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United States District Court, N.D. Illinois, Eastern Division.

UNITED STATES EQUAL EMPLOYMENT COMMISSION, Plaintiff,
James FERGUSON, Plaintiff–Intervenor
v.
FOSTER WHEELER CONSTRUCTORS, INC., et al Defendant.

No. 98 C 1601. | July 14, 1999.

Opinion

MEMORANDUM OPINION AND ORDER

COAR, J.

***1** Before this court is Defendant Foster Wheeler Construction, Inc.'s ("FW Const.")[1] motion for summary judgment as to claims filed by the Equal Employment Opportunity Commission ("EEOC") on behalf of subcontractor employees who worked at the Robbins Resource Recovery Facility construction site. For the following reasons, this motion is denied. Additionally, pursuant to Defendant's request in its reply memorandum, the court finds that 37(c)(1) sanctions against the EEOC are appropriate and excludes all evidence of discrimination against FW Illinois employees.

I. Facts

The EEOC brings this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.,* and Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981, against Defendants FW Const. and Pipefitters Association, Local Union 597 ("Union") and against former Defendants Foster Wheeler Corporation ("FW Corp."), Foster Wheeler Illinois ("FW Illinois"), and Foster Wheeler USA ("FW USA"). (Dft's 12(M) Stmt. ¶ 3.) The EEOC seeks relief on behalf of a class of African American and females once employed as construction and office workers at the Robbins Resource Recovery Facility construction site in Robbins, Illinois ("Robbins Facility"); the EEOC alleges that Defendants maintained a racially and sexually hostile working environment on the site. (Dft's 12(M) Stmt. ¶ 3.) FW Const. is a Delaware corporation based in New Jersey specializing in construction of fuel and other industrial facilities. (Dft's 12(M) Stmt. ¶ 4.) FW Const. was the general contractor in charge of the Robbins Facility construction project. (Dft's 12(M) Stmt. ¶ 4.) In addition to FW Const., several subcontractors were also involved in the construction of the Robbins Facility. (Dft's 12(M) Stmt. ¶ 4.)

During conciliation and pre-litigation settlement discussions, the EEOC never indicated that it was seeking relief on behalf of any employee of any subcontractor of FW Const. (Dft's 12(M) Stmt. ¶ 5.)[2] The EEOC's complaint and amended complaints do not state that the class of injured persons include subcontractors' employees but instead uses the generic term "employees." (Dft's 12(M) Stmt. ¶ 5; EEOC's 3d Am. Cpt.) The two paragraphs of the EEOC's third amended complaint that allege that FW Const. violated federal law by their actions specifically refer to "African American employees of the Foster Wheeler Defendants," and to "female employees of the Foster Wheeler Defendants." (EEOC's 3d Am. Cpt. ¶¶ 29, 30. *See also* EEOC's Original Cpt. ¶¶ 18 ("African American employees of Defendant Foster Wheeler"), 19 ("female employees of Defendant Foster Wheeler").) No subcontractor's employee filed a charge of discrimination against FW Const. concerning the Robbins site. (Dft's 12(M) Stmt. ¶ 6.) In the fall of 1998, during off-the-record conversations with the EEOC's counsel, FW Const.'s counsel first learned that the EEOC sought to include subcontractor employees in its class. (Dft's 12(M) Stmt. ¶ 7.)[3]

***2** On January 21, 1999, the EEOC answered interrogatories which addressed subcontractors. (Dft's 12(M) Stmt. ¶ 8.) In response to Interrogatory No. 11, the EEOC asserted that it was seeking damages on behalf of subcontractors' employees.

(Dft's 12(M) Stmt. ¶ 8.) In response to Interrogatory No. 12, asking the EEOC to "state all facts that support the EEOC's contention" that FW Const. may be liable to employees of subcontractors, the EEOC responded as follows:

> Foster Wheeler exercised control over the working conditions and employment of persons being compensated by other contractors at the Robbins Site. EEOC is seeking relief for the African–Americans and women identified in Foster Wheeler 02923—Foster Wheeler 03881.

(Dft's 12(M) Stmt. ¶ 8.) In response to Interrogatory No. 13, which asked the EEOC to identify what allegations in its then operative Second Amended Complaint gave notice that subcontractors' employees were in the class, the EEOC stated: "See paragraphs 10, 12, 14, 15, and Prayer for Relief paragraphs F, G, I, J, L, M." (Dft's 12(M) Stmt. ¶ 9.)[4]

FW Const. states that its authority over the work of subcontractors involved only general coordination of work assignments and that it did not direct the internal affairs of any of the subcontractors' employment policies. (Dft's 12(M) Stmt. ¶¶ 10–11.) The EEOC disagrees and cites eight different ways that FW Const.[5] allegedly controlled subcontractors and their employees:

1. FW Const. "controlled the entire work site with respect to restricted entry, employee behavior rules, and safety rules." (Ptf's 12(N) Resp. ¶ 10, sub ¶ 1.) FW Const. does not dispute the general statement that FW Const. controlled access to the site and enforced rules regarding safety and protection of property against all individuals on the site. (Dft's 12(M) Reply ¶ 10, sub ¶ 1.) A number of the EEOC's other points are disputed:

a. The EEOC alleges that all construction employees, including subcontractors' employees, reported to Steve Kokosa ("Kokosa"), construction manager for FW Const.. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 1; Prel. Inj. Tr. (Kokosa Test.) at 44 ("Q. So ultimately everyone reports to you?" A. On the construction side, yes.").) FW Const. notes that Kokosa did not have supervisory authority over subcontractors' employees. (Dft's 12(N) Reply ¶ 10, sub ¶ 1; Prel. Inj. Tr. (Kokosa Test.) at 73.)

b. The EEOC alleges that FW Const.'s "project policy and work rules applied to all employees, including those of subcontractors." (Ptf's 12(N) Resp. ¶ 10, sub ¶ 1; LeBarre Dep. at 113–14 ("Q. Is it your understanding that [subcontractor employees are] subject to the handbook, the employee safety and regulations handbook? A. Correct."); *id.* at 125–26 (stating that subcontractor employees were subject to the ethics code and to the handbook); Roach Dep. at 25–26 (stating that booklet of "project labor policy and project work rules coordinated with all employers at project" went to all employees on the Robbins project site; stating that FW Const. employees were expected to sign a document indicating that they'd received the rules but noting that he did not know how subcontractors dealt with documenting reception of the rules; also stating that Foster Wheeler work rules applied to all persons on the site); Ptf's Ex. 17 (noting distribution and enforcement of work rules by all employers on site); Prel. Inj. Tr. (Kokosa Test.) at 74–75 (noting that work rules are signed by and enforced against all employees on the site; noting that rules include ban on fighting but do not refer to harassment). FW Const. states that subcontractors were free to adopt FW Const.'s rules, to use their own rules consistent with FW Const.'s rules, or to use a combination of their own rules and FW Const.'s rules. (Dft's 12(M) Reply ¶ 10, sub ¶ 1; Roach Dep. at 30–31; Prel. Inj. Tr. (Kokosa Test.) at 75.)

***3** c. It is undisputed that FW Const. could bar a subcontractor employee from the work site for objectionable behavior. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 1.) However, the source cited by both FW Const. and the EEOC notes that FW Const.'s safety manager did not, as the EEOC asserts, have the ability to require that a subcontractor dismiss an employee. (Jordan Dep. at 91–92.)

2. FW Const. "passed out employee job and safety rules and the Foster Wheeler Code of Ethics to subcontractor employees, who were bound by them." (Ptf's 12(N) Resp. ¶ 10, sub ¶ 1.) FW Const. notes that the subcontractors had their own procedures and policies to address complaints. (Dft's 12(M) Reply ¶ 10, sub ¶ 2; Kokosa Dep. at 32.)

3. FW. Const. solely controlled the porta-johns on site which were used by subcontractor employees, as well as by all other employees. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 3.) FW Const. paid for and was responsible for the upkeep of the porta-johns. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 3.) Issues about the porta-johns came up at weekly meetings attended by contractors and subcontractors; the issue of graffiti on the porta-johns did not come up at those weekly meetings. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 3; Dft's 12(M) Reply ¶ 10, sub ¶ 3; Jordan Dep. at 30–31.) On September 18, 1996, Kokosa inspected the porta johns and ordered that they be cleaned, painted over, or returned to the company from whom they were rented. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 3.) FW Const. then hired and paid for

security guards to monitor the portable toilets. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 3.)

4. It is undisputed that FW Const. recruited African American employees for subcontractors and encouraged subcontractors to hire them. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 4.)

5. It is undisputed that FW Const. hired Leonard Wallace ("Wallace") to work as a liaison between Foster Wheeler and the Village of Robbins in order to recruit residents for positions with FW Const., FW Illinois, or subcontractors. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 10, sub ¶ 5; Dft's 12(N) Reply ¶ 10, sub ¶ 5.) It is undisputed that FW Const. did, in fact, refer prospective employees to subcontractors and that FW Const. kept records of the number of and length of service of employees so referred who were hired. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 5.) FW Const., however, notes that Wallace did not have the ultimate authority to hire anyone on behalf of subcontractors. (Dft's 12(M) Reply ¶ 10, sub ¶ 5; Wallace Dep. at 188.)

6. The EEOC alleges that FW Const. "checked up on all African American employees on the work site, including those of subcontractors and addressed complaints of race or sex discrimination by or about subcontractor employees." (Ptf's 12(N) Resp. ¶ 10, sub ¶ 7.) FW Const. disputes this claim: while Wallace did tour the site and ask minorities about how their jobs were going, he referred complaints to the subcontractor employee's superintendent who then "took care of the problem." (Dft's 12(M) Reply ¶ 10, sub ¶ 7; Wallace Dep. at 135, 139.) FW Const. did respond to one complaint from two FW Illinois employees but states that there is no evidence to show that it was responsible to respond to FW Illinois employees' complaints. (Dft's 12(M) Reply ¶ 10, sub ¶ 7.)

***4** 7. All subcontractors were parties to the same Foster Wheeler project labor agreement with unions. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 8.)

8. Foster Wheeler promulgated a policy and response to racially offensive graffiti at the Robbins work site. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 9.) This policy required that *any* employee on the site, including employees of subcontractors, report any other employee violating work rules, including those against graffiti. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 9.) FW Corp. employee David Semerad ("Semerad"), working as FW Const. Human Relations manager, reported to Kokosa the presence of racially offensive graffiti on September 18, 1996. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 9.) When faxed an EEOC notice regarding racial and sexual graffiti at the Foster Wheeler work site, Semerad suggested that it be broadened to include both Foster Wheeler workers subcontractors' employees. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 9.) Violations of the prohibitions against graffiti were to be brought to the attention of FW Const., who would take certain actions, including requiring the employee's removal and ban from the site; subcontractor employees were subject to this bar if they engaged in such graffiti. (Ptf's 12(N) Resp. ¶ 10, sub ¶ 9.)

FW Const. did not directly supervise or direct the details of the work of the subcontractor employees. (Dft's 12(M) Stmt. ¶ 11.) FW Const. expected the employees of subcontractors to follow general regulations pertaining to safety and protection of property and had the right to ask subcontractor employees to be removed if they violated safety regulations or damaged property on the site. (Dft's 12(M) Stmt. ¶ 12.) FW Const. did not assume the costs of any of the subcontractors' operations or provide them with equipment. (Dft's 12(M) Stmt. ¶ 13.) At no time did FW Const. keep any employee of any subcontractor on its payroll or file tax reforms on behalf of the employees of subcontractors. (Dft's 12(M) Stmt. ¶ 13 .) Some subcontractor employees may have attended FW Const.'s new hire orientation. (Dft's 12(M) Stmt. ¶ 14.)

Robbins Facility was completed in October 1996. (Dft's 12(M) Stmt. ¶ 16.) By November 1996, all subcontractors' employees were off the Robbins site. (Dft's 12(M) Stmt. ¶ 16.)[6]

II. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Cox v. Acme Health Serv., Inc.,* 55 F.3d 1304, 1308 (7th Cir.1995). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-movant, a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986); *Hedberg v. Indiana Bell Tel. Co.,* 47 F.3d 928, 931 (7th Cir.1995). The movant has the burden of establishing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986); *Hedberg,* 47 F.3d at 931. If the movant meets this burden, the non-movant must set forth specific facts that demonstrate the existence of a genuine issue for trial. Rule 56(e); *Celotex,* 477 U.S. at 324,

106 S.Ct. at 2553. Rule 56(c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322, 106 S.Ct. at 2552–53. A scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson,* 477 U.S. at 250, 106 S.Ct. at 2511.

III. Analysis

***5** This motion raises the unsettled question of "whether an employee of employer X may bring a Title VII action against employer Y when Y is not his employer, but merely someone whose discriminatory conduct interferes with his employment with employer X." *Alexander v. Rush North Shore Medical Center,* 101 F.3d 487, 493 n. 2 (7th Cir.1996), *cert. denied,* – U.S. –, 118 S.Ct. 54 (1997). FW Const. is an "employer" pursuant to Title VII, 42 U.S.C. § 2000e(b) (requiring that an "employer" have at least 15 employees), and it appears that the putative class members at issue in this motion are the employees of Title VII employers, i.e., the subcontractors who worked on the Robbins site. Thus, in the hypothetical noted (but not answered) by *Alexander,* FW Const. is Employer X and the subcontractors collecltively are Employer Y. The parties, however, disagree about whether FW Const, was also an indirect employer of the subcontractors' employees; if, as the EEOC argues, FW Const, was an employer of the subcontractors' employees, then those employees clearly may sue FW Const. Because FW Const was not an employer of the subcontractors' employees, the court must address the *Alexander* question. The court finds that an employee of one Title VII employer may sue a different Title VII employer whose discriminatory actions interfere with the employee's employment conditions. Accordingly, summary judgment is denied.

A. Was FW Const. a Title VII employer of the subcontractors' employees?

The question of whether FW Const. was a Title VII employer of the persons at issue in this motion is "a 'legal conclusion' which involves 'an application of the law to the facts' " *Equal Employment Opportunity Commission v. North Knox School Corp.,* 154 F.3d 744, 747 (7th Cir.1998) (quoting *Knight v. United Farm Bureau Mut. Ins. Co.,* 950 F.2d 377, 378 (7th Cir.1991)). In addressing this question, the court looks to two different yet related theories: the *Knight* factors (which seek to distinguish between "independent contractors" and "employees") and the joint employer theory (a theory taken from the NLRA which seeks to determine whether two separate entities have sufficient control over a given employee that each should be viewed as the employee's employer). While the *Knight* factors address a wider range of considerations, both theories turn heavily on the question of control. *North Knox,* 154 F.3d at 747 (applying *Knight* factors; "The first and most significant factor requires us to look at the amount of 'control' or 'supervision' that [the putative employer] exerted over the [putative employee]."); *National Labor Relations Board v. Western Temporary Services, Inc.,* 821 F.2d 1258, 1266 (7th Cir.1987) ("[J]oint employer status exists if two employers 'exert significant control over the same employees." ').[7] With that in mind, the court turns to the five *Knight* factors:

> 1. The "extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work" (control factor);
>
> ***6** 2. The "kind of occupation and nature of skill required, including whether skills are obtained in the work place" (skills factor);
>
> 3. "[R]esponsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance operations" (costs factor);
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> 4. "[M]ethod and form of payment and benefits" (pay factor);
>
> 5. "[L]ength of job commitment and/or expectations" (tenure factor).
>
> *North Knox,* 154 F.3d at 747 (quoting *Alexander,* 101 F.3d at 492).

1. Control Factor

"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 is likely to exist." *Alexander,* 101 F.3d at 492 (quoting *Ost v. West Suburban Travelers Limousine, Inc.,* 88 F.3d 435, 439 (7th Cir.1996) (brackets removed). *See also G. Heileman Brewing, Inc. v. National Labor Relations Board,* 879 F.2d 1526, 1531 (7th Cir.1989) (noting that control test for joint employment theory looks to " 'such factors as the supervision of the employees' day to day activities, authority to hire or fire employees, promulgation of work rules and conditions of employment, work assignments, and issuance of operating instructions ." ') (quoting *W.W. Grainger Inc. v. NLRB,* 860 F.2d 244, 247 (7th Cir.1988)). The EEOC argues that FW Const. had significant control over subcontractors' employees because it (1) recommended that subcontractors hire certain minority persons and monitored their hiring and retention rates; (2) maintained and enforced rules regulating safety, upholding property rights, and banning discrimination on the work site; (3) controlled what persons were permitted on the work site; (4) had the ability to ban persons who had violated its rules from the work site; (5) had an employee, Wallace, who talked with all of the minority workers (including subcontractors' employees) on the site and who received complaints about discrimination from some subcontractors' employees; and (6) controlled the portable toilets at issue in this case.

a. Recommendations regarding hiring and monitoring of minority hiring and retention; Wallace interaction with minority employees

FW Const. sought to identify minority members of the Robbins population for employment on the Robbins Facility project. FW Const, hired some of the persons identified to be its own employees and recommended to subcontractors that they hire some of the other persons identified. However, there is no evidence that subcontractors were required to hire anyone identified by FW Const. or that there would be any repercussions of a refusal to hire people so identified. FW Const. had no hiring authority for any of the subcontractors. *See Equal Employment Opportunity Commission v. State of Illinois,* 69 F.3d 167, 171 (7th Cir.1995) (finding that state was not the indirect or de facto employer of teachers where state did not have power to hire or fire the teachers). Accordingly, the court finds that the evidence that FW Const. recommended that subcontractors hire certain minority persons does not indicate that FW Const. was an employer of the subcontractors' employees. *Compare with Western Temp.,* 821 F.2d at 1266 (finding that company and temporary agency were joint employers of employees; "Although Western hires and fires the part-time employees whom it maintains on its roster, Western hired every former part-time employee of Classic who agreed to the new employment arrangement.").

***7** The EEOC produces no case law to indicate that FW Const.'s monitoring of retention rates of minority workers created an employment relationship. Similarly, the fact that Wallace spoke with minority workers on the work site does not indicate that he had control over subcontractors' employees, particularly since he referred their complaints to the subcontractors.

b. Safety, property, and discrimination rules; control of entry onto the work site; and ability to bar rulebreakers from the work site

The EEOC's broad argument regarding FW Const.'s maintenance and enforcement of rules regarding safety, property rights, and discrimination on the work site is troubling. The logical consequence of the EEOC's argument is that any employer who required that a worker at its site act in such a way as to minimize the risks to persons and property on that site would automatically be the worker's employer. However, "one can 'control the conduct of another contracting party by setting out in detail his obligations; this is nothing more than the freedom of contract. This sort of one-time 'control' is significantly different than the discretionary control an employer daily exercises over its employees' conduct." *North Knox,* 154 F.3d at 748. Thus, a school could require a school bus driver to utilize certain prescribed discipline and punishment standards and to follow certain routes and timetables without being the school bus driver's employer. *Id.* at 748–49. Here, FW Const. has instituted general rules which require safe, non-harassing behavior as a condition for entry onto the work site. Like in *North Knox,* the court finds that the institution of these rules does not create an employment relationship.

Beyond the fact that the EEOC's argument is unsupported and even contrary to the case law, the implications of that argument are startling. If this court were to adopt the EEOC's argument, an employer who sought to protect its employees from safety risks or from racial or sexual harassment at the hands of independent contractors would also have to take on the burden of becoming the independent contractors' employer. The EEOC does not address the question of whether the employer could legally turn a blind eye to the wrongful behavior of independent contractors where that behavior puts persons on the work site at risk of injury or of suffering the indignities of harassment. Assuming that the employer could legally ignore the wrongful acts of independent contractors,[8] adoption of the EEOC's argument would create an incentive for employers to ignore those acts in order to limit their liability. The court will not adopt the EEOC's argument in the light of the case law against it and the problems underlying it.

The court's rejection of the EEOC's argument largely rejects the EEOC's claims that FW Const.'s control of entry onto the work site and ability to bar rulebreakers from the site created an employment relationship with subcontractors' employees. Regarding these two claims, it is also significant that, while FW Const. could bar a subcontractor's employee from entering the site, FW Const. could not fire a subcontractor's employee. *Compare with Western Temps.,* 821 F.2d at 1266 (finding that two entities were joint employers of workers where the decision by one entity to "refuse[ ] a referral" on a given worker automatically meant that the other entity would not send that worker on any assignment to *any* employer).

c. Control of the portable toilets

***8** The EEOC makes the interesting argument that FW Const.'s control of the portable toilets where the graffiti occurred makes FW Const. the employer of the workers who utilized the site. Without more, the court cannot accept this argument, which appears to conflate responsibility for harassment with employment of the victim—two different issues regarding a given defendant's liability. Indeed, there does not appear to be any case law supporting the claim that control over the locale of harassment automatically makes the defendant the employer of a harassee. The court also notes that this argument would cause FW Const. to be the employer of *any* individual who used the portable toilets in the course of his or her work—from subcontractors' employees to vendors to state inspectors to attorneys. While the court is not necessarily opposed to considering control over the locale of harassment as a factor to consider regarding harassment, the court finds that such control is not sufficient, in and of itself, to create an employment relationship.

d. Conclusion

FW Const. did not have the traditional means of control over subcontractors' employees—the ability to hire and to fire. Additionally, there is no evidence that FW Const. could set the hours of subcontractors' employees, set rules regulating or banning their outside work, determine their day-to-day tasks, or structure the hierarchy controlling them. The court finds that the control factor indicates that FW Const. was not a Title VII employer of the subcontractors' employees. *Alexander,* 101 F.3d at 493 (finding that defendant was not plaintiff's employer where plaintiff "had the authority to exercise his own independent discretion concerning the care he delivered to his patients based on his professional judgment as to what was in their best interests, ... was not required to admit his patients to [defendant], and ... was free to associate himself with other hospitals if he wished to do so; finding that fact that defendant assigned patients to plaintiff and required him to spend certain amounts of time "on call" was insufficient to create an employment relationship); *Ost,* 88 F.3d at 438–39 (finding that defendant was not plaintiff's employer where defendant did not set days or hours of plaintiff, did not choose plaintiff's routes, and did not bar plaintiff from doing outside work); *Knight,* 950 F.2d at 380 (finding that defendant was not plaintiff's employer where defendant did not set hours or day-to-day tasks for plaintiff).

2. Skills Factor

The skills factor tends to show that the subcontractors' employees were not FW Const.'s employees. The EEOC does not dispute that the construction workers at issue in this case were to some degree skilled. There is no evidence that the construction workers attained that skill through FW Const. There is an allegation that some of the subcontractors' employees attended FW Const.'s new hire orientation. The EEOC does not indicate that the subcontractors' employees gained their relevant skills at that orientation. The court finds that the skills factor tends to show that FW Const. was not a Title VII employer of the subcontractors' employees.

3. Costs Factor

***9** Because FW Const. did not directly bear the costs of the subcontractors' work and did not provide their equipment, the costs factor tends to show that FW Const. was not a Title VII employer of the subcontractors' employees. *Ost,* 88 F.3d at 438.

4. Pay Factor

FW Const. did not pay the salaries of the subcontractors' employees, withhold taxes for them, or give them benefits. Accordingly, the pay factor tends to show that FW Const. was not a Title VII employer of the subcontractors' employees.

Alexander, 101 F.3d at 493.

5. Tenure Factor

It is undisputed that the subcontractors and their employees were hired for a finite period in order to complete a definite project and that the subcontractors and their employees ceased to do any work for FW Const. at the end of that project. In light of these facts, the tenure factor points toward a finding that the subcontractors' employees were not FW Const.'s employees. *Hollingsworth–Hanlon v. Alliance Francaise of Chicago,* 1998 WL 341630,*6 (N.D.Ill.1998).

6. Conclusion

Considering the five *Knight* factors, the court finds that FW Const. was not a Title VII employer of the subcontractors' employees.

B. In the absence of an employer-employee relationship with the putative plaintiffs, can FW Const. be found liable for discriminatory conduct that allegedly interfered with the employment conditions enjoyed by the subcontractors' employees?

Having found that FW Const. was not an employer for the subcontractors' employees, the court turns to the question of whether FW Const. can be liable under Title VII to those employees despite the lack of an employer-employee relationship.[9] Given the frequency that workers employed by one employer work on sites controlled by a different employer, it is surprising that this question has not been definitively resolved. The reason for the uncertainty is a recent shift in the case law. In 1973, the D.C. Circuit addressed the question at issue in this motion and held that a Title VII employer could be found liable for interfering with an individual's employment opportunity with another Title VII employer. *Sibley Memorial Hospital v. Wilson,* 488 F.2d 1338, 1340 (D.C.Cir.1973) ("To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, which it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited."). In 1986, the Seventh Circuit more than embraced *Sibley*—it extended it by ruling that a Title VII plaintiff need not be an employee, much less the defendant's employee. *Doe v. St. Joseph's Hospital of Fort Wayne,* 788 F.2d 411, 422 (7th Cir.1986), *overruled by Alexander v. Rush North Shore Medical Center,* 101 F .3d 487 (7th Cir.1997). *See Alexander,* 101 F.3d at 491 (discussing *Doe;* "The majority concluded that dismissal of Doe's claim was inappropriate even though she could not demonstrate an employer-employee relationship with either her patients or the hospital, so long as she could show that the hospital interfered in some way with her economic possibilities). Under *Doe's* holding, the narrower question of whether the employee of one employer could sue a second employer was moot because Title VII plaintiffs were not required to show that they were any entity's employees. In 1996, however, the Seventh Circuit explicitly repudiated *Doe. Alexander,* 101 F.3d at 491–92 ("The simple fact that the plaintiffs were not employees, that they could not demonstrate the existence of an employment relationship, rendered them without the ambit of Title VII protection and precluded them from bringing discrimination actions alleging violations of the Act."). *Alexander's* rejection of *Doe* meant that the narrower question at issue in this case was no longer moot—but still unanswered.[10]

***10** In addressing an unsettled question of statutory interpretation, the court looks first to the language of the statute at issue. The relevant portion of Title VII states that "it is unlawful for *an employer* to fail or refuse to hire or to discharge *any individual,* or otherwise to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges or employment, because of *such individual's* race, color, religion, sex, or national origin...." 42 U.S.C. § 2000e–2(a)(1) (emphasis added). *Sibley* and other courts interpreting this language have focused on the use of the term "any individual," a much broader term that the word "employee," which could have been used to protect a smaller class of persons. 488 F.2d at 1341. *See also Bender v. Suburban Hospital, Inc.,* 159 F.3d 186, 188 (4th Cir.1998) ("Every Court of Appeals to consider this question has followed the lead of the District of Columbia Circuit in allowing such a claim."; assuming, without deciding, that the *Sibley* rule applied in the Fourth Circuit). While courts have "consistently held that 'Title VII contemplates some employment relationship' ... [t]his relationship ... need not link together the plaintiff and the defendant." *Vakharia v. Swedish Covenant Hospital,* 765 F.Supp. 461, 463 (N.D.Ill.1991) (citations omitted). This court concurs with this interpretation of § 2000e–2(a)(1).

The court notes that the Seventh Circuit did suggest in *EEOC v. Illinois* that the *Sibley* line of cases only addresses situations "in which the defendant so far controlled the plaintiff's employment relationship that it was appropriate to regard the

defendant as the de facto or indirect employer of the plaintiff....” 69 F.3d at 169. At least one court has viewed that suggestion as a sign that the Seventh Circuit was considering limiting the *Sibley* interference liability theory to situations where the defendant was the “de facto or indirect employer of the plaintiff,” *Bender,* 159 F.3d at 188 n. 1, and FW Const. urges this court to adopt that limitation. The Seventh Circuit, however, has not adopted this limitation, and, without a clear precedent requiring it to apply such a limitation, this court will not adopt an interpretation of a federal statute that would contravene the statute’s plain language. A narrower interpretation that required a showing that the defendant was the plaintiff’s employer would constrict Title VII’s plain language. The court instead applies the *Sibley* interference theory to find that subcontractors’ employees who were employed by Title VII employers may sue FW Const. (a Title VII employer) for interfering with conditions of their employment.[11]

C. Foster Wheeler Illinois employees

Defendants had a duty under Fed. R. Ev. 26(a)(5) to respond to Plaintiffs’ written interrogatories and a duty under Fed.R.Civ.P. 26(e)(1) “to supplement at appropriate intervals its disclosures under [Fed.R.Civ.P. 26(a)] if [Defendants learned] that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to” Plaintiffs through the discovery process. Under Fed R. Civ. P. 37(c)(1), a “party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.” *See also McNabola v. Chicago Transit Authority,* 10 F.3d 501, 517 (7th Cir.1993) (stating that failure to disclose documents justified exclusion of the documents). Rule 37(c)(1)’s “sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless.” *Salgado v. General Motors Corporation,* --- F.3d ---, ---, 1998 WL 409926,*5 (7th Cir.1998) (citing *Finley v. Marathon Oil Co.,* 75 F.3d 1225, 1230 (7th Cir.1996)).

***11** Here, FW Const. was without knowledge until the EEOC’s response to this motion that the EEOC sought to hold FW Const. liable to employees of FW Illinois—a separate entity. FW Const. sought to protect itself by proffering interrogatories seeking clear delineations of what persons were considered to be members of the classes represented by the EEOC. (*See* Dft’s Ex. I (EEOC’s Resp. to FW Const.’s Fourth Set of Interrogatories (mentioning subcontractors’ employees; not mentioning FW Illinois employees)).) The court finds that Rule 37(c)(1) sanctions are appropriate and hereby excludes evidence of discrimination against FW Illinois employees.

IV. Conclusion

For the foregoing reasons, FW Const.’s motion for partial summary judgment as to the claims of subcontractors’ employees is denied. The court also finds that Rule 37(c)(1) sanctions against the EEOC are appropriate and hereby excludes evidence of discrimination against FW Illinois employees.

Footnotes

1 This motion was also filed by Foster Wheeler Corp., Foster Wheeler Illinois, and Foster Wheeler USA, which have been dismissed from this suit.

2 The EEOC argues that this allegation is irrelevant but admits that it is correct.

3 The EEOC argues that its first complaint put FW Const. on notice that all African American and female employees on the work site were part of the class alleged. While the preamble to the complaint does refer to “a class of African American employees” and “a class of female employees,” the complaint later refers to “African American employees of Defendant Foster Wheeler” and to “female employees of Defendant Foster Wheeler,” (EEOC’s Original Cpt. ¶¶ 18, 19), and the complaint never mentions either subcontractors or their employees.

4 The cited paragraphs of the Second Amended Complaint mention “a class of African American employees” and “a class of female employees.” (*See, e.g.,* EEOC’s 2d Am. Cpt. ¶¶ 14, 15. *But see id.* ¶¶ 18 (“African American employees of Defendant Foster Wheeler”), 19 (“female employees of Defendant Foster Wheeler”).)

5 The EEOC actually lists nine ways that the Foster Wheeler Defendants affected the lives of subcontractors. One of those ways,

(Ptf's 12(N) Resp. ¶ 10, sub ¶ 6), refers solely to FW Corp., which has been dismissed as a defendant. Thus, the court will not address that sub ¶ .

[6] The EEOC submitted a 12(N) Statement of Additional Facts. The facts in this statement are either irrelevant (i.e., statements regarding Semerad) or are covered by the Defendant's 12(M) Statement and the EEOC's 12(N) Response, particular Response ¶ 10, sub ¶¶ 1–5, 7–9.

[7] It is unclear whether the joint employer theory is still applicable to discrimination cases in this Circuit in light of the *Knight* line of cases, which explicitly considers other factors in addition to the question of control. Also, the Seventh Circuit recently rejected application of the NLRA "single employer" theory in favor of a test tailored to employment discrimination cases. *See Papa v. Katy Indus., Inc.,* 166 F.3d 937, 940–41 (7th Cir.1999). Because the court finds that FW Const. did not have sufficient control over the subcontractors' employees to satisfy either the first *Knight* factor or the joint employer liability theory, the court need not decide whether the joint employer theory applies to employment discrimination cases.

[8] A hypothetical illustrates the underlying problems of the EEOC's argument. Assume that an employer has employees and independent contractors working on the same site and that the independent contractors were sexually and/or racially harassing the employees. If the employer knew of the harassment but did not act to stop it, could the employer raise as a defense to a discrimination lawsuit by the employees that it was not the employer of the harassers? Similarly, could the employer refuse to stop an independent contractor's behavior that was creating a serious safety risk on the grounds that the independent contractor was not its employee? The court doubts that the EEOC would support such a defense. Yet the EEOC's argument, as a necessary implication, requires that an employer's action in banning discrimination and safety risks by *all* workers on a site be considered an extraordinary act of control over the workers-rather than ordinary acts used to maintain a safe, harassment-free workplace.

[9] FW Const. spends a great deal of time detailing their lack of notice about the EEOC's intentions to seek relief on behalf of the subcontractors' employees—but makes no argument as to the effect (if any) of that lack of notice. FW Const. also does not address the fact that the EEOC's complaints (including the original complaint and the operative Third Amended Complaint) both specifically refer to classes of "employees of *Foster Wheeler,"* particularly in light of FW Const.'s argument (accepted by this court) that the subcontractors' employees were not employees of FW Const. Because FW Const. does not argue that the EEOC's actions and pleading has any effect on this litigation, the court will not address these issues.

[10] Several Northern District of Illinois opinions have addressed this question, but each of those opinions predate the *Alexander* opinion. *See Morrison v American Board of Psychiatry and Neurology, Inc.,* 908 F.Supp. 582 (N.D.Ill.1996); *United States Equal Employment Opportunity Commission v. City of Evanston,* 854 F.Supp. 534 (N.D.Ill.1994); *Pelech v. Klaff–Koss, LP,* 815 F.Supp. 260 (N.D.Ill.1993); *Vakharia v. Swedish Covenant Hospital,* 765 F.Supp. 461 (N.D.Ill.1991). Thus, while the court may consider the reasoning of those cases, they do not address *Alexander's* shift in the law.

[11] The parties appear to assume that FW Const.'s maintenance of a hostile work environment can constitute "interference" with the employment conditions of the subcontractors' employees.