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Myers v. Reno Cab Co., Inc., 137 Nev. Ad. Op. 36 (July 29 2021).

Colleen C. Freedman

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EMPLOYMENT LAW: EMPLOYMENT STATUS UNDER NRS 608.155

Summary

The Nevada Supreme Court reversed and remanded consolidated appeals of a district court order granting summary judgment in minimum wage matters. The question considered was whether the appellants were "employees" or "independent contractors" under the scope of the Minimum Wage Act and waiting time penalties for late-paid wages. The employee status for the Minimum Wage Amendment (MWA) under the Article 15, Section 16 of the Nevada Constitution is determined only by the economic realities test. The employee status for purposes of statutory waiting time penalties for late-paid wages may be affected by the presumption set forth in NRS 608.0155. The court reaffirmed that a contractual recitation stating a worker is not an employee is not conclusive under either test and is determined by the facts presented to the court. Further, employee status for the purpose of MWA or NRS Chapter 608 is not affected by the Nevada Transit Authority's approval of a taxi lease under NRS 706.473. The Court held the district court erred when granting NTA's approval of appellant leases foreclosed further inquiry into their employee status and the Court reversed and remanded.

Facts and Procedural History

In 2015, the drivers sued the taxicab companies alleging their pay was often less than the MWA requirement for minimum hourly wage. The taxicab companies leased taxicabs to the drivers under agreements approved by the NTA, pursuant to NRS 706.473.

The drivers argued they were in fact employees under the "economic realities" test as clarified in *Terry v. Sapphire Gentlemen's Club*.[2] *Terry* involved the statutory right to a minimum wage, here, the drivers argued that the same test should apply to their MWA claims. In addition, the drivers alleged that they were not paid all the wages they were owed at the time of separation, entitling them to waiting time penalties under NRS 608.040.

The cab companies moved for summary judgment, arguing that the drivers were independent contractors, not employees, for the purposes of the minimum wage laws. The district court initially denied the first motion, but then the court later granted the cab companies' renewed motion. The court based its decision solely on the fact that the drivers had NTA-approved taxicab leases. The court reasoned that when the NTA approves a lease pursuant to NRS 706.473, it confirms that the parties of the lease have entered a "statutorily created independent contractor relationship."[3] The court further held a worker who is an independent contractor under NRS 706.473 is not an employee for any purpose, and thus the protections afforded to "employees" by the MWA and NRS Chapter 608 did not apply. The drivers appealed, and the Supreme Court consolidated the appeals.

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[1] By Colleen C. Freedman.

[2] Terry v. Sapphire Gentlemen's Club, 130 Nev. 879, 336 P.3d 951 (2014).

[3] *See* Yellow Cab of Reno, Inc. v. Second Judicial Dist. Court, 127 Nev. 583, 592, 262 P.3d 699, 704 (2011).

Discussion

Standard of Review

The Court reviews de novo, the order granting a NRCP 12(b)(5) motion to dismiss.[4] The facts are undisputed, and the existence of an employment relationship under a given test is a question of law that can be resolved at summary judgment.[5] Under *Doe Dancer*, the proper legal test for MWA and NRS Chapter 608 is a question of law, which the Court reviews de novo.[6]

A contractual disavowal of an employment relationship

The Court first disposed the cab companies' argument that the recitation in the lease agreement was conclusive evidence that the drivers were independent contractors for MWA and NRS Chapter 608 purposes. Each agreement contained the following language:

RELATIONSHIP: Neither Party is the partner, joint venture, agent, or representatives of the other Party. LESSEE is an independent contractor. LEASING COMPANY and LESSEE acknowledge and agree that there does not exist between them the relationship of employer and employee, principal and agent or master and servant, either express or implied, but that the relationship of the parties is strictly that of lessor and lessee, the LESSEE being free from interference or control on the part of the LEASEING COMPANY.

The Court noted that employment relationships are not solely dependent on recitations within a contract and facts proven in court determine the worker's actual employment status. Further, the Court rejects the cab companies' application of *Kaldi v. Farmers Insurance Exchange*, where the Court relied on a contract provision to find that no employment relationship existed.[7] However, *Kaldi* was not concerned with any "remedial statute" or constitutional provision, but only with an alleged contractual right to be free from termination except for good cause.[8] In the instant case, the drivers seek to enforce a right that if they are employees under the appropriate tests, is guaranteed to them by law, not by contract.

The Court held that a worker is not automatically an independent contractor solely because a contract says so. The court must determine employee status under the applicable legal test, based on all the relevant facts.

NRS 706.473 does not affect the test for employment status under the MWA or NRS Chapter 608

Next, the Court analyzed whether NRS 706.473 affected the test for employment status under the MWA or NRS Chapter 608. This Court has held that a statutorily created independent contractor relationship exists as a matter of law when all the statutory and administrative requirements for creating an independent contractor relationship are satisfied.[9] The drivers' leases were approved by the NTA pursuant to NRS 706.473, which permits a company to lease a taxicab to an independent contractor.[10] The district court held that because the NTA approved the drivers' leases and all other administrative requirements were satisfied, the relationship

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[4] Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[5] Terry, 130 Nev. At 889, 336 P.3d at 958.

[6] *See* Doe Dancer I v. La Fuente, Inc., 137 Nev., Adv. Op. 3, 481 P.3 860 (2021).

[7] Kaldi v. Farmers Insurance Exchange, 117 Nev. 273, 21 P.3d 16 (2001).

[8] Id.

[9] *See Yellow Cab*, 127 Nev. At 592, 262 P.3d at 704.

[10] NEV. REV. STAT. 706.473 (2021).

between the drivers and the companies was a "statutorily created independent contractor relationship" and the drivers were not entitled to protection of either the MWA or NRS Chapter 608. However, this Court found the district court erred in its assumption that an independent contractor under NRS Chapter 706 is necessarily an independent contractor *for all purposes*. The Court held that an "independent contractor" does not have a single, universal meaning and because different statutes have different scopes and it is not unusual for a worker to be classified as an independent contractor for some purposes and as an employee for others.[11]

NRS 706.473 cannot override the constitutional minimum wage guarantee

The Court held that NRS 706.473 cannot preclude coverage under the MWA. The court reasoned that Nevada's Constitution guarantees a minimum wage to workers who satisfy the economic realities test and only the economic realities test determines whether a worker is an employee for the purposes of the MWA.[12] Under the economic realities test, the court "examines the totality of the circumstances and determines whether, as a matter of economic reality, workers depend upon the business to which they render service for the opportunity to work."[13] Under this test, an independent contractor is one who, "as a matter of economic fact, is in business for himself."[14] The Court held that regardless of a worker's status under NRS 706.473, is constitutionally entitled to a minimum hourly rage as long as a matter of economic reality a worker is dependent on the business to which she or he renders service, is not in business for herself or himself, and is not subject to the MWA's express exceptions.

The NTA's sweeiping definition of "independent contractor" does not apply to NRS Chapter 608 waiting time penalty claims

The Court found the district court erred in granting summary judgment on the grounds that the NTA's approval of the drivers' leases rendered them independent contractors, and not employees, for all purposes. The issue is whether a driver whose lease is approved by the NTA, after satisfying all relevant requirements, is necessarily an independent contractor for purposes of NRS Chapter 608 and NRS 608.255.

NRS 706.473 permits a taxicab company to lease cars to independent contractors. NTA's own regulations define "independent contractor" as "a person who leases a taxicab from a certificate holder pursuant to 706.473."[15] The NTA's definition of independent contractor does not distinguish independent contractors from employees in a meaningful way and is fundamentally different than the type of independent contractor relationship relevant to the MWA or NRS Chapter 608. The Court held that the "statutorily created independent contractor relationship" recognized in *Yellow Cab* is distinct from independent contractor status from MWA or NRS Chapter 608 purposes.

NRS 608.0155 may affect a worker's entitlement to waiting time penalties

The Court disagreed with the drivers' assertion that they were entitled to seek waiting time penalties under section (B) of the MWA, and their claim that if they were employees for constitutional purposes, they could seek statutory waiting time penalties regardless of their status

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[11] Dynamenx Operations W., Inc. v. Superior Court, 416 P.3d 1, 29 (Cal. 2018).

[12] *See Doe Dancer* 137 Nev., Adv. Op. 3, 481 P.3d at 867.

[13] *Terry*, 130 Nev. at 886, 336 P.3d at 956.

[14] Henderson v. Inter-Chem Coal Co., 41 F.3d 567, 570 (10th Cir. 1994).

[15] NEV. ADMIN. CODE § 706.069.

under NRS 708.0155.[16] The Court held that when a plaintiff asserts both an MWA claim and NRS Chapter 608 claim, the court will analyze the economic realities test, and NRS 608.0155 only applies to NRS Chapter 608 claims, it does not apply to MWA claims.[17]

The court held the drivers stated two separate claims for relief: First, as relief for their MWA claim and second, NRS 608.040 claim they sought a judgment against the defendant for wages owed as prescribed by NRS 608.040. Under the MWA cause of action, the drivers were seeking back pay, injunctive relief, punitive damages, and attorney fees. However, nothing in the MWA provides availability of a separate statutory cause of action. The court did not read the MWA as abrogating the requirement for the plaintiff to prove waiting time penalties under NRS 608.040. The worker must have resigned, quit or been discharged; the employer must have failed to pay the wages when due, if the worker resigned or quit, or within three days of when due, if the worker was discharged; and the worker must be an "employee" within the meaning of NRS Chapter 608. The court did not read it as making such penalties available to a worker who does not satisfy the statutory definition of "employee."

Conclusion

This Court could not decide as a matter of law whether the drivers were employees under either law. Both the economic realities test and the NRS 608.0155 test may be fact intensive and the district court found certain material facts were disputed to which are potentially material to the drivers' status under the MWA and NRS Chapter 608. This Court reversed the district court's grant of summary judgment and remand for further proceedings.

Concurrence

Justice Pickering wrote an opinion concurring with much of the majority's analysis. She agrees that the Court's holding the contractual negation of an employment relationship does not control whether a working relationship is that of an employer and employee with the meaning of the MWA to the Nevada Constitution and that the resolution of the question turns on the fact-intensive application of the economic realities test. Further, Justice Pickering agrees with the NTA's approval of a driver's lease does not demonstrate that driver is an independent contractor for the purposes of Nevada's minimum wage laws. In regard to the majority's holding that "NRS 608.0155 may affect a worker's entitlement to waiting time penalties," joins on the understanding that this outcome results from the way the drivers pleaded their waiting time penalty claims in the instant case, based in statute NRS 608.040, separate from their MWA claims. Justice Pickering joined based on the understanding that the majority's opinion did not foreclose the availability of waiting time penalties under the MWA's subsection (B).

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[16] Nev. Const. art. 15, § 16(B).

[17] *Doe Dancer*, 137 Nev., Adv. Op. 3, 481 P.3d at 871.