FILED
United States Court of Appeals
Tenth Circuit

September 21, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WILLIAM CLINTON HILL,

Plaintiff - Appellant,

v.

SER JOBS FOR PROGRESS NATIONAL, INC.,

Defendant - Appellee.

No. 21-1079
(D.C. No. 1:19-CV-01851-KMT)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **PHILLIPS**, Circuit Judges.

Plaintiff William Hill, appearing pro se, appeals from the district court's decision granting summary judgment in favor of defendant SER Jobs for Progress National (SER) on Hill's claims of employment discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e–17. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we reverse and remand for further proceedings.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I

SER is a national, private, nonprofit organization that addresses the needs of economically-challenged individuals in education, job skills training, literacy, and employment. Among its various programs, SER administers the Senior Community Service Employment Program (SCSEP). The SCSEP, which was enacted by Congress and implemented by the United States Department of Labor (DOL), focuses on the training and employment needs of mature workers. For example, the SCSEP attempts to address barriers faced by mature workers, including low literacy skills, physical and mental disabilities, and homelessness. In administering the SCSEP, SER partners with local nonprofit organizations, called host agencies, to provide participants with training opportunities to update their skills or to develop a new career path.

SER has taken the position that its SCSEP participants are not employees of SER or the host agencies. SCSEP conveys its position on this issue to its SCSEP participants by way of repeated statements in a participant handbook. SER's SCSEP participants are also asked to sign a statement of acknowledgment to this effect when they first enroll in the program.

Hill, a resident of Pueblo, Colorado, began participating in SER's SCSEP in June 2017. Upon his entry into SER's SCSEP, and repeatedly thereafter, Hill signed forms acknowledging his receipt of a copy of SCSEP's participant handbook, and also acknowledging that SCSEP was "a short term training program" and "not a job." ECF No. 32-3 at 4.

II

On June 26, 2019, Hill filed a pro se employment discrimination complaint against SER. Claim One of the complaint alleged employment discrimination in the form of failure to promote, different terms and conditions of employment, and retaliation on the basis of race. Claim Two was identical in form, except that Hill labeled it as "Retaliation." *Id*. at 4. The complaint otherwise included no supporting allegations. But Hill did attach to the complaint a copy of a charge of discrimination that he filed with the EEOC in March 2019. That charge of discrimination stated, in pertinent part:

> I began employment with [SER] on June 20, 2017 and am currently employed as an Administrative Assistant.
>
> In or around October 2018 I was denied the opportunity to interview for a full-time position. On or about February 26, 2019 I made a complaint to my employer about discrimination. In or around March 2019 I was wrongfully disciplined.
>
> I believe I was denied equal terms and conditions of employment and disciplined based on my race (African American), age (60), disability, and in retaliation for engaging in protected activity in violation of Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1967, as amended, and the Americans with Disabilities Act of 1990, as amended.

Id. at 7.

The magistrate judge assigned to the case issued an order directing Hill to cure deficiencies in his complaint. Hill responded to the magistrate judge's order by filing an amended complaint. Like the original complaint, the amended complaint asserted two claims for relief: "Employment Discrimination" and "Retaliation." ECF No. 5 at

3–4. In support of these claims, Hill attached to the complaint form two pages of factual allegations. With respect to his Employment Discrimination claim, Hill alleged as follows:

> 1)Mr. Hill is a 61 year old African American male. He was employed at SER since June 20, 2017.
>
> 2) He was employed as an administrative assistant. Habitat for Humanity (HFH) had an opening for an administrative assistant. Mr. Hill was qualified for the position. Though qualified he was rejected and not promoted to that position.
>
> 3) HFH is a "host[”] agency for SER where they send qualified participant [sic] in its program.
>
> 4) SER kept the employment opportunity hidden until it was no longer available, but had previously sent a lesser qualified non-African-American candidate to apply for the position.
>
> 5) HFH rejected the lesser qualified candidate in favor of Mr. Hill, but he was never notified that position was open and the job was never posted.
>
> 6) Mr. Hill understood that his treatment was intentional to keep him from obtaining this position.
>
> 7) Mr. Hill filed a charge of discrimination with the Equal Employment Opportunity Commission on March 22, 2019 and received his right to sue notice on April 3, 2019. Both documents are attached to this amended complaint.

Id. at 6. And in support of his Retaliation claim, Hill offered the following allegations:

> 1) Mr. Hill filed a charge of discrimination with the EEOC which is attached to this amended complaint.
>
> 2) After learning of his charge the Defendant, SER, illegally retaliated against him by:

(a) Issuing him corrective actions (disciplinary) that were unfounded. These corrective actions had nothing to do with Mr. Hill's actual performance.

b) placing him on unpaid disciplinary leave for unjustified reasons while deviating from one of its standard business practices were pretext to hide illegal discrimination. Prior to this Mr. Hill had no corrective actions in his full 2 year tenure at SER.

c) Under these circumstances Mr. Hill was constructively discharged. The 3 months of unpaid leave with no pay with little hope of any change required Mr. Hill to seek other employment. Mr. Hill's financial situation also mandated change.

d) After securing other employment Mr. Hill was terminated. He is now in the process of filling [sic] another charge of employment discrimination with the EEOC related to his discharge and this action.

3) Mr. Hill does seek trial by jury.

Id. at 7. Hill also attached to his amended complaint copies of the charge of discrimination he filed with the EEOC and the EEOCs' dismissal of his charge.

On May 28, 2020, following the conclusion of discovery, SER filed a motion for summary judgment. SER argued in its motion that Hill's claims should be dismissed because he was never an employee of SER and therefore could not establish a prima facie case of discrimination under Title VII. SER submitted in support of its motion a copy of its SCSEP participant handbook and copies of the various forms that Hill had signed prior to and during his participation in the program acknowledging that he was not an employee of SER. In addition, SER submitted as evidence a sworn affidavit from Tony Morales, SER's Director of Human Resources,

who stated that Hill was merely a participant in the SCSEP program and not an employee of SER or any host agency.

Hill filed a brief in opposition to SER's motion for summary judgment and attached to his brief various exhibits, including copies of 2017 and 2018 W-2 forms he received listing his employer as "SER JOBS FOR PROGRESS NATIONAL INC." ECF No. 35 at 40–41.

On February 25, 2021, the district court issued an order granting SER's motion for summary judgment. In doing so, the district court concluded, based upon a statement in a 1994 Senate Committee report and a handful of federal district court cases, that "SER does not satisfy the definition of employer for Title VII." ECF No. 40 at 6. Final judgment was entered in the case that same day.

Hill filed a timely notice of appeal.

III

Hill argues in his appeal that the district court erred in granting summary judgment in favor of SER. We "review[] a district court's decision on a summary judgment motion de novo, applying the standard set out in Rule 56(a) of the Federal Rules of Civil Procedure." *Reorganized FLI, Inc. v. Williams Cos., Inc.*, 1 F.4th 1214, 1218 (10th Cir. 2021). "Under that standard, a 'court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id*. (quoting Fed. R. Civ. P. 56(a)).

Hill's discrimination and retaliation claims were brought under Title VII. Title VII makes it "unlawful . . . for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's 'race' or 'color.'" 42 U.S.C. §2000e-2(a)(1). Title VII defines the term "employee" to "mean[] an individual employed by an employer." 42 U.S.C. § 2000e(f). Title VII in turn defines the term "employer" to "mean[] a person engaged in industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b).

In determining whether a person is an employee for purposes of Title VII, we have generally "relie[d] on a common law test that invokes agency principles." *Sacchi v. IHC Health Servs., Inc*., 918 F.3d 1155, 1158 (10th Cir. 2019); *see Lambertson v. Utah Dep't of Corr*., 79 F.3d 1024, 1028 (10th Cir. 1996). "Under the common-law agency approach, although no one factor is decisive, the primary focus is whether the hiring party controls the means and manner by which work is accomplished." *Lambertson*, 79 F.3d at 1028. Other factors may also be considered, including, for example, the intention of the parties. *Id*.

Here, it is undisputed that Hill was a participant in the SCSEP program that SER administered. The question we must address is whether, for purposes of Title VII, an employer/employee relationship also existed between SER and Hill.

The SCSEP is a product of the Older Americans Act (OAA), 42 U.S.C. § 3001 et seq. The OAA authorized the Secretary of the Department of Labor (DOL) to "establish an older American community service employment program" designed in part "[t]o foster individual economic self-sufficiency and promote useful opportunities in community service activities . . . for unemployed low-income persons who are age 55 or older, particularly persons who have poor employment prospects." 42 U.S.C. § 3056(a)(1). In order for the Secretary to carry out this program, the OAA authorized the Secretary to "make grants to public and nonprofit private agencies and organizations, agencies of a State, and tribal organizations." 42 U.S.C. §3056(b)(1). The grantees receive "financial assistance directly from the [DOL] to carry out SCSEP activities." 20 C.F.R. § 641.140. The grantees provide training to SCSEP participants and match them with so-called "host agencies" that in turn "provide[] a training work site and supervision" for the SCSEP participants. *Id*. With the funding received from the Department of Labor, the grantees pay the SCSEP participants for the time the participants spend in training with the grantee and the host agencies.

Notably, the OAA includes a provision entitled "Participants not Federal employees" that provides as follows:

> **(a) Inapplicability of certain provisions covering Federal employees**
> Eligible individuals who are participants in any project funded under this subchapter shall not be considered to be Federal employees as a result of such participation and shall not be subject to part III of Title 5.

> **(b) Workers' compensation**
> No grant or subgrant shall be made and no contract or subcontract shall be entered into under this subchapter with an entity who is, or whose employees are, under State law, exempted from operation of the State workers' compensation law, generally applicable to employees, unless the entity shall undertake to provide either through insurance by a recognized carrier or by self-insurance, as authorized by State law, that the persons employed under the grant, subgrant, contract, or subcontract shall enjoy workers' compensation coverage equal to that provided by law for covered employment.

42 U.S.C. § 3056b.

The DOL in turn has promulgated a regulation entitled "What is the employment status of SCSEP participants?" that provides as follows:

> (a) Participants are not considered Federal employees solely as a result of their participation in the SCSEP. (OAA § 504(a)).
>
> (b) *Grantees must determine whether or not a participant qualifies as an employee of the grantee, sub-recipient, local project, or host agency, under applicable law*. Responsibility for this determination rests with the grantee even when a Federal agency is a grantee or host agency.

20 C.F.R. § 641.585 (emphasis added).

Thus, in sum, both the OAA and its implementing regulations make clear that SCSEP participants are not federal employees. But the OAA is silent on the question of whether SCSEP participants are employees of the grantees or host agencies, and the DOL's implementing regulations suggest it is possible that an SCSEP participant could be an employee of a grantee or host agency, depending upon the "applicable law."[1]

[1] We note that both SER and the district court omit the phrase "under applicable law" when quoting 20 C.F.R. § 641.585. *See* Aple. Br. at 5; ECF No. 40 at 5 (district court's order granting summary judgment in favor of SER).

To be sure, SER points to a 1993 Senate Committee report that, according to SER, indicates Congress did not intend for SCSEP participants to be employees of grantees. In that report, the Senate Committee on Appropriations was addressing an appropriations bill for the Departments of Labor, Health and Human Services, and Education and related agencies for the fiscal year ending September 30, 1994. Senate Committee on Appropriations Report to the Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriation Bill, S. Rep. No, 103·143 (1993)). Of relevance here, the report noted, in addressing appropriations for the SCSEP program: "The Committee reaffirms that participants in the Senior Community Service Employment Program [SCSEP] are enrollees in a work and training experience program. They are not employees of the Department of Labor or State or national sponsors administering the SCSEP." *Id*. at 16.

We find this statement less than persuasive. To begin with, the statement was not made in the course of Congress debating or enacting the provisions of the OAA that created the SCSEP. Instead, as noted, the statement was made later in the course of the Senate Committee on Appropriations considering funding for the SCSEP for fiscal year 1994. Further, and more importantly, the statement does not accurately reflect either the text of the SCSEP or the DOL's implementing regulations. As the Supreme Court has emphasized, "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011). Where, as here, we are presented, "on the one hand, with clear

statutory [or regulatory] language and, on the other," a conflicting statement in a committee report, "we must choose the language." *Id*.

Turning to the evidence in the record before us, it is undisputed that SER took the position that its SCSEP participants were not employees of SER or the host agencies. It is also undisputed that SER conveyed its position to its SCSEP participants, including Hill, and had them sign statements that they were informed of this. The problem for SER, however, is that this evidence carries little weight in applying the common law test that we typically utilize in determining whether a person is an employee for purposes of Title VII. *Cf. Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (holding, in the context of an FLSA case, that the positions of the parties regarding the nature of their relationship "cannot be dispositive" and that, instead, "[t]he test of employment under the Act is one of 'economic reality'"). And, notably, SER has provided us with no other evidence that would support its position that its SCSEP participants are not employees of SER or the host agencies. Hill, for his part, has submitted copies of W2 forms he received from SER. Those forms list SER as the "Employer" and Hill as the "Employee." ECF No. 35 at 40. Although these forms likewise carry little weight for purposes of applying our common law test, we cannot discount them entirely because they arguably undercut SER's own position that Hill was not its employee.[2]

[2] Notably, SER did not address this evidence in its reply brief in support of its motion for summary judgment.

SER's position regarding the status of its SCSEP participants, including Hill, may well prove to be correct. But based on the record before us, we are unable to conclude that SER is entitled to summary judgment on the question of whether it was an "employer" and Hill was an "employee" for purposes of Title VII. We must therefore reverse the district court's grant of summary judgment in favor of SER and remand the case to the district court for further proceedings.

IV

The judgment of the district court is REVERSED and the case is REMANDED to the district court for further proceedings.

Entered for the Court

Mary Beck Briscoe
Circuit Judge