IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN CSOMOS, INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL SIMILARLY SITUATED PERSONS,
Appellant,
vs.
VENETIAN CASINO RESORT, LLC,
Respondent.

No. 55913

FILED

FEB 24 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

In this appeal from a district court order granting summary judgment in an employment action, Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge, we consider whether NRS 608.018, as written between 2005 and 2009, required employers to pay overtime to banquet servers.[1]

Appellant Steven Csomos worked for the Venetian Casino Resort as a food service employee from late 2003 to September 2007, for which he received an hourly wage of $11.38 plus service charges. Although Csomos's primary job was to provide room service to hotel guests, on approximately four occasions he also worked as a banquet server. Csomos's work as a banquet server included one and one-half hours of overtime for which he did not receive an overtime wage. On January 29, 2009, Csomos filed a class action complaint against the Venetian alleging violation of state labor laws, specifically, failure to pay banquet servers overtime under NRS 608.018. On September 25, 2009, the Venetian filed a motion for summary judgment which argued that, as

[1]In his appeal, Csomos also argued that a private right of action exists for overtime pay under NRS 608.018. Since we affirm, we need not address the issue.

a banquet server, Csomos had no right to overtime. The district court granted the Venetian's motion in a detailed order.

"We review an appeal from an order granting a motion for summary judgment de novo." Sustainable Growth v. Jumpers, LLC, 122 Nev. 53, 61, 128 P.3d 452, 458 (2006). Summary judgment is appropriate when the pleadings and other evidence, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue as to any material fact remains and the moving party is entitled to judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

Prior to 2005, employees who were paid at least one and one-half times the minimum wage were exempt from overtime pay. See NRS 608.018(2)(b) (2003). In so providing, NRS 608.018 differed from established federal law because, under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-291, an employee making more than one and one-half times the minimum wage could still qualify for overtime depending on the kind of work the employee did. 29 U.S.C. § 213(b). Under the FLSA, a banquet server would not be eligible for overtime pay because § 207(i) exempted:

> any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under [the minimum wage] section . . . of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona

> fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

29 U.S.C. § 207(i) (2006); see also Hearing on A.B. 44 Before the Assembly Commerce and Labor Comm., 73rd Leg. (Nev., March 9, 2005) (discussing the historical differences between Nevada law and federal law).

In 2005, the Legislature eliminated the blanket exception and amended NRS 608.018(2)[2] to read:

> An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate not less than 1 1/2 times the minimum rate prescribed pursuant to NRS 608.250 works more than 40 hours in any scheduled week of work.

Notably, the amended statute included an exemption for "[s]alesmen earning commissions in a retail business if their regular rate is more than 1 1/2 times the minimum wage, and more than one-half their compensation comes from commissions." NRS 608.018(3)(c). This exemption, as written, does not appear in the analogous section of the FLSA, which has remained unchanged since 1970. Compare 29 U.S.C. § 207(i) (1970) with 29 U.S.C. § 207(i) (2006). However, the current 2009 version of NRS 608.018, now consistent with the FLSA, exempts commissioned employees in a retail or service business, which would include banquet servers who receive more than half their compensation from commissions. NRS 608.018(3)(c) (2009); see 29 U.S.C. § 207(i) (2006).

Here, the parties agree that, as a banquet server, Csomos's wage was greater than one and one-half times the state minimum wage

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[2]Unless otherwise specified, citations to NRS 608.018 hereafter refer to the 2005 version.

and that the majority of his compensation came from commissions. They also agree that the 2005-2009 version of NRS 608.018 controls. But the Venetian argues that Csomos was not entitled to overtime pay because banquet servers are "salesmen" exempted from overtime pay. Further, the Venetian reasons that the 2005 amendment was intended to mirror federal law, which excludes retail and service establishment employees who received in excess of one and one-half times the minimum wage and more than half of whose compensation came from commissions. See 29 U.S.C. § 207(i) (2006). In opposition, Csomos argues that the word "salesman" as used in the 2005-2009 version of NRS 608.018 is unambiguous, making legislative history and comparison to federal and other state laws irrelevant.

NRS 608.018 does not define "salesmen" or "retail establishment."[3] "'Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.'" State, Div. of Insurance v. State Farm, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000) (quoting State v. Jepsen, 46 Nev. 193, 196, 209 P. 501, 502 (1922)). "However, when a statute is susceptible to more than one reasonable but inconsistent interpretation, the statute is ambiguous, and this court must determine the Legislature's intent." City Plan Dev. v. State, Labor Comm'r, 121 Nev. 419, 434-35, 117 P.3d 182, 192 (2005).

We agree with the Venetian that NRS 608.018's use of "salesmen" is susceptible to several interpretations. See also In re

[3]The parties seem to agree, however, that a hotel-casino providing banquet service qualifies as a retail establishment.

Novartis Wage and Hour Litigation, 611 F.3d 141, 149 (2d Cir. 2010) (showing that the term "salesman" is open to interpretation). For example, Webster's New College Dictionary defines "salesman" as "[a] man employed to sell merchandise in a store or in a designated territory." Webster's II New College Dictionary 999 (3d ed. 2005) (emphasis added). By comparison, the Oxford Dictionaries Online defines a salesman as "a man whose job involves selling or promoting commercial products, either in a shop or visiting locations to get orders." Oxford Dictionaries Online, http://oxforddictionaries.com/definition/salesman (last visited January 27, 2012) (emphasis added). Arguably, banquet servers who work on commission are part of the food and beverage department's convention-promotion effort, which presumably includes the promotion of return convention and related business. Because we find the statute ambiguous, a review of its legislative history is appropriate.

Prior to 2005, NRS 608.018(2)(d)'s exemption of retail salesmen was subsumed by the statute's exemption of employees earning at least one and one-half times the minimum wage, because a salesperson making more than one and one-half times the minimum wage plus more than one-half of his or her compensation from commissions would always fall under both exemptions. NRS 608.018(2)(b), (d) (2003). Thus, the 2003 version of NRS 608.018 did not track federal law because, under the FLSA, certain employees making more than one and one-half times the minimum wage could still qualify for overtime, whereas under Nevada law, they could not. 29 U.S.C. § 213(b) (specifying which employees are excluded from overtime pay requirements); NRS 608.018(2)(b) (2003) (excluding all employees who earn at least one and one-half times the minimum wage from overtime pay requirements); see also Hearing on A.B.

44 Before the Assembly Commerce and Labor Comm., 73rd Leg. (Nev., March 9, 2005).

In 2005, the Legislature amended NRS 608.018, according to the legislative history, to make it consistent with federal law. See Hearing on A.B. 44 Before the Assembly Commerce and Labor Comm., 73rd Leg. (Nev., March 9, 2005) (stating that the intent of the amendments was to "mirror federal law" and including comments from the Labor Commissioner that the exceptions under NRS 608.018 "generally track the exceptions that are in the Fair Labor Standards Act"). At that time the FLSA excluded all retail and service establishment employees who received over one and one-half times the minimum wage and more than half of whose compensation came from commissions. 29 U.S.C. § 207(i) (2006).

In a 2005 opinion, the Nevada Attorney General addressed the revised statute and commented that, "it is apparent that the Legislature intended to enact state overtime compensation law that was generally consistent with federal law on the same topic." 05-04 Op. Att'y Gen. 12, 24-25 (2005). And, in practice, banquet servers did not receive overtime under the 2005 law because, consistent with federal law, people in the industry assumed banquet servers were commissioned retail salespeople. Hearing on A.B. 84 Before the Senate Commerce and Labor Comm., 75th Leg. (Nev., April 29, 2009).

In 2009, the Nevada gaming industry sought further amendment of NRS 608.018 to eliminate its argued inconsistency with the FLSA, an amendment they described as "allow[ing] the status quo to continue." Hearing on A.B. 84 Before the Senate Commerce and Labor Comm., 75th Leg. (Nev., April 29, 2009). The amendment passed and,

since then, NRS 608.018 has exempted commissioned employees in a retail or service business, which includes banquet servers who receive more than half of their compensation from commissions, consistent with the FLSA. NRS 608.018(3)(c) (2009); see 29 U.S.C. § 207(i) (2006).

The legislative history demonstrates that, although the 2005-2009 version of the statute is not as clearly worded as the current version, the Nevada Legislature intended to track federal law beginning in 2005. Thus, we conclude that the "salesmen" exemption applied to all retail establishment employees who received more than one and one-half times the minimum wage, and more than half of whose compensation came from commissions. Thus construed, the 2009 amendment clarified the law, rather than modifying it. See Fernandez v. Fernandez, 126 Nev. ___, ___ n.6, 222 P.3d 1031, 1035 n.6 (2010) (noting that a legislative amendment meant to clarify, not change, a statute applies retroactively); see also 1A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 22.34 (7th ed. 2009) ("Where an amendment clarifies existing law but does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive, especially where the amendment is enacted during a controversy over the meaning of the law."). Because we conclude that, in his capacity as a banquet server, Csomos was not entitled to overtime pursuant to NRS 608.018, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.

Gibbons, J.

Pickering, J.

cc: Hon. Linda Marie Bell, District Judge
Leon M. Greenberg
Fox Rothschild, LLP
Jackson Lewis LLP
Eighth District Court Clerk