

# 3rd Circ. Revives Exotic Dancer's Wage Suit

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Law360, New York (August 17, 2017, 4:34 PM EDT) -- The Third Circuit on Thursday revived a putative collective and class action alleging a New Jersey adult nightclub underpaid an exotic dancer, issuing a precedential ruling clarifying that statutory claims fall outside of arbitration agreements unless the clauses specifically mention them.

The three-judge panel's decision handed a victory to Alissa Moon, who had unsuccessfully argued to New Jersey federal court that the arbitration provision within her "Independent Dancer Rental Agreement" with Breathless Inc. is invalid and that her federal Fair Labor Standards Act and New Jersey Wage Payment Law and Wage and Hour Law claims are outside its scope.

U.S. District Judge Susan D. Wigenton tossed the case in July 2016 by granting summary judgment to the club after finding that Moon must arbitrate her claims because, under the agreement, she'd waived her right to go to court.

In reversing that ruling, the Third Circuit analyzed three New Jersey Supreme Court rulings addressing arbitration clauses: *Garfinkel v. Morristown Obstetrics & Gynecology Associates* in 2001, *Martindale v. Sandvik Inc.* in 2002 and *Atalese v. U.S. Legal Services Group* in 2014. The panel found guidance in *Atalese* and *Garfinkel*, in which the state justices found that the quoted language made the arbitration clauses applicable only to contract claims. The *Martindale* case didn't apply, the panel said, because that clause had no limiting language.

"Because the arbitration clause here resembles the arbitration clauses in *Garfinkel* and *Atalese*, and because the Supreme Court of New Jersey found that the arbitration clauses in *Garfinkel* and *Atalese* only applied to contract disputes, we hold that the arbitration clause here does not cover Moon's statutory claims," the panel said.

Moon's lawsuit alleged the business misclassified her and other dancers as independent contractors and thus violated the federal Fair Labor Standards Act and New Jersey's Wage Payment Law and Wage and Hour Law "by failing to pay minimum and overtime wages;

unemployment, disability, and social security taxes; as well as workers' compensation premiums and other mandatory insurance benefits.”

Moon, who performed as a dancer at the Breathless Men's Club in Rahway, New Jersey, from May 2013 to about September 2015, signed the agreement in January 2015, according to court records.

The agreement Moon signed states that she was an independent contractor and not a Breathless employee, according to court records. The arbitration provision states that Moon and the club each waived their litigation rights and that they may request to resolve disputes by binding arbitration.

In challenging the validity of the agreement and the provision, Moon argued the agreement is void because it misclassified her as an independent contractor, but Judge Wigenton had said “challenges to the legality of an agreement that contains an arbitration provision, as opposed to challenges to the arbitration provision itself, are decided by the arbitrator.”

Moon claimed the agreement and the provision were not supported by “sufficient consideration” — referring to what she received under the deal — because she only performed at the club for eight months on a part-time basis after signing the agreement, but the judge found Moon's continued ability to perform was sufficient consideration.

Moon also asserted the overall agreement is “substantively unconscionable,” because of one-sided terms that benefit Breathless, including those within the arbitration provision.

Third Circuit Judges D. Michael Fisher, Thomas Michael Hardiman and Joseph Anthony Greenaway Jr. sat on the panel.

Moon is represented by Jeremy E. Abay and John K. Weston of [Sacks Weston Diamond LLC](#)

Breathless is represented by Marc J. Gross and Justin P. Kolbenschlag of [Greenbaum Rowe Smith & Davis LLP](#).

The case is Moon et al v. Breathless, Inc., case number 16-3356, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Alanna Weissman.

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