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THE THIRD CIRCUIT REVIEWS POTENTIAL LIABILITY FOR DISCRIMINATION CLAIMS INVOLVING TEMPORARY OR LEASED EMPLOYEES IN *FAUSH V. TUESDAY MORNING, INC.*

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In a common scenario, a business obtains some or all of its workers from a third-party staffing firm or similar provider, which remains the individuals' "employer of record" for payroll and other purposes. There are any number of sensible business reasons to utilize such an arrangement, but a common misconception is that the individuals involved are and remain employees only of the staffing firm and that the "customer" is therefore insulated from any potential liability involving them. On November 18, 2015, the United States Court of Appeals for the Third Circuit provided a clear reminder that this assumption of insulation is at best dangerous and at worst entirely mistaken.

In *Fausch v. Tuesday Morning, Inc.*, ___ F.3d ___, 2015 WL 7273268 (3d Cir. Nov. 18, 2015), Matthew Fausch was employed by Labor Ready, a staffing firm, and assigned by Labor Ready to its customer, Tuesday Morning, a closeout home-goods retailer. The assignment lasted 10 days, during which Fausch alleged that he was subjected to several acts of racial discrimination and ultimately "terminated." When he then sued Tuesday Morning under Title VII and other statutes, the trial court entered summary judgment for Tuesday Morning, finding as a matter of law that it had not been his legal employer under the test articulated by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). In doing so, the court focused on what it characterized

as the "key three" of the Darden factors: which entity paid the employees' salaries, hired and fired them and had control over their daily employment activities. On appeal, the Third Circuit reversed, holding that the entry of summary judgment was improper because there were a number of aspects of the relationship between Fausch and Tuesday Morning which would permit a jury to conclude that it and Labor Ready were his joint employers and both amenable to suit under Title VII and the other statutes.

The Third Circuit pointed to a number of incidents of an employment relationship that are not at all uncommon in an "employee leasing" situation:

- While Labor Ready set the leased employees' wage rate and was responsible for payroll taxes and other matters, Tuesday Morning retained primary responsibility for compliance with applicable prevailing wage laws and was in a better position than Labor Ready to do so and explicitly undertook to comply with all state and federal laws governing employees.
- While Tuesday Morning did not pay the leased employees directly, its payments to Labor Ready were "functionally indistinguishable" from direct wage payments because they simply reimbursed Labor Ready for its direct hourly labor costs for each hour worked by the leased employees and added an administrative fee.

- While Tuesday morning did not have the power to hire or fire an individual as an employee of Labor Ready, it retained complete control over whether a Labor Ready employee could or could not work in its facility.
- Once the leased employee reported for work, the work was performed entirely on Tuesday Morning's premises, rather than at some remote site controlled by Labor Ready, and Tuesday Morning provided training, equipment, materials and supervision, and otherwise exercised complete control over what the leased employee did and where, how and for how long they did it. Conversely, there was almost never any Labor Ready supervision on the premises.
- The leased employees were not provided on a temporary basis for a specific project, but rather worked on an ongoing basis in a manner indistinguishable from Tuesday Morning's "own" employees.

While it bears emphasis that the Third Circuit did

not find that these factors created an employment relationship as a matter of law, but only that they created a fact issue for the jury, the attendant risks for employers are plainly apparent.

Fausch serves as a timely reminder of the principle that "if it seems too good to be true, it probably is" and that the assumption that a business can insulate itself from employment practices liability simply by making use of leased employees is just as simply incorrect. On the other hand, Fausch also provides important guidance to staffing firms and their customers alike on how best to structure and conduct their relationship so as to serve their business goals while minimizing unwanted potential liability.

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