

United States Courts
Southern District of Texas
FILED

JAN 26 2015

David J. Bradley
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS, VICTORIA DIVISION

TONI MAREK	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO. 6:14-cv-00055
	§	
PHI THETA KAPPA HONOR SOCIETY	§	
AND EXECUTIVE DIRECTOR, DR. ROD	§	
RISLEY	§	
Defendants,		

**PLAINTIFF’S RESPONSE TO DEFENDANTS’ MOTION TO DISMISS, OR
ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Toni Marek, respectfully submits this brief in opposition to the Motion to Dismiss filed by the Defendants, Phi Theta Kappa Honor Society and Executive Director, Dr. Rod Risley. The Defendants seek to dismiss, in its entirety, the Plaintiff’s Employment Discrimination Complaint (Case 6:14-cv-00055 Document 1 Filed in TXSD on 09/05/14). The Defendants claim that the Plaintiff has “failed to plead and cannot show as a matter of law that: (1) she was an employee as defined by Title VII; (2) either Defendant was her employer as defined by Title VII; and/or (3) Risley has any individual liability to her under Title VII” (Case 6:14-cv-00055 Document 4 Filed in TXSD on 12/23/14 Page 1 of 8).

The Plaintiff disagrees with these statements, the Motion to Dismiss or, Alternatively, Motion for Summary Judgment. The Plaintiff asserts that (1) she was an employee of Phi Theta Kappa as defined by Title VII and for reasons listed below, is protected under Title VII; (2) the

Defendant was her employer as defined by Title VII; (3) the Plaintiff was under the direction of Dr. Rod Risley, thus this Defendant has individual liability to the Plaintiff under Title VII.

PLAINTIFF'S DISCUSSION

Circuit Judge McGowan of the United States Court of Appeals, District of Columbia Circuit filed an opinion for the court on July 10, 1979 that stated:

“Consideration of all the circumstances surrounding the work relationship is essential, and no one factor is determinative... the extent of the employer’s right to control the ‘means and manner’ of the worker’s performance is the most important factor to review here, as it is common law and in the context of several other federal statutes. If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which the result is achieved, an employer/employee relationship is likely to exist” (*Spirides v. Reinhardt*, 613 F.2d 826, 830 D.C. Cir. 1979)

Judge McGowan’s opinion illustrates that an employer/employee relationship is based on more than just monetary facets and that employee status is of crucial significance in determining applicability of Title VII. More recently, the United States District Court, N. D. Illinois, Eastern Division stated that the Seventh Circuit “has squarely rejected the ‘tyranny of labels’ advocated by the defendants in brandishing the term ‘volunteer’ as a shield to ward of liability under Title VII” and that the Seventh Circuit had “followed and endorsed” the Supreme Court’s instruction to study the numerous common law factors in determining an employee/employer relationship and whether individuals were covered as employees under Title VII (*Volling v. Antioch Rescue Squad*, N.D. IL, No. 11 C 04920, 12/4/12).

The language of Title VII's basic antidiscrimination provision makes it unlawful "to discriminate against any individual," and includes language that numerous court opinions rely heavily on when determining an employer/employee relationship. These court opinions more often than not, relied heavily on the master-servant relationship when determining whether or not an employee/employer relationship existed and centered on the fundamental question of: "to what extent did the employer exercise control of the details of the work and the employee's physical conduct?" (*See Commun. for Non-Violence v. Reid* 490 U.S. 730 (1989); *Clackamas Gastroenterology Associates, P. C. v. Wells* 538 U.S. 440 (2003))

PLAINTIFF'S STATEMENT OF FACTS

To this fact, the Plaintiff states that she was an employee of Phi Theta Kappa Honor Society and under the direction of Dr. Rod Risley and the Plaintiff is protected under Title VII for the following reasons:

1. Phi Theta Kappa and Dr. Rod Risley were in complete control of the Plaintiff's job, including, but not limited to, permission to travel, when to travel, mandatory travel and mandatory deadlines for projects, mandatory monthly and weekly conference calls, mandatory meetings, and expense reports. The Defendants were in complete control of the Plaintiff's physical conduct, physical attire, and anything spoken or written that could potentially be seen on any sort of media, social or print, outlets.
2. The Defendants terminated the Plaintiff's employment, because of her sex, thus denying her future employment with the same entity.
3. The Defendants' Constitution and Bylaws contain clearly written employment duties of the Plaintiff's employment position.

4. The Plaintiff was required to adhere to the Defendant's explicitly written instructions for her employment position or the Plaintiff was subject to discipline enforced by the Defendants.
5. The Defendant, Dr. Rod Risley, referred to the Plaintiff's position as that of an employee
6. The Defendants addressed and referred to the Plaintiff as an employee in correspondences addressed to all employees and staff of Phi Theta Kappa Honor Society.
7. The Defendants supplied and promised compensation to the Plaintiff for her services.

PLAINTIFF'S SUPPORTING STATEMENTS

The Plaintiff states that she was an employee of Phi Theta Kappa based on the Equal Employment Opportunity Commission's Threshold issues outlined in the EEO Compliance Manual, Section 2. The Plaintiff cites the United States Equal Employment Opportunity Commission's (EEOC) Compliance Manual, Section 2: Threshold Issues 1) *Who is an Employee?* 2-III-A-1, 2) *Volunteers* 2-III-A-1(c), and (3) *Partners, Officers, Members of Boards of Directors, and Major Shareholders* 2-III-A-1(d).

1. The EEOC Compliance Manual, Section 2-III-A-1 states that "The question of whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls the means and manner of the worker's work performance." The EEOC Compliance Manual further lists factors taken from *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992). These factors were adopted by the Court, in *Darden*, as a "common law test" for the purpose of determining the qualification of an individual as an "employee" under the Employee Retirement Income Security Act of 1974 (ERISA). The EEOC

Compliance Manual states that “the *Darden* rationale applies under the EEO statutes because the ERISA definition of ‘employee’ is identical to that in Title VII, the ADEA, and the ADA.” The Plaintiff states the following in relation to factors that indicate an employee/employer relationship:

- a) The Defendants had the right to control when, where, and how the Plaintiff performed her job.
- b) The Defendants furnished the tools, materials, and equipment.
- c) Work was performed at the employer's premises, and on behalf of the employer.
- d) The Defendants had the right to assign additional projects to the Plaintiff.
- e) The Defendants set the hours of work and the duration of the job.
- f) The Defendants could discharge the worker.
- g) The Defendants created an employee and employer relationship with training and numerous references to how the Plaintiff performed the “job.” Therefore, the Plaintiff and the employer believed that they are creating an employer-employee relationship.
- h) The Plaintiff’s responsibilities included work that was a part of the regular business of the Defendant’s employees.

According to the United States Equal Employment Opportunity Commission’s (EEOC) Compliance Manual, Section 2: Threshold Issues, “*Who is an Employee?*” (Section 2-III-A-1), the Plaintiff is considered an employee of Phi Theta Kappa and the Plaintiff is protected under Title VII.

2. Further, the EEOC Compliance Manual, Section 2-III-A-1(c) states “a volunteer may also be covered by the EEO statutes if the volunteer work is required for regular employment or regularly leads to regular employment with the same entity.” The Plaintiff states that numerous current and past employees of Phi Theta Kappa (including the Chairman of the Board of Directors of Phi Theta Kappa and Dr. Rod Risley) all served in the same position (International/National Officer) that the Plaintiff held at the time of her employment, prior to their employment; and that deference is given to applicants that previously served as International/National Officers for Phi Theta Kappa, as it is “the highest pinnacle of leadership within PTK” (See Declaration of Dr. Rod Risley, Case 6:14-cv-00055 Document 4-1 Filed in TXSD on 12/23/14 Page 1 of 2, Exhibit “A”). The Plaintiff believes that if the highest paid employee of Phi Theta Kappa (Executive Director’s Rod Risley), the Chairman of the Board, and numerous past and present employees were all past International Officers, then the Plaintiff’s employment position was one of which “regularly leads to regular employment with the same entity,” and thus the Plaintiff is to be protected under Title VII.

3. Finally, the EEOC Compliance Manual, Section 2-III-A-1(d) states “in most circumstances, individuals who are partners, officers, members of boards of directors, or major shareholders will not qualify as employees” and that “if the individual is subject to the organization's control, s/he is an employee.” The Plaintiff states that during her tenure of office, she was a part of the Executive Committee of Phi Theta Kappa and thus, an officer of the organization, as stated in Phi Theta Kappa’s Constitution (See “Phi Theta Kappa Constitution,” Article V, Sec. II and Sec. III, which is attached and fully incorporated into this brief as Exhibit “B.”). The Plaintiff served as an International Vice President of Phi Theta Kappa and duties outlined in the Constitution of Phi Theta Kappa included “perform[ing] whatever other duties or

services are required in the orderly operation of the Society" (See Exhibit B, "Phi Theta Kappa Constitution" Article V, Sec. II E. (3)). Since the Plaintiff was a member of the Executive Committee charged with the some aspects of operation of the organization, the Plaintiff is an employee of Phi Theta Kappa and is protected under Title VII.

4. Additionally, Phi Theta Kappa adopted in January 2000 a list of "Professional Guidelines For Serving as an International Officer" (which is attached and fully incorporated into this brief as Exhibit "C") and International Officers are required to sign an "Honor Code for International Officers" (which is attached and fully incorporated into this brief as Exhibit "D"). The International Officers must adhere to these guidelines or be disciplined as deemed appropriate by the Executive Director, Dr. Rod Risley. These documents supersede the organization's Constitution and Bylaws and is enforced by Phi Theta Kappa as an employer, of which the Plaintiff was an employee. The Honor Code (Exhibit "D") is enforced by the Executive Director, Dr. Rod Risley, therefore the Plaintiff was an employee and under the direction and supervision of Dr. Rod Risley.

5. Additionally, the Plaintiff was discharged from her employment by Dr. Rod Risley. The Plaintiff was told by more than one Phi Theta Kappa employee and the Chairman of the Board of Director's for Phi Theta Kappa, that Dr. Rod Risley, alone, made the determination to discharge the Plaintiff from her employment. Further, during Dr. Rod Risley's meeting with the Plaintiff to discharge the Plaintiff from employment, Dr. Rod Risley stated that the plaintiff, "should know how to do [her] job."

6. The Defendants addressed the Plaintiff as "staff" in an email on December 13, 2013 (Exhibit E). The Plaintiff was required to adhere to employee guidelines for travel (Exhibit

F). The Plaintiff was given staff guidelines to follow (Exhibit G). The Plaintiff was given instructions by an employee that she was required to attend a function (Exhibit H).

7 The Courts have left open the possibility that "benefits that create career opportunities" might potentially amount to adequate compensation (*Haavistola*, 6 F.3d at 220; *see also Neff*, 916 F. Supp. at 712). The Defendants promised that the Plaintiff would receive indispensable work and leadership experience, possible academic credit in the form of a leadership course, the opportunity to network with potential employers and admissions teams in higher academe, valuable employer references, and possible future work with the Defendant's organization, Phi Theta Kappa Honor Society. Along with these benefits The Defendants provided compensation by: (1) paying the Plaintiff \$700 in 2013 via direct deposit; (2) giving the Plaintiff a tablet valued at approximately \$650; (3) giving the Plaintiff an employee credit card to charge purchases of flights, hotels, rental cars, and meals.; (4) allowing the Plaintiff to use the employee credit card to purchase a rental car for personal use at the value of \$335.12 (Exhibit I); (5) gave the Plaintiff meals that were in excess of a daily per diem amount; (6) promised the Plaintiff two payments in the year 2014, in the amounts of \$700 and \$2000 (7) offered benefits that other employees receive; and (8) did not make clear that the Plaintiff would not be protected under the Volunteer Protection Act.

CONCLUSION

The Defendant claims that if the Plaintiff were "to amend the Complaint to allege that she was an employee of PTK or Risley, or that either PTK or Risley was her employer, Marek would have to certify to the Court that this factual allegation either had evidentiary support or would likely have evidentiary support after a reasonable opportunity for further investigation or discovery" and that "given the conclusive evidence given in this Motion, Marek could not make

such a pleading in good faith” (Case 6:14-cv-00055 Document 4 Filed in TXSD on 12/23/14 Page 5 of 8).

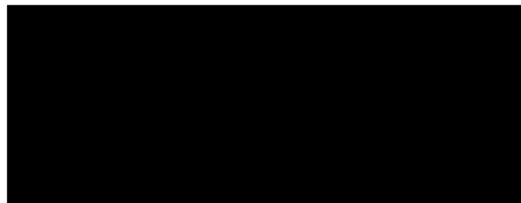
The Plaintiff has made her Complaint in good faith, as well as this opposition to the Defendants’ Motion to Dismiss and Summary Judgment. Further documentation and testimony from witnesses for the Plaintiff can attest to these facts listed within this opposition to the Defendant’s motion.

The Plaintiff has demonstrated within this brief that by the EEOC’s own governmental standards, and by prior court opinion, that the Plaintiff was an employee of Phi Theta Kappa and under the direction of Dr. Rod Risley. The Plaintiff has properly stated claims upon which relief can be granted and because of these reasons, the Defendants’ Motion to Dismiss and for Summary Judgment should be denied.

Respectfully submitted,

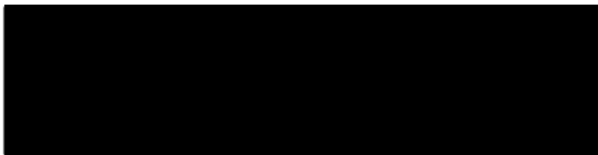


Toni A. Marek



CERTIFICATE OF SERVICE

I certify that on January 26, 2015, I mailed a courtesy copy of this PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT to Pamela B. Lindberg by United States Certified Mail, Return Receipt Requested, to the address of record: Jackson Lewis, P.C. c/o Pamela B. Lindberg, Wedge International Tower, 1415 Louisiana, Suite 3325, Houston, Texas 77002.



Toni A. Marek