



Franchisees miscast as independent contractors

Judge: franchising not separate business

By David E. Frank

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A cleaning service company that claimed it was merely in the business of selling franchises to third parties misclassified its franchisees as independent contractors in violation of G.L.c. 149, §148B, a U.S. District Court judge has ruled.

The company - which had shared economic interests with the parties it had entered franchise agreements with - argued that numerous courts had found the functions of a franchisor are separate and distinct from those of a franchisee.

But Judge William G. Young disagreed.

"[The company's] argument is not unlike arguments made by other employers in Massachusetts who also required their employees to sign agreements stating that they were independent contractors," he wrote. "Describing franchising as a business in itself, as [the company] seeks to do, sounds vaguely like a description for a modified Ponzi scheme - a company that does not earn money from the sale of goods and services, but from taking in more money from unwitting franchisees to make payments to pay previous franchisees."

The 11-page decision is *Awuah, et al. v. Coverall North America, Inc.*, Lawyers Weekly No. 02-067-10. [The full text of the ruling can be found by clicking here.](#)

'Nailed shut'

Boston lawyer Shannon Liss-Riordan, who represented the plaintiffs, said Young clearly found that a misclassified worker does not have to prove damages during the liability phase of a case.

Liss-Riordan said she believed the issue had been settled in 2009 by the Supreme Judicial Court in

Somers v. Converged Access. Nevertheless, many employers have continued to argue otherwise, she said.

"It should have been nailed shut by Somers, but we're still seeing employers claim that you have to prove someone didn't get paid overtime or minimum wage or something like that to survive summary judgment," she said. "But [Young] ruled that Somers allows the court to decide as a legal matter whether someone is an employee or independent contractor."

Liss-Riordan, who practices at Lichten & Liss-Riordan, said she has filed a number of cases against cleaning franchise companies that "prey upon" immigrant plaintiffs, many of whom do not speak fluent English.

Those cases, including a class certification complaint in U.S. District Court Chief Judge Mark D. Wolf's session, are pending.

Coverall is significant, she said, because it is the first liability ruling against a cleaning franchise company.

Coverall Senior Vice President and General Counsel Jacqueline Vlaming called Liss-Riordan's accusations against her company, which has more than 250 franchise owners in Massachusetts, completely false.

"It's all plaintiffs' lawyers speak," she said. "We have franchise owners who have done extremely well with our franchises. We don't prey upon anyone. We offer opportunities."

In the wake of Young's ruling, Vlaming said, Coverall is considering whether it can continue to do business in Massachusetts.

"That's a question we are struggling to answer right now because we don't really know where we stand with this ruling," she said. "This is a lawyer case where they saw an opportunity with a very broadly worded, expansive statute to go out there and have their latest theory du jour, and unfortunately we and our major competitors all got caught up in this because they've sued every one of us."

Michael D. Vhay of DLA Piper in Boston, who represented Coverall, said the statute is limited mostly to cases involving minimum wage and overtime.

Young's ruling, he said, marks the first time any court has addressed the relationship of the independent contractor statute to the franchising industry.

"There is no other state in the country that uses this particular test to determine if someone is an independent contractor or not," he said. "We simply believe the statute under which they are relying requires a plaintiff to show he has been harmed through the misclassification, although the judge clearly disagreed."

In a written statement, David French of the International Franchise Association said that wrongfully defining franchisees as employees, as Young did, threatens the viability of franchise businesses in Massachusetts.

Classified

Since 1985, defendant Coverall North America provided "clean work environments" for more than 50,000 customers.

According to court filings, Coverall had more than 900 franchise owners and had "developed and owned a distinctive system relating to the establishment and operation of janitorial cleaning service businesses."

Each individual who purchased a franchise entered into a standard contract with Coverall that required franchisees to complete training programs and wear approved uniforms while on the premises of a customer account.

The contract included a provision that stated that the franchisees were independent contractors. Coverall retained the exclusive right to perform all billing and collection for services provided by a franchisee. For each cleaning service provided, Coverall received management and royalty fees.

In 2007, the plaintiffs, who all performed cleaning services as franchisees for Coverall, filed suit alleging in part that they had been misclassified as independent contractors.

Passing the test

In declining to classify the franchisees as independent contractors, Young wrote that individuals performing a service are employees unless an employer can first show the franchisee is free from control and direction in the performance of his work.

Second, the judge said an employer must prove the service being performed is outside the usual course of the employer's business. Lastly, Young said the employer must show the franchisee was customarily engaged in an independently established trade that is the same as that involved in the service performed.

"The [SJC has] held that regardless of the agreement between the employer and the individual or the intent of the employer, if the employer cannot satisfy the three prongs, the individual is an employee," he said.

In focusing on the second prong, Young rejected the company's argument that it was in a distinct business from its franchisee.

"While Coverall is correct ... that courts have ruled that a 'shared economic interest does not make one the employer of the other' - such rulings do not establish Coverall's conclusion that 'the functions and business of a franchisor are separate and distinct from those of a franchisee,'" he said.

The cases cited by the company, Young added, did not discuss whether a franchisor and a franchisee were in the same business.

Because the franchisees did not perform services outside the usual course of Coverall's business, the judge wrote, the company "failed to establish that the franchisees are independent contractors."

For more information about the judge mentioned in this story, visit the Judge Center at www.judgecenter.com.

CASE: Awuah, et al. v. Coverall North America, Inc., Lawyers Weekly No. 02-067-10

COURT: U.S. District Court

ISSUE: Did a cleaning company that claimed it was merely in the business of selling

franchises to third parties misclassify its franchisees as independent contractors?

DECISION: Yes