GONZALEZ SAGGIO HARLAN

THE GSH 60 SECOND MEMO®

SPONSORED BY THE GSH EMPLOYMENT GROUP

October 16, 2013

Warren E. Buliox, Esq.

Questions on this topic? CLICK HERE

Am I My Brother's Keeper? Joint Employer Liability in the Employment Discrimination Context

By Warren E. Buliox

If we are not our brother's keeper, at least let us not be his executioner. - Marlon Brando

Can one employer be held liable for the actions of another employer? It depends. Imagine for a moment that you have a company named ABC Corp. that employs on average 50 or so employees during a given year and, depending on market conditions, engages an additional 10-20 seasonal workers. The seasonal workers come from Contractors Unlimited, a third-party placement agency.

Suppose that at some point during the last quarter ABC Corp. management received a complaint from one of its employees that she had been subjected to harassing and sexually offensive conduct by a Contractors Unlimited employee. After being advised of the same by ABC Corp., Contractors Unlimited immediately discharges the employee, no questions asked. Months later, the discharged employee files a claim with the Equal Employment Opportunity Commission ("EEOC") against both companies, alleging that he was unlawfully discharged on account of his race in violation of Title VII of the Civil Rights Act of 1964. While he was not an "employee" of ABC Corp., he alleges that ABC Corp. was a *de facto* ("in fact") employer of his and should be held jointly responsible for his discharge. He also charges, in the alternative, that his race motivated ABC Corp. to make a false report against him to his direct employer, and that the false report directly resulted in his discharge.

Our scenario here generally concerns theories of joint employer liability and third-party interference with employment opportunities. The general rule is that an actual or prospective employment relationship must exist in order for liability under Title VII to attach. If, however, a non-employing entity controls or can substantially affect the terms and conditions of the employment of another company's employee, that entity may be considered a "joint employer" for Title VII purposes. This means that a non-employing entity could be held equally responsible for any discrimination or harassment that may occur. This is referred to as *de facto* or joint employment liability, and often appears in situations in which a company utilizes a staffing firm, placement agency, or outsourcing company for workers.

Many, but not all, jurisdictions apply *de facto* or joint employer liability in Title VII cases. In those jurisdictions that do, liability generally only attaches in situations where "the putative defendant [while not the actual employer] is so *extensively involved* with the plaintiff's day to day employment that the putative defendant is the 'real' employer for all intents and purposes, including Title VII liability." *Kerr v. WGN Continental Broadcasting Co.*, 229 F. Supp. 2d 880, 886 (N.D. Ill. 2002) (emphasis added). In analyzing whether an alleged defendant is "extensively involved," *de facto* or joint employer liability cases examine the amount of control a putative defendant exercises over a plaintiff. Factors considered include, but are not limited to, whether the "non-employing" entity has authority to discipline; is able to assign work; routinely supervises day-to-day activities; furnishes tools, equipment, and materials; sets work schedules; and is able to apply and enforce work rules. Each item stated here need not be present for a joint employer relationship to exist, and no one factor is controlling or necessarily carries more weight than the other. Courts will look at the totality of circumstances to determine whether a non-employing entity has exercised enough control over another's employee for joint employer liability purposes.

In our scenario, if Contractors Unlimited employees worked alongside ABC Corp. employees and were integrated into the work unit, assisting where necessary and as directed by ABC Corp. managers, then ABC Corp. would likely be found to be a "joint employer" for Title VII purposes and thus subject to the race discrimination claim from the Contractor Unlimited employee. If not, Contractors Unlimited may stand alone in the suit.

That said, ABC Corp. could still be held liable for the employee's termination even in the absence of a joint employer relationship. In addition to prohibiting employers from taking unlawful action against their own employees, Title VII prohibits employers from interfering with the employment opportunities of individuals who

work for others. This is known as "third party interference" liability and could apply in our situation if ABC Corp. knew or should have known the report of harassment to be false and reported it to Contractors Unlimited anyway. Thus, ABC Corp. could be held liable for the discharge.

So, then, what about Contractors Unlimited? If ABC Corp. did in fact hold some type of racial animus against the employee and fabricated its report of harassment, can Contractors Unlimited be held liable for relying on the false report it received from its business partner? As a general matter, "he made me do it" is not a defense. If Contractors Unlimited knew, or should have reasonably known, that the report was not truthful and/or motivated by some unlawful animus, it can be held jointly responsible for the alleged discrimination. If, on the other hand, Contractors Unlimited had reasonable grounds to believe the report and based their decision to terminate on its honest belief that the employee did in fact engage in the conduct alleged, it may be off the proverbial hook. At the heart of most employment discrimination cases is the employer's motivation. As such, if an employer genuinely believes its asserted, non-discriminatory reason for taking an adverse employment action, even if it is mistaken, it cannot be found to have had discriminatory intent and therefore may not be held liable for the discrimination alleged.

Given all of the above, it is important to note that in joint employer or third party interference cases, both employers can be held jointly and severally responsible for the unlawful activity alleged. This means that if liability is found, the employee can collect from both or any one of the employers. This may include collection for back pay, attorney fees, and compensatory and punitive damages, all of which can be quite substantial.

In light of what is at stake, employers should make every effort to reduce the likelihood of being held responsible for what happens to the employees of another company. To help minimize risks, employers should take steps to ensure that they are not controlling, and cannot be construed as controlling, the terms and conditions of another employer's employee. Not only should any contract between a primary employer and a contracting agency clearly articulate that the agency is solely responsible for the management of its own employees, but in practice the primary employer should endeavor to not control any meaningful aspect of the contracting employees' work. To further reduce risk, employers should consider placing in their contracts indemnification clauses, whereby the parties agree to indemnify and hold each other harmless for any costs/liability associated with each other's treatment of common employees.

At the end of the day, actions speak louder than words (and

contracts). As in other contexts, employers should make sure managers and supervisors are current on the law and are treating all individuals, employees or not, fairly and consistent with the law.

Forward this issue