

**Is it Bigger than a Bread Box?
When is it appropriate for Courts to aggregate a parent employer with a subsidiary
to satisfy the Title VII jurisdictional minimum?**

Introduction

Congress enacted Title VII of the Civil Rights Act of 1964 (“Title VII”) in order to combat pervasive discrimination in the workplace and other areas of daily life. Over time, as the realities of discrimination in employment were explored and, eventually, changed and as corporate structures became more complex, the courts have had to consider the boundaries of Title VII. Although the statute is generally broadly applicable, one area where Congress chose to limit its reach was in exempting employers with small numbers of employees from liability under the statute. This has represented a significant hurdle or even bar for some plaintiffs. The question of just who is an employer with few employees is complicated when a technically “small employer” is owned and operated by a larger parent corporation. Courts have used variations of three tests to determine whether two or more companies, one a parent, and another a subsidiary, should be combined for the purpose of liability and jurisdiction when a complaining plaintiff is the employee of the subsidiary. These tests are unsatisfactory in that they either fail to adequately address Congress’ motives in exempting small employers from Title VII liability or they describe circumstances so narrow that they provide little relief at all for plaintiffs who justly need some form of redress.

This note will discuss under what circumstances a court should choose to aggregate the employees of affiliated corporations to satisfy the numerical jurisdictional requirement under Title VII. Part I of this paper will discuss the background of Title VII,

particularly with respect to the minimum number of employees jurisdictional requirement, will discuss the motivation behind the jurisdictional minimum and will discuss the circumstances where aggregation might be attempted by a plaintiff. Part II will explain the tests that courts have set up to allow aggregation of affiliated corporations' employees and evaluate them based on their consistency with the motivation for the jurisdictional minimum requirement and with the statutory language. Part III will suggest an alternative to the current tests which both addresses Congress' concerns in protecting tiny employers from Title VII and the policy and justice concerns raised by injured plaintiffs who are employed by subsidiary corporations.

I. Background: Title VII

Title VII prohibits discrimination on the basis of five particular classifications in the employment setting (employers, labor unions, and employment agencies), in state and local government services, and in public accommodation and transportation. The statute provides that, "it shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate ... because of such individual's race, color, religion, sex, or national origin."¹ As a remedial statute, Title VII should be read, in general, broadly, the better to achieve its purpose: to eliminate prohibited discrimination in the workplace and in public accommodations². Indeed,

¹ See *id.* 42 U.S.C. § 2000e-2(a)(1)

² See e.g. *Virgo v. Riviera Beach Assoc.*, 30 F. 3d 1350, 1359 (11th Cir.); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977).

Congress has amended Title VII in the past to expand its reach when the courts have limited it³.

A. Covered Entities/Individuals and the Jurisdictional Minimum

Congress elected to allow only certain entities and individuals to be possible plaintiffs and defendants under Title VII. This effectively limits Title VII's reach as a non-covered entity or individual would not be an appropriate litigant under the statute.

Title VII defines an "employee" as "an individual employed by an employer."⁴ Although the prohibitory language in §701(a)(1) bars discriminatory employment practices by any "employer" against "any individual," courts, such as the Seventh Circuit in *Alexander v. Rush*, have ruled that a plaintiff must be an "employee" as defined by Title VII in an employment relationship with the defendant employer to bring an action under Title VII.⁵

In *Alexander v. Rush*, the Seventh Circuit rejected their previous holding in *Doe v. St. Joseph's Hosp. of Fort Wayne*.⁶ In *Doe*, the court had held that a plaintiff only needed to show that the defendant met the statutory definition of employer under Title VII citing the fact that the statute referred to discrimination by employers against individuals.⁷ In *Rush*, however the court reversed itself stating that a "plaintiff 'must prove the existence of an employment relationship in order to maintain a Title VII action against [the

³ See. e.g. The Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) which overruled the Supreme Court's decision in *General Elec. Co. v. Gilbert*, 429 U.S. 125, 134-135 (U.S. 1976) (holding that discrimination based on pregnancy was not gender discrimination).

⁴ 42 U.S.C. § 2000e; §701(f)

⁵ See e.g. *Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 491-92 (7th Cir. 1997); *Camacho v. P.R. Ports Auth.*, 369 F.3d 570, 574 (1st Cir. 2004); *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 374-375 (2d Cir. 2006).

⁶ *Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986)

⁷ *Id* at 424-425

defendant]’.”⁸ This requirement that a plaintiff be an employee under Title VII to bring an action adds complications to the situation when courts consider the definition of “employer.”

An “employer” is defined in Title VII as one who,

“engages in an industry affecting commerce [and] 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 person.” (emphasis added)⁹

If a potential employer-defendant does not engage in an industry affecting commerce and have the prerequisite minimum number of fifteen employees, the plaintiff’s suit fails for lack of subject matter jurisdiction. Because the commerce requirement is so easily, and generally automatically, met, cases involving a defendant’s possible status as a Title VII employer often turn on whether the defendant employs the requisite number of employees.

This question is complicated by the definition of “employer” and “employee” found in the statute. Perhaps to ensure a broad, commonsense interpretation, Congress left the definitions vague and somewhat circular¹⁰. They reference each other, resulting in a circular definition for both. An “employer” must have fifteen “employees” but an “employee” must be an individual employed by an “employer.”¹¹ Courts have struggled with just who should be considered a “commonsense” covered employer under Title VII

⁸ 101 F.3d 487, 492. It should be noted that the court in *Rush* did not address the statutory language-based reasoning in *Doe* deciding the case based on later case law which they felt undercut *Doe*. However, a deep discussion of the Title VII definition of employee is beyond the scope of this paper. It suffices to say that in several Circuits, Title VII plaintiffs must, at least, be “employees” under the statute to bring an action.

⁹ 42 U.S.C. § 2000e; § 701(b)

¹⁰ 110 Cong. Rec. S. 7207-17 (Remarks of Sen. Clark) – “[t]he term ‘employer’ is intended to have its common dictionary meaning, except as expressly qualified by the act.”

¹¹ §701(f) and §701(b)

with respect to temporary workers¹², partners¹³, and as is addressed by this paper, small employers who have close relationships with parent corporations.

In the situation addressed in this paper, we imagine there is an individual who thinks he was discharged from his employment because of his gender. He works for a company with only 10 employees which, therefore, does not meet the jurisdictional minimum to be a covered employer under Title VII. His company is owned by another corporation with 42 employees. If the court simply looked to his direct employer, he would not be able to bring a Title VII claim. But if the court counted the employees of his direct employer and those of parent employer for the purposes of the jurisdictional minimum, there would be 52 employees which would meet the minimum and the employee's case could go forward.

The courts have carved out business situations where two separate employers' could have their employees aggregated in this way to satisfy the jurisdictional requirement. The courts have attempted to decide, using various methods, when, if ever, it is appropriate to treat two or more affiliated corporations' employees as part of the pool of countable employees under the Title VII jurisdictional minimum but they have not reached consensus regarding what should be the test to decide whether business circumstances call for aggregation.

¹² *Walters v. Metro. Educ. Enters.*, 519 U.S. 202 (U.S. 1997).

¹³ *Hishon v. King & Spalding*, 467 U.S. 69 (U.S. 1984).

B. Policy Reasons for Allowing Aggregation to defeat the Jurisdictional Minimum

Aggregation is not necessarily a common concern in every Title VII case. Often, the question of whether an employer has the requisite number of employees to satisfy the jurisdictional minimum or whether a plaintiff is employed by a particular employer is clear cut. However, there are several reasons why justice would drive a plaintiff to wish to aggregate their direct and subsidiary employer with a parent corporation. Particularly aggregation to satisfy the jurisdictional minimum can be (1) a plaintiff's only means of remedy for discriminatory employment practices, (2) the only way a plaintiff can receive full monetary satisfaction for their injury by reaching a wealthier defendant, or (3) the parent corporation was actually so involved in both the decision and the subsidiary's practices that justice calls for them to be held accountable for the actions they took against the plaintiff through their subsidiary.

1. Dismissal for lack of subject matter jurisdiction because of failure to satisfy the jurisdictional minimum deprives many plaintiffs' of their only means of redress.

As mentioned above, plaintiffs most often wish to aggregate their employer with a parent or affiliate in order to satisfy the minimum employee jurisdictional requirement and bring a suit under Title VII. This is not a minor concern; a plaintiff who has suffered discrimination could have little means of redress if they cannot show that their employer is covered by Title VII. Although §§ 1981 and 1983 protect parties from discrimination in the contractual setting, they are limited to discrimination based on race; a plaintiff's

whose claim is based on an instance of gender or national origin discrimination would not be covered¹⁴. And, although some commentators suggest that plaintiffs whose employers fall outside the jurisdictional minimum can find redress in state courts, this is often untrue. Many states hold to the same jurisdictional minimum of fifteen employees set out in Title VII. For example, Illinois has the same fifteen employee minimum requirement as Title VII in its employment discrimination statute¹⁵ and Florida uses language practically identical to Title VII in its own Civil Rights statute¹⁶. While there are some states with more liberal statutes, such as Vermont¹⁷ and Michigan¹⁸, which require an employer to have only one employee, this would probably not provide very much comfort for a plaintiff in Illinois or Florida. In many cases then, aggregation under Title VII is the only way a plaintiff will have their “day in court.”

2. Plaintiffs who will be unable to gain full satisfaction from a poorer subsidiary can get it from the richer parent corporation.

Strategy also plays as a factor in seeking to have a subsidiary aggregated with a parent corporation. A plaintiff with a grievance against a small employer may doubt that employer’s ability to pay them an adequate remedy for their injury. Because aggregation

¹⁴ 42 U.S.C. § 1981 and § 1983

¹⁵ 775 ILCS 5/2-101.

"Employer" includes:

(a) Any person employing 15 or more employees within Illinois during 20 or more calendar weeks within the calendar year of or preceding the alleged violation.

¹⁶ Fla. Stat. § 760.02

“Employer” means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.”

¹⁷ V.S.A. § 495d.

(1) "Employer" means any individual, organization, or governmental body ... which has one or more individuals performing services for it within this state.

¹⁸ MCLS § 37.2201.

(a) "Employer" means a person who has 1 or more employees, and includes an agent of that person.

is combined with exposure to liability, plaintiffs can use it to gain access to the deeper-pocketed parent corporation when their own direct employer is too small to satisfy them. Although there are statutory caps on damages, a tiny employer is probably less likely to be able to pay even as much as the cap than a larger parent. For some plaintiffs, the only way they will get full satisfaction for their injury is by accessing the “deeper pockets” of the parent corporation.

3. The parent was so involved in the decision which harmed the plaintiff that justice calls for them to be held accountable.

In some cases, aggregation with of the parent and subsidiary are the only means of giving a plaintiff personal vindication against the parent who was the instigator of the injury or was so involved in the discriminatory action as to be blameworthy as well. Discrimination in the workplace can have an emotionally devastating effect on the victims and often feelings of anger and desire for justice drives the plaintiff to the court house. In such situations, these plaintiffs want the entity which is “truly” responsible for their wrongs¹⁹. The plaintiffs in *Swallows v. Barnes & Noble Book Stores* were not necessarily searching for jurisdiction or deep pockets. Employed as they were by Barnes & Noble, which is a large national corporation, their desire to aggregate the university that first employed them implies that they felt that it shared some complicity with their direct employer for the discriminatory acts.

Thus Title VII plaintiffs do have compelling reasons to attempt to overcome the Title VII jurisdictional minimum. Because of this, courts have had to carefully consider when it would be appropriate, in light of the language and purpose of both Title VII as a

¹⁹ *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990 (6th Cir. 1997).

whole and the jurisdictional minimum section on its own, to allow plaintiffs to aggregate two employers, exposing both to liability.

C. Why Include a Jurisdictional Minimum in the Statute?

Before considering when it is appropriate to satisfy the jurisdictional minimum by aggregation and before evaluating the situations where the courts have allowed plaintiffs to aggregate, it is vital to look at Congress' motives for including the jurisdictional minimum in Title VII in the first place. The courts and the legislative history provide some suggestions for why Congress chose to include the fifteen employee jurisdictional minimum.

The reasoning most often cited by the courts was Congress' desire to spare tiny employers the burden of compliance with federal statutes and possibly crushing litigation²⁰. This reasoning seems somewhat sound. Title VII generates a large amount of litigation. An employer with a small number of employees might find it difficult to keep abreast of developing regulations and case law. Moreover, smaller employers are less likely to be able to afford the cost of litigation.

Congress was also concerned with personal liberty when they set the jurisdictional minimum. It was thought that a small business employer's choice of employee is closely akin to a private person's choice of friend or social associate rather than the business considerations that go into hiring an employee at a larger company. Congress did not want to involve itself in that deeply personal process²¹.

²⁰ 110 Cong. Rec. S. 13092 (1964) (Remarks of Sen. Cotton); 110 Cong. Rec. S. 13088 (1964) (Remarks of Sen. Humphrey); 110 Cong. Rec. S. 13092-93 (1964) (Remarks of Sen. Morse); and *Papa v. Katy*, 166 F.3d 937, 940 (7th Cir. 1999), and *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2nd Cir. 1995).

²¹ 110 Cong. Rec. 7088 (1964) (Remarks of Sen. Stennis)

Congress included the jurisdictional minimum as well to allay concerns about possibly overstepping its Constitutional Commerce Clause powers²². However, considering the permissive standard set by the courts to satisfy the commerce clause requirement, this concern is probably less compelling than the other two. Because aggregation would expose a small business to liability which the jurisdictional minimum would normally protect it against, it is important to consider any test which would allow aggregation in light of these Congressional concerns.

II. Aggregation Tests

The courts have adopted several tests to determine whether it is appropriate to aggregate two or more corporations to satisfy the Title VII jurisdictional requirement. These tests all struggle to balance the needs of the injured client, the motives of Congress' protection for the small employer, and justice to the larger parent corporation who may be held liable for the small employer's acts. The primary tests used by the courts are the integrated enterprise analysis, the *Papa v. Katy* set of business circumstances, and the joint enterprise analysis. The integrated enterprise is inadequate because it attempts to answer two related but separate questions without acknowledging their separateness: (1) Under what circumstances should a parent/affiliate be held liable for actions forbidden by Title VII and committed by a subsidiary/affiliated corporation? And (2) Under what circumstances should a subsidiary be stripped of its "small employer status" because of its relationship to the parent? The *Papa v. Katy* test and the joint enterprise test answer these questions to a degree but are rendered impractical by the extremely limited number of circumstances to which they might apply.

²² 110 Cong. Rec. S. 7207-17 (Remarks of Sen. Clark)

A. The Integrated Enterprise Analysis

The integrated enterprise analysis considers whether apparently independent entities may be held liable because they are in fact one integrated enterprise or “single employer” based on four factors: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control²³. Most courts have stated that none of the four factors is completely dispositive however particular attention is often given to the “centralized control of labor relations.”²⁴

1. Interrelation of operations

Courts evaluating the interrelation of operations consider whether the general business operations of the subsidiary/affiliate are managed by the parent. The Equal Employment Opportunity Commission’s Compliance Manual states that “evidence of interrelation of operations includes: the sharing of management services, such as checkwriting, the preparation of mutual policy manuals, and the completion of business licenses; the sharing of payroll and insurance programs; the sharing of services of managers and personnel; using the employees on the payroll of one entity to perform work for the benefit of another nominally separate entity; sharing the use of office space,

²³ See e.g. *Trevino v. Celanese Corp.*, 701 F. 2d 397, 404 (5th Cir. 1983)).

²⁴ *Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir. 1983); *Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606, 617 (5th Cir. 1999).

equipment and storage; providing services principally for the benefit of another entity or operating the entities as a single unit.”²⁵

2. Centralized Control of Labor Relations

Courts focus on whether the parent corporation is involved in the hiring, promotion, and termination process of the subsidiary. Here the EEOC guidelines state that evidence should be analyzed to see “whether there is a centralized source of authority where personnel policy is developed and implemented. Whether one entity maintains personnel records and screens and tests applicants for employment. Whether the entities share a personnel department and whether inter-company transfers and promotions of personnel are common. Whether the same persons make the employment decisions for both entities.”²⁶

3. Common Management

This prong considers whether to affiliated corporations have the same directors, officers, managers or other important employees²⁷. Generally, having only one officer in common is not enough however some courts have held that a manager in a key labor relations position might be enough to satisfy this prong²⁸.

²⁵ Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Compliance Manual app. 605-G at 3 citing to *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 14 EPD P 7775 (8th Cir. 1977); *EEOC v. Wooster Brush Co.*, 523 F. Supp. 1256, 1262, 27 EPD P 32,239 (N.D. Ohio 1981), aff'd in part and rev'd on other grounds, 727 F.2d 566, 33 EPD P 34,147 (6th Cir. 1984); and *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 230, 10 EPD P10,353 (4th Cir. 1975).

²⁶ Equal Employment Opportunity Commission, Equal Employment Opportunity Commission Compliance Manual app. 605-G.

²⁷ *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1364 (10th Cir. 1993)

²⁸ *Richard v. Bell Atlantic Corp.* 976 F. Supp. 40 (D.D.C. 1997)

4. Common Ownership and Financial Control

Simply asks whether the parent and subsidiary are owned by the same individual or corporation²⁹. Neither common ownership nor common management on their own are enough to have a parent and subsidiary be considered an integrated enterprise³⁰.

Although some of the factors within each of the four categories would go to whether a Congress' motives for protecting a small employee are no longer applicable because of the parent company, courts do not consider the factors in light of that question nor do all courts follow the EEOC guidelines. In *Dewey v. Ptt Telecom Neth*, for example, when the court decided that the operations were not interrelated, it considered that the two companies did not use the similar facilities, a factor which might go to whether the owner still had a personal social stake in choosing employees and whether it would go to Congress' desire not to regulate personal relationships. However the focus of the court was on the financial aspect of the relationship, whether the bank accounts of the two corporations were separated³¹. The focus of the analysis is on whether the relationship between the two companies results in control between them and does not look specifically to whether the smaller corporation loses its small status because of the relationship.

The integrated enterprise analysis is well-suited to determining whether a parent employer should be liable for the acts of a subsidiary which is a covered employer under Title VII but does not address the question of whether a subsidiary which falls under the jurisdictional minimum should be aggregated with the employer. It does not address

²⁹ 3 F.3d at 1364

³⁰ *Rogers v. Sugar Tree Products., Inc.* 7 F. 3d 577, 583 (7th Cir. 1994) and *Frank*, 3 F.3d at 1364.

³¹ *Dewey v. Ptt Telecom Neth.*, 1995 U.S. Dist. LEXIS 10028 (D.N.Y. 1995).

whether the subsidiary, because of its relationship with the parent, should no longer be considered a “small employer” in need of the jurisdictional minimum’s protection.

5. The Integrated Enterprise Analysis is a valid means to determine whether a parent corporation should be liable under Title VII for a subsidiary’s acts.

The integrated enterprise analysis was first applied to a federal antidiscrimination law case in *Williams v. New Orleans Steamship Association*³² after being adopted by the Equal Employment Opportunity Commission in several administrative decisions³³. The integrated enterprise analysis has its roots in labor law and was first developed by the National Labor Relations Board to evaluate whether it could exert jurisdiction over affiliated corporations under the National Labor Relations Act (“NLRA”)³⁴. Although some commentators and courts argue that this makes the test ill-suited to use with respect to Title VII³⁵, Congress has adopted the integrated enterprise analysis as a means of evaluating whether a parent corporation “controls” an owned subsidiary to degree that would expose them to Title VII liability in its 1991 Amendment to Title VII in the limited context of foreign-based subsidiary corporations. According to §702(c)(1) and §702(c)(3) of Title VII³⁶:

³² F. Supp. 613, 615 (E.D. La. 1972)

³³ *EEOC Decision No. 71-1677*, 3 Fair Employment Practice Cases (BNA) at 1242.

³⁴ The test was approved for NLRA by the Supreme Court in *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 13 L. Ed. 2d 789, 85 S. Ct. 876 (1965) (per curiam).

³⁵ See e.g. *The Failure of the Integrated Enterprise Test: Why Courts Need To Find A New Answer to the Multiple-Employer Puzzle in Federal Discrimination Cases*, 75 Ind. L.J. 1041 and *Papa v. Katy*, 166 F. 3d. 937.

³⁶ 42 U.S.C §2000(e)

“If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 703 or 704 engaged in by such corporation shall be presumed to be engaged in by such employer.” And

“For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on –

- (A) The interrelation of operations;
- (B) The common management;
- (C) The centralized control of labor relations; and
- (D) The common ownership or financial control, of the employer and the corporation.”

Congress’ decision to actually incorporate the integrated enterprise analysis into the statute certainly implies that Congress believes that the test is serviceable in the Title VII context. Moreover, it also suggests that Congress was aware of and approved of the fact that the test was being applied by the courts to Title VII cases.

However, this is part of the 1991 amendment to Title VII and Congress did not amend Title VII to apply this standard in a domestic context and, while it gives guidance to whether a parent may be liable for the acts of a subsidiary, it does not mention whether a parent could be *aggregated* with the subsidiary. Even in the context of this section, if the foreign-based corporation had fewer employees than the statutory minimum, it would not be an employer under Title VII and would thus not have committed acts prohibited by Title VII and would then, presumably not expose its parent to liability either. Additionally, if the US-based company did not have the requisite number of employees, it would not be an “employer covered by §702. The question of whether or not a small subsidiary should lose its “small status” because of association with the parent corporation remains open.

It is also important to notice that Congress couched questions of the liability of a parent for a subsidiary’s acts in terms of “control” and used the integrated enterprise

analysis not to determine whether the parent and subsidiary are a “single enterprise” but rather to decide whether the parent controlled the subsidiary and should thus be responsible for possible forbidden acts.

6. The Integrated Enterprise Analysis does not determine whether a small employer should lose their small status because of their association with a larger parent employer.

The integrated enterprise test does not require courts to analyze the parent/subsidiary relationship in light of the reasons behind the Title VII jurisdictional minimum. The four factors on the integrated enterprise analysis focus on the particular realities of the employment relationship. But designed as it was to apply to a different statute altogether, the National Labor Relations Act, it never requires the courts to consider what the employment realities mean with respect to a small subsidiary business and the reasons Congress chose to protect it from Title VII liability. The courts applying the test do not explicitly consider whether a small business stopped being a “small business” because of the relationship with the parent that was analyzed by the test. The question of whether the “control” exerted by the parent made the subsidiary lose its smallness goes unanswered.

Small businesses are able survive in part because, instead of maintaining large staff to handle all of their needs, they are able to contract out (integrate) with outside parties to perform corporate functions (e.g. hiring outside accountants, lawyers, consultants etc.). Sometimes these outside functions, instead of being handled by many separate corporations, will be handled by the parent corporation.

When the court, for example in *Cook v. Arrowsmith Shelburne, Inc.*, found that the parent company should be integrated with the subsidiary according to the integrated enterprise analysis, it considered the fact that the parent handled the application materials, made the ultimate decision to fire the plaintiff, and the subsidiary cleared all hiring decisions with the parent³⁷. The focus of the test was, “What entity made the final decisions regarding employment matters related to the person claiming discrimination?” Although this question is probably vital in deciding whether the parent should be held responsible for the discriminatory act, it does not truly reveal whether the relationship with the parent meant that the subsidiary was no longer a “small employer” with respect to the motives behind the jurisdictional requirement. The fact that the labor operations of a subsidiary are handled by the parent does not reveal whether the subsidiary is sufficiently large to handle compliance with federal statutes or Title VII litigation. Neither does the test inquire into whether the staff of the subsidiary is so intertwined with the larger parent that the concerns Congress had with regulating personal association are no longer valid.

B. The *Papa v. Katy* Enumerated Circumstances

The Seventh Circuit in *Papa v. Katy* rejected the integrated enterprise analysis in favor of setting out a group of situations where they thought it would be consistent with the purpose of Title VII to allow aggregation of a parent and subsidiary and also expose the parent to liability³⁸. Although the approach seems valid, because it acknowledges the

³⁷ *Cook v. Arrowsmith Shelburne, Inc.* 69 F.3d 1235, 1241 (2d Cir. 1995).

³⁸ *Papa*, 166 F.3d at 937.

purpose of the Title VII jurisdictional minimum, practical problems with the “test” undercut its usefulness.

In *Papa v. Katy*, the Seventh Circuit chose to revisit and over-rule its former support for the integrated enterprise analysis³⁹. Instead the court set out three situations in which affiliated corporations could be aggregated stating that these are the “three situations in which the policy behind the exemption of the tiny employer is vitiated by the presence of an affiliated corporation.”⁴⁰: (1) When the traditional requirements for piercing the corporate veil are in place⁴¹; (2) when the corporations have separated themselves for the purpose of avoiding Title VII liability⁴²; and (3) when the parent corporation directed the discriminatory act or policy described in the statute⁴³.

1. When the traditional conditions for piercing the corporate veil are present.

The court argued that just as a parent which neglected corporate formalities would be liable for the torts or breaches of contract of its subsidiary so to it should be liable for the statutory torts⁴⁴. This situation seems to cover both questions though neither is addressed specifically. It is a compelling argument for holding the parent liable for the discriminatory actions and it also suggests that, as the legal separation that existed between subsidiary and parent was not maintained, the subsidiary is not a tiny employer

³⁹ *Id.* at 940-42

⁴⁰ *Id.* at 940

⁴¹ *Id.* at 940

⁴² *Id.* at 941

⁴³ *Id.* at 941-42

⁴⁴ *Id.* at 940-41

any longer and is subsumed into the parental identity. Neither party need be protected from liability.

There is a significant practical problem with this scenario however. Although it is valid as far as it goes, the situations where a plaintiff will be so “fortunate” as to be discriminated against by a subsidiary which has also been negligent with the maintenance of corporate formalities are likely to be few. The practical application for this prong seems negligible unless it will provide encouragement for corporations to be conscientious about observing corporate forms.

2. When the corporations have split themselves into a number of smaller corporations with fewer than the statutory minimum in order to avoid Title VII liability

A corporation may, suggested the court, split itself into smaller corporations in order to avoid Title VII liability⁴⁵. In this situation the court stated that “the privilege of separate incorporation is not intended to allow enterprises to duck their statutory duties.”⁴⁶

Both questions are covered here as well. A group of affiliated corporations which are fragmented in order to be able to discriminate or even simply in order to avoid liability for discrimination are attempting to undercut the purpose of the statute to such a degree that exposing them to liability and stripping away their small employer status seems valid. However this situation also has limited practical application. The number of corporations who would deliberately set up their corporate structure in order to avoid Title VII liability are probably (and hopefully) quite small. There are almost certainly

⁴⁵ *Id* at 941.

⁴⁶ *Id.*

few corporations callous enough to deliberately wish to discriminate against their employees and who would also base their entire corporate organization around this desire⁴⁷.

3. When the parent corporation directed the discriminatory act, practice, or policy complained of by the plaintiff

The Seventh Circuit developed this possible employment situation from the modified integrated enterprise suggested by the Fourth⁴⁸ and Fifth Circuit⁴⁹ which focuses on the 4 prongs of the integrated enterprise test only with respect to whether the parent corporation ordered the personnel decision – the discriminatory act⁵⁰. The *Papa* court argues however, that whether the parent made the decision is the only question, holding that, in such a situation, the parent is being held liable for its own wrongful acts⁵¹.

This reasoning seems somewhat confusing however. Even if the corporation ordered the subsidiary to commit the discriminatory act, if the subsidiary is not a Title VII employer, the act is not wrongful under Title VII. Moreover, the Seventh Circuit has held in *Alexander v. Rush N. Shore Med. Ctr.* (above) that a plaintiff who is not an

⁴⁷ It is probably worth noting that I have not been able to find any cases in which a plaintiff has attempted to aggregate a parent with a subsidiary under the circumstances in the first and second prong of *Papa*.

⁴⁸ *Johnson v. Flowers Industries, Inc.*, 814 F.2d 978, 981 n.1 (4th Cir. 1987) (“We need not adopt such a mechanical test in every instance; the factors all point to the ultimate inquiry of parent domination. The four factors simply express relevant evidentiary inquiries whose importance will vary with the individual case.”)

⁴⁹ See *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir. 1997) (“This analysis ultimately focuses on the question whether the parent corporation was a final decision-maker in connection with the employment matters underlying the litigation, and all four factors are examined only as they bear on this precise issue”) (citations omitted).

⁵⁰ This approach can also be found in the Tenth Circuit case *Frank v. U.S. West, Inc.*, 3 F.3d at 1363 (“the critical question is, ‘what entity made the final decisions regarding employment matters related to the person claiming discrimination?’”), but the *Papa* court did not cite to it.

⁵¹ 166 F.3d at 942.

employee cannot bring an action under Title VII⁵². Having a parent corporation which orders you to perform discriminatory acts does not necessarily mean that a small employer is (1) able to keep up with federal statutory obligations; (2) able to face Title VII litigation; or (3) no longer so small that it does not need to have the owner's rights to choose their personal associates without Congress intervening protected.

Moreover the third prong has the practical difficulty which is a problem in the Fifth Circuit version of the integrated enterprise analysis as well. Inquiring into whether a corporation "committed the discriminatory act" would require a sort of mini-trial before the trial. Title VII actions often turn on who committed what act and when and requiring the plaintiff to engage in this activity to establish jurisdiction seems time-consuming and burdensome.

Papa is also troublesome in limiting parental liability to three limited employment scenarios, because it completely dismisses the Congressional adoption of the integrated enterprise analysis for use in establishing whether a parent corporation should be held liable considering that the analysis has been incorporated into Title VII with respect to foreign-based subsidiaries with USA-base parent/employers⁵³. Although Congress did not introduce the analysis domestically, the fact that it used the analysis in the amendment suggests that it was aware that the courts were using it to establish Title VII liability.

⁵² 101 F.3d at 491-92.

⁵³ 42 U.S.C. §2000e

C. The Joint Employer Test

Some jurisdictions have permitted aggregation based on the theory that two employers are both the employer of a plaintiff⁵⁴. The courts focus on the degree to which two employers have retained control of the plaintiff/employee⁵⁵. Under the joint employer theory there is no search for a single, integrated enterprise. The two units are acknowledged to be separate entities that nevertheless contractually agreed to jointly manage vital aspects of the employer/employee relationship⁵⁶. A finding of joint employer status is proper where one company has retained for itself significant control of the terms and conditions of employment of the employees who are employed by the other employer. Courts look to the degree to which the other employer set the employee's hours, dictated their work assignments, and handled their salary and promotion decisions⁵⁷. Courts have found that, when two corporations are found to be joint employers, their employees can be aggregated to satisfy the jurisdictional minimum⁵⁸.

The joint employer theory runs into some difficulty because it disregards the fact that, while two employers may retain control over a single employee, they both might not be responsible for the discriminatory act or policy. The discrimination could easily occur outside the ambit of their control. Moreover, like the test set out in *Papa v. Katy*, the joint employer test also has limited application. Only plaintiffs whose employers have created a unique contractual relationship would be covered by the test.

⁵⁴ See e.g. *Virgo v. Riviera Beach Assocs.*, 30 F.3d at 1361.

⁵⁵ *Id.* at 1360.

⁵⁶ *Astrowsky v. First Portland Mortgage Corp. Inc.*, 887 F. Supp. 332 (D. Me. 1995).

⁵⁷ *Virgo*, 30 F.3d at 1360-61.

⁵⁸ In practice some courts have retained the title of joint employer theory but have adopted the same four integrated analysis factors in evaluating whether two employers are acting jointly. See e.g. *Scheidecker v. Arvig Enters.*, 122 F. Supp. 2d 1031, 1038 (D. Minn. 2000). Therefore, in some cases, the difference between the two approaches is simply one of semantics.

III. Resolve the conflict between the tests by approaching the question of liability for parent and subsidiary from two directions.

As discussed previously in this note, the tests currently proposed by the courts to decide whether aggregation of a parent and subsidiary company, with resulting liability for both parent and subsidiary, would be appropriate under Title VII either inadequately address the question of whether a small employer should lose its small status because of its relationship with a parent or set up circumstances so limited in scope that they represent little chance of relief for any complaining plaintiff. Moreover some unifying test should be established as the current situation may yield very different results for plaintiffs of small subsidiaries owned by larger parents depending on the circuit they happen to be in. The courts should consider both the question of whether a parent should be liable for a subsidiary's bad acts and when a subsidiary should be held liable by being stripped of its small employer status on account of its relationship with its parent corporation.

As shown in Part II, the integrated enterprise analysis is well-suited to determining whether a parent should be liable for a subsidiary's bad acts. Congress has explicitly used the test and incorporated it into §702 of Title VII to establish liability for United States based companies which own foreign subsidiaries which discriminate.

With the regard to the second question: When does a small employer stop being considered a small employer because it has a parent corporation, the *Papa* approach which considered Congress' reasons for exempting small employers is valuable. It makes sense to consider why small employers are exempted from Title VII when the court is considering restricting or withdrawing that exemption. However, the *Papa*

analysis resulted in a test which is overly restrictive in limiting plaintiffs to a set of circumstances which almost never arise and which also might require plaintiffs to engage in mini-trials of the main questions of their case before their case even progressed past the summary judgment stage. Instead, courts should consider whether the specific relationship with the parent has resulted in the subsidiary no longer being the type of small employer Congress intended to protect by looking at the totality of the circumstances characterizing the particular relationship between the parent corporation and the subsidiary.

Courts would look to whether the larger corporation assisted the smaller to keep in compliance with other Federal statutes, whether the larger corporation has assisted the smaller in dealing with other federal or state statutory litigation, whether the two share facilities (implying that the subsidiary's choice of employee was no longer a matter of personal/social preference); whether the owners are the same (implying that the owner is not choosing employees in a manner based on personal social preference), whether the parent corporation promulgated a policy which the plaintiff is complaining of and/or whether the parent has contracted to indemnify the subsidiary. A subsidiary, for example, which had received help complying with other federal statutes from its parent, entered into an indemnity agreement with the parent, and which shared a facility with the parent corporation would probably no longer be in need of the protection from Title VII which Congress gave.

There is some concern that such a test would produce disincentive for parent corporations to assist subsidiaries with Title VII compliance if it might result in exposing them to Title VII liability. However, on its own, such assistance would not result in Title

VII liability. An otherwise small business which gets assistance with Title VII compliance from its parent or from an outside firm is not only choosing to go above and beyond what is required of them by statute, but is also still a small business since assistance with compliance does not result in assistance with litigation or mean that the small business is operating as a large business. If the subsidiary's relationship with a parent results in their being able to comply with Title VII, face Title VII litigation, and no longer deal with their own employees as private individuals making personal social decisions, they were not the sort of small business Congress intended to protect anyway.

IV. Conclusion

By approaching the question of aggregation of a parent and subsidiary to satisfy the jurisdictional requirement under Title VII from two directions, evaluating whether a parent should be held liable by applying the integrated enterprise analysis and deciding whether a small employer subsidiary should lose its small status by considering whether the relationship with the parent solves the difficulties Congress thought Title VII might cause small employers, allows courts to balance the needs of injured plaintiffs with Congress' concerns for small employers and the courts' own concerns for justice to a, possibly, innocent parent corporation.