THE CURRENT STATUS OF THE JOINT-EMPLOYER DOCTRINE

Panel Presentation Materials

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I. HISTORY and BRIEF BACKGROUND

For several decades, the National Labor Relations Board (NLRB) defined a “joint employer” as one who “has retained for itself sufficient control of the terms and conditions of employment of employees who are employed by the other employer.” NLRB v. Browning-Ferris Industries of Pa., 691 F.2d 1117, 1122 (3rd Cir. 1982). That definitional standard was further delineated over the years, resulting in a definitional standard that states a joint employer may be found where it shares or codetermines matters governing essential terms and conditions of employment, including hiring, firing, discipline, supervision, and direction. Laerco Transp. & Warehouse, 269 NLRB 324 (Mar. 21, 1984); TLI, Inc., 271 NLRB 798 (July 31, 1984). Most recently, prior to the Browning-Ferris decision, the NLRB stated that to establish joint employer status, “control over employment matters [must be] direct and immediate.” Airborne Express, 338 NLRB 597 (2002).

Then, in 2014, the blogosphere erupted when two things happened: First, The NLRB invited interested amici to file briefs addressing joint-employment issues in connection with the then-pending Browning-Ferris Industries of Ca. matter. The NLRB’s General Counsel (and an esteemed panelist for this presentation), Richard Griffin, submitted an amicus brief arguing that the Board’s current standard was significantly narrower than the traditional standard from pre-Laerco and ignored Congress’s intent to construe the term “employer” broadly. Mr. Griffin advocated for a standard that accounted for the totality of the circumstances, including how putative joint employers structure their commercial dealings. This concept was gaining traction around this time also because of David Weil’s book The Fissured Workplace and his subsequent appointment as Administrator of the Wage and Hour Division of the Department of Labor.

The second occurrence was Mr. Griffin’s announcement that the NLRB Office of the General Counsel had authorized complaints to proceed against McDonald’s franchisees and that the certain claims would also be brought against McDonald’s USA, LLC, the franchisor, as a joint employer if the parties were unable to reach settlements.1 As discussed below, the NLRB issued a 3-2 decision in favor of the union. BFI appealed that decision to the U.S. Court of Appeals for the District of Columbia Circuit, from which all stakeholders breathlessly await a final decision.

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1 The McDonald’s complaints were issued under the then-current joint employer standard and Counsel for the General Counsel has stated that he would advance the argument for the new test only in the alternative.
II. BROWNING-FERRIS INDUSTRIES of CALIFORNIA v. NLRB

A. NLRB Decision

An NLRB regional director found that BFI was not a joint employer with its contractor, Leadpoint Business Services, but, upon review, the Board found it was a joint employer. 362 NLRB No. 186 (Aug. 27, 2015). The question that loomed before the Board in BFI was whether it should change its joint-employer standard as recommended by Mr. Griffin. The critical issues underlying that question were (1) whether control over terms and conditions of employment means exercised control or possession of or the right to control; and (2) whether that control must be directly over the employees or whether it can be indirect.

The NLRB rejected the current joint-employer test and held that, to be determined a joint employer, an employer need not exercise its authority or control over employees’ terms and conditions of employment—the reservation of the authority or the possession of or right to that authority would be sufficient. In addition, the Board held that the control need not be direct or immediate; it could be exercised, if at all, through an intermediary.

The Board gave a more expansive and expressly non-exhaustive listing of “essential terms and conditions.” Additionally, the NLRB found that “[w]here the user firm owns and controls the premises, dictates the essential nature of the job, and imposes the broad, operational contours of the work, and the supplier firm, pursuant to the user’s guidance, makes specific personnel decisions and administers job performance on a day-to-day basis, employees’ working conditions are a byproduct of two layers of control.” Id. at 14.

The NLRB said it was relying on the common law concept of control in this definition. The Board acknowledged that, “[e]ven where the common law does permit the Board to find joint-employer status in a particular case, the Board must determine whether it would serve the purposes of the Act to do so, taking into account the Act’s paramount policy to ‘encourage[ ] the practice and procedure of collective bargaining.’ . . .’ To best promote this policy, our joint-employer standard – to the extent permitted by the common law – should encompass the full range of employment relationships wherein meaningful collective bargaining is, in fact,
possible.” *Id.* at 12. Ultimately, the NLRB’s decision, although agreeing in most respects with the General Counsel’s proposed test, declined to adopt that test “insofar as it might suggest that the applicable inquiry is based on ‘industrial realities’ rather than the common law.” *Id.* at 12-13, n.68.

In addition to declaring the decision was legally wrong, dissenting Board Members Philip Miscimarra (now Acting Chairman of the Board) and Harry Johnson argued that the decision was overbroad, unclear, created uncertainty, and would lead to negative consequences for employers. Notably, the dissent stated that “no bargaining table is big enough to seat all of the entities that will be potential join employers under the majority’s new standard.” *Id.* at 21. Additionally, the dissent contended that the decision was not truly based on common law because common law requires direct control and does not incorporate the “economic realities” test as it claimed the majority’s decision did.

**B. BFI Appeal**

BFI has appealed the decision to the D.C. Circuit. The issues on appeal are:

1. Whether the Board’s new joint-employer test fails as a matter of law because:
   a. it is contrary to the employment relationships recognized by Congress in the 1947 Taft-Hartley amendments to the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*;
   b. it relies upon the kind of assessment of “economic realities” prohibited in the Taft-Hartley amendments;
   c. it fails to promote stable collective bargaining relationships as required by the NLRA.

2. Alternatively, whether the NLRB’s new test is arbitrary and capricious because it overturns decades of settled law and imposes a joint employer definition so broad and unconstitutionally vague that it is impossible for parties to arrange their affairs to achieve predictable legal outcomes.

3. Whether Browning-Ferris is a joint employer under either the longstanding test the Board abandoned in this case or its new test.

4. If the Board’s new test is valid, whether it is equitable to retroactively apply its reversal of 30 years of precedent to Browning-Ferris.
The parties submitted extensive briefing to the D.C. Circuit, and several amici joined in as well, including the EEO and Teamsters Local 350 (as intervenor) on behalf of the NLRB; and the U.S. Chamber of Commerce, Microsoft, the HR Policy Association, the International Franchise Association and several other trade associations on behalf of BFI. As a practical matter, the NLRB argued that how employers work has changed (i.e., “fissured”), and the law should change also. Employers, on the other hand, argue that creating liability for them for workers that they do not employ and do not directly control leads to the kind of instability and uncertainty that harms businesses.

The EEOC’s amicus brief stressed the importance of the D.C. Circuit’s decision because “Title VII is based upon the NLRA, the statutes’ definitions of ‘employer’ are virtually identical, and both Title VII and the NLRA are remedial in nature.” *Browning-Ferris Indus. of Ca. v. NLRB*, USCA Case No. 16-0128, Brief of the Equal Employment Opportunity Commission As Amicus Curiae in Support of Respondent/Cross-Petitioner and in Favor of Enforcement, filed Sept. 14, 2016 (Doc. No. 1635688) [“EEOC Amicus Brief”] at 14. Thus, the EEOC concluded, the joint-employer tests should be the same. The EEOC repeatedly defines its test as “a flexible, multi-factor test, based on traditional agency principles under common law, to determine whether an entity has sufficient control over the terms and conditions of employment to qualify as an employer. No one factor is determinative and not all factors apply in any given case.” *Id.* The EEOC then turned to defending its joint employer standard and its consideration of the right to control and indirect control, which it describes as “acting through an intermediary.” *Id.* at 21-22.

One industry brief providing more than policy arguments in support of BFI’s position and remaining with the *Laerco-TLI* joint employer standard included a compelling analysis of the importance the Board always has placed on actual control. *See Browning-Ferris Indus. of Ca. v. NLRB*, USCA Case No. 16-0128, Brief of Amici Curiae National Association of Manufacturers, National Restaurant Association, National Federation of Independent Business, Coalition for a Democratic Workplace, and American Staffing Association on Behalf of Petitioner, filed June 15, 2016 (Doc. No. 1619622) [“NAM Amicus Brief”] at 25-29. The NAM Amicus Brief also articulated
the argument that the “new” standard espoused by the NLRB impermissibly deviated from the Taft-Hartley Act, contrary to congressional intent. *Id.* at 29-30.

Finally, the U.S. Chamber of Commerce and the Retail Litigation Center, Inc. filed an amicus brief flatly stating that the Board’s position was not only not in line with common law, it was contrary to the common law and to most court decisions. *See Browning-Ferris Indus. of Ca. v. NLRB*, USCA Case No. 16-0128, Brief of Amici Curiae Chamber of Commerce of the United States and Retail Litigation Center, Inc., filed June 14, 2016 (Doc. No. 1619400) [“Chamber Amicus Brief”] at 18-27. The Chamber Amicus Brief also outlined the argument that the Restatement (Second) of Agency does not support the NLRB’s decision—an issue that the D.C. Circuit addressed during oral argument. *Id.* at 27-33.

**C. Hearing**

Circuit Judges Patricia A. Millett and Robert L. Wilkins and Senior Circuit Judge A. Raymond Randolph questioned the presenting attorneys in an active oral argument on March 9, 2017. BFI’s counsel repeatedly referred to actual control as the “center of gravity” for the determination of whether a company is a joint employer, regardless of what other factors might be relevant or considered. Judge Millett expressed concern that the Board should be able to maintain the flexibility to weight the factors differently over time.

The panel seemed genuinely concerned about the lack of clarity around “indirect control” and how to weigh it against direct control factors. For example, Judge Randolph posed a hypothetical to counsel for the NLRB about a hotel owner who directs a landscaper to correct his employee’s mowing techniques, asking whether that hotel owner could now be considered a joint employer. Faced with a second hypothetical about a restaurant owner and a hired exterminator, NLRB’s counsel distinguished the hypotheticals by stating that they do not involve contractors who are doing the “core work” of the putative employer, like with Leadpoint and BFI.

Other criticism of the NLRB’s new test included a lack of clarity about where the line was between influence and indirect control, between impacting the end result and impacting the
process. Judge Millett noted that the Board’s failure to rely on indirect control in any decisions in the last three decades made it difficult to determine how the Board would interpret and apply indirect control going forward, and the BFI decision shed no light on that analysis.

No timeline currently exists for a decision from the D.C. Circuit.

III. **CAUSE FOR CONCERN?**

Employers and management attorneys likely breathed a collective sigh of relief listening to the line of questioning during the hearing, but, even prior to that, when Mr. Miscimarra was appointed the Acting Chairman—in light of his powerful dissent in the NLRB’s BFI decision. Moreover, the current president is likely to appoint more pro-employer board members as positions become available. Accordingly, although management lawyers believe that the D.C. Circuit will reverse or severely restrict the BFI decision, the Board itself is likely to retreat from the decision within the next two to three years, if upheld. That prospect is still not entirely positive for employers if they have to predict and prepare for the same tumult and uncertainty that has existed for the last three years.

For employees, their counsel, and the EEOC, the NLRB’s proposed test represents a standard consistent with the EEOC’s position and will not beget any “uncertainty” greater than any other application of a multi-factor test—if it has any impact at all. Regardless of position on whether the NLRB’s joint employer test should be upheld, the political exigencies of the new administration do not favor increased employer liability.

For unions, the decision may not be cause for concern with respect to Title VII, but affirming the NLRB’s decision and use of the “traditional” standard could certainly alter the collective bargaining dynamic (i) if the number of employees can be expanded by redefining the bargaining unit, and (ii) if putative joint employers can be forced to the bargaining table to negotiate terms that subcontractors, staffing agencies, and franchisees lacked authority to negotiate on their own.
IV. EEO CASES ADDRESSING JOINT EMPLOYMENT

Below are brief summaries of a sample of recent Title VII cases that have addressed the joint employer issue, although few address—and none implement—the NLRB’s new joint employer standard.


Plaintiff Walter Love, a black male, was fired from his job with subcontractor Union after a physical altercation on a construction site for general contractor Cullen. Cullen had reserved the right to require that subcontractors employed union workers; its city contract required the use of a certain percentage of city residents; and Cullen could investigate any instances of worker misconduct and make the final determination regarding whether that worker could stay on the project site. Following Love’s altercation, Cullen’s superintendent permanently removed him (and later another subcontractor’s employee) from the job site. Love claims that Cullen and Union discriminated against him based on his race and sought to hold Cullen accountable as a joint employer.

The U.S. Court of Appeals for the Seventh Circuit examined the five-factor test from *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377 (7th Cir. 1991). The *Knight* test balances the following factors: (1) the extent of the employer’s control and supervision over the employee; (2) the kind of occupation and nature of skill required; (3) the employer’s responsibility for the costs of operation; (4) the method and form of payment and benefits; and (5) the length of the job commitment. The second test considers the amount of control exerted by the alleged de facto employer, emphasizing the “economic realities” of the employment relationship.

The Seventh Circuit held that the five-factor test subsumed the concept of “economic realities” and thus that the tests were not distinct. The court granted Cullen summary judgment when it found that none of the factors supported Love’s claim. Union had supervisors on site, and Union was responsible for its costs; and Union paid Love’s wages and benefits. It could have placed Love at another project site; Cullen did not terminate his employment. This final part is often a critical issue in staffing and temporary placement agency cases, but the Seventh
Circuit very easily distinguished between Love not working on one project and Love being terminated by his primary employer.


The U.S. Court of Appeals for the Fifth Circuit partially reversed the district court’s grant of summary judgment finding a genuine issue of material fact regarding whether the manufacturer Freescale was the employer for purposes of ADA liability of the Manpower temp employee Burton.

The Fifth Circuit applied the “hybrid economic realities/common law control test” to determine whether Freescale was Burton’s joint employer. The court described this test as an analysis of the most important right to control the employee’s conduct and also the rights to hire and fire, to supervise, and to set the employee’s schedule. The court also addressed the economic realities of whether the alleged employer paid the employee’s salary, withheld taxes, provided benefits, and set the terms and conditions of employment.

The court found that Freescale had the right to terminate Burton’s assignment, and it decided and insisted on that termination; and it supervised Burton, including conducting performance reviews. On the other hand, Freescale did not pay Burton or provide her benefits, or set the terms and conditions of her employment. The court considered these “competing” tests to be tied and held that the overall analysis did not permit a decision as a matter of law.

In a related ruling, the court also held affirmed that “the Seventh Circuit agreed with the First and Eleventh Circuits as well as the EEOC that a joint employer must bear some responsibility for the discriminatory at to be liable for an ADA violation.” Id. at 228 (citing EEOC, No. 915.002, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, at 2260 (1997); Torres–Negrón v. Merck & Co., 488 F.3d 34, 41 n. 6 (1st Cir. 2007); Llampallas v. Mini–Circuits, Lab, Inc., 163 F.3d 1236, 1244–45 (11th Cir. 1998)).

Nardi brings Title VII sexual harassment hostile environment and retaliation claims against her former employer, a small trucking company ALG, and its outsourced human resources services provider TLC. The claims only proceed against TLC, which moves for summary judgment. The court grants summary judgment because Nardi failed to present evidence sufficient for a reasonable juror to conclude that TLC was her employer.

At the outset the U.S. District Court for the Northern District of Illinois makes clear that the right to control is the most important consideration in determining the existence of an employer-employee relationship. Nardi seeks application of the five-factor common-law/economic realities test. TLC argues that the court should not address the economic realities test but adopt instead the joint-employer test from labor law, for which the court cites the NLRB’s 2015 BFI decision. Ultimately, however, the court determines that, for purposes of this case, the tests do not make a difference because “both focus on the extent of control and supervision an entity exerts over the plaintiff.” Id. at 1247. (The court did distinguish the joint-employer test from the economic realities test in that joint employers can be liable for each other’s actions, whereas the Seventh Circuit has been unwilling to impose vicarious liability on one employer for the acts of another.)

In this case, Nardi points to TLC’s name and logo on many employment forms, but the court does not see that (or TLC’s statement that Nardi was “no longer an employee of the TLC Companies) as sufficient control. TLC was not involved in hiring and firing decisions, nor did it control work or discipline of ALG’s employees.

The court concluded that TLC was not involved in the discharge decision, and Nardi understood that was not TLC’s role—“to conclude otherwise would elevate form over substance.” Id. at 1249.


Black male temp employee Faush were assigned to work at a Tuesday Morning retail location by their staffing firm Labor Ready. Faush claims that he and his co-workers were subjected to race-based discrimination and ultimately terminated. He sued Tuesday Morning, which prevailed on summary judgment, arguing it was not Faush’s employer and thus could not be liable for discrimination. Faush appealed to the U.S. Court of Appeals for the Third Circuit.
The facts revealed that, although Labor Ready hired and placed Faush, Tuesday Morning supervised and directed his daily activities, trained him, specified what clothing and equipment he could wear, assigned them to tasks, and could demand a replacement within the first two hours of work. Labor Ready set Faush’s wages and paid his employment taxes, etc. Both companies agreed to comply with Title VII and to provide a workplace free from discrimination.

The court determines that the test for an employment relationship should be governed by the “Darden test—a multi-factor test arising out of Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 112 S. Ct. 1344 (1992). In Darden, the U.S. Supreme Court concluded that employee should be construed according to common-law agency doctrine. Darden looks at “the hiring party’s right to control the manner and means by which the product is accomplished.” Faush, 808 F.3d at 214. The Darden non-exhaustive factors include:

- the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. The court further stated that, although it focused often on which entity paid the employees, hired and fired them, and controlled daily activities, “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”

The court found persuasive Tuesday Morning’s ability to impact Faush’s wages and that its payments to Labor Ready were “functionally indistinguishable” from paying Faush directly. Moreover, while Tuesday Morning did not hire Faush and could not terminate his employment relationship with Labor Ready, it could control whether he worked at Tuesday Morning by demanding a replacement for any reason. Tuesday Morning also controlled and directed Faush’s daily activities with almost no oversight by Labor Ready. The court also noted that the Supreme Court adopted the factors identified by the EEOC in its 1997 Guidance because they were consistent with the “common-law touchstone of control.” Id. at 219 at n. 11.

The U.S. District Court for the Western District of Virginia held that landscaping franchisor U.S. Lawns did not exert any control over Wright, an employee of an independently operated franchise, such that it could be liable under Title VII as a joint employer.

The court relies on Butler v. Drive Automotive Industries of America, Inc., 793 F.3d 404 (4th Cir. 2015), whether the Fourth Circuit determined that multiple entities could be simultaneous employers if one, while contracting in good faith with an otherwise independent company, retains for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Id. at *3. Historically, the court says that none of the enumerated nine factors is dispositive, but the common law element of control remains the principal guidepost. The three most important factors being which entity has the power to hire and fire; to what extent is employee supervised; and where and how the work takes place. Id. at *4.

Examining these factors in light of the facts of the case, the court finds that the franchisor has no authority to hire and fire Wright; all day-to-day supervision is conducted by the franchisee; and the franchisee provided all of the equipment and place of work. Wright focused on U.S. Lawn’s control, through the franchise agreement, of Mountain View, but the court found that was not the relevant inquiry in the joint-employment analysis.


Defendant FedEx moved for summary judgment on plaintiff Liotard’s Title VII claim based on her gender and under the ADEA. Liotard was a cleaning professional hired by Bright Horizons and its owner Lindberg and assigned to clean a FedEx service center. Liotard received compensation from Bright Horizons, not FedEx. Bright Horizons provided most of her cleaning supplies and typically gave her direction when needed (although a few times, FedEx asked that Liotard complete a cleaning task).

Liotard reported inappropriate comments made by FedEx employees to Lindberg who failed to act. When Liotard complained to FedEx, it was eventually investigated, but FedEx could not corroborate her complaint. FedEx alerted Lindberg of the results of its investigation and
asked that she be reassigned. Lindberg reassigned Liotard to a car dealership but left there after a couple of weeks.

The court held that determination of a joint employer requires “sufficient evidence of immediate control over the employees.” *Id.* at *4. This Second Circuit test examines five factors that bear on “immediate control”: whether the alleged employer (1) did the hiring and firing; (2) directly administered any disciplinary procedures; (3) maintained records of hours, handled the payroll, or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process.” *Id.* (citing *AT & T v. NLRB*, 67 F.3d 446, 451 (2d Cir. 1995) *NLRB v. Solid Waste Servs., Inc.*, 38 F.3d 93, 94 (2d Cir. 1994) (per curiam)). The court found that Lindberg did the hiring and ultimately firing decision-making and was also responsible for Liotard’s compensation. FedEx had no authority to fire Liotard, only to terminate her placement at FedEx at best, which is what occurred when she was relocated. *See Conde v. Sisley Cosmetics USA, Inc.*, No. 11 CIV.4010(RJS), 2012 WL 1883508, at *4 (S.D.N.Y. May 23, 2012) (“An entity that has the power to request than an employee be moved but not to cause her to be terminated is not a joint employer.”).


The EEOC brought an ADA discrimination claim against S&B for failure to hire two prospective employees due to their hearing impairments. The parties cross-moved for summary judgment, and the court found that there was a genuine issue of material fact on the issue of whether S&B was a joint employer along with its temporary employee placement agency Staff Force. Adopting the hybrid economic realities/common law control test, the court identified the right to control as the most important part, which requires consideration of whether the alleged employer has the right to hire and fire employees, supervise, and set the schedule, as well as whether the alleged employer paid the salary, withheld taxes, provided benefits, and set the terms and conditions of employment.

Although the plaintiffs were technically employees of Staff Force, S&B would have been responsible for controlling their work; it had the ultimate authority to hire or not the prospective employees from Staff Force; and it trained all employees on the production line and gave detailed instructions. The court finds that the economic realities factors may point to
Staff Force as an employer, but the more important right-to-control test leaves room for a reasonable jury to find that S&B had that right.
APPENDIX

A. Hypotheticals

B. *Browning-Ferris v. NLRB*
   1. NLRB Decision
   2. BFI Briefing
   3. NLRB Briefing
   4. Amici Curiae Briefing

C. EEOC Enforcement Guidance 1997

D. Joint Employment AI 2016-1

E. DOL Wage and Hour Fact Sheet 35 – Joint Employment

F. NLRB Freshii Memorandum

G. NLRB, Miller & Anderson Decision
Hypotheticals

1. Franchise

Hubby for Hire is the name of a handyman franchise concept. HfH has a rather industry-standard franchise agreement that permits the franchisor to lease its trademarks, trade dress, business system, methods, procedures, standards, and any other operational elements considered proprietary. The standard HfH agreement is for five years and includes the following terms: (1) noncompete agreement; (2) right to inspect work done on site with prior notice; (3) right to terminate the agreement for failure to pay royalties or ad fees; for noncompliance with the operations manual; or for failure to comply with other provisions in the agreement or operations manual or violation of any brand standard.

For an additional fee, HfH provides the following additional helpful resources:

(1) A 10-part DVD set Human Resources guide. A franchisee can look up any issue and get pre-taped advice from a certified labor and employment law specialist on an array of issues. The guide also comes with a set of recommended form templates, like an employee handbook, progressive discipline documents, onboarding documents, and sample separation notices. All of the forms can be customized. For an additional fee, franchisees can purchase annual updates.

(2) HfH’s “Keeping It 100: How to Keep Your Prices Within Market” is a computer program that analyzes current construction materials market data and pricing, finds the sources for products a franchisee needs for a project at the best price considering shipping and amount. The program has a similar function for pricing additional labor and includes live data and analytics on the job market and labor costs, which helps predict hiring during particular seasons (which means letting go of employees at other times).

(3) An HfH consultant to assist with training you and any of your site supervisors for the first six months. This training includes weekly evaluations, training on how to perform various HfH jobs, how to manage workers, staffing levels and scheduling, and even wear to purchase the standard HfH overalls, shirts, caps, and workboots. For an additional fee, franchisees can purchase periodic additional consultations.

Although purchase of these resources is not required, 90% of the 50 franchisees have purchased all three packages, and when HfH talks about the cost of purchasing a franchise, it includes the cost of these three programs. These resources are advertised as helping franchisees comply with the operations manual, maintain brand standards, and make both their franchises and the system as a whole a success with consistent results and consistently wonderful customer experiences.

Sammy Sanders applies for a HfH site supervisor position online through HfH’s website. It sends Sammy to HfH franchisee Bayou Contractors d/b/a Hubby for Hire New Orleans. Bayou Contractors hires Sammy, who works for two months on different sites, oddly, without meeting anyone from Bayou. Then, Sammy is told to attend a mandatory training event hosted by HfH. There, her boss finds out she is a Muslim woman and fires her immediately.

She brings a lawsuit against HfH and Bayou as joint employers.

A-1
2. **Subcontractor**

On a large renovation project, a general contractor, GenCon, hired a subcontractor, SubCon, for a portion of the work. SubCon in turn hired its own subcontractor, Little Sub, which hired a Foreman for the project. Little Sub had no direct relationship with GenCon and no real contract. Little Sub also paid Foreman his salary and other benefits. GenCon did reserve some rights with respect to its subcontractors, including (1) the requirement that the subcontractor not have simultaneous projects that would take away workers who could be working on GenCon’s project; (2) the requirement that the subcontractors hire union workers; and (3) the right to investigate alleged misconduct on site and discipline or remove any bad actors.

After an altercation between Foreman and some other workers, GenCon’s supervisor investigated and had both Foreman and another worker permanently removed from the worksite. Little Sub did not have any other projects at that time, so removing Foreman was basically terminating him. Foreman felt like this was overly punitive, that he had not done anything wrong, and that GenCon’s action was because he was the only black foreman.

3. **HR PEO**

A small trucking company, TruckCo, contracts with a company, PEO, that provides administrative human resource services, payroll, and related functions for the trucking industry. PEO provides employees with onboarding orientation and an employee handbook. It manages all of the payroll and benefits for TruckCo’s employees. It also provides any HR forms like documented warnings, probation notices, and complaints. PEO’s logo and name appears on all of its documents, including TruckCo employees’ checks.

As part of its grievance management procedure, PEO provides an online form to submit and a call-in number for any discrimination or similar complaints. A PEO employee reviews and investigates all complaints but conveys the report and the status in a weekly summary to TruckCo. After completing its investigation, PEO makes a recommendation to TruckCo, and a TruckCo supervisor takes the lead on the necessary disciplinary counseling, termination, or other discussion. A PEO investigator may sit in on any follow-up discussions or disciplinary actions.

A TruckCo custodian used PEO’s process to submit a complaint about sexual harassment by several TruckCo coworkers. She was fired within a week from submitting her statement through PEO’s call-in number. Upon termination, she received a separation notice from PEO, along with a COBRA notice. Other than telling her she was fired, she had no further contact with TruckCo.

She files a Title VII claim against TruckCo and PEO, alleging that they are joint employers.
Staff University provides a two-year training program for IT workers. While taking classes and gaining necessary certifications to become more marketable workers, Staff U places students in positions with local companies for three months to two years. Some students are eventually hired by the companies after graduation. Staff U has ten very large client relationships, and, at those companies, Staff University maintains an office with an on-site supervisor. At CompOne, one of the companies where Staff University has an on-site presence, the supervisor does not have official reporting responsibilities to anyone, but usually keeps CompOne’s IT Director apprised of what is going on, how many students are working, and the status of their projects.

Companies, like CompOne pay Staff U by the project, giving very detailed project requirements, a timeline, and necessary access or materials. Staff U and the onsite supervisor are at liberty to staff each project and direct the student activity within those project requirements. Staff U pays the students. As part of their classes, students receive and review a Staff U employee handbook, but also must certify that they received and reviewed their assigned company’s employee handbook. Staff U has an EEO policy and a human resources specialist to whom students may direct questions regarding both class and work issues. This person is ultimately treated more like a career counselor.

CompOne also has a telemarketing department. Its supervisor used to be in the IT department and is always hanging out there, where the Staff U students are. Over the last three years, several Staff U students and several CompOne employees have complained about this telemarketing supervisor to the IT Director because he makes sexually harassing comments to the women in the department. The situation has become so bad that Staff U tries not to assign women to CompOne to avoid the problem. However, CompOne usually has the highest paying positions, provides the best on-the-job training, and is the most likely to lead to a full-time position either in the IT Department or elsewhere in the company.

Similarly, the CompOne employees know the IT Department is a good place to work, except for the problems caused by this one person outside of the department, but many of the female employees have requested department transfers or quit. Three have expressed physical symptoms of anxiety, stress, and depression because of the hostile work environment.

Five Staff U students who have already received offers to work at CompOne upon graduation and five CompOne IT Department employees file complaints against Staff University and CompOne for violation of Title VII based on gender-based discrimination and sexual harassment. The students allege that CompOne and Staff U are joint employers for purposes of their Title VII claims (assume timely EEOC filings and right to sue letters).