

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR



[Connie Elder Carrigan](#) is a partner in the firm, with a practice concentration in Business Law. Her focus is assisting clients with issues regarding employment law, business advice and litigation, construction law, equipment leasing and creditor bankruptcy. Connie has lectured on topics ranging from employment law, bankruptcy, and equipment leasing to construction law.

4th Circuit Says Employers May Be Liable for Temp Agency Employees

September 18, 2015 | by

“TEST DRIVES” MAY NOT LET COMPANIES OFF THE HOOK FOR JOINT EMPLOYER LIABILITY UNDER TITLE VII

It is common for employers to utilize temporary staffing agencies to meet their needs, at least for the short term. The United States Court of Appeals for the Fourth Circuit has just joined other jurisdictions in ruling that such “test drive” relationships likely provide no protection to employers when it comes to Title VII claims.

In the case of *Butler v. Drive Automotive Industries of America, Inc.*, the 4th Circuit held that the staffing agency employee was, in fact, an employee jointly employed by the staffing agency and the manufacturer. Under the staffing agency arrangement, both entities exercised some degree of control over the worker in question’s employment. The staffing agency issued uniforms, paid its employees, provided a special parking lot for its employees, and had ultimate responsibility for disciplining and terminating its employees. The manufacturer set the staffing agency employees’ work schedules, arranged portions of their training, and supervised them while they worked on the factory floor.

The plaintiff, a staffing agency employee, alleged that a supervisor at the manufacturing plant sexually harassed her while at work, and no action was taken by the staffing agency or manufacturer after she reported the incident. The plaintiff also alleged that after she had complained about the work conditions, the alleged harasser had facilitated the staffing agency’s termination of her employment.

The district court granted the manufacturer’s motion to dismiss the case against it, agreeing with the manufacturer’s argument that it did not exercise sufficient control over the plaintiff to be considered her employer. However, adopting the joint employment doctrine for the first time in Title VII cases, the 4th Circuit reversed this decision. The court also set out a list of factors – a hybrid test – for assessing whether an individual is jointly employed:

- (1) Which entity can hire and fire the individual?

- (2) Which entity has day-to-day supervision of the individual, including disciplinary authority?
- (3) Which entity furnishes the equipment used and the place of work?
- (4) Which entity has possession of and responsibility for the individual's personnel records, including payroll, insurance, and taxes?
- (5) How many years has the individual worked for the alleged joint employer?
- (6) Which entity has provided the individual with formal or informal training?
- (7) Are the individual's duties the equivalent of a regular employee's duties?
- (8) Is the individual assigned solely to the alleged joint employer?
- (9) Did the individual and the alleged joint employer intend to enter into an employment relationship?

Although no factor is dispositive, the 4th Circuit acknowledged that the factors 1-3 possibly carry the most weight in determining if an individual is jointly employed. Accordingly, employers who routinely use temporary staffing agencies need to be wary of what constitutes jointly employed employees hired through staffing agencies are, in fact, entitled to the same protections as employees when it comes to claims of harassment, discrimination, and retaliation. If an entity exercises sufficient control over such individuals, it may not thereafter avoid liability by claiming such individuals are not its employees.

If you have questions regarding this court decision or other legal issues, please feel free to contact Connie Carrigan at ccarrigan@smithdebnamlaw.com.

CONTACT US

919.250.2000
mail@smithdebnamlaw.com

RALEIGH OFFICE

The Landmark Center
4601 Six Forks Road, Suite 400
Raleigh, NC 27609

Phone: 919.250.2000
Fax: 919.250.2100

CHARLESTON OFFICE

171 Church Street
Suite 120C
Charleston, SC 29401

Phone: 843.714.2530
Fax: 843.714.2541