

IN THE
SUPREME COURT OF MISSOURI

No. 93379

ANDRO TOLENTINO,
Plaintiff-Appellant,

v.

STARWOOD HOTELS & RESORTS WORLDWIDE, INC., et al.,
Defendants-Respondents.

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit,
Case No. 1016-CV12176
The Honorable W. Brent Powell, Judge

RESPONDENTS' SUPPLEMENTAL BRIEF REGARDING THE
JOINT-EMPLOYER ISSUE

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ARGUMENT

The Westin¹ was not a joint employer of Tolentino and therefore cannot be liable for any purported violations of Missouri’s Minimum Wage Law (the “MMWL”) that were committed by Giant Labor Services (“GLS”). In its order granting the Westin summary judgment on Tolentino’s MMWL claims, the trial court found that, “[v]iewed in the light most favorable to [Tolentino], genuine issues of material fact exist as to whether [the Westin], along with [GLS] [was a] joint employer[] of [Tolentino].” The trial court’s order, however, did not engage in any analysis before reaching that finding. In fact, the trial court essentially indicated that the joint-employer question was irrelevant to its ruling. The trial court ultimately ruled that, even if the Westin were “presume[d]” to be Tolentino’s joint employer, the Westin nevertheless could not be held liable for GLS’s criminal and unforeseeable acts which caused Tolentino to be underpaid.

Notwithstanding that the joint-employer finding was not essential to the trial court’s ruling, this Court may still affirm the trial court’s entry of summary judgment by ruling on the joint-employer issue. *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 664 (Mo. 2010) (this Court may affirm summary judgment on any valid ground, even one not considered by the trial court). Indeed, a careful review of the record evidence reveals that the Westin was not Tolentino’s joint employer, and that there are no *genuine* disputes about the material facts that are required to reach that legal conclusion. Thus, the Westin

¹Respondents Starwood Hotels & Resorts Worldwide, Inc. and Westin Hotel Management, L.P. will be collectively referred to herein as the “Westin.”

cannot be held liable for GLS's failure to adequately compensate Tolentino under the MMWL.

The Court need not look any farther than the plain language of the regulation governing the joint-employer inquiry to conclude that the Westin was not Tolentino's joint employer. Even if that were not so, the factors applied by Missouri courts to determine when a joint-employment relationship exists further demonstrate that no joint-employer relationship exists here. Finally, even if the Court accepts Tolentino's invitation to apply additional factors that have not yet been recognized in Missouri as relevant to the joint-employer question, those factors likewise show that the Westin was not Tolentino's joint employer.

Moreover, contrary to Tolentino's suggestion that summary judgment is not appropriate in the context of the joint-employer inquiry, summary judgment must be granted "where application of the relevant factors to the facts of the case, viewed in the light most favorable to the plaintiff, compels the legal conclusion that the plaintiff was not an employee of a putative joint employer." *Lawrence v. Adderley Industries, Inc.*, No. CV-09-2309, 2011 WL 666304, at *7 (E.D.N.Y. Feb. 11, 2011); *see also Conrad v. Waffle House, Inc.*, 351 S.W.3d 813 (Mo. App. 2011) (affirming trial court's entry of summary judgment for alleged joint employer); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 76-77 (2d Cir. 2003) (to grant summary judgment, a court "need not decide that every factor weighs against joint employment"); *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1215 (11th Cir. 2003) (granting summary judgment for the putative joint employer even though some factors pointed toward a joint employer

relationship); *In re Enterprise Rent-a-Car Wage & Hour Employment Practices Litig.*, 735 F. Supp. 2d 277, 346 (W.D. Pa. 2010) (same).

In his supplemental brief, Tolentino attempts to escape the conclusion that the Westin was not his joint employer by taking liberties both with the record evidence and the caselaw governing the joint-employer inquiry. (*See generally* the Westin’s reply to Tolentino’s response to the Westin’s statement of undisputed facts in the trial court, at LF1224–75). As explained below, Tolentino’s tactics are insufficient to create a genuine issue of material fact as to the joint-employer issue, and the Court should therefore find that the Westin was not Tolentino’s joint employer and affirm the trial court’s summary judgment on that basis.

A. THE WESTIN IS NOT TOLENTINO’S JOINT EMPLOYER UNDER THE PLAIN LANGUAGE OF THE REGULATION GOVERNING THE JOINT-EMPLOYER INQUIRY.

By Missouri state regulation, the MMWL is to be interpreted in accordance with the federal regulations regarding the Fair Labor Standards Act (the “FLSA”). 8 C.S.R. § 30-4.010(1).² Section 791.2 of Chapter 29 of the Code of Federal Regulations (entitled “joint employment”) sets out the circumstances in which a joint-employment relationship may exist under the FLSA. That section recognizes that an employer will not be liable

² The state regulation provides that the MMWL shall be interpreted in accordance with any FLSA regulations that were in effect as of December 16, 2004.

for violations of the FLSA by another employer unless the two employers have employees in common and certain other relationships exist between the two employers:

Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

- (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees;
- (2) Where one employer is acting directly or in-directly [*sic*] in the interest of the other employer (or employers) in relation to the employee;
- (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

This case falls within none of the three scenarios in Section 791.2 under which joint-employment liability may arise. First, there has been no suggestion in this case of any arrangement between GLS and the Westin to share the services of Tolentino (or any other GLS employee) or to interchange employees. The undisputed facts demonstrate as much. (LF0169–71, ¶¶ 14–23; LF1229–32, ¶¶ 14–23.) Second, GLS was not acting directly or indirectly in the interest of the Westin in relation to Tolentino. Indeed, even the United States Government recognized that the Westin, along with Tolentino, was

“defrauded” by GLS in its criminal scheme. (LF0185 ¶ 121; LF0555; LF1256-57 ¶ 121.) Finally, Neither GLS nor the Westin controlled each other; nor were the two companies under common control. (LF0168–69, ¶¶ 8–10; LF1226–27, ¶¶ 8–10.) As a matter of law, under the plain terms of the applicable regulation, GLS and the Westin were not joint employers of Tolentino.

Summary judgment in favor of the Westin may be affirmed on this basis alone, without resort to consideration of the economic-realities factors. In any case, as explained below, those factors also support the affirmance of summary judgment.

B. THE WESTIN IS NOT TOLENTINO’S JOINT EMPLOYER UNDER THE FACTORS APPLIED BY MISSOURI COURTS.

Application of a five-factor test used by Missouri courts to determine whether a joint-employment relationship exists demonstrates that the Westin was not Tolentino’s joint employer. The Missouri Supreme Court has not previously considered what factors should be applied to determine when an employer may be held to be a joint employer under the MMWL, but Missouri courts have examined the following factors:

(1) who has the power to hire and fire the worker; (2) who supervises and controls the worker’s work schedule and conditions of work; (3) who determines the rate and method of payment of the worker; [] (4) who maintains work records; [and (5)] whose premises and equipment are used in performing work.

Conrad, 351 S.W.3d 813, 820 (Mo. App. 2011) (internal quotations omitted); *see also Fields v. Advanced Health Care Mgmt. Servs., LLC*, 340 S.W.3d 648, 654–55 (Mo. App.

2011). The Missouri Court of Appeals has explained that no one factor is dispositive, and the “factors are not applied mechanically, but must be considered in the context of the economic realities and circumstances of the whole work relationship.” *Conrad*, 351 S.W.3d at 820 (internal quotations omitted).³

Missouri federal district courts have adopted and routinely applied a similar set of factors to determine whether joint employment exists in the wage and hour context. *See Schubert v. Bethesda Health Group, Inc.*, 319 F. Supp. 2d 963, 971 (E.D. Mo. 2004) (“[T]he Court must determine whether the alleged employer: (1) had the power to hire and fire the plaintiff; (2) supervised and controlled plaintiff’s work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained plaintiff’s employment records.”); *see also Loyd v. Ace Logistics, LLC*, Case No. 08-CV-00188-W-HFS, 2008 WL 5211022, at *3-4 (W.D. Mo. Dec. 12, 2008); *Arnold v. Direct TV, Inc.*, Case No. 4:10CV00352AFG, 2011 WL 839636, at *6 (E.D. Mo. Mar. 7, 2011); *Baker v. Stone County*, 41 F. Supp. 2d 965, 980 (W.D. Mo. 1999); *Jones v. Sprint Nextel Corp.*, Case No. 08-CV-00278-W-HFS, 2009 WL 1651093, at *2 (W.D. Mo. June 12, 2009).

³ Tolentino suggests in his Supplemental Brief that courts regularly apply additional factors referred to as “functional factors,” but Tolentino cites no case law for the proposition and does not otherwise explain why the Court should apply those factors here. (Supplemental Brief, at p. 8.)

Other federal jurisdictions have likewise adopted and applied a similar test regarding joint employment. There are two recent federal decisions that, although not binding on this Court, are particularly instructive in applying the relevant factors to the facts of this case.

Lawrence v. Adderly

In *Lawrence v. Adderley Industries, Inc.*, the district court determined as a matter of law at the summary judgment state that the defendant cable company, Cablevision Systems Corporation (“Cablevision”), was not a joint employer of the cable technicians who performed work for Cablevision’s customers pursuant to an agreement between Cablevision and its vendor, Adderley Industries, Inc. (“Adderley”). No. CV-09-2309, 2011 WL 666304 (E.D.N.Y. Feb. 11, 2011). Cablevision had entered into a contract with Adderley where Adderley provided “technicians to install, service, repair and remove equipment for Cablevision’s customers.” *Id.* at *1. Pursuant to the terms of the contract, Cablevision exercised some level of control over the technicians: Cablevision gave the technicians Cablevision identification badges, it set procedures and specifications for the technicians to follow, it had the right to remove technicians from Cablevision jobs, it required technicians to arrive at customers’ homes at certain times, it performed quality control inspections of the technicians’ work, and it required Adderley to provide ongoing training and to do background checks before hiring a technician. *Id.* at **1-4.

Adderley, on the other hand, paid the technicians, controlled which technicians would be sent to any given Cablevision job, determined the number of technicians that it would provide Cablevision on a weekly basis, and had the sole power to fire a particular

technician. *Id.* While Cablevision could request that a particular technician no longer work on Cablevision jobs, Adderley was free to employ that person in another capacity. Moreover, Cablevision was Adderley’s only client—that is, the only company to which Adderley provided technicians. *Id.* at *2.

Applying the relevant factors, the court first determined that Cablevision had no formal control over the technicians. *Id.* at **7–8. The fact that Cablevision required Adderley’s technicians to follow certain guidelines and specifications did not weigh in favor of a joint-employer relationship because “[i]t is in the nature of a contract that the contractor . . . promises to deliver the performance bargained for by the client.” *Id.* (citation omitted). Requiring a contractor to satisfy the client’s specifications “is not the type of ‘control’ which bestows ‘employee’ status on the contractor.” *Id.* (citation omitted).

The court similarly concluded that the fact that Adderley’s technician’s wore Cablevision identification badges did not render the technicians Cablevision employees because the wearing of “such identifying materials does not affect the economic reality of the relationship [between Adderley and Cablevision], but merely allows consumers to be assured of the [technician’s] bona fides.” *Id.* (internal quotations and citation omitted). Likewise, Cablevision’s policy of requiring background checks and requiring technicians to arrive at their customers’ homes within certain windows of time were similarly motivated by “good business sense” and the “nature of the business,” not any economic reality of an employer-employee relationship. *Id.* Although Cablevision performed quality control inspections and reviewed the technicians’ work, Cablevision did “not

exercise any significant degree of supervision over plaintiff's or any particular technician's work." *Id.* at *10.

The court also found it significant that, if hired to do so, "Adderley's business could 'shift as a unit' from Cablevision to another cable media provider." *Id.* Moreover, the court noted that the absence of a broad client base "is not a proxy for joint employment because it is perfectly consistent with a legitimate subcontracting relationship." *Id.* (citation omitted). Viewing the four factors in the light most favorable to the Plaintiff, the Court granted Cablevision's motion for summary judgment, holding that Cablevision was not a joint employer as a matter of law and could not be held independently liable for violations of the FLSA.

Jacobson v. Comcast

In a similar case, *Jacobson v. Comcast Corp.*, the district court likewise found no employer-employee relationship despite an even greater measure of control exercised by the alleged joint employer. 740 F. Supp. 2d 683 (D. Md. 2010). Much like in *Lawrence*, the defendant cable company, Comcast Corporation ("Comcast"), contracted with various other companies to obtain cable technicians to install cable for Comcast's customers. *Id.* at 686. The cable technicians claimed that Comcast was their joint employer for purposes of FLSA liability. *Id.* at 685–86. For the most part, Comcast's contracts with its various labor providers closely resembled the arrangement between Cablevision and Adderley in *Lawrence*. *See id.* at 686–87. But Comcast exercised distinctly greater control over the hiring of technicians, requiring its labor providers to receive approval from Comcast before hiring someone new. *Id.* at 686. Comcast also had the power to

“deauthorize” a technician, which, given that the labor providers only worked with Comcast, was the equivalent of firing the technician. *Id.* at 687. The court summarized this control by noting that “Comcast unquestionably plays a role in hiring and firing technicians.” *Id.* at 689. The court nevertheless found that such control did not weigh in favor of a joint-employer relationship because “[i]t is only in the context of quality control [] that Comcast exercises power over the hiring or firing of technicians.” *Id.* at 689–90.

Comcast would also sometimes interact directly with the technicians, telling them where to report and when, and perform follow-up surveys to assess the technicians’ customer service, sharing those results directly with technicians to incentivize better service. *Id.* at 687. Again, the court found that such control was not indicative of an employer-employee relationship because “detailed instructions and a strict quality control mechanism will not, on their own, indicate an employment relationship.” *Id.* at 690, 691–92. In other words, “[t]he nature of the control exercised by putative joint employer is the key . . . generic control exercised by a supervisor over an independent contractor” will not create an employment relationship. *Id.* at 690. Rather, control indicating an employment relationship entails developing human resource policies, dictating working conditions, and determining the conditions upon which employees receive payment. *Id.* at 691.⁴

⁴ In a case almost identical to *Lawrence* and *Jacobson*, the United States District Court for the Northern District of Illinois applying similar factors also held that Comcast was

The Westin's interaction with Tolentino was even less remarkable than that of Comcast or Cablevision in the aforementioned cases. Application of the five factors to the undisputed facts in this case, even when viewed most favorably to Tolentino, compels the legal conclusion that the Westin was not Tolentino's joint employer.

1. The Westin Did Not Have the Power to Hire or Fire Tolentino.

The Westin had no authority to hire or fire Tolentino or any of GLS's room attendants (the "Contract Room Attendants"), nor did the Westin participate in any of GLS's employment decisions. (LF0167 ¶¶ 60, 62, 63; LF0182 ¶95; LF1241 ¶¶ 60, 62, 63; LF1252 ¶95.) The fact that the Westin did not hire or fire any Contract Room Attendants is apparent when considering the myriad processes that the Westin requires their own employees to go through prior to starting work at the Westin. The Westin's own employee room attendants must fill out an application, which is then screened by a human resources manager; if selected, the applicant will then be contacted to go through one or more interviews; if the interview process goes well, the applicant will then "shadow" one of the Westin's employee room attendants so that the applicant can make his or her own determination as to whether he or she is capable of doing the work; if ultimately hired as a room attendant, the applicant will then have to complete a drug test, fill out several hours of paperwork, watch an OSHA video, and attend several training

not the joint employer of independent technicians who installed and serviced Comcast products. *See Zampos v. W&E Communications, Inc.*, Case No. 12CV1268, 2013 WL 4782152, *11 (N.D. Ill. Sept. 4, 2013).

seminars before starting work, including a day and a half of orientation. (LF0177-178 ¶ 65; LF1242 ¶ 65.)

Tolentino, as a Contract Room Attendant, was not put through any of these paces by the Westin. Indeed, the important differences in the processes by which Contract Room Attendants and the Westin’s employees come to work is evident from the record. After GLS was indicted and became defunct, the Westin decided to hire on a few of the GLS Contract Room Attendants. (LF0186 ¶ 125; LF1257 ¶ 125.) Despite their previous contract work at the hotel, the Westin nevertheless required these individuals to go through the formal hiring process described above. (LF0186 ¶ 126; LF1257 ¶ 126.)

In attempting to argue that the Westin made the decision to hire him, Tolentino erroneously suggests that he was “required to interview with the Westin prior to beginning work there.” (Supplemental Brief, p. 10.) But Tolentino’s own testimony contradicts his embellished suggestion that any sort of “interview” ever occurred at the Westin. Rather, Tolentino made clear in his deposition that someone from GLS brought him to the Westin and merely introduced him to the Westin’s Director of Housekeeping, Dorothy Gibson, and that they only talked for ten minutes before she referred him to someone else to help him get a uniform and a badge. (LF1227, ¶ 13; LF1258–60, ¶ 130.) Tolentino further offers up his conclusory contention that “[t]he Westin, not Giant Labor, made the final decision to hire Tolentino.” (Supplemental Brief, p. 10.) But again, closer examination of Tolentino’s own deposition testimony reveals his contention has no real backing, as Tolentino bases his position solely on the fact that Gibson allegedly told him to “come back the next day” after their 10-minute conversation. ((LF1258–60, ¶ 130.)

More importantly, Tolentino is focusing on the wrong moment in time. Tolentino was hired by his employer, GLS, when GLS recruited him to come to Kansas City, long before he ever started performing services at the Westin. (LF0177, ¶¶ 62, 63; LF1241–42, ¶¶ 62, 63.) It is undisputed that the Westin played no role in any of GLS’s decisions regarding who GLS would bring into its work force. (LF0177, ¶¶ 60, 62, 63; LF0182–83, ¶¶ 95–98; LF1241–42, ¶¶ 60, 62, 63; LF1252, ¶¶ 95–98.) That is why Tolentino filled out an application to work for GLS and not for the Westin. (LF0177, ¶¶ 63; LF1241–42, ¶ 63.) Tolentino was employed by GLS before he started performing services at the Westin and, in the same fashion, he continued to be employed by GLS after he stopped performing services at the Westin. (LF0182–83, ¶¶ 97–98; LF1252, ¶¶ 97–98.) Specifically, GLS reassigned him to work at the Marriot Union Hill, also located in Kansas City, Missouri. (LF0182–83 ¶¶ 97–98; LF1252 ¶¶ 97–98.) Thus, Tolentino is mistaken when claims that the Westin “made the decision to terminate his employment.” (Supplemental Brief, p. 11.) To the contrary, the Westin merely notified GLS that it no longer wanted Tolentino to perform work at the Westin due to his failure to timely clean the rooms. (LF0182, ¶ 97; LF1252, ¶¶ 97.)

Also, as a general matter, the Westin had no authority to terminate or fire any other GLS Contract Room Attendants. Although the Westin had the contractual right to request that GLS stop sending unsatisfactory Contract Room Attendants to perform services at the hotel, like in *Lawrence*, GLS was not required to fire those individuals, and GLS could, and did, send those individuals to perform services for the Westin’s competitors. (LF0182 ¶ 96; LF1252 ¶ 96.) The ability to request reassignment or refuse

a particular contract worker may constitute the ability to modify working conditions, but such limited power does not result in joint employment. *See Diaz v. U.S. Century Bank*, Case No. 12-21224, 2013 WL 204654, *8 (S.D. Fl. May 14, 2013). To be certain, the Westin’s lack of influence in the hiring and firing process starkly contrasts to that seen in *Jacobson*, where the court concluded that the putative joint employer “unquestionably play[ed] a role in hiring and firing,” and, recall, still found that there was no joint-employer relationship. 740 F. Supp. 2d at 689.

Tolentino, seemingly aware of the weakness in his position, resorts to misrepresenting two cases by claiming they stand for the proposition that the ability to request that a contract laborer cease performing services for the alleged joint employer amounts to firing power for purposes of the joint-employer doctrine. (Supplemental Brief, p. 12.) Ironically, one of the cases that Tolentino cites declares the opposite to be true: “The fact that [the labor contractor] routinely attempted to accommodate the [alleged joint employer] Defendants, however, does not give the [] Defendants the power to hire or fire members of the plaintiff class.” *Flores v. Albertson’s Inc.*, No. CV 01-0515, 2003 WL 24216269, *3 (C.D. Cal. Dec. 9, 2003) (emphasis added). The second case merely acknowledges that the alleged joint employer could request that certain contract laborers no longer perform services for the alleged joint employer, without any suggestion one way or the other that such conduct amounts to firing power. *See Bastian v. Apartment Inv. & Mgmt. Co.*, No. 07 C 2069, 2008 WL 4671763, *4 (N.D. Ill. Oct. 21, 2008).

The Westin’s lack of involvement in the hiring process for GLS Contract Room Attendants and its limited ability to request that a GLS Contract Room Attendant not return to the Westin do not counsel in favor of a joint-employer finding. *See Grenawalt v. AT&T Mobility, LLC*, 937 F. Supp. 2d 438, 449–450 (S.D.N.Y. 2013).

2. The Westin Did Not Supervise or Control Tolentino’s Schedule or Conditions of Employment.

As an initial matter, it must be noted that Tolentino mistakenly combines this factor with one of the factors courts outside of Missouri examine to determine “functional” control over a putative employee—supervision of the alleged employee’s work. To keep order, the Westin only addresses the lack of supervision and control it had over Tolentino’s schedule and conditions of employment in this part of its brief, and the Westin will address its lack of supervision of Tolentino’s work performance in the next part, which addresses the functional control factors.

The Westin did not determine Tolentino and the other GLS Contract Room Attendants’ work schedules, and the Westin did not oversee the Contract Room Attendants’ work conditions. While the Westin provided assignments so that GLS’s Contract Room Attendants would know which rooms to clean once they arrived at the Westin, GLS—not the Westin—decided which Contract Room Attendants would perform services at the Hotel on a daily basis. (LF0180-181 ¶¶ 80–84; LF1246-1248 ¶¶ 80–84.) Accordingly, Tolentino testified that the Westin did not tell him how many hours he had to work, or how long he had to stay at the hotel, but simply assigned him rooms to clean. (LF0180-181 ¶ 84; LF1247-1248 ¶ 84, ¶ 84.)

Despite there being no dispute about this lack of the most basic control an employer would have over an employee's schedule—control over when the employee comes to work—Tolentino nevertheless maintains that the Westin controlled his schedule. Tolentino suggests this “control” was carried out through morning meetings at the Westin, where the Westin's managers would allegedly give Tolentino his “daily assignments and . . . discuss projects for the day.” (Supplemental Brief, p. 12.) The Westin's minimal control in directing the Contract Room Attendants to clean certain rooms is similar to the control that Cablevision exercised in *Lawrence*, directing its contract technicians to certain customers' houses. *Lawrence*, 2011 WL 666304, at *8. The court there held that this type of control, “stemm[ing] from the nature of the business,” has no bearing on the employer-employee relationship. *Id.* (citation omitted).

Tolentino attempts to counter this conclusion by citing to *Tumulty v. FedEx Ground Packaging Systems, Inc.* for the proposition that regular meetings are enough to suggest control of the alleged employees, but *Tumulty* actually supports the opposite conclusion. (Supplemental Brief, p. 13.) In that case, the court noted that regular meetings were but one indicia of the putative joint employer's control, in addition to the fact that the alleged employer closely monitored the alleged employees' work progress, required the alleged employees to call when they could not complete certain tasks, commented on the employees' uniforms, and dictated how many hours a day the alleged employees should work. *Tumulty*, No. 04-1425, 2005 U.S. Dist. Lexis 26215, *10 (W.D. Wash. Mar. 7, 2005). Those additional elements of control are not present here, and the

court expressly noted that the mere presence of just one of the aforementioned factors individually would “not support a ‘joint employment relationship.’” *Id.*

Tolentino then turns to factual mischaracterizations to carry him the rest of the way on this factor. First, he incorrectly suggests that the Westin “set the schedule for Tolentino and other Room Attendants 18 days ahead of when work was to commence.” (Supplemental Brief, p. 15.) But when one examines the deposition testimony that Tolentino cites for this proposition, it is clear that Tolentino has taken a great liberty in suggesting that the Westin was setting any sort of schedule for specific, individual Contract Room Attendants. Quite the contrary, Caralou Schmollinger’s testimony—to which Tolentino cites—makes clear that the Westin generally told the *labor contractors* (*i.e.*, GLS) what their labor needs would be for the next 18 days. (LF1270, ¶ 163.) The Westin did not provide any 18-day schedules to Tolentino or any other individual Contract Room Attendant. (*Id.*) Tolentino further misstates the facts when he suggests that he “was expected to remain on the Westin premises” during his “shift.” (Supplemental Brief, p. 15.) Tolentino’s own deposition testimony makes clear that that is untrue, as he did not recall having to work any set number of hours per day; rather, he only had to work as long as it took him to finish his assigned rooms. (LF1271, ¶ 165.)

3. The Westin Had No Control Over the Rate and Method of Payment For Tolentino.

The Westin had no control over the rate and method of payment for Tolentino or any other GLS Contract Room Attendants, and the Westin never made any sort of payment to these individuals. (LF0178 ¶¶ 66, 68, 72; LF1242-1244. ¶¶ 66, 68, 72.)

Tolentino argues that the Westin controlled Tolentino's pay because the amount of money that the Westin paid Tolentino's employer, GLS, allegedly indirectly affected how much GLS in turn paid Tolentino. However, "[a]n employee's income, received from its direct employer, will always be determined and influenced by what a contractor decides to pay the direct employer for services rendered by the employee." *Jacobson*, 740 F. Supp. 2d 691. That is why courts must use caution in applying this factor, otherwise every legitimate labor-contracting relationship would become "joint-employment." For example, in *Zampos*, Comcast paid its contractor on a per-service basis, assigning a set fee based on how long each task took. *Zampos*, 2013 WL 4782152, at *9. Comcast had no input on the amount paid to the contractor's technicians. *Id.* The Court noted, denying a joint-employment finding on this factor, that "[t]o find that this arrangement places Comcast in control of Plaintiffs' wages would drastically expand the FLSA to subsume traditional independent contractor relationships." *Id.* (internal citations omitted).

Similar to *Zampos*, under the GLS contract, the Westin paid GLS based on the number of rooms GLS's Contract Room Attendants cleaned. (LF0710-711 ¶¶ 19–20; LF1230-1231 ¶¶ 19–20.) It was then GLS's contractual and legal obligation to pay its Contract Room Attendants in conformity with the MMWL. (LF0170 ¶¶ 17–18; LF0178 ¶ 68; LF1230 ¶¶ 17–18; LF1243 ¶ 68.) The Westin had no control over how GLS paid its employees, and, in any case, GLS "defrauded" the Westin, leading the Westin to believe that GLS was paying its Contract Room Attendants fairly and in accordance with the law when it in fact was not. (LF0178 ¶ 72; LF0185-186 ¶¶ 121–122; LF1243-1244

¶ 72; LF1256-1257 ¶¶ 121-122.) Indeed, it is undisputed that GLS was making unlawful deductions for visa fees from Tolentino’s paycheck without the Westin’s knowledge, salient proof that it was GLS, not the Westin, that controlled Tolentino’s rate of pay. (LF0185, ¶ 121; LF1256–57, ¶ 121.)

Tolentino ignores these undisputed facts and instead turns again to mischaracterization in his attempt to sway this factor, incorrectly suggesting that the Westin “concedes” that it paid the Contract Room Attendants by the number of rooms cleaned. (Supplemental Brief, pp. 15–16.) The Westin has made no such concession, and the record cite to which Tolentino points makes it clear that the Westin always paid Tolentino’s employer, GLS, and never Tolentino: “[The Westin] and GLS calculated the number of hours worked by calculating the total number of rooms cleaned by GLS Room Attendants and dividing by two.” (LF0998, ¶ 20 (emphasis added).) It is unclear how Tolentino could extract from that paragraph any concession that the Westin paid anything to Tolentino or any of the other Contract Room Attendants.

Tolentino also tries to suggest that the Westin had some control over the way that GLS compensated him by pointing out that the Westin’s Director of Housekeeping, Dorothy Gibson, merely asked Tolentino during a conversation at the Westin if GLS had informed him it was “per room.” (LF1260–61, ¶ 132.) In fact, Tolentino testified that he did not discuss pay at all with Gibson. (*Id.*) Tolentino fails to explain how this exchange could possibly indicate that the Westin had any control over Tolentino’s rate or method of pay. Rather, it only reaffirms that it was GLS, not the Westin, that had such control.

The Westin had no say or control in setting the pay rate or method for Tolentino and accordingly this factor weighs in favor of a finding that the Westin was not Tolentino's joint employer.

4. The Westin Did Not Maintain Employment Records for Tolentino.

The Westin never maintained any work records or other documents relating to the terms or conditions of employment for Tolentino or any other Contract Room Attendant supplied by GLS. (LF0174 ¶¶ 46–47; LF0176 ¶ 58; LF1235-1237 ¶¶ 46–47; LF1240 ¶ 58.) Specifically, the Westin did not maintain applications of employment, benefits information, I-9s, performance reviews or evaluations, or any other documentation customarily maintained in an employee's personnel file. (LF0174 ¶ 46; LF1235-1237 ¶ 46.) Indeed, the Westin has no personnel records whatsoever for Tolentino or other GLS employees. (LF0147 ¶ 47; LF1237 ¶ 47.) In contrast, the Westin of course maintains all such documentation for its own employees. (LF0175-176 ¶ 53; LF01238-1239 ¶ 53.)

Tolentino nevertheless strains to claim that the Westin maintained “employment records” for him in the form of room cleanliness standards and handwritten sheets that allowed the Westin's labor contractors to track how many rooms the contractors' employees were cleaning at the Westin so the contractors could invoice the Westin. (Supplemental Brief, pp. 16–17; LF0174-175 ¶¶ 48–49; LF1237-1238 ¶¶ 48–49.) These types of records, however, are clearly not within the ambit of “employment records,” which typically include things like an IRS form W-4, a Missouri Department of Revenue

Employee's Withholding Allowance Certificate, or even a United States Immigrant and Naturalization Services Form I-9. *See, e.g., State ex rel. DFS v. Sutherland*, 916 S.W.2d 818, 819–20 (Mo. App. 1995) (describing all those things as “employment records”). In fact, when applying this factor, the Missouri Court of Appeals noted that employment records include things like “personal documents, prior employment information, benefit information, personnel files, leave and attendance records, or performance reviews.” *Conrad*, 351 S.W.3d at 822. It is undisputed that the Westin did not maintain any such documents, and Tolentino's suggestion that the handwritten sheets or the room cleanliness standards could somehow qualify as “performance review” records is beyond colorable. (*See* Supplemental Brief, pp. 16–17.)

In any case, the retention of these limited records is insufficient to support a ruling in favor of joint employment on this factor. *See Zampos*, 2013 WL 4782152, at *10; *Jacobson*, 740 F. Supp. 2d at 692; *Lawrence*, 2011 WL 666304, at *9 (each of these courts held that retention of limited documents of contract workers is only an extension of the contract employer's quality control procedures). In fact, in the *Zampos* case, Comcast retained significantly more employment records related to its contract workers and the Court still found in favor of Comcast on this factor. *Zampos*, 2013 WL 4782152, at *10 (Comcast retained badge identification request forms, quality check forms, checklists, and other documents that contained contractor's social security numbers licensing information and drug screening information).

5. The Fact That Tolentino Performed His Work on the Westin's Premises with the Westin's Equipment Bears Little Weight on the Joint-Employer Determination.

The final factor applied by Missouri courts considers whether the purported joint employer's premises and equipment were used for the plaintiff's work. *See Conrad*, 351 S.W.3d at 820. In applying this factor, courts have noted that "shared premises is not anything close to a perfect proxy for joint employment because it is perfectly consistent with a legitimate subcontracting relationship." *Grenawalt*, 937 F. Supp. 2d at 452. Indeed, in the *Grenawalt* case, the plaintiffs were security guards for designated AT&T store locations and it was undisputed that they worked on the premises of the purported joint employer. *Id.* The court nevertheless denied that there was a joint-employment relationship because the evidence that plaintiffs worked primarily at the AT&T stores "misses the larger point that the guards were not so integrated into AT&T as to constitute an employer relationship instead of a legitimate subcontracting arrangement." *Id.* at 452–54. Likewise, here, this factor does little to establish that the Westin is Tolentino's joint employer.

The Westin does not dispute that Tolentino performed services on the Westin's property using the Westin's equipment, but that alone cannot remove the Westin's subcontracting relationship from the realm of legitimacy. Indeed, the mere fact that one of the economic-realities factors does not clearly weigh in favor of the conclusion that no joint-employer relationship exists does not prevent the affirmance of the trial court's entry summary judgment in favor of the Westin. *See Zheng*, 355 F.3d at 77 (to grant

summary judgment, a court “need not decide that every factor weighs against joint employment”); *see also* *Martinez-Mendoza v. Champion Int’l Corp.*, 340 F.3d 1200, 1215 (11th Cir. 2003) (granting summary judgment for the putative joint employer even though some factors pointed toward a joint employer relationship); *In re Enterprise Rent-a-Car Wage & Hour Employment Practices Litig.*, 735 F. Supp. 2d 277, 346 (W.D. Pa. 2010) (same).

On the whole, the five factors applied by Missouri courts demonstrate that the Westin is not a joint employer of Tolentino as a matter of law.

C. EVEN UNDER THE ADDITIONAL “FUNCTIONAL” FACTORS CITED BY TOLENTINO, THE WESTIN IS NOT TOLENTINO’S JOINT EMPLOYER.

Tolentino suggests that the Court should consider in its analysis five additional “functional” factors in order to determine whether the Westin was a joint employer of Tolentino. While the Westin recognizes that other circuits have applied varying additional factors in evaluating joint-employment issues, as discussed above, courts in Missouri have not. Even if the Court applies the additional factors which Tolentino claims are relevant, it nevertheless remains clear that the Westin was not Tolentino’s joint employer as a matter of law.

1. GLS’s Workforce Could Shift As a Unit From One Business to Another.

The first “functional” factor analyzes whether the labor vendor has a business that could or did shift as a unit from one putative joint employer to another. *See Zheng*, 355

F.3d at 72. The Second Circuit found this factor relevant in its analysis because “a contractor that seeks business from a variety of contractors is less likely to be a part of a subterfuge arrangement than a subcontractor that serves a single client.” *Zheng*, 355 F.3d at 72. Moreover, this factor asks whether the putative employees *could* have shifted as a unit, not whether they actually did so. *See Godlewska v. HDA*, 916 F. Supp. 2d 246, 262–63 (E.D.N.Y. 2013); *see also Grenawalt*, 937 F. Supp. 2d at 452 (even though the other work was limited, the court found that this factor weighed against a finding of joint employment).

Tolentino first suggests that this factor is not satisfied because, according to Tolentino, the Westin’s contract with GLS prevented GLS from shifting its workforce as a unit from the Westin to another hotel, if need be. Specifically, Tolentino claims that the 30-day and 10-day notice of termination provisions in the contract prevent such a shift from occurring. Tolentino’s argument wrongly assumes that properly noticed termination of the contract is a prerequisite to GLS’s ability to shift its workforce. Rather, GLS was always free, even while under contract with the Westin, to pull its entire labor force from the Westin and exchange it with a group of laborers from one of the other area hotels to which GLS supplied contract labor. (*See* LF0173, ¶¶ 39, 40; LF0180, ¶¶ 81–83; LF1234–35, ¶¶ 39, 40; LF1246–47, ¶¶ 81–83.) Tolentino does not mount any real dispute to the fact that GLS had the freedom to—and did—send whomever it preferred to the Westin on a daily basis. (*See* LF1246–47, ¶¶ 81–83.) Tolentino’s own experience is salient proof of the interchangeable nature of GLS’s labor-force, as he does not dispute that he performed services simultaneously for two of GLS’s clients—the

Westin and the Marriott Union Hill. (LF0182–83, ¶¶ 97, 98; LF1252, ¶¶ 97, 98; LF1273, ¶ 173.) Moreover, there is no dispute that GLS provided labor services to other businesses in town and in other states. (LF0173–74, ¶¶ 40, 41; LF1235, ¶¶ 40, 41.)

Despite the fact that the notice provisions of the Westin’s contract with GLS have no bearing on GLS’s ability to shift its labor force as a unit, Tolentino nevertheless perseveres in his attempt to make them relevant by mischaracterizing two cases. He first suggests that the Supreme Court in *Rutherford Food Corp. v. McComb* relied on similar contractual termination provisions to determine that a labor vendor’s work force could not shift as a unit from one business to another. (Supplemental Brief, p. 21.) But the *Rutherford* case makes no mention of any notice-of-termination provisions, and indeed the Court made no mention whatsoever of a contractual relationship when it concluded that the contractor could not shift his workforce as a unit. *See* 331 U.S. 722, 730 (1947). Likewise, the other case that Tolentino cites, *Flores v. Albertson’s, Inc.*, makes no mention of any notice-of-termination provisions, and it is not even clear whether the court determined in that case that the contractor’s work force was unable to shift as a unit. *See* 2003 WL 24216269, at *4.

GLS could shift its workforce as a unit from one hotel to the next, and thus this factor suggests that the Westin was a not a joint employer with GLS.

2. Tolentino Did Not Perform a Discrete Line Job that Was Integral to Any Sort of Production Process at the Westin.

The next functional factor analyzes whether the plaintiff performed a discrete line job that was integral to the putative joint employer’s production process. *See Zheng*, 355

F.3d at 72. Courts have recognized the limited utility of this factor: “Interpreted broadly, this factor could be said to be implicated in *every* subcontracting relationship, because all subcontractors perform a function that a general contractor deems ‘integral’ to a product or service.” *Id.* at 73; *see Jean-Louis v. Metro. Cable Communications, Inc.*, 838 F. Supp. 2d 111, 134 (S.D.N.Y. 2011) (“[T]he third factor might apply with somewhat less vigor where, as here, the parties are engaged in providing a service rather than manufacturing a product.”).

As the Second Circuit explained in *Zheng*, this factor derives from the notion that where an individual is merely working on a line in a production process in a role that does not require much training, it tends to look more like the putative employer is seeking to avoid labor laws by engaging in “subterfuge.” *See Zheng*, 355 F.3d at 73. On the other end of the spectrum are those situations where it seems obvious that the alleged employer is contracting or “out-sourcing” out of necessity—and not subterfuge—to increase efficiency and deal with unpredictable demand. *See id.* Thus, as the Second Circuit explained, “insofar as the practice of using subcontractors to complete a particular task is widespread, it is unlikely to be a mere subterfuge to avoid complying with labor laws.” *Id.* In other words, this factor essentially attempts to discern whether the putative employer, in contracting for labor, was merely attempting to circumvent wage and hour laws, or whether it was legitimately contracting out of some need. As the Second Circuit explained, the economic realities test “is manifestly not intended to bring normal, strategically-oriented contracting schemes within the ambit of the FLSA,” or, in this case, the MMWL. *Id.* at 76. In that same vein, this factor should not be stretched too far,

“because all subcontractors perform a function that a general contractor deems ‘integral’ to a product or service.” *Id.* at 73.

Here, there is no question that the Westin was legitimately contracting with Tolentino’s employer, GLS, based on the necessity of dealing with the ebb and flow of occupancy rates at the Westin. (LF0168, ¶ 5; LF1225, ¶ 5.) This conclusion is only bolstered when considering that the Westin’s arrangement of paying GLS by the number of rooms GLS’s employees cleaned provided GLS with more than enough money to pay Tolentino for all the minimum wage and overtime he worked for GLS. (LF0183–84, ¶¶ 99 – 112; LF1253–56, ¶¶ 99–112.) In other words, the only thing the Westin gained by using GLS (and the other labor vendors it used⁵) was the ability to efficiently deal with the change in occupancy rates at the Westin—it did not get cheaper labor. Contrary to Tolentino’s repeated suggestion, the Westin had no intent of circumventing any wage and hour laws, and indeed it did not. This factor then, which is aimed at rooting out such evasive behavior, does not favor the finding of a joint-employer relationship.⁶

⁵ It is undisputed that GLS was not the only vendor who supplied contract room attendants to the Westin. (LF0168, ¶¶ 5–8; LF1225–27, ¶¶ 5–8.)

⁶ Tolentino cites to the *Flores* case to support a favorable finding on this factor. (Supplemental Brief, p. 23.) Contrary to what Tolentino suggested in his brief, the *Flores* court specifically noted that “Defendants are in the business of selling food, and . . . the janitorial services provided by the plaintiff class are not an integral part of that business.” *Flores*, 2003 WL 24216269, at *4. The Court noted the practical necessity of cleanliness

3. The Westin Did Not Continue Receiving Services from any GLS Contract Room Attendants Without Material Change after GLS Became Defunct.

The next factor considers whether the “responsibilities under the contract could pass from one subcontractor to another without material change.” *See Zheng*, 355 F.3d at 72. Where “employees work for an entity (the purported joint employer) only to the extent that their direct employer is hired by that entity, this factor does not in any way support the determination that a joint employment relationship exists.” *Id.*

Tolentino suggests this factor weighs in favor of finding a joint-employer relationship because, following GLS’s indictment, the Westin, as Tolentino characterizes it, “continued to employ [Contract] Room Attendants who had been hired through GLS.” (Supplemental Brief, p. 24.) Tolentino has simply misstated the facts. Although the Westin did hire on a few GLS Contract Room Attendants after GLS became defunct, the Westin required these individuals to go through the Westin’s formal hiring process, which includes filling out an application (which is then screened by a human resources manager), one or more rounds of interviews, a trial period where the applicant will “shadow” one of the Westin’s employees, a drug test, several hours of paperwork, and a day and a half long orientation, among other things. (LF0177–78, ¶ 65; LF0186, ¶¶ 125–26; LF1242, ¶ 65; LF1257, ¶¶ 125–26.)

at a supermarket, but did not suggest that such practical necessity weighed in favor of a finding of joint employment or a finding that this factor was met. *Id.*

Moreover, Tolentino is mistaken when he suggests that the key inquiry on this factor is whether the alleged employee continued to do the “same work” in the “same place.” (Supplemental Brief, p. 23.) *Rutherford*, a case heavily relied upon by Tolentino, demonstrates the type of phony contracting this factor seeks to expose: in that case the initial “contractor” abandoned his work for the putative joint employer, then one of the original contractor’s employees took over as the new “contractor,” and when that “contractor” gave up the work, yet another employee took over as the new “contractor.” 331 U.S. 722, 725 (1947). In other words, the “contractor” was fungible, but somehow the workers working under the contractor remained the same. Unlike in *Rutherford*, when the Westin ends its contract with one of its labor vendors, it does not simply keep all the same Contract Room Attendants and find a new “contractor.” To the contrary, if the Westin terminates its agreement with any one of its vendors, the Contract Room Attendants provided by that vendor would no longer perform services at the Westin. (LF0174, ¶ 44; LF1235, ¶ 44.) Again, in the one instance where Contract Room Attendants did stay on, they did not remain as Contract Room Attendants under some new “contractor,” but they were put through all of the Westin’s formal hiring processes. (LF0186 ¶¶ 125, 126; LF1257 ¶¶ 125, 126.) This set of facts demonstrates that the Westin’s contract with GLS was legitimate and not a mere façade.

4. The Westin Did Not Supervise Tolentino’s Work.

Any oversight of Tolentino’s work performed by the Westin was merely for the Westin’s own quality control purposes. As several courts have noted, “[q]uality control and compliance monitoring that stem from the nature of the business—that is, from the

nature of the goods or services being delivered—are qualitatively different from control that stems from the nature of the relationship between the employees and the putative employer.” *Grenawalt*, 937 F. Supp. 2d at 450–51. As the Court in *Flores v. Albertson’s Inc.* explained—a case Tolentino frequently cites—“it would be a foolish business practice to contract with a company to perform a service, but provide it with little or no guidance on exactly what services are to be performed.” 2003 WL 2421629, at *3; *see also Lawrence*, 2011 WL 666304, at **4, 10 (inspection of contractor’s employees’ work not indicative of joint-employer relationship); *Jacobson*, 740 F. Supp. 2d at 690 (quality control not indicative of joint employer relationship); *see also Conrad*, 351 S.W. 3d at 821 (franchisor’s exercise of control over franchisee employees for purpose of protecting “the integrity of its marks” held not to weigh in favor of joint-employer relationship).

Here, none of the alleged facts Tolentino cites take the Westin’s conduct from the realm of quality-control to the realm of supervision. The only evidence of “supervision” Tolentino can point to is his own testimony that the Westin’s managers inspected the rooms he cleaned and sometimes asked him to return to a room to re-clean something if it was not done properly. (Supplemental Brief, p. 13.) Even accepting Tolentino’s testimony to be true, such activity constitutes nothing more than the Westin’s exercising of its right to ensure the quality of the performance the Westin had contracted for with GLS. Such quality control does not amount to supervision for purposes of the joint-employer inquiry. Moreover, Tolentino cannot dispute that GLS managers performed similar inspections; in the trial court, Tolentino questioned Caralou Schmollinger’s (a manager at the Westin) testimony on this point, but he did not offer any evidence to

contradict Ms. Schmollinger's statement. (LF0973, n.4.) The rest of the record evidence that Tolentino cites likewise relates to mere quality control, and was addressed by the Westin's briefing in the trial court. (*See* the Westin's Reply in Support of Motion for Summary Judgment, LF1219 – 20.)

5. GLS and Tolentino Did Not Perform Services Exclusively for the Westin.

Tolentino does not dispute that he performed services for both the Westin and the Marriott during his employment with GLS. (Supplemental Brief, p. 25.) He nevertheless contends that he performed services “predominantly” for the Westin because he worked 16 to 24 hours every two weeks at the Marriott while he worked approximately 36 hours every two weeks at the Westin. (*Id.*) This nearly equal, 60/40 split of Tolentino's time between two businesses demonstrates that Tolentino did not work “exclusively” or “predominantly” for either of them. Moreover, the fact that GLS sent Tolentino to perform services at multiple clients' businesses suggests anything but contractual subterfuge on the part of the Westin. *See Moreau v. Air France*, 343 F.3d 1179, 1185 (9th Cir. 2003) (noting the difference between a “labor contractor [that] really had no employees, but worked like a broker to funnel workers” to another employer, and a contractor that “has an ongoing business which hires, fires and supervises a significant number of employees who perform services for companies other than” the alleged joint employer). Rather, it suggests that the Westin sought to obtain labor from a vendor who, by all appearances, appeared to be legitimately vending labor to several area businesses. Indeed, it is undisputed that GLS supplied labor to hotels and other businesses in addition

to the Westin. (LF0173–74, ¶¶ 40, 41; LF1235, ¶¶ 40, 41.) It is also undisputed that the Westin obtained contract room attendants from multiple labor vendors. (LF0168, ¶¶ 5–8; LF1225–27, ¶¶ 5–8.) It was only through GLS’s “fraud” that the Westin was fooled into believing GLS was a legitimate company (LF0185, ¶ 120; LF1256, ¶ 120), and there is certainly no evidence at all that the Westin had any role in creating GLS to funnel workers to its hotel.

CONCLUSION

For all of the above reasons, and those stated in the Westin’s memorandum in support of its motion for summary judgment (LF0135) and its reply in support of summary judgment (LF1194), summary judgment in favor of the Westin should be affirmed.

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**CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULE 84.06(b) and (c)**

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on Microsoft Word 2010, by which it was prepared, contains 9568 words.

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2014, I submitted electronic versions of this Respondents' Supplemental Brief Regarding the Joint-Employer Issue to the Clerk of the Supreme Court of Missouri for filing by using the Court's electronic filing system. I understand that doing so will accomplish service on all the following attorneys of record.

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