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2016]

DOES TITLE VII WORK FOR TEMPS? *FAUSH v. TUESDAY MORNING*
RECONSIDERS THE EMPLOYMENT RELATIONSHIP

SHANE O'HALLORAN*

“And you have all these people say, ‘When are you going to get a real job?’ I mean, you’re going through all the motions of a real job. I mean, you’re showing up at a place between eight and five. And technically, you’re probably doing as much as anyone else who works there full-time. You know? But you’re just sort of this ghost.”¹

I. INTRODUCTION: EVERYBODY’S WORKING FOR THE WEEKEND—EXCEPT
TEMPORARY WORKERS

Matthew Faush was an African-American employed by Labor Ready, a national temporary staffing company.² Faush alleged that, while assigned to closeout store Tuesday Morning, Inc. (Tuesday Morning), white employees and managers subjected him to racial discrimination that ultimately resulted in his termination.³ Faush sought a legal remedy for this alleged injustice.⁴ However, Faush found the halls of justice closed when the court determined that, because Faush was a temporary worker, he was not an employee of Tuesday Morning for purposes of Title VII of the Civil Rights Act of 1964 (Title VII).⁵ Rather, Faush, like other temporary workers who have sought to bring Title VII claims against their temporarily-assigned placement employers, was deemed an employee only of the staffing company.⁶

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1. KEVIN D. HENSON, *JUST A TEMP* 1 (1996).

2. *See* Faush v. Tuesday Morning, Inc., 995 F. Supp. 2d 350, 352 (E.D. Pa. 2014) (recounting factual posture of Faush’s claim), *aff’d in part, vacated in part, remanded by* 808 F.3d 208 (3d Cir. 2015).

3. *See id.* (describing Faush’s contentions regarding treatment by Tuesday Morning employees).

4. *See id.* (describing Faush’s claims under Title VII of Civil Rights Act of 1964 and Pennsylvania Human Relations Act).

5. *See id.* at 355 (holding Faush “was not an employee of Tuesday Morning” under Title VII or Pennsylvania Human Relations Act). To determine whether Faush was an employee, the trial court applied the analysis announced by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*. *See id.* (applying *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–24 (1992)). Finding that no employment relationship existed, the district court granted summary judgment for Tuesday Morning on Faush’s Title VII and PHRA claims. *See id.* at 356.

6. *See id.* at 355 (discussing facts indicative of employment relationship between Faush and Labor Ready). The trial court focused on Labor Ready’s role in assigning Faush to work at Tuesday Morning; providing him with a timecard; set-

The use of temporary employees has grown significantly over the past several decades, raising new questions about statutory liability under federal employment laws for employers using temporary staffing services.⁷ For example, studies from the Department of Labor (DOL) show that “between ten and thirty percent” of employers studied “misclassified [their] employees as independent contractors,” and this incorrect classification impacts employers’ statutory liability and results in underreported wages and unemployment compensation tax liability.⁸ Meanwhile, the Equal Opportunity Employment Commission (EEOC) and some courts have sought to expand the legal obligations of employers toward temporary workers, and some observers have predicted that, given Title VII’s remedial policy purpose, courts are likely to construe the definition of employee more expansively than in the past.⁹

ting his pay rate and paying wages, taxes, and insurance; and not permitting him to be on Tuesday Morning’s premises unattended. *See id.*

7. *See* Pamela Villarreal & Peter Swanson, *Temporary Employment: The New Permanent?*, NAT’L CENTER FOR POL’Y ANALYSIS (Oct. 10, 2011), <http://www.ncpa.org/pub/ba754> [<https://perma.cc/9NPB-WK9K>] (describing increase in percentage of labor force made up by temporary employees from less than one percent in early 1970s to three percent by 2000). Outside of the Title VII context, Third Circuit courts have found that temporary workers may qualify as joint employees of both the assigning agency and the recipient of services for purposes of the Fair Labor Standards Act (FLSA). *See* 29 U.S.C. §§ 201–219 (2012); *see also* Lindsay Kreppel, *The Third Circuit Enunciates a New Test for Determining Joint Employers Under the Fair Labor Standards Act in In Re Enterprise Rent-A-Car Wage & Employment Practices Litigation: A Look into Its Potential Impact on Business Management and the Need to Further Recognize FLSA’s Legislative Intent*, 15 DUQ. BUS. L.J. 243, 245 (2013) (discussing *In re Enter. Rent-A-Car Wage & Hour Emp’t Practices Litig.*, 683 F.3d 462 (3d Cir. 2012)) (describing Third Circuit case law holding two or more entities may be considered joint employers under FLSA if both exert significant control over worker).

8. *See* Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 613 n.25 (2012) (discussing analysis of incorrect characterizations of employees by employers). As Rubinstein points out,

[T]here is no clear understanding about how the law should distinguish between employees and non-employees whether they are characterized as volunteers, independent contractors, or shareholders. This lack of clarity is largely due to the fact that the statutory language defining employee status in virtually all of our nation’s employment laws is vague, conclusory, and largely useless This is not helpful for anyone. Both employees and employers need to be able to determine what rights they do or do not have. When employment status is unclear, employment rights are unclear. Uncertainty can become a breeding ground for litigation.

Id. at 608–09 (footnotes omitted).

9. *See* Charles G. Meyer, III & A. Tevis Marshall, *The Temptation of Hiring Temps: Potential Liability for Employers*, 17 No. 1 VA. EMP. L. LETTER 3 (2005) (noting courts may seek to expand employer liability given remedial policy considerations behind Title VII). Meyer and Marshall note that some jurisdictions have expanded Title VII liability to include temporary workers “when the employers retained suffi-

Third Circuit courts have consistently analyzed temporary workers' Title VII claims under the test set forth by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*,¹⁰ which considers the hiring party's right to control the manner and means by which the worker accomplishes the work or creates the product.¹¹ Those cases focused largely on formal payment procedures and hiring and firing authority, and did not consider the possibility that a temporary worker may qualify as a joint employee of both employers at common law.¹²

The relevant case law yielded consistent results: the Third Circuit found temporary workers were employees only of the staffing agencies, not the agencies' clients.¹³ However, in reviewing Faush's claims, the Third Circuit reaffirmed the applicability of *Darden* to Title VII claims but, for the first time, held that a temporary worker may survive summary judgment as to the issue of whether an employment relationship existed with an assigned temporary placement employer.¹⁴

This Casebrief discusses the Third Circuit's evolving approach to temporary workers and Title VII and explains that more temporary workers will survive summary judgment after *Faush v. Tuesday Morning, Inc.*¹⁵ The *Faush* court's explicit recognition of joint-employer liability, increased em-

cient control over the means and manner of a temporary worker's performance." *See id.*

10. 503 U.S. 318 (1992).

11. *See id.* at 323 (describing focus of common law employment test); *Scott v. UPS Supply Chain Solutions*, Civil Action No. 10-929-RGA, 2012 WL 2016820, at *1 (D. Del. June 5, 2012), *aff'd*, 523 F. App'x 911 (3d Cir. 2013) (applying *Darden* to conclude temporary worker was not employee of assigned work placement); *Prather v. Prudential Fox & Roach*, 326 F. App'x 670, 672 (3d Cir. 2009) (affirming conclusion that temporary worker was not employee); *Shah v. Bank of Am.*, 598 F. Supp. 2d 596, 602 (D. Del. 2009), *aff'd*, 346 F. App'x 831 (3d Cir. 2009) (applying *Darden* test in holding temporary worker was not employee). While these were unpublished decisions aside from *Shah*, they represent all instances of Third Circuit courts considering the issue at hand. *See Faush*, 808 F.3d at 212 n.1 ("The District Court, in the absence of precedential authority within this Circuit, understandably relied on non-precedential opinions in reaching its conclusion.").

12. *See Scott*, 523 F. App'x at 912 (omitting discussion of joint employment while focusing on payment procedures and hiring and firing authority); *Prather*, 326 F. App'x at 672 (same); *Shah*, 346 F. App'x at 833 (same).

13. *See Scott*, 523 F. App'x at 912-13 (holding temporary worker at UPS facility not eligible for Title VII protection); *Prather*, 326 F. App'x at 671-72 (deeming "temporary administrative aide" in real estate office ineligible for Title VII protection); *Shah*, 346 F. App'x at 833-34 (affirming finding that temporary bank worker was ineligible for Title VII protection).

14. *See Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 220 (3d Cir. 2015) (holding reasonable jury could find Faush was employee of Tuesday Morning and reversing grant of summary judgment). In *Faush*, the court noted the "absence of precedential authority" discussing this issue, but noted that the previous cases "involved pro se plaintiffs who presented virtually no evidence in opposition to summary judgment and thus are readily distinguishable," thus signaling the possibility that a temporary employee-plaintiff may survive summary judgment. *See id.* 212 n.1 (describing reasoning of district court).

15. 808 F.3d 208 (3d Cir. 2015).

phasis on factors relating to day-to-day control, and focus on practical function over legal form in payment procedures, as well as hiring and firing authority, suggest this increased likelihood of surviving summary judgment may be particularly true for workers who perform the same unskilled tasks as full-time employees at fixed hourly rates under direct supervision of the assigned temporary employer.¹⁶

The *Faush* court's decision has important consequences for businesses making use of temporary employees and appears to represent a potential expansion of liability under Title VII.¹⁷ While the *Faush* decision may signal an expansion of potential liability for Title VII claims in the Third Circuit, the holding that employers may be jointly liable comports with the weight of authority in other jurisdictions and current EEOC guidance.¹⁸

Part II of this Casebrief will provide an overview of the substantive provisions and policy purposes of Title VII.¹⁹ Part II will also trace the development of temporary workers' eligibility for Title VII protection in the Third Circuit, as well as that of other circuits and the EEOC's treatment of the issue.²⁰ Part III will examine the facts, procedural history, and holding of *Faush*.²¹ Part IV will compare the analyses of other jurisdictions, the district court, and the Third Circuit Court of Appeals, highlighting differences in their respective analytical frameworks and concluding that *Faush* appropriately extends liability to some temporary assigned

16. See *id.* at 215–17 (noting Tuesday Morning's payments to Labor Ready were "functionally indistinguishable from direct employee compensation," Tuesday Morning managers "directly supervised" Labor Ready workers, those workers were hired for and "performed only unskilled tasks," and agreement between Tuesday Morning and Labor Ready obligated Tuesday Morning to comply with relevant labor and employment laws).

17. See Susan K. Lessack & Kali T. Wellington-James, *Third Circuit Rules That Temporary Worker Assigned by Staffing Agency Can Bring Race Discrimination Claim Against Company Where He Was Placed*, PEPPER HAMILTON LLP (Nov. 24, 2015), www.pepperlaw.com/publications/third-circuit-rules-that-temporary-worker-assigned-by-staffing-agency-can-bring-race-discrimination-claim-against-company-where-he-was-placed-2015-11-24/ [https://perma.cc/H3LF-9XUQ] (opining *Faush* should "cause companies to review their relationships with temporary workers, assess the risk of their being viewed as joint employers and, if appropriate, restructure the relationships to minimize that risk").

18. See *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 409 (4th Cir. 2015) (expressly adopting possibility of joint-employer liability under Title VII and applying hybrid test); *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 611 F. Supp. 344, 347–49 (S.D.N.Y. 1984) (discussing joint-employer possibility under economic realities test and common law loaned servant doctrine in denying motion to dismiss for failure to allege employment relationship in Title VII claim), *aff'd sub nom.* *Aharnare v. Merrill Lynch*, 770 F.2d 157 (2d Cir. 1985); U.S. Equal Emp. Opportunity Comm'n Notice No. 915.002 (1997), 1997 WL 33159161, at *5–6.

19. For a discussion of Title VII of the Civil Rights Act of 1964, see *infra* notes 24–35 and accompanying text.

20. For a discussion of case law and administrative guidance on the applicability of Title VII to temporary workers, see *infra* notes 36–65 and accompanying text.

21. For a detailed explanation of the Third Circuit's decision in *Faush*, see *infra* notes 66–109 and accompanying text.

placement employers.²² Finally, Part V will offer brief advice to practitioners representing employers and temporary employees following *Faush*.²³

II. BACKGROUND: TEMPORARY WORKERS LEFT WAITING FOR TITLE VII BONUS

Title VII of the Civil Rights Act of 1964 has represented landmark legislation aimed at eliminating discriminatory employment practices.²⁴ Despite its broad sweep, Title VII's sparse and circular definition of "employee" has led to interpretation in the form of both administrative guidance and judicial opinions.²⁵

A. *Title VII: Fighting for the Rights of Employees but Failing to Define Who Qualifies as One*

Congress enacted Title VII to ensure equal employment opportunities by eliminating employment practices and policies that discriminate on the basis of race, color, religion, sex, or national origin.²⁶ Though the

22. For a critical analysis of the reasoning in *Faush*, see *infra* notes 110–28 and accompanying text.

23. For a discussion of practical advice for practitioners in the wake of *Faush*, see *infra* notes 129–43 and accompanying text.

24. See 42 U.S.C. §§ 2000e-1–2000e-17 (2012); Damon Ritenhouse, *A Primer on Title VII: Part One*, A.B.A. (Jan. 2013), http://www.americanbar.org/publications/gpsolo_ereport/2013/january_2013/primer_title_vii_part_one.html [<https://perma.cc/89ME-GA8U>] (introducing Title VII).

25. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (applying traditional agency law principles to determine who qualifies as employee where "statute containing that terms fails to helpfully define it"); *Frankel v. Bally, Inc.*, 987 F.2d 86, 88–89 (2d Cir. 1993) (citing various federal anti-discrimination statutes and Supreme Court decisions interpreting term "employer") (discussing difficulties in defining employer in federal statutes and applying common law agency test to Age Discrimination in Employment Act claim); U.S. Equal Emp. Opportunity Comm'n Notice No. 915.002 (1997), 1997 WL 33159161, at *1 (discussing whether temporary workers qualify as employees under Title VII). That the relevant case law includes cases defining employee in contexts other than Title VII—such as ERISA and the Americans with Disabilities Act—is irrelevant, as the *Darden* court explained that "where a statute containing the word 'employee' does not helpfully define it, the common law agency test should be applied." See *Frankel*, 987 F.2d at 90 (citing *Darden*, 503 U.S. at 322).

26. See 42 U.S.C. §§ 2000e-1–2000e-17; Ritenhouse, *supra* note 24 (describing purpose of Title VII). Congress passed Title VII at a time when racial biases were overt and often incorporated in official employment policies, with the goal of combating racial discrimination by promoting equal opportunities for all races, especially African-Americans. See *id.* (arguing legislative history and final form of Title VII demonstrate intent to advance employment prospects of African-Americans and other minorities). In enacting Title VII, Congress also created the EEOC, "a five-member bipartisan commission" charged with enforcing the anti-discrimination laws contained in the Civil Rights Act, which began operating on July 2, 1965. See *EEOC History*, EEOC, <http://www.eeoc.gov/eeoc/history/35th/thelaw/> [<https://perma.cc/7ZYW-JDPB>] (last visited Apr. 8, 2016). Title VII provides that no more than three of the five commissioners may be members of the same political party, and it requires members to be appointed to five-year terms by the Presi-

Supreme Court has characterized Title VII as a “detailed statutory scheme,” Title VII defines “employee” only as “an individual employed by an employer,” a definition that many criticize as circular.²⁷ Accordingly, courts have concluded that Congress intended to describe the common law agency doctrine’s conception of the master–servant relationship, and have applied the common law test for that relationship as articulated in *Darden* when considering Title VII claims.²⁸

B. Interpreting “Employee”: *The Tricks of the Trade*

In interpreting Title VII’s definition of employee, courts have applied the common law test as set forth in *Darden* to determine the existence of an employment relationship.²⁹ The *Darden* test considers a non-exhaustive set of factors, including:

dent and confirmed by the Senate. *See id.* The “majority of Title VII claims” are predicated on claims of disparate treatment. *See Ritenhouse, supra* note 24. An individual may establish a prima facie case of disparate treatment under Title VII by showing “that he or she: (1) belongs to a protected class; (2) was qualified for the job; (3) was subjected to adverse employment action; and that (4) the employer gave better treatment to similarly situated person outside of the protected class.” *See* Carla A. Ford, *Gender Discrimination and Hostile Work Environment*, 57 U.S. ATT’YS’ BULL. 2 (2009) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 792–93 (1973)) (introducing elements of prima facie case of disparate treatment under governing *McDonnell Douglas* framework). Adverse employment actions may include: “failure to hire or promote, termination of employment, demotion, suspension, a cut in pay or benefit, reassignment of duties, reassignment to an undesirable position or location, and denial of opportunities for training and advancement.” *See id.* (providing examples of adverse actions). Ford also comments that circuits have interpreted adverse action differently, noting that “[t]he First, Second, Seventh, Ninth, Eleventh, and District of Columbia Circuits take a more expansive view,” while the “Fifth and Eighth Circuits hold that only ‘ultimate employment actions’ such as hiring, firing, promoting and demoting constitute actionable adverse actions.” *See id.* (citations omitted) (discussing varying jurisdictional interpretations of employment actions). However, despite the specificity with which unlawful employment practices under Title VII have been defined in case law, the statute defines “employee” only as “an individual employed by an employer.” *See* 42 U.S.C. § 2000e(f) (setting forth definition of “employee” for purposes of Title VII); *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 206 (1997) (citing 42 U.S.C. § 2000e(f)).

27. *See Darden*, 503 U.S. at 323 (“ERISA’s nominal definition of ‘employee’ as ‘any individual employed by an employer’ is completely circular and explains nothing.” (citation omitted)). While *Darden* was concerned with the definition of employee under ERISA “because Title VII’s definition of ‘employee’ is similarly devoid of content, the common-law test outlined in *Darden* governs in the Title VII context as well.” *See Faush*, 808 F.3d at 213 (citing Supreme Court and Third Circuit cases that applied *Darden* to Title VII claims).

28. For a discussion of courts’ interpretation of employer and employee in the context of Title VII, see *infra* notes 29–65 and accompanying text.

29. *See Walters*, 519 U.S. at 211 (citing *Darden*, 503 U.S. at 323–24) (noting definition of “employee” as set forth in *Darden* and describing definition as stemming from “traditional principles of agency law”). *Darden* involved an ERISA claim, but courts have subsequently utilized its construction of the terms “employee” and “employer” in the context of Title VII and other statutes where definitions are devoid of context and content. *See Darden*, 503 U.S. at 321 (discussing

[T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.³⁰

The analysis requires a fact-based examination of “the level of control an organization asserts over an individual's access to employment and the organization's power to deny such access,” rather than a bright-line determination.³¹ In *Faush*, the Third Circuit distilled the relevant factors into three: “which entity paid [the employees'] salaries, hired and fired them, and had control over their daily employment activities.”³²

The Third Circuit has previously recognized the concept of a “joint employer” under the relevant employment relationship analysis.³³ It has held that a joint-employment relationship exists where “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 who are employed by the other em-

ERISA claim); *see also* *Walters*, 519 U.S. at 211–12 (applying *Darden* in context of Title VII claim).

30. *Darden*, 503 U.S. at 323–24 (introducing factors relevant in discerning whether employer–employee relationship exists). In addition to listing these factors, the Court stated that, “[i]n determining whether a hired party is an employee under the general common law of agency, we consider the party's right to control the manner and means by which the product is accomplished.” *See id.* at 323 (discussing application of common law agency analysis).

31. *See* *Graves v. Lowery*, 117 F.3d 723, 728 (3d Cir. 1997) (citing *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1342 (D.C. Cir. 1973)) (discussing approach to determining existence of employment relationship).

32. *See* *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 214 (3d Cir. 2015) (alteration in original) (quoting *Covington v. Int'l Ass'n of Approved Basketball Officials*, 710 F.3d 114, 119 (3d Cir. 2013)) (noting Third Circuit's focus on three factors).

33. *See id.* at 213 (rejecting *Enterprise* test for joint-employer status in Title VII actions); *see also* *NLRB v. Browning-Ferris Indus. of Pa.*, 691 F.2d 1117, 1122–24 (3d Cir. 1982) (discussing concept and characteristics of joint employers at common law).

ployer.”³⁴ Thus, prior Third Circuit decisions recognized the joint-employment relationship under the common law.³⁵

C. *Employment History: Third Circuit Case Law on Temporary Workers and Title VII*

Until *Faush*, Third Circuit courts consistently found that temporary workers were not employees of their temporary placements, and the Third Circuit upheld grants of summary judgment based on the nonexistence of an employment relationship in several recent cases with similar facts.³⁶ Significantly, in granting summary judgment, district courts assumed that an employee could have only one employer.³⁷

In *Prather v. Prudential Fox & Roach*,³⁸ a temporary administrative aide alleged sexual harassment over the course of her work placement.³⁹ The plaintiff had worked at a realty company for approximately five months after being assigned the administrative aide job “through a staffing service.”⁴⁰ The trial court entered summary judgment in favor of the realty company, and the Third Circuit affirmed under *Darden*, specifically noting

34. See *Browning-Ferris*, 691 F.2d at 1123 (quoting *Walter B. Cooke, Inc.*, Case 2-CA-16979, slip op. at 31 (N.L.R.B. June 30, 1982)). In *Browning-Ferris*, *Browning-Ferris*, which “operated a refuse transfer site,” was found to have engaged in unfair labor practices in firing two drivers jointly employed by both *Browning-Ferris* and independently-contracted trucking companies. See *id.* at 1119 (introducing facts of case). The court found that the drivers qualified as joint employees because *Browning-Ferris* and the independent contractors “shared . . . the right to hire and fire the drivers” and set rules of employment, and the operator set schedules and provided company uniforms to the drivers, despite the drivers being paid by the independent contractors. See *id.* at 1124–25 (discussing facts relevant to finding of joint-employer relationship).

35. See *Browning-Ferris*, 691 F.2d at 1122–24 (discussing joint-employer relationship under common law); see also *Graves*, 117 F.3d at 727 (recognizing possibility that county and state could be joint-employers of court clerks).

36. See *Scott v. UPS Supply Chain Solutions*, 523 F. App’x 911, 912–13 (3d Cir. 2013) (holding temporary UPS worker ineligible for Title VII protection); *Prather v. Prudential Fox & Roach*, 326 F. App’x 670, 672 (3d Cir. 2009) (holding temporary administrative aide at realty company ineligible for Title VII protection); *Shah v. Bank of Am.*, 346 F. App’x 831, 833 (3d Cir. 2009) (holding temporary bank worker ineligible for Title VII protection).

37. See *Scott*, 523 F. App’x at 912 (omitting discussion of joint-employment relationship in determining temporary “billing and collections” worker was not employee of shipping, freight, and logistics company); *Prather*, 326 F. App’x at 672–73 (omitting discussion of joint-employment relationship in determining temporary administrative aide was not employee of real estate company); *Shah*, 346 F. App’x at 834 (omitting discussion of joint-employment relationship in determining temporary bank teller was not employee of bank); *Fields v. Colgate Palmolive Co.*, Civil Action No. 10–365 (PGS), 2010 WL 5252537, at *4 (D.N.J. Dec. 15, 2010) (finding temporary chemist not employee of temporary assigned employer without discussing potential joint-employer relationship).

38. 326 F. App’x 670 (3d Cir. 2009).

39. See *id.* at 671–72 (introducing facts of case).

40. See *id.* (describing plaintiff’s temporary employment).

that the aide “sent her timesheets to, and received her paycheck directly from, [the agency],” and contacted them when calling out sick.⁴¹

In *Shah v. Bank of America*,⁴² a temporary worker “alleged discrimination based upon race and national-origin” against Bank of America (BOA) in violation of Title VII and Delaware law.⁴³ After the district court entered summary judgment in favor of the defendant, the Third Circuit affirmed, focusing on the short duration of the temporary employment, as well as payment and rate-setting procedures.⁴⁴

The district court also entered summary judgment for the defendant on similar grounds in *Scott v. UPS Supply Chain Solutions*.⁴⁵ In *Scott*, a temporary worker assigned to UPS Supply Chain Solutions (UPS) by a staffing service brought a discrimination claim, “on the basis of gender stereotyping” and “on the basis of his sexual orientation.”⁴⁶ The worker had been assigned to UPS “for about ten months.”⁴⁷ As in *Shah* and *Prather*, the trial court entered summary judgment in favor of the defendant.⁴⁸ The Third

41. *See id.* at 672–73 (holding temporary administrative aide was not employee under *Darden* and was therefore ineligible for Title VII protection). The court also noted that the staffing service “paid [the aide’s] social security taxes and worker’s compensation insurance,” and the realty company lacked “the ability to terminate” the aide. *See id.* (describing factors weighing against Title VII protection and treating plaintiff’s listing of service as employer on commission form as non-dispositive).

42. 346 F. App’x 831 (3d Cir. 2009).

43. *See id.* at 833 (“Shah then filed suit against BOA in the Superior Court of Delaware alleging employment discrimination under Title VII . . . alleg[ing] discrimination based upon race and national origin.” (citations omitted)). The worker had already been assigned to work at Bank of America (BOA) temporarily. *See id.* On the worker’s first day of the second temporary assignment, an employee recognized the worker as having been accused of harassing another employee during the previous temporary assignment, and the worker “was escorted out the building.” *See id.* (discussing adverse employment action giving rise to allegations). The employee had accused the temporary worker of harassing her via phone and by “[driving] by her house on multiple occasions.” *See id.*

44. *See id.* at 834 (affirming trial court’s entry of summary judgment). In support of its holding, the Third Circuit noted that:

the record demonstrates that Shah worked for BOA for less than four hours; he continue[d] to receive work assignments through [the staffing service]; that it is [the staffing service] that assigns his rate of pay; that BOA contacted [the staffing service] before terminating Shah’s employment; and that following his termination, he received unemployment benefits from [the staffing service], not BOA.

Id. (describing *Darden* factors that weighed against finding employment relationship).

45. 523 F. App’x 911 (3d Cir. 2013).

46. *See id.* at 912 (discussing procedural background of case).

47. *See id.* at 913 (“Scott worked for UPS for about ten months; that he remained employed by Kelly Services after his UPS assignment ended; that Kelly Services determined his rate of pay and paid him; and that Kelly Services terminated his UPS assignment.” (citing *Scott v. UPS Supply Chain Solutions*, Civil Action No. 10–929–RGÁ, 2012 WL 2016820, at *5 (D. Del. June 5, 2012), *aff’d*, 523 F. App’x 911 (3d Cir. 2013))).

48. *See id.*

Circuit affirmed based on the *Darden* factors, focusing on payment procedures and that UPS neither hired nor fired the plaintiff.⁴⁹

D. *Surveying the Job Market: Treatment of Temporary Workers and the Title VII Employment Relationship in Other Jurisdictions and Administrative Guidance*

Other circuits and administrative guidance have emphasized the control-related factors of *Darden* and recognized the possibility of joint-employer status.⁵⁰ EEOC guidance from as early as 1997 also supports temporary workers' potential status as employees under Title VII.⁵¹ According to the EEOC, "[a] client of a temporary employment agency typically qualifies as an employer of the temporary worker during the job assignment [for purposes of Title VII] . . . because the client usually exercises significant supervisory control over the worker."⁵²

In *Maynard v. Kenova Chemical Co.*,⁵³ a temporary worker brought suit after being injured at a job site.⁵⁴ The worker had previously received a

49. *See id.* (affirming trial court's entry of summary judgment). Specifically, the court noted that the worker "remained employed by [the staffing service] after his UPS assignment ended; [the staffing service] determined his rate of pay and paid him; [the staffing service] terminated his UPS assignment." *Id.* (applying *Darden* factors). Further, the court noted that "[a]dditionally, [the staffing service] was in charge of monitoring his daily attendance, vacation, sick leave, and performance evaluations," and the worker "did not have employee access to the UPS facility and had to be admitted by the receptionist every day." *Id.* (listing *Darden* factors that weighed against finding employment relationship); *see also* *Fields v. Colgate Palmolive Co.*, Civil Action No. 10-365 (PGS), 2010 WL 5252537, at *1 (D.N.J. Dec. 15, 2010) (granting motion to dismiss on grounds that temporary worker never had employment relationship with temporary work placement). In *Fields*, the court cited *Shah* for the proposition that "when [a] [t]emporary [e]mployment [a]gency assigns an individual to work for an employer, that individual does not become an employee of the employer." *See id.* at *4.

50. *See* *Casey v. Dep't of Health and Human Servs.*, 807 F.3d 395, 404-05 (1st Cir. 2015) (emphasizing "non-exhaustive" list of control-related factors recommended by EEOC); *Butler v. Drive Auto. Indus. of Am.*, 793 F.3d 404, 406 (4th Cir. 2015) (describing "hybrid test which considers both the common law of agency and the economic realities of employment"); *Maynard v. Kenova Chem. Co.*, 626 F.2d 359, 360-61 (4th Cir. 1980) (introducing loaned servant doctrine of joint-employer liability). Under the loaned servant doctrine, a worker may become an employee of his or her temporary employer "while performing [] services" for that temporary employer. *See id.* at 361. District courts have also found joint-employer status. *See, e.g.*, *Callicutt v. Pepsi Bottling Grp., Inc.*, No. CIV. 00-95DWFAJB, 2002 WL 992757, at *7-8 (D. Minn. May 13, 2002) (applying hybrid test); U.S. Equal Emp. Opportunity Comm'n Notice No. 915.002, *infra* note 51.

51. *See* U.S. Equal Emp. Opportunity Comm'n Notice No. 915.002 (1997), 1997 WL 33159161, at *1 ("The guidance makes clear that a staffing firm must hire and make job assignments in a non-discriminatory manner. It also makes clear that the client must treat the staffing firm worker assigned to it in a non-discriminatory manner.").

52. *Id.* at *5 (defining "client" in context of temporary employment).

53. 626 F.2d 359 (4th Cir. 1980).

54. *See id.* at 360 (discussing facts of case). The plaintiff "fell from an allegedly defective scaffolding." *See id.* As the *Faush* court notes, *Maynard* predates

workman's compensation award from the staffing company relating to the same accident but brought his action "against [the temporary assigned work placement] as a third-party tort-feasor."⁵⁵ The Fourth Circuit affirmed the trial court's finding that the temporary assigned work placement agency was acting as Maynard's employer at the time of the accident under the "loaned servant doctrine," and because the agency was "a subscriber in good standing with [the state's] workmen's compensation fund," the plaintiff was precluded from bringing further action in addition to the worker's compensation claim.⁵⁶ In doing so, the *Maynard* court recognized the applicability of the joint-employer concept to determine the existence of a common law employment relationship, anticipating the EEOC's 1997 guidance.⁵⁷

The First Circuit also emphasized control-related factors in examining the existence of a common law employment relationship in *Casey v. Department of Health and Human Services*.⁵⁸ In *Casey*, a former employee of a government contractor working at a military facility brought a Title VII action against the contractor-employer and "several government agencies," alleging "gender discrimination in violation of Title VII."⁵⁹ The First Circuit affirmed summary judgment in favor of the government agencies based on the district court's findings that, although the government agencies "had oversight responsibility for administration of the program" and set performance criteria, the worker's direct supervisor at the government contractor directed her day-to-day activities.⁶⁰ While the *Casey* court upheld the finding that the government contractor's employee did not qualify as a government employee for Title VII, it stressed control-related factors in doing so.⁶¹

Other jurisdictions have employed a "hybrid test" that focuses on the common law factors while also taking into account the "economic reali-

Darden, but the *Maynard* court sought to determine the same type of common law employment relationship. See *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 219 n.8 (3d Cir. 2015) ("*Maynard* predates *Darden*, but it does not predate the common law of agency. Although *Maynard* concerned the West Virginia Workmen's Compensation Act, the Fourth Circuit applied the common law in finding that an employment relationship existed . . ." (citing *Maynard*, 626 F.2d at 361–62)).

55. See *Maynard*, 626 F.2d at 360 (discussing worker's claim against Kenova Chemical Company).

56. See *id.* at 361–62 (affirming trial court's decision). The Fourth Circuit applied the "loaned servant doctrine" of traditional agency law and found that *Maynard* was a loaned servant of Kenova. See *id.* The court reasoned that, "the loaned servant doctrine provides that an employee directed or permitted to perform services for another 'special' employer may become that employer's employee while performing those services." See *id.* at 361 (citing RESTATEMENT (SECOND) OF AGENCY § 227 (1958)).

57. See *id.* at 361–62 (recognizing joint-employer liability under loaned servant doctrine).

58. 807 F.3d 395 (1st Cir. 2015).

59. See *id.* at 398 (introducing background of case).

60. See *id.* at 404–05 (concluding no employment relationship existed).

61. See *id.* (applying control-related factors).

ties” of the employment situation, asking whether an employee was economically dependent on the temporary work assignment.⁶² However, courts purporting to include an investigation of economic realities as a component of their analysis have returned to the concept that “control remains the principal guidepost for determining whether multiple entities can be a plaintiff’s joint employers.”⁶³

In short, other circuits considering Title VII liability for temporary workers have both explicitly considered joint-employer liability in accordance with EEOC guidance and emphasized control-related factors when considering the existence of a common law employment relationship.⁶⁴ Likewise, in *Faush*, the Third Circuit departed from its prior decisions by recognizing joint-employer liability, emphasizing the sufficiency of control-related factors to defeat summary judgment and focusing on the practical reality of payment practices and hiring and firing procedures.⁶⁵

62. See *Butler v. Drive Auto. Indus. of Am.*, 793 F.3d 404, 406 (4th Cir. 2015) (“We further conclude that the so-called ‘hybrid test,’ which considers both the common law of agency and the economic realities of employment, is the correct means to apply the joint employment doctrine . . .”); *Callicutt v. Pepsi Bottling Grp., Inc.*, No. CIV. 00-95DWFAJB, 2002 WL 992757, at *7 (D. Minn. May 13, 2002) (“Under the hybrid test, to determine whether an employee relationship exists, all circumstances surrounding the relationship must be considered.” (citing *Wilde v. Cnty. of Kandiyohi*, 15 F.3d 103, 106 (8th Cir. 1994))). In *Butler*, a temporary worker at an automotive factory alleged sexual harassment in violation of Title VII. See *Butler*, 793 F.3d at 406 (introducing facts of case). The trial court granted summary judgment to the defendant on the grounds that the worker was an employee of only the temporary staffing agency that assigned her, and the Fourth Circuit reversed after applying the hybrid test. See *id.* (reversing and remanding to trial court). In *Callicutt*, several employees of a warehouse loading contract company alleged racial discrimination in violation of Title VII at a Pepsi facility. See *Callicutt*, 2002 WL 992757, at *1 (introducing facts of case). The trial court found that the plaintiffs’ allegations were sufficient to survive summary judgment under the hybrid test due to the strength of control-related factors in their favor. See *id.* at *8 (applying hybrid test factors including skill required, source of equipment, location of work, duration of employment relationship, whether employer assigns additional projects, employee’s control over work schedule, method of payment, employee’s role in hiring and paying assistants, whether work is part of regular business of employer, whether employer is in business, how employee benefits are conducted, and tax treatment of employee). The court found that in finding that “while many of the economic factors weigh against a finding that [plaintiffs] were ‘employees,’ all of the factors relating to the work environment—the common law factors—weigh in favor, including Pepsi’s control over the manner and means of work performance.” See *id.*

63. See *Butler*, 793 F.3d at 415; see also *Callicutt*, 2002 WL 992757, at *7 (“The most important consideration, however, is whether the employer controls the means and manner of the purported employee’s work.” (citing *Schwieger v. Farm Bureau Ins. Co. of Neb.*, 207 F.3d 480, 484 (8th Cir. 2000))).

64. See *Equal Emp. Opportunity Comm’n Notice No. 915.002* (1997), 1997 WL 33159161, at *5–6; see also *Butler*, 793 F.3d at 406; *Casey v. Dep’t Health and Human Servs.*, 807 F.3d 395, 406 (1st Cir. 2015); *Maynard v. Kenova Chem. Co.*, 626 F.2d 359, 360 (4th Cir. 1980).

65. See *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 214–17 (3d Cir. 2015) (recognizing joint-employer liability under Title VII and noting heavy weight accorded to control-related factors); *Scott v. UPS Supply Chain Solutions*, 523 F.

III. *FAUSH V. TUESDAY MORNING*: THE THIRD CIRCUIT PUTS TITLE VII TO WORK FOR TEMPORARY WORKERS?

Before *Faush*, an entire segment of the workforce was foreclosed from protection from even the most egregious discriminatory workplace practices under Title VII, based on its inability to clear the threshold question of employee status. In *Faush*, the Third Circuit considered Faush's allegations that he and other African-American workers temporarily assigned to a Tuesday Morning retail store were subjected to racial discrimination.⁶⁶ The trial court entered summary judgment for the defendant, holding that Faush did not qualify as an employee, but the Third Circuit reversed and remanded after applying *Darden*.⁶⁷ The court recognized joint-employer liability and placed more emphasis on the control-related factors and practical function than legal form in payment or hiring and firing practices.⁶⁸

A. *Interview Questions: Factual Background in Faush*

As an employee of Labor Ready, a staffing firm that provides temporary employees to clients, Faush was assigned to Tuesday Morning for a period of ten days, during which "he generally worked for eight hours" per day.⁶⁹ Faush claimed the store manager subjected him and other African-American workers to discriminatory treatment.⁷⁰ Following these alleged events, Faush brought suit against Tuesday Morning for, among other things, a violation of Title VII, and Tuesday Morning filed a motion for summary judgment.⁷¹

App'x 911, 912 (3d Cir. 2013) (failing to acknowledge possibility of joint-employer relationship); *Prather v. Prudential Fox & Roach*, 326 F. App'x 670, 672–73 (3d Cir. 2009) (omitting discussion of joint-employer relationship); *Shah v. Bank of Am.*, 346 F. App'x 831, 834 (3d Cir. 2009) (same); *Fields v. Colgate Palmolive Co.*, Civil Action No. 10–365 (PGS), 2010 WL 5252537, at *4 (D.N.J. Dec. 15, 2010) (omitting same).

66. *See Faush*, 808 F.3d at 210 (introducing Faush's claims).

67. *See id.* at 215–20 (undertaking *Darden* analysis with emphasis on control-related factors and practical impact of payment and concluding Faush survived summary judgment).

68. *See id.*

69. *See id.* at 210 (noting Faush's working arrangement with Tuesday Morning).

70. *See id.* (describing facts underlying discrimination claim). Specifically, Faush alleged that the manager "accused him and [other African-American workers] of stealing" store merchandise, that "the store owner's mother told [Faush] and two other African-American temporary employees to work in the back of the store with the garbage," and that "a white employee blocked their path and referred to them using a racial slur." *See id.* (detailing allegedly discriminatory behavior). Faush also alleged that the store manager told him that "[his] people wouldn't do that," in reference to the alleged merchandise theft. *See id.* (internal citation omitted).

71. *See Faush v. Tuesday Morning, Inc.*, 995 F. Supp. 2d 350, 352 (E.D. Pa. 2014) (describing Faush's allegations), *aff'd in part, vacated in part, remanded* by 808 F.3d 208 (3d Cir. 2015). While Faush brought claims under both Title VII and the

B. *Job Requirements: Evidence at Summary Judgment*

The trial court chose to apply the *Darden* test.⁷² Yet, the court mainly focused on the formal procedures relating to compensation and hiring and firing while largely omitting discussion of factors relating to day-to-day control, and ignored the possibility of joint-employer liability after rejecting Faush's argument in favor of the test from *In re Enterprise Rent-A-Car Wage & Employment Practices Litigation*⁷³ and ignoring the possibility of joint-employer liability.⁷⁴ As a result, it found Faush was not an employee of Tuesday Morning.⁷⁵

1. *All About the Benjamins: Trial Court's Analysis of Factors Relating to Compensation*

Faush worked at Tuesday Morning pursuant to an "Agreement to Supply Temporary Employees" (the Agreement).⁷⁶ In its reasoning, the district court accorded significant weight to the parties' respective responsibilities for paying temporary workers, noting that "Labor Ready was solely responsible" in determining wages, social security, taxes, and workers' compensation insurance under the Agreement.⁷⁷ The court also noted that Tuesday Morning and Labor Ready are "separate and distinct companies," that "there is no record that Faush has ever applied for employment with Tuesday Morning," and that Tuesday Morning and Faush

Pennsylvania Human Relations Act, the court noted that the statutes are "interpreted coextensively" with each other. *See id.* at 356 (quoting *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 180 n.1 (3d Cir. 2009)).

72. *See id.* at 354–55 (rejecting *Enterprise* framework in favor of *Darden* analysis). In *Enterprise*, the Third Circuit limited its holding to the definition of "employer" under the FLSA. *See In re Enter. Rent-A-Car Wage & Hour Emp. Practices Litig.*, 683 F.3d 462, 468 (3d Cir. 2012) (describing factors courts should consider "[w]hen faced with a question requiring examination of a potential joint employment relationship under the FLSA" (emphasis added)).

73. 683 F.3d 462 (3d Cir. 2012).

74. *See Faush*, 995 F. Supp. 2d. at 355 (discussing compensation and other aspects of employment). The trial court did not note the possibility of a joint-employment relationship, and instead applied the *Darden* test with the presupposition that either Tuesday Morning or Labor Ready was Faush's employer. *See id.*

75. *See id.* at 356 (applying *Darden* test, finding balance of factors weighed in favor of finding that Tuesday Morning was not employer, and granting summary judgment to Tuesday Morning).

76. *See id.* at 352 (discussing staffing agreement between Tuesday Morning and Labor Ready). Faush and Tuesday Morning "never entered into any contracts," and Faush "never applied for employment with Tuesday Morning." *See id.* Under the agreement, "Tuesday Morning was expected to approve [the] time card for each [temporary employee], or otherwise accurately report the daily hours worked." *See Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 210 (3d Cir. 2015) (alteration in original) (internal quotation marks omitted). "Accordingly, at the end of each day, [the store manager] signed a document indicating how many hours each [Labor Ready] employee had worked." *Id.* (discussing Tuesday Morning supervision of Labor Ready employees).

77. *See Faush*, 995 F. Supp. 2d. at 353 (discussing Labor Ready's responsibilities under Agreement).

neither contracted with each other nor had any arrangement regarding compensation.⁷⁸ Moreover, the court noted, “Tuesday Morning never intended to utilize any of the Labor Ready employees who worked at the [s]tore as Tuesday Morning employees.”⁷⁹

2. *Pink Slip Blues: Trial Court Analysis of Factors Related to Hiring and Firing*

In reaching its conclusion, the trial court extensively discussed factors relating to the procedures for recording hours, missing work, terminating employment, and accessing the store.⁸⁰ The court noted that Tuesday Morning “never provided any Labor Ready workers . . . with a key to the [s]tore . . . [and] Labor Ready provided gave a time card to all of its employees . . . which were returned to the Labor Ready office.”⁸¹ Labor Ready would subsequently send an invoice to Tuesday Morning that included the number of hours Labor Ready employees had worked in the pay period, and the amount due based on a prearranged hourly fee.⁸² The trial court also noted that Faush “was not expected to contact any Tuesday Morning employee if he was not able to report to work at the [s]tore.”⁸³ The trial court finally noted that only Labor Ready, and not Tuesday Morning, “had the authority to terminate [Faush’s] employment with Labor Ready,” and the store never received an unemployment benefits claim from Faush.⁸⁴

78. *See id.* at 352 (noting absence of employment application, wage or benefit payments, or contract between Faush and Tuesday Morning). The trial court noted that Labor Ready was “solely responsible for payment of wages . . . required taxes, social security,” as well as insurance for temporary employees. *See id.* at 353 (noting Labor Ready’s obligations under Agreement).

79. *See id.* at 353 (discussing Agreement).

80. *See id.* (discussing time card procedures and access to store keys for temporary workers). The district court cited Labor Ready’s provision of Faush’s time card and invoice procedure as evidence that Faush was not Tuesday Morning’s employee. *See id.* at 355. While the court did not specifically note that Faush and other temporary workers were not given keys to Labor Ready, court acknowledged that the Terms and Conditions of the Agreement did not permit Tuesday Morning to “entrust [Labor Ready’s temporary employees] ‘with the care of unattended premises, custody or control of cash, credit cards, valuables or other similar property.’” *See id.* at 355 (quoting Agreement).

81. *See id.* at 353 (discussing time card procedures and access to store keys for temporary workers).

82. *See id.* (discussing procedure for Labor Ready invoicing of Tuesday Morning).

83. *Id.* (stating Faush was not obligated to contact Tuesday Morning when absent).

84. *See id.* (discussing Tuesday Morning’s inability to fire Faush from Labor Ready and non-receipt of unemployment benefit claims from Faush).

3. *Are You My Employer? Trial Court's Analysis of the Joint-Employer Relationship*

In addition, the trial court rejected Faush's argument in favor of applying *In re Enterprise*, distinguishing *In re Enterprise* as considering the employment relationship only in the context of the FLSA.⁸⁵ As a result, there is nothing in the trial court's opinion to suggest that the court considered the possibility of a joint-employer relationship under *Darden*.⁸⁶

C. *The Third Circuit Takes the Job: Faush on Appeal*

On appeal, the Third Circuit also undertook a *Darden* analysis.⁸⁷ However, in reversing the trial court's decision, the Third Circuit emphasized control-related factors and found joint-employer liability.⁸⁸ The

85. *See id.* at 354 (rejecting Faush's theory of joint-employer status). The *Faush* court noted that the definition of "employer" is "broadest" under the FLSA. *See id.* at 355 (citing *In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 468 (3d Cir. 2012)).

86. *See id.* (rejecting Faush's theory of joint-employer status). The court's opinion noted that Title VII's definition of employer is "much narrower" than the definition found in the Family Medical Leave Act (FMLA) and FLSA, which means cases construing Title VII are not persuasive sources of authority for interpreting the FMLA or FLSA. *See id.* at 356 (quoting *Haybarger v. Lawrence Cnty. Adult Prob. and Parole*, 667 F.3d 408, 415 n.6 (3d Cir. 2012)). *Compare* Family Medical Leave Act, 29 U.S.C. § 2611(4)(A)(i) (2012) (defining employer as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year"), *and* Fair Labor Standards Act, 29 U.S.C. § 203(d) (defining employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization"), *with* 42 U.S.C. § 2000e(b) (2012) (defining "employer" under Title VII and noting limitations). The trial court further noted other Third Circuit cases that applied *Darden* and found that the workers were employees of the agency, not the worker's temporary assignment. *See Faush*, 995 F. Supp. 2d at 356 (detailing application of *Darden*). In its discussion, the trial court again rejected the possibility of joint-employer status, though it did not cite the test it used, noting "Tuesday Morning did not have sufficient control over the terms and conditions of plaintiff's employment and did not share or co-determine those matters with Labor Ready, to be considered a joint employer for purposes of Title VII, in any event." *See id.*

87. *See Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 213–14 (3d Cir. 2015) (rejecting *Enterprise* test in favor of *Darden* test). The Third Circuit confirmed the inapplicability of *In re Enterprise*, noting that "[a]s a doctrinal matter, however, it is clear that the *Darden* test applies to Title VII cases, while the *Enterprise* test does not." *See id.* at 213 (declining to apply *Enterprise* test in Title VII case because definition of employee in Title VII and ERISA cases is understood to mean "conventional master-servant relationship as understood by common law"). The *Darden* test was announced in an ERISA case, whereas the *Enterprise* test applied in FLSA cases, where definition of employee construed more broadly. *See id.*

88. *See id.* at 214–16 ("[T]he inquiry under *Darden* is not *which* of two entities should be considered the employer of the person in question . . ." (citing *Graves v. Lowery*, 117 F.3d 723, 727 (3d Cir. 1997))). The court found that "Tuesday

court also focused on the practical effects of payment and hiring and firing procedures, rather than their formal arrangements.⁸⁹ While Tuesday Morning could not terminate Faush's employment with Labor Ready, it could bar him from working at its store, and its payments to Labor Ready were "functionally indistinguishable" from "direct" payments to temporary workers.⁹⁰ Significantly, the court extended the importance of temporary workers performing the same tasks as full-time employees—a consideration that falls most squarely under the control-related factor umbrella, as dictating tasks to workers is indicia of control—to compensation-related factors, as well.⁹¹

1. *Money Isn't Everything: Compensation in the Third Circuit's Analysis*

The Third Circuit began its analysis by finding that the district court "overstated the extent to which the factors pertaining to compensation cut against Faush."⁹² It noted that while Labor Ready set the workers' pay rate and paid their taxes, wages, and worker's compensation insurance, Tuesday Morning was responsible for ensuring compliance with minimum and "prevailing wage law[s]," and paying any required overtime.⁹³ The court determined Tuesday Morning was "in the best position to ensure compliance with wage and hour laws because the temporary workers were similarly situated to Tuesday Morning's permanent employees."⁹⁴ Further, the court found that Tuesday Morning's payments to Labor Ready were "functionally indistinguishable" from Tuesday Morning's payments to employees.⁹⁵ Though the relevant compensation-related facts are analogous

Morning's control over the temporary employees' daily activities overwhelmingly favors Faush." *See id.* at 216.

89. *See id.* at 216–17 (finding payments from Tuesday Morning to Faush were "functionally indistinguishable from direct employee compensation" because Tuesday Morning paid Labor Ready agreed-upon hourly rate for Faush's services).

90. *See id.* at 216–17 (analyzing compensation and hiring- and firing-related factors in terms of practical effect rather than formal structure).

91. *See id.* at 215–16 (linking overlap of temporary and permanent workers' duties with finding that compensation-related factors weigh less strongly in favor of Tuesday Morning than trial court had found).

92. *See id.* at 215.

93. *See id.* at 212 (stating Agreement did not relieve Tuesday Morning of "its primary responsibility for ensuring complete and accurate compliance with all local, state, and federal laws relating to prevailing wages").

94. *See id.* at 215 (discussing ability of Tuesday Morning to ensure compliance).

95. *See id.* at 215–16 (analyzing payments to Labor Ready). The court distinguished Tuesday Morning's practice of paying an agreed-upon hourly rate for each hour worked by a temporary employee to Labor Ready, who then paid its employees from payment procedures typically used to compensate independent contractors, which include paying "a fixed rate for completion of a discrete project." *See id.* at 216 (citing *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989)). The court noted that Tuesday Morning "was even obligated under the [a]greement to pay any overtime charges required by law[.]" ultimately characterizing the arrangement as one where "[e]ssentially, Tuesday Morning indirectly paid the temporary employees' wages, plus a fee to Labor Ready for its administra-

to those in cases where the Third Circuit had previously found no employment relationship under *Darden*, the *Faush* court focused on practical function over legal form in finding that Tuesday Morning “essentially,” albeit “indirectly,” paid Labor Ready employees’ salaries.⁹⁶

2. *Should I Stay or Should I Go Now? Third Circuit’s Analysis of Hiring and Firing*

The court found that hiring and firing factors favored Tuesday Morning only slightly.⁹⁷ The court noted “Tuesday Morning obviously did not have the power to terminate Faush’s employment with Labor Ready or any obligation to pay him unemployment benefits . . . [but] did, however, have ultimate control over whether Faush was permitted to work at its store.”⁹⁸ Further, the court concluded the record did not reflect any obligation on Labor Ready’s part to pay Faush when not assigned to a workplace or provide him an “immediate alternative assignment.”⁹⁹ In light of this reasoning, the court concluded the hiring and firing factors supported Tuesday Morning to a lesser degree than the district court had found.¹⁰⁰

The Third Circuit emphasized practical function over legal form with respect to compensation-related factors, noting that, while “Tuesday Morning obviously did not have the power to terminate Faush’s employment with Labor Ready or any obligation to pay him unemployment benefits[,] Tuesday Morning did, however, have ultimate control over whether Faush was permitted to work at its store.”¹⁰¹ When faced with analogous facts in the past, the Third Circuit gave significant weight to temporary

services.” *See id.* Conceptually, the court separated Tuesday Morning’s “indirect” payments to temporary workers from the “administrative services” payments to Labor Ready. *See id.*

96. *See id.* at 215–16 (holding payment per hour made from temporary assigned employer to employment agency represents functional equivalent of directly paying temporary workers); *but see* Prather v. Prudential Fox & Roach, 326 F. App’x 670, 672–73 (3d Cir. 2009) (concluding compensation factors weighed against plaintiff); Shah v. Bank of Am., 346 F. App’x 831, 834 (3d Cir. 2009) (concluding same).

97. *See Faush*, 808 F.3d at 216 (stating factors related to “hiring and firing provide only weak support for Tuesday Morning’s position”).

98. *See id.* (“If Tuesday Morning was unhappy with any temporary employee for any reason, it had the power to demand a replacement from Labor Ready and to prevent the ejected employee from returning to the store.”).

99. *See id.* (discussing factors related to hiring and firing).

100. *See id.* (discussing factors related to hiring and firing). As Faush was the non-moving party, under the applicable summary judgment standard, the court inferred all facts in his favor. *See id.* Compare *Faush*, 995 F. Supp. 2d at 353 (finding hiring and firing factors weighed against Faush), with *Faush*, 808 F.3d at 216 (finding hiring and firing factors did not weigh heavily in either direction).

101. *See id.* (reasoning Tuesday Morning had ability to decide whether Faush could work in its store).

employers' inability to terminate a worker's employment with a staffing firm.¹⁰²

3. *Working for the Man: Third Circuit's Analysis of Daily Control Factors*

Finally, the court found the factors relating to the daily control of temporary workers "overwhelmingly favor[ed] Faush."¹⁰³ Specifically, Tuesday Morning recorded hours worked, assigned work, oversaw assignments, and "furnished any equipment and materials necessary."¹⁰⁴ Notably, Tuesday Morning contracted for the Labor Ready employees only as a "stop[gap] measure" until it could hire more full-time employees.¹⁰⁵

Supervision by Labor Ready was minimal once a worker was present at his or her assigned worksite, with the court noting that "on the rare occasions that a Labor Ready supervisor visited the Tuesday Morning store," the supervisor simply relayed information from Tuesday Morning's management to the temporary workers.¹⁰⁶ In previous cases considering temporary workers' eligibility for Title VII protection, Third Circuit courts had

102. *See* Scott v. UPS Supply Chain Solutions, 523 F. App'x 911, 912 (3d Cir. 2013) (finding fact that staffing service set compensation and was responsible for hiring and firing weighed against plaintiff); Prather v. Prudential Fox & Roach, 326 F. App'x 670, 672-73 (3d Cir. 2009) (stating fact that plaintiff received paycheck directly from staffing service and temporary assigned employer did not have power to terminate plaintiff's relationship with staffing service weighed against plaintiff); Shah v. Bank of Am., 346 F. App'x 831, 834 (3d Cir. 2009) (finding fact that staffing service set plaintiff's "rate of pay" and that temporary assigned employer "contacted [staffing agency] before terminating [plaintiff's] employment" weighed against plaintiff).

103. *See* Faush, 808 F.3d at 216 (noting Tuesday Morning's control over temporary workers' tasks such as "unloading and stocking merchandise, setting up display shelves, and removing garbage" favored Faush).

104. *See id.* (discussing factors relating to daily control). The court noted that, while Tuesday Morning had no input on which Labor Ready employees arrived at the store on any given day, when an employee was present, he or she received "assignments, direct[] supervis[ion] . . . site-specific training, [] any equipment and materials necessary" from Tuesday Morning personnel, and Tuesday Morning employees were responsible for verifying the hours worked by each Labor Ready worker on a daily basis. The court explained that such an arrangement more closely resembles a "traditional" employment relationship than one of an independent contractor. *See id.*

105. *See id.* at 217 (alteration in original) (discussing Labor Ready's reason for hiring temporary workers). The court further pointed out that "the Labor Ready employees, under the direct supervision of Tuesday Morning management, performed only unskilled tasks . . ." *Id.* In fact, the Third Circuit noted that "[w]hile it is true that the [a]greement precluded Tuesday Morning from entrusting any temporary employee with unattended premises, valuables, machinery, or vehicles, the tasks assigned to the Labor Ready employees . . . were *no different* than those assigned to Tuesday Morning employees." *See id.* (discussing similarity of work performed by temporary and permanent employees).

106. *See id.* at 218 (discussing extent of Labor Ready's supervision of employees assigned to Tuesday Morning).

omitted any extensive discussion of analogous facts relating to day-to-day control.¹⁰⁷

4. *Two Employers Are Better Than One: Third Circuit's Analysis of Joint-Employer Liability*

The court pointed out that two employers could qualify as “co-employers or joint employers” under *Darden*, noting that, “[s]ignificantly, the inquiry under *Darden* is not *which* of the two entities should be considered the employer of the person in question.”¹⁰⁸ Accordingly, in a departure from previous cases, the court in *Faush* explicitly accepted the proposition that it need not find one or the other entity to be the sole employer.¹⁰⁹

IV. CRITICAL ANALYSIS: TEMPORARY WORKERS GET A BREAK UNDER *FAUSH*

The Third Circuit’s decision in *Faush* entails two main developments related to temporary workers and Title VII.¹¹⁰ First, the court’s explicit recognition of joint-employer liability for temporary workers’ Title VII

107. See *Scott v. UPS Supply Chain Solutions*, 523 F. App’x 911, 912 (3d Cir. 2013) (omitting discussion of day-to-day supervision and control in favor of formal hiring and firing and payment procedures); *Prather v. Prudential Fox & Roach*, 326 F. App’x 670, 672 (3d Cir. 2009) (finding that formal hiring and firing and payment procedures supported summary judgment for defendant without extensive consideration of day-to-day supervision and control factors when temporary administrative aide was paid and terminated by staffing service); *Shah v. Bank of Am.*, 346 F. App’x 831, 834 (3d Cir. 2009) (omitting extensive discussion of day-to-day supervision and control factors in finding that hiring and firing factors and payment procedures weighed against plaintiff). In *Shah*, the temporary employer consulted the staffing agency prior to terminating the plaintiff, and the plaintiff had been paid by the staffing agency. See *id.*

108. See *Faush*, 808 F.3d at 215 (citing *Graves v. Lowery*, 117 F.3d 723, 727 (3d Cir. 1997)) (recognizing joint-employer concept under Title VII). In *Graves*, former state judicial clerks brought a Title VII claim for sex discrimination against the county in which they worked. See *Graves*, 117 F.3d at 723. The district court dismissed the action, finding that because the clerks were officially employees of the judicial branch of the Commonwealth of Pennsylvania, they could not also be county employees. See *id.* at 724. The Third Circuit reversed the district court, finding that although the state judicial branch had “the inherent right to hire, discharge, and supervise clerks . . . it may also have the derivative right to delegate employer-type responsibilities to a county,” and thus create a “de facto” employment relationship. See *id.* at 727, 729. The Third Circuit also previously considered potential joint-employer liability under Title VII through analysis of the hiring and firing, payment, and daily control factors under *Darden*, considering: “(1) the entity’s authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (2) its day-to-day supervision of employees, including employee discipline; and (3) its control of employee records, including payroll, insurance, taxes and the like.” See *Plaso v. IJKG, LLC*, 553 F. App’x 199, 204 (3d Cir. 2014) (internal quotation marks omitted).

109. See *Faush*, 808 F.3d at 213–14 (discussing possibility of joint-employer status).

110. For a discussion of the Third Circuit’s analysis in *Faush*, see *supra* notes 82–109 and accompanying text.

claims broadens the universe of potential Title VII plaintiffs.¹¹¹ Second, the Third Circuit has made it more likely that temporary-worker plaintiffs will survive summary judgment by emphasizing the significance of control-related factors and focusing on the practical implications of hiring and firing and compensation factors in the *Darden* inquiry.¹¹² Finally, while these holdings may represent a new direction for the Third Circuit—espe-

111. For an analysis of the Third Circuit's treatment of the joint-employer concept in *Faush*, see *supra* notes 102–03 and accompanying text. The Third Circuit's recognition of joint-employer status is a significant change for both temporary employees and the employers who enlist them. See Development in the Law, *Temporary Employment and the Imbalance of Power*, 109 HARV. L. REV. 1647, 1658 (1996) (noting difficulty temporary employees experience in obtaining Title VII protection despite language of statute that appears to cover temporary employees); *Points to Remember*, 37 NO. 2 QUINLAN, EMP. TERMINATIONS L. BULL. NL 6 (2016) (noting that Labor Ready did not anticipate potential Title VII liability and “importance of recognizing the blurred lines that may surface concerning workers you retain through a temporary staffing agency”); Robert H. Bernstein & Michael J. Slocum, *Third Circuit Espouses Fact-Sensitive Inquiries in Considering Joint-Employer Liability and Compensation for Meal Periods: What Employers Can Do to Brighten the Lines*, GREENBERG TRAURIG (Dec. 2015), <http://www.gtlaw.com/News-Events/Publications/Alerts/190405/Third-Circuit-Espouses-Fact-Sensitive-Inquiries-in-Considering-Joint-Employer-Liability-and-Compensation-for-Meal-Periods-What-Employers-Can-Do-to-Brighten-the-Lines> [<https://perma.cc/9ME9-Z5PK>] (noting that “the Third Circuit has now made it more likely that [temporary employers] will also be subject to Title VII”). An employer that uses temporary workers should keep the following steps in mind:

First, wherever possible, identify the full panoply of factors that a court is likely to consider in evaluating a particular issue. Bear in mind that courts typically decline to articulate exhaustive lists. Nonetheless, those factors which the courts cite are likely to be central, even if not necessarily dispositive. Second, determine the ideal set of “ground rules” that must exist in your workplaces to meet the applicable factors. In other words, envision what you would want your summary judgment fact statement to say. Finally—and most importantly, as ultimately it will be the actual facts in existence which control—ensure that the realities of your workplace meet those “ground rules” to the greatest extent possible.

Id.

112. For an analysis of the *Faush* court's treatment of the relative importance of control-related factors as compared to hiring and firing- and compensation-related factors, see *supra* notes 86–107 and accompanying text. See also Joel Kreizman, *How Will Faush v. Tuesday Morning Impact New Jersey Employers?*, SCARINI HOLLENBECK (Dec. 1, 2015), <http://scarinichollenbeck.com/temporary-worker-can-bring-bias-suit/> [<https://perma.cc/C79W-PP6M>] (“The decision in *Faush v. Tuesday Morning* will not impact all temp workers, but could result in liability in cases where the employer exerts a certain degree of control over the day-to-day activities of the employee.”); Philip J. Morin III & Veronica P. Hallett, *Employment/HR Alert: Court Expands Potential Liability of Employers for Discrimination Claims by Temporary Workers from Staffing Agencies*, FLORIO PERRUCCI STEINHARDT & FADER BLOG (Jan. 6, 2016), http://www2.fpsflawfirm.com/court_expands_potential_liability_of_employers_for_discrimination_claims_by_temporary_workers_from_staffing_agencies [<https://perma.cc/BY24-DWZE>] (“[C]ompanies that use temporary workers will likely be considered joint employers . . . under federal and state anti-discrimination laws . . . the *Faush* opinion could significantly increase exposure for discrimination claims for employers who do business in the states within the Third Circuit . . .”).

cially in light of *Prather*, *Shah*, and *Scott*—they reflect the weight of authority from other jurisdictions and official guidance.¹¹³

A. *Joint Employer Liability Opens the Office Door to Temporary Workers*

Before the court's holding in *Faush*, Third Circuit cases determining the existence of an employment relationship showed no indication that the court considered the possibility of joint-employer status.¹¹⁴ Rather, the analyses in those cases proceeded from the premise that the individual had an employment relationship with either the temporary staffing agency or the temporary assigned placement employer.¹¹⁵ In *Faush*, the Third Circuit explicitly noted the possibility of a joint-employer relationship despite rejecting the plaintiff's preferred joint-employer test.¹¹⁶

In fact, the relevant considerations in determining joint-employer status are virtually identical to the *Darden* factors.¹¹⁷ By providing a precedential opinion regarding the proper analysis of the employment relationship for temporary workers under Title VII and specifically acknowledging the existence of a joint-employer test that is essentially coex-

113. For analysis of *Prather*, *Shah*, and *Scott*, see *supra* notes 36–45 and accompanying text. For analysis of other jurisdiction's cases determining the existence of an employment relationship between a temporary worker and a temporary assigned employer, as well as EEOC guidance on this issue, see *Butler v. Drive Auto. Indus. of Am.*, 793 F.3d 404, 406 (4th Cir. 2015); *Maynard v. Kenova Chem. Co.*, 626 F.2d 359, 360 (4th Cir. 1980); U.S. Equal Emp. Opportunity Comm'n Notice No. 915.002 (1997), 1997 WL 33159161, at *5–6; *supra* notes 49–63 and accompanying text.

114. See *Scott v. UPS Supply Chain Solutions*, 523 F. App'x 911, 912 (3d Cir. 2013) (finding temporary administrative assistant not employee for purposes of Title VII); *Shah v. Bank of Am.*, 346 F. App'x 831, 833 (3d Cir. 2009) (finding temporary bank worker not employee for purposes of Title VII); *Fields v. Colgate Palmolive Co.*, Civil Action No. 10–365 (PGS), 2010 WL 5252537, *4 (D.N.J. Dec. 15, 2010) (finding temporary chemist not employee for purposes of Title VII).

115. See *Scott*, 523 F. App'x at 912 (failing to acknowledge possibility of joint-employer relationship); *Prather v. Prudential Fox & Roach*, 326 F. App'x 670, 672–73 (3d Cir. 2009) (finding no employment relationship between temporary administrative aide and temporary assigned employer without reference to possibility of joint-employer relationship); *Shah*, 346 F. App'x at 834 (finding temporary bank teller not employee of bank without discussion of potential joint-employer relationship); *Fields*, 2010 WL 5252537, at *4 (finding temporary chemist not employee of temporary assigned employer without discussion of potential joint-employer relationship).

116. See *Faush v. Tuesday Morning*, 808 F.3d 208, 213–15 (3d Cir. 2015) (rejecting *Enterprise* test but noting loaned servant doctrine and *Graves* finding of joint-employment under Title VII). The court specifically acknowledged that *Graves* contemplated a joint-employer relationship under Title VII, despite the lack of a citation to that case in *Faush*'s brief. See *id.*

117. See *Plaso v. IJKG, LLC*, 553 F. App'x 199, 204 (3d Cir. 2014) (finding no joint-employment relationship when consulting firm employee brought Title VII claim); see also *Faush*, 808 F.3d at 214 (quoting *Covington v. Int'l Ass'n of Approved Basketball Officials*, 710 F.3d 114, 119 (3d Cir. 2013)) (noting court's focus on "which entity paid [the employees'] salary, hired and fired them, and had control over their daily employment activities" (alteration in original)).

tensive with the most relevant *Darden* factors, the Third Circuit's opinion in *Faush* contemplates broader employer liability than previous opinions.¹¹⁸ This result is consistent with the broad remedial purpose of Title VII and liberal construction applied by courts.¹¹⁹ Further, this liberal construction of Title VII is especially appropriate, given the Supreme Court's characterization of Title VII as "central to the federal policy of prohibiting wrongful discrimination in the [n]ation's workplaces and in all sectors of economic endeavor."¹²⁰

118. See *Faush*, 808 F.3d at 209 (concluding reasonable jury could find existence of employment relationship under facts presented if it considers possibility of joint employment); but see *Scott*, 523 F. App'x at 912 (omitting discussion of possibility of joint-employer relationship); *Prather*, 326 F. App'x at 672–73 (omitting discussion of joint-employer relationship); *Shah*, 346 F. App'x at 834 (omitting discussion of joint-employer relationship). The *Faush* opinion anticipates this expansion of liability, noting, "[w]e are mindful that many aspects of the Labor Ready–Tuesday Morning employment arrangement that we have identified . . . will pertain to a large number of temporary employment arrangements, with attendant potential liability under Title VII for the clients of those temporary employment agencies." See *Faush*, 808 F.3d at 218.

119. See Stuart J. Ishimaru, *Fulfilling the Promise of Title VII of the Civil Rights Act of 1964*, 36 U. MEM. L. REV. 25, 40 (2005) (arguing for expanded and dynamic application of Title VII); Meyer & Marshall, *supra* note 9 (noting that remedial nature of Title VII supports expansion of protections to temporary workers in some cases). The significance of Title VII's protections was not lost on contemporary observers, as one 1966 account of Title VII's legislative history exulted that Congress "brought to fruition the labors and aspirations of civil rights proponents everywhere[] [and] made possible that which has never before been possible in America and will leave a lasting mark on the structure of American society." See Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431, 457 (1966). Vaas evinces a clear appreciation for Title VII's historical significance in a near-contemporaneous account of its legislative history, noting, "[t]he significance of what Congress has done and the extent of its labors cannot be overstated." See *id.* Commenters were not alone in the view that Title VII was intended to remedy historical racial injustice broadly; before signing the Civil Rights Act of 1964, President Lyndon Johnson remarked,

We believe that all men are entitled to the blessings of liberty. Yet millions of men are being deprived of those blessings—not because of their own failures, but because of the color of their skin But it cannot continue. Our Constitution, the foundation of our Republic, forbids it. The principles of our freedom forbid it. Morality forbids it. And the law I will sign tonight forbids it.

Jacqueline A. Berrien, *Statement on the 50th Anniversary of the Civil Rights Act of 1964*, EEOC (July 2, 2014), <http://www.eeoc.gov/eeoc/history/cra50th/> [https://perma.cc/K2W5-KEKN] (quoting President Lyndon B. Johnson on Civil Rights Act of 1964).

120. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2522 (2013) (describing Title VII).

B. *A Model Employee: Third Circuit's Analysis Brings It into Line with Other Jurisdictions*

The Third Circuit's decision in *Faush* reflects the weight of authority both in other circuits and official EEOC guidance.¹²¹ In keeping with the policy of liberal interpretation, the reasoning in *Faush* corresponds with the Fourth Circuit's determination that an employment relationship exists between a temporary worker and an assigned placement, as well as the First Circuit's focus on control-related factors.¹²² Moreover, while the hybrid test applied by some circuits appears to contradict the *Darden* inquiry, its application leans heavily on common law control factors and thus recognizes their importance in examining the worker's "economic realities."¹²³

Although *Maynard* was decided before *Darden*, its discussion of the loaned servant doctrine comports with the court's joint-employer analysis in *Faush*.¹²⁴ Moreover, EEOC guidance clearly contemplates Title VII liability for an employer when that "employer exercises significant supervisory control over the [temporary] worker."¹²⁵

121. See *Faush*, 808 F.3d at 210; *Butler v. Drive Auto. Indus. of Am.*, 793 F.3d 404, 406 (4th Cir. 2015); *Maynard v. Kenova Chem. Co.*, 626 F.2d 359, 360 (4th Cir. 1980); U.S. Equal Emp. Opportunity Comm'n Notice No. 915.002 (1997), 1997 WL 33159161, at *5–6. The *Faush* court distinguished the First Circuit's decision in *Rivas v. Federacion de Asociaciones Pecuarías de Puerto Rico*, 929 F.2d 814 (1st Cir. 1991), on the grounds that, while the court did examine the possible existence of a joint-employer relationship under a control-based analysis, the degree of control was such that "under [those] circumstances, it is unsurprising that the First Circuit held that the grain mill operator was not the laborer's employer." See *Faush*, 808 F.3d at 219 n.10 (distinguishing *Rivas*). Notably, the *Faush* court held only that summary judgment should not have been granted, while the Fourth Circuit found that an employment relationship existed as a matter of law in both cases. Compare *Faush*, 808 F.3d at 210, with *Butler*, 793 F.3d at 406, and *Maynard*, 626 F.2d at 360.

122. See *Butler*, 793 F.3d at 406 (finding employment relationship between temporary employee and assigned placement under hybrid test); *Maynard*, 626 F.2d at 360 (finding employment relationship between temporary worker and assigned placement under loaned servant theory); *Rivas*, 929 F.2d at 819–22 (analyzing joint-employer relationship for temporary employee by considering control factors).

123. See *Butler*, 793 F.3d at 414–15 (explaining centrality of control-related factors in hybrid test); *Callicutt*, 2002 WL 992757, at *7–8 (explaining centrality of control-related factors in hybrid test).

124. Compare *Maynard*, 626 F.2d at 361–62 (examining loaned servant doctrine's applicability to temporary worker assignment), with *Faush*, 808 F.3d at 215 (examining whether temporary worker assignment created joint-employer relationship).

125. See U.S. Equal Emp. Opportunity Comm'n Notice No. 915.002 (1997), 1997 WL 33159161, at *5–6 ("A client of a temporary employment agency typically qualifies as an employer of the temporary worker during the job assignment, along with the agency. This is because the client usually exercises significant supervisory control over the worker.").

C. *Daily Control, Payment Practices, and Hiring and Firing As a Practical Matter: Temporary Workers Get a Raise over the Summary Judgment Bar*

The *Faush* court found that control-related factors could be sufficient to allow the worker to survive summary judgment.¹²⁶ The court's corresponding emphasis on the practical implications of hiring, firing, and compensation reinforces this shift toward expanding Title VII protection to temporary workers.¹²⁷ While Third Circuit courts have found in the past that hiring, firing, and compensation considerations were sufficient to grant summary judgment on a finding of no employment relationship, the *Faush* decision will properly compel examination of all factors from a practical perspective.¹²⁸

V. ADVICE FOR PRACTITIONERS: HOW TO KEEP YOUR JOB AFTER *FAUSH*

The Third Circuit's decision in *Faush* both explicitly recognizes joint-employer liability and suggests that more temporary workers subject to day-to-day direction by assigned-placement supervisors may survive sum-

126. See *Faush*, 808 F.3d at 215–17 (finding district court overstated extent to which certain factors weighed against plaintiff and control-related factors favored plaintiff). As the Court summarized its holding, “[a]lthough [Faush] was paid and dispatched by Labor Ready, he worked under the direct supervision and control of Tuesday Morning managers who instructed the Labor Ready employees on the ‘details of the work they were doing.’” See *id.* at 218 (quoting *Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1352 (3d Cir. 1991)). The court's language indicates that control-related factors alone may be enough to preclude summary judgment hinging on the existence of an employment relationship. See *id.* (“Tuesday Morning's extensive control over Faush's activities could suffice to make him a common-law servant even though Labor Ready paid him and had the ultimate power to fire him.”).

127. See *id.* at 215–17 (analyzing hiring, firing, and compensation according to practical effect rather than official procedure). The court found that Tuesday Morning actions, in providing site-specific training and necessary equipment and materials, and directly supervising and assigning tasks to Labor Ready workers more closely resembled those of a traditional employer than an entity hiring an independent contractor. See *id.* at 216–17 (noting control-related factors supporting employment relationship); see also *Kreizman*, *supra* note 112 (“The decision in *Faush v. Tuesday Morning* will not impact all temp workers, but could result in liability in cases where the employer exerts a certain degree of control over the day-to-day activities of the employee.”); *Morin III & Hallett*, *supra* note 112 (“[C]ompanies that use temporary workers will likely be considered joint employers . . . under federal and state anti-discrimination laws. Thus, the *Faush* opinion could significantly increase exposure for discrimination claims for employers who do business in the states within the Third Circuit . . .”).

128. See *Scott v. UPS Supply Chain Solutions*, 523 F. App'x 911, 912 (3d Cir. 2013) (concluding compensation and hiring- and firing-related factors weighed against plaintiff); *Prather v. Prudential Fox & Roach*, 326 F. App'x 670, 672 (3d Cir. 2009) (concluding same); *Shah v. Bank of Am.*, 346 F. App'x 831, 833 (3d Cir. 2009) (concluding same); *Bernstein & Slocum*, *supra* note 111 (discussing *Darden* factors employed by court to determine employee status and stressing fact-specific nature of proper inquiry as described in *Faush*).

mary judgment as to the existence of an employment relationship.¹²⁹ Following *Faush*, employers' attorneys should attack control-related factors weighing against an employer and emphasize any payment practices that resemble those of a contracting relationship, while employees' attorneys' should focus on assigned placement supervisors' day-to-day control and the practical effects of their hiring, firing, and compensation procedures.¹³⁰

A. *Hands-Off Management: Employers' Attorneys Should Work to Attack Factors Relating to Control and Emphasize Any Payment Practices Suggestive of Contractor Relationship*

Faush represents a potential expansion of employer liability.¹³¹ Accordingly, employers' attorneys should attack both the factors relating to possible joint-employer liability, as well as the *Darden* factors relating to control over an employee.¹³² The grounds on which to attack these issues overlap, as the criteria relevant to both include the entity's ability to assign tasks, supervise day-to-day employee activities, and oversee employee records.¹³³ Courts may find these arguments more persuasive when the temporary worker is performing tasks that require more specialized skills, rather than unskilled tasks directed by the temporary assigned employer.¹³⁴ Likewise, employers' attorneys should emphasize practical aspects of payment procedures that suggest a contractor relationship—wherein an employee is paid “a fixed rate for the completion of a discrete project”—rather than a traditional employment relationship where an em-

129. See *Faush*, 808 F.3d at 215–17 (recognizing joint-employer liability while examining *Faush*'s relationship to Tuesday Morning).

130. For advice for employers' attorneys, see *infra* notes 135–39 and accompanying text. For advice for temporary workers' attorneys, see *infra* notes 140–45 and accompanying text.

131. See *Faush*, 808 F.3d at 215–17 (recognizing joint-employer liability); Kathleen M. Connelly, *Third Circuit Adopts Narrower Darden Test to Determine Joint Employer Status for Purposes of Title VII*, LINDABURY, MCCORMICK, ESTABROOK & COOPER, P.C. (Dec. 24, 2015), <http://www.lindabury.com/firm/articles-resources/narrower-darden-test-joint-employer-status-title-vii.html> [https://perma.cc/52AK-D369] (“Despite efforts by employers to doge an employer–employee relationship, the courts are increasingly scrutinizing these relationships and finding that both the temporary staffing agency and the employer it is staffing are on the hook for compliance with a wide range of labor and employment laws.”).

132. See *Faush*, 808 F.3d at 215–17 (recognizing joint-employer liability and control-related factors). Evidence that temporary employees received direction from their assigning agency or were directly supervised by the assigning agency would weigh against a finding of joint-employer liability. See *id.*

133. See e.g., *Plaso v. IJKG, LLC*, 553 F. App'x 199, 204–05 (3d Cir. 2014) (citing *Covington v. Int'l Assoc. of Approved Basketball Officials*, 710 F.3d 114, 119 (3d Cir. 2013) (reciting factors relevant to joint-employer inquiry)).

134. See e.g., *Faush*, 808 F.3d at 217 (“[T]he tasks assigned to the Labor Ready employees, according to the testimony of a Tuesday Morning manager, were *no different* than those assigned to Tuesday Morning employees.”); see also *Points to Remember, supra* note 111 (noting frequently “blurred lines” between work of full-time employees and temporary workers).

ployee is paid a set hourly rate, either by the temporary assigned employer or the staffing agency.¹³⁵

B. *Works Well with Others: Temporary Workers' Attorneys Should Emphasize Control Factors and Payment Procedures Indicative of Traditional Employment Relationship*

Attorneys representing temporary workers will find significant support for their clients' position in *Faush*.¹³⁶ Specifically, employees' attorneys should emphasize temporary assigned employers' day-to-day control over their clients.¹³⁷ As previously noted, these factors overlap with factors that tend to prove the existence of a joint-employment relationship and may kill two birds of burden with one evidentiary stone.¹³⁸ Employees' attorneys may find these arguments more availing when representing clients who performed low or unskilled labor at their temporary assigned work assignment.¹³⁹

Employees' attorneys should also seek to analogize payment practices during a temporary work assignment to those of a traditional employment relationship and stress the lack of functional difference between whether the assigned employer or staffing agency pays the temporary worker.¹⁴⁰ Similarly, employees' attorneys should stress that the staffing agency has a responsibility to provide a new work assignment to a client upon termination.¹⁴¹

135. *See id.* at 215–16 (discussing difference in payment procedure between independent contractors and employees).

136. *See id.* at 220 (reversing trial court's entry of summary judgment on Faush's Title VII and PHRA claims); Bernstein & Slocum, *supra* note 111 (“[T]he Third Circuit has now made it more likely that they will also be subject to Title VII in relation to temporary workers”); Connelly, *supra* note 131 (stating “courts are increasingly scrutinizing these relationships and finding that both the temporary staffing agency and the employer it is staffing are on the hook for compliance”).

137. *See Faush*, 808 F.3d at 216–17 (emphasizing control-related factors).

138. *See id.* (discussing control-related factors); *see also Plaso*, 553 F. App'x at 204 (citing *Covington*, 710 F.3d at 119) (listing considerations in determining joint-employer status); Bernstein & Slocum, *supra* note 111 (listing factors of which employers need to be aware when employing temporary workers).

139. *See Faush*, 808 F.3d at 217 (noting Faush performed unskilled tasks that full-time employees otherwise would have performed).

140. *See id.* at 215–16 (finding payment of fixed hourly rate to staffing company was effectively “direct employee compensation”); *see also Points to Remember*, *supra* note 111 (noting payment process in *Faush* was important factor in court's holding).

141. *See Faush*, 808 F.3d at 216 (noting lack of evidence that Tuesday Morning had obligation to provide Faush with new work assignment upon termination); *see also Points to Remember*, *supra* note 111 (stating Labor Ready employed Faush when he was not working for Tuesday Morning).

VI. CONCLUSION

By recognizing joint-employer liability, focusing on control-related factors, payment procedures, and hiring and firing authority from a practical perspective, the Third Circuit's decision in *Faush* will allow more temporary workers to survive summary judgment on Title VII claims.¹⁴² While the court's decision will expand employer liability, it comports with the weight of authority from other circuits and EEOC guidance and accurately reflects the broad remedial policy considerations underlying Title VII.¹⁴³

142. For a discussion of the joint-employer liability analysis in *Faush*, see *supra* notes 86–109 and accompanying text.

143. For a discussion of other circuits' and the EEOC's treatment of the issue, see *supra* notes 49–64 and accompanying text. For a discussion of the remedial policy considerations underlying Title VII, see *supra* notes 26–28 and accompanying text.