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Bringing a Title VII Action: Which Test Regarding Standing to Sue is the Most Applicable?

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BRINGING A TITLE VII ACTION: WHICH TEST REGARDING STANDING TO SUE IS THE MOST APPLICABLE?

I. Introduction

Title VII of the Civil Rights Act of 1964[1] prohibits discrimination on the basis of race, color, religion, sex, or national origin.[2] Possibly the most important general statute concerning employment discrimination,[3] Title VII was enacted by Congress to ensure equality of employment opportunities by eliminating those practices that discriminate on the above-mentioned bases.[4]

Because Congress designed the statute to eliminate the inconvenience, unfairness and humiliation of certain types of employment discrimination,[5] ambiguities are resolved in favor of the complaining

1. Civil Rights Act of 1964 § 701, Pub. L. No. 88-352, 78 Stat. 253 (codified as 42 U.S.C. § 2000e (1982)) [hereinafter Title VII or Act].

2. 42 U.S.C. § 2000e-2(a). Title VII covers discrimination based on these factors only. It does not cover discrimination based on non-citizenship or homosexuality. Employment discrimination based on age is prohibited under the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90-201, § 2, 81 Stat. 602 (codified as 29 U.S.C. §§ 621-34 (1982)).

3. LARSON, EMPLOYMENT DISCRIMINATION § 5.10 at 2-2 (1988) [hereinafter LARSON].

4. Griggs v. Duke Power Co., 401 U.S. 424 (1971). In *Griggs*, Chief Justice Burger's opinion explained that an employer may violate Title VII even when acting in good faith. Focusing on 42 U.S.C. § 2000e-2(a), he stated:

> [t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Id. at 429-30. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 468 (1982); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). *See also* SULLIVAN, ZIMMER & RICHARDS, EMPLOYMENT DISCRIMINATION § 2.1 at 35 (2d ed. 1988) [hereinafter EMPLOYMENT DISCRIMINATION] ("Most obviously, the prohibition of discrimination reflects society's commitment to racial and gender equality. . . . Title VII takes a step towards equality by prohibiting unequal treatment in the sense that it proscribes employment decisions resulting from an intent to discriminate. This sense of discrimination has come to be called disparate treatment.").

5. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 425 (8th Cir. 1970). *See* 110 CONG. REC. 13090 (daily ed. June 9, 1964) (statement of Sen. Humphrey) (in discussing the minimum number of employees necessary for the statute to govern the employer's practices, Sen. Humphrey stated that the principle of the statute is "fairness that is so morally and ethically correct that its validity should long ago have been universally recognized.").

party.[6] This approach reflects not only the "manifest importance of Title VII rights to complaining parties, but also the broad national commitment to eliminating such discrimination and the importance of private suits in fulfilling that commitment."[7]

The courts, however, have faced considerable confusion as to whom the Act protects. Most courts have held that since Title VII is a remedial statute,[8] its provisions are to be liberally construed.[9] Such broad construction has resulted in several interpretations of the provision that defines "employee."[10] Moreover, controversy stems from what relationship must exist between an "employer" and "employee" in order for Title VII to apply.

Notwithstanding the language, purposes and goals of the Act, some courts have narrowed the extent of protection under Title VII by barring certain individuals from bringing suit.[11] For example, several courts[12] have limited plaintiff status by using common law principles of agency and declaring certain individuals to be independent contractors.[13] Liability attaches if the agent is an employee, but not if he is an independent contractor. In order to state a cognizable claim under Title VII, these courts require an immediate employer-employee relationship between the plaintiff and the defendant.

Other courts have turned away from the common law meaning of

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6. Sanchez v. Standard Brands, Inc., 431 F.2d 455, 461 (5th Cir. 1970).

7. Coles v. Penny, 531 F.2d 609, 615 (D.C. Cir. 1976).

8. *E.g.*, Craig v. Department of Health, Educ. & Welfare, 581 F.2d 189, 193 (8th Cir. 1978); Hart v. J.T. Baker Chem. Co., 598 F.2d 829, 831 (3d Cir. 1979); Silver v. KCA, Inc., 586 F.2d 138, 141 (9th Cir. 1978); Bell v. Brown, 557 F.2d 849, 853 (D.C. Cir. 1977); Davis v. Valley Distrib. Co., 522 F.2d 827, 833 (9th Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977); EEOC v. Eagle Iron Works, 367 F. Supp. 817, 820 (S.D. Iowa 1973).

9. *E.g.*, Quijano v. University Fed. Credit Union, 617 F.2d 129, 131 (5th Cir. 1980); Hart v. J.T. Baker Chem. Co., 598 F.2d 829, 831 (3d Cir. 1979); Craig v. Department of Health, Educ. & Welfare, 581 F.2d 189, 193 (8th Cir. 1978); Bell v. Brown, 557 F.2d 849, 853 (D.C. Cir. 1977); Davis v. Valley Distrib. Co., 522 F.2d 827, 832 (9th Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977); Hauck v. Xerox Corp., 493 F. Supp. 1340 (E.D. Pa. 1980), *aff'd*, 649 F.2d 859 (3d Cir. 1981). *See* H.R. REP. No. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2401.

10. Armbruster v. Quinn, 711 F.2d 1332, 1336 (6th Cir. 1983).

11. American Federation of Gov't Employees v. Webb, 580 F.2d 496, 504-05 (D.C. Cir.), *cert. denied*, 439 U.S. 927 (1978).

12. Smith v. Dutra Trucking Co., 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd*, 580 F.2d 1054 (9th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979). *See* EEOC v. Zippo Mfg. Co., 713 F.2d 32 (3d Cir. 1983); Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979).

13. *Spirides*, 613 F.2d at 829; *Smith*, 410 F. Supp. at 518. *See* Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir.)(where the court ruled that a janitor was an independent contractor and, therefore, beyond the protection of the statute), *cert. denied*, 459 U.S. 874 (1982); Lutcher v. Musicians Union Local 47, 633 F.2d 880 (9th Cir. 1980) (musician hired by school district to give concert was an independent contractor).

employee and instead look to the "economic realities"[14] of the total situation and the underlying relationship between the individual and the principal.[15] This method considers the potential for employment discrimination arising from the principal's economic dominance of the relation. The greater the dependency, the more likely the court will find the plaintiff to be an employee. This approach would apply Title VII to any circumstance where an individual was dependent on the employer's business for his livelihood, notwithstanding the absence of employer control necessary for Title VII to apply under the common law or hybrid tests.

A few circuits have allowed a cause of action even after concluding that the plaintiff is not an employee.[16] These courts have extended the reach of Title VII beyond the traditional employer-employee relationship by focusing upon whether the defendant can interfere with that individual's employment opportunities.[17] These courts extend Title VII's protection to a claim that the defendant interfered with an individual's employment relationship with a third party.[18] This rationale is based on the language of Title VII's basic antidiscrimination provision, which makes it unlawful "to discriminate against *any individual*."[19]

This Note examines who is a proper plaintiff under Title VII and explains the need for a clearer definition of "employee" and "employed." Part II presents a historical development of the standards used to define employment relationships in Title VII. Part III discusses the general requirements for standing and sets forth the tests currently used to determine standing for a Title VII action. Part IV analyzes how the tests can produce different outcomes and why some tests more adequately serve the Act's goals. The Note concludes that Congress should amend the definition of "employee" or at least define what constitutes "employed." In the alternative, a consistent method should be used and this Note proposes a two-part test that would suffice for standing: (1) the claimant must first demonstrate that the defendant is a covered employer within the meaning of Title VII; and

14. Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983). *See* Bartels v. Birmingham, 332 U.S. 126 (1943).

15. *Bartels*, 332 U.S. at 129; *Armbruster*, 711 F.2d at 1340.

16. Doe on behalf of Doe v. Saint Joseph's Hosp., 788 F.2d 411 (7th Cir. 1986); Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973); Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089 (D.N.H. 1974).

17. *See, e.g., Saint Joseph's Hosp.*, 788 F.2d at 424; *Sibley Memorial Hosp.*, 488 F.2d at 1341; *Puntolillo*, 375 F. Supp. at 1092 (citing *Sibley*, 488 F.2d at 1341).

18. *See, e.g., Saint Joseph's Hosp.*, 788 F.2d at 422; *Sibley Memorial Hosp.*, 488 F.2d at 1342; *Puntolillo*, 375 F. Supp. at 1092 (citing *Sibley*, at 1342).

19. 42 U.S.C. § 2000e-2(a) (1981).

(2) the claimant must demonstrate the existence of an identifiable employment relationship which is allegedly being interfered with by the defendant.

II. The Framework of Title VII

A. Statutory Language

Section 2000e-2 of Title VII of the Civil Rights Act of 1964 prohibits its employers from discriminating against any individual with respect to terms of his or her employment on the basis of race, color, religion, sex or national origin. The section provides that it shall be an unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[20]

An employer must employ at least fifteen employees in order to be subject to the Act.[21] These provisions have caused confusion among the courts because of the statute's circular definitions of "employee" and "employer." For Title VII purposes, an "employee" is defined as an "individual employed by an employer."[22] An "employer" is "a

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20. *Id.*

21. 42 U.S.C. § 2000e(b)(1964), *amended by* Pub. L. No. 92-261, § 2(2) (March 24, 1972). Originally, the Act only applied to employers who employed twenty-five or more employees. This was amended in 1972 to extend coverage. Pub. L. No. 92-261 § 2(2) (March 24, 1972). Many state civil rights statutes have lower jurisdictional requirements than Title VII. For example, Colorado and Wyoming both prohibit discrimination by employers with two or more employees. *See* Newcom, Hishon v. King & Spalding: *Discrimination in Professional Partnerships*, 62 DEN. U.L. REV. 485, 492 (1985).

22. 42 U.S.C. § 2000e(f)(1964), *amended by* Pub. L. No. 92-261, § 2(2) (March 24, 1972) defines employee as:

> an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

person engaged in an industry affecting commerce who has fifteen or more employees."[23] The term "employee" has been used for two purposes: (1) for determining who is an employer,[24] and (2) for determining unlawful employment practices.[25] Most of the provisions defining unlawful employment practices, however, use the term "any individual" rather than "employee."[26] The statute, however, fails to define the specific factors which create an employment relationship.[27] This shortcoming[28] has required the courts to adopt several tests for determining who is an employee for the purposes of bringing a Title VII action.[29]

B. The History of Title VII in Relation to Other Federal Statutes

Title VII proscribes specific discriminatory practices by employers engaging in industries affecting commerce.[30] In general, an employer engages in discriminatory practices by making certain distinctions in the treatment of employees.[31] Under the Act, discrimination is prohibited only if it is based upon race, color, religion, sex, or national

23. 42 U.S.C. § 2000e(b) provides:

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 of the United States Code, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

24. *Id.*

25. 42 U.S.C. § 2000e-2(a)(2).

26. 42 U.S.C. § 2000e-2(a)(1).

27. *See, e.g.*, Cobb v. Sun Papers, Inc., 673 F.2d 337, 339 (11th Cir.) ("There is no further elaboration in the statute, nor is there any evidence in the legislative history as to how expansively that definition [of employee] is meant to be read."), *cert. denied*, 459 U.S. 874 (1982); Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985) (Title VII statute is of "scant help" in defining "employee"); Spirides v. Reinhardt, 613 F.2d 826, 830 (D.C. Cir. 1979) ("[w]hether appellant is an employee . . . is more difficult to determine, because the Act does not clearly compel consideration of any particular set of factors."). *See* Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75 (1984); EMPLOYMENT DISCRIMINATION § 1.2.

28. *See supra* note 27.

29. *See infra* notes 78-137 and accompanying text.

30. 42 U.S.C. § 2000e-2(a).

31. 110 CONG. REC. 7218 (daily ed. April 8, 1964).

origin.[32]

Those covered under Title VII are delineated by the definitions of "employer" and "employee."[33] Although these terms are defined in the manner common for other relevant federal statutes,[34] the definitions of "employer" and "employee" in the federal statutes were, until amended, also unclear.[35]

The legislative history of Title VII reveals little as to the reach of the Act.[36] Legislative history does indicate, however, that the exclusion of public officials and their personal staff members from the provision defining "employee" is to be narrowly construed.[37] For example, the conference report on this legislation states "[i]t is the conferees [sic] intent that this exemption shall be narrowly construed."[38]

Judicial interpretation of the terms in federal social legislation[39] has implemented the congressional intent to encourage liberal defini-

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32. 42 U.S.C. § 2000e-2(a).

33. *See* 42 U.S.C. § 2000e(b), (f).

34. Civil Rights Act of 1964, Pub. L. No. 88-352, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS (78 Stat.) 2391, 2402. *See* 110 CONG. REC. 7216 (daily ed. April 8, 1964) (statement of Sen. Clark) (During the Senate debates on Title VII, Sen. Joseph Clark stated that "the term 'employer' is intended to have its common dictionary meaning except as expressly qualified by the act.").

Black's Law Dictionary defines "employer" as: "one who employs the services of others; one for whom employees work and who pays their wages or salaries." BLACK'S LAW DICTIONARY 471 (5th ed. 1979).

Black's defines "employee" as: "a person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in material details of how the work is to be performed." BLACK'S LAW DICTIONARY 471 (5th ed. 1979).

But see EEOC v. Zippo Mfg. Co., 713 F.2d 32, 35-36 (3d Cir. 1983) (discussing how an individual could not be considered an employee under some common law standards and some federal definitions, while nevertheless could be considered an employee under others).

35. The Fair Labor Standards Act, National Labor Relations Act, Social Security Act and Title VII have nearly identical provisions defining "employer" and "employee." *See* 29 U.S.C. § 203 (1978); 29 U.S.C. § 152 (1972); 42 U.S.C. § 410 (1982). *See also* Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 796 (2d Cir. 1986); In re National Airlines Inc., 700 F.2d 695 (11th Cir.), *cert. denied*, 464 U.S. 933 (1983).

36. Lavender-Cabellero v. Department of Consumer Affairs, 458 F. Supp. 213, 214 (S.D.N.Y. 1978) (This court has not been able to find "any explicit language, in either the statute or the legislative history, to illuminate this issue.").

37. *See* 42 U.S.C. § 2000e(f); *see also* Owens v. Rush, 654 F.2d 1370 (10th Cir. 1981).

38. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS (86 Stat.) 2137, 2180.

39. Social legislation includes but is not limited to the National Labor Relations Act, The Fair Labor Standards Act and the Social Security Act.

tions.[40] The Supreme Court[41] has examined the definition of employee in the context of the National Labor Relations Act (NLRA),[42] the Social Security Act (SSA)[43] and the Fair Labor Standards Act (FLSA).[44] The Court, however, has considered the definition of employee under Title VII only in the context of partnership decisions.[45]

In *NLRB v. Hearst Publications, Inc.*,[46] the Supreme Court considered whether newsboys were "employees" under the NLRA. The case arose when Hearst Publications (Hearst) refused to comply with an NLRA bargaining order. Hearst argued that the newsboys were individual contractors and therefore, not covered by the NLRA. Since Congress had not explicitly defined the term "employee," its meaning had to be determined by reference to common law standards.[47] Hearst invoked the common law test that looks at principles of agency to determine the power of control (whether or not exercised) that an employer has over the manner in which a service is to be performed. The Court, however, rejected the narrow common law right to control test as the appropriate standard for employee status under the NLRA,[48] instead holding that the history, context and purpose of the NLRA and the economic facts of the relation must also be

40. *See* 110 CONG. REC. 13,087-93 (daily ed. June 9, 1964) (statements of Senators Morse, Humphrey and others). Sen. Humphrey commented:

> [i]t should be remembered that 25 States have fair employment laws. The laws of 23 of these States have more liberal coverage than the pending bill. Thus in States such as Connecticut, Delaware and Wisconsin, there is no minimum number of employees that are required for an employer to be covered . . . . Other Federal statutes also provide precedent for our consideration of the coverage of Title VII. In the past, when Congress has enacted legislation to deal with significant community problems, the goal always has been to make coverage as broad as possible . . . . The need for fair employment legislation is imperative. Its scope should be broad and encompassing.

Id. at 13,090-91. *See also* Thurber v. Jack Reilly's, Inc., 717 F.2d 633 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984).

41. *See* United States v. Silk, 331 U.S. 704 (1947); Walling v. Portland Terminal Co., 330 U.S. 148 (1947); NLRB v. Hearst Publications Inc., 322 U.S. 111 (1944).

42. 29 U.S.C. § 151 *et seq.* (1973).

43. 42 U.S.C. § 401 *et seq.* (1982).

44. 29 U.S.C. § 201 *et seq.* (1978). *See infra* notes 60 and 96 and accompanying text.

45. Hishon v. King & Spalding, 467 U.S. 69 (1984). The *Hishon* Court ruled that in certain circumstances, the decision of a law firm to make an associate a partner is subject to Title VII's antidiscrimination provision. The Court reasoned that partnership consideration is a term, privilege, or condition of an associate's employment. *Id.* at 76. Justice Powell, in his concurring opinion, emphasized that the Court's decision did not constitute a ruling that a partnership relationship is one of employment. *Id.* at 79.

46. 322 U.S. 111 (1944). *Hearst* has since been superceded by statute and overruled by NLRB v. United Ins. Co., 390 U.S. 254 (1967). *See infra* note 61.

47. *Id.* at 120. *See infra* notes 78-80 and accompanying text.

48. *Id.* at 129.

considered.[49] Upon applying these factors, the Court held that the newsboys were employees, thereby reversing the Ninth Circuit.

The Supreme Court has since applied the *Hearst* analysis in several cases regarding the definition of employee in the context of other social legislation.[50] In *United States v. Silk*,[51] the plaintiff sued for recovery of social security taxes it had paid on the basis that the workers unloading and delivering his coal were independent contractors. The Court examined the legislative history of the SSA to search for the definition of "employee" under the SSA and decided that "[a]pplication of the social security legislation should follow the same rule that [was] applied to the [NLRA] in the *Hearst* case."[52] Despite this willingness, the Court ultimately focused upon the common law factors bypassed in *Hearst*,[53] such as the permanency of the relationship, the skills required, the risk undertaken and the control exercised. The Court held that the workers were independent contractors because they had their own trucks, hired their own helpers, could haul for others and could be paid per trip.[54] No one factor, however, was controlling nor was the list complete.[55] Rather, the total situation had to be examined.[56] Shortly after *Silk*, the Court decided *Bartels v. Birmingham*,[57] in which the plaintiff, a ballroom owner, sued for social security taxes paid. The plaintiff claimed that the band members were not his employees but employees of the band leader whom he characterized as an independent contractor. The Court reasoned that in determining employee status for the purposes of social legislation, the common law right to control test was too narrow.[58] The Court stated that although the right to control is an element of the employment relationship, employees are "those who as a matter of economic reality are dependent upon the business to which they render ser-

49. When the economic facts of the relation make it more nearly one of employment rather than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh the technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protection. *Id.* at 128.

50. Such analysis has been applied to the SSA, the FLSA and by some courts to Title VII. *See infra* notes 51-60 and accompanying text.

51. 331 U.S. 704 (1947). *Silk* has since been superceded by statute. *See infra* note 62.

52. *Id.* at 713-14.

53. *Id.* at 712-15, 714 n.8. *See infra* note 93 and accompanying text.

54. *Id.* at 719.

55. *Id.* at 716.

56. *Id.* at 719.

57. 332 U.S. 126 (1947). *Bartels* has since been superceded by statute. *See infra* note 62.

58. *Id.* at 130.

vice."[59] The Court enunciated the factors that made up the "total situation": the band leader organized and trained the band and selected the members; it was the band leader's skill and showmanship that determined the success or failure of the organization; and the relations between him and the other members were permanent while those between the band and the operator were transient.[60]

Congress responded to these constructions of the term "employee" by amending those statutes it thought should have a more restrictive definition. For example, Congress amended the NLRA to exclude independent contractors[61] and the SSA to require the use of the common law test to determine employee status,[62] but did not amend the

59. *Id.* In applying this test, the courts generally focus on five factors: (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; and (5) the degree of skill required to perform the work. *See* Trustees of Sabine Area Carpenters' Health & Welfare Fund v. Don Lightfoot Home Builder, Inc., 704 F.2d 822, 825 (5th Cir. 1983). This standard has also been used in cases involving the FLSA. *See also* Mednick v. Albert Enterprises Inc., 508 F.2d 297, 299 (5th Cir. 1975) (in federal social welfare, the term employee should not be restricted to common law meaning).

60. *Bartels*, 332 U.S. at 132. The *Hearst* analysis was also persuasive in defining the coverage under the FLSA. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 150 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722, 723, 730 (1947) (Decisions defining the coverage of the employer-employee relationship under the NLRA and the SSA are persuasive in the consideration of a similar condition under the FLSA. The Court further stated that determination does not depend on isolated factors but rather upon the circumstances of the whole activity.). *See also* Mednick v. Albert Enterprises, Inc., 508 F.2d 297, 299 (5th Cir. 1975) (The FLSA definition was articulated. The court held that in federal social welfare, the term "employee" should not be restricted to common law meaning. Thus, a person is an "employee" under the FLSA if he or she is economically dependent on the business.).

61. The amendment was designed to codify the common law distinction between independent contractors and employees. As the statute reads today:

> the term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor . . . .

29 U.S.C. § 152(3) (1976). *See* Labor-Management Relations Act of 1947, H.R. REP. NO. 245, 80th Cong., 1st Sess. 18, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT at 309 (criticizing the *Hearst* Court for expanding the meaning of "employee" and ignoring common law distinctions between independent contractor and employee); NLRB v. Amber Delivery Serv., Inc., 651 F.2d 57 (1st Cir. 1981). *See generally* Note, *Section 2(3) of the NLRA and the "Right to Control" Test*, 39 WASH. & LEE L. REV. 768 (1982).

62. *See* 42 U.S.C. § 410(j)(2). The Social Security Act defines "employee" as "any

FLSA.[63]

Congress used the NLRA as the model for Title VII's remedial provisions.[64] Therefore, had Congress wanted a limitation on the term "employee" in Title VII, it would have been explicit in the statute.[65] Furthermore, Title VII expressly includes within its reach employment agencies[66] and labor organizations[67] as well as employers. In addition, when Congress amended Title VII to include the Equal Employment Opportunity Act of 1972,[68] the amendment to Section 701(f) expanded Title VII's coverage to include employees who had previously been excluded, those individuals employed by state and federal governments. The amendment to Section 701(b) reduced the minimum number of employees from twenty-five to fifteen thereby serving to broaden its reach by subjecting more employers to the Act.[69] These actions indicate that Congress intended that the Act have a broad reach.[70]

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individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee . . . ." *Id. See also* Democratic Union Org. v. NLRB, 603 F.2d 862 (1979).

63. 29 U.S.C. § 203(e)(1). The FLSA provides in part: "[e]xcept as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer." *See* Donovan v. Agnew, 712 F.2d 1509, 1514 (1st Cir. 1983) (Congress' silence in not amending the FLSA definitions in wake of judicial construction indicates an acquiescence to the broad judicial interpretation of such definitions).

64. *E.g.*, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 395 n.11 (1982); International Bhd. of Teamsters v. United States, 431 U.S. 324, 366 (1977); Armbruster v. Quinn, 711 F.2d 1332, 1336, 1341 (6th Cir. 1983).

65. *See* Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 796 (2d Cir. 1986) (because the FLSA, Title VII and the ADEA have nearly identical provisions defining "employer" and "employee" and have similar purposes, cases construing the definitional provisions of the one are persuasive authorities when interpreting the others); *see also* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 395 n.11 (1982); International Bhd. of Teamsters v. United States, 431 U.S. 324, 366 (1977); Armbruster v. Quinn, 711 F.2d 1332, 1336, 1341 (6th Cir. 1983). There is the contrary view that had Congress wanted a broader definition, it would not have enacted such a limited amendment.

66. 42 U.S.C. § 2000e(c) provides: "[t]he term 'employment agency' means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person."

67. 42 U.S.C. § 2000e(d) defines a labor organization as: "a labor organization engaged in an industry affecting commerce . . . ." *See* 42 U.S.C. § 2000e(e) for what constitutes a "labor organization in an industry affecting commerce."

68. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

69. *See* Armbruster v. Quinn, 711 F.2d 1332, 1336-37 (6th Cir. 1983).

70. *Id.* at 1341. No court has made the argument that had Congress wanted to broaden the reach of Title VII, it would not have limited the 1972 amendment to only decreasing the number of employees needed to make an employer come within the Act and including public employees.

III. Tests to Determine Who has Standing to Sue Under Title VII

A. General Standing Requirements

Whether a plaintiff can bring a Title VII claim depends on whether that individual is a "person aggrieved." Such a person must meet the standing requirements of the statute. This includes complying with the procedural requirements of the Act: filing a timely charge with the Equal Employment Opportunity Commission and filing an action promptly after receiving a notice of right to sue.[71]

In addition, the plaintiff must satisfy two other requirements. The standing rules under Article III of the United States Constitution require that a plaintiff show "an injury to him or herself that is likely to be redressed by a favorable decision."[72] This constitutional requirement is one of "injury in fact," meaning that as a result of defendant's action, the plaintiff suffered a "distinct and palpable injury."[73] The plaintiff must also demonstrate that his or her interest is "arguably within the zone of interests to be protected or regulated" by the statutory framework.[74]

A cognizible claim under Title VII requires that the plaintiff allege and prove some link between the defendant's actions and an employment relationship.[75] How extensive that relationship must be, or with whom, is not explicitly stated in the statute or its legislative history. Under some courts' interpretation, a plaintiff has standing only if an employer-employee relationship was contemplated by the parties.[76] Other courts have concluded that the language of § 703(a) of the Act, "or otherwise discriminate against any individual . . . ," encompasses situations where a defendant subject to Title VII interferes with an individual's employment opportunities with another employer.[77]

B. The Common Law Test of Power to Control and the Hybrid Test

Courts originally distinguished between employees and non-employees by using the common law test of the degree of control the

71. *See* 42 U.S.C. § 2000e-5.

72. Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976).

73. Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)).

74. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

75. Beverley v. Douglas, 591 F. Supp. 1321, 1328 (S.D.N.Y. 1984).

76. *See infra* notes 78-91 and accompanying text.

77. Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 n.3 (9th Cir. 1980); Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1340-41 (D.C. Cir. 1973); Gomez v. Alexian Bros. Hosp. of San Jose, 698 F.2d 1019, 1021 (9th Cir. 1983).

employer had over the means and manner of the worker's performance.[78] An employer-employee relationship was likely to exist if an employer had the right to control and direct the work of the individual.[79] Furthermore, for employee status to attach, the employer had to have not only the control over the result to be achieved, but also over the details by which the result was to be achieved. If the power to control is insignificant, the worker is more likely to be an independent contractor.

Some courts in construing Title VII still strictly follow the common law principles of agency,[80] and therefore bar an individual from bringing suit if that individual is an independent contractor. In light of the Supreme Court's decisions regarding the definition of "employee" in other social reform legislation,[81] however, a majority of federal courts have modified the common law test when determining employee status under Title VII.[82] These courts apply a hybrid of the common law right to control and the economic realities standards. In this "hybrid" test, all circumstances surrounding the work relationship are given consideration to determine employee status.[83] The most important

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78. RESTATEMENT (SECOND) OF AGENCY § 2 (1958) provides in relevant part:

> 2. A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
> 3. An independent contractor is a person who contracts to work with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical control in the performance of the undertaking. He may or may not be an agent.

See Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985) (the first test used to determine employer-employee status was the traditional common law test of agency); Case comment, Equal Employment Opportunity Commission v. Zippo Manufacturing Co.: *Choice of a Test for Coverage of the Age Discrimination in Employment Act*, 64 B.U.L. REV. 1145, 1155 (1984).

79. Spirides v. Reinhardt, 613 F.2d 826, 831-32 (D.C. Cir. 1979).

80. *See* Smith v. Dutra Trucking Co., 410 F. Supp. 513, 516 (N.D. Cal. 1976) ("While the Court agrees with plaintiff that Title VII is not to be construed narrowly, there is nothing in the legislative history of the Act to indicate a Congressional intent to construe the term 'employee' in any manner other than in accordance with common-law agency principles."), *aff'd mem.*, 580 F.2d 1054 (9th Cir. 1978).

81. In federal social welfare legislation, the terms "employee" and "independent contractor" are not to be construed in the common law sense. *See supra* notes 41-60 and accompanying text.

82. *See* Diggs v. Harris Hosp.-Methodist, Inc., 847 F.2d 270 (5th Cir.), *cert. denied*, 109 S.Ct. 394 (1988); Broussard v. L.H. Bossier Inc., 789 F.2d 1158 (5th Cir. 1986); Mares v. Marsh, 777 F.2d 1066 (5th Cir. 1985); Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir.) (the court applied the common law right to control test and although it did look at other factors, those factors were identical to those listed in the RESTATEMENT (SECOND) OF AGENCY § 220), *cert. denied*, 459 U.S. 874 (1982); Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979).

83. Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir. 1982). "[I]t is the economic

factor, however, still remains to be the employer's right to control.[84]

The District of Columbia Circuit, in *Spirides v. Reinhardt*,[85] identified the other factors which the "hybrid" test proponents consider:[86]

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.[87]

The *Spirides* plaintiff, a former foreign language broadcaster for a division of Voice of America, brought an employment discrimination action after the defendant refused to renew her contract. The plaintiff had worked pursuant to purchase order vendor contracts that stipulated she "shall perform such services as an independent contractor . . . ."[88] The court noted that under Title VII, contractual provisions agreed upon by the parties in a contract are not binding for purposes of defining whether plaintiff is an "employee";[89] the intent of the parties is merely a factor to be considered.[90] The court of appeals remanded so that the district court could review all the circumstances surrounding plaintiff's work relationship rather than just the elements of her contract with the defendant.[91] The factors set out in *Spirides*, however, are very similar to those listed in the Restatement (Second) of Agency for distinguishing between employee and independent con-

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realities of the relationship viewed in light of the common law principles of agency and the right of the employer to control the employee that are determinative." *Id.* at 341.

84. Hickey v. Arkla Indus. Inc., 699 F.2d 748, 751 (5th Cir. 1983); Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979). *See* Helenkamp v. Kingsley Assoc., 682 F. Supp. 813 (W.D. Pa. 1987); Amarnare v. Merrill Lynch, Pierce, Fenner & Smith Inc., 611 F. Supp. 344 (S.D.N.Y. 1984), *aff'd*, 770 F.2d 157 (2d Cir. 1985).

85. 613 F.2d 826 (D.C. Cir. 1979).

86. *See id.* at 832.

87. *Id.*

88. 486 F. Supp. 685, 687 (D.D.C. 1980), *aff'd without opinion*, 656 F.2d 900 (D.C. Cir. 1981).

89. *Id.* (citing Mueller v. Cities Serv. Oil Co., 339 F.2d 303 (7th Cir. 1965)).

90. *See id.*

91. 613 F.2d at 833. Using the factors enunciated by the District of Columbia Circuit, the district court held that the plaintiff was not an employee.

tractor.[92] The Restatement provides:

> [i]n determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in the business.[93]

The "hybrid" test is formally different from the common law rules for distinguishing between servant and independent contractor. In the Title VII context, however, the applications and results of both tests are essentially the same.[94]

C. The Economic Realities Test

The Sixth Circuit has rejected the common law and "hybrid" tests.[95] Instead, the Circuit has adopted an "economic realities" test, derived from the FLSA.[96]

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92. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

93. *Id.*

94. Mitchell v. Tenney, 650 F. Supp. 703, 705-706 (N.D. Ill. 1986).

95. Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983).

96. This test was first used by the Supreme Court in NLRB v. Hearst Publications, Inc., 322 U.S. 111, 128-29, *reh'g denied*, 322 U.S. 769 (1944). *See* Mednick v. Albert Enterprises, Inc., 508 F.2d 297 (5th Cir. 1975). Mednick operated cardrooms for defendant's apartment house-hotel. The defendant did not pay plaintiff for vacation or sick leave. The plaintiff received no benefits and paid his own social security and withholding taxes. In addition, Mednick hired and fired the people who worked in the cardrooms. Plaintiff had no written contract with the defendant but did wear a uniform bearing defendant's name. The court found Mednick to be an employee for the purposes of the FLSA because he was, as a matter of economic reality, dependent upon the defendant's

In *Armbruster v. Quinn*,[97] the court considered whether manufacturer's representatives were employees within the jurisdictional provisions of Title VII.[98] These employees worked outside of the corporate office, could sell other products and could set their own hours. The court stated that "one must examine the economic realities underlying the relationship between the individual and the so-called principal in an effort to determine whether that individual is likely to be susceptible to the discriminatory practices which the act was designed to eliminate."[99] That is, courts should examine whether the employer is in the position to affect the ongoing working conditions of that employee. The *Armbruster* court considered the legislative history and determined that Congress intended to cover all workers who may be subject to these discriminatory practices,[100] unless such workers are excluded by specific statutory exception.[101] The court held that the term "employee" in Title VII

> "must be read in light of the mischief to be corrected and the end to be attained." The mischief to be corrected is that discrimination in employment opportunity has been made unlawful by Title VII's violation provisions, 42 U.S.C. §§ 2000e-2 and 3: the end, to rid from the world of work the evil of discrimination because of an individual's race, color, religion, sex or national origin.[102]

Furthermore, the *Armbruster* court noted that Title VII was modeled in important aspects after the NLRA and that Congress had amended the NLRA to exclude all independent contractors prior to formulating Title VII. Therefore, if Congress had wanted to limit the

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business as his means of livelihood. Quoting Fahs v. Tree-Gold Co-op. Growers of Florida, Inc., 166 F.2d 40, 44 (5th Cir. 1948), the court stated:

> [t]he ultimate criteria are to be found in the purposes of the act. Under these decisions [*Silk*, *Rutherford*, *Bartels* and *Hearst*], the act is intended to protect those whose livelihood is dependent upon finding employment in the business of others. It is directed towards those who themselves are least able in good times to make provisions for their needs when old age and unemployment may cut off their earnings. The statutory coverage is not limited to those [whose work activities satisfy the common law "control" test] but rather to those who, as a matter of economic reality are dependent upon the business to which they render service.

Id. at 300.

97. 711 F.2d 1332 (6th Cir. 1983).

98. *Id.* at 1339.

99. *Id.* at 1340.

100. *Id.* at 1339.

101. *See, e.g.*, 42 U.S.C. § 2000e(f) (persons not covered as employees); 42 U.S.C. § 2000e(b) (entities not considered employers); 42 U.S.C. §§ 2000e-2(e)-(j) (special exceptions).

102. 711 F.2d at 1340 (quoting Dunlop v. Carriage Carpet Co., 548 F.2d 139, 145 (6th Cir. 1977)).

scope of "employee," it would have explicitly incorporated a provision in the statute.[103] Absent such explicit limitation, the *Armbruster* court "refuse[d] to imply such a restriction into the otherwise broad terms of the Act."[104] The court suggested several factors to examine when determining whether the workers are susceptible to the kind of unlawful practices that Title VII was intended to remedy:[105] hiring and termination processes, history of the positions, evidence of payment, and advancement opportunities.[106]

One Michigan court has further developed *Armbruster's* economic realities test by holding that a court has an obligation to look beyond the title of a claimant's position to determine his or her standing for Title VII. In *Ross v. William Beaumont Hospital*,[107] the court decided that a physician was a Title VII employee of a hospital which terminated his staff privileges. In so deciding, the *Ross* court analogized to the Supreme Court's decision in *Hishon v. King & Spalding*[108] that the right of an associate to be considered for partnership is a term, condition, or privilege of employment since it was an expectation created by the working or contractual relationship.[109] Moreover, the *Ross* court relied on a Pennsylvania case which applied the *Hishon* analysis to a medical resident's right to be considered for staff privileges at the hospital of residency.[110] Through these cases, the *Ross* court determined that Dr. Ross had a contractual privilege or had been granted a benefit to use the hospital's facilities for surgery.[111] The court then applied the "economic realities test" of *Armbruster* but also stated that issues which address an employee's ability to obtain comparable employment and the nature of the disciplinary mechanism are addi-

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103. 711 F.2d at 1341.

104. *Id.* at 1341. *But see* Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979).

105. *Id.* at 1342.

106. *Id.* at 1342 n.9.

107. 678 F. Supp. 655 (E.D. Mich. 1988).

108. 467 U.S. 69 (1983).

109. 678 F. Supp. at 675.

110. *See* Amro v. St. Luke's Hosp., 39 F.E.P. 1574 (E.D. Pa. 1986).

111. 678 F. Supp. at 675. In Brewster v. Shockley, 554 F. Supp. 365, 371 (W.D. Va. 1983), the court determined that a deputy sheriff was an "employee" under the Act by considering evidence relevant to the following factors:

> (1) whether the relationship between a sheriff and deputy sheriff was an official relationship or a private one; (2) whether the deputy sheriff had an employment contract with the sheriff; (3) whether a quasi-contractual relationship existed such that a deputy had a "reasonable expectation" of continuing a specific job assignment or of obtaining promotions or raises in any established manner; and (4) whether a seniority system was in effect for deputies by which assignment to a particular job, promotions or pay raises were granted.

Id.

tional factors that should be explored.[112]

The economic realities test provides a framework for analysis that insures broad protection of workers from potential employment discrimination by focusing on the economic terms of a particular relationship. It has been followed, however, only by courts within the Sixth Circuit.

D. Interference with Employment Opportunities Test

A minority of jurisdictions use a test which focuses on interference with employment opportunities rather than on the claimant's actual employment relationship with the defendant.[113] By focusing on the substantive provisions of the statute that prohibit an employer from discriminating against "any individual" (not necessarily an employee),[114] this test allows more coverage than those that insist on an immediate employment relationship between the plaintiff and defendant. In *Sibley Memorial Hospital v. Wilson*,[115] the District of Columbia Circuit Court ruled that the term, "any individual," in § 703(a)(1)[116] reaches beyond the immediate employment relationship.[117] In *Sibley*, a male private duty nurse alleged that the hospital discriminated against him on the basis of sex because it refused to refer him to female patients. The hospital argued that because neither party contemplated a direct employment relationship between them,

112. 678 F. Supp. at 675. "Ross clearly satisfies Title VII under this standard. She based her whole livelihood at Beaumont, including service as chairperson of some of Beaumont's committees, underwent extensive progressive discipline, including probation and leaves of absence." *Id.*

113. *See* Doe on behalf of Doe v. Saint Joseph's Hosp., 788 F.2d 411, 422 (7th Cir. 1986); Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973). *See also* Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021 (9th Cir. 1983) (Plaintiff alleged that the defendant violated Title VII by failing to hire plaintiff's corporation due to the national origin of the corporation's employees. Defendant's motion for summary judgement on the grounds that plaintiff lacked standing because he was not defendant's employee was denied. The court stated that because defendant's actions deprived plaintiff of an opportunity to be employed as director of defendant's emergency room, plaintiff had standing to sue under Title VII); Pao v. Holy Redeemer Hosp., 547 F. Supp. 484, 494 (E.D. Pa. 1982) (Plaintiff, a physician was denied staff privileges. The court said that the Hospital shared an employment relationship with the plaintiff because it controlled his access to "prospective patients who are his ultimate 'employers.'" (footnote omitted)). *But see* Mitchell v. Frank R. Howard Memorial Hosp., 853 F.2d 762, 767 (9th Cir. 1988) (where the court rejected plaintiff's argument that the hospital violated Title VII by interfering with his employment relationship with his patients. The court found that the traditional physician/patient relationship was not one of employee/employer and as such was not protected under Title VII), *cert. denied*, 109 S. Ct. 1123 (1989).

114. 42 U.S.C. § 2000e-2(a)(1).

115. 488 F.2d 1338 (D.C. Cir. 1973).

116. 42 U.S.C. § 2000e-2(a)(1). *See supra* note 20 and accompanying text.

117. 488 F.2d at 1341.

the hospital could not be the nurse's employer. The court rejected the hospital's argument, stating that the Act contains no words of limitation that restrict "any individual" to an employee of an employer.[118] Although the term "individual" may have been intended to encompass applicants as well as employees,[119] it does not necessarily require that the employment held or sought be with the defendant. The court in *Sibley* noted:

> the Act defines "employee" as an "individual employed by an employer," but nowhere are there words of limitation that restrict references in the Act to "any individual" as comprehending only an employee of an employer. Nor is there any good reason to confine the meaning of "any individual" to include only former employees and applicants for employment, in addition to present employees. Those words should, therefore, be given their ordinary meaning so long as that meaning does not conflict with the manifest policy of the Act.[120]

Furthermore, the Act, in providing for the filing of charges with the Equal Employment Opportunity Commission,[121] uses the term "person claiming to be aggrieved" rather than "employee."[122]

Although the court did not define the relationship necessary to maintain a Title VII action, it suggested that the nurse stood in some type of employment relationship with the patient.[123] The nurse could

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118. *Id.*

119. Wilson v. Monosanto Co., 315 F. Supp. 977, 978 (E.D. La. 1970) (Title VII applies to applicants).

120. *Sibley*, 488 F.2d at 1341. *See* Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089 (D.N.H. 1974). The plaintiff, a driver/trainer of horses alleged national origin discrimination against the defendant for denying him a license and stall space necessary for him to gain employment with harness horse owners. The court said:

> [t]hroughout the Act and the applicable federal regulations, an intent to deal with more than the conventional employer-employee situation is indicated. This intent is demonstrated by the specific prohibition against discrimination by employment agencies and labor organizations, and by the prohibition of discrimination against *individuals* (as opposed to employees who are defined as "individual[s] employed by an employer.").

Id. at 1091.

121. 42 U.S.C. § 2000e-5(b).

122. *Id. See* Hackett v. McGuire Bros., Inc., 445 F.2d 442, 445 (3d Cir. 1971) ("A person claiming to be aggrieved may never have been an employee of the defendant . . . . An aggrieved person obviously is any person aggrieved by any of the forbidden practices.").

123. *Sibley*, 488 F.2d at 1342. *But see* Beverley v. Douglas, 591 F. Supp. 1321 (S.D.N.Y. 1984) (a Black female physician was held to be an independent contractor with respect to her patients and to have no employment relationship with the defendant hospital. The court granted the defendant's motion for summary judgment on the doctor's claim because no employment relationship had been interfered with by the denial of voluntary admitting privileges and corresponding faculty appointment.).

be considered an applicant for a job, thereby constituting a type of relationship covered by Title VII. Although the hospital was not the plaintiff's employer, the hospital was "so circumstanced, and its daily operations [were] of such a character as to have . . . a nexus to the third parties in this case . . . . [N]either the spirit nor, more essentially, the language of the Act leave [sic] it outside the reach of Title VII."[124] The court also pointed out that:

> [t]o permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.[125]

The Seventh Circuit furthered the idea established in *Sibley* in its 1986 decision of *Doe on behalf of Doe v. Saint Joseph's Hospital.*[126] In *Saint Joseph's Hospital,* a physician brought an action, following the loss of staff privileges, against the hospital, its corporate owner, its board of directors, its administrator, the president of its medical staff and the members of its medical staff executive committee.[127] The district court held that one must be an "employee" to state a Title VII claim for employment discrimination, and because no employment relationship existed between the physician and the hospital, the claim was dismissed.[128] The Seventh Circuit, in reversing, held that the plaintiff had a cognizable claim under Title VII even though she was admittedly not an employee of the hospital.[129] Although employee status is important, the court stated that the focus must be on whether the defendant can subject the plaintiff to the type of acts[130] which

124. *Id.* at 1342.

125. *Sibley,* 488 F.2d at 1341.

126. 788 F.2d 411 (7th Cir. 1986). Previously, the Seventh Circuit followed either the "hybrid" test or the *Armbruster* rationale on a case by case basis. *See* Unger v. Consolidated Foods Corp., 657 F.2d 909 (7th Cir. 1981), *vacated and remanded on other grounds,* 456 U.S. 1002 (1982) (court relied on factors set out in *Spirides* in determining that plaintiff was an employee), *cert. denied* 464 U.S. 1017 (1983). *But see* EEOC v. Dowd & Dowd, Ltd., 34 F.E.P. Cases 1815, 1816 (7th Cir. 1984) (the court applied the *Armbruster* rationale in determining whether shareholders in a law firm could be considered employees).

127. 788 F.2d at 413.

128. *Id.* at 422.

129. *Id.* Plaintiff had been denied staff privileges and alleged discrimination on the basis of race.

130. The Supreme Court compared Title VII with 28 U.S.C. § 1981 in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). The Court found that certain acts are post-formation conduct by the employer and, because they relate to terms and conditions of continuing employment, they are "actionable only under the more expansive reach of

Title VII prohibits.[131] Relying on *Sibley*,[132] the court noted that defendant's alleged discriminatory conduct deprived the plaintiff of access to those prospective patients who ultimately would be her "employers."[133]

Since *Saint Joseph's Hospital*, the Seventh Circuit has continued to hold that the common law distinction between servant and independent contractor does not control the question of who may bring a Title VII action.[134] The focus is not on whether the plaintiff is an employee but on whether he or she was "an *individual*" denied equal access to an employment opportunity[135] whether or not that opportunity was with the defendant.

IV. Analysis

Current definitions in social legislation statutes reflect an intent to either incorporate common law standards or to provide flexibility for administrative agencies and courts in interpreting the concept of "employee" in light of workplace realities and the policies of the statutes. The definitional provisions of Title VII, however, are silent as to congressional intent and this has resulted in the courts adopting a variety of tests to determine employee status. These tests often result in different outcomes. Therefore, it is imperative that a consistent method be used. Ideally the way to achieve such consistency would be for Con-

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Title VII." *Id.* at 2369. Acts violative of Title VII include racial harassment such as giving a Black more work than a white employee, assigning her more demeaning tasks than those given to white employees, subjecting her to a racial slur, singling her out for criticism and not affording her the training for higher level jobs which white employees received. *Id.* at 2367. "[H]arrassment [which is] sufficiently severe or pervasive to 'alter the conditions of [the victim's] employment and create an abusive working environment,' . . . is actionable under Title VII because it 'affects a term, condition or privilege' of employment." *Id.* at 2374 (quoting Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-67 (1986)).

131. *Saint Joseph's Hosp.*, 788 F.2d at 422-23.

132. The court also relied on Pao v. Holy Redeemer Hosp., 547 F. Supp. 484 (E.D. Pa. 1982). The plaintiff in *Pao* alleged Title VII discrimination after being denied staff privileges at defendant hospital. In addressing the defendant's argument that plaintiff lacked standing, the court stated that "[w]hether or not the plaintiff had access to, or could gain access to, other hospital facilities is not relevant to the principal question whether his Title VII rights have been violated . . . . [T]he focal question is whether the defendants can be considered employers whose allegedly invidious conduct deprived the plaintiff of an employment opportunity within the meaning of the Act." *Id.* at 494.

133. 788 F.2d at 424-25 (quoting *Pao*, 547 F. Supp. at 491). A discriminatory denial of staff privileges adversely affects a physician's ability to obtain and maintain employment by patients who need hospitalization. *See id.* at 427.

134. *See* Mitchell v. Tenney, 650 F. Supp. 703, 707-08 (N.D. Ill. 1986); Ellerby v. State of Illinois, 46 F.E.P. Cases 524, 525 (N.D. Ill. 1988).

135. Ellerby v. State of Illinois, 46 F.E.P. Cases at 526 (citing *Saint Joseph's Hosp.*, 788 F.2d at 421-25).

gress to either amend the definition of "employee" under the Act as it has done in the past with other social legislation statutes or to define what constitutes "employed."[136]

The problem with the common law standard and the "hybrid" approaches is that their narrow foci in defining "employer" and "employee"[137] do not provide for the extensive coverage envisioned by Congress.[138] The narrowness results from their failure to consider the term "employee" in the context of the overall statutory scheme.[139] Moreover, the narrow construction is inconsistent with the broad reach of the statute's prohibitions and remedies as well as the steady expansion of its coverage to more employees.[140] The courts that have adopted the common law test have ignored the legislative history of federal social legislation.[141] Their reluctance[142] to adopt a broader test reflects an unwillingness to consider the policies underlying Title VII.[143]

In *Armbruster*, the Sixth Circuit rejected the "hybrid" test and focused on the economic realities that permit employment discrimination to occur. The issue under this test is the control of employment

136. The reason Congress should amend the statute is because "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978).

137. 42 U.S.C. § 2000e.

138. *See* notes 5 and 36-38 and accompanying text.

139. "The right to be free from all forms of racial intolerance is so fundamentally the privilege of each and every citizen of the United States . . . ." 1964 U.S. CODE CONG. & ADMIN. NEWS 2430 (statement of Sen. Moore).

140. The 1972 amendments were meant to expand coverage. EEOC v. Bailey Co., 563 F.2d 439 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978). *See* notes 69-70 and accompanying text. In addition, exclusive reliance on control makes it too difficult for a plaintiff to establish standing, a result inconsistent with the statute's remedial nature. *Saint Joseph's Hosp.*, 788 F.2d at 425 n.28.

141. *See* Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983). *But see* Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir.), *cert. denied*, 459 U.S. 874 (1982); Smith v. Dutra Trucking Co., 410 F. Supp. 513, 516 (N.D. Cal. 1976), *aff'd mem.*, 580 F.2d 1054 (9th Cir. 1978) ("[T]here is nothing in the legislative history of the Act to indicate Congressional intent to construe the term 'employee' in any manner other than in accordance with common-law agency principles.").

142. The courts' reluctance stems from the fact that "there is no statement in the Act or legislative history of Title VII comparable to one made by Senator Hugo Black (later Justice Black), during the debates on the Fair Labor Standards Act, that the term 'employee' in the FLSA was given the broadest definition that has ever been included in any one act." Cobb v. Sun Papers, Inc., 673 F.2d 337, 340 (11th Cir.), *cert. denied*, 459 U.S. 874 (1982). *See supra* note 34 and accompanying text.

143. Furthermore, there is no apparent reason to allow discrimination against independent contractors on the basis of the proscribed criteria. Such narrow construction could lead to inducing employers to hire independent contractors rather than employees so as to avoid the impact of Title VII.

opportunities, viewed from the perspective of the employee's dependency on the employer, rather than the employer's right to control the means and manner of the employee's performance.[144] The *Armbruster* court stated:

> [t]his principle not only applies to the coverage of the antidiscrimination provision of Title VII imposing liability on an employer and protection for the employee, but it necessarily must apply for the jurisdictional scope of the Act. To conclude that one is an employee for the purposes of the antidiscrimination provision and yet to find that he/she is not to be considered as an employee for the purpose of meeting the fifteen employee jurisdictional requirement would frustrate the very purpose of the Act.[145]

Thus, *Armbruster* holds that the same individual who holds employee status for the purposes of the antidiscrimination provision should also be considered an employee for jurisdictional purposes. To hold otherwise would frustrate the intent of the Act.

This economic realities method, while avoiding the rigidity of the common law test, nevertheless has its problems. It ignores the different terminology of the provisions of the statute.[146] The jurisdictional provision[147] speaks of employees, whereas the antidiscrimination provision[148] speaks in terms of "any individual."[149] Therefore, some individuals can be protected under the antidiscrimination provision even though they cannot be counted for jurisdictional purposes.[150] For example, a part-time worker who does not work a sufficient number of hours or weeks to meet the requirements of 42 U.S.C. § 2000e(b) can still bring suit against his or her employer as long as the employer has enough employees to meet the jurisdictional requirements.[151]

Both the "control" test and the "economic realities" test were re-

144. Dowd, *The Test Of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 112 (1984).

145. 711 F.2d at 1340.

146. Graves v. Women's Professional Rodeo Ass'n, 708 F. Supp. 233, 237 (W.D. Ark. 1989).

147. 42 U.S.C. § 2000e(b).

148. 42 U.S.C. § 2000e-2(a)(1).

149. 42 U.S.C. § 2000e-2(a)(1). *See* 42 U.S.C. §§ 2000e-5(e), (f)(1) and (f)(3).

150. *Graves*, 708 F. Supp. at 237. *See* Hornick v. Duryea, 507 F. Supp. 1091 (M.D. Pa. 1980). *See also* Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1342-43 (D.C. Cir. 1973); Pao v. Holy Redeemer Hosp., 547 F. Supp. 484, 492-93 (E.D. Pa. 1982).

151. *See* Hornick v. Duryea, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980). In *Hornick*, school crossing guards were considered employees even though they worked only a few hours each day and were paid only $40 per month since they were hired, controlled and paid by the borough and because the employer also employed enough full time workers to exceed the jurisdictional threshold. *See also* Thurber v. Jack Reilly's Inc., 717 F.2d 633 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984).

jected in a bona fide general partner situation in *Wheeler v. Hurdman*.[152] In this case the court held that the plaintiff, a general partner in defendant's accounting firm, who alleged her dismissal was because of her sex, was not an employee under the Act. After considering both the "control" tests and the "economic realities" test, the court reasoned that such tests ignore or unacceptably diminish the essential attributes of partnerships, and are incapable of rational application.[153] The factors established in *Spirides*, such as whether the employer furnishes the equipment used, the place of work, the length of time during which the individual has worked and payment by time or by the job,[154] are largely inapposite in the general partnership context. Furthermore, every general partner is "dependent on the business" and such inquiry is essential to the "economic realities" analysis.[155] There is no way to apply the "domination" standard unless every partnership is given the burden of proving "some sort of parity of influence and day to day independence between and among the partners, free of 'control' by the partnership as a whole."[156]

In *Saint Joseph's Hospital*, the Seventh Circuit placed emphasis on a plaintiff's exposure to harm in regard to his or her compensation, terms, conditions, or privileges of employment caused by an employer's discriminatory practices.[157] The employer need not be the plaintiff's employer in terms of agency law, as long as it is an employer under the statutory definition and its act had a discriminatory effect on the plaintiff's employment.[158]

The *Saint Joseph's Hospital* court noted that "the 'common law independent contractor/employee test' is often not applied to antidiscrimination legislation, because 'it is considered inconsistent with the remedial purposes behind such legislation.' "[159]

Under the common law test, a physician denied staff privileges

152. Wheeler v. Hurdman, 825 F.2d 257 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987) (dismissed general partner of accounting firm brought a Title VII suit alleging sex discrimination).

153. *Id.* at 276. The domination of partner may not consist of an absence of rights. The status of partners is permanent while employee status is transient. The status of general partner carries important economic reality, assumptions of risk of loss and liabilities of its employees. An entirely different body of statutes and case law applies to partners and partnerships conferring rights and imposing obligations upon them. *Id.* at 274-75.

154. *See supra* note 87 and accompanying text.

155. *See supra* notes 99-101 and accompanying text.

156. *Wheeler*, 825 F.2d at 273.

157. *Saint Joseph's Hosp.*, 788 F.2d at 425.

158. *Cf.* 42 U.S.C. § 2000e-2(a)(1).

159. *Saint Joseph's Hosp.*, 788 F.2d at 425 n.28 (quoting Mares v. Marsh, 777 F.2d 1066, 1067 n.1 (5th Cir. 1985)).

would not be able to state a cause of action under Title VII[160] because the hospital does not have such total control over plaintiff's ability to obtain patients. Staffing privileges only afford a physician an opportunity to treat patients at that particular hospital. A physician may still treat patients at an office or another health facility.[161] In jurisdictions following the *Doe* analysis, however, this physician has a cause of action. The problem with the *Saint Joseph's Hospital* test, however, is that although it expands the reach of Title VII, it does not enunciate definable dimensions of a valid Title VII discrimination claim. Furthermore, such test does not indicate the extent of interference needed to violate Title VII.

Because of the above mentioned problems, Congress should define "employed" or at least clarify "employee" in the Statute. Until such amendment is made, however, a two-part analysis should be considered. First the claimant would demonstrate that the defendant is an employer within the definitions provision of Title VII,[162] thereby conferring subject matter jurisdiction on the court.[163] Second, once an employer is covered by the Act, Title VII protection extends to any aggrieved individual who can demonstrate the existence of an identifiable employment relationship with the defendant or another which the defendant is in a position to affect.[164] The relationship with the defendant need not be a traditional one;[165] Title VII's protection can extend to one whose employment opportunities have been interfered

160. *See* Beverley v. Douglas, 591 F. Supp. 1321 (S.D.N.Y. 1984), where the court concluded:

> [e]ven assuming that plaintiff has alleged that the Hospital's denial of her application for voluntary attending privileges interfered with her relationship to her patients, her relationship to her patients is not one of employment. Indeed, plaintiff admits that "there is no question that a 'physician, in his or her relationship with patients, is the classic independent contractor.' " In order to invoke Title VII, plaintiff must allege and prove some link between the defendants' actions and an employment relationship. No such connection is present here—by plaintiff's own admission, her relationship to her patients is not that of employer and employee.

Id. at 1328. *See also* Nanavati v. Burdette Tomlin Memorial Hosp., 42 F.E.P. Cases 197 (D.N.J. 1986) (in applying the "hybrid" test, a physician with staff privileges was an independent contractor, not an employee of the hospital.)

161. *Saint Joseph's Hosp.*, 788 F.2d at 427 (Ripple, J., concurring in part, dissenting in part).

162. *See supra* note 23 and accompanying text.

163. *Graves*, 708 F. Supp. at 235. If the defendant does not have the requisite number of qualified employees as required under the Statute, Title VII is inapplicable.

164. "[T]here must be a relationship of some kind, actual or potential, *with some employer* since the discrimination forbidden relates to the field of employment." LARSON, § 5.21 at 2-9.

165. *Graves*, 708 F. Supp. at 235. *See* 42 U.S.C. § 2000e-2(a)(1).

with by the defendant's discriminatory conduct. To assure that a relationship is substantial enough so as not to subject an employer to Title VII liability over matters only tangentially related to a claimant's employment concerns, the following factors should be considered: whether the defendant pays the plaintiff wages, has control over plaintiff's manner of operating, has an economic interest in the relationship or affects plaintiff's access to the job market. This approach allows a cause of action for interference with employment opportunities and seems consistent with the statute's purpose.

Today's employment practices are complex and often do not constitute a traditional or immediate employer-employee relationship. People in private businesses may rely extensively on others to broaden their practice, clientele and reputation in the community. For example, a physician relies on a hospital's granting of staff privileges. The hospital also benefits from such relationship because more hospital services can be billed and the hospital's reputation is increased by prominent doctors on its staff. Furthermore, there is no reason why the coverage of Title VII should not be broadly extended. It makes little sense to allow people who use independent contractors to discriminate on the bases prohibited by Title VII.[166] Under this test, not every unfavorable action by an employer directed against an individual can result in a Title VII claim. If there is no effect on an employment relationship, Title VII is inapplicable. For example, a city's denial of a license to operate a dance hall to an individual is outside the scope of the Act.[167] The plaintiff is not an "employee" of the City; he is an independent entrepreneur and the denial of such license does not directly or immediately affect plaintiff's employment relationship with anyone.[168]

Because Title VII's forbidden discrimination relates to the field of employment, "there must be a relationship of some kind, actual or potential, with some employer."[169] While the relationship need not be a traditional one,[170] there must be some identifiable connection.[171]

166. Such expansion of Title VII may result in the protection of independent contractors who ought not be covered under other labor statutes. These relations, however, are discussed by 42 U.S.C. § 1981 which expressly prohibits discrimination in contract formation.

167. Darks v. Cincinnati, 745 F.2d 1040 (6th Cir. 1984).

168. *Id.* at 1042. Another possible limitation would be to allow coverage only to independent contractors who have no employees of their own, thereby avoiding problems of such contractors also being employers.

169. LARSON, § 5.21 at 2-9 (1988).

170. *Graves*, 708 F. Supp. at 235. *See* 42 U.S.C. § 2000e-2(a)(1).

171. If there is no actual employment relationship (i.e., if plaintiff's relationship with the "principal" is one of independent contractor), Title VII will not apply. This plaintiff,

Otherwise almost any claim would result in liability.[172]

V. Conclusion

Title VII is the most important general statute on employment discrimination. It was enacted to prohibit an employer from discriminating on the basis of race, color, religion, sex, or national origin. Because of the statute's definition of "employee," the judicial interpretations have resulted in illogical and unsatisfactory types of tests. Congress has amended the term "employee" in other social welfare legislation because of the uneven outcomes which resulted. Because of the disparate outcomes regarding Title VII standing, Congress should clarify the definition of "employee" or define "employed." In the alternative, courts should adopt a consistent method, such as the test proposed herein.

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may have other causes of action available to him or her. For example, the tort of interference with contract may be available. This cause of action, however, is more difficult to prove because it requires proof of intent, whereas such requirement is not an element for Title VII.

172. *See* Silver v. KCA Inc., 586 F.2d 138, 141 (9th Cir. 1978) (Title VII is directed at eradication of all discrimination by employers against employees, not eradication of all discrimination by private individuals.); EEOC v. Sheet Metal Workers, Local 122, 463 F. Supp. 388, 398 (D. Md. 1978) (Title VII is not intended to guarantee a job to every person regardless of qualifications).