STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No. BCD-WB-10-CV-46

Tristan Grasso,

Plaintiff

v.

ORDER
(Motion for Summary Judgment)

Lisa Caruolo,

Defendant

This matter is before the Court on Defendant Lisa Caruolo's motion for summary judgment. As part of his opposition to Defendant's motion, pursuant to M.R. Civ. P. 56(c), Plaintiff Tristan Grasso requested the entry of summary judgment in his favor. Plaintiff also argues that Defendant cannot rely upon the testimony of her designated expert, Chris Dingwell, to support her request for judgment.

Factual Background

In 2008, Plaintiff was interested in becoming a tattoo artist. Because there are no official tattoo schools, the best way to become a tattoo artist is to apprentice with an experienced tattoo artist. In an effort to become a tattoo artist, therefore, Plaintiff entered into an apprenticeship agreement with Defendant, an established tattoo artist and owner of a small tattoo shop. Plaintiff paid the Defendant $3,400 for the experience. The parties agreed that the plaintiff would work between 20 and 30 hours per week.

During his time with the Defendant, Plaintiff learned the proper sanitation procedures in the tattoo industry, and observed the Defendant administering tattoos on a regular basis. Plaintiff also practiced his drawing, and learned how to communicate with customers, how to complete customer consent forms, and how the Defendant maintained her business records. At various times, Plaintiff

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swept and mopped the shop, removed the trash, set up the phone, and prepared consent forms for customers' signatures.

During the apprenticeship, Plaintiff was allowed to tattoo some friends, but he was not permitted to tattoo a paying customer until the Defendant determined that he had the necessary skills. The parties' written apprenticeship agreement provides that Plaintiff could tattoo live subjects, despite the fact that Plaintiff did not have the necessary license.

According to the apprenticeship agreement, Plaintiff would receive his license under Defendant's instruction. Plaintiff eventually received his license. The parties dispute whether Plaintiff reasonably expected employment at the end of the apprenticeship.

Discussion

I. Standard of Review

Summary judgment should be granted if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c). The Court will consider '"only the portions of the record referred to, and the material facts set forth in the [M.R. Civ. P. 56(h)] statements,'" *F.R. Carroll, Inc. v. TD Bank, N.A.*, 2010 ME 115, ¶ 8, 8 A.3d 646, 648-49 (quoting *Deutsche Bank Nat'l Trust Co. v. Raggiani*, 2009 ME 120, ¶ 5, 985 A.2d 1, 3 (quotation marks omitted)). "Summary judgment is appropriate when review of the parties' statements of material facts and the referenced record evidence, considered in the light most favorable to the non-moving party, indicates that no genuine issue of material fact is in dispute." *Blue Star Corp. v. CKF Props., LLC*, 2009 ME 101, ¶ 23, 980 A.2d 1270, 1276. '"[W]hen facts, though undisputed, are capable of supporting conflicting yet plausible inferences – inferences that are capable of leading a rational factfinder to different outcomes in a litigated matter depending on which of them the factfinder draws – then the choice between those inferences is not for the court on summary judgment.'" *F.R. Carroll, Inc.*, 2010

ME 115, ¶ 8, 8 A.3d at 649 (quoting *Ramirez-Carlo v. United States*, 496 F.3d 41, 50 n. 5 (1st Cir. 2007) (quotation marks omitted)).

II. Testimony of Chris Dingwell

Plaintiff contends that the testimony of Defendant's expert, Chris Dingwell, is irrelevant and barred under M.R. Evid. 702 because Mr. Dingwell can only testify generally, and is not familiar with the parties' particular situation. "An expert witness's opinion may be excluded under Rule 702 if the court finds that it is not within the expert's specialized knowledge." *Constr. Servs. Workers' Comp. Group Self Ins. Trust v. Stevens*, 2010 ME 108, ¶ 14, 8 A.3d 688, 693. To assess whether the testimony is admissible, the Court must apply a two-part test: '"A proponent of expert testimony must establish that (1) the testimony is relevant pursuant to M.R. Evid. 401, and (2) it will assist the trier of fact in understanding the evidence or determining a fact in issue."' *Tolliver v. Dept. of Transp.*, 2008 ME 83, ¶ 29, 948 A.2d 1223, 1233 (quoting *Searles v. Fleetwood Homes of Pa., Inc.*, 2005 ME 94, ¶ 21, 878 A.2d 509, 515-16). "Further, to meet the two-part test, 'the testimony must also meet a threshold level of reliability.'" *Tolliver*, 2008 ME 83, ¶ 29, 948 A.2d at 1233 (quoting *Searles*, 2005 ME 94, ¶ 22, 878 A.2d at 516 (quotation marks omitted)). Plaintiff does not challenge the reliability of Mr. Dingwall's testimony. Instead, Plaintiff maintains that Mr. Dingwell's testimony is not relevant and would not assist the trier of fact.

Contrary to Plaintiff's argument, Mr. Dingwall's testimony is relevant as to the nature of the tattoo industry generally and tattoo apprenticeships in particular. Given Mr. Dingwell's knowledge of the industry, Mr. Dingwall's testimony will assist the trier of fact understanding tattoo apprenticeships. That is, though Mr. Dingwall is not familiar with the details of the Plaintiff's apprenticeship, he can provide testimony generally as to the nature of apprenticeships in this relatively small industry.

III. Count I and III – Violations of the Fair Labor Standard Act (FLSA) and the Maine Wage and Hour Law

Under both the FLSA and Maine's Wage and Hour Laws, an employer must pay an employee minimum wage, unless an exception applies. 26 M.R.S. § 664; 29 U.S.C. § 206. The issue in this case is whether the parties' arrangement constitutes an employer-employee relationship such that Plaintiff is entitled to a minimum wage.

"Employ" means "to suffer or permit to work." 26 M.R.S. § 663(2); 29 U.S.C. § 203(g). "[T]his definition was 'not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another,' nor should it be interpreted so as to 'sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, work[s] in activities carried on by other persons either for their pleasure or profit.'" *Purdham v. Fairfax County Sch. Bd.*, 637 F.3d 421, 427 (4th Cir. 2011) (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

Defendant cites to federal law and regulations to determine what constitutes and employer – employee relationship. Defendant urges the Court to apply the primary benefits test, and to reject the six-factor test employed by the court in its assessment of Defendant's motion to dissolve the attachment. *See Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 2011 U.S. App. LEXIS 8585, *18-19 (6th Cir. Apr. 28, 2011) (rejecting the six- factor test for the primary benefits test).[1] Conversely, Plaintiff contends that the Court should apply the six-factor test, instead of the more narrow primary benefits test. *Ulrich v. Alaska Airlines, Inc.*, 2009 U.S. Dist. LEXIS 10104, *7-8 (W.D. Wash. Feb. 9, 2009) (applying the six-factor test).[2]

[1] Under the primary benefits test, "the ultimate inquiry is whether the employee is the primary beneficiary of the work performed." *Id.* at *19. Under the economic realities test, applied in this circuit, "the economic realities of the relationship govern." *Bolduc v. Nat'l Semiconductor Corp.*, 35 F. Supp. 2d 106, 112 (D. Me. 1998) (applying the economic realities test to determine if an individual was an employee or an independent contractor under FLSA). The economic realities test is similar to the primary benefits test in that the court looks at the status of the alleged employee. Under the economic realities test, "[t]he focal point is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself." *Id.*

[2] "The six factors which must be met in order for the trainees not to be employees are as follows:

Regardless of the test the Court applies, summary judgment is not appropriate on this issue. Under either test, the Court must ascertain the type of work that Defendant expected the Plaintiff to perform and whether that work was necessary or expected of a tattoo apprentice. Such a determination requires the Court to resolve a number of disputed factual issues at trial.[3]

IV. Count II – Violation of the Unfair Agreements Statute and the Unfair Trade Practices Act

Defendant claims that she is entitled to summary judgment on Count II Plaintiff's Complaint because the record establishes that Plaintiff is not a consumer as contemplated by the Unfair Trade Practices Act (the Act), and because the record does not support Plaintiff's contention that he was promised employment with Defendant.

Under 26 M.R.S. § 629(1),[4] an unfair agreement is one that requires a person to work, without compensation, in exchange for the promise of future employment. Defendant asserts that Plaintiff was not promised future employment, nor was he a trainee. *See Cooper v. Springfield Terminal Ry.*, 635 A.2d 952, 955 (Me. 1993) ("The language used in section 629, forbidding "any person" from being

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> 1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
> 2) the training is for the benefit of the trainees;
> 3) the trainees do not displace regular employees, but work under close observation;
> 4) the employer that provides the training derives no immediate advantage from the activities of the trainees; and on occasions his operations may actually be impeded;
> 5) the trainees are not necessarily entitled to a job at the completion of the training period; and
> 6) the employer and the trainees understand that the trainees are not entitled to wages for the time spent training.

Id. (citing DOL Opinion Letter, 2001 DOLWH LEXIS 10, 2001 WL 1558755 (January 30, 2001); 2004 DOLWH LEXIS 56, 2004 WL 3177877 (October 19, 2004)).

[3] There is no dispute that the parties entered into an apprenticeship agreement and that the plaintiff did not have "an approved apprentice training program" in place. *See* 26 M.R.S. § 667. However, this is not dispositive of the parties' relationship. *See Campbell v. Wash. Cnty. Technical Coll.*, 219 F.3d 3, 7 (1st Cir. 2000) ("Maine courts follow the oft-stated rule that the legal relationship between the parties does not turn on the label the parties themselves attach.").

[4] Title 26, section 629 of the Maine Revised Statutes state, in pertinent part:

> WORK WITHOUT COMPENSATION; RETURN OF COMPENSATION. A person, firm or corporation may not require or permit any person as a condition of securing or retaining employment to work without monetary compensation or when having an agreement, oral, written or implied, that a part of such compensation should be returned to the person, firm or corporation for any reason other than for the payment of a loan, debt or advance made to the person, or for the payment of any merchandise purchased from the employer or for sick or accident benefits, or life or group insurance premiums, excluding compensation insurance, that an employee has agreed to pay, or for rent, light or water expense of a company-owned house or building. This section does not apply to work performed in agriculture or in or about a private home.

26 M.R.S. § 629.

required or permitted to work "as a condition of securing . . . employment," is universal and plainly connotes coverage for trainees seeking to obtain a position.") A review of the record demonstrates that although Plaintiff might have expected future employment, there is no evidence that Defendant promised that she would hire Plaintiff as a condition of his apprenticeship.[5] Accordingly, Plaintiff's claim cannot be based upon an alleged promise of future employment.

The Act (5 M.R.S. § 207) makes unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," and provides a cause of action for "[a]ny person who purchases or leases goods, services or property, real or personal, primarily for *personal,* family or household *purposes* and thereby suffers any loss of money or property, real or personal" as a result of unfair methods, acts, or practices. 5 M.R.S. § 213(1) (emphasis added). Plaintiff asserts that in the event that the relationship between the parties is not an employer-employee relationship, the Act applies. *See State v. DeCoster*, 653 A.2d 891, 896 (Me. 1995) (holding that the Act does not apply to disputes between an employer and an employee).

The Law Court has not defined the scope of "personal, family or household purposes," but consistently has referred to the Act as a consumer protection statute. *See State v. Weinschenk*, 2005 ME 28, ¶ 11, 868 A.2d 200, 205. Here, there is no dispute that Plaintiff purchased a service from Defendant, and that the service was for Plaintiff's personal use. (S.M.F. ¶ 69; S. Add'l M.F. ¶ 38.) Therefore, arguably, the relationship between the parties could be covered by the Act.[6] However, given the factual disputes regarding the nature of the parties' relationship, the Court cannot determine definitively, without a trial, whether the Act applies. The Court cannot, therefore, enter summary judgment for either party on Count II.

[5] S.M.F. ¶ 38; Opp. S.M.F. ¶ 38.

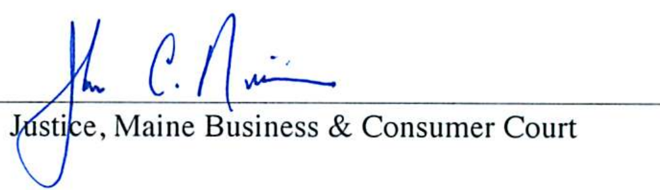
[6] Some courts have found that educational services are subject to unfair trade practices claims. *See Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 475-76 (Minn. App. 1999) (holding that the Minnesota's Uniform Deceptive Trade Practices Act applies to educational services); *Scott v. Association for Childbirth at Home, Int'l*, 88 Ill. 2d 279, 285, 430 N.E.2d 1012, 1015 (Ill. 1981) ("[I]t is clear that purchasers of educational services may be as much in need of protection against unfair or deceptive practices in their advertising and sale as are purchasers of any other service.") (citations omitted).

Conclusion

Based on the foregoing analysis, the Court denies Defendant's motion for summary judgment. The Court also denies Plaintiff's request, pursuant to M.R. Civ. P. 56(c), for the entry of summary judgment.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Order into the docket by reference.

Date: 7/21/11



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