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# Doe Dancer I v. La Fuente, Inc., Nev. Adv. Op. 3 (Feb. 25, 2021)

Kristin Wilde

*Doe Dancer I v. La Fuente, Inc., Nev. Adv. Op. 3 (Feb. 25, 2021)*[1]

# INTERPRETING THE TERM "EMPLOYEE" PURSUANT TO NEVADA'S MINIMUM WAGE AMENDMENT (MWA) AND NRS 608.0155

## Summary

The definition of the term "employee" in Article 15, Section 16 of the Nevada Constitution, the Minimum Wage Amendment, (MWA) incorporates the economic realities test of the Fair Labor Standard Act (FLSA). Moreover, NRS.608.0155's expansion definition of the term "independent contractor" does not limit MWA protected rights.

## Background

Each appellant (Doe Dancers), at some point, performed as a dancer at Cheetahs Lounge, owned by respondent La Fuente, Inc. (Cheetahs). The Doe Dancers were permitted to perform at Cheetah's as long as they had a sheriff's card, state ID, work licenses, and costume, were not "trashed" and were "standing up." However, after receiving a performing shift, the Doe Dancers were required to comply with a long list of posted rules that were strictly enforced by Cheetahs.

The long list of rules addressed the Doe Dancers' manners, etiquette, social interactions, personal hygiene, wound care, transportation and parking. The rules also included similar rules that would be enforced in a typical workplace, such as rules regarding the use of the shared refrigerator as well as rules prohibiting smoking, chewing gum, or using one's personal phone while performing. Cheetahs' rules further digressed to intrusive limitations including, but not limited to, informing the manager of current prescription medications, prohibiting the use of glass and plastic cups in dressing rooms, requiring an intoxication test before each shift, and requiring a minimum of three costume changes during each shift. The evidence showed that these rules were strictly enforced. In addition to the posted rules, the Doe Dancers were prohibited from dancing based on less tangible standards such as having a "bad attitude," being "total ghetto," or acting like a "prima donna."

Before each shift, the Doe Dancers were required to a sign a "Dancer Performer's Lease" agreement which disavowed any employment relationship. Additionally, the leasing agreement gave Cheetahs the right to impose rules upon the Doe Dancers with absolute discretion. Despite this contractual agreement, the Doe Dancers demanded minimum wage from Cheetahs claiming they were employees. Cheetahs refused, considering the Doe Dancers to be independent contractors.

As a result, the Doe Dancers filed a class action against Cheetahs in which both parties filed cross motions for summary judgment. Doe Dancers sought a ruling that they were entitled to minimum wages under both NRS Chapter 608 and Article 15, Section 16 of the Nevada Constitution, the Minimum Wage Amendment (MWA).[2] Cheetahs sought a ruling that the Doe Dancers were not entitled to minimum wages because they were conclusively presumed to be independent contractors pursuant to NRS 608.0155. The district court granted summary judgment in favor of Cheetahs finding that the Doe Dancers were independent contractors under both NRS Chapter 608 and MWA, and thus were ineligible to receive to minimum wages. The

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[2] NEV. CONST. art. 15, § 16.

Doe Dancers appealed, abandoning their claims under NRS Chapter 806, solely relying on claims under MWA.

**Discussion**

The Court reviewed the district court's classification of the Doe Dancers as independent contractors de novo. The Court held that to determine whether the Doe Dancers were correctly classified as independent contractors was a question of statutory interpretation and the constitutional reach of MWA.

In examining the statutory meaning of the MWA, the Court found that the term "employee" was ambiguous on its face. The MWA text alone did not provide meaningful clarification to the term "employee". As such, the Court turned to external aids of interpretation. The Court found that federal case law interpreting the Fair Labor Standard Act (FLSA)[3] provided interpretation guidance, reasoning that Nevada Courts look to analogous federal counterparts when interpreting state provisions. Additionally, the Court further reasoned that the FLSA should serve as an interpretation aid, because the Nevada Legislature has long recognized that federal minimum wage laws provide a floor for workers' protection in the state.

The Court found that because MWA's definition of employee mirrored FLSA's definition for employee, it can presume that the Nevada Legislature enacted MWA with full knowledge of FLSA. Thus, the Court concluded that the federal economic realities test found within FLSA applied in determining MWA's definition of employee.

The economic realities test of the FLSA consists of six prongs that must be sufficiently met. While the Court noted that the FLSA's definition of employee applied to exotic dancers in the similar case *Terry v. Sapphire Gentlemen's Club*,[4] the Court held that exotic dancers do not make up a class that categorically receives the status of employee. Rather, the economic realities test must be applied to the particular facts in each specific case. Here, the court easily determined that each prong of the economic realities test was sufficiently met, lending to support that the Doe Dancers should be considered employees.

Next, the Court examined whether NRS 608.0155's definition of independent contractor excluded the Doe Dancers from the constitutional protection of the MWA. While Cheetahs contend that NRS 608.0155's expanded definition of independent contractor does not conflict with MWA's definition of employee, the Court noted that independent contractor and employee are mutually exclusive concepts and thus, the two could not be read to be in harmony. However, the Court held that the Nevada Legislature intended the two laws to be read harmoniously, thus limiting the NRS 608.0155 definition of independent contractors to only apply to NRS Chapter 608 claims. Here, the Doe Dancers were only claiming protection under MWA. Additionally, the Court held that even if NRS.608.0155 was intended to apply to additional claims besides NRS Chapter 608 claims, it could not alter the protection of the MWA as this would raise a separation of powers issue. The Nevada Legislature cannot create exceptions to the right protected in the Nevada Constitution.

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[3] Fair Labor Standards Act, 29 U.S.C. § 206(a)(1) (1938).

[4] Terry v. Sapphire Gentlemen's Club, 336 P.3d 951 (2014).

**Conclusion**

The Court concluded that MWA's definition of employee incorporates the economic realities test of the FLSA. Additionally, the Court held that NRS.608.0155 did not exclude the Doe Dancers from their rights under MWA. Here, because the Doe Dancers were considered employees under MWA, and NRS 608.0155 could not impose any limitation on this determination, the Doe Dancers were found to be entitled to receive minimum wages. The Court reversed the district court's order of summary judgment in favor of Cheetahs and remanded for a proceeding consistent with this opinion.

**Concurrence**

Justice Stiglich issued a concurring opinion stating that she agreed with the majority opinion that that the MWA incorporates the economic realities test of the FLSA, and that the test was successfully met here. However, she differed, finding that the NRS 608.0155 indeed was intended to limit the protection scope of the MWA. Justice Stiglich concluded that because the Nevada Legislature did not have the power to do so, her diverting analysis would still produce the same result as the majority opinion.