

In his Affidavit, Mr. Busack states that he was told by Allan Lane, a foreman with McAlvain Construction, that in relation to Mr. Golrangi, "Get that f**king Iranian off the job or I will." This statement in and of itself provides a basis on which Mr. Golrangi should be permitted to avoid summary judgment in relation to McAlvain Construction, for the reason that Mr. Lane, acting on behalf of McAlvain Construction, is interfering with the employment relationship between Mr. Golrangi and Romar Electric. Further, Mr. Lane, by his statement, clearly indicates that he controls, to some extent, the ability to terminate Mr. Golrangi's employment.

Additionally, in its "Response to Charge of Discrimination", attached as Exhibit B to the Affidavit of Merrily Munther in Support of Motion for Summary Judgment, McAlvain Construction states that it "is entitled to require a subcontractor to remove from the project any employee who was disrupting work on the project as was Golrangi." See, Response to Charge of Discrimination at p. 2. This is more evidence that McAlvain Construction had the ability to control Mr. Golrangi's employment.

II. ARGUMENT

The Ninth Circuit recognizes that an employer may be indirectly liable under Title VII even though it is not the plaintiff's direct employer. See, Anderson v. Pacific Maritime Assoc., 336 F.3d 924 (9th Cir. 2003). Under the indirect employer liability theory, an entity may be a Title VII employer "where a defendant subject to Title VII interferes with an individual's employment opportunities with another employer." Id. at 930 (quoting Lutcher v. Musicians' Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980)). The Anderson court also cites Gomez v. Alexian Brothers Hospital, 698 F.2d 1019 (9th Cir. 1983), in which a Hispanic employee of AES was permitted to file a Title VII claim against the hospital even though he was in an independent contractor relationship to

the hospital. In Gomez, the court specifically held that the independent contractor status “did not mean that the hospital had not interfered with the relationship between the plaintiff and [his employer].” Anderson, 336 F.3d at 390 (citing Gomez, 698 F.2d at 1021). In other words, if an entity such as McAlvain Construction performs a discriminatory act, thereby interfering with an employment relationship, the entity is an indirect employer for purposes of Title VII. See also, Association of Mexican American Educators v. California, 231 F.3d 572 (9th Cir. 2000) (en banc). It is clear that the supervisor for McAlvain Construction creates liability for McAlvain Construction, based on the indirect employer liability approach.

Alternatively, two or more employers may be considered joint employers if they both control the terms and conditions of employment of the employee, considering the following factors: “(1) the nature and degree of control over the employee; (2) day to day supervision, including discipline; (3) authority to hire and fire the employee and said conditions of employment; (4) power to control pay rates or methods of payment; (5) control of the employee records, including payroll.” Wynn v. National Broadcasting Co., Inc., 234 F.Supp.2d 1067, 1093 (Dist. C. D. Ca. 2002) (citing Swallows v. Barnes & Noble Bookstores, Inc., 128 F.3d 990 (6th Cir. 1997); (Torres-Lopez v. May, 111 F.3d 633 (9th Cir. 1997)). In the case at bar, it is certainly a question of fact as to whether McAlvain Construction exerted such control and/or influence over Romar Electric that it could determine who could work on the job from which Mr. Golrangi was terminated.

A third basis for liability against McAlvain Construction involves a determination of “whether the person or entity that took the allegedly illegal employment action was acting as the agent of another company, which may then be held liable as the [plaintiffs’] employer.” Swallows v. Barnes & Noble Bookstores, Inc., 128 F.3d 990, 992 (6th Cir. 1997) (citing Deal v. State Farm

County Mutual Ins. Co. of Texas, 5 F.3d 117 (5th Cir. 1993); Fike v. Gold Kist, Inc., 514 F.Supp. 722 (N.E. Ala. 1981), aff'd 664 F.2d 295 (11th Cir. 1981)). Mr. Golrangi needs to perform discovery to determine the extent to which McAlvain Construction exerted control over Romar Electric and its employees, and the extent to which McAlvain Construction acted on behalf of Romar Electric in controlling employees.

Thus, based upon the pleadings filed by McAlvain Construction, it is clear that there is at least a question of fact as to whether McAlvain Construction is an indirect employer based on the conduct of its supervisor. In any event, Mr. Golrangi specifically seeks additional time to conduct discovery in order to respond to the motion filed by McAlvain Construction.

DATED this 22nd day of September, 2004.

BOWEN & BAILEY, L.L.P.



CHRIS KRONBERG
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of September, 2004, I caused a true and correct copy of the within and foregoing instrument to be served upon the following individuals, by the method indicated below:

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- U.S. MAIL
- FACSIMILE
- HAND DELIVERY
- OVERNIGHT MAIL


Chris Kronberg