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## Suing the Government as a 'Joint Employer' - Evolving Pathologies of the Blended Workforce

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# THE GOVERNMENT CONTRACTOR<sup>®</sup>

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### FEATURE COMMENT: Suing The Government As A 'Joint Employer'—Evolving Pathologies Of The Blended Workforce

The contemporary Federal Government's nature, as a hollowed-out, insatiable consumer of services, is increasingly well documented. Many of the public policy and economic risks associated with this phenomenon have been acknowledged, but not all of the pathologies an outsourced Government breeds are fully understood.

As the "blended workforce"—a realm in which contractors work alongside, and often are indistinguishable from, their Government counterparts—becomes more commonplace, the distinction between civil servants, members of the military and contractor employees increasingly blurs. Indeed, as agencies routinely rely on service contracts—or, more specifically, employee augmentation agreements—to supplement their depleted Government staffs, the long-standing statutory/regulatory prohibition against personal service contracts is increasingly perceived as a dead letter.

Alas, the Government's experience and sophistication in managing and supervising the blended workforce lags its growth. One intriguing (and, apparently, accelerating), yet little-known trend is that contractor employees are more frequently suing the Government, alleging employment discrimination on the part of Government managers, supervisors or even coworkers. That seems like quite a wrench to throw into the contractual relationship.

**How Did We Get To This Point?**—If the idea of contractor employees suing Government supervisors sounds unnatural to you, you are not alone.

Indeed, to many familiar with the traditional relationship between a Government customer and its contractor, it is surprising that these suits even exist.

Title VII of the Civil Rights Act of 1964 prohibits—and provides remedies for individuals subjected to—employment discrimination. See 42 USCA §§ 2000e to e-17 (2006). Title VII's reach is broad, making it illegal for employers to discriminate on the basis of "race, color, religion, sex, national origin, age, disability, or genetic information," or to retaliate against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices. 29 CFR § 1614.101 (2010). Discrimination is defined as denying any of these suspect groups "the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants." 29 CFR § 1607.11 (2010). For the purposes of Title VII, disparate treatment can occur in any aspect of employment, including, among other things: hiring and firing, assignment or transfer of employees, or other terms and conditions of employment. Indeed, the last category proves the most flexible in practice.

Of course, no one sues the Federal Government without its permission. Sovereign immunity is a well established principle in this country. Accordingly, when Congress amended Title VII, in 1972, to protect federal employees, see 42 USCA § 2000e-16 (2006), it extended the Federal Government's liability to only "those individuals in a direct employment relationship with a government employer." *Spirides v. Reinhardt*, 613 F.2d 826, 829 (D.C. Cir. 1979). At the time, Congress never contemplated that contractor personnel might exploit these protections against Government supervisors. Indeed, the civil service laws specifically require that all federal employees be "appointed in the civil service." 5 USCA § 2105(a) (2006). And it is pretty clear that contractor personnel, by definition, are not appointed to the civil service.

More than 30 years ago, however, the U.S. Court of Appeals for the District of Columbia Circuit expanded Title VII's waiver of sovereign immunity and enabled certain contractor personnel, in unique

circumstances, to sue the Government for employment discrimination. In *Spirides*, a female foreign language broadcaster, working as an independent contractor for the U.S. International Communication Agency (USICA), sued it for sex discrimination. The court held that it was improper to apply the narrow 5 USCA § 2105(a) definition of “federal employee” to Title VII cases, because § 2105(a) applies only to the civil service laws. In a moment of prescience, the court clarified that Title VII should be liberally construed because it is remedial in character. Specifically, the court explained that “[u]se of the restrictive civil service definition ... would not effectuate the broad remedial purposes of the Act, and would therefore be inappropriate.” *Spirides*, 613 F.2d at 831.

Instead, the court defined employee by applying “general principles of the law of agency to [the] undisputed or established facts” of the case. *Id.* This approach requires an examination of all aspects of the relationship between the individual and the alleged employer to determine if an employment relationship exists. While no single factor is determinative, the most important element is the extent to which the employer has the right to control the means and manner of the individual’s work performance. “If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist.” *Id.* at 831–32.

**Explosion of Service Contracts**—At the time, this had little effect on the relationship between the Federal Government and its contractors. The situation in *Spirides* was unique; USICA had authority under 22 USCA § 1471(5) (1970) to hire foreign language broadcasters “without regard to the civil service and classification laws.” Most federal agencies had not yet employed large cadres of contractor personnel to augment, and often work alongside, civil servants. The prohibition on personal service contracting was still respected, and federal agencies were cognizant of the need to avoid situations that created employment-type relationships with contractors.

By the 1990s, however, in the name of “new public management,” the Clinton administration aggressively turned to the private sector as it trumpeted a massive Government downsizing initiative. Clinton-era budgets suggested that they represented the smallest Government since the Kennedy administration. Federal employee rolls (and, particularly, members of the

acquisition workforce) were reduced out of a political desire to “end the era of big Government.” According to Paul Light, over 418,000 federal civil servant jobs were cut as part of this effort between 1990 and 2002. Light, Fact Sheet on the New True Size of Government 5 (2003), available at [www.brookings.edu/~/media/Files/rc/articles/2003/0905politics\\_light/light20030905.pdf](http://www.brookings.edu/~/media/Files/rc/articles/2003/0905politics_light/light20030905.pdf); see also Light, “Outsourcing and the True Size of Government,” 33 Pub. Cont. L.J. 311 (2004). The second Bush administration continued this bipartisan trend. Now, two decades later, federal agencies find themselves, in reality, left with little more than a skeletal workforce that lacks the in-house personnel resources to sufficiently achieve their mandates and perform the Government’s broad range of duties and responsibilities.

To cope with this situation, the Federal Government had no choice but to outsource functions to contractors. Agencies dramatically increased their use of service, and particularly employee-augmentation, contracts. One estimate suggests that more than one-third of a million *service* contractor jobs were created between 1990 and 2002. Overall, from 1999 to 2002, as many as 727,000 contractor jobs were created to support the Federal Government. Light, Fact Sheet, *supra*, at 5. More than half a million of these jobs were created in the Department of Defense, the Department of Energy and NASA. *Id.* at 6. Services absorbed increasingly large portions of the federal procurement budget; by 2005, over 60 percent of federal procurement dollars were spent on service contracts. See 49 GC ¶ 2.

In light of the last decade’s military actions, the trend worked its way into the public’s consciousness. For the last few years, more contractors have served in Iraq and Afghanistan than members of the military. Indeed, these contractors not only perform more military-related tasks and support functions, but they also face the risks associated with performing those functions. This has led to a stark increase in the number of contractor fatalities on the battlefield, particularly since 2007. Overall, more than 2,000 contractor personnel have been killed in Iraq and Afghanistan. Most disturbingly, in the first half of this year, more contractor personnel than U.S. military service members died in these countries. See Schooner & Swan, “Contractors and the Ultimate Sacrifice,” *Service Contractor* 16 (September 2010).

This massive outsourcing also exacerbated a deepening contract-management crisis. It is now

well understood that the demands on the purchasing community have increased dramatically since 2001. As a result, we more frequently witness a triage-type focus on buying which severely limits the resources available for contract administration. See 47 GC ¶ 203. This is caused in part by “the additional demands that service contracting places on the acquisition workforce.” Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress 356 (2007), available at [www.acquisition.gov/comp/aap/final\\_aapreport.html](http://www.acquisition.gov/comp/aap/final_aapreport.html). Service contracts often require greater involvement and attention from acquisition personnel during the contract formation process, as well as in contract management and oversight, “in order to enable the government to ensure that it is receiving the services for which it has contracted.” *Id.*

More significantly, for the purposes of this discussion, the increased reliance on employee-augmentation contracts has blurred the distinction between contractor employees and civil servants in the Government workspace. Despite the Federal Acquisition Regulation’s long-standing prohibition on personal service contracts, see FAR 37.104, agencies have increasingly relied on these types of contractual relationships to fulfill their missions. Specific statutory and regulatory authorizations allowing agencies to hire temporary workers, consultants and experts have become voluminous. And, in the absence of appropriate waivers of the personal services prohibition, the bar is simply ignored. Today, it is not unusual in most agencies to find contractor personnel and civil servants working in the same offices and, all too often, performing the same or similar functions.

**The Evolving Joint Employer Liability Doctrine**—As hordes of contractor employees began working alongside civil servants, federal courts and the Equal Employment Opportunity Commission (EEOC) faced a rising number of employment discrimination complaints brought by these contractor employees against their federal supervisors. In their attempt to adjudicate these complaints, the federal courts and the EEOC returned to the *Spirides* analysis.

As the *Spirides* doctrine evolved, the EEOC and federal courts began employing slightly different nomenclature to describe their analyses. For example, the EEOC prefers the term “common law agency test”; whereas some federal courts prefer the terms “*Spirides* test” or the “joint employment test.” All of these

tests, however, apply the same common law agency principles that take into account the entirety of the relationship between the individual and the federal agency, with the most important factor being whether the potential employer has the right to control the individual’s work performance. The different tests, in practice, generally produce similar results.

**The Federal Courts: *Spirides* Applied to Joint Employer Liability**—In 1995, the U.S. District Court for the Eastern District of Virginia broadened the application of *Spirides* to situations in which an aggrieved individual sues the Federal Government despite being a primary employee of an independent contractor, such as a staffing agency or temporary hiring firm. In *King v. Dalton*, 895 F. Supp. 831, 834–35 (E.D. Va. 1995), Stephanie King was employed by a contractor providing support services for the installation of naval satellite communication systems. When King became subject to the unwanted advances of, and derogatory comments by, the naval supervisor in charge of planning and executing the project, she brought a sexual harassment suit against the Navy. Although the court found that King was not a joint employee of the contractor and the Navy, the court stated that the contractor’s “undisputed status as King’s employer does not automatically preclude a finding that the Navy shared that status during the time period in question.” *King*, 895 F. Supp. at 837.

In essence, *King* starkly established the proposition that the Federal Government could no longer shield itself from liability simply by asserting it does not directly employ or pay contractor personnel. The concept of “joint employer liability” was previously applied in Title VII cases in the private employment context. See, e.g., *Virgo v. Riviera Beach Assocs.*, 30 F.3d 1350 (11th Cir. 1994) (holding that owner of ocean-side hotel employing a management contractor was a joint employer of the contractor’s employee). *King*, however, was the first case to apply this concept to the Federal Government.

Since *King*, the D.C. Circuit has accepted the idea that the Federal Government can be considered a “joint employer” for Title VII purposes. In *Redd v. Summers*, 232 F.3d 933, 936 (D.C. Cir. 2000), Trayon Redd, a tour guide assigned by a personnel corporation to the Bureau of Engraving and Printing, sued the Bureau for discriminatory termination. The court applied the *Spirides* test to determine whether the Bureau could be considered Redd’s “joint employer,” although the court opined that it would have preferred to use the



nomenclature of the Third Circuit’s “joint employment test.” See *Redd*, 232 F.3d at 938 (The Third Circuit’s test asks whether “one employer[,] while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees” of the contractor. (quoting *NLRB v. Browning-Ferris Indus. of Pa.*, 691 F.2d 1117, 1123 (3d Cir. 1982))). While *Redd* ultimately failed to obtain the relief she sought, the D.C. Circuit’s opinion further solidified the idea that a federal agency, in certain situations, may be considered a “joint employer” of a contractor employee.

**The EEOC and Common Law Agency**—Leaping the chasm from precedent to policy less than two years after *King*, the EEOC issued enforcement guidance specifically stating that “a federal agency qualifies as a joint employer of an individual assigned to it if it has the requisite control over that worker.” Equal Emp’t Opportunity Comm’n, No. 915-002, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms 7 (1997), available at [www.eeoc.gov/policy/docs/conting.html](http://www.eeoc.gov/policy/docs/conting.html).

Soon after, in 1998, the EEOC appeared to break new ground in *Ma v. Dep’t of Health and Human Servs.*, EEOC Decision No. 01962390 (1998). *Ma* and her husband conducted biomedical research while serving as visiting fellows at the National Institutes of Health. *Ma* claimed that when she informed her research supervisor that she was pregnant, he encouraged the couple to abort the pregnancy, began to closely monitor her activities and pressured her not to request heightened protection from radiation. *Ma* recognized that Title VII specifically prohibits sex-based discrimination, which includes discrimination based on pregnancy and childbirth. Accordingly, *Ma* sued her federal “employer.”

The EEOC decided to apply the “common law agency test” to determine if *Ma* was an NIH employee, recognizing that “the factors listed for consideration in the *Spirides* decision are drawn from the common law of agency test.” *Ma*, EEOC Decision No. 01962390 at 8. The EEOC relied on the common law agency test for two reasons: (1) Title VII does not specifically define “federal employee” beyond the general definition of “an individual employed by an employer,” *id.* at 7 (quoting 42 USCA § 2000e(f) (1994)); and (2) the U.S. Supreme Court previously stated that “[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer,

unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms,” *id.* (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)). The EEOC ultimately determined that *Ma* and her husband were not NIH employees for Title VII purposes. *Ma* may have lost her case, but her struggles now represent landmark precedent. More than 338 additional EEOC decisions have now referenced *Ma*.

**One More Nail in the Personal Services Coffin**—The federal courts’ and the EEOC’s willingness to define federal agencies as de facto employers of contractor employees is further evidence that the prohibition on personal service contracts is—or should now be deemed—a dead letter. For example, the AAP in 2007 recommended an easing of the personal services prohibition “to promote efficient management of the blended federal workforce.” See 48 GC ¶ 282. The AAP report began with the premise that this prohibition “doesn’t take proper recognition of where we are as a workforce today.” Acquisition Advisory Panel, *supra*, at 400. The proliferation of statutory exceptions to the prohibition, combined with the fact that “agencies often ignore the prohibition” anyway, see 48 GC ¶ 282, indicates that the prohibition is a legal abstraction with little remaining relevance to practical reality. See also Schooner & Greenspahn, “Too Dependent on Contractors? Minimum Standards For Responsible Governance,” *J. Cont. Mgmt.* 16 (Summer 2008). Ultimately, it is hard to manage a problem when you deny it exists. Accordingly, it is time for either the Office of Federal Procurement Policy or Congress (or both) to revisit the utility of perpetuating the now anachronistic personal services prohibition.

**More Government Challenges in Managing the Blended Workforce**—Our sense is that most Government managers and contracting professionals have not fully recognized their potential liability as a joint employer of contractor personnel. Indeed, it seems that even knowledgeable professionals are unaware that this potential liability exists. For example, application of joint employer liability to federal agencies seems directly contrary to the AAP’s conclusion that “the activities that are currently barred as [personal service contracts] by the FAR would not create ... an employer-employee relationship.” Acquisition Advisory Panel, *supra*, at 404.

The courts’ and EEOC’s application of joint employer liability further demonstrates how important it is for federal agencies to train not only managers

but all Government personnel—whether political appointees, senior executive service, civil servants, military officers and even enlisted personnel—in how to appropriately supervise and interact with contractors. It is unrealistic to assume that, at any time in the near future, federal agencies will be able to significantly reduce their reliance on contractor employees and temporary hires. Frankly, the Government “currently has no short-term option but to rely on contractors for every conceivable task that it lacks appropriate staff to fulfill.” Schooner and Greenspahn, *supra*, at 10. As a result, Government personnel need to be aware of the growing liabilities associated with both managing and operating within a blended workforce. A broad range of remedies are available for employment discrimination, including, among others, back pay, reinstatement, other actions that will make an individual “whole,” attorneys’ fees, expert witness fees and court costs.

But this is not merely a fiscal issue. From both an organizational and a human resources viewpoint, employment discrimination suits have the potential to disrupt and destabilize the workplace.

Still, it is easy to see the potential risk to Government agencies. One of the most compelling arguments that frustrated Government managers offer in support of outsourcing has been that it is easier for them to jettison individual contractor employees, for whatever reason, than to terminate or reassign civil servants. These federal managers fail to realize, however, that a contractor employee’s denial of a preferred assignment or an employment opportunity could spur a discrimination claim against their agency. Moreover, Government managers must recognize that there are limits, particularly in offices and organizations in which either civil servants or contractors have alleged discrimination. Specifically, Title VII makes it illegal to retaliate against an individual for filing a charge of discrimination, opposing discriminatory practices, or “participating in any stage of administrative or judicial proceedings.” 29 CFR § 1614.101(b) (2010).

Behavioral norms vary widely among the military, the civil service and contractor organizations. Indeed, they also vary within each of these categories—among the military services, among various agencies and departments, and throughout the private sector. Most Government supervisors know better than to ask a subordinate out on a date, but they may not appreciate the risks associated with similarly approaching a contractor employee.

Government managers must understand that sexual harassment includes not only “[u]nwelcome sexual advances [and] requests for sexual favors” but also “other verbal or physical conduct of a sexual nature ... [that] ... has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” 29 CFR § 1604.11(a) (2010). These types of relationships can prove problematic, even among individuals that appear to be peers. The EEOC makes clear that

[s]exual harassment can occur in a variety of circumstances .... The victim does not have to be of the opposite sex. The harasser can be the victim’s supervisor, ... *a supervisor in another area, a co-worker, or a non-employee*. The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.

*Facts About Sexual Harassment*, Equal Emp’t Opportunity Comm’n (June 27, 2002), [www.eeoc.gov/facts/fs-sex.html](http://www.eeoc.gov/facts/fs-sex.html) (emphasis added). The potential for a hostile work environment claim does not seem far-fetched.

Looking ahead, particularly as the administration struggles with the military’s “Don’t Ask, Don’t Tell” policy, discrimination claims brought by contractor employees based on sexual orientation could raise some serious concerns, particularly if contractors are supporting the military. As a general rule, the EEOC does not protect against discrimination and harassment based on sexual orientation. See *Discrimination Based on Sexual Orientation, Status as a Parent, Marital Status and Political Affiliation*, Equal Emp’t Opportunity Comm’n, [www.eeoc.gov/federal/otherprotections.cfm](http://www.eeoc.gov/federal/otherprotections.cfm) (last visited Oct. 15, 2010). However, EO 13087 amended EO 11478 to include sexual orientation as a prohibited basis for discrimination. See EO 13087, 63 Fed. Reg. 30097 (May 28, 1998). Although sexual orientation as a basis for discrimination is currently still not actionable under Title VII, the current environment suggests that this could change in the future. This would raise some additional risks, particularly for military supervisors.

Federal managers also need to recognize the disruptive effects these suits can cause. Training and other preventive measures are critical. But who is providing federal supervisors with the appropriate training? To implement appropriate measures, supervisors need to be aware of this phenomenon and

understand how it affects their workplace. Above all, federal managers need to appreciate that they can no longer hide behind a formalistic employee-contractor distinction. As this precedent develops, both in concreteness and in volume, it becomes increasingly difficult (nay, impossible) for Congress to put the genie back in the bottle.

**Contractors Beware: Unanticipated Risk to Maintaining Customer Satisfaction**—The Government's status as a joint employer also has implications on the other side of the table. Contractors need to appreciate how this phenomenon will affect their relationship with their Government customer. Unless proper mechanisms are in place to adequately address employment issues before they arise, the resulting discrimination suits by employees could have devastating effects on the company's future as a Government contractor. Consider, for example, that the EEO regime is perceived as being particularly susceptible to frivolous suits, often brought by disgruntled (or dismissed) employees. Moreover, it does not require much creativity to see how the Government might punish

contractors—with, e.g., negative past performance ratings or potentially suspensions or debarment—when those firms' employees brought (either substantiated or unsubstantiated) discrimination allegations against Government officials.

Perhaps most importantly, both the Government and its contractors need to understand that, as federal agencies continue to rely on contractors for their staffing needs, the ability to distinguish between civil servants and contractors—in the eyes of the law—will become increasingly more difficult. We know the blended workforce is here to stay. We don't yet know what that really means.



*This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by Steven L. Schooner and Collin D. Swan. Professor Schooner is Co-Director of the George Washington University Law School's Government Procurement Law Program and a Director of the Procurement Round Table. Mr. Swan is a second-year law student at the GW Law School.*