

# Who is the Employer in a Title VII Claim?

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**In a Contractor and Subcontractor Relationship, Who is the Employer? The 7th Circuit Clarifies the Standard for Showing “Indirect Employer” Status Under Title VII**

This case highlights the need for employers, especially those who work with subcontractors, to be properly informed of the factors which determine the formation of an employer and employee relationship so they can minimize potential liability under Title VII.

An African-American foreman who was fired by the general contractor on a city hall construction project sued under Title VII alleging discrimination and retaliation on the basis of race. The city hall contract contained a city residency program. The general contractor hired a subcontractor in order to ensure compliance with the residency program. The subcontractor then employed a second subcontractor who in turn hired the foreman.

The foreman had no contractual relationship with the general contractor. The foreman’s duties included: shipping and receiving, managing laborers, and ensuring that necessary materials were on site and properly staged. The second subcontractor paid the foreman’s salary and provided all other benefits, and general work instructions based on the general contractor’s expectations.

The general contractor’s contract with the subcontractor required the subcontractor to furnish all labor, materials, equipment, and services necessary to complete its work. However, the general contractor controlled access to the project work site, and required that all subcontractor employees attend periodic safety training meetings. However, the general contractor retained the right to investigate alleged misconduct by its subcontractors’ employees, to discipline them if necessary. Additionally, the general contractor made the final decision on which workers could be permanently removed from the job site if any worker presented a threat to workplace safety or worker productivity or well-being. The general contractor terminated the foreman and an African American employee of a different subcontractor after the men were involved in a fight.

In response to the foreman's lawsuit, the district court noted that a defendant who is not a "direct employer" may nevertheless be subject to Title VII liability if the plaintiff demonstrates that the defendant functioned as a "de facto" or "indirect employer." The district court found that the foreman failed to make the necessary showing and concluded that "indirect employer" liability depends on the amount of control a defendant has over the plaintiff's employment. After the district court dismissed the foreman's lawsuit he appealed to the 7th Circuit Court of Appeals. The 7th Circuit analyzed whether the general contractor exercised sufficient control over the foreman in order to determine whether the general contractor was a proper defendant under Title VII. The district court had identified two independent tests used to determine whether a defendant can be deemed an employer. The first test, a "five-factor test", balances the following factors relevant to an employer-employee relationship:

- (1) The extent of the employer's control and supervision over the employee;
- (2) The kind of occupation and nature of skill required, including whether skills were acquired on the job;
- (3) The employer's responsibility for the costs of operation;
- (4) The method and form of payment and benefits; and
- (5) The length of the job commitment.

The second test, the "economic realities" test, considers the amount of control exerted by the alleged "de facto employer."

The 7th Circuit clarified that the "five-factor test" is simply more a detailed application of the "economic realities" test. In applying the "five-factor test" the 7th Circuit upheld the dismissal of the foreman's lawsuit since the general contractor did not set the foreman's hours, did not assign or directly supervise his projects, and did not have the ability to promote or demote the foreman, aside from the general contractor's ability to remove the foreman from the job site for safety reasons. Additionally, the control factors lacking include the fact that the general contractor did not provide the foreman with health insurance, sick leave, or vacation time. The 7th Circuit concluded that the general contractor's involvement in the foreman's dismissal from the city hall project was relevant to their relationship; however, it was not enough to overcome the "five-factor test" analysis because overall the general contractor exercised insufficient control over the foreman. The 7th Circuit ruled that the general contractor was not liable as an "indirect employer" under Title VII.

Walter V. Love v. JP Cullen & Sons, Inc., No. 13-3291(7th Cir., March 9, 2015)