The Legal Intelligencer

Court Revives Dancers' Claims Holding Arbitration Agreement Unenforceable

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Picture this working scenario. You are lucky enough to have a job where you are required to pay your employer just to work. A fee that you pay just for showing up. You pay for everything from the uniform you are required to wear, to the locker you use to safeguard your valuables, to tipping everyone else before you ever collect a dime in wages. Now, also imagine that if you are late to work, late for your shift, or have to leave early (even if

for an emergency), you pay a fine to your employer. You are not permitted to use your cellphone, bring food or drinks to work, and you can only take a break when your boss says so, albeit for limited time. And let us not forget, you are also required to maintain a certain body shape lest you will be "shamed if deemed overweight."

These working conditions sound an awful lot like a sweatshop or forced labor. One might even think that for these types of draconian measures, the pay must be pretty substantial. To the contrary, according to the allegations contained in a complaint filed in the District of New Jersey, the pay rate for this job was not even $8.38 per hour, the state's rate for minimum wage. According to the complaint, to work as an exotic dancer at "Breathless Men's Club" (the club) in Rahway, New Jersey, you must meet all of the foregoing requirements, in addition to a myriad of other rules and regulations, before you can ever take the stage. Oftentimes dancers at the club work an entire shift and actually lose money.

Based on the complaint filed in the case, in order to avoid classifying the dancers as employees, the club required the dancers to rent performance space in the club and sign an "independent dancer rental agreement." The agreement contained an employment provision and an arbitration clause. The employment provision provided: "Dancer understands and agrees that he/she is an independent contractor and not an employee of the club. Dancer is renting the performance space for an agreed upon fee previously agreed to by dancer and club." The "employment" agreement was essentially a rental agreement to lease space from the Club.

The arbitration clause accompanying the agreement said the following about resolving disputes: "In a dispute between the dancer and the club under this agreement, either may request to resolve the dispute by binding arbitration. This means that neither party shall have the right to litigate such claim in court or to have a jury trial —discovery and appeal rights are limited in arbitration. Arbitration must be on an individual basis. This means neither you nor we may join or consolidate claims in arbitration, or litigate in court or arbitrate any claims as a - representative or member of a class" (emphasis in original).

Alissa Moon and Yasmeen Davis filed a collective action under the Fair Labor Standards Act (FLSA), 29 U.S.C. Section 201, et seq., and class action under New Jersey's Wage Payment Law (NJWPL), N.J.S.A. Section 34:11-4.1, et seq., and Wage and Hour Law (NJWHL), N.J.S.A. Section 34:11-56a, et seq., against defendant Breathless, Inc. doing business as Breathless Men's Club. Among the allegations leveled against the club, the dancers accused the club of misclassifying its exotic dancers as independent contractors even though they are actually employees under federal and state law and unlawfully avoiding paying hourly wages, overtime wages, unemployment taxes, disability taxes, Social Security taxes, workers' compensation premiums and other mandatory insurance benefits.

The club sought to have the complaint dismissed on the ground that the arbitration clause signed by the dancers foreclosed Moon and Davis from seeking relief in the district court and required mandatory arbitration of all claims. On July 29, 2016, the district court granted the club's motion for summary judgment concluding that there was no genuine dispute as to whether the plaintiffs' claims fell within the scope of the arbitration provision in *Moon v. Breathless,* No. CV1506297SDWLDW, (D.N.J. July 29, 2016). The U.S. Court of Appeals for the Third Circuit recently issued a precedential decision reviving the suit and declaring that the wage-and-hour claims were not subject to arbitration because the arbitration agreement could not apply to statutory employment  claims.

On appeal, Moon argued that New Jersey state law required an arbitration clause to clearly and unmistakably establish that it applies to statutory claims arising from the employment relationship. The arbitration agreement at issue in this case merely required the parties to arbitrate "a dispute" under the agreement. There was no explicit reference to arbitration of statutory claims. As a result, the appellate court rejected the club's demand for mandatory arbitration. The court relied on three principles under New Jersey law to determine the enforceability of an arbitration agreement in the employment context.

First, a waiver-of-rights provision should, at a minimum, provide that the employee agrees to arbitrate all

statutory claims arising out of the employment relationship or its termination, see Garfinkel v. Morristown Obstetrics & Gynecology, 773 A.2d 665, 672 (N.J. 2001). Here, the arbitration agreement failed to specify that the dancers agreed to arbitrate all statutory claims arising out of the employment relationship or termination.

Second, the court wrote, the arbitration agreement should also reflect the employee's general understanding of the type of claims included in the waiver, e.g., workplace discrimination claims. Again, the agreement used by the club here failed to reference the types of claims waived by the provision, let alone refer to waiver of rights relating to discrimination claims and wage and hour claims.

Third, for an agreement to be valid, it must explain the difference between arbitration and litigation, in clear and unambiguous language. "The parties must know that there is a distinction between resolving a dispute in arbitration and in a judicial forum," as in Atalese v. U.S. Legal Services Group, 99 A.3d 306, 315 (N.J. 2014); *Martindale v. Sandvik , 800 A.2d 872, 884* (N.J. 2002), (enforcing an arbitration clause because it, inter alia, "addressed specifically a waiver of the right to a jury trial, augmenting the notice to all parties to the agreement that claims involving jury trials would be resolved instead through arbitration.").

The club argued in this case that the foregoing principles apply only to agreements involving "employees" and not "independent contractors." The club also argued that deciding the arbitration question would essentially force the court to determine the merits of the dancers' employee misclassification claims. The Third Circuit rejected both arguments out of hand, relying on U.S. Supreme Court precedent from 70 years ago that declared that a court would need to determine what the employee does in order to resolve the separate wage-and-hour claims, as in Rutherford Food v. McComb , 331 U.S. 722, 729 (1947), ("Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of  the act.").

The dancers who filed this suit will get to present their claims in open court, instead of a private arbitration. Given the working conditions, it really is no surprise why the club wanted to limit the remedy to a private setting. The court did not set any new precedent here, nor did it create any new law. That should come as no surprise, either, as trial and appellate courts throughout the nation have been consistently and vigilantly upholding workers' wage and hour rights, particularly in the context of worker misclassification.

This decision is important for other reasons. First, it reinforces the notion that an employee, even if misclassified as an independent contractor, cannot waive statutory rights without clear and unambiguous language in an employment agreement. Second, for an arbitration agreement to apply to all disputes arising out of the employment context, including discrimination claims, the clause better be ironclad, with knowing and voluntary waivers, to be enforceable. Lastly, this decision stands as a reminder that employers cannot just force employees to sign away rights and expect that waiver to be valid. When you force an employee to pay to come to work that should be all the indication necessary to know that something is not quite right here. •

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.

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