

Exotic Dancer Settles Wage Suit Against NJ Nightclub

Law360 (March 12, 2018, 9:52 PM EDT) -- An adult nightclub has reached a nearly \$96,000 settlement with an exotic dancer in her putative collective and class action over unpaid wages, almost seven months after she won a precedential Third Circuit ruling that revived the matter, according to the club's counsel in a New Jersey federal court filing on Monday.

In a letter to U.S. Magistrate Judge Leda D. Wettre, John H. Schmidt Jr. of [Lindabury McCormick Estabrook & Cooper PC](#), an attorney representing Breathless Inc., noted that plaintiff Alissa Moon's lawsuit was “amicably settled by the parties.”

“As this matter arises under the Fair Labor Standards Act, the settlement is being submitted for the court's approval,” Schmidt wrote.

Under the settlement agreement attached to Schmidt's letter, the \$95,933.32 payment from Breathless would cover all of Moon's claims, including “claims for lost wages, emotional stress and other irreparable harm resulting from the strain of this controversy, and attorney's fees.”

Schmidt could not immediately be reached for comment on Monday.

Moon's attorney, Jeremy E. Abay of [Sacks Weston Diamond LLC](#), told Law360 on Monday in an email, “This is an excellent result for Ms. Moon's individual claims. We believe the payment amount is commensurate with Ms. Moon's efforts in obtaining a precedential ruling from the Third Circuit.”

Moon performed as a dancer at the “Breathless Men's Club” in Rahway from May 2013 to about September 2015, court documents state. She filed the lawsuit in August 2015.

Moon alleged the business misclassified her and other dancers as independent contractors and thus violated the federal Fair Labor Standards Act and New Jersey's Wage Payment Law and Wage and Hour Law “by failing to pay minimum and overtime wages; unemployment, disability and social security taxes; as well as 'workers' compensation premiums and other mandatory insurance benefits,’” court documents state.

In January 2015, Moon had signed an “Independent Dancer Rental Agreement,” which stated that she is an independent contractor and not a Breathless employee, according to court documents. An arbitration provision in the agreement said that Moon and the club each waived their litigation rights and that they may request to resolve disputes by binding arbitration, court documents state.

U.S. District Judge Susan D. Wigenton, in July 2016, granted a summary judgment motion from Breathless to dismiss Moon's lawsuit, rejecting her arguments that the arbitration provision is invalid and that her claims are outside its scope.

“Moreover, the arbitration provision explains and sets out in capital letters that, under the terms of the provision, plaintiff waived her litigation rights,” Judge Wigenton said in a written opinion. “As a result, there is no genuine dispute as to whether plaintiff’s claims fall within the scope of the arbitration provision.”

Moon had asserted that the agreement is void, because it misclassifies her as an independent contractor, but the judge said “challenges to the legality of an agreement that contains an arbitration provision, as opposed to challenges to the arbitration provision itself, are decided by the arbitrator.”

Moon claimed the agreement and the provision were not supported by “sufficient consideration” — referring to what she received under the deal — because she only performed at the club for eight months on a part-time basis after signing the agreement, but Judge Wigenton found Moon’s continued ability to perform was sufficient consideration.

Moon also asserted the overall agreement is “substantively unconscionable,” because of one-sided terms that benefit Breathless, including those within the arbitration provision.

Judge Wigenton said the question of whether the agreement as a whole is unconscionable is for an arbitrator to decide, but the judge refuted Moon’s claim that the arbitration provision is one-sided, since she and the club are both bound by its terms.

But in a precedential opinion handed down last August, a Third Circuit panel overturned the judge’s decision.

In reversing the ruling, the appellate court analyzed three New Jersey Supreme Court rulings addressing arbitration clauses: *Garfinkel v. Morristown Obstetrics & Gynecology Associates* in 2001, *Martindale v. Sandvik Inc.* in 2002 and *Atalese v. U.S. Legal Services Group* in 2014. The panel found guidance in *Atalese* and *Garfinkel*, in which the state justices found that the quoted language made the arbitration clauses applicable only to contract claims. The *Martindale* case didn’t apply, the panel said, because that clause had no limiting language.

“Because the arbitration clause here resembles the arbitration clauses in *Garfinkel* and *Atalese*, and because the Supreme Court of New Jersey found that the arbitration clauses in *Garfinkel* and *Atalese* only applied to contract disputes, we hold that the arbitration clause here does not cover Moon’s statutory claims,” the panel said.

Moon is represented by Jeremy E. Abay of Sacks Weston Diamond LLC.

Breathless is represented by John H. Schmidt Jr. of Lindabury McCormick Estabrook & Cooper PC.

The case is *Alissa Moon v. Breathless Inc.*, case number [2:15-cv-06297](#), in the U.S. District Court for the District of New Jersey.

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