"It's Not You, It's Me" - When Are Client Companies Liable For Staffing Firms' Discriminatory Hiring Practices?

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THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION INDICATES THAT A CLIENT COMPANY MAY FACE LIABILITY IF IT KNOWS OR SHOULD KNOW THAT A STAFFING FIRM USES DISCRIMINATORY HIRING PRACTICES BUT NONETHELESS MAINTAINS A CONTRACTUAL RELATIONSHIP WITH SAID FIRM. THIS COMMENT POINTS OUT THAT CONGRESS HAS NOT YET ARTICULATED A CONSISTENT STANDARD FOR HOLDING CLIENT COMPANIES LIABLE FOR DISCRIMINATORY HIRING PRACTICES OF A STAFFING FIRM. IN DETERMINING WHETHER CONGRESS SHOULD ESTABLISH SUCH LIABILITY, THIS COMMENT UNEARTHS COMMON DISCRIMINATORY HIRING PRACTICES BY STAFFING FIRMS AND DEMONSTRATES THAT THE CURRENT BODY OF LAW DOES NOT ADEQUATELY ADDRESS WHO CARRIES THE RESPONSIBILITY TO UNCOVER AND RESPOND TO DISCRIMINATORY HIRING PRACTICES IN THE MODERN WORKFORCE. THIS COMMENT EMPHASIZES THAT THE FAILURE TO CONSOLIDATE DIFFERENT LEGAL PRINCIPLES INTO A COMMON DUTY OF CARE, COUPLED WITH THE PREVALENCE OF SETTLEMENT AGREEMENTS, CAUSES UNDESIRABLE RESULTS FOR WORKERS AND BUSINESSES. TO RESOLVE THESE ISSUES, THIS COMMENT CALLS FOR A DUTY-BASED APPROACH TO DISCRIMINATION CASES INVOLVING STAFFING FIRMS AND CLIENT COMPANIES. IT SUGGESTS A POTENTIAL BASIS FOR AN OVERARCHING DUTY BY EXTRAPOLATING A VARIETY OF LEGAL PRINCIPLES THAT FACTOR INTO COURT DECISIONS AND STATUTORY INTERPRETATIONS.

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INTRODUCTION

"It’s not you, it’s me." A defendant in a civil action will likely never utter this popular phrase from the dating world. Yet, businesses readily concede client company liability for the actions by staffing agencies in an effort to educate the workforce and prevent investigation and legal action by the Equal Employment Opportunity Commission ("EEOC").1 This suggested liability is based primarily on the Commission’s liberal interpretation of discrimination liability: the notion that liability based on employer-status should be assigned to non-employers.2

As employers increased their use of staffing agencies to hire workers, the EEOC, commentators, and the courts have paid much attention to staffing firm liability for employment discrimination by its clients.3 The EEOC has explained that a staffing firm and its client may both be held liable for discrimination when the staffing firm follows its client’s discriminatory orders with regard to hiring practices.4 The EEOC has further clarified that in situations where the staffing agency has knowledge that its client discriminates against the agency’s workers, but fails to take appropriate measures, the agency may also be held liable for discrimination.5

1. This Comment uses the terms “client companies” or “clients” interchangeably to refer to the entities that engage the services of a staffing firm. See Aaron Green, Staffing firms: an overview of services offered, HR CENTER ON STAFFING (Mar. 24, 2007), available at http://www.boston.com/jobs/on_staffing/042307.shtml. For some examples of websites that clarify employment relationships and potential liability for employers who engage the services of staffing agencies, see, e.g., Michael Harris, EEOC is Watching You: Recruitment Discrimination Comes to the Forefront, ERE (May 30, 2006), http://www.ere.net/2006/05/30/eeoc-is-watching-you-recruitment-discrimination-comes-to-the-forefront/ (cautioning that the EEOC’s compliance manual requires that recruitment and hiring can create legal liability for all parties, not just the employment agency or the employer, and that clients may be responsible for the discriminatory acts performed by another party); Your Legal Obligation to Temporary Agency Workers, PERSONNEL POL’Y SERV., INC., http://www.ppspublishers.com/articles/legal_temp_workers.htm (last visited Mar. 8, 2014) (acknowledging the EEOC’s directive that even if the agency or the client is not the employer, both may still be liable under the antidiscrimination laws).

2. See Daniel P. O’Gorman, Paying for the Sins of Their Clients: The EEOC’s Position That Staffing Firms can be Liable When Their Clients Terminate an Assigned Employee for a Discriminatory Reason, 112 PENN ST. L. REV. 425, 457 (2007) (demonstrating that the EEOC’s view lacks firm support in the case law).

3. See John R. Merinar, Jr., When Staffing Companies Discriminate: Is the Client Liable?, 18.12 W. VA. EMP. L. LETTER 4, 1 (2013) (asserting that legal publications have devoted substantial attention to the liability incurred by a staffing company if a client discriminates against its employees).

4. EQUAL EMP’T OPPORTUNITY COMM’N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS 3 (1997) [hereinafter EEOC ENFORCEMENT GUIDANCE].

5. See id. at 33.
However, it remains unclear whether a client company similarly faces liability if it knows or should know of a staffing firm's discriminatory practice but nonetheless maintains a contractual relationship with said firm.6 Even though common sense and morality dictate that a company should sever ties with an agency that discriminates against employees or job seekers, such liability assessment and assignment of responsibilities should be firmly rooted in the law.7

This Comment argues that Congress should clarify the principle and rationale underlying the liability for staffing firms whose clients discriminate, as well as for client companies who maintain relationships with discriminatory staffing agencies to preserve the uniform character of Title VII of the Civil Rights Act of 1964 ("Title VII").8 Part II of this Comment describes the rules and guidelines that currently hold staffing firms and their clients liable for employment discrimination. Part III explains that the current body of law fails to establish an adequate standard of liability and causes uncertainty among client companies as to how far their liability extends. Part IV argues that the principles and rationales on which client company liability is based should be articulated in Title VII, so as to ensure uniformity and awareness, as well as to avoid costly litigation.

I. THE CURRENT LAW SURROUNDING STAFFING FIRMS' DISCRIMINATORY HIRING PRACTICES

The EEOC has issued a number of guidelines detailing the standard and scope of liability for staffing companies and client firms in a wide variety of circumstances.9 Similarly, the common law suggests several theories of liability.10 Taken together, these guidelines and court rulings establish liability for client companies who make discriminatory hiring requests and

6. See Merinar, supra note 3, at 2 (explaining that this question cannot be answered with certainty because it is hard to predict what courts will do).
7. Cf. O'Gorman, supra note 2, at 426 (arguing that an EEOC position which has no support in the statutes should be rejected).
8. Cf. McAdoo v. Toll, 591 F. Supp. 1399, 1402 (D. Md. 1984) (explaining that the procedures of Title VII were not intended to serve as a stumbling block to the accomplishment of the statutory objective).
9. See EEOC ENFORCEMENT GUIDANCE, supra note 4, at 2.
10. See Jason E. Pirruccello, Note, Contingent Worker Protection from Client Company Discrimination: Statutory Coverage, Gaps, and the Role of the Common Law, 84 Tex. L. Rev. 191, 193 (2005) (arguing that workers have adequate protection from discrimination via judicial interpretations of Title VII, such as under a theory of discriminatory interference of an existing or prospective third-party employment relationship or by acknowledging indirect or de facto employment relationships between contingent employees and client companies).
staffing firms who honor such requests. They further establish that both client companies and staffing firms may be liable to workers in cases where discrimination occurs at the client’s workplace, even if the claimant is technically the employee of the staffing company but not of the client.

On a few occasions, the EEOC suggested that client companies may face liability for maintaining a relationship with discriminatory staffing firms. Furthermore, several states have recently passed legislation making it unlawful to discriminate against a job applicant based on his or her status as unemployed, a widespread practice among employment agencies.

A. Parties who may be Involved in Employment Discrimination Litigation

The types of employment discrimination disputes discussed in this Comment generally involve workers, staffing firms, client companies, and the EEOC.

1. Workers, Staffing Firms, and Client Companies

To avoid drawing legal conclusions about the liability and coverage that an individual may receive, this Comment frequently uses the term “worker” instead of “employee” (individuals who are engaged by an


12. See id. (accepting the view that a staffing firm is liable for its discriminatory assignment decisions even when it is based on its client’s requirements); cf. Koch v. Holder, 930 F. Supp. 2d 14, 17 (D.D.C. 2013) (acknowledging that under limited circumstances, a plaintiff may bring a discrimination claim against a non-employer defendant if the defendant controls and denies access to employment).


14. See, e.g., D.C. CODE § 32-1368 (2012); see generally Mary Price Birk, New Employment Law Compliance Strategies and Concerns for Attorneys and Clients, in THE IMPACT OF RECENT REGULATORY DEVELOPMENTS IN EMPLOYMENT LAW 21, (2013) (cautioning that employers should be increasingly aware of legislation enacted statewide around the country).

15. See Mitchell H. Rubinstein, Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship, 14 U. PA. J. BUS. L. 605, 628, 658 (2012) (explaining that, when dealing with any question of labor and employment law, one must first examine whether a private or public employer is involved and that, beyond this distinction, cases involving the definition of an employer and the definition of employee are somewhat elusive).
Staffing firms hire their own workers and either assign them to client companies according to the client companies’ needs or connect job seekers with potential employers. This Comment relies heavily on the terminology used in the EEOC Guidelines.

2. The Equal Employment Opportunity Commission

The EEOC has the authority to investigate, administer, interpret, and enforce federal anti-discrimination laws. The Commission may also bring action against employers who violate such laws. Because of the EEOC’s interpretive role, courts frequently adopt its proposed standards and guidelines, while employers similarly look to EEOC interpretations in order to determine when and under what circumstances they may be held liable for discrimination.

16. Civil Rights Act of 1964 § 701(b), 42 U.S.C. § 2000e(b), (f) (2012) defining “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.”). Because the distinction between public and private sector employees reaches beyond the scope of this Comment, my discussion will focus primarily on employee definitions that are assigned independently of these classifications. See Rubinstein, supra note 15, at 605 (stating that in most cases, coverage of employment laws boils down to the question of whether the individuals in question are “employees” and whether the entity in question is an “employer”).

17. See Staffing Clients: Definition of Staffing Services, AM. STAFFING ASS’N, http://www.americanstaffing.net/definitions.cfm (last visited Mar. 9, 2014) (stating that staffing firms bring qualified job candidates together with potential employers for the purpose of establishing a temporary or permanent employment relationship).

18. See EEOC ENFORCEMENT GUIDANCE, supra note 4, at 2 (using the term “staffing firm” interchangeably with temporary employment agencies, contract firms, and other firms that hire workers and place them in job assignments with the firm’s clients).


"IT'S NOT YOU, IT'S ME"

B. Federal Anti-Discrimination Statutes

This Comment focuses on two federal anti-discrimination statutes that serve as vehicles for protected groups to enjoy equal opportunity for employment and workplace accommodation.

1. Title VII of the Civil Rights Act of 1964

Title VII provides that equal employment opportunities cannot be denied to any person on the basis of his or her race, color, national origin, sex, or religion.\textsuperscript{22} In 1991, Congress expanded the coverage of Title VII to proscribe discrimination in employment and prohibit employers from retaliating against an employee for engaging in the enforcement of Title VII.\textsuperscript{23}

2. Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") provides protections to persons with disabilities that are like the civil right protections afforded to individuals covered by Title VII.\textsuperscript{24} The ADA explicitly states that maintaining a contractual relationship with an employment or referral agency that has the effect of subjecting an otherwise qualified applicant to discrimination amounts to discrimination.\textsuperscript{25}

C. Discriminatory and "Quasi-Discriminatory" Hiring Practices

Many companies use staffing agencies to hire temporary or permanent workers.\textsuperscript{26} Where a staffing agency assigns workers to a client company, the worker will traditionally be considered an employee of the staffing company, rather than of the client.\textsuperscript{27} Nonetheless, employees, as well as

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{22} See Americans with Disabilities Act, 42 U.S.C. \textsection 12112(a) (2012).
\item \textsuperscript{23} Jana H. Carey, General Overview of Employment Relationships Within the Framework of Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA), A.B.A. CONTINUING LEGAL EDUC. G-1, at 3 (1998) (providing an overview of governing regulatory schemes).
\item \textsuperscript{24} See 42 U.S.C. \textsection 12112(b)(2); EEOC v. Olsten Staffing Servs. Corp., 657 F. Supp. 2d 1029, 1033 (W.D. Wis. 2009); see also Americans with Disabilities Act (ADA), U.S. DEP’T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/docs/hq9805.html (last visited Mar. 9, 2014) (explaining that the ADA guarantees individuals with disabilities equal opportunity in employment).
\item \textsuperscript{25} 42 U.S.C. \textsection 12112(b)(2).
\item \textsuperscript{26} Buchanan Ingersoll, EEOC Issues Guidance on Treatment of Contingent Workers, 8.5 PA. EMP. L. LETTER 4, at 1 (1998) (recognizing that a growing number of employees are employed by temporary agencies).
\item \textsuperscript{27} See EEOC ENFORCEMENT GUIDANCE, supra note 4, at 7 (stating that the staffing firm generally qualifies as the worker’s employer because it typically hires the worker, determines when and where the worker should report to work, pays the wages, is itself in business, withholds taxes and social security, provides workers’
\end{enumerate}
\end{footnotesize}
non-employees, can find relief for discrimination. Despite the current protections, staffing firms continue to discriminate and “quasi-discriminate” against current and prospective employees.

1. “Quasi-Discrimination”

For purposes of this Comment, procedures that may adversely affect ethnic groups and women qualify as “quasi-discriminatory” hiring practices. Some hiring procedures may have such an effect if they discourage certain groups from applying or if they systematically prevent qualified minorities from knowing about the opportunities. Even though such practices are not inherently illegal, they can become illegal if they adversely impact protected groups. Various reports point to situations in

compensation coverage, and has the right to discharge the worker).

28. See Pirruccello, supra note 10, at 222 (arguing that contingent workers have protection from unlawful discrimination similar to the protection afforded full-time care employees).

29. See Laura Bassett, How Employers Weed Out Unemployed Job Applicants, Others, Behind The Scenes, THE HUFFINGTON POST (Jan. 14, 2011), http://www.huffingtonpost.com/2011/01/14/unemployed-job-applicants-discrimination_n_809010.html (conceding that staffing firms recognize code words used by clients while regularly accommodating client demands such as finding someone of a particular gender or within a particular age bracket).


31. See Russell Specter & Paul J. Spiegelman, Employment Discrimination Action Under Federal Civil Rights Acts, 21 AM. JUR. 1ST TRIALS §§ 24–26 (1974) (introducing examples such as word of mouth recruitment, sex-differentiated advertising, or exclusionary media and messages); see also Bassett, supra note 29 (discussing the widespread practice among employers and staffing agencies to exclude from consideration candidates who are not currently or recently employed); Brianna Lee, ‘Unemployed Need Not Apply’, PBS (Jul. 28, 2011), http://www.pbs.org/wnet/need-to-know/the-daily-need/unemployed-need-not-apply/10736/ (stating that a nonprofit organization surveying the labor market found nearly 150 ads from Careerbuilder, Monster, Indeed, and Craigslist that openly discriminated against potential candidates, asking them not to apply unless they were currently employed).

which staffing firms have independently and regularly used quasi-discriminatory practices that had such an adverse effect. Nonetheless, neither federal law nor a majority of states' laws deem practices such as unemployment discrimination illegal, although a number of states and municipalities have started to prohibit them.

2. Independent Discrimination by Staffing Firms

A couple of recent examples illustrate that staffing firms independently discriminate against prospective employees. According to a recent decision in the Wisconsin District Court, EEOC v. Olsten Staffing Servs. Corp., a reasonable jury could conclude that a staffing agency discriminated against a deaf job applicant on the basis of his disability. The court noted that the agency specialist's deviation from the agency's general practice reasonably suggests that she discriminated against the plaintiff. The court pointed out that the specialist treated the plaintiff differently, although he was otherwise qualified for the position and the client company had given the specialist no information suggesting that a deaf person would be unable to perform the job's essential functions. After the client indicated that it would not hire the plaintiff without providing an explicit reason, the specialist did not refer the plaintiff to the policies because a client could face liability if the staffing firm refuses to hire individuals based solely on the fact that they have a criminal history).

33. See, e.g., EEOC to Examine Treatment of Unemployed Job Seekers (2011) (written testimony of Algernon Austin, PhD, Director, Program on Race, Ethnicity, and the Economy, Economic Policy Institute) [hereinafter Austin Testimony], available at http://www1.eeoc.gov/eeoc/meetings/2-16-11/Austin.cfm.

34. See, e.g., D.C. CODE § 32-1362 (2012) (prohibiting employers and employment agencies from discriminating against applicants because they are unemployed); Birk, supra note 14 (noting that New Jersey passed a similar law, which took effect in 2011, prohibiting unemployment discrimination in job advertisements); see also Rutherglen, supra note 30, at 1298 (observing that the principal prohibitions of Title VII do not refer to disparate impact at all).

35. See, e.g., EEOC v. Olsten Staffing Servs. Corp., 657 F. Supp. 2d 1029, 1033 (W.D. Wis. 2009) (featuring a representative of a staffing firm who discriminated against a qualified disabled applicant on the basis of her belief that the client would not accommodate the applicant's disability).

36. See id. at 1038.

37. See id. at 1031 (providing that, as a general hiring practice, Olsten's staffing specialist sent a survey sheet to applicants whom she believed to be qualified and then sent the completed sheet back to its client and—unless the client objected within a day or so—the candidate would begin working).

38. See id. (explaining that the specialist used a different procedure in the plaintiff's case, which involved e-mailing the client, indicating that the candidate would like to work for the client, but that her only hesitation is that he is deaf and whether this would be too much of a concern for the client).

39. See id. at 1036.
client when another position opened up.40 Furthermore, when the plaintiff requested a reason for why the client did not want to hire the plaintiff, the specialist appeared to invent a justification for the decision, telling him that the client was concerned about plaintiff’s ability to hear the forklifts, which was false information, and she had no knowledge that the client had any such concerns.41

Another example arose in 2012, when BP Exploration and Production, Inc. ("BP") entered into a settlement agreement with the EEOC after a number of women complained that BP’s contractors discriminated against female job applicants.42 The class of affected women alleged that BP’s contractors did not consider them to work on the cleanup effort following an oil spill in 2010, based solely on their gender.43 While the EEOC never determined that BP violated anti-discrimination laws and BP argued that it did nothing wrong, the settlement agreement included a provision that BP provide training to its administrators who engage contractors.44 Furthermore, the EEOC praised BP for resolving the matter outside of court action and for refusing to tolerate discriminatory hiring practices by any contractor who works for BP.45

Similarly, a recent action brought against Stellar Staffing agency offers another example of independent employment discrimination by staffing firms. In this case, the employment agency violated the anti-discrimination provision of the Immigration and Nationality Act by demanding more specific documents during the employment eligibility verification process from foreign nationals while being more flexible with documentation of U.S. citizens.46 This action supports the notion that staffing companies

40. See id.
41. See id. at 1032 (demonstrating that, instead of remaining neutral, the specialist relied on her own belief of what caused her client to reject the applicant when she claimed that the client needed the plaintiff to be able to hear the forklifts).
42. See Press Release, Equal Emp’t Opportunity Comm’n, EEOC and BP Resolve Claims Related to Contractor Hiring During Gulf Response (June 29, 2012) [hereinafter EEOC & BP Press Release], available at http://www.eeoc.gov/eeoc/newsroom/release/6-29-12.cfm; Mendez, supra note 13 (reporting that BP agreed to pay up to $5.4 million to the class of women who applied for jobs with the contractors during the emergency response).
43. See EEOC & BP Press Release, supra note 42 (reporting that the staffing agencies utilized by BP’s contractors allegedly used discriminatory hiring practices).
44. See id.
45. See id.
46. See DOJ Press Release, supra note 32 (indicating that staffing firms treat applicants differently in the hiring process based on discriminatory assumptions about their citizenship status).
independently violate anti-discrimination provisions by treating applicants differently on the basis of national origin without a client’s request.\footnote{47}

\section{D. Common Law Remedies}

The following common law tests serve as useful tools in determining whether liability can be assigned in cases of non-traditional employment.\footnote{48}

\subsection{1. Joint Employer Liability and Control}

Joint employment assigns liability to client companies in cases where a client discriminates against a worker or applicant who would otherwise be considered the employee of a staffing firm.\footnote{49} According to the EEOC, a staffing company and its client can be held liable as joint employers if both have the right to exercise control over the employee.\footnote{50} This concept seems to be consistent with the view of the Federal Courts and the Supreme Court.\footnote{51} Similarly, courts agree that staffing companies that honor their clients’ demands, if they are based on discriminatory reasons, may face liability for discrimination.\footnote{52}

\begin{itemize}
\item \textit{See} id. (reporting that Stellar Staffing agency agreed to pay $2,250 in civil penalties and undergo training on anti-discrimination provisions).
\item \textit{See} Pirruccello, \textit{supra} note 10, at 192, 204.
\item \textit{See} EEOC ENFORCEMENT GUIDANCE, \textit{supra} note 4, ¶ 12, at 29.
\item \textit{See} id. at 8.
\item \textit{See}, e.g., Moldenhauer v. Tazewell-Pekin Consol. Commc’n Ctr., 536 F.3d 640, 644–45 (7th Cir. 2008) ("[J]oint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer."); Carparts Distrib. Ctr. Inc. v. Auto. Wholesaler’s Ass’n of New England Inc., 37 F.3d 12, 17 (1st Cir. 1994) (finding that defendants function as employers if they exercise significant control over an important aspect of his employment); Watson v. Adecco Emp’t Servs. Inc., 252 F. Supp. 2d 1347, 1356 (M.D. Fla. 2003) (holding that a temporary employment agency was not an employer because it exercised no control over the plaintiffs’ responsibilities or duties once on assignment); Stephanie Greene & Christine Neylon O’Brien, \textit{Who Counts?: The United States Supreme Court Cites “Control” as the Key to Distinguishing Employers From Employees Under Federal Employment Antidiscrimination Laws}, 2003 COLUM. BUS. L. REV. 761, 780 (2003) (citing Clackamas Gastroenterology Assoc., P.C. v. Wells, 548 U.S. 440, 440 (2003) (looking to control as the deciding factor in determining whether an employment relationship exists)).
\item \textit{See} Shah v. Littlefuse Inc., No. 12 CV 6845, 2013 WL 1828926, at *6 (N.D. Ill. Apr. 29, 2013) ("Courts addressing the liability of temporary employment agencies have held that a staffing or employment agency found to be a joint employer may be held liable under Title VII if the agency knew or should have known of the discriminatory conduct and failed to take prompt corrective measures within its control.").
\end{itemize}
2. Tortious Interference for Non-Employers

A person may be liable for tortiously interfering with a contract between two other parties if he intentionally induces or otherwise causes one party not to perform the contract. A court could find a client company liable for tortious interference of the plaintiff’s employment contract. Though tests vary across jurisdictions, tortious interference generally requires that the client company interfere with a direct employment relationship, such as that between a contingent worker and a staffing company. Under these circumstances, even if the company does not exercise its control to turn the worker into an employee, the discrimination toward the worker could still damage the worker’s relationship with the staffing company.

Even though the common law provides some ways to afford protection to non-traditional employees and applicants, neither the common law nor the EEOC Guidelines have thus far pronounced a consistent underlying justification or rationale for holding staffing firms and their clients responsible for each other’s wrongful acts.

54. See EEOC ENFORCEMENT GUIDANCE, supra note 4, at 3.
55. See McGanty v. Staudenraus, 901 P.2d 841, 846–47 (Or. 1995) (holding that since the plaintiff employee admitted that the supervisor had been acting within his scope of employment at all times, the plaintiff had no claim for intentional interference with economic relations); Pirruccello, supra note 10, at 210 (citing George A. Fuller Co. v. Chi. Coll. of Osteopathic Med., 719 F.2d 1326, 1332–33 (7th Cir. 1983) (analyzing the necessary elements of malice and third-party status in a tortious interference case)); see also Christopher v. Stouder Mem’l Hosp., 936 F.2d 870, 875 (6th Cir. 1991) (proposing that the defendant may be liable if he significantly affects access of any individual to employment opportunities); Lyons v. Midwest Glazing, 265 F. Supp. 2d 1061, 1075 (N.D. Iowa 2003) (holding that tortious interference requires intent, knowledge of an existing relationship, causation, and damages).
56. See Pirruccello, supra note 10, at 195 (explaining that contingent employees may establish themselves as direct employees of a third party, typically a staffing agency, and allege that the defendant employer discriminatorily and harmfully interfered with the employment relationship).
57. See Sibley Mem’l Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (holding that the liability of an employer who affects the employee of another entity may depend on surrounding circumstances); Med. Indus. Inc. v. Maersk Med. Ltd., 230 F. Supp. 2d 857, 873–74 (N.D. Ill. 2002) (holding that a defendant interfered with the plaintiff’s prospective economic relationship with a generically-defined third party is sufficient to survive a motion to dismiss when plaintiffs alleged that it had a reasonable expectation of entering into valid business relationships with thousands of customers).
58. See O’Gorman, supra note 2, at 441 (“The Commission does not disclose the basis for its conclusion that a staffing firm must take corrective action when it has reason to know a client terminated an employee’s assignment for an unlawful reason.”).
Under federal anti-discrimination statutes, injured parties may establish a cause of action against employers who discriminate and quasi-discriminate. Some states have enacted legislation prohibiting unemployment discrimination and statutes against aiding and abetting discrimination.

1. **Disparate Impact Theory under Title VII**

Title VII explicitly forbids discrimination against individuals based on race, sex, religion, national origin, physical disability, and age. Even though not all forms of discrimination are in themselves illegal, a cause of action may arise if a quasi-discriminatory practice adversely affects protected groups. It remains unclear whether client companies could be held liable in cases where staffing firms independently use such quasi-discriminatory practices.

2. **Provisions of the ADA Provide Liability for Clients who Maintain a Contractual Relationship With Discriminatory Employment Agencies**

In cases arising out of disability discrimination, an employer may face liability regardless of the source of the discrimination. Furthermore, a company who is neither an employer nor a prospective employer of a discriminated party may still qualify as a "covered entity" under the ADA if, for instance, the company maintains a contractual relationship with a

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62. See, e.g., Donna Ballman, 8 Ways Employers Can Discriminate Against Workers—Legally, AOL Jobs (Nov. 19, 2012), http://jobs.aol.com/articles/2012/11/19/8-ways-employers-can-discriminate-against-workers-legally/ (explaining that an employer can legally refuse to hire a person due to bad credit and physical appearance); see also Bassett, supra note 29 (illustrating that, though prohibited in a small number of states, there is no federal law prohibiting unemployment discrimination).
64. See EEOC v. Olsten Staffing Servs. Corp., 657 F. Supp. 2d 1029, 1036 (W.D. Wis. 2009) (holding that an employer has a duty to protect its employees from discrimination by its clients, whether it comes from an employee, independent contractor, or even a customer).
65. 42 U.S.C. § 12112 (defining a "covered entity" as an employer, employment agency, labor organization, or joint labor-management committee).
discriminatory staffing agency. The ADA provides that both a staffing firm and its client can be held liable if either one knows, or should have known, that the other discriminates against the agency’s workers but fails to take appropriate measures.

The EEOC has provided an explicit corresponding instruction in its ADA Guidelines for client company liability in situations where staffing firms fail to provide reasonable accommodations to the disabled during the hiring process. However, the Commission has not yet provided a similar guideline for other anti-discrimination statutes, although it has on occasion alluded to such standards.

3. State Statutes on Aiding and Abetting Discrimination Legislation

A state’s statute on aiding and abetting of discrimination may also expose client companies to liability. For instance, West Virginia’s Human Rights statute might lend support to claims implicating clients who continue a relationship with a discriminatory staffing agency. A number of other states’ human rights statutes include similar aiding-and-abetting provisions. It is not clear, however, whether mere knowledge and inaction, such as maintaining a contractual relationship with a discriminatory staffing agency, is sufficient to find liability under the statutes.

66. See id.; Olsten Staffing Servs. Corp., 657 F. Supp. 2d at 1032–33 (carving out liability for participating in a contractual or other arrangement or relationship, including a relationship with an employment or referral agency, that has the effect of subjecting a qualified applicant or employee with a disability to discrimination).

67. See 42 U.S.C. § 12112(b)(2); see also Olsten Staffing Servs. Corp., 657 F. Supp. 2d at 1032 (mentioning that employment agencies can be held accountable for discrimination even if they do not have unilateral authority to place or reject an applicant).

68. See, e.g., Mendez, supra note 13 (suggesting that BP avoided liability for discriminatory hiring decisions of staffing firms hired by BP’s contractors by voluntarily entering into a settlement agreement).

69. See, e.g., CONN. GEN. STAT. § 46a–60(a)(5) (2011) (prohibiting any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any act declared to be a discriminatory employment practice or to attempt to do so); W. Va. CODE § 5-11-9(7) (1994) (making it illegal to aid or abet another in engaging in unlawful discriminatory practices).

70. See Holstein v. Norandex, Inc., 461 S.E.2d. 473, 478 (W. Va. 1995) (holding that a plaintiff may bring action not only against supervisors but also against another employee for aiding or abetting an employer engaging in unlawful discrimination practices).

71. See, e.g., CONN. GEN. STAT. § 46a–60(a)(5); N.D. CENT. CODE § 14-02.4-18 (1995); N.Y. EXEC. LAW § 296(6) (McKinney 2010).

72. See, e.g., Merinar, supra note 3, at 2 (claiming that neither West Virginia courts nor the Supreme Court have ruled on the matter).
4. States' Unemployment Discrimination Legislation

In response to increasing allegations of discrimination based on unemployment status, a number of districts, cities, and states have enacted legislation to prevent such practices. In March 2012, for instance, the District of Columbia enacted the Unemployed Anti-Discrimination Act of 2012.73 Similarly, a number of other jurisdictions have enacted regulations to protect unemployed job applicants.74

II. Effects of Staffing Firms' Discrimination on Protected Groups and the Chaos of Liability

The increasing reliance on staffing firms in the wake of a changing job market75 increasingly complicates employer-employee relationships.76 Even though employment laws cover most individuals who are deemed employees, issues have arisen in situations where the employer-employment relationship is not so clearly defined.77 Furthermore, there is no consistent principle justifying a finding of liability under either the statute or the common law.78

73. See D.C. CODE § 32-1362 (2012) (prohibiting employers and employment agencies from discriminating against applicants because they are unemployed); see also Birk, supra note 14 (noting that New Jersey passed a similar law, which took effect in 2011, prohibited unemployment discrimination in job advertisements).

74. See Birk, supra note 14 (demonstrating that Connecticut, Florida, Illinois, Michigan, New York, and Oregon have enacted such legislation).

75. New information technology has narrowed the importance of employees' specialized skills, whereas companies' flexibility and ability to respond to the changing dictates and demands of the marketplace has become increasingly important. See KENNETH G. DAU-SCHMIDT, ROBERT N. COVINGTON & MATTHEW W. FINKIN, LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 46-52 (4th ed. 2010) (citing Kenneth G. Dau-Schmidt, Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law, 76 IND. L.J. 1, 10-14, 52 (2001)) (arguing further that the focus on reorganizing firms in leaner ways that are internally more subject to the machinations of the market makes large and costly human resource departments less desirable).

76. See Mark Crandley, Note, The Failure of the Integrated Enterprise Test: Why Courts Need to Find New Answers to the Multiple-Employer Puzzle in Federal Discrimination Cases, 75 IND. L.J. 1041, 1041 (2000) (observing that the increase in independent and temporary work, smaller technology-based firms, and new corporate forms, have permanently altered the world of work); cf. DAU-SCHMIDT, COVINGTON & FINKIN, supra note 75, at 45, 50 (describing employer/contractor distinctions as being drawn more woodenly in U.S. courts than in other countries, even though Dau-Schmidt suggests that employment relationships be adaptable to the changes in our economy).

77. See Pirruccello, supra note 10, at 192 (acknowledging that commentators have criticized the general failure of labor and employment laws to protect the contingent workforce).

78. See Brishen Rogers, Toward Third-Party Liability for Wage Theft, 31 BERKELEY J. EMP. & LAB. L. 1, 17 (2010) (arguing that two or more contractual intermediaries often stand between unskilled workers and the companies for whom
While the EEOC does not have legislative powers, it does have the authority to interpret anti-discrimination legislation. Courts have generally accepted these interpretations. Particularly in the absence of statutorily defined employee-like entities, the EEOC's Guidelines are an arguably useful resource to client companies because they illustrate the scope of employer liability.

A. Inconsistency in Federal Statutes

Thus far, Congress has failed to establish whether a constructive knowledge standard applies to clients who engage staffing firms when they hire new workers. Furthermore, it fails to establish whether the ADA's duties not to enter into contractual relationships resulting in discrimination apply to both staffing firms and client companies or whether they apply only in the context of disability-related discrimination. Because of the uncertainty this creates, Congress should consider clarifying the scope of this liability or adopting a duty-based approach to create more uniformity in this area of law.

1. Issues with Definitions

Even though the threshold question to finding employer liability asks whether or not the defendant qualifies as an employer, certain situations may also permit liability for non-employers. Although such non-employer liability should rest on an independent duty, much of the analysis provided by the courts and the EEOC guidelines derives the liability from they ultimately perform work, emphasizing that "[t]hey are not 'employed' in any legal sense by those companies, frequently rendering them 'beyond the grasp or reach of employment law'.")

79. See About EEOC: Overview, supra note 19 (explaining the EEOC’s authority and role).

80. See, e.g., Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63 (1986) (affirming the lower court's decision to consider the supervisor an employer—which relied chiefly on Title VII’s definition of employer and on EEOC Guidelines).

81. See Rubinstein, supra note 15, at 629 & nn.127-28 (citing DAU-SCHMIDT, COVINGTON & FINKIN, supra note 75, at 45) (observing that some countries, such as Germany, have developed intermediate categories such as “parasubordinated” persons to cover employee-like persons in an effort to respond to the problem of defining employee status).

82. See Vinson, 477 U.S. at 63 (supporting the notion that client companies take the guidance seriously because the Supreme Court has relied heavily on the EEOC Guidelines in certain cases).

83. See, e.g., Neal v. Manpower Int'l Inc., No. 3:00-CV-277/LAC, 2001 WL 1923127, at *8 (N.D. Fla. Sept. 17, 2001) (holding that an employer can be liable for harassment by a non-employee only if the employer knew or should have known of the harassment).
employer status. However, this approach fails to explore the duties of third parties or non-employers who play a role in the hiring process, a question which has received varying treatment across jurisdictions. The courts’ disparate treatment in attempting to assign non-employer liability demonstrates a need for introducing a new classification of “quasi-employment” relationships, rather than applying existing statutory provisions to non-employers according to differing standards of employment characteristics. It is important that legislative changes include a clarification of the duties and responsibilities for “employer-like” persons and the principles shaping these duties.

2. Differing Principles Underlying Title VII and the ADA

Title VII’s statutory character aims to achieve a national policy of nondiscrimination, which inherently requires a uniform body of law that clearly identifies the scope of obligations and responsibilities of companies

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84. See Rubinstein, supra note 15, at 606 (shedding light on the “state of disarray” in the law “with regard to the definition of employee [and employer] . . . .”).

85. See, e.g., Carparts Distrib. Ctr. Inc. v. Auto. Wholesaler’s Ass’n of New England Inc., 37 F.3d 12, 17 (1st Cir. 1994) (prohibiting holding an individual employee liable for violating a provision which, by its terms, restricts liability to employers but allowing it under provisions that specifically refer to persons in addition to employers, arguing that the statute intended it to apply to individuals other than employers). But cf. Johnson v. BE & K Constr. Co., 593 F. Supp. 2d 1044, 1050 (S.D. Iowa 2009) (implying that non-employer third parties may be held liable under certain circumstances and that, although the defendant alleged that it was merely a customer, the court allowed the inference that the defendant could still have supervisory authority over plaintiff’s employment).

86. See, e.g., EEOC v. Olsten Staffing Servs. Corp., 657 F. Supp. 2d 1029, 1033 (W.D. Wis. 2009) (noting that, as an employer, a staffing firm has a duty to protect its employees, regardless of the source); see also Rubinstein, supra note 15, at 657 (pointing out that the modern landscape of hiring procedures and employer-employee relationships calls for a major “overhaul” in anti-discrimination legislation and that much of the inconsistency surrounding employer liability arises from the struggle to arrive at a common definition for employer); cf. United States ex rel. Morgan v. Sci. Applications Int’l Co., 604 F. Supp. 2d 245, 250 (D.D.C. 2009) (arguing that if Congress had wanted to extend liability to non-employers, it would have done so by using the words “any person,” but it merely used the words “any employee, contractor, or agent”). But see Leu v. Embraer Aircraft Maint. Servs., No. 3:10-0322, 2010 WL 1753616, at *3 (M.D. Tenn. Apr. 30, 2010) (noting that courts have recognized the theory of holding non-employers liable for third-party interference with employment contracts under Title VII).

87. See Rubinstein, supra note 15, at 629 (indicating that a consistent definition would be desirable); see also Esther Torres, The Spanish Law on Dependent Self-Employed Workers: A New Evolution in Labor Law, 31 COMP. LAB. L. & POL’Y J. 231, 234 (2010) (observing that Spain and other EU Member States have expanded the borders of traditional employment to new parameters, based on three elements: dependency, alienation from risks and benefits, and economic remuneration).
who wish to hire workers through staffing firms.\textsuperscript{88} Such uniformity can only be achieved if the courts adopt or develop a consistent theory of liability for client companies or if Congress passes legislation that establishes the liability-parameters for staffing agencies, their clients, and the workers involved.\textsuperscript{89}

While the ADA establishes that a contractual relationship between clients and staffing firms can result in liability,\textsuperscript{90} Title VII remains silent on whether a similar standard applies to other types of discrimination as well.\textsuperscript{91} It would be helpful for Congress to clarify whether the duties of the ADA standard arise specifically from a duty owed to persons with disabilities, because if it applied to all forms of discrimination, employers should be aware of such heightened duty.\textsuperscript{92} The EEOC seems to believe that such a duty exists.\textsuperscript{93} If we are to follow the EEOC's position, Congress should explain the basis of the non-employer duty owed to affected parties, and amend Title VII to include a provision similar to that of the ADA in order to ensure that the common law remains consistent with the statutory purpose of anti-discrimination legislation.\textsuperscript{94}

\begin{itemize}
  \item \textsuperscript{88} Cf. McAdoo v. Toll, 591 F. Supp. 1399, 1406 (D. Md. 1984) ("An individual occupying a supervisory position could be held liable for the acts of his underlings when the employer of both can also be held liable, even where the supervisor has no personal involvement . . . because placing an affirmative [implying consistent] duty to prevent discriminatory acts on those who are charged with employment decisions appears to be consistent with the aims of Title VII.").
  \item \textsuperscript{89} Cf. DAU-SCHMIDT, COVINGTON & FINKIN, supra note 75, at 46–52 (suggesting that the expansion of employer parameters in foreign jurisdictions may legitimate a more flexible and statutorily-focused analysis by the legislature).
  \item \textsuperscript{90} 42 U.S.C. § 12112(b)(2) (2012) (stating that maintaining a contractual relationship with an employment or referral agency that has the effect of subjecting an otherwise qualified applicant to discrimination amounts to discrimination).
  \item \textsuperscript{91} See Kevin W. Williams, Note, The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed under Title VII in Disparate Treatment Cases to Claims Brought under Title I of the Americans with Disabilities Act, 18 BERKELEY J. EMP. & LAB. L. 98, 98–99 (1997) (arguing that employment discrimination under the ADA should sometimes be treated differently than discrimination under Title VII).
  \item \textsuperscript{92} See McAdoo, 591 F. Supp. at 1406 (calling for an affirmative duty on individuals who make employment decisions).
  \item \textsuperscript{93} See Mendez, supra note 13 (indicating that a company or its clients may be liable for the discriminatory hiring practices of its staffing agencies, because it treated BP as responsible for the discrimination committed by its contractors which is similar to the ADA standard of imposing a heightened duty on clients who maintain contractual relationships that result in discrimination).
  \item \textsuperscript{94} See O'Gorman, supra note 2, at 434–36 (indicating that there is not one single common law test but several, none of which are entirely consistent with the statutory purpose of Title VII); Rubinstein, supra note 15, at 627 (indicating that courts rely on common law tests as the default standard where Congress has not specified an appropriate standard).
\end{itemize}
Alternatively, if Congress explains that the ADA’s duty to refrain from entering into a contractual relationship that results in discrimination against applicants is disability-specific, the liability articulated by the EEOC on staffing firms and clients may be questioned. Because client companies frequently consider the Commission’s Guidelines and prefer settlements over in-court litigation, the EEOC’s statements likely affect the legal outcome of these employment discrimination matters. It is therefore important that, when the EEOC uses the opportunity to educate and inform companies of liability, this information has a solid basis in the law.

3. Inconsistent Application of the Statutes

The courts have not provided a coherent framework for determining whether client companies, who know or should know that a staffing firm discriminates, face liability if they enter into an agreement with that firm. In particular, they do not fully explain how they derive employer status from the tests used in non-traditional employment relationships. While the Supreme Court looks to control as the deciding factor in determining whether an employer-employee relationship exists, the ADA carves out potential liability for companies that do not have the authority to place or reject an applicant.

As with the rationale governing the joint employment standard, the Olsten court’s inclination to hold staffing companies and their clients liable seems to stem from the level of control that each party has over the hiring

95. See, e.g., O’Gorman, supra note 2, at 432 (making the argument that common law tests should not merely be transplanted into statute, which allows for the inference that if Title VII’s plain meaning actively excludes the ADA standard, the EEOC’s statements or courts simply applying the ADA standard to Title VII would be inappropriate).

96. See Ray v. Henderson, 217 F.3d 1234, 1242–43 (9th Cir. 2000) (demonstrating that, because the EEOC has the authority to interpret federal anti-discrimination laws, litigants frequently look to the EEOC Guidelines to assess where liability can be found).

97. See O’Gorman, supra note 2, at 458 (arguing that the EEOC standards are not supported by the statutes’ plain language).

98. See Rogers, supra note 78, at 22 (citing Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947)) (observing that the Court was not entirely clear why the factors it relied on—for instance, that the worker did a specialty job and that the work took place on the company’s premise—established an employment relationship).

99. See Greene & O’Brien, supra note 51, at 798 (stating that, in filling the gaps of the sparse statutory language, the Court held that an individual’s employment status depends on whether he has control within the organization).

100. See EEOC v. Olsten Staffing Servs. Corp., 657 F. Supp. 2d 1029, 1038 (W.D. Wis. 2009) (reasoning that the inclusion of employment agencies in the ADA inherently accepts that an agency can be held liable even in absence of authority to reject an applicant).
process.\textsuperscript{101} It follows that, by maintaining such a relationship with a discriminatory staffing agency, the client's omissions facilitate the discrimination.\textsuperscript{102} If companies seeking to hire new workers have a duty not to facilitate discrimination and to have reasonable knowledge of discrimination that occurs in the hiring and recruitment process, then such duties should apply to Title VII discrimination as well, rather than merely being inferred by EEOC statements.\textsuperscript{103}

In applying the ADA, the Seventh Circuit suggests that the duty to protect workers from discrimination arises from a company's status as an employer.\textsuperscript{104} At the same time, the court suggests imposing a duty on non-employers to refrain from engaging in agreements that negatively impact the employment opportunities of jobseekers.\textsuperscript{105} This is problematic because the court freely assigns a duty that arises from employer status to non-employers. If there is, in fact, a similar duty for non-employers in these cases, this duty must find its basis in something other than employer status.\textsuperscript{106}

\section*{B. Inconsistency of Legal Principles Call for Congressional Clarification}

Certain common law rationales and statutes, prohibiting unemployment discrimination while imposing aid-and-abet liability, provide support for a client company's duty to avoid contractual relationships with staffing firms if they know or should know that such firms discriminate. However,

\begin{footnotesize}
\begin{enumerate}
\item See Greene & O'Brien, \textit{supra} note 51, at 780 (specifying that control is a decisive factor among the six-factor approach); see also \textit{Olsten Staffing Servs. Corp.}, 657 F. Supp. 2d at 1038 (emphasizing that, where a client contracts to receive workers through a staffing agency, the client exercises a significant amount of control over the individuals who ultimately get hired).
\item The court reasoned that, if the specialist truly believed that the client would not hire the plaintiff because he could not hear the forklift, then her attempt to place the plaintiff at another job would be an accommodation of a discriminatory attitude rather than of the plaintiff's disability. \textit{See Olsten Staffing Servs. Corp.}, 657 F. Supp. 2d at 1038.
\item See \textit{White, supra} note 20, at 74 (stating that the EEOC Guidelines are not enforceable rules of law but should nonetheless be followed, particularly in cases of ambiguity).
\item See \textit{Olsten Staffing Servs. Corp.}, 657 F. Supp. 2d at 1036 (emphasis added) ("As Schaefer's employer, Olsten had a duty under the ADA to protect Schaefer from discrimination by its clients.").
\item See \textit{id.} at 1035 (emphasis added) ("[I]n a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant.").
\item See, e.g., \textit{Miller v. Maxwell's Int'l Inc.}, 991 F.2d 583, 587 (9th Cir. 1993) (concluding that the obvious purpose of including an agent provision is to incorporate respondeat superior liability into the statute, which could provide a rationale for holding a client company liable for torts arising from the company's business).
\end{enumerate}
\end{footnotesize}
because these areas provide only bits and pieces, rather than articulating a consistent principle for finding this duty, Congress should provide clear guidance on the matter.

I. Chaos in the Common Law

Because the plain language of Title VII concerns intentional discrimination, an argument supporting vicarious liability for non-employers must support the statute’s purpose. Beyond the inconsistencies between the ADA and Title VII, the common law tests for determining liability for staffing firms and client companies further illustrate the need for Congress to identify governing principles for non-employer liability. However, it is important not to simply dismiss these tests, as they could provide some helpful rationales to piece together an employer-like duty.

a. Aid and Abet Liability

While one commentator argues that the standards issued by the EEOC are not firmly grounded in the common law, another source suggests that a proper rationale may be found in state legislation on aiding and abetting discrimination for holding non-employers liable for discriminatory hiring practices. Such legislation, however, does not specify whether an employer has a duty to take reasonable measures to find out whether discrimination has occurred. Furthermore, there is no uniformity as to whether mere inaction is sufficient to find liability under such statutes, resulting in an inconsistent application of the law.

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107. See O’Gorman, supra note 2, at 436, 457 (noting that statutes only allow for liability when an employer or its agent engaged in intentional discrimination).

108. See id. at 464–65, 467–68 (arguing that acceptance of the “knows-or-should-have-known” standard for holding staffing firms liable for client discrimination is a form of vicarious liability, the rationale of which, is not applicable to these cases, as the client will already absorb and distribute the costs and instances of discrimination have not been deemed a risk of doing business).

109. See Merinar, supra note 3, at 2 (suggesting that West Virginia’s Human Rights statute may be used to impose liability on a client who maintains a contractual relationship with a discriminatory staffing firm).

110. Cf. McGill v. Duckworth, 944 F.2d 344, 351 (7th Cir. 1991) (“Going out of your way to avoid acquiring unwelcome knowledge is a species of intent.”).

b. Joint Employers and the Control Factor

Within the joint employment relationship standard, the extent to control the means and manner of the worker is considered the overriding factor for finding joint employment status. Even though the joint employer standard does not fully explain the rationale for holding non-employers liable, it may provide a reason to examine more closely a client’s ability to prevent or remedy the discrimination in cases where staffing companies discriminate. However, tests for joint employer liability suggest that holding a party to the “knows-or-should-know” standard requires employer status, which the ADA does not appear to require. Joint employer liability therefore does not fully explain what duty, if any, a non-employer owes to applicants and workers.

c. Tortious Interference

While the test for tortious interference establishes a duty not to interfere with a party’s employment contract for a third party regardless of employment, this test can only justify holding a client company liable where it intentionally interfered with the worker’s and staffing firm’s agreement that no discrimination shall take place. While intent, knowledge of an existing relationship, and damages may be present where a client company continues to provide business to a staffing firm it knows to have discriminated against applicants, such a claim would likely fail on account of the missing causal relationship between the client company’s conduct and the rejection of the applicant by the staffing firm.

112. See Shah v. Littlefuse, Inc., No. 12 CV 6845, 2013 WL 1828926, at *6 (N.D. Ill. Apr. 29, 2013) (providing that a joint employer would be required to take appropriate action if it knows or should know that the staffing firm has discriminated against the workers in its assignment).

113. See Greene & O’Brien, supra note 51, at 780 (stressing the importance of control in finding joint employer status).

114. Cf. EEOC ENFORCEMENT GUIDANCE, supra note 4, at 28–29 (indicating that the right to control the worker creates joint liability, implying that client companies that have the ultimate decision-making power over who is hired may satisfy the control requirement with regard to hiring discrimination).

115. See Rubinstein, supra note 15, at 640 (explaining that “controlling employers” under the Occupational Safety Health Act qualify as quasi-employers because they do not directly employ the subcontractors, yet they are subject to regulation, which emphasizes the importance of control and regulation in assessing employer or employer-like status).

116. See Pirruccello, supra note 10, at 207 (noting that the interfering party must actually possess intent and mere negligent interference is not enough).

117. See, e.g., Lyons v. Midwest Glazing, 265 F. Supp. 2d 1061, 1075 (N.D. Iowa 2003) (holding that, although the employer lost some business since the employee’s dismissal, the employer’s claim of tortious interference failed on causation because it was not unusual that some customers felt loyal to the employee rather than the
Even though the common law tests point to certain duties for client companies and staffing agencies, courts lack a uniform principle to apply statutory anti-discrimination laws in a consistent way.

2. National Inconsistency in Addressing Unemployment Discrimination

Quasi-discriminatory practices, such as unemployment discrimination, further add to the problem of failing to consistently address employment discrimination because no federal law directly prohibits the practice. Nonetheless, due to recently enacted state legislation, quasi-discriminatory practices could result in additional claims that raise questions about client liability and might lead to even greater inconsistencies.

In areas where state statutes do not prohibit quasi-discrimination or do not provide private rights of action, persons affected may still be able to bring action under a disparate impact claim. Testimony provided by the National Women's Law Center and the Economic Policy Institute has acknowledged that unemployment discrimination may have a serious negative impact on women and people of color. In jurisdictions that

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company that employed him). *But cf.* Med. Indus. Inc. v. Maersk Med. Ltd., 230 F. Supp. 2d 857, 871 (N.D. Ill. 2002) (holding that a defendant interfered with the plaintiff's prospective economic relationship with a generically-defined third party is sufficient to survive a motion to dismiss where plaintiffs alleged that it had a reasonable expectation of entering into valid business relationships with thousands of customers).

118. See Ballman, *supra* note 62 (listing several ways in which an employer can legally discriminate against a worker).

119. See Birk, *supra* note 14 (illustrating that a number of states and municipalities have passed legislation that makes it illegal to discriminate against applicants based on their status as unemployed).


121. See Rutherglen, *supra* note 30, at 1297 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)) (explaining that a plaintiff has a reduced burden of proof, whereas a defendant has the burden of justifying employment practices with adverse impact).

122. See EEOC to Examine Treatment of Unemployed Job Seekers (2011) (written testimony of Fatima Goss Graves, Vice President for Education and Employment, National Women's Law Center) [hereinafter Graves Testimony], available at http://www1.eeoc.gov/eeoc/meetings/2-16-11/graves.cfm (citing Current Employment Statistics—CES (National), DEP'T OF LABOR (Feb. 5, 2010), http://b1s.gov/ces/cesstabs.htm); see also Bassett, *supra* note 29 (pointing out that the use of code-words to mask a discriminatory request is common practice among staffing
have declared the practice illegal, the number of discrimination claims against staffing firms and their clients will likely increase.123

3. Effects of "Quasi-Discrimination" on Protected Groups

A substantial number of articles shed light on the quasi-discriminatory practices that staffing firms use to discriminate against protected groups.124 Particularly, the discrimination against individuals who are unemployed has been a method openly used by staffing agencies.125

Several protected groups appear to be overrepresented in unemployment figures.126 As the Economic Policy Institute's cited figures and common sense indicate, because the "unemployed population is disproportionately made up of people of color," policies and advertisements that actively exclude unemployed applicants from the selection process will probably have an adverse effect on people of color.127

Furthermore, a report by the National Women's Law Center, discussing unemployment rates for women, contends that restricting applications from unemployed job seekers likely has an impact on women in nontraditional fields and within certain age groups where women experience higher unemployment than men.128
Because a finding of disparate impact does not require evidence of an employer's discriminatory intent or motivation, protected groups may still hold the employer liable under Title VII. If a staffing agency discriminates against the unemployed and this identified practice has a disparate impact on minority applicants, then unless the staffing firm could demonstrate that employment was a necessary criterion for the position sought, the complaining parties would be able to state a cause of action. This is important because disparate impact carves out a duty to refrain from unintentional discrimination, alluding to a negligence-like standard of liability under Title VII, which could help frame a proper duty for staffing firms and client companies.

The recent reports describing an overrepresentation of certain protected groups in unemployment figures encourage the EEOC to vigorously enforce Title VII in cases where facially neutral practices adversely impact protected groups. Therefore, even in jurisdictions where unemployment discrimination remains legal, the increased coverage and examination by the EEOC and several news sources will likely increase discrimination claims by affected workers and applicants against staffing firms and clients. This could lead client companies to become more concerned about their liability for engaging staffing firms who use these methods.

C. Client Companies Remain Uninformed About Their Liability for Discrimination by Staffing Firms

The inconsistencies and hazy standards that stretch from federal and state statutes across the common law, which subsequently find a home in the EEOC's administrative guidelines, serve as guide posts for companies


130. See id. (describing that a plaintiff's prima facie case of disparate impact shifts the burden to the employer to demonstrate that the challenged practice is job-related and consistent with business necessity).


132. See, e.g., Craig Johnson, EEOC Guidance Complicates Background Check Process, STAFFING INDUSTRY ANALYSTS (Apr. 10, 2013), http://www.staffingindustry.com/Research-Publications/Publications/CWS-3.0/April-2013/April-10-2013/EEOC-Guidance-Complicates-Background-Check-Process (reporting that Pepsi's criminal background check policy disproportionately excluded black applicants from permanent employment, according to the EEOC).

133. See Kami, supra note 123 (estimating that newly passed unemployment legislation will give millions of rejected applicants "a potential new weapon to wield against any company who chooses not to hire them").
who seek to educate themselves and their staff on hiring policies. These standards, however, are insufficient to provide client companies with the necessary framework to assess what duties they owe to prospective employees.

As a result, companies are left to speculate and provide settlements to escape legal action without firm knowledge of their duties under the law. The EEOC statements, the courts' interpretations of the ADA and Title VII, and the recent settlement agreement between BP and the EEOC carve out a duty for companies that includes accountability for facilitating discrimination through acts or omissions, regardless of their authority to place or reject an applicant. The statutory language does not, however, clearly warrant the inference of a duty for non-employers. Client companies can reasonably assume that their knowledge about receiving a non-diverse applicant pool due to a staffing firm’s discriminatory practice may expose them to litigation if they maintain a contractual relationship with the staffing firm. Nonetheless, the outcome of such litigation remains hazy. In light of recent legislation banning unemployment discrimination, clients will likely face the same issues of liability that arise in traditional employment discrimination litigation when maintaining a

134. See, e.g., Ingersoll, supra note 26, (referencing the EEOC Guidelines and providing updates on EEOC standards).

135. Cf. Noah D. Zatz, Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent, 109 COLUM. L. REV. 1357, 1360–62 (2009) (pointing out that a large and unanimous body of case law and administrative guidance holds employers liable for third-party harassment, and that Title VII is capable of covering such cases, despite the common belief that an employer’s duty to cover an employee’s limitations—regardless of the origin of discrimination—is instead covered by the ADA).

136. See Jennifer Cerven, Employers Should Use Care to Avoid Discrimination When Using Temporary Staffing Agencies, LEXOLOGY (Jul. 8, 2013), http://www.lexology.com/library/detail.aspx?g=c4f8975b-1e13-4933-9eda-4c126b0623b8 (advising that an employer may be held liable if the actions of a temporary staffing agency resulted in discrimination against an applicant).

137. See id. (discussing a settlement following allegations by a female applicant that the defendant’s temporary staffing firm discriminated against an applicant).

138. See 42 U.S.C. § 12112(b)(2) (2012) (allowing for liability in cases where employers participate in contractual relationships or arrangements that have the effect of discriminating against a disabled worker). But see id. (implying that a client company qualifies as an employer if it uses a temporary staffing agency to select applicants, even though it has not yet seemed to exercise control or supervisory authority over the applicant).

139. Cf. O’Gorman, supra note 2, at 441–42 (indicating that it remains unclear what legal standards provide the basis for the EEOC’s position on related issues of liability for staffing firms and clients).
relationship with employment agencies that refuse to hire or consider unemployed applicants.\textsuperscript{140}

1. \textit{Risk of Increased Discrimination Litigation Amplifies the Need for Clarification and Consistency}

While it may seem unlikely - without any prior indication by a client - that a staffing agency would preemptively discriminate against the workers it sends to the client company, sources have indicated that staffing firms are generally well aware of the preferences that its clients have when hiring new workers.\textsuperscript{141} It is therefore reasonable to assume that staffing firms carry such notions with them, even where no specific discriminatory request has been made.\textsuperscript{142} Additionally, the use of code words and other illusive ways a client may convey a certain preference can result in a claim against the staffing firm while the client escapes liability.\textsuperscript{143} Thus, the current body of law fails to provide consistent remedies for common forms of employment discrimination.

2. \textit{Lack of Uniformity and Awareness Leads to Speculation and Preemptive Payouts}

Client companies are ultimately left to speculate as to their responsibilities in cases where staffing firms discriminate due to the uncertainty about governing legal standards.\textsuperscript{144} As the BP settlement demonstrates, client companies agree to settle in response to discrimination allegations against their contractors with the EEOC, even if it was the staffing agency that made discriminatory hiring decisions.\textsuperscript{145} The settlement agreement between the EEOC and BP included a provision that

\begin{itemize}
  \item \textsuperscript{140} See Karni, \textit{supra} note 123 (emphasizing that unemployment legislation serves as a potential new weapon for millions of applicants against companies who chose not to hire them).
  \item \textsuperscript{141} See Bassett, \textit{supra} note 29 (reporting that an anonymous recruiter knows that when a company says "we want somebody with small hands" for an administrative position, it means they want an attractive woman).
  \item \textsuperscript{142} See, \textit{e.g.}, EEOC v. Olsten Staffing Servs. Corp., 657 F. Supp. 2d 1029, 1031 (W.D. Wis. 2009) (illustrating how a specialist at a staffing agency can pre-select in a discriminatory way based on her own assumptions about the client's preference).
  \item \textsuperscript{143} See Nelson, \textit{supra} note 129, at 452 (explaining how mouth recruitment in effect enlist existing employees to help screen new applicants conscientiously, which could lead to the inference that the screener would be the one to the discriminatory act, rather than the employer).
  \item \textsuperscript{144} See generally Baker & Daniels, \textit{When is an Employee not an Employee?}, 8.1 IND. EMP. L. LETTER 3 (1998) (applying a confused theory of liability, referring on one hand to an employer who may be powerless to stop the discrimination, but nonetheless sharing in control); see also Sriram, \textit{supra} note 120 (indicating that client companies are unsure but are encouraged to err on the side of caution).
  \item \textsuperscript{145} Mendez, \textit{supra} note 13.
\end{itemize}
BP would provide training to its administrators who plan to hire contractors.146 This supports an inference that the EEOC holds BP responsible for inadequate training of its administrators, allowing for the discriminatory practices by its contractors to continue.147 It is unclear what the required training for BP administrators will be, and whether it will include taking reasonable steps to uncover discriminatory hiring practices and taking appropriate action.

It is clear, however, that companies, when entering into agreements in an effort to avoid litigation and bad publicity, may rely heavily on the EEOC’s interpretations of liability that lack firm support in the law.148 As a result, in this case, the EEOC may have seized an opportunity to declare an assumed liability on part of BP, even though BP merely sought to avoid further bad publicity following the oil spill, and it is not clear that the matter would have survived in court.149 This suggests that the EEOC may in practice enforce a legal standard for client companies based primarily on the client’s good faith effort to avoid litigation, rather than on legal principles and duties embedded in the statute.

III. CLIENT LIABILITY SHOULD BE UNIFORMLY ADDRESSED IN CASES OF INDEPENDENT DISCRIMINATION BY STAFFING FIRMS

In light of the economic downturn, workers and the unemployed have become increasingly aware of discriminatory hiring practices, leading to a rise in claims against former or prospective employers.150 Furthermore,

146. See EEOC & BP Press Release, supra note 42.

147. See id. (reporting that the settlement agreement included contractual safeguards requiring contractors to abide by EEO laws and to offer training to BP administrators who engage contractors).


149. See generally Mendez, supra note 13 (reporting that resolving the matter outside of the court system reflects the EEOC’s view that contractors are required to comply with federal employment laws, that the employer is responsible for EEO compliance by the staffing agency, and that an organization cannot claim unawareness about a staffing agency’s violation of these laws as a defense).

client companies in jurisdictions that have adopted anti-unemployment discrimination legislation will likely encounter similar claims by unemployed applicants who experienced discrimination by a staffing agency, similar to claims brought under the ADA or Title VII.\footnote{Cf. Karni, supra note 123 (expecting the legislation banning unemployment discrimination to be a new source of litigation).} Meanwhile, these client companies will likely continue to settle claims to avoid costly and lengthy litigation for conventional discrimination by contractors or agencies without knowing how far their liability actually extends.\footnote{See FED. R. CIV. P. 68 advisory committee’s note (encouraging settlements and avoidance of protracted litigation); Bree Bernwanger, How Settlement is Hurting Us All, LIFE OF THE LAW (Sept. 21, 2013), http://www.lifeofthelaw.org/how-settlement-culture-is-hurting-us-all/ (discussing a recent case in which the National Football League sought to avoid potentially embarrassing litigation by reaching a tentative settlement in response to concussion-related allegations from former players and issuing a carefully-worded press release).}

If the ADA statute implies a pre-existing duty for non-employers to refrain from participating in relationships with employment agencies that have the effect of subjecting individuals to all types of discrimination, other anti-discrimination statutes should reflect this. More specifically, if the duty does not just apply to disability discrimination, such a duty should also be incorporated into Title VII, rather than leaving employers to fill in the gaps based on statements issued by the EEOC and other anti-discrimination statutes.\footnote{See Bernwanger, supra note 152 (arguing that even the most fairly bargained settlements come at the expense of failing to set legal precedent).} If duties were incorporated into the statute, employers would be clear on potential sources of liability and courts would be more consistent in applying the statute to employment discrimination cases.

Furthermore, to ensure greater consistency, statutory amendments should clarify the duties and principles for client companies who use staffing firms, rather than addressing the issues through the common law and EEOC interpretations.\footnote{ Cf. Dau-Schmidt, Covington & Finkin, supra note 75, at 45, 50 (providing the possibility of a statutorily-focused analysis by the legislature); Rubinstein, supra note 15, at 606.} The common law has filled in the gaps in the wake of increasingly complex issues of employer-employee relationships.\footnote{See Pirruccello, supra note 10, at 222–23; Rubinstein, supra note 15, at 653.} However, the case-by-case treatment has resulted in some confusion about the duties assigned to staffing firms and clients regarding both current and prospective employees.\footnote{Cf. Zatz, supra note 135 (making the argument that addressing employer liability...
In addition to the unconsolidated areas of employment discrimination concerning staffing agencies, quasi-discriminatory practices that result in disparate impact for minority applicants, such as unemployment discrimination, are receiving increasing attention. Experts recommend that the EEOC provide guidance on unemployment discrimination, which provides additional urgency to consolidate principles of employer liability because such new guidance will likely increase litigation against staffing firms who tend to use these methods.

The prospect of increased litigation coupled with the current lack of clarity in the law about client company liability calls for statutory clarification. If Congress includes a provision which specifies the principle or legal theory that supports one clear standard of liability, this would likely result in more consistency in the courts. Furthermore, companies can incorporate these principles into their employment manuals and newsletters, and combat discrimination through preventative measures rather than in the courts or settlement agreements.

A clear principle justifying the issues of non-employer liability has become particularly important because employment relationships have become increasingly complex. In the wake of a dramatic change in the workforce, it is particularly important for businesses that use staffing

responsibility apart from a causal analysis using two different theories can establish employer responsibility, but merely does so in different ways).


159. Cf. Rogers, supra note 78, at 49 (arguing that a duty-based regime would lead more companies to invest in monitoring and deterrence efforts).

160. See id. at 39 (mentioning that scholars have therefore often endorsed duty-based regimes allowing mitigation of damages for good-faith preventative measures); see, e.g., Cerven, supra note 136 (illustrating that the company preferred a settlement over continuing to litigate a gender discrimination case that arose from the actions taken by the company’s temporary staffing agency).

161. Cf. Your Legal Obligation to Temporary Agency Workers, supra note 1 (emphasizing that clients must know of their obligations when utilizing staffing agencies).

162. See Rogers, supra note 78, at 17 (stating that even leading global firms are now subcontracting and outsourcing extensively, handling only essential functions in-house, and have cut back on long-term employment relationships).
firms to hire workers that know of the obligations and risks that arise from this relationship. If client liability for staffing firm discrimination, as provided by the ADA, rests on a duty for businesses that know or should know of a staffing firm’s discrimination to prevent discrimination that arises from a contractual relationship with such a firm, Congress should affirm that this duty applies.

Such a duty would definitively open up a liability to which the EEOC has thus far only alluded: a liability for non-employers who facilitate or fail to prevent discrimination when engaging staffing firms to hire their workers. Articulating the broader principles for finding liability in unconventional employer-employee relationships will ensure more consistency in judicial interpretations, cause less confusion among employers who utilize staffing firms, and encourage preventative measures throughout the hiring process in place of costly litigation.

CONCLUSION

Because the principles underlying EEOC Guidelines, ADA duties, and common law interpretations are not firmly rooted in Title VII’s plain meaning, companies are uncertain as to how far their liability extends in cases involving discrimination against protected groups and groups that are protected by state laws. To adapt the statute to the modern workforce and to ensure greater consistency and transparency of the legal standards governing litigation in this area, Congress should amend Title VII and address the duties staffing companies and their clients have to employees and non-employees.

163. See Baker & Daniels, supra note 144 (warning that many clients of staffing firms make expensive mistakes by remaining uninformed about EEO obligations).

164. Cf. O’Gorman, supra note 2, at 437 (eluding to a duty-based approach by describing co-worker harassment liability, and illustrating that prompt remedial action can deter future wrongdoing by sending the message that the employer does not tolerate harassment, and that this can be considered a limitation on liability that promotes the statutes’ purposes).

165. Cf. id. (arguing that it is problematic that the EEOC does not disclose the basis for its conclusion).

166. Cf. Rubinstein, supra note 15, at 657–58 (concluding that third-party liability has articulated an employer-like duty on those who assume an important responsibility that effects the terms and conditions of workers).