

## Third Circuit Rejects Plaintiff's Claims That Entity To Whom She Provided Consulting Services Was Her "Employer" Under Title VII Or The NJLAD

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The Third Circuit has provided useful guidance to employers with respect to key factors to consider in implementing consulting relationships without generating an employment relationship under the law. Specifically, in *Plaso v. IJKG, LLC et. al*, [found here](#), the Third Circuit accepted the holdings of the District Court for the District of New Jersey that the defendant did not constitute an "employer" for liability purposes under Title VII or the New Jersey Law Against Discrimination (NJLAD.) Though the opinion is deemed not precedential by the Court, the factors set forth therein reflect the indicia of control analyses that employers should be aware of when considering whether they could be found to be an "employer" under these laws.

In this case, the plaintiff worked for MCR Martin, LLC d/b/a Healthcare MCR (Healthcare), which provided consulting services. The plaintiff had a contract with Healthcare requiring her to report to the President and Managing Partner of Healthcare, R. Brent Martin, and to "provide the Services as directed by [Healthcare] and in compliance with...the terms of the Client Engagement to which [she was] assigned." Healthcare was responsible for paying the plaintiff's salary and benefits and reimbursing expenses incurred at the client's site, and could terminate the plaintiff's employment. Mr. Martin worked as the Chief Restructuring Officer for a client, Bayonne Medical Center (BMC) to which he assigned plaintiff to work. The plaintiff worked at BMC five days a week, interacted daily with BMC executives and employees, had unfettered access to BMC's facility, had a BMC office, had BMC email and telephone accounts, had an access pass that identified her as a Healthcare employee, gave assignments to BMC employees and was asked by BMC to evaluate those employees (which Mr. Martin instructed her not to do), and interacted with Mr. Martin every day (as he was almost always at the site).

Martin/Healthcare controlled the plaintiff's work hours, disciplined the plaintiff, and provided authorization to plaintiff in relation to leave or working from home. When BMC formed another group, Mr. Martin assigned Plaintiff to serve as its "practice administrator," who represented BMC to physician practices and trained that group's future Vice-President of Business to perform such tasks. While working for Healthcare, the plaintiff also provided services to Healthcare clients other than BMC.

The plaintiff ultimately alleged that Mr. Martin engaged in sexually harassing

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behaviors. She complained regarding this alleged conduct to BMC's Human Resources personnel and advised the CEO of BMC that she did not want to work by Mr. Martin. The CEO, in turn, allegedly advised her to pack up her office and go home, with no further communications after that (despite the plaintiff's belief she would be offered employment by BMC). The plaintiff subsequently remained on Healthcare's payroll for a number of months thereafter. She ultimately filed discrimination claims against Mr. Martin and Healthcare, which were settled. She later sued BMC alleging a number of claims under Title VII and the New Jersey Law Against Discrimination. These claims were dismissed by the District Court via summary judgment, after it found that BMC was not her "employer" for purposes of liability under Title VII and the New Jersey Law Against Discrimination.

In rejecting the plaintiff's appeal and her argument that BMC was her "employer," the Third Circuit focused on "three indicia of control: (1) which entity paid plaintiff; (2) who hired and fired plaintiff; and (3) who 'had control over [plaintiff's] daily employment activities.'" Based on the facts presented, the Court squarely held that BMC "had no authority to affect Plasco's employment."

The Court similarly rejected any claim that BMC functioned as a joint employer of plaintiff, again focusing on the level of control (or lack thereof) BMC held over the plaintiff. In reviewing the facts as a whole, the Court agreed with the District Court that it was Healthcare – not BMC – that controlled the plaintiff's work. The Third Circuit narrowed in on the fact that "only Healthcare paid [plaintiff's] salary and business expenses, maintained employment records for her, and had the authority to terminate her," as well as that Mr. Martin controlled her responsibilities, her use of BMC resources, and work schedule. In contrast, the Third Circuit found that BMC exercised limited supervision over the plaintiff, thereby undermining any claim of joint employment. Moreover, the Court found no evidence in the record that BMC terminated the plaintiff (or, for that matter, that plaintiff was terminated at all), or that the services performed by the plaintiff fell outside those comporting with her contract with Healthcare.

The Third Circuit additionally declined to find BMC and Healthcare to be a single employer under the "joint enterprise" theory, finding these entities to be separate legal entities and finding no evidence in the record that they were "united in ownership, management, or purpose." The Court found that Healthcare performed its own administrative functions (e.g., employee recordkeeping, payroll, business expense reimbursement, etc.), and serviced clients other than BMC.

This case serves as yet another reminder that employers (particularly those within the Third Circuit and New Jersey) must continually assess these control factors as they increasingly rely upon consulting relationships in their workplaces.