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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DEARICA HAMBY

Plaintiff,

v.

WNBA, LLC and LAS VEGAS BASKETBALL L.P. *doing business as* LAS VEGAS ACES

Defendants.

Case No. 2:24-cv-01474

PROPOSED AMICUS BRIEF OF PUBLIC JUSTICE, A BETTER BALANCE, AND THE NATIONAL EMPLOYMENT LAW PROJECT

INTERESTS OF AMICI CURIAE

Public Justice is a national nonprofit legal advocacy organization that fights against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's sustainability. Public Justice regularly advocates for the rights of workers and their access to courts. In particular, Public Justice frequently represents workers in cases involving questions about misclassification and joint employers. *See Noye v. Johnson & Johnson Servs., Inc.*, 765 F. App'x 742 (3d Cir. 2019); *Adler v. Gruma Corp.*, No. 23-3177 (3d Cir.) (case pending); *Cross v. Amazon.com, Inc.,* No. 23-cv-02099, 2024 WL 4346414 (D. Colo. Sept. 30, 2024). Public Justice also has a long history of advocating for athletes facing sex discrimination. Among other examples, Public Justice litigated *Cohen v. Brown University*, a landmark class action that established important precedent about schools' obligations to sex equality in athletics under Title IX of the Education Amendments of 1972. *See Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993).

A Better Balance (ABB) is a national nonprofit legal advocacy organization that uses the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. On ABB's free and confidential helpline, they regularly hear from workers who have experienced pregnancy discrimination and retaliation at work, and whose employers disclaim responsibility for this treatment under the guise of nontraditional employment relationships. Through legal representation and policy advocacy, ABB fights for these workers' right to be free from discrimination and retaliation in all workplaces.

The National Employment Law Project (NELP) is a non-profit legal organization with more than 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP focuses on the ways in which various work structures, such as subcontracted and franchised work, degrade working conditions and allow employers to avoid accountability under state and federal law. For decades, NELP has collaborated closely with community-based worker centers, unions, and state policy groups on these issues. NELP has also litigated directly, and participated as amicus in, numerous cases addressing the rights of subcontracted workers attempting to hold their multiple employers responsible for workplace violations. NELP seeks to ensure that all workers receive the full protection of labor and employment laws and that employers are not rewarded for denying their

status as employers and skirting their obligations.

INTRODUCTION

Dearica Hamby is exceptional. She is a top player in the Women's National Basketball Association, a former first-round draft pick, a three-time WNBA All-Star, a WNBA champion, and an Olympian. Compl. ¶¶ 15-16, ECF No. 1. Yet Ms. Hamby is, in important ways, representative of many other workers—including in fields that look very different from professional sports—because her employment is "fissured." Increasingly, and across industries, workers' jobs are controlled by multiple entities, whether those be a team and a league or a fast-food franchise and its parent company. Fissuring is especially common in low wage sectors ripe with abuses, such as retail and agricultural work. This makes it all the more troubling that corporations often try to take advantage of the fissured workplace to disclaim employment relationships with their workers and so avoid the reach of employment laws, as the WNBA does here in moving to dismiss Ms. Hamby's claims against it.

That is where the joint employer doctrine comes in. Under familiar common law agency principles, a worker may be jointly employed by two entities at once if both exercise control over her working conditions. That doctrine provides important protections to workers, especially low-wage workers, in fissured industries. As a result, how courts resolve cases like Ms. Hamby's will have significant effects on the most vulnerable. And, contrary to the WNBA's arguments here, Ms. Hamby may bring employment claims against the league in addition to her former team.

ARGUMENT

I. The joint employment doctrine is essential for workers, especially low-wage workers, to vindicate their rights.

A. American industries are increasingly fissured.

"In recent decades, there has been a transformation of employment relationships . . . in the United States . . . . The direct, two-party relationship assumed in federal and state legislation . . . no longer describes the employment situation on the ground." David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 Econ. & Labour Rels. Rev. 33, 33 (2011). "[M]ajor companies . . . have . . . shed their role as the direct employer of the people responsible for providing th[eir] products and services." *Id.* at 34. "Instead, like rocks split by elements, employment has been fissured

away from these market leaders and transferred to a complicated network of smaller business units" with whom the leaders contract, such as "franchisees, licensees, [and] third party managers." *Id.* at 36, 40; *see* Catherine Ruckelshaus et al., Nat'l Emp. L. Project, *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work* 7-8 (2014) (describing models of fissured employment). These "contractual forms . . . alter who is the employer of record or make the worker-employer tie tenuous and far less transparent." Weil, *Enforcing Labour Standards*, *supra*, at 36.

Fissuring occurs in a diverse range of workplaces. As this case and others demonstrate, it can even affect celebrity athletes. *See* Part II.A (discussing other cases concerning the fissured nature of athletic employment). But fissuring is particularly common in "industries . . . with large concentrations of low wage workers." Weil, *Enforcing Labour Standards*, *supra*, at 34. These include home health care, grocery and retail stores, food service, hotels, construction, janitorial services, and agriculture. *Id.* at 35; Ruckelshaus, *supra*, at 9-25. The same industries are also ripe with labor abuses. Weil, *Enforcing Labour Standards*, *supra*, at 35; Ruckelshaus, *supra*, at 9-25.

B. Joint employment law allows workers in fissured industries to vindicate their rights.

Fissured employment poses obstacles to enforcement of American employment laws. Weil, *Enforcing Labour Standards*, *supra*, at 42-43. Even as large corporations outsource more of their business to third-party companies, they often retain strict controls over the work environment akin to the role they used to play as a direct employer. *See* David Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, 5 Russell Sage Found. J. Soc. Scis. 147, 149 (2019). Those controls may "take the form of detailed subcontracting and supply chain requirements, franchise agreements, and most recently the highly calibrated incentive systems created by platform algorithms." *Id.* Despite that extensive control, many parent companies try to use the contractual distance created by a fissured workplace to disclaim an employment relationship with a worker and avoid the obligations of employment laws and potential liability. Weil, *Enforcing Labour Standards*, *supra*, at 37. These companies want to "have it both ways: benefit from work executed in strict compliance with central corporate objectives and not be required to treat the workers who do it as their employees with the obligations that relationship holds." Weil, *Understanding the Present and Future of Work*, *supra*, at 149.

After all, laws like those Ms. Hamby calls on in this case, Title VII of the Civil Rights Act of 1964 and Nevada Revised Statute 613.340, apply only to employer-employee relationships. *See* 42 U.S.C. § 2000e-2(a); Nev. Rev. Stat. § 613.330 (2018). If only one entity counts as a worker's employer, she will be unable to seek accountability for employment abuses committed by the other entity, or by both entities together. *See infra* Part I.C. That is particularly a problem when the employment abuses are part of a systemic pattern across multiple franchises or subcontractors. For example, if a large corporation has a practice of allowing—or even encouraging—harassment or other discrimination at its franchises, it can avoid accountability for the scope of its wrongdoing if workers are limited to suing only the small franchise where they work. *See infra* Part II.C (discussing abuses across McDonald's franchises). Workers' remedies may also be limited if they are able to sue only their smaller employer. For example, Title VII caps damages based on the number of employees who work for an employer. 42 U.S.C. § 1981a(b)(3). Accordingly, a plaintiff who can only bring claims against, say, a small fast food franchise will be able to recover far smaller damages than if she could bring the same claims against the large franchisor. Those limited damages may also be harder to collect: Small franchises and similar companies may also be so undercapitalized as to be judgment proof. *See* Andrew Elmore, *Regulating Mobility Limitations in the Franchise Relationship as Dependency in the Joint Employment Doctrine*, 55 U.C. Davis L. Rev. 1227, 1230 (2021).

Fortunately, the law recognizes that "an individual can have more than one employer." *U.S. Equal Emp. Opportunity Comm'n v. Glob. Horizons, Inc.*, 915 F.3d 631, 637 (9th Cir. 2019); *see also, e.g.*, *Nissenbaum v. NNH Cal Neva Servs. Co.*, 983 F. Supp. 2d 1245, 1258 (D. Nev. 2013) (recognizing possibility of joint employer liability under Nevada employment law). "[T]wo entities may simultaneously share control over the terms and conditions of employment," and so be "joint employers." *Glob. Horizons*, 915 F.3d at 637. As a result, both may be liable if they violate workers' rights. *See id.*

C. Protections from joint employers' abuses are crucial for low-income workers.

Case law demonstrates that many low-wage workers—who are particularly likely to work in fissured industries marked by pervasive employment abuses, *see supra* Part I.A—are only able to vindicate their rights when courts recognize that they are jointly employed. For that reason, how this Court resolves the WNBA's motion to dismiss will have ramifications not only for her and other professional

athletes but also for the most vulnerable workers.

Global Horizons, the Ninth Circuit's landmark case adopting a legal standard for joint employment, illustrates this point well. That case arose from egregious and discriminatory abuses suffered by Thai farm workers. *See* 915 F.3d at 635-36. On those workers' behalf, the Equal Employment Opportunity Commission brought Title VII claims against both the farms for which the migrants worked and the labor contractor who "recruited" them "and brought them to the United States under [a] guest worker program." *Id.* at 633. The Ninth Circuit held that, under the common law agency test, the farms and the labor contractor were joint employers of the workers. *Id.* at 637-41. That ruling allowed the EEOC to pursue full accountability for all the entities that had abused the vulnerable farm workers. *See id.* at 641-43.

Similarly, appeals courts have held that temp workers may be jointly employed by both a staffing agency and the company where the worker is placed when both entities exercise significant control over the worker's employment. *See, e.g.*, *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 215-19 (3d Cir. 2015); *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 415 (4th Cir. 2015). In doing so, the courts ensured that the structure of temp-agency work—precarious, short-term, low-paid positions under the control of two separate entities—does not leave workers unprotected from abuses by either of their employers. *See, e.g.*, Jane R. Flanagan, *Fissured Opportunity: How Staffing Agencies Stifle Labor Market Competition and Keep Workers "Temp,"* 20 J. L. Soc'y 247, 250-51 (2020) (discussing nature of temp work); Rebecca Smith & Claire McKenna, Nat'l Emp. L. Project & Nat'l Staffing Workers All., *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America's Workers* 13 (2014) (same).

The joint employment doctrine has likewise led to accountability in another industry ripe with fissured employment and abuses: hospitality. In *Frey v. Coleman*, for example, the Seventh Circuit recognized that a worker may have been jointly employed by a Holiday Inn Express and the company it hired to manage the hotel. 903 F.3d 671, 679-81 (7th Cir. 2018). As a result, she could bring claims against both entities for the persistent sexual harassment and pregnancy discrimination she experienced while working a service job at the hotel. *See id.* at 674-75.

Courts' recognition of joint employment relationships has also allowed some low-wage fast food workers to challenge abuses by both the local franchises for whom they work directly and their parent

companies, such as the McDonald's Corporation. *See, e.g.*, *Johnson v. McDonald Corp.*, 542 F. Supp. 3d 888, 891-92 (E.D. Mo. 2021); *Smith v. JEENS, Inc.*, 566 F. Supp. 3d 941, 946 (S.D. Iowa 2021); *see also Farmer v. Shake Shack Enters*., *LLC*, 473 F. Supp. 3d 309, 322-23 (S.D.N.Y. 2020) (similar, for claims brought against Shake Shack Enterprises and local location). By contrast, where McDonald's has been able to avoid findings of joint employment, it has been able to skirt liability for rampant abuses in its franchise restaurants. *See, e.g.*, *Doe v. McDonald's USA, LLC*, 504 F. Supp. 3d 360, 365-67 (E.D. Pa. 2020) (holding McDonald's USA was not joint employer of sexual harassment victim); *Chavez v. McDonald's Corp.*, No. 19-CV-00164, 2020 WL 1322864 at *4-*5 (D. Colo. Mar. 20, 2020) (same, for race discrimination victim). As a result, McDonald's has avoided pressure to implement reforms, demonstrating the importance of joint employer liability. *See, e.g.*, Bryce Covert, *McDonald's Hasn't Taken Promised Action on Sexual Harassment*, The Nation (Feb. 18, 2022), https://www.thenation.com/article/economy/mcdonalds-sexual-harassment-2 (describing McDonald's failures to address systemic sexual harassment in wake of deluge of lawsuits, in which the company argued it was not a joint employer).

In disposing of the WNBA's motion, then, the Court will not only determine whether Ms. Hamby can pursue her claims against the league. The Court will also contribute to a growing body of law that has proven crucial for vulnerable workers to vindicate their rights.

II. Ms. Hamby has sufficiently alleged that the WNBA may be liable as her joint employer.

A. The WNBA's extensive control over the conditions of Ms. Hamby's employment meets the test for joint employer liability under state and federal law.

Ms. Hamby alleges that the WNBA retaliated against her in violation of Title VII and Nevada law for reporting pregnancy discrimination when it publicly posted her workplace complaints to social media, failed to properly investigate her discrimination claims, failed to deter future discriminatory conduct, and failed to renew her marketing contract. Compl. ¶¶ 93-99. The WNBA seeks to avoid liability for its actions by arguing that only Ms. Hamby's former team, not the WNBA, was her "employer" within the meaning of Title VII and Nevada law. That argument fails because the WNBA's extensive control over the conditions of Ms. Hamby's employment means it can be liable as her joint employer.

Under Title VII, the "common-law agency test" applies to determine whether an entity is a joint employer. *Glob. Horizons*, 915 F.3d at 638. Although Nevada courts have not adopted a particular joint employer test for Nevada's anti-retaliation statute, Nev. Rev. Stat. § 613.340, "discrimination and retaliation claims under Nevada law are substantially similar to federal claims under Title VII," *Harrington v. Nevada ex rel. Nev. Sys. of Higher Educ.*, No. 18-cv-00009, 2018 WL 4286169, at *3 (D. Nev. Sept. 6, 2018) (Gordon, J.).

Under the common law agency test, "'the principal guidepost' is the element of control—that is, 'the extent of control that one may exercise over the details of the work of the other.'" *Glob. Horizons*, 915 F.3d at 638 (quoting *Clackamas Gastroenterology Assocs., P.C. v. Wells,* 538 U.S. 440, 448 (2003) (internal quotation marks omitted)). The Supreme Court has provided a "non-exhaustive list of factors" to consider when analyzing whether the requisite control exists. These include:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Glob. Horizons, 915 F.3d at 638 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992)). When examining whether an employment relationship exists, "[t]here is 'no shorthand formula' . . . so 'all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* (quoting *Darden*, 503 U.S at 324). Considering similar factors, courts have held that analogous professional sports leagues are joint employers of athletes. *See, e.g.*, *N. Am. Soccer League v. NLRB*, 613 F.2d 1379, 1383 (5th Cir. 1980); *Senne v. Kan. City Royals Baseball Corp.*, 591 F. Supp. 3d 453, 515-28 (N.D. Cal. 2022).[1]

This Court should come to the same conclusion here because Ms. Hamby has plausibly alleged that the WNBA was her joint employer. First, Ms. Hamby's first complaint alleges that the WNBA had the power to investigate and remedy misconduct, which is sufficient to plead a joint employer relationship. Second, even if that were not enough, Ms. Hamby's proposed Amended Complaint describes how

[1] These cases were decided under different employment laws, but the Ninth Circuit has explained that "there may be little functional difference among the common-law agency test" and the joint employer tests applied under those statutes. *Glob. Horizons*, 915 F.3d at 639.

the WNBA exercises substantial control over nearly every aspect of players' employment through its Collective Bargaining Agreement with the players.

Power to Investigate

Courts have held that the power to investigate misconduct and take remedial action is strong evidence that an employer has the requisite control to be a joint employer. For example, in *Haro v. KRM, Inc.*, this Court held that a plaintiff had sufficiently pled joint employer status solely because he pled that "he was able to complain to [the joint employer's] human resources department about activities at [his direct employer], and that [his direct employer's] employees were subject to termination if they violated [the joint employer's] policies." No. 20-cv-02113, 2022 WL 980249, at *4 (D. Nev. Mar. 30, 2022) (Gordon, J.). Similarly, in *Smith v. JEENS, Inc.*, a court held that a Title VII plaintiff had plausibly alleged that McDonald's was her joint employer in part because it "listened to" workers' complaints of sexual harassment and "forwarded them" on to a third party and because it "conducted an on-site investigation into the harassment." 566 F. Supp. 3d at 946-47. And in *Frazer v. Johnson Controls, Inc.*, a court held that "[t]he fact that plaintiff's [discrimination] allegations were repeatedly referred to . . . [the alleged joint employer] for investigation raises the inference that [it] was one of her employers." No. 11-CV-03956, 2012 WL 5379186, at *5 (N.D. Ala. Oct. 29, 2012); *see also Allen v. CH2M-WG, Idaho, LLC*, No. 08CV422, 2009 WL 1658018, at *4 (D. Idaho June 10, 2009) (holding, in discrimination suit, that plaintiff pled sufficient facts for joint employment where plaintiff alleged that putative joint employer "provided a mechanism for receiving employee complaints about the work environment" and "had the power/and or authority to investigate her concerns and take remedial actions").

That is precisely what happened in this case: Ms. Hamby was able to complain to the WNBA about her team's actions, the WNBA conducted a (deeply flawed) "formal investigation" of her complaint, and the WNBA had the power to take disciplinary action against the team's employees for violating its policies. Compl. ¶¶ 51-52, 56-57. Indeed, after uncovering violations of league policies, the WNBA disciplined Aces coach Becky Hammon by suspending her for two games, and the team itself by rescinding its 2025 first-round draft pick. *Id.* ¶ 57. Thus, based solely on the allegations that the WNBA had the power to receive, investigate, and take action in response to Ms. Hamby's complaints—

and that it exercised that power—the Court can find that that the WNBA was plausibly Ms. Hamby's joint employer.

Power to Control Players' Employment Through the Collective Bargaining Agreement

The allegations in the current complaint are sufficient alone to support a plausible joint employer relationship. But the proposed amended complaint further demonstrates that the WNBA exercises significant control over nearly every aspect of players' employment. As described in the proposed Amended Complaint, the WNBA has bargained with the players' union and entered into a collective bargaining agreement ("CBA") with the players that is binding on their teams. Am. Compl. ¶¶ 13-16, ECF No. 31-1. The purpose and function of a CBA is to define the terms and conditions of workers' employment. *See, e.g.*, 20 Samuel Williston, A Treatise on the Law of Contracts § 55:1 (4th ed. 2024). The existence of a comprehensive CBA between the league and the players demonstrates that the WNBA is Ms. Hamby's joint employer.

A closer look at the terms of the WNBA CBA makes that all the more clear. The CBA allows the WNBA to control nearly every aspect of players' employment, and thus meets many of the common law agency factors for finding a joint employer relationship. *See generally* Women's National Basketball Association Collective Bargaining Agreement ("WNBA CBA"), https://wnbpa.com/wp-content/uploads/2020/01/WNBA-WNBPA-CBA-2020-2027.pdf (Jan. 17, 2020). For example, consider the WNBA's control over "the location of the work" and "over when and how long to work." *Darden*, 503 U.S. at 323. The league decides the location of each team, the number of scheduled games, and where those games are played. WNBA CBA at 210, 213-14. The WNBA also sets the parameters within which the teams can set players' schedules outside of games: For example, the league sets the date that training camp for the season begins, and, as a result, places limits on when players can practice with their teams. *Id.* at 153. And, most fundamentally, the WNBA controls which players work for which teams, and therefore where they live, by controlling the annual draft process and regulating trades and free agency. Am. Compl. ¶ 16; *see also Senne*, 591 F. Supp. 3d at 519 (holding that conducting draft was evidence of joint employer relationship); *N. Am. Soccer League*, 613 F.2d at 1382 (same). Likewise, the WNBA controls "the duration of the relationship between the parties," *Darden*, 503 U.S. at 323, by setting rules

on free agency, thereby dictating when a player can negotiate contracts with either her current team or other teams. Am. Compl. ¶ 15.

The WNBA also plays a major role with respect to "the provision of employee benefits" and "the method of payment." *See Darden*, 503 U.S. at 323-24. The CBA provides for a "standard player contract," sets minimum and maximum salary levels, and limits trade bonuses. Am. Compl. ¶ 15; WNBA CBA at 20, 23, 36–37; *see Senne*, 591 F. Supp. 3d at 525 (finding Major League Baseball was joint employer in part because league imposed a "standard" contract and "exercised substantial control in setting minimum salary rates for minor league players"); *N. Am. Soccer League*, 613 F.2d at 1382 (upholding finding that soccer league was joint employer in part because it "exercises considerable control over . . . contractual relationships" through "standard player contract[s] adopted by the [l]eague"). If teams enter contracts that are not in compliance with the CBA, the WNBA Commissioner has the authority to "void" them, WNBA CBA at 20, or otherwise impose punishment, Compl. ¶ 57 (noting the WNBA disciplined Ms. Hamby's previous team for offering her an "impermissible" benefit). In addition, under the CBA, the WNBA provides health and life insurance, maintains a 401(k) program, and can award players performance-based bonuses and marketing deals that the league pays for. Am. Compl. ¶¶ 15-16; WNBA CBA at 87, 89, 92, 95. The CBA also sets reimbursement amounts for lodging, relocation expenses, and meals. WNBA CBA at 98–101.

The WNBA also freely "assign[s] . . . projects" to players. *Darden*, 503 U.S. at 323. Players may be required to make "promotional appearances on behalf of . . . the WNBA during any Season and . . . Off-Season." WNBA CBA at 187. And players are required to comply with the WNBA's content creation and social medial requests. *Id.* at 200.

Moreover, beyond the specific, nonexclusive factors identified by the Supreme Court, the WNBA exercises control over many other aspects of players' employment. These range from the small "details of the work," *Glob. Horizons*, 915 F.3d at 638 (quoting *Clackamas*, 538 U.S. at 448), such as requiring that players wear wireless microphones during games or practices, WNBA CBA at 49, to their very eligibility to play in the league. The WNBA sets rules and standards for player conduct that it has the power to enforce through fines and suspensions, and even outright bans. Am, Compl. ¶¶ 15-16; *see N. Am. Soccer League*, 613 F.2d at 1382 (holding the "power to discipline players for misconduct either on

or off the playing field . . . rang[ing] from fines to suspension to termination of the player's contract" was evidence of joint employer relationship); *Senne*, 591 F. Supp. 3d at 519 (holding that power "to take punitive action against a player" and "declar[e] a player permanently ineligible to play" was evidence of joint employer relationship). Players are also required under the CBA to participate in the WNBA's drug testing program and face disciplinary consequences if they fail a drug test. Ex. 2, WNBA CBA at 256-306; *see Senne*, 591 F. Supp. 2d at 518 (drug testing evidence of joint employer control). And the WNBA Commissioner has "exclusive jurisdiction" over all grievances related to on-court conduct. WNBA CBA at 172.

In short, the facts alleged in both the current complaint and the Amended Complaint support a holding that the WNBA plausibly crosses the "principal guidepost" of the joint employer test—"the element of control." *See Glob. Horizons*, 915 F.3d at 641.

B. The WNBA's liability as a joint employer plausibly extends to its refusal to renew Ms. Hamby's marketing contract.

The WNBA contends that, even if it is a joint employer for some purposes, it cannot be liable for refusing to renew Ms. Hamby's marketing contract because the marketing contract itself does not create an employment relationship, instead labeling Ms. Hamby an independent contractor. *See* Def.'s Mot. to Dismiss 14, ECF No. 14. That is wrong for two reasons. First, the label given to Ms. Hamby in the marketing contract does not determine her employment status. Second, even if the marketing contract created an independent contractor relationship separate from her joint employment relationship with the Aces and the WNBA, the Supreme Court has squarely held that an employer may be liable for a retaliatory act taken beyond the bounds of the employment relationship.

1. The label an employer uses to describe a worker does not determine their employment status.

If a defendant meets the standard for a joint employer, as the WNBA does here, it cannot avoid liability by simply labeling a plaintiff as a non-employee. This principle is well established in employment law and the law of agency more generally. "The underlying . . . realities of the employment relationship, rather than any designation or characterization of the relationship in an agreement or employer policy statement, determine whether a particular individual is an employee." Restatement of Employment Law § 1.01 cmt. g (Am. L. Inst. 2015); *see also* Restatement (Third) of Agency § 1.02 cmt. a (Am. L. Inst. 2006) ("[H]ow the parties to any given relationship label it is not dispositive. Nor does party characterization or nonlegal usage control whether an agent has an agency relationship with a particular person as principal."); *cf.* 26 C.F.R. § 31.3121(d)-1(a)(3) (2023) ("If the relationship of employer and employee exists, . . . it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.").

Accordingly, as the Supreme Court of Nevada recently "reaffirm[ed]," a worker does not lose her status as an employee "solely because a contract says so. Instead, [a] court must determine employee status under the applicable legal test, based on all the relevant facts." *Myers v. Reno Cab Co.*, 492 P.3d 545, 550 (Nev. 2021). Federal courts and agencies are in accord. *See, e.g.*, *Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290, 301 (1985) (explaining that the reality of the parties' relationship, rather than the labels they apply, determine whether an entity is an employer); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (same); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979) (same); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522 (6th Cir. 2011) (noting that the nature of the employment relationship "is not fixed by labels that parties may attach" but instead by the "economic reality" of their affiliation); *Ruiz v. Affinity Logistics. Corp.*, 754 F.3d 1093, 1105 (9th Cir. 2014) (same); U.S. Dep't of Lab., *Myths About Misclassification*, https://www.dol.gov/agencies/whd/flsa/misclassification/myths/detail/#8 (last visited Oct. 22, 2024) ("Your employer cannot classify you as an independent contractor just because it wants you to be an independent contractor. You are an employee if your work falls within a law's definition of employment."); *cf. Glob. Horizons*, 915 F.3d at 640 (explaining "[t]he terms of the contract between" two

companies "do not change "th[e] analysis" of whether they are joint employers).

The law is settled for a reason. Any other rule would lead to absurd results. If courts "allow[ed] contractual recitations to be used as 'subterfuges' to avoid mandatory legal obligations . . . constitutional and statutory protections for workers could (and almost certainly would) be eviscerated by contracts of adhesion disavowing an employment relationship." *Myers*, 492 P.3d at 550; *see also Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 954 (Nev. 2014) ("Particularly where, as here, remedial statutes are in play, a putative employer's self-interested disclaimers of any intent to hire cannot control the realities of an employment relationship.").

The same is true here. Because Ms. Hamby has plausibly alleged that she was jointly employed by the WNBA and her former team, *see supra* Part II.A., she may bring employment law claims against the league. The label the WNBA used to describe Ms. Hamby in its marketing contract does not shield it from suit for ending that contract if it did so in retaliation for her protected activity as an employee.

2. An adverse action need not be related to a workers' employment to be actionable retaliation.

Regardless, whether or not Ms. Hamby was the WNBA's employee for purposes of the marketing contract, the league may still be liable for retaliating against her by not renewing that contract. The hallmark of an employment retaliation claim is an employer's adverse action motivated by the plaintiff's protected activity. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 56 (2006); *Pope v. Motel 6*, 114 P.3d 277, 281 (Nev. 2005). The Supreme Court has held, in unambiguous terms, that Title VII's "antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." *Burlington N.*, 548 U.S. at 57. So long as an employer's adverse action "might have dissuaded a reasonable worker from making or supporting a charge of discrimination," *id.* at 68 (internal quotations omitted), it has engaged in retaliation, regardless of whether those "actions affect the terms and conditions of employment," *id.* at 64. The same should go for Nevada's anti-retaliation provision. *See supra* p. 8 (noting courts look to Title VII to interpret Nevada employment law).

Accordingly, even if the WNBA did not jointly employ Ms. Hamby for purposes of the marketing contract, its failure to extend that agreement may still constitute illegal employment retaliation. Ms.

Hamby alleges she complained of discrimination in her capacity as a basketball player—for which the WNBA and Aces jointly employed her, *see supra* Part I.A—and that the WNBA retaliated against her, in part, by deciding not to renew its marketing contract with her. Compl. ¶¶ 99-100, 102. That decision resulted in lost "compensation" for Ms. Hamby. *Id.* ¶ 65. Because that reduced income could have dissuaded a reasonable person from complaining of pregnancy discrimination, as Ms. Hamby did, Ms. Hamby has plausibly alleged retaliation by the WNBA, regardless of whether she was an employee or independent contractor for purposes of the marketing contract.

CONCLUSION

The Court should deny the WNBA's motion to dismiss.

October 23, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all registered CM/ECF users.

/s/ *Keren E. Gesund*
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