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Strip Club Can't Claim Fees From Dancer in FLSA Lawsuit

By *Kevin McGowan*

Sept. 13 — A Las Vegas strip club operator can't force a dancer suing for employee status under the Fair Labor Standards Act to turn over dance fees she previously received from customers, a federal district court in Nevada ruled (*Desio v. Russell Rd. Food and Beverage, LLC*, 2016 BL 296749, D. Nev., No. 15-1440, 9/9/16).

The decision is a victory for workers who allege they're wrongly classified as independent contractors and it could affect those in many industries, said Harold Lichten, a Boston lawyer who represented the dancer.

Almost all contracts signed by workers classified as independent contractors now include indemnification clauses, which would require workers to pay back money they received for their services if they sought FLSA protection, Lichten told Bloomberg BNA Sept. 13.

Such clauses have the "bizarre" effect of saying that if a worker succeeds in showing she's actually an FLSA-covered employee, she must pay damages to the employer that wrongly classified her, he said.

The clauses are common among workers classified as independent contractors, which can include truckers, cable installers, limousine drivers and others in addition to exotic dancers, said Lichten, a partner with Lichten & Liss-Riordan P.C.

The clauses have a "chilling effect" on such workers asserting their FLSA rights, which the district court in this case recognized, he said.

Courts Divided

The courts are "a little bit divided" on whether a company may pursue breach-of-contract counterclaims based on such clauses when responding to an FLSA lawsuit, Lichten said.

Some courts say they must determine first if the worker is an FLSA-covered employee before deciding if the company's counterclaim may proceed, he said.

An attorney representing the Las Vegas club wasn't immediately available for comment Sept. 13.

Impermissible Waiver of FLSA Rights

But the federal court in Nevada rejected the notion that dancer Diane Desio breached her entertainer's agreement with Russell Road Food and Beverage LLC by asserting her rights under the FLSA.

Statutory rights can't be limited by contract or otherwise waived because that would thwart the FLSA's purpose to provide broad wage protections, Judge Gloria Navarro said in her Sept. 9 decision.

Russell Road, which operates the Crazy Horse III Gentlemen's Club, relied on the contract clause in which Desio disavowed she was an employee or entitled to any benefits that accompany employee status.

But that clause is "an impermissible waiver" of Desio's rights under federal wage laws, the court said.

Terms in the entertainer's agreement that "tend to be abridge or waive" a dancer's federal statutory rights can't form the basis of a breach-of-contract claim, the court said.

Russell Road also failed to properly plead it suffered any damages from Desio's alleged breach, the court said.

No Breach of Covenant

Russell Road also alleged Desio breached an implied covenant of good faith and fair dealing, converted to her own use dance fees that rightly belong to the club and that she may be liable for unjust enrichment.

Desio didn't breach any implied covenant by seeking employee status under the FLSA, the court said.

That can't be deemed a repudiation of her agreement when the clause the club seeks to enforce is an impermissible waiver of her FLSA rights, the court said.

Nor can Russell Road show that Desio's retention of the money she received from club patrons was "inconsistent" or "in derogation" of the club's rights, the court said.

The court dismissed the conversion and unjust enrichment counterclaims without prejudice. That means Russell Road may amend its complaint to allege Desio might have been obliged to share some of her dance fees with the club.

Russell Road also may seek a declaratory judgment that it had a valid and enforceable agreement with Desio and that she's not an FLSA-covered employee, the court said.

Retaliation Claim Allowed

Desio can add an FLSA retaliation claim to her complaint based on the company's filing of the counterclaims, the court said.

Russell Road argued the court should deny Desio permission to amend her complaint because the retaliation claim wouldn't survive a legal challenge.

But Desio's proposed amendment isn't "futile" because she has an arguable claim the company filed the counterclaims to discourage her and other dancers from asserting their FLSA rights, the court said.

Desio contended that faced with the threat of losing "virtually all" her dance fees, a "reasonable dancer" would "absolutely be deterred" from suing or joining an FLSA lawsuit.

Desio's proposed amendment meets the essential elements of an FLSA retaliation claim, the court said.

Shannon Liss-Riordan of Lichten & Liss-Riordan, Kristen Hillman in Minden, Nev., and Adam Rose of the Law Office of Robert Starr in Woodland Hills, Calif., also represented Desio. Jeffrey Bendavid of Moran & Associates in Las Vegas and Gregory Kamer and Kaitlin Ziegler of Kamer Zucker Abbott in Las Vegas represented Russell Road Food and Beverage.

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