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Supreme Court No. 89534-1

(Court of Appeals No. 68528-7-1)

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MARTINEZ, ORLANDO VENTURA REYES, ALMA A. BECERRA,
and ADELENE MENDOZA SOLORIO,

Respondents/Plaintiffs,

v.

EXPERT JANITORIAL, LLC, and FRED MEYER STORES, INC.,

Petitioners/Defendants.

ANSWER OF PETITIONERS EXPERT JANITORIAL, LLC AND
FRED MEYER STORES, INC. TO BRIEF OF AMICI CURIAE CASA
LATINA ET AL.

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I. INTRODUCTION

This appeal calls on the Court to decide which version of the federal “economic reality” test applies to joint employment claims under the Washington Minimum Wage Act (“MWA”); which factors are relevant under that test; and how those factors apply to the undisputed facts in this case. The brief submitted by Amici CASA Latina et al. (“Amici”) fails to assist the Court with any of these issues. Instead, it consists of generalized complaints about the use of subcontracting in our economy; ad hominem attacks on the janitorial industry; and a radical and legally baseless proposal to impose what amounts to strict liability on businesses that subcontract work.

Amici are certainly entitled to their opinions, but their political views regarding broad economic trends and the allegedly undesirable consequences of subcontracting are no basis for any of the *legal* rulings this Court is being asked to make. Moreover, their proposed standard of liability is so all-encompassing it bears no resemblance to the economic reality test developed by the federal courts, which is the test that all of the parties in this case—including Plaintiffs—agree should be used for joint employment claims under the MWA.

Amici’s brief amounts to a policy paper that advocates a major break from how joint employment has been defined by the wage and hour

laws for more than 60 years, as well as a reversal of those laws’ longstanding acceptance of lawful subcontracting arrangements. Whatever one thinks of Amici’s arguments, they are fundamentally political in nature, and should be directed to Washington’s Legislature rather than this Court.

II. ARGUMENT

A. Amici’s Attack on Subcontracting Is Irrelevant to the Legal Test for Joint Employment.

Amici are an assortment of union, plaintiffs’ employment lawyer, and immigrant advocacy groups. The first half of their brief is dedicated to a discussion of how subcontracting—which has been around since long before the wage and hour laws were enacted—supposedly has “transformed” the nation’s economy and modern-day employment relationships. *See* Amici’s Br. at 3-9. It reads like an op-ed column, eschewing any discussion of the applicable legal standard in favor of conventional union rhetoric about allegedly low pay and poor working conditions. While conceding that “‘contracting out’ is not per se harmful to workers,” *id.* at 4, Amici proceed to argue the opposite, launching a scathing attack on subcontracting in general and the janitorial industry in particular.¹ Their arguments rely on conclusory assertions and gross

¹ Many of the advocacy papers cited in Amici’s brief discuss the alleged misclassification of workers as independent contractors, not subcontracting, in non-service industries. *See*,

generalizations, with no attempt to link the abuses they allege to the facts of this case or the evidence in the record.

Clearly Amici are opposed to certain economic arrangements and business models, including outsourcing. But this Court has not granted review to pass judgment on the economic desirability of subcontracting. Amici's broadside against lawful contractual relationships between businesses provides no assistance to the Court in answering any of the legal questions before it.

In fact, Amici's attack on subcontracting is directly at odds with the economic reality test that all of the parties agree this Court should adopt. Unlike Amici, the federal courts have long been "mindful of the substantial and valuable place that outsourcing, along with the subcontracting relationships that follow from outsourcing, have come to occupy in the American economy." *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 73 (2d Cir. 2003). Thus, the courts have emphasized that the test for joint employment is not intended to impose liability based on legitimate subcontracting relationships:

[B]y limiting FLSA liability to cases in which defendants, based on the totality of the circumstances, function as employers of the plaintiffs rather than mere business

e.g., Rebecca Smith et al., *The Big Rig: Poverty, Pollution, and the Misclassification of Truck Drivers at America's Ports* (Nat'l Employment Law Project & Change to Win, 2010).

partners of plaintiffs' direct employer, the test also ensures that the statute is not interpreted to subsume typical outsourcing relationships. The "economic reality" test, therefore, is intended to expose outsourcing relationships that lack a substantial economic purpose, *but it is manifestly not intended to bring normal, strategically-oriented contracting schemes within the ambit of the FLSA.*

Id. at 76 (emphasis added). By contrast, the standard of liability advocated by Amici is palpably hostile to subcontracting, and seeks to eliminate this key limitation on the scope of liability.

B. The Joint Employment Test Proposed by Amici Is Contrary to the Economic Reality Test Developed by the Federal Courts and Thus With This Court's Decision in *Anfinson*.

Amici argue that joint employer liability should be extended to *all* entities "in a position to know of and prevent" violations of the wage and hour laws. Amici's Br. at 3, 11. It is difficult to overstate how sweeping a standard this is, or how radical a re-write of the federal joint employment test it would be. The standard bears no resemblance to the FLSA's economic reality test; on the contrary, it is the brain-child of a handful of academics who are critical of and dissatisfied with that test. The proposed standard would replace the FLSA's twin multi-factor analyses of formal and functional control with what amounts to strict liability for any business that subcontracts work.

Amici's arguments in favor of such a standard are taken from a law review article by Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983 (1999). That article's authors sharply criticize the economic reality test, which they say "improperly narrows the scope of the FLSA coverage" by using "many common-law factors" supposedly at odds with the statutory meaning of "suffer or permit to work." *Id.* at 1161. They characterize the federal courts' adoption of the test as a mistake. *Id.* at 1117-18 ("Unfortunately, the Supreme Court took a wrong turn in [*Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)], leading to fifty years in which the economic reality test would be mistakenly used to determine coverage of workers under the FLSA"). The authors expressly call for the abandonment of the economic reality test, arguing that the standard for liability should simply be: "Did the business owner have the means to know of and prevent the work?" *Id.* at 1162.

Unlike Amici, the article's authors make clear what they really are asking for: a repudiation of the economic reality test and the adoption of a completely different standard. They admit that their proposal is contrary to the entire body of federal case law that has developed since the FLSA was enacted:

The only problem with the view that the “suffer or permit to work” standard is so broad that it makes an owner of a business in which the employees of independent contractors work liable for FLSA violations committed there, is that *in sixty years of interpreting the FLSA, no federal judge has ever adopted it.*

46 UCLA L. Rev. at 1139 (emphasis added). This remains true today, fifteen years after the article’s publication.

No court has ever interpreted the FLSA’s “suffer or permit” language to make a business a joint employer simply because it is “in a position to know” that another business is not paying its employees correctly. On the contrary, the courts have uniformly held that a business’s knowledge, whether actual or imputed, becomes relevant only *after* that business has been determined to be an employer, because even an employer is not liable if it did not know its employees were working without receiving proper pay. *See, e.g., Lindow v. United States*, 738 F.2d 1057, 1060 (9th Cir. 1984) (“We have interpreted the words ‘suffer’ or ‘permit’ to mean ‘with the knowledge of the employer’”); *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 287 (2d Cir. 2008) (“It is clear that an employer’s actual or imputed knowledge that an employee is working is a necessary condition to finding the employer suffers or permits that work”); *UFCW Union Local 1001 v. Mutual Benefit Life Ins. Co.*, 84 Wn. App. 47,

52 (1996) (“Under the analogous federal wage and hour provisions, which mandate compensation for all the hours that employers ‘suffer or permit’ their employees to work, an employer ‘permits’ its employee to work when it has either actual or constructive knowledge of the allegedly uncompensated work”), *abrogated on other grounds by SPEEA v. Boeing Co.*, 139 Wn.2d 824, 834 (2000).

The standard for joint employment advocated by Amici is contrary to the FLSA’s economic reality test and all of the federal case law interpreting and applying that test. It is therefore contrary to this Court’s holding in *Anfinson* that where, as here, the MWA is functionally identical to the FLSA, the MWA should carry “the same construction as the federal law and the same interpretation as federal case law.” *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 868 (2012).

C. Amici Fail to Show How the Federal Economic Reality Test Is Inadequate to Prevent the Abuses They Allege.

Amici do not explain how the federal joint employment test and its analysis of formal and functional control fails to adequately protect employees, or why the drastic departure they advocate from that test is needed in Washington. In fact, the key criteria they propose for Washington’s test are satisfied by the federal joint employment test.

First, Amici argue that Washington’s test must be vigorous enough to uncover employers who attempt to evade liability through “sham subcontractor arrangements.” Amici’s Mot. at 5. This is precisely what the federal joint employment factors are designed to do. *See Zheng*, 355 F.3d at 72-74 (applying joint employment factors to determine whether subcontracting relationship was a “subterfuge” to evade the FLSA); *Jean-Louise v. Time Warner*, 838 F. Supp. 2d 111, 124-25 (S.D.N.Y. 2011) (same).

Second, Amici point out that the MWA must be liberally construed. But the same is true of the FLSA. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296 (1985) (“The Court has consistently construed the [FLSA] liberally to apply to the furthest reaches consistent with congressional direction”) (internal quotations omitted); *M. L. Cotton v. Weyerhaeuser Timber Co.*, 20 Wn.2d 300, 307 (1944) (“It is a precept, frequently declared and generally recognized, that the fair labor standards act is a remedial one and must therefore be liberally construed to effect its purposes”). Thus, adopting the FLSA’s joint employment test, which is itself the product of liberal construction, is fully consistent with a liberal construction of the MWA. *See Anfinson*, 174 Wn.2d at 870 (“Adoption of the [FLSA’s] economic-dependence test

for determining employee [versus independent contractor] status is also appropriate as a matter of liberal construction”).

Third, Amici contend that the definition of who is a joint employer under the MWA should be broader than the common-law definition of employer. The federal joint employment test satisfies this requirement, too. *See Bonnette v. Cal. Health and Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983) (“The definition of ‘employer’ under the FLSA is not limited by the common law concept of ‘employer,’ and is to be given an expansive interpretation in order to effectuate the FLSA’s broad remedial purpose”); *Zheng*, 355 F.3d at 78 (“federal courts interpreting the ‘suffer or permit’ language have looked beyond common-law agency principles in analyzing joint employment relationships”).

Thus, based on Amici’s criteria, the FLSA’s economic reality test is well-suited to protect Washington employees from the types of abuses Amici claim are rampant. That is why all of the parties, including Plaintiffs, are asking this Court to adopt it. Amici have failed to show any need for the adoption in this State of their proposed alternative standard, which is radically at odds with the test the federal courts have developed and refined over the past 60 years.

D. Amici’s Policy Arguments in Favor of a Different Standard for Joint Employment Should Be Directed to the Legislature.

When the MWA was enacted in 1959, the U.S. Supreme Court had already adopted the economic reality test for joint employment under the FLSA. *See Rutherford Food Corp.*, 331 U.S. at 726-30 (applying economic reality test in 1947). By enacting a definition of “employer” that was functionally identical to the FLSA’s, the Washington Legislature indicated that the MWA’s definition should be interpreted consistently with the FLSA’s. *See Anfinson*, 174 Wn.2d at 869 (“The legislature’s nearly verbatim adoption in the MWA of the FLSA language with respect to the definition of ‘employee’ evidences legislative intent to adopt the federal standards in effect at the time”). Amici ask this Court to ignore this legislative intent in favor of creating a new standard of liability that sweeps far more broadly than the federal test. The Court should refuse to do so absent a clear direction from the Legislature to depart from the federal standard.

It is worth noting that some legislatures in other states have given such directions by enacting statutes that supersede the economic reality test in certain industries. Those statutes impose broader liability on some companies that subcontract work, usually by requiring consideration of additional factors such as those advocated by Plaintiffs—for example, the

company's knowledge or the contract price—which are not part of the joint employment test. *See, e.g.*, N.Y. Labor Law § 345-a (McKinney 2014) (an apparel manufacturer who contracts or subcontracts with another manufacturer or contractor “and *who knew or should have known* with the exercise of reasonable care or diligence of such other manufacturer's or contractor's failure to comply with article six [regarding the payment of wages] or nineteen [regarding New York's minimum wage provision] of this chapter in the performance of such service shall be liable for such failure”) (emphasis added); *Zheng v. Liberty Apparel Co.*, 556 F. Supp. 2d 284, 296 (S.D.N.Y. 2008) (“Unlike FLSA, § 345-a does *not* require a finding of joint employment” in order to impose liability) (emphasis in original); Cal. Labor Code § 2810(a) (West 2014) (a person or entity who contracts with a construction, farm labor, garment, janitorial, security guard, or warehouse contractor is liable for wage violations by such a contractor if the person or entity “*knows or should know* that the contract or agreement *does not include funds sufficient* to allow the contractor to comply with all applicable” wage and hour laws) (emphasis added).

Washington's Legislature could enact similar statutes if it wanted to expand liability beyond the established test for joint employment, but it has not done so. If Amici believe that economic trends and modern-day

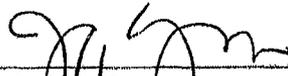
subcontracting practices have made the economic reality test inadequate or obsolete, and that a broader and more all-encompassing definition of “employer” is now required, they should direct these arguments to the Legislature for amendment of the MWA or enactment of other legislation.

III. CONCLUSION

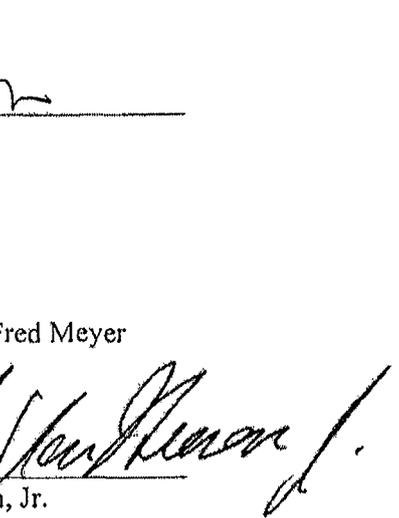
The Court should reject the radical re-writing of the joint employment standard urged by Amici, and should adopt, consistent with *Anfinson*, the FLSA’s economic reality test as applied by the federal courts.

RESPECTFULLY SUBMITTED this 13th day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on this date the above and foregoing ANSWER OF PETITIONERS EXPERT JANITORIAL, LLC AND FRED MEYER STORES, INC. TO BRIEF OF AMICI CURIAE CASA LATINA ET AL. was filed with the Washington Supreme Court, and copies were served on:

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Dear Clerk:

Please see attached *Answer of Petitioners Expert Janitorial and Fred Meyer Stores, Inc. to Brief of Amici Curiae CASA Latina, et al.* for filing with the Court.

Thank you, Valerie

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Supreme Court No. 89534-1

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