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Recommended Citation
Michael R. Lowe, Stirring Muddled Waters: Are Physicians with Hospital Medical Staff Privileges Considered Employees under Title VII or the ADA Act When Alleging an Employment Discrimination Claim?, 1 DePaul J. Health Care L. 119 (1996)
Available at: https://via.library.depaul.edu/jhcl/vol1/iss1/7
STIRRING MUDDLED WATERS: ARE PHYSICIANS WITH HOSPITAL MEDICAL STAFF PRIVILEGES CONSIDERED EMPLOYEES UNDER TITLE VII OR THE ADA ACT WHEN ALLEGING AN EMPLOYMENT DISCRIMINATION CLAIM?

Michael R. Lowe*

INTRODUCTION

Hospital medical staff privileges can be a crucial component of a physician's medical practice. Because physicians often need access to a hospital's clinical facilities and equipment in order to practice within their area of medical specialty, or even simply to treat patients, many physicians depend upon their hospital medical staff and clinical privileges for their financial and professional well-being. Typically, physicians gain access to such facilities only when a hospital grants them medical staff privileges. Consequently, in an increasingly competitive health care market, a denial or termination of a physician's staff privileges can be both professionally and financially devastating. Because of this economic reality, physicians often contest hospital decisions to terminate their staff privileges through private administrative hearings, legal action, or both.

Conversely, hospitals have a paramount interest in maintaining and ensuring the quality of care provided by their medical staffs. Physicians, who do not meet the standard of care established by their host hospital, may find themselves the subject of an adverse staff privileges determination. Hospitals base adverse medical staff privileges decisions on a number of grounds, including a physician's inability to work and get along with others, failure to maintain adequate medical malpractice

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insurance coverage\(^2\) or to meet proper record keeping requirements,\(^3\) lack of professional competence or qualifications,\(^4\) and geographic proximity of a physician's residence to a hospital.\(^5\) These grounds for adverse staff privileges decisions have been challenged by physicians who claim they are based on pretext.

Physicians have responded to adverse staff privileges determinations with a variety of legal causes of action, including antitrust theories, procedural and substantive due process claims, breach of contract actions, defamation lawsuits, federal civil rights actions, and intentional interference with contractual or business relations claims. Physicians have also relied upon federal employment statutes, such as Title VII of the Civil Rights Act of 1964 ("Title VII"),\(^6\) when challenging adverse medical staff privileges decisions. As a result, over the past two decades there have been a proliferation of federal employment discrimination claims alleging racial, sexual, national origin, or disability discrimination in staff privileges decisions.

When adjudicating the physicians' claims, courts have applied federal employment statutes to the independent contractor type relationship that exists between physician and hospital once a physician obtains staff privileges. In doing so, the federal courts have been forced to struggle with the issue of whether a physician with staff privileges is an employee under federal employment statutes.\(^7\)

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\(^3\) See e.g., Tabora v. Gottlieb, No. 92 C 8179, 1995 WL 121567 (N.D. Ill. Feb. 15, 1995).


\(^7\) See 42 U.S.C. § 2000e-5 (1988). It should be noted that Title VII provides that "a person claiming to be aggrieved," a term that could very well encompass more than just employees, can bring employment discrimination claims against employers. This provision may have significant implications for the analysis of staff privileges cases involving employment discrimination claims. However, the inclusion of such analysis is beyond the current scope of this paper.
In most hospitals, physicians with active medical staff privileges are not considered employees, but rather independent contractors. Historically, attempts to challenge medical staff terminations under Title VII were dismissed due to the lack of an employment relationship between physician and hospital. Recently however, courts have held hospitals accountable under Title VII despite finding the physician plaintiff was not an employee of the hospital.

As a result of this recent shift in legal precedent, the issue of whether a staff physician is an employee of a hospital for purposes of the federal employment discrimination statutes is important for three reasons. First, federal court decisions concerning this issue have reached significantly different conclusions, not only throughout individual United States Circuit Courts of Appeals, but also within the circuits themselves. There is a marked split among the courts concerning, not only the existence of an employer-employee relationship between a hospital and a staff physician, but also with regard to how to determine whether such a relationship exists. At this time, there is little consistency among the federal courts in this area, making it difficult for courts and litigants to interpret and apply the existing law.

Second, the advent of managed care in the health care industry, has caused changes in many of the traditional relationships between physicians, hospitals, and health insurance entities. Insurers, physicians and hospitals are often intertwined in complex business entities, contractual arrangements, and financial risk-sharing agreements. Under the guise of "economic credentialing," managed care entities exclude physician providers from their networks based on a physician's economic performance in order to increase efficiency and reduce costs. Physicians are beginning to challenge these decisions, in what are known as "provider exclusion" cases.

Although an employment relationship typically exists between a physician and a managed care entity in certain types of networks such as

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9 Id.
10 See e.g., Pardazi v. Cullman Medical Ctr., 838 F.2d 1155 (11th Cir. 1988); Doe v. St. Joseph's Hosp., 788 F.2d 411 (7th Cir. 1986).
a staff-model health maintenance organization ("HMO"), the relationship between a physician and other managed care entities such as a preferred provider organization ("PPO"), an independent practice association ("IPA") model HMO, or a group-model HMO, is more likely to resemble the independent contractor type of relationship present in staff privilege arrangements between doctors and hospitals. Thus, as a starting point for analyzing managed care credentialing decisions, lawyers representing excluded physicians and managed care entities alike are turning to the extensive, yet inconsistent and confusing case law, that has arisen out of medical staff privileges litigation.11

Third, the Health Care Quality Improvement Act of 1986 ("HCQIA")12 provides immunity from damages to members of professional review bodies in staff privileges cases, but does not provide immunity to actions commenced under state and federal civil rights statutes.13 This is a matter of considerable importance not only because of the racial, sexual, and national origin pluralism of the average hospital's active medical staff,14 but also because HMOs and group practices that conduct some type of formal review process can meet the qualifications for HCQIA immunity.15 Thus, a physician plaintiff who is a member of a protected class and who successfully proves discrimination by a hospital in a staff privileges decision, or by a managed care entity in a provider exclusion decision, might recover damages from the hospital or managed care entity. A physician's employment discrimination claim, however, has no merit unless the physician can first prove he had an employment relationship with the hospital that terminated the doctor's staff privileges, or the managed care entity that excluded the provider.

The purpose of this article is to examine the issue of whether a physician with medical staff privileges at a hospital is an employee of the

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14 Conlon, supra note 9, at 1253.
hospital and, in doing so, to focus on staff privileges cases involving Title VII of the Civil rights Act of 1964 and American with Disabilities Act ("ADA")\textsuperscript{16} claims. To accomplish this objective, the paper will first identify and evaluate several legal theories and tests that courts have relied upon in determining whether the relationship between two parties is that of employer-employee, or rather one of an independent contractor providing services to a buyer. Next, the paper will analyze the myriad of staff privileges case law involving federal employment discrimination claims under Title VII. Additionally, this paper will analyze several staff privileges cases involving claims under Title I of the ADA\textsuperscript{17} against hospitals that have terminated the privileges of a physician who alleges having is a disability.

Finally, because this paper analyzes the existing law regarding employment discrimination claims in staff privileges cases on a case-by-case basis, the analysis lends itself to the conclusion that federal courts have reached a multitude of inconsistent holdings which create a confusing legal framework in which to litigate such cases. As a general matter it should be noted that although federal court decisions in staff privileges cases involving federal employment discrimination claims are inconsistent, it would be very difficult to develop and apply any one test or type of legal analysis that would render consistent results in such cases. Medical staff privileges cases involving employment discrimination claims are extremely fact sensitive. Federal courts have applied different multi-factor balancing tests to these fact-specific cases, but the application of these balancing tests is inherently apt to produce inconsistent outcomes because it requires courts to engage in a "weighing" process that is dependent upon objective as well as subjective determinations.\textsuperscript{18} While it seems that no one test or


\textsuperscript{17} See 42 U.S.C.A. §§ 12111-12117 (1995). The Americans with Disabilities Act consists of four separate titles or subchapters. Title I concerns disability discrimination in employment

\textsuperscript{18} For example, a court applying an eleven factor balancing test could reasonably conclude that after applying the eleven factors to the case at issue that six factors indicate the existence of an employment relationship between the litigants, while five factors do not indicate the existence of such a relationship. A simple "weighing" of this result by the court should require it to determine that an employment relationship exists. However, if controlling precedent had established that one of the eleven factors was the dominant, or perhaps most important factor within the framework of the multi-factor balancing test's analysis, and that particular factor was one of the five which indicated that no
A legal framework is best suited to make the determination of whether an employment relationship exists between a staff physician and hospital, this paper ultimately proposes a new legal framework/test to use when making such determinations. It does so by combining elements of already existing tests with a number of factual and economic considerations that are specific to relationships between physicians and the hospitals that grant them staff privileges.

LEGAL THEORIES/TESTS FOR DISTINGUISHING BETWEEN AN EMPLOYEE AND INDEPENDENT CONTRACTOR

A cursory review of Title VII and the ADA suggests that neither statute applies to medical staff privileges decisions because, physicians typically are not considered to be employees of a hospital. Title VII provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer -

(1) 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.

Title VII further provides that an employer "means a person engaged in an industry affecting commerce 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 that an employee "means an individual employed by an employer.

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The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Also, the ADA's definitions of an employer and an employee are virtually identical to those in Title VII.

Although hospitals easily fit within the Title VII and ADA definitions of an "employer," the plain language of both statutes provides no express indication that physicians with hospital staff privileges are employees of the hospitals. In fact, courts generally treat doctors with staff privileges as independent contractors rather than as employees. Therefore, it appears that neither statute's employment provisions apply to the relationship between a staff physician and a hospital. A closer review of both statutes, however, requires further analysis of the possibility of the existence of an employment relationship between a hospital and a staff physician.

As defined in Title I of the ADA, the term "discriminate" includes in pertinent part:

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

25 See Conlon, supra note 9.
(3) utilizing standards, criteria, or methods of administration -

(A) that have the effect of discrimination on the basis of
disability; or

(B) that perpetuate the discrimination of others who are subject
to common administrative control . . . 27

These ADA provisions could encompass hospital actions taken as part
of a staff privileges determination, thereby allowing a terminated
physician to bring a claim for disability discrimination under Title I of the
ADA. For example, under section 12112(b)(3) of the ADA, a physician
might allege that a hospital utilizes "methods of administration that have
the effect of discrimination on the basis of disability, or that perpetuate the
discrimination of others who are subject to common administrative
control." 28

Typically, hospital medical staffs are self-governing and routinely
administer, either in conjunction with a hospital's board of directors or
independently, the day-to-day interactions of the physicians on such staffs.
Moreover, medical staff members often make the initial decision to
terminate a physician's staff privileges and ad hoc review committees that
hear challenges to adverse medical staff privileges decisions, are usually
comprised of medical staff members. If a medical staff member or a
member of an ad hoc review committee member displays any animus
towards a disabled physician because of that physician's disability, a
decision to terminate a qualified physician with a disability could imply a
discriminatory intent by the medical staff and the hospital, thus creating
possible liability for the decision. In fact, the Joint Commission on
Accreditation for Healthcare Organizations (JCAHO) recently alerted
hospitals that the ADA may prohibit certain kinds of questions generally
asked during physician credentialing procedures, and may require them to

make accommodations for disabled physicians. Moreover, in the absence of specific ADA case law on the question of whether the ADA can be construed to apply to physicians who are non-employee members of a medical staff, the California Medical Association has amended its model medical staff applications and reapplication forms to comply with the ADA.

In addition, the legislative history of Title VII reveals Congress' aim to permit the classification of professionals such as professors, doctors, and lawyers, as employees. As part of the 1972 amendments to Title VII, Congress considered, but did not include, a proposal that physicians and surgeons employed by public or private hospitals be excluded from Title VII's protection. In speaking out against the proposed amendment, Senator Javits stated that:

One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water, that only the blue collar jobs and ditchdiggings jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life. Yet his amendment would go back beyond decades of struggle and of injustice and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them.

Congress' rejection of the proposal to exclude physicians from Title VII's coverage, as well as Senator Javits' statement in support of this

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29 Robin Elizabeth Margolis, Client Memos and Newsletters, 11 No. 9 HEALTHSPAN 34 (October 1994).
30 Id.
32 Id.
rejection, strongly suggests that physicians in certain circumstances can be protected by Title VII. In order for a physician to bring a successful Title VII employment discrimination claim in a staff privileges case, however, the physician must first establish that a valid employment relationship existed between himself and the hospital that terminated his privileges.

Arguably, hospital medical staff physicians may be considered employees of a hospital. In making such a determination, courts might apply one of several different legal tests or frameworks, including one developed by the IRS. Thus, the method or legal theory that a

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34 Taber and King, supra note 27, at 1201.
35 Rev. Rul. 87-41, 1987-1 C.B. 296. According to the IRS, the following 20 factors tend to indicate the existence of employment relationship:

1. The hiring party requires the physician to comply with instructions about when, where, and how he or she is to work.
2. The hiring party provides some type of training for the physician.
3. The physician's services are integrated into the hiring party's business operations.
4. The physician personally renders services.
5. The hiring party hires, supervises and pays assistants to the physician.
6. The physician and the hiring party have a continuing relationship.
7. The hiring party establishes set hours of work.
8. The physician is required to work substantially full time.
9. Work takes place on the premises of the hiring party or the hiring party provides free office space to the physician.
10. The physician is required to perform services in the order and sequence set by the hiring party.
11. The physician is required to submit regular or written reports.
12. The physician is paid by the hour, week or month as opposed to being paid by the job or on a straight commission.
13. The hiring party pays for (or reimburses the physician for) the physician's business and/or travel expenses.
14. The hiring party furnishes medical equipment and supplies and other "significant tools" to the physician.
15. The physician is dependent on the hiring party for facilities at which to perform services. A physician who has significant monetary investment in the equipment and facilities that he or she uses in performing services is more likely to be an independent contractor.
16. The physician has no ability to realize a profit or suffer a loss as a result of his or her services.
17. The physician may not work for more than one entity at a time.
18. The physician's services are not marketed to the general public on a regular and consistent basis. The physician does not have a private practice or business outside and independent from the hiring party.
19. The hiring party has the right to discharge or terminate the physician at any time, without cause, for failure to obey instructions.
federal court uses to determine whether the requisite employment relationship exists in either a Title VII or an ADA staff privileges case is critical.

While the IRS 20-factor test might provide some assistance in staff privileges cases involving a federal employment discrimination claim, it is perhaps better suited for cases involving tax issues. The IRS test was not designed for use in employment discrimination litigation, but rather to aid in the determination of whether a physician is a hospital employee for federal income tax purposes. No one factor in the IRS test, in and of itself, is determinative of whether a physician is an employee of a hospital. Furthermore, like most multi-factor balancing tests, the IRS test is very comprehensive and would be difficult to manage when the facts of a case require a court to apply all twenty factors and balance a number of contrary results in order to make a determination as to whether an employment relationship exists.

Under the IRS test, a case might arise where several factors indicate that a physician is a hospital employee, and several other factors indicate that the physician is not an employee. For example, it is not unusual for a hospital to require a physician with staff privileges to comply with instructions about when, where and how the physician is to work within the hospital (factor 1), and to submit regular or written reports (factor 11). Physicians are often dependent upon hospital facilities to perform services (factor 15), and hospitals often furnish medical equipment for physician use (factor 14), as well as free office space for physician recruits (factor 9). Each of these factors tends to indicate that an employer-employee relationship exists between the physician and the hospital. However, physicians routinely hold staff privileges at more than one hospital and maintain their own independent practice (factor 17).

Hospitals rarely reimburse a physician’s business and/or travel expenses outside of physician recruitment activities (factor 13). Physicians

(20) The physician has the right to end his or her work relationship at any time without incurring liability.

Additionally, the IRS requires that degree of direction and control must be exercised over the physician to create an employer/employee relationship. See Hall and Brewbaker, supra note 12 at § 5 11.10.
often have the ability to realize a profit or suffer a loss as a result of his or her participation on a hospital medical staff (factor 16). And, while the physician performs work on the hospital premises (factor 9), few physicians work substantially full time for one hospital (factor 8), and except for emergency room or on-call rotations, hospitals rarely dictate set hours of work for medical staff physicians (factor 7). Each of these factors tend to establish an independent contractor type of relationship between the physician and hospital. All of these factors could be present in medical staff privileges cases, and weighing or balancing these factors most likely will not produce a conclusive determination of whether a medical staff physician is an employee or independent contractor.36

In the area of employment discrimination, federal courts have developed three tests to unravel the employee/independent contractor conundrum.37 The first test is the traditional common law test of agency based on the employer's right to control an employee. This test is commonly referred to as the "right to control" standard or test. Prior to 1947, courts distinguished an employee from an independent contractor by using this common law test and determining the degree of control that an alleged employer exercised over the work performance of an individual whose status was in dispute.38 If the alleged employer had the right to determine not only what work should be done, but also how it should be done, the worker was deemed to be an employee.39

As an alternative to the "right to control" test, the United States Supreme Court subsequently developed an "economic realities" test under which persons are considered employees if they are, as a matter of economic reality, dependent upon the business to which they render service.40 In Bartels v. Birmingham, the Supreme Court held that the "right to control" test was too narrow for use in deciding employee status for the purposes of far reaching social legislation such as the Social

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36 In fact, research indicates that to date no federal court has applied the IRS 20-factor test in a staff privileges case involving an employment discrimination claim for purposes of determining whether an employment relationship existed between a physician and a hospital.
37 Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985).
Security Act,\textsuperscript{41} and further stated that "[o]bviously control is characteristically associated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service."\textsuperscript{42}

In the wake of the \textit{Bartels} decision, federal courts developed two different standards to determine employee status for purposes of social legislation.\textsuperscript{43} The standard used by the courts has come to depend upon the type of legislation involved. Courts generally use the "economic realities" test in cases involving the Fair Labor Standards Act\textsuperscript{44} ("FLSA"). In these cases, it is the degree of economic dependence of the alleged employees on the business with which they are connected that indicates employee status,\textsuperscript{45} or the absence thereof.\textsuperscript{46}

Other courts have applied a hybrid of the common law "right to control" test and the "economic realities" test to determine employee status for purposes of Title VII.\textsuperscript{47} These cases hold that it is the economic realities of the relationship viewed in light of the common law principles of agency, and the right of the employer to control the employee that are determinative.\textsuperscript{48} The factors that enter into a court's determination of employee status under the hybrid standard are:

1. the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;
2. the skill required in the particular occupation;
3. whether the "employer" or the individual in question furnishes the equipment used and the place

\begin{footnotes}
\item[42] Bartels, 332 U.S. at 130.
\item[45] See e.g., Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981); Urey v. Pilgrim Equip. Co., 527 F.2d 1308, 1311 (5th Cir.), \textit{cert. denied}, 429 U.S. 826 (1976).
\item[46] Urey, 527 F.2d at 1311.
\end{footnotes}
of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer;” (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.49

Additionally, the Spirides court stressed the importance of the employer's right to control an employee's performance by stating that:

Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor to review here, as it is at common law and in the context of several other federal statutes. If an employer has the right to control the individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist. 50

Federal courts have generally refrained from using the broader "economic realities" test in Title VII cases, and instead have employed the hybrid test set forth in Spirides. In medical staff privileges cases, however, a number of federal courts have applied the "economic realities" test. 51 While other federal courts have reverted to using the "right to control" or agency test in medical staff privileges cases involving a Title VII claim, a majority of the federal courts that have considered the issue of whether a physician is an employee of a hospital in a Title VII medical staff

49 Spirides, 613 F.2d at 832.
50 Id. at 831-32.
52 See e.g., Flanagan v. Aaron E. Henry Community Health Servs. Ctr., 876 F.2d 1231 (5th Cir. 1989).
privileges case have employed the hybrid test from \textit{Spirides}.\textsuperscript{53} In doing so, these courts have reached a variety of different holdings, providing for a somewhat confusing and disjointed legal landscape not only among the federal circuit courts, but also in some instances within the circuits themselves.

**TITLE VII CLAIMS AND EMPLOYER-EMPLOYEE RELATIONSHIPS IN MEDICAL STAFF PRIVILEGES CASES**

Federal courts differ significantly in their conclusions as to whether a physician with medical staff privileges at a hospital is an employee of that hospital under the provisions of Title VII. Despite these broad variances in federal court decisions, the cases considering this issue can be grouped into three categories. Specifically, courts have found either no employment relationship between a physician and a hospital, a direct employer-employee relationship between a doctor and a hospital, or an indirect employment relationship between a physician and a third party other than a hospital. In finding that a physician has established an employment relationship with an independent third party, courts have held hospitals liable on the theory that termination of the physician's medical staff privileges is equivalent to interference with the third party employment relationship. Thus, several courts have allowed a physician to maintain a federal employment discrimination claim under Title VII because of the existence of an indirect employment nexus. An in-depth analysis of the cases in each of these categories reveals inconsistencies not only in the case holdings, but also in the various courts' reasoning and application of law to the facts in each case.

At least two federal courts have concluded that a physician with staff privileges may be a hospital employee for the purposes of adjudicating the physician's Title VII employment discrimination claim against the hospital.\textsuperscript{54} In \textit{Cabaniss v. Coosa Valley MedicalCtr.}, the court held that a nurse anesthetist's ("CRNA") status as an employee within the meaning of Title VII was a question of fact.\textsuperscript{55} While the \textit{Cabaniss} court ultimately granted the hospital's motion for summary judgment, the court also noted that the CRNA could be an employee of the hospital.\textsuperscript{56}

The \textit{Cabaniss} decision is significant in a staff privileges analysis because a CRNA's relationship with a hospital strongly resembles that of a doctor with medical staff privileges. In fact, the CRNA in \textit{Cabaniss}, although initially an employee of the defendant hospital, eventually provided her services to the defendant hospital on a contractual basis.\textsuperscript{57}

The defendant hospital contended that the plaintiff was not an "employee" within the meaning of Title VII, and listed several facts in support of its argument. The hospital noted that it did not pay the plaintiff any wages, did not control the plaintiff's working hours or on-call schedule, did not provide the plaintiff any benefits, annual leave, or vacation, and did not pay Social Security taxes on behalf of the plaintiff. Furthermore, the hospital presented evidence that neither it nor the plaintiff had intended to enter into an employment relationship.

The plaintiff CRNA countered the hospital's argument by offering evidence that she was required to have affiliate privileges with the hospital, that she had to work under the direction and supervision of a physician, and that all of the equipment and supplies used in the performance of her job were provided by the hospital. The plaintiff also contended she was an employee of the hospital for Title VII purposes because the hospital retained the right to control the manner of her performance. In support of


\textsuperscript{55} \textit{Cabaniss}, 1995 WL 241937 at *8-9.

\textsuperscript{56} \textit{Id.} at *21.

\textsuperscript{57} The plaintiff nurse anesthetist in \textit{Cabaniss} actually established her own partnership business with several other health care providers and subsequently contracted with the hospital for her services.
this argument, the plaintiff relied upon *Pardazi v. Cullman Medical Ctr.*, a case adopting the *Spirides* 12-factor hybrid test. In considering this argument together with the available evidence, the court applied the 12-part hybrid test from *Spirides*.

Although the factors in support of the hospital's argument that the CRNA was an independent contractor seemed to outweigh factors supporting the nurse's contention that she was an employee, the court concluded surprisingly that the plaintiff "may be [an] employee[] within the meaning of the Title VII statute." In noting "[t]here may be at least a question of fact as to whether [the hospital] retained the right to control the manner and means of the performance of [the CRNA's] job . . . .", the court appeared to rely upon the *Spirides* court's direction that the extent of an employer's right to control the worker's performance is the most important factor that a court must consider under the hybrid test. Thus, the *Cabaniss* court concluded the plaintiff could be an employee of the hospital for Title VII purposes and "there was at least a question of fact as to whether [the hospital] retained the right to control the manner and means of the plaintiff's job performance." In a footnote, however, the court clearly noted that it did "not definitively decide this issue," and that it did "not reach it as a basis for its final decision."

Interestingly, in concluding that a direct employer-employee relationship existed between the CRNA and the hospital, the court disregarded the plaintiff's contention that she was entitled to Title VII protection because the statute did not require that a defendant be an "employer" or the plaintiff an "employee" in order for discrimination that affects a term or condition of the plaintiff's employment to exist. This type of argument has been advanced by physicians in a number of other cases in which federal courts have found an indirect employment

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58 *Pardazi v. Cullman Medical Ctr.*, 838 F.2d 1155 (11th Cir. 1988), rev'd 896 F.2d 1313 (11th Cir. 1990).
60 Id. at *21.
61 Id.
62 Id.
63 Id. at *30, n.20.
relationship, thereby allowing the physician to bring a Title VII claim against a hospital that terminated the physician's staff privileges. In fact, the Eleventh Circuit has held in favor of a physician who stated a claim for relief under Title VII based on an allegation that a hospital's denial of the physician's staff privileges interfered with his employment relationship with a third party. Although the Cabaniss court acknowledged Pardazi in its evaluation of the Spirides hybrid test, it failed to analyze the plaintiff's indirect employment relationship argument, opting instead to conclude that a direct employer-employment relationship "may" exist.

In a similar case involving a radiologist's Title VII action against a hospital for the termination of its agreement with the radiologist, the Ninth Circuit held that the radiologist provided sufficient evidence to prove an employer-employee relationship for Title VII purposes. Like the court in Cabaniss, the Ninth Circuit in Mitchell chose to distinguish its case from existing the existing precedent of Gomez v. Alexian Bros. Hosp., in its own circuit that had involved an employment discrimination claim in a staff privileges case. In Gomez, the Ninth Circuit held that the language of Title VII forbidding discrimination in employment encompasses situations in which a defendant subject to Title VII interferes with an individual's employment opportunities with another employer. Although the plaintiff in Mitchell argued that the defendant hospital had interfered with his employment relationship with the professional corporation of which he was a sole shareholder, the Ninth Circuit rejected this argument based upon the belief that this was not the type of employment relationship Congress had intended to protect under Title VII.

Instead, citing the Ninth Circuit's decision in Lutcher v. Musician's Union Local 47, the Mitchell court first noted that a "plaintiff need not aver the existence of a protected employment relationship with the defendant, but rather could state a claim under Title VII by averring that

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65 See subpart "C" infra.
66 See Pardazi v. Cullman Medical Ctr., 838 F.2d 1155, 1156 (11th Cir. 1988).
69 Id. at 1021.
70 Mitchell, 853 F.2d at 767.
71 Lutcher v. Musician's Union Local 47, 633 F.2d 880 (9th Cir. 1980).
a defendant's actions interfered 'with an individual's employment opportunities with another employer.'

The court then noted, however, based on its decision in *Lutcher*, "there must be some connection with an employment relationship for Title VII protections to apply." Thus, the Ninth Circuit concluded in *Mitchell* that the plaintiff had not alleged any facts that would support a finding of an employment relationship between plaintiff and his patients for purposes of Title VII, and therefore, failed to state a claim for relief under Title VII based on the hospital's alleged interference with his third party employment opportunities.

Moreover, the *Mitchell* court also rejected the plaintiff's argument that the defendant hospital interfered with his employment relationship with a professional corporation. In doing so, the court further distinguished its case from that in *Gomez* by stating that while *Gomez* involved a corporation that employed a number of doctors who rendered medical services as part of the corporation's group medical practice, "[i]n contrast, Dr. Mitchell is both the sole shareholder and sole employee of his professional corporation."

The *Mitchell* court concluded ultimately that a direct employer-employee relationship existed between the plaintiff physician and the defendant hospital. The court based this holding on the fact that the plaintiff was paid by the hospital rather than by his patients, as well as the inference that the hospital enjoyed considerable control over the "means and manner" of the plaintiff's performance. Additionally, the court found that because the plaintiff did not aver that his relationships with his patients in any way diverged from the traditional physician/patient relationship, his allegations that the hospital interfered with his patient relationships failed to state a claim for relief under Title VII.

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72 *Mitchell*, 853 F.2d at 767.
73 Id.
74 Id.
75 Id.
76 Id.
78 Id.
79 Id.
It is interesting to note that both the *Cabaniss* and *Mitchell* courts emphasized that the defendant hospitals retained considerable control over the plaintiffs' performance, but in *Mitchell* the hospital paid the radiologist, while in *Cabaniss* the nurse anesthetist was paid by the partnership she had joined to provide anesthesia services to the hospital on a contractual basis. Furthermore, while the *Cabaniss* court relied directly upon the hybrid test established in *Spirides*, the *Mitchell* court concluded that it should employ a fact-specific inquiry that "depends upon the economic realities of the situation," and that "a number of factors should be considered when determining whether an employment relationship existed, the primary one being the extent to which the 'employer' has a right to control the means and manner of the worker's performance." In reaching this conclusion, the Ninth Circuit relied upon its previous decision in *Lutcher*. A close examination of *Lutcher* reveals, however, that the Ninth Circuit in that case cited to *Spirides* where it adopted its test for determining whether an employment relationship exists between two parties. Therefore, it appears that while the *Mitchell* court never expressly stated that it was employing the *Spirides* 12-factor hybrid test in its analysis, the court did actually apply the hybrid test to Dr. Mitchell's claim.

While these cases may seem relatively consistent in that they both find a direct employer-employee relationship as part of their holdings, both the factual underpinnings of the cases as well as the legal analysis employed by the courts to determine whether there is an employee-employer relationship in their respective cases, are somewhat inconsistent. Moreover, the cases themselves seem inconsistent with regard to their own precedent within the Eleventh and Ninth Circuits. While the *Mitchell* court distinguished its facts and its holding from that in *Gomez*, the court in *Cabaniss*, despite the plaintiff's pleas, failed to consider the argument that a hospital can interfere with a physician's or CRNA's third party employment relationships as set forth in *Pardazi*. This is exactly the type of inconsistency that seems to typify the majority of staff privileges cases involving Title VII employment discrimination claims.

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80 Id. at 766.
81 Id.
82 Lutcher v. Musician's Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980).
Cases Finding No Employer-Employee Relationship

A number of federal courts have held that no direct or indirect employment relationship exists between a hospital and staff physician. In what has become a leading case on this issue, the United States District Court for the Southern District of New York held that there was no employment relationship between a hospital, a college, and a voluntary medical staff.

The plaintiff in Beverley v. Douglas brought a civil rights action to challenge the denial of her application for voluntary attending privileges at the hospital. In reaching its decision, the court found the hospital had both a full-time attending staff and a voluntary attending staff, and that the full-time staff physicians were employees of the hospital and the college, but the voluntary staff doctors were not employees.

The court based its conclusion on its application of the conclusion, 12-factor Spirides hybrid test to the voluntary staff’s relationship with the teaching hospital and held that “[c]onsideration of each of the relevant factors leaves no room to doubt that the relationship between the Hospital and the voluntary staff is not one of employment.” As part of its analysis of the case under the Spirides test, the court noted that:

There is a sharp delineation in the duties, functions, and relationship to the Hospital and the College of the two groups . . . full-time physicians have Hospital- based practices. Physicians with voluntary

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84 Beverley, 591 F. Supp. at 1327.

85 Id. at 1323 (stating that the hospital was a teaching hospital affiliated with the Cornell University Medical College).

86 Id. at 1327.

87 Id.
privileges have practices outside the Hospital and are self-employed or are professional corporations. Full-time attending staff members are paid a salary by the Hospital, from which income and social security taxes are withheld, while voluntary staff members receive no salary. The licensing fees and professional dues of the full-time attending physicians are paid by the hospital, which also provides them with retirement benefits, health and life insurance, and coverage under the Hospital's malpractice insurance policy; voluntary attending staff members receive no such benefits. The Hospital provides office space and support staff for full-time attending staff; the voluntary staff members have no offices at the Hospital. The Hospital exercises some control over the work of its full-time attending physicians - it can direct staff members to work at affiliated hospitals, for example, and can hold full-time attending physicians accountable for their time. No such control is exercised over voluntary attending doctors.  

Attempting to counterbalance these numerous factors, the plaintiff argued that voluntary physicians attended clinics and taught students at the request of the hospital's department chairmen. The court responded by stating that "[t]hose facts shed no light on whether the voluntary staff physicians are employees of the Hospital, because they would apply equally to an independent contractor, or even to a physician who volunteered his or her services to the Hospital without requiring the quid pro quo of admitting privileges."  

The plaintiff next argued that even if there was no employment relationship between the voluntary staff and the hospital, her application for voluntary admitting privileges would, nevertheless, come under Title VII coverage because the Hospital's denial of her application "interfered with plaintiff's employment opportunities" and caused her to lose income. In support of her argument, the plaintiff cited several cases that held a physician may come under Title VII protection if a defendant hospital significantly affected or controlled the plaintiff's access to other

88 Id. (emphasis added).
90 Id.
employment opportunities in a discriminatory manner. The court, however, rejected the plaintiff's indirect employment argument noting that "[e]ven assuming that plaintiff has alleged that the Hospital's denial of her application for voluntary attending privileges interfered with her relationship to her patients, her relationship to her patients is not one of employment." The Beverley court also pointed out that the plaintiff in Beverley did not state she had lost patients or was prevented from taking patients because she had no admitting privileges at the hospital, unlike other cases in which a plaintiff is prevented from entering into employment relationships because the hospital blocks physical access to a potential employer. The court further noted that the plaintiff admitted that there was no question the relationship between a physician and his or her patient is that of an independent contractor, and that "[i]n order to invoke Title VII, plaintiff must allege and prove some link between the defendant's actions and an employment relationship." Because the court found no such connection in Beverley, it granted summary judgment to the hospital.

It is important to note that while other courts within the same circuit have applied different tests and reached rather inconsistent holdings in Title VII staff privileges cases, the Southern District of New York has not. Several years after the Beverley decision, a case arose in that district in which a doctor sued the Cornell University Medical College alleging civil rights violations for failure to continue his appointment as a visiting lecturer or to assign him teaching duties. Relying upon the Spirides hybrid test and the Beverley decision, the court in Tadros v. Coleman concluded that a plaintiff must render a putative employer some kind of service from which the employer willingly derives a benefit, and that a

92 Beverley, 591 F. Supp. at 1328.
93 Id. at 1328, n. 24.
94 Id. at 1328 (footnote omitted).
95 Id.
volunteer is not an employee and cannot maintain an action under Title VII. Thus, the court in Tadros dismissed the plaintiff's complaint.

At least two other jurisdictions have followed the Beverley court's holding. In Diggs v. Harris Hosp.-Methodist, Inc, the Fifth Circuit held that a employer-employee relationship did not exist between a physician and a hospital which terminated the physician's staff privileges. The plaintiff in Diggs advanced two theories of Title VII coverage, alleging both that she was an employee of the hospital and that Title VII encompasses interference by an employer with a person's access to the employment market. In rejecting the plaintiff's argument that she was an employee of the hospital the court applied the Spirides hybrid test and found that "[a]s a matter of economic reality, Diggs, as an obstetrician-gynecologist, is dependent upon having hospital staff privileges in order to pursue her medical practice." The court, however, focused on the control factor and concluded that while the hospital supplied the tools, staff and equipment utilized by the plaintiff and imposed standards upon physicians with staff privileges, it did not direct the manner or means by which the plaintiff rendered medical care. Furthermore, the court noted that the hospital did not pay the plaintiff a salary, nor did it pay the plaintiff's licensing fees, professional dues, insurance, taxes, or retirement benefits.

The Fifth Circuit also rejected the plaintiff's contention that even if she did not have an employment relationship with the hospital, the alleged discrimination came under Title VII coverage because the hospital's actions interfered with her employment opportunities. In rejecting this theory the Fifth Circuit followed the Beverley court's reasoning and noted that:

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97 Id. at 1001-03.
98 Id. at 1012.
100 Id. at 274.
101 Id. at 273.
102 Id.
103 Id.
The employment opportunities to which [the plaintiff] points were her potential treatment arrangements with private patients. . . . A Title VII claim must involve discriminatory conduct that affects an employment relationship of the complainant, as determined by application of the economic realities/common law control test.

Under the above test, [the plaintiff's] relationship with her patients is decidedly not one of employment. Her patients did not control the manner and means of her professional treatment. A physician's work involves considerable skill. Further, patients do not furnish the equipment, instruments, supplies, and support staff used in a physician's rendition of medical care. Payment is for services rendered, not on-going compensation. . . .

The United States District Court for the District of Columbia has also followed the reasoning/holdings of Beverley and Diggs. Unlike the consistent and homogeneous decisions from the Fifth Circuit and the Southern District of New York, however, the decisions in Samuels v. Rayford and Johnson v. Greater Southeast Community Hospital Corporation are inconsistent with their circuit's case law. While the United States Court of Appeals for the District of Columbia Circuit previously held that a private duty nurse could maintain a Title VII employment discrimination action against a hospital even though the parties did not stand in a direct employment relationship, both the Johnson and Samuels courts reached contrary holdings.

In Johnson, the district court considered an African-American physician's argument that Title VII applies to conduct that interferes with employment relationship such as the physician-patient relationship, and that medical staff privileges at the defendant hospital provided clear employment opportunities for practicing physicians. In evaluating this argument under the 12-factor, hybrid test from Spirides, the court provided a factor-by-factor analysis of the plaintiff's argument and held that

105 Id. (emphasis added).
the criteria indicated the existence of a classic independent contractor relationship, and concluded that "[s]ince plaintiff's status is that of an independent contractor and not an employee, he may not invoke Title VII as a basis for his claim against the Hospital."

In order to distinguish the circuit decision in *Sibley Memorial Hosp. v. Wilson*, the *Johnson* court applied the twelfth and most important *Spirides* factor, the ability of the alleged employer to control the means and manner of the plaintiff's performance. In doing so, the court noted that:

In *Sibley*, the hospital prevented plaintiff from entering into employment relationships with patients by blocking plaintiff's physical access to his potential employers. The hospital therefore had complete control over plaintiff's ability to secure potential employment. This is not true for Dr. Johnson. Unlike the nurse in *Sibley*, Dr. Johnson's access to potential patient-employers is not controlled by the Hospital . . . [that] may control the premises . . . but . . . has no absolutely no control over Dr. Johnson's ability to secure patients and to enter into employment relationships with the patients.

Consequently, based on its application of the *Spirides* test, and in particular the court's finding that the hospital in no way controlled the plaintiff physicians employment opportunities with his patients, the *Johnson* court held that there was no employer-employee relationship implicated in the physician's medical practice at the hospital.

In *Samuels*, the same district court considered an issue similar to that in *Johnson* when an African-American female physician brought an action

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109 *Id.* at 155-56. In applying the first eleven factors of the *Spirides* test, the court determined that: (1) a physician's work is normally conducted without supervision by the patient; (2) the practice of medicine is a highly skilled and specialized profession; (3) neither the equipment nor the place of work is provided by the patient; (4) a physician's work with respect to individual patients is usually brief and/or episodic; (5) the method of payment varies with patient and the particular services rendered; (6) the work relationship can be terminated at will by either the patient or the physician; (7) no annual leave is provided by the patient; (8) the services provided by the physician are typically not an integral part of the work the patient; (9) the patient provides no retirement benefits for the physician; (10) the patient pays no social security taxes; and (11) patients generally do not intend to become a physician's employer.

110 *Id.* at 156 (emphasis added).

111 *Id.*
under the District of Columbia Human Rights Act ("DCHRA") after a hospital terminated her staff privileges. The plaintiff conceded in her complaint that she was not an employee of the hospital, but argued that the defendants interfered with her ability to work for the hospital's patients. As part of its analysis of the plaintiff's claim, the court stated that "[w]ithout question, Sibley holds that Title VII (and, therefore, the DCHRA) does not require an employer-employee relationship between plaintiff and defendant." But the Samuels court also noted that the Sibley court did not continue its analysis to answer the question posed in the Samuels case of whether a plaintiff must stand in an employer-employee relationship with a third party to impose Title VII liability on a defendant. While several other courts analyzed this issue in light of Sibley, and held there is no need for an employer-employee relationship in order to impose Title VII liability, the Samuels court refused to adopt such a broad reading. The court concluded that "[i]n the absence of legislative guidance or precedent in this jurisdiction . . . the . . . DCHRA requires [that] an employer-employee relationship exists either between plaintiff and defendant or between the plaintiff and a third-party." Additionally, relying in part on the Beverley and Diggs decisions, the Samuels court held there was no employer-employee relationship between a physician who is an independent contractor and her patients.

While consistent with each other, the Johnson and Samuels decisions are inconsistent with the holding in Sibley for two reasons. First, although the Johnson court distinguished its case from Sibley using the "control" factor from Spirides, the court's enumeration of the other eleven factors from Spirides would change the holding of Sibley if applied to a private

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113 Id.
114 Id.
116 Samuels, 1995 WL 376939, at *6 (emphasis added).
117 Id. at *7.
duty nurse-patient relationship. In other words, the analysis applied by the Johnson court to find the relationship between a physician and patient is that of an independent contractor, would likely reach the same result if it was applied to the private duty nurse in Sibley. This outcome seems inconsistent with Sibley's holding because the appellate court interpreted Title VII as extending beyond the bounds of an ordinary employment relationship and also applicable to individuals who do not stand in a direct employment relationship with an employer.

The Sibley case involved a male private duty nurse who filed a Title VII sex discrimination claim against a hospital which refused to allow him to care for female patients. Although the plaintiff had no direct employment relationship with the hospital, the court held that Title VII had a broader scope than the confines of the ordinary employment relationship. In doing so, the court emphasized that Title VII uses the word "individuals," and therefore refrained from restricting the Act to only direct employer-employee relationships.

Second, the Sibley court's finding of an employment relationship, as well as similar holdings by courts in at least four other circuits based on their broad reading of Sibley, are inconsistent with the Johnson and Samuels decisions. It is odd that courts in other circuits would follow what amounts to some rather tenuous, but persuasive, authority from the

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118 Johnson v. Greater Southeast Community Hosp. Corp., 903 F. Supp. 140 (D.D.C. 1995). An application of the eleven factors to the relationship between a private duty nurse and a patient reveals the following: (1) the nurse's duty is normally conducted without the patient's supervision, but more likely that of a physician; (2) nursing is a highly skilled and specialized profession; (3) neither the equipment nor the place of work is provided by the patient if the nurse is performing his or her services at a hospital; (4) the nurse's work with respect to the patient is normally brief (i.e. the length of the patient's hospital stay); (5) the patient typically does not pay the nurse's salary; (6) the work relationship can theoretically be terminated by either party; (7) no annual leave is provided by the patient; (8) the services provided by the nurse are typically not part of the patient's business or work; (9) the patient provides no retirement benefits for the physician; (10) the patient pays no social security taxes; and (11) patients generally do not intend to become a nurse's employer.


120 Id.

121 Id.

D.C. Circuit, while federal district courts within the circuit itself have not followed seemingly mandatory authority in their own cases. This juxtaposition of case authority, however, is not unusual in staff privileges cases involving Title VII employment discrimination claims. It appears as though courts will read and apply the existing case law either broadly or narrowly in order to reach the outcome the courts expect or desire in the particular staff privileges case. This is even more apparent upon analysis of other staff privileges cases in which courts have concluded that a physician may bring a Title VII claim based on the existence of some indirect or third party employment relationship.

Cases Finding an Indirect or Third Party Employment Relationship

As noted above, the seminal case with regard to third party employment relationships in Title VII staff privileges cases seems to be *Sibley Memorial Hosp. v. Wilson.* Perhaps the biggest irony besides the refusal of the district courts in the D.C. Circuit to follow *Sibley,* is that *Sibley* involved a nurse rather than a staff physician, yet other courts have chosen to apply this factually distinctive case to cases involving termination of a physician's staff privileges.

At least four other circuits have adopted *Sibley's* broad reading of Title VII in considering whether a staff physician may maintain a Title VII employment discrimination action against a hospital that terminates a physician's privileges. In *Pao v. Holy Redeemer Hosp.,* a Chinese doctor brought suit under Title VII on the theory he was denied staff privileges on the basis on his ethnic background. The United States District Court for the Eastern District of Pennsylvania concluded that the case fell "quite clearly within the line of cases beginning with *Sibley* . . ." Rather than applying the *Spirides* hybrid test, however, the court looked only at the economic control the hospital had over the physician's practice. Concluding the hospital had influence over the physician's

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123 *Sibley*, 488 F.2d at 1338.
124 *See Christopher,* at 936 F.2d at 870, *cert. den[cid],* 502 U.S. at 1013; *Pardazi,* 838 F.2d at 1155; *Doe,* 788 F.2d at 411; *Pao,* 547 F. Supp. at 484.
125 *Pao,* 547 F. Supp. at 494.
126 *Id.*
ability to find prospective patients, the court determined the hospital maintained significant control over Dr. Pao's access to other employment opportunities.\textsuperscript{127} Therefore, the court held an employment relationship existed between the physician and the hospital.\textsuperscript{128}

After \textit{Pao}, two other cases in the Eastern District of Pennsylvania held that an employment relationship can exist between a medical resident and a hospital based on staff privileges.\textsuperscript{129} \textit{Amro v. St. Luke's Hosp} involved a Title VII claim by a physician who was a surgical resident at the defendant hospital when the hospital denied his application for staff privileges. In \textit{Amro}, the court applied the \textit{Spirides} hybrid test to determine whether an employment relationship existed.\textsuperscript{130} Through its analysis of the 12 factors, the court concluded "the hospital does not pay the doctors who have staff privileges any salary, nor provide them with any retirement benefits, vacation plans or other forms of remuneration . . . [and] does not supervise their work or make any demands of the doctors."\textsuperscript{131} Thus, the court stated these factors suggested the defendant hospital was not an employer as defined by Title VII.\textsuperscript{132} The court, however, did not end its analysis at this point. Citing the earlier \textit{Pao} decision and the Pao court's use of the broader "economic realities" test, the court in \textit{Amro} stated that:

\begin{quote}
[The] opinion still can be relied upon to show that a hospital maintains economic control over a doctor. Moreover, the present case involves a surgeon who would be unable to practice his specialty without the use of the hospital's facilities rather than an ophthalmologist as in \textit{Pao}. Also, the fact that the defendant hospital can influence other hospitals across the country on their decision to hire Dr. Amro demonstrates the economic control that St. Luke's has over the plaintiff. \textbf{This control aspect is the most important fact in the hybrid test and could}
\end{quote}

\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.}
\textsuperscript{130} \textit{Amro, 1986 WL at *3 (citing EEOC v. Zippo Mfg. Co., 713 F.2d 32, 37 (3d Cir. 1983) which adopts the \textit{Spirides} hybrid test).}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.}
conceivably outweigh the other factors to characterize the hospital as an employer for Title VII purposes.\textsuperscript{133}

Relying on the Third Circuit's decision in \textit{EEOC v. Zippo Mfg. Co}, however, the court concluded that "even though the defendant hospital may exercise economic control over the plaintiff's future ability to earn income, this is not sufficient to counterbalance all of the factors which tend to classify the doctor as an independent contractor."\textsuperscript{134}

But despite this conclusion, the \textit{Amro} court still managed to find an employment relationship between the resident physician and the defendant hospital. Noting that Title VII protects individuals in the "terms, conditions, or privileges of employment," the court looked to the prior contractual relationship the plaintiff had established with the hospital as a surgical resident.\textsuperscript{135} Relying upon the United States Supreme Court's decision in \textit{Hinshon v. King & Spalding},\textsuperscript{136} the \textit{Amro} court concluded that the hospital's consideration of the plaintiff for staff privileges was a fringe benefit of employment.\textsuperscript{137} Therefore, the court held that even though the right to have staff privileges was not a contractual provision in the plaintiff's contract, "it would still be actionable under Title VII as a benefit which cannot be doled out in a discriminatory manner."\textsuperscript{138}

In \textit{Mallare v. St. Luke's Hosp.}, the district court held it could not conclude "as a matter of law, that the defendant [hospital] is not the prospective 'employer' of the plaintiff under the circumstances here present."\textsuperscript{139} In reaching this decision, the court determined that the "proper standard to apply to the determination of employment status for Title VII purposes in this Circuit is the hybrid standard described in \textit{Zippo}\textsuperscript{140} in which the Court takes, while taking into account the economic realities of the situation presented, focuses on the employer's right to control the
employee." Based upon analysis of all 12 factors from the Spirides-Zippo hybrid test, the court determined that:

[A] simple counting of the eleven enumerated factors in the context of a doctor/hospital relationship would seem to weigh somewhat more heavily in favor of no employment relationship. We must keep in mind that the factors themselves are mere aids in determining the ultimate question of control of the means and manner of the "employee's" job performance and that the Court is also required to consider the economic realities of the situation. When those general principles are also weighed in the balance, the question of the existence of an employment relationship for Title VII purposes becomes much closer. While control over the manner of job performance in the sense of supervision of discrete tasks is missing, ultimate control can be exercised by a hospital in the sense that privileges can be withdrawn if a doctor's performance does not comport with hospital standards. Certainly, the withholding or withdrawal of staff privileges allows a hospital to control the means of a doctor's job performance to the extent that the work must be performed in a hospital setting, using hospital equipment and support staff.

Based on this reasoning, the court held that material issues of fact existed as to whether the hospital was the employer of the physician for purposes of Title VII, and thus, denied the hospital's motion for summary judgment. In arguendo, it is important to note the inconsistencies that exist between the holdings of Amro and Mallare, two cases that involved practically the same issue, as well as analogous factual situations. In both cases, the defendant was the same hospital (St. Luke's). The plaintiffs were both medical residents at St. Luke's who brought national origin discrimination claims under Title VII after their applications for staff

141 Mallare, 699 F. Supp. at 1129.
142 Id. at 1130 (emphasis added).
143 Id. at 1133. See also Mousavi v. Beebe Hosp., 674 F. Supp. 145 (D. Del. 1987), aff'd, 853 F.2d 919 (3d Cir. 1988) (applying Spirides/Zippo hybrid test and holding that physician's potential relationship with hospital as a neurologist with staff privileges was a relationship between an employer and employee for purposes of Title VII, and, thus, the physician had standing to bring suit under Title VII, even though the potential relationship would not be a formal employment relationship).
privileges at St. Luke's were denied by the hospital. Both cases were decided by courts in the Eastern District of Pennsylvania. Furthermore, both courts employed the same legal analysis, using the Spirides-Zippo hybrid test, to determine if an employment relationship existed between the hospital and the plaintiffs, and both courts recognized the control factor as the pivotal issue under the hybrid test. Yet despite the multitude of legal and factual similarities, the courts reached seemingly opposite conclusions concerning the defendant hospital's ability to control the plaintiffs' employment opportunities. Such inconsistencies perhaps serve to demonstrate the confusion that parties can expect to encounter while litigating a staff privileges case involving a Title VII employment discrimination claim.

The Eastern District of Pennsylvania is not the only jurisdiction that has struggled with the issue of an indirect or third party employment relationship in a medical staff privileges case. The Seventh Circuit, as well as federal district courts in that jurisdiction, have considered the issue and, while they have reached consistent conclusions, they have not employed consistent legal reasoning to reach their conclusions. Furthermore, what otherwise might be considered to be the Circuit's leading staff privileges case involving an employment discrimination

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144 The Amro court concluded that "[e]ven though the defendant hospital may exercise economic control over the plaintiff's future income, this is not sufficient to counterbalance all the other factors which tend to classify the doctor as an independent contractor." Amro v. St. Luke's Hosp., No. Civ. A. 84-1355, 1986 WL 766 at *3. In denying the defendant hospital's motion for summary judgment and concluding that it could not say as a matter of law that the defendant hospital was not the "prospective employer" of the plaintiff, the Mallare court concluded that:

[a] doctor who practices surgery or expects to deliver babies depends upon access to a hospital for his patients and is unlikely to attract many patients without such access. Where, as here, there is only one hospital in the area in which the doctor expects to practice, denial of staff privileges there severely limits, if it does not completely foreclose, the opportunity to develop a full practice....

Mallare, 699 F. Supp. at 1131 (emphasis added).

145 Mallare, 699 F. Supp. at 1131, n.1 (noting that the Third Circuit has never specifically addressed the issue of whether Title VII applies to doctors who have been denied staff privileges).

claim,\textsuperscript{147} has been called into question and seems to provide only limited guidance in staff privileges cases involving Title VII employment discrimination claims.

In \textit{Doe v. St. Joseph's Hosp.}, the Seventh Circuit held a physician who was not an employee of a hospital that terminated the physician's staff privileges could maintain a claim under Title VII.\textsuperscript{148} The plaintiff in \textit{Doe} sued the hospital and its board of directors, administrators, and the medical staff executive committee after the hospital terminated her staff privileges. She alleged the defendants had terminated her staff privileges because she was Korean. While the district court dismissed the claim \textit{sua sponte}, the Seventh Circuit reversed and remanded in part, holding the plaintiff should have been allowed to show the defendants discriminatorily interfered with her employment opportunities with prospective patients who were her "ultimate employers."\textsuperscript{149} As part of her argument, the plaintiff relied upon the \textit{Sibley} decision, arguing that Title VII does not require an employment relationship between a plaintiff and a defendant as a prerequisite to a Title VII claim. The court concluded that the plaintiff's reliance on \textit{Sibley} was appropriate, especially in the pleading stage of litigation.\textsuperscript{150} In adopting the plaintiff's argument, the Seventh Circuit concluded that the pivotal issue in the case, as well as in the \textit{Sibley} decision, was the hospital's influence and control over access to the supply of patients who might form employment relationships with the plaintiff.\textsuperscript{151} Furthermore, in reaching its holding, the majority rejected both the dissent's reliance on the \textit{Beverley} decision, and the dissent's argument that even under \textit{Sibley} the plaintiff could not invoke Title VII because she does not have employment relationship with her patients.\textsuperscript{152} The Seventh Circuit, however, was careful to note that while "it is far from certain that the physician-patient relationship would not be protected under a \textit{Sibley} analysis, . . . [t]here is substantial uncertainty
about the type of employment relationship that is protected by such an analysis."\textsuperscript{153}

After the \textit{Doe} decision, several district courts adjudicated staff privileges cases involving Title VII claims. Significantly, while each of these cases was decided in the Northern District of Illinois, there are glaring inconsistencies among the decisions. Although it appears that in \textit{Doe} the Seventh Circuit considered both the economic realities of the situation as well as the control aspect of the hospital's relationship with the plaintiff, the court never expressly stated or held which test should be used in such cases. Subsequent cases in the Northern District of Illinois have struggled with this question. In \textit{Vakharia v. Swedish Covenant Hosp.}, the district court noted conflicting Seventh Circuit decisions concerning which test to apply. The court considered both the \textit{Spirides} hybrid test and the "economic realities" test, and concluded that "in deciding whether an employment relationship is present" it would follow the latter test as set forth in \textit{EEOC v. Dowd & Dowd, Ltd.}\textsuperscript{154} (authority subsequent to and factually distinctive from \textit{Doe}).\textsuperscript{155} The court next noted that "[i]dentifying the proper standard to apply is only half the battle. actually applying it presents altogether new problems."\textsuperscript{156} Because the plaintiff did not maintain an outside practice or have outside patients whom she could admit to the defendant hospital, the \textit{Vakharia} court did not preclude the possibility of an employment relationship between the plaintiff and the hospital.\textsuperscript{157} Additionally, the court held the plaintiff adequately alleged the existence of an employment relationship between herself and her patients or prospective patients.\textsuperscript{158}

Shortly after the \textit{Vakharia} decision seemed to established the "economic realities" as the proper standard in staff privileges cases involving a Title VII employment discrimination claim, another Northern District of Illinois decision noted that "there is some confusion as to whether the hybrid test or the economic realities test is the proper Seventh

\begin{footnotes}
\item[153] \textit{Id.} at 425.
\item[154] \textit{EEOC v. Dowd & Dowd, Ltd.}, 736 F.2d 1177 (7th Cir. 1984).
\item[156] \textit{Id.} at 468.
\item[157] \textit{Id.}
\item[158] \textit{Id.}
\end{footnotes}
Circuit standard.\textsuperscript{159} Because of this perceived confusion, the court in \textit{Ikpoh v. Central DuPage Hospital} decided to analyze the plaintiff's argument that an employment relationship existed between him and the defendant hospital under both the hybrid and the "economic realities" standards.\textsuperscript{160}

In applying the 12 factor hybrid test from \textit{Spirides}, the \textit{Ikpoh} court determined that the only factor in favor of the plaintiff's argument was that the hospital provided equipment and the plaintiff's place of work.\textsuperscript{161} Thus, the court held the evidence failed to establish an employment relationship under the hybrid test.\textsuperscript{162} The court, however, then analyzed the case under the "economic realities" test and held the plaintiff had presented sufficient evidence to establish that an employment relationship existed for purposes of Title VII.\textsuperscript{163} The court based this decision on the fact that by denying the plaintiff staff privileges, the hospital prevented the plaintiff from having access to an entire group of potential patients.\textsuperscript{164} Although the court went on to hold the plaintiff had failed to establish that race or national origin was a determining factor in the denial of his staff privileges application, and entered judgment for the defendant, the court established a very confusing and inconsistent standard by analyzing the plaintiff's claim under both the hybrid and the "economic realities" standards. It seems as though the \textit{Ikpoh} court continued to analyze the case under different standards until it reached the result it wanted; i.e., the existence of an employment relationship between the parties. This type of decision-making by a court creates confusion both for litigants, and for courts considering similar issues in future cases at a time when both need a more definitive standard on which to rely in these analytically difficult and extremely fact sensitive cases.

\textsuperscript{159} \textit{See} \textit{Ikpoh v. Central DuPage Hosp.}, No. 90 C 7146, 1993 WL 524817, at *17 (N.D. Ill. Dec. 15, 1993). It is interesting to note here that the court cites to the \textit{Vakharia} and not to the \textit{Doe} decision. \textit{Vakharia} clearly adopted the "economic realities" standard.

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} \textit{Id.} at *18.

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} \textit{Id.} at *18-19.

Two other staff privileges cases from the Northern District of Illinois reinforce this point. While both of these cases held that a physician is protected under Title VII where a hospital controlled a physician's employment opportunities with patients, the courts are inconsistent in their analysis. *Tabora v. Gottlieb Memorial Hospital* applied *Doe* and *Sibley*, emphasizing the issue of control over access to employment relationships with patients. While the defendants in *Tabora* noted that *Doe* was decided on a motion to dismiss whereas the motion in *Tabora* arose after discovery on a motion for summary judgment, the court concluded that "[u]nless the Seventh Circuit were to overrule *Doe* . . . it is clear that it controls." This conclusion seems to directly contradict the *Vakharia* decision where the district court followed the Seventh Circuit's decision in *Dowd & Dowd* rather then in *Doe*. The *Alexander v. Rush North Shore Medical Ctr.* court on the other hand, applied both *Vakharia* and *Doe*, but also noted the Seventh Circuit in dicta has cast doubt as to the validity of *Doe*. Thus, it appears that not only is there some confusion within the Seventh Circuit as to what standard should be applied to determine whether an employment relationship exists between a hospital and physician with staff privileges, but also that the Circuit's leading case rests on an uncertain legal foundation.

While the Sixth Circuit seems to be more consistent than the Seventh Circuit in its choice of what standard to use in similar cases, the Sixth Circuit has not yet directly considered the issue of whether a doctor with staff privileges at a hospital enjoys an employment relationship with that hospital. Two federal district courts within the Sixth Circuit, however, have held that Title VII applies to a hospital's termination of a physician's staff privileges. Both of these courts employed the "economic realities" standard.

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166 *Tabora*, 882 F. Supp. at 118.

167 *Id.*


170 *LeMasters, 777 F. Supp. at 1380-81; Ross, 678 F. Supp. at 675 (citing Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983)).
In the leading Sixth Circuit staff privileges case involving a Title VII employment discrimination claim, the plaintiff was a nurse, not a physician. The plaintiff in *Christopher v. Stouder Memorial Hosp.* filed a Title VII action against a hospital challenging its refusal to grant the nurse limited privileges to work as a private duty scrub nurse for physicians at the hospital. Relying upon the *Sibley* and *Doe* decisions, and employing the "economic realities" standard, the Sixth Circuit held the nurse was entitled to maintain a retaliation action under Title VII where the hospital had the ability to affect the nurse's employment opportunities.

While the Sixth Circuit's decision is internally consistent and does not conflict with either *LeMasters v. Christ Hosp.* or *Ross v. William Beaumont Hospital*, it involves a nurse plaintiff rather than a physician plaintiff. This raises questions with regard to how much reliance a Sixth Circuit court considering a physician's complaint in a staff privileges case should place on the *Christopher* decision. Obviously, there are factual differences between a physician staff privileges case and a nurse's employment discrimination claim based on a retaliation theory. Nurses such as the plaintiff in *Christopher*, however, often have an independent contractor type of relationship with a hospital, much like that of a physician with staff privileges. The *LeMasters* court relied upon the *Christopher* decision with little problem and without producing any major inconsistency. Thus, it appears that if courts within a particular circuit employ the same standard to determine whether an employment relationship exists in a staff privileges case, and carefully apply established precedent to the facts of a case, reasonable and consistent case decisions could necessarily follow.

Finally, an Eleventh Circuit decision illustrates another way in which courts may find an employment relationship in a staff privileges case for purposes of determining whether a physician has standing to maintain a claim under Title VII. In *Pardazi v. Cullman Medical Ctr.*, a physician brought a Title VII action against a hospital alleging national origin discrimination after the hospital denied the physician's application for staff

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172 Id. at 873-875.

173 See *Pardazi v. Cullman Medical Ctr.*, 838 F.2d 1155 (11th Cir. 1988).
privileges. The Eleventh Circuit accepted the district court's conclusion that the physician was not a hospital employee.\(^{174}\) The court, however, also acknowledged the physician had entered into an employment contract with another physician which was contingent upon his obtaining staff privileges at the defendant hospital.\(^{175}\) Therefore, applying the Spirides hybrid test, the Pardazi court concluded that if the physician could prove the hospital's discrimination against him interfered in his employment opportunity with another physician, Title VII would encompass the physician's claim.\(^{176}\) Thus, the Pardazi decision adds to other holdings that have found that a hospital can interfere with a physician's employment opportunities with third parties such as patients.

**ADA CLAIMS IN STAFF PRIVILEGES CASES**

Although staff privileges cases involving ADA claims are not as numerous as those involving Title VII actions, the ADA cases reported thus far involve many of the same issues that are present in their Title VII counterparts. Two recent cases, in particular, raise questions regarding application of the ADA's provisions to the determination of whether a physician is an employee of a health care entity.\(^{177}\) In *Reigel v. Kaiser Found. Health Plan of North Carolina*, the federal district court held a health plan was a separate and distinct entity from a medical group that employed the plaintiff physician.\(^{178}\) The physician brought an ADA action against the medical group that formerly employed her, challenging her termination. Because the physician had an employment agreement with the medical group, the court did not have to struggle with the issue of whether an employment relationship existed between the two parties for

\(^{174}\) *Id.* at 1156.

\(^{175}\) *Id.*

\(^{176}\) *Id.*


\(^{178}\) *Reigel*, 859 F. Supp. at 966.
purposes of the plaintiff's ADA claim. The physician, however, included the health plan among her named defendants even though she had never enjoyed any contractual relationship with the health plan or submitted any correspondence to the health plan concerning her employment status with the medical group. Based on this obvious lack of relationship with the health plan on the part of the physician, the court granted the defendant health plan's motion for summary judgment.\textsuperscript{179}

Although the \textit{Reigel} decision appears to be relatively straightforward, it raises some possible warning signs for managed care entities that either employ physicians directly or contract with physician groups for the provision of medical services. Courts considering a tenuous employment relationship between a health plan and a physician could look to established precedent in staff privileges cases involving Title VII claims. Based on this precedent, a court that reads provisions of the ADA broadly might be inclined to establish an employment relationship between a health plan and a physician where one only tenuously exists, thereby creating liability for the plan based on some remote relationship with a physician. Because of the inconsistency and confusion generated by staff privileges cases involving Title VII claims, there are few assurances for health plans that courts will not find an employment relationship between a plan and a physician, no matter how unlikely such a relationship seems.

In another staff privileges case involving an ADA claim, the United States District Court for the Northern District of Florida held that the facts presented at trial conclusively established that the plaintiff physician was not an employee of either the hospital or her patients, but was in fact an independent contractor.\textsuperscript{180} The plaintiff in \textit{Elbrecht v HCA Health Services of Florida}, brought an ADA, Title I claim after the defendant hospital effectively terminated her staff privileges. To reach its decision, the court applied the \textit{Spirides} hybrid test and found that "the plaintiff's unequivocal responses [left] no room for interpretation other than" one that the physician was not the employee of her patients.\textsuperscript{181} Furthermore, the court concluded that the Eleventh Circuit's decision in \textit{Pardazi} was not

\textsuperscript{179} \textit{Id.}

\textsuperscript{180} \textit{See Elbrecht v.HCA Health Servs. of Florida, 1994 U.S. Dist. LEXIS 18877 at *6-7.}

\textsuperscript{181} \textit{Id. at *7.}
controlling because *Pardazi* involved a situation in which the plaintiff physician had already entered into an employment contract with another physician. Therefore, the court granted the defendant hospital’s motion for a directed verdict on the plaintiff’s ADA claim.

Although the *Elbrecht* decision is currently on appeal to the Eleventh Circuit, the district court decision provides some important points for consideration. First, the court applied the *Spirides* hybrid test to determine whether an employment relationship exists. Second, the court distinguished its case from the Eleventh Circuit’s decision in *Pardazi*. Both of these points indicate that courts will look to previous Title VII staff privileges case law when faced with an ADA claim in a staff privileges case. They also reemphasize that federal district courts are not inclined to follow precedent in such cases and the confusion and the inconsistency inherent in the body of Title VII staff privileges cases is very likely to carry over when courts are adjudicating ADA claims.

**CONCLUSION**

Staff privileges cases involving the issue of whether a staff physician is an employee of a hospital for Title VII purposes have produced a variety of legal approaches and conclusions. Because of this, litigants in staff privileges cases involving an employment discrimination claim may be left to guess what standard (*i.e.* the hybrid test, the "economic realities" test, or right to control test) a federal court will apply, as well as to how a court will apply the standard it selects. With the advent of managed care, as well as increasing cost competition within the health care industry, it is very likely there could be an explosion of staff privileges cases involving employment discrimination claims in the near future, as both hospitals and health plans seek to streamline their operations and cut costs. When future litigants and courts look to the myriad of staff privileges case law involving Title VII claims, they will find anything but a clear, concise body of law on which to draw a solution in their own cases.

As an alternative to this morass of confusing and inconsistent case

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182 *Id.* at *8.
183 *Id.* at *8-9.
law, there is perhaps, a more efficient, uniform, and fact-specific legal framework which could be applied to staff privileges cases involving employment discrimination claims. As indicated above, the key element of both the "right to control test" and the *Spirides* hybrid test is an employer's right to control an employee's work and performance. Furthermore, the economic realities test focuses on the economic dependence of an alleged employee on an alleged employer. Thus, under the economic realities test, the critical inquiry relates to the degree of economic dependence an employee has on an employer, or in other words, the degree of control an employer can assert over an employee because of the employee's economic dependence upon his job or position.

Therefore, any alternative legal framework should be premised upon the degree of control a hospital asserts over a physician's ability to practice medicine. The first question a federal court should ask in such cases then is whether the physician has medical staff privileges at only one hospital, or more than one hospital. Obviously, if a physician enjoys privileges at multiple hospitals, it will be more difficult for the hospital in question to control the physician's economic or employment opportunities. Thus, based upon the answer to this initial inquiry, the alternative test employs one of two frameworks for analyzing the issue of whether a physician is a hospital employee, or has an employment relationship with the hospital for Title VII purposes.

Physicians with staff privileges at only one hospital:

If the physician in question has privileges at only one hospital, the first consideration a court should focus on is whether the physician has an exclusive provider contract with the hospital. In conjunction with this initial inquiry, courts should also take into account the area in which the physician specializes. Radiologists, pathologists, and anesthesiologists often have exclusive provider contracts with hospitals. These three specialty areas are particularly susceptible to an over-crowded and highly competitive health care market, and therefore, specialists in these areas may have no choice but to sign an exclusive provider contract with a hospital in order to ensure a continuing source of patients. Furthermore, specialists in these areas most likely do not maintain a separate medical
practice on which they can rely for a steady stream of patients. Thus, if a physician has an exclusive provider contract with a hospital, specializes in the area of pathology, radiology, or anesthesiology, and does not maintain a separate medical practice, it is very likely that the hospital has the ability to control the physician's employment opportunities.

If the physician in question does not have an exclusive provider contract with the hospital in question, the next inquiry in a court's analysis should be whether the physician maintains a separate, private practice. As part of this inquiry, courts also should incorporate elements of the Spirides hybrid test and look for other sources of an employment relationship between the physician and the hospital. Examples of fact specific questions which a court could apply in its analysis include: (1) whether there is a recruitment contract between the physician and the hospital; (2) whether the hospital rents or provides office space to a physician at a reduced rental rate or at no cost to the physician; (3) whether the hospital used some sort of minimum salary guarantee in order to attract the physician to the hospital's staff; and (4) whether the hospital has exclusive control over the equipment and facilities used by the physician to practice medicine. Physicians who do maintain separate medical practices will most likely have a steady income/patient stream which is not dependent upon their medical staff privileges. However, courts should not simply assume that because a physician maintains a separate practice that a hospital does not in any way control the physician's employment opportunities. If the hospital rents or provides office space, equipment, or facilities to the physician at lower than market rate rental value, and ties the provision of such space to the physician's maintenance of staff privileges, then the termination of the physician's privileges could definitely affect the physician's ability to maintain his separate practice. Additionally, although a physician may operate a separate practice, if a large percentage of the physician's account receivables result from admissions to the hospital where the physician has his only set of staff privileges, termination of the physician's privileges could spell financial disaster for the physician. Therefore, a court should not only be aware of the amount of a physician's business which results from admissions to a particular hospital, but should also factor this analysis into its final determination of whether a staff physician is a hospital employee for Title VII purposes.
Finally, the last inquiry for a court in cases where a physician has privileges at only one hospital, is whether the hospital, the physician, or both are part of a managed care network, as well as the effect that a negative staff privileges determination would have on the physician's relationship with such a network. If a physician's contract within a managed care network is tied in any way to the maintenance of the physician's staff privileges at a particular hospital, then the termination of the physician's privileges would also result in the physician's expulsion from the network. Therefore, courts considering whether a staff physician is an employee of a particular hospital, must take into account whether, and to what extent, the physician and the hospital are part of a managed care network. Moreover, if a large percentage of the physician's business or patient stream comes from one managed care network, and a hospital is in a position to determine whether the physician can maintain his membership in the network, then courts must apply this consideration to their analysis of whether an employment relationship exists between the physician and the hospital.

Physicians with staff privileges at more than one hospital:

When a physician has privileges at more than one hospital, a court's analysis of whether the physician is an employee of a hospital that terminates the physician's privileges is essentially the same as its analysis when the physician has privileges at only one hospital. Courts should consider whether the physician maintains a separate practice, whether the physician and hospital in question are part of a managed care network, and whether there are any other factors (i.e. recruitment contracts, provision of office space or equipment, or minimum salary guarantees) which might aid the court's analysis.

There are, however, three important differences between the analytical frameworks. First, by definition, exclusive provider contracts will not apply in situations where a physician has staff privileges at multiple hospitals. Second, a court should be particularly sensitive to the percentage of a physician's business which results from having privileges at the hospital which terminated the privileges. For example, if the percentage of a physician's practice at the hospital in question is less than
10 to 15 percent of the physician's business, it could be possible that the hospital has little control over the physician's employment. If the percentage is higher, however, a court might have to scrutinize the parties' relationship more closely before making such a determination.

Finally, in multiple staff privileges cases, the National Practitioner Data Bank ("NPDB") could play a significant role in determining whether an employment relationship exists between the parties for Title VII purposes. HCQIA requires hospitals to report any negative staff privileges determinations to the NPDB.134 HCQIA also requires hospitals to check the NPDB before granting a physician staff privileges.135 Thus, negative entries in the NPDB could definitely influence a hospital's decision to grant a physician privileges. When a physician has privileges at only one hospital, a NPDB entry only affects the physician's opportunities to obtain future staff privileges. By comparison, when a physician has privileges at multiple hospitals, a NPDB entry could affect the physician's current relationship with other hospitals. While in the former scenario courts could conclude that the hospital in question had interfered with the physician's future ability to practice medicine (particularly when the physician's medical specialty is pathology, radiology, or anesthesiology), courts analyzing the latter situation could conclude that the hospital had interfered with identifiable staff privileges relationships which the physician enjoyed at other hospitals. Therefore, while a court should include the possibility of a NPDB entry as part of its analysis in either situation, the court might give greater consideration to this factor in multiple staff privileges cases where such an entry would affect a physician's established employment opportunities, rather than future, perhaps intangible, opportunities.

Like the "right to control," the economic realities test, and Spirides hybrid test, this proposed alternative analytical framework is premised upon the hospital or employer's right to control an alleged employee's employment opportunities. Unlike, these three tests, however, courts do not have to engage in a subjective balancing test to reach a conclusion. Rather, courts should use this alternative framework in a progressive fashion, applying each of the specific inquiries in the order described

Each inquiry provides a logical breaking point for a court which is attempting to decide whether a physician is a hospital employee for Title VII purposes. Thus, this alternative test is intended to provide a more manageable legal framework, as well as more consistent results, when applied to future staff privileges cases involving federal employment discrimination claims. In the overlapping cross section between the often complex area of federal employment discrimination law and today's highly competitive and rapidly changing health care market, such a framework is necessary in order to avoid what could otherwise be inequitable and precipitous judicial decisions for both physicians and hospitals alike.

For instance, if a physician has privileges at only one hospital, the court should structure its analysis as follows: (1) Is there an exclusive provider contract? (2) If so what is the physician's area of medical specialty? (3) Does the physician maintain an independent practice? (4) If so, are there other considerations such as minimum salary guarantees, provision of space and/or equipment by the hospital, etc.? (5) Are the parties involved in a managed care network, and to what extent does the physician rely on his involvement for his professional and financial well-being?

If the situation involves multiple staff privileges then the analysis is the same, except that element (1) is not a consideration, and instead, courts should consider the effect a NPDB entry will have on the physician's career/business opportunities, and also, should scrutinize more closely the percentage of the physician's revenues derived from the particular hospital which terminated his staff privileges.