

PUBLICATION

Sixth Circuit Holds General Contractor Can Be Liable in Discrimination Suit Brought by Sub-Contractor's Employees

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The Sixth Circuit Court of Appeals recently reversed a district court's ruling granting summary judgment to a general contractor on the question of whether it could be held liable to its sub-contractor's employees as a joint employer under Title VII. The Court held that, in light of the significant control exerted by the general contractor over the sub-contractor's employees, it was their *de facto* employer and could be liable as a joint employer.

The case involves a general contractor, Skanska USA Building, Inc. (Skanska), hired to oversee the construction of a new hospital facility in Memphis, Tennessee. Skanska hired C-1, Inc. (C-1) as a subcontractor to provide operators for the construction site's temporary elevators. C-1 in turn hired several operators, including African-American Maurice Knox. During his employment as an operator, Knox alleges that he and the other African-American operators employed by C-1 experienced rampant harassment and discrimination in the form of racial slurs and racist graffiti painted in portable toilets at the job site. In addition, Knox alleges that liquid from a portable toilet was thrown at his arms and eyes, causing them to swell. One of Knox's co-operators repeatedly complained to C-1's owner about the harassment, but was told to take the complaints to Skanska management instead.

Following the toilet incident, Knox complained to a Skanska executive, who soon after removed all C-1 personnel from the construction site. After C-1's owner appealed the removal, Knox and other C-1 operators were allowed to return to the site. Knox contends that the harassment continued after his return. Ultimately, Knox was removed from the site for using his cell phone while on the job.

Thereafter, the EEOC filed suit against Skanska on behalf of Knox and the other operators, alleging racial discrimination and retaliation in violation of Title VII and 42 U.S.C. §1981. Knox later intervened as a plaintiff as well. Both parties moved for summary judgment on the question of whether Skanska could be held liable as a joint employer under Title VII. The district court granted summary judgment to Skanska. On appeal, the Sixth Circuit reversed, finding there was a genuine issue of material fact as to whether Skanska could be a joint employer in light of the circumstances of the case.

First, without any underlying analysis, the court ruled that the joint employer theory was applicable to Title VII, despite the fact that the Sixth Circuit had not previously ruled definitively on that issue. Next, the court examined the extent to which Skanska exercised control over the C-1 operators. Despite the language of the contract between Skanska and C-1, which provided that C-1's owner was responsible for supervising the operators, in practice Skanska exercised nearly complete control over them. As the Court explained:

Skanska supervised and controlled the operators' day-to-day activities without any oversight from [C-1's owner]. As a general matter, Skanska routinely exercised its ability to direct and supervise the operators' performance. Skanska set the operators' hours and daily assignments. Skanska assigned the operators' supervisors. When the operators complained about the conditions on site, Skanska handled their complaint. When the operators had disagreements with their supervisors, Skanska arranged a meeting to discuss the situation.

Accordingly, the Court held: "C-1 was a nonentity on the construction site[; t]hat the terms of C-1's contract with Skanska envisioned a more active role for C-1 is beside the point." As such, there was a genuine issue of material fact as to whether Skanska was a joint employer.

The case, *EEOC v. Skanska USA Building, Inc.*, should be read as a warning to general contractors in particular and the construction industry generally, where contractor relationships such as this one are common. Notwithstanding contractual language to the contrary, if the reality of a relationship between a general contractor and subcontractor implies joint employment, liability may be incurred.