

## Third Circuit Holds That Jury Must Decide If Temporary Workers Are Employees Under Anti-Discrimination Laws

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Last week, the United States Third Circuit Court of Appeals reversed a trial court's grant of summary judgment to retailer Tuesday Morning, Inc. in the case of *Faush v. Tuesday Morning, Inc.* In that case, Matthew Faush, a temporary worker assigned by an employment agency to work at a Tuesday Morning store, sued Tuesday Morning under Title VII of the Civil Rights Act (Title VII) and the Pennsylvania Human Relations Act (PHRA). The trial court granted summary judgment for Tuesday Morning, finding that Tuesday Morning was not Faush's employer. The Third Circuit, however, reversed.

In doing so, the Third Circuit established an important standard for determining whether temporary workers are employees under Title VII and the PHRA. The court utilized the common law Darden test, named after the U.S. Supreme Court's 1992 decision in *Nationwide Mutual Insurance Co. v. Darden*, which considers the following non-exhaustive factors in determining whether an entity can be considered an employer:

- the skill required for the worker's task
- the source of the instrumentalities and tools used
- 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
- the tax treatment of the hired party.

Looking at these factors, the Third Circuit found that although the employment agency paid Faush's wages, payroll taxes, and maintained workers' compensation insurance for him, Tuesday Morning took on "many of the legal responsibilities of a traditional employer." For example, Tuesday Morning bore primary responsibility for ensuring compliance with minimum wage obligations, Faush was paid an hourly wage just like Tuesday Morning's employees,

and Tuesday Morning had the ultimate power to determine if Faush was permitted to work in its stores. Tuesday Morning gave temporary workers assignments, directly supervised them, provided site-specific training, and furnished any equipment and necessary materials. Tuesday Morning also managed the temporary employees in the same way that it managed its own employees and assigned them the same work it assigned its own employees. In its agreement with the temporary employment agency, Tuesday Morning pledged to comply with all applicable laws and regulations concerning the temporary worker's employment.

Based on this evidence, the Third Circuit held that a reasonable jury could find that Tuesday Morning was Faush's employer under Title VII and the PHRA. Accordingly, the Third Circuit vacated the trial court's order granting Tuesday Morning summary judgment and remanded the case for trial.

This decision will be significant for both temporary employment agencies and businesses that use temporary workers. Parties to temporary employment agreements, therefore, should evaluate those agreements under the Darden factors-particularly the day-to-day control that the business has over temporary workers-to determine which entity will be considered temporary workers' employer under state and federal anti-discrimination laws.

If your company needs assistance in evaluating these factors, please feel free to contact one of the attorneys in our Employment Law Group. Attorneys in Barley Snyder's Employment Law Group have significant experience advising both temporary staffing agencies and businesses that use temporary workers.

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