EEOC v. Guardian

United States District Court for the Middle District of Tennessee, Nashville Division
April 19, 2001, Decided ; April 20, 2001, Entered
No. 3:99-1145

Reporter: 2001 U.S. Dist. LEXIS 25254
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, and PEGGY ROUILLIER, Intervenor, v. THE GUARDIAN, Defendant.

Subsequent History: Summary judgment denied by EEOC v. Guardian, 2002 U.S. Dist. LEXIS 26449 (M.D. Tenn., Oct. 22, 2002)

Prior History: EEOC v. The Guardian, 2001 U.S. Dist. LEXIS 25255 (M.D. Tenn., Feb. 15, 2001)

Disposition: [*1] Defendant's motion to reconsider or amend denied. Defendant's request for an interlocutory appeal denied. Action remanded.

Counsel: For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, plaintiff: Draga G. Anthony, Celia S. Liner, Equal Employment Opportunity Commission, Memphis, TN.

For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, plaintiff: Katharine W. Kores, Terry Beck, Lawrence "Ken" R. Kenyon, II, Equal Employment Opportunity Commission, Nashville, TN.

For THE GUARDIAN, defendant: Richard Lee Colbert, Kent B. Thomas, Beth C. Baggett, Colbert & Winstead, Nashville, TN.

For PEGGY ROUILIER, intevenor plaintiff: Irwin Bruce Venick, Dobbins & Venick, Nashville, TN.

Judges: WILLIAM J. HAYNES, JR., United States District Court.

Opinion by: WILLIAM J. HAYNES, JR.

Opinion

MEMORANDUM

Before the Court is the defendant's motion to reconsider or amend (Docket Entry No. 43) as well as its request for an interlocutory appeal under 28 U.S.C. § 1292(b). For the reasons set forth below, the defendant's motion to reconsider and amend is denied and its request for an interlocutory appeal is denied.

In its [*2] earlier Order, the Court denied the defendant's motion to dismiss or in the alternative for summary judgment concluding that the Plaintiff, the Equal Employment Opportunity Commission ("EEOC"), had presented sufficient facts to support a judgment that the defendant is an employer within the meaning of Title VII. In its pending motion, the defendant contends that the Court's decision is contrary to controlling legal authority and exceeded the issues before the Court.

First, the defendant contends that the Court did not consider as controlling authority the decision in Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992) that adopts a common law agency test to a statutory definition of employer. The Supreme Court has summarized the common-law test for determining who qualifies as an "employee":

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the produce it accomplished. Among other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of [*3] 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 fo the hiring party; whether the hiring party is in the business; the provision of employee benefits; and the tax treatment of the hired party."Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992) (citing RESTATEMENT (SECOND) OF AGENCY § 220(2)(1958)).

Darden, however, was decided under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. Prior to Darden, the Sixth Circuit adopted the "economic realities" test for determination of who is an employer under Title VII. Armbruster v. Quinn, 711 F.2d 1332, 1341-42 (6th Cir. 1983). Yet, the Sixth Circuit has

since applied Darden as a general rule in an action under the Americans with Disabilities Act.

> "We hold that the proper test [*4] is the common law test suggested by the city and Darden. Although Darden was an ERISA case, it stands for the proposition that when a statute has left a term undefined, has left no hint in the legislative history of its intended meaning for the terms, and the term has 'accumulated settled meaning' under the common law, there is a presumption that Congress meant to incorporate the common law definition into the statute …. It is a rule of general applicability.
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> In a recent case, we applied Darden …, but recognized that in practice there is not much difference between the two standards--both consider the entire relationship with the most important factor being the 'employer's ability to control job performance and employment opportunities of the aggrieved individual.' …"Johnson v. City of Saline 151 F.3d 564, 568 (6th Cir. 1998) (citations omitted).

In an action under the Age Discrimination in Employment Act, the Sixth Circuit applied Darden, but again deemed the Darden test as essentially the same as the economic realities test: "A panel of this circuit concluded that [the] economic realities test juxtaposed with Darden's common [*5] law agency test disclosed no material difference." Simpson v. Ernst & Young, 100 F.3d 436, 442 (6th Cir. 1996) (citing Eyerman v. Mary Kay Cosmetics, Inc. 967 F.2d 213 (6th Cir. 1992). This Court relied upon Eyerman and Armbuster-- both are consistent with Darden. (Docket Entry No. 40, Memorandum, at p. 8).

Next, Defendant contends that this Court's decision is at odds with the Sixth Circuit decisions in Eyerman, Wolcott v. Nationwide Mut. Ins. Co., 884 F.2d 245 (6th Cir. 1989) and Alfred v. Tenn. Farmers Mut. Ins. Co., 8 F. Supp.2d 1024 (E.D. Tenn. 1997). The defendant also cites decisions from other circuits that found insurance agents to be independent contractors, not employees in a variety of contexts. The latter non-Sixth Circuit decisions are not binding on this Court. Roddy v. State of Tennessee, 366 F. Supp. 33, 35-37 (E.D. Tenn 1973).

In this circuit, whether an employer-employee relationship exists "… a court must assess and weight all of the incidences of the relationship … with no one factor being decisive." Ware v. United States, 67 F.3d 574, 577 (6th Cir. 1995) [*6] (quoting NLRB v. United Ins. Co. of America, 390 U.S. 254, 258, 19 L. Ed. 2d 1083, 88 S. Ct. 988 (1968). "The fact that the same test might produce disparate results in different contexts merely reveals that the employer-employee relationship is complex, even under traditional rules of agencies." Id. at 578.

In this Court's view, the Circuit decisions cited by the defendants [1] do not reflect similar facts to alter the Court's conclusion here. In Ware, the facts involved whether the plaintiff was an independent contractor for federal tax purposes under the following pertinent facts that included the following:

> The question in this case is whether Mr. Ware has operated sufficiently independently of AAA that he should be able to deduct all his business expenses directly from gross business income. If Ware were an employee, particularly one with a fixed salary, spending large sums on such expenses would seem foolish; as an independent contractor with the ability to increase his profits, these expenses are a cost of business or an investment. Therefore, those factors that reveal which party stands to profit from the expenditures are most important, and we [*7] find that thee factors … strongly favor independent contractor status, and serve to reinforce the district court's holding.
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> First, Ware was paid by commission rather than straight salary or according to the number of hours worked …. He paid most of his business and travel expenses, furnished almost all of his own tools and materials, and he made a significant investment in the enterprise, at least relative to AAA's stake in the venture. Finally, Ware stood to profit or lose money as a result of his services, the former being particularly important. The revenue ruling notes, "the risk that a worker will not receive payment for his or her services … is common to both independent contractors and employees," but the reverse is certainly not true. Both Ware and AAA bargained for Ware's entrepreneurship and the profit incentive in changing to a general agent relationship, and part and parcel of that arrangement is Ware's ability and freedom to

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[1] The defendant erroneously cites Wolcott as 844 F.2d 245 (6th Cir. 1989) whereas the actual cite is 884 F.2d 245 (6th Cir. 1989).

> invest accordingly in additional office help, equipment and advertising for his own benefit.Ware, 67 F.3d at 579-80 (emphasis added and citations omitted). Here, the field representatives did not make large independent [*8] expenditures.

In Wolcott, the issue was whether the plaintiff in that case was an employee under ERISA where:

> "[Plaintiff] hired his own employees and exercised managerial skill in the operation of his business. Further, [Plaintiff] owned his own office condominium; maintained the office where the business was located; was responsible for most of all his own expenses; paid his own insurance; and was responsible for obtaining and maintaining a license to sell insurance …. Nationwide made no deductions for Social Security or income taxes …. [The plaintiff] was not eligible for regular employee benefits including sick pay, vacation pay, and leave time, or any of the employee pension or retirement plans, provided to Nationwide's regular employees."884 F.2d at 251 (emphasis added).

In Alfred v. Tennessee Farmers Mut. Ins. Co., 8 F. Supp.2d 1024 (E.D. Tenn. 1997), [*9] the Court was presented with the following facts:

> The [agreements] on the defendant's forms stated expressly an intention to create an independent contractor relationship, not an employer-employee relationship. Other evidence submitted by the defendant in support of its motion shows that agency managers (as opposed to regional agency managers, who are employed by the defendant) and agents of the defendant are not paid salaries or wages, but earn their livings through commissions; that these agents are "captive" agents, placing most policies sold by them with the defendant only, except that they place substandard automobile insurance risks with one or more other carriers, and offer disability insurance underwritten by another insurance carrier; that in a Tennessee Farm Bureau insurance agency, secretaries are paid out of agents' commissions, as is office rent; that the defendant does not set the hours of agents' work; that agents pay for their own insurance agent examinations and licenses, own their own automobiles, and pay to fuel their automobiles; that agents pay their own expenses of membership in professional associations; that regional agency managers do not evaluate [*10] agents' work performance on any basis other than production; that the defendant maintains a sales force at its corporate headquarters, but does not maintain offices elsewhere in Tennessee; that the defendant does not prohibit its agents from selling insurance outside their counties, does not provide its agents with health insurance, vacations, sick leave, or other employment benefits, and does not provide errors and omissions insurance coverage for its agents; that agents of the defendant are permitted to incorporate, and some have; that the defendant places no minimum hours or office requirements on its agents; that the defendant does not provide its agents with stationery or business cards, but does provide copies of its uniform insurance application and policy forms; and that the defendant does not withhold income taxes from agents' earnings, does not pay any Social Security taxes for its agents, and does not provide IRS W-2 forms to its agents. According to Tom McDonald, the defendant's chief marketing officer,
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> > Agents and Agency Managers may sell lines of insurance other than TFMIC. Agents currently sell, or in the past have sold, lines not carried by TFMIC such as [*11] non-standard automobile insurance, bonds and disability income insurance. They may also write coverages for insureds that TFMIC chooses not to accept. Agents currently write, or have previously written, coverages through, among others, Atlanta Casualty, Progressive Insurance Company, Dairyland Insurance Company and Provident Insurance Company.Id. at 1025 (emphasis added).

Contrary to Wolcott and Alfred, here, the facts include defendant's classification of field representatives as "statutory employees" and its withholding of federal taxes with W-2's for at least seven years.

In the Court's view, this action is factually akin to the Sixth Circuit's decision in Lilley v. BTM Corp., 958 F.2d

746 (6th Cir. 1992), an ADEA action, where the Court found the following facts sufficient to warrant a jury trial on this issue:

> BTM exercised control over Lilley. Although Lilley set his own hours and vacation schedule such flexibility is not sufficient to negate control. BTM had the authority to remove Lilley from particular sales. In at least one instance, BTM exercised this authority, removing Lilley from a deal while negotiations [*12] were still taking place and replacing him with another employee. In addition, BTM required Lilley to obtain its approval before he could quote a price to a potential buyer.
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> Although he paid some of his own expenses, Lilley did not make an investment in the business. BTM supplied Lilley with an office, secretarial services, business cards and stationary bearing BTM's name brochures and stickers advertising BTM's products, and telephone privileges.
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> In addition, Lilley was integrated into BTM's normal business operations. After BTM approved a price quotation, Lilley was authorized to sign for and bind BTM. He also attended weekly meetings of BTM's sales staff, whose members are undisputedly employees. Lilley went on "trouble-shooting trips, involving the resolution of problems that customers had with BTM's products *after* purchase. Finally, BTM invited its customers to visit its facility and offered that "our people will give you all the help you need …." Lilley was listed among BTM's "people."
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> It is also significant that Lilley sold only BTM's products. Although this is by no means determinative, it provides support for the existence of an employment relationship, [*13] particularly when viewed within the totality of the facts of this case.
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> In light of the totality of the circumstances in this case, there was sufficient evidence to raise a question for the jury. The district court properly denied BTM's motion for judgment notwithstanding the verdict.Id. at 750-51 (emphasis added and citations omitted).

As in Lilley, there is a restriction on insurance products that the plaintiff intervenor could sell without the defendant's prior approval or risk the defendant's cancellation and termination. Guardian paid education expenses for its field representatives as well as worker's compensation and disability benefits. In their employee benefit documents, Guardian referred to its field representatives as employees. The defendant trained and set the guidelines for eligibility as a field representative. Such control over a field representative's work can support a finding that the defendant was an employer for Title VII purposes.

For the contention that this Court exceeded its authority in ruling on the prior motion by finding the defendant to be an employer, "the determinations of employment status is a mixed question of law [*14] and fact. Normally, a judge will be able to make this determination as a matter of law. However, where there is a genuine issue of fact, or conflicting inferences can be drawn from undisputed facts, as here, the question is to be resolved by the finer of fact in accordance with the appropriate rules of law." Lilley, 958 F.2d at 750 n.1.

Although the EEOC disputed the defendant's statement of facts, the defendant does not identify any fact relied upon by the Court as disputed. Thus, at this point, the Court does not discern a factual dispute as to those facts relied upon by the Court to conclude that the defendant is an employer under Title VII.

As to a request for an interlocutory appeal, the Court is unable to distinguish this ruling from any other ruling on jurisdictional issues in any action. Moreover, the defendant advances the view that because insurance agents have been found not to have an employer-employee relationship by some courts, that all employers of such agents are not employers for Title VII purposes. This is contrary to Sixth Circuit precedents that each such case is to be evaluated upon its specific and individual facts. Thus, the Defendant's request [*15] for an interlocutory appeal is denied..

An appropriate Order is filed herewith.

This the 19th day of April, 2001.

WILLIAM J. HAYNES, JR.

United States District Judge

ORDER

In accordance with the Memorandum filed herewith, the defendant The Guardian's motion to reconsider or amend (Docket Entry No. 43) as well as its request for an interlocutory appeal are **DENIED.** This action is remanded to the Magistrate Judge pursuant to Local Rule 11.

It is so **ORDERED** this the 19th day of April, 2001.

United States District Court

WILLIAM J. HAYNES, JR.