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Lerohl v. Friends of Minnesota Sinfonia: An Out of Tune Definition of “Employee” Keeps Freelance Musicians from Being Covered by Title VII

Jeff Clement

I. INTRODUCTION

Should individuals classified as employees have standing to sue while individuals classified as independent contractors have no standing to sue under remedial statutes like Title VII? The Supreme Court has clearly said “yes.”

Despite the broad legislative intent of Title VII, courts have decided that Title VII and other federal employment discrimination laws do not protect independent contractors. Therefore, courts have grappled with determining who is an employee, covered under federal discrimination statutes, and who is an independent contractor, not covered under federal discrimination statutes.

The exclusion of an entire category of workers from statutes such as Title VII leaves many workers, who have been discriminated against, with no remedy under Title VII. An overly narrow definition of employee can have the same effect. Such classifications are particularly damaging to employees in less conventional fields. A case that exemplifies this is Lerohl v. Friends of Minnesota Sinfonia, which involved freelance symphony musicians. The Lerohl court followed the current narrow test of employment status enunciated by the Supreme Court in

1. J.D. from DePaul University College of Law expected 2005; M.B.A. from DePaul University Kellstadt School of Business expected 2005; Florida State University, B.S., 2002.


4. However, such workers can still sue under tort law assuming there is a valid claim. David L. Gregory, The Problematic Employment Dynamics of Student Internships, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 227, 229 n.9 (1998). Further, individuals also sometimes seek relief under 42. U.S.C. § 1981 (“Section 1981”). However, the statute prohibits discrimination only on the basis of face or ethnicity, excluding claims on other grounds such as sex. Yamada, 38 B.C. L. REV. at 256.

5. Lerohl v. Friends of Minnesota Sinfonia, 322 F.3d 486 (8th Cir. 2003).
Reid\textsuperscript{6} to hold that the musicians in the case were not employees but independent contractors.\textsuperscript{7}

The purpose of this note is to argue that the \textit{Lerohl} decision was incorrectly decided because it used a definition of employee that is overly narrow for a Title VII discrimination case. Part II of this note will analyze the history of the various tests that have been used by courts to determine whether an individual is an employee. Then, Part III and IV of this note will outline the \textit{Lerohl} case and analyze the decision's strengths and weaknesses. Finally, Part V of this paper will suggest that the legislature specifically include independent contractors as being covered under Title VII.

II. BACKGROUND

Section 2000e-2 of Title VII of the Civil Rights Act of 1964 prohibits discrimination in the employment setting against any individual on the basis of race, color, religion, sex or national origin.\textsuperscript{8} Despite the broad language of Title VII, there are several hurdles that a plaintiff must overcome. One of the hurdles involves a determination of whether the plaintiff is an employee under Title VII.

A. Definition of Employee

In order to bring a Title VII discrimination claim, a plaintiff must first have standing to sue under Title VII. A plaintiff achieves standing by showing that an employer-employee relationship exists. Basically, this means that the plaintiff must be an employee of the employer in order to be covered by Title VII.\textsuperscript{9} Under Title VII, an employee is defined as an individual employed by an employer.\textsuperscript{10}


\textsuperscript{7} \textit{Id.} at 489. The Reid test is basically the common-law agency test as discussed later in this article. \textit{See infra} Part II.G.1. This test considers the hiring party's right to control the manner and means by which the product is accomplished and several additional factors. \textit{Id.}

\textsuperscript{8} 42 U.S.C. § 2000e-2(1964). This section 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 to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1)-(2).

\textsuperscript{9} Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111 (2d Cir. 2000) (stating that "Title VII... covers employees not independent contractors").

\textsuperscript{10} 42 U.S.C. § 2000e(f)(1964). According to Title VII, "the term 'employee' means an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an ap-
Since this definition provides little guidance, courts have grappled with the issue of determining employee status.

B. Independent Contractor as Distinct from Employee

It is now well established that Title VII protects employees, but not individuals classified as independent contractors. Originally, the distinction between employees and independent contractors was necessary to determine if an employer was to be held liable for injuries its employees caused to third parties under the concept of vicarious liability. However, the distinction has been applied with equal force to claims involving Title VII and other acts regulating employment relationships. The ways in which courts have made this employee/independent contractor determination have varied drastically. Various tests have come in and out of favor over the years.

C. The Common Law Test of Employee

Originally, some courts adopted the common law agency test to determine whether an individual was an employee. The basic inquiry of this test determines whether the employer had the right to control the manner and means of the individual's work performance. For example, in Smith v. Dutra Trucking Co., the court used the common law test to determine employee status.
right to control test to hold that a plaintiff working through a subhauling agreement was not covered by Title VII because she was not an employee. The court stated that the "right to control" factor had not been satisfied because the plaintiff and her husband maintained their own supplies and had contracted only for as long as was required to do a specific job. Further, the fact that the plaintiff received an hourly rate, was directed to the jobsite, and was requested to arrive and depart at specified times did not transform the plaintiff into an employee. However, most courts did not adopt the common law test, instead preferring methods that took into consideration more than merely the "right to control" factor. These approaches are detailed below.

D. Hearst and Silk Test: Mischief to Be Corrected

One of the more interesting developments in litigation regarding the definition of employee occurred in a series of cases in the 1940's. These cases rejected the common law "right to control" test and instead interpreted the term employee based on the statutory purpose or mischief to be corrected and the end to be attained.

In *NLRB v. Hearst Publications, Inc.*, the Supreme Court determined whether newsboys were employees under the National Labor Relations Act (NLRA). Instead of adopting the common law approach, the Court adopted a significantly more liberal construction of the term employee. The Court stated that the word "employee" is not treated by Congress as a word of art having a definite meaning. Rather it takes color from its surroundings in the statute where it appears, and derives meaning from the context of that statute, which must be read in the light of the mischief to be corrected and the end to be attained.

Under this test, statutory purpose could outweigh rigid legal classifications.

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16. *Id.*
17. *Id.* at 516-517.
18. *Id.* at 517.
19. Maltby, *Beyond Economic Realities*, 38 B.C. L. Rev. at 248 (stating that during the late 1970s and early 1980s, most courts adopted either the economic realities test, or more frequently, a hybrid test).
22. *Id.* at 113.
23. *Id.* at 124.
This reasoning was also applied in *United States v. Silk.*\(^24\) This time, the case involved an employee determination under the Social Security Act (SSA).\(^25\) The Court decided to apply the same rule as was applied in the *Hearst* case based on the idea of statutory purpose.\(^26\)

Congress responded to cases like *Hearst* and *Silk* by amending those statutes that it felt should have a restrictive definition of employee.\(^27\) For example, Congress amended the NLRA to exclude independent contractors.\(^28\) Further, Congress amended the SSA to require the use of the common law test to determine employee status.\(^29\) The effect of this amendment was to invalidate the *Silk* decision. By contrast, Congress did not amend all statutes to which the *Hearst* analysis had been applied. For example, Congress did not amend the Fair Labor Standards Act (FLSA),\(^30\) even though the *Hearst* analysis had been used in *Walling v. Portland Terminal Co.*, a case involving the FLSA.\(^31\)

### E. The Economic Realities Test

The economic realities test is somewhat of an outgrowth of the broad construction of the term employee applied in *Hearst.* However, this test provides more guidance for courts. The economic realities test focuses on the balance of power in the employment relationship.\(^32\) Under the economic realities test, courts examine the underlying economic realities of the relationship including whether the employer has the ability to control access to employment opportunities and whether the employee is economically dependent on the employer.\(^33\) Control of employment opportunities is the key to the economic realities test.\(^34\) This test was adopted by some courts that focused on the broad remedial purpose of acts like Title VII.\(^35\)

\(^{24}\) *Silk,* 331 U.S. 704.

\(^{25}\) Id. at 705.

\(^{26}\) Id. at 713-714.

\(^{27}\) Valerie L. Jacobson, *Bringing a Title VII Action: Which Test Regarding Standing to Sue is Most Applicable?*, 18 FORDHAM URB. L.J. 95, 103 (1990); Dowd, *The Test of Employee Status*, 26 WM & MARY L. REV. at 92.


\(^{29}\) Id. at 92-93.

\(^{30}\) Id.


\(^{33}\) Id. at 102; Maltby, *Beyond Economic Realities*, 38 B.C. L. REV. at 249.

\(^{34}\) Dowd, *The Test of Employee Status*, 26 WM. & MARY L. REV. at 112.

\(^{35}\) Maltby, 38. B.C. L. REV. at 248.
For example, in *Lilley v. BTM Corp.*, the plaintiff, a salesman, brought an action alleging age discrimination under the Age Discrimination in Employment Act (ADEA). The court stated that the term employee should be given a broad construction in order to effectuate the remedial purpose of the ADEA. The court then applied the economic realities test, which it described as looking to whether the "putative employee is economically dependent upon the principal or is instead in business for himself." The court ultimately held that the salesman qualified as an employee.

However, the economic realities test has not always been applied with great consistency. Some courts have claimed to be applying the economic realities test while in practice the court applied the hybrid approach described below. For example, in *Broussard v. L.H. Bossier, Inc.*, the court applied the economic realities test to a Title VII claim by a woman truck driver. The facts of the case were almost identical to the earlier *Smith v. Dutra Trucking Co.* case in that both involved a separate truck hauling company that the plaintiffs co-owned with their husbands. However, in this case, the court stated that the economic realities test should guide the analysis of whether an individual is an employee under Title VII.

Despite formally adopting the economic realities test, the *Broussard* court ultimately came to the same conclusion as the *Smith* court. The court did this by focusing on factors more in line with the common-law test and hybrid test like the "right to control." Therefore, the plaintiff was found to not be an employee under Title VII because the control factor was not satisfied. Decisions like *Broussard* show that the economic realities test, which should emphasize the plaintiff's economic dependence on the employer, is often misapplied in favor of applying the traditional common-law control inquiry.

37. Id. at 749.
38. Id. at 750.
39. Id. at 750.
40. Id. at 756.
42. Compare Id. at 1159, with Smith v. Dutra Trucking Co., 410 F. Supp at 519.
43. Broussard, 789 F.2d at 1160.
44. Id. at 1161 (holding that Broussard was not an employee for Title VII purposes).
45. Id. at 1160. The Court stated that under the economic realities test, the right to control is the most important factor in determining employee status. Id. However, the court provided no authority for this proposition, instead citing to *Smith v. Dutra Trucking Co.*, which applied the common-law test instead of the economic realities test.
46. Id. at 1160.
F. Hybrid Test,

The test most often applied for Title VII purposes is the hybrid test. The hybrid test is a combination of the common-law right to control test and the economic realities test. However, the right to control factor is most heavily weighed in the hybrid test.

*Mallare v. St. Luke's Hospital of Bethlehem* involved a Title VII claim brought by plaintiff physician. The court stated that the proper standard to apply in the determination of employment status is the hybrid standard, which takes into account the economic realities of the situation, but focuses on the employer's right to control the employee. The court stated that while the hospital may not have had control in the sense of supervision over the physician, ultimate control can be exercised by a hospital since privileges can be withdrawn if a doctor's performance does not comport with hospital standards. Regarding the economic realities of the situation, the court stated that the physician's practice depended upon access to the hospital for his patients. Therefore, the court denied the hospital's motion for summary judgment on the issue of employment status.

Despite the more worker-favorable outcome present in *Mallare*, application of the hybrid test usually results in a holding that the plaintiff was not an employee because the "right to control" factor is given the greatest weight. For example, in *Equal Employment Opportunity Commission v. Zippo Manufacturing Co.*, the plaintiff, a district manager and distributor of Zippo products, was found to not be an employee because of Zippo's lack of control over the managers. The court emphasized the fact that the managers could choose the business form of their choice and set their own hours. Therefore,


48. Wilde, 811 F. Supp at 451 (stating that the extent of the employer's right to control the worker is the most telling factor.).


51. Id. at 1129.

52. Id. at 1130.

53. Id. In this case, the physician was in a medical residency program in Obstetrics/Gynecology. Id. at 1128.

54. Id. at 1130.


56. Equal Employment Opportunities Commission, 713 F.2d at 33.

57. Id.
any economic dependence the managers may have had on Zippo was overcome by the "right to control" factor.\textsuperscript{58}

G. Significant Recent Supreme Court Cases

Two recent Supreme Court cases, \textit{Reid}\textsuperscript{59} and \textit{Darden},\textsuperscript{60} have set the standard by which most courts determine the definition of employee today. The basis of the modern test is an analysis of several factors, none of which are given greater weight than the others.

1. The \textit{Reid} Case

The \textit{Reid} case involved an interpretation of the "work made for hire" provisions of the Copyright Act of 1976.\textsuperscript{61} It was necessary to determine whether Reid's sculpture was "a work prepared by an employee within the scope of his or her employment" in order to decide whether the "work for hire" provision applied. Like Title VII, the Act did not define the term employee.\textsuperscript{62} The Court stated that in the past when Congress used the term employee without defining it, the conventional master-servant relationship as understood by common law agency principles has been applied.\textsuperscript{63}

Applying agency principles, the Court stated that in determining whether the plaintiff is an employee, the Court should consider the hiring party's right to control the manner and means by which the product is accomplished.\textsuperscript{64} Further, several factors are relevant to achieving this inquiry. These factors include the following:

(1) the skill required
(2) the source of the instrumentalities and tools
(3) the location of the work
(4) the duration of the relationship between the parties
(5) whether the hiring party has the right to assign additional projects to the hired party

\textsuperscript{58} Id. at 38 (stating "even if appellants were required to sell only Zippo products, and even if they were economically dependent on the income they earned as Zippo DMs (district managers), these factors are not sufficient to establish that they were employees when balanced against the other factors that tend to establish their status as independent contractors."). \textit{Id.}


\textsuperscript{61} \textit{Reid}, 490 U.S. at 738.

\textsuperscript{62} \textit{Id.} at 738. The term "scope of employment" was also not defined. \textit{Id.}

\textsuperscript{63} \textit{Id.} at 739-740 citing Kelley v. Southern Pacific Co., 419 U.S. 318, 322-323 (1974); Baker v. Texas v. Pacific R. Co., 359 U.S. 227, 228 (1959); Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84, 94 (1915). The Court stated that "where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." \textit{Id.} at 739.

\textsuperscript{64} \textit{Id.} at 751.
(6) the extent of the hired party's discretion over when and how long to work
(7) the method of payment
(8) the hired party's role in hiring and paying assistants
(9) whether the work is part of the regular business of the hiring party
(10) whether the hiring party is in business
(11) the provision of employee benefits
(12) the tax treatment of the hired party.\textsuperscript{65}

However, unlike the hybrid test, the Court stated that no one of these factors is determinative.\textsuperscript{66} Applying these factors, the Court concluded that Reid was an independent contractor as opposed to an employee.\textsuperscript{67}

2. The Darden Case

The Darden case concerned the definition of employee under the Employee Retirement Income Security Act (ERISA).\textsuperscript{68} According to the Court, since ERISA's definition of employee was merely nominal in nature, it was appropriate to adopt the same common law standard as in Reid.\textsuperscript{69}

Interestingly, the Court in Darden took the opportunity to state that the Hearst and Silk cases should not be followed as precedent.\textsuperscript{70} The Court said that both cases were "feeble precedents" because after both cases expanded the definition of employee for their respective statutes, Congress responded by amending those statutes to demonstrate that the common law definition should be applied.\textsuperscript{71}

The Supreme Court's decisions in Reid and Darden are strong signals that the common law test has returned. According to some commentators, "many recent decisions have interpreted Darden as requiring application of the common-law test to Title VII and ADEA

\textsuperscript{65} Reid, 490 U.S. at 751-752. Most of these factors were borrowed from the Restatement (Second) of Agency § 220. For example, the Restatement lists factors such as control, the skill required, and the length of time for which the person is employed. \textit{Restatement (Second) of Agency} § 220(2)(a)-(j).

\textsuperscript{66} Id. at 752.

\textsuperscript{67} Id. at 752. Unlike most of the cases analyzed in this note, this determination was actually beneficial to Reid, since now Reid would be considered the owner of the copyright in his work.

\textsuperscript{68} Darden, 503 U.S. 318, 320-321. The Court stated that Darden's ERISA claim can succeed only if he was Nationwide's "employee." \textit{Id.}

\textsuperscript{69} Id. at 323. According to the Court, "ERISA'S nominal definition of employee... is completely circular and explains nothing... Thus we adopt a common-law test for determining who qualifies as an employee under ERISA." \textit{Id.}

\textsuperscript{70} Id. at 324-325.

\textsuperscript{71} Id.
claims, even if the courts had previously applied either the economic realities or hybrid test." One decision that applies the Reid and Darden rationale to Title VII is the subject opinion of this note.

III. Subject Opinion: The Lerohl Case

_Lehrol v. Friends of Minnesota Sinfonia_ is one of the most recent cases to deal with the definition of employee. Tricia Lerohl, a French horn player, filed suit against the Friends of Minnesota Sinfonia, a nonprofit corporation that governs the Minnesota Sinfonia. Lerohl claimed that she was terminated from the Sinfonia in violation of Title VII of the Civil Rights Act of 1964.

The Minnesota Sinfonia, an outgrowth of the Minneapolis Chamber Symphony Orchestra, puts on free classical music concerts. Fishman conducts the Sinfonia and acts as the Sinfonia’s executive and artistic director. The musicians playing in the Sinfonia are all freelance musicians; however, all Sinfonia players are members of Local 30-73 of the American Federation of Musicians. The freelance musicians that are most often invited to play in the concerts are termed as “regular” players. Although players may opt out of Sinfonia concerts, Fishman’s policy is that a musician must accept the vast majority of work offered in order to retain “regular” player status.

The Sinfonia players are paid on a per-concert basis at the union scale. Also, the Sinfonia contributes an agreed percentage of the union scale payments to the musician’s union pension fund. However, the Sinfonia does not withhold income or taxes and does not provide any additional fringe benefits.

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73. _Lehrol v. Friends of Minnesota Sinfonia_, 322 F.3d 486 (8th Cir. 2003).
74. _Id._ at 487. The Court of Appeal’s decision deals simultaneously with a claim by Shelley Hanson, another freelance player in the Sinfonia. Hanson brought suit under the American with Disabilities Act, claiming that the Sinfonia violated the ADA when it stopped hiring her after being absent for several months while recovering from work-related injuries. This note will focus on Lerohl’s Title VII claim; however, the Court of Appeal’s applies an identical analysis to both claims. _Id._ at 487-489.
75. _Id._ at 487.
76. _Id._ at 488.
77. _Lerohl_, 322 F.3d at 488.
78. _Id._ at 488. The jurisdiction of Local 30-73 of the American Federation of Musicians covers several counties in Minnesota and Wisconsin. It is also known as the “Twin Cities Musicians Union.” For more information, see http://www.afm.org/30-73/ and http://www.tcmu.com.
79. _Id._.
80. _Id._. In order to opt out, musicians had to give two weeks notice and arrange for an eligible substitute to perform. _Id._
81. _Id._ at 488-489.
82. _Lerohl_, 322 F.3d at 488.
Lerohl, a “regular” player at Sinfonia concerts from 1990 to 1999, claimed that the Sinfonia stopped offering work to her in retaliation for her complaints about sexual harassment by Fishman. She argued that her termination was a violation of Title VII. The district court dismissed her complaint, holding that Lerohl was an independent contractor outside the protection of Title VII.

The Court of Appeals affirmed, and in doing so adopted the Reid and Darden test for employment status. Citing the Darden case from the Supreme Court, the Lerohl Court stated that the general common law of agency should be applied to determine whether a hired party is an employee or an independent contractor. Further, the court ruled that the Reid factors should be considered in this analysis. The court stated:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are 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 hiring party.

The court particularly emphasized that no one of these factors is determinative. The court stated that all of the incidents of the relationship must be assessed and weighed. Interestingly, the court acknowledged that the economic aspects of the parties' relationship may be considered; however, this inquiry is to be confined to the district court.

83. Id. at 489.
84. Id.
85. Id. at 488.
86. Id.
87. Lerohl, 322 F.3d at 489.
88. Id. at 489 (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-752 (1989).)
89. Lerohl, 322 F.3d at 489.
90. Id. The court stated that the inquiry required more “than simply tallying factors on each side and selecting the winner on the basis of a point score.” Id.
91. Id.
Lerohl claimed that the “right to control” factor should be given primary consideration. Lerohl argued that since Fishman, as conductor, “controlled” the rehearsals and concerts, all of the Sinfonia musicians were employees. The court strongly rejected Lerohl’s reliance on the “right to control” factor, instead emphasizing that no one factor is determinative.

The court acknowledged that it was treading in new waters, noting that there were surprisingly few cases dealing with whether musicians who played in a band or orchestra were employees. One case that the court found to be relevant was Seattle Opera v. NLRB, where the Seattle Opera’s auxiliary choristers were held to be employees of the Opera. However, the court stated that it found the dissent in the Seattle Opera case to be more persuasive. Further, the court pointed to the Florida Gulf Coast Symphony case, which was decided prior to the Reid or Darden decisions. The Florida Gulf Coast Symphony case applied the common-law test to determine whether musicians were employees of their orchestra. The Florida Gulf Coast Symphony Court held that the musicians were independent contractors because they were engaged in a distinct occupation and received the bulk of their income from other sources.

Using this information and applying the Reid factors, the court held that Lerohl was an independent contractor. First, the court stated that Sinfonia musicians are highly skilled professionals who supply their own instruments. Also, the court claimed that Lerohl and Sinfonia musicians chose to remain “free-lance” instead of joining an orchestra. The court also noted that the Sinfonia withheld no in-

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92. Id. at 490. The court mentioned the “control theory urged by Lerohl.”
93. Lerohl, 322 F.3d at 490.
94. Id. (citing Darden, 503 U.S. at 325-326 and Reid, 490 U.S. at 750-751.)
95. Id.
96. Seattle Opera v. NLRB, 292 F.3d 757 (D.C. Cir. 2002).
97. Lerohl, 322 F.3d at 490.
98. Florida Gulf Coast Symphony v. Dep’t of Labor & Employment Sec., 386 So. 2d 259 (Fla. App. 1980).
99. Id.
100. Id. at 264. The court also emphasized that the musicians spent more than two-thirds of their time in activities over which petitioner had no control and supplied their own instruments. Id.
101. Lerohl, 322 F.3d at 491-493.
102. Id. at 491.
103. Id. The court likened the situation to lawyers, accountants, and business consultants who choose private practice instead of “in-house” employment. Id.
come or FICA taxes, and provided no employee benefits to Sinfonia musicians.  

The most relevant part of the court's decision, however, dealt with the court's construction of the "right to control" factor. The court stated that the relevant control issue is not whether Fishman controlled the musicians' performance, but whether Sinfonia musicians retained the right to decline particular Sinfonia concerts and play elsewhere. Applying the "right to retain" factor, the court held that Lerohl and other "regular" Sinfonia musicians retained the right to accept or reject playing a particular concert. Therefore, Lerohl was an independent contractor and without a remedy under Title VII.

IV. Analysis

A. The Decision in Lerohl Was Incorrect

This note argues that the Lerohl decision was incorrect. First, the court should have applied the hybrid test to the facts of the case instead of the Reid test. Second, the court mistakenly emphasized the "right to retain" factor in coming to its conclusion that Lerohl and the Sinfonia musicians were not employees. Next, the court's decision was incorrect because it contradicts a prior determination of the employment status of symphony musicians. Further, this note will argue that the Reid test is inappropriate for Title VII claims because of the broad purpose and scope of Title VII. Finally, the "Reid factors" are unfair when applied to symphony musicians.

1. The Hybrid Test Is the Appropriate Test for Title VII Claims

The appropriate test for Title VII claims is the hybrid test. Some cases have taken the Reid and Darden cases as applying to all employment status determinations. However, there is no express language

104. Id. at 492. Tax treatment and benefits are both Reid factors. The court gave these factors significant attention adding that "every case since Reid that has applied the common-law test has found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes. Id.

105. Lerohl, 322 F.3d at 491.

106. Id. at 492. Further, the court stated that musicians were even allowed to back out of concerts that they already agreed to perform at. Id.

107. Id.


109. See Lerohl, 322 F.3d at 491.

110. See Seattle Opera v. NLRB, which held that auxiliary choristers were employees of the Opera. Seattle Opera v. NLRB, 292 F.3d 757 (D.C. Cir. 2002).

in either the *Reid* or *Darden* cases that their rationale should be applied to Title VII claims.\textsuperscript{112}

On the other hand, there are multiple cases applying the hybrid test to Title VII claims.\textsuperscript{113} For example, in *Wilde v. Count of Kandiyohi,*\textsuperscript{114} the court stated that "nearly every appellate court has applied a test described as a hybrid of the common-law test and the economic realities test."\textsuperscript{115} Further, many Title VII cases decided after *Reid* and *Darden* have continued to use a hybrid test. For example, in *Eisenberg v. Advance Relocation & Storage, Inc.,*\textsuperscript{116} decided in 2000, the court stated that the greatest emphasis should be placed on the "right to control" factor, which is a sign that the hybrid test was being applied by the court. Unfortunately, the *Lerohl* court chose to apply the Supreme Court's general rule to the more specific area of Title VII cases despite the majority of Title VII cases applying the hybrid test.

If the hybrid test had been applied, there is a good chance that Lerohl would have prevailed and the court would have found her to be an employee. She would have prevailed because under the hybrid test, the "right to control" factor is the most important factor.\textsuperscript{117} Conductor Fishman clearly had the right to control Lerohl and the Sinfonia musicians' performances. Therefore, by applying greater weight to

\textsuperscript{112} The Supreme Court in the *Darden* case stated that the "general rule" followed in the *Reid* case, namely "where Congress uses terms that have accumulated settled meaning under the common law without defining it, the common law definition applies," stood as independent authority for the decision in relation to claims under the Copyright Act. Then, the Court analyzed whether the "general rule" applied to ERISA. *National Mutual Ins. Co., v. Darden,* 503 U.S. 318, 322-323. The Court made no statement about the applicability of the "general rule" to Title VII claims.


\textsuperscript{114} *Wilde v. County of Kandiyohi,* 15 F.3d 103 (8th Cir. 1994). This note provides reference to both the lower District Court decision in the Wilde case (see *Wilde,* 81 F.Supp 446) and the Court of Appeals decision.

\textsuperscript{115} *Id.* at 105 (citing *Oestman v. National Farmers Union Ins. Co.,* 958 F.2d 303, 305 (10th Cir. 1992); *Mares v. Marsh,* 777 F.2d 1066, 1067-68 & n.2 (5th Cir. 1985); *Garrett v. Phillips Mills, Inc.,* 721 F.2d 979, 981-82 (4th Cir. 1983); *EEOC v. Zippo Mfg. Co.,* 713 F.2d 32, 37-38 (3rd Cir. 1983); *Cobb v. Sun Papers, Inc.,* 673 F.2d 337, 340-41 (11th Cir.); *Unger v. Consolidated Foods Corp.,* 657 F.2d 909, 915 n.8 (7th Cir. 1981); *Lutcher v. Musicians Union Local 47,* 633 F.2d 880, 883 & n.5 (9th Cir. 1980); *Spirides,* 613 F.2d at 831-32.)

\textsuperscript{116} *Eisenberg v. Advance Relocation & Storage, Inc.,* 237 F.3d 111, 114 (stating that "though no single factor is dispositive, the "greatest emphasis" should be placed on the first factor—that is, on the extent to which the hiring party controls the "manner and means" by which the worker completes his or her assigned tasks.").

\textsuperscript{117} *Wilde,* 811 F. Supp at 451 (stating that the extent of the employer's right to control the worker is the most telling factor).
the "right to control" that is proper under the hybrid test, Lerohl was an employee of conductor Fishman and the Sinfonia under Title VII.

2. The Court's Emphasis of the "Right to Retain" Factor Is Flawed

Further, the court mistakenly emphasized the "right to retain" factor in its analysis in the Lerohl case. First, the court's emphasis on the "right to retain" factor directly contradicts their statement that no one factor is determinative.

In addition, the court incorrectly concluded that the "right to retain" factor favors the Sinfonia's position that the musicians were independent contractors. Although the musicians could technically turn down work that was offered to them, such a decision would have a clear adverse impact on their status as "regular" players. Conductor Fishman's policy was that musicians must accept the vast majority of the work to be considered "regular" or "first call" players. Therefore, if a Sinfonia musician turned down a job that was offered to him or her, that musician might no longer be offered jobs in the future. The court characterized this policy as merely an inducement. The court seems to be saying that anything short of formally firing the employee for failure to accept work fails the "right to retain" factor of employment status.

According to the Lerohl Court, the relevant control issue is not the traditional "right to control" factor but the "right to retain" factor. However, the court did not provide any precedent for cases that have considered the "right to retain" factor to be more important that the "right to control" factor. The court merely stated that other courts have found the "right to retain" factor to be relevant in determining whether a worker is an employee or an independent contractor. Also, unlike the court's characterization of the "right to retain" factor as being the relevant control issue, the "right to retain" factor is a

118. See Lerohl, 322 F.3d at 491.
119. Lerohl, 322 F.3d at 489 (stating that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.").
120. Id. at 488. The court states, "to remain a Sinfonia regular, which ensures being invited to play in most if not all Sinfonia concerts, Fishman's policy is that a musician must accept the vast majority of the work." Id.
121. Id. at 492. The court stated, "though the Sinfonia understandably offered inducements to preferred performers, such as "regular" status, the musicians retained control over the extent to which they committed their available professional time to the Sinfonia."
122. Lerohl, 322 F.3d at 491.
123. Id. at 491 (stating that "cases applying the common-law agency test have recognized this freedom-of-choice principle in determining whether a skilled professional was an employee or an independent contractor.")
separate and distinct factor from the "right to control" factor. More specifically stated, the Reid Court described the "right to retain" factor as "whether the hiring party has the right to assign additional projects to the hired party." The Lerohl Court simply has no basis for placing greater importance on the "right to retain" factor than on the traditional "right to control" factor. Therefore, the Lerohl Court was mistaken when it claimed that the relevant control issue is the "right to retain" factor.

3. The Decision Went Against a Prior Determination Regarding Symphony Musicians

The Lerohl decision is also flawed because it contradicts Seattle Opera v. NLRB, a prior employment status decision regarding symphony musicians. In Seattle Opera, the court held that auxiliary choristers were employees of the Opera. Similar to the freelance musicians in the Lerohl case, the auxiliary choristers were chosen from a larger pool of choristers to fill gaps in chorus when regulars were unavailable. The Seattle Opera case involved a determination of employment status under the National Labor Relations Act (NLRA). Although the NLRA's statutory definition of employee is more specific than Title VII's definition of employee, the relevant inquiry is much the same. Under the NLRA, a person is an employee if he works for a statutory employer in return for financial or other compensation and the statutory employer has the power or "right to control" or direct the person in the material details of how such work is to be performed. There are several exemptions to this rule, one which includes whether the worker is an independent contractor. Not

124. See Reid, 490 U.S. at 751-752.
125. Id.
126. See generally Seattle Opera v. NLRB, 292 F.3d 757 (D.C. Cir. 2002).
127. Id. at 761. The Court stated, "we must ask whether the Board's determination that auxiliaries are 'employees' under the Act has warrant in the record and a reasonable basis in law. We conclude that it does.
128. Id. at 759. The Seattle Opera had a pool of 100 to 200 auxiliary choristers who audition before a musical committee. From the pool, the Opera selects up to 16 "alternate choristers" to fill openings in the chorus. If a regular takes a leave of absence, his replacement is designated a "temporary regular chorister."
129. Id. at 762.
130. Id. The statute reads, "The term "employee shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the
only did the National Labor Relations Board (NLRB) hold that the auxiliary choristers are employees under the Act, but also that the Seattle Opera did not even claim on appeal that the auxiliary choristers fell into the independent contractor exemption.

Despite this, the Lerohl Court chose to side with the dissent in the Seattle Opera case. However, the Lerohl Court did not claim that they agreed with the dissent that the auxiliary choristers were not employees. The court merely agreed with the dissent’s attack of the “right to control” factor. Since the Lerohl Court admitted that there were few cases of this type dealing with musicians, they should have used the majority’s decision in Seattle Opera to aid them. Therefore, the Lerohl Court should have followed the Seattle Opera Court’s reasoning and held that the freelance musicians, like the auxiliary choristers, were employees.

4. The Reid Test Is Inappropriate for Title VII Claims

The Reid test is inappropriate for Title VII claims because it ignores the broad scope of Title VII. The Reid and Darden cases applied to different statutes than the Lerohl case, the work-for-hire provision of the Copyright Act and ERISA, respectively. Therefore, the decisions applying to these statutes cannot be easily applied to Title VII cases since policies vary between statutes.

For example, the work-for-hire provision of the Copyright Act, which was the subject of the Reid decision, is vastly different than Title VII. Under the work-for-hire provision, the employer is granted a status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. 29 U.S.C § 152(3) (emphasis added).

131. Seattle Opera, 292 F.3d at 759.
132. Id. at 762. The court stated that “the Opera does not claim that the auxiliaries fall within any of the section 152(3)’s specific exemptions.”
133. Lerohl, 322 F.3d at 490.
134. Id. at 490 (stating that “on the control theory urged by Lerohl, Hanson, and the EEOC, we find Judge Randolph’s dissent more persuasive).”
135. Id. at 490 (stating that “there are surprisingly few cases addressing whether musicians who played in a band or orchestra were employees of either the entity that engaged the performance, or the musician’s band leader or orchestra conductor.”).
137. 17 U.S.C.A. § 101 (2003). A “work made for hire” is defined as (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. Id.
copyright in the work created by the employee even if the employer
did not add any significant creative input into the finished product.\textsuperscript{138} The narrow \textit{Reid} test of employee enunciated by the court is therefore completely appropriate to the work-for-hire provision of the Copyright Act. It would do violence to the idea of granting a copyright, which rewards authors with a monopoly right in a work as a means of encouraging creative works, by allowing employers to gain a copyright in a work that they did not create without significant safeguards.\textsuperscript{139} The narrow \textit{Reid} test helps to carry out this policy. However, these concerns do not apply to Title VII claims in which the employer is discriminating against the worker. Title VII is a broad and remedial statute. Title VII’s "strictures are absolute and represent a congressional command that each employee be free from discriminatory practices."\textsuperscript{140} Therefore, the narrow \textit{Reid} test is inappropriate to the problem of discrimination covered under Title VII.

Further, the policy of respondent superior from which the common law and \textit{Reid} tests were based is vastly different from the policy of Title VII. Unlike the doctrine of respondent superior, Title VII encourages the expansion of employer liability.\textsuperscript{141} The doctrine of respondent superior works to hold an employer liable for the actions of his employees.\textsuperscript{142} Therefore, the employer is being held accountable for the actions of another. A narrow definition of employee is correct for the doctrine of respondent superior since it would be unfair to hold an individual liable for the actions of a person he or she had minimal contact with.\textsuperscript{143} On the other hand, under Title VII cases, the

\begin{itemize}
\item \textsuperscript{138} 17 U.S.C.A. § 201(b). "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." \textit{Id}.
\item \textsuperscript{139} "The Supreme Court has observed that the promotion of the arts and sciences is the primary purpose of the monopoly granted to copyright owners." \textsc{Rochell C. Dreyfuss \& Roberta Rosenthal Kwall, Intellectual Property, Cases And Materials On Trademark, Copyright And Patent Law} (Foundation Press 1996) (citing Fogerty v. Fantasy, Inc., 114 S.Ct. 1023 (1994); Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991); Mazer v. Stein, 347 U.S. 201 (1954).)
\item \textsuperscript{140} Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974); Dowd, \textit{The Test of Employee Status}, 26 WM. \& MARY L. REV. at 87 (stating that "the prohibitions against employment discrimination contained in Title VII are sweeping, and presume an equally expansive definition in order to achieve the statute's goals.").
\item \textsuperscript{141} Dowd, \textit{The Test of Employee Status}, 26 WM. \& MARY L. REV. at 102.
\item \textsuperscript{142} \textit{Id} at 98 (stating the "if done by a servant... and acting within the scope of his authority... the maxim respondent superior is adopted in that case.").
\item \textsuperscript{143} See \textit{Id} at 101 (stating that "the right to control has remained the cornerstone of the common law test of employee status, reflecting a perception of fairness and sound public policy that employers should be held vicariously liable for the acts of employees only when the employer has the means to control that liability.").
\end{itemize}
employer is being held accountable for the employer's own actions. In a Title VII case, the employer is accused of actively discriminating against a worker. The narrow definition of employee developed under the doctrine of Respondent Superior is therefore inappropriate for Title VII claims. Courts have failed to analyze whether the common-law test is compatible with the policies behind Title VII. The common-law test was designed "as a shield to protect employers from unwarranted tort liability, not as a weapon to ensure employee rights."

5. The Reid Factors Are Unfair When Applied to Symphony Musicians

Finally, some of the Reid factors are unfair when applied to symphony musicians and other employees. First, one of the Reid factors is the level of skill of the worker. If a worker is considered highly skilled, it points toward a finding that a person is not an employee but an independent contractor. It seems unfair to penalize an employee for being highly skilled. Highly skilled employees spend years and sometimes decades on perfecting their craft. Therefore, it is particularly nonsensical to keep highly skilled workers from seeking redress from an employer who has lessened their career or employment opportunities via discrimination.

Other Reid factors that the Lerohl Court used against Lerohl was the fact that the Sinfonia did not withhold FICA taxes for its Sinfonia musicians or provide significant benefits. Under the Reid case, tax treatment of the worker and benefits received are considered relevant factors in determining whether the worker is an employee. However, earlier Title VII decisions have pointed out that courts should not place too great a weight upon how a worker is treated for tax purposes or whether the worker receives benefits. For example, in

144. See Dowd, The Test of Employee Status, 26 WM & MARY L. REV. at 101 (stating "these policy considerations are fundamentally different from those that underlie the common law test of employee status limiting an employer's vicarious liability. The policy underlying Title VII encourages the expansion of employer liability to encompass all conduct that deprives individuals of employment opportunities on the basis of race, sex, religion or national origin.").
146. Id.
148. Reid, 490 U.S. at 751-752.
149. Lerohl, 322 F.3d at 492.
150. Reid, 490 U.S. at 751-752.
Eisenberg v. Advance Relocation & Storage, Inc.,\textsuperscript{152} the court stated that if Reid's tax and benefit factors were given too much weight, firms would simply devise compensation packages that include a "nobenefits (sic) clause and a no-tax-deductions clause, thereby all but insuring that the workers are characterized as independent contractors."\textsuperscript{153} Therefore, technical considerations like benefits and treatment under the Internal Revenue Code should not play an important role in determining employment status considering the broad remedial purpose of Title VII.

In addition, applying the Reid factors to symphony musicians leads to unfair results due to the nature of work as a musician. For example, a large part of a symphony musician's time is spent practicing. Most musicians practice 2 to 3 hours per day. Therefore, a typical employment situation one would find in most professions is not possible. Most professionals do not spend a large part of their day honing and maintaining their skills. The majority of professionals merely employ their skills throughout their workday. Further, employment in symphony orchestras is usually only one of the jobs that symphony musicians take. Most musicians teach or give lessons as another source of income. Only the most financially successful of musicians can earn a living merely on performances alone. Therefore, it is unfair to penalize Lerohl and other freelance musicians for choosing not to formally join another symphony orchestra that offers permanent employment.

B. The Decision in Lerohl Was Correct in Some Respects

Despite the fact that the Lerohl Court mistakenly applied the Reid test to a Title VII claim, the court's decision appropriately pointed out the weaknesses in some of the factors of the test. For example, the court criticized the "right to control" factor by citing to the dissenting opinion in the Seattle Opera case.\textsuperscript{154} The dissenting opinion in Seattle Opera questioned "are we to suppose that volunteer firefighters or volunteer rescue workers become employees because the fire chief or the head of the rescue squad directs them?"\textsuperscript{155}

Although the "right to control" was the correct factor to apply in the Lerohl case, such examples as that mentioned by the dissent in Seattle Opera show that application of the factors can lead to incorrect

\begin{footnotes}
\item[152] See generally Eisenberg, 237 F.3d 111.
\item[153] Id. at 117.
\item[154] Lerohl, 332 F.3d at 490-491.
\item[155] Id. at 491.
\end{footnotes}
results. As mentioned earlier, some of the factors such as "level of skill of the worker" and "tax treatment" can lead to unfair results for workers like symphony musicians. Therefore, perhaps a broader test for determining coverage under Title VII needs to be developed.

V. IMPACT

The decision in *Lerohl* continues the mistake made by some courts by applying the *Reid* test to all cases involving employee status determinations even though the cases apply to different statutes. However, there are some that argue that all of the tests of employment status differ only mildly from each other. Despite the differences between the tests as stated by the courts, the various tests are often applied in identical ways. Further, all of the tests have the potential result of denying coverage to someone who has genuinely been discriminated against in an employment setting.

There is an increasing debate among scholars as to whether a new test for determining whether a worker is an employee is really the answer to the inequities in the current system. One of the most interesting ideas for solving the problem is to amend Title VII to include independent contractors. This note will argue that amending

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156. See Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM & MARY L. REV. 75, 85-86 (1984) (stating that the factor analysis is "unduly simplistic" because "this analysis excludes workers from Title VII not on the basis of the realities of their interaction with employers, but rather upon the existence or nonexistence of a limited set of factors.").


158. See Dowd, *The Test of Employee Status*, 26 WM. & MARY L. REV. at 113-114 for an example of a proposed test for determining whether a worker is an "employee." The author states, "among the considerations that might be examined are the structure and nature of the employer's business; hiring, promotion and termination procedures; the structure of compensation and standards of performance; referral to and control of the employment market; and the degree of integration of the worker in the employer's business. Other relevant factors are whether the worker is hired for a particular skill, or is unskilled or trained by the employer; whether the worker can hire others to perform the work without the employer's approval; and whether the worker provides equipment or other resources to perform the work. The means and methods of performance are relevant not to determine the employer's control over the physical conduct of the worker, but rather to analyze the relative power and bargaining position of the employer and the worker so as to determine the potential for employment discrimination." *Id*; See also Yamada, 38 B.C. L. REV. at 259-266 (detailing the various proposals that have been offered for clearing up the determination of employment status issue).

159. *Id*. at 240. The authors of this article feel that despite its popularity among some, the "economic realities" test is not the best solution.

160. See generally Yamada, 38 B.C. L. REV. 239 for a thorough analysis of the issue.
Title VII to include independent contractors is the best solution to the problem.

First, the amount of independent contractors in the workforce is ever increasing.\textsuperscript{161} Less secure job arrangements are starting to take over the traditional blue collar and white collar employment patterns.\textsuperscript{162} Therefore, under the current system, more workers are left without a remedy if discriminated against in the employment setting. The legislature should be mindful of trends in the make-up of the workforce in meeting the purposes of federal employment discrimination statutes. Protecting independent contractors will most effectively serve the broad purpose of Title VII, which is protecting the largest possible number of workers. There is simply no good reason for excluding independent contractors from coverage under Title VII when the purpose of Title VII is to prevent discrimination in the workplace. According to some commentators, "anyone in the zone of interest of the statute who suffers either economic or non-economic injury because of employment discrimination" should be included in Title VII.\textsuperscript{163} The fact that independent contractors make up an increasingly large part of the workforce makes it even more necessary to protect them under Title VII. Faced with the current realities regarding independent contractors in the workforce, the expansion of Title VII to cover independent contractors best serves the intention of Title VII: ensuring the broadest possible reach to Title VII's prohibitions in the hopes of eliminating employment discrimination.\textsuperscript{164}

Additionally, amending Title VII to protect independent contractors will remove the incentive for employers to classify workers as independent contractors to evade discrimination claims.\textsuperscript{165} Employers are sometimes able to avoid Title VII coverage by specifying the terms and conditions of jobs in such a way that the worker will be classified as an independent contractor.\textsuperscript{166} The \textit{Reid} and common-law tests fail to "consider the employee's perspective of the relationship and the employer's ability to manipulate access to employment opportunities and to control the terms and conditions of employment."\textsuperscript{167} Actual

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{161} \textit{Id.} at 243 (noting a survey in which 6.7 percent of the total work force identified themselves as independent contractors).
\item\textsuperscript{162} \textit{Id.} at 245.
\item\textsuperscript{163} Dowd, \textit{The Test of Employee Status}, 26 WM. & MARY L. REV. at 88.
\item\textsuperscript{164} \textit{Id.} at 89.
\item\textsuperscript{165} Yamada, 38 B.C. L. REV. at 266.
\item\textsuperscript{166} Nancy E. Dowd, \textit{The Test of Employee Status: Economic Realities and Title VII}, 26 WM & MARY L. REV. 75, 85 (1984) (stating that "the emphasis on form over substance also permits employers to avoid Title VII coverage simply by following a particular pattern when establishing the terms and conditions of specific jobs.").
\item\textsuperscript{167} \textit{Id.} at 86.
\end{enumerate}
\end{footnotesize}
employees can be “misclassified” as independent contractors. As a result, they will lose their protections under Title VII.

It must be noted that covering independent contractors under Title VII does not damage the traditional definition and understanding of the place of an independent contractor in the workforce. Further, the traditional legal relationship between an employer and an independent contractor will remain the same, except in the case where an independent contractor has been discriminated against by the employer.

Further, including coverage to independent contractors will lead to a decrease in litigation. Litigating whether a worker fits the technical definition of employee will no longer be necessary. Instead, independent contractors will have the full range of arguments afforded to traditional workers under Title VII. Also, litigation regarding the numerous Reid factors will be unnecessary if independent contractors are included under Title VII. This solution will eliminate the factor tests that sometimes unfairly classify certain workers just on the basis of the subtleties of their profession.

It should be noted that this solution should only be applied to Title VII. Other statutes must be independently analyzed to determine whether including independent contractors best suits the purposes of the statutes. In the case of Title VII, it is clear that covering independent contractors best serves its broad remedial purpose.

VI. Conclusion

The policy behind Title VII of the Civil Rights Act of 1964, protecting workers from discrimination, has not been well served by decisions like *Lerohl v. Friends of Minnesota Sinfonia*. Courts continue to rely on an overly narrow definition of “employee” in determining whether an individual is covered under Title VII. This definition has the effect of denying relief to many workers who have been discriminated against during their professional careers. Courts need to develop a broader test for determining if a worker is covered under Title VII in order to accommodate the broad purpose of Title VII. Further, the continuing practice of denying coverage under Title VII to people characterized as independent contractors is nonsensical since independent contractors can also suffer from employment discrimination and should have a proper remedy. Therefore, the legislature should amend Title VII to extend coverage to independent contractors. Such

169. Id.
170. Id. at 266.
measures are necessary to alleviate the current inequities in the administration of Title VII.