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Employment Law—Blurred Lines: Loopholes to Avoid Joint Employer Liability—Felder v. United States Tennis Ass'n, 27 F.4th 834 (2d Cir. 2022)

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EMPLOYMENT LAW—BLURRED LINES: LOOPHOLES TO AVOID JOINT EMPLOYER LIABILITY—*FELDER V. U.S. TENNIS ASS'N*, 27 F.4TH 834 (2D CIR. 2022).

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Title VII of the Civil Rights Act of 1967 ("Title VII") provides protections to employees against workplace discrimination on the basis of race, color, religion, sex, and/or national origin.[1] However, the terms 'employee' and 'employer' under Title 41, Chapter 21 of the United States Code are ill defined, and can otherwise vary among state and federal employment statutes.[2] If someone lacks 'employee' status, they are presumptively not covered under any relevant anti-discrimination laws.[3] The joint employer

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[1] 42 U.S.C. § 2000e (defining terms relating to equal employment opportunities under Title VII).

[2] *See* 42 U.S.C. §§ 2000e(b), (f) (defining employer and employee). As defined by the United States Code, an employer is "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." 42 U.S.C. § 2000e(b). An employee is defined as "an individual employed by an employer." 42 U.S.C. § 2000e(f). Because the provided definitions of these terms are so vague, several types of tests exist to determine employment status situationally, including the common law control test and the primary beneficiary tests, also known as the economic realities test. *See* Charles J. Muhl, *What Is an Employee*, BUREAU OF LABOR STATISTICS, [https://perma.cc/BTP6-LY6F] (last visited Mar. 4, 2023) (providing in-depth review of employment status compared to independent contractor status). *See, e.g.*, Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1144 (9th Cir. 2017) ("[T]he Supreme Court has, in a handful of cases outside the educational context, further refined the employment relationship test under the FLSA, finding that the 'test of employment under the [FLSA] is one of "economic reality."'" (quoting Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961))) (alteration in original); Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2016) ("[T]he proper question is whether the intern or the employer is the primary beneficiary of the relationship."); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1211-12 (11th Cir. 2015) (considering benefits to student while offsetting any abuse of free labor by internship program); Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947) ("[T]he definitions of 'employ' and of 'employee' . . . cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction."); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011) (holding proper approach to determine employment relationship existence is ascertaining which party derives primary benefit). The Second Circuit has gone so far as to acknowledge that "neither definition is particularly helpful in deciding whether an employment relationship exists." Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 370-71 (2d Cir. 2006).

[3] *See generally* Falls v. Sporting News Pub. Co., 834 F.2d 611, 613 (6th Cir. 1987) (denying protections for independent contractors).

doctrine can complement this nonspecific area of law by aiding in circumstances involving non-specific employer relationships, such as when a secondary employer exercises sufficient control over the employee's terms and conditions of employment.[4] However, *Felder v. U.S. Tennis Ass'n*[5]

> Although this court has rejected a narrow construction of the term "employee" under both Title VII and the ADEA, it has nevertheless adhered to a standard that would exclude from the protection of either act a person who cannot be considered an employee, but is instead clearly an independent contractor.

Id. Under the Fair Labor Standards Act of 1938, enacted to provide fair workplace conditions and labor wages, courts have generally ruled that independent contractors are not employees, and therefore are not covered by Title VII. EEOC v. Steven T. Cox, Inc., No. 3:99-1184, 2002 U.S. Dist. LEXIS 27160, at *10 (M.D. Tenn. July 19, 2002) (concluding misidentification as independent contractor did not alter protection because corporation retained control over assignment). *See also* 29 C.F.R. § 795.105(a) (defining independent contractors)

> Independent contractors are not employees under the Act. An individual who renders services to a potential employer—i.e., a putative employer or alleged employer—as an independent contractor is not that potential employer's employee under the Act. As such, sections 6, 7, and 11 of the Act, which impose obligations on employers regarding their employees, are inapplicable.

Id. Additionally, on several occasions, the Supreme Court has indicated no single rule or test exists to determine employment status under the Fair Labor Standards Act ("FLSA"). *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA),* U.S. DEP'T. OF LABOR, [https://perma.cc/UZ99-79Y8] (last visited Mar. 23, 2023) (evaluating employment status for unpaid interns through primary beneficiary test). However, factors which the Court has deemed significant for consideration when attempting such an analysis are:

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

Id.

[4] *See* EEOC Dec. No. 72-0676, 4 FEP 441 (Dec. 27, 1971) (advising that department store and cosmetics company were joint employers where employment oversights were shared). In this circumstance, the department store hired the plaintiff, paid her salary, and set employment expectations, whereas the cosmetics company created the position, trained the plaintiff, paid her commissions, and ultimately fired her. *Id.* "[T]he 'joint employer' concept recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment." NLRB v. Browning-Ferris Indus., Inc., 691 F.2d 1117, 1123 (3d Cir. 1982) (emphasis in original). The crux of the joint employer doctrine is that one employer retains sufficient control of terms and conditions of employment for employees who are contracted out in good faith to another employer. *Id.* at 1122-23.

[5] 27 F.4th 834 (2d Cir. 2022).

demonstrates that the joint- employer doctrine is not sufficiently defined by the courts, especially in the Title VII arena, allowing for many companies to avoid liability for discriminatory or retaliatory acts by utilizing third-party employment agencies to hire employees, though the company itself may retain control over the employees' work assignments.[6] Whenever a company's authority intercedes the contracting agency's control in the delegation, quantity, and quality of work assignments, that company should be deemed a constructive employer and be held accountable for any discriminatory employment actions.[7]

The United States Tennis Association ("USTA") regularly outsources the hiring and assignments of security for various events to private security firms—including the U.S. Open Tennis Championship ("U.S. Open").[8] From 2002 to 2009, CSC Security Services ("CSC") contracted Sean G. Felder, a Black NYC resident, to work seasonally as a security guard for the USTA.[9] CSC did not rehire Felder for the 2010 season, and he subsequently filed suit against CSC for discriminatory and retaliatory refusal to

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[6] *See* 29 CFR § 791.2 (determining previous joint employer status under Fair Labor Standards Act). The "single or joint employer" test began as a four-factor test, originally developed by the NLRB, but later adopted by the Second Circuit to determine whether two employers could be held jointly and severally liable for adverse employment decisions. Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 378 (2d Cir. 2006) (outlining theories of indirect employer liability). The "joint employer doctrine" applies "where the plaintiff's employment is subcontracted by one employer to another, formally distinct, entity" and "the existence of an employer-employee relationship is a primary element of Title VII claims." *Id.* at 371, 378; *see also* Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1343 (D.C. Cir. 1973) (arguing interference with employment theory can affect employer liability).

[7] *See* Arculeo v. On-Site Sales & Mktg., LLC, 425 F.3d 193, 198 (2d Cir. 2005) (elucidating joint employer relationships and establishing constructive employer definition and purpose). The Second Circuit explained the necessity of the joint employer doctrine, and the subsequent implications of the doctrine on the constructive employer—the second entity that is involved in jointly controlling the terms, conditions, and stipulations of a worker's employment:

> Where this doctrine is operative, an employee, formally employed by one entity, who has been assigned to work in circumstances that justify the conclusion that the employee is at the same time constructively employed by another entity, may impose liability for violations of employment law on the constructive employer, on the theory that this other entity is the employee's joint employer.

Id.

See Clinton's Ditch Coop. Co. v. NLRB, 778 F.2d 132, 137 (2d Cir. 1985) (examining four factors to determine joint employer status); *see also* Laurin v. Pokoik, No. 02 Civ. 1938, 2004 U.S. Dist. LEXIS 4066, at *30 (S.D.N.Y. Mar. 14, 2004) ("An employee's work done to benefit another entity can indicate an employer-employee relationship.").

[8] Felder v. U.S. Tennis Ass'n, 27 F.4th 834, 839 (2d Cir. 2022) (explaining typical hiring process for security at USTA events).

[9] *Id.* (expounding Felder's work history with USTA); *see also* Brief of Plaintiff-Appellant at 6, *Felder*, 27 F.4th 834 (No. 19-1094) (detailing Felder's prior employment at all eight U.S. Open Tournaments between 2002 and 2009).

hire.[10] In 2016, AJ Squared Security ("AJ Security"), an alleged subcontractor of CSC, hired Felder as a security guard and assigned him to work at the 2016 U.S. Open.[11] Upon receiving his assignment, Felder went to the USTA credentials office to pick up his security credentials where the USTA informed Felder he was not on the list to receive credentials.[12] Felder's supervisor, Terrence Rauls, allegedly informed him that USTA had denied his credentials to prevent his employment at the 2016 U.S. Open as retaliation for his 2012 complaint of employment discrimination.[13]

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[10] *Felder*, 27 F.4th at 839 (asserting USTA's decision to discontinue Felder's employment in 2010 was predication upon racial discrimination). Felder's 2012 suit alleged discrimination and retaliatory refusal to hire under Title VII, 42 U.S.C. § 1981, and the New York City Human Rights Law, contending that CSC's refusal to rehire him for the 2010 season was a result of his complaint "[d]uring his employment [at the U.S. Open] in 2009 . . . that African American security personnel were given inferior assignments and White security personnel were given the better assignments." *Id.* (quoting Plaintiff's Second Amended Complaint at 3, Felder v. Contemp. Sec. Servs., No. CIV. 1:12-07486 (S.D.N.Y. Aug. 20, 2014), ECF No. 51) (alteration in original). *See Mr. Williams Alleges Racism at Tennis Tourney,* ABC NEWS, [https://perma.cc/QD66-6J3Y] (last visited on Apr. 1, 2023) (referencing entrenchment of racism within tennis industry that permeates multiple facets of industry). The Williams family claimed that tournament officials failed to take action to address the harassment, despite multiple complaints. *Id.* (emphasizing need for policies ensuring safe and inclusive environment for all tennis players). The multifaceted issue of racism in tennis has garnered significant attention in recent years. *See* David Waldstein, *Naomi Osaka Beats Serena Williams in a U.S. Open Final Marred by Boos and Tears,* N.Y. TIMES, [https://perma.cc/9MTS-F7PA] (last visited Apr. 1, 2023). The 2018 U.S. Open final between Serena Williams and Naomi Osaka exemplified the challenges faced by black women in the sport, as Williams faced accusations of bias against her due to her race and gender after being penalized for breaking a racket and arguing with an umpire. *Id.* (highlighting ongoing bias, racial and gender discrimination against most decorated female tennis player); *see also* Plaintiff's Second Amended Complaint, *supra*, at 3. Felder and CSC settled in 2015 for an undisclosed amount. *See* Stipulation of Final Dismissal with Prejudice, Felder v. Contemp. Sec. Servs., No. 1:12-cv-07486 (S.D.N.Y. July 22, 2015), ECF No. 103.

[11] *Felder*, 27 F.4th at 839 (providing hiring of Felder to USTA subcontractor AJ Security). According to Felder's appellant brief, AJ Security hired him and provided his employment ID card and work schedule on August 26, 2016, the same day he submitted his application. Brief of Plaintiff-Appellant, *supra* note 9, at 6.

[12] *Felder*, 27 F.4th at 840 (providing Felder's inability to secure gainful employment during 2016 U.S. Open). Three days after being hired by AJ Security, on August 29, 2016, an employee of the USTA credentialing office denied Felder security credentials. Brief of Plaintiff-Appellant, *supra* note 9, at 6. Felder's pleading included a claim for discriminatory interference with an employment contract, stating that by denying his credentials USTA interfered with his right to be free of racial discrimination when making and enforcing an employment contract, as actionable under 42 U.S.C. § 1981. *Id.* at 27 ("When USTA discriminatorily denied Mr. Felder's credentials to work the 2016 US Open, it also deprived Mr. Felder of the right to contract for gainful employment with AJ Security."); *see also* 42 U.S.C. § 1981 (affording equal rights under law).

[13] *Felder*, 27 F.4th at 840 (explaining perceived rationale for denial of Felder's credentials). The 2012 suit against CSC Security was settled in 2015, following the firing of the supervisor whom Mr. Felder alleged had violated the company's discriminatory practices. Brief of Plaintiff-Appellant, *supra* note 9, at 6. Felder specifically alleged that: (1) he was denied credentials to the 2016 U.S. Open by USTA; (2) he asked AJ Security why his access to the work site was denied; and (3) Mr. Rauls said he was told that USTA did not want Mr. Felder working the U.S. Open

Shortly after being denied security credentials, Felder filed a verified complaint against the USTA.[14] The New York State Division of Human Rights dismissed Felder's complaint in February 2017; the Equal Employment Opportunity Commission adopted the same findings in May 2017, yet issued Felder a notice of right-to-sue.[15] Felder filed suit for discrimination and retaliation under Title VII and 42 U.S.C. § 1981 against the USTA in July 2017.[16] At this time, the District Court granted USTA's Rule 12(c) motion to dismiss, but allowed Felder to replead his Title VII and Section 1981 claims.[17] Felder amended his complaint regarding the Title VII and Section

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because of his previous lawsuit against CSC. Reply Brief of Plaintiff-Appellant at 12, *Felder*, 27 F.4th 834 (No. 19-1094), citing J.A. 143, 147.

[14] *Felder*, 27 F.4th at 840 (bringing formal complaint before filing *pro se* action against USTA). Felder filed his complaint with the New York State Division of Human Rights and the Equal Employment Opportunity Commission, alleging discriminatory and retaliatory treatment in violation of the New York State Human Rights Law and Title VII. *Id.*

[15] *Id.* (detailing outcome of Felder's complaint investigated by NYSDHR, affirmed by EEOC). Felder's complaint was dismissed on the grounds that "[t]he Division investigation established [the USTA] did not employ [Felder] in any capacity," and that "the Division [could not] conclude that there was a violation of the State Human Rights Law as alleged." *Id.* Elaborated upon in the Appellee's Brief, the New York State Division of Human Rights published a Determination and Order After Investigation following investigation of Felder's claims:

> In a Determination and Order After Investigation dated February 27, 2017, the NYSDHR dismissed Felder's Verified Complaint with a No Probable Cause Determination (the "Determination") because, among other reasons, the USTA was neither Felder's direct employer nor a joint employer with CSC or [AJ Security]. In the Determination, the NYSDHR found that Felder was not directly employed by the USTA because he applied for an Events Security position through [AJ Security] and never applied for employment with the USTA.

Brief for Appellee United States Tennis Association, Inc. at 9-10, *Felder,* 27 F.4th 834 (No. 19-1094) (citations omitted). The EEOC concurred with the NYSDHR's conclusions, closed its file, but issued a dismissal and notice of right to sue. *Id.*; *Felder*, 27 F.4th at 840. Felder filed his claim sixty-five days after receiving the EEOC's right to sue. Brief for Appellee United States Tennis Association, Inc., *supra*, at 9-10. An EEOC right to sue grants an individual who has filed a discrimination complaint the authority to initiate a lawsuit in federal court; excluding lawsuits under the Equal Pay Act, a charge alleging discrimination on the basis of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age, disability, genetic information, or retaliation must be filed first with the EEOC before a lawsuit can be filed under federal law. *Charge Filing and Notice of Right-to-Sue Requirements,* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, [https://perma.cc/P6BR-CERV] (last visited Apr. 2, 2023). If the EEOC investigation finds insufficient evidence to support a discrimination claim or the complaint remains unresolved through conciliation, the individual receives a right to sue letter that allows them 90 days to file a lawsuit. *Id.* Receiving a right to sue letter does not mean that the EEOC has decided on the merits of the case, but it does give the individual the option to pursue their claim in court if they so choose. *Id.*

[16] *Felder*, 27 F.4th at 840 (pleading claims based on adverse employment actions including failure-to-hire and interference with employment contract).

[17] *Id.* at 840-41 (outlining District Court's reasoning for granting USTA's Rule 12(c) motion to dismiss). The District Court determined Felder failed to state a claim under Title VII or Section

1981 claims, but did not supplement his original complaint to include any additional facts demonstrating USTA was his employer in any capacity.[18] Again, the district court dismissed Felder's claim on the grounds of Federal Rule of Civil Procedure 12(b)(6), basing its decision on the fact that he again failed to demonstrate his employment status with USTA and therefore had no plausible claim for relief.[19]

Title VII of the Civil Rights Act of 1964 articulates guidelines for ensuring equal employment opportunities.[20] By enacting Title VII, Congress

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1981 because he did not properly establish that an employer-employee relationship "existed between the parties at the time of the alleged unlawful conduct." *Id.*; *see also* FED. R. CIV. P. 12(c) (moving for judgment on pleadings following pleadings closure).

[18] *Felder*, 27 F.4th at 841 (expounding procedural history regarding Felder's complaint in district court). Felder's amended complaint also added USTA's counsel Reed Smith LLP as a defendant. *Id.* The Appellant's reply brief, later included and authored by Felder's court-appointed pro bono counsel, states the issue at hand as USTA's ability to prevent Felder from accessing the worksite constitutes sufficient immediate control over hiring to establish a plausible joint employer claim. Reply Brief of Plaintiff-Appellant, *supra* note 13, at 7. The Reply asserted that the analysis which rendered the conclusions that Felder failed to provide facts which show USTA shared immediate control over him overlooks four of the five factors found in the *Clinton's Ditch* decision. *Id.*; *see* Clinton's Ditch Coop. Co. v. NLRB*,* 778 F.2d 132, 138-40 (2d Cir. 1985) (considering control over hiring/firing, discipline, pay/insurance/records, supervision, and participation in collective bargaining process). Felder found fault in the district court conclusions, stating:

> Such an analysis ignores the fact that the last four Clinton's Ditch factors are irrelevant if the joint employer could effectively veto the hiring. . . . Under the district court's and USTA's analysis, even if we assume that USTA was the gatekeeper to the workplace—i.e., had a veto over hiring for this event— and was racially motivated in denying his credentials, Mr. Felder would have no recourse under Title VII. There is no allegation that AJ Security had discriminatory intent, only USTA. Thus, if the district court and USTA's analysis were found to apply, USTA would be able to discriminate freely and without repercussion simply by farming out security to third parties, while maintaining control of who actually came into the worksite.

Reply Brief of Plaintiff-Appellant, *supra*, at 8 (emphasis omitted) (citation omitted). Felder does not dispute the finding that U.S. Open credentials between 2002 and 2009 do not indicate that USTA controlled the details of his work, including the tasks to perform, the location, schedule, and manner of performance. *Id.* However, Felder contends that these eight seasons of work are not at issue, nor does they bear on the level of oversight that USTA exerted over him in 2016. *Id.*

[19] Felder v. U.S. Tennis Ass'n, No. 1:17 Civ. 5045, 2019 U.S. Dist. LEXIS 60061, at *4 (S.D.N.Y. Apr. 8, 2019) (granting USTA's second motion to dismiss). The District Court dismissed Felder's claim with prejudice, explaining that no additional facts had been asserted "to prove the USTA shared immediate control over him with either CSC or AJ Security." *Id. See also* FED. R. CIV. P. 12(b)(6) (moving to dismiss for failure to state claim upon which relief can be granted).

[20] 42 U.S.C. § 2000e (outlining requirements for equal employment opportunities). The objective of this landmark was to confront the long-standing pattern of discrimination that had become prevalent in the American workplace, and since its enactment, Title VII has been transformed by various landmark decisions to expand its protections, including pregnancy discrimination and discrimination based on sexual orientation and gender identity. *See* Young v. UPS, 575 U.S. 206, 227-28 (2015) (expanding sex discrimination to include discrimination based on pregnancy status); Bostock v. Clayton Cty., 140 S. Ct. 1731, 1754 (U.S. 2020) (expanding sex discrimination to

aimed to eliminate employment barriers which previously favored an identifiable group of white employees over minority identifying employees.[21] Such protections include claims of individual disparate treatment, systemic disparate treatment, and systemic disparate impact.[22] Title VII's protections

include discrimination based on sexual orientation and gender identity). Further decisions fine-tuned the nuances of Title VII, as seen in *Meritor Savings Bank v. Vinson,* where the Supreme Court held that sexual harassment constitutes sex discrimination under Title VII. 477 U.S. 57, 66 (1986) (recognizing sexual harassment as basis for hostile work environment). Title VII protections also extend to candidates for employment. 42 U.S.C. § 2000e-3(a). *See also* Adeniji v. New York State, 557 F. Supp. 3d 413, 434 (S.D.N.Y. 2021) (analyzing failure-to-hire). When arguing discriminatory failure-to-hire,

> [A] plaintiff complaining . . . must first make out a prima facie case of discrimination by showing that (1) he is a member of a protected class, (2) he was qualified for the job for which he applied, (3) he was denied the job, and (4) the denial occurred under circumstances that give rise to an inference of invidious discrimination.

Id. (alteration in original). While Title VII's protections do not extend to independent contractors, it is important to note that the determination of whether an individual is an employee or independent contractor is fact-specific and that courts will look at various factors, such as the degree of control the employer has over the work performed. Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973); D'Angelo v. Conagra Foods, 422 F.3d 1220, 1233 (11th Cir. 2005). Joint employer liability can also be a factor in determining whether an independent contractor is covered by Title VII; in *Salinas v. Commercial Interiors, Inc.*, the court held that a general contractor could be held liable as a joint employer under Title VII if it exercised control over the working conditions of the subcontractor's employees. 848 F.3d 125, 147 (4th Cir. 2017).

[21] *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971) (expounding Congress's purpose for enacting Title VII). Congress considered Title VII to be a tool in which equality in employment could be achieved; however, it was not the intent of Congress that employment be guaranteed to all previously excluded minorities regardless of qualifications. *Id.* at 430. *Griggs* has long been held as a primary authority regarding Title VII, stating:

> In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id. at 430-31. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (creating burden shifting test for discrimination claims under Title VII); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977) (requiring preponderance of evidence to prove racial discrimination as standard practice); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 457-58 (1975) (citation omitted) ("Title VII . . . was enacted 'to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin.' It creates statutory rights against invidious discrimination in employment and establishes a comprehensive scheme for vindication of those rights.").

[22] *Laws We Enforce,* U.S. DEP'T. OF JUSTICE, [https://perma.cc/82FY-CDCT] (last visited on Mar. 4, 2023) (including unlawful policies or practices covered by Title VII). Individual disparate treatment refers to intentional discrimination against an individual based on their protected characteristic such as race, gender, or religion. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 265-66 (1989). Systemic disparate treatment, on the other hand, refers to a pattern or practice of intentional

go beyond addressing the primary issue of discrimination and encompass the prohibition of retaliation against individuals who engage in any form of participation related to a complaint or charge of discrimination.[23]

Defining who constitutes an 'employee' under Title VII discrimination claims has proven challenging, leading to an influx of misidentification cases.[24] The definition of an employee is crucial in Title VII claims, as the statute only provides protections for employees and not independent contractors.[25] Courts have recognized the difficulty in distinguishing between employees and independent contractors, as it is a highly fact-specific inquiry.[26] Generally, courts look at the amount of control an employer has over the worker in question to determine if they are an employee or an independent

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discrimination against a group of individuals based on their protected characteristic and is often more difficult to prove than individual disparate treatment because it requires a showing of a systemic or widespread practice of discrimination. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973) (establishing pattern-or-practice burden of proof)*; see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977) ("The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy."). Systemic disparate impact refers to practices or policies that have a disproportionate and adverse impact on a protected group, even if they are not intended to be discriminatory or are facially neutral. *Griggs*, 401 U.S. at 430 (defining scope of disparate impact).

[23] *Laws We Enforce,* U.S. DEP'T. OF JUSTICE, [https://perma.cc/82FY-CDCT] (last visited on Mar. 4, 2023) (depicting enforcement of Title VII). Retaliation claims under Title VII refer to situations in which an employer retaliates against an employee for engaging in protected activity, such as filing a complaint or participating in an investigation related to discrimination. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 59 (2006) (detailing protected activities for employees against their employers). Retaliation claims can arise even if the underlying discrimination complaint is found to lack merit. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 359 (2013) (separating retaliation claims from unsuccessful discrimination complaints). To establish a retaliation claim, the employee must show that they engaged in protected activity, that the employer took an adverse action against them, and that there was a causal connection between the protected activity and the adverse action. Treglia v. Town of Manlius, 313 F.3d 713, 719 (2d Cir. 2002). Courts have held that adverse actions can include a wide range of actions, including demotion, transfer, or even verbal threats. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 64 (citations omitted) (holding that "the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment"). If the employee can establish a prima facie case of retaliation, the burden shifts to the employer to provide a legitimate, non-retaliatory reason for the adverse action. Hicks v. Baines, 593 F.3d 159, 164 (2d Cir. 2010).

[24] *What Is an Employee*, U.S. BUREAU OF LABOR STATISTICS, [https://perma.cc/BTP6-LY6F] (last visited Mar. 4, 2023) (depicting intricacies of employer-employee determinations).

[25] *See* Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 323 (1992) (ruling relevant definitions are to be determined under the common law of agency). *See* Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 252 (1997) (footnote omitted) ("At issue in *Darden* was the definition of 'employee' under ERISA. Ultimately, the Court adopted for ERISA a common-law test that it had previously summarized in another case.").

[26] *See* Salamon v. Our Lady of Victory Hosp., 514 F.3d 217, 226 (2d Cir. 2008) ("Once a plaintiff is found to be an independent contractor and not an employee . . . the Title VII claim must fail.").

contractor.[27] Additionally, courts may consider additional factors such as the permanency of the relationship between the employer and worker, the extent of the worker's investment in their own equipment, and the degree of skill required to perform the work.[28]

The joint employer doctrine is particularly relevant in cases involving temporary staffing agencies or subcontractors, where both the staffing agency or subcontractor and the client company may have control over the worker's employment, and in such cases, both entities may be held liable for any Title VII violations that occur.[29] The Second Circuit has yet to set forth the standard of review to determine what qualifies an entity as a "joint employer" under Title VII.[30] Nevertheless, non-exhaustive factors which may

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[27] *Salamon*, 514 F.3d at 221 (reversing summary judgment where genuine factual conflict regarding degree of control exercised by employer existed). In the context of anti-discrimination cases, the Second Circuit has concluded that courts should assign particular importance to the degree of control that the hiring party has over the "manner and means" through which the worker fulfills their assigned duties. Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 117 (2d Cir. 2000).

[28] Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1444 (10th Cir. 1998) (listing factors that can be considered to determine status as independent contractor).

> [We] conclude plaintiffs are employees of Flint, rather than independent contractors . . . . In most respects, plaintiffs are no different from any other workers hired by Flint and treated as employees. Plaintiffs are hired to complete a job, are told their working hours, are told their hourly pay rate, and are told on what portion of the project they will be working during a given workday. . . . Ultimately, plaintiffs, like other workers hired by Flint, are dependent upon Flint for the opportunity to render services for however long a particular project lasts.

Id. *See also* Merrill v. Harris, No. 21-1295, 2022 U.S. App. LEXIS 24120, at *31 (10th Cir. Aug. 26, 2022) (affirming decision that plaintiffs were independent contractors under *Baker* where plaintiffs invested in business). *Cf.* FedEx Home Delivery v. NLRB, 563 F.3d 492, 504 (D.C. Cir. 2009) (Garland, J., dissenting in part). Garland argued that

> [u]nderlying [his] colleagues' conclusion is their view that the common-law test has gradually evolved until one factor–whether the position presents the opportunities and risks inherent in entrepreneurialism"–has become the focus of the test. . . . While the NLRB may have authority to alter the focus of the common-law test . . . this court does not.

Id. (citation omitted).

[29] *See* Maltby & Yamada, *supra* note 25, at 252-53 (arguing for policy change to address current exclusions of independent contractors under federal discrimination laws).

[30] *Felder*, 27 F.4th at 855 (stating lack of precedent from Second Circuit regarding joint employer tests under Title VII). The Second Circuit, however, has reviewed and considered non-binding precedent from other circuits to aid in decision-making. Int'l House v. NLRB, 676 F.2d 906, 913 (2d Cir. 1982) (evaluating proper standards to determine sufficient control under joint employer analysis).

> The Eighth Circuit, for example, endorses the four factors applied by the Administrative Law Judge in this case. . . . The Ninth Circuit concentrates on the degree of an

be considered for purposes of identifying a joint employer relationship include: "control over an employee's hiring, firing, training, promotion, discipline, supervision, and handling of records, insurance, and payroll."[31] Consideration of such factors is an approach supported by several circuit courts, including the Eleventh Circuit, which asserts a "totality of the circumstances" test.[32] Ultimately, regardless of which standard of review utilized,

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> employer's "authority over employment conditions which are within the area of mandatory collective bargaining." . . . The D.C. Circuit has scrutinized "the amount of actual and potential control . . . over the . . . employees."

Id. (citations omitted). Determining employment under the common law of agency includes many of the same tests used by other jurisdictions; known as the *Reid* factors, these considerations include:

> [1] the hiring party's right to control the manner and means by which the product is accomplished . . . .[:] [2] the skill required; [3] the source of the instrumentalities and tools; [4] the location of the work; [5] the duration of the relationship between the parties; [6] whether the hiring party has the right to assign additional projects to the hired party; [7] the extent of the hired party's discretion over when and how long to work; [8] the method of payment; [9] the hired party's role in hiring and paying assistants; [10] whether the work is part of the regular business of the hiring party; [11] whether the hiring party is in business; [12] the provision of employee benefits; [13] and the tax treatment of the hired party.

Comty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989). Two entities can be joint employers if they "exercise significant control over the same employees." Knitter v. Corvias Mil. Living, LLC*,* 758 F.3d 1214, 1226 (10th Cir. 2014); *see also* Plaso v. IJKG, LLC, 553 F. App'x 199, 204 (3d Cir. 2015) (holding two entities can have joint employer relationship).

[31] *Felder*, 27 F.4th at 838; *see also* Nethery v. Quality Care Inv'rs, L.P.*,* 814 F. App'x 97, 102-03 (6th Cir. 2020) (conveying Sixth Circuit's established standard of review). The Sixth Circuit established a standard of review to include consideration of major factors such as: the "entity's ability to hire, fire or discipline employees, affect their compensation and benefits, and direct and supervise their performance." E.E.O.C. v. Skanska USA Bldg., Inc.*,* 550 F. App'x 253, 256 (6th Cir. 2013) (citing Carrier Corp. v. NLRB, 768 F.2d 778, 781 (6th Cir. 1985)). *See also* United States EEOC v. Glob. Horizons, Inc.*,* 915 F.3d 631, 640 (9th Cir. 2019) (outlining similar factors used by Ninth Circuit in determining employment status); Redd v. Summers, 232 F.3d 933, 936-40 (D.C. Cir. 2000) (considering ability to hire and fire employees in joint employer analysis).

[32] Parker v. Esper, 856 F. App'x 807, 808 (11th Cir. 2021) (defining joint employer).

> Two entities are joint employers when they have contracted in good faith and co-determine the essential terms of employment. In determining whether an entity is a person's employer, the court considers whether the employment took place on the alleged employer's premises, how much control the alleged employer asserted, and the extent to which the alleged employer had the power to modify employment conditions. Indirect control is insufficient to deem an entity a joint employer.

Id. See Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983) (presenting guiding factors for joint employer liability determinations). This four-factor test evaluated (1) who hires or fires the employee; (2) who supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) who determines the employee's rate and method of payment; and (4) who maintains the employee's employment records. *Id.*; 29 CFR § 791.2. In 2020, the Trump Administration published the Joint Employer Final Rule ("Final Rule"), which

the joint employer doctrine presumes that the two potential employers have opted to jointly manage and delegate various aspects of their employer-employee relationship.[33]

In *Felder v. U.S. Tennis Ass'n*, the Second Circuit Court of Appeals affirmed the District Court's dismissal of Felder's discrimination claims under Title VII, 42 U.S.C. § 2000e-2, and 42 U.S.C. § 1981, and vacated the dismissal of Felder's Title VII, 42 U.S.C. § 2000e-3(a) claims, remanding with instructions that Felder be permitted to amend his complaint as to this remaining claim.[34] The court's comprehensive, trifurcated analysis focused

instructed that these factors must employ actual exercise of control to establish a joint employment relationship, rather than theoretical control, as was the Department of Labor's previous stance ("DOL") which several federal courts also adopted. 29 CFR § 791.2; *Labor Board Proposes Tossing Trump Joint Employer Regulation (3),* BLOOMBERG L., [https://perma.cc/SD6C-NTC6] (last visited Apr. 1, 2023) (addressing NLRB's proposal to loosen strictly held joint employer standard enacted during Trump's administration). However, the Biden Administration took issue with this rule when 18 states filed suit to have the Final Rule vacated; the New York federal court determined that the Final Rule was improper for: granting excessive deference to FLSA's definition of "employer;" its adoption of a control-based vertical joint employer liability test; and its prohibition on non-control-based factors, such as economic dependence. *But see* 86 FED. REG. 40939 (July 30, 2021) (recission of 29 CFR § 791.2 under Biden Administration); *Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule*, FED. REG., [https://perma.cc/4L77-QEFZ] (last visited Mar. 23, 2023) (finalizing DOL's proposal rescinding "Joint Employer Status Under the Fair Labor Standards Act").

[33] *See* Arculeo v. On-Site Sales & Mktg., LLC, 321 F. Supp. 2d 604, 608 (S.D.N.Y. 2004) (explaining near contractual nature of joint employer relationship). Comparing joint liability within employment, the Second Circuit has established that "[t]he joint employer doctrine is analytically similar to the single employer doctrine, as a joint employer relationship may be found where there is sufficient evidence that a defendant had immediate control over another company's employees. Relevant factors include the commonality of hiring, firing, discipline, pay, insurance records, and supervision." *Id.* Unlike a single employer, a joint employer typically shares control with another entity over one or more essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction of work. Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195, 1209 (D.C. Cir. 2019) (exercising indirect control may establish joint employer status, despite no direct control over working conditions). In addition, courts may consider whether one employer exercises indirect or reserved control over the employee's work, such as through contractual arrangements or by providing equipment, tools, or training. *Bonnette*, 704 F.2d at 1470 (determining relevancy of control over employment decisions); *see also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989) (considering control over "instrumentalities of work" and "manner and means by which the product is accomplished" as relevant factors). Finally, courts may examine the extent to which each employer's actions contributed to the alleged employment law violation, such as discrimination or retaliation. Univ. of Tex. Southwestern Med. Ctr. v. Nassar, 570 U.S. 338, 348-49, 362 (2013) (holding that "motivating factor" standard applies to retaliation claims under Title VII).

[34] *Felder*, 27 F.4th at 849 (affirming in part and vacating in part district court's decision). The court has granted Felder permission to modify his complaint once more, with the aim of presenting evidence of a joint employer relationship. *Id.* "Absent any 'indication as to what [Felder] might add to [his] complaint in order to make [these claims] viable,' we solely exercise our discretion to vacate and remand the District Court's dismissal of Felder's Title VII retaliation claim." *Id.* (citing Wilson v. Merrill Lynch & Co., 671 F.3d 120, 140 (2d Cir. 2011)) (alteration in original). The court dismissed Felder's Title VII, 42 U.S.C. § 2000e-2, and § 1981 claims, which assert a failure

sequentially on Felder's Title VII claim, § 1981 claim, and Request for Leave to Amend.[35] The Title VII claim, which was the most prominently addressed, was broken down into three parts for analysis: (1) an examination of the terms 'employee' and 'employer,' with an evaluation of when a joint employer relationship can be established; (2) an assessment of how the joint employer doctrine applies to Felder's case; and (3) a determination of whether Felder had satisfactorily met the burden of addressing this claim.[36]

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or refusal to hire Felder based on color, religion, sex, or national origin. *Felder*, 27 F.4th at 841. However, the court remanded Felder's Title VII retaliation claim under 42 U.S.C. § 2000e-3(a), which seeks to hold an employer liable for discriminating against any of his employees or applicants for employment because he "has opposed any practice made an unlawful employment practice by this subchapter . . . ." *Id.* at 841.

[35] *Felder*, 27 F.4th at 841-47 (outlining majority court's conclusory analysis). Felder's claim under § 1981 was addressed much more briefly; the court established the standard of review, and immediately concluded that Felder pled no facts which suggest his security credentials were denied by USTA due to his race. *Id.* at 848. *See* Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009, 1019 (U.S. 2020) ("[A] plaintiff must initially plead and ultimately prove that, but for race, [he] would not have suffered the loss of a legally protected right."). Upon reviewing Felder's Request for Leave to Amend, the court granted it, to the extent which Felder could amend his complaint to allege additional indicia of a joint employer relationship under 42 U.S.C. § 2000e-3(a). *Felder*, 27 F.4th at 848-49 (noting Felder's opportunity to amend his complaint to allege more relevant information).

[36] *Felder*, 27 F.4th at 849 (beginning conclusory analysis with Title VII claims). The court established Felder's first and largest hurdle in successfully asserting a Title VII claim against USTA was his (in)ability to prove the existence of an employer-employee relationship, as is a primary element of Title VII claims. *Id.* at 842 ("[B]oth parties agree that the USTA was not Felder's direct employer."). *See also* Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 113 (2d Cir. 2000) ("Title VII . . . cover[s] 'employees,' not independent contractors."). The decision caveats that the Second Circuit has '"not yet fully analyzed or described a test for what constitutes joint employment in the context of Title VII,' and because it was 'not necessary for our resolution of [the] case … decline[d] to do so [t]here." *Felder*, 27 F.4th at 842 (alteration in original) (quoting Arculeo v. On-Site Sales & Mktg., LLC, 425 F.3d 193, 199-200 n.7 (2d Cir. 2005)). Because of the "completely circular" nature of definition of Title VII, the court relied on the general common law of agency to govern the meaning of 'employee' and 'employer.' *Felder*, 27 F.4th at 843. *See e.g.,* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444-45 (2003) (applying federal common law of agency to definition of "employee" under ADA); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (applying federal common law of agency to definition of "employee" under ERISA); United States v. City of New York, 359 F.3d 83, 92 (2d Cir. 2004) (applying set of non-exhaustive factors to determine employer-employee relationship under common law). The court will ascertain the existence of a joint employer relationship, as per common law principles, when two or more entities jointly hold substantial control over an employee. *Felder*, 27 F.4th at 843. *See, e.g.*, Knitter v. Corvias Mil. Living, LLC, 758 F.3d 1214, 1226 (10th Cir. 2014) ("Under the joint employer test, two entities are considered joint employers if they 'share or co-determine those matters governing the essential terms and conditions of employment.'" (quoting Bristol v. Bd. of Cnty. Comm'rs of Cnty. of Clear Creek, 312 F.3d 1213, 1218 (10th Cir. 2002))); Plaso v. IJKG, LLC, 553 F. App'x 199, 204 (3d Cir. 2015) ("[A] joint employment relationship exists when 'two entities exercise significant control over the same employees.'" (quoting Graves v. Lowery, 117 F.3d 723, 727 (3d Cir. 1997))). The court specified the inquiry required to establish liability under the joint employer doctrine, assessing the operative questions: "Would the USTA have been Felder's joint employer *had* Felder worked at the U.S. Open?" *Felder*, 27 F.4th at 845. The majority court's application of the joint employer test to Felder's lent itself to the

The court acknowledged that one of its primary obstacles in reaching a conclusion was the lack of an established relationship between the two parties—as most joint employer factors assume a preexisting relationship—yet the case at hand involved Felder's purported denial of employment prior to commencing work, which added a layer of complexity to the court's analysis.[37]

Justice Gerard E. Lynch authored a dissenting opinion, focusing predominately on the contended argument that the majority opinion allows employers to refuse an employee assigned by a subcontractor to work for the contracting company on the basis of prohibited categories, such as race or gender, and still be exempt from any liability under Title VII.[38] Justice

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conclusion that "[t]o plausibly allege that the parties intended to enter into a joint-employment relationship, then [Felder] must allege that the entity would have exercised significant control over the terms and conditions of his employment . . . . Because Felder's complaint is devoid of any such allegations, his Title VII claims must fail." *Id.* at 838-39 (determining Felder's claim lacked allegations which would entitle him to relief under Title VII) (alterations omitted). Per the court's understanding, Felder did not allege: (1) USTA had control over his hiring or firing; (2) USTA exerted control over AJ Security's employment decisions; or (3) USTA was or would have been involved in training, supervising, issuing pay, or otherwise controlling means of his employment. *Id.* According to the Tenth Circuit and the D.C. Circuit, requesting that the subcontractor "no longer assign" an employee to work at a company's facilities does not equate to firing the employee. *Knitter*, 758 F.3d at 1229; *see also* Redd v. Summers, 232 F.3d 933, 936-37 (D.C. Cir. 2000) (noting though "the [defendant] had the right to reject any tour guide [hired by its subcontractor] . . . [the subcontractor] did all the hiring and firing"). Such a demand does not result in the termination of the worker's ongoing employment with the subcontractor, nor does it restrict the worker from providing services to other clients of the subcontractor. *Knitter*, 758 F.3d at 1217; *Redd*, 232 F.3d at 940 ("[W]hile the contract gives the [defendant] the right to reject any guide . . . the decision to terminate the guide's employment with [the subcontractor] is solely within [the subcontractor's] power.").

[37] *Felder*, 27 F.4th at 846-47 (concluding USTA's refusal of credentials was insufficient to adequately plead joint employer relationship). "This leaves us to consider how to assess the pleading standards applicable to the joint employer relationship in situations where the relationship has not yet commenced in any meaningful way." *Id.* at 844. *Cf.* NLRB v. W. Temp. Servs., Inc., 821 F.2d 1258, 1266-67 (7th Cir. 1987) (finding joint employer relationship where the company could "refuse a referral" but had "exclusive control over the day-to-day activities of the part-time workers who [were] referred to it"). The court argues that if refusal to issue credentials were in fact sufficient to render joint employment status, that would force the conclusion that issuing credentials would also render USTA a joint employer, and in doing so would render any other factors indicating a common law agency relationship irrelevant in the context of applying the joint employer doctrine. *Felder*, 27 F.4th at 847.

[38] *Felder*, 27 F.4th at 849-55 (Lynch, J., dissenting in part) (arguing Title VII should be interpreted to support finding of liability). Disagreeing with the majority's operative question, Justice Lynch argues that the question at hand should be "[w]ho is responsible for the refusal to hire?" –

> While the joint employer doctrine sensibly protects companies from the discriminatory employment practices of its subcontractors where the company is insufficiently involved with the conditions of employment to be reasonably held responsible for the subcontractor's acts, it makes little sense to adopt a rule that permits an employer to require its subcontractors to violate Title VII by sending it only white security guards, or non-Jewish bookkeepers, or female office temps, thus putting the subcontractor to the choice of

Lynch articulated that while he agrees with the majority court that Felder failed to plead or proffer concrete facts as to racial discrimination, the majority court's reasoning as to Felder's failure of an adequately pled a Title VII claim is questionable on its face.[39] Moreover, Justice Lynch's dissent noted that the nature of a refusal-to-hire implies that no "employer-employee" relationship existed between Felder and USTA because Felder is effectively an applicant for employment to USTA through his independent contract with AJ Security.[40] Justice Lynch's dissent further challenged the majority by reminding the court that Title VII explicitly protects applicants for employment, making it unlawful for "employers" to fail or refuse to hire an employee on the basis of a protected class.[41] Ultimately, Justice Lynch argued that it is not justifiable for an employer, such as USTA, to outsource its security guard hiring to a contractor while maintaining absolute and

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> losing the contract or violating Title VII itself by classifying its employees on the basis of race in ways that will adversely affect their employment opportunities.

Id. at 854-55 (Lynch, J., dissenting in part).

[39] *Id.* at 852 (Lynch, J., dissenting in part) (reasoning against majority opinions dismissal of refusal-to-hire analysis). Justice Lynch emphasizes the misplacement of emphasis on mistreatment by USTA, as Felder's claim substantiated that he was denied an employment opportunity, alleging that he had been completely precluded from employment due to the discriminatory practices against *applicants* by the company controlling the workplace. *Id.*

[40] *Felder*, 27 F.4th at 852 (Lynch, J., dissenting in part) (reasoning against majority's dismissal of refusal-to-hire analysis). The joint employer doctrine utilizes a complex, multi-factor test, as referenced by the majority in this case, to balance the legitimate economic justifications for allowing labor subcontracting against the potential for mistreatment of workers by both the subcontractor agency and the receiving company. *Id.* This approach aims to avoid unfairly attributing the mistreatment of selected, managed, and supervised workers by the subcontractor agency to the entity receiving the services, while also safeguarding the rights of both workers and the subcontracting agency from any abuse imposed solely or in collaboration with the recipient company. *Id.*; Butler v. Drive Auto Indus. of Am., Inc., 793 F.3d 404, 414 (4th Cir. 2015) (adopting hybrid test which bridges control test and economic realities test). Justice Lynch found no fault with this test in discrimination contexts, yet reminded the majority that Title VII explicitly protects *applicants*, a key function of Title VII. *Felder*, 27 F.4th at 852 (Lynch, J., dissenting in part). It is significant to note, according to Justice Lynch's dissent, that when an applicant is denied employment—allegedly for a discriminatory reason—assigning responsibility to an entity should be a straightforward task. *Id.*

> [T]here is not the same need to sort out the complexities of interactions in the workplace between workers and supervisors formally employed by the subcontracting agency and the officials of the contracting employer to whom they report. There is a simple binary decision, to hire or not to hire, to accept a worker's presence or reject it. Someone, at one company or the other, is the ultimate decisionmaker in the hiring choice.

Id.

[41] *Felder*, 27 F.4th at 851-53 (Lynch, J., dissenting in part) (emphasizing Title VII's protections of both current employees and applications for employment). *See* Butler v. Drive Auto. Indus. of Am., Inc., 793 F.3d 404, 410 (4th Cir. 2015) (preventing delegating company from evading liability by hiding behind staffing entity).

unilateral authority to reject any guards furnished by the a subcontractor on the basis of discriminatory or retaliatory grounds, thereby indulging in the employer's own biased preferences.[42]

Justice Lynch's dissent provided a more cogent perspective on the joint employer issue at hand, given Felder's employment relationships, or lack thereof, with AJ Security and USTA.[43] The majority's decision represents an application of policy which seeks to safeguard employers' contractual responsibility in complying with employment discrimination laws, but improperly does so in this context, where the entity in question—USTA—did not retain the power to hire, yet had the authority to deny credentials.[44] Following the majority court's decision, any entity who outsources the hiring decisions to a third-party employer retains the power to deny workers' work assignments on discriminatory grounds without rebuke, contradicting the protective measures outlined in Title VII.[45]

The majority court's reading of Title VII's protections contend that because Title VII only protects employees from discrimination and retaliation under protected classes, Title VII would not protect Felder as an

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[42] *Felder*, 27 F.4th at 852 (Lynch, J., dissenting in part) (importing doctrines from various workplace regulations). Justice Lynch embraces courts and regulators who have shaped the joint employer doctrine to "'prevent' the delegating company from 'evading liability by hiding behind another entity, such as a staffing entity.'" *Id.*; *see also* Butler*,* 793 F.3d at 410 (preventing employers from hiding behind other entities, like staffing agencies).

[43] *See Felder*, 27 F.4th at 850 (Lynch, J., dissenting in part) (agreeing Felder failed to adequately plead racial discrimination yet offered substantial proof of retaliation); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989) (describing determining factors for employees compared to independent contractors). Applying the independent contractor analysis provided by the Supreme Court in *Reid* to Felder's relationship with the USTA, Felder would have been deemed an independent contractor, formally employed by AJ Security. 490 U.S. at 751-52; *Felder*, 27 F.4th at 840, 844 (Livingston, C.J., majority). However, the court lacked oversight of Felder, presuming USTA would not have the authority to fire, issue payment, or otherwise control Felder's daily employment activities. *Felder*, 27 F.4th at 844. The issue at hand is more appropriately categorized as failure-to-hire claim, which arises prior to the establishment of such a relationship. *Id.* at 850 (Lynch, J., dissenting in part); *see also* 42 U.S.C. § 2000e(j) (stating employer's failure-to-hire based on protected class violates Title VII).

[44] Baker v. Flint Eng'g & Constr. Co.*,* 137 F.3d 1436, 1444 (10th Cir. 1998) (concluding dependence upon controlling entity granted employee status). AJ Security hired Felder "to do seasonal security for 2 weeks at 2016 U.S. Open." Reply Brief of Plaintiff-Appellant, *supra* note 13, at 9. Like the plaintiffs in *Baker*, Felder would have been told his working hours and what portion of the "project" he was assigned to—what to do and where to do it—by USTA. *See id.* at 2; *Baker,* 137 F.3d at 1444. Felder became "dependent upon USTA for the opportunity to render serves for however long [the U.S. Open] lasted" because of his inability to perform his contractual assignment. Reply Brief of Plaintiff-Appellant, *supra* note 13, at 2*; Felder*, 27 F.4th at 844 (Livingston, C.J., majority).

[45] *See Butler,* 793 F.3d at 412-13 (requiring totality of employment circumstances to be considered).

applicant to an independent contractor position with USTA.[46] However, this reading invites USTA to continue nominally delegating the responsibility of hiring to another agency and subsequently rejecting the employees hired by the agency for discriminatory motives without liability.[47] It is unjustifiable to protect a company that carries out a discriminatory agenda of excluding disfavored groups from its workforce through indirect means.[48] As highlighted by Justice Lynch's dissent, there is no doubt that minority employees, as well as subcontracting agencies, are adversely affected by such practices that entail this type of indirect discrimination.[49]

A failure-to-hire claim warrants distinctive treatment when compared to other forms of adverse employment actions under Title VII, given that it materializes before the establishment of an employer-employee

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[46] *Felder*, 27 F.4th at 843-45 (analyzing under assumption Felder independently contracts for USTA without joint employer status). The court's emphasis on Felder's ability to remain employed with AJ Security is misplaced under the circumstances, as AJ Security's behaviors are not under review, nor do they bear relevance on the conclusion as to USTA's liability. *Id. Cf.* Parker v. Esper, 856 F. App'x 807, 808-09 (11th Cir. 2021) (failing to establish joint employment without power to modify plaintiff's employment conditions).

[47] *Felder*, 27 F.4th at 854 (Lynch, J., dissenting in part) (emphasizing importance of companies preventing their own workforces from becoming exclusionary).

> The majority finds it significant that USTA does not insist that AJ Security fire employees of protected groups, or not to assign them to work for other entities to whom it contracts to provide security guards. But Title VII does not impose liability only on employers who seek to require other companies to maintain exclusionary workforces; it seeks to prevent employers from maintaining exclusionary workforces themselves.

Id. See also Muhl, *supra* note 2, at 6 (stating employment relationship exists if individual is economically dependent on entity for continued employment). In Felder's circumstance, because he was hired specifically as a seasonal employee to work for the U.S. Open, Felder was dependent on USTA for continued employment with both USTA itself, and with AJ Security. *Felder*, 27 F.4th at 838-40 (Livingston, C.J., majority).

[48] Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009, 1019 (U.S. 2020) ("Under [Title VII's] terms, once a plaintiff establishes a prima facie case of race discrimination through indirect proof, the defendant bears the burden of producing a race-neutral explanation for its action, after which the plaintiff may challenge that explanation as pretextual."). *See also* Maltby & Yamada, *supra* note 25, at 257-58 (discussing evolution of Title VII protections from strictly intentional discrimination to include facially neutral discrimination).

[49] *See* Maltby & Yamada, *supra* note 25, at 256 (highlighting risks of employee definition under common-law standard).

> With the wider adoption of the common-law standard, we can fairly conclude that only individuals who fit into traditional patterns of employment will be sure bets to fall within the statutory definition of employee. This leaves everyone else in a potential regulatory void . . . . The unfortunate direction being taken by the federal judiciary in this regard comes at a time when those who are likely to be excluded from discrimination laws' protection constitute a growing sector of the workforce.

Id.

relationship.[50] Justice Lynch's dissent correctly avowed a lack of justification for employers to utilize subcontractors for recruitment purposes while maintaining the prerogative to arbitrarily reject any candidate proposed by the subcontractor on the basis of discriminatory or retaliatory motives.[51] Allowing such a practice to persist would enable employers to evade legal liability for their discriminatory conduct, thus undermining the purpose of anti-discrimination laws.[52]

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[50] Adeniji v. New York State, 557 F. Supp. 3d 413, 434 (S.D.N.Y. 2021) (discussing burden shifting test in Title VII failure-to-hire cases). Title VII protections extend to applicants for employment under 42 U.S.C. § 2000e-3(a), which prohibits retaliation for opposition or participation in claim of discriminatory action perpetrated by employer. 42 U.S.C. § 2000e-3(a). Because the alleged discrimination was not perpetrated by AJ Security, Felder's employer, but rather USTA, the standard the majority applies to Felder's claims is excessive. *Felder*, 27 F.4th at 853 n.2 (Lynch, J., dissenting in part) ("[A] plaintiff asserting a claim of discriminatory refusal to hire should not bear such a burden of pleading or proof in the first place."). Moving forward, Felder may or may not plead stronger joint-employment facts, but the court's four-factor analysis for failure-to-hire is crucial. *See id.* at 855 n.4. He is a qualified Black man over forty, who previously worked for USTA, and was hired by AJ Security as a seasonal employee for the U.S. Open finals; as such, he successfully and plausibly alleged that USTA denied his credentials in retaliation for the lawsuit he had previously filed in 2012. *Id.* at 839-40 (Livingston, C.J., majority). Felder's specific employment with AJ Security was for seasonal work at the USTA U.S. Open Tournament. *Id.*; Reply Brief of Plaintiff-Appellant, *supra* note 13, at 9 (describing Felder's involvement with AJ Security). After the applicant has established a prima facie case, it is then the responsibility of the defendant to present a non-discriminatory explanation for why the plaintiff was not hired; Felder has already plead sufficient facts to establish a prima facie case under Title VII and thus, the burden should be on USTA to assert a non-discriminatory reason for declining Felder's credentials. *See Adeniji*, 557 F. Supp. 3d at 434; *Felder*, 27 F.4th at 851-52 (Lynch, J., dissenting in part); *see also* Maltby & Yamada, *supra* note 25, at 240 ("The question of whether independent contractors should fall within the aegis of statutes designed to protect workers does not yield a single, blanket analysis and answer.").

[51] *Felder*, 27 F.4th at 855 (Lynch, J., dissenting in part) (emphasizing role of contractors in employment decisions cannot shield employers from liability).

> If it is not to be held responsible for AJ Security's employment decisions, those decisions must be those of the contractor. Employers cannot be permitted to replace a sign that says "No Irish need apply to work here" with one that says "No Irish will be given credentials to work here if they are hired by our security contractor and assigned to work at our premises.

Id.

[52] *But see* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (forbidding employment practices with discriminatory disparate *impact* without justifiable business necessity); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-03 (1973) (shifting burden of proof in Title VII cases involving disparate treatment); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (prohibiting discriminatory employment practices resulting in disparate impact); Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989) (expanding Title VII to include discrimination based on gender stereotypes); City of L.A. Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) ("[I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))). *See also* Parker v. Esper, 856 F. App'x 807, 808 (11th Cir. 2021) (clarifying burden

The majority's ruling effectively implied that employers have the legal right to reject an employee assigned by a subcontractor to work for them based on prohibited discriminatory factors, such as race or gender, without facing any legal consequences under Title VII. However, the majority's decision fails to properly consider the failure-to-hire aspect of Felder's discrimination and retaliation claims. While Felder's brief may not have pled the necessary facts to find discrimination of the basis of a protected class, this loophole—which denies him the opportunity for legal recourse based on his independent contractor applicant status—will perpetuate discrimination and further disadvantage already marginalized communities in the workforce. Moreover, as more people earn income through on-demand work, this ruling sets a dangerous precedent by allowing employers to evade accountability for their discriminatory actions. Moving forward, courts must continuously challenge their perceptions of employment relationships to provide fair recourse for plaintiffs pursuing remedies from discriminatory employment decisions. Regardless of the approach taken, it remains evident that there is a need for an evolved joint employer rule.

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of proof required in discrimination cases under Age Discrimination in Employment Act ("ADEA")); Arculeo v. On-Site Sales & Mktg., LLC, 425 F.3d 193, 198 (2d Cir. 2005) (establishing plaintiff need not be member of protected class for retaliation claim under Title VII).