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April 29, 2008

**By Fax and First Class Mail**

Milo Silberstein, Esq.
Dealy & Silberstein, LLP
225 Broadway, Suite 1405
New York, New York 10007

Re: Gayle v. Harry's Nurses Registry, Inc. *et ano.*, 07 Civ. 4672 (CPS) (KAM)

Dear Mr. Silberstein:

This responds to your letter of yesterday's date.

Defendants' Interrogatory No. 2. (1) The time and pay records generated by Harry's are the best evidence of a continuing relationship between your clients and mine. I do not see how the existence of relationships with other persons impairs her relationship with Harry's. (2) Industry practice and custom are not relevant to the employer/independent contractor issue. In Reich v. SNET, 121 F.3d 58 (2d Cir. 1997), industry practice was rejected as a defense to liquidated damages; as such, it can hardly be a defense to liability. (3) The standard is "economic realities," not "intent of the parties." Brock v. Superior Care, 840 F.2d 1054, 1058-59 (2d Cir. 1988). I have never seen any formulation of economic realities that considers intent of the parties. If you know of any contrary authority, please let me know. (4) It is not relevant that plaintiff worked for more than one employer. Moonlighting employees are entitled to the protection of the FLSA. Id.

Similarly, plaintiff's failure to complain of misclassification is not relevant. Courts have recognized for over 60 years that waivers of FLSA rights are void. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); Spanos Painting Contractors, Inc. v. Union Bldg. & Constr. Corp., 334 F.2d 457, 459 (2d Cir. 1964) ("[t]o permit a laborer to waive his rights under the act would undermine the very purpose of fair labor legislation").

Nevertheless, in the interest of avoiding motion practice, we will produce a copy of plaintiff's resume with the hard copy of this letter.

Defendant's Interrogatory No. 3. You contend that information regarding plaintiff's

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immigration status would "speak[] directly to Plaintiff's credibility and qualifications."

We reject credibility as a basis for the interrogatory. We have stipulated to conduct discovery necessary to your anticipated motion for summary judgment on the IC/employee issue. A summary judgment court may not, however, consider credibility issues. Petrosino v. Bell Atlantic, 385 F.3d 210, 219 (2d Cir. 2004) (court must resolve all factual ambiguities and credit all inferences, including those relating to credibility, in favor of the non-movant), citing Brown v. Henderson, 257 F.3d 246, 251 (2d Cir. 2001). Moreover, immigration documents as a test of credibility was rejected in EEOC v. First Wireless Group, Inc., 225 F.R.D. 404 (E.D.N.Y. 2004).

I can only assume that by "qualifications" you mean the plaintiff's entitlement to back pay. However, every court in the Southern and Eastern Districts to have pronounced on the matter has held that undocumented plaintiffs are entitled to back pay for services performed under the FLSA – even if they are not, under Hoffman Plastics, entitled to back pay arising from wrongful termination. E.g., Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191 (S.D.N.Y. 2002); Flores v. Amigon, 233 F. Supp. 2d 462 (E.D.N.Y. 2002).

Ms. Gayle, having mitigated her damages, elected not to pursue a claim for retaliation against your clients. Her immigration status is not relevant to "qualifications."

Many courts have noted the in terrorem effect of requiring employment plaintiffs to disclose records relating to immigration status. E.g. Topo v. Dhir, 210 F.R.D. 76, 78 (S.D.N.Y. 2002); Rengifo v. Erevos Enters., 2007 U.S. Dist. LEXIS 19928 (S.D.N.Y. Mar. 20, 2007) (disclosure "presents a danger of intimidation that would inhibit plaintiffs in pursuing their rights. [In an FLSA case,] immigration status and authority to work is a collateral issue. The protective order becomes necessary as it is entirely likely that any undocumented litigant forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face potential deportation") (citations, quotations and alterations omitted).

Accordingly, if you inquire at my client's deposition regarding immigration status, I will direct her not to answer pursuant to our so-ordered stipulation that discovery is limited to IC/employee issues. In addition, I would regard the questions as harassing and vexatious pursuant to the authorities cited above, and give the same direction at later stages of the litigation. Please let me know if you intend to pursue this line of questioning so that I may timely seek a protective order.

Plaintiff's Response to Document Request No. 1, 2, 3. The relevance vel non of

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plaintiff's employment elsewhere is addressed above. Plaintiff's income is not in issue in this litigation within the meaning of Smith v. Bader, 83 F.R.D. 437 (S.D.N.Y. 1979). Accordingly, we will not produce her tax returns. In the interest of avoiding motion practice, however, all W-2s in her custody, possession or control will be produced with the hard copy of this letter.

Plaintiff's Interrogatory No. 4. I do not understand how you can contend that plaintiff's economic relations with third parties are relevant to IC/employee status and simultaneously take the position that my client's economic relations with her own patients are not relevant. Please explain this.

Depositions. We will produce Ms. Gayle for deposition at the time and place you request. Please let me know when your client is available for deposition.

Very truly yours,

Jonathan A. Bernstein

JAB:jb

# A-506



PAYER'S name, street address, city, state, ZIP code, and telephone no.
HARRY'S NURSES REGISTRY, INC.
8825 163RD ST
JAMAICA, NY 114324046
718-739-0045

1 Rents $

2 Royalties $

OMB No. 1545-0115

2007

Form 1099-MISC

Miscellaneous Income

3 Other income $

4 Federal income tax withheld $

PAYER'S federal identification number: 11-3047689

RECIPIENT'S identification number: 125-82-9064

5 Fishing boat proceeds $

6 Medical and health care payments $

RECIPIENT'S name
CLAUDIA GAYLE

7 Nonemployee compensation $ 44,148.00

8 Substitute payments in lieu of dividends or interest $

Street address (including apt. no.)
230 CREST LANE

9 Payer made direct sales of $5,000 or more of consumer products to a buyer (recipient) for resale ▶ ☐

10 Crop insurance proceeds $

City, state, and ZIP code
COVINGTON GA 30016

11

12

Account number (see instructions)

2nd TIN not. ☐

13 Excess golden parachute payments $

14 Gross proceeds paid to an attorney $

15a Section 409A deferrals $

15b Section 409A income $

16 State tax withheld $

17 State/Payer's state no.

18 State income $

Form 1099-MISC

Department of the Treasury - Internal Revenue Service

38-2099803

Copy A
For Internal Revenue Service Center
File with Form 1096.

For Privacy Act and Paperwork Reduction Act Notice, see the 2007 General Instructions for Forms 1099, 1098, 5498, and W-2G.

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