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Title VII and the Temporary Employment Relationship

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Articles

TITLE VII AND THE TEMPORARY EMPLOYMENT RELATIONSHIP

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Since 1970, the number of American workers employed as temporary employees has risen by more than 400%.[1] More than ninety percent of American businesses use, or have used, "temps."[2] While temporary employees offer a company certain advantages,[3] those employees exist in a kind of limbo with respect to their employment status.[3] Because a temporary employee often works at a site away from his or her actual employer, a serious question exists as to whether or not the "on-site" employer, that is, the employer who is purchasing the worker's services from the temporary agency, can be held liable for violations of a temporary worker's Title VII rights.

Depending upon the situation, a temporary employee could be considered an employee of his or her temporary agency, an employee of the on-site employer, or both. Therefore, it is important for on-site employers to know what actions by them could later lead to liability under Title VII, and what protections are available. Further, an employer must know how to react if a temporary employee accuses the on-site employer, or its agents, of a Title VII violation.

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1. DAVID NYE, ALTERNATIVE STAFFING STRATEGIES 7 (1988).
2. *Id.* at 6.
3. For an excellent discussion of the "temp" way of life, see KEVIN D. HENSON, JUST A TEMP (1996).

I. THE TEMPORARY EMPLOYMENT RELATIONSHIP

As of 1993, between one and two percent of all American workers worked as temporary employees.[4] In 1993, about fifteen percent of all new jobs created were temporary jobs.[5] Typically, these temporary jobs pay less than permanent jobs and offer fewer benefits to employees.[6]

The use of temporary workers benefits the on-site employer in several ways. First, the company experiences significant cost savings.[7] These savings are due not only to the fact that temporary employees work for lower wages and fewer benefits, but also because on-site employers typically invest far less time and money into training temporary employees. Temporary employees also offer companies greater flexibility. An employer can hire a temp for just a few days when a permanent employee is ill, absent, or leaves the company. Additionally, the temporary arrangement allows the company to terminate the relationship whenever it sees fit.

The use of temporary employees also allows companies who use temps to fill vacancies quickly. Rather than placing an advertisement in the newspaper, interviewing those who respond, and finally hiring a permanent employee, a company can usually get a temp the next day. Many temporary employees are seeking permanent work;[8] while some temps may not be as productive as permanent workers, a good temporary candidate may be hired by an employer as a permanent employee.[9]

Because temps receive lower pay and fewer benefits, temporary employment agencies must do something to attract employees. In addition to the obvious benefit of being able to start work almost immediately, temporary agencies sell the flexibility of a temporary work assignment to potential workers.

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4. *Id.* at 7.

5. *Id.* at 3.

6. *Id.* at 5-6.

7. NYE, *supra* note 1, at 28.

8. According to Henson, 75 to 80% of temporary employees are seeking full-time work. HENSON, *supra* note 3, at 32.

9. Some temporary employment agencies attempt to limit an on-site employer's ability to hire its workers by making the company sign an agreement not to hire temporary workers as permanent employees for a specific period of time following the end of the employee's temporary assignment.

Temp agencies often target the recruitment of homemakers, students, recent graduates, people who are seeking permanent employment, and others who desire a great amount of flexibility.[10]

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. History

Title VII of the Civil Rights Act[11] prohibits discrimination on the basis of race, color, religion, sex or national origin.[12] This legislation was a response to the racial unrest that engulfed the United States in the late 1950s and early 1960s. Following the assassination of President Kennedy, President Johnson pushed for the passage of federal civil rights legislation. The legislation that emerged was a compromise between those who proposed more sweeping civil rights legislation and Southern representatives who favored no federal action.[13]

Title VII has been amended three times. In 1972, the Equal Employment Opportunity Act[14] was enacted. This amendment expanded the coverage of Title VII in relation to the employers who are covered by Title VII and clarified the definition of discrimination on the basis of religion.[15]

In 1978, the United States Supreme Court, in *General Electric Co. v. Gilbert*,[16] held that pregnancy was not covered under the prohibitions against sex discrimination included in Title VII.[17] Congress responded by enacting the Pregnancy Discrimination Amendments of 1978.[18] This amendment placed discrimination due to pregnancy within the purview of Title VII's sex discrimination prohibitions.

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10. HENSON, *supra* note 3, at 26-47. Whether or not on-site employers allow temps to take advantage of this flexibility is questionable. Henson asserts that temp agencies may discourage workers from missing work so that the agency's customer, the on-site employer, is not angered or inconvenienced.

11. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

12. 42 U.S.C. § 2000e-1. Title VII also prohibits employers from segregating their workers based on these classifications. 42 U.S.C. §§ 2000e-2(a).

13. *See generally* MACK A. PLAYER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW 24 (2d ed. 1995). The author also wishes to thank Attorney Patrick O. Patterson for imparting his knowledge of Title VII and its history.

14. *Id.*

15. *Id.* For a discussion of the EEO Act of 1972, see PLAYER ET AL., *supra* note 13, at 25.

16. 429 U.S. 125 (1976).

17. *Id.* at 136.

18. 42 U.S.C. § 2000e(k) (1994) (specifically defining "pregnancy, childbirth or related medical conditions" as being within the term "because of sex" for Title VII discrimination purposes).

The 1989 Supreme Court decision in *Wards Cove Packing Co. v. Atonio*[19] made it easier for an employer to prove that it had a business justification for discrimination by requiring a plaintiff to show that a particular employment practice had a disparate impact on his or her protected class. The Civil Rights Act of 1991[20] restored the interpretation of Title VII to the *status quo* as it existed prior to *Wards Cove* and several other decisions.[21]

B. Theories of Discrimination Under Title VII

There are four separate theories under which a plaintiff can bring a Title VII discrimination suit. These theories are disparate treatment, adverse impact, failure to make reasonable accomodation, and retaliation.

1. Disparate Treatment

Disparate treatment refers to the unlawful practice of treating an employee differently based on his or her membership in a protected class.[22] Disparate treatment can be proven by direct evidence,[23] circumstantial evidence,[24] or by proving a pattern or practice of discrimination on the part of the employer.[25]

2. Adverse Impact

Adverse impact refers to a practice that, while not facially discriminatory, has a disparate impact on a particular protected class.[26] Adverse impact can apply to both "objective" measures and "subjective criteria."[27]

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19. 490 U.S. 642 (1989).
20. Pub. L. No. 102-66, 105 Stat. 1071 (1991).
21. *See generally* PLAYER ET AL., *supra* note 13, at 25-27.
22. *See* 42 U.S.C. § 2000e-2.
23. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).
24. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnel-Douglas Corp. v. Green, 411 U.S. 792 (1973).
25. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transport Co., 424 U.S. 747 (1976).
26. 42 U.S.C. § 2000e-2(a)(2) (1994). *See also* Griggs v. Duke Power Co., 401 U.S. 424 (1971). For a review of the EEOC's guidelines for adverse impact analysis, see 29 C.F.R. § 1607.3 (1995).
27. Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977, 989-91 (1988). In *Watson*, the subjective measure in question involved input by supervisors who were familiar with all the candidates for a specific job. *Id.* at 982. An example of an objective measure would be an aptitude test.

3. Failure to Make Reasonable Accomodation

Failure to reasonably accomodate refers to an employer's duty to accomodate an "employee's religious observance or practice."[28] Employers are not required to make an accomodation if that accomodation presents undue hardship.[29]

4. Retaliation

Employees who participate in the filing of discrimination charges against an employer are protected from adverse employment action due to their participation.[30] Title VII also protects employees who suffer adverse employment outcomes due to the employees' opposition to unlawful practices.

C. The Employment Relationship Under Title VII

The terms "employer" and "employee" are vaguely defined in the statutory language of Title VII.[31] Title VII applies to employers engaged in industry affecting commerce who employ fifteen or more employees.[32] Employee is defined as "an individual employed by an employer."[33] Specific employers, such as "bona fide" private clubs and Indian tribes, are exempted from Title VII.[34] Beyond that, no indication exists of how Congress intended to define the employment relationship in Title VII.[35]

1. Tests for Determining Who Is an Employer

The fact that no statutory language further defines the term "employer" is particularly troubling when viewed in the context of a temporary employment relationship. One must look to the courts to provide guidance as to what constitutes an employment relationship under Title VII.

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28. 42 U.S.C. § 2000e(j).

29. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73-74, 84 (1977). In this case, the Supreme Court defined undue hardship as any cost beyond *de minimis*. *Id.* at 84.

30. 42 U.S.C. § 2000e3(a).

31. 42 U.S.C. § 2000e(b). *See also* CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION 582 (4th ed. 1997).

32. 42 U.S.C. § 2000e(b) (1994). Specifically, a "person" who is "engaged in an industry affecting interstate commerce" must have 15 or more employees for each working day for 20 or more days in the current or preceding calendar year. 42 U.S.C. § 2000e(b).

33. 42 U.S.C. § 2000e(f).

34. 42 U.S.C. § 2000e(b).

35. *See generally* SULLIVAN ET AL., *supra* note 31, at 582.

a. NLRA Tests

(1) Economic Realities Test

Courts have applied three tests in an attempt to ascertain what does or does not constitiute an employment relationship. The first test is the "economic realities" test applied by the D.C. Circuit in *Spirides v. Reinhardt*.[36] Spirides involved a broadcaster for Voice of Amercia who worked as an independent contractor. She brought suit under Title VII after she was discharged when the VOA decided that they no longer needed a "female voice."[37] Using a test usually applied to National Labor Relations Act (NLRA)[38] cases, the court held that it was proper to look at the "economic realities" of the employment relationship, particularly the degree of control exercised by on-site employers.[39]

The *Spirides* court set forth eleven factors that a court will consider when applying the economic realities test:

1. the type of occupation;
2. the skill required;
3. who furnishes the equipment;
4. the length of time that an individual has worked;
5. the method of payment (by time or by job);
6. the manner in which the relationship is terminated;
7. the leave given;
8. is the work an integral part of the business?;
9. are retirement benfits paid?;
10. are social security taxes paid?; and
11. the intent of the parties.[40]

(2) Union Membership Test

In *NLRB v. Western Temporary Services*,[41] the Seventh Circuit held that temporary employees were eligible to vote in union elections if their relationship with the on-site employer met four criteria. These criteria are:

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36. 613 F.2d 826, 831-32 (D.C. Cir. 1979). *See also* Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1160 (5th Cir. 1986); Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983).

37. *Spirides*, 613 F.2d at 828.

38. 29 U.S.C. §§ 158(a)(5), 160(f) (1994).

39. *Spirides*, 613 F.2d at 830-32. *See also* L. Lynne Pullium, *Temporary Employees: What Are an Employer's EEO Responsibilities?*, 18 EMP. REL. L.J. 533, 535 (1992).

40. *Spirides*, 613 F.2d at 832.

41. 821 F.2d 1258 (7th Cir. 1987).

1. the employer requested the employee by name from the temporary agency;
2. a long-term relationship exists between the on-site employer and the temporary employee;
3. the employee worked at the same facility as the company's permanent workers; and
4. the potential for permanent employment existed.[42]

On its face this ruling applies narrowly to union membership for a small number of temporary employees. However, given the willingness of other courts to apply NLRA tests to Title VII, it is possible that a court may look at the union membership test as an alternative to the economic realities test.[43]

b. The *Magnuson/Amarnare* Test

The two most significant cases dealing with the relationship between temporary employees and on-site employers are *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[44] and *Magnuson v. Peak Technical Services, Inc.*[45] The district court in *Magnuson* built upon the opinion in *Amarnare* to develop a test for determining whether or not an employer is subject to Title VII liability.

In *Amarnare,* a temporary employee for a brokerage firm filed suit against her on-site employer for sexual discrimination. The district court held that the on-site employer was the plaintiff's employer for the purposes of Title VII. The court said that the most important factor in determining whether or not a party is an employer for the purposes of Title VII is the extent of the employer's "right to control means and manner of individual performance."[46] The court looked to common law principles to guide the analysis as to whether the relationship met the standard.[47]

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42. *Id.* at 1266-67, 1269-70.

43. The rationale for choosing the union membership test over the economic realities test would be two-fold. First, the union membership test is easier to apply and is much less fact intensive. Second, the union membership test is much more narrow in scope. A court that wished to narrow the definition of employee for Title VII liability purposes, but did not completely wish to preclude a temporary employee's ability to recover under Title VII, may find the union membership test a desirable alternative.

44. 611 F. Supp. 344 (S.D.N.Y. 1984).

45. 808 F. Supp. 500 (E.D. Va. 1992).

46. *Amarnare,* 611 F. Supp. at 348.

47. The *Amarnare* court held that the common law principle of a shared servant subjected both the temporary agency and the on-site employer to Title VII liability. *Id.* at 349. In its discussion of the shared servant doctrine, the court cited *Maynard v. Kenova Chem. Co.*, 626 F.2d 359 (4th Cir. 1980). The *Maynard* court based its shared servant analysis on agency principles. It is unclear whether or not the *Amarnare* court meant to base its analysis of the "right to control" on agency principles. A variation of the shared servant doctrine, the doctrine of joint employment, will be

The *Magnuson* court expanded upon the holding in *Amarnare* by developing a two-part test for determining whether or not an on-site employer is the legal employer of a temporary employee. Magnuson was a temporary employee who was sexually harassed by her on-site supervisor. Magnuson brought an action against the temporary agency that employed her, the on-site employer, and the corporation for whom her on-site employer was a dealer, Volkswagen.[48]

The *Magnuson* court first held that the employer must meet the statutory definition of an employer under Title VII.[49] Second, the court held that the employer-employee relationship must meet the *Amarnare* criteria.[50] Under the *Magnuson* test, both the temporary agency and the dealership were found to be employers for the purposes of Title VII. The court held that the relationship between the temp agency and the worker was exactly the relationship contemplated by the definition of employer in Title VII.[51] The court also found that, based on the statutory definition of employer, the dealership and Volkswagen were also employers.[52]

The court then analyzed the relationships based on the *Amarnare* criteria. Again, the court held that, because the relationship between the plaintiff and her temporary agency was clearly that of employer-employee, no further analysis was necessary. The court conducted a much more detailed analysis in reviewing the relationship between the dealership and the temporary worker. The court held that, because many of the functions of the dealership went to the means of control and manner of performance, the dealership was an employer for Title VII purposes.[53] The court viewed such things as defining job duties, setting the work schedule, signing the employee's timeslip, and having the temporary employee report to an on-site supervisor as controlling the means of work. Such things as on-site interviewing and training were viewed as controlling the manner of performance.[54]

c. Other Applicable Standards

The economic realities test and the *Amarnare/Magnuson* test are the only specific tests that have been applied by courts in temporary employment cases.

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discussed later in this article.

48. *Magnuson*, 808 F. Supp. at 504-05.

49. *Id.* at 507.

50. *Id.* at 508-09. The *Amarnare* court based its analysis on the employer's "right to control" and on the shared servant doctrine. *See Amarnare*, 611 F. Supp. at 348-49.

51. Magnuson v. Peak Technical Servs., Inc., 808 F. Supp. 500, 508 (E.D. Va. 1992).

52. *Id.* at 508-10.

53. *Id.* at 508-09. *See also* Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 611 F. Supp. 344, 384 (S.D.N.Y. 1984).

54. *Magnuson*, 808 F. Supp. at 508-09.

Several other standards, however, may be of use in analyzing the employer-employee relationship within the temporary employment context. In particular, several other cases expanded the view of the *Amarnare* court with respect to the necessary employer control of a temporary employee.

For example, in *Sibley Memorial Hospital v. Wilson*,[55] the D.C. Circuit held that Title VII protected even those persons who were not in an employment relationship with the party who discriminated against them.[56] Specifically, the court read the terms "any individual" and "person aggrieved" in sections 703(a)(1)[57] and 706(g)[58] of Title VII to refer to "individuals who do not stand in direct employment relationship with an employer."[59]

In *Bostick v. Rappleyea*,[60] the district court held that not only employers, but parties who control "compensation, terms, conditions, or privileges of employment," are subject to liability under Title VII.[61] This language, and the language of the *Sibley Memorial* decision, greatly lowered the standard for liability to temporary employees under Title VII. If courts were to adopt these standards, as opposed to the *Amarnare* criteria, almost all temporary employees would be able to bring causes of action against their on-site employers.

III. DOCTRINE OF JOINT EMPLOYMENT

The origins of the doctrine of joint employment are traceable to labor law. This doctrine is normally applied in the context of determining who a party's employer is for purpose of collective bargaining.[62] The doctrine is applied in a similar fashion to cases under the Fair Labor Standards Act (FLSA).[63] While joint employment is not normally a doctrine associated with Title VII cases, some fact scenarios involving temporary employees, their temp agencies, and their on-site employers have required the courts to analyze the relationships in the context of the employee having more than one employer.[64]

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55. 488 F.2d 1338 (D.C. Cir. 1973).

56. *Id.* at 1341. *But see* Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir.) (no employment relationship exists if a "totality of the evidence" favors a finding that plaintiff was an independent contractor), *cert. denied*, 459 U.S. 874 (1982).

57. 42 U.S.C. § 2000e2(a)(1) (1994).

58. 42 U.S.C. § 2000e-5(f)(1)(A).

59. *Sibley Mem'l Hosp.*, 488 F.2d at 1341.

60. 629 F. Supp. 1328 (N.D.N.Y. 1985).

61. *Id.* at 1334.

62. *See generally* 2 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1599 (Patrick Hardin et al. eds., 3d ed. 1992).

63. 29 U.S.C. §§ 201-06 (1994).

64. *Maynard*, 626 F.2d at 361; Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021 (9th Cir. 1983).

A. Joint Employment in Labor Cases

The Supreme Court has made two major rulings in the area of joint employment. In *Boire v. Greyhound Corp.*,[65] the Court reversed both the district court and the court of appeals in holding that the question of whether or not joint employment exists was a question of fact rather than a question of law. The Court held that the "indicia of control"[66] exercised by an employer went beyond a simple judicial determination as to whether a joint employment relationship existed.[67]

In *Falk v. Brennan*,[68] the Supreme Court interpreted the joint employment doctrine with respect to the FLSA. The Court held that the definition of employer under the FLSA was broad enough to allow for the possibility that a worker had two employers.[69] Taken together, the holdings of these two cases indicate that, under both the NLRA and the FLSA, an employee can have more than one legal employer.

B. Tests for Determining Joint Employment

Courts employ two main tests to determine whether a joint employment relationship exists. Some circuits accept the "mutual control" or "labor relations" test based on the *Boire* and *Falk* decisions. Other circuits require another element of that test to form what is called the "integration" test.

1. Mutual Control Test

In four circuits, the mutual control test is the standard used for determining whether joint employment exists.[70] This test is based on the joint control over labor relations or working conditions of the employee.[71] The elements of this test are best expressed by the Fifth Circuit in *Wirtz v. Lone Star Steel Co.*[72] *Wirtz* was an NLRB case involving a trucking company that hauled exclusively

65. 376 U.S. 473 (1964).

66. *Id.* at 481.

67. *Id.*

68. 414 U.S. 190 (1973).

69. *Id.* at 195. The FLSA defines employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d) (1994).

70. *See* International House of Pancakes v. NLRB, 676 F.2d 906, 912-13 (2d Cir. 1982); NLRB v. Browning-Ferris Indus., 691 F.2d 1117, 1123 (3d Cir. 1982); NLRB v. Jewell Smokeless Coal Corp., 435 F.2d 1270, 1271-72 (4th Cir. 1970); Ref-Chem Co. v. NLRB, 418 F.2d 127, 131 (5th Cir. 1969).

71. NLRB v. Solid Waste Servs., Inc., 38 F.3d 93, 94 (2d Cir. 1994). *See also* Rivera-Vega v. Conagra, Inc., 876 F. Supp. 1350, 1369 (D.P.R. 1995).

72. 405 F.2d 668 (5th Cir. 1968).

for a mining concern.[73] In determining whether or not a joint employment relationship existed, the *Wirtz* court asked five questions: 1) does the employment take place on the premises of the company; 2) how much control does the company exert over the employees; 3) does the company have the power to fire, hire or modify the employment conditions of the employees; 4) do the employees perform a "specialty job" within the production line; and 5) may the employee refuse to work for the company?[74]

2. Integration Test

The integration test for joint employment requires that the employment relationship not only meet the standards for the mutual control test, but also that a certain degree of integration exist between the two employers.[75] The federal circuits that use the integration test use similar factors in applying the test, although they apply these factors in slightly different ways.[76]

The test applied by the Sixth Circuit in *Metropolitan Detroit Bricklayers District Council v. J.E. Hoetger & Co.*[77] analyzed four factors: first, the interrelation between the two companies; second, whether or not the companies had common management; third, the extent of centralization of labor relations; and fourth, common ownership.[78] However, the court concluded that these were merely factors to be considered and not all of the criteria needed to be present for joint employment to exist.[79] In *Davis v. NLRB*,[80] the Seventh Circuit used the same factors in analyzing a joint employment situation.[81]

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73. *Id.* at 671.

74. *Id.* at 669-70. The Fifth Circuit applied the same standard when reviewing a joint employment case under the FLSA. Hodgson v. Griffin & Brand, Inc., 471 F.2d 235, 237-38 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973).

75. *See* Metropolitan Detroit Bricklayers Dist. Council v. J.E. Hoetger & Co., 672 F.2d 580, 584 (6th Cir. 1982). *See also* Davis v. NLRB, 617 F.2d 1264, 1271-73 (7th Cir. 1980); Pulitzer Publ'g Co. v. NLRB, 618 F.2d 1275, 1278-79 (8th Cir.), *cert. denied*, 449 U.S. 875 (1980); NLRB v. Triumph Curing Ctr., 571 F.2d 462, 468 (9th Cir. 1978); International Chem. Workers Union v. NLRB, 561 F.2d 253, 257-58 (D.C. Cir. 1977).

76. International Chem. Workers, 561 F.2d at 257-58. *But see* Sakrete of N. California, Inc. v. NLRB, 332 F.2d 902, 905-06 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965); *Davis*, 617 F.2d at 1271-73.

77. 672 F.2d 580 (6th Cir. 1982).

78. *Id.* at 584.

79. *Id.*

80. 617 F.2d 1264 (7th Cir. 1980).

81. *But see* Lutheran Welfare Servs. v. NLRB, 607 F.2d 777, 778 (7th Cir. 1979) (two or more employers exercising significant control is sufficient to establish joint employment).

The Ninth Circuit has applied a similar test, but its criteria differ slightly. In *NLRB v. Triumph Curing Center*,[82] the Ninth Circuit relied on language from a relatively obscure Supreme Court case in crafting its joint employer analysis.[83] Based on the decision in *Radio & Television Broadcast Technicians Local Union, Local 1264 v. Broadcast Service, Inc.*,[84] in *Triumph*, the Ninth Circuit held that while the four factors required for integration are valid, courts should place more emphasis on three of the factors. The court held that while centralized control, common management and the interrelation of the parties are important elements of an integration analysis, based on *Radio Union*, the element of common ownership is not as important.[85]

The Eighth Circuit test is also a slightly less onerous integration test. In *Industrial Personnel Corp. v. NLRB*,[86] the court held that, beyond the mutual control test, all that is necessary for integration is a "significant, functional" relationship between the employers.[87] Like the Ninth Circuit test, this analysis of the employment relationship requires less of a link between the two employers in order to establish a joint employee relationship.

C. Application of Joint Employer Analysis to Temporary Employment Cases

1. Mutual Control Test

The analysis of a temporary employment situation under the mutual control test would attempt to answer the five questions asked in *Wirtz* in the context of temporary employment.[88]

a. Location of Employment

In almost every case, a temporary employee will work at the on-site employer's business location. This is an indication that an employer-employee relationship exists. However, because most temporary employees do work on-site, the fact that this is a customary business practice makes this element less definitive. Clearly, however, a temporary employee who works out of his or

82. 571 F.2d 462 (9th Cir. 1978).
83. *Id.* at 468.
84. 380 U.S. 255 (1965). *Radio Union* is the only Supreme Court case in which the Court discusses the concept of integration. In *Radio Union*, however, the Court requires integration in the context of a "single employer" analysis as opposed to a "joint employer" analysis. *Id.* at 256. Therefore, the Ninth Circiut may have interpreted *Radio Union* in a slightly different manner than the Supreme Court intended.
85. *Triumph Curing Ctr.*, 571 F.2d at 468.
86. 657 F.2d 226 (8th Cir. 1981).
87. *Id.* at 229.
88. Wirtz v. Lone Star Steel Co, 405 F.2d 668, 669-70 (5th Cir. 1968).

her home would have a more difficult time proving that a joint employment relationship exists than would a temporary who works at the on-site employer's location.

b. Control over Employee/Ability to Hire and Fire

In *Browning-Ferris*, the company hired independent truckers to haul loads through a trucking "broker." The on-site employers had the ability to control the daily activities of the contract employee. This, along with the on-site employer's input into hiring and firing decisions, led the court to its finding that both the on-site trucking company and the employment broker were employers.[89]

On-site employers have the ultimate say as to whether or not a temporary employee stays on the job. However, it is common for on-site employers to make these decisions in consultation with temporary agencies.[90] The more input an on-site employer has, the greater is the likelihood that a joint employment relationship will surrender this type of authority. An analysis that is heavily weighed toward this element is likely to benefit potential plaintiffs.

c. Specialization of Job/Ability to Take Other Jobs

The jobs performed by temporary employees vary greatly. There are temporary lawyers, engineers and accountants, as well as temporary laborers and clerical workers.[91] The type of work performed by the temp will affect the length and substance of a temp's relationship with an on-site employer and, therefore, must be addressed.

The greater the skill level necessary to perform a job, the more complex the particular project will be. This means that temporary assignments for "professional" temps will often be longer in duration and require a greater commitment on the part of the temporary worker. This commitment limits the employee's ability to take other assignments.[92] The greater the commitment to the on-site employer by the employee, the greater the possibility that this relationship would rise to the level of an employer-employee relationship.

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89. NLRB v. Browning-Ferris Indus., 691 F.2d 1117, 1119, 1123 (3d. Cir. 1982).

90. For a complete discussion of this process, see ROBERT E. PARKER, FLESH PEDDLERS AND WARM BODIES: THE TEMPORARY HELP INDUSTRY AND ITS WORKERS 47-48, 90-92 (1994).

91. HENSON, *supra* note 3, at 3.

92. *See Wirtz*, 405 F.2d at 671-72 (discussing the role of independent contractors).

2. Integration Test

The integration test in a temporary employment case would require the plaintiff to prove the additional element of integration between the two employers. This analysis does not translate well to the temporary employment context, and this element would be very difficult for a plaintiff to prove in most circumstances.

a. Sixth Circuit/Seventh Circuit Test

The integration test used by the Sixth and Seventh Circuits would be the most difficult for a temporary employee plaintiff to satisfy. Few temporary agencies have a relationship with their business customers that is close enough to establish integration.[93]

It should be noted, however, that the elements of the integration test are merely factors that a court is to consider rather than necessary elements. It may be that, if the relationship between the temporary agency and the on-site employer is extremely close in one area, a court in a temporary employment case may decide that the plaintiff has satisfied the spirit of the integration test.[94]

b. Eighth Circuit/Ninth Circuit Tests

The Eighth Circuit integration test is probably the integration test that is best suited for application to temporary employment cases. To establish integration under the *Industrial Personnel* standard, the plaintiff need only establish that a "significant, functional" relationship existed.[95] In *Industrial Personnel*, the Eighth Circuit held that such activities as having input on working conditions and work rules was sufficient to establish such a relationship.[96] This standard would be much easier for a plaintiff to satisfy than the standards used by the Sixth and Seventh Circuits.

The Ninth Circuit standard set forth in *Triumph Curing Center* would also represent a lower burden for plaintiffs. The *Triumph* court stressed the importance of common management and control of labor relations, and

93. An exception would be a company that opens a temporary agency as a subsidiary, then hires all those workers for its business. By doing this, the company can avoid having to offer benefits to the employees. Under this scenario, the level of interrelationship between the two companies probably would be sufficient to satisfy the integration test.

94. This is one area where a court may less stringently adhere to the test as it is applied in labor cases and adapt the test for use in temporary employment cases.

95. Industrial Personnel Corp. v. NLRB, 657 F.2d 226, 228 (8th Cir. 1981).

96. *Id.*

downplayed the importance of common ownership.[97] Again, if the court is willing to adapt this test to better fit temporary employment cases, a plaintiff would not be overly burdened by this test.

D. Synthesis of the Joint Employment Doctrine

Many of the labor law cases that apply the joint employment doctrine have facts that are similar to temporary employment scenarios. In fact, many of the concepts of this doctrine are similar to those applied in the temporary employment cases that were discussed earlier. The joint employment doctrine does not necessarily add anything new to the analysis of temporary employment cases. Rather, it adds an established set of standards and a body of case law to guide courts in this new and challenging area of employment law.

V. RECOMMENDATIONS

A. The Temporary Employee

The temporary employee who suffers discrimination at the hands of an on-site employer has the same rights as any other worker. However, the temporary employee must go an extra step to protect his or her rights against both the temporary agency and the on-site employer.

In *Magnuson*, the court noted with approval the fact that the temporary employee notified her supervisor of the on-site employer's activity.[98] This action reflected the plaintiff's perception as to whom her employer was at the time of the discrimination. While Magnuson viewed the temporary agency as her "legal" employer, she obviously viewed the on-site supervisor as an employer as well.

To protect his or her rights, a temporary employee who has suffered discrimination should report the situation to his or her temporary agency immediately. Depending upon the managerial hierarchy of the on-site employer, the temp may also want to inform someone in the on-site organization of the discrimination. Unfortunately, given the status of a temporary employee, this is a risky and highly unlikely scenario.[99]

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97. NLRB v. Triumph Curing Ctr., 571 F.2d 462, 468 (9th Cir. 1978).

98. Magnuson v. Peck Technical Servs., Inc., 808 F. Supp. 500, 506 (E.D. Va. 1992).

99. The temporary employee typically is not accorded the same amount of attention and respect that is given to permanent employees. PARKER, *supra* note 90, at 120.

Robert Parker relays the story of a black temporary employee who was treated poorly by what he referred to as a "bigoted employer."[100] In this situation, the employee walked off the job rather than deal with the abuse. Presumably, the employee did this without notifying the temporary agency or the on-site employer about the supervisor's actions.[101]

In a situation like this, neither the temporary agency nor the on-site employer would incur liability, as neither had notice that the behavior occurred.[102] Obviously, the offended employee felt that, if he said anything to the on-site employer, his temporary job would be jeopardized and that neither his temporary agency nor his on-site employer would assist him. Unfortunately, this situation is far too common. Nonetheless, the employee must take the affirmative step of at least notifying the temporary agency to protect his or her rights.

B. The Temporary Agency

In most situations, the temporary agency will be an employer for the purposes of Title VII.[103] The agency might think that, because its employees have not committed the harassment, the agency is off the hook. In these situations, the "easy way out" for the temp agency would be to ignore the actions of the on-site employer. As the client of the temporary agency, the on-site employer may not be happy when the agency contacts them with information about a permanent employee harassing a temp.

It is vital, however, that the temporary agency do something to remedy the situation once it is discovered. While bringing this situation to the attention of the on-site employer may upset the employer,[104] the *Magnuson* court made it clear that a failure to act by the temporary agency will lead to liability on the part of the agency.[105]

C. The On-Site Employer

When a temporary employee accuses a permanent co-worker of discrimination, the on-site employer is faced with a choice. The employer can assume that it is not the employer of the temporary employee and suggest that

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100. *Id.* at 119.
101. *Id.*
102. Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986).
103. *Magnuson*, 808 F. Supp. at 508.
104. Conversely, the on-site employer may be pleased that this information was brought to its attention.
105. Magnuson v. Peck Technical Servs., Inc., 808 F. Supp. 500, 506, 508 (E.D. Va. 1992).

the employee contact the temporary agency, or the employer can investigate the allegations. Smart on-site employers will choose the latter, even if this means investigating the actions of valued employees.

In *Temporary Employees: What Are an Employer's EEO Responsibilities?*, L. Lynne Pulliam sets forth some guidelines to help on-site employers understand their liability under Title VII.[106] These suggestions include: (1) selecting the agency "carefully"; (2) evaluating how the agency controls the work of the temporaries; (3) not interfering with a temp's employment opportunities with other employers; (4) examining job classifications that are comprised mostly of temps for potential adverse impact; and (5) establishing written policies in a neutral manner.[107] While, in principle, these suggestions are helpful, in reality, it may be as difficult for an on-site employer to avoid these situations with temporary employees as it is to avoid these situations with permanent employees. Certainly, an on-site employer should do all it can to avoid situations that could lead to potential liability. It is just as important, however, to have a plan in place to deal with a case of discrimination when it arises.

There are three reasons not to ignore the claims of a temporary employee. First, ignoring such information is a gamble. Based on *Amarnare* and *Magnuson*, there is a good chance that the on-site employer will be subject to liability as an employer under Title VII. Second, the permanent employee may not have limited his or her behavior to the temp employee. By exposing this behavior now, the on-site employer may prevent similar incidents in the future. Finally, by forcefully addressing an incident like this, the employer notifies all of its employees that such behavior will not be tolerated. While taking action against a permanent employee may be painful, acting now will limit liability in both the present case and perhaps in future cases as well.

VI. CONCLUSION

The use of temporary employees is greatly increasing in the American workplace. While these relationships are typically beneficial to all involved, when something goes wrong, the parties may be confused as to where responsibility lies. Because widespread temporary employment is a fairly recent phenomenon, many of these questions have not yet reached the courts.

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106. Pulliam, *supra* note 39, at 537.

107. *Id.* Pulliam's suggestions regarding the creation of written policies and the review of job classifications are excellent. However, suggestions to choose your agency carefully, or to evaluate the amount of control an agency exercises, seem inefficient and impractical.

The cases that have reached the courts provide some guidance as to how situations involving temporary employees should be handled. Based on NLRA cases and the joint employment doctrine, courts hearing cases involving temporary employment issues are likely to gauge an on-site employer's liability based on the employer's extent of control over the employee.[108]

Each of these doctrines requires an intensive factual analysis. While it is clear that both temporary agencies and on-site employers *can* be liable for discrimination suffered by temporary employees, the question of whether or not they will be liable, as well as the extent of the liability, will vary from case to case.

Finally, the doctrines set forth by the *Amarnare* and *Magnuson* courts are very similar to the joint employment doctrine. In fact, the *Magnuson* court, in a footnote, acknowledged that it felt that the joint employment doctrine supported its holding.[109] Hopefully, in the years to come, courts will synthesize these doctrines into a test that will provide guidance to temporary employees, temporary agencies, and on-site employers.

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108. According to the *Magnuson* court, in analyzing the relationship between the parties in a temporary employment relationship, the most important factor is "the employer's right to control the manner and means of worker performance." *Magnuson*, 808 F. Supp. at 510.

109. *Id.* at 509 & n.4.