

**IN THE MISSOURI SUPREME COURT
SUPREME COURT NO. SC93379**

ANDRO TOLENTINO,

Appellant

v.

STARWOOD HOTELS & RESORTS WORLDWIDE, et al.,

Respondents

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

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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ARGUMENT

Under the Westin’s loose reading of the joint employer doctrine, it is difficult, if not impossible, to conceive of a class of workers from an employment staffing agency who could ever successfully bring a claim against the company for which they worked. Tolentino performed no work for GLS, GLS did not supervise his work, and all of the work at issue was performed on the Westin’s premises for the Westin. If these facts do not establish that the Westin was a joint employer, the doctrine is a nullity under the Missouri Minimum Wage Law (“MMWL”). Contrary to the Westin’s narrow view of the joint employer doctrine, courts have consistently applied it to cover businesses that hire employees indirectly through employee staffing agencies.¹ Indeed, in *Beck v. Boce*

¹ See *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (holding slaughterhouse that used workers through another company was their employer); *Barfield v. New York City Heath & Hosp. Corp.*, 537 F.3d 132 (2d Cir. 2008) (hospital that hired nurses through an employee staffing agency was the joint employer of nurses); *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403 (7th Cir. 2007) (company that used workers hired through contractor to detassel and rogue corn plants held to be joint employer); *Bastian v. Apt. Invest. and Mgmt. Co.*, No. 07c2069, 2008 WL 4671763 (N.D. Ill. Oct. 21, 2008) (defendant call center that hired through three different employee staffing agencies was joint employer of those employees); *Ansoumana v. Gristede’s Operating Corp.*, 255 F. Supp. 2d 184 (S.D.N.Y. 2003) (supermarket and drug store chain that hired delivery workers through employee staffing agency was joint

Group, L.C., the court held that an employee staffing agency was not a joint employer because they were not economically dependent on the agency, which for the most part simply served as a payroll service and provided human resources services. 391 F. Supp. 2d 1183, 1192-93 (S.D. Fla. 2005). The functions performed by the agency in *Beck* far exceeded those performed by GLS. Simply put, if the shoe was on the other foot and Tolentino had sued GLS to recover his wages, the *Beck* decision would preclude his recovery because GLS would not be considered his employer.

In its supplemental brief, the Westin relies heavily on three cases, all of which dealt with cable technicians. See *Lawrence v. Adderley Indus., Inc.*, No. 09-2309, 2011 WL 666304 (E.D.N.Y. Feb. 11, 2011); *Jacobson v. Comcast Corp.*, 740 F.Supp.2d 683 (D. Md. 2010); *Zampos v. W & E Comm., Inc.*, No. 12CV1268, 2013 WL 4782152 (N.D. Ill. Sept. 4, 2013). Perhaps the most important fact distinguishing these cases from the present case is the degree of skill required to perform the job of cable technician versus that of a Room Attendant. *Lawrence*, 2011 WL 666304 at *10 (“the degree of skill required to perform those jobs weighs against a finding of employer status.”) (citing *Chao v. Mid-Atlantic Installation Services, Inc.*, 16 Fed. Appx. 104 (4th Cir. 2001)). In contrast to the skill required to install cable television, the job of cleaning hotel rooms is relatively simple. This fact is critical because a person with a

employer of those employees); *Flores v. Alberton’s Inc.*, No. cv01-0515, 2003 WL 24216269 (C.D. Cal. Dec. 9, 2003) (holding that supermarkets who hired janitors through employee staffing agencies were joint employers of janitors).

high level of skill is more likely to be an independent contractor than a person “economically dependent” upon an employer, the overarching test for both employee and joint employer status. *See Baystate v. Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998); *Schultz v. Capital Int’l Security, Inc.*, 466 F.3d 298, 304 (4th Cir. 2006) (“The focal point is whether the worker ‘is economically dependent on the business to which he renders service or is, as a matter of economic [reality], in business for himself.’”). These cases are also distinguishable on several other grounds that will be discussed in more detail below.

Under the Westin’s narrow view of the joint employer doctrine, employee staffing agency workers must establish that the contract between the agency and the company it contracts with is a subterfuge, phony, or a façade meant to evade wage and hour law. There is no support for such a burdensome requirement in the joint employer regulation or case law. Moreover, such a view is wholly at odds with the broad, remedial purpose of the MMWL.

I. The plain language of the joint employer regulation applies to entities like the Westin that partner with employment staffing agencies.

As noted by the Westin, the joint employer regulation lists three situations where joint employment may be found to exist. The Westin contends that each situation is inapplicable. Tolentino has consistently maintained that the second scenario is implicated here and that the Westin and GLS were acting directly or indirectly in the interest of each other in relation to Tolentino. 29 C.F.R. § 791.2(b)(2) (“Where one employer is acting directly or indirectly in the interest of the other employer (or

employers) in relation to the employee . . .”). In short, GLS acted in the Westin’s interest by providing a supply of labor for the Westin and performing the Westin’s payroll duties for work completed at the Westin. In *Grace v. USCAR*, the court held that an employee staffing agency was acting in the other employer’s interest for purposes of this prong of the Family and Medical Leave Act’s (“FMLA”) joint employer regulation, which mirrors the FLSA’s,² by managing the employee and ensuring that the staffing needs of the employer were met. 521 F.3d 655, 666 (6th Cir. 2008).

As previously noted, courts regularly find that the joint employer doctrine covers businesses who hire employees indirectly through employee staffing agencies. Consistent with such case law, federal regulations for the FMLA provide that “joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer.” 29 C.F.R. § 825.106(b)(1); *see also Bastian v. Apt. Invest. and Mgmt. Co.*, No. 07c2069, 2008 WL 4671763, *3 (N.D. Ill. Oct. 21, 2008) (noting significance of FMLA regulation regarding employee staffing agencies for FLSA joint employment). This regulation effectively provides a presumption that the Westin should be considered Tolentino’s joint employer.³ In sum, the Westin’s argument that the plain language of the joint employer regulation precludes a finding that the Westin was Tolentino’s joint employer is baseless.

² Compare 29 C.F.R. § 825.106(a) with 29 C.F.R. § 791.2(b).

³ Tolentino notes that the Westin cites to *Moreau v. Air France*, 356 F.3d 942 (9th Cir. 2004), an FMLA case, in support of its arguments.

II. The functional factors should be applied because the MMWL is a remedial statute and the functional factors look to the economic reality of the employment relationship.

The Westin believes that only five factors apply here, the four formal factors and one functional factor. Nonetheless, the Westin applied all of the formal and functional factors when it moved for summary judgment at the trial court. (LF0141-157.) Although the Westin demands Tolentino explain why all factors should be applied, it offers no explanation for its more circumscribed position on appeal—presumably because it believes these factors favor Tolentino.⁴ That said, Tolentino welcomes the opportunity to explain why these factors are essential to joint employer analysis. At bottom, the joint employer test examines the economic reality of the employment relationship. *See Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (“economic reality rather than technical concepts is to be the test of employment”) (internal quotation marks omitted). This test looks at the “totality of the circumstances bearing on whether the putative employee is *economically dependent* on the alleged employer.” *Baystate*, 163 F.3d at 675; *see also Aimable v. Long and Scott Farms*, 20 F.3d 434, 439 (11th Cir.

⁴ Notably, cases primarily relied on by the Westin also apply the functional factors. *See Lawrence*, 2011 WL 666304 at *10; *Jacobson*, 740 F. Supp. 2d at 693. Indeed, the case law is replete with examples of courts applying these factors. *See e.g., Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61 (2d Cir. 2003); *Barfield*, 537 F.3d 132; *Flores*, 2003 WL 24216269.

1994). Yet, the Westin avoids discussing the economic realities test and whether Tolentino was economically dependent upon the Westin.

In *Zheng v. Liberty Apparel Co., Inc.*, the court observed that “[m]easured against the expansive language of the FLSA, the four-part test . . . is unduly narrow, as it focuses on the formal right to control the physical performance of another’s work . . . [t]hat right is central to the common-law employment relationship.” 355 F.3d 61, 69 (2d Cir. 2003). As discussed in detail in Appellant’s substitute briefs, the remedial purpose of wage and hour laws like the MMWL requires that they be given a broader reach than the common law employment relationship.⁵ Application of the functional factors will ensure that the MMWL, which, as a remedial statute “should be construed liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case . . .[,]” will be given the expansive interpretation it requires. *MCHR v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 166-67 (Mo. App. W.D. 1999). Accordingly, it is that remedial purpose of the MMWL

⁵ See e.g., *Karr v. Strong Detective Agency, Inc.*, 787 F.2d 1205, 1207 (7th Cir. 1985) (“Because we deal with a statutory construction of the FLSA, our determination of [joint employer] status is *not limited by the previous common law notion of ‘joint employer’* . . . and we need to give this concept an expansive interpretation in order to effectuate Congress’ remedial intent in enacting the FLSA.”) (internal citations omitted) (emphasis added)).

which justifies—and indeed compels—use of the functional factors in joint employer determinations.

III. The Westin has failed to establish that it is entitled to judgment as a matter of law under either the formal or functional factors.

In finding that there was a genuine issue of material fact as to whether the Westin and GLS were Tolentino’s joint employers, the trial court was given briefing on both the formal and the functional factors used to determine joint employer status. The Westin’s brief on this issue confirms that the trial court was correct in that genuine issues of material fact exist on this issue.

A. The Westin had the power to hire and fire Tolentino.

According to the Westin, Tolentino is focused on the wrong moment in time. The Westin maintains that rather than the interview with its Director of Housekeeping, where Tolentino was informed of the method of payment of his wages, this Court should focus on when GLS recruited him to come to Kansas City. Further, because Tolentino filled out an application with GLS, the Westin concludes that GLS employed him. Missing from the Westin’s analysis is the crucial fact that Tolentino never performed work for GLS. (LF1034-35, ¶¶ 178-179; LF1189, ¶¶ 2-3.) It is a matter of common sense that one cannot be employed if one is not performing work. It is also a matter of statutory language. The FLSA provides that the term “employ” means “to suffer or permit *to work*.” 29 U.S.C. § 203(g) (emphasis added). If Tolentino never performed work for GLS, it could not have employed him. That is why the Westin, not GLS, was Tolentino’s employer.

The Westin avoids addressing the content of the interview, namely, that Tolentino was informed he would be paid by the room,⁶ but instead focuses on its length. The content of the interview is undisputed. The Westin could have provided an affidavit from the Director of Housekeeping, Dorothy Gibbs, to dispute that it was an interview or that the method of payment was discussed with Tolentino, but it never did. The Westin also fails to address the requirement that Tolentino sign the Westin's ABC's of Housekeeping checklist and the Westin's Room Cleanliness Standards policy. Appellant's Supp. Br. at 10.

The Westin further does not mention that Tolentino participated in required training when his employment started. Such training by the putative joint employers was notably absent from the "cable technician" cases relied on heavily by the Westin. *See Lawrence*, 2011 WL 666304, *4; *Jacobson*, 740 F. Supp. 2d 683; *Zampos*, 2013 WL 4782152, *4. The Westin's attempt to distinguish Tolentino's training from that of its other employees is unpersuasive. The Westin notes that its non-GLS employees were interviewed, shadowed by a Westin room attendant, filled out paperwork, and had to watch an OSHA video. Respondent's Supp. Br. at 17-18. The undisputed record evidence indicates that Tolentino was also required to complete similar requirements, including signing the Westin's ABC's of Housekeeping checklist and the Westin's Room Cleanliness Standards policy, watching the Westin's ABC's of Housekeeping video, and being paired with a more experienced associate to follow his work for a

⁶ (LF1027, ¶ 132; LF1043, 71:8-9, 25; 72:1-3, 17-25; 73:1-6.)

couple of days. Appellant’s Supp. Br. at 10-11. This training by the Westin lasted for two weeks and was not the sort typically given to transient independent contractors.

Long on accusations and short on facts and law, the Westin falsely contends that Tolentino has intentionally misrepresented cases to stand for the proposition that the ability to request a contract laborer cease performing services amounts to firing power. In *Bastian v. Apartment Inv. & Mgmt. Co.*, the court, in granting the plaintiff’s motion for partial summary on the joint employer issue, noted that although the defendant “could not terminate a worker from the staffing agency . . . [, it] could direct that a staffing agency employee no longer be placed with defendant.” No. 07C2069, 2008 U.S. Dist. LEXIS 84280, * 4 (N.D. Ill. Oct. 21, 2008). If summary judgment was granted in the *plaintiff’s* favor, it stands to reason that the court found this power to be tantamount to a firing power. Likewise, in *Barfield*, the court found that the defendant hospital—not the employee staffing agency it contracted with—had “the power to hire and fire at will agency employees referred to work on hospital premises. . . .” 537 F.3d at 144.⁷ This

⁷ The Westin is correct that *Flores v. Albertson’s Inc.*, does not stand for that proposition. No. CV01-0515 (C.D. Cal. Dec. 9, 2003). Upon a closer reading of the case, it appears that even though the court distinguished between the power to fire *directly* with “evidence that requests by the Supermarket Defendants to retain or dismiss an individual employee were routinely granted . . .,” the court did not believe this rose to the level of firing power. *Id.* at *3. The inclusion of *Flores* for that proposition was not meant to intentionally mislead, but based on a cursory reading of the above-cited

finding was based on the district court's determination that the hospital could prohibit particular employees from working at the hospital if it "determined that the individual had violated a hospital rule or because it was generally dissatisfied with the individual's performance." *Id.* at 138. This power is no different than the Westin's undisputed power to direct GLS to stop sending unsatisfactory Room Attendants to the Westin. Indeed, the Westin concedes it had a contractual right to request that GLS stop sending unsatisfactory Room Attendants to perform services at the hotel, but fails to address the next obvious question: Upon exercising its contractual right, would GLS continue to pay wages to Tolentino? The undisputed answer is no. (LF1034-35, ¶¶ 178-179; LF1189, ¶¶ 2-3.) If the wages stop, the employment ends. That is the power to fire.

B. The Westin supervised Tolentino and controlled his work schedule and conditions of work.

Even assuming the first factor weighs against Tolentino, the Westin's level of daily supervision over him is sufficient for finding joint employer status. Courts have found joint employer status in the employee staffing context despite the lack of hiring and firing power if the workers were supervised on a daily basis like Tolentino. In *Songer v. Dillon Resources, Inc.*, the court found joint employer status because the trucking company was responsible for control of the drivers' day-to-day operations even though the staffing agency hired, trained, and paid the truck driver employees. 618 F.3d _____, _____.

language and the fact that the court denied summary judgment on the issue of joint employer status.

467, 473 (5th Cir. 2010). Likewise, in *Grace*, the court found joint employer status even though the staffing agency had “ultimate ability to hire and fire” the employee because the company contracting with the staffing agency “undoubtedly controlled [the employee’s] day-to-day activities.” 521 F.3d at 668. The level of supervision exercised by the Westin over Tolentino’s daily work plainly meets this factor’s requirements.

The Westin, however, maintains that it exercised merely “quality control” rather than actual supervision.⁸ It makes no attempt to provide any sort of qualitative or quantitative measurement for how these two concepts can be distinguished. Although entirely unclear, the Westin apparently believes that if the work is performed pursuant to a contract with a subcontractor it is quality control, if not, it is supervision. Such an explanation is deficient for a law that was “designed to defeat rather than implement contractual arrangements.” *Sec. of Labor v. Lauritzen*, 835 F.2d 1529, 1544-45 (7th Cir. 1987).

While it is true that the Westin’s corporate representative testified that GLS supervised some of its workers, Tolentino testified that he was never aware of them. (LF1031, ¶ 155; LF1050, 168:14-17.) In contrast, the daily supervision he experienced

⁸ The Westin falsely maintains that the only evidence Tolentino can cite to in support of the fact that he was supervised is his own testimony. Respondents’ Supp. Br. at 36. To the contrary, Tolentino has cited to the testimony of three of the Westin’s own supervisors, Consuelo Hampton, Jacqueline Wenig, and Elizabeth Berube, in support of his position. Appellant’s Supp. Br. at 12-15.

by Westin supervisors is well documented in the record evidence. Appellant's Supp. Br. at 12-15. It is undisputed that Tolentino was supervised throughout the day by Westin supervisors. Even so, "[u]ltimate control is not necessarily required to find an employer-employee relationship under the FLSA, and even 'indirect control' may be sufficient." *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litig.*, 683 F.3d 462, 468 (3rd Cir. 2012). The *Barfield* court drew a similar distinction, noting that "even when one entity exerts 'ultimate' control over a worker, that does not preclude a finding that another entity exerts *sufficient control* to qualify as a joint employer under the FLSA." 537 F.3d at 148 (emphasis added). Thus, even if the Westin and GLS both exercised control over Tolentino, that fact does not preclude a joint employer finding—a result consistent with the plain language of the regulation, which recognizes that workers may be employed by more than one employer at a time. 29 C.F.R. § 791.2(a).

In contrast to the daily supervision experienced by Tolentino, in the Westin's "cable technician" cases, the putative joint employers did not exercise such daily supervision over the technicians' work. *See Zamos*, 2013 WL 4782152 at *9 ("Comcast does not observe W & E technicians' activities throughout the day."); *Lawrence*, 2011 WL 666304 at *10 ("[Cablevision] does not exercise any significant degree of supervision over plaintiff's or any particular technician's work."); *Jacobson*, 740 F. Supp. 2d at 691 ("Comcast is not responsible for the day-to-day management of the technicians . . . and does not dictate the technicians' working conditions . . .").

The agency in *Zamos*, moreover, also managed schedules and attendance and technicians were required to report to the agency warehouse each morning and at the end

of the day. *Id.* at *8. In contrast, Tolentino had to report to the Westin, not GLS, every morning for a meeting in which he received his assignments. (LF1032, ¶ 159; LF1108, 24:12-19, LF1129, 4:19-24; LF1124-25, 33:17-34:4, 34:21-25; LF1113, 43:18-44:21.) The agency in *Zampos* also administered discipline to the workers. *Id.* The Westin has offered no evidence that GLS administered discipline to Tolentino or any other Room Attendants.

The Westin also contends that “GLS—not the Westin—decided which Contract Room Attendants would perform services at the Hotel on a daily basis.” Respondents’ Supp. Br. at 21. The cited record does not support this assertion. The cited record only states that GLS decided which Room Attendants to place at the hotel, not that it did so on a daily basis. To the contrary, the record evidence indicates that the Westin set the schedule for Tolentino. (LF1033, ¶ 163; LF1088, 30:11-31:23.) Corporate representative Caralou Schmollinger’s testimony confirms that the Westin, not GLS, set the schedule:

- A. So we prepare in advance what we believe our occupancy will be 18 days out so that we can *schedule according to our needs*. So we try to always provide the contract company what our needs will be for the upcoming week.

LF1088, 30:11-15 (emphasis added).

Upon further inquiry, Ms. Schmollinger again confirmed that the Westin, not GLS, set the schedule for employees like Tolentino:

Q. [I]f there was less than three days' notice given to Giant Labor by *the Westin for its schedule*, then Westin would pay overtime to Giant Labor; is that accurate?

A. That is accurate.

LF1088, 31:16-20 (emphasis added).

Ms. Schmollinger never distinguished between the Westin's schedule and Tolentino or any other Room Attendant's schedule. She never stated that GLS set the schedule for Tolentino, as the Westin now (without any evidence) maintains. She simply referred to the Westin's schedule that was provided to GLS.

The Westin also contends that Tolentino has misstated facts by stating that he was expected to remain on Westin premises during his shift. It then suggests that this is false because Tolentino did not recall having to work a set number of hours during the day, but just until he finished his assigned rooms. In an attempt to bolster its false accusation, the Westin has improperly conflated two very different things. There is a glaring difference between not recalling specific hours worked and having to remain on the premises. The record evidence is undisputed that Tolentino had to remain on the premises during his shift. (LF1033, ¶ 165; LF1113, 42:11-13; LF1124, 32:18-25.) That he did not have a time frame for doing so during the day does not mean he did not have a shift. He received his daily assignments every morning, so it is fair to assume he had the day to complete them. That is a shift.

C. The Westin determined Tolentino's rate and method of payment.

Relying on its inapposite “cable technician” cases, the Westin misreads this factor to include an “apply with caution” label. Even the cases cited by the Westin do not support such a reading. No such label was applied in *Torres-Lopez v. May*, where the court held that an agricultural grower’s increase in compensation to the farm labor contractor to allow farm workers to draw higher wages weighed in favor of joint employer status for the agricultural grower. 111 F.3d 633, 643 (9th Cir. 1997); *see also Flores*, 2003 WL 24216269 at *4 (increase in contract price is evidence of control over workers’ pay rate). Instead, this Court should apply the factor with the economic realities of Tolentino’s employment relationship in mind. That requires an acknowledgement that the Westin’s decision to pay by the room and its decision to raise the rate per room because of the increase in the minimum wage is evidence that the Westin, not GLS, was determining Tolentino’s rate and method of payment. (LF0998, ¶¶ 19-20; LF0368; LF0193, ¶ 13.)

The Westin makes much of the distinction between payment to GLS versus payment to Tolentino. Such a distinction is the sort of formalism the economic realities test is meant to defeat. Because the amount paid was based directly on Tolentino’s performance, it also constituted his wages. Indeed, the case of *Grenawalt v. AT&T Mobility, LLC*, cited by the Westin, makes the critical distinction between simply paying the security guard agency for services, which does not support a finding of joint employment, and determining the rate of payment from calculating each individual

guard's hours and compensating accordingly. 937 F. Supp. 2d 438, 451 (S.D.N.Y. 2013). As the Westin made the determination to pay by the number of rooms Tolentino cleaned,⁹ it set his rate and method of payment, as confirmed by the undisputed evidence that the Director of Housekeeping informed Tolentino that he would be paid by the room. (LF1027, ¶ 132; LF1043, 71:8-9, 25; 72:1-3, 17-25; 73:1-6.)

The Westin also confuses rate of pay with receipt of payment in its conclusion that GLS's deductions are proof that it controlled Tolentino's rate of pay.¹⁰ These are two distinct concepts. Simply because an employer shorts an employee's hours does not change that employee's rate of pay for those hours. It is also worth noting that when it comes to how GLS was paid, the Westin lacks credibility. The Westin's corporate representative Caralou Schmollinger first testified in her deposition that GLS was paid by the hour. (LF0714, 24:18-25:19.) She later contradicted this testimony in her sworn affidavit stating that GLS was paid by the room. (LF0193, ¶ 13.) Regardless, this factor plainly weighs in favor of finding joint employer status.

⁹ (LF0998, ¶ 20; LF0193, ¶ 13; LF0336, 6:3-16.)

¹⁰ The Westin once again makes much of the fact that it was defrauded by GLS. It is unclear, however, what actual damages the Westin suffered as a result of this defrauding. In contrast, Tolentino's damages based on GLS's defrauding are quite clear.

D. The Westin maintained work records tracking Tolentino's performance.

Although the Westin lists several different types of documents it believes to be relevant to this factor, the *Grenawalt* case, on which it relies, noted that “[t]he most relevant employment records are those concerning hours worked.” *Id.* at 451. The maintenance of such records is compelling evidence of an employment relationship because companies doing business with independent contractors rarely track the time of such contractors. It is undisputed that the Westin maintained time sheets on Tolentino and other Room Attendants hired through GLS. (LF1031, ¶ 152; LF1033-34, ¶ 171; LF1110, 30:8-14, 15-21; LF1097, 123:21-124:23; LF1097-98, 125:25-126:25; LF1098-99, 129:15-131:10; LF1099, 132:2-133:1; LF1100, 147:6-8.) The Westin’s time sheets provide sufficient evidence for this factor to support joint employer status.

The Westin also contends that Tolentino’s suggestion that its records could constitute performance review records is “beyond colorable.” The undisputed record evidence, however, plainly indicates that Westin supervisors also completed job performance evaluations on the Room Attendants hired through GLS that were given to the Director of Housekeeping. (LF1031-32, ¶ 156; LF1110, 31:11-20; LF1123, 27:2-8; LF1126, 39:23-40:23; LF1131, 15:12-14.) The signed copies of the Westin’s ABC’s checklist were retained until GLS was indicted, at which time they were destroyed by the Westin. (LF1029, ¶ 146, 78:1-79:18.) The Westin undoubtedly knew these documents regarding GLS workers could be relevant to the potential criminal case against GLS, of which it had knowledge. (LF0196, ¶ 29.) Still, the Westin chose to

destroy them. Now the Westin contends that there is insufficient evidence that it maintained performance records on Tolentino. The Westin should be estopped from making this argument. *See Baldrige v. Dir. of Rev.*, 82 S.W.3d 212, 223 (Mo. App. W.D. 2002) (“A party who intentionally spoliates evidence is subject to an adverse evidentiary inference). In any event, these records, along with the others identified in Tolentino’s Supplemental Brief, easily satisfy this factor.

E. Tolentino’s work took place at the Westin and was performed with its equipment.

Although the Westin already conceded this factor was in Tolentino’s favor at the trial court, it has since changed its mind. In support, the Westin relies on the *Grenawalt* case to read an “integration” element into this factor. 937 F. Supp. 2d 438. Tolentino notes that the Westin’s cited quote about the security guards being not so “integrated into AT&T as to constitute an employer relationship . . .” was not specific to this factor, but was instead looking at the entire case as a whole. *Id.* at 454. That said, the case actually provides an excellent contrast to the work performed by Tolentino. Without denigrating the work of security guards, it suffices to say that such work is ancillary to the operation of most businesses, including hotels like the Westin. Cleaning guest rooms, on the other hand, is undoubtedly integral to the operation of a hotel.

In the cases relied on heavily (if not solely) by the Westin, either the plaintiffs or their staffing agencies supplied all of tools and equipment they used to perform their jobs. *See Lawrence*, 2011 WL 666304 at *4; *Jacobson*, 740 F. Supp. 2d at 686; *Zamos*, 2013 WL 4782152 at *10 (“it is undisputed that W & E technicians use their own

tools”). Importantly, the work performed by the plaintiffs in these cases was not performed on the defendants’ premises, but at the homes of cable customers. *Lawrence*, 2011 WL 666304, *4; *Jacobson*, 740 F. Supp. 2d at 685-86. In *Lawrence*, the plaintiff reported to the general contractor’s office each morning. 2011 WL 666304 at *3. In contrast, Tolentino reported to the Westin every morning for his daily morning meeting (LF1032, ¶ 159; LF1108, 24:12-19, LF1129, 4:19-24; LF1124-25, 33:17-34:4, 34:21-25; LF1113, 43:18-44:21) and was expected to remain at the Westin for his entire shift. (LF1033, ¶ 165; LF1113, 42:11-13; LF1124, 32:18-25.)

F. The Westin’s contract with GLS prevented GLS from shifting its business as a unit from the Westin to another hotel.

The Westin contends that “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.” Respondents’ Supp. Br. at 30 (citing LF1246-47, ¶¶ 81-83.) As previously noted, however, the cited record only states that GLS decided which Room Attendants to place at the hotel, not that it did so on a daily, or even frequent, basis. The Westin set the schedule and there is no evidence that GLS ever sent a Room Attendant different than the one the Westin had scheduled.

In discussing this factor, the court in *Barfield* found it significant that none of the referral agency defendants “shifts [their] employees as a unit from one hospital to another, but instead each assigned health care workers . . . to the same facility *whenever possible* to ensure continuity of care.” 537 F.3d at 145 (emphasis added). There is simply no record evidence to suggest that such unit shifts were a practice of GLS. To

the contrary, there was continuity in the placement of workers at the Westin, as demonstrated by the fact that during Tolentino's employment at the Westin, no fewer than 11 workers supplied by GLS were consistently assigned to the Westin (LF1034, ¶ 175; LF1139-65) and some Room Attendants hired through GLS had worked at the Westin for more than a year, with one worker at least up to four years. (LF1034, ¶ 172; LF1096, 98:2-10; LF1124, 31:1-4.)

The focus of the inquiry, moreover, is not on whether specific employees were interchangeable, but whether the company could shift *as a unit* to another location.¹¹ *See id.* at 147 (“Defendants’ argument fails because they point to no record evidence indicating that agency health care workers *comprised units that shifted* from hospital to hospital.”) (Emphasis added). The Westin has proffered no evidence that GLS Room Attendants shifted as a unit from hotel to hotel. Furthermore, the Westin offers no real rebuttal to the fact that its contract prevented such a shift. The Westin and GLS could have entered into a contract simply permitting GLS to provide workers completely at the pleasure and whim of the Westin. But both parties instead believed a contract creating more settled expectations through notice provisions was more appropriate for their relationship.

¹¹ The Westin's belief that Tolentino maintained a second job at the time is also irrelevant to this inquiry and not worthy of discussion as it has nothing to do with whether GLS could shift as a unit.

According to the Westin, Tolentino has mischaracterized cases because *Rutherford Food Corp. v. McComb* and *Flores v. Albertson's, Inc.*, did not discuss notice provisions in the contracts at issue. The Westin's hollow theme of Tolentino's alleged mischaracterization of cases running throughout its brief is once again undermined here because Tolentino never stated that either case discussed notice provisions. The court in *Flores*, however, did state that "it is clear . . . that the contract could not readily shift from Building One to another organization." 2003 WL 24216269 at *4. Of course, the lack of any notice provision in *Rutherford* or *Flores* only bolsters Tolentino's argument because it was even harder for GLS to shift as a unit.

G. Tolentino performed a job that was integral to the Westin's business.

Relying primarily on the Second Circuit's *Zheng* decision, the Westin misconstrues the test for this factor to create an entirely new test that looks at whether the putative employer was seeking to circumvent wage and hour laws. The same argument was made by the defendants in *Barfield*, and rejected by the Second Circuit as a misreading of *Zheng*. 537 F.3d at 145-46. The court noted that "nothing in *Zheng* suggests, as defendants urge, that functional control factors are relevant only to identifying subterfuge." *Id.* at 146. Moreover, "*Zheng* contemplates arrangements under which the totality of circumstances demonstrate that workers formally employed by one entity operatively function as the joint employees of another entity, even if the arrangements were not purposely structured to avoid FLSA obligations." *Id.* In short, subterfuge is not the test.

The test is nothing more complicated than whether the job performed by Tolentino was integral to the operation of the Westin. In concluding that this factor was met, the *Barfield* court found it significant that “the same work is routinely performed by [the putative employer’s] full-time employees, with temporary agency-referred workers being hired to fill in when regular staff are unavailable. . . [and thus not] typical outsourcing . . .” *Id.* at 146-47. There is no dispute that Tolentino worked alongside other employees of the Westin performing the exact same job of cleaning hotel rooms. (LF1028, ¶ 137, LF1090, 68:11-20; LF1114, 47:9-21.)

In *Ansoumana*, the court applied this straightforward test and held that based on the fact that the defendants were “engaged primarily in the business of providing delivery services to retail establishments and that plaintiffs perform the actual delivery work,” the services constituted an integral part of the defendants’ business. 255 F. Supp. 2d at 191-92. There is no doubt that the Westin’s primary service is providing hotel rooms and because it must provide clean rooms, there can also be no doubt that cleaning those rooms is an integral part of its business.

H. Responsibility under the Westin’s contract with GLS could pass from one subcontractor to another without material changes.

The Westin disputes that the inquiry is whether the “same employees” would continue to do the “same work” in the “same place” if the ostensible direct employer’s supervisor changed, as indicated in *Zheng*, 355 F.3d at 74, but offers no support for this view other than to reimagine the test as one that asks whether the contract was “phony” or a “façade.” As previously discussed, *Barfield* puts this notion to rest.

Notably, the Westin does not dispute that Tolentino was primarily supervised by the Westin and that he would continue to do the same work regardless of who was supervising him. The Westin considers its additional requirements for hiring on GLS Room Attendants to preclude a finding in Tolentino's favor, but the test is really whether the ostensible direct employer's supervisor changed, not whether the subcontractor changed. Nonetheless, those GLS employees who were hired after GLS's indictment continued to do the same work in the same place.

I. Tolentino worked exclusively or predominately for the Westin.

The Westin misreads this factor to require workers to demonstrate subterfuge in the contracting arrangement—an argument rejected by *Barfield*. It is undisputed that Tolentino worked predominately for the Westin. It is also undisputed that he never performed work on GLS's premises and never received compensation from GLS unless he had done work for a hotel GLS placed him in. (LF1034-35, ¶¶ 178-179; LF1189, ¶¶ 2-3.) In that sense, it is fair to say that Tolentino worked exclusively for the Westin vis-à-vis GLS and predominately for the Westin vis-à-vis the Marriott. As the Westin has offered nothing to dispute these facts, this factor must be read to favor Tolentino.

CONCLUSION

The Westin has failed to establish that there are no genuine issues of fact about whether it was Tolentino's joint employer. Quite to the contrary, the facts viewed in a light most favorable to Tolentino indicate that the Westin was Tolentino's joint, if not primary, employer. The Westin cannot escape the economic reality that all of the work

Tolentino performed was at and for the Westin. Nor can it escape the fact that it supervised Tolentino on a daily basis.

Even if this Court finds some of these factors to weigh in favor of the Westin, it should still find in favor of Tolentino because control of an employee is not an all-or-nothing concept, but can be exercised concurrently under the joint employer doctrine. The regulation, and indeed the very name, *joint* employer, contemplate employees working for more than one employer. Because the joint employer doctrine is one that must be applied expansively, and because the facts viewed in a light most favorable to Tolentino establish that the Westin was his joint employer, this Court should find that genuine issues of material fact exists as to whether the Westin and GLS were joint employers.

For the foregoing reasons, Tolentino respectfully requests that this Court reverse the trial court's March 8, 2012 Order and Judgment granting the Westin's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, as required by Missouri Supreme Court Rule 84.06(c), that the foregoing Appellant’s Supplemental Brief fully complies with the provisions of Missouri Supreme Court Rule 84.06(b), in that beginning with the Table of Contents and concluding with the last sentence before the signature block, Appellant’s Supplemental Brief contains 6,902 words. The word count was generated by Microsoft Word 2010, and complies with the word limitations contained in Rule 84.06(b).

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Appellant's Supplemental Reply Brief was served, via the Missouri Casenet Electronic Filing System, this 5th day of February 2014 to:

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