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Summary of Terry v. Sapphire Gentlemen's Club, 130 Nev. Adv. Op. 87

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LABOR & EMPLOYMENT LAW: MINIMUM WAGE

Summary

The Court adopted the “economic realities” test of the Fair Labor Standards Act, and held as a matter of law that performers at the Sapphire Gentlemen’s Club were “employees within the meaning of NRS 608.010, and thus entitled to the minimum wages guaranteed by NRS Chapter 608.”

Background

The appellants, topless performers at the Sapphire Gentlemen’s Club, brought suit against Sapphire asserting they were employees, not independent contractors, and therefore were owed minimum wages pursuant to NRS 608. The district court applied the “employment status test” previously used under Nevada’s workers compensation law, and concluded that the performers were not employees. The performers appealed the district court’s subsequent grant of Sapphire’s summary judgment motion.

The material facts of the case were undisputed. Sapphire contracted with around 6,600 performers. Each performer determined her own schedules, set her own prices, controlled the artistic aspects of her work, and could work at other venues. However, the performers were required to work a minimum shift length each day they chose to work, abide by the club’s minimum prices, and obey various house rules about, for example, rules governing costume coverage and physical contact with customers. Performers kept the customer’s dancing fees and tips, but were not paid wages by Sapphire and were required to pay the club a “house fee” on days they worked.

Discussion

Adopting the “economic realities” test

After careful analysis, the Court adopted the “economic realities” test for determining whether a person was an employee or an independent contractor. Nevada’s minimum wage guarantees apply only to employees, defined in NRS 608.010 as “persons in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed.” Sapphire argued that “the performers had no ‘contract of hire’ and alternatively that the performers were not ‘in the service’ of Sapphire.” The Court rejected both arguments, holding that the performers’ entertainment agreements were contracts of hire, and that the performers were in service of Sapphire because they were “of use” to Sapphire.

The Court noted the definition of “employer” within NRS 608.010 hinged on NRS 608.011, which defines an employer as “every person having control or custody of any employment, place of employment or any employee.” The Court concluded that because the meanings of “control” and “custody” were too imprecise and could lead to unreasonable results,

¹ By Walter Fick.

an interpretive framework was required. Before looking outside of Nevada's existing minimum wage laws, the Court first rejected the definition of employer under the Nevada Constitution's Minimum Wage Amendment² as "equally, if not more, tautological than NRS 608.011." Having expended Nevada's interpretive aids, the Court turned to the Fair Labor Standards Act (FLSA).³

In previous cases, the Court had referenced the economic realities test, but never expressly determined its applicability to Nevada.⁴ Here, the Court looked extensively at Nevada's legislative history (which suggested that Nevada's minimum wage laws be interpreted in alignment with the FLSA,⁵ and encompass at least as many employers as the FLSA) as well as other state's adoption of the test to interpret employment relationships under their state minimum wage laws. Against this backdrop, the Court held that the economic realities test was the most suitable, given its broad reach and implications for judicial efficiency.

The Court also rejected the test used by the district court, which was based on the Nevada Industrial Insurance Act. Although the language of NRS 608.010 followed the workers' compensation statute, NRS 616A.105, the Court held that the statutes underlying purposes were different, and therefore the respective employment relations tests should follow the different statutory goals. This adoption of differing tests in minimum wage and workers' compensation statutes followed the example of other states, and reflected the legislative history of Nevada's statutes.⁶

Performers are employees under the "economic realities" test

In analyzing the performers' status under the economic realities test, the Court looked at six factors:

- "1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
- 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
- 4) whether the service rendered requires a special skill;
- 5) the degree of permanence of the working relationship; and
- 6) whether the service rendered is an integral part of the alleged employer's business."

Regarding the first factor, concerning the employer's "control," the Court held that the performers were only given a coercive "choice," and therefore Sapphire exercised de facto control. For example, performers could choose to not dance on stage, but only if they paid an "off-stage fee;" and performers could choose not to dance for a customer paying with "dance dollars," but they could not ask the customer to pay in cash instead. Turning to the second factor, concerning "profit or loss," the Court held that the performers risked minimal losses and were

² NEV. CONST. art. 15, § 16.

³ 29 U.S.C. §§ 201-219 (2012).

⁴ See *Boucher v. Shaw*, 124 Nev. 1164, 1170–71 n.27, 196 P.3d 959, 963 n.27 (2008); *Prieur v. D.C.I. Plasma Center of Nevada, Inc.*, 102 Nev. 472, 473, 726 P.2d 1372, 1373 (1986).

⁵ Except where Nevada's statutes were clearly contrary to the FLSA rules. See, e.g., *Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 32–34, 176 P.3d 271, 274–75 (2008); *Boucher*, 124 Nev. at 1170–71 n.27, 196 P.3d at 963 n.27.

⁶ The Court concluded that the parallel language was adopted only for the purpose of insuring that Nevada's minimum wage protections applied to all employees regardless of their immigration status.

limited in their opportunity for profits. The Court compared the impact on profits of a performer's skill in "hustling" to a waiter's customer service skills impact on tips.

Similarly, regarding the third factor and the performer's financial investments, the Court held that their minimal expenses compared to Sapphire's, made the "performers . . . far more closely akin to wage earners toiling for a living, than to independent entrepreneurs seeking a return on their risky capital investments." The Court also held that performers did not require any "special skill[s]," under the fourth factor, and rejected Sapphire's argument that "hustling" was such a skill. Likewise, regarding factor five and the "permanence of the working relationship," the Court compared performers' freedom to work at other venues to other service-sector workers with multiple employers. Consequently, it held that "though the temporary nature of the relationship at issue weighs against it being that of employer/employee, this factor carries little persuasive value in the context of topless dancers and the clubs at which they perform."

The sixth and final factor, "whether the service rendered is an integral part of the alleged employer's business," produced disagreement over what test should be used to interpret "integral part." Sapphire argued, based on *Meers v. Haughton Elevator*,⁷ "that the test is not whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business, the test is whether that indispensable activity is, in that business, normally carried on through employees rather than independent contractors." The Court, however, held that it "makes no sense" to apply that test to whether or not "work is 'integral' to an employer's business." Instead, the Court looked only at whether an activity was "useful, necessary, or even absolutely indispensable to the business." Because Sapphire advertised itself as a strip club, the performers were a necessary part of its business.

The Court's analysis of the six factors, in addition to similarly decided cases in other jurisdictions,⁸ led it to conclude that the performers were employees under the economic realities test.

Conclusion

Determining employee status, with regard to Nevada's minimum wage laws, requires analysis under the Fair Labor Standards Act's "economic realities" test, and examining the totality of the circumstances. Here, the performers at Sapphire Gentlemen's Club were employees under NRS 608.010. Therefore, the Court reversed the district court's summary judgment decision and remanded the case for further proceedings.

⁷ 101 Nev. 283, 286, 701 P.2d 1006, 1007 (1985).

⁸ See, e.g., *Reich v. Circle C. Invs., Inc.*, 988 F.2d 324 (5th Cir. 1993); *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901 (S.D.N.Y. 2013); *Clinicy v. Galardi S. Enters., Inc.*, 808 F. Supp. 2d 1326 ((N.D. Ga. 2011); *Thompson v. Linda & A.*, 779 F. Supp. 2d 139 (D.D.C. 2011); *Harrell v. Diamond A Entm't, Inc.*, 992 F. Supp. 1343 (M.D. Fla. 1997); *Reich v. Priba Corp.*, 890 F. Supp. 586 (N.D. Tex. 1995); *Jeffcoat v. State, Dep't of Labor*, 732 P.2d 1073 (Alaska 1987).