

Hart V. Rick's Cabaret Brings Further Clarity To New York Labor Law

November 13, 2014 • Legal Updates & Insights

On November 14, 2014, a federal judge in the District Court for the Southern District of New York granted summary judgment to plaintiffs, a group of exotic dancers, for nearly \$11 million in wage and hour claims. [Hart v. Rick's Cabaret Int'l, Inc., No. 09 Civ. 3043 \(PAE\) \(S.D.N.Y. Nov. 14, 2014\)](#).

Defendant Rick's Cabaret ("Rick's") opened in New York City in September 2005. Exotic dancers worked at Rick's performing several different services, including public dances on one of Rick's three stages, performances in semi-private rooms, and "personal dances" (i.e., lap dances and table dances). Rick's consistently classified the dancers as "independent contractors" and never paid them any wages. All payments received by the dancers were in the form of payments from customers, including a \$20 charge for a personal dance. A personal dance could also be paid for with a voucher called a "Dance Dollar," which a customer could purchase from Rick's with a credit card for \$24. At the end of her shift, a dancer redeemed each voucher for \$18, with Rick's keeping the remaining \$6 paid for the Dance Dollar voucher.

The dancers sued Rick's for minimum wage violations and unlawful retention of gratuities. Rick's claimed that because the dancers were independent contractors, not employees, they were therefore not covered by the [New York Labor Law](#) or [Fair Labor Standards Act](#) minimum wage laws. Defendants argued in the alternative that, if they were liable for minimum wage violations, any money owed should be offset by the personal dance fees. Plaintiffs moved for summary judgment.

This case raised several issues under wage and hour laws, most notably [New York Labor Law Section 196-d](#), which prohibits employers from retaining "any part of a gratuity or any charge purported to be a gratuity for an employee." Rick's claimed that the performance fees paid to the dancers by means of the Dance Dollars could be used to offset their minimum wage obligations. Defendants also claimed that under [Samiento v. World Yacht, 10 N.Y.3d 70 \(2008\)](#), Rick's should be allowed to retain these fees as service charges that the reasonable customer would not perceive as a gratuity.

The court found that there is no authority allowing employers to use such a performance fee as wages in *post hoc* fashion. Furthermore, the court held that World Yacht did not apply because World Yacht and its progeny determine who, between the employer and employee, may keep certain mandatory customer payments. It does not, however, stand for the proposition that when an employer makes such a charge on customers but does not treat it as a wage that the charge may be used to offset the employer's minimum wage obligations. Thus, the court held that Defendants' reliance on World Yacht and its progeny was misplaced and inapposite.

The court then went on to analyze whether, if World Yacht were to apply, Rick's would be entitled to keep the performance charges. The court analyzed whether the reasonable customer would believe the charge to be a gratuity, ultimately finding that the reasonable customer would understand that the payments were tips. In support of this conclusion, the court noted that: (1) the fees were paid directly by customers to dancers, (2) the fees were largely paid in cash, and (3) the fees were paid in exchange for a

personalized service (i.e., a personal dance). Furthermore, the court also found that the mere fact that the fees paid via the Dance Dollars briefly passed through Rick's before being converted into cash did not change their essential nature, thus they should be treated the same as cash payments. In other words, the court explained, a customer paying a dancer in cash would have expected that the full amount would be retained by the dancer. Therefore, the same customer paying by Dance Dollar would have the same reasonable expectation. Rick's argued that it set the price for personal dances, and thus any payments should not be considered a gratuity. The court disagreed, noting that World Yacht itself stood for the proposition that even mandatory charges may be considered tips.

Rick's also argued that there was a printed disclaimer on one version of the Dance Dollar which stated that it was "not valid for gratuities." The court, however, was skeptical that a customer would even read that disclaimer "in the sybaritic setting of an exotic nightclub." Even if the customer did read it, reasoned the court, a reasonable customer could believe that the disclaimer only meant that the voucher could not be used as a gratuity for drinks or other items purchased in the club. Rick's showed that another version of the Dance Dollar had a disclaimer which stated that (1) "entertainers do not retain the full amount of fees paid for personal dances," and (2) "payments for personal dances are mandatory charges & not gratuities." The court found that the first statement was unhelpful to the defense because the cost of the Dance Dollar was \$24, which was used to obtain the same service as a \$20 cash payment. Thus, the reasonable customer could easily believe that the dancer would retain \$20, not the full \$24 paid. The court acknowledged that the second statement benefitted Rick's, but that it was only one factor in the analysis, which was overcome by the totality of the circumstances, as described above.

Thus, the court held, a reasonable customer would have understood the personal dance fees to be gratuities, not service charges. Therefore Rick's was not entitled to retain them. The court, relying on its earlier arguments, found that a reasonable customer would believe that \$20 would go to the dancer and \$4 would go to Rick's.

There are several practical implications raised by this case. First, it reaffirms that exotic dancers may very well be considered employees, notwithstanding that they may be incorrectly treated as independent contractors. Second, the court recognized that mandatory fees which are not wages may not be used *post hoc* to offset minimum wage obligations. Third, the court affirmed that charges that may be understood by customers to constitute gratuities cannot be kept by management.

Brian A. Bodansky*Associate***WIGDOR LLP**

85 Fifth Avenue, New York, NY 10003

T: [\(212\) 257-6800](tel:(212)257-6800) | F: [\(212\) 257-6845](tel:(212)257-6845)wigdorlaw.com