Independent Contractor vs. Employee: A Stripper's Plight

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The center of several recent South Carolina cases has been the issue of independent contractor versus employee. Under the Common Law, the body of case law originating in England and modified by our courts over time, there is a four-factor analysis to determine whether a person is an employee or an independent contractor:
"(1) direct evidence of the right or exercise of control;
(2) furnishing of equipment;
(3) method of payment; [and]
(4) right to fire."
Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009).

Using this analysis, the South Carolina Court of Appeals recently took up the case of *Lewis v. L.B. Dynasty, Inc.*, 732 S.E.2d 662, 400 S.C. 129 (S.C.App. 2012). "Lewis's role as a dancer … is what most people would call being a stripper." *Id.* at 663, 400 S.C. at 131. Lewis frequented many clubs across North and South Carolina. There was no schedule or call ahead, she just showed up at the clubs and paid a "tip-out" fee. The clubs would provide the stage, poles, towels, and a locker. The clubs picked the music and told her when to dance. The clubs required her to serve drinks when not on stage and to strive for VIP dances when on stage. She received $250-$350 a night in cash tips, dancing 5 nights a week, 50 weeks a year. The clubs themselves paid her nothing, but would cash large bills to enable patrons to "make it rain." The clubs could fine her or refuse to let her in in the future.

On the night in question, gunfire erupted in the Boom Boom Room, one of the clubs Lewis frequented, with one bullet striking Lewis in the abdomen. There were significant injuries and scarring. Lewis made a claim against the club for worker's compensation benefits.

The Single Commissioner and Full Commission found Lewis was not an employee. The Court of Appeals analyzed the case under the four Common Law factors. In terms of the right to control, Lewis conceded that the clubs did not tell her how to dance and thus the clubs did not exercise control over her. She could pick the club, she determined how to dance, and she could leave if she wanted. The club telling her when to dance, to serve drinks, or to strive for VIP dances did not shift the analysis. Therefore the first prong of "right to control" favored independent contractor.

The equipment factor also favored independent contractor. While the club provided towels, a stage, and poles; there is "no practical possibility" that the dancers could bring some of these items. "From the standpoint of both the Boom Boom Room and its customers, Lewis brought her own 'equipment' for her work." *Id.* at 665, 400 S.C. 135.

The payment factor favors an independent contractor as well. Lewis had to pay a $70 tip-out fee and a portion of her VIP tips to the club. Lewis also had to tip the disc jockey and the bartender. The club, on the other hand, paid Lewis $0. Even when cashing large bills for customers to "make it rain," it was done with the customers' money and at the customers' insistence.

Finally, the right to fire factor also favors independent contractor. There were club "rules," and if Lewis violated them she was fined or refused entry on subsequent nights. The court concluded that many businesses have property that they would invite independent contractors onto for the performance of services. To the extent that a right to refuse entry constitutes firing, all independent contractors would favor employment on this factor. Therefore, this alone is not enough to shift the factor in favor of employment.

Accordingly, all the factors point towards an independent contractor relationship, and the case was found not compensable. While this example is very case specific, the analysis remains the same for any profession. For more recent reference, see *Shatto v. McCleod Regional Medical Center,* 394 S.C. 552, 716 S.E.2d 446 (Ct. App. 2011) and its subsequent appeal to the Supreme Court in December 2013.

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