THE IMPLICATIONS OF *ARBAUGH V. Y & H CORPORATION*: POTENTIAL EXPANSION OF TITLE VII OBLIGATIONS TO ENTERPRISES WITH FEWER THAN FIFTEEN EMPLOYEES

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On February 22, 2006, the Supreme Court of the United States reversed and remanded the Fifth Circuit case *Arbaugh v. Y & H Corporation* (hereinafter referred to as *Arbaugh*).[325] The case involves a sexual harassment complaint initiated by a female bartender and waitress against her former employer, a small New Orleans, Louisiana restaurant, the Moonlight Cafe.[326] Though the complaining party had initially prevailed in her litigation, the jury verdict was later vacated when post-factum discovery found that the Moonlight Cafe did not have the requisite fifteen or more employees, conditional of Section 701(b) of Title VII of the Civil Rights Act of 1964.[327]

The subsequent appeal was noteworthy because it posed two specific concerns for employers. First, does Title VII's prohibition against employers with fifteen or more employees limit the subject-matter jurisdiction of federal courts, or does it merely raise the issue going to the merits of a claim? Second, who is an "employee" for the purpose of establishing the "fifteen or more employees" threshold? However, the Supreme Court chose only to address the first issue in its decision by ruling that the fifteen-employee threshold of Title VII "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts."[328]

This manuscript examines the arguments presented within *Arbaugh*. It will also ascertain the potential consequences for employers, especially small businesses, based upon the Court's ruling. This decision not only opens smaller employers to an increased risk of litigation, but may also expose such employers to Title VII remedies if competent counsel does not raise the objection that a complaint "fails to state a claim upon which relief can be granted.[329]

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 defines an *employer* covered under the Act to be "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 any agent of such a person."[330] The meaning of this definition appears to be very specific and to leave little room for interpretation, or so it would seem. To some, an employer with fourteen or fewer employees would not be subject to the Act's equal employment opportunity provisions. This

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[325] 126 S. Ct. 1235 (2006).
[326] 2003 U.S. Dist. LEXIS 5568 (E.D. La. 2003).
[327] Arbaugh v. Y & H Corp., 380 F.3d 219, 222 (5th Cir. 2004).
[328] *Supra* note 1, at 1237.
[329] *Id.* at 1236.
[330] 42 U.S.C. § 2000e(b).

point that Title VII only applies to private sector employers with 15 or more employees is taught in most human resource management and personnel law textbooks.[331]

This article will examine the arguments presented within *Arbaugh* in regard to two critical issues addressed in the case: whether subject-matter jurisdiction or merit is to be appropriate gravaman for determining a federal court's right to hear a Title VII complaint, and what standard is to be used when determining whether an individual is an employee under the Act. Since the threshold for a covered *employer* is established at fifteen employees, a major redefinition of who constitutes an *employee* would have a significant impact. This is particularly true in determining the status of independent contractors, partners, and shareholders of small enterprises. Such a redefinition potentially expands Title VII coverage to smaller employers, especially in the professional fields such as medicine, law, accountancy, etc. This article will also ascertain the repercussions of the potential outcomes *Arbaugh* may bode for small businesses. In order to enhance the reader's understanding of the issues addressed in this article, a brief recounting of the findings of fact in *Arbaugh* are presented. This is followed by a brief review of both subject-matter jurisdiction and employee/employer determinations.

II. FINDINGS OF FACT

Jenifer Arbaugh had worked as a waitress and bartender for Y & H Corporation (hereinafter referred to as Y & H), which does business in the New Orleans Garden District as the Moonlight Café. Her period of employment with Y & H covered the period May 2000 to February 2001.[332] In her complaint, Arbaugh states that during this period she was subjected to unwelcomed sexual harassment by one of Y & H's owners, Yalcin Hatipoglu. The unwelcomed harassment consisted of Mr. Hatipoglu making lewd comments regarding her breasts, Mr. Hatipoglu touching himself obscenely in her presence, and finally, Mr. Hatipoglu reaching up her skirt and grabbing her.[333]

Arbaugh filed suit in the U.S. District Court for the Eastern District of Louisiana alleging hostile environment sexual harassment in violation of Title VII of the Civil Rights Act of 1964 (hereinafter referred to as the Civil Rights Act).[334] On October 28 and 29, 2002, her case was heard before a jury which subsequently found in her favor and awarded her $5000 in backpay, $5000 in compensatory damages, and $30,000 in punitive damages.[335] The compensatory and punitive damage awards were predicated on the maximum $50,000 cap on combined compensatory and punitive damage awards mandated under the Civil Rights Act of 1991 for employers with 15 to 100 employees.[336]

On November 19, 2002, the respondents filed a post-factum motion to dismiss the case on the grounds that Y & H was not a covered employer under Title VII because it employed fewer than the requisite 15 employees during at least 20 weeks during the relevant time period.[337] The

[331] ANNE M. BOGARDUS, PHR/SPHR PROFESSIONAL IN HUMAN RESOURCES CERTIFICATION STUDY GUIDE SYBEX (2004); JEFFERY A. HELEWITZ, ADVANCED EMPLOYMENT LAW 75 Pearson publications (2001); ROBERT K. ROBINSON ET AL., THE REGULATORY ENVIRONMENT OF HUMAN RESOURCE MANAGEMENT 46 Harcourt College Publishers (2002); KENNETH L. SOVEREIGN, PERSONNEL LAW 35, Prentice Hall (4th ed. 1999); DAVID P. TWOMEY, EMPLOYMENT DISCRIMINATION LAW: A MANGER'S GUIDE 3 West Legal Studies (6th ed. 2005); BENJAMIN W. WOLKINSON & RICHARD N. BLOCK, EMPLOYMENT LAW: THE WORKPLACE RIGHTS OF EMPLOYERS AND EMPLOYEES. 11, Blackwell Business (1996).
[332] *Supra* note 3, at 221 (5th Cir. 2004).
[333] *Id.* at 222.
[334] *Id.*
[335] *Id.*
[336] 42 U.S.C., § 1981a(3)(A) (2003). (The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000).
[337] *Supra* note 3, at 222.

complaining party was permitted to conduct discovery to ascertain the accuracy of Y & H's claim. Arbaugh argued that if the delivery drivers, previously counted as independent contractors, and the employer's souses were tallied as employees, then the requisite threshold of 15 employees would be met.[338] The District court concluded that the drivers were indeed independent contractors based on a hybrid economic realities/common law control test and vacated and reversed the jury's verdict and judgment on April 4, 2003.[339]

Arbaugh then appealed her case to the U.S. Court of Appeals for the Fifth Circuit challenging the lower court's decision on the grounds that it erred in ruling that the number of employees determined the court's subject-matter jurisdiction rather than the issue going to its merits.[340] Additionally, in the event that the first tack failed, Arbaugh argued that the District court further erred by ruling that Y & H had fewer than 15 employees when it concluded that the delivery drivers were independent contractors rather than "employees."[341] The Fifth Circuit affirmed the lower court's ruling. On May 16, 2005, the Supreme Court writ of certiorari was granted.[342]

III. SUBJECT-MATTER JURISDICTION

Subject-matter jurisdiction is the authority of a court to decide a particular issue and to hear the kind of case the litigation encompasses.[343] An obvious example of a situation in which a court would lack subject-matter jurisdiction would be a state court adjudicating a conflict arising from a copyright infringement–an issue exclusively reserved for federal courts. Conversely, a federal court would lack subject-matter jurisdiction in a divorce case. Under the concept of federal question subject-matter jurisdiction, federal courts are limited to hearing cases arising from:

> [U]nder this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;–to all cases affecting ambassadors, other public ministers and consuls;–to all cases of admiralty and maritime jurisdiction;–to controversies to which the United States shall be a party;–to controversies between two or more states;–between a state and citizens of another state;–between citizens of different states;–between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.[344]

Federal courts deciding claims within their federal-question subject-matter jurisdiction may decide state law claims not within their subject-matter jurisdiction if the federal and state law claims "derive from a common nucleus of operative fact" and compose "but one constitutional case."[345] A federal court must determine that it has subject-matter jurisdiction over the case before it can pass on the merits of that case.[346] Rejecting the practice of some appellate courts to decide the merits of a case based on "hypothetical jurisdiction," the Supreme Court reaffirmed the principle that subject-matter jurisdiction is a necessary prerequisite to any merits decision by a federal court: "The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain

[338] *Supra* note 2, at *5.
[339] *Supra* note 3, at 226.
[340] *Id.* at 223.
[341] *Id*. at 225.
[342] 125 S. Ct. 2246 (2005).
[343] Jack H. Friedenthal et al., FEDERAL RULES OF CIVIL PROCEDURE § 2.2 West Publishing Company (1985).
[344] U.S. CONST. art. III § 2; *see also* 28 U.S.C. § 1331.
[345] Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).
[346] Constantine v. Rectors & Visitors of George Mason University, 411 F.3d 474, at 480-81 (4th Cir. 2005).

times, and even restraining them from acting permanently regarding certain subjects."[347] Therefore, has Congress allowed the federal courts the right to hear the case?

Because the language in Title VII makes clear that a complaining party must establish as a preliminary matter that he is an employee as defined under the Civil Rights Act and that the respondent is his or her employer and has more than fifteen employees,[348] at least six of the circuits have held that the issue of an employer having a minimum fifteen employees is jurisdictional in Title VII cases.[349] Employee numerosity is determinative of subject-matter jurisdiction.[350]

However, four circuits (the Second, Third, Seventh and Federal) circuits have concluded that federal courts have the right to hear any nonfrivolous claim which is sufficient to convey subject-matter jurisdiction.[351] The question before the Supreme Court was whether Title VII's employee-numerosity requirement (having fifteen or more employees)[352] is jurisdictional or whether it is simply an element of a plaintiff's claim for relief.

IV. COVERED EMPLOYERS

Many federal laws governing equal employment opportunity (EEO) or fair labor standards define employers covered under the respective acts by the number of individuals they employee, usually over a given period of time (see Table 1). Germaine to the discussion in this article is Title VII of the Civil Rights Act of 1964 which defines an employer as follows:

> The term "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 any agent of such a person . . . [emphasis added][353]

This definition then begs the question, who is an employee? According to Title VII, *employee* is defined as:

> [A]n individual employed by an employer, except that the term ''employee'' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.[354]

[347] Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, at 101 (1998).
[348] See 42 U.S.C. § 2000e(b), (f).
[349] Hukill v. Auto Care, Inc., 192 F.3d 437 (4th Cir. 1999); Womble v. Bhangu, 864 F.2d 1212 (5th Cir. 1989); Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983); Childs v. Local 18, IBEW, 719 F.2d 1379 (9th Cir. 1983); Wheeler v. Hurdman, 825 F.2d 257, 262-63 (10th Cir. 1987); and Scarfo v. Ginsberg, 175 F.3d 957 (11th Cir. 1999).
[350] *Supra* note 3, at 225.
[351] Da Silva v. Kinsho International Corp., 229 F.3d 358 (2nd Cir. 2000); Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, at 76-83 (3th Cir. 2003); Papa v. Katy Industries, 166 F.3d 937 (7th Cir. 1999); and EEOC v. St. Francis Xavier Parochial School, 117 F.3d 621 (DC Cir.1997) (holding that the employee numerosity requirement under the Americans with Disabilities Act is nonjurisdictional).
[352] 42 U.S.C. § 2000e(b) (2005).
[353] *Id.*
[354] *Id.* at § 2000e(f).

TABLE 1. MAJOR COMPLIANCE LAWS AFFECTING SMALL EMPLOYERS[355]

Age Discrimination in Employment Act (ADEA) of 1976 (as amended)	≥ 20 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.
Americans with Disabilities Act (ADA) of 1990	≥ 15 employees for each working day in each of 20 or more calendar weeks in a year.
Civil Rights Act of 1964, Title VII (as amended)	≥ employees for each working day in each of 20 or more calendar weeks in a year.
Fair Labor Standards Act (FLSA) of 1938 (as amended)	Employers who engage in interstate commerce, produce goods for interstate commerce, or handle, sell or work on goods or materials that have been moved in or produced for interstate commerce. For most firs, a test of ≥ $500,000 in annual gross revenue applies.
Family and Medical Leave Act (FMLA) of 1993	≥ 50 full-time employees within 75 miles of the facility.
Immigration Reform and Control Act (IRCA) of 1986	All employers regardless of size engaging in interstate commerce.
Immigration Reform and Control Act (IRCA) of 1986 Nondiscrimination Provision	Employers ≥ 4 employees
National Labor Relations Act	All employers regardless of size engaging in interstate commerce.

In *Arbaugh* the complaining party argued that had the District Court counted delivery drivers, as well as the two owners and their spouses as employees, Y & H would have easily satisfied the fifteen employee requirement as a Title VII employer.[356] The fact that the Supreme Court chose not to address this part of Arbaugh's complaint does not negate its importance to smaller businesses. Granted if the employer fails to raise the issue until after trial, there is no effect on the outcome. However, the employer may raise the issue of not meeting the fifteen employee threshold *any time before the conclusion of the trial*. When tolling the threshold, knowing who is and who is not an employee is absolutely critical. This means that the employer, and his or her legal counsel, must know which of the individuals receiving compensation from that employer are employees for Title VII purposes.

A. PARTNERS AND SHAREHOLDERS AS EMPLOYEES

In *Burke v. Friedman, Eisenstein, Raemer, and Schwartz,*[357] the Seventh Circuit Court of Appeals concluded that partners are not to be counted as employees. Using past precedent, the Court further defined a partnership as existing when, "persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession or business and when there is community of interest in the profits and losses."[358] Also, in *Clackamas Gastroenterology*

[355] Robert K. Robinson, Geralyn M. Franklin & A.M. Nunley. *Growing Pains: An Employment Compliance Primer for Small Business*, PROCEEDINGS OF THE NAT'L ENTREPRENEURSHIP AND SMALL BUSINESS EDUCATORS 27-33. (2003).
[356] *Supra* note 3, at 225.
[357] 556 U.S. 867 (1977).
[358] Commissioner of Internal Revenue v. Tower, 327 U.S. 280 (1946); Commissioner v. Culberson 337 U.S. 733 (1949).

Associates, P.C. v. Wells,[359] the Supreme Court approved the EEOC's guidance on the control standard in questioning whether a partner, officer, major shareholder, or director qualifies as an employee. The EEOC framed the issue as "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." The *Clackamas* Court specifically embraced the EEOC's proposed six factors relevant to determining whether a shareholder/director is an employee:[360]

> (1) Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
> (2) Whether and, if so, to what extent the organization supervises the individual's work.
> (3) Whether the individual reports to someone higher in the organization.
> (4) Whether and, if so, to what extent the individual is able to influence the organization.
> (5) Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
> (6) Whether the individual shares in the profits, losses, and liabilities of the organization.[361]

This standard precludes an employer from evading the EEO provision of Title VII by merely giving its employees the title of *partner*.[362] Furthermore, companies which have large numbers of partners, such as accounting firms, it becomes imperative to distinguish between those partners who do not exert organizational decision-making authority and managing partners who do. Partners who do not exercise decision-making authority are entitled to Title VII protection as *employees*.[363]

B. FAMILY MEMBERS AS EMPLOYEES

There has been a long-held tradition of exempting members of the owners' immediate family from treatment as *employees* under federal employment law. For example, the Fair Labor Standards Act specifically states the term *employee* does not include any individual employed by the employer "if such individual is the parent, spouse, child, or other member of the employer's immediate family."[364] Similarly, the National Labor Relations Act excludes "any individual employed by his parent or spouse" from its definition of an employee.[365]

C. INDEPENDENT CONTRACTORS

As with family members, there has been a tradition of excluding independent contractors from treatment as employees entitled to protection under federal statues. They are, for example, excluded under the National Labor Relations Act,[366] the Family Medical and Leave Act and the

[359] 538 U.S. 440 (2003).
[360] *Id.* at 449.
[361] EEOC, COMPLIANCE MANUAL § 605:0009 (2000).
[362] Hishon v. King & Spalding, 467 U.S. 69, at 80 (1984).
[363] *Id.*
[364] 29 U.S.C. § 203(e) (3).
[365] 29 U.S.C. § 152(3).
[366] *Id.*

Age Discrimination in Employment Act.[367] In part, there are three tests currently being used to establish whether an individual qualifies as an independent contractor.[368] First, an employer should demonstrate a lack of behavior control. Generally, behavioral control is evidenced when the business has the right to direct the when, where, what, and how the worker completes the hired task[369]. Second, an employer is afforded the opportunity to demonstrate a lack of financial control. Lack of financial control is exhibited when the business does not reimburse the worker's business expenses, invest in the equipment necessary for the worker to perform the hired task, limit the worker's opportunity for additional business opportunities, and/or pay the worker a regular wage amount. An additional financial control is the extent to which the worker can earn a profit or experience a financial loss.[370] Finally, the employer is given the opportunity to define the existing relationship in terms of contractual obligations, permanency of the relationship, type of benefits offered, and/or services provided.

V. THE SUPREME COURT'S DECISION

On February 22, 2006, the Supreme Court held that Title VII's numerical threshold does not circumscribe federal court subject-matter jurisdiction. Instead, the employee numerosity requirement relates only to the substantive adequacy of Arbaugh's Title VII claim, and, therefore, cannot be raised defensively late in the lawsuit, i.e., after Y & H had failed to assert the objection prior to the close of trial on the merits.[371] This principally arises out of the Court's interpretation of the jurisdiction and venue that federal courts have been granted under the *United States Code* to hear "all civil actions arising under the Constitution, laws, or treaties of the United States."[372] As a consequence, Title VII's numerical threshold (fifteen or more employees) has now been declared to only relate to the *substantive adequacy* of a Title VII claim. According to the Supreme Court, nothing in the language of Title VII would indicate that Congress intended federal courts, on their own motion, to assure that the employee-numerosity requirement is met.[373] The Court acknowledges that the Congress has the power and authority to make employee numerosity a jurisdiction matter if it chooses to do so.[374] However, in the opinion of the Supreme Court, the language of Title VII does indicate that Congress has taken this course of action. In the absence of any language restricting the federal judiciary's discretion to hear equal employment opportunity matters on their merits, the Supreme Court has concluded that "the sounder course is to refrain from constricting §1331 or §2000e-5(f)(3), and to leave the ball in Congress' court."[375]

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character. Applying that readily administrable bright line here yields the holding that Title VII's 15-employee threshold is an element of a plaintiff's claim for relief, not a jurisdictional issue.[376]

[367] Rao v. Kenya Airways, Ltd. 73 Fair Empl. Prac. Cas. (BNA) 1139, 1997 5902 (S.D. N.Y. 1995).
[368] Brackens v. Best Cabs, Inc., 2005 U.S. App. LEXIS 15655 (10th Cir., Oct. 12, 2005)
[369] DEPT OF THE TREASURY PUB. 15-A EMPLOYER'S SUPPLEMENTAL TAX GUIDE (2006).
[370] *Id.*
[371] *Supra* note 1, at1239.
[372] 28 U.S.C. § 1331.
[373] *Supra* note 1, at 1245.
[374] *Id.*
[375] *Id.* at 1237.
[376] *Id.*

In keeping with this view, the Court concludes that it finds nothing in the Congressional intent behind either Title VII or the Judiciary Act to indicate that subject-matter jurisdiction is restricted by the statute. Precedent has also held that subject-matter jurisdiction, because it involves the court's power to hear a case, "can never be forfeited or waived."[377] Without expressed language to the contrary, it must be assumed that Title VII's definition of *employer* imposes no limitation on federal courts jurisdiction in hearing Title VII violations.

Citing *Kontrick v. Ryan*,[378] the Supreme Court held the objection that a complaint "'fails to state a claim upon which relief can be granted' *cannot be raised after a trial has decided the case on the merits*" [emphasis added]. In essence, because the federal courts have subject-matter jurisdiction over Title VII matters (regardless of the employer's size), the respondent is precluded from raising the matter of its coverage under the Act post trial.[379] Because *Federal Rules of Civil Procedure* states that objection endures up to, but not beyond, trial on the merits,[380] the objection that the employer is not covered under Title VII may not be raised once a verdict has been rendered.[381] In short, if an employer, regardless of the number of individuals he or she employs, does not raise the issue that he or she is not an employer covered under Title VII before the conclusion of trial, the respondent is forever barred from doing so.

VI. IMPLICATIONS FOR SMALL BUSINESSES

At the heart of the Supreme Courts decision is the manner with which employers respond to charges of sexual harassment, or in larger perspective Title VII violations. Previous precedent, concerning Title VII, provides that the complaining party has the initial burden of establishing a *prima facie* case.[382] In order to establish a *prima facie* case for sexual harassment, the complaining party must:

(1) Demonstrate membership of a protected class,
(2) Demonstrate conduct of a sexual nature was unwelcome,
(3) Demonstrate that except for the complainant's sex, he or she would not have been subjected to the alleged harassment and
(4) Depending on harassment type, *quid pro quo* or hostile work environment, demonstrate that:
  (a) The complaining party's acceptance or rejection of the unwelcomed conduct would affect tangible job benefits (*quid pro quo)*, or
  (b) The unwelcome conduct was so severe or pervasive as to create an intimidating and adverse work environment (hostile work environment)[383]

What has changed, as a result of *Arbaugh*, is the respondent's rebuttal. Small businesses must now establish Federal Title VII exclusion based upon lack of employee numerosity in the first stages of the allegations. Recall that employers with fewer than fifteen employees are excluded from Federal requirements. Although the small business may be exempt from Federal Regulations, several state Equal Employment Opportunity laws have a smaller threshold. For example, the state of Wisconsin excludes firms with fewer than two employees (Table 2).

[377] United States v. Cotton, 535 U.S. 625, at 630 (2002); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, at 583 (1999).
[378] 540 U.S. 443, at 455 (2004).
[379] *Supra* note 1, at 1240, *citing* Rule 12(b)(6): "A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading . . . or by motion for judgment on the pleadings, or at the trial on the merits."
[380] Supra note 19, 12(h)(2).
[381] *Supra* note 1, at 1236.
[382] McDonnell Douglas Corp. v Green, 411, U.S. 792, 802 (1973).
[383] 29 C.F.R. § 1604.11.

TABLE 2. STATE EEO EMPLOYER INCLUSION[384]

>2	>3	>4	>5	>6	>8	>12
Wisconsin Wyoming	Alaska Colorado Connecticut	Delaware Iowa Kansas New Jersey New Mexico New York North Dakota Ohio Oregon Pennsylvania Rhode Island	District of Columbia Hawaii Idaho	Indiana Kentucky Maine Massachusetts Minnesota Missouri New Hampshire	South Dakota Tennessee Vermont Washington	West Virginia

VII. CONCLUSION

It is estimated that, on average, corporations spend $100,000 per EEO case;[385] thus, it is not far from the imagination that Congress purposively sought to protect the small business owner. Indeed, Congress at the outset limited Title VII to firms employing more than 25 individuals. Subsequent Congressional debates witnessed the employee numerosity requirement drop to eight employees and then to the eventual established threshold of fifteen employees.[386]

In *Arbaugh*, the Supreme Court had to find a balance between an explicitly lewd act and Title VII coverage. Albeit that the acts of the management of the Moonlight Café are offensive, the larger issue of determining subject-matter jurisdiction and clarifying the employer definition is of greatest importance. There is little doubt that Arbaugh will indeed place greater risk management burdens on small businesses. Additionally, the effects of this decision are not just limited to Title VII issues. This decision establishes precedent which will be applied to the other federal laws with minimum employee thresholds. This includes, but is not limited to: the Americans with Disabilities Act of 1990,[387] Age Discrimination in Employment Act of 1967,[388] the Family and Medical Leave Act (FMLA) of 1993,[389] and the Immigration Reform and Control Act's (IRCA) of 1986 nondiscrimination provisions[390] (see Table 1).

Small businesses previously not covered due to employee-numerosity provisions may now find themselves targeted for litigation based upon merits, and are especially vulnerable if they are not well informed regarding employment law. Since employee-numerosity does not bar a federal court from hearing a case on its merits, then small businesses may find themselves in the uncomfortable position of raising the numerosity issue only after legal proceedings have commenced. This does not mean that the court may impose a remedy on a non-covered employer, only that the business in question must raise this issue very early in the case as a substantive ingredient of a Title VII claim of relief.[391] That is to say, the argument that Title VII was not intended to authorize relief to employees of firms with fewer that fifteen employees is compelling and would preclude a

[384] Alicia M. Simmons. State Sexual Harassment. 6 GEORGETOWN J. OF GENDER AND THE LAW 597, at 613 (2005).
[385] Dimitra Kessenides, *Law: Can't We All Get Along?* INC. MAGAZINE. (June 2005), *available at* http://www.inc.com/magazine/20050601/law.html (last visited Feb. 24, 2006).
[386] Jeffery A. Mandell, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statues*. 72 UNIVERSITY OF CHICAGO L. R., 1047 (2005).
[387] 42 U.S.C. § 12101 (2003).
[388] 29 U.S.C. § 621 (2003).
[389] 29 U.S.C. § 2601 (2003).
[390] 8 U.S.C. 1101 (2003).
[391] *Supra* note 1, at 1238.

remedy,[392] but this may result only after the small business incurs court costs and attorney's fees. This does not appear to be consistent with Congress' wish that smaller businesses, with fewer financial resources, be sheltered from exposure to expensive litigation.

In these matters, the competency of the small business' attorney is critical. Should the attorney for the employer fail to recognize that the employer is not a covered employer, 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,[393] the issue may not be raised after the entry of judgment.[394] The tardy realization that the employer was not a covered employer will not negate the remedy *after* the trial. Though some would contend that these circumstances are rare and highly unlikely to occur, it should be noted that this was precisely what happened to Y & H. In our brave new world, an employer who is not an *employer* defined under Title VII may, nonetheless, be held liable for damages under that very Act, because this fact was made known too late.

[392] *Supra* note 53, at 459.
[393] 42 U.S.C. § 2000e(b) (2003).
[394] *Supra* note 19, 12(h)(3).