

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: February 5, 2003

Decided: February 13, 2004)

Docket Nos. 02-6102 (L); 02-6112, 02-6122, 02-6124, 02-6126, 02-7405 (Con)

UNITED STATES OF AMERICA, NORMA COLON,

Plaintiffs-Appellants,

MARIA E. GONZALEZ, TAMMY AUER, THERESA CALDWELL-
BENJAMIN,

Intervenors-Plaintiffs-Appellants,

-v-

CITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY,
JASON TURNER, individually and in his capacity as Commissioner
of the New York City Human Resources Administration, GEORGE
SANTIAGO, in his individual capacity,

Defendants-Appellees.

Before: JACOBS and POOLER, Circuit Judges, GLEESON, District Judge.*

The United States, on behalf of four participants in New York City's Work Experience Program, a mandatory welfare work program, and an individual participant sued the city, the

*The Honorable John Gleeson, United States District Judge for the Eastern District of New York, sitting by designation.

New York City Housing Authority and certain city officials, alleging sexual and racial harassment in violation of Title VII of the Civil Rights Act of 1964. After finding that the participants were not employees within the meaning of Title VII, the district court (Richard Conway Casey, Judge) dismissed their complaints.

Vacated and remanded. Judge Jacobs dissents in a separate opinion

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Catherine K. Ruckelshaus, Noah D. Zatz, National Employment Law Project, New York, NY; Jonathan P. Hiatt, Lynn Rhinehart, American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”); Judith L. Lichtman, Jocelyn C. Frye, National Partnership for Women & Families, Washington, D.C., for Amici Curiae AFL-CIO, New York State AFL-CIO, Lawyers’ Committee for Civil Rights Under Law, Mexican-American Legal Defense and Educational Fund, National Asian Pacific American Legal Consortium, National Employment Law Project, National Partnership for Women & Families, National Women’s Law Center, National Workrights Institute, and Women Employed.

POOLER, Circuit Judge:

We are asked to determine whether welfare recipients obliged to participate in New York City's Work Experience Program ("WEP") are employees within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and thus entitled to Title VII's protections against sexual and racial harassment. Applying this circuit's test for the existence of an employer-employee relationship, we conclude that the district court erred by finding as a matter of law on a Rule 12(b)(6) motion that plaintiffs are not employees. We also conclude that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which requires participation in certain work activities including programs like WEP as a condition of the receipt of welfare benefits, does not evince an intent to deprive these workers of Title VII's civil rights protections. Our conclusion accords with the conclusions reached by the federal agencies charged with enforcing Title VII and PRWORA. We therefore vacate the judgment and remand for further proceedings.

BACKGROUND

The Statutory Framework of the Work Experience Program

In 1996, Congress enacted, and the president signed, PRWORA. This act ended the previous program for providing assistance to needy families, Aid to Families With Dependent Children ("AFDC"), and authorized a new and time-limited program, Temporary Assistance to Needy Families ("TANF").

The purpose of the new program is "to increase the flexibility of States in operating a

program designed to” meet certain goals including “end[ing] the dependence of needy parents on government benefits by promoting job preparation, work, and marriage.” 42 U.S.C. § 601(a). As a condition of receiving TANF grants, states must ensure that certain percentages of families participate in work activities. 42 U.S.C. § 607(a). “Work activities” include: unsubsidized employment; subsidized private sector employment; subsidized public sector employment; work experience; on-the-job training; job search and job readiness assistance; community service programs; vocational education; job skills training; education related to employment (for individuals without high school degrees or high school equivalency certificates); secondary school attendance or study leading to an equivalency certificate; and provision of child care services for individuals participating in community service programs. 42 U.S. C. § 607(d)(1)-(12). When an individual refuses to participate in a work activity, PRWORA requires the state to “(A) reduce the amount of assistance otherwise payable to the family pro rata (or more, at the option of the State). . .; or (B) terminate such assistance, subject to such good cause and other exceptions as the State may establish.” 42 U.S.C. § 607(e)(1). Section 608(c) provides that such a reduction “shall not be construed to be a reduction in any wage paid to the individual.”

PRWORA also provides under the caption, “Nondiscrimination provisions”:

The following provisions of law shall apply to any program or activity which receives funds provided under this part:

- (1) the Age Discrimination Act of 1975, (42 U.S.C. 6101 et seq.)
- (2) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).
- (3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.)
- (4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et

seq.)

42 U.S.C. § 608(d).

Finally, PRWORA limits federal enforcement authority as follows: “No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.” 42 U.S.C. § 617.

New York has implemented PRWORA through Chapter 55 of the Social Services Law. However, New York’s work requirements apply not only to families with children, as does TANF—the federal welfare program created by PRWORA—but also to households without dependent children that consequently receive only state funding. N.Y. Soc. Serv. L. § 335-b(1). A recipient who refuses to engage in a work activity incurs a pro rata reduction of his household’s grant. NY Soc. Serv. L. 342(2),(3).

As an alternative to other “work activities” authorized by PRWORA and by state statute, New York social services districts may require recipients of public assistance to participate in “work experience in the public sector or non-profit sector.” N.Y. Soc. Serv. L. § 336 (1)(d). In order to calculate the number of hours a recipient may be required to participate in a work experience activity, New York divides the amount of assistance payable to the recipient including food stamps by the higher of the federal minimum wage or the state minimum wage. N.Y. Soc. Servs. L. § 336-c(2)(b). In addition, New York human resource agencies can assign recipients to a given task only if they are “provided appropriate workers’ compensation or equivalent protection for on-the-job injuries and tort claims protection on the same basis, but not necessarily at the same benefit level, as they are provided to other persons in the same or similar positions,”

and “the project to which the participant is assigned serves a useful public purpose.” N.Y. Soc. Serv. L. § 336-c(2)(c)&(d). WEP participants also receive authorized child care expenses and transportation expenses.

Plaintiffs’ Allegations

Because a Rule 12(b)(6) motion tests only the adequacy of the complaint, we summarize plaintiffs’ claims in some detail. See Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001).

Tammy Auer

In January 1997, New York City’s Human Resources Administration (“HRA”) assigned Tammy Auer to do general office work at the City’s Sanitation Department. Auer’s supervisor, James Soto, immediately began to make inappropriate, sexually charged comments to Auer. He also asked her to move in with him and told her that they could make a beautiful baby. Each day Soto asked Auer to come into his office, instructed her to turn around, and then commented on her appearance.

During spring 1998, Soto escalated his behavior to inappropriate touching. Not only did Soto ignore Auer’s objections, but he also warned her that he could terminate her WEP assignment. Auer complained to the Sanitation Department’s Staten Island borough commissioner, who took no action. After she complained to the department’s Manhattan office, she was transferred to a different facility. However, Soto, who continued to have supervisory responsibility for Auer, went to her new work site and screamed at her. He also instructed Auer’s immediate supervisor not to give her any work to do. Shortly thereafter Auer quit because of the way she had been treated. She filed a complaint with the United States Equal Employment Opportunity Commission (“EEOC”), which after finding reasonable cause to

believe her allegations were true, referred her charge to the United States Department of Justice (“DOJ”). See 42 U.S.C. § 2000e-5(f)(1) (authorizing EEOC to refer charges against governments, government agencies, and political subdivisions to the Attorney General).

Tonja McGhee

In April 1998, HRA assigned Tonja McGhee to work for the New York City Housing Authority (“NYCHA”). Three months later she began to perform a maintenance job at the Roosevelt Houses in Brooklyn. Within a month, McGhee began a consensual sexual relationship with her supervisor, Choice Bennett. However, in August 1998, she broke off this relationship. Thereafter, Bennett called McGhee at home on a daily basis and threatened to “get her” if she did not resume the relationship. In addition, Bennett falsely informed his supervisor that McGhee was not doing her work.

In October 1998, Bennett directed McGhee to enter his office, turned off the lights, and told McGhee to take her pants down. McGhee ran out of the office. She also complained both to Bennett’s supervisors and to a WEP coordinator about the harassing conduct. The WEP coordinator took no action, but one of Bennett’s supervisors arranged for McGhee’s transfer to a location several blocks away where Bennett continued to call McGhee and to threaten her. McGhee made complaints to her supervisor, but the supervisor took no action. Therefore, in May 1999, McGhee stopped working at her assignment and filed a charge of discrimination with EEOC. On October 5, 1999, EEOC found reasonable cause to accept the truth of McGhee’s allegations and referred her charge to DOJ.

Maria Gonzalez

In spring 1997, HRA assigned Maria Gonzalez to do clerical work in its Manhattan offices. Within a week, Gonzalez's supervisor, Gregory Payne, began touching her without her consent. Gonzalez thwarted Payne's attempt to grope her genital area by pushing him away, but he frequently touched and twirled her hair and blew on her neck. On several occasions, Payne observed that Gonzalez had worn a long skirt and told her that the skirt "made it easier for [him] to get at her." After Gonzalez rebuffed Payne's advances, he frequently called her a "lesbian," a "bitch," and "hideous" and said that "all [she] needed was a man." Payne also made it more difficult for Gonzalez to verify her hours by taking her time cards. When Gonzalez complained to Payne's supervisor, Robert Estelle, he told her that she would have to resolve the issue with Payne.

In January 1999, Payne grabbed Gonzalez and attempted to kiss her. During the next two months, Payne twice threatened to have her killed. In March 1999, Gonzalez complained to Robert Fox, another of Payne's supervisors. Fox told Gonzalez to put her complaint in writing and responded to the written complaint by transferring Gonzalez to another location where there was no work for her. HRA then transferred Gonzalez to a third location where working conditions were so poor that she left. Gonzalez filed an EEOC charge. EEOC found reasonable cause to support the charge and referred it to DOJ.

Theresa Caldwell-Benjamin

In July 1996, HRA assigned Theresa Caldwell-Benjamin, an African-American woman, to work for the City's Parks Department. Her tenure with the Parks Department was uneventful until March 1998 when she was assigned to paint the interior of a building on Staten Island. On

the first day of her assignment, she observed a noose hanging in one of the windows of the building as well as a racist caricature of a black man and boy. Caldwell-Benjamin complained to her WEP supervisor, who told her that the other employees meant nothing by the noose and caricature. The noose remained in the window during the entire week that Caldwell-Benjamin worked there. Although the racist caricature was removed during the painting, it was replaced after the painting was completed. On October 4, 1999, EEOC found that Caldwell-Benjamin's subsequent complaint was supported by reasonable cause and referred the charge to DOJ.

Norma Colon

On May 5, 1997, HRA assigned Norma Colon to work at its Office of Employment Services as a computer operator. During Colon's orientation, she noticed her supervisor, George Santiago, staring at her. After the orientation, Santiago invited Colon to lunch. Santiago also arranged for Colon's desk to be next to his. Santiago frequently and usually outside the presence of others told Colon that he had a nice car and wanted to take her to parties. On one occasion, Santiago said that Colon's stomach was bloated and asked if she was having her period. He also referred to the "big boobs" of women in a beauty contest he had judged. On the same occasion, Santiago told Colon that she could solve all her problems by spending the night with him at a motel. In apparent retaliation for Colon's lack of response, Santiago refused to help Colon to obtain necessary childcare and she was forced to leave her placement. Colon also filed an EEOC complaint. EEOC found reasonable cause to support her charges and issued a right to sue letter on June 28, 2001.

District Court Proceedings

In May 2001, the United States brought a lawsuit against the city and NYCHA pursuant

to 42 U.S.C. § 2000e-5(f)(1), which allows the Attorney General to sue to redress charges of discrimination filed with the EEOC against states and municipalities. The United States acted on behalf of Gonzalez, Auer, Caldwell-Benjamin, and McGhee.¹ All four women moved to intervene in the government’s lawsuit, and Auer sought to add claims based on state and local anti-discrimination law. In September 2001, Colon filed a lawsuit asserting both federal and state discrimination claims on her own behalf.

Defendants moved to dismiss both lawsuits pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). In support of both motions, defendants argued that the individual plaintiffs were not employees within the meaning of Title VII and that, even assuming they would otherwise be considered employees, 42 U.S.C. §§ 608(d) and 617 evince an intent that Title VII not apply to WEP participants. The court consolidated the lawsuits for the purpose of hearing and deciding the motions.

Although defendants argued both lack of subject matter jurisdiction and failure to state a claim, the district court assumed that jurisdiction existed and resolved the motion under Federal Rule of Civil Procedure 12(b)(6). In an unpublished opinion and order dated March 8, 2002, Judge Richard Conway Casey granted defendants’ motions, holding that defendants were not employees within the meaning of Title VII. After noting that we require a putative employee to demonstrate that she was “hired” before reviewing common law factors to determine whether the individual is an employee or an independent contractor, Judge Casey pointed out that the individual plaintiffs did not allege they were hired. Equating “hiring” with the receipt of “direct

¹On appeal, McGhee settled her claims against defendants. Because she is no longer a party to this appeal, we have not included her in the caption and the Clerk is directed to delete her name from the official caption.

or indirect remuneration from the alleged employer,” the judge found that plaintiffs did not receive “employment-related benefits from Defendants.” The factors supporting Judge Casey’s conclusion were (1) Section 608(c)’s instruction that discontinuance of TANF benefits based on failure to comply with work requirements is not a reduction in wages; (2) his own assessment that “[e]very benefit [p]laintiffs received resulted from their status as welfare recipients;” (3) plaintiffs’ non-receipt of benefits such as pensions, survivors benefits, sick pay, and health insurance that we and other courts have considered in determining whether an individual who does not receive wages is an employee; and (4) plaintiffs’ potential entitlement to workers compensation benefits in amounts different from those received by other employees.

Although the EEOC previously had announced in an enforcement guideline that PRWORA participants could be employees under appropriate circumstances, Judge Casey found EEOC’s position to conflict with Second Circuit cases and thus to be unpersuasive. He rejected similar positions by the Department of Labor and Department of Health and Human Services because these agencies are not charged with administering Title VII. Having found that the plaintiffs were not employees within the meaning of Title VII, Judge Casey had no need to determine whether Sections 608(d) and 617 of PRWORA are intended to exclude from Title VII protections persons performing work activities as a condition of TANF eligibility.

Defendants had not objected to the intervention of any of the individual plaintiffs except Auer, who attempted to make state and local law claims. Judge Casey denied Auer’s motion to intervene as moot and also declined to exercise supplemental jurisdiction over Colon’s state law claims.

Plaintiffs appealed, arguing that their complaints sufficiently alleged their status as Title

VII employees to withstand a motion to dismiss and that PRWORA does not preempt Title VII. Colon also contends that the court erred by dismissing her state law claims. Two groups of amici consisting of civil rights and workers' rights organizations have submitted briefs in support of plaintiffs' position.

DISCUSSION

I. Standard

We review a Rule 12(b)(6) dismissal de novo, accepting all of the plaintiff's allegations as true and drawing all inferences in a manner favorable to the plaintiff. Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001). Complaints alleging civil rights violations must be construed especially liberally. Id.

II. Overview

To determine whether Title VII covers WEP participants, we look first to Title VII itself and to cases interpreting it. If the individual plaintiffs fall within Title VII's definition of an employee, we then must examine whether PRWORA is intended to preempt Title VII's coverage for WEP.²

III. Coverage Under Title VII

Title VII itself defines an employee as "an individual employed by an employer." 42 U.S.C. § 2000e(f). In applying this somewhat "circular" definition, we use a two-part test.

² Defendants claim they are not making a preemption argument, but arguing that the plain language of PRWORA demonstrates that Congress did not intend to extend Title VII coverage to TANF beneficiaries. This argument is, of course, a preemption argument. If Title VII covers WEP participants by its own terms, it is of no moment that PRWORA is silent on the issue. Thus, defendants can argue only that PRWORA evinces an intent to repeal coverage that would otherwise exist, which is a preemption argument.

O'Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997). First, the plaintiff must show she was hired by the putative employer. Id. To prove that she was hired, she must establish that she received remuneration in some form for her work. Id. at 116. This remuneration need not be a salary, Pietras v. Board of Fire Comm'rs of the Farmingville Fire Dist., 180 F.3d 468, 473 (2d Cir. 1999), but must consist of “substantial benefits not merely incidental to the activity performed,” York v. Association of the Bar of the City of New York, 286 F.3d 122, 126 (2d Cir.), cert. denied, 123 S. Ct. 702 (2002). Once plaintiff furnishes proof that her putative employer remunerated her for services she performed, we look to “the thirteen factors articulated by the Supreme Court in Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)” to determine whether an employment relationship exists. Eisenberg v. Advance Relocation and Storage, Inc., 237 F.3d 111, 113-14 (2d Cir. 2000). These factors, which derive from the federal common law of agency, are

the hiring party's right to control the manner and means by which the product is accomplished[;] the skill required; the sources of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Reid, 490 U.S. at 751-52 (footnotes omitted). We place the greatest emphasis on “the extent to which the hiring party controls the manner and means by which the worker completes his or her assigned tasks.” Eisenberg, 237 F.3d at 114 (internal quotation marks omitted)

_____ Defendants tacitly concede, as they must, that plaintiffs' work was completely controlled by the various agencies for which they worked but argue that plaintiffs do not satisfy the first

O'Connor prong, being “hired,” because they received no remuneration for their work.

We disagree. The plaintiffs allege that they received cash payments and food stamps in return for their work for the city. Those payments equaled the minimum wage times the number of hours the plaintiffs worked. A plaintiff who unjustifiably refused to work would lose the portion of the family’s grant attributable to her. Thus, each plaintiff had to work in order to receive her share of the family grant. A functional commonsense assessment of the plaintiffs’ alleged relationship with the city results in the conclusion that they were employees.

In addition, plaintiffs received other benefits including transportation and child care expenses and eligibility for workers’ compensation because of their work. Contrary to the district court’s position, these benefits do not flow solely from their status as welfare recipients. The individual plaintiffs must perform useful work to receive any of the benefits. See N.Y. Soc. Serv. L. § 336-c(2)(b). Because these benefits are substantial,³ they satisfy the O’Connor/Pietras/York

³ The dissent disparages the importance of workers’ compensation to the WEP participant, characterizing it as “chiefly a benefit for the employer.” Dissent at [41]. This argument ignores the history and purpose of workers’ compensation statutes. The primary purpose of those laws was “to provide benefits to the victims of work-related injuries by allocating the burden of payments to the employer and therefore ultimately to consumers.” 4 J.D. Lee & Barry A. Lindahl, Modern Tort Law § 43.10, at 43-20 (2d ed. 2002). The laws relieve the injured worker of the need to bring a tort action, to prove fault on the part of the employer, and to wait until the conclusion of a potentially lengthy court proceeding to obtain compensation. Id. “Given the limited hopes a worker might have under the common law rules, workers’ compensation statutes represented progressive reform.” 2 Dan B. Dobbs, The Law of Torts 1098 (2001). The dissent underplays the importance of the benefit to the worker by discussing only the medical coverage provided. Workers compensation also provides cash benefits, N.Y. Workers’ Comp. L. § 14, and scheduled awards in the case of certain disabilities, id. §15.

Of course workers’ compensation schemes include benefits for employers as well. In particular, by extinguishing the tort action in exchange for the no-fault benefit, the schemes eliminate the potential for the ruinous verdicts that might otherwise be obtained by injured workers who have the wherewithal to bring a lawsuit and establish negligence. That employers
(continued...)

test.

In addition, the plaintiffs' position is consistent with that of the agency charged with interpreting Title VII, the EEOC, which has amended its compliance manual to state:

A welfare recipient participating in work-related activities as a condition for receipt of benefits will likely be an "employee." The fact that an entity does not pay the worker a salary does not preclude the existence of an employer-employee relationship. The determination of whether there is an employment relationship is based on the same factors outlined above [the Reid factors].

EEOC Notice No. 915.003 § 5.a (Dec. 3, 1997). The EEOC also instructs that

welfare recipients would likely be considered employees in most of the work activities described in the new welfare law, including unsubsidized and subsidized public and private sector employment, work experience, and on-the-job training programs. On the other hand, individuals engaged in activities such as vocational education, job search assistance, and secondary school attendance would probably not be covered.

EEOC Notice No. 915.002 § 5.a (Dec. 3, 1997) (footnotes omitted). These interpretations, which are neither adjudications nor the result of notice and comment rulemaking, are "entitled to respect . . . only to the extent that [they] have the power to persuade." Christensen v. Harris County, 529 U.S. 576, 587 (2000) (internal quotation marks omitted). The district court found EEOC's opinion unpersuasive because it relied on the Reid factors and did not address this court's substantial economic benefit test. However, the EEOC's division of persons performing work activities into those presumably receiving some remuneration for services rendered to an agency (those participating in subsidized and unsubsidized public and private sector employment, work experience, and on-the-job training) and those neither rendering services nor receiving

³(...continued)

obtain this benefit does not alter the fact that workers compensation is a significant benefit to the worker and particularly to the worker who may not be able to establish negligence.

remuneration (students and participants receiving job search assistance) is reasonable and completely consistent with the Second Circuit’s employee test. Thus, it was entitled to respect.⁴

Despite our cases, the substantial work-related benefits plaintiffs received, and the EEOC’s position, defendants contend that the individual plaintiffs are not employees. Relying primarily on a case from the Tenth Circuit, and one from the New York Court of Appeals, defendants argue that the benefits and income plaintiffs receive are part of a scheme of public assistance benefits rather than remuneration for work performed. The dissent also suggests that O’Connor precludes employee status for plaintiffs. Finally, both the dissent and the defendants claim that 42 U.S.C. § 608(c) requires a finding that plaintiffs are not employees. In the succeeding paragraphs, we explain why defendants’—and the dissent’s—reliance on these cases and on Section 608(c) is misplaced.

In Johns v. Stewart, 57 F.3d 1544 (10th Cir. 1995), the court found that participants in a Utah public assistance program that antedated PRWORA and required recipients’ “participation in a broad range of adult education, short-term skills training, community work and job search activities” were not employees within the meaning of the Fair Labor Standards Act (“FLSA”). 57 F.3d at 1550, 1559. The Tenth Circuit rejected employee status because the work component was “just one requirement of . . . comprehensive assistance programs” with many other components. Id. at 1558. It noted that recipients applied for public assistance, and not for a job, that taxes were not withheld from their grants, and “that they do not receive the same salary, safe working conditions, job security, career development, Social Security, pension rights, collective

⁴We note that the Supreme Court recently placed significant weight on another portion of the EEOC Compliance Manual in addressing the Americans with Disabilities Act’s definition of employee. Clackamas Gastroenterology Assocs. v. Wells, 123 S. Ct. 1673, 1679-81 (2003).

bargaining, or grievance procedures as do the actual employees.” Id. at 1559 (internal quotation marks omitted).

For several reasons, Johns does not persuade us that WEP participants cannot be considered Title VII employees. First, Johns is not a Title VII case and the workfare program was not governed by PRWORA. Therefore, the Johns court did not use the O’Connor analysis or consider the administrative interpretations relevant to Title VII or to PRWORA. Second, as we discuss below, even with respect to the statute Johns does construe, the FLSA, the Department of Labor (“DOL”), the agency charged with interpreting the FLSA, has rejected the Johns approach. Third, there is no indication in Johns that the participants received the full range of benefits received by WEP participants or that they were required to perform useful work. Finally, the Johns analysis and most of defendants’ arguments rest on an artificial dichotomy: one must be either a welfare recipient or an employee and cannot be both. Johns, 57 F.3d at 1558. For instance, defendants argue that the Human Resources Administration could have terminated or reduced plaintiffs’ grants for any one of a number of reasons, not just for their failure to accept an assignment to WEP. They also point out that a parent’s failure to work does not result in the termination of the entire family’s public assistance grant and that the benefits the participant receives are calculated on the basis of her family’s need and not based on the amount or the type of work she performs. The answer to defendants’ arguments and to Johns is that we have not adopted an either/or approach to employee status. Instead, we recognize that a person may be an employee with respect to certain of his duties and not be an employee with respect to others. EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1539-40 (2d Cir. 1996) (holding that corporate directors who also served as officers and/or employees of the corporation could be outside the

scope of Title VII in their capacity as directors but protected by Title VII as officers and employees); see also Baker v. McNeil Island Corr. Center, 859 F.2d 124, 128-29 (9th Cir. 1988) (reversing Rule 12(b)(6) dismissal of prison inmate's Title VII claim related to his application for a library-aide job that paid \$30 per month and offered some training).

Defendants also rely on Brukhman v. Giuliani, 705 N.Y.S.2d 558 (N.Y. 2000), in which the New York Court of Appeals found that WEP participants are not employees within the meaning of a New York constitutional provision requiring contractors and subcontractors performing public work to pay their employees the prevailing wage for their work. 705 N.Y.S.2d at 561. Brukhman addressed New York State Constitution article I, § 17, “which extends prevailing wage protection only to employees of contractors and subcontractors performing public work.” 705 N.Y.S.2d at 561 (internal quotation marks omitted). In addition to finding that the plaintiffs were not employees “within the intendment of the New York Constitution,” the Court also found that the plaintiffs did not perform public works and did not work for contractors or subcontractors. Id. at 562-63. Thus, whether or not WEP participants are employees, they would not be covered by Article I § 17 because they do not work for contractors or subcontractors within the meaning of Article I and are not engaged in “public works.”

It is the difference in purpose between the New York constitutional provision and Title VII that best distinguishes Brukhman from this case. Article I § 17 of the New York Constitution grants special economic rights to certain classes of workers, i.e, they must receive the prevailing wage in the community for the work they perform if the employer receives a public works contract. Title VII in contrast accords the basic civil right of freedom from discrimination to all employees employed by covered employers. In light of the very different scope of Section 17 and

Title VII, it would be foolhardy to assume that the New York Court of Appeals would extend its interpretation of the prevailing wage provision to Title VII. In addition, Brukhman does not employ our long-established test for an employer-employee relationship and does not take into account the views of the agencies charged with enforcing Title VII and PRWORA.

The dissent cites O'Connor for the proposition that “although compensation by the putative employer in exchange for his service is not a sufficient condition, . . . it is an essential condition to the existence of an employer-employee relationship.” Dissent at [36] (quoting O'Connor, 126 F.3d at 116; internal quotation marks omitted; emphases added). O'Connor a college student, performed field work at a psychiatric hospital and received federal work study funding from the college she attended. She sued not the college but rather the psychiatric hospital, the state that operated the hospital, and her supervisor, who allegedly had sexually harassed her. In holding that O'Connor could not sue under Title VII or Title IX, we pointed out that the psychiatric hospital had “no affiliation to” the college that, using federal funds, paid O'Connor. Id. at 119. Simply put, the putative employer paid nothing to the putative employee. In contrast, the City is both the payor and the recipient of the plaintiffs' services in this case. Thus, the rationale of O'Connor does not apply.

Defendants also argue that unlike the benefits we previously have considered significant in the Title VII context such as sick and medical leave, pensions, and health insurance, the benefits plaintiffs received—a cash grant, transportation and child care expenses, and eligibility for workers' compensation—are not typically associated with employment. Workers' compensation, of course, is typically associated with employment, and the fact that WEP participants may receive only a partial benefit, N.Y. Soc. Serv. L. § 336-c(2)(c), is not dispositive in light of this

circuit's definition of an employee. Payment of money is also typically associated with employment. Moreover, the number of hours a recipient can be required to work is based on the size of her grant divided by the minimum wage, N.Y. Soc. Serv. L. § 336-c(2)(b), an all too typical way of calculating compensation for work. Finally, reimbursement for child care and transportation expenses may not be typical compensation for employment, but they are payments that are necessary only because the recipient works. They are not offered solely or primarily for the employer's benefit.

Finally, defendants rely on 42 U.S.C. § 608(c), which provides that a penalty imposed against a person "by reason of the failure of the individual to comply with a requirement under the State program funded under this part shall not be construed to be a reduction in any wage paid to the individual." 42 U.S.C. § 608(c). This provision is the linchpin of the dissent, which reads Section 608(c) as an "unambiguous command" from Congress that WEP participants' benefits must not be considered wages. Dissent at [38]; see also id. at[32] ("The welfare benefits received by WEP participants are not wages because [PRWORA] says they are not . . .").

This argument cannot be squared with the text of Section 608(c). Congress could easily have said that the benefits at issue in this case may not be considered wages, but it did not. Rather it said that the withholding of benefits (to penalize workers) may not be considered a reduction in wages. If the benefits were not considered wages (or the equivalent of wages) to begin with, Section 608(c) would be superfluous.

Logically, the fact that a penalty imposed on an individual WEP participant may not be considered a reduction in wages does not imply that the individual does not receive wages in the first instance. Plaintiffs in these cases must work in exchange for payments equal to the minimum

wage times the number of hours they work. A failure to show up for work without good cause will produce (in the first instance) a pro rata reduction of those payments until the plaintiff returns to work. N.Y. Soc. Serv. L. § 342(2)(a). At that time, the payments resume, again at the rate of the minimum wage. Thus, the sanction is the loss of payments, not a wage reduction. An absent employee does not suffer a wage reduction simply because her pay is docked.

In short, Section 608(c) does not say that plaintiffs' benefits are not wages, and indeed the provision only makes sense if the opposite is true. Moreover, Section 608(c) eliminates a contradiction that otherwise would exist between the penalty provisions for recalcitrant workers and the requirement that welfare recipients who are forced to work not be paid below the minimum wage. See id. § 336-c(2)(b). For example, a WEP participant's second unexcused failure to appear at work results in a three-month loss of payments for the participant if the participant is the parent of a dependent child. See id. § 342(2)(b). Thus, even if the worker missed only one month of work, and is willing to resume working immediately, her payments are docked for three months. In that event, the "benefits" divided by the hours worked produces a wage far below the minimum wage, and thus a possible violation of New York Social Services Law Section 336-c(2)(b). Section 608(c) allows the state to impose the penalty without violating the minimum wage requirement.

Even if Section 608(c) were—implausibly—read as a decree that the payments to these plaintiffs could not be considered wages, we would still find plaintiffs to be employees. We have held that a person need not receive wages in order to be considered an employee under Title VII. Pietras v. Board of Fire Comm'rs, 180 F.3d 468, 473 (2d Cir. 1999). Moreover, the applicability of Title VII turns on the substance of the relationship between plaintiffs and defendants, not on

labels affixed by statutes.

We conclude that the relationship alleged here—which includes the cash payment, the related benefits, and the requirement that the plaintiffs’ work be useful—if proved, establishes the plaintiffs as employees for the purposes of Title VII.⁵

IV. Preemption

Having determined that the allegations of the complaint sufficiently establish the individual plaintiffs’ status as Title VII employees, we turn to the question of whether Congress in enacting PRWORA intended to take away Title VII protections from WEP participants. In order for one federal statute to preempt or implicitly repeal another, there must be “express manifestations of a preemptive intent.” United States v. General Dynamics Corp., 19 F.3d 770, 774 (2d Cir. 1994). “The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” Morton v.

⁵ The dissent argues that our reading of the statute is “unnecessary” because it “offers no incremental protection from sex discrimination.” Dissent at [33]. If that is true—that is, if WEP participants are no better off with Title VII protection than without it—it is difficult to understand why, as the dissent further argues, the “chief impact” of our decision will be to impair “the flexible and temporary nature of WEP assignments.” Dissent at [33]. It is equally difficult to understand how depriving WEP participants of a Title VII remedy for sexual harassment in the workplace would foster flexibility in welfare reform, or why that sort of flexibility would be a positive thing.

In fact, it is not true that Title VII “offers no incremental protection from sex discrimination.” Section 603(a)(5)(I)(iv) of Title 42, on which the dissent relies, protects only participants in the Welfare to Work (“WtW”) program, which is discussed below; it does not protect TANF recipients who may be WEP participants but do not receive WtW services. See id. In addition, the grievance procedure provided for in Section 603(a)(5)(I)(iv) makes no provision for judicial review, an important aspect of Title VII. New York Social Services Law § 331(3), also cited by the dissent, simply prohibits discrimination and provides no remedy for the aggrieved WEP participant.

Mancari, 417 U.S. 535, 551 (1974).

Defendants find a clearly expressed congressional intention to remove WEP participants from the protection of Title VII in (1) Sections 608(d) and 617 of PRWORA; (2) the presence of a global non-discrimination provision in the legislation governing TANF's predecessor, AFDC; and (3) Congress's adoption, after it enacted PRWORA, of an amendment forbidding gender discrimination in a related program and referring enforcement to state agencies.

Section 608(d) provides that four specific discrimination laws apply to "any program or activity which receives funds provided under [PRWORA]": the Age Discrimination Act of 1975, Section 504 of the Rehabilitation Act, the American with Disabilities Act, and Title VI of the Civil Rights Act. Each of these laws contains provisions that forbid discrimination in programs or activities receiving federal assistance. See 42 U.S.C. § 6101, 29 U.S.C. § 794, 42 U.S.C. § 12132, 42 U.S.C. § 2000d.

Defendants rely on the maxim, "expressio unius est exclusio alterius," to argue that Congress's list of statutes governing programs that receive federal financial assistance means its failure to list statutes governing discrimination in employment is significant. We disagree. First, "[s]ince not every silence is pregnant, expressio unius is an uncertain guide to interpretation." Westnau Land Corp. v. United States Small Business Admin, 1 F.3d 112, 116 (2d Cir. 1993) (internal quotation marks omitted). Second, the maxim applies only when the statute identifies "a series of two or more terms or things that should be understood to go hand in hand," thus raising the inference that a similar unlisted term was deliberately excluded. Chevron U.S.A., Inc., v. Echazabal, 536 U.S. 73, 81 (2002). Section 608(d) includes non-discrimination laws applicable to programs or activities that receive PRWORA funds. These programs and activities include

functions like education and vocational training that, due to the absence of an employment relationship, clearly are not subject to Title VII. Title VII, on the other hand, governs employment relationships whether federally funded or not. Therefore, Congress's failure to list Title VII with the "programs or activities" discrimination provisions is not a clear indication of Congressional intent to exclude from the protection of Title VII those PRWORA participants who under Title VII would be employees.

Defendants also rely on Section 617, which as previously noted, provides that "[n]o officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part." Based on this provision, defendants argue that Section 608(d) contains the only anti-discrimination provisions that the federal government can enforce.

Of course any preemptive effect that Section 617 might have would limit only the government's enforcement powers. Individual WEP participants would remain free to sue under Title VII or any other applicable statute. More significantly, Section 617 applies only to the provisions of PRWORA, and Title VII is not part of PRWORA. Therefore, Section 617 does nothing to restrict DOJ's enforcement of Title VII on behalf of WEP participants.

Next, defendants find significance in the inclusion in the former AFDC/JOBS program of a requirement that state agencies ensure that "[i]n assigning participants . . . to any program activity . . . individuals are not discriminated against on the basis of . . . sex . . . and all participants will have such rights as are available under any applicable Federal . . . law prohibiting discrimination." H.R. Rep. No. 104-651, at 908. They argue that Congress's failure to include similar language in PRWORA evinces Congressional intent to remove those protections.

Because the AFDC/JOBS program was repealed in its entirety, no particular significance attaches to the revocation of this provision. In fact, Congress also repealed a provision stating that AFDC payments to workfare participants were not “compensation for work performed.” Id. at 904. Since this provision suggests that AFDC workfare participants were not employees within the meaning of Title VII, the repeal of the AFDC/JOBS program can just as logically—or illogically—be seen as a manifestation of Congressional intent that WEP participants be covered by Title VII as of Congressional intent to the contrary.

Finally, defendants discern a Congressional intent that Title VII not apply to PRWORA participants in a 1997 amendment to PRWORA authorizing Welfare-to-Work (“WtW”) grants, 42 U.S.C. § 603(a)(5). The parties agree that some TANF recipients are eligible for WtW services but that persons other than TANF recipients also will be eligible. The WtW legislation contains a non-discrimination provision which states:

(iii) Nondiscrimination. In addition to the protections provided under the provisions of law specified in section 608(c) [sic, probably 608(d) intended] of this title, an individual may not be discriminated against by reason of gender with respect to participation in work activities engaged in under a program operated with funds provided under this paragraph.

42 U.S.C. § 603(a)(5)(I)(iii). WtW also provides a state grievance procedure as the exclusive remedy for gender discrimination complaints. 42 U.S.C. § 603(a)(5)(I)(iv). Like PRWORA, WtW includes both activities that would normally be considered employment and activities that would not traditionally be considered employment. See 42 U.S.C. § 603(a)(5)(C). The non-discrimination provision in WtW would therefore serve a useful purpose even if Title VII were available to protect employees. Section 608(d)—through its adoption of various other non-discrimination statutes—provides protection against age, disability, race, and national origin

discrimination in programs and activities receiving federal financial assistance. Subsection iii of Section 603(a)(5)(I) adds gender discrimination to that list for all activities funded by WtW. Other anti-discrimination statutes like Title VII prohibit the same categories of discrimination for PRWORA participants who also are employees. Thus, WtW's gender discrimination provision is no stronger a basis for finding preemption than is Section 608(d), which we already have held does not demonstrate preemptive intent.

In fact, the legislative history of the WtW program strongly suggests that Congress intended no preemption. Before Congress authorized the WtW program, DOL issued a guidance indicating that anti-discrimination laws "apply to welfare recipients as they apply to other workers. The new welfare law does not exempt welfare recipients from these laws." United States Department of Labor, *How Workplace Laws Apply to Welfare Recipients*, at Q&A No. 1 (May 1997, revised Feb. 1999). The omnibus budget bill reported to the House on June 24, 1997, contained a provision specifically designed to override the guidance:

A recipient of assistance under a State program funded under this part who is engaged in work experience or community service with a public agency or nonprofit organization shall not be considered an employee of the public agency or the nonprofit organization.

H.R. Rep. No. 105-149, at 238, 293. The House later modified this language to provide: "Participants engaged in work experience and community service programs are not entitled to a salary or work or training expenses and are not entitled to any other compensation for work performed." H.R. Rep. No. 105-217, at 934. Neither measure was adopted by Congress and neither became part of the Balanced Budget Act that President Clinton signed into law on August 5, 1997. The Conference Committee report on the bill acknowledged that DOL had determined

that “workfare participants may be covered ‘employees’ and thus would be covered by the Fair Labor Standards Act (FLSA), which sets hour and wage standards, and other employment laws” and noted that the Committee had rejected the House’s effort to override DOL’s interpretation.

Id. The failure of Congress to act when it had knowledge of DOL’s interpretation suggests that DOL’s interpretation is correct.

Regulations issued by the two agencies charged with enforcing PROWRA, DOL and the Department of Health and Human Services (“HHS”) also support finding no preemption. The current DOL regulation on discrimination incorporates all the protections of Section 608(d), see 20 C.F.R. § 645.255(a) as well as the gender protections of the WtW program, see id., subd. (b).

The regulation also states:

Complaints alleging discrimination in violation of any applicable Federal, State or local law, such as Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Pregnancy Discrimination Act (42 U.S.C. 2000e (paragraph k)), or Section 188 of the Workforce Investment Act of 1998 (29 U.S.C. 2938) as well as those listed in paragraph (a) of this section, shall be processed in accordance with those laws and the implementing regulations.

20 C.F.R. § 645.255(c). HHS has issued a regulation explicitly stating that Section 617 does not have a preemptive effect on Title VII. It provides:

The limitation on Federal regulatory and enforcement authority at section 417 of the Act does not limit the effect of other Federal laws, including Federal employment laws (such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA) and unemployment insurance (UI), and nondiscrimination laws. These laws apply to TANF beneficiaries in the same manner as they apply to other workers.

45 C.F.R. § 260.35(b). The district court found these regulations unpersuasive because Title VII is not within either agency’s delegated authority. Defendants argue that the regulations deserve no

deference because both agencies changed their positions on the issue as the result of public advocacy.

Legislative regulations issued after notice and comment rulemaking, as these regulations were, are given “considerable weight.” Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). However, no deference is required where the agency acts outside its delegated authority. Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990). The district court found that because HHS and DOL have no authority to define Title VII’s coverage, their regulations are not binding. We disagree. DOL and HHS do not purport to define the coverage of Title VII. Instead, their regulations set forth, respectively, the manner in which discrimination claims are to be processed and the lack of preemptive effect attributable to Section 617, both subjects that are well within the respective agency’s authority. See 42 U.S.C. §§ 602 (granting Secretary of Health and Human Services authority to approve state TANF plans) and 603(a)(5)(C)(ix) (directing Secretary of Labor, after consultation with Secretary of Health and Human Services to promulgate regulations implementing WtW).

Defendants also argue that the DOL and HHS regulations are not entitled to respect because both agencies shifted their positions on the applicability of Title VII to PRWORA participants. The case on which defendants rely, EEOC v. Arabian Oil Co., 499 U.S. 244, 257 (1991), lists a variety of factors, including consistency over a period of time, that should be used to determine how much weight to give an EEOC guideline. Because Arabian Oil does not address regulations, it is not particularly helpful in this case.

More important, the agencies did not shift position. It is true that DOL did not mention Title VII in the interim final version of Section 645.525. 62 Fed. Reg. 61588, 61608 (Nov. 18,

1997). However, in the preamble to this interim regulation, DOL said: “The Balanced Budget Act of 1997 amended the PRWORA. It provides for, among other things, a new civil rights protection against gender discrimination. This provision ensures that participants who may not be covered under either Title VII of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972, are protected against gender discrimination.” Id. at 61597. Because certain TANF recipients will be neither employees nor students, this comment is entirely consistent with DOL’s prior position, as expressed in its guideline, that anti-discrimination laws such as Title VII apply to workfare participants as they do to other workers and with its final regulation, which explains how discrimination complaints of various sorts should be processed. The statement indicates only that some WtW participants may not be employees and thus may not be covered by Title VII.

In the preamble to its final regulations, HHS acknowledged that it had not initially included Title VII or the anti-discrimination provisions in Section 608(d) in its regulation. 64 Fed. Reg. 17720, 17747 (Apr. 12, 1999). The agency noted that its omission had provoked several negative comments and determined

that [the language in the earlier regulation] did not adequately represent this Administration’s commitment to the enforcement of civil rights and labor laws. In that context, we have decided that we should focus more attention on these protections in the final rule. We can do that without violating section 417 [42 U.S.C. § 617] (in letter or spirit) or interfering with the jurisdiction of other Federal agencies. In light of the concerns raised in these comments, we believed it would be helpful to include the nondiscrimination provisions referenced at section 404(d) of the Act in the regulation. They appear at § 260.35(a). In § 260.35(b), you will find new regulatory language designed to further clarify the protections applicable to TANF programs and activities. In this new clarifying language, we make the point that section 417 of the Act does not limit the effect of other Federal laws, including those that provide workplace and non-discrimination protections. We also indicate that Federal employment laws and nondiscrimination laws apply to TANF beneficiaries in the same manner as they apply to other workers.

Based on comments we received in this subject area and on some of the fiscal issues being raised, we were concerned that some States were reading the limitations in section 417 more broadly, in effect to free States from all provisions of Federal law, except those in the new title IV-A. In fact, section 417 only limits regulation and enforcement of the TANF provisions. It does not affect the applicability of other Federal laws or the authority of other Federal agencies to enforce laws over which they have jurisdiction.

Id. Read in context, it is clear that HHS did not reverse position on the applicability of Title VII. Rather, it initially declined to reference Title VII in its regulations because it is not charged with enforcing Title VII. After receiving comments both from welfare recipient advocates distressed at the omission and from state officials who believed no federal law except PRWORA had any impact on their administration of PRWORA, HHS changed the regulation only to clarify that PRWORA did not preempt Title VII's protection of employees who also receive TANF funds.

In sum, neither the language of Sections 608(d) and 617 nor the legislative history of PRWORA supports a conclusion that Congress intended to preempt Title VII's protections. In addition, both administrative agencies with a role in administering PRWORA have issued regulations suggesting that no preemption exists. Because the allegations in the complaint sufficiently establish the individual plaintiffs' status as employees within the meaning of Title VII and we discern no preemptive intent in PRWORA, we reverse the district court's dismissal of plaintiffs' Title VII claims.

V. State and local law claims

Colon argues that if we vacate dismissal of her federal claims, we also should reinstate her related state and local claims. The district court declined to exercise supplemental jurisdiction over state and local claims solely because it had dismissed all claims over which it had original jurisdiction. Because we vacate the dismissal of plaintiffs' federal claims, we also vacate the

dismissal of plaintiffs' state and local claims without reaching the merits of those claims and without prejudice to the district court's consideration of other bases for dismissal.

CONCLUSION

We hold that the allegations of plaintiffs' complaints sufficiently pleaded the individual plaintiffs' status as employees entitled to Title VII's protection and that PRWORA does not preempt Title VII with respect to WEP participants. Because the district court dismissed state and local claims solely for lack of supplemental jurisdiction, these dismissals also must be vacated.

We remand for further proceedings consistent with this opinion.

