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# Employee Rights in Sex Work: The Struggle for Dancers' Rights as Employees

Carrie Benson Fischer\*

## Introduction

The legal sex industry<sup>1</sup> in Minneapolis has boomed in recent years,<sup>2</sup> and will likely continue to grow.<sup>3</sup> The number of women

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\* J.D., University of Minnesota Law School, expected 1997; B.A., St. Olaf College, 1993. I gratefully acknowledge Sandra Conroy, Kent Klaudt, Sarah Garb and Amy Chiericozzi for their thoughtful editing. I am especially thankful to Kelly Holsope and the entire staff of WHISPER, to whom this article is dedicated, for providing research materials and personal insight into the sex industry. Finally, I am indebted to the partner of my life, David Fischer, who not only provided me with infinite support and encouragement, but who sincerely understands why this article needed to be written.

1. "Legal sex industry" refers to commercial facilities, bars or clubs, that feature strip shows, nude dancing, and other live entertainment for the sexual gratification of their patrons. Sexually-oriented clubs typically feature female dancers performing in various ways for an almost entirely male audience.

Although the specifics of a club's layout may differ, commonly women circulate around the room engaging in what is called "table dancing" (she stands on a small portable platform so that her crotch is at eye-level with the customer) or "lap dancing" (she literally "sits" on the customer's lap).

EVELINA GIOBBE, WHY WHISPER IS OPPOSED TO STRIP CLUBS (1992) (pamphlet distributed by WHISPER Action Group) (on file with author). See *infra* note 41 for a description of the organization WHISPER.

2. See Peter Leyden, *From Eclectic to Sex District?*, STAR TRIB. (Minneapolis), Dec. 29, 1993, at A1 (discussing how the legal sex industry is growing in Minneapolis' Warehouse District). Many sexually-oriented clubs are located in the Warehouse District as a result of a 1986 City Council ordinance mandating that such establishments pull out of other neighborhoods and locate downtown. *Id.* See *infra* note 26 and accompanying text (discussing zoning regulations for the legal sex industry). "In all, the number of sexual-entertainment businesses in the Warehouse District is pushing 10." Leyden, *supra*, at A1. Deja Vu, a prominent sexually-oriented business featuring nude dancers, opened in the Warehouse District in the late 1980s. *Id.* The club now known as Dream Girls began featuring topless dancers in 1992. Doug Grow, *Old Friends Took Off After Jukebox Owner Hired Topless Dancers*, STAR TRIB. (Minneapolis), Feb. 2, 1992, at B3.

3. See Tony Kennedy, *Deja Vu Owner Eyes Third Nude Dancing Club: Also Signs Letter of Intent to Buy Bar Next Door*, STAR TRIB. (Minneapolis), June 27, 1995, at D1. The prospective club, Darlings Entertainment Inc., would be a non-alcoholic juice bar featuring nude dancing with a bar serving alcohol next door. *Id.*

working<sup>4</sup> as nude or semi-nude dancers has consequently increased. The sex industry is inextricably connected to national and local economies,<sup>5</sup> and may offer a woman more income than she would earn elsewhere.<sup>6</sup> Nonetheless, within this "profession" wo-

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4. The use of language such as "work" or "employment" is not intended to imply that participation in the sex industry is a purely commercial exchange.

5. For example, Rick's Cabaret, a Houston "gentlemen's club," recently became the first publicly traded strip club in the history of the stock market when it offered 1.6 million shares on the Nasdaq. Jesse Katz, *Strip Club's Debut on Nasdaq Reveals New Era of Legitimacy*, S.F. CHRON., Oct. 13, 1995, at A16. "During a good month, Rick's may pay out nearly \$30,000 in liquor taxes alone." *Id.*

The sex industry draws a lot of business from local sports events. Colin Covert & Neal Justin, *Businesses Plan Huge Rally to Keep Wolves*, STAR TRIB. (Minneapolis), May 27, 1994, at B1; see also Chris Waddington, *Super Bowl Traffic Expected to Pick Up Pace of Sex Trade*, STAR TRIB. (Minneapolis), Jan. 21, 1992, at E1.

In a letter to the Minneapolis City Council, an executive from a Twin Cities investment firm recounted an outing with a client during which they stopped at Solid Gold (a Minneapolis strip club now called Schiek's) for drinks after a Timberwolves game: "Instead of staying for just one drink, the client chose to stay for several hours and during that time we negotiated on a very large multimillion-dollar joint venture." Jill Hodges, *Doing in Doing Lunch: Women Articulate Growing Concerns About Noon-Hour Adult Entertainment*, STAR TRIB. (Minneapolis), Jan. 26, 1995, at D1, D7. "The Greater Minneapolis Hospitality Council said Solid Gold adds a dimension to the 'entertainment community' that is critical if Minneapolis is to be billed as a 'world-class convention city.'" *Id.*

The sex industry also has strong relationships with politicians and other community leaders. Doug Grow, *War on Porn May be More Political than You Think*, STAR TRIB. (Minneapolis), Feb. 3, 1995, at B3. For example, "[T]he [Minneapolis] City Council once quietly encouraged Solid Gold, a topless bar now called Schiek's, to open downtown." *Id.* "And many local politicians are happy to accept the campaign contributions of Robert Sabes, owner of Schiek's." *Id.* Such participation in local and national economies offers the sex industry social legitimization. On the other hand, the connection of the sex industry with business has raised concerns in Minneapolis. Hodges, *supra*, at D1, D7 (discussing Minneapolis businesswomen's concerns about the growing trend of conducting business meetings at sexually-oriented clubs).

6. American women face great challenges in earning their living. "In 1991 employed women working full-time, year-round had average earnings that amounted to only 70 percent of the average earnings for men employed full-time, year-round." COMMISSION ON THE ECONOMIC STATUS OF WOMEN, PAY EQUITY: THE MINNESOTA EXPERIENCE 4 (1994). The pay gap between women's and men's salaries is largely due to occupational segregation; most employed women perform lower-paying work. *Id.* "The wage gap continues because women do 'women's work' and 'women's work' is low paid." *Id.*

Sources disagree as to how much income a woman can earn through prostitution and other forms of sex work. Women often perform sex work under individualized coercion, where most of their "earnings" are expropriated by a pimp. See KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 96 (1984) ("Prostitution is not the economic alternative for women that many have believed it to be. The money a woman makes is usually not her own. The pimp takes most or all of it."); see also *infra* note 171 (explaining that nude dancers also often work for agents/pimps, who likely control most or all of their income). On the other hand, according to some reports, sex work may provide women a high-income alternative to low-paying jobs. See *infra* note 77 and accompanying text (discussing the income potential of nude dancing); see also *infra* text accompanying note 114. "I absolutely hate it when they say: 'And what's a nice girl like you doing a job like this for?' I always feel like saying: 'Earning four times as much as you do!' Because it's true." Barbara, *It's a Pleasure Doing Busi-*

men are denied legal protections relating to the terms and conditions under which they earn their livings. Most dancers are hired to work as "independent contractors" rather than "employees."<sup>7</sup> Whether workers are employees or independent contractors can have a tremendous impact on their lives. Classification as independent contractors effectively denies them the rights and protections afforded those workers defined as employees under the law.<sup>8</sup> Dancers are not paid any wages, instead earning all of their income from customer tips.<sup>9</sup> Sometimes the dancers themselves have to pay for the right to work at a club.<sup>10</sup> As independent contractors, they are not entitled to file discrimination claims, receive unemployment benefits or workers' compensation.<sup>11</sup> Club owners are free from tax obligations and potential tort liability based on respondeat superior with respect to these workers.<sup>12</sup>

Litigation on this issue has sprouted nationally in recent years.<sup>13</sup> In Minneapolis, women working as dancers in the sex industry have brought at least two lawsuits against nightclub owners.<sup>14</sup> While both lawsuits were settled,<sup>15</sup> in one a jury found that the dancers were employees and were thus entitled to back wages.<sup>16</sup>

This article argues that women who dance nude in nightclubs,<sup>17</sup> though ostensibly hired as independent contractors, are employees as a matter of law. As such, they are entitled to certain legal protections. In its reluctance to embrace legal endorsement of sexually-oriented work, American society has been slow to acknowl-

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ness With You, SOCIAL TEXT, Winter 1993, at 11, 13 (Barbara is an escort worker in Great Britain).

7. See *infra* note 50 and accompanying text.

8. See *infra* notes 80-88 and accompanying text (discussing differences in legal rights and obligations with regard to independent contractors and employees).

9. See *infra* note 60 and accompanying text.

10. See *infra* note 64 and accompanying text.

11. See *infra* notes 80-81, 87 and accompanying text.

12. See *infra* notes 80, 85 and accompanying text.

13. See, e.g., *infra* part I.D.3.

14. Dancers filed suit under Minnesota's Fair Labor Standards Act against Deja Vu in 1994. *Panel to Set Deja Vu Settlement: Attorneys to Consider How Much to Award*, STAR TRIB. (Minneapolis), Nov. 17, 1994, at B2 [hereinafter *Panel*]; Mark Brunswick, *Jury: Deja Vu Dancers are Club Employees: Ruling Yet to Come on Pay*, STAR TRIB. (Minneapolis), Nov. 15, 1994, at B1; Matt Nelson, *Deja Vu Dancers Say Club Violated Independent Contract*, STAR TRIB. (Minneapolis), Oct. 25, 1994, at B2. Dancers filed a similar lawsuit against Solid Gold in 1991. *Id.*

15. *Panel*, *supra* note 14, at B2; Nelson, *supra* note 14, at B2.

16. Brunswick, *supra* note 14, at B1.

17. This article will only address that part of the sex industry which involves females performing for male audiences. This article will not specifically address potentially overlapping issues arising from sexual entertainment targeted at a homosexual or bisexual audience.

edge that these women are denied their workplace rights. Granting sex workers their legal rights as employees will help to mitigate the harms they experience as "throwaway women."<sup>18</sup>

Part I of this article explains how the Supreme Court has held that nude dancing is entitled to First Amendment protection.<sup>19</sup> The harmful nature of work in the sex industry is then discussed. Part I also analyzes the legal consequences of the employee/independent contractor distinction and defines the criteria for determining whether a particular worker is an employee or an independent contractor. Finally, the approaches of other jurisdictions to the employee/independent contractor distinction within the context of sex industry work are examined.

Part II argues that under this legal framework, dancers in the sex industry are employees rather than independent contractors. Part II then analyzes the consequences of this conclusion. Successful litigation for sex workers' rights as employees would entitle sex workers to greater legal protection, but it may also elevate nude dancing to legal recognition as a "profession."<sup>20</sup> Part II thus considers whether seeking employee status for sex workers is a desirable goal in light of the inherently harmful nature of the sex industry, described in Part I.

Part II also considers the reasons society has been hesitant to address the employment rights of women working in the sex industry. This article considers whether litigating for the rights of sex

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18. See BARRY, *supra* note 6, at 124 (discussing how prostituted women are rendered "throwaway women" to society).

Having such a class of dispensable persons serves a function in society. "[D]eviant persons often supply an important service to society by patrolling the outer edges of group space and by providing a contrast which gives the rest of the community some sense of their own territorial identity." Neil L. Shumsky, *Tacit Acceptance: Respectable Americans and Segregated Prostitution, 1870-1910*, 19 J. Soc. Hist. 665, 671 (1985/1986) (quoting Kai Erikson). Many Americans believed (and some still believe) that having "throwaway" women available to serve men's needs prevented "respectable" women from being attacked. *Id.* "The only remaining option, if the wives, mothers, daughters, and sisters of respectable Americans were to be protected, was to provide an arena for the deployment and control of other men's sexuality." *Id.* See also Margaret Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47, 48-49 (1992) (discussing how feminists have dismissed prostitutes as the "other"). "What is lost in the prostitution debate . . . is what other women need to learn and know and appreciate and politicize about the conditions of their own existence from women in prostitution." *Id.*

19. See *infra* part I.A.1.

20. This statement is not meant to deny the fact that calling dancers independent contractors still implies that their relationship with club owners has a purely commercial base. The concern in granting dancers legal recognition as employees is that such recognition will only partially address the problems faced by sex workers. See *infra* notes 186-87 and accompanying text (discussing the dangers of partial reform).

workers will appropriately address the harms of the industry and, specifically, whether such litigation will ultimately prove beneficial for women in general, or whether it will simply further legitimize an occupation many view as inherently dehumanizing and degrading for women. Ultimately, this article concludes that litigation on behalf of sex workers to protect their rights as employees should be pursued despite the risk of further legitimizing sex work as a profession. The risk of legitimization is outweighed by the fact that employee status for sex workers can temper what many regard as abuse per se.

## I. Background

### A. Sex Industry Employment in Context

#### 1. Obscenity Law and the First Amendment

In general, the First Amendment to the United States Constitution prevents both the federal government and the states from imposing an outright ban on material that a legislature might view as offensive.<sup>21</sup> In *Barnes v. Glen Theatre*,<sup>22</sup> the Supreme Court held in a plurality opinion that nude dancing is a form of speech protected by the First Amendment. Federal and state governments, therefore, are forbidden from entirely banning nude dancing or live sexual entertainment.

The Court tempered this decision, however, by noting that nude dancing is afforded only marginal protection.<sup>23</sup> Thus, a state may impose time, place, and manner regulations on nude dancing.<sup>24</sup> Specifically, the Court has held that a state may regulate the nature of entertainment in bars and nightclubs to which the state grants licenses to serve alcoholic beverages.<sup>25</sup> Courts have also up-

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21. See *Miller v. California*, 413 U.S. 15, 23 (1973); *Ginsberg v. New York*, 390 U.S. 629, 637-38 (1968).

22. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991).

23. In *Barnes*, the Court held that an Indiana statutory requirement that nightclub dancers must wear pasties and G-strings did not violate the First Amendment. *Id.*

24. See *California v. LaRue*, 409 U.S. 109 (1972), *reh'g denied*, 410 U.S. 948 (1973) (holding that a state has authority under the Twenty-First Amendment to prohibit nude dancing in establishments licensed to sell liquor); see generally *The Supreme Court, 1990 Term: State Restrictions on Nude Dancing*, 105 HARV. L. REV. 287 (1991) (discussing *Barnes*); Lisa Malmer, *Nude Dancing and the First Amendment*, 59 U. CIN. L. REV. 1275 (1991).

25. *LaRue*, 409 U.S. at 118-19; see also *Knudtson v. City of Coates*, 519 N.W.2d 166, 168 (Minn. 1994).

One St. Paul bar has found a solution to the city's ordinance banning alcohol in clubs featuring nude dancing: the Lamplighter owns two adjacent buildings separated by a glass wall and serves alcohol in one with nude dancing visible next door. Susan J. Berkson, *If It Looks Like (And Exploits Like) A Strip Joint . . . : 'Sin Tour'*

held zoning restrictions<sup>26</sup> and requirements for distance between dancers and patrons.<sup>27</sup>

## 2. Legal Contradictions in Sex Work Regulation

The judiciary and legislatures have historically placed sex work in a nebulous legal position. The Supreme Court has established that nude dancing may not be entirely prohibited, but legislative bodies may nonetheless restrict some aspects of its operation.<sup>28</sup> In this manner the legal system succeeds in simultaneously legitimizing and condemning the industry.

The law's treatment of the legal sex industry is remarkably similar to its historical treatment of traditional prostitution.<sup>29</sup> As with the legal sex industry, lawmakers have wavered between restrictive and permissive responses to traditional prostitution.<sup>30</sup> For example, the historical use of red-light districts bears a striking similarity to today's zoning regulations for sexually-oriented businesses and clubs.<sup>31</sup> This practice effectively tolerates the existence of sex work while condemning it by limiting where it may occur.<sup>32</sup>

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*Reveals A Minneapolis Industry Bent On Abusing Women*, STAR TRIB. (Minneapolis), Aug. 7, 1994, at A25.

26. See *Mga Susu, Inc. v. County of Benton*, 853 F. Supp. 1147, 1154 (D. Minn. 1994) (finding a specific licensing requirement unconstitutional, but that zoning power may be exercised within constitutional limits).

27. See, e.g., *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1061 (9th Cir. 1986).

28. See *supra* part I.A.1.

29. For purposes of this article, the term "traditional prostitution" refers to street prostitution, saunas, call girls, and escort services. Cf. *infra* note 33 (detailing Minnesota's statutory definition of prostitution).

30. See Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, in *SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY* 184, 194-96 (Frédérique Delacoste & Priscilla Alexander eds., 1987) (discussing the historical treatment of prostitution as wavering between restrictive and permissive); BARBARA MEIL HOBSON, *UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION* 4 (1987) ("The American response [to prostitution] has been one of radical swings in policy between all-out campaigns against prostitution and sufferance of its existence."); JOHN DECKER, *PROSTITUTION: REGULATION AND CONTROL* 57-62, 67-78, 81-92 (1979) (discussing historical treatment of prostitution in the United States). See generally THOMAS C. MACKEY, *RED LIGHTS OUT: A LEGAL HISTORY OF PROSTITUTION, DISORDERLY HOUSES, AND VICE DISTRICTS* (1987) (analyzing the historical legal response to prostitution).

31. DECKER, *supra* note 30, at 61 (discussing use of red-light districts in regulating prostitution in the United States). "Many cities tolerated the presence of prostitutes as long as they confined themselves to certain 'red-light' districts even though these women were technically in violation of the law." *Id.*; see also *infra* note 36 (discussing how red-light districts were used to maintain segregation between members of "respectable" society and prostitutes).

32. DECKER, *supra* note 30, at 61. "This ambivalent approach to prostitution might be explained in part by a class conflict between women which was caused by their subordinate roles in a male-dominated society." *Id.*

### 3. Society's Hypocrisy Toward the Sex Industry

The American legal system has thus accepted the existence of sex work but has struggled with how to respond to it. American lawmakers have classified some forms of sex work as illegal prostitution.<sup>33</sup> Other forms of sex work, such as nude dancing, are entitled to legal protection.<sup>34</sup> Often the distinction seems arbitrary.<sup>35</sup>

This legal ambivalence toward sex work is a reflection of society's ambivalence and discomfort with sex work. Sexually-oriented clubs, though legal, are viewed as subversive and subcultural.<sup>36</sup>

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33. In Minnesota, the definition of prostitution requires penetration or sexual contact. MINN. STAT. § 609.321(9) (1995). "Prostitution" means engaging or offering or agreeing to engage for hire in sexual penetration or sexual contact." *Id.* "Sexual contact" is further defined as "any of the following acts, if the acts can reasonably be construed as being for the purpose of satisfying the actor's sexual impulses: (i) The intentional touching by an individual of a prostitute's intimate parts; or (ii) The intentional touching by a prostitute of another individual's intimate parts." *Id.* § 609.321(10). "Sexual penetration" is defined as

any of the following acts, if for the purpose of satisfying sexual impulses: sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion however slight into the genital or anal openings of an individual's body by any part of another individual's body or any object used for the purpose of satisfying sexual impulses. Emission of semen is not necessary.

*Id.* § 609.321(11).

34. See *supra* part I.A.1.

35. Contrary to a typical statutory definition, a common sense understanding of prostitution is not limited to penetration or sexual contact. Sarah H. Garb, *Sex for Money is Sex for Money: The Illegality of Pornographic Film as Prostitution*, 13 LAW & INEQ. J. 281, 298 (1995); cf. *supra* note 33 (outlining Minnesota's statutory definition of prostitution). For example, if a man brought a prostitute to his hotel room and asked her to masturbate for him to observe in exchange for money, most people would deem that prostitution. Garb, *supra*, at 298.

The common sense understanding of prostitution therefore seems to center on a general notion of exchange of money for sexual services or gratification. Under this perspective of prostitution, nude dancing for the sexual gratification of club patrons clearly is a form of prostitution despite the fact that it does not explicitly fit into the Minnesota statutory definition of prostitution because it does not by definition require sexual contact or penetration.

Dave Chuzzle, manager of the Foxy Lady nightclub in Providence, Rhode Island, described one of the private nude dances offered by the club as the "friction dance," and stated, "In other parts of the country, they do a full-on friction dance where the girl will literally rub the whole front of her body up against the customer . . . In fact, some community activists call these private dances the stepsisters of prostitution." *Dateline: The Naked Truth?* (NBC television broadcast, Nov. 28, 1995) (transcript on file with author) [hereinafter *Dateline*]. Though this "dance" does not seem to entail penetration, certainly it incorporates sexual contact exchanged for money. In this same interview, however, Chuzzle asserted, "Prostitution is a severe crime . . . We don't want to be associated with that." *Id.*

36. Though these clubs claim to be respectable and conventional, most do not put their names on their credit card receipts. *Dateline*, *supra* note 35. On receipts from the Foxy Lady, the name "Gulliver's Tavern" appears. *Id.*

The societal mystique surrounding sexually-oriented clubs is likely fueled by laws regulating aspects of their operation, including time, place, and manner restrictions. See *supra* notes 23-27 and accompanying text (discussing these restrictions).



Society perceives women working as sexual entertainers as "bad girls,"<sup>37</sup> yet simultaneously encourages women to enter into sex work through economic demand for the industry.<sup>38</sup> This stereotyping creates a class of marginalized and forgotten women. Nude dancers become "throwaway" women, who are dispensable and available for whimsical sexual access, rather than human beings with human needs.<sup>39</sup>

Though feminists recognize that sex work predominantly affects women, they are divided both in their perspectives on sex work and in how they believe the legal system should respond to it.<sup>40</sup> Some feminists view prostitution as a systematic form of oppression that must be eliminated.<sup>41</sup> Other feminists assert that they have a right to engage in prostitution.<sup>42</sup> The different perspec-

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That society deems sex work as deviant is apparent in historical responses to it. For example, in the late nineteenth century and early twentieth century, American cities zoned prostitution into particular areas "to avoid contaminating respectable neighborhoods and to separate moral from immoral behavior." Shumsky, *supra* note 18, at 671; see also Hobson, *supra* note 30, at 25-27; *supra* note 31 and accompanying text (discussing historical use of red-light districts to regulate prostitution).

37. As Margaret Baldwin explains, "'real women' do not combine sex with money." Baldwin, *supra* note 18, at 48-49.

38. For an example of such economic encouragement in one city, see *supra* note 2 (discussing the growing economic role of the sex industry in Minneapolis).

39. See *supra* note 18 and accompanying text (discussing the "throwaway woman" perception).

40. See Priscilla Alexander, *Why This Book?*, in *SEX WORK*, *supra* note 30, at 14, 17 (discussing conflicting feminist views on sex work) [hereinafter Alexander, *Why This Book?*].

41. WHISPER (Women Hurt in Systems of Prostitution Engaged in Revolt) is a nationally-recognized organization comprised of both women who have survived the sex industry and advocates concerned about commercial sex exploitation. Evelina Giobbe & Sue Gibel, *Impressions of a Public Policy Initiative*, 16 *HAMLINE J. PUB. L. & POL'Y* 1, 2 (1994). Founded in 1985, "WHISPER educates the public about prostitution as a form of institutionalized violence that differentially impacts women and youth and advocates for services to be made available to its victims." *Id.*

WHISPER recognizes that women do not enter into prostitution out of a free, uncoerced choice to engage in a commercial transaction. See Evelina Giobbe, *Confronting the Liberal Lies About Prostitution*, in *SEXUAL LIBERALS AND THE ATTACK ON FEMINISM* 67 (Dorchen Leidholdt & Janice G. Raymond eds., 1990) [hereinafter Giobbe, *Confronting the Liberal Lies About Prostitution*]. Giobbe challenges popular myths about prostitution: "[Sexual liberal ideology] erroneously claims that prostitution is a career choice; that prostitution epitomizes women's sexual liberation; that prostitutes set the sexual and economic conditions of their interactions with customers." *Id.*

Similarly, the U.S. Prostitutes Collective and related organizations see prostitution as primarily a class issue, arguing that "poverty forces poor women to work in the sex industry." Alexander, *Why This Book?*, *supra* note 40, at 17. Such organizations believe that prostitution will disappear when women are able to earn sufficient income without it. *Id.*

42. COYOTE (Call Off Your Old Tired Ethics), another nationally-recognized organization, is also largely comprised of prostitutes but, in contrast to WHISPER, the position of COYOTE and similar organizations is that prostitution should be recognized as legitimate work. Alexander, *Why This Book?*, *supra* note 40, at 17.

tives often center on concerns about women's control and agency in their sexuality.<sup>43</sup> Issues of control and agency are particularly central in nude dancing.<sup>44</sup> Those feminists who categorize prostitution as oppressive are beginning to incorporate nude dancing into their definition of prostitution.<sup>45</sup> For them, nude dancing is a form of sexual exploitation that must be eliminated.

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[Such organizations] work from the perspective that women have the right to determine, for themselves, how they will use their bodies, whether the issue is prostitution, abortion/reproductive rights, lesbian rights, or the right to be celibate and/or asexual. We believe that most of the problems associated with prostitution are directly related to the prohibition and the related stigma associated with sex and especially with sex work. While we consider the economic status of women to be a major factor in the amount of prostitution in the world, we do not think that economics is the only factor, nor do we believe that prostitution would disappear altogether if classism, and the closely related caste system of racism, disappeared.

*Id.*

43. COYOTE representatives firmly assert that a right to engage in prostitution centers around women's right to control their sexuality. *See id.*

Legal responses to prostitution certainly may fail to adequately affirm female sexual autonomy. Feminist scholars have argued that reform of the law's treatment of other forms of violence against women has failed to respect women's agency. Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41 (1993) (arguing that legal reform in rape law has failed to respect women's agency, and advocating reconstruction of heterosexuality as a response).

44. As one dancer explained, "[dancing is] very empowering. I'm proud of the fact that I'm good at what I do. I think of it as both a job and an art." *Dateline*, *supra* note 35. *But see* Interview with Kelly Holsopple, WHISPER, in Minneapolis, Minn. (Nov. 16, 1995) (explaining that dancers often present a picture to the outside world that they are in control of their dancing and how such an image does not coincide with the actual control dynamics within the sex industry); *see also infra* notes 139-43, 158-61 and accompanying text (discussing the extent to which club owners actually control dancers).

45. WHISPER has taken a strong stance against the legal sex industry viewing it as a form of prostitution. WHISPER identifies stripping as sexual exploitation and states "[s]tripping usually involves prostitution and always involves sexual harassment and abuse." WHISPER, TEENS WHO HAVE SURVIVED PROSTITUTION WANT YOU TO KNOW . . . TRICKS AREN'T FOR KIDS (on file with author) (pamphlet developed by teens used in prostitution). Founder Evelina Giobbe explains: "We define systems of prostitution as any industry in which women's or children's bodies are bought, sold, or traded for sexual use and abuse. These systems include pornography, live sex shows, peep shows, international sexual slavery, and prostitution as it is commonly defined." Giobbe, *Confronting the Liberal Lies About Prostitution*, *supra* note 41, at 67.

In its 1990 Resolution on Prostitution, the National Coalition Against Sexual Assault (NCASA) identified prostitution "in all of its forms, including but not limited to live sex shows, peep shows, escort services, street walking, table dancing, lap dancing, stripping, telephone sex, sexual penetration, sexual torture, pornography and prostitution as it is commonly known [as] sexual abuse and subordination of women and children." NATIONAL COALITION AGAINST SEXUAL ASSAULT, 1990 RESOLUTION ON PROSTITUTION 5 (1990).

As a dancer straddled men seated on a sofa at the Dream Girls all-nude club in Minneapolis, Giobbe watched the men stare at her genitals; "Look at their faces, their body language. I was a prostitute. I know what that look is. 'Do me. Do me, baby.' He is buying sexual access to her, visual or otherwise. If that's not prostitu-

Society's ambivalence toward sex work directly affects those who work in the sex industry. Because their work is legally legitimized through First Amendment protection,<sup>46</sup> women working as dancers in the sex industry often do not view themselves as oppressed, nor do they view their work as exploitation akin to prostitution.<sup>47</sup> This confusion fuels the fire of uncertainty that surrounds sex workers' rights.<sup>48</sup>

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tion, I don't know what is." Susan M. Barbieri, *Quiet Revolution: Evelina Giobbe's Own Experiences Led Her to Found WHISPER, a Group that Helps Prostitutes Leave "the Life,"* ST. PAUL PIONEER PRESS, Nov. 7, 1993, at G1, G6.

46. See *supra* part I.A.1.

47. See Judy Helfand, *Silence Again*, in *SEX WORK*, *supra* note 30, at 99. Helfand describes her own confusion about the nature of her work as a nude model and topless dancer when she learned of a solicitation for contributions to an anthology by women who have worked or are working in "the sex industry":

My stomach jumped. A book from a feminist press by women who may have shared my feelings and experiences. I could read their writings. I could submit an article, too! Finally, a release from that sense of isolation. Cleis Press has recognized this as an important area for feminist discourse.

Then I read on: "massage parlors, encounter studios, escort services, pornography, street prostitution, as well as other areas of sex work." Another clench of the stomach as I saw that topless dancing wasn't in there. Neither was nude modeling. Maybe my experiences weren't really "sex industry." I couldn't waste people's time with my writing because what I had done was too "tame" . . . .

Then I affirmed, yes, I had been part of the sex industry. My denial was part of what needed to be examined. I needed to share my experiences if for no other reason than to find other women who felt the same. In our own experience we hold the keys to deeper understanding of the oppression of women in the world. Silence. Guilt. Isolation. I needed to participate in breaking through these three barriers.

*Id.* at 99-100.

In addition to the mixed treatment by the law, dancers' reluctance to recognize their work as exploitation is also fostered by their need to assert control and agency over their dancing. See *supra* note 44 and accompanying text (discussing the control dynamics in nude dancing).

48. Baldwin explains the conceptual challenge in understanding the sex worker as exploited:

"Legitimate" work is, after all, the place where women are supposed to make money, an assumption which has fueled anti-sexual harassment legal initiatives and education efforts. Here, [feminists'] advocacy stresses the *distinction* between a woman's willingness to work and her willingness to have sex as part of the bargain, or to be sexualized in her status as worker.

Baldwin, *supra* note 18, at 76.

Dancers' confusion about their legal rights as employees extends to all forms of legal protection. This is similar to the fact that prostituted women often are unable to pursue claims against perpetrators when they are assaulted or raped. One woman described how a police officer refused to take a report after she was violently raped: "Even though I am a prostitute, I feel I should still be entitled to protection from the police." Karen, *The Right to Protection from Rape*, in *SEX WORK*, *supra* note 30, at 145, 146; see also Carole, *Interview with Barbara*, in *SEX WORK*, *supra* note 30, at 166, 169 (discussing police and societal indifference toward prostitute rape and murder). "The fate of a woman's claims on justice, we all seem to know somewhere, crucially depends on her success in proving that she is not, and never has been, a

*B. The Facts of Sex Industry Employment: Typical Terms and Conditions*

Although specific job requirements may vary in sexually-oriented clubs, many nude dancers relate similar stories about their work experiences.<sup>49</sup> Most performers are hired to work as though they are independent contractors<sup>50</sup> when, in reality, their relationship to their supervisors is an employer-employee relationship.<sup>51</sup>

In a typical hiring scenario, women respond in person to an advertisement offering significant income for dancing, "no experience required."<sup>52</sup> As an audition, the club often asks applicants to perform on "amateur night."<sup>53</sup> The club will make job offers based on amateur night performances.<sup>54</sup> Clubs portray the job requirements as very flexible. Dancers are told that they will not be forced to do anything they do not want to do and that they will work as independent contractors.<sup>55</sup> Some club owners require applicants to sign agreements indicating that they are working as independent contractors.<sup>56</sup> Often applicants do not understand the legal impli-

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prostitute." Baldwin, *supra* note 18, at 81. See also *People v. Slovinski*, 420 N.W.2d 145 (1988) (holding that evidence showing complainant was a prostitute is probative on issue of consent where defendant was charged with criminal sexual conduct).

49. Available stories of dancers' experiences are likely to be contained in mainstream media sources such as newspaper articles, see, e.g., Nelson, *supra* note 14, at B2; Brunswick, *supra* note 14, at B1, or television segments. See, e.g., Dateline, *supra* note 35. Analyses of sex work by outsiders, journalists or scholars who have not themselves performed sex work are not likely to be accurate or complete. One master's degree student conducted comprehensive interviews of current and former sex workers and noted that their stories generally did not coincide with accounts of those purporting to be academic "experts" on sex work. Kari Lerum, *Is it Exploitative if I Like it? Commercial Sex Workers Compare Notes with Feminists and the Social Problems Industry* (1993) (unpublished M.A. thesis, University of Washington). "[W]hen compared to the words of the women I interviewed, it seems that experts often present a disproportionate view of commercial sex work. Just as some map makers inflate Europe and deflate Africa, sex industry map makers magnify and diminish aspects of sex work, according to their agenda." *Id.* at 26. This article only considers one facet of dancers' experience, namely the distinction between employee and independent contractor, and does not claim to present a complete picture of the dynamics of sex work.

50. GIOBBE, *supra* note 1 ("In the majority [of clubs] a woman must pay the management for the 'privilege' of working there as an 'independent contractor.'"); Interview with Kelly Holsopple, *supra* note 44.

51. See *infra* part II.A-B. (explaining how dancers' relationships with club owners indicates that they are employees rather than independent contractors).

52. Interview with Kelly Holsopple, *supra* note 44.

53. *Id.* Holsopple noted that this is a particularly popular night for customers, who hope to see "girl-next-door" types rather than seasoned strippers. *Id.*

54. *Id.*

55. *Id.*

56. See *Martin v. Priba Corp.*, C.A. No. 3:91-CV-2786-G, 1992 WL 486911 at \*1 (N.D. Tex., Nov. 6, 1992). Before hiring a dancer, the defendant club in this case required that she sign an "independent contracting agreement." *Id.*

cations arising from independent contractor status,<sup>57</sup> but accept the job as an independent contractor out of a belief that they can avoid paying taxes.<sup>58</sup> Additionally, many clubs require applicants to sign a waiver of their right to sue the club for any reason.<sup>59</sup> Most clubs do not pay dancers a regular wage.<sup>60</sup> Club owners do not pay taxes or unemployment or workers' compensation taxes on behalf of the dancers working for them.<sup>61</sup>

Regardless of such up-front agreements claiming independent contractor status, clubs maintain a significant amount of control over the performers they hire. Club supervisors typically control the hours dancers are scheduled to work<sup>62</sup> and maintain policies about missing scheduled shifts.<sup>63</sup> Supervisors may estimate dancers' earnings from customer tips and require dancers to pay a percentage back to the club, or dancers may have to pay a "stage rental fee."<sup>64</sup>

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57. Interview with Kelly Holsopple, *supra* note 44. See *infra* notes 80-88 and accompanying text (discussing the legal implications for independent contractors and employees).

58. Interview with Kelly Holsopple, *supra* note 44. Holsopple explained that when clubs told her that she was hired as an independent contractor, she used to think, "that means I don't have to pay taxes. Sure I was comfortable with it." *Id.* Holsopple also noted that clubs often did not ask to see her identification or confirm her Social Security number. *Id.*

59. *Id.* Many applicants do not realize that such waivers are not legally binding if the club violates their legal rights. "An employee is not permitted to waive employee status." *Jeffcoat v. State Dep't of Labor*, 732 P.2d 1073, 1077 (Alaska 1987) (citing *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 667 (5th Cir. 1983)).

60. Interview with Kelly Holsopple, *supra* note 44; see also *Martin*, 1992 WL 486911 at \*1 (dancers' sole source of income was tips from customers for stage performances or private table dances).

Holsopple recalled a few exceptions and noted that a performer may receive additional compensation if she is the "feature act" or if she has appeared in pornographic films. Interview with Kelly Holsopple, *supra* note 44.

61. Nelson, *supra* note 14, at B2; Berkson, *supra* note 25, at A25 ("Labeling the women independent contractors means management pays no Social Security, no health insurance, no life insurance, no FICA, nothing."); see also Thomas J. Dwyer, *That Control Thing: Employment Status of Worker Defines Tax Obligation*, 79 A.B.A. J. 90 (June 1993) ("The general formula is that an employee costs the employer about a third more in taxes and benefits than the stated salary."); *infra* notes 80-83.

62. See *Reich v. Circle C. Inv., Inc.*, 998 F.2d 324, 327 (5th Cir. 1993) (finding that club compiled weekly work schedules); *Jeffcoat*, 732 P.2d at 1076 (finding that club controlled the working hours of the dancers).

63. See *Reich*, 998 F.2d at 327 (finding that club fined dancers for absences and tardiness).

64. In fact, dancers generally are required to turn over to the club up to 40% of their tips at the end of the night. "The majority of clubs require that women turn over as much as 40% of their income to cover 'services' provided by busboys, bartenders, and bouncers." Giobbe, *supra* note 1; see *Reich*, 998 F.2d at 326. The dancers in *Reich* were required to pay the club twenty dollars at the end of each night. *Id.* "The defendants characterize this 'tip-out' as stage rental and argue that the dancers are merely 'tenants.' According to the defendants, the dancers are . . . business women renting space, stages, music, dressing rooms, and lights from [the club]." *Id.* at 326-

In addition to these restrictions, many clubs also regulate the dancers' actual performance. A club may require a dancer to perform a certain number or type of dances<sup>65</sup> and participate in group dances or events.<sup>66</sup> Even table dances and other private dances may be controlled.<sup>67</sup> Often the dancers are not allowed to choose the music to which they perform.<sup>68</sup> Even if the dancers provide their own costumes, a club may have specific rules about performing attire.<sup>69</sup> A club may even impose requirements on dancers' personal grooming, requiring them to trim their pubic hair and have a tan.<sup>70</sup>

Many clubs enforce rules about dancers' behavior even when they are not actually dancing before an audience. At the beginning of a show, the dancers may be required to stand on stage and be introduced to the crowd.<sup>71</sup> A club may require dancers to circulate among the patrons soliciting private dances throughout the dancers' scheduled shifts.<sup>72</sup> Clubs also exert significant control over

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27; see also *Martin*, 1992 WL 486911 at \*1 (recounting that dancers were required to pay a thirty-five dollar "administrative fee"). Such arrangements basically mean dancers are paying the club for the right to work there.

65. See *Jeffcoat*, 732 P.2d at 1076. In *Jeffcoat*, while the dancers chose their specific dance steps, each was required to perform three dances onstage each shift. "[T]he first dance was to be performed fully clothed, the second dance involved removal of some item(s) of clothing, and the third dance was to be done while topless." *Id.*

66. Plaintiffs' Memorandum of Law in Support of Their Motion for Partial Summary Judgment at 5, *Davis v. Deja Vu* (D. Minn. 1994) (No. CT 92-010727) [hereinafter Plaintiffs' Memorandum] (explaining that dancers were required to perform group and "mystery dances").

67. "Even the table dances were controlled; dancers were to strip to their waists, and only to their waists, and could not wear bikinis." *Jeffcoat*, 732 P.2d at 1076; see also *Reich*, 998 F.2d at 327 (recounting that dancers were required to charge at least ten dollars for table dances and twenty dollars for couch dances).

68. See *Jeffcoat*, 732 P.2d at 1076. In this case, not only was performance music left to the club's discretion, but club rules dictated that the disc jockey could play whatever music he wanted and that the dancers were not to complain. *Id.*; see also *Reich*, 998 F.2d at 327 (recounting that dancers can only express preferences for music and have no final say).

69. Plaintiffs' Memorandum, *supra* note 66, at 5 (dancers required to dance totally nude and the club retains control over the timing and sequence of nudity). The club in *Jeffcoat* required its dancers to wear dresses on weekends and country/western gear on Wednesdays. 732 P.2d at 1076; see also *Reich*, 998 F.2d at 327 (explaining that dancers were required to supply their own costumes which had to meet standards set by the club and were not allowed to wear flat heels).

70. Plaintiffs' Memorandum, *supra* note 66, at 5-6.

71. See *Reich*, 998 F.2d at 327 (recounting that all dancers were required to be "on the floor" at opening time).

72. See *Jeffcoat*, 732 P.2d at 1076-77. In *Jeffcoat*, when not dancing, dancers encouraged patrons to drink and to buy them drinks. *Id.* Dancers accrued a penny for each \$5.00 billed to a customer, and the club awarded better shifts to those earning the most pennies. *Id.* Because the dancers performed approximately one hour in each eight hour shift, they spent the vast majority of their time circulating among

dancers' behavior during their shifts, such as regulating what they are allowed to drink and how many of them may be in the restroom at one time.<sup>73</sup> As with absence or tardiness, a club may enforce these rules through fines.<sup>74</sup>

Despite the club's initial representation of a dancing job as flexible, dancers attest that their relationship with the club becomes all-consuming.<sup>75</sup> Not only do dancers spend a majority of their hours each week at the club, but their work typically has significant effects on their personal lives and well-being.<sup>76</sup>

Many dancers indicate that they are able to make a lot of money from performing in sexually-oriented clubs.<sup>77</sup> Although

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the crowd either table dancing or soliciting pennies, in effect, selling liquor for the club. *Id.*

73. The rules of the club in *Jeffcoat* offer an example of such regulations:

Should a dancer's friend have visited during a period when the dancer was offstage, the friend had to buy the dancer a drink. The dancers could only drink house drinks during working hours, and no complaints could be made about the drinks unless, for example, the glass was chipped. The women were also required to finish the drinks.

*Jeffcoat*, 732 P.2d at 1076; see also *Reich*, 998 F.2d at 327 (explaining that club allowed only one dancer in the restroom at a time and no more than 15 minutes at one time in the dressing room); Plaintiffs' Memorandum, *supra* note 66, at 6 (explaining that dancers were not allowed to use the bathroom whenever they wanted).

74. See *Reich*, 998 F.2d at 327.

75. Despite the common perception that a woman can dance to earn her way through school, many dancers report that their jobs essentially take over their lives. "You're sleeping half of the day and then going to work at night. You're just a complete vampire." *Dateline*, *supra* note 35 (interview with a former dancer named Kaylee). Clubs often structure dancers' hours in a way that uniquely burdens their lives. Holsopple explained that clubs often schedule a dancer to work with several hours off between her working shifts; for example, she might be scheduled to perform between two and four o'clock, and then again from six o'clock until midnight. Interview with Kelly Holsopple, *supra* note 44. Rather than leave the club premises during the interim, the dancer will most likely remain there and perhaps mingle with the customers. *Id.* In this manner the club is able to book longer periods of dancers' time without having to compensate them for doing so.

76. As one dancer explained, "I've never seen a girl go into dancing involved in a relationship and leave dancing, with that same relationship. It destroys them." *Dateline*, *supra* note 35.

"In my clinical experience, all prostitutes suffer from serious psychological damage." Melissa Farley, *How Prostitution Cripples Emotions*, S.F. EXAMINER, May 31, 1995, at A15.

Statistics can't provide a picture of the devastating psychological effects. To work as a prostitute, it is necessary to shut down emotionally. . . . This provides psychological protection, in much the same way a political prisoner protects himself during torture. Over time, it becomes difficult for someone to switch back. The emotionally distanced self takes over more and more of the private self.

*Id.* (Melissa Farley is a clinical psychologist in San Francisco).

77. Holsopple acknowledged that she was able to earn her living through sex work. Interview with Kelly Holsopple, *supra* note 44. "I always paid my rent . . . I have a car . . . I supported a drug habit." *Id.* She attested that dancers were always aware of their inability to find "straight" jobs because of their lack of education. *Id.*

dancers may earn a high income as independent contractors, if they are actually employees as a matter of law, their legal rights are being violated.

### C. Employees and Independent Contractors

#### 1. What's the Difference?

There is no simple or universally applicable definition of either "independent contractor" or "employee."<sup>78</sup> Nonetheless, distinguishing between the two categories has a number of important legal implications for both the worker and the hiring party.<sup>79</sup> An employer incurs legal obligations with respect to employees for tax purposes,<sup>80</sup> worker's compensation,<sup>81</sup> retirement benefits,<sup>82</sup> unem-

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see *supra* note 6 (discussing the economic disadvantages women as a group face in the workforce); see also *infra* note 114 and accompanying text (describing how attorneys for club owners claim that dancers earn up to \$500 each night).

78. The common law doctrine of master and servant does provide a starting point for understanding the relationship between employer and worker. Phyllis Karasov, *How to Distinguish Independent Contractors from Employees*, in INDEPENDENT CONTRACTORS VS. EMPLOYEES § II (Minn. St. Bar. Ass'n ed., 1992). This doctrine is set forth in the *Restatement (Second) of Agency*, which characterizes a servant as subject to another's control or right to control; RESTATEMENT (SECOND) OF AGENCY § 220 (1958); see *infra* note 89 and accompanying text.

79. See generally Rita A. McConnell, *Defining the Employment Relationship*, in EMPLOYMENT LAW AND PRACTICE 47 (Stephen F. Befort & Karen G. Schanfield eds., 1995) (discussing worker status).

80. The employer must withhold federal and state income tax from an employee's wages. 26 I.R.C. § 3401 (West 1989 & Supp. 1995). The employer must pay federal and state payroll taxes. See, e.g., Federal Unemployment Tax Act, 26 U.S.C.A. § 3301 (West 1989 & Supp. 1995). The employer must also withhold the employee's share of the FICA tax from wages. Federal Insurance Contributions Act, 26 U.S.C.A. § 3101 (West 1989 & Supp. 1995). The employer must report an employee's wages to the IRS and to the employee on IRS Form W-2. McConnell, *supra* note 79, at 54.

If, instead, a worker is an independent contractor, the employer has none of these obligations. *Id.* The employer must submit an IRS Form 1099 for each worker it pays more than \$600 per year. *Id.* "The worker is liable for federal and state income taxes on amounts received from the company and for federal self-employment tax." *Id.* at 54-55; see Dwyer, *supra* note 61, at 90; John Aramburu, *How the IRS Misapplies the Common Law Test When Classifying Workers as Employees*, 60 TAX NOTES 663 (1993).

An employer who incorrectly classifies employees as independent contractors may be liable for past-due taxes, including interest and penalties. McConnell, *supra* note 79, at 57; 26 I.R.C. § 3509(a), (c) (West 1989 & Supp. 1995); MINN. STAT. ANN. § 289A.31(5)(b) (West 1989 & Supp. 1996); see also Amy S. Cohen, *IRS Cracking Down on Worker Misclassification, Practitioner Says*, 65 TAX NOTES 1248 (1994).

81. Under the Minnesota Workers' Compensation Act, "an employer is liable for compensation in every case of personal injury or death of an employee arising out of and in the course of employment." McConnell, *supra* note 79, at 58; MINN. STAT. ANN. § 176.021(1) (West 1993 & Supp. 1996); see *Guhlke v. Roberts Truck Lines*, 128 N.W.2d 324 (Minn. 1964); *Hemmerling v. Happy Cab Co.*, 530 N.W.2d 916 (Neb. 1995) (holding that cab driver was an employee of a cab company and entitled to workers' compensation benefits for injuries sustained while driving cab); see also



ployment compensation<sup>83</sup> and protection from workplace hazards.<sup>84</sup> An employer may be held liable for torts committed by an employee under the doctrine of respondeat superior.<sup>85</sup> An employer is required to follow laws governing employee wages and benefits.<sup>86</sup> In addition, a worker falling under the definition of employee gains protection under federal discrimination statutes.<sup>87</sup> Finally, em-

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Theodore Postel, *Workers' Comp: Employee or Independent Contractor?*, CHI. DAILY L. BULL., Feb. 2, 1995, at 1; Michelle M. Lasswell, *Workers' Compensation: Determining the Status of a Worker as an Employee or an Independent Contractor*, 43 DRAKE L. REV. 419 (1994).

82. The Employee Retirement Income Security Act of 1974 (ERISA) provides employee rights and remedies for pension and welfare plans. 29 U.S.C.A. §§ 1001-1461 (West 1985 & Supp. 1995).

83. *Speaks, Inc. v. Jensen*, 243 N.W.2d 142, 144 (Minn. 1976); *Lewis v. Commissioner of Jobs & Training*, 425 N.W.2d 309 (Minn. Ct. App. 1988); *Wise v. Denesen Insulation Co.*, 387 N.W.2d 477, 479 (Minn. Ct. App. 1986).

84. Employees are protected from workplace hazards under federal and state occupational health and safety laws and regulations. James B. Platt, *Background to the Independent Contractor/Employee Classification Dispute*, in INDEPENDENT CONTRACTORS VS. EMPLOYEES, *supra* note 78, § 1, at 4.

85. "Once it is determined that the man at work is a servant, the master becomes subject to vicarious liability for his torts." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 70 (5th ed. 1984); *see McKee v. Brimmer*, 39 F.2d 94 (5th Cir. 1994). In *McKee*, a third party motorist brought an action against a pulpwood company for injuries sustained in a collision between the motorist and a vehicle owned by a logging company. *Id.* The court held that the owner of the logging company was an independent contractor, rather than an employee of the pulpwood company which had hired him to haul timber, and thus found that the pulpwood company was not liable. *Id.*; *see also Jones v. Century Oil U.S.A., Inc.*, 957 F.2d 84 (3d Cir. 1992) (involving locksmith who brought tort suit against oil corporation for personal injuries caused by tenant while locksmith attempted to remove locks from service station); *Clark v. Container Corp. of America, Inc.*, 936 F.2d 1220 (11th Cir. 1991) (involving subcontractor's employee who sued plant owner for injuries); *Johns v. Jarard*, 927 F.2d 551 (11th Cir. 1991) (involving wrongful death action against hospital for surgeon's actions); *Stone v. Pinkerton Farms, Inc.*, 741 F.2d 941 (7th Cir. 1984) (involving personal injury action against grain elevator for injuries caused by trucking company); *Newcomb v. North East Ins. Co.*, 721 F.2d 1016 (5th Cir. 1983) (involving widow who sued courier's destination for death caused by courier).

86. Under federal law the applicable statute is the Fair Labor Standards Act, 29 U.S.C.A. § 230. State law also governs wages and benefits. MINN. STAT. ANN. §§ 177 & 181 (West 1993 & Supp. 1996).

87. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e(b), (f) (West 1989 & Supp. 1995); Age Discrimination in Employment Act, 29 U.S.C.A. § 621 (West 1985 & Supp. 1995); Americans with Disabilities Act, 42 U.S.C.A. §§ 12111(4), (5) (West 1995); *see also Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377 (7th Cir. 1991) (affirming district court's decision denying Title VII protection in a sex discrimination claim based on the independent contractor status of the claimant).

Independent contractors have no claim under the Minnesota Human Rights Act's anti-discrimination in employment provisions. MINN. STAT. ANN. § 363.01 (West 1991 & Supp. 1996). However, "[a] related provision of the Act prohibits the intentional refusal to do business or contract with an individual on the basis of race, color, sex or disability, and prohibits discrimination in the basic terms, conditions or performance of the contract on those same grounds." McConnell, *supra* note 79, at 62; MINN. STAT. ANN. § 363.03(8a) (West 1991 & Supp. 1996). "This provision may

ployees have the right to organize and engage in collective bargaining over the terms and conditions of their employment.<sup>88</sup>

## 2. Tests to Determine Whether a Worker is an Employee or an Independent Contractor

### a. *Common Law Test*

The most frequently used test for determining whether a worker is an employee or an independent contractor is the common law test summarized in the *Restatement of Agency*.<sup>89</sup> The Supreme Court looked to the *Restatement* in formulating its modification of the common law test.<sup>90</sup> In *Nationwide Mutual Insurance Co. v. Darden*, the United States Supreme Court held that where a statute lacks a helpful definition of the term employee, the common law test, as stated in *Nationwide*, should be applied.<sup>91</sup> Examples of

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provide a cause of action in state court to the independent contractor who is outside the scope of Title VII." McConnell, *supra* note 79, at 62.

88. Labor Management Relations Act, 1947, 29 U.S.C.A. § 141 (West 1973). The LMRA specifically exempts independent contractors from coverage. 29 U.S.C.A. § 152, cited in Karasov, *supra* note 78, at 7.

89. The *Restatement* test is set forth as follows:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.  
(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman [sic] supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

90. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (holding that whether employer could disqualify worker for benefits depended on whether worker was an "employee" under ERISA definition).

91. *Id.* at 322 (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)).

such statutes include the Internal Revenue Code and the National Labor Relations Act.<sup>92</sup>

In both the *Restatement* and the Supreme Court's interpretation of it, the most significant element in determining whether a worker is an employee is the employer's right to control the worker's performance. This right to control is determined by considering a number of factors.<sup>93</sup>

Minnesota courts have adopted an abbreviated version of the common law test and emphasize five factors to determine whether a worker is an independent contractor or an employee: (1) the right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge.<sup>94</sup> The most important factor is the employer's right of control over the worker.<sup>95</sup>

Determining whether a worker is an employee invokes questions of both fact and law.<sup>96</sup> The way in which the employment relationship is classified by either the hiring party or the worker is not determinative; instead courts make the determination by examining the actual conduct of the parties.<sup>97</sup>

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92. Karasov, *supra* note 78, at 8. See also *infra* note 98 (regarding the application of the common law test to the National Labor Relations Act).

93. See *supra* note 89 (outlining the *Restatement* test, which lists the right to control as the first consideration, followed by an enumeration of factors to determine whether control over a worker exists). The Supreme Court listed the relevant factors in modifying the common law test:

[The relevant factors include] the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

*Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

94. *Speaks, Inc. v. Jensen*, 243 N.W.2d 142, 144 (Minn. 1976) (citing *Guhlke v. Roberts Truck Lines*, 128 N.W.2d 324 (Minn. 1964)). Of these factors, only the last is not included in the *Restatement* or in the factors described in *Nationwide*. McConnell, *supra* note 79, at 54; see *supra* notes 89, 93 and accompanying text (discussing the *Restatement* factors and the *Nationwide* factors).

95. *Speaks*, 243 N.W.2d at 144.

96. *Lewis v. Commissioner*, 425 N.W.2d at 309 (holding that home health care aides are employees for purposes of unemployment benefits) (citing *Wise v. Denesen Insulation Co.*, 387 N.W.2d 477, 479 (Minn. Ct. App. 1986)).

97. *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376 (3d Cir. 1985), *cert. denied*, 474 U.S. 919 (1985) (holding that the conduct of the parties, rather than the existence of an "Independent Contractor's Agreement," determined the status of homeworkers under the Fair Labor Standards Act); *Johnson v. Independent Sch.*

b. *Economic Realities Test*

Although virtually all federal and state laws utilize some form of the common law test to distinguish between independent contractors and employees, the Fair Labor Standards Act (FLSA) and other wage and hour statutes require that courts apply the economic realities test.<sup>98</sup> The economic realities test examines the "history, terms or purposes of the legislation" to determine whether a worker is an employee under a particular statute.<sup>99</sup> Under "social legislation" employees are those who as a matter of economic reality are dependent upon the business to which they render service. Statutes that are deemed "social legislation" require application of the economic realities test. Social legislation encompasses statutes intended to protect the rights of workers who are dependent upon their employers for their livelihood.<sup>100</sup>

The economic realities test measures the economic dependence of the worker by utilizing factors similar to those of the common law test.<sup>101</sup> The definition of employee under the economic realities test, however, is broader than the common law test in that it covers

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Dist. No. 535, 291 N.W.2d 699, 702 (Minn. 1980); *Ossenfort v. Associated Milk Prods.*, 254 N.W.2d 672, 677 (Minn. 1977).

98. *Karasov*, *supra* note 78, at 12. The economic realities test arose when the Supreme Court was required to consider the term "employee" under the National Labor Relations Act, 29 U.S.C. §§ 141-187 (West 1973 & Supp. 1995). In *Nationwide*, the Supreme Court abandoned the economic realities test for most situations, holding that courts should presume Congress intended that the common law definition of employee be applied unless the statute under consideration indicates otherwise. *McConnell*, *supra* note 79, at 52 (citing *Nationwide*, 503 U.S. at 319). "Under this analysis, the economic realities test continues to be used under the Fair Labor Standards Act." *Id.*

99. *Hearst*, 322 U.S. at 123.

100. *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (applying the economic realities test to the Social Security Act); *see also* *United States v. Silk*, 331 U.S. 704 (1947) (same); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (applying the economic realities test to the Fair Labor Standards Act).

In other words, the court will consider whether the job is the worker's primary means to earn a living and whether the policy behind the legislation was social, "in light of the mischief to be corrected and the end to be attained." *Silk*, 331 U.S. at 712. The court will also analyze whether the worker is entitled to the legal rights granted by the statute. *Id.*

101. These factors include:

- (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; (6) whether the service rendered is an integral part of the alleged employer's business.

*McConnell*, *supra* note 79, at 52 (citing *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985) (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947) and *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981)).

workers who may not qualify under the traditional agency principles underlying the common law test. Though the degree of control is not determinative under the economic realities test, it remains a key factor. Courts occasionally have used a hybrid test, incorporating elements of the common law and economic realities tests, thereby focusing on both the right of control over the worker and the totality of the circumstances of the relationship.<sup>102</sup>

#### *D. The Employee/Independent Contractor Distinction in Sex Industry Employment*

##### 1. Which Test Is Applicable to Sex Work?

Courts have considered whether club dancers are employees in disputes involving wage and hour claims,<sup>103</sup> tort liability,<sup>104</sup> and other agency matters.<sup>105</sup> Because most statutes require the common law test, most claims that dancers would bring would require the court to utilize the common law test to determine whether a dancer is an employee as a matter of law.<sup>106</sup> However, the FLSA and comparable state laws,<sup>107</sup> which establish minimum wage, overtime, equal pay and child labor requirements for employers,<sup>108</sup> utilize the economic realities test.<sup>109</sup> Therefore some claims brought by dancers will require application of the economic realities test.

##### 2. Deja Vu (Minneapolis) Litigation

In 1994, about 150 dancers filed suit against the Minneapolis nightclub *Deja Vu* to recover back wages under Minnesota's Fair Labor Standards Act.<sup>110</sup> The key issue in the case was whether the

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For the *Restatement* language, which is the foundation for the common law test, see *supra* note 89 and accompanying text.

102. McConnell, *supra* note 79, at 53 (citing *Wilde v. County of Kandiyohi*, 15 F.3d 103 (8th Cir. 1994)). The hybrid test has been used in employment discrimination cases. *Id.*

103. See *supra* note 86 and accompanying text.

104. See *supra* note 85 and accompanying text.

105. See, e.g., *Byrne v. Stern*, 431 N.E.2d 1073 (Ill. App. Ct. 1981) (holding that a dancer was an employee of a club and that the club therefore was liable for liquor regulation violations when dancer was charged with prostitution).

106. See *supra* text accompanying notes 89, 91.

107. See MINN. STAT. ANN. §§ 177, 181 (West 1993 & Supp. 1996).

108. 29 U.S.C.A. § 203 (West 1978 & Supp. 1995).

109. McConnell, *supra* note 79, at 63 (citing *Nationwide*, 503 U.S. at 327).

110. *Panel*, *supra* note 14, at B2. Under the federal FLSA, tip earnings are included in determining whether an employee earns minimum wage. 29 U.S.C.A. § 207(m) (West 1978 & Supp. 1995). The credit may not exceed 50% of the minimum wage, even if the employee received more than that in tips. *Id.* In contrast to the federal FLSA, Minnesota minimum wage law does not permit a tip credit; employers must pay employees the minimum wage no matter how much they earn through

women were legally employees, rather than independent contractors, under federal and state laws and thus entitled to minimum wages.<sup>111</sup> The club owners argued that the women were independent contractors and signed contracts to perform.<sup>112</sup> They argued that the dancers were fully aware of the job requirements and had no reason to expect additional compensation.<sup>113</sup> According to the club and the club attorneys, the dancers sometimes earned up to \$500 a night from customers' tips.<sup>114</sup>

In addition to being denied employee rights, dancers testified that their managers frequently fined dancers, changed schedules without notice and sometimes demanded sexual favors before granting time off.<sup>115</sup> The club, in turn, contended that the dancers would not have continued to work there if the conditions were in fact intolerable.<sup>116</sup>

A jury found that the women were entitled to the minimum wage.<sup>117</sup> The two sides ultimately agreed to arbitration to determine a settlement rather than continue with the jury proceedings.<sup>118</sup>

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tips. MINN. STAT. ANN. § 177.24(2). Thus, depending upon an individual state's statutory scheme, some dancers will not be able to bring claims for the full minimum wage because of their tip income.

111. Matt Nelson, *150 Former Dancers Sue Deja Vu: They Say They Deserve Back Wages as Employees*, STAR TRIB. (Minneapolis), Sept. 22, 1994, at B2.

112. *Id.* "According to court documents, dancers signed a 'dancers' lease agreement' with the club, which required the women to pay 30 to 35 percent of their tips to the club and \$5 per shift as a side tip to other dancers." Brunswick, *supra* note 14, at B2.

113. *Id.*

114. *Panel, supra* note 14, at B2; *see supra* note 77 and accompanying text (discussing potential income from nude dancing). Under Minnesota law, tip earnings are irrelevant in determining whether an employee was properly paid minimum wage. *See supra* note 110 and accompanying text.

115. Nelson, *supra* note 14, at B2.

116. *Id.*

117. *Panel, supra* note 14, at B2. As reported in the *Minneapolis Star Tribune*: As part of a questionnaire, the jurors acknowledged that the dancers were employees and that they received a salary of at least \$250 a week.

The jurors found, though that what the women do does not constitute "invention, imagination or talent" and also contended that they did not exercise their own judgment in their performances. [Hennepin County District Judge] Ginsberg imposed a continued gag order on the proceedings pending the outcome of the deliberations on damages, but the verdict suggests that jurors found that dancers were told what hours to work, what costumes to wear and where to work, indicating that managers had more control over the workers than merely hiring independent contractors.

Brunswick, *supra* note 14, at B1.

118. *Panel, supra* note 14, at B2.

### 3. What Other Courts Have Held

Courts are increasingly recognizing that nude dancers and other sexual entertainers are employees rather than independent contractors. As such, dancers are beginning to attain their statutory rights and protections as employees through litigation. Judges are applying principles developed in litigation from other employment contexts to the question of whether sex industry workers are employees as a matter of law.

In 1993, the United States Secretary of Labor brought an action against a club for violations of the minimum wage, overtime, and record-keeping provisions of the FLSA.<sup>119</sup> Dancers in the club earned their income solely from customer tips "for performing on stage and performing private 'table dances' and 'couch dances.'"<sup>120</sup> The club set the dancers' weekly work schedules, enforced costume requirements, selected performance music, and fined dancers for rule violations.<sup>121</sup> The court, applying the economic realities test, held that the dancers were employees.<sup>122</sup>

In a similar case against a Dallas nightclub, a U.S. District Court, also applying the economic realities test, found that dancers were employees within the meaning of the FLSA.<sup>123</sup> The dancers in this club had signed "independent contractor agreements" before being hired, provided their own costumes, and paid the club thirty-five dollars each night for working there.<sup>124</sup> Their sole source of income was patron tips for stage and private table dances.<sup>125</sup> The court's decision that the dancers were employees was based on the dancers' economic dependence upon the club, demonstrated by the club's degree of control, the dancers' opportunities for profit or loss, the dancers' investment in the facilities, and the permanency of the relationship between the parties.<sup>126</sup>

In 1987, the Alaska Department of Labor brought an action on behalf of a dancer working under contract for a club, alleging that the club had violated wage and subsistence statutes.<sup>127</sup> The club required dancers to work eight hour shifts and perform three dances, the last topless.<sup>128</sup> During the remaining time they solic-

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119. *Reich v. Circle C. Inv., Inc.*, 998 F.2d 324, 324 (5th Cir. 1993).

120. *Id.* at 326.

121. *Id.* at 327.

122. *Id.* at 328-29.

123. *Martin v. Priba Corp.*, C.A. No. 3: 91-CV-2786-G, 1992 WL 486911 at \*5 (N.D. Tex., Nov. 6, 1992).

124. *Id.* at \*1-2.

125. *Id.* at \*2.

126. *Id.* at \*3.

127. *Jeffcoat v. State Dep't of Labor*, 732 P.2d 1073, 1073 (Alaska 1987).

128. *Id.* at 1075.

ited table dances and drinks.<sup>129</sup> Dancers earned all income from table dances and tips.<sup>130</sup> The Supreme Court of Alaska relied upon the economic realities test<sup>131</sup> and considered six specific factors.<sup>132</sup> The court found that the dancer was an employee of the defendant club for purposes of Alaska's labor laws.<sup>133</sup>

In addition to granting recovery under wage and hour claims, courts have recognized that dancers have valid claims of employee status under other statutes, including workers' compensation<sup>134</sup> and liquor regulations.<sup>135</sup>

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129. *Id.*

130. *Id.*

131. *Id.*; see *supra* notes 98-102 and accompanying text (discussing the economic realities test). Because Alaska's labor laws are based on the federal FLSA, Alaska courts have looked to federal case law for guidance. *Jeffcoat*, 732 P.2d at 1075; see *supra* note 86 and accompanying text (discussing the federal FLSA).

132. *Jeffcoat*, 732 P.2d at 1075-76. The six factors are:

1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business.

*Id.* (citing *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985)). The court utilized these factors with a basic understanding that the FLSA was designed to protect persons who as a matter of economic reality are dependent upon the business in which they render service. *Id.*

133. *Id.* at 1078.

134. In 1988, the Idaho Supreme Court remanded for reconsideration a decision by the Industrial Commission, which held that an exotic dancer shot and killed while leaving the bar where she worked was not covered by workers' compensation. *Hanson v. BCB, Inc.*, 754 P.2d 444 (Idaho 1988). Analyzing the statutory test, the court rejected the decision of the Industrial Commission, which had found that she was an independent contractor rather than an employee of the bar based on the statutory test. *Id.* at 445. Section 44.00 of the Idaho Workmen's Compensation Law utilizes a right-of-control test with evidentiary factors including the furnishing of equipment. *Id.* at 446. The court found that the Industrial Commission had improperly applied the "furnishing of equipment" factor in finding that her body was a major item of equipment. *Id.* at 447. The court explained that "[m]ajor items of equipment include such things as tools, machinery, special clothing, parts, and other similar items necessary for the worker to accomplish the task to be performed." *Id.* The court noted that the fact that a plumber supplies his body whether he is working as an employee or as an independent contractor. *Id.*

It is worth noting that the Industrial Commission deemed the dancer's body to be a piece of equipment—a material commodity rather than something essentially human. *Id.*; see also *id.* at 448 (McFadden, J., dissenting) (agreeing with the decision of the Industrial Commission and arguing that the majority's reasoning is "ludicrous when applied to an exotic dancer's body when she is engaged in her dancing before the patrons of a saloon as in this case, and as found by the commission").

135. The Illinois Appellate Court held a bar owner accountable for the acts of a dancer charged with soliciting prostitution and thus affirmed the revocation of his liquor license pursuant to Illinois law. *Byrne v. Stern*, 431 N.E.2d 1073 (Ill. App. Ct. 1981). "[T]he [Illinois] Liquor Control Act imposes strict liability upon the licensee



## II. Sex Industry Workers Are Employees as a Matter of Law

Women working as dancers in the sex industry are employees as a matter of law, under both the common law and the economic realities tests. As employees they should be entitled to the corresponding legal rights and protections.

### A. Dancers Meet Definition of Employee Under Common Law Test

Dancers meet the requirements of the common law test for employees.<sup>136</sup> In Minnesota, the determining factors are: (1) the right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge.<sup>137</sup>

#### 1. Club's Control Over Dancers

The key issue in finding employee status under the common law test is the employer's level of control over the worker.<sup>138</sup> The

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for all violations of the act by the licensee's agents or employees." *Id.* at 1076 (citing ILL. REV. STAT. 1977, ch. 43, para. 185 (1977)). The court based its decision on a presumption of employee status and found that the defendant did not present any evidence to rebut this presumption. *Id.* The court stated:

The performance of work by one party is *prima facie* evidence of employment and, in the absence of contrary evidence, supports a presumption that that the person is a servant. . . . There is no dispute in this case that Ms. Spasic performed work as a dancer for defendant. During the hearing, defendant did not present any evidence to rebut the presumption that Ms. Spasic was anything but an employee. For our review of the report of proceedings, it appears that the parties to the hearing viewed Ms. Spasic as an employee and not otherwise. Therefore, it was reasonable under the facts and circumstances of this case to consider the dancer as an employee for purposes of the proceedings.

*Id.* (citations omitted).

136. See *supra* part I.C.2.a. (defining the common law test).

137. See *supra* note 94 and accompanying text. The Supreme Court outlined a more comprehensive list of factors in *Nationwide*. 503 U.S. 318 (1992). This article utilizes the more abbreviated Minnesota test to illustrate how dancers meet the common law test. Factors in the *Nationwide* test that are not in the Minnesota test include: the skill required; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the hired party's role in hiring and paying assistants; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *Id.* at 323-24. Some of these factors are addressed below in the discussion of relevant inquiries in the economic realities test. See, e.g., *infra* notes 165-67 and accompanying text (noting that no special skill is required for nude dancing); see also *supra* note 80 and accompanying text (discussing how employees and independent contractors are treated differently for tax purposes).

138. See *supra* notes 93-95 and accompanying text.

number and extent of rules imposed by clubs over the dancers they hire indicates a significant degree of control.

A club typically will set up dancers' work schedules.<sup>139</sup> Dancers are not permitted to choose when they will work. The club, rather, controls when dancers will earn their income. By setting a schedule, a club coordinates its own needs and ensures that it will always have performers available for patrons.

Further, a club has significant control over the specifics of dancers' performances. A club generally requires dancers to perform a certain number of stage dances each night and to bring in a certain amount of income through table dances and couch dances at a set rate per dance.<sup>140</sup> Though the club may not control the exact dance moves performers use, it generally provides the music and the stage.<sup>141</sup> The club, therefore, is able to control key elements of the dancers' performances by selecting certain types of music and setting the stage in particular ways.

A club may also require its dancers to provide their own costumes, but typically it has regulations as to what constitutes an appropriate costume and thus exercises control over what dancers wear.<sup>142</sup> A club typically controls dancers' behavior on the job through other restrictive rules, including when they are allowed to use the restroom.<sup>143</sup> In sum, dancers are subject to heavy control by club management and thus meet this element of the common law test.

## 2. Mode of Payment

Dancers typically are not paid an hourly wage, but rather earn all their income through customer tips.<sup>144</sup> Such a method of payment seems at first glance to suggest independent contractor status rather than that of employee. Nonetheless, evidence regarding how dancers are paid, though probative of the issue as to whether they are employees under the common law test, is not conclusive. Instead the court must weigh all factors, with the greatest attention paid to the level of control a hiring party has over the worker. It is also worth noting that many workers, such as restaurant servers, who clearly are employees under the law, receive a significant percentage of their income through customer tips.

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139. See *supra* note 62 and accompanying text.

140. See *supra* notes 65-67 and accompanying text.

141. See *supra* note 68 and accompanying text.

142. See *supra* notes 69-70 and accompanying text. See also *Jeffcoat v. State Dep't of Labor*, 732 P.2d 1073, 1076 (Alaska 1987).

143. See *supra* note 73 and accompanying text.

144. See *supra* notes 60, 64 and accompanying text.

### 3. Investment in Materials or Tools

Typical independent contractors furnish equipment or materials to accomplish their tasks.<sup>145</sup> Nude dancers, like typical employees, have little or no investment in equipment or materials to perform their jobs. Under the economic realities test, this indicates that dancers are employees rather than independent contractors.<sup>146</sup>

Dancers typically provide their own costumes and toiletries in accordance with club rules.<sup>147</sup> However, these minimal investment requirements do not rise to the level required to indicate independent contractor status.<sup>148</sup>

Dancers, of course, may invest in additional materials such as expensive costumes, or incur costs for expenses like breast enlargement, that increase their overall personal investment in their work. However, their primary "equipment" requirement is themselves, their exposed bodies, and this does not constitute "equipment" under the meaning of the test.<sup>149</sup>

### 4. Control of Premises Where Work is Done

In conjunction with the right to control the means and manner in which dancers perform their duties at a club, the club owner retains control over the actual premises. As discussed below in the analysis of the economic realities test, dancers have no interest in the operations or management of the clubs in which they perform. Rather, the clubs are controlled by owners, and dancers are simply hired to perform there. This arrangement, where dancers have no role in controlling the premises where their work occurs, indicates that the dancers are employees under the common law test.

### 5. Employer's Right to Discharge

The existence of a hiring party's right to discharge a worker at will indicates that the worker is an employee, rather than an independent contractor.<sup>150</sup> This criterion seems to reflect the same principles as the first factor of the common law test, which considers the level of control a hiring party has over a worker. A club

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145. For example, a plumber hired to fix a sink would bring necessary tools with him or her.

146. *Reich v. Circle C. Inv., Inc.*, 998 F.2d 327, 328 (5th Cir. 1993).

147. See *supra* note 69 and accompanying text; Interview with Kelly Holsopple, *supra* note 44.

148. *Reich*, 998 F.2d at 328 ("dancer's investment in costumes . . . is relatively minor to the considerable investment [the club has made]").

149. See *Hanson v. BCB, Inc.*, 754 P.2d 444 (Idaho 1988).

150. See *supra* note 94 and accompanying text.

owner's control over the club premises and the dancers performing there includes the right to discharge them at will.<sup>151</sup> If a club owner is dissatisfied with the performance of a dancer or if she fails to comply with the oftentimes extensive club rules, the owner has the authority to discharge her from her work at the club. Such authority further points to the conclusion that dancers are employees as a matter of law pursuant to the common law test.

*B. Dancers Meet Definition of Employee under Economic Realities Test*

Under the economic realities test (the test required by the FLSA),<sup>152</sup> dancers at sexually-oriented clubs meet the definition of employee. They are therefore entitled to the legal protections and rights afforded by legislation.<sup>153</sup> In the claim brought by former Deja Vu dancers in Minneapolis, the jury correctly found that the dancers were employees.<sup>154</sup> As such, these dancers were entitled to back wages to compensate them for being denied their legal right to a minimum wage under applicable laws during their tenure.<sup>155</sup>

The economic realities test seeks to protect workers who are dependent upon their employers to make a living.<sup>156</sup> Dancers exhibit strong dependence on their club-employers based on the following factors: (1) the club's control over the dancers' work; (2) the dancers' opportunity for profit or loss depending upon their own managerial skill; (3) the dancers' investment in equipment or materials; (4) the special skill required in dancing; (5) the degree of permanence of the relationship between dancers and the club; and (6) the degree to which nude dancing is an integral part of the alleged employer's business.<sup>157</sup>

1. Dancers Are Under Club's Control

The number and specificity of typical club rules demonstrate that clubs heavily control the nude dancers they hire. The club's control over dancers is discussed above as one of the factors in the

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151. Interview with Kelly Holsopple, *supra* note 44.

152. See *supra* note 98 and accompanying text.

153. *Id.*

154. Brunswick, *supra* note 14, at B1.

155. The club ultimately settled this suit, rather than have a court determine damages to be awarded. *Panel*, *supra* note 14, at B2. These dancers were entitled to seek recovery for unpaid minimum wages despite their allegedly high tip income because Minnesota minimum wage law does not include earnings through customer tips. See *supra* note 110.

156. See *supra* note 100 and accompanying text.

157. These factors are delineated in *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985). See *supra* note 101 and accompanying text.

common law test.<sup>158</sup> This level of control exceeds the control required to satisfy the economic realities test, as well.

Under the economic realities test, a worker is an employee when the hiring party retains control over the means and manner of work rather than merely a concern over the ultimate product.<sup>159</sup> Independent contractors are typically hired to complete a specific task, and the hiring party is not interested in the process used to accomplish the result.<sup>160</sup> The club's control over the process of dancers performing, therefore, suggests that club owners are not concerned with the result of dancers' work, but with the process. This focus indicates that the dancers are working as employees, rather than independent contractors.<sup>161</sup>

## 2. Dancers Have No Role in Economic Enterprise

Unlike typical independent contractors, dancers exhibit no entrepreneurial characteristics. They are dependent on the club to develop a successful economic enterprise. Dancers' opportunities for profit or loss are not dependent upon their own managerial skills. Under the economic realities test, this indicates that dancers are employees of the clubs for which they work.<sup>162</sup>

Dancers depend on clubs to make income available to them. The club controls all meaningful aspects of the business. It handles the advertising and promotion, without which the dancers would not have an audience to pay them tips. Dancers would be unable to overcome a club's inability to manage its business. Furthermore, dancers' efforts to perform well do not demonstrate a role in the club's economic enterprise. Even employees can earn increased income through good work performance. An effort toward good work performance is not sufficient to indicate a role in the economic enterprise. Dancers' only real opportunity to increase their earnings is through an increase in tips from customers. Employees in any profession where income is earned through customer tips could seek to improve their performance to earn more tip revenue, and this would not alter their status as employees.<sup>163</sup> Courts look instead for characteristics such as innovative business skill and initiative to

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158. See *supra* part II.A.1.

159. See *supra* note 101 and accompanying text.

160. For example, when a plumber is hired to fix a sink, the hiring party is presumably more interested in the end result (the repaired sink) than the process by which the work is accomplished.

161. See *supra* note 101 and accompanying text.

162. See *Id.*; *Reich v. Circle C. Inv., Inc.*, 998 F.2d 324, 328 (5th Cir. 1993).

163. Plaintiffs' Memorandum, *supra* note 66, at 15; see *Jeffcoat v. State Dep't of Labor*, 732 P.2d 1073, 1076-77 (Alaska 1987).

overcome this element of the economic realities test.<sup>164</sup> Thus, nude dancers are appropriately deemed employees under this aspect of the test, as well.

### 3. Dancers Have Little or No Investment in Equipment or Materials

As discussed above under the common law factors, dancers have a minimal investment in the necessary materials with which they work. Therefore, pursuant to the economic realities test, they are employees rather than independent contractors.

### 4. Nude Dancing Requires No Special Skill

Typical independent contractors market their services in a special skill and use this skill to complete a task for which they are hired. In contrast, no special skill is required for performing in the sex industry; in fact, typical advertisements for dancing provide that no experience is necessary.<sup>165</sup>

In fact, the only real requirement for nude dancing seems to be female anatomy.<sup>166</sup> Of course, a secondary requirement is simply a willingness<sup>167</sup> to perform the work, to remove clothing as required by the club, to dance the required number of dances, and to meet the club's income quota. Basic compliance with job requirements does not rise to the level of special skills indicative of independent contractor work. Thus nude dancing indicates employee status under the economic realities test.

### 5. Permanence of the Relationship

A long-term relationship between the hiring party and the worker is another factor that can indicate economic dependence pursuant to the economic realities test.<sup>168</sup> An independent contrac-

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164. See *Martin v. Priba Corp.*, C.A. No. 3:91-CV-2786-G, 1992 WL 486911 at \*4 (N.D. Tex., Nov. 6, 1992) (finding that the scope of the dancers' initiative was limited to decisions regarding choice of costumes to wear or the provocativeness of the dance performance, and that such initiative is consistent with that of an employee, rather than an independent contractor).

165. See *supra* note 52 and accompanying text; see also *Jeffcoat*, 732 P.2d at 1077 ("The Club . . . hired dancers without knowing whether or not they had danced previously. Apparently the skill required for topless dancing was slight.").

166. See Interview with Kelly Holsopple, *supra* note 44. "This does not take any talent . . . if you can bend over, you got it." *Id.*

167. Such "willingness" is largely illusory in light of the extensive factors that contribute to the use of women in the sex industry and prostitution. See *supra* notes 4, 6; Garb, *supra* note 35, at 294 n.76.

168. See *supra* note 101 and accompanying text.

tor is more likely to work for a number of parties and move from job to job.<sup>169</sup>

The permanence of the relationship between club and dancer seems to vary. Dancers indicate that their relationship with a club can become all-consuming.<sup>170</sup> On the other hand, a club may explicitly state that dancers may perform elsewhere, indicating an impermanent relationship.<sup>171</sup> However, courts are required under the economic realities test to weigh the factors evenly; no one factor is determinative.<sup>172</sup> Even the potential impermanence of the relationship between dancers and the club hiring them is not sufficient to find that the dancers are working as independent contractors, particularly when other factors of the economic realities test indicate that they are employees.

## 6. Dancers Are Integral Part of Employer's Business

The final aspect of economic dependence in the economic realities inquiry is the workers' role in the hiring party's business.<sup>173</sup> An employee will likely play a central role in the employer's enterprise.

Dancers at sexually-oriented clubs are clearly an integral part of such clubs' business. The primary focus of such facilities is to provide live entertainment by partially or fully nude female dancers.<sup>174</sup> Though most of these clubs are also bars, alcohol is not the

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169. For example, a plumber will move from home to home, doing a different job at each location, and his or her relationship with each homeowner will not rise to the level of employee and employer. See Dwyer, *supra* note 61, at 90.

170. See *supra* note 75 and accompanying text. Holsopple attested that a dancer typically finds herself giving a significant number of hours to the club each week. Interview with Kelly Holsopple, *supra* note 44.

171. See *Martin v. Priba Corp.* C.A. No. 3:91-CV-2786-G, 1992 WL 486911 at \*5 (N.D. Tex., Nov. 6, 1992). Holsopple said that a patron will see the same dancers at all clubs and venues in a given market, indicating that many work at more than one facility. Interview with Kelly Holsopple, *supra* note 44 and accompanying text. On a national level, dancers often travel from club to club, traveling the strip circuit to perform. *Id.* In this context, they may be under the control of an agent or manager who essentially is their pimp. *Id.*

172. See *supra* note 101; *Reich v. Circle C. Inv., Inc.*, 998 F.2d at 327, 328-39 (5th Cir. 1993) ("The transient nature of the work force is not enough here to remove the dancers from the protections of the FLSA.").

173. See *supra* note 101.

174. As stated in plaintiffs' court documents in the Minneapolis *Deja Vu* case, "[Deja Vu] would not exist but for the 'beautiful, friendly, sexiest showgirls found anywhere in the world.'" Plaintiffs' Memorandum, *supra* note 66, at 17. "For [Deja Vu] to suggest that the nude dancers are merely complimentary and/or peripheral to their real business of selling soft drinks and fruit juices is simply ludicrous." *Id.* at 16. Plaintiffs' Supplemental Memorandum of Law at 16, *Davis v. Deja Vu*, (D. Minn. 1994) (No. CT 92-010727); see also *Jeffcoat v. State Dep't of Labor*, 732 P.2d 1073, 1077 (Alaska 1987).

primary focus of their business. This is demonstrated by the number of clubs that feature nude dancers and thus are forbidden by the laws of their jurisdictions from serving alcoholic beverages.<sup>175</sup> Without the services that dancers provide, the clubs would be forced to change their focus or risk losing business entirely.<sup>176</sup> These club owners clearly are dependent on the availability of exotic dancers.

### *C. Ramifications and Analysis of this Conclusion*

#### *1. Opening Legal Doors to "Throwaway" Women*

Granting sex workers their rights as employees will have an immediate impact on their lives. For example, legal acknowledgment will offer sex workers greater protection on the job. They will be able to file sexual harassment suits under Title VII the next time their supervisor demands sexual favors before granting time off work.<sup>177</sup> They will be able to unionize and collectively bargain with their employers for more favorable terms and conditions of employment.<sup>178</sup> They will be entitled to minimum wages.<sup>179</sup>

Opening legal doors for sex workers will serve to acknowledge a group of women too long deemed "throwaway" human beings. Like traditional prostitutes, women working in the legal sex industry have been treated as though they are not entitled to the same legal protections as other "socially accepted" workers. While the inequity in the sex industry reflects overall economic disadvantages endured by women,<sup>180</sup> it also reflects American ambivalence toward sex work. As American society simultaneously supports and condemns the sex industry, it has marginalized and forgotten the women involved. Prostituted women and women working in the legal sex industry are essentially "thrown away."<sup>181</sup>

Feminists, in their own mixed responses to sex work,<sup>182</sup> have also contributed to an effective dismissal of sex workers. Feminists

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175. See *supra* note 25 and accompanying text.

176. This assumes, of course, that most sexually-oriented club patrons do not frequent these facilities because of their beverage selection.

177. See *supra* note 87 and accompanying text. Of course, in light of the fact that sex workers are routinely sexually harassed by club owners and patrons alike, it would be interesting to see how a court would handle such a claim. Interview with Kelly Holsopple, *supra* note 44.

178. See *supra* note 88 and accompanying text.

179. See *supra* note 86 and accompanying text.

180. See *supra* note 6 and accompanying text.

181. See *supra* note 18 and accompanying text (discussing the "throwaway woman" phenomenon).

182. See *supra* notes 40-45 and accompanying text (discussing differences in feminist thought about sex work and the appropriate legal approaches to it).



have forgotten sex workers and neglected to acknowledge that sex workers are people, citizens entitled to the same legal rights and protections as workers in "straight" jobs.

The underlying social tensions will not be eliminated by granting sex workers the legal protections and rights to which they are entitled. However, addressing these tensions is a task beyond simple repair. On the other hand, the legal system has laws in place establishing rights and protections for employees, as well as the factors to determine whether workers are employees. Available legal remedies could make a significant difference in the lives of sex workers.

## 2. The Dangers of Legitimization and Partial Reform

Despite the immediate benefits that would be available to sex workers by affirming their status as employees, providing legal protection in sex work has drawbacks. Specifically, it fails to acknowledge the inherently degrading and dehumanizing character of the industry and in fact further supports its legitimacy as a commercial venture. Furthermore, granting sex workers rights as employees is only a partial response to the harm of working in the sex industry and may impede comprehensive reform.

Elevating the status of sex industry work to an employment relationship neglects to address its sexually exploitative nature. Through legitimization, the legal system may send a message to American girls that sex work is a socially acceptable option for earning a living. This contradicts a central focus for many feminists: the desire that girls grow up knowing that they are more than sex objects, that they deserve respect and attention for more than their sexuality.

By legally legitimizing sex work, the government is authorized to collect taxes on sex employees.<sup>183</sup> For feminists who view legal sex work as akin to illegal prostitution,<sup>184</sup> governmental authority to collect taxes based on sexual exploitation effectively places the government in the role of pimp.<sup>185</sup> The benefits and rights accorded women working in the sex industry through legal determinations of employee status would permit the government to profit from the perpetuation of men's sexual access to a class of women. This is a drawback that mandates serious consideration.

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183. See *supra* note 80 and accompanying text.

184. See *supra* note 45 and accompanying text.

185. "The legal definition of pimping is 'living off the earnings of a prostitute.'" Alexander, *supra* note 30, at 198.

Many may protest litigation on behalf of sex workers out of a concern that an acceptance of partial reform will come at the expense of ignoring the overall problem of the inherent exploitation of the sex industry.<sup>186</sup> Such a concern is also meritorious and deserves further analysis.<sup>187</sup>

### 3. Employee Rights for Dancers is a Desirable Goal

Despite valid concerns about legitimizing the industry and the dangers of partial reform, the benefits of fighting for employee status for sex workers outweigh the costs. Regulation of the industry may help to clean it up and minimize the abuses occurring within it.<sup>188</sup> Legal attention to the industry forces club owners to be more accountable for their illegal activities.

Until further analysis of the dangers of legitimization and partial reform is available, established law could make a significant difference in the lives of nude dancers. Sex workers meet the applicable standards of employee status, and thus should be granted the rights and protections of employees. The problem of the exploitative sex industry can be partially addressed through available law. Marginalized and forgotten sex workers will benefit from judicial recognition of their rights.

The greatest benefit for affording legal recognition to sex workers is that it will help the women exploited by the sex industry.<sup>189</sup> Granting sex workers the rights and protections to which they are legally entitled would immediately make a difference in their lives. The importance of this goal should not be minimized.

### Conclusion

Women who work in the legal sex industry are denied rights and protections to which they are entitled. Though hired ostensibly as independent contractors, dancers' relationships with club owners indicate that they are employees under both common law and the

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186. Partial reform raises the concern that some levels of exploitation will be seen as acceptable. Only full reform supports the notion that the industry per se is unacceptable exploitation.

187. It is, of course, difficult to conceive of the dangers of partial reform without the benefit of hindsight. Such hindsight has been useful in reconsidering the philosophy behind the past twenty years of rape law reform. See Henderson, *supra* note 43, at 43-50 (describing the historical and philosophical development of rape law).

188. This is not to disregard the inherent abuses of the industry. See *supra* notes 186-87 and accompanying text (considering this danger with partial reform).

189. "Until the legal community opens the doors of justice to prostituted women, they will continue to 'stand alone at the side of the road.'" Giobbe & Gibel, *supra* note 41, at 56.

economic realities test. Litigation on behalf of sex workers will help to remedy a portion of the injustice they endure.

Many may protest such litigation for sex workers' rights in recognition of the harms inherent in such work; granting dancers their rights as employees may be a band-aid solution to a gaping wound. However, the workplace rights of individual citizens can be attained while simultaneously fighting the conditions that create a culture where women are subordinated and sexually exploited. At the very least, affirming dancers' rights as employees will temper the harm and give them a legal voice in addressing workplace wrongs. Such small battles may be fought without forgetting the greater fight.

As one former dancer said, "We're not fighting for the money . . . we're fighting for human rights and respect every paid worker gets."<sup>190</sup> Such acknowledgment is hardly too much to ask.

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190. Nelson, *supra* note 111, at B2 (quoting Julie Chavira, age 23, of Minneapolis).