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## The GSH 60-Second Memo

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### Who's the Boss? Determining the Employment Status of Temporary Personnel

By Jerilyn Jacobs, Esq.

Issues regarding the use of temporary personnel from staffing agencies can be confusing. One company pays the worker, but another directs that person's day-to-day activities. So, for purposes of employment laws, which company is the person's employer? A recent decision by the Fifth Circuit (covering Louisiana, Mississippi, and Texas), *Johnson v. Manpower Professional Services, Inc.*, 2011 WL 4584757 (Oct. 5, 2011), addressed this issue.

*Johnson v. Manpower Professional Services, Inc.* involved a staffing agreement between Manpower Professional Services, Inc., a national staffing company, and Air Liquide Process & Construction. Pursuant to the staffing agreement between the companies, Air Liquide managed and supervised the workers placed at its facility, and Manpower handled all administrative and payroll issues.

Willie Johnson, a black male, responded to Manpower's advertisement for a recruiter position. As part of Manpower's application process, he underwent a background check and drug test. Manpower then referred Mr. Johnson to Air Liquide, who approved him for the position.

For the first five weeks that Mr. Johnson worked at Air Liquide, he received overtime for the hours he worked in excess of 40 per week. But then Air Liquide's Director of Finance and Accounting, who was Air Liquide's "time approver" for Mr. Johnson, requested that Mr. Johnson's status be changed from non-exempt to exempt. Manpower complied with the request.

Approximately six months later, a new Director of Finance and Accounting began supervising Mr. Johnson, and based on negative feedback from Air Liquide managers regarding Mr. Johnson's performance, he notified Manpower that he wanted Mr. Johnson replaced. Manpower again complied with Air Liquide's request. Mr. Johnson's replacement, a white female, was paid overtime pay and was not asked to submit to a drug test or background check.

Mr. Johnson sued both Manpower and Air Liquide under the Fair Labor Standards Act (FLSA) for unpaid overtime pay. He settled that suit with Manpower.

Mr. Johnson then sued both Manpower and Air Liquide, alleging violations of Title VII and Section 1981 for, among other things, his termination of employment and the failure to pay overtime. The district court granted summary judgment to both Manpower and Air Liquide, and Mr. Johnson appealed.

In analyzing Mr. Johnson's claim, the Fifth Circuit had to decide whether Manpower or Air Liquide was Mr. Johnson's employer. The Court applied a two-step standard laid out under Fifth Circuit law. The first step was to determine whether either company fell within the Title VII's statutory definition of an employer. Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees ..., and any agent of such a person..." The Fifth Circuit found that both Manpower and Air Liquide met this definition.

The second step was to apply the "hybrid economic realities/common law control test." Under this approach, a court looks at both the degree of the right to control an employee's conduct (e.g., the ability to hire, fire, supervise, and set the schedule of the employee in question) and the economic realities of the nature of the relationship (e.g., the payment of salary, withholding of taxes, provision of benefits, and setting the terms and conditions of employment). The test is weighted in favor of the right-to-control component, which is deemed the more important of the two factors.

In Johnson, the Fifth Circuit looked at the respective duties of Manpower and Air Liquide, as set out in the staffing agreement between the companies. Under the agreement, Manpower's responsibilities, once it had placed a worker at Air Liquide, consisted of:

- Maintaining personnel and payroll records;
- Paying, withholding, and transmitting payroll taxes;
- Making unemployment contributions;
- Handling unemployment and workers' compensation claims;
- and
- Removing assigned employees at Air Liquide's request, so long as there is a valid legal reason for doing so.

The Fifth Circuit held that, while Manpower was technically in charge of hiring and firing employees, it only did so upon Air

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Liquide's approval or at Air Liquide's request. Further, Mr. Johnson's job performance had only been evaluated by Air Liquide. Thus, the court concluded that Air Liquide, not Manpower, was Mr. Johnson's employer. The Fifth Circuit explained its reasoning as follows:

To be sure, almost all of the factors under the economic realities test point to Manpower being Johnson's employer, as Manpower paid Johnson and withheld taxes on his behalf. Nonetheless, because the majority of the more important right to control factors point to Air Liquide as Johnson's employer, we conclude that Air Liquide and not Manpower is Johnson's employer for the purposes of his overtime denial claim.

The Fifth Circuit then remanded that portion of the case back to the district court because Air Liquide had not provided a legitimate, non-discriminatory reason for changing Mr. Johnson's status from non-exempt to exempt.

The *Johnson* case serves as a reminder to employers who use temporary personnel that, despite the fact that they do not handle the administrative 'economic realities' for temporary employees, they may still face liability under Title VII, the FLSA, and other employment statutes. Further, the standards that have been set out by courts and employment administrative agencies to determine whether a particular individual is an employee can be very fact specific, making it sometimes difficult for employers to know with certainty whether a particular relationship will be deemed an employer-employee relationship. As such, employers may want to proceed cautiously and take measures to ensure that temporary employees placed with them are treated in a manner consistent with applicable employment laws, as well as internal company policies.

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