Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building – Third Floor
Des Moines, Iowa 50319

IOWA CIVIL RIGHTS COMMISSION, State Law Enforcement Agency, and MARQUIS TAYLOR, Complainant, v. TITAN TIRE and JERRY PALMER, Respondents.	)	Docket No. 14ICRC008 **PROPOSED DECISION**

The parties to this proceeding are the Iowa Civil Rights Commission, Complainant Marquis Taylor, and Respondents Titan Tire and Jerry Palmer. A contested case hearing was held on November 17-18, 2014. Assistant Attorney General Katie Fiala represented the Commission. Attorney Becky Knutson represented Titan and Palmer. Taylor appeared and testified. Yana Perry, Demarcus Butts, Jerry Palmer, Joyce Kain, Craig Warren, Mike Duberke, and Jeff Dotson also testified. Exhibits 1 through 6, A through I, and L were admitted into the record. The record was left open for the receipt of post-hearing briefs.

FINDINGS OF FACT

Titan International, Inc. ("Titan") owns Titan Tire Corporation and Titan Distribution. Titan Tire Corporation manufactures tires in Des Moines. Titan Distribution operates a warehouse next to the tire plant. Before a strike in the late 1990s, the Titan workforce in Des Moines was predominantly Caucasian. During the strike the composition of the workforce changed. Kain, a human resources consultant for Titan, testified the workforce in Des Moines is now 60% minority.

In 2012, Taylor attended a family gathering with his cousin, Butts, in Des Moines. Taylor was interested in moving back to Des Moines from Kansas City and was looking for a job.

Butts had worked in the Titan warehouse for a number of years as a lead man. He told Taylor Jacobson Staffing ("Jacobson") was hiring employees to work at Titan in the

warehouse and he should contact Jacobson. Butts spoke with Jacobson and informed Jacobson Taylor was his cousin and he was looking for work.

On June 1, 2012, Taylor applied for a position with Jacobson. Taylor submitted his resume. Taylor noted his education included high school/GED through Central Campus in Des Moines. Taylor's resume noted that from March 2008 through July 2011 he worked for Kentucky Fried Chicken, as a cook, a cashier, and eventually, as a shift manager. From March 2004 through February 2008 Taylor worked for Labor Pros, as a laborer in the warehouse and as a skilled carpenter. Taylor reported that in April 2012 he worked for DES Staffing performing carpentry and warehouse work.

Jacobson hired Taylor to work the second shift at Titan in the warehouse from 3:00 p.m. through 11:30 p.m., to perform pallet repair and "other warehouse duties as assigned." Titan operated three shifts in the warehouse, from 6:30 a.m. through 3:00 p.m., from 3:00 p.m. through 11:30, p.m., and from 11:30 p.m. through 8:00 a.m.

Mike Dubberke and Jeff Dotson worked as account managers for Jacobson and covered all three shifts at the Titan warehouse. Dubberke testified he would typically arrive at the warehouse at 6:00 a.m., leave at 10:00 a.m. to go to Jacobson, and return to Titan at 2:30 p.m. until the second shift employees started working. Dubberke testified he was responsible for recruiting, screening, interviewing, hiring, and training employees at Jacobson and at Titan, and providing ongoing support to Jacobson employees at Titan.

Alejandra Rocha worked for Jacobson in its corporate office in 2012. Rocha assisted with Taylor's employment documentation and orientation. Taylor's Employee Orientation Sheet for Jacobson notes he completed his orientation on June 16, 2012. Taylor initialed the sections of the document. Rocha noted that Taylor's supervisor's name was "Jerry Palmer" and that he was assigned to "Titan Distribution." (Exhibit E at 6).

The Employee Orientation Sheet noted, "ATTENDANCE IS EXTREMELY IMPORTANT! POOR ATTENDANCE IS GROUNDS FOR DISMISSAL." (Exhibit E at 6). The Employee Orientation Sheet also provided, in part, "[i]f you have a question or concern, please use the phone numbers at the top and bottom of this form for your local contact, or call our Human Resources Department @ 515-261-8171." (Exhibit E at 7). The document listed in bold at the bottom:

Jacobson Staffing Company Contact Information
Office Phone 515-265-6797 After Hours Phone 515-490-9221

(Exhibit E at 7).

Taylor acknowledged he received the Jacobson Employee Handbook on June 15, 2012. Jacobson's Employee Handbook provides a procedure for filing a complaint in the workplace as follows:

1. Report the incident, both verbally and in writing, to Jacobson Staffing Company Operations Manager – Frank Tursi or Assistant Operations Manager – Nate Cloe.
2. Jacobson Staffing Company will conduct a prompt and thorough investigation of your complaint and take appropriate remedial action where necessary.

* * * *

If you believe you have witnessed harassing behavior in the workplace, immediately contact your Supervisor to report such behavior. In addition, any supervisor who becomes aware of harassing behavior must immediately report it to the President, and must immediately act to end the harassing behavior. . . .

(Exhibit A at 16).

Kain testified 60 to 70 employees worked in the warehouse in 2012 during the three shifts. Palmer was the second shift supervisor for Titan when Taylor worked in the warehouse. In 2012, Palmer supervised 14 employees.

Palmer has worked in the warehouse for 18 years. For the first five years he worked for Action Warehouse. Palmer was then hired by Warehouse Manager Craig Warren to work for a subsidiary of Titan. In 2002, Palmer began working for Titan Distribution. At all times material hereto, Palmer was the second shift supervisor at the warehouse. Palmer testified 11 through 14 people work in the warehouse during the second shift. Palmer reports directly to Warren.

The office for the supervisors is located at the top of the stairs by the employee entrance to the warehouse. Warren, Palmer, Dubberke, and Dotson used the office. Tena Zepeda, Warren's administrative assistant also used the office. Zepeda performs the human resources functions in the warehouse under Kain's direction. Dubberke testified he was on the floor most of the time and did not spend much time in the office.

Dubberke and Dodson worked primarily during the day, and were present at the beginning of the second shift. Dubberke delivered the paychecks to the Jacobson employees each week. The Titan and Jacobson employees used separate time clocks located at the foot of the stairs leading to the office. Dubberke pulled the time clock records to document the employees' attendance.

Taylor's starting wage was $9.50 per hour. When Jacobson hired Taylor he was living with Butts. Butts worked the first shift and Taylor worked the second shift in the warehouse. Taylor moved from Butt's residence in August 2012.

Palmer testified that when a new employee from Jacobson starts working at Titan he provides instruction on personal protection equipment, including protective eyewear, ear plugs, and steel-toed boots. If Jacobson employees have questions regarding work they come to Palmer to ask questions. Palmer noted if the Jacobson employees have questions about pay, hours, or attendance, they speak to Jacobson's supervisors.

Dubberke testified when he delivered paychecks to the Jacobson employees he would speak with them regarding work. Taylor testified Dubberke did not provide him with instruction at work and Palmer was his supervisor. Taylor noted Palmer showed him how to repair the pallets, and Jacobson provided him with forklift training.

Palmer testified in 2012 Titan employees Troy Galeazzi and Ira Johnson were the lead men in the warehouse during the second shift. Butts was a lead man for the first shift. Warren testified Titan employs one supervisor for every 15 people. The lead men support the supervisors and are paid hourly. Palmer testified Galeazzi, Johnson, and Butts were not supervisors because they did not have authority to hire, fire, or discipline employees, or to process grievances.

After working in pallet repair for a period of time Taylor started working on the dock. Galeazzi was the lead man in the dock area during the second shift. Galeazzi would break down the orders for the truck loads and separate the types of tires for the trucks. Galeazzi would distribute the lists to the dock workers to bring the tires back to the dock. Taylor testified Galeazzi provided him with work instructions after he broke down the orders. Taylor assisted with moving tires with the forklift, organizing and painting tires, rolling tires, and lifting tires with the clamp jeep.

While Butts did not work the same shift as Taylor, he worked with Taylor on two occasions when Taylor came in early to help. Butts testified he instructed Taylor on warehouse duties, including pulling product off the line and provided Taylor with some forklift training. Butts did not have any problems with Taylor's job performance when he worked with him.

Butts started working at Titan as an employee of Jacobson in 2000. Butts worked as a lead man for Jacobson. Titan hired Butts as a direct employee in 2011 or 2012. Butts testified he is not a supervisor, but provides work instructions to four employees. Butts confirmed he does not the authority to hire, fire, or discipline employees at Titan. Butts testified his job responsibilities have not changed from the time he worked as a lead man for Jacobson at Titan through his present employment as a direct employee of Titan.

Titan and Jacobson were pleased with Taylor's work performance. Dubberke reported Taylor had very good attendance during his first 60 days of employment. Taylor was eligible for a raise and received a raise to $10.15 per hour after he was employed by Jacobson for 60 days.

Two days after receiving a raise, on August 21, 2012, Taylor had his first attendance point when he was tardy. He received a second point when he was tardy on August 28, 2012, and a third point on September 10, 2012 when he called in sick. Taylor's fourth attendance point occurred when he was tardy on September 27, 2012.

Dubberke and Dotson testified that after Taylor received his fourth attendance point they approached Taylor about his attendance. Dubberke and Dotson told Taylor Titan thought highly of him initially, but Titan now had concerns about his attendance.

Dubberke testified Taylor responded "these guys have their favorites" and Dubberke responded he was uncertain what that had to do with attendance.

Palmer testified that during Taylor's employment with Jacobson, he was pleased with Taylor's work, but Taylor had problems with attendance. Palmer reported he told Taylor that he needed to be on-time for work and that being late would affect his job. Palmer reported Taylor did not provide a response to him.

Palmer testified he observed Taylor become angry with Galeazzi on one occasion. Palmer was coming up the aisle and saw Galeazzi walking up to Taylor's clamp jeep. Taylor became upset with Galeazzi. Taylor's hands were in the air and he said to Galeazzi "you need to treat me like a man." Galeazzi responded "I just wanted this can of paint." Palmer saw Dubberke and told him there was a problem with Taylor and that he needed to speak to him. Palmer observed Dubberke speak to Taylor, but did not overhear the conversation.

Taylor testified that on September 28, 2012, he was using the clamp jeep at work and noticed Palmer was laughing and Palmer said to a coworker, "look at this monkey. We got monkey business." Taylor reported he picked up the tires with the clamp jeep and loaded them in the trailer. Taylor testified he felt humiliated, disrespected and angry when Palmer made the comment.

Taylor stated he pulled Palmer aside and said "I heard what you said, I need my job." Taylor reports Palmer's smile changed to a frown and he did not deny making the comment. Palmer denies making the comment and that Taylor pulled him aside.

Taylor testified he reported the incident to Dubberke because he was frustrated. Taylor reported Dubberke told him that Palmer, Rob, and Rodney Nelson were friends and did not need to be nice to Taylor, and if he did not like it, he could find another place to work. Taylor noted Dubberke did not follow up with him about his complaint.

Dubberke testified Taylor told him he overheard two guys on the dock talking about craziness out there, "monkey business." Dotson testified Taylor had reported overhearing Palmer say "look at this monkey business out here." Dubberke and Dotson told Taylor they would look into it. Dubberke testified he told Taylor he did not know how the comment related to his attendance problems.

Dubberke and Dotson spoke with Palmer and Galeazzi in the office and told them Taylor felt bad about a comment he overheard. Dubberke inquired whether there were any problems with Taylor. Palmer and Galeazzi responded there were no problems other than Taylor's attendance. Dubberke noted Palmer did not deny making the comment, but did not testify he asked Palmer whether Palmer made the comment. Dubberke stated he told Palmer and Galeazzi that they needed to be careful about what they said in an open area because their comments could be misunderstood.

Dubberke and Dotson testified they met with Taylor after speaking with Palmer and Galeazzi. Dubberke told Taylor that Palmer had not intended to offend him. Dotson

testified they asked Taylor if he was fine and he responded he was. Dubberke could not recall receiving a response from Taylor. Dubberke and Dotson testified they did not receive any additional complaints from Taylor.

Palmer acknowledged Dubberke came back to him and stated Taylor told him Palmer had called him a "monkey." Palmer testified he was shocked and he did not know where that came from and that he never called Taylor a "monkey" at any time.

Warren was worked with Palmer for 18 years. He denied ever receiving a complaint from an employee that Palmer had engaged in harassing or discriminating behavior.

Dubberke testified Taylor had additional attendance violations on October 3, 2012 when he was absent, October 5, 2012, when he was tardy, October 22, 2012, when he was absent, and on October 29, 2012 and October 30, 2012 when he was tardy. When Taylor reported to work on November 1, 2012, Dubberke terminated his employment with Jacobson for poor attendance.

Taylor filed a Complaint with the Commission on November 19, 2012 alleging Titan, Palmer, and Galeazzi had subjected him to racial harassment.[1] In his Complaint, Taylor alleged the incident involving Palmer occurred on September 28, 2012, the incident involving Galeazzi occurred on September 7, 2012, and the incidents involving Nelson occurred on October 11-12, 2012.

Taylor reported:

> Dock Supervisor: Troy.
> I applied for a position @ (Titan tire Union) side. Troy overhead the conversation, He say's they should hire you you haven't robbed anybody @ least not lately. Tires are like a dope deal, ect. I know you can Relate to that. Also continued to be rude and disrespectful.
>
> Shift Supervisor: Jerry Palmer
> Ask's me to load a trailor as I am doing so he tap's a coworker – Rob – coworker a friend and sys's watch this monkey look at the monkey show.
>
> They never denied these thing's. Said they were just joking!
>
> Mike – Jeff: Are Jacobsan Employers
> These two guy's do the hiring. Staffing agency. I came to them with my issue – I told them everything that was said to me they did nothing. They did say to me. Jeff – don't expect people to be nice when they ask you to do something. Mike say's – they are going to treat others better because they have known them longer?

[1] The Complaint and Statement of Charges raised allegations of racial discrimination and retaliation. Titan filed a Motion for Summary Judgment. The Commission did not resist the Motion with respect to the discrimination and retaliations claims. I granted the Motion with respect to the discrimination and retaliation claims.

> Rodney: What's up nigger. Whats up my nigger he continued to disrespect my race with a smile as he bashes Barack Obama saying hes the devil.

(Exhibit L).

Taylor testified after he had been working for Jacobson for a period of time he applied for a position as a direct employee of Titan. Taylor's coworkers asked him if he had been hired in the break room. Taylor testified Galeazzi said Taylor should have been hired because "he had not robbed anyone, at least not yet lately." Taylor reported he did not know how to respond and looked at Galeazzi and shook his head. Taylor believed the comment was due to his race and noted he never heard Galeazzi make such a comment to a Caucasian person. Taylor stated he believed the comment was disrespectful and it made him feel uncomfortable.

Taylor testified has prior convictions for assault and theft. Taylor testified some of his Jacobson coworkers had felony convictions.

Taylor reported Galeazzi made another comment to him, "tires are like a dope deal, I know you can relate to that." Taylor believed the comment was racial because Galeazzi was implying that because he was black he knew about drugs. Taylor reported he asked Galeazzi where that was coming from and responded, "no, I cannot relate to that." Taylor testified Galeazzi responded by laughing and continuing the talk about work.

Taylor testified he told Butts about the comments. Butts denied Taylor told him he was being treated poorly because of his race. Butts testified Taylor approached him and said he thought he was being left out of the overtime schedule and he wanted the overtime. Butts reported he responded that seniority controls overtime.

Palmer testified Galeazzi got along well with other workers. Palmer reported he never heard Galeazzi make improper comments to other employees or get into arguments or fights with other employees. Palmer denied Taylor ever complained to him that Galeazzi was harassing him on the basis of race.

Butts described Galeazzi and a great guy who worked at Titan for 18 years. Butts denied ever hearing Galeazzi use racial slurs. Butts and Warren testified Galeazzi was religious and would talk about his faith. Warren observed Galeazzi reading the Bible during breaks. Butts and Warren testified they never heard any Titan or Jacobson employees make direct racial slurs to Taylor.

Warren testified he received a complaint that Galeazzi was preaching at work. An employee complained to Warren that he should not have to listen to scripture at work. Warren spoke with Galeazzi and told him work was not the place to preach.

Taylor testified that on October 11-12, 2012, Jacobson employee Rodney Nelson called him a "nigger" twice when he was coming out of the bathroom in the break room when

they were working during the weekend. Taylor reported Nelson said, "my bad. What's up my nigger?"

Taylor also reported he overheard Nelson and an employee named "Rob" comparing the KKK with the Black Panthers at work in the break area and Nelson said his daughter had called another student a "nigger" at school.

Taylor testified he told Butts, his parents, and coworker Richard Cameron about the comments. Apart from his complaint about the "monkey business" comment, Taylor did not report the allegations to Palmer, Dubberke, or Dotson.

Butts testified Taylor never told him Palmer called him a "monkey." Butts acknowledged Taylor came to him with concerns. He thought Troy and Palmer were being disrespectful to him because of his race. Butts told him that was not the case and that he needed to put his time. After the Commission's attorney refreshed his recollection, Butts recalled Taylor told him about a comment, "let's watch the monkey show, look at the circus."

Palmer denied hearing discussions at work about the KKK or Black Panthers. Palmer recalled an article in the paper about the KKK wanting to come to Iowa for the State Fair. No one complained to Palmer about workplace discussions regarding the KKK at the workplace.

Butts stated Taylor told him Nelson and another coworker discussed racial tensions at the Iowa State Fair. Butts testified he has worked with Nelson and does not have any problems with him.

During the hearing Taylor testified Palmer discriminated against him on one occasion when he ran out of gas for the forklift. Taylor wanted to use the golf cart to carry the fuel tank for the forklift. Taylor reports Palmer told him not to use the golf cart and if he did, he would be fired. Taylor reports he was forced to carry the tank on his shoulder. Palmer denied the allegation testified an empty tank weighs 15 to 20 pounds, and approximately 50 pounds full.

Taylor testified that after the incidents his attitude toward work changed. He did not look forward to coming to work and did not have pride in his job and was depressed. Taylor reported he liked working at the warehouse and wanted to retire there. He testified his coworkers and supervisors made him feel like he was not an equal.

Taylor reported he had worked in construction while in high school. The worksite was dirty and hot and the employees cussed and shouted. Taylor noted Titan was different than construction because he was called a "monkey," a "nigger," and the employees discussed the KKK.

On December 18, 2012, Rachel Passage, the Regional Human Resources Manager, contacted Dubberke and asked for information about Taylor because Taylor had complained Dubberke and Dotson discriminated against him on September 28, 2012

because "he went to [Dubberke] with a complaint and [Dubberke] and Dotson did nothing. And that others are treated better because they have known them longer."

(Exhibit H).

CONCLUSIONS OF LAW

Taylor contends he was subjected to a hostile work environment when he worked in the warehouse because Titan employee Palmer referred to him as a "monkey," Titan employee Galeazzi told Taylor Titan should hire him because he had not robbed anyone lately and tires were like a dope deal, Jacobson employee Nelson said to him on two days "what's up nigger," and Nelson spoke with another coworker about the KKK and Black Panthers.

The Iowa Legislature enacted the Iowa Civil Rights Act ("ICRA") "in an effort to establish parity in the workplace and marketplace and opportunity for all."[2] The ICRA prohibits employers from engaging in discriminatory employment practices "because of" the person's race.[3] The Iowa Supreme Court has recognized maintaining a hostile work environment is actionable as a form of discrimination under the ICRA.[4] A claim for hostile work environment is actionable "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive working environment."[5]

I. DUAL EMPLOYER

Titan avers it is not liable under the ICRA for any alleged harassment Taylor experienced at Titan because Taylor was an employee of Jacobson only. The Commission disagrees and alleges Titan is a joint employer of Taylor. Essentially Titan avers Taylor was an independent contractor while performing his duties at Titan. The ICRA provides protection to employees, but not to independent contractors.[6] This raises an issue of standing under the ICRA.

The ICRA defines "employee" as "any person employed by an employer."[7] The ICRA further defines an "employer" as "the state of Iowa, or any political subdivision, board, commission, department, institution, or school district thereof, and every other person employing employees within the state."[8] The ICRA contains exemptions for certain

---

[2] *Pippen v. State*, 854 N.W.2d 1, 9 (Iowa 2014) (quoting (*Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999)).
[3] Iowa Code § 216.6(1)*a*.
[4] *Edmunds v. Mercy Hosp.*, 503 N.W.2d 877, 879 (Iowa 1993) (noting principle in case involving an allegation of sexual harassment).
[5] *Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.S.2d 733, 743 (Iowa 2003) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).
[6] Iowa Code § 216.6(6); *Cf. Wilde v. County of Kandiyohi*, 15 F.3d 103, 104 (8th Cir. 1994) (noting principle under Title VII).
[7] Iowa Code § 216.2(6).
[8] *Id.* § 216.2(7).

employers that are not applicable in this case.[9] The ICRA does not preclude an individual from having two or more employers for the same work.[10]

A. Factors for Determining whether a Worker is an Employee

While the Iowa Supreme Court has not addressed the issue of whether an employee can have two employers for the same work, the Iowa Supreme Court considered the issue of whether an inmate of a prison may be an employee under the ICRA, using the multi-factor hybrid test developed by the federal courts and factors developed by the Iowa courts in the workers' compensation context.[11] The definition of "employee" is the same under Title VII and the ICRA.[12] The definition of "employer" is similar under Title VII and the ICRA.[13]

The Eighth Circuit has applied the hybrid test when determining whether a dual employment relationship exists under Title VII.[14] Under the hybrid test the court weighs a list of relevant common law factors derived from the Restatement (Second) of Agency section 220(2).[15] The court also weighs "the 'economic realities' of the worker's situation, including factors such as how the work relationship may be terminated and whether the worker receives yearly leave."[16]

In *Renda*, the Iowa Supreme Court followed a variation of the hybrid test developed by the D.C. Circuit, which differs from the test adopted by the Eighth Circuit.[17] The court determined relevant factors include:

> (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 of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by 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

---

[9] *Id.* § 216.6(6)*a-d* (exempting employers with fewer than four employees, employees who work within the employer's home, employees hired to perform personal services for the employer's family, and bona fide religious institutions).
[10] *Id.* ch. 216; *see also Glascock v. Linn County Emergency Medicine, P.C.* 698 F.3d 695, 698 (8th Cir. 2012) (noting independent contractors are not protected under Title VII or the ICRA).
[11] *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 20 (Iowa 2010).
[12] Iowa Code § 216.6(2)(6); 42 U.S.C. § 2000e(f).
[13] Iowa Code § 216.6(2)(7); 42 U.S.C. § 2000e(b) (defining the term "employer" as "a person engaged in 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 any agent of such a person. . . .")
[14] *Hunt v. Missouri*, 297 F.3d 735, 741-42 (8th Cir. 2002).
[15] *Alexander v. Avera St. Luke's Hospital*, 768 F.3d 756 (8th Cir. 2014) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992)).
[16] *Schwieger v. Farm Bureau Ins. Co. of Neb.*, 207 F.3d 480, 484 (8th Cir. 2000).
[17] *Renda*, 784 N.W.2d at 20.

> "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.[18]

The court has held while no single factor is determinative under the hybrid test,

> the extent of the employer's right of control the 'means and manner' of the worker's performance is the most important factor to review here, as it is at common law . . . . If an employer has the right to control and direct the work of an 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 exists.[19]

In addition to the common law factors from the hybrid test, the court noted it has developed relevant factors for determining whether an employee-employer relationship exists for purposes of workers' compensation coverage, including:

> (1) is the "responsible authority in charge of the work or for whose benefit the work is performed," (2) has the right to select, 'or to employ at will," (3) has a responsibility for payment of wage, (4) has 'the right to discharge or terminate the relationship," and (5) has "the right to control the work."[20]

In the case of *Parson v. Proctor & Gamble Manufacturing Co.*, 514 N.W.2d 891 (Iowa 1994) employees of a labor broker, Kelly Temporary Services ("Kelly"), filed a tort action against the broker's industrial customer, Proctor and Gamble Manufacturing Co. ("Proctor and Gamble"). Proctor and Gamble argued the Kelly employees were also employees of Proctor and Gamble, and their sole remedy was through Iowa Code chapter 85. The Iowa Supreme Court found that while the application of the employment test developed in *Henderson* was unnecessary because no contract of hire had been shown, the court applied the factors for determining whether an employee-employer relationship exists and found the analysis reinforced the argument that the plaintiffs were not employees of Protector and Gamble.[21]

---

[18] Compare *Renda*, 784 N.W.2d at 21, with *Alexander*, 768 F.3d 756 at 762 (quoting *Darden*, 503 U.S. at 106 ("in determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skills required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in the business; the provision of employee benefits; and the tax treatment of the hired party").
[19] *Renda*, 784 N.W.2d at 20 (quoting *Spirides v. Reinhardt*, 613 F.2d 826, 831-32 (D.C. Cir. 1979)).
[20] *Id.* at 21 (quoting *Sister Mary Benedict v. St. Mary's Corp.*, 255 Iowa 847, 851-52 , 124 N.W.2d 548, 551 (1963) and citing *Henderson v. Jennie Edmundson Hosp.*, 178 N.W.2d 429, 431 (Iowa 1970)).
[21] *Parson*, 514 N.W.2d at 896.

In applying the *Henderson* test the court in *Parson* found: (1) Kelly had the primary right to select the employees who worked for Protector and Gamble, the applications were filled out at Kelly, the employees took drug tests at Kelly, and Proctor and Gamble generally accepted any worker Kelly sent; (2) Kelly, not Proctor and Gamble, determined the wages the Kelly workers received for labor performed on Proctor and Gamble's premises, Kelly was responsible for the workers' time cards, issued the paychecks, and provided the workers W-2 income tax forms; (3) "the right to discharge Kelly workers rested with Kelly" and while Proctor and Gamble could request that the worker be reassigned to another line in the plant, Kelly had the primary authority over termination; (4) Kelly had control over the work of its employees at the Proctor and Gamble plant, and while Proctor and Gamble had some control over the Kelly employees, the agreement noted Kelly had "direct control" of the workers' services and Proctor and Gamble took "no obligation of any sort" to the workers; and (5) "Kelly as much as [Proctor and Gamble] 'was the responsible authority in charge of the work' and was the party 'for whose benefit' the work was performed."[22]

B. Application of the *Renda* Factors

Jacobson employed Taylor for the work he performed at Titan. The evidence presented at hearing established Taylor worked full-time for Jacobson at Titan. He did not perform other duties for Jacobson independent from his work at Titan.

Titan did not pay Taylor or provide him with any benefits. Jacobson determined Taylor's pay and was responsible for taxes related to Taylor's employment. Jacobson created the weekly schedules for the Jacobson employees and Palmer created the Jacobson employees' weekend schedules. Jacobson maintained a separate time clock at Titan for its employees and recorded Taylor's absences from work.

Titan controlled the premises, tools, and instrumentalities of Taylor's work. Jacobson provided forklift training to Taylor.

Taylor testified he relied on guidance from Palmer and Galeazzi for performing his job duties. He reported to Galeazzi on a daily basis and Galeazzi assigned him projects at Titan. Palmer provided instruction to Taylor on the work area, safety equipment, and performing job tasks. Butts also testified he provided instruction to Taylor when he worked with him during the first shift. There was no evidence presented at hearing that Dotson or Dubberke provided any daily instruction to Taylor on how to perform his job duties while he was working at Titan.

The Vendor On-Premises Agreement between Titan and Jacobson supports that Titan, not Jacobson provided supervision to Taylor, as follows:

---

[22] *Id.* at 896-97 (concluding while the five factors suggested the Kelly workers were not employees of Proctor and Gamble, "there was at least a genuine issue of material factor as to whether the plaintiffs entered into an employment relationship with [Proctor and Gamble]").

> 3.3 Supervision of employees. COMPANY [Titan] agrees that COMPANY employees and not VENDOR [Jacobson] employees, will provide direct, job-site supervision. COMPANY agrees to provide written feedback to VENDOR concerning the performance of VENDOR'S employees at the time of said employees' performance review. COMPANY agrees to assist VENDOR to identify previous employees of COMPANY, or who have previously worked at the Facility and their respective rehire status. COMPANY agrees VENDOR is not responsible for damaged product, equipment, inventory, machinery tools or any other items of COMPANY.

(Exhibit D at 3). In accord with the Vendor On-Premises Agreement, Jacobson listed Palmer as Taylor's supervisor on his Employee Orientation Sheet Staffing.

Titan employees, not Jacobson employees, supervised Taylor on a daily basis. The evidence at hearing established Titan controlled Taylor's work and working conditions. The Commission has established Taylor was a dual employee of Jacobson and Titan.

II. RACIAL HARASSMENT

A. Hostile Work Environment

To establish a claim of hostile work environment, the Commission must establish: (1) Taylor belongs to a protected class based on his race; (2) Taylor was subject to unwelcome harassment; (3) the harassment was based on Taylor' race; and (4) "the harassment affected a term, condition, or privilege of employment."[23] "If the harassment is perpetrated by a nonsupervisory employee, the plaintiff must show the employer knew or should have known of the harassment and failed to take proper remedial action."[24] A complainant must present evidence of a working environment a reasonable person would find to be hostile.[25] This case concerns allegations of supervisory and nonsupervisory harassment.

The complaining party must establish the harassment is severe or pervasive by demonstrating the conduct was subjectively and objectively abusive or hostile.[26] "The objective determination considers all of the following circumstances, including: (1) the frequency of the conduct, (2) the severity of the conduct, (3) whether the conduct was physically threatening or humiliating or whether it was merely offensive, and (4) whether the conduct unreasonably interfered with the employee's job performance."[27] Thus the conduct must be severe enough "to amount to an alteration of the terms or conditions of the employment."[28]

---

[23] *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 746 (Iowa 2006).
[24] *Id.*
[25] *Id.* at 747.
[26] *Farmland Foods, Inc.*, 672 N.W.2d at 744.
[27] *Id.* at 744-45.
[28] *Id.*

Taylor is a member of a protected class based on his race. The Commission avers the Palmer's use of the term "monkey," Galeazzi's comment Taylor "had not robbed anyone lately" and "tires were like a dope deal," Nelson's statements to Taylor that he was a "nigger," and Nelson's discussion about the KKK were unwelcome and based on Taylor's race. There is no evidence Taylor used racial slurs in the workplace. Taylor testified he felt humiliated by the comments and they impacted his work performance. While Taylor testified regarding his subjective feelings of humiliation, Taylor's attendance problems developed before the alleged "monkey" comment.

The evidence at hearing did not establish Galeazzi's comments had anything to do with Taylor's race. Taylor conceded many of his coworker had felony and other criminal convictions. And his coworkers included individuals who were Caucasian, African-American, Asian, and Pacific Islander. Kain testified the Titan workforce in Des Moines was 60% minority in 2012.

Taylor also alleged that on one occasion Palmer refused to allow him to use the cart to obtain fuel for the forklift. Palmer disputes Taylor's contention, but even assuming it is true, the statement does not relate to Taylor's race.

Taylor testified he overheard Nelson discussion the KKK with another coworker related to the KKK. Palmer recalled an article in the newspaper about the KKK wanting to come to Des Moines for the State Fair. Taylor mentioned hearing the comment once while he worked at Titan. Taylor did not report the conversation to Palmer, Dubberke, Dotson, or any other supervisor at Jacobson or Titan.

The terms "monkey" and "nigger" are recognized as racial slurs.[29] Taylor never complained about Nelson's use of the term "nigger" on two days to any Titan or Jacobson supervisor. Dubberke and Doston testified Taylor complained about the "monkey" comment and Dubberke and Dotson spoke with Palmer about the need to be careful about what he said in the workplace.

Taylor testified Palmer stated to Galeazzi, "look at this monkey, we got monkey business." Taylor states he then pulled Palmer aside and said, "I heard what you said – I need my job." Palmer has consistently denied calling Taylor a "monkey." Palmer testified Dubberke and Dotson spoke with him about the alleged comment after Taylor was angry with Galeazzi. This raises an issue of credibility. There are many factors used when considering the credibility of witness testimony. Some of the most common standards are as follows:

1. Whether the testimony is reasonable and consistent with other evidence you believe.
2. Whether a witness has made inconsistent statements.
3. The witness' appearance, conduct, age, intelligence, memory and knowledge of facts.

[29] *Canady v. John Morrell & Co.*, 247 F. Supp. 2d 1107, 1119 (N.D. Iowa 2003)

4. The witness' interest in the trial, their motive, candor, bias and prejudice.[30]

Taylor's testimony is not reasonable and consistent with the other evidence I believe. In his complaint, Taylor testified Palmer said, "watch this monkey, look at the monkey show." Taylor's statement changed over time. Palmer has consistently denied making the statement. Dubberke testified Taylor told him he overheard two guys on the dock talking about craziness out there, "monkey business." Dotson testified Taylor had reported overhearing Palmer say "look at this monkey business out here."

The Commission did not present any witnesses who testified Palmer made any discriminatory comments in the workplace. Taylor's cousin, Butts, is also African American. Butts did not testify Palmer made any harassing comments in the workplace. I do not believe Palmer told Galeazzi to "watch this monkey" or "look at this monkey," referring to Taylor.

The Eighth Circuit has noted that while a working environment "dominated by racial slurs constitutes a violation of Title VII . . . "[i]f the comments are '[s]poradic or casual,' they are unlikely to establish a hostile work environment claim."[31] While frequency of the harassment is a factor, "even infrequent conduct can be severe enough to be actionable."[32]

Even assuming Palmer made a comment about the craziness out there, "monkey business," and Nelson referred to Taylor as a "nigger" on two days, the question is whether a reasonable person would find the comments abusive or hostile. The conduct Taylor complains of was not frequent, and the environment was not permeated with discriminatory intimidation, ridicule, and insult. The Commission has not met its burden of establishing Taylor's work environment was objectively abusive or hostile.[33]

---

[30] *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996).

[31] *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 911 (8th Cir. 2006) (quoting *Jackson v. Flint Ink. N. Am. Corp.* 370 F.3d 791, 794 (8th Cir. 2004), *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999)).

[32] *Id.* (citing *Bowen v. Mo. Dep't of Soc. Servs.*, 311 F.3d 878, 884-85 (8th Cir. 2002)).

[33] *See Fuller v. Fiber Glass Sys., LP*, 618 F.3d 858, 864 (8th Cir. 2010) (concluding the evidence established Fuller's work environment was hostile and permeated with discriminatory intimidation, ridicule and insult where Fuller's trainer told her she did not like black people, asked her why she came back to work, told her that her job was too difficult, and where she was told to stay off the phones because customers were not used to hearing a black voice, and where her manager made "monkey or gorilla gestures" behind her); *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 911-12 (8th Cir. 2006) (finding the plaintiff met her burden where her coworker threatened to eat her liver and referred to her as a "monkey," a "black monkey", a "chimpanzee", and telling her she should wear dreadlocks); *Curry v. SBC Communications, Inc.*, 669 F. Supp. 2d 805, 833-34 (E.D. Mich. 2009) (finding a reasonable jury could find that five incidents over four years involving a noose, a "porch monkey" comment, racial graffiti, "Mr. Bojangles" slur, and a white supremacist lunch room flyer constituted a racially hostile work environment and noting "[t]he noose incident is undoubtedly among the most serious of the plaintiffs' allegations, since it is pregnant with historical and cultural meaning," but noting the comment "porch monkey" "would not by itself rise to the level of severity to constitute a hostile work environment").

ORDER

The Commission has not proven Titan or Palmer committed an unfair or discriminatory practice in employment by subjecting Taylor to a racially hostile work environment. This matter is dismissed. The Commission shall take any steps necessary to implement this decision.

Dated this 16th day of January, 2015.

Heather L. Palmer
Administrative Law Judge
515-281-7183

cc: Katie Fiala (electronic mail)
Becky Knutson (electronic mail and first class mail)
Marquis Taylor (first class mail)

Notice

Any adversely affected party may appeal this decision to the Iowa Civil Rights Commission within 30 days of the date of the decision.[34] The appeal must be signed by the appealing party or representative of the appealing party and contain a certificate of service upon the other parties, and specify:

a. The parties initiating the appeal;
b. The proposed decision or order appealed from;
c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
d. The relief sought;
e. The grounds for relief.[35]

The Commission may also initiate review of a proposed decision on its own motion at any time within 60 days following the issuance of the decision.[36]

[34] 161 IAC 4.23(1).
[35] *Id*. 4.23(3).
[36] *Id*. 4.23(2).