Dancer's Statutory Claim Against Club Not Subject to Arbitration

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Breathless Go-go Bar in Rahway

The U.S. Court of Appeals for the Third Circuit has reinstated a suit claiming that exotic dancers at a men's club have been wrongly classified as independent contractors.

The court said in a published decision Thursday that an arbitration clause in a signed employment contract does not govern statutory wage-and-hour claims. The court reached its conclusion based on a finding that *Moon v. Breathless* resembles two New Jersey Supreme Court cases in which arbitration clauses were defeated, *Garfinkel v. Morristown Obstetrics & Gynecology Associates* and *Atalese v. U.S. Legal Services*.

Plaintiff Alissa Moon, a dancer at Breathless Men's Club in Rahway, said in her suit that the club misclassifies its dancers as independent contractors, allowing it to unlawfully avoid paying hourly wages or overtime, let alone unemployment, disability or Social Security taxes or workers' compensation premiums. She brought a collective action against Breathless for violations of the Fair Labor Standards Act and the state Wage Payment Law and Wage and Hour Law. According to the suit, Breathless requires its dancers to pay a fee to work there, and makes them contribute part of their tips to a tip pool.

U.S. District Judge Susan Wigenton dismissed the suit in July 2016, concluding that Moon was subject to the arbitration agreement. On appeal, Judges D. Michael Fisher, Thomas Hardiman and Joseph Greenaway Jr. said Moon's wage-and-hour claims were not subject to arbitration for three reasons. First, because the arbitration agreement failed to specify that the employee agreed to arbitrate all statutory claims arising out of the employment relationship or termination. Second, the agreement failed to reference the types of claims waived by the provision, such as discrimination claims. Finally, the agreement failed to explain the difference between arbitration and litigation, the court said.

The case at bar resembles *Garfinkel* because in that case, from 2001, a doctor sued his employer for violation of the New Jersey Law Against Discrimination, the panel said. The present case resembles *Atalese* because in that case, from 2014, the court found that the plaintiff did not surrender his statutory rights by signing the arbitration agreement because its wording did not clearly indicate to the plaintiff that she was giving up her right to pursue her claim in court.

On appeal, the club maintained that *Garfinkel* did not apply because it involved employees, while the present case, according to the club, involves an independent contractor. But the panel said that argument fails because *Garfinkle* has been applied to other cases that did not concern employment.

Jeremy Abay of Sacks Weston Diamond in Philadelphia, representing Moon, said he believes the court designated the case for publication because it encountered similar circumstances in another case, *Herzfeld v. 1416 Chancellor*, which was decided in November 2016. The court in *Herzfeld*concluded an arbitration agreement did not apply to statutory claims made by another dancer at a Philadelphia venue called The Gold Club. Dancers there were also classified as independent contractors, and were required to pay a fee to work there.

"We're pleased that Breathless will have to explain its wage violations to a judge and jury in open court and not to a private arbitrator sitting behind closed doors," said Abay.

Marc Gross, the lawyer for Breathless, did not return a call or an email. At the time the case was argued he was at Greenbaum, Rowe, Smith & Davis in Woodbridge but in June he joined Fox Rothschild in Roseland.

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