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Working for free? Sixth Circuit Says Courts Must Weigh All Factors to Determine "Employee" Status, Not Just Remuneration

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Bryson v. Middlefield Volunteer Fire Dep't, Inc, 2011 WL 3873789 (September 2, 2011)

In today's competitive job market people often find themselves working for free. Typically, they are interns, students, volunteers, etc. who either hope to build their resume, get experience, or just enjoy spending time doing that particular activity. A problem, however, arises when one of those workers are a party to a Title VII issue. We briefly discussed this topic back in June when we wrote about the Hofstra football manager, who the Second Circuit found was an employee because she was paid for services. Well, the Sixth Circuit recently ruled on a similar issue and decided that it will not follow the two-step analysis set forth by the Second Circuit.

In *Bryson v. Middlefield Volunteer Fire Dep't, Inc,* the plaintiff worked as a volunteer firefighter for the Middlefield Volunteer Fire Department. During her employment, she was subjected to unwanted sexual advances, requests for sexual favors, and other verbal and physical contact of a sexual nature by the Fire Chief. The plaintiff subsequently brought sexual harassment and retaliation claims against the fire department and its fire chief.

In analyzing the issue, the Sixth Circuit followed the Supreme Court's *Darden* and *Reid* decisions, which determined that courts must consider the "degree of control" exercised by the employer over the manner and means by which the work is accomplished. In *Darden*, the Supreme Court wrote that when evaluating the degree of control courts must look at all of the following factors:

> *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.

Unlike the Second Circuit, the Sixth Circuit refused to adopt "remuneration" as a factor. Ultimately, the Court determined that because the district court mistakenly concluded that remuneration is an independent antecedent inquiry of the employer-employee relationship, and did not consider and weigh all the factors set forth by the Supreme Court, the case must be remanded to determine if the plaintiff was an employee of the fire department.

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