IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RENAE EKSTRAND,

OPINION AND ORDER NO. 1

Plaintiff,

08-cv-193-bbc

v.

SCHOOL DISTRICT OF SOMERSET,

Defendant.

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This civil case was brought under the Americans with Disability Act (ADA), 42 U.S.C. § 12112-12114(b). It went to trial on September 29, 2010 before a jury, which found in favor of plaintiff Renae Ekstrand on her claim that defendant School District of Somerset had discriminated against her because of her disability. At the close of trial, counsel for both parties stipulated on the record that the school district employed 150-160 persons, which meant that under 42 U.S.C. § 1981a(b)(3), the maximum amount of plaintiff's compensatory damages would be $100,000.

Shortly after trial plaintiff moved to set aside the stipulation, arguing that it was based upon a mistake of fact because the stipulated number of employees did not include substitute teachers and third party vendor employees. Plaintiff argued that had these employees been counted by defendant, the number of employees would be over 200 during the relevant time period thereby increasing the maximum amount of plaintiff's compensatory damages to $200,000. Shortly after trial plaintiff moved to set aside the stipulation, arguing that it was based upon a mistake of fact because the stipulated number of employees did not include substitutes and third party vendor employees. Plaintiff argued that had these employees been counted by defendant, the number of employees would be over 200 during the relevant time period thereby increasing the maximum amount of plaintiff's compensatory damages to $200,000.

Defendant opposed reopening the stipulation, denying that it was based on a mistake of fact and arguing that plaintiff had had an opportunity to take discovery on the issue before trial. It maintained that defendant would be prejudiced if the stipulation were to be reconsidered after counsel had forgone the opportunity to put defendant's superintendent on the stand at trial. I concluded that it would be premature to say whether the basis for the stipulation was a mistake until I knew more about defendant's part-time and contract employees and that it was a mistake for the parties to rely on defendant's representation without knowing more about the basis for it or about the requirements of 42 U.S.C. §

1981(b)(3). I noted that defendant would have a full opportunity to develop the issue and would not be prejudiced by not being able to take the matter up at trial.

Now that the parties' briefing on the issue is complete, the questions before the court are (1) whether substitute teachers are employees of defendant, and if so, how they should be counted for purpose of the ADA statutory cap; and (2) whether food service and maintenance workers are employees of defendant for determining the ADA statutory cap. After reviewing the parties' briefs and associated materials, I conclude that substitute teachers should be counted as employees of defendant only on the calendar week in which they performed services for the district. Also, I conclude that food service and maintenance workers are not employees of the district. Thus, defendant has shown it did not employ more than 200 total employees in 20 or more calendar weeks during the relevant time period. The stipulation will remain in effect.

FACTS

A. Relevant Time Period

The parties agree that the relevant time period is 2004, 2005 and 2006. Defendant submitted employment data for 2006 because this is the year in which it had the most employees. Neither party submitted evidence suggesting that defendant may have had more

than 200 employees for 20 calendar weeks in 2004 or 2005.

B. Substitute Teachers

Individuals wishing to become substitute teachers for defendant must submit an application, proof of teaching license, references and a consent to a background check. Defendant then conducts a background check and verifies certifications before adding the individual to a list of potential substitutes without further interviewing. Defendant gives no assurance to the individuals that they will ever be called upon to substitute teach or how often they will be called. Some individuals who are added to the list never work for defendant as a substitute teacher, some work periodically and others work for extended periods of time. Defendant does not limit the number of substitutes on the list. It knows that listed individuals can turn down offered assignments, decide how long and when they are willing to work and are usually on the substitute lists of other school districts.

Once a substitute accepts a position, he or she performs duties consistent with the absent teacher's lesson plans. Substitutes are paid on a per diem basis, earning $50 for half a day and $95 for a whole day. They receive no other benefits. If substitute teachers work more than 20 consecutive days in the same classroom, their pay increases to the daily salary schedule amount for a first year teacher. Defendant reports compensation paid to substitute teachers on W-2 forms and withholds taxes. Substitutes have no formal termination process;

defendant is not required to submit a notice of termination to potential substitutes and substitutes are not required to inform defendant that they no longer wish to be called for substitute openings.

In 2006, defendant had on its substitute list a total of 73 substitute teachers and between 28 and 38 teacher aides. During the calendar year 2006, six substitute teachers worked more than 20 consecutive days in the same classroom.

C. Food Service Providers

In 2004 defendant contracted with Chartwells, a division of Compass Group USA, Inc., for food services at the district's schools. The contract was in place until at least 2008. Chartwells is a food service management company that serves more than 500 school districts nationwide. Chartwells used ten of its employees to fulfill the terms of its contract with the district, including a head cook and three aides at the high school, a cook and an aide at the middle school, a cook and an aide at the elementary school and two student dishwashers. Under the contract between defendant and Chartwells, "Chartwells shall be an independent contractor and shall retain control over its employees and agents." Id. at ¶ 1.3. In addition, Chartwells "shall be responsible for its employees on its payroll including, but not limited to, responsibility for recruitment, employment, promotion, payment of wages, pension

benefits, layoffs and termination. . . ." Dkt. #216-1, ¶ 3.1. Also, Chartwells "shall prepare and process the payroll for its employees and shall withhold and pay all applicable federal and state employment taxes and payroll insurance relating to its employees . . . ." Id.

The food services workers working at defendant's schools in 2006 were hired and supervised by Deb Revalee, the food service director at Chartwells. Defendant had no formal role in the hiring process, but it had the right to evaluate and approve employees who would be directors or supervisors. Revalee was responsible for advertising employment vacancies and reviewing applications, which were submitted on a Chartwells application form. She also handled the termination process of Chartwells's employees, as well as all human resource issues including recruitment, promotions, benefits, termination, training, discipline and scheduling. Defendant had no role in the termination process, but it could provide Chartwells "written notice that it requires the removal of an employee of Chartwells if such employee violates health requirements or conducts himself/herself in a manner which is detrimental to the physical, mental or moral well-being of students, staff or faculty, in which case the employee shall be removed immediately." Id. at ¶ 3.8. Chartwells recommended the number of work hours and the number of positions required at each school with the final determination being made by defendant.

As Chartwells' food service director, Revalee was responsible for establishing menus using guidelines established by Chartwells and the United States Department of Agriculture.

Although the contract stated that defendant would establish an advisory board to assist in menu planning, defendant had no input or influence on the menus. Chartwells ordered the food and supplies and forwarded the bills to defendant. Revalee was not supervised by any of defendant's employees and did not report to anyone working for defendant. On a few occasions, she discussed unusual or controversial issues with the superintendent.

D. Maintenance Workers

Since June 5, 2005, cleaning services have been provided to defendant by ISS Facility Services, Inc. and its predecessors. ISS Facility Services is a national company that provides janitorial services to a variety of businesses. During 2006 and 2007, ISS used ten of its employees to provide janitorial services to defendant, including four workers at the high school and five at the elementary school. These workers were supervised by Andy Diaz, an on-site working supervisor employed by ISS, who split his time between the elementary and high school. Diaz was not supervised by any employees of defendant and did not report to defendant; rather, Diaz was supervised by Brian Knutson, an area manager for ISS who manages the school district account. Knutson was supervised by Julie Lynch, the district manager for ISS. If defendant had a specific request or problem, its representatives would write it in a communications notebook kept specifically for that purpose and either Diaz or

Knutson would discuss the issue with defendant's representatives. In addition, defendant's representatives performed inspections of maintenance work periodically. (It is not clear whether defendant or ISS paid for the supplies used by the maintenance workers. The contract between defendant and ISS states that ISS will furnish all supplies and equipment necessary to perform the contract, but plaintiff alleges that defendant actually paid for the supplies.)

When the contract began, Knutson met with defendant's representatives to establish the specifications for the job, including the areas to be cleaned, the frequency of cleaning, the time window for cleaning and facility access. ISS used this information to price the contract and Knutson divided the specifications into "job runs" that were assigned to individual cleaners.

ISS is responsible for all hiring, termination, discipline, vacation and other human resource decisions related to the janitorial workers. Defendant had no involvement in the application, interview, selection or termination process other than offering referrals and references.

OPINION

Under the Americans with Disabilities Act (ADA), a plaintiff's compensatory and

punitive damages are limited by the number of employees employed by the defendant. 42 U.S.C. § 12133, incorporating 42 U.S.C. § 1981a(b)(3). If the defendant has more than 100 and fewer than 201 employees "in each of 20 or more calendar weeks in the current or proceeding calendar year," compensatory damages are capped at $100,000. If the defendant has more than 200 and fewer than 501 employees, damages are capped at $200,000.

The ADA and Title VII of the Civil Rights Act define "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f), § 12111(4). As the Supreme Court has pointed out, this definition "is completely circular and explains nothing." Clackamas Gastroenterology Associations, P.C. v. Wells, 538 U.S. 440 (2003) (discussing definition of employee under ADA) (citing Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 323 (1992) (discussing same definition of "employee" used in the Employee Income Retirement Security Act (ERISA))). To clarify the definition, the Supreme Court has explained that the primary consideration in determining whether an individual is an "employee" for purposes of Title VII is whether "an employment relationship" exists. Walters v. Metropolitan Educational Enterprises, Inc., 519 U.S. 202, 206 (1997). An "employment relationship" is demonstrated most readily by the "payroll method," meaning, whether the individual appears on the employer's payroll. Id.; Mizwicki v. Helwig, 196 F.3d 828, 831-33 (7th Cir. 1999). However, the payroll method is not necessarily determinative, as "an individual who appears on the payroll but is not an 'employee' under traditional

principles of agency law," would not count as a employee for purpose of ADA or Title VII. Walters, 519 U.S. at 211-12 (internal citations omitted). Thus, the individual must ultimately satisfy the traditional common-law agency definition of "employee" to be considered to have an "employment relationship" with the alleged employer under Title VII and the ADA. The factors relevant to the common-law agency definition are

> the hiring party's right to control the manner and means by which the product is accomplished[;] . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-24; see also Clackamas, 538 U.S. at 448-49; Walters, 519 U.S. at 211. The Court of Appeals for the Seventh Circuit has described the relevant factors as

> (1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations.

Ost v. West Suburban Travelers Limousine, Inc., 88 F.3d 435, 438 (7th Cir. 1996). In this common-law agency inquiry, "all of the incidents of the relationship must be assessed and

weighed with no one factor being decisive." Darden, 503 U.S. at 324.

A. Substitute Teachers

Plaintiff contends that under the payroll method set forth in Walters and under traditional agency principles, substitute teachers are employees of defendant from the time they first perform services for defendant until they "cease performing services" for defendant. Pltf.'s Reply Br., dkt. #218, at 2. In particular, once substitute accepts calls to work, they are directed by defendant as to hours of work and duties to be performed and they work alongside other employees performing the same or similar services. Additionally, defendant provides the supplies necessary for teaching, controls the workplace, pays compensation to these individuals and withholds taxes. Even if I agree with plaintiff that defendant has an employment relationship with substitute teachers during the time they are performing services for defendant, I do not agree with plaintiff's proposed method for counting these substitutes as employees for purposes of the statutory cap.

In Walters, 519 U.S. at 211, the Supreme Court held that an employee "is counted as an employee for each working day after arrival and before departure." In that case, the issue was whether part-time employees who ordinarily worked four days each week should be counted as employees on their days off. The Court held that such individuals should be counted as employees even on their days off because they maintained an employment

relationship with their employer. Id. at 210. The Court recognized that under its holding, "an employee who works irregular hours, perhaps only a few days a month, will be counted" as an employee for purposes of Title VII. Id. Plaintiff cites Walters to support her argument that substitute teachers should be counted as employees of defendant for each week between their first and last day of actual work. In other words, plaintiff contends that the employment relationship endures even if the substitute teacher is not working.

However, unlike the part-time employees in Walters, it is less clear whether the "employment relationship" continues between defendant and the substitute teacher after the substitute leaves at the end of a workday. Typical part-time employees like those in Walters are expected to report to work when scheduled, even if it is only a couple of days each week. Additionally, such employees, even those who work infrequently, expect that their employment will continue until they are formally terminated or they resign. In contrast, substitute teachers have no formal employment start or end date and no assurance that they will ever be called to work for defendant. Although several substitutes work multiple weeks in a school year, some substitutes work only one or two days in an entire year or none at all. Under plaintiff's theory, a substitute who works one day at the beginning of the year and one day at the end of the year maintains an employment relationship with defendant for the entire year. However, neither the substitute teacher nor defendant has any expectation that the substitute will return after that first day. When substitute teachers finish a particular

work assignment, they have no obligation to return. Thus, although substitute teachers may have an employment relationship with defendant during the time for which they are teaching at one of defendant's schools, that relationship ends when their particular job assignment ends. They cannot be counted as employees for every week from the time they first take an assignment.

Plaintiff makes an alternative argument based on defendant's payroll periods. Defendant pays its employees on the 5th and 20th of each month. Plaintiff contends that substitute teachers who worked on at least one day in a two-week pay period should be counted as employees for both weeks in the pay period. Under plaintiff's theory, if a substitute works on a Monday at the beginning of a pay period, that substitute would be counted as an employee for the next two weeks, regardless whether the substitute teaches again in the next two weeks. However, plaintiff points to no authority for counting employees on a two-week period rather than the one-week period used in the statute. 42 U.S.C. § 1981a(b)(3) (if employer has more than 200 employees "in each of 20 or more *calendar weeks* in the current or proceeding calendar year," compensatory damages are capped at $200,000) (emphasis added). Additionally, there is no rationale for concluding that a substitute teacher has an employment relationship with defendant during a week in which the substitute does not work. A substitute could teach the first week of a payroll period and then not again for many weeks or months.

If I assume that substitute teachers have an employment relationship with defendant on the days they are actually teaching for defendant, under the statute they should be counted as employees for each calendar week in which they worked and appeared on the district's payroll. However, defendant did not submit data showing the number of substitutes who worked during each calendar week for 2006. Rather than use calendar weeks, defendant divided the year into *payroll weeks*, stating that it was much simpler to organize the employees by payroll week given the type of data available. For each payroll week, defendant notes the number of substitutes who worked and states that the numbers would not be much different if calendaer weeks were used. Def.'s Br., dkt. #214, at 7-9. Defendant's numbers show that if substitute teachers are counted as employees for each payroll week in which they taught, defendant had more than 200 employees for only seven weeks in 2006. Plaintiff does not contend that defendant's data is inaccurate or that defendant's use of payroll weeks produces results that would differ significantly from the results under calendar weeks.

In sum, the date submitted by the parties shows that inclusion of substitute teachers as employees does not push defendant's numbers above 200 employees for 20 or more calendar weeks.

B. Maintenance and Food Service Providers

Plaintiff concedes that the maintenance and food services workers provided by ISS Facilities and Chartwells are employees of those corporations. However, plaintiff contends that the maintenance and food service workers should also be considered employees of defendant for purposes of the ADA. Plaintiff cites National Labor Relations Board v. Western Temporary Services, Inc., 821 F.2d 1258, 1266 (7th Cir. 1987), to support her theory that the workers may be considered employees of both defendant and the third party vendors. In that case, the court of appeals held that a temporary help service and its client were "joint employers" because they each exerted "significant control" over the same employees. Id. Also, plaintiff cites several cases in which courts have applied traditional agency principles to determine whether an individual worker hired by a staffing service or related company had an employment relationship with the defendant. E.g., Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976 (10th Cir. 2002) (considering whether temporary workers were sufficiently controlled as to be employees of defendant); EEOC v. Custom Companies, Inc., 2007 WL 734395, *6-8 (N. D. Ill. Mar. 8, 2007) (allowing aggregation of leased employees where defendant interviewed and trained workers, provided an employee handbook and all equipment with which they worked, maintained significant control over them, provided personnel files, performance reviews, discipline and health benefits and approved salary changes); Burdett v. Abrasive Engineering & Technology, Inc.,

989 F. Supp. 1107, 1111-12 (D. Kan. 1997) (considering "joint employer" doctrine and holding that plaintiff could aggregate employees of staffing agency only if employer exercised sufficient control over employees).

Relying on these cases, and the common law agency principles set forth in cases such as Darden and Ost, plaintiff contends that the employees of Chartwells and ISS Facilities who worked at defendant's schools during the relevant time period had an employment relationship with defendant because they performed unskilled labor that required little discretion and is ongoing, rather than labor performed for a particular project. Additionally, defendant had some control over the time and manner in which the work was performed and was ultimately responsible for the conditions of its schools and the quality of its meals. On occasion, defendant inspected work for compliance with the contract and asked that particular projects be completed. Finally, with respect to the maintenance workers in particular, defendant evaluated and approved directors, assistant directors and supervisors and may have supplied the equipment and materials used by the maintenance workers for janitorial services.

I am not persuaded that defendant exercised sufficient control over the maintenance and food workers to amount to an employment relationship. Unlike the situation with the workers in Custom Companies, plaintiff did not interview or train the maintenance and food

workers. Defendant did not provide these workers employee handbooks or health benefits, maintain personnel files for them, approve salary adjustments or maintain significant control over their daily activities. Defendant does not list these workers on its payroll, does not pay their salaries, benefits or any taxes related to them and does not directly hire, train, schedule, promote, discipline or terminate them. In fact, defendant had no direct communication with the majority of food service or maintenance workers. All of the workers are supervised by a clearly defined chain of supervision that does not include defendant's own employees. If defendant wants something particular done it has to go to ISS Facilities' and Chartwells's supervisory staff and make the request as a customer. Finally, the work performed by these employees is not a part of the district's regular business of education, whereas ISS Facility and Chartwells are large corporations that specialize in the type of work performed by these employees and train their employees accordingly. Because defendant does not exercise significant control over the maintenance and food service workers, they cannot be counted as employees of defendant for ADA purposes.

In sum, plaintiff has not shown that the original stipulation of the parties regarding the number of employees employed by defendant during the relevant time period was based on a mistake of fact or was incorrect. (Plaintiff suggested in her reply brief that employees on medical leave should be counted as employees, but she did not pursue this suggestion or adduce any evidence of any employees other than herself fell into this category. Including

plaintiff would not change the outcome of plaintiff's motion to set aside the stipulation.) Therefore, there is no reason to set aside the stipulation.

ORDER

IT IS ORDERED that plaintiff Renae Ekstrand's motion to set aside the stipulation, dkt. #169, is DENIED.

Entered this 29th day of March, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge