Duck Dynasty – Did A & E Network Violate Title VII?

Although commentators talk about free speech, gay rights and religious freedom given A&E's suspension of Duck Dynasty patriarch Phil Robertson, perhaps the real question is – were Title VII rights violated? News media reports state that, during an interview with GQ magazine, Phil was questioned about his religious beliefs with respect to sin. Phil genuinely expressed his biblically based beliefs which included criticism of the gay lifestyle, among others. After allegedly receiving push-back from gay rights organizations, the network "suspended" Phil. After receiving counter push-back from religious organizations and others the network recently lifted the "suspension."

I have watched and listened to a number of talking heads discussing this issue. All the talk seems to revolve around the First Amendment which clearly does not apply -- this was not a "state" action. Interestingly, I have not heard any mention of Title VII at all. This caused me to wonder: Did I have something funny in my eggnog or is there really a rational basis for this argument?

Does Phil have a case? After all, who doesn't love an underdog -- especially one who gets bullied because he expresses his religious beliefs outside the workplace. Ultimately, from Phil's perspective, he really is just a messenger. It is the actual biblical message and Phil's religious beliefs that offends those at A & E.

Now, with the "suspension" lifted the question has become an academic one. Neither Phil nor his family members have suffered any economic losses resulting from the suspension. Future episodes had already been prepared and new taping was not expected to take place until March. Conspiracy theorists will note that the "suspension" didn't really suspend anything. Realists will say, "Follow the money." Early reports suggest viewership of the program has increased exponentially benefiting both the Robertson family and the network.

Assuming, for the sake of the argument, that the "suspension" had not been lifted, and the Robertson family actually suffered lost income as a result, this case would be worthy of rolling the legal dice. Ultimately, the goal is to clear any pre-trial motions such as summary judgment and get this case before a jury of your peers. Before a jury Phil's chances of success would be quite high. Trust me, A & E will not want to go there – and didn't.

Title VII (42 U.S.C. § 2000e et seq.) prohibits ***employers*** from discriminating against "any ***individual*** with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, ***religion***, sex, or national origin." (Emphasis added).

The first question presented is the most problematic one: Is the A & E network an "employer" and is Phil a qualified "individual" covered by this statute?

Without question A & E employs fifteen or individuals and falls within the statute's jurisdictional basis from that perspective. While this is somewhat helpful to Phil the analysis continues. A & E would vehemently argue (because the rest of their defense arguments will be woefully pitiful) that their relationship with Phil and the rest of the cast is one of an independent

contractor, not employer/employee. There is an abundance of cases and arguments in their favor.

I am reluctant to say there must be an "employer/employee" relationship because this is not what the statute says. It says "individual." This is intended to present an expanded view to include those seeking employment, those that have left employment, and others contemplated by the statute. In other words – maybe persons like Phil.

So, where did this defense of "independent contractor" come from? It is not in the statute. So, what happens when the legislature passes statutes with such vagaries? It is left to the courts to sort who qualifies and who does not. The courts are required to analyze the statute to divine the legislative "intent" without a definition of a qualifying "individual." In the legal analysis the courts do note that Congress did provide us with a definition of "employee." Here it is, brace yourself: *(f) The term "employee" means an individual employed by an employer, except . . .".* (Note: the exceptions do not apply here).

Therefore, many courts in the many jurisdictions were left to their own devises to interpret this statutory scheme. Frankly, the decisions varied greatly as to who is "in" and who is "out". Ultimately the Supreme Court provided some guidance in the case of ***Nationwide Mutual Insurance Co. v. Darden,*** 503 U.S. 318 (1992). This was an ERISA case using the same circular definition of "employee." The thinking is that the definition the Supreme Court utilized to break the circle in ***Darden*** would be equally applicable to Title VII.

Ultimately the Supreme Court decided to apply the common law agency test. This means the courts would look towards the means of control of the work and the manner of work. This includes an examination of:

- The skills required to perform the tasks
- Who is providing the instrumentalities and the tools
- Duration of the relationship between the parties
- Whether the hiring party has the right to assign additional duties
- The extent of the hired party's discretion as to when and how long to work
- Method of payment
- The hiring party's role in hiring and paying assistants
- Whether the work is part of the regular business of the hiring party
- The provision or absence of employee benefits
- The tax treatment of the hired party and what is reflected in any written agreements

I can make some good arguments based on the foregoing guidance but let's examine another court decision which may be helpful. The case of ***Alberty-Velez v. Corporacion De Puerto Rico para la Difusion Publica***, 361 F.3d 1 (1st Cir. 2004), is entertaining. This involved a television talk show host who brought an action under Title VII. The court concluded the host was an independent contractor not covered by the statute because:

- She was a trained actress whose skills and talent were developed before her relationship with the T.V. station;

- She provided her own tools in her wardrobe, jewelry, etc.
- She had a separate contract for each episode
- She was paid a lump sum per episode
- She received no insurance or other benefits
- The pay was income for professional services

The court reached this conclusion even though:

- She was economically dependent upon the station
- The station did determine where the filming would take place
- The station did direct the show
- The station produced the show

This talk show host case is easily distinguished from Phil's situation. Duck Dynasty is a reality show. Phil and the family cast members are ***not*** professional actors and actresses. That is not how they make their living. But the differences do not stop there. A & E took manner of control to an all new level – disciplining and/or bullying Phil for faith based comments made outside the workplace. Comments clearly contemplated by section 2000e, subsection (j):

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The more control A & E exerts the greater the likelihood a court will conclude A & E was acting as an employer rather than a contractor. Someday A & E may suspend Phil "for real" under similar circumstances. When that day comes we may see the reality of Title VII play out.

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