

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT WILLIAMS – PETITIONER,

vs.

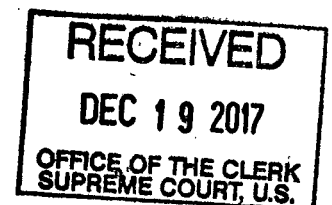
VICTORIA'S SECRET-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Robert Williams
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QUESTIONS PRESENTED

The petitioner was employed by a joint-employer recognized under the Joint Employer Doctrine. Moreover, The Fifth Amendment Due Process Clause infers equal protection of the laws.

An incident occurred at Victoria's Secret which the petitioner did nothing in violation of their policies but was terminated. Moreover, if a direct employee commenced Title VII litigation and made the claim I was singled out and terminated, this would be sufficient at bare minimum to proceed to discovery to gather evidence to support the claims, if the pleading requirements have been met.

Under the circumstances,

1. Did the underlying courts adjudicate in a manner that compromised the petitioner's Fifth Amendment Constitutional Right?
2. Does the underlying adjudication comply to The United States Supreme Court Uniformity Standards?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issued to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was September 13, 2017.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution states: "...nor be deprived of, liberty or property, without due process of law and an implicit guarantee that each person receive equal protection of the laws" for all citizens. (U.S. Constitution).

Fair Labor Standards Act

Joint Employer Doctrine

28 U.S.C. paragraph 1915

STATEMENT OF THE CASE

The administrative processing of this case by the underlying courts began correctly. As the case proceeded the courts lost sight of the opportunity to be heard and equal protection of all laws, at bare minimum, to gather evidence to support the causes of action, Violating The United States Supreme Court Precedents of the procedural process of the right to be heard and an appeal as a right if taken.

THE UNITED STATES DISTRICT COURT PROCEEDINGS

On July 29, 2017, the court reviewing judge granted *IFP* status. On August 25, 2017, the reviewing judge rejected the Original Complaint and issued an Order to Amend with instructions on how to cure the deficiencies. Moreover, the petitioner submitted an Amended Complaint, which the reviewing judge accepted as cured on October 5, 2017. The case was assigned and docketed to a district judge. The district Judge issued an Order of Service. (Appendix at C-23).

At this point it is clear the pleading requirements have been met. The court issued a pretrial conference also demonstrating, the pleading requirements have been met. During the interim the defendant moved for a motion to dismiss or in the alternative a motion for summary judgment. The court revoked the pretrial conference and gave them permission to present its papers. (Appendix at B-2-22).

THE APPELLATE COURT

Since the district court certified an appeal would not be taken in good faith, petitioner must now ask the Second Circuit to waive the appellate filing fee and submit the necessary statement of the merits of appeal. Although, this submission was substantiated on non-frivolous

arguments the second circuit denied the appeal without a submission of brief and appendix pursuant the appeal lacks an arguable basis of law or fact. (Appendix at 1).

REASONS WHY CERTIORARI SHOULD BE GRANTED

Although, petitioner was a contracted employee, he is not an Independent Contractor, by several government agencies. The Internal Revenue Service (“IRS”) the federal government declares plaintiff an employee, The Fair Labor Standards Act (“FLSA”) declares plaintiff an employee and The Department of Labor (“DOL”) declares plaintiff an employee under the applicable joint employer standards.

For example, the IRS states “People such as doctors, dentists, veterinarians, lawyers, accountants, contractors, subcontractors, public stenographers, or auctioneers who are in an independent trade, business, or profession in which they offer their services to the public are generally independent contractors. However, whether these people are independent contractors or employees depends on the facts in each case. The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done. The earnings of a person who is working as an independent contractor are subject to Self-Employment Tax”. More, Williams was not subject to self-employment tax.

Since the Amended Complaint has done what it is supposed to do in putting the defendant on notice of what the complaint alleges. Plaintiff is entitled to proceed to discovery in accordance to his constitutional due process rights. This follows the courts duty to protect pro se litigants’ inadvertent forfeiture of important rights.

The Fifth Amendment provides that “[no] person shall be.... deprived of life, liberty, or property without due process of law ...” In numerous decisions, the court “has held that the Due

Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws. *Hampton v. Wiesenfeld*, 420 U.S. 88, 100 (1976).

It is undeniable plaintiff as an employee is protected by the Fair Labor Standards Act (“FLSA”). The determination of whether an employer-employee relationship exists for purposes of the FLSA should be grounded in “economic reality rather than technical concepts,” *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961) (internal quotation marks omitted),

For example, in *Carter v. Dutchess Community College*, 735 F.2d 8, prison inmates conducting classes in a program managed by a community college asserted that the college should be viewed as their employer and obligated to pay them in accordance with the FLSA's minimum wage requirements. The district court was not persuaded, observing that the college had only “qualified control” over the inmate instructors; the Department of Correctional Services always maintained “ultimate control.” The appellate court rejected “ultimate control” as the determinative factor of an entity's status as an employer, because such a rule would not comport with the “remedial” purpose of the FLSA, which Congress intended to “have the widest possible impact in the national economy.” Instead, they cited four factors that better determine the “economic reality” of a putative employment relationship, specifically, “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.’. (Quoting *Bonnette v. Calif. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir.1983)); *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir.1999) (applying Carter factors, reiterating that absolute control is not determinative of employer status, and noting that “[c]ontrol may be restricted, or exercised only

occasionally, without removing the employment relationship from the protections of the FLSA, since such limitations on control do not diminish the significance of its existence” (internal quotation marks and alterations omitted)).

Under the Economic Realities Test, Victoria’s Secret qualifies as Williams employer as a Matter of Law. Victoria’s Secret exercised sufficient formal and functional control over Williams work to qualify as his Joint Employer. The traditional four-factor test set forth in *Carter v. Dutchess Community College*, 735 F.2d at 12, for determining when an entity exercises sufficient formal control over a worker to be that worker's employer under the FLSA, strongly indicates that Victoria’s Secret should be deemed plaintiff’s joint employer as a matter of law.

Defendant had the undisputed power to hire and fire at will agency employees referred to work on retail premises; Defendant supervised and controlled agency employees' on-site work schedules and conditions of employment; and defendant maintained employment records confirming referred workers' certifications and the shifts they worked. The fact that the referral agencies themselves may have exercised “ultimate” authority in these areas does not alter the fact that defendant also exercised some authority which helps establish the economic reality of its status as a joint employer. *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d at 139 (observing that joint employer's exercise of limited or occasional control did not remove employment relationship from protections of the FLSA).

In this case there is no question that Defendant maintained employment records on the matter most relevant to payroll obligations under the FLSA: the hours worked at the store by employees. Only the third Carter factor, relating to the determination of the rate and method of a worker's payment, is inconclusive. There is no question that Williams was paid directly by the referral agencies in an amount set by them, which was less than what Victoria’s Secret paid

the agencies for his services. Nevertheless, Defendant did not lack total control over plaintiff's pay. The fact that defendant calculated the hour's plaintiff worked and that it then paid the agencies an hourly rate for those hours, so that the agencies, in turn, paid plaintiff an hourly rate for the exact same hours, indicates that defendant exerted some control over plaintiff's pay. Certainly, defendant's calculations conclusively determined the number of hours for which plaintiff would be paid.

Further, the hourly rate defendant paid the referral agencies effectively set a cap on the hourly rate that the agencies would pay Williams. Whether formal control can be determined as a matter of law in this case based on three Carter factors admitting no other conclusion and one factor that does not tilt decisively either way or need to be decided. The record in this case established Defendants functional control over plaintiff's work as a matter of law.

The Department of Labor's ("DOL") Interpretation of the FLSA Supports Treating Victoria's Secret as Williams Joint Employer. Supported by various opinion letters issued by the Department of Labor DOL, the agency charged with enforcement of the FLSA. Statutory interpretations contained in DOL opinion letters, as opposed to those arrived at after formal agency adjudication or notice-and-comment rulemaking, are not binding authority, see *Gualandi v. Adams*, 385 F.3d 236, 243 (2d Cir.2004). Nevertheless, such agency letters represent "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Gualandi v. Adams*, 385 F.3d at 243 (citing *Bragdon v. Abbott*, 524 U.S. 624, 642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998)).

The Second Circuit like, the DOL views joint employment as a question to be resolved from the totality of the evidence. See generally Opinion Letter from Dep't of Labor, Wage & Hour Div., 2001 WL 1558966, at *1 (May 11, 2001) (identifying relevant factors to include (1)

power to control or supervise workers or work performed; (2) power, whether alone or jointly, directly or indirectly, to hire, fire, or modify employment conditions of individual; (3) permanency and duration of relationship; (4) level of skill involved; (5) whether worker's activities are integral part of overall business operations; (6) where work is performed and what equipment is used; and (7) who performs payroll and similar functions).

In a slightly different context, the DOL concluded that a hospital was a joint employer with individual inpatients of private duty nurses in light of the “great degree of control and supervision” evidenced by the fact that all work was performed on hospital premises, all equipment and supplies used by the private nurses were provided by the hospital, the hospital required the private nurses to report to the hospital's nursing office at the start and end of each tour, and the hospital was legally obligated to provide some oversight of the nurses and to take action if the nurses failed to comply with hospital policies. Opinion Letter from Dep't of Labor, Wage & Hour Div., 2001 WL 1558966, at *1 (supplementing previous Opinion Letter from Dep't of Labor, Wage & Hour Div., 1999 WL 1788146 (Aug. 24, 1999)). The identical control factors are evident in this case. (Emphasis on control elements).

The United States Supreme Court has offered the following guidelines to distinguish employees from independent contractors:

1. The extent to which services are integral to the employer's business. Greater integration favors an employee-employer relationship.
2. The permanence of the relationship. More established relationships favor employee status. Suggests an independent contractor relationship.
3. The degree of control by the principal. More control favors employee-employer status.

4. The amount of financial risk. More opportunity for profit or loss favors an independent contractor relationship.

The amount of initiative, judgment or foresight in open-market competition with others required for the success of the claimed independent enterprise. Entrepreneurial and distinctive work favors an independent contractor relationship.

Pursuant the above-mentioned reasons why certiorari should be granted the appellate court determination of law is wrong that the appeal lacks an arguable basis of law or fact. (Appendix at A-1). Taking away petitioners appeal as a right without consideration of a brief an appendix.

Also, pursuant the above mentioned reasons why certiorari should be granted the united states district court determination of law is wrong petitioner was not an independent contractor he was jointly employed by Victoria's Secret.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respect

Robert Williams

Date: December 12, 2017