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### Rare Employer Victory in CA Misclassification Case

A unanimous three-judge panel reached a decision in the case of *Bijon Hill v. Walmart*. Last week, the U.S. Court of Appeals for the Ninth Circuit affirmed that Walmart classified a freelance model, Bijon Hill, as an independent contractor in good faith. Therefore, Walmart did not owe Hill waiting time penalties under California Labor Code Section 203 for failing to pay her immediately after photo shoots.

Plaintiff Hill, a clothing model, appeared in 10 San Francisco-based photo shoots organized by Walmart over a total of 15 days between July 2016 and August 2017. Hill received payment for these appearances from a third party, Scout Talent Management Agency, which had a contract with Walmart. Walmart paid a flat day rate for modeling services provided by the agency. Hill brought various wage-and-hour claims against Walmart in July 2019, alleging that each of the 10 photo shoots constituted a different instance of employment by Walmart and that she was "discharged" after each shoot. Hill sought \$540,000 in damages, alleging that Walmart failed to pay her all wages due within 30 days of discharging her employment. Hill demonstrated that she did not receive wages until more than 30 days after each photo shoot.

Last year, upon diversity removal, the U.S. District Court for the Northern District of California denied summary judgment on Walmart's defense that Hill was an independent contractor outside of the protection of the relevant Labor Code provisions due to genuine disputes of material fact. However, the court granted summary judgment in favor of Walmart's good faith defense regarding Ms. Hill's disputed employee status. The court found that Walmart was objectively reasonable for believing that Hill was not an employee due to the sporadic nature of her work and to the terms of her contract with Scout Talent Management Agency, including the terms of the contract between the agency and Walmart.

Upon appeal, Ninth Circuit Judge Milan Smith relied on the "limited and irregular nature of her work," which occurred in one- to two-day increments, to rule that it was reasonable for Walmart to believe that Hill was not an employee but an independent contractor. As a result, the Ninth Circuit panel affirmed the Northern District of California ruling and concluded that there was a good faith dispute about whether Hill was an independent contractor. Therefore, Hill was not entitled to immediate payment after each photo shoot or Labor Code waiting time penalties because Walmart's classification was in good faith.

### **Takeaways for Employers**

In a rare win for California employers, this case reinforced that some freelance workers outside the purview of the California Industrial Welfare Commission, such as modeling agencies and other freelance agencies, are not held to the strict 2018 *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County* standard. Instead, courts may apply the *Borello* test, established in 1989, to evaluate 13 factors in determining whether a worker is correctly classified as an independent contractor:

1. Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer;
2. Whether the work is a regular or integral part of the employer's business;
3. Whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work;
4. Whether the worker has invested in the business, such as in the equipment or materials required by their task;

5. Whether the service provided requires a special skill;
6. The kind of occupation and whether the work is usually done under the direction of the employer or by a specialist without supervision;
7. The worker's opportunity for profit or loss depending on their managerial skill;
8. The length of time for which the services are to be performed;
9. The degree of permanence of the working relationship;
10. The method of payment, whether by time or by the job;
11. Whether the worker hires their own employees;
12. Whether the employer has a right to fire at will or whether a termination gives rise to an action for breach of contract; and
13. Whether or not the worker and the potential employer believe they are creating an employer-employee relationship. While this may be relevant, the legal determination of employment status is not based solely on whether the parties believe they have an employer-employee relationship.

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