The Legal Intelligencer

Appeals Court Upholds $4.5M Verdict for Misclassified Exotic Dancers

In yet another victory for workers who have been misclassified as independent contractors, an appellate court recently affirmed a multimillion-dollar verdict for a class of exotic dancers.

By **Jeffrey Campolongo** | September 19, 2019

Jeffrey Campolongo.

In yet another victory for workers who have been misclassified as independent contractors, an appellate court recently affirmed a multimillion-dollar verdict for a class of exotic dancers. Plaintiff Priya Verma sued her former employer, defendant 3001 Castor, Inc. d/b/a The Penthouse Club (the Penthouse Club), alleging that it violated the Fair Labor Standards Act (FLSA), the Pennsylvania Minimum Wage Act (PaMWA) and the Pennsylvania Wage Payment and Collection Law (PaWPCL).

Verma worked at the Penthouse Club as an exotic dancer. In her class action lawsuit, Verma alleged that the Penthouse Club improperly classified its dancers as independent contractors instead of employees, and, as a result, the Penthouse Club failed to pay her and all other dancers statutory minimum wages and premium overtime compensation. Verma also alleged that the Penthouse Club improperly took a percentage of the compensation that dancers earned from performing dances on the club's stage and in private rooms for individual customers. See *Verma v. The Penthouse Club,* Civil Action No. 13-3034 (E.D. Pa. Nov. 29, 2016).

Following a trial in the U.S. District Court for the Eastern District of Pennsylvania, the plaintiffs in the case were awarded $4.5 million for unpaid minimum wages and unjust enrichment under Pennsylvania law. On appeal to the U.S. Court of Appeals for the Third Circuit, the Penthouse Club argued that the dancers were independent contractors, not employees of the club. The club also made the novel argument that the plaintiffs' state law claims for unjust enrichment were preempted by the federal FLSA. The appellate court rejected all of the defendants' arguments and affirmed across the board and sustained the jury's verdict, see *Verma v. The Penthouse Club,* No. 18-2462 (3d Cir. Aug. 30, 2019).

As explained by the court, the dancers at the Penthouse Club were classified into two categories: "entertainers" and "freelancers." Entertainers were required to commit to working at least four days per week and submit a weekly schedule, while freelancers had no such commitments. Interestingly, the club demanded and required that each dancer in both categories sign an agreement stating that she was an independent contractor.

In order to avoid having to pay wages to the dancers, the club allowed them to keep tips they received when dancing on stage or fixed dance fees at rates established by the club, which they received from giving private dances in the private dance rooms. For this privilege, the club took a fee, called a "room-rental fee," for each private dance and also required the dancers to tip out the club's disc jockey, house mom (who kept track of the dancers' schedules and assisted them in other ways) and the podium host.

According to the decision, dancers at the club worked in shifts. They could choose among five different shifts: a day shift lasting from noon to 6 p.m.; a mid-shift from 3 to 9:00 p.m.; a preferred shift from 6 p.m. to midnight; a premium shift from 8 p.m. to 2 a.m.; and a power shift from 10 p.m. to 2 a.m. Each dancer had to rent stage time for each shift she worked. The rates for these "stage-rental fees" varied depending on the shift and were lower for entertainers than for freelancers. Dancers performed in two locations: on the club's main stage and in private dance rooms. The club provided training to the dancers and closely reviewed their attendance, appearance, demeanor, and customer service. It also had a strict set of rules the dancers must follow. When they violated those rules, they were fined amounts ranging from $10 to $100.

Based on the foregoing facts, the trial court made a pretrial determination that the dancers were indeed employees subject to protection under the wage-and-hour statutes. Just before trial, the parties settled all or a portion of the FLSA overtime claims. As a result, the trial court was left with no remaining federal claims for which it could exercise jurisdiction. The trial court, however, exercised supplemental jurisdiction over the state law claims under 28 U.S.C. Section 1367(a) and the case proceeded trial.

The remaining claims under the PaMWA and for unjust enrichment went to trial wherein a jury returned a verdict awarding the class $2,610,322.61 for its minimum wage claims and $1,948,400.12 for its unjust enrichment claims. The Penthouse Club argued in post-trial motions that the court should dismiss the suit for lack of jurisdiction, to reconsider its summary-judgment rulings, and to enter judgment for the club as a matter of law.

On appeal, the court quickly dispensed with the club's jurisdictional arguments. Citing the overlap between the federal and state law claims, as well as considerations of judicial economy, convenience, and fairness to the parties, there was sufficient justification for exercising supplemental jurisdiction.

Next the appeals court turned to the trial court's pretrial ruling that found the dancers to be "employees" as a matter of law. The court cited a longstanding six-factor test to determine whether a worker is an "employee" or an "independent contractor" under the FLSA. The test consists of: the degree of the alleged employer's right to control the manner in which the work is to be performed; the alleged employee's opportunity for profit or loss depending upon her managerial skill; the alleged employee's investment in equipment or materials required for her task, or her employment of helpers; whether the service rendered requires a special skill; the degree of permanence of the working relationship; and whether the service rendered is an integral part of the alleged employer's business.

In a fervent defense of workers who are "not on a level of equality in bargaining with their employers in regard to minimum fair wage standards," the opinion underscored the fact that the six-factor test says nothing about whether the dancers signed an agreement stating that she was an independent contractor. The whole point of the FLSA and the PMWA, per the opinion, is to protect workers by overriding contractual relations through statute. Furthermore, no single factor in the analysis is dispositive and courts should consider them together in the "circumstances of the whole activity."

After reviewing the six factors, the court concluded that the case was not a hard one to decide. The dancers' relationship to the club falls well on the employee side of the line inasmuch as five of the six factors weigh in favor of concluding the dancers are employees of the Penthouse Club. The only factor in the club's favor is the lack of permanence of the relationship, and even so, that factor does not come close to outweighing the other five. Thus, the court easily concluded that the dancers were not, as a matter of economic reality, operating independent businesses for themselves.

On the club's preemption argument, the court said the FLSA is a parallel regime of wage-and-hour protections that works in cooperation with, not to the exclusion of, other laws protecting workers. No argument advanced by the club undermines the presumption that the FLSA is meant to supplement, not supplant, state laws protecting workers, the court wrote.

Finally, the court refused to upset the jury's verdict on unjust enrichment. The club argued that it was entitled to a credit or offset because "it would be unjust and inequitable" to allow the dancers to recover monies for the tips they were forced to pay other club employees without giving the club a credit for the dance fees they retained. This was essentially an unjust enrichment defense to an unjust enrichment claim. The court was not persuaded, nor amused by the specious argument. Just because the club allowed the dancers to keep some of the money they earned as dance fees, did not mean the dancers were any less entitled to the full jury award.

Jeffrey Campolongo, *founder of the Law Office of Jeffrey Campolongo, focuses his practice on employment and entertainment law. For over a decade, he has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters.*
