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How to Count to Fifteen: Determining the Jurisdictional Scope of Title VII: An Analysis of Walters v. Metropolitan Educational Enterprises Inc.

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How to Count to Fifteen: Determining the Jurisdictional Scope of Title VII

by Barbara J. Fick

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Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1994). The prohibition, however, applies only to an employer "who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . ." 42 U.S.C. § 2000e(b). It thus becomes important to establish the number of workers an employer has in order to decide if that particular employer is subject to Title VII's employment discrimination prohibition.

The statute is clear that there must be 15 employees, but it is less clear as to the means of counting the number of employees. Does the statutory phrase "15 or more employees for each working day in each of 20 or more calendar weeks" mean that only those employees physically present at work or on leave for each working day in a week are counted, or does it mean that all employees carried on the payroll for each working day of the week are counted? This case requires the Supreme Court to interpret that phrase and decide how to count employees.

ISSUE

How should a court count the number of employees to determine if a particular employer must comply with the antidiscrimination requirements imposed by Title VII?

FACTS

Metropolitan Educational Enterprises, Inc. ("Metropolitan") sells and finances encyclopedias, dictionaries, and other educational materials through door-to-door sales. Darlene Walters worked for Metropolitan as a collector from 1986 to April 1990. In April 1990 Walters filed a Title VII charge with the Equal Employment Opportunity Commission (the "EEOC" or the "Commission") alleging that Metropolitan had denied her a promotion based on gender. Shortly

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DARLENE WALTERS V. METROPOLITAN EDUCATIONAL ENTERPRISES, INC. AND LEONARD D. BIEBER AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION V. METROPOLITAN EDUCATIONAL ENTERPRISES, INC. AND LEONARD D. BIEBER
DOCKET NOS. 95-259 AND 95-779, CONSOLIDATED

ARGUMENT DATE:
NOVEMBER 6, 1996
FROM: THE SEVENTH CIRCUIT

Case at a Glance

Title VII prohibits certain types of employment discrimination but applies only to employers with 15 or more employees. The statute, however, is unclear on the method for counting the number of employees. Filling this gap, some courts perform a head count to determine the number of employees at work every workday; other courts look at the employer's payroll records to determine the number of employees listed for every workday. In this case, the Supreme Court is asked to decide which of these methods is correct.

after Metropolitan received notice that Walters had filed the charge, it fired her. Walters then filed a second charge with the EEOC claiming that she was terminated in retaliation for filing the first charge.

In April 1993 the Commission filed a lawsuit in federal district court alleging that Metropolitan's discharge of Walters was illegal retaliation in violation of Section 704(a) of Title VII. 42 U.S.C. § 2000e-3(a). Section 704(a) prohibits adverse employment actions based on an employee's filing a charge or participating in proceedings under Title VII.

Walters entered the EEOC's lawsuit as a plaintiff. She alleged that Metropolitan discriminated against her on the basis of gender when it denied her a promotion; she also alleged retaliatory discharge.

Metropolitan filed a motion to dismiss for lack of subject matter jurisdiction, claiming that it was not a covered employer under Title VII because it did not employ 15 or more employees for each working day for 20 or more calendar weeks. In order to verify this defense, the parties engaged in extensive discovery relating to the employment status of Metropolitan's work force. (Refer to Glossary for the definition of discovery.)

After discovery, the parties agreed to the following facts regarding Metropolitan's work schedule and employees. For 1990 Leonard Bieber, Metropolitan's president, was the only salaried employee; there were two regular part-time employees and 13 regular full-time employees, all of whom were paid hourly. Metropolitan's regular workdays were Monday through Friday, from 9:00 a.m. to 5:00 p.m. During 1990, Metropolitan had 15 or more employees on its payroll on each working day of 47 calendar weeks but had 15 or more employees physically present at work or on paid leave for only nine weeks.

The EEOC and Walters asserted that the district court should count the number of employees on Metropolitan's weekly payroll to determine whether or not it had subject matter jurisdiction over Metropolitan. Under the test urged by the Commission and Walters known as the payroll test, Metropolitan would be subject to the antidiscrimination provisions of Title VII.

Metropolitan countered that the court should count only those employees either physically present at work or on paid leave for each day of the workweek. Under this test, known as the day-by-day test, Metropolitan was not an employer for purposes of Title VII and, thus, was outside the jurisdictional scope of the statute.

The district court held that it was bound to apply the day-by-day method for counting employees and granted Metropolitan's motion to dismiss. 864 F. Supp. 71 (N.D. Ill. 1994). The district court, which is within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, ruled that it was required to follow the Seventh Circuit's decision announced in *Zimmerman v. North American Signal Co.,* 704 F.2d 347 (7th Cir. 1983), which, in interpreting identical jurisdictional language of the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 630(b), endorsed the day-by-day method.

The Commission and Walters appealed the district court's decision to the Seventh Circuit which affirmed on the basis of *Zimmerman.* 60 F.3d 1225 (7th Cir. 1995). The Supreme Court granted the separate petitions for a writ of certiorari filed by the EEOC and Walters to decide whether the payroll method or the day-by-day method is the more appropriate basis for determining jurisdiction under Title VII. The cases have been consolidated for argument and decision. 116 S. Ct. 1260 (1996).

Case Analysis

The federal circuit courts of appeals are split on the issue of which method should be used to count employees. The payroll method counts all employees who are carried on the payroll for the calendar week, whether those employees are physically present or on paid leave for each day. The day-by-day method counts all salaried workers for every day of the week whether they are present at work or not, but counts only those hourly employees who are physically present at work or on paid leave. In effect, this latter method counts as employees only those workers who actually receive pay for each day of the workweek.

The First and Fifth Circuits as well as the EEOC have endorsed the payroll method. *Thurber v. Jack Reilly's, Inc.,* 717 F.2d 633 (1st Cir. 1983); *Dumas v. Town of Mount Vernon,* 612 F.2d 974 (5th Cir. 1980). In interpreting the phrase "has 15 or more employees for each working day," these two courts focus on the word "has," which they interpret to mean that the employer is in an employment relationship with 15 or more employees for each working day, i.e., the employer has 15 or more employees whether or not they actually work during the employer's workweek.

The payroll method determines if the employer has in its employ 15 or more employees during a particular workweek. If an employee is carried on the payroll for the week, that

person is an employee for each working day of that week. For example, an employee who severs his or her employment relationship with the employer on a Wednesday would not be counted as an employee for that calendar week because the employee would not have been in an employment relationship with that employer for each working day that week. On the other hand, a part-time employee who works only two days a week would be counted for the entire week because that person remains in the employment relationship for every working day that week.

The payroll method counts all employees equally based on the existence of an employment relationship, whereas the day-by-day method results in distinctions among workers that seem somewhat artificial. First, the day-by-day method makes a distinction between salaried workers (who are counted whether physically present or not) and hourly workers (who are counted only if present or on paid leave). Yet the statutory language itself draws no distinction between these two classes of workers. Second, the day-by-day method would count employees who work only two hours a day every workday, but the method would not count employees who work 10 hours for four days of an employer's regular workweek but do not work on the fifth day.

There is also some indication in the legislative history of Title VII that the payroll method is consistent with congressional intent in using the phrase "for each working day." In discussing the employer coverage issue, Senator Dirksen, the then-minority leader, referred to the definition of employer used in unemployment compensation law as providing a basis for the language used in Title VII. Under this body of law, the focus is on the employment relationship as the controlling factor for counting employees.

Congress also used the phrase "for each working day" in defining the jurisdictional coverage of the Family and Medical Leave Act of 1993 (the "FMLA"). 29 U.S.C. § 2611(4)(A)(i). Both the House of Representatives and Senate reports accompanying the FMLA explain that Congress intended the phrase to be construed in accordance with the payroll method for counting employees.

Lastly, it can be argued that the payroll method is more efficient to apply. It requires only an examination of the payroll records which federal tax laws mandate must be kept by employers, while the day-by-day method necessitates reviewing the daily work history of every employee.

The Seventh Circuit, as illustrated in this case, and the Eighth Circuit apply the day-by-day method, stating that it is the only method that gives meaning to the statutory phrase "for each working day." *See, e.g., EEOC v. Garden & Assocs., Ltd.,* 956 F.2d 842 (8th Cir. 1992).

A general rule of statutory construction requires that a statute should not be interpreted in a way that renders words or phrases meaningless, redundant, or superfluous. Under this rule, which is advanced vigorously by Metropolitan, courts assume that Congress had a reason for including all the language found in the statute. In applying this principle of statutory construction, courts using the day-by-day method have held that the payroll method fails to give meaning to the phrase "for each working day" because the payroll method counts, for example, employees who work only on Mondays as employees for every day of the week.

Metropolitan also argues that isolated remarks by legislators during congressional debates on Title VII do not provide a firm foundation for interpreting statutory language. Moreover, congressional reports interpreting the FMLA may not be a reliable indicator of what Congress intended 30 years earlier when it enacted Title VII.

Metropolitan argues further that the EEOC's interpretation of the statutory phrase "15 or more employees for each working day" is not entitled to deference. The EEOC guidelines endorsing the payroll method were issued after several courts had already rejected that method; also, the determination of an Executive Branch agency's jurisdictional authority is an issue for the courts, not for the agency, to decide.

Significance

Title VII is not the only statute that defines jurisdiction based on the number of employees employed "for each working day in each of 20 or more calendar weeks." The ADEA, as already noted, and the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12111(5)(A), use this same language. Accordingly, the Supreme Court's decision in this case will apply with equal force in determining the jurisdictional coverage of those statutes.

Companies are increasingly reliant on part-time workers as well as on flexible working arrangements for their full-time workers. In 1994 almost 20 percent of all workers — about 24 million employees — worked part-time. In 1991 some 15 percent of full-time workers — about 12 million employees — had flexible work schedules. In contrast, at least 12 percent of all employers fall within just a few employees of Title VII's 15-employee jurisdictional minimum.

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A decision to use the day-by-day method could result in many employers remaining outside the reach of federal antidiscrimination laws because the day-to-day method has the effect of undercounting employees. For example, full time employees who work a five-day, 40-hour week would not be counted if the employer operated on a seven-day-a-week basis because full-time workers would not be physically present at work "for each working day" in the calendar week. And part-time workers who are regularly scheduled to work three days a week out of a five-day workweek would also not be counted; neither would full-time workers who are on compressed schedules of four 10-hour workdays out of a five-day workweek.

A decision for Metropolitan does not necessarily leave employers home free. Even if an employer does not fall within the scope of Title VII's jurisdiction, it might be required to comply with existing state laws prohibiting employment discrimination, although there are at least three states that do not have such laws.

The Court's decision in this case, at bottom, will either broaden the range of employers subject to the jurisdiction of Title VII, the ADEA, the ADA, and similar laws or narrow their numbers. In the world of global competition and downsizing, the Court's decision will have major repercussions for both sides.

Attorneys of the Parties

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For Metropolitan Educational Enterprises, Inc. and Leonard D. Bieber (Patrick J. Falahee, Jr.; (312) 322-1103).

Amicus Briefs

In support of Darlene Walters and the Equal Employment Opportunity Commission

American Federation of Labor and Congress of Industrial Organizations (Counsel of Record: Laurence Gold; (202) 833-9340);

Lawyers' Committee for Civil Rights Under Law (Counsel of Record: Lawrence J. Latto; Shea & Gardner; (202) 828-2000);

Joint brief of the Women's Legal Defense Fund; American Association of Retired Persons; American Association of University Women; American Civil Liberties Union — Women's Rights Project; American Federation of State, County and Municipal Employees, AFL-CIO; American Nurses Association; California Women's Law Center; Connecticut Women's Education and Legal Fund, Inc.; Disability Rights Education and Defense Fund, Inc.; Equal Rights Advocates, Inc.; International Brotherhood of Teamsters; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America; Laborers' International Union of North America; Lambda Legal Defense and Education Fund, Inc.; Mexican American Legal Defense Fund; National Council on Family Relations; National Council of Jewish Women, Inc.; National Employment Law Project; National Women's Law Center; NOW Legal Defense and Education Fund; Wider Opportunities for Women; The Woman Activist Fund, Inc.; Women Employed; and Women's Law Project (Counsel of Record: Helen L. Norton; Women's Legal Defense Fund; (202) 986-2600).

In support of Metropolitan Educational Enterprises, Inc. and Leonard D. Bieber

Joint brief of the Illinois State Chamber of Commerce, Chamber of Commerce of the United States of America, Illinois Manufacturers' Association, Illinois Restaurant Association, Illinois Retail Merchants Association, the Management Association, of Illinois, and Wisconsin Manufacturers & Commerce (Counsel of Record: Donald J. McNeil; Keck, Mahin & Cate; (312) 634-7700);

Joint brief of the Pacific Legal Foundation and National Federation of Independent Business (Counsel of Record: Sharon L. Browne; Pacific Legal Foundation; (916) 641-8888).