UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPEAL NO. 91-3083

DEBI EYERMAN

Plaintiff-Appellant,

v.

MARY KAY COSMETICS, INC.

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE DIRECT SELLING ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Fed. R. App. P. 29, the Direct Selling Association ("DSA") hereby respectfully requests leave of this Court to file its brief as amicus curiae in support of Defendant-Appellant Mary Kay Cosmetics, Inc.

For the reasons set forth in the accompanying Memorandum, DSA has a vital interest in the outcome of this matter, and based upon its unique expertise in the direct selling industry, can offer the Court the benefit of its perspective on important issues raised on appeal.

Respectfully submitted,

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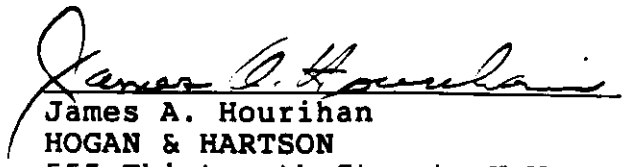
MEMORANDUM IN SUPPORT OF MOTION TO FILE AMICUS CURIAE BRIEF

The Direct Selling Association (DSA) has an important interest in the outcome of this case, and brings to this Court its extensive experience in the direct sales industry. DSA is a national trade association headquartered in Washington, D.C. It represents approximately 100 "direct sales" companies, which distribute their products to customers through independent contractors. The direct selling industry is a significant part of the nation's economy, providing income-earning opportunities to approximately four million people in the United States, over 98 percent of whom are independent contractors. DSA member firms annually account for approximately 90 percent of the industry's retail sales volume.

DSA is concerned that Appellant and her amici curiae are seeking to expand Ohio's employment discrimination law beyond the scope intended by the legislature. Specifically, Appellant attempts to stretch the scope of the employment law to cover nonemployee independent contractors. This could have serious repercussions for direct sales businesses and independent contractors by causing confusion about the scope of numerous employment-related statutes which, in the past, have not applied to independent contractors.

Accordingly, DSA respectfully requests leave to file its brief as amicus curiae.

Respectfully submitted,



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Statement of Interest of Amicus Curiae

The Direct Selling Association (DSA) is a national trade association headquartered in Washington, D.C. It represents approximately 100 "direct sales" companies, which distribute their products to customers through independent contractors. The direct selling industry annually provides income-earning opportunities to approximately four million people in the United States, over 98 percent of whom are independent contractors. DSA member firms annually account for approximately 90 percent of the industry's retail sales volume.

DSA is concerned that Appellant and her amici curiae are seeking to expand Ohio law beyond the scope intended by the Ohio legislature. Specifically, Appellant attempts to stretch the scope of Ohio's employment discrimination law to cover nonemployee independent contractors. If Appellant's position is accepted, it would expand the statute in question and possibly subject the direct sales industry to a host of other employment-related statutes which currently are not applicable. This would result in confusion and increased costs within the direct sales industry, and the likely loss of income-earning opportunities for people wishing to become or remain direct salespersons. It also would be contrary to the clear intent of the Ohio legislature and prior interpretations by Ohio courts.

DSA is uniquely qualified to advise the Court concerning the fundamental differences between employees and independent contractors. Moreover, DSA is vitally interested in maintaining the integrity of the independent nature of its members' sales forces, and in protecting the millions of citizens who rely on their independent businesses for income.

Statement of Issue Presented for Review by Amicus Curiae

Whether the scope of Ohio's employment discrimination statute may be judicially expanded to cover independent contractors, notwithstanding clear evidence of legislative intent and Ohio judicial precedent to the contrary.

Statement of the Case

Amicus Curiae adopts the Statement of the Case of Defendant-Appellee.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Plaintiff-Appellant,

v.

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BRIEF OF AMICUS CURIAE DIRECT SELLING ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE

Introduction

The Direct Selling Association ("DSA"), appearing as an amicus curiae in this action, hereby submits this brief in support of the trial court's decision that independent contractors are not covered under Ohio's employment discrimination statute, Ohio Rev. Code § 4112.02(A). Contrary to Appellant's position, nothing in the Ohio statute indicates a legislative intent to stretch the statute beyond the employment context. Rather, it is clear from the statute

itself and well-established case law that independent contractors are not covered.

Argument

I. Independent Contractors Are Fundamentally Different From Employees and the Difference Has Consistently Been Recognized Under State and Federal Law

Independent contractors, including direct salespersons, earn their livelihoods in a manner that is fundamentally different from those in an employer-employee relationship. Independent contractors run their own businesses and control their own activities. Their success depends directly upon their independent judgment and effort. Thus, independent contractors have the freedom to set their own hours, to take time off when they choose and to work as much or as little as they want. Independent contractors generally pay their own expenses, and frequently maintain their own inventories.

Direct salespersons generally conduct their businesses much like typical retailers, except that direct salespersons take the product to their customers rather than operating at a fixed retail location. For most direct salespersons, selling is not seen as a "job," but rather as a way to earn additional income. As independent contractors, direct salespersons are compensated differently from employees. Their earnings are based directly on the results they achieve, not on the hours they put in. Like many independent contractors, direct

salespersons are often paid on a commission basis. A majority of direct salespersons purchase products from supplying companies at wholesale prices, and then sell these products to consumers at retail prices. In addition, as independent contractors, direct salespersons have the freedom to choose -- and pay for -- those benefits best suited to their personal needs. Put simply, direct selling is an ideal way for individuals to earn extra money without experience, without capital, and without sales quotas. Over 98 percent of direct salespersons are independent contractors and over 80 percent work part-time or temporarily.

Employees, on the other hand, work for an employer who controls their activities. Among other things, the employer decides the hours of work, the activities for the employee to perform, and the location for the work. Employees are subject to the direction and control of their employers. Generally, employees are provided those benefits that their employers select.

The fundamental difference between independent contractors and employees has long been recognized at both the state and federal level. The Ohio legislature and the Ohio courts have repeatedly acknowledged that Ohio's employment-related laws do not apply to independent contractors. For example, independent contractors are not

covered under Ohio's unemployment insurance statute. 1/ Nor are they covered under Ohio's workers' compensation statute. 2/ Similarly, as the trial court noted, Ohio's age discrimination statute does not apply to independent contractors. 3/

The principle that the employment-related statutes are not applicable to independent contractors also has been recognized consistently at the federal level. As the courts have repeatedly held, independent contractors are not subject to Title VII of the Civil Rights Act of 1964, as amended, 4/ the Age Discrimination in Employment Act of 1967, 5/ the

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1/ Ohio Rev. Code § 4141.01 et seq. See, e.g., Davis Cabs, Inc. v. Leach, 115 Ohio App. 165, 184 N.E.2d 444 (Franklin Co. 1962)(leading case explaining that independent contractors are not covered under unemployment insurance statute).

2/ Ohio Rev. Code § 4123.01 et seq. See, e.g., Fankhauser v. Knight-Ridder Newspaper, 27 Ohio App.3d 236, 500 N.E.2d 407 (Summit Co. 1986).

3/ Ohio Rev. Code § 4101.17. See Cavanaugh v. Nationwide Mutual Insurance Co., 65 Ohio App. 2d 123, 416 N.E.2d 1059 (Summit Co. 1976).

4/ See, e.g., Falls v. Sporting News Publishing Co., 834 F.2d 611, 613 (6th Cir. 1987); Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979).

5/ See, e.g., EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068 (6th Cir. 1982), cert. denied, 464 U.S. 819 (1983); Garrett v. Phillips Mills, Inc., 721 F.2d 979 (4th Cir. 1983).

federal Fair Labor Standards Act, 6/ the federal Social Security Act, 7/ or a host of federal tax statutes. The same principle has routinely been upheld by the legislatures and courts of other states. 8/

In short, in order to prevail, the Appellant must somehow show that when the Ohio legislature enacted Ohio Rev. Code § 4112.02, it intended to ignore the settled law recognizing the fundamental difference between employees and independent contractors, and to apply an employment law in a nonemployment context. As discussed below, and as the trial court properly found, Appellant cannot make this showing.

II. The Trial Court Correctly Concluded That Ohio's Employment Discrimination Statute Does Not Cover Independent Contractors

The trial court determined that Ohio's legislature did not intend § 4112.02 -- an employment discrimination statute -- to apply outside of the employment context. The court properly focused on the fact that the statute, on its face, applies to

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6/ See, e.g., Brock v. Superior Care, Inc., 840 F.2d 1054 (2d Cir. 1988); cf. Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793 (2d Cir. 1983).

7/ See, e.g., United States v. Silk, 331 U.S. 704 (1947).

8/ See, e.g. Mehtani v. New York Life, 145 A.D.2d, 498 N.Y.S.2d 800 (1989). See also Falls v. Sporting News Publishing Co., 834 F.2d 611, 613 (6th Cir. 1987) (applying Michigan law).

"employers," and regulates their conduct with respect to matters "related to employment." (R. 278: Opinion and Order, p. 6) (emphasis added in part). The court correctly concluded that in using the words "employer" and "employment" in the statute, the Ohio legislature clearly did not intend the section to be stretched to "encompass more than the traditional employer-employee relationship." See (R. 278: Opinion and Order, p. 7).

Appellant argued below, as she does on appeal, that the statute's repeated references to employment should be disregarded because the statute uses the word "person" in prohibiting discrimination. The trial court properly rejected this argument, noting that the word "person" is defined not only for purposes of the employment discrimination prohibition, but also for purposes of "ten separate prohibitions of discriminatory conduct" from discrimination in housing to discrimination in public accommodation. (R. 278: Opinion and Order, p. 5). The word "person" also appears within the statute in both the "perpetrator" and "victim" contexts. In applying the statute, the court noted, one must "look at the particular prohibition at issue to determine who could reasonably fall within the definition of 'person' as used in that subsection." (R. 278: Opinion and Order, p. 6). For example, although the definition of "person" includes "associations," "corporations," and "all state[s] and political

subdivisions," these entities "are not imbued with such characteristics as race, color, religion, sex, national origin, handicap, or ancestry" for purposes of being the "victim" of employment discrimination.

In addition to being contrary to the clear language of the statute, Appellant's position is contrary to established precedent from the Ohio courts, which this Court is obliged to follow in interpreting Ohio law. 9/ First, as the trial court pointed out, the one Ohio court that has construed § 4112.02 on this point rejected Appellant's statutory interpretation. In Berger Hospital v. Ohio Civil Rights Commission, Slip. Op., No. 86-CA-7, Pickaway County Court of Appeals (June 26, 1987), the court held that § 4112.02 does not protect independent contractors.

Second, the Ohio Supreme Court found in a similar context that the legislature's use of the term "person" rather than "employee" does not mean that independent contractors are covered. In Gillum v. Industrial Comm'n, 141 Ohio St. 373, 48 N.E.2d 234 (1943), the Ohio Supreme Court determined that the Ohio Workers' Compensation Act, which applies to "every person in the service of" certain employers, did not apply to bona fide independent contractors.

9/ See Mullaney v. Wilbur, 421 U.S. 684, 691 (1975).

Third, the Ohio state courts have recognized that "federal case law interpreting Title VII . . . is generally applicable to cases involving alleged violations of R.C. Chapter 4112." 10/ As noted above, Title VII case law, as determined by this Court and the other circuits, has consistently reflected that independent contractors are not covered under the employment statute absent an actual employment relationship.

Appellant and her amici have not cited a single case in which a court has held that an independent contractor is covered under any employment discrimination statute (including Ohio's statute), absent an actual employment relationship. None of the cases which Appellant and/or her amici cite for their proposition that "nonemployees" are covered under employment discrimination statutes is on point. 11/ In fact,

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10/ Plumbers & Steamfitters v. Ohio Civil Rights Comm'n, 66 Ohio St.2d 192, 421 N.E.2d 128, 131 (1981). See also South Wind Motel v. Ohio Civil Rights Comm'n, 24 Ohio App.3d 209, 494 N.E.2d 1158, 1159 (Franklin Co. 1985).

11/ For example, Puntolillo v. New Hampshire Racing Ass'n, 375 F. Supp. 1089 (D.N.H. 1974); Gomez v. Alexian Bros. Hosp., 698 F.2d 1019 (9th Cir. 1983); Doe v. St. Joseph's Hospital, 788 F.2d 411 (7th Cir. 1986); Pardazi v. Cullman Medical Center, 838 F.2d 1155 (11th Cir. 1988); Pao v. Holy Redeemer Hosp., 547 F. Supp. 484 (E.D. Pa. 1982); Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973); Zaklama v. Mt. Sinai Medical Center, 842 F.2d 291 (11th Cir. 1988); and Livingston

[Footnote continued]

the cited cases expressly acknowledge that there must be a connection "with an employment relationship for Title VII protections to apply." 12/ Other cited cases actually stand for the proposition that independent contractors are not covered under employment-related statutes. 13/ Finally, Appellant and her amici's citation of certain cases simply reflects a misreading of the cases. 14/

11/ [Footnote continued]

v. Ewing, 601 F.2d 1110 (10th Cir.), cert. denied, 444 U.S. 870 (1979) did not even purport to hold that Title VII applied absent an employment relationship. These cases concerned whether Title VII covers a nonemployee's claim against an employer, alleging discriminatory actions which resulted in the denial of an employment opportunity with a third party. For example, several cases involved a hospital's denial of staff privileges to a doctor or nurse, allegedly denying the individual the opportunity to be employed by hospital patients.

12/ Gomez v. Alexian Bros. Hosp. of San Jose, 698 F.2d at 1021 (citing Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980)).

13/ See Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983); and EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068 (6th Cir. 1982), cert. denied, 464 U.S. 819 (1983). In Falls v. Sporting News Publishing Co., 834 F.2d 611, 613 (6th Cir. 1987), this Court cited Armbruster for the proposition that independent contractors are not protected under Title VII. In Garrett v. Phillips Mills, Inc., 721 F.2d 979, 980-81 (4th Cir. 1983), the court cited First Catholic for the fact that only employees -- not independent contractors -- are covered under the applicable employment discrimination statute.

14/ See, e.g., Price Waterhouse v. Hopkins, __ U.S. __, 109 S. Ct. 1775, 1781 n. 1 (1989); and Hishon v. King & Spalding,

[Footnote continued]

Conclusion

The trial court properly recognized the fundamental differences between independent contractors and employees. Moreover, relying on the legislative intent expressed on the face of the statute and on controlling Ohio precedent, the court correctly rejected Appellant's suggestion that the court should stretch the employment statute beyond the employment context.

Reversing this decision would not only cut against the legislature's clear intent and the established case law, it also would harm the direct sales industry and possibly result in the loss of opportunities for direct salespersons. The law is currently settled in Ohio and across the nation that employment statutes of all kinds -- including laws dealing with

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14/ [Footnote continued]

467 U.S. 69 (1984)). Contrary to Appellant's representations, these cases do not hold or imply that decisions regarding nonemployees (i.e., partners in a law firm or an accounting firm) fall within the scope of employment for purposes of Title VII. In Hishon, the U.S. Supreme Court stated that consideration for partnership in the law firm fell within Title VII because it was a "term, condition, or privilege" of an associate's employment, in that the associate was induced to accept employment by the law firm because of the promise of partnership consideration. The Court in Price Waterhouse cited Hishon in support of the statement that decisions concerning an accounting associate's promotion to partnership were likewise within Title VII. Accordingly, neither case indicates that decisions affecting nonemployees is within the scope of Title VII.

workers' compensation, unemployment compensation, employment benefits and other areas -- are not applicable to independent contractor relationships. A judicially adopted exception to this rule in this case would inevitably lead to uncertainty and confusion in the industry with regard to coverage of other employment laws. Independent contractors will not know which benefits are provided by statute and which benefits they must provide on their own. Similarly, businesses that utilize independent contractors may conclude that they are potentially exposed to the cost of providing employment benefits to independent contractors. Due to the part-time and often temporary nature of independent contractors' affiliations with direct sales companies, many income-earning opportunities would be eliminated due to costs potentially outweighing the benefits of the independent contractors' services.

The fundamental differences between employees and independent contractors have long been recognized by courts at all levels determining the coverage of state and federal employment-related statutes. Ohio's employment discrimination statute, like other employment statutes, does not apply to independent contractors, and any rewriting of Ohio's law to cover nonemployees must be left to Ohio's legislature.

Respectfully submitted,

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BERGER HOSPITAL, Plaintiff-Appellee,
v.
OHIO CIVIL RIGHTS COMMISSION and Darlene Spyra, Defendant-Appellants.
No. 86 CA 7.
Court of Appeals of Ohio, Pickaway County.
June 26, 1987.

Anthony J. Celebrezze, Jr., Attorney General and Deanna Dawe Rush, Kate Schulte, Columbus, for appellant.
P. Eugene Long, Circleville, for appellee.

OPINION & JUDGMENT ENTRY

ABELE, Judge.

*1 Appellant appeals from a Pickaway County Common Pleas Court judgment finding the Ohio Civil Rights Commission (hereafter OCRC) lacks jurisdiction over the subject matter and these parties as required by R.C. 4112.01 et seq. The court determined appellant Spyra, hereinafter appellant, is an independent contractor of appellee, therefore, the court held the employee protections of R.C. 4112.01 et seq do not extend to appellant. The court also held the record does not contain reliable, probative and substantial evidence of gender discrimination.

Appellant, a nurse anesthetist for United Anesthesia, first began providing interim anesthesiology services for appellee in February 1983. Appellee then engaged for a short time a group of anesthesiologists to provide service, but within several weeks hospital administrator Rideout invited appellant to submit a resume for a permanent position as anesthetist.

Appellant and a second candidate, Dan Reuter, applied for the position. Meanwhile, appellant continued to provide complete anesthesia coverage for surgeries. The surgeons who make up the Surgery and Anesthesia Committee evaluated both candidates' performances for a two week period in April, 1983. On April 26, 1983, all but one member voted to recommend appellant to appellee's broad of governors to receive a contract of employment. One surgeon, Dr. Exconde, abstained from the vote.

The board of governors, however, did not follow the Committee's recommendation, choosing instead on April 27, 1983, to continue the search for an anesthesiologist. Rideout requested appellant to provide service until then. The board did soon after hire an anesthesiologist, Dr. Aguila, who worked only a few months before giving notice of his departure. Rideout once again contacted appellant, who had moved to New York, about applying again for the anesthetist position. Although appellant indicated she was still interested, the board voted on July 14, 1983, to offer Dan Reuter a contract of employment.

The board had invited the members of the Surgery and Anesthesia Committee to attend the July 14, 1983 meeting. At that time, Dr. Exconde voiced his concerns regarding appellant. He stated he had reason to doubt appellant's competence, based upon his observations of her performance. Several surgeons reminded Dr.

Exconde of the earlier vote for appellant, but Dr. Exconde maintained he was reluctant to work with appellant in the future. After appellee awarded the contract of employment to anethetist Reuter, appellant filed a charge of gender discrimination with the OCRC against appellee.

The OCRC determined on October 10, 1983, that it was probable appellee was engaging in discriminatory employment practices, and further, that OCRC attempts to resolve the allegations through conciliation had been unsuccessful. After a May 8 and 9, 1984, hearing the OCRC ruled in appellant's favor. The trial court reversed. We affirm.

ASSIGNMENT OF ERROR I

'THE LOWER COURT ERRED IN FAILING TO FIND COMMISSION JURISDICTION OVER THE PARTIES AND SUBJECT MATTER IN THIS CASE.'

*2 In this assignment of error, appellant raises the threshold issue of whether the OCRC has jurisdiction over the parties and subject matter of this litigation. R.C. 4112.01 et seq, which creates and empowers the OCRC, proscribes inter alia unlawful discriminatory practices by employers in an employment setting. OCRC jurisdiction thus turns on the question: was appellant an employee of appellee, or was appellant an independent contractor? R.C. 4112.01(A)(3) simply defines an employee as '. . . an individual employed by an employer . . .' The issue for this court, then, is to determine the nature of the employment relationship in the case at bar.

Appellee contends appellant was an independent contractor, as such, appellee concludes the OCRC does not have jurisdiction. The trial court agreed, noting R.C. 4112.02(A) only applies to employment situations, and concluded the traditional test indicated appellant functioned as an independent contractor. The court pointed out appellee neither withheld taxes for appellant, nor paid appellant a salary, nor instructed appellant in the particulars of her work. Instead, appellant billed patients directly, and the surgeons oversaw her role in the operating room.

The court appears to have applied Ohio principles of agency in defining 'employee;' as it specifically rejected federal case law definitions, stating it found the Ohio and federal civil rights laws not coextensive. The court relied on Foulks v. Ohio Dept. of Rehabilitation (C.A. 6, 1983), 173 F. 2d 1229.

Appellant asserts the OCRC does have jurisdiction in this matter, arguing appellant was an employee of appellee. Appellant contends, initially, there is a dearth of Ohio case law defining 'employee' for the purposes of R.C. 4112.01 et seq; and therefore, the court must look to applicable federal law for a definition because of the similarity in the wording of the federal and Ohio statutes. The two statutes state in pertinent part:

'4112.02 Unlawful discriminatory practices.

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.'

'2000e-2. Unlawful employment practices.

Employer practices

(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 t discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or'

We believe federal case law is applicable to Ohio Law for the purposes of defining employment relationships. We disagree with the court's reliance on Foulks, supra.

The seemingly simple task of defining employment relationships is made more difficult by the existence of different tests or criteria. Ohio definitions, for example, evolve from cases deciding issues of tort liability bases on agency.

*3 In Ohio, an employer-employee relationship is characterized by the high level of control the employer exercises over the mode and manner of the employee's work. Councell v. Douglas (1955), 163 Ohio St. 292, syllabus. See, also, Gillum v. Industrial Commission of Ohio (1943), 141 Ohio St. 373.

The federal circuits are currently split on the issue of the proper test for determining employment relationships in the context of discrimination. Mares v. Marsh (C.A. 5, 1985), 777 F. 2d 1066; Miller v. Advanced Studies, Inc. (N.D. Ill. 1986), 635 F. Supp. 1196. The Sixth Circuit originated the 'economic realities' test in Armbruster v. Quinn (C.A. 6, 1983), 711 F. 2d 1332. Armbrustar advocates a liberal definition of 'employee' because '. . . the term . . . was not meant in technical sense, divorced from broadly humanitarian goals of statute.' Armbruster, supra, at paragraph eleven of the syllabus. Armbruster held at paragraph twelve of the syllabus that the definition of 'employee' depends upon a determination of whether the individual is 'susceptible to the kind of unlawful practices that Title VII was intended to remedy.'

A second line of federal case law advocates a much narrower definition. Spirides v. Reinhardt (D.C. Cir., 1980), 486 F. Supp. 685. The Spirides court used the 'hybrid' test, as the court scrutinized the economic realities of the working relationship, but focused more on the common law agency notions of employer control. In concluding Spirides (a foreign language broadcast for the Voice of America) was an independent contractor, the court held at paragraph one of the syllabus:

'Plaintiff, who worked pursuant to purchase order vendor contracts which indicated that plaintiff 'shall perform such services as an independent contractor, and not as an employee' where, under these renewable yearly contracts, she was paid per assignment, did not receive annual or sick leave, received no retirement credits, and had no hospitalization insurance, and where government did not make any deduction from her salary for withholding of taxes, and no social security payments were made on her behalf, plaintiff was not an 'employee' under Title VII of Civil Rights Act of 1964 but was, rather, an independent contractor.'

Appellant urges this court to adopt the broadbrush reasoning of Armbruster, supra, in determining employment relationships. Appellant also proposes an alternate test under which to find her an employee, and that is 'interference with employment opportunities' test as found in Sibley Memorial Hospital v. Wilson (1973), 488 F. 2d 1338. Sibley held at paragraph three of the syllabus:

'Phrase 'person aggrieved' as used in provisions of Civil Rights Act of 1964 for filing of complaints with EEOC and of eventual actions in district court

comprehends individuals who do not stand in direct employment relationship with employer.' (Emphasis Ours)
See, also, Gomez v. Alexian Brothers Hospital of San Jose (1983), 698 F. 2d 1019. We note Ohio law lacks the verbiage 'persons aggrieved,' upon which this test appears to turn. We are not persuaded Ohio law can embrace the Sibley interpretation.
*4 Appellee, on the other hand, urges us to apply the 'hybrid' theory of Spirides, supra, in examining the employment relationship. We agree with appellee Spirides appears to be the prevailing federal test; we note Dake v. Mutual of Omaha Insurance Co. (N.D. Ohio 1984), 600 F. Supp. 63, 65 appears to reject the Sixth Circuit Armbruster test when it expressly adopted the hybrid test followed by the Third, Fourth and Fifth Circuits.
We choose to apply the federal hybrid test of Spirides, supra. The test incorporates common law principles of agency, and thus closely mirrors existing Ohio definitions, evolved from different circumstances. See Stratso v. Song (1984), 17 Ohio App. 3d 39, where the court found agency by estoppel, but acknowledged the independent contractor relationship usually maintained between a hospital and an anesthesiologistor anesthetist.
The hybrid test requires a determination, firstly, of whether an individual is economically dependent for his livelihood upon his employer. Hickey v. Arkla Industries, Inc. (C.A. 5, 1983), 699 F. 2d 748, 751; secondly, whether the employer maintains the right to control the means and manner of the individual's performance to such an extent that the worker is deemed an employer for the purposes of civil rights protections. Mares, supra, annotation, Civil Rights--Who is 'Employee,' as defined in 701(f) of the Civil Rights Act of 1964, 42 U.S.C.S. 2000 e(f) (1985), 72 A.L.R. Fed. 522.
Appellee hospital contracted in February 1983, with United Anesthesia, who assigned independent contractor appellant to provide anesthesia coverage on in interim basis. She administered anesthesia for scheduled and emergency surgery upon a surgeon's request. She billed patients directly. She lived in the hospital, and was required to provide 24-hour coverage, seven days a week. Appellant provided the service as a specialist; while the operating surgeon is technically responsible for the anesthetist, a surgeon is not necessarily expert in the area of anesthesia. Appellant generally made the decisions regarding the choice, method and timing of anesthesia, based upon her training.
The contract which administrator Rideout offered appellant provided: 'The anesthetist is 'free lance' self employed and liability for Income Tax, Social Security, and/or any other items remains with the anesthetist.' The contract also did not provide for annual leave, sick leave, hospital or retirement benefits. The contract required appellant to maintain liability insurance coverage at her own expense. The contract does not give appellee the right to control the mode and manner in which appellant performed her contractual duties.
When we apply the hybrid test of Spirides, supra, we find appellant earned her living by providing a killed service as an independent contractor. Appellee neither controlled the way appellant performed her work nor compensated her as an employee.
We agree with the court the OCRC lacks jurisdiction, and we differ from the judgment below in that we apply federal discrimination case law rather than Ohio agency law. We overrule appellant's first assignment of error.

ASSIGNMENT OF ERROR II

"THE LOWER COURT ERRED IN FINDING THE FINAL ORDER OF THE OHIO CIVIL RIGHTS COMMISSION WAS NOT SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE."

After a hearing, the OCRC rendered its decision on September 18, 1985, holding appellee's failure to hire appellant constituted unlawful discrimination. The trial court reversed, holding the Commission's finding in this respect is not supported by the evidence. The court indicated in its journal entry that appellee articulated (in response to appellant's prima facie case) a legitimate, non-discriminatory reason for not hiring appellant. Texas Department of Community Affairs v. Burdine (1981), 450 U.S. 248.

In its brief to this court, appellant states at page 25: 'After the employer has articulated a clear and specific reason . . . the Commission has the burden of showing that such reasons are a pretext for unlawful differential treatment . . . The Commission can show the employer's articulated reason to be pretextual 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence' (citations omitted).'

Appellant attempted to persuade the court appellee's failure to hire her was motivated by a desire on the part of Dr. Exconde not to work with a female, and further, that Dr. Exconde's allegations regarding her competence were a smokescreen for his prejudice. The court disagreed, stating Dr. Exconde based his objections to appellant's candidacy for a permanent position upon Exconde's opinion of her performance. Appellant now argues the court cannot substitute its judgment for that of the fact-finder. We have very carefully reviewed the record, and agree with the trial court the evidence does not support a finding of gender discrimination. We overrule appellant's final assignment of error.

JUDGMENT AFFIRMED.

GREY, P.J., Concurs with Attached Concurring Opinion.

STEPHENSON, J., Concurs in Judgment & Opinion.

GREY, J. CONCURRING:

I concur in the judgment of affirmance.

I do not agree with the majority treatment of the issue of jurisdiction. I do believe that the majority opinion takes a comprehensive view at the vexing problem of who, or what, is an employee. As in this case, it's often a close question. I would follow the rationale in Armbruster, supra, and in a close case always put great weight on the economic realities test. A truly independent contractor doesn't have to put up with discrimination because he can go somewhere else. An employee can't. The Armbruster case requires us to look at the facts in terms of the economic realities, rather than in terms of theoritical relationships. The Spirides case talks about a hybrid test and the indices of control, but if you have the power to discriminate against a person and significantly affect that person's right to make a living, you are in control.

I agree with the finding is Assignment of Error II that the record is devoid of any evidence of sexual discrimination. The record is replete with evidence

that Dr. Exconde did not like appellant, did not think her qualified, did not want to work with her. There is some evidence that his judgment about her professional ability may be wrong. But right or wrong, there is no evidence that his judgment was based on her sex.

*6 Thus, I concur in the judgment.

Ohio App., 1987.
Berger Hosp. v. Ohio Civil Rights Com'n
1987 WL 13493 (Ohio App.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Leave to File Brief of Amicus Curiae Direct Selling Association in Support of Defendant-Appellee, Memorandum in Support of Motion to File Amicus Curiae Brief, and Brief of Amicus Curiae Direct Selling Association in Support of Defendant-Appellee were, this 9th day of April 1991, served by first-class mail, postage pre-paid to:

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