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Exotic dancers claim clubs break labor laws by not paying wages

By THOMAS B. SCHEFFEY

Is there a difference between a TV on the wall in a sports bar and a nude woman performing onstage in a men's club?

Yes, of course. That's what a Massachusetts Superior Court judge found recently in the case of Lucienne Chaves v. King Arthur's Lounge, a Chelsea strip club. And these issues may soon be playing out in federal court in Hartford.

Suffolk Judge Frances A. McIntyre was clear: "A court would need to be blind to human instinct to decide that live nude entertainment was equivalent to the wallpaper of routinely-televised matches, games, tournaments and sports talk in such a place."

She was applying part of the labor law test to determine whether a worker – in this case, an exotic dancer – can be considered an independent contractor, and escape the protections and rights of state labor laws. Massachusetts and Connecticut have nearly identical statutes on this point of law, but Connecticut's caselaw is currently thin.

Boston lawyers who have had success with exotic dancer clients in Massachusetts are hoping to make favorable caselaw – and attract Connecticut exotic dancers – in a case recently filed in U.S. District Court in Hartford. The defendants are Cousin Vinnie's Back Room, Service Road Corp., doing business as The Gold Club, in Groton and in Hartford. The named plaintiffs are exotic dancers who worked in those clubs.

Hartford labor lawyer Richard E. Hayber is Connecticut counsel, and Massachusetts attorney Shannon Liss-Riordan is hoping to be admitted pro hac vice. She's a partner at Lichten & Liss-Riordan, which has made a thriving specialty of "misclassification" cases in which purported independent contractors are legally employees.

Hayber is co-counsel on a current independent contractor claim against FedEx Ground, now proceeding in federal court.

Tip Wage

The way much of the exotic dancing establishments work is an eye-opener, Liss-Riordan explained in an interview.

For one thing, they are not considered employees of the clubs where the work, but independent contractors. For another, she said, "the dancers aren't paid any wage. They don't even get minimum wage. They just work on their tips. That's not legal."

Surprisingly, she noted, there is a rate of pay below minimum wage. It's called the "tip minimum," for businesses where the employees generate a lot of tip income.

In Massachusetts, the minimum wage is \$8.00 an hour, but tipped employees can be paid \$2.63 an hour, she said. In Connecticut, the minimum wage is \$8.25 per hour, and the tipped minimum wage is \$2.56 per hour. But plaintiff's lawyers say that exotic dancers often don't even get the tip wage.

The former Connecticut dancers in the case, Dina D'Antuono, Ramona Cruz and Karen Vilnit, are seeking class action certification, and to recover all past unpaid wages, liquidated damages, and attorney fees.

Gold Club owner Alfred Ciraldo referred calls to attorney Daniel Silver, of New Britain's Silver & Silver. "I haven't read the complaint," he said. Silver, a First Amendment lawyer who specializes in adult entertainment cases, said the matter would be referred to employment law counsel. "I'm like general counsel on this case," he said.

Liss-Riordan said the case hinges on Connecticut's labor law statute defining independent contractors. "There are a lot of tests, including the federal IRS test; state law tests that involve 20 elements. It's not like that. In Connecticut, Massachusetts and a handful of other states, it's the strict three-pronged test," she said.

The first element the employer must prove is that the person is not under contractual control, or actual control or the employer.

In the recent Massachusetts case, she said, the court found the dancers were not free of control of the club. "It decided when they could work, and set the shifts. If you missed your shift you had to get somebody to fill in for you. Or you were fined. They controlled aspects of the employment," said Liss-Riordan.

The second thing the employer must prove is that the "independent contractor's" work is performed outside of the main business of the establishment. The King Arthur's Lounge owners argued that their main business was selling alcoholic drinks, and like TVs in a sports bar, the exotic dancers were a diversion, but not the main business of the club. But the judge in the case, didn't consider the naked women mere wallpaper.

"Television and pool in a sports bar – the analogy suggested by defendant—are inapposite," Massachusetts Judge McIntyre wrote in 2009. The TVs don't bring in revenue and are a "sidelight" selling alcohol. At the dance club, "The sale of alcohol and the exotic dancing, together and intertwined, both clearly comprise the adult entertainment portfolio of King Arthur's," the judge wrote, in denying the club summary judgment on its claim the dancers were independent contractors.

As Liss-Riordan put it, "it's a strip club, and the reason people go there is because there are women performing live nude dancing." She plans to try to prove the same thing about the Connecticut Gold Club establishments.

The third prong in the independent contractor test is that the employer needs to prove that the individual is engaged in an independently established trade, occupation or profession. He or she can't just work for just a single employer, Liss-Riordan said. In Massachusetts, plaintiff Lucienne Chaves did three private performances at barbecues, but her one real employer was King Arthur's, her lawyer said.

On this third prong, a practice in the exotic dancing business also worked against King Arthur's club. Not only did it not pay Chaves a wage, it charged her a \$35 "shift fee" for each shift she danced. "In a free market, where exotic dancing was an independently established occupation, the dancer would not need to pay to ply it," the judge concluded.

The Chaves case not only prevailed on the independent contractor challenge. It won class certification on the grounds that the 70 anticipated class members were numerous enough, their claims were similar in law and fact, that the representatives typified the class, and that they would be fairly represented.

Liss-Riordan is also litigating in several states with cleaning services that claim to be franchises, and charge workers for the opportunity to work.

When employers illegally classify workers as independent contractors, she said, it has far-reaching negative impacts. For one thing, the employer is not paying into unemployment funds or workers' comp. "It really hurts the state, and, as we like to point out, complying competitors," she said.

How, Liss-Riordan asked, can an employer compete with a competitor who manages to get its employees to subsist on tips alone, and even to pay for the privilege of working?

"If other companies in an industry are saving labor costs through misuse of independent contractors," she said, "it puts complying employers who pay their employees at a competitive disadvantage." •