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Miller & Martin Dismissal of Whistleblower Retaliation Claim Brought by Alleged "Loaned Servant" Upheld

Nearly every industry uses them. The Health Care industry is full of them. They are "employees of one business who are contracted out to provide particular services to another business." They could be support personnel for an IT department. They could be medical personnel staffing a segment of a hospital. Often times, they "blend in" with the employees of the other business. They provide valuable services, but when they have a claim -- whether it be workers' comp or wrongful discharge, who is responsible?

Miller & Martin recently defended an employer against such a claim.

Last week, in *Gager v. River Park Hospital*, the Tennessee Court of Appeals upheld the dismissal of River Park Hospital ("the Hospital") who was sued by the employee of another entity with whom it had a contract to provide medical support services. The plaintiff was a nurse practitioner who was employed by a contractor who provided medical support services for the Hospital's Emergency Room. Based on a number of issues, the Hospital had asked the contractor to assign the plaintiff somewhere other than its ER. When the contractor then fired the plaintiff, she sued the Hospital for whistleblower retaliation under both statutory and common law, claiming she was a "loaned servant" of the Hospital and, as such, should have the same legal protection as a Hospital employee.

"Loaned servant" status is created when one employer "loans" an employee to another and gives the "other employer" sufficient control over the employee so as to be deemed his/her "employer" as a matter of law. This doctrine has been used to create liability for the "other employer" in the workers' compensation and/or employment law realms.

While the Court in *Gager* acknowledged that the "loaned servant" doctrine has not, to this point, been applied to establish the required employment relationship necessary for a whistleblower retaliation claim in Tennessee, the Court went on to state, "However, we are persuaded that certain circumstances may exist in which the loaned servant doctrine could be applied to give rise to an employer-employee relationship in such cases."

It is therefore important to note what "circumstances" the Court considered in *Gager* in finding that the requisite level of "loaned servant" relationship did not exist so as to make sure other employers do not inadvertently create such relationships with their "loaned" contract personnel.

The Court looked to factors such as the degree of control exercised by the Hospital over the means and manner by which the plaintiff performed the contracted services, whether a contract of employment existed between the Hospital and the plaintiff (or the contractor and the plaintiff), the contractual terms between the Hospital and the contractor employing the plaintiff, and, most importantly, who had the right to terminate the plaintiff's employment.

Fortunately for the Hospital, the Court found that the "loaned servant" doctrine did not apply in this case. However, the Court's comment above that it could foresee "certain circumstances" in which a "loaned servant" relationship is created which could be applied to create liability for other employers who find themselves in a situation similar to the Hospital in *Gager* should serve as a wake-up call to all employers who utilize the services of the employees of another business/contractor.

It is imperative that any business relationship involving the employees of a contractor who are providing services to your business be documented and the terms clearly stated as to whose "employee" the

person is. It is also important to monitor closely the degree of control which your business is exercising over such contract personnel on a day-to-day basis. If contracted persons are for all intents and purposes treated just like or very similar to the employees on your payroll, you may be in danger of them being given "employee" status as a matter of law under the "loaned servant" doctrine.

Undoubtedly, there will be more claims involving "loaned servants" following the *Gager* decision. Make sure the first successful claim is not against your company!

If you have any questions about the "loaned servant" doctrine or any other labor and employment law matter, please contact [Eric Stevens](mailto:estevens@millermartin.com) (estevens@millermartin.com | 615.744.8423) or your [Labor & Employment attorney at Miller & Martin PLLC](#).

The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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