No. 82762

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID A. GONZALEZ, an individual,

Appellant,

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,

Respondent.

On Appeal from the Eighth Judicial
District Court of the State of Nevada
Case No. A-20-820596-C

RESPONDENT'S APPENDIX

Respectfully Submitted By:
AARON FORD
Attorney General

By: /s/ Anthony J. Walsh

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List of Exhibits

	Description	Pages
1.	Notice of Entry of Order of Dismissal – Filed March 11, 2021	10

Exhibit 1

Exhibit 1

NEOJ
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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

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 11th day of March, 2021, I electronically filed the foregoing document, **NOTICE OF ENTRY ORDER OF DISMISSAL**, with the Clerk of the Court by using the CM/ECF system.

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

/s/ *Kristalei Wolfe*
Kristalei Wolfe
State of Nevada,
Office of the Attorney General

Exhibit A

Exhibit A

ELECTRONICALLY SERVED
2/24/2021 8:48 PM

Electronically Filed
02/24/2021 8:48 PM
CLERK OF THE COURT

ORDM
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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

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

Case Number: A-20-820596-C

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

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

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

The Court held:

> Thus, the Legislature has not clearly signaled its intent that Nevada's minimum wage scheme should deviate from the 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

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

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

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

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

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

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

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/ / /

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

Pursuant to Nevada Rule of Civil Procedure ("NRCP") 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, Plaintiffs is not an employee, and has no claims for which relief can be granted.

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

DATED: _____

Dated this 24th day of February, 2021

_____

DISTRICT COURT JUDGE

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

Respectfully submitted by:

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

David Gonzalez, Plaintiff(s)	CASE NO: A-20-820596-C
vs.	DEPT. NO. Department 14
State of Nevada, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 2/24/2021

Nathan Lawrence	nlawrence@vegascase.com
Anthony Walsh	AJWalsh@ag.nv.gov