Supreme Court of New Jersey

DOCKET NO. 089632

SERGIO LOPEZ,

Plaintiff-Petitioner,

—against—

MARMIC LLC, and MIKE RUANE, individually,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION FROM AN ORDER OF THE SUPERIOR COURT

APPELLATE DIVISION DOCKET NO. A-002391-22

SAT BELOW: HON. ROBERT HEYS GARDNER J.S.C.

PETITION FOR CERTIFICATION

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STATEMENT OF THE MATTER INVOLVED

In this wage and hour action brought pursuant to the New Jersey Wage and Hour Law ("NJWHL") and the New Jersey Wage Payment Law ("NJWPL"), Plaintiff-Petitioner Sergio Lopez ("Petitioner") petitions for review of the Appellate Division's affirmance of the Superior Court's post-bench trial dismissal of his claims against his former employers, Defendants-Respondents Marmic LLC ("Marmic") and Mike Ruane, individually (together as "Respondents"), due to the trial court's: (i) unprecedented decision to consider Petitioner's immigration status in determining whether Respondents owed him unpaid overtime and other statutory wages for time actually spent working; and (ii) acceptance of the existence of a "barter arrangement" as being something other than an employer-employee relationship that requires the payment of wages under New Jersey law. This Court's review is compelled to correct the Appellate Division's egregious legal errors that allowed undue prejudice against Petitioner on the basis of his immigration status and allowed Respondents to entirely escape liability by the creation of, what would be, if permitted to stand, an unprecedented loophole to New Jersey's wage and hour laws.

In his underlying Complaint, Petitioner, who worked for Respondents — a New Jersey residential and commercial realty management limited liability company and its owner — as a superintendent from June 15, 2015, through

December 3, 2018, in Newark, New Jersey, pursued claims for Respondents' violations of: (i) the overtime provisions of the NJWHL, N.J.S.A., 34:11-56a4; (ii) the minimum wage provisions of the NJWHL, N.J.S.A., 34:11-56a4; and (iii) the full payment provisions of the NJWPL, N.J.S.A., 34:11-4.2. See App2-3.[1] As was adduced at trial, Petitioner alleged, and proved, that Respondents, both of whom were his undisputed employers within the meaning of those statutes, failed to compensate Petitioner at his agreed upon $400.00 weekly salary after the second week of his employment, and only compensated him with an apartment and utilities for the remainder of his employment thereafter, thereby failing to pay Petitioner at least at the applicable minimum wage rate or his agreed upon wage for all hours worked, or at the applicable overtime rate for the many hours that he worked in excess of forty each week.

Following the bench trial and post-trial briefing, the trial court dismissed all of Petitioner's claims for several erroneous reasons, including, as is relevant on this Petition, that: (i) Petitioner was not credible due to testimony, to which he objected, concerning his W-4 form and his undocumented status (App49); and (ii) Petitioner accepted a "barter arrangement" to continue to work for Respondents without pay, which the trial court implicitly held is legally distinct

[1] "App," as used herein, refers to the Appendix to this Petition, followed by the relevant page numbers.

from employment under New Jersey law and thereby does not require the payment of otherwise statutorily-due wages (App36-37). Accordingly, on appeal to the Appellate Division, Petitioner argued, *inter alia*, that: (i) the trial court should not have admitted evidence concerning, or even considered, Petitioner's immigration status or his W-4, which were plainly irrelevant to Petitioner's claims for unpaid wages or to his credibility more generally (App24-26); and (ii) the "barter arrangement" described by the trial court is legally commensurate to employment, thereby requiring the payment of wages in accordance with the applicable statutes (App27-29).

More specifically, the Appellate Division's first error was its affirmance of the lower court's decision to consider Petitioner's undocumented status. Although New Jersey Courts have not explicitly addressed the relevance of an individual's undocumented status in relation to claims brought under the NJWHL and NJWPL in a published decision,[2] this Court, as well as judges in

[2] The Appellate Division had previously addressed this issue in an unpublished opinion, Serrano v. Underground Utilities Corp., wherein it stated that while "New Jersey courts to date have not addressed these specific issues in a published decision, a number of cases from other states and the federal courts have disclosed certain immigration-related discovery requests in civil litigation to be irrelevant and unduly prejudicial," and concluded that even in the case where plaintiffs' immigration status were not barred by Rule 403, that "the texts of Evidence Rules 607 and 608, the associated commentary from the Supreme Court Committee, and related case law, operate to prohibit defendants from

the United States District Court for the District of New Jersey, have recognized the similarity between those statutes and the Fair Labor Standards Act ("FLSA"). See Hargrove v. Sleepy's, LLC, 220 N.J. 289, 313 (2015) ("Like FLSA, the WPL and WHL address the most fundamental terms of the employment relationship."); Morales v. Aqua Pazza LLC, No. 20-6690, 2022 WL 1718050, at *3 (D.N.J. May 27, 2022) ("The NJWHL is interpreted similarly to the FLSA and provides a parallel cause of action for nonpayment of New Jersey's state minimum wage or overtime compensation."); Colosimo v. Flagship Resort Dev. Corp., No. 17-3969, 2021 WL 1207484, at *1 (D.N.J. Mar. 31, 2021) (quoting Brunozzi v. Crossmark, Inc., No. 13-4585, 2016 WL 112455, at *5 (D.N.J. Jan. 11, 2016) and Hargrove, 220 N.J. 289, at 313) ("The Supreme Court of New Jersey has recognized the similarity between the statutes, adding that '[s]tatutes addressing similar concerns should resolve similar issues ... by

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using prior false statements by plaintiffs about their immigration status as specific instances of past untruthful conduct in order to show a general character trait of dishonesty." 407 N.J. Super. 253, 278 (App. Div. 2009); see also Gold Medal Bakery, Inc. v. Super Bread II Corp., No. A-0907-13T2, 2014 WL 2117846, at *3 (N.J. Super. Ct. App. Div. May 21, 2014) (quoting Serrano, 407 N.J. Super. at 286) ("permitting discovery into an individual's immigration status is 'fraught with the potential for undue prejudice' and should not be permitted absent a meaningful nexus ... to overcome the obvious prejudice that will follow from such inquiry.") (internal quotations omitted). The Appellate Division here brushed those cases off because they were unpublished. App25; id., at fn.4.

the same standard.'"). And as to claims for unpaid wages under the FLSA, courts have routinely held that an individual's undocumented status is irrelevant to his/her unpaid wage claims for time spent working, as opposed to a claim for back pay for time not actually spent working. Compare Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 325 (D.N.J. 2005), aff'd, 691 F.3d 527 (3d Cir. 2012) ("Only after concluding that undocumented workers were covered by the FLSA could courts then determine, as they have, that the immigration status of the plaintiffs was non-relevant information, and ultimately, that the employer defendants in FLSA actions were not entitled to discovery of the employees' immigration status."); In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987) ("It is well established that the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant."); Walsh v. Fusion Japanese Steakhouse, Inc., 585 F. Supp. 3d 766, 790–91 (W.D. Pa. 2022) ("District courts have consistently found that immigration status is irrelevant during FLSA litigation." (collecting cases); Rosas v. Alice's Tea Cup, LLC, 127 F. Supp. 3d 4, 11 (S.D.N.Y. 2015) ("Even if evidence regarding immigration status were relevant, the risk of injury to the plaintiffs if such information were disclosed outweighs the need for its disclosure because of the danger of intimidation and of undermining the purposes of the FLSA.") Colon v. Major Perry St. Corp., 987 F. Supp. 2d 451,

459 (S.D.N.Y. 2013) (finding immigration status irrelevant to both FLSA and New York Labor Law claims); Francois v. Mazer, No. 09-CV-3275, 2012 WL 1506054, at *1 (S.D.N.Y. April 24, 2012) ("This Court finds that evidence of immigration status is irrelevant and therefore not admissible regarding any issue with respect to any [FLSA or] New York state law claim."); with Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 150 (2002) (determining that immigration status is relevant in cases claiming back pay for time not actually spent working, i.e. for lost wage following from an unlawful termination). As Petitioner's claim here concerns non-payment of wages for time that he worked, it was legal error for the lower court to admit this as evidence, and even worse to rely on it in making credibility decisions.

Second, the Appellate Division egregiously erred in affirming the trial court's unprecedented existence of a "barter arrangement" in lieu of employment, finding that because Respondents determined that they could not legally pay Plaintiff due to his immigration status, that instead, Petitioner performed work for Respondents in exchange for the receipt of his monthly rent and utility payments. See App27. This does nothing short of rewriting the relevant statutes. More specifically, and as stated in Petitioner's Appellate Brief, the NJWHL defines "employer" to include "any person . . . acting directly or indirectly in the interest of an employer in relation to an employee." N.J.S.A.

34:11-56a1(g). Similarly, the NJWPL defines an "employer" as "any individual . . . corporation . . . or successor of any of the same, employing any person in this State," and an "employee" as "any person suffered or permitted to work by an employer, except that independent contractors and subcontractors shall not be considered employees." N.J.S.A. 34:11–4.1(a)-(b). Thus, as it remains uncontested that Petitioner performed work for Respondents' benefit and otherwise meets the elements to qualify him as Respondents' employee from June 15, 2015, through December 3, 2018, the Appellate Division's decision is plainly contrary to New Jersey law. See App40 (confirming that "Plaintiff was relieved of his position in December of '18").

QUESTIONS PRESENTED

1) Whether the Appellate Division erred by determining that Petitioner's immigration status was relevant in determining whether an employer owes wages for time actually spent working under the NJWHL and the NJWPL?
2) Can a "barter arrangement," where an individual works in exchange for compensation and would otherwise qualify as an employee, exist in lieu of or as legally distinct from an employer-employee relationship under New Jersey law?

ERRORS COMPLAINED OF

1. The Appellate Division erred in affirming the trial court's admission and consideration of Petitioner's immigration status in determining Petitioner's credibility and whether Respondents owed him unpaid overtime and other wages for time that he actually spent working.
2. The Appellate Division erroneously concluded that Petitioner worked for Respondents under a "barter arrangement" instead of determining that an employer-employee relationship existed, in direct contravention of New Jersey law.

REASONS WHY CERTIFICATION SHOULD BE GRANTED

This petition satisfies R. 2:12-4 for certification as it presents questions of great public importance that affect the welfare, not only of New Jersey's undocumented immigrant population, but New Jersey's entire populace by way of enforcement of principles long recognized to play an important role in discouraging illegal immigration. Moreover, this matter presents questions that have not been previously addressed in this State in a published decision.

As this Court stated in its discussion concerning the Immigration Reform and Control Act and the country's implementation of sanctions for employers who benefited from the use and abuse of undocumented farmworkers in Brambila v. Bd. of Rev., New Jersey Dep't of Lab. & Indus., "Congress was

also mindful that prior immigration laws that had exempted farmworkers from state and federal wage, working condition, and labor laws had led to a system of indentured slavery where employer exploitation was rampant and inhumane." Brambila, 124 N.J. 425, 433 (1991) (internal citations and quotations omitted); see also Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988) (stating that the enforcement of wage laws, specifically the FLSA, goes "hand in hand with the IRCA," because "Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens.").

Indeed, at issue in the present case is the Appellate Division's decision that affirmed the trial court's admission into evidence and subsequent consideration of Petitioner's undocumented status in his claims for unpaid wages where, despite being entirely irrelevant, it was used, *inter alia*, to determine that he was not credible, thereby undermining his entire case. Moreover, as discussed in greater detail below, the Appellate Division's affirmance of the admissibility of Petitioner's undocumented status creates the risk of a widely recognized "chilling effect" that discourages litigants from attempting to vindicate their legal interests purely by nature of their immigration status, thereby encouraging employers to hire more undocumented workers who they then will not have to pay pursuant to the applicable statutes.

Additionally, the Appellate Division's affirmance of the existence of a "barter arrangement" being anything other than an employer-employee relationship openly endorses the exact abuse and exploitation that Congress and this State have determined is against public policy, as it allowed for Respondents to escape all liability under the NJWHL and NJWPL by nature of Petitioner's undocumented status. The NJWHL is "designed to protect employees from unfair wages and excessive hours," and Petitioner submits that the interests of justice require this Court's review to make clear that those protections extend to documented and undocumented individuals alike. Hargrove, 220 N.J. 289 at 304.

COMMENTS ON THE APPELLATE DIVISION DECISION

I. The Appellate Division erred in its determination that Petitioner's immigration status, in any context, was relevant to his claims and not unduly prejudicial.

Petitioner submits that the Appellate Division erred because his undocumented status was not relevant to his wage claims under R. 401, and even if it were, evidence of his undocumented status should have been entirely precluded under R. 403, regardless of whether a bench trial took place.

"'Relevant evidence' means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. As stated above, both New Jersey and federal courts have

routinely held, albeit sometimes in unpublished decisions, that an employee's immigration status is irrelevant — and not even *discoverable* — to a claim for unpaid wages for work already performed and for matters pertaining to credibility. See e.g., Francois, 2012 WL 1506054, at *1 ("There are a number of cases that have found that evidence of immigration status has no bearing on matters of consequence to be determined under the FLSA, and to be both undiscoverable and inappropriate topics for trial."); Nieves v. OPA, Inc., 948 F. Supp. 2d 887, 892 (N.D. Ill. 2013) (collecting cases) ("[C]ourts in this district and elsewhere have uniformly found that the immigration status of a party is not a line of inquiry that is reasonably calculated to lead to the discovery of admissible evidence in action brought for unpaid wages.").

Even if relevant, the Appellate Division incorrectly determined that such evidence should not have been excluded under R. 403 because even without the case having been submitted to a jury, an employee's immigration status is both irrelevant and requiring its disclosure is immediately prejudicial and creates a chilling effect. See e.g., David v. Signal Int'l, LLC, 257 F.R.D. 114, 124 (E.D. La. 2009), objections overruled, No. 08-1220, 2009 WL 2030382 (E.D. La. June 2, 2009) ("This Court finds that defendants' opportunity to test the credibility of plaintiffs does not outweigh the public interest in allowing employees to enforce their rights."); Rengifo v. Erevos Enterprises, Inc., No. 06-CV-4266,

2007 WL 894376, at *3 (S.D.N.Y. Mar. 20, 2007) ("[T]he opportunity to test the credibility of a party based on representations made when seeking employment does not outweigh the chilling effect that disclosure of immigration status has on employees seeking to enforce their rights."); Avila-Blum v. Casa de Cambio Delgado, Inc., 236 F.R.D. 190, 192 (S.D.N.Y. 2006) (granting plaintiff's request for a protective order precluding defendants from inquiring about her immigration status and denying defendants' objections on the basis that plaintiff's immigration status is relevant to plaintiff's credibility); see also Serrano, 407 N.J. Super. at 272 ("As the cases from other jurisdictions have recognized, discovery inquiries of litigants who happen to be immigrants, probing into their legal status to live and work in the United States, raises sensitive considerations. Such inquiries may have a chilling effect on those litigants when they attempt to vindicate their legal interests in the courts of our nation.").

Further illustrating this point, some courts have explicitly held that a plaintiff's immigration status is both irrelevant, and even if relevant, unduly prejudicial, for the express purpose of a bench trial concerning claims for unpaid wages. See Mancilla v. Chesapeake Outdoor Servs., LLC, No. 22-CV-00032, 2024 WL 361328 (D. Md. Jan. 31, 2024) (precluding defendants from offering evidence relating to plaintiff's immigration status, despite conducting a bench

trial, on plaintiff's federal and state wage claims); Romero v. Prindle Hill Constr., LLC, No. 14-CV-01835, 2017 WL 3390242, at *3 (D. Conn. Aug. 7, 2017) (granting plaintiff's motion *in limine* to exclude evidence concerning his immigration status prior to a bench trial, determining that "plaintiff's immigration status is both irrelevant and unduly prejudicial."). Petitioner's underlying case is analogous to the plaintiff's in Romero in that none of his NJWHL and NJWPL claims was predicated on his immigration status, and thus, his immigration status did not have a tendency "to prove or disprove any fact of consequence to the determination of the action," and even if it were, such as for the alleged purpose of assessing his credibility, it should have been excluded because any probative value is "substantially outweighed" by risk of undue prejudice because of the potential "'chilling effect' it could have on the pursuit of such actions by others." N.J.R.E. 401; N.J.R.E. 403(a); Romero, 2017 WL 3390242, at *3.

Thus, the Appellate Division's erroneous decision compels this Court's review.

II. The Appellate Division Erred in affirming the existence of a "barter arrangement."

The Appellate Division's decision affirming the existence of a "barter arrangement" between Petitioner and Respondents is plainly erroneous and in direct contradiction to the NJWHL's and NJWPL's definitions of employment,

as there is no precedent for such a finding, and as there has never been a case in the State of New Jersey, nor in any federal court, that has upheld the existence of a "barter arrangement" being something other than employment in the wage and hour context. See also Lynn's Food Stores, Inc. v. U.S. By & Through U.S. Dep't of Lab., Emp. Standards Admin., Wage & Hour Div., 679 F.2d 1350, 1352 (11th Cir. 1982) ("Recognizing that there are often great inequalities in bargaining power between employers and employees, Congress made the FLSA's provisions mandatory."); Kapolka v. Anchor Drilling Fluids USA, LLC, No. 18-CV-01007, 2019 WL 5394751, at *1 (W.D. Pa. Oct. 22, 2019) ("The FLSA's provisions are mandatory and not subject to negotiation and bargaining between employers and employees.") (internal citations and quotations omitted).

"The definitions for 'employer' and 'employee' under the FLSA and NJWHL are virtually identical." Wang v. Chapei LLC, No. 15-CV-2950, 2020 WL 468858, at *2 (D.N.J. Jan. 29, 2020) (internal quotations and citations omitted); Liu v. New Dickson Trading, LLC, No. 21-15779, 2023 WL 3736351, at *4 (D.N.J. May 30, 2023). "In Hargrove, the Court noted the NJWHL and WPL do not define 'employee,' 'employer,' or 'employ' identically, but the Court held "[t]he similarity of language" in the statutes "suggests that any interpretation or implementation issues should be treated similarly." HMH Hosps. Corp. v. Warren, No. A-2560-21, 2023 WL 2146405, at *7 (N.J. Super.

Ct. App. Div. Feb. 22, 2023) (internal quotations omitted) (citing Hargrove, 220 N.J. at 312).[3] "To determine whether an entity or individual is an employer under the NJWHL, courts consider whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." Wang, 2020 WL 468858, at *6.[4]

In its decision, the Appellate Division affirmed the trial court's findings that, *inter alia*, Respondents hired Petitioner, assigned Petitioner's work tasks, paid Petitioner for the first two weeks of his employment and thereafter with the provision of Petitioner's apartment, and failed to maintain Petitioner's

[3] In Hargrove, this Court affirmed the applicability of the "ABC" test to NJWHL and NJWPL claims, which "presumes an individual is an employee unless the employer can make certain showings regarding the individual employed." 220 N.J. at 305-316. Thus, Petitioner submitted a full analysis of how his relationship with Respondents constituted employment under the ABC test in his appellate brief. See App27-29. However, the Appellate Division concluded "the ABC test is inapplicable here because whether plaintiff was an employee of defendants or worked as an independent contractor is not at issue," which Petitioner submits was also in error. See id.

[4] Although Petitioner, in his Appellate Brief, also set forth his proof of the existence of an employer-employee relationship under the economic realities test, the Appellate Division's decision only addressed the alleged inapplicability of the ABC test. See App29.

employment records. See App5 ("Ruane advised plaintiff his salary would be $1,600 per month and that plaintiff would pay $800 per month for an apartment in the Marmic building, which plaintiff accepted."); App6 ("Marmic paid plaintiff an initial paycheck for his first two weeks of work."); App7 ("for his continued employ at the buildings because he did not have a valid Social Security number[,] Plaintiff was offered the apartment rent and utility free in exchange for his part-time services as a superintendent."). Thus, the Appellate Division erroneously affirmed that the existence of the alleged "barter arrangement" on the basis that "plaintiff could not be legally paid [as] he provided false [S]ocial [S]ecurity number and apparently he did not have a valid [S]ocial [S]ecurity number." App27. However, as previously stated in the sections above, the overwhelming majority of case law dictates that undocumented immigrants have the same rights for wage claims for work already performed as anyone else. See Zavala, 393 F. Supp. 2d at 322 ("This Court agrees that Plaintiffs, by virtue of their undocumented status, are not barred from seeking relief under the [FLSA]."); Jimenez v. KLB Foods, Inc., No. 12-CV-6796, 2014 WL 2738533, at *3 (S.D.N.Y. June 17, 2014) ("Immigration status is irrelevant to an employee's rights under FLSA."); Kim v. Kum Gang, Inc., No. 12-CV-6344, 2014 WL 2510576, at *1 (S.D.N.Y. June 2, 2014) (finding immigration status irrelevant in an FLSA case and holding that

"undocumented workers are protected by the FLSA"); Singh v. Jutla & C.D. & R's Oil, Inc., 214 F. Supp. 2d 1056, 1058 (N.D. Cal. 2002) ("The underlying rationale in Sure–Tan, that the NLRA applies to illegal aliens, was extended in Patel v. Quality Inn South, 846 F.2d 700 (11th Cir.1988), where the Eleventh Circuit held that the FLSA applies to illegal aliens."). By holding otherwise, the Appellate Division effectively rewrote the relevant statutes, finding that even if an individual qualifies as an employee under the ABC, and/or the economic realities test, that employee is not entitled to statutory wages if undocumented.

To be sure, Respondents were not without recourse here. Upon determining, in their judgment, that they could not pay Petitioner due to immigration status, they had every legal right to terminate his employment. What Respondents were not permitted to do was continue his employment, accept the full value of his work, and not pay him statutorily-required minimum, regular, and overtime wages. This Court should grant this Petition and reverse the Order of the Appellate Division.

CONCLUSION AND CERTIFICATION

For the reasons set forth herein, Petitioner asks this Court to grant his petition and reverse the Appellate Division's judgments. Pursuant to R. 2:12-7(a), the undersigned certifies that the Petition presents a substantial question, filed in good faith, and not for purposes of delay.

Dated: New York, New York
July 22, 2024

Respectfully submitted,

By: /s/ Anthony P. Consiglio
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