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Fourth Circuit Applies 9-Factor Joint Employer Test; Affirms Dismissal of Discrimination Case

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In August 2015, the U.S. Court of Appeals for the Fourth Circuit issued its decision in *Butler v. Drive Automotive Industries of America, Inc.*, 793 F.3d 404 (4th Cir. 2015), wherein it expressly adopted the "joint employment doctrine" for cases brought under Title VII of the Civil Rights Act of 1964. This landmark case meant that employers in the Fourth Circuit—covering Maryland, Virginia, West Virginia, and the Carolinas—could be sued and potentially held liable for discrimination or harassment claims brought by workers who aren't even on their payroll.

Late last month, the Fourth Circuit issued an unpublished decision in the case of *Greene v. Harris Corporation* (No. 14-1601) that dealt with the 9-part joint employer test it adopted in Butler. In a 2-to-1 ruling, the Court of Appeals affirmed the dismissal of the plaintiff's claims of wrongful termination based on sexual orientation. The plaintiff, Karen Greene, was a janitor provided by a staffing firm to work at Harris Corporation ("Harris"), a large information technology company. In her lawsuit, Ms. Greene — who is gay — alleged that a supervisor at Harris had called her "frumpy (and) dumpy" and said she looked like a man. However, the Court found that Harris was not a "joint employer" of Ms. Greene, even though it exercised some control over her work.

Ms. Greene's lawsuit explained that she had contracted directly with Harris until 2010, when a Harris supervisor named Dan Pierce had terminated her contract (allegedly after learning from a coworker that Greene was gay). Ms. Greene was then hired by a staffing company (Eurest Services) and assigned to clean Harris' offices. Unhappy that Greene had returned, Mr. Pierce complained to Eurest, claiming that she was overcharging the company, that she had searched his office without permission, and that she had screamed obscenities at him when she was fired in 2010. Not wanting to risk its contract with Harris, the staffing company terminated Ms. Greene based on its client's demand.

Ms. Greene filed suit against Harris as a joint employer, because Harris told her what days to work and where to clean, provided supplies and had the authority to interview janitors and remove them from the job.

The Court of Appeals disagreed that Harris was a joint employer, pointing out that Ms. Greene worked at Harris' offices for only a few hours a month, was not involved in creating the company's work product, and could ultimately only be fired by Eurest (the staffing firm). Furthermore, Greene's lawsuit did not allege that Eurest and Harris intended to establish any type of joint employment relationship. The Court concluded that Ms. Greene's complaint relied on excerpts of the contract between Harris and Eurest rather than actual facts concerning real control over her employment.

As part of its analysis, the Court distinguished the facts in Ms. Greene's case from those of the plaintiff in Butler. Like Ms. Greene, that plaintiff was employed directly by a staffing agency which conducted many traditional employer functions and had issued her paychecks, etc. However, Ms. Butler had worked side-by-side with workers employed solely by the client, was directly engaged in producing the client's product, and was supervised by a manager employed by the client, which the Court determined was enough to establish the joint employer relationship. By contrast, Ms. Greene "failed to plead plausible allegations of an employment relationship with Harris."

This case illustrates how important it is for companies that deal with third-party staffing firms to avoid exercising control over assigned contractors and/or treating them like company employees. Harris Corporation was spared from liability as a joint employer because it did not supervise the plaintiff's day-to-day activities, did not assign duties to her that were related to its business product(s), and did not give her work that was also undertaken by Harris employees.

