

## **Independent Contractors Find Protection for Employment Contracts under Section 1981**

Employers are often confused about who can properly be classified as an independent contractor. The decision has enormous ramifications, not the least of which is whether the worker is covered by state and federal discrimination laws. In Brown v. J. Kaz Inc. d/b/a Craftmatic of Pittsburgh, 581 F3rd 175 (3rd Cir. 2009) the Third Circuit Court of Appeals concluded that the applicant in that case was an independent contractor and, therefore, was not covered by Title VII or the Pennsylvania Human Relations Act (PHRA). On the other hand, the Court found that the applicant, as an independent contractor, was covered by 42 U.S.C. Section 1981 (“Section 1981”).

In *Brown*, Craftmatic was a distributor of adjustable beds and sold those beds through sales representatives who visited potential customers’ homes. In 2006 Kimberly Brown, an African-American female, responded to an ad from Craftmatic soliciting sales representatives. After speaking to Brown twice by telephone, recruiting manager Jay Morris invited Brown to attend a training session at Craftmatic’s Pittsburgh, Pennsylvania office. During these telephone conversations, Brown mentioned to Morris that she planned to take the bus to the training session because she did not like to drive in unfamiliar areas.

Brown attended the training session, which was held from August 8-10, 2006. Two other trainees, Ronald Gibbs and Daryl Rinehart, also attended the training. Neither Gibbs nor Rinehart is African-American. During the course of the training, training manager Daniel Pesta gave homework assignments. Although Pesta testified that Brown did not complete those assignments, Craftmatic owner John Girty testified at his deposition that Pesta told him that Brown had completed her assignments. Brown also contends she completed the assignments. In any event, at the end of the training, Pesta presented Brown with a contract, which Brown signed on the final day of training.

On the final day, after Brown had signed her contract with Craftmatic, Brown, Gibbs and Rinehart were on the deck outside the training room. Morris approached the group and offered his hand to each of them. Gibbs and Rinehart both shook hands with Morris; but, for reasons that are unclear, Brown refused to shake Morris’ hand. It is undisputed that Brown and Morris then had a heated argument. Brown contended that when she refused to shake his hand, Morris told her “Well, you ain’t nothing but a Black person anyway.” and “Well, you ain’t nothing but the N word.” Brown testified that she then asked Morris, “Are you calling me a n-----?” and Morris then “smirked and shook his head” in the affirmative.

Morris disputed Brown’s version. He testified that he and Brown argued and that he told Brown that “not shaking a man’s hand is like calling a Black person a derogatory name” and that “it’s like calling a Black person the N-word.” After this exchange, the two engaged in some discussion about slapping or hitting people.

Minutes later, Brown and Morris returned to the training room and Morris told Brown that if he had anything to say about it, she would not work for Craftmatic. Morris then reported the incident to Girty and told Girty that he did not want Brown to work for the company. Subsequently, Girty decided that

Craftmatic would not use Brown as a sales representative and she was reimbursed for expenses she incurred as a result of attending the training. Brown sued under Title VII, PHRA, and Section 1981.

The District Court granted summary judgment in favor of Craftmatic because Brown, as an independent contractor, was not protected by Title VII and/or the PHRA. The District Court further held that although Brown was covered by Section 1981, Girty had legitimate concerns about whether Brown could succeed as a sales representative. First, Girty was concerned that “Brown would exhibit inappropriate behavior in a customer’s home” based on her heated argument with Morris during the training break; second, Girty was concerned that since Brown did not like to drive in unfamiliar places, she would be not able to perform the job of a traveling sales representative.

The Appellate Court disagreed, criticized the District Courts’ reasoning in the case as “problematic” and pointed out a number of inconsistencies with Craftmatic’s arguments. For instance, the District Court concluded that Girty decided to terminate Brown’s contract after speaking to Pesta, who was not alleged to have racial animus against Brown. However, in his deposition, Girty stated that Pesta did not provide him with any information that led to his decision to terminate Brown’s contract. Furthermore, Brown’s reluctance to drive in unfamiliar areas was known by both Pesta and Morris. Yet Morris still invited Brown to attend the training sessions. Similarly, this prior knowledge did not prevent Pesta from presenting Brown with a sales representative contract. In fact, Pesta testified at his deposition that “the fact that Brown came in on a bus in and of itself didn’t have any bearing” on whether Brown was a good sales representative candidate.

Evaluating the evidence in the light most favorable to Brown (because Brown is the non-moving party in the Summary Judgment), Brown was able to show direct evidence of discrimination. The Court concluded that Morris’ comments were more than simply “stray remarks”, and within minutes of these comments Morris told Brown that if he had anything to do with it, Brown would not work for the company, then Morris recommended to Girty that Brown’s contract be terminated.

The Appellate Court examined Section 1981, which provides that “all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens.” Section 1981 embraces all contracts, and does not limit itself, or even refer, to employment contracts where an independent contractor provides service to another. The Appellate Court agreed with three other courts of appeals and held that Brown could bring a discrimination claim under Section 1981. The Court added that Craftmatic would have to show that race had not been part of the process, and that its termination decision concerning Brown’s contract would have been the same even if Brown had not been an African American. Accordingly, the case was remanded back to the District Court to reconsider Brown’s section 1981 claim.

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