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Apr 13 2021 01:30 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

1 NOAS

2 GALLIAN WELKER & BECKSTROM, L.C.

3 Nathan E. Lawrence, SBN 15060

4 Travis N. Barrick, SBN 9257

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10 Attorneys for Plaintiff David A. Gonzalez

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

DAVID A. GONZALEZ, an individual,

Plaintiff,

v.

STATE OF NEVADA; NEVADA
DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES; NEVADA
DIVISION OF FORESTRY; STEPHEN F.
SISOLAK, in his official capacity as
Governor of Nevada; BRADLEY
CROWELL, in his official capacity as
Director of Nevada Department of
Conservation and Natural Resources; and
KACEY KC, in her official capacity as
Nevada State Forester Firewarden;
collectively,

Defendants.

Case No.: A-20-820596-C

Dept. No.: 14

NOTICE OF APPEAL

Notice is hereby given that Plaintiff DAVID A. GONZALEZ appeals to the Supreme Court of Nevada from the Order of Dismissal entered on February 24, 2021. Notice of Entry of the indicated Order was effected on March 11, 2021. True and correct copies of the Notice of

1 Entry of Order of Dismissal and the associated Order are attached hereto as **Exhibit 1**.

2 DATED this 8th day of April 2021.

3
4 **GALLIAN WELKER & BECKSTROM, L.C.**

5 
6 Nathan E. Lawrence, SBN 15060

7 Travis N. Barrick, SBN 9257

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9 Las Vegas, Nevada 89104

10 Telephone: (702) 892-3500

11 Facsimile: (702) 386-1946

12 nlawrence@vegascase.com

13 *Attorneys for Plaintiff David A. Gonzalez*

14 **CERTIFICATE OF SERVICE**

15 I, the undersigned, hereby certify that on the 8th day of April 2021, I served a true and
16 correct copy of the foregoing **NOTICE OF APPEAL**, as filed, by way of the District Court's
17 electronic Odyssey File and Serve system to the following:

18 **AARON D. FORD, Attorney General**

19 Mr. Anthony J. Walsh, Esq.

20 Deputy Attorney General, Office of the Attorney General

21 100 North Carson Street

22 Carson City, Nevada 89701-4717

23 Tel: 775-684-1213

24 Fax: 775-684-1108

25 ajwalsh@ag.nv.gov

26 *Attorney for Defendants*

27 DATED this 8th day of April 2021.

28 **GALLIAN WELKER & BECKSTROM, L.C.**


Nathan E. Lawrence, SBN 15060

Attorneys for Plaintiff David A. Gonzalez

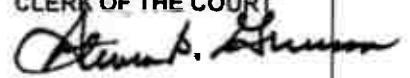
EXHIBIT 1

EXHIBIT 1

Gonzalez v. State of Nevada, *et al.*

Case No.: A-20-820596-C / Dept. No.: 14

Notice of Entry of Order of Dismissal



1 **NEOJ**
2 **AARON D. FORD**
3 **Attorney General**
4 **ANTHONY J. WALSH**
5 **(Bar No. 14128)**
6 **Deputy Attorney General**
7 **Office of the Attorney General**
8 **100 North Carson Street**
9 **Carson City, NV 89701-4717**
10 **Tel: (775) 684-1213**
11 **Fax: (775) 684-1108**
12 **Email: AJWalsh@ag.nv.gov**
13 **Attorneys for Defendants**

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 **DAVID A. GONZALEZ, an individual,**

Case No.: A-20-820596-C

11 **Plaintiff,**

Dept. No.: 14

12 **vs.**

13 **STATE OF NEVADA; NEVADA**
14 **DEPARTMENT OF CONSERVATION AND**
15 **NATURAL RESOURCES; NEVADA**
16 **DIVISION OF FORESTRY; STEPHEN F.**
17 **SISOLAK, in his official capacity as**
18 **Governor of Nevada; BRADLEY CROWELL;**
19 **in his official capacity as Director of Nevada**
20 **Department of Conservation and Natural**
21 **Resources; and KACEY KC, in her official**
22 **capacity as Nevada State Forester**
23 **Firewarden; collectively,**

19 **Defendants.**

20 **NOTICE OF ENTRY OF ORDER OF DISMISSAL**

21 **PLEASE TAKE NOTICE** that an Order of Dismissal was entered in the above-
22 **entitled matter** on the 24th day of February, 2021, a copy of said Order is attached hereto
23 **as Exhibit "A".**

24 **DATED** this 11th day of March, 2021.

25 **AARON D. FORD**
26 **Attorney General**

27 **By: /s/ Anthony Walsh**
28 **ANTHONY WALSH**
Deputy Attorney General
Attorney for Defendant

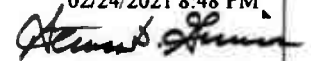
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Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Page 2 of 2

Exhibit A

Exhibit A


CLERK OF THE COURT

1 **ORDM**
2 **AARON D. FORD**
3 **Attorney General**
4 **ANTHONY J. WALSH**
5 **(Bar No. 14128)**
6 **Deputy Attorney General**
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13 **Attorneys for Defendants**

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 **DAVID A. GONZALEZ, an individual,**

Case No.: A-20-820596-C

11 **Plaintiff,**

Dept. No.: 14

12 **vs.**

13 **STATE OF NEVADA; NEVADA**
14 **DEPARTMENT OF CONSERVATION AND**
15 **NATURAL RESOURCES; NEVADA**
16 **DIVISION OF FORESTRY; STEPHEN F.**
17 **SISOLAK, in his official capacity as**
18 **Governor of Nevada; BRADLEY CROWELL;**
19 **in his official capacity as Director of Nevada**
20 **Department of Conservation and Natural**
21 **Resources; and KACEY KC, in her official**
22 **capacity as Nevada State Forester**
23 **Firewarden; collectively,**

24 **Defendants.**

25 **ORDER OF DISMISSAL**

26 **This matter having come on regularly for hearing before this court on January 12,**
27 **2021, at the hour of 9:30 a.m. on Defendants' Motion to Dismiss.**

28 **The Court having read and reviewed the papers and pleadings on file herein and**
29 **considered the arguments of counsel, and finds the following:**

30 **The instant Complaint alleges that Plaintiff, David A. Gonzalez, who at all relevant**
31 **times has been an inmate of the Nevada Department of Corrections ("NDOC"), has**
32 **participated in a Nevada Division of Forestry ("NDF") work program pursuant to Nevada**

1 Revised Statute ("NRS") 209.457(2)(a). The Complaint seeks relief declaring Plaintiff is
2 entitled to minimum wage compensation under Article 15, Section 16 of the Nevada State
3 Constitution. Defendant's Motion to Dismiss argues the Plaintiff is not entitled to such
4 relief as he was an inmate and not defined as an employee under Nevada law. As such, the
5 sole issue before this Court is whether inmates in the NDOC and performing work for the
6 NDF pursuant to NRS 209.457(2)(a), are employees as defined by Article 15, Section 16 of
7 the Nevada State Constitution and are thus entitled to minimum wage compensation under
8 Article 15, Section 16 of the Nevada State Constitution.

9 **A. Plaintiff is Not an Employee Under Article 15, Section 16 of The**
10 **Nevada State Constitution**

11 The Nevada Supreme Court in *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951,
12 130 Nev. 879 (2014) has adopted an "economic realities" test to determine whether an
13 employment relationship exists between purported employees and employers for claims
14 arising under NRS 608.010. There, the Court found that certain adult performers met the
15 statutory definition of "employee" under NRS 608.250, while also recognizing that NRS 608
16 was superseded by Article 15, Section 16 of the Nevada State Constitution ("Minimum
17 Wage Amendment" or "MWA"), under *Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518,
18 130 Nev. 484 (2014). In *Terry*, the original complaint was brought under NRS 608.250 and
19 not the MWA. Nevertheless, the Court reasoned that both definitions of employee and
20 employer under NRS 608.010, 608.011 and the MWA required a more instructive aid – the
21 federal Fair Labor Standards Act "economic realities" test – to determine the exact
22 relationship between appellant and respondent in harmony with Nevada legislative intent
23 for Nevada minimum wage laws to "run parallel" to federal law, at least in many significant
24 respects. *Terry*, 336 P.3d at 955

25 The Court held:

26 Thus, the Legislature has not clearly signaled its intent that
27 Nevada's minimum wage scheme should deviate from the
28 federally set course, and for the practical reasons examined
above, our state's and federal minimum wage laws should be
harmonious in terms of which workers qualify as employees
under them. We therefore adopt the FLSA's "economic realities"

test for employment in the context of Nevada's minimum wage laws.

Id. at 958.

Nevada courts may, therefore, follow federal case law in applying the economic reality test, including an examination of the totality of the circumstances:

Thus, the economic realities test examines the totality of the circumstances and determines whether, as a matter of economic reality, workers depend upon the business to which they render service for the opportunity to work. See *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32-33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961); *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 434 (5th Cir.2013). Given this backdrop, this court has difficulty fathoming a test that would encompass more workers than the economic realities test, short of deciding that all who render service to an industry would qualify, a result that NRS Chapter 608 and our case law specifically negate. See NRS 608.255; *Prieur*, 102 Nev. at 474, 726 P.2d at 1373.

Thus, to the extent that our test could only, from a pragmatic standpoint, seek to be equally as protective as the economic realities test, and having no substantive reason to break with the federal courts on this issue, “judicial efficiency implores us to use the same test as the federal courts” under the FLSA. See *Moore v. Labor & Indus. Review Comm’n*, 175 Wis.2d 561, 499 N.W.2d 288, 292 (Wis.Ct.App.1993) (adopting, for analogous state law purposes, the test used by federal courts to determine whether someone is an employee for the purpose of a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012))

Id. at 956-957.

Defendants argued that the holdings in *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993), *Morgan v. MacDonald*, 41 F.3d 1291 (9th Cir. 1994) and *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992) were determinative. Specifically, “the primary policy concern of the FLSA—ensuring a minimum standard of living for all workers—is simply inapplicable to prisoners ‘for whom clothing, shelter, and food are provided by the prison.’” *Morgan*, 41 F.3d. at 1292. Federal Appellate Courts have consistently found that inmates do not meet the definition of employee under the FLSA. This court agrees and may apply the same test to the MWA under *Terry*.

As here, under *Morgan* and *Hale*, inmates were held to be required to perform work as a condition of their incarceration. See *Morgan*, 41 F.3d. at *Id.* (citing NRS 209.461(1)(b))

1 as applied to Nevada inmates under the FLSA); *Hale*, 993 F.2d 1387 at 1398. Because
2 *Morgan* examined the economic realities of Nevada inmates, *Morgan* is factually and
3 analytically on point for this court's determination: NRS 209.461(1)(b) still requires, to the
4 extent practicable, Nevada inmates to either receive vocational training or work 40 hours
5 per week as a condition of incarceration, subject to behavioral, medical, or educational
6 exclusions. Further, the NDOC may provide inmates to the NDF under NRS 209.457(3)
7 which allows the NDF to utilize inmates to perform work as specified in the statute,
8 provided that an inmate volunteering for a work program meets certain eligibility
9 requirements under NRS 209.457(2)(a) and NRS 209.4615.

10 The only Nevada Supreme Court decisions to consider inmate eligibility for
11 minimum wage compensation are *Prieur v. D.C.I. Plasma Ctr.*, 102 Nev. 472, 726 P2d 1372
12 (1986) and *White v. State*, 454 P.3d 736, 135 Nev. Adv. Op. 67 (2019). However, the Court
13 in *Prieur*, sitting prior to the enactment of the MWA, recognized but did not employ the
14 economic reality test; instead, ultimately finding that no employment relationship existed
15 between Nevada inmates and a private company because the State and the company were
16 the sole contracting parties. See *Prieur*, 726 P2d 1372 at 1373. Similarly, *White* was
17 decided on other workers' compensation grounds. See *White*, 454 P.3d at 739-40.
18 Nevertheless, the Court in *Prieur* signaled that it was open to examining the economic
19 realities of incarceration in terms of employment. See *Prieur*, 726 P2d 1372 at *Id.* *Prieur*
20 can therefore be read consistently with *Terry*, which was decided after the enactment of
21 the MWA and which specifically applied the economic realities test to both Nevada law and
22 the FLSA. See *Terry*, 336 P.3d at 955-957. As such, this court may examine the economic
23 realities of Nevada inmates to determine whether an employment relationship exists.

24 Under the totality of the circumstances, factors and policies analyzed in *Terry*, *Hale*,
25 *Morgan* and *Vanskike*, it is this court's finding, parallel to and consistent with federal law,
26 that the purpose of any minimum wage law is to prevent members of the general public
27 from falling into substandard living conditions. The economic realities of incarceration are
28 distinct and separate from those faced by the general public because inmates are

1 guaranteed housing, meals, medical attention and are able to participate in work programs
2 under NRS 209.457(2)(a) and in exchange for sentence reduction credits under NRS
3 209.449. The reality of incarceration is further not based on a pecuniary relationship
4 between inmates and the state. Therefore, there is no employment relationship between
5 inmates and the state.

6 Based on the foregoing, this court finds that inmates in Nevada do not meet the
7 definition of employee under Nevada's Minimum Wage Amendment.

8 **B. Article 15, Section 16 of the Nevada State Constitution Does Not**
9 **Impliedly Repeal NRS 209.461(8)**

10 Defendants assert that NRS 209.461(8) establishes that there is no right to
11 minimum wage compensation for inmates. Plaintiff has argued that the MWA impliedly
12 repealed NRS 209.461(8). Plaintiff relies on *Thomas v. Nevada Yellow Cab Corp* (citation
13 *supra*), in which a taxi-driver exception to Nevada's Wage and Hour Law was held to be
14 impliedly repealed by the later enactment of the MWA, precisely because taxi-drivers were
15 not explicitly exempted under the MWA.

16 This court finds that *Thomas* is distinguishable from the case at hand and therefore
17 inapplicable. NRS 209.461(8) does not create a constitutionally conflicting exemption from
18 the MWA in the same way as the taxi driver exemption examined in *Thomas*. Here, NRS
19 209.461(8) simply bars a minimum wage cause of action for inmates arising pursuant to
20 the provisions of NRS Chapter 209 and does not expressly create an exemption for those
21 who would otherwise be classified as employees under the MWA. Based on the totality of
22 the circumstances and policies examined in *Terry, Hale, Morgan, and Vanskike*, inmates
23 do not have the same employee-employer relationship characteristics as taxi drivers and
24 their employers.

25 Based on the foregoing, this court finds that NRS 209.461(8) is not in conflict with,
26 nor impliedly repealed by the MWA.

27 ///

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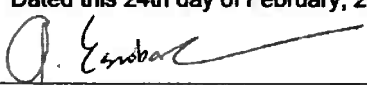
1 **C. Plaintiff's Complaint Fails to State a Claim Upon Which Relief Can**
2 **Be Granted**

3 Pursuant to Nevada Rule of Civil Procedure ("NRCPP") 12(b)(5), Plaintiff's Complaint
4 fails to state a claim upon which relief can be granted because Plaintiff's claim for minimum
5 wage compensation is explicitly barred by NRS 209.461(8). NRS 209.461(8) states: "The
6 provisions of this chapter do not create a right on behalf of the offender to employment or
7 to receive the federal or state minimum wage for any employment and do not establish a
8 basis for any cause of action against the State or its officers or employees for employment
9 of an offender or for payment of the federal or state minimum wage to an offender." As
10 such, Plaintiff is not an employee, and has no claims for which relief can be granted.

11 Based thereon, IT IS HEREBY ORDERED that Plaintiff's Complaint be and is
12 hereby dismissed with prejudice.

13 DATED: 

Dated this 24th day of February, 2021


DISTRICT COURT JUDGE

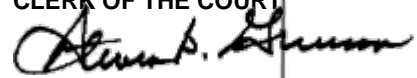
AA8 9E3 90C8 907F
Adriana Escobar
District Court Judge

17 Respectfully submitted by:

18 AARON D. FORD
19 Attorney General

20 /s/ Anthony J. Walsh
21 ANTHONY WALSH (Bar No. 14128)
22 Deputy Attorney General
23 100 North Carson Street
24 Carson City, NV 89701-4717
25 Tel: (775) 684-1213
26 Fax: (775) 684-1108
27 Email: AJWalsh@ag.nv.gov

28 *Attorneys for Defendants*



1 **ASTA**
2 **GALLIAN WELKER & BECKSTROM, L.C.**
3 **Nathan E. Lawrence, SBN 15060**
4 **Travis N. Barrick, SBN 9257**
5 **540 East St. Louis Avenue**
6 **Las Vegas, Nevada 89104**
7 **Telephone: (702) 892-3500**
8 **Facsimile: (702) 386-1946**
9 **nlawrence@vegascase.com**
10 **Attorneys for Plaintiff David A. Gonzalez**

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 **DAVID A. GONZALEZ, an individual,**
14 **Plaintiff,**

15 **v.**

16 **STATE OF NEVADA; NEVADA**
17 **DEPARTMENT OF CONSERVATION**
18 **AND NATURAL RESOURCES; NEVADA**
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20 **SISOLAK, in his official capacity as**
21 **Governor of Nevada; BRADLEY**
22 **CROWELL, in his official capacity as**
23 **Director of Nevada Department of**
24 **Conservation and Natural Resources; and**
25 **KACEY KC, in her official capacity as**
26 **Nevada State Forester Firewarden;**
27 **collectively,**
28 **Defendants.**

Case No.: A-20-820596-C

Dept. No.: 14

CASE APPEAL STATEMENT

29 **Plaintiff DAVID A. GONZALEZ, by and through his attorneys of the law firm of**
30 **GALLIAN WELKER & BECKSTROM, L.C., hereby submits his Case Appeal Statement in support**
31 **of his concurrently filed Notice of Appeal in the instant matter.**

1 **1. Name of Appellant filing this Case Appeal Statement:**

2 David A. Gonzalez ("Mr. Gonzalez")

3 **2. Identify the Judge issuing the Decision, Judgment, or Order appealed from:**

4 Judge Adriana Escobar, Department 14

5 **3. Identify each Appellant and the name and address of counsel for each Appellant:**

6 Appellant: David A. Gonzalez

7 Counsel: GALLIAN WELKER & BECKSTROM, L.C.

8 Nathan E. Lawrence, SBN 15060

9 Travis N. Barrick, SBN 9257

10 540 East St. Louis Avenue

11 Las Vegas, Nevada 89104

12 **4. Identify each Respondent and the name and address of appellate counsel, if**
13 **known, for each Respondent:**

14 Respondent: State of Nevada

15 Nevada Department of Conservation and Natural Resources

16 Nevada Division of Forestry

17 Stephen F. Sisolak, as Governor of Nevada

18 Bradley Crowell, as Director of Nevada Department of

19 Conservation and Natural Resources

20 Kacey KC, as Nevada State Forester Firewarden

21 Counsel: AARON D. FORD, Attorney General

22 Anthony Walsh, SBN 14128

23 Deputy Attorney General

24 100 North Carson Street

25 Carson City, NV 89701-4717

26 **5. Whether any attorney identified above in response to question 3 or 4 is not**
27 **licensed to practice law in Nevada and, if so, whether the District Court granted**
28 **that attorney permission to appear under SCR 42 (attach a copy of any District**

1 **Court order granting such permission):**

2 Not applicable

- 3 **6. Whether appellant was represented by appointed counsel in the district court,**
4 **and whether the appellant is represented by appointed counsel on appeal:**

5 Mr. Gonzalez retained GALLIAN WELKER & BECKSTROM, L.C. as counsel for
6 proceedings in District Court and for the instant appeal.

- 7 **7. Whether appellant was granted leave to proceed in forma pauperis, and the date**
8 **of entry of the District Court order granting such leave:**

9 Not applicable

- 10 **8. The date the proceedings commenced in the District Court:**

11 Mr. Gonzalez commenced this action on September 2, 2020. The District
12 Court entered its Order of Dismissal on February 24, 2021.

- 13 **9. Provide a brief description of the nature of the action and result in the District**
14 **Court, including the type of Judgment or Order being appealed and the relief**
15 **granted by the District Court:**

16 Appellant argues that Article 15, Section 16 of the Constitution of the State of
17 Nevada provides a minimum wage for all non-excluded employees in the State of
18 Nevada and that the broad purposes and text of Article 15, Section 16, as well as other
19 considerations implicated by relevant caselaw, include and apply to inmates working
20 out of Nevada Department of Corrections conservation camps, such that Appellant is
21 entitled to receive the minimum wage and to an award of economic damages.

22 Respondents argue, *inter alia*, that the “economic realities” caselaw doctrine is
23 the controlling definition for entitled employees and that, under the economic realities
24 test, inmates are not employees and are not, therefore, entitled to receipt of minimum
25 wage. On February 24, 2021, pursuant to a Motion to Dismiss filed by Respondents’
26 counsel, the District Court entered its Order of Dismissal, as attached to the
27 concurrently filed Notice of Appeal.

1 **10. Whether the case has previously been the subject of an appeal to or original writ**
2 **proceeding in the Supreme Court and, if so, the caption and Supreme Court**
3 **docket number of the prior proceedings:**

4 Not applicable

5 **11. Whether this appeal involves child custody or visitation:**

6 Not applicable

7 **12. If this is a civil case, indicate whether this appeal involves the possibility of**
8 **settlement:**

9 Given the nature and implication of the asserted cause of action, it is believed
10 that settlement is unlikely.

11 **13. Appeal tracking statement:**

12 Appellant believes that the Supreme Court should retain jurisdiction in this
13 matter pursuant to NRAP 17(a)(11) for a matter of first impression involving the
14 Nevada Constitution. Alternatively and/or additionally, the Supreme Court should
15 retain jurisdiction pursuant to NRAP 17(a)(12) for an issue of statewide public
16 importance.

17
18 DATED this 8th day of April 2021.

19
20 **GALLIAN WELKER & BECKSTROM, L.C.**

21 
22 Nathan E. Lawrence, SBN 15060

23 Travis N. Barrick, SBN 9257

24 540 East St. Louis Avenue

25 Las Vegas, Nevada 89104

26 Telephone: (702) 892-3500

27 Facsimile: (702) 386-1946

28 nlawrence@vegascase.com

Attorneys for Plaintiff David A. Gonzalez

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 8th day of April 2021, I served a true and correct copy of the foregoing **NOTICE OF APPEAL**, as filed, by way of the District Court's electronic Odyssey File and Serve system to the following:

AARON D. FORD, Attorney General

Mr. Anthony J. Walsh, Esq.

Deputy Attorney General, Office of the Attorney General

100 North Carson Street

Carson City, Nevada 89701-4717

Tel: 775-684-1213

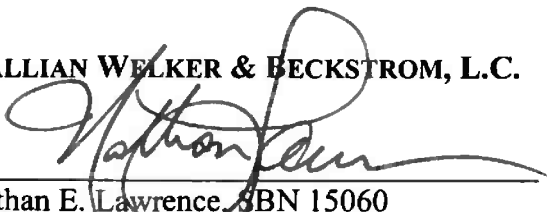
Fax: 775-684-1108

ajwalsh@ag.nv.gov

Attorney for Defendants

DATED this 8th day of April 2021.

GALLIAN WELKER & BECKSTROM, L.C.



Nathan E. Lawrence, SBN 15060

Travis N. Barrick, SBN 9257

540 East St. Louis Avenue

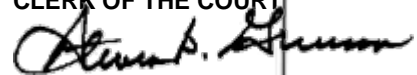
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Attorneys for Plaintiff David A. Gonzalez



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10 Attorneys for Plaintiff David A. Gonzalez

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

DAVID A. GONZALEZ, an individual,

Plaintiff,

v.

STATE OF NEVADA; NEVADA
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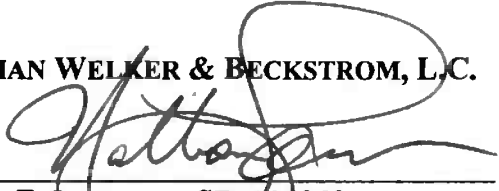
NOTICE OF POSTING COST BOND

Please take notice that Plaintiff DAVID A. GONZALEZ, by and through his attorneys of the law firm of GALLIAN WELKER & BECKSTROM, L.C., has posted a check in the amount of

1 \$500.00 for the costs on appeal, pursuant to NRAP Rule 7.

2 DATED this 9th day of April 2021.

3
4 **GALLIAN WELKER & BECKSTROM, L.C.**

5 
6 Nathan E. Lawrence, SBN 15060

7 Travis N. Barrick, SBN 9257

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9 Las Vegas, Nevada 89104

10 Telephone: (702) 892-3500

11 Facsimile: (702) 386-1946

12 nlawrence@vegascase.com

13 *Attorneys for Plaintiff David A. Gonzalez*

14
15 **CERTIFICATE OF SERVICE**

16 I, the undersigned, hereby certify that on the 9th day of April 2021, I served a true and correct copy of the foregoing **NOTICE OF POSTING COST BOND**, as filed, by way of the District Court's electronic Odyssey File and Serve system to the following:

17 **AARON D. FORD, Attorney General**

18 Mr. Anthony J. Walsh, Esq.

19 Deputy Attorney General, Office of the Attorney General

20 100 North Carson Street

21 Carson City, Nevada 89701-4717

22 Tel: 775-684-1213

23 Fax: 775-684-1108

24 *Attorney for Defendants*

25 DATED this 9th day of April 2021.

26
27 **GALLIAN WELKER & BECKSTROM, L.C.**

28 
Nathan E. Lawrence, SBN 15060

Attorneys for Plaintiff David A. Gonzalez

CASE SUMMARY**CASE NO. A-20-820596-C**

David Gonzalez, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

§
§
§
§
§

Location: **Department 14**
 Judicial Officer: **Escobar, Adriana**
 Filed on: **09/02/2020**
 Cross-Reference Case Number: **A820596**

CASE INFORMATION**Statistical Closures**

02/24/2021 Motion to Dismiss by the Defendant(s)

Case Type: **Other Civil Matters**

Case Status: **02/24/2021 Dismissed**

DATE**CASE ASSIGNMENT****Current Case Assignment**

Case Number A-20-820596-C
 Court Department 14
 Date Assigned 09/02/2020
 Judicial Officer Escobar, Adriana

PARTY INFORMATION

		<i>Lead Attorneys</i>
Plaintiff	Gonzalez, David A	Lawrence, Nathan Edward <i>Retained</i> 702-892-3500(W)
Defendant	Crowell, Bradley Removed: 02/24/2021 Dismissed	Ott, Gregory D. <i>Retained</i> 775-684-1229(W)
	KC, Kacey Removed: 02/24/2021 Dismissed	Ott, Gregory D. <i>Retained</i> 775-684-1229(W)
	Nevada Department of Conservation and Natural Resources Removed: 02/24/2021 Dismissed	Ott, Gregory D. <i>Retained</i> 775-684-1229(W)
	Nevada Division of Forestry Removed: 02/24/2021 Dismissed	Ott, Gregory D. <i>Retained</i> 775-684-1229(W)
	Sisolak, Stephen F. Removed: 02/24/2021 Dismissed	Ott, Gregory D. <i>Retained</i> 775-684-1229(W)
	State of Nevada	Ott, Gregory D. <i>Retained</i> 775-684-1229(W)

DATE**EVENTS & ORDERS OF THE COURT****INDEX****EVENTS**

09/02/2020



Complaint

Filed By: Plaintiff Gonzalez, David A
Complaint

09/02/2020




Initial Appearance Fee Disclosure

CASE SUMMARY


CASE NO. A-20-820596-C

Filed By: Plaintiff Gonzalez, David A
Initial Appearance Fee Disclosure


09/02/2020

 Summons Electronically Issued - Service Pending
Party: Plaintiff Gonzalez, David A
Summons Electronically Issued - State of Nevada


09/02/2020

 Summons Electronically Issued - Service Pending
Party: Plaintiff Gonzalez, David A
Summons Electronically Issued - Nevada Dept of Conservation and Natural Resources


09/02/2020

 Summons Electronically Issued - Service Pending
Party: Plaintiff Gonzalez, David A
Summons Electronically Issued - Nevada Division of Forestry


09/02/2020

 Summons Electronically Issued - Service Pending
Party: Plaintiff Gonzalez, David A
Summons Electronically Issued - Governor Sisolak


09/02/2020

 Summons Electronically Issued - Service Pending
Party: Plaintiff Gonzalez, David A
Summons Electronically Issued - Director Crowell


09/02/2020

 Summons Electronically Issued - Service Pending
Party: Plaintiff Gonzalez, David A
Summons Electronically Issued - State Forester Firewarden KC


10/06/2020

 Proof of Service
Filed by: Plaintiff Gonzalez, David A
Proof of Service


10/06/2020

 Proof of Service
Filed by: Plaintiff Gonzalez, David A
Proof of Service


10/06/2020

 Proof of Service
Filed by: Plaintiff Gonzalez, David A
Proof of Service


10/06/2020

 Proof of Service
Filed by: Plaintiff Gonzalez, David A
Proof of Service


10/06/2020

 Proof of Service
Filed by: Plaintiff Gonzalez, David A
Proof of Service

10/23/2020



 Notice of Appearance
Party: Defendant State of Nevada; Defendant Nevada Department of Conservation and Natural Resources; Defendant Nevada Division of Forestry; Defendant Sisolak, Stephen F.; Defendant Crowell, Bradley; Defendant KC, Kacey
Notice of Appearance for Defendants

10/23/2020

 Motion to Dismiss

CASE SUMMARY

CASE NO. A-20-820596-C

	<p>Filed By: Defendant State of Nevada; Defendant Nevada Department of Conservation and Natural Resources; Defendant Nevada Division of Forestry; Defendant Sisolak, Stephen F.; Defendant Crowell, Bradley; Defendant KC, Kacey</p> <p><i>Motion to Dismiss Complaint</i></p>
10/23/2020	<p> Errata</p> <p>Filed By: Defendant State of Nevada; Defendant Nevada Department of Conservation and Natural Resources; Defendant Nevada Division of Forestry; Defendant Sisolak, Stephen F.; Defendant Crowell, Bradley; Defendant KC, Kacey</p> <p><i>ERRATA TO NOTICE OF APPEARANCE FOR DEFENDANTS</i></p>
10/26/2020	<p> Clerk's Notice of Hearing</p> <p><i>Notice of Hearing</i></p>
10/27/2020	<p> Proof of Service</p> <p>Filed by: Plaintiff Gonzalez, David A</p> <p><i>Proof of Service - Governor Sisolak</i></p>
11/05/2020	<p> Opposition to Motion to Dismiss</p> <p>Filed By: Plaintiff Gonzalez, David A</p> <p><i>Opposition to Motion to Dismiss Complaint</i></p>
11/12/2020	<p> Reply in Support</p> <p>Filed By: Defendant State of Nevada; Defendant Nevada Department of Conservation and Natural Resources; Defendant Nevada Division of Forestry; Defendant Sisolak, Stephen F.; Defendant Crowell, Bradley; Defendant KC, Kacey</p> <p><i>Reply in Support of Motion to Dismiss Complaint</i></p>
11/17/2020	<p> Media Request and Order</p> <p><i>Media Request and Order</i></p>
11/19/2020	<p> Notice of Appearance</p> <p>Party: Defendant State of Nevada; Defendant Nevada Department of Conservation and Natural Resources; Defendant Nevada Division of Forestry; Defendant Sisolak, Stephen F.; Defendant Crowell, Bradley; Defendant KC, Kacey</p> <p><i>Notice of Appearance</i></p>
02/24/2021	<p> Order of Dismissal</p> <p><i>Order of Dismissal</i></p>
03/11/2021	<p> Notice of Entry of Order for Dismissal With Prejudice</p> <p>Filed By: Defendant State of Nevada; Defendant Nevada Department of Conservation and Natural Resources; Defendant Nevada Division of Forestry; Defendant Sisolak, Stephen F.; Defendant Crowell, Bradley; Defendant KC, Kacey</p> <p><i>NOTICE OF ENTRY OF ORDER OF DISMISSAL</i></p>
04/08/2021	<p> Notice of Appeal</p> <p>Filed By: Plaintiff Gonzalez, David A</p> <p><i>Notice of Appeal</i></p>
04/08/2021	<p> Case Appeal Statement</p> <p>Filed By: Plaintiff Gonzalez, David A</p> <p><i>Plaintiff's Case Appeal Statement</i></p>
04/09/2021	<p> Notice of Posting of Cost Bond</p>

CASE SUMMARY

CASE NO. A-20-820596-C

Filed By: Plaintiff Gonzalez, David A
Plaintiff's Notice of Posting Cost Bond

DISPOSITIONS

02/24/2021

Order of Dismissal With Prejudice (Judicial Officer: Escobar, Adriana)
Debtors: David A Gonzalez (Plaintiff)
Creditors: State of Nevada (Defendant), Nevada Department of Conservation and Natural Resources (Defendant), Nevada Division of Forestry (Defendant), Stephen F. Sisolak (Defendant), Bradley Crowell (Defendant), Kacey KC (Defendant)
Judgment: 02/24/2021, Docketed: 02/25/2021

HEARINGS

01/12/2021



Motion to Dismiss (9:30 AM) (Judicial Officer: Escobar, Adriana)

Defendant's Motion to Dismiss Complaint

Granted With Prejudice;

Journal Entry Details:

Argument by Mr Walsh noting an inmate would not be covered by any statutory framework for unemployment benefits and the statute specifically states that inmates in the Nevada Prison system do not have a cause of action against the state or its officers for federal or state minimum wage. Mr. Lawrence stated he believes Mr. Gonzalez satisfies the Economic Realities Test and they should be able to avoid dismissal. Mr. Ott argued inmates would not meet the definition of employment both under the Economic Realities Test and the Fair Labor Standards Act. COURT STATED IT S FINDINGS AND ORDERED Defendant s Motion to Dismiss Complaint GRANTED WITH PREJUDICE. Court Instructed the State to prepare a detailed and organized order, forward it to Mr. Lawrence to review as to form and substance, and submit it to the Department 14 inbox in Word and PDF format.;

DATE

FINANCIAL INFORMATION

Plaintiff Gonzalez, David A

Total Charges

294.00

Total Payments and Credits

294.00

Balance Due as of 4/12/2021

0.00

DISTRICT COURT CIVIL COVER SHEET

CLARK

County, Nevada

CASE NO: A-20-820596-C

Department 14

Case No. _____

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

David A. Gonzalez

Three Lakes Valley Conservation Camp

P.O. Box 208, Indian Springs, Nevada 89070

Attorney (name/address/phone):

Nathan E. Lawrence, Esq. / Gallian Welker & Beckstrom, L.C.

540 East St. Louis Avenue, Las Vegas, Nevada 89104

Tel: 702-892-3500 / Fax: 702-386-1946

nlawrence@vegascase.com

Defendant(s) (name/address/phone):

State of Nevada

Nevada Dept. of Conservation and Natural Resources

Nevada Division of Forestry

Stephen F. Sisolak, Bradley Crowell, Kacey KC

Attorney (name/address/phone):

Aaron D. Ford, Attorney General

100 North Carson Street

Carson City, Nevada 89701

Tel: 775-400-0340 / Fax: 775-684-1108

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types****Real Property****Landlord/Tenant**☐ Unlawful Detainer☐ Other Landlord/Tenant**Title to Property**☐ Judicial Foreclosure☐ Other Title to Property**Other Real Property**☐ Condemnation/Eminent Domain☐ Other Real Property**Negligence**☐ Auto☐ Premises Liability☐ Other Negligence**Malpractice**☐ Medical/Dental☐ Legal☐ Accounting☐ Other Malpractice**Torts****Other Torts**☐ Product Liability☐ Intentional Misconduct☐ Employment Tort☐ Insurance Tort☐ Other Tort**Probate****Probate** (select case type and estate value)☐ Summary Administration☐ General Administration☐ Special Administration☐ Set Aside☐ Trust/Conservatorship☐ Other Probate**Estate Value**☐ Over \$200,000☐ Between \$100,000 and \$200,000☐ Under \$100,000 or Unknown☐ Under \$2,500**Construction Defect & Contract****Construction Defect**☐ Chapter 40☐ Other Construction Defect**Contract Case**☐ Uniform Commercial Code☐ Building and Construction☐ Insurance Carrier☐ Commercial Instrument☐ Collection of Accounts☐ Employment Contract☐ Other Contract**Judicial Review/Appeal****Judicial Review**☐ Foreclosure Mediation Case☐ Petition to Seal Records☐ Mental Competency**Nevada State Agency Appeal**☐ Department of Motor Vehicle☐ Worker's Compensation☒ Other Nevada State Agency**Appeal Other**☐ Appeal from Lower Court☐ Other Judicial Review/Appeal**Civil Writ****Civil Writ**☐ Writ of Habeas Corpus☐ Writ of Mandamus☐ Writ of Quo Warrant☐ Writ of Prohibition☐ Other Civil Writ**Other Civil Filing****Other Civil Filing**☐ Compromise of Minor's Claim☐ Foreign Judgment☒ Other Civil Matters

Business Court filings should be filed using the Business Court civil cover sheet.

09/02/2020

Date

Signature of initiating party or representative

See other side for family-related case filings.

Heather S. Smith

CLERK OF THE COURT

ORDM
AARON D. FORD
Attorney General
ANTHONY J. WALSH
(Bar No. 14128)
Deputy Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717
Tel: (775) 684-1213
Fax: (775) 684-1108
Email: AJWalsh@ag.nv.gov
Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID A. GONZALEZ, an individual,

Case No.: A-20-820596-C

Plaintiff,

Dept. No.: 14

vs.

STATE OF NEVADA; NEVADA
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES; NEVADA
DIVISION OF FORESTRY; STEPHEN F.
SISOLAK, in his official capacity as
Governor of Nevada; BRADLEY CROWELL;
in his official capacity as Director of Nevada
Department of Conservation and Natural
Resources; and KACEY KC, in her official
capacity as Nevada State Forester
Firewarden; collectively,

Defendants.

ORDER OF DISMISSAL

This matter having come on regularly for hearing before this court on January 12, 2021, at the hour of 9:30 a.m. on Defendants' Motion to Dismiss.

The Court having read and reviewed the papers and pleadings on file herein and considered the arguments of counsel, and finds the following:

The instant Complaint alleges that Plaintiff, David A. Gonzalez, who at all relevant times has been an inmate of the Nevada Department of Corrections ("NDOC"), has participated in a Nevada Division of Forestry ("NDF") work program pursuant to Nevada

1 Revised Statute (“NRS”) 209.457(2)(a). The Complaint seeks relief declaring Plaintiff is
2 entitled to minimum wage compensation under Article 15, Section 16 of the Nevada State
3 Constitution. Defendant’s Motion to Dismiss argues the Plaintiff is not entitled to such
4 relief as he was an inmate and not defined as an employee under Nevada law. As such, the
5 sole issue before this Court is whether inmates in the NDOC and performing work for the
6 NDF pursuant to NRS 209.457(2)(a), are employees as defined by Article 15, Section 16 of
7 the Nevada State Constitution and are thus entitled to minimum wage compensation under
8 Article 15, Section 16 of the Nevada State Constitution.

9 **A. Plaintiff is Not an Employee Under Article 15, Section 16 of The**
10 **Nevada State Constitution**

11 The Nevada Supreme Court in *Terry v. Sapphire Gentlemen’s Club*, 336 P.3d 951,
12 130 Nev. 879 (2014) has adopted an “economic realities” test to determine whether an
13 employment relationship exists between purported employees and employers for claims
14 arising under NRS 608.010. There, the Court found that certain adult performers met the
15 statutory definition of “employee” under NRS 608.250, while also recognizing that NRS 608
16 was superseded by Article 15, Section 16 of the Nevada State Constitution (“Minimum
17 Wage Amendment” or “MWA”), under *Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518,
18 130 Nev. 484 (2014). In *Terry*, the original complaint was brought under NRS 608.250 and
19 not the MWA. Nevertheless, the Court reasoned that both definitions of employee and
20 employer under NRS 608.010, 608.011 and the MWA required a more instructive aid – the
21 federal Fair Labor Standards Act “economic realities” test – to determine the exact
22 relationship between appellant and respondent in harmony with Nevada legislative intent
23 for Nevada minimum wage laws to “run parallel” to federal law, at least in many significant
24 respects. *Terry*, 336 P.3d at 955

25 The Court held:

26 Thus, the Legislature has not clearly signaled its intent that
27 Nevada's minimum wage scheme should deviate from the
28 federally set course, and for the practical reasons examined
above, our state's and federal minimum wage laws should be
harmonious in terms of which workers qualify as employees
under them. We therefore adopt the FLSA's "economic realities"

test for employment in the context of Nevada's minimum wage laws.

Id at 958.

Nevada courts may, therefore, follow federal case law in applying the economic reality test, including an examination of the totality of the circumstances:

Thus, the economic realities test examines the totality of the circumstances and determines whether, as a matter of economic reality, workers depend upon the business to which they render service for the opportunity to work. See *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32-33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961); *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 434 (5th Cir.2013). Given this backdrop, this court has difficulty fathoming a test that would encompass more workers than the economic realities test, short of deciding that all who render service to an industry would qualify, a result that NRS Chapter 608 and our case law specifically negate. See NRS 608.255; *Prieur*, 102 Nev. at 474, 726 P.2d at 1373.

Thus, to the extent that our test could only, from a pragmatic standpoint, seek to be equally as protective as the economic realities test, and having no substantive reason to break with the federal courts on this issue, “judicial efficiency implores us to use the same test as the federal courts” under the FLSA. See *Moore v. Labor & Indus. Review Comm’n*, 175 Wis.2d 561, 499 N.W.2d 288, 292 (Wis.Ct.App.1993) (adopting, for analogous state law purposes, the test used by federal courts to determine whether someone is an employee for the purpose of a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012))

Id. at 956-957.

Defendants argued that the holdings in *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993), *Morgan v. MacDonald*, 41 F.3d 1291 (9th Cir. 1994) and *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992) were determinative. Specifically, “the primary policy concern of the FLSA—ensuring a minimum standard of living for all workers—is simply inapplicable to prisoners ‘for whom clothing, shelter, and food are provided by the prison.’” *Morgan*, 41 F.3d. at 1292. Federal Appellate Courts have consistently found that inmates do not meet the definition of employee under the FLSA. This court agrees and may apply the same test to the MWA under *Terry*.

As here, under *Morgan* and *Hale*, inmates were held to be required to perform work as a condition of their incarceration. See *Morgan*, 41 F.3d. at *Id.* (citing NRS 209.461(1)(b))

as applied to Nevada inmates under the FLSA); *Hale*, 993 F.2d 1387 at 1398. Because *Morgan* examined the economic realities of Nevada inmates, *Morgan* is factually and analytically on point for this court's determination: NRS 209.461(1)(b) still requires, to the extent practicable, Nevada inmates to either receive vocational training or work 40 hours per week as a condition of incarceration, subject to behavioral, medical, or educational exclusions. Further, the NDOC may provide inmates to the NDF under NRS 209.457(3) which allows the NDF to utilize inmates to perform work as specified in the statute, provided that an inmate volunteering for a work program meets certain eligibility requirements under NRS 209.457(2)(a) and NRS 209.4615.

The only Nevada Supreme Court decisions to consider inmate eligibility for minimum wage compensation are *Prieur v. D.C.I. Plasma Ctr.*, 102 Nev. 472, 726 P2d 1372 (1986) and *White v. State*, 454 P.3d 736, 135 Nev. Adv. Op. 67 (2019). However, the Court in *Prieur*, sitting prior to the enactment of the MWA, recognized but did not employ the economic reality test; instead, ultimately finding that no employment relationship existed between Nevada inmates and a private company because the State and the company were the sole contracting parties. See *Prieur*, 726 P2d 1372 at 1373. Similarly, *White* was decided on other workers' compensation grounds. See *White*, 454 P.3d at 739-40. Nevertheless, the Court in *Prieur* signaled that it was open to examining the economic realities of incarceration in terms of employment. See *Prieur*, 726 P2d 1372 at *Id.* *Prieur* can therefore be read consistently with *Terry*, which was decided after the enactment of the MWA and which specifically applied the economic realities test to both Nevada law and the FLSA. See *Terry*, 336 P.3d at 955-957. As such, this court may examine the economic realities of Nevada inmates to determine whether an employment relationship exists.

Under the totality of the circumstances, factors and policies analyzed in *Terry*, *Hale*, *Morgan* and *Vanskike*, it is this court's finding, parallel to and consistent with federal law, that the purpose of any minimum wage law is to prevent members of the general public from falling into substandard living conditions. The economic realities of incarceration are distinct and separate from those faced by the general public because inmates are

1 guaranteed housing, meals, medical attention and are able to participate in work programs
2 under NRS 209.457(2)(a) and in exchange for sentence reduction credits under NRS
3 209.449. The reality of incarceration is further not based on a pecuniary relationship
4 between inmates and the state. Therefore, there is no employment relationship between
5 inmates and the state.

6 Based on the foregoing, this court finds that inmates in Nevada do not meet the
7 definition of employee under Nevada's Minimum Wage Amendment.

8 **B. Article 15, Section 16 of the Nevada State Constitution Does Not**
9 **Impliedly Repeal NRS 209.461(8)**

10 Defendants assert that NRS 209.461(8) establishes that there is no right to
11 minimum wage compensation for inmates. Plaintiff has argued that the MWA impliedly
12 repealed NRS 209.461(8). Plaintiff relies on *Thomas v. Nevada Yellow Cab Corp* (citation
13 supra), in which a taxi-driver exception to Nevada's Wage and Hour Law was held to be
14 impliedly repealed by the later enactment of the MWA, precisely because taxi-drivers were
15 not explicitly exempted under the MWA.

16 This court finds that *Thomas* is distinguishable from the case at hand and therefore
17 inapplicable. NRS 209.461(8) does not create a constitutionally conflicting exemption from
18 the MWA in the same way as the taxi driver exemption examined in *Thomas*. Here, NRS
19 209.461(8) simply bars a minimum wage cause of action for inmates arising pursuant to
20 the provisions of NRS Chapter 209 and does not expressly create an exemption for those
21 who would otherwise be classified as employees under the MWA. Based on the totality of
22 the circumstances and policies examined in *Terry*, *Hale*, *Morgan*, and *Vanskike*, inmates
23 do not have the same employee-employer relationship characteristics as taxi drivers and
24 their employers.

25 Based on the foregoing, this court finds that NRS 209.461(8) is not in conflict with,
26 nor impliedly repealed by the MWA.

27 ///

28 ///

Pursuant to Nevada Rule of Civil Procedure (“NRC P”) 12(b)(5), Plaintiff’s Complaint fails to state a claim upon which relief can be granted because Plaintiff’s claim for minimum wage compensation is explicitly barred by NRS 209.461(8). NRS 209.461(8) states: “The provisions of this chapter do not create a right on behalf of the offender to employment or to receive the federal or state minimum wage for any employment and do not establish a basis for any cause of action against the State or its officers or employees for employment of an offender or for payment of the federal or state minimum wage to an offender.” As such, Plaintiff is not an employee, and has no claims for which relief can be granted.

DATED: 9. 29. 2008

Q. Emdin

AA8 9E3 90C8 907F
Adriana Escobar
District Court Judge

/s/ Anthony J. Walsh
ANTHONY WALSH (Bar No. 14128)
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701-4717
Tel: (775) 684-1213
Fax: (775) 684-1108
Email: AJWalsh@ag.nv.gov

Page 6 of 6

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 David Gonzalez, Plaintiff(s)

CASE NO: A-20-820596-C

7 vs.

DEPT. NO. Department 14

8 State of Nevada, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

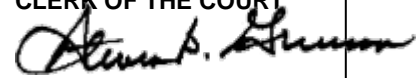
14 Service Date: 2/24/2021

15 Nathan Lawrence

nlawrence@vegascase.com

16 Anthony Walsh

AJWalsh@ag.nv.gov



NEOJ
AARON D. FORD
Attorney General
ANTHONY J. WALSH
(Bar No. 14128)
Deputy Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717
Tel: (775) 684-1213
Fax: (775) 684-1108
Email: AJWalsh@ag.nv.gov
Attorneys for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

DAVID A. GONZALEZ, an individual,

Plaintiff,

vs.

STATE OF NEVADA; NEVADA
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES; NEVADA
DIVISION OF FORESTRY; STEPHEN F.
SISOLAK, in his official capacity as
Governor of Nevada; BRADLEY CROWELL;
in his official capacity as Director of Nevada
Department of Conservation and Natural
Resources; and KACEY KC, in her official
capacity as Nevada State Forester
Firewarden; collectively,

Defendants.

Case No.: A-20-820596-C

Dept. No.: 14

NOTICE OF ENTRY OF ORDER OF DISMISSAL

PLEASE TAKE NOTICE that an Order of Dismissal was entered in the above-entitled matter on the 24th day of February, 2021, a copy of said Order is attached hereto as Exhibit "A".

DATED this 11th day of March, 2021.

AARON D. FORD
Attorney General

By: /s/ Anthony Walsh
ANTHONY WALSH
Deputy Attorney General
Attorney for Defendant

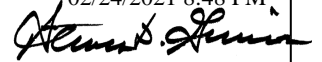
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Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Page 2 of 2

Exhibit A

Exhibit A


CLERK OF THE COURT

ORDM
AARON D. FORD
Attorney General
ANTHONY J. WALSH
(Bar No. 14128)
Deputy Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717
Tel: (775) 684-1213
Fax: (775) 684-1108
Email: AJWalsh@ag.nv.gov
Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID A. GONZALEZ, an individual,

Case No.: A-20-820596-C

Plaintiff,

Dept. No.: 14

vs.

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NATURAL RESOURCES; NEVADA
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Firewarden; collectively,

Defendants.

ORDER OF DISMISSAL

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The Court having read and reviewed the papers and pleadings on file herein and considered the arguments of counsel, and finds the following:

The instant Complaint alleges that Plaintiff, David A. Gonzalez, who at all relevant times has been an inmate of the Nevada Department of Corrections ("NDOC"), has participated in a Nevada Division of Forestry ("NDF") work program pursuant to Nevada

1 Revised Statute (“NRS”) 209.457(2)(a). The Complaint seeks relief declaring Plaintiff is
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6 NDF pursuant to NRS 209.457(2)(a), are employees as defined by Article 15, Section 16 of
7 the Nevada State Constitution and are thus entitled to minimum wage compensation under
8 Article 15, Section 16 of the Nevada State Constitution.

9 **A. Plaintiff is Not an Employee Under Article 15, Section 16 of The**
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11 The Nevada Supreme Court in *Terry v. Sapphire Gentlemen’s Club*, 336 P.3d 951,
12 130 Nev. 879 (2014) has adopted an “economic realities” test to determine whether an
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22 relationship between appellant and respondent in harmony with Nevada legislative intent
23 for Nevada minimum wage laws to “run parallel” to federal law, at least in many significant
24 respects. *Terry*, 336 P.3d at 955

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26 Thus, the Legislature has not clearly signaled its intent that
27 Nevada's minimum wage scheme should deviate from the
28 federally set course, and for the practical reasons examined
above, our state's and federal minimum wage laws should be
harmonious in terms of which workers qualify as employees
under them. We therefore adopt the FLSA's "economic realities"

test for employment in the context of Nevada's minimum wage laws.

Id at 958.

Nevada courts may, therefore, follow federal case law in applying the economic reality test, including an examination of the totality of the circumstances:

Thus, the economic realities test examines the totality of the circumstances and determines whether, as a matter of economic reality, workers depend upon the business to which they render service for the opportunity to work. See *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32-33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961); *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 434 (5th Cir.2013). Given this backdrop, this court has difficulty fathoming a test that would encompass more workers than the economic realities test, short of deciding that all who render service to an industry would qualify, a result that NRS Chapter 608 and our case law specifically negate. See NRS 608.255; *Prieur*, 102 Nev. at 474, 726 P.2d at 1373.

Thus, to the extent that our test could only, from a pragmatic standpoint, seek to be equally as protective as the economic realities test, and having no substantive reason to break with the federal courts on this issue, “judicial efficiency implores us to use the same test as the federal courts” under the FLSA. See *Moore v. Labor & Indus. Review Comm’n*, 175 Wis.2d 561, 499 N.W.2d 288, 292 (Wis.Ct.App.1993) (adopting, for analogous state law purposes, the test used by federal courts to determine whether someone is an employee for the purpose of a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012))

Id. at 956-957.

Defendants argued that the holdings in *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993), *Morgan v. MacDonald*, 41 F.3d 1291 (9th Cir. 1994) and *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992) were determinative. Specifically, “the primary policy concern of the FLSA—ensuring a minimum standard of living for all workers—is simply inapplicable to prisoners ‘for whom clothing, shelter, and food are provided by the prison.’” *Morgan*, 41 F.3d. at 1292. Federal Appellate Courts have consistently found that inmates do not meet the definition of employee under the FLSA. This court agrees and may apply the same test to the MWA under *Terry*.

As here, under *Morgan* and *Hale*, inmates were held to be required to perform work as a condition of their incarceration. See *Morgan*, 41 F.3d. at *Id.* (citing NRS 209.461(1)(b))

as applied to Nevada inmates under the FLSA); *Hale*, 993 F.2d 1387 at 1398. Because *Morgan* examined the economic realities of Nevada inmates, *Morgan* is factually and analytically on point for this court's determination: NRS 209.461(1)(b) still requires, to the extent practicable, Nevada inmates to either receive vocational training or work 40 hours per week as a condition of incarceration, subject to behavioral, medical, or educational exclusions. Further, the NDOC may provide inmates to the NDF under NRS 209.457(3) which allows the NDF to utilize inmates to perform work as specified in the statute, provided that an inmate volunteering for a work program meets certain eligibility requirements under NRS 209.457(2)(a) and NRS 209.4615.

The only Nevada Supreme Court decisions to consider inmate eligibility for minimum wage compensation are *Prieur v. D.C.I. Plasma Ctr.*, 102 Nev. 472, 726 P2d 1372 (1986) and *White v. State*, 454 P.3d 736, 135 Nev. Adv. Op. 67 (2019). However, the Court in *Prieur*, sitting prior to the enactment of the MWA, recognized but did not employ the economic reality test; instead, ultimately finding that no employment relationship existed between Nevada inmates and a private company because the State and the company were the sole contracting parties. See *Prieur*, 726 P2d 1372 at 1373. Similarly, *White* was decided on other workers' compensation grounds. See *White*, 454 P.3d at 739-40. Nevertheless, the Court in *Prieur* signaled that it was open to examining the economic realities of incarceration in terms of employment. See *Prieur*, 726 P2d 1372 at *Id.* *Prieur* can therefore be read consistently with *Terry*, which was decided after the enactment of the MWA and which specifically applied the economic realities test to both Nevada law and the FLSA. See *Terry*, 336 P.3d at 955-957. As such, this court may examine the economic realities of Nevada inmates to determine whether an employment relationship exists.

Under the totality of the circumstances, factors and policies analyzed in *Terry*, *Hale*, *Morgan* and *Vanskike*, it is this court's finding, parallel to and consistent with federal law, that the purpose of any minimum wage law is to prevent members of the general public from falling into substandard living conditions. The economic realities of incarceration are distinct and separate from those faced by the general public because inmates are

1 guaranteed housing, meals, medical attention and are able to participate in work programs
2 under NRS 209.457(2)(a) and in exchange for sentence reduction credits under NRS
3 209.449. The reality of incarceration is further not based on a pecuniary relationship
4 between inmates and the state. Therefore, there is no employment relationship between
5 inmates and the state.

6 Based on the foregoing, this court finds that inmates in Nevada do not meet the
7 definition of employee under Nevada's Minimum Wage Amendment.

8 **B. Article 15, Section 16 of the Nevada State Constitution Does Not**
9 **Impliedly Repeal NRS 209.461(8)**

10 Defendants assert that NRS 209.461(8) establishes that there is no right to
11 minimum wage compensation for inmates. Plaintiff has argued that the MWA impliedly
12 repealed NRS 209.461(8). Plaintiff relies on *Thomas v. Nevada Yellow Cab Corp* (citation
13 supra), in which a taxi-driver exception to Nevada's Wage and Hour Law was held to be
14 impliedly repealed by the later enactment of the MWA, precisely because taxi-drivers were
15 not explicitly exempted under the MWA.

16 This court finds that *Thomas* is distinguishable from the case at hand and therefore
17 inapplicable. NRS 209.461(8) does not create a constitutionally conflicting exemption from
18 the MWA in the same way as the taxi driver exemption examined in *Thomas*. Here, NRS
19 209.461(8) simply bars a minimum wage cause of action for inmates arising pursuant to
20 the provisions of NRS Chapter 209 and does not expressly create an exemption for those
21 who would otherwise be classified as employees under the MWA. Based on the totality of
22 the circumstances and policies examined in *Terry*, *Hale*, *Morgan*, and *Vanskike*, inmates
23 do not have the same employee-employer relationship characteristics as taxi drivers and
24 their employers.

25 Based on the foregoing, this court finds that NRS 209.461(8) is not in conflict with,
26 nor impliedly repealed by the MWA.

27 ///

28 ///

1 **C. Plaintiff's Complaint Fails to State a Claim Upon Which Relief Can**
2 **Be Granted**

3 Pursuant to Nevada Rule of Civil Procedure ("NRCF") 12(b)(5), Plaintiff's Complaint
4 fails to state a claim upon which relief can be granted because Plaintiff's claim for minimum
5 wage compensation is explicitly barred by NRS 209.461(8). NRS 209.461(8) states: "The
6 provisions of this chapter do not create a right on behalf of the offender to employment or
7 to receive the federal or state minimum wage for any employment and do not establish a
8 basis for any cause of action against the State or its officers or employees for employment
9 of an offender or for payment of the federal or state minimum wage to an offender." As
10 such, Plaintiff is not an employee, and has no claims for which relief can be granted.

11 Based thereon, IT IS HEREBY ORDERED that Plaintiff's Complaint be and is
12 hereby dismissed with prejudice.

13 DATED: *A. Escobar*

 Dated this 24th day of February, 2021

 A. Escobar

 DISTRICT COURT JUDGE

 AA8 9E3 90C8 907F
 Adriana Escobar
 District Court Judge

17 Respectfully submitted by:

18 AARON D. FORD
19 Attorney General

20 /s/ Anthony J. Walsh
21 ANTHONY WALSH (Bar No. 14128)
22 Deputy Attorney General
23 100 North Carson Street
24 Carson City, NV 89701-4717
25 Tel: (775) 684-1213
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27 Email: AJWalsh@ag.nv.gov

28 *Attorneys for Defendants*

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 David Gonzalez, Plaintiff(s)

CASE NO: A-20-820596-C

7 vs.

DEPT. NO. Department 14

8 State of Nevada, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 2/24/2021

15 Nathan Lawrence

nlawrence@vegascase.com

16 Anthony Walsh

AJWalsh@ag.nv.gov

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Civil Matters

COURT MINUTES

January 12, 2021

A-20-820596-C	David Gonzalez, Plaintiff(s)
	vs.
	State of Nevada, Defendant(s)

January 12, 2021 9:30 AM Motion to Dismiss

HEARD BY: Escobar, Adriana **COURTROOM:** RJC Courtroom 14C

COURT CLERK: Michelle Jones

RECORDER: Jill Jacoby

REPORTER:

PARTIES

PRESENT:	Lawrence, Nathan Edward	Attorney
	Ott, Gregory D.	Attorney
	Walsh, Anthony J.A.	Attorney

JOURNAL ENTRIES

- Argument by Mr Walsh noting an inmate would not be covered by any statutory framework for unemployment benefits and the statute specifically states that inmates in the Nevada Prison system do not have a cause of action against the state or its officers for federal or state minimum wage. Mr. Lawrence stated he believes Mr. Gonzalez satisfies the Economic Realities Test and they should be able to avoid dismissal. Mr. Ott argued inmates would not meet the definition of employment both under the Economic Realities Test and the Fair Labor Standards Act. COURT STATED IT S FINDINGS AND ORDERED Defendant s Motion to Dismiss Complaint GRANTED WITH PREJUDICE. Court Instructed the State to prepare a detailed and organized order, forward it to Mr. Lawrence to review as to form and substance, and submit it to the Department 14 inbox in Word and PDF format.



EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE
NOTICE OF DEFICIENCY
ON APPEAL TO NEVADA SUPREME COURT

NATHAN E. LAWRENCE, ESQ.
540 E. ST. LOUIS AVE.
LAS VEGAS, NV 89104

DATE: April 12, 2021
CASE: A-20-820596-C

RE CASE: DAVID A. GONZALEZ vs. STATE OF NEVADA; NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES; NEVADA DIVISION OF FORESTRY; STEPHEN F. SISOLAK; BRADLEY CROWELL; KACEY KC

NOTICE OF APPEAL FILED: April 8, 2021

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS **NOT** TRANSMITTED HAVE BEEN MARKED:

- ☒ \$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
 - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ \$24 – District Court Filing Fee (Make Check Payable to the District Court)**
- ☒ \$500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
 - NRAP 7: Bond For Costs On Appeal in Civil Cases
 - *Previously paid Bonds are not transferable between appeals without an order of the District Court.*
- ☐ Case Appeal Statement
 - NRAP 3 (a)(1), Form 2
- ☐ Order
- ☐ Notice of Entry of Order

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. **The district court clerk shall apprise appellant of the deficiencies in writing**, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (g) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

***Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.*

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; NOTICE OF POSTING
COST BOND; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; ORDER OF
DISMISSAL; NOTICE OF ENTRY OF ORDER OF DISMISSAL; DISTRICT COURT MINUTES;
NOTICE OF DEFICIENCY

DAVID A. GONZALEZ,

Plaintiff(s),

vs.

STATE OF NEVADA; NEVADA
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES; NEVADA
DIVISION OF FORESTRY; STEPHEN F.
SISOLAK; BRADLEY CROWELL; KACEY
KC,

Defendant(s),


Case No: A-20-820596-C

Dept No: XIV

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 12 day of April 2021.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk