

AN INSIDE LOOK: THE LIFE OF THE EXOTIC DANCER

Devi Maria Schmidt

I. INTRODUCTION

This paper explores the working conditions of exotic dancers in strip clubs both locally and nationally. I will demonstrate that exotic dancers are frequently exploited by their employers.¹

First, I will briefly discuss common trends in the adult entertainment industry on a national level. Then I will introduce the narratives of three women interviewed. Two of the women are currently exotic dancers in Salem, and one was a dancer in Eugene. Even though the purpose of this paper is not to debate about whether stripping is degrading, the discussion I had with these three women on the topic was intriguing. Before discussing specific labor conditions within strip clubs, it is worthwhile to discussing the nature of the industry itself. Therefore, included in the introductory narrative section, I will relate the heated discussion I had with these women on how they view stripping. The narratives of the women I interviewed will be weaved in throughout the paper to provide an inside look at strip clubs and exotic dancers in Oregon.

I will next review the protection afforded nude dancing by the First Amendment in the United States Constitution. I will then discuss the relevant Oregon Statutes and local ordinances which are used to regulate nude dancing. Next, I will examine the

common practice of club owners classifying exotic dancers as independent contractors, rather than employees, both nationally and in Oregon. I will then explain how difficulties arise when exotic dancers are classified as employees, and the traditional employment regulations are applied to strip clubs. Finally I conclude about what reform is necessary.

II. CURRENT TRENDS AND VIEWS OF THE ADULT ENTERTAINMENT INDUSTRY

Adult entertainment is an ever increasing part of American culture. Technological advances allow people to easily access computer pornography, cable television porn, and telephone sex hotlines from the privacy of their homes. Public adult entertainment, such as strip clubs, is a rapidly growing industry.² Nude dance clubs are an “expanding 3-billion-a –year industry that in 1995 drew 10 million customers to about 2,200 clubs around the country.”³ As of February 1997, Americans “spent more money at strip clubs than at Broadway and off-Broadway theatres, regional and nonprofit theatres, opera, ballet, and jazz and classical music performances combined.”⁴

Society encourages women to enter the sex industry by financially supporting it; however, at the same time stigmatizes the women who enter the industry by labeling them “bad girls.”⁵ The law pushes exotic dancers to the outer perimeters of society by not recognizing that they deserve the same rights and protections in the workplace as those of other workers. Of particular importance in this paper, is the fact that courts

often do not recognize that exotic dancers are mislabeled as independent contractors by club owners.⁶

Feminists for the most part have failed to acknowledge exotic dancers as women who deserve more protection and rights under the law. Most feminists have taken the stance that sex workers need to be “rescued” from the industry. Feminists have based their position of needing to rescue sex workers on the premise that sex workers are forced into the industry.⁷ Norma Ramos, the general legal counsel for Women Against Pornography, says: “I never see women stripping. . . as a function of choice. I always see it as a function of lack of choice.”⁸

The fact is that sex workers are not necessarily forced into the adult entertainment industry. Rather, some dancers deliberately choose to work in adult entertainment because they find stripping sexually liberating.

Economic necessity, however, does play a role in many women’s decisions to choose stripping. Reports have shown that exotic dancers are often students, single mothers, or women unskilled in other work who dance in order to meet their living expenses.⁹

The bottom line is that exotic dancers are unequivocally entitled to the same protections and rights as workers in “straight” jobs. Stripping does reduce women to sex objects and certainly can be sexually degrading. However, strip clubs are not going to disappear. In fact, they are quickly growing in numbers.¹⁰ The law can at least offer assistance in helping exotic dancers to gain rights in the workplace.

III. EXCERPTS FROM THE NARRATIVES OF THREE WOMEN I INTERVIEWED

A. An Introduction to the Three Women I Interviewed

I interviewed Daniella, Stevie and Magic on the evening of April 3, 2002 in the casual setting of Magic's home.¹¹ The interview turned out to be a fascinating experience. The women were very open and easy to talk to. Daniella and Magic have known each other since 1997 and are very good friends. Daniella met Stevie a year ago. Magic and Stevie have known each other for about two months.

At one point, the interview turned into a heated debate between Magic and Daniella. All three women have very different opinions about dancing and have had quite different experiences in the industry.

Magic is a white, twenty-three year old female from St. Paul, Minnesota. Magic comes from an upper middle class family. Magic lives in Eugene and is graduating from the University of Oregon in June with a degree in International Studies and a minor in Spanish. Magic first began dancing in 1999 because she was tired of being broke. Magic danced in Eugene at the Silver Dollar and then at Jiggles. Magic said that at both Silver Dollar and Jiggles the dancers get completely nude.

Daniella is a white, twenty-six year old female from San Diego. Daniella moved to Eugene with her mother in 1990. Daniella's comes from a lower middle class family

and her parents are divorced. Daniella graduated from South Eugene High School.

Daniella said:

“I always wanted to be a stripper. When Magic started dancing, I knew that I could do it too. I am very talented when it comes to dancing and entertainment. Also I was so broke, I needed to do something to make more money.”

Daniella worked at Jiggles for two years and then moved to California where she worked at the Kit Kat in San Jose and New Century in San Francisco. Six months later, Daniella moved to Salem, Oregon. Daniella used to work at Stars in Salem. Now she dances in Salem at Foxes. Foxes is a nonalcoholic club. Daniella said that in every club she has worked at in Oregon, the dancers get completely nude.

Stevie is a white, nineteen year old female from Klamath Falls. Stevie graduated from high school a year ago and then moved to Salem. Stevie comes from a middle class Mormon family. Stevie said she started stripping because she was broke. She saw an add in the newspaper and decided to give dancing a try. Stevie danced at Cowgirls III and Firehouse in Salem. She has also done guest appearances at City Limits in Portland. Currently, Stevie dances at Foxes in Salem. Stevie said the dancers get completely nude at each of these clubs.

B. An Inside Look At How These Women View Dancing

I asked how they would respond to the belief held by many feminists and other members of society that stripping is inherently degrading.

Daniella responded:

“Feminists are not open-minded. Dancing makes me feel like I am a star. Dancing is only degrading if you let it be. What you do with stripping is either good or not- there is no in between. If you have to be drunk or high on drugs to dance, what you are doing with stripping is not good. But if you are a true performer, working hard out there in the club- you know dancing hard, dancing confidently, then dancing is not degrading.”

Magic quickly jumped in and said:

“That is so naïve to say that. I think it is much deeper than that. It is much deeper than the attitude of the dancer. I mean, look at what stripping does in our society. Men can see women whenever they want. That in itself turns women into sex objects. So, Daniella, you don’t think it is degrading for guys to throw down bills?”

Daniella responded by saying:

“It is only degrading if you let it be. If I let myself fall to men’s level, then it is degrading.”

Magic replied:

“It is enough for guys to act horrible. Their attitude can be degrading. You are fooling yourself, Daniella, to act like something like this does not exist unless you let it.”

Daniella still insisted:

“If you let what guys say to you at the club effect you, it can be degrading. As a whole, I don’t feel that dancing is degrading. If you have the courage to show off what god gave you, how can that be degrading? I mean look at the country fair, a lot of people run around nude and we don’t call that degrading.”

Magic says insistently:

“The difference is in stripping men are throwing money!”

Daniella says:

“Well, I don’t have a problem showing off my body for money. There are some women that degrade themselves because they will say anything to get money. I am honest. I act the same way in a strip club, as I do right now. I enjoy my job. I enjoy being in spot light, as you know.”

I asked Daneilla if she truthfully can always be herself at the club, or if there are times when she has to put on an act. Daniella laughed and responded:

“Well, I guess, at times I hustle a little bit. I mean, I have to admit that part of stripping is acting. If a guys cracks a joke that you don’t think is funny, sometimes you still just have to laugh. But, you still should try to be yourself.”

I turned to Stevie and asked her how she felt about dancing. Stevie said:

“Dancing makes me more comfortable with my body. I feel more self-confident. I am a very shy person, and dancing has helped me to open up more.”

I asked if there were specific times they could think of when stripping made them feel degraded.

Magic said:

“There are those nights when all the guys are rude, and you just feel so low. On those nights, you just want to cry and leave the club. Dancing can make you feel horrible.”

Daniella then began nodding her head,

“Yeah, I mean I guess there are times when I feel crappy. There was this one time, this guy said he would pay me sixty dollars for three songs- but that I wouldn’t have to dance. He just wanted me to stand there so he could talk to me. He ended up saying really odd sexual things about what he wanted to do to me. I stood there because I kept thinking, okay, it is only nine minutes, and sixty dollars is a lot. But it really affected me. For the next week, I kept thinking about what he had said. It was always lingering in my head.”

Stevie then spoke up and said:

“When those sort of things happen, the men are taking your power. You have to remember why you are doing it- bring it back to the money.”

It was fascinating to hear the women’s different opinions on how they view dancing. After hearing Magic’s opinion, I came to the conclusion that she must have stopped dancing because she was overwhelmed by feelings of being sexually degraded.

However, to my surprise, she gave an answer quite to the contrary:

“Oh, I stopped dancing because Jiggles closed down. I had it so good there. It was so easy. I would show up for work three times a week, work for six hours, and earn tons of money! I did not feel like re-auditioning anywhere or deal with getting adjusted to a new club.”

IV. PROTECTION FOR NUDE DANCING UNDER THE UNITED STATES CONSTITUTION

The United States Supreme Court first ruled on nude dancing in 1975 in Doran v. Salem Inn.¹² In Doran the Court held that nude dancing may involve only the “barest minimum of protected expression” and might be entitled to First Amendment protection in some circumstances.¹³

In 1991, in Barnes v. Glen Theatre, Inc., the United States Supreme Court clarified the Doran decision and held that nude dancing is “expressive conduct within the outer perimeters of the First Amendment.”¹⁴

The Court in Barnes also held that the test in United States v. O’Brien should be used to determine when nude dancing can be regulated by a government entity.¹⁵ The O’Brien Court found that regulation of symbolic expression is justified if it is within the

constitutional power of government, furthers an important or substantial governmental interest unrelated to the suppression of expression, and the incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest.¹⁶

V. CLUB RULES, OREGON STATUTES, OREGON ADMINISTRATIVE RULES AND ORDINANCES REGARDING NUDITY AND NUDE ENTERTAINMENT

Each strip club has its own rules regarding specific conduct that is allowed. The conduct permitted in the club rules must be within the parameters of conduct that is allowed under local ordinances and state statutes. Across the country there are many cities that have ordinances restricting what conduct is allowed in strip clubs.¹⁷

In fact, there are no ordinances in Eugene that discuss nude dancing or strip clubs. Eugene Ordinance 4.760 Prohibited Nudity states:

“It shall be unlawful for any person eight years of age or older to expose their genitalia while in a public place or place visible from a public place, if the public place is open or available to persons of the opposite sex.”

The Eugene City Recorder, Kate Feiland, explained that under the Eugene code, strip clubs are considered private property. Thus, strippers are not prohibited from exposing their genitalia while in the strip club.¹⁸

Salem Ordinance 96.210 Obscene Conduct in Public states:

“It shall be unlawful for any person who is in any public place or in a place where food or alcoholic beverage is offered for sale or consumption on the premises to:

(a) Appear in a state of nudity with the intent of arousing sexual excitement in himself or another person;

(b) Engage in any sexual conduct.”

I received conflicting information from the Salem City Recorder’s office, and thus, have not been able to determine how ordinance 96.210 applies to strip clubs. The first time I called the Salem City Recorder’s office, I spoke with a woman named Michelle who explained that ordinance 96.210 does not allow strip clubs to serve alcohol. The recorder stated that the policy behind this ordinance is based on the city’s determination that alcohol and sexy dancers were not a good combination.¹⁹

I called the Salem City Recorder’s office for a second time to inquire about the zoning laws in Salem. I again inquired about ordinance 96.210 in order to confirm that the information I received before was correct. I spoke with Helen, who said that the ordinance does not necessarily restrict alcohol in all strip clubs. She said that the club Stars in Salem serves alcohol. She explained that the clubs can get around this ordinance by arguing that the dancers appear in a state of nudity but not with the intent of arousing sexual excitement- only for entertainment purposes.²⁰ I then spoke to a woman in the legal department of the City Recorder’s office. She told me that she had never read this ordinance and did not know how it applied to strip clubs. I have left multiple messages with other employees at the City Recorder’s office. I have not yet received a call back. Unfortunately, there are no court cases that discuss this ordinance. Nevertheless, it seems that Helen is probably correct- Stars got around the ordinance by claiming that their dancers are nude only for the purpose of entertaining the patrons.

Under the zoning ordinances in Eugene a strip club is classified as a commercial enterprise, and thus, is allowed only in an area that is zoned commercial. A strip club is not allowed in an area that is zoned residential or industrial.²¹ According to Dave Pratt, the zoning law specialist in the Salem City Recorder's office, Salem does not have zoning restrictions, and thus, theoretically, a strip club could operate in a residential neighborhood.²²

The Oregon Liquor Control Commission relies on specific Oregon statutes and Oregon administrative rules to regulate the activity of those licensed by the Commission. There are several Oregon statutes used by the OLCC that are relevant to strip clubs and nude dancers. ORS 471.425(2) states:

“No licensee of the commission shall maintain a noisy, lewd, disorderly or insanitary establishment or supply impure or otherwise deleterious alcoholic beverages.”

The following are the relevant Oregon administrative rules used by the OLCC to regulate its licensees. OAR 845.006.0347(2)(a) states:

“No licensee or permittee will permit noisy, lewd or disorderly activities on the licensed premises or in areas the licensee controls that are adjacent to or outside the premises.”

OAR 845.006.0347(b) defines “lewd activities” as those activities “that contain lustful, lascivious, or lecherous behavior. Examples include sexual intercourse and masturbation.”

OAR 845.006.347(4) Restrictions on Entertainers to Prevent Lewd Behavior states:

“(a) No licensee permittee who allows or provides live, nude entertainment will permit a person to touch another person’s uncovered genitals, pubic area, buttocks or female breasts or to reach beneath another person’s clothing to touch the person’s genitals, pubic area, buttocks or female breasts.

(b) A licensee or permittee who allows or provides live, nude entertainment must post a notice stating that patrons and entertainers must not touch another’s genitals, pubic area, buttocks or female breasts or participate in lewd activities. The licensee must post this notice in a place that customers can easily see and read, and in all dressing rooms that entertainers use.”

OAR 845.006.347(5)(a) states:

“A licensee or permittee who knows that a patron has engaged in noisy, lewd, disorderly, or unlawful activities or any touching that subsection (4)(a) of this rule prohibits must evict that patron from the premises for at least a 24-hour period.”

OAR 845.006.0362 Responsibility of Licensees for Conduct of Others states:

“Each licensee may be held responsible for violation of any liquor control law or administrative rule or regulation of the Commission affecting his license privileges for any act or omission of his servant, agent, employee, or representative in violation of any law, municipal ordinance, administrative rule, or regulation affecting his license privileges.”

Neptune’s Restaurant, Inc. v. Oregon Liquor Control Commission interpreted the meaning of “maintain” as used in ORS 471.425(2). The court determined that “the charge of maintaining a lewd establishment could not be proven by evidence of one violation alone. There must be evidence to support an inference of “continuity of the proscribed conduct in order to prove a charge of maintaining.”²³

**A. Excerpts from the Narratives Regarding Oregon Statutes, Administrative Rules
and Club Rules**

I asked the women I interviewed if they were familiar with the Oregon statutes and administrative rules involving nude entertainment.

Daniella said:

“Yeah, every club I have worked at has had rules posted in the club. I think some of those rules are statutes. All the clubs I have worked at post rules that customers are prohibited from touching us. Also, we are not supposed to touch ourselves in a way that is sexual or stimulating.”

Daniella then went on to explain:

“We have pillow dances at Foxes. Basically, pillow dances are the same as lap dances, but we put a pillow down on the guy’s lap. Somehow, under the law in Salem these are allowed. Lap dances are not allowed, but with the pillow they are okay.”

Magic said:

“I don’t know if I ever saw any statutes posted in Jiggles, but I do know that Jiggles was much stricter than the clubs in Salem. At Jiggles the dancers were supposed to stay six inches away from the customers. There were cameras everywhere at Jiggles. Also, at Jiggles the bouncers watched how much alcohol the girls drank.”

Daniella adds in:

“Yeah, Foxes is much more relaxed. The bouncers don’t even seem to be watching. But, the bouncers are good if you tell them there is a problem. They will kick the customer right out!”

Stevie chimes in:

“At Foxes you can kick anyone out. I think at any strip club it is easy to get the guys kicked out. The dancer just has to say the word.”

I asked the women whether dancers in the clubs, which they have worked in, obeyed the restrictions set forth in the Oregon statutes, administrative rules, and club rules.

Daniella's immediate response was:

"All club girls break the rules. Eugene is stricter at enforcing the rules than in Salem. Dang, dancers, they go over and kiss customers."

Magic commented:

"Yeah, one of the rules is the dancers are not supposed to use drugs, but dancers are always doing drugs like vicodin or percocet. At Jiggles, I did not know of any girls getting caught popping pills, but I knew of girls that did get caught smoking pot."

Daneilla said that the club rule at Foxes is that you are not allowed to give out your phone number. Danielle then added:

"You can take phone numbers from customers, but then you are supposed to go over to the bar and throw them out. Not all the dancers follow this rule. I do have some regulars, and I have their business cards. I can call them up if it is slow on a particular night."

Stevie said:

"Yeah, I already have some regulars and they I definitely call them up on a slow night."

I asked the women what kind of experiences they have had with customers breaking club rules and statutes that prohibit touching.

Steve said that:

"Guys have tried to grab my legs, my hips, and my boobs."

Danielle said:

“Yeah, sometimes when guys hand me money, they touch my thighs. Once a man touched my crotch, and so I yelled for help immediately and he got kicked out. The second time that happened it was from a man that had been spending tons of money on me all night. So, I told him quietly that I would give him five minutes to leave before I got him kicked out.”

Magic claimed:

“I never had a problem with customers touching me. Once I had a guy touch my toe.”

Stevie said:

“It is so much different with male strippers. We went to this show where there were male strippers a few weeks ago. Girls were always grabbing at all the men- screaming and everything. The bouncers were just standing there, letting the girls grab the strippers. We hung out with the male dancers after the show and they told us they don’t mind the females touching them. It is crazy, male strippers make so much more money than us!”

I then asked the women about if they have ever been “propositioned.”

Magic said:

“It is mostly Chinese and Hispanic men that proposition the dancers.”

Danielle proclaimed that she gets propositioned once a night. Danielle added:

“I saw a lot more dancers prostituting in California. I went to work at this one club in California and after two hours I quit. They had private rooms where girls would supposedly do private dances. The time limit in these rooms was supposed to be five minutes. I asked the most approachable dancer in there I could find what was the real deal with private dances. She said each dance was sixty dollars and up. I asked her what she meant by and up. She said, well you know you can really do anything you want and charge like one hundred dollars. So basically these girls could take part in prostitution of they chose. I got out of that place!”

Stevie then explained:

“Well, you know, there is a lot of prostitution that takes place among supposed female escorts. I mean you can look at the adds in the Xmag and you can see that these women are more than escorts. The adds give a hint of whether more than an escort service is offered by the women.”

I asked them if they knew about if dancers the Eugene or Salem area were often the victims or assault or rape.

Daniella responded that:

“Violence against dancers is not really a problem in Eugene or Salem. Maybe in the big cities it is a bigger problem. The bouncers always walk you out and make sure that you leave safely. I have been followed twice after leaving a club. Both times it turned out it was nothing. The second time I was in a taxi, and when I realized I was being followed I made the taxi take a different route. I made it clear that we knew we were being followed. And then the guy just disappeared. You have to stand up for yourself in situations like this.

The “poor me girls” are the ones that will get into trouble. Those girls that don’t stand up for themselves might end up getting raped. Those dancers that can be easily manipulated and are weak minded may have some problems.”

These girls’ view regarding violence against exotic dancers does not *necessarily* mirror reality. There is documentation of a high correlation between women who work in the sex industry and women who are victims of sexual assault and rape.²⁴ Most of the documentation is from bigger cities, however, it would be safe to assume that some of the findings are applicable to Eugene and Salem.

VI. CLASSIFICATION OF DANCERS AS INDEPENDENT CONTRACTORS

A. Current Trends Nationally and in Oregon

As other commentators have noted, the single greatest challenge facing exotic dancers is that club owners typically hire them as independent contractors.²⁵ I will demonstrate that in a majority of all clubs, the relationship between club owner and dancer is actually one of employer and employee. There are various federal and state statutes that define employee and independent contractor, as well as tests used to determine if an individual is an employee or independent contractor. In almost all scenarios when the various test and definitions are applied, an exotic dancer can more accurately be defined as an employee.²⁶

As an independent contractor, an exotic dancer's income usually consists entirely of tips and the money she earns from table dances; an independent contractor usually does not earn a wage.²⁷ In Oregon, under ORS 653.025, employers are only required to pay *employees* minimum wage.²⁸

I asked the women I interviewed if they were independent contractors or employees at the various clubs they worked at. At first Magic said she did not know. Then Daniella chimed in:

“Oh, yeah, I know that at all the clubs I have worked in I have been an independent contractor.”

I then explained the difference between employee and independent contractor to Magic and Stevie. Magic said:

“I must have been an independent contractor because I never got paid a wage and I never got any employment benefits.”

The classification of exotic dancers as independent contractors is important to discuss because having the status of independent contractor has many negative legal ramifications for the dancers. However, club owners benefit from this classification. For example, club owners do not have to pay state and federal withholding taxes, social security tax, state unemployment taxes, and worker's compensation insurance premiums on behalf of the dancers working for them when they are classified as independent contractors.²⁹

Only employees are eligible for protections provided by state laws and federally mandated programs such as minimum wage laws, federal anti-discrimination laws, family leave programs, unemployment insurance, and workers compensation.³⁰ Thus, for example, only employees are eligible for the protections provided in Title VII and the analogous Oregon statute, ORS 659A.030.³¹

Most clubs that classify their dancers as independent contractors require their dancers to pay certain fees and fines. Almost every club that classifies its dancers as independent contractors collects a stage fee from the dancers before they perform each night.³² Daniella said that at Foxes the dancers have to pay a ten dollar stage fee on weekdays, a thirty dollar fee on Saturday, and a fifteen dollar fee on Sunday. Some clubs require that the dancer to sell a certain amount of drinks per shift, and if a dancer fails to meet such quota, they must pay the club for unsold drinks. Almost all clubs that classify their dancers as independent contractors mandate that the dancers pay a portion of their tips to other employees in the club, such as bouncers, disc jockeys,

waitresses and bartenders.³³ Stevie said that the dancers at Foxes have to tip the DJ ten percent and the bartender and waitresses five percent. Exotic dancers, as independent contractors, are fined if they miss work for any reason, including illness. Further, dancers have to pay stage fees for the days they miss.³⁴ Sadly, even though many clubs charge excessive entrance fees, this revenue is rarely shared with the dancers.

According to Hiedi Machen, in one club in California it is predicted that “by charging stage fees and cutting out employment costs, the O’Farrell Theatre may come out ahead as much as \$2 million a year.”³⁵

Some clubs provide their dancers with written lease agreements outlining the scope of the dancer’s employment while other have oral agreements.³⁶ Daniella, Magic and Stevie all said they have never had a written employment agreement at any of the clubs they had worked for. If a dancer does not agree to or tries to change a term of her employment agreement, most often she will either not be hired or will be fired.³⁷ Club owners can afford to do this because there is a large labor pool of women to choose from.³⁸

I learned about how these dancers feel about most of the club owners they have worked for. Magic said:

“Most club owners are not very nice. They are all about making money and using people.”

The two other women nodded their head in agreement with what Magic said. Magic said she tried not to have any interaction with the club owner at Jiggles. She said:

“I would just go to work, do my job and then leave. I did not want to deal with the management.”

Daniella claims that many owners of low scale, “dive-like” clubs just use their clubs as a front for a drug operation. Daniella said laughing:

“I think Jiggles was just a front for a huge cocaine operation and I even think that where I work now is just a front for some kind of drug operation. I knew girls that worked at Jiggles for seven years, and they were positive that the owner was just using the club as a cover-up.”

B. How to Determine if a Dancer is an Independent Contractor or an Employee

1. Federal Statutes

Courts employ various tests from the federal statutes to determine if an individual is an employer or independent contractor. The Fair Labor Standards Act requires the “economic realities test” be utilized to determine the status of a worker.³⁹ Courts have predominantly employed the “hybrid test” when determining worker status under Title VII.⁴⁰ The hybrid test is a combination of the “economic realities test” and the “right to control test.”⁴¹

The United States Supreme Court in Nationwide Mutual Insurance Co. v. Darden held that when a statute lacks a clear and helpful definition of an employee, the “right to control test” is to be used.⁴² Courts have determined that when examining claims under Worker’s Compensation laws and Unemployment Compensation law, the right to control test should be utilized.⁴³

2. Oregon statutes

ORS 653.025, the state statute analogous to the FLSA, does not specify a certain test to be used to determine the status of a worker.⁴⁴ Oregon courts have typically used the “right of control test” when analyzing a claim under ORS 653.025.⁴⁵ Only one court in Oregon has addressed how to determine the classification of a worker under ORS 659.030, the state statute analogous to Title VII. The court in Cantua v. Creager held the “right to control test” is to be used when determining whether an individual is an employee or independent contractor under ORS 659.030.⁴⁶

Since each of the various federal and state employment statutes use a different test to determine if an individual is an employee, often an individual can be an employee under one statute and not another. In 1993, the Oregon legislature recognized the lack of uniformity that arises from the different tests and enacted ORS 670.060.⁴⁷ ORS 670.060 sets forth eight factors that must be satisfied in order to classify an individual as an independent contractor.⁴⁸ ORS 670.605 provides that ORS 656, the Worker’s Compensation chapter, and ORS 657, the Unemployment Insurance chapter, should jointly adopt the test set forth in ORS 670.060 to determine the status of a worker. However, case law demonstrates that the courts have not necessarily relied on ORS 670.060 when determining the status of an individual under Worker’s Compensation law and Unemployment Compensation law.⁴⁹ Instead, the courts have followed the 1994 decision S-W Floor Cover Shop v. National Council on Compensation Insurance.⁵⁰ The court in S-W Floor Cover Shop held that the test set out in ORS 670.060

should be used in conjunction with the statutory definitions of ORS 656 and ORS 657 as well as the “right to control test.”⁵¹

Whenever the “right to control test” proves inconclusive in determining the status of a worker, Oregon courts apply the “nature of the work test.”⁵²

3. Economic Realities Test

Exotic dancers have had the most success in lawsuits in which they have filed under the Fair Labor Standards Act.⁵³ The FLSA is also the statute that exotic dancers most commonly file under.⁵⁴ Although, exotic dancers have had success in bringing claims under the FLSA, the number of lawsuits brought by exotic dancers is still very low compared to the number of dancers in America, who potentially could bring claims. Thus, the practice of classifying dancers as independent contractors is indeed still quite prevalent.⁵⁵

If exotic dancers are found to be employees under the “economic realities test”, then employers are mandated to pay minimum wage, possibly unpaid back wages, and reimburse any fees that the dancers had paid them.⁵⁶

It is worthwhile to briefly examine the factors that compose the “economic realities test” and how these factors can be applied to the setting of a strip club.

The economic realities test takes the following factors into consideration: permanency of the relationship, skill required, investment in the work facilities, opportunities for profit or loss from the activities, and whether the worker is an integral

part of the business.⁵⁷ Listed below are the factors of the economic realities test and explanations of how each factor apply to a strip club.

(a). Club Owner's Control over the Dancer's Work

A worker is an employee when the club owner retains control over the means and manner of the work, not just merely control over the final result.⁵⁸

Typical strip clubs have many specific rules the dancers are supposed to follow. In most clubs, the club owner controls the amount of nudity of a dancer, the number of songs each dancer must dance to, and the order the dancers are to perform in. Usually employers set some restrictions on the costumes the dancers wear and what songs they perform to. A strong factor pointing to the employer's control is that usually the employer posts or announces the price for private dances.⁵⁹ The above mentioned facts lead to the conclusion that club owners have control over the means and manner of the dancer's performance.

(b). Permanency of the Relationship

When examining the permanency of the relationship, the courts look at how long the individual has been with the same employer. The longer an individual is with an employer, the more likely they will be classified as an employee. An independent contractor usually works for a number of different parties and moves from job to job.⁶⁰

Some club owners state in their employment agreements that dancers may perform at other clubs; this would indicate that a dancer's relationship with a club may be impermanent. However, there are some dancers who stay at the same club for a long

period of time and establish a large clientele.⁶¹ This would indicate the relationship was one of employee-employer. The courts are required to weigh each factor equally when applying the “economic realities test.”⁶² Thus, even if a dancer is found to have an impermanent relationship with a club, this factor is not determinative that a dancer is an independent contractor.

(c). Skill Required

If the employment position requires a particular skill, the courts are more likely to classify the individual as an independent contractor.⁶³

Even though dancers can be considered to possess special skills to dance in front of large crowds and take off their clothes, most courts have expressed the sentiment that the skill is very slight.⁶⁴ In fact when club owners advertise for dancers, they often advertise that no experience is necessary.⁶⁵

(d). Investment In Work Facilities

The courts will consider the extent of the worker’s investment in the employment facilities. The greater the investment, the more likely the courts will find that the worker is an independent contractor.⁶⁶

In typical strip clubs, the employer rents the building, hires lighting technicians and DJ’s, and builds a stage. Dancers usually only invest in costumes and makeup.⁶⁷ Therefore, this factor easily points in favor of an employee classification.

(e). Opportunity for Profit or Loss

When employers control a worker's opportunity for profit or loss, a worker is usually found to be an employee.⁶⁸

Most club owners have control over when dancers will work and how many hours they may work. A club owner usually has authority over what part of the club the dancer will dance in and how long the dancer will perform on stage. These factors can greatly affect how much money the dancer is able to earn. Dancers depend on the club owners to develop a successful economic enterprise.⁶⁹ Club owners handle the advertising and promotion for the clubs.

(f). Integral Part of the Business

The final factor is whether the worker is an integral part of the business. The more integral the worker is to the business the more likely it is that the court will classify the dancer as an employee.⁷⁰

When customers come to strip clubs their primary reason is to see exotic, naked dancers. This is the reason that customers pay entrance fees to get into strip clubs. There are many strip clubs throughout the country in which alcohol is prohibited; they still have many patrons.⁷¹ Dancers are clearly an integral part of the strip clubs.

4. Right to Control Test

Dancers have had less success in lawsuits in which the "right to control test" is invoked than the "economic realities test"⁷²

The "right to control test" has the following factors: direct evidence of the right to exercise control, investment in work facilities, method of payment, and the right to

terminate.⁷³ The first two factors of the “right to control test” are the same as the “economic realities test.” Therefore, I will only explore in greater detail the method of payment and the right to terminate factors.

(a). Method of Payment

If the method of payment is in the form of an hourly wage, a court is more likely to find that an individual is an employee.⁷⁴ Most dancers do not receive wages, thus, leading to the conclusion that they are independent contractors. Further, courts may also look at tax returns and determine how the dancers classified themselves. Also, the courts will consider if the employer withheld payroll taxes. If the employer did withhold taxes, the worker would appear to be an employee.⁷⁵

Each of the four factors in the “right to control test” has to be weighed equally: one factor alone cannot lead to the conclusion that a dancer is not an employee.⁷⁶ Thus, even if the method of payment indicates that an exotic dancer is an independent contractor, this factor alone does not establish that the dancer is an independent contractor.

(b) Right to Terminate

If an employer has the right to discharge a worker at will, it indicates that the worker is an employee.⁷⁷ Club owners definitely have the right to discharge at will exotic dancers. In fact, club owners terminate their dancers for very small infractions of the rules or simply if they are dissatisfied with the performance of a dancer.⁷⁸

C. Case law in Oregon

Thus far, there have only been four cases in Oregon brought by exotic dancers for the purpose of determining if they are independent contractors or employees under employment statutes.⁷⁹ Three cases have been brought under ORS 653.05, the statute analogous to the FLSA; one case has been brought under the ORS 657, the Worker's Compensation law.

1. Under FLSA and 653.052

Exotic dancers were only found to be employees in two cases, State ex rel. Roberts v. Acropolis McLoughlin and State ex Roberts v. Bombareto Entertainment.⁸⁰ However, in Acropolis, the court that the dancers were only employees from 1991 to 1993. In 1993, the Acropolis club, probably anticipating a lawsuit, restructured its relationship with its dancers. The club hired an agency to hire, schedule, discipline, and fire the club's dancers; the club literally just rented stage space to the agency.⁸¹

The 2000 federal court decision, 7455 v. Matson did not find in favor of the exotic dancers.⁸² Interestingly, the facts from Matson and Bombareto almost identical.⁸³ Thus far the Bombareto decision is the only decision in Oregon that has found for the exotic dancers on all of their claims.⁸⁴ It is hard to predict what results future litigation in Oregon will produce for exotic dancers bringing claims under 653.05.

State ex rel. Roberts v. Acropolis McLoughlin I decided in 1997, was the first case brought in Oregon under ORS 653.052 to determine the status of an exotic dancer.⁸⁵

At trial, the Oregon Bureau of Labor and Industries (BOLI) brought the action on behalf of the dancers who worked at the Acropolis club in Portland. BOLI alleged that

dancers were entitled to wages from the time they were working in June, 1991 until April, 1994. Further, BOLI asked for declaratory and injunctive relief for the dancers working after September 1993.⁸⁶

BOLI also brought a wage claim on behalf of dancer Mazur for the period of September 1993 until April 1994. The trial court jury found in favor of the dancers for their wage claims from the time period of June 1991 until September 1993. The claims for injunctive and declaratory relief for the period after September 1993 were denied relief. The court also dismissed the claim brought by dancer Mazur. BOLI appealed the trial court decision.⁸⁷

On appeal, the BOLI argued that the trial court erred in failing to grant injunctive and declaratory relief. The issue on appeal was whether the dancers who worked at the Acropolis club after September 1993 were employees under ORS 653.020, thus, entitling them to minimum wage. The parties disagreed whether the “right to control test” or the “economic realities test” should be used to determine the status of these dancers. The parties also disagreed about which test the trial court actually applied.⁸⁸ The court found that trial court used a combination of the “right to control test” and the “economic realities test.” BOLI argued that only the “economic realities test” should have been applied. The appellate court held that since BOLI raised that claim for the first time on appeal, the court would not consider it.⁸⁹

BOLI alleged that the trial court erred in dismissing the claim brought by Mazur for the time period after 1993. BOLI alleges that the trial court should have evaluated

Mazur's claim using the "economic realities test."⁹⁰ The court stated that it would not consider which test the trial court should have applied. However, the court found that there was evidence that an employee-employer relationship existed between Mazur and the Acropolis. The appellate court reversed the trial court's decision with respect to Mazur's claim and affirmed the rest of the trial court's decision.⁹¹

In State v. Acropolis McLoughlin, Inc. II., BOLI argued that under the test utilized by the trial court used, a combination of the "economic realities test" and the "right to control test", the dancers should have been found to be employees post-September 1993.⁹² The appellate court considered this claim on de novo review. The court examined in great detail the employment relationship that the dancers had with Acropolis club pre 1993 and post 1993.⁹³ The Acropolis club modified its operating procedure beginning in September of 1993. Prior to September 1993, an employee of the Acropolis, Don Cloud, hired the dancers, made up their schedules and served as their manager. The dancers had strict rules which they were to follow. After September 1993, the Acropolis fired Cloud and replaced him with an agency called "Hot Stuff." Hot Stuff leased the stages at the Acropolis and was in charge of scheduling the dancers. The dancers paid a stage fee to Hot Stuff instead of the Acropolis. After hiring Hot Stuff, Acropolis no longer had rules for the dancers to follow. Instead, Hot Stuff promulgated rules for the dancers to follow and disciplined them if they violated them.⁹⁴

The court found that under the hybrid test used by the trial court, the dancers at the Acropolis were not employees post-September 1993. The court held that its decision applied to dancer Mazur and thus, she was not an employee post 1993 either.⁹⁵

State ex rel. Roberts v. Bamareto Entertainment, was the next case brought under ORS 653.052 by exotic dancers.⁹⁶ BOLI sued Bamareto Entertainment, the corporation that ran the clubs Jiggles and the Great Alaska Bush Company in Eugene. BOLI brought the action against Bamareto seeking unpaid minimum wages, penalty wages, and declaratory and injunctive relief on behalf of the dancers who performed at Jiggles and the Great Alaska Bush Company. The dancers at those clubs were not paid a minimum wage, but they kept the money earned from tips. The dancers had to pay a stage fee to the clubs each night they performed. The court had to determine whether the dancers were employees under ORS 653.052.⁹⁷

Bamareto argued that ORS 653.052 does not define “employee” and thus the definition from ORS 642.310 must be used- under this definition the dancers were not employees. However, the court found that ORS chapter 653 does contain its own definition of employee. ORS 653.010 defines the word “employ” as “including to suffer or permit to work.” The court then concluded that by contextual implication an employee is a person who is “suffered or permitted to work.” The court held that since Bamareto “suffered or permitted” the dancers to work, the dancers were employees and thus, protected under the minimum wage laws.⁹⁸

Matson v. 7455, Inc. was a 2000 federal court decision from the United States District Court for the District of Oregon.⁹⁹ The exotic dancer in this case brought claims under both the FLSA and ORS 653.052. Matson was a dancer at Jiggles in Tualin off and on from 1993 until 1998. Throughout her time at Jiggles, Matson paid a stage fee of thirty dollars a shift, and her earnings consisted of the money she collected from tips and table dances. Jiggles subjected Matson to its club rules for dancers.¹⁰⁰

The court acknowledged that in deciding Matson's FLSA claims it would apply the "economic realities test." In using this test, the court found that Matson was an independent contractor. The court held that the written agreement that Matson signed with Jiggles was the most salient factor. The agreement said that Matson was in charge of paying her own taxes.¹⁰¹

2. Under Worker's Compensation Law

The only case in Oregon brought under ORS 656, the Worker's Compensation law is Cy Investment Inc. v. National Council on Compensation Insurance.¹⁰² In this case, the SAIF corporation is seeking review of an order made by the Department of Insurance and Finance that twenty-two dancers at Cy's Parkrose Pub are not "workers". The DIF determined that since the dancers are not "workers", they were not subject to worker's compensation coverage.¹⁰³

The dancers at Cy's signed themselves up for shifts on a weekly schedule that Cy's maintained. The dancers received an hourly wage of six dollars. Cy's exercised a substantial amount of control over the dancers' performances. Cy's required the

dancers to dance for four songs and then sit out for four songs. Cy's had strict club rules the dancers were supposed to follow. After considering the above mentioned facts, DIF concluded that the dancers were not employees within the meaning of ORS 656.005(28), the worker's compensation statute. The DIF relied exclusively on the "right to control test" in reaching the conclusion that the dancers were not workers.¹⁰⁴

The court re-applied the "right to control test." The court applied the first factor which examines whether the employer had control over the dancer's method of performance. The court found that both the employer and the dancers exercised control over the performances and thus, this factor was inconclusive. Then the court examined the second factor, the method of payment. The dancers received an hourly wage, however, the dancers reported their compensation to the IRS as "non-employee compensation." The court found this factor inconclusive also. The court applied the third factor, the right to fire factor. The court determined that although Cy's retained the right not invite a dancer back, Cy's never prevented a dancer from working a previously scheduled shift. The court determined this factor to be inconclusive as well. The court applied the fourth factor, the furnishing of equipment factor. The dancers provided their own costumes, make-up and music. Cy's provided the stage. The court held that the stage "was not equipment in its ordinary sense, but was, instead, merely the site of the dancer's performance." Thus, the court found that this factor supports the conclusion that the dancers were not "workers".¹⁰⁵

The court ruled that the "right to control test" was inconclusive in determining

whether the dancers were workers. The court said that the DIF erred in basing its determination solely on the “right to control test.” The court remanded the case and ordered DIF to apply the “nature of the work test.”¹⁰⁶

VII. CONCLUSIONS REGARDING INDEPENDENT CONTRACTOR STATUS FOR EXOTIC DANCERS

As a matter of law, exotic dancers are often incorrectly classified as independent contractors. My initial conclusion was that the independent contractor status had no redeeming value for exotic dancers. I further thought that the only way that their employment conditions could improve would be by classifying them as employees so they would be eligible for the protection provided by state and federal employment laws. However, after researching further, I realized that the situation is not so black and white as I first had thought.

First of all, just because exotic dancers are classified as employees does not mean they necessarily will benefit from the employment laws in the same way as workers in traditional fields do. When traditional employment regulations are applied to strip clubs, complex and unique issues arise. I will discuss the dilemmas which occur when the FLSA and Title VII are applied in the context of strip clubs.

Secondly, I discovered that not all dancers want their status to change. In fact, two of the women I interviewed are vehemently against being classified as employees. I found some of their arguments compelling and worth considering.

Thirdly, independent contractors still have tort and contract remedies which protect their rights to bring lawsuits for various causes of action arising in the workplace. Independent contractors can bring tort claims for intentional infliction of emotional distress, injury caused by unsafe conditions, assault and battery against either the owner or customer, etc. Also independent contractors can bring claims based on contract such as breach of employment agreements, payment for work, tips, etc.

A. Applying Traditional Employment Regulations to the Strip Club

1. FLSA

Some club owners have structured their relationship so that the dancers have the status of an employee but still take advantage of the dancer. For example, club owners will pay the dancer a wage but still will retain a percentage of each private dance to offset the wages.¹⁰⁷ Club owners get away with this because as employees, the money which the dancers earn from private dances is considered revenue for the club, thus, entitling the club to a share.¹⁰⁸ Some club owners will pay wages, but also collect stage fees from the dancers. The result of these ploys is that often a dancer will earn less when classified as an employee.¹⁰⁹

2. Opinions From the Women I Interviewed Regarding Being Classified as an Employee v. Independent Contractor

An important issue arises regarding what is more important to a dancer: a better income or eligibility for protection under federal and state anti-discrimination laws, unemployment compensation, family leave programs, and worker's compensation?

I asked the women whether they would rather be classified as independent contractors by their clubs owners or as employees so that they would be eligible for protection under the state and federal employment regulations?

Daniella said:

“I love my situation now. I get to take all the money I make from table dances- and I don’t have to pay taxes. I mean I know I should, but I don’t. I mean after all, the Oregon Health Plan is for people who don’t get benefits! That is all I need.”

Stevie said:

“If our status changed and dancers made less, hardly any girls would do it. The reason girls dance is because we make twice as much as the average female worker.”

Magic piped in:

“I disagree with you. There are dancers out there that have children, that need more security, like unemployment compensation. There are dancers out there that would appreciate those benefits and rights they would be eligible for as employees. It is not right that dancers don’t get treated like workers in other fields.”

Daniella proclaims:

“Nah nah, it is all about the money. If our status changes to that of an employee, those club owners will find a way to take all of the money we earn off table dances, and that is the place we make money! If I don’t take home between \$700-\$1000 each week, it is not worth it. And if they changed my status- those club owners would take all our money!”

Daniella goes on:

“We deserve so much more than minimum wage. We are doing a lot out there dancing. Seriously, my body is always sore. I have a sprained ankle, and my shoulder is messed up. We are professional entertainers and we deserve to get compensated a lot for it!”

Stevie adds:

“So many girls would quit dancing if they couldn’t take home all the money we get from table dances. Seriously, the club owners would not be able to find anyone to dance!”

Obviously, not all dancers agree with Daniella and Stevie. There have been many lawsuits filed against club owners by exotic dancers claiming that they have been improperly classified as independent contractors.¹¹⁰ In fact, in 1999 several class action lawsuits were filed in California and Nevada by over five thousand exotic dancers from thirty-one strip clubs. One of the California cases, *Vickery v. Cinema Seven, Inc.* has already been settled. The five hundred dancers involved in the suit settled for 2.5 million dollars.¹¹¹

3. Title VII Sexual Harassment

Even if exotic dancers are classified as employees by club owners, difficulties arise when employment regulations are applied to the context of exotic dancing. Particularly interesting is the dilemma that emerges when Title VII and ORS 659.030 sexual harassment law are applied to the context of a strip club. Sexual harassment is a form of sex discrimination prohibited by Title VII and ORS 659.030.¹¹² I am going to discuss hostile work environment sexual harassment. No exotic dancer has yet brought a hostile work environment sexual harassment claim.¹¹³

In *Harris v. Forklift*, Justice Sandra Day O'Connor explained that an environment can be a hostile work environment even if it "does not seriously affect employees' psychological well-being."¹¹⁴ O'Connor stated that an environment is hostile if it "detract[s] from employees' job performance, discourage[s] employees from remaining on the job, or keep[s] them from advancing in their careers." According to O'Connor the test for a hostile work environment is whether the work environment

“would reasonably be perceived, and is perceived, as hostile or abusive.”¹¹⁵ Thus, hostile work environment claims must be evaluated objectively and from the subjective standpoint of the plaintiff.

Courts have found that an employer may be responsible for the sexual harassment of employees by non-employees if the employer knows or should have known of the conduct but failed to take immediate and appropriate action to correct the situation.¹¹⁶ The United States Supreme Court has ruled that an employer is vicariously liable for the harassment of an employee by a supervisor, even if the employer had no notice of the inappropriate conduct.¹¹⁷

Exotic dancers do frequently experience customers and employees behaving in vulgar and insulting ways. The women I talked to all agreed that guys often do behave offensively.

Magic explained:

“Guys have made some really disgusting comments to me about what different sexual positions they would want to try with me. Sometimes those comments do get to me and I usually go dance in the other side of the club.”

Daniella said:

“The times that a guy has tried to touch my crotch or rub my thigh when handing me money, has bothered me. I am cool with guys looking at me, but when guys touch me, they are crossing the line.”

Stevie added:

“I sometimes gets these comments from guys about how they want to be my “daddy” and show me some fun- meaning have sex with me. They make these comments because I guess they can tell how young I am.”

For purposes of the following discussion, I am assuming that the exotic dancers are classified as employees, and thus, are eligible to bring sexual harassment claims. It is difficult to apply traditional sexual harassment law to strip clubs because conduct that is considered sexual harassment in more traditional areas of work, may have a different connotation in the sexually orientated environment of strip clubs. Nudity and certain amount of sexual banter between the dancers and the customers are considered reasonable in strip clubs. However, in more traditional work settings nudity and sexual banter in the work place could be enough to create a hostile work environment.¹¹⁸

In strip clubs, staring is considered appropriate behavior because dancers are there to show off their bodies. Customers even stare at dancers in suggestive ways when they are performing. However, in some more traditional areas of work, constant staring could be considered harassment.¹¹⁹

When true sexual harassment does occur it may be hard for a dancer to recognize it. In order to have a hostile work environment claim, the victim must perceive the conduct as harassment.¹²⁰ Unfortunately, most dancers are not familiar with sexual harassment law, and might not even know that the comments and behavior of the patron constitute hostile work environment sexual harassment. Further, after years of working in the strip clubs dancers are conditioned to think that offensive comments are “just part of the job.”¹²¹ What some dancers may fail to realize is that vulgar comments that interfere with their work are not “just part of the job”; they are sexual harassment.

Thus, tragically, some dancers may be experiencing true hostile work environment harassment, but not even know it.

After briefly explaining hostile environment sexual harassment law, I asked the women I interviewed if they thought the vulgar comments they received constituted harassment.

Daniella said:

“There are some nights when guys make so many insulting comments that you just want to go home. But, if someone is bothering me enough it is really easy to kick him out. I never thought about filing a lawsuit. That would be cool to get money for something like that! But, see I am sure that I would not win because people would say, you are putting yourself up to that kind of behavior by being a stripper.”

Another difficulty may come up if the employer did not know or did not have a reason to know that harassing behavior was occurring. Most likely, if dancers do not inform employers of harassment, then it would be up to the bouncers. Bouncers monitor the interactions between dancers and the customers. However, unfortunately, in the sexually charged climate of a strip club, bouncers may have a difficult time identifying conduct that constitutes harassment. If bouncers don't recognize that certain behavior constitutes harassment then they can't do anything to prevent it.

Most likely the biggest stumbling block a dancer would encounter when bringing a sexual harassment claim would be convincing a jury that the conduct is true harassment. A jury might say that the purported harassment is reasonable under the circumstances- meaning the sexually charged atmosphere of a strip club. Most juries

would be aware that a certain amount of sexual banter occurs in strip clubs. Thus, a jury might have a difficult time recognizing conduct that is true harassment and conduct that is just the typical banter.

Regardless of the erotic nature of strip clubs, exotic dancers still deserve to be protected from conduct that creates a hostile working environment for them. Dancers should still be able to recover from their employers for conduct that constitutes sexual harassment when employer knows or should have known and fails to take remedial action.

VIII. REFORM

On the one hand, exotic dancers do not necessarily benefit from being classified as an employee. If dancers are found to be employees under the FLSA and ORS 653, club owners are required to pay them an hourly wage.¹²² However, when dancers are employees, club owners usually take a large percentage of their table dance tips. The result is that dancers typically earn a smaller income as employees than would as independent contractors.¹²³ As employees, exotic dancers would be eligible for Title VII and ORS 659.030 hostile environment sexual harassment protection, however, it seems unlikely they would easily succeed in winning a sexual harassment claim.

Also, dancers are not completely left without legal recourse for harms at the workplace when classified as independent contractors- they still can bring claims under tort and contract law. Thus, if money is more important to exotic

dancers than being eligible for protective employment laws, independent contractor status would be better.

However, on the other hand, the fact that club owners are getting away with improperly classifying dancers is unacceptable. Club owners all over the country are violating the law by misclassifying their workers. Club owners are creating a façade that their dancers are independent contractors in order to not have to provide them with benefits. Club owners do not have to pay state and federal withholding taxes, social security tax, worker's compensation insurance, unemployment insurance, be concerned with Title VII, or comply with the FMLA and FLSA.¹²⁴ I find this fundamentally wrong.

I advocate that national legislation should be promulgated to stop this practice of improperly classifying exotic dancers. Dancers, who are in actuality employees, should be classified as employees and receive employment benefits and be eligible for the protection of employment regulations.

Legislation should not end there; it should also include provisions for dancer's earnings. Club owners should not be able to financially exploit dancers when they have the status of employees. Club owners should not be allowed to take a large percentage of the dancers' table dance profits. Club owners are already profiting from high entrance fees as well as the alcohol and food that is served in the bar. Exotic dancers should be entitled to keep all the money they receive from table dances.

Exotic dancers work hard in the clubs convincing patrons to buy dances and then performing them. After speaking with the women I interviewed, I now know how physically demanding the job is and what a strain dancing puts on these women's personal lives.

I asked the women how dancing has affected their relationships with their families.

Daniella said:

“Well, my family shuns me. My mom is so ashamed of me. She is always telling me I need to quit. The first year and a half I was dancing she did not know. My mom won't tell her new husband that I dance. It is like the big family secret. The only person in my family that does not mind is my Grandma. She was a prostitute when she was in her twenties. Now to me, being a prostitute is crossing the line!”

Magic said:

“Yeah, to this day, my parents do not know that I used to dance. And I never plan on telling them. If my mom knew I was dancing, she would have come to Eugene, plucked me up, and taken me far away.”

Stevie said:

“Yeah, I told my dad that I worked as a waitress at the club I dance at. He came in one night, and I was performing! I told the bouncer right away to have him kicked out, and he was. My parents are really upset about what I am doing. They are strict Mormons. But I really want to go to college and this is the best way for me to get money.”

I asked the dancers if they ever feel rejected by their friends or boyfriends for stripping.

Daniella said:

“Well, when I first started dancing I had a boyfriend. Soon he began calling me a slut. We broke up and I have not had a boyfriend since then. All the guys I meet have problem with me stripping.”

Stevie said:

“Most guys seem to back off and don’t want to hang out with me when they find out I am a dancer. Others don’t mind because they like all the money I make.”

Magic added:

“The biggest misconception is that we go home with guys, you know customers, from the club all the time. That does not happen. I lost a lot of my guys friends when I started dancing. They all started trash talking me and saying what a slut I had turned into- which was of course not true! My female roommate moved out on me a few months after I started dancing. She said she could not live with someone who would do anything for money.”

Daniella said:

“When I first started dancing in Eugene it was very awkward when friends of mine would come into the club and see me dancing. I remember thinking I wanted to run off the stage, but I didn’t, I stayed and did my job.”

Although Daniella and Stevie claim to be content with their independent contractor status, they still want some changes in their clubs.

Daniella said:

“I wish the clubs were managed better. All the clubs I have ever worked at have been owned and managed by men. I think women would do such a better job. I think women would have more meetings with the dancers to see what needs to improve. At the club I work at right now the dressing room is small and moldy. The bathrooms the dancers use are so dirty. There is never any soap in our bathroom- if you want soap, you

have to bring your own. My manager never does anything to make us dancers feel comfortable.”

Stevie added:

“ I think if more women were involved in running strip clubs so much would change. I don’t think that dancers would have to pay a stupid stage fee or share their tips with all the other employees in the club.”

The exploitation of female exotic dancers is occurring at the hands of primarily male club owners. To me, it seems that club owners are operating as quasi-pimps. The club owners are reaping the financial benefits from women they have working for them in the sex industry. Since the law has declared that nude dancing is protected speech, responsible laws should protect nude dancers within the industry.

IX. FINAL REMARKS

Sex workers have for too long been thought of as “throwaway” human beings.¹²⁵ Society has stigmatized strippers and pushed them to the outer fringes of society. Society may never change its view of women in the sex industry, but nonetheless the law can assist these women to attain the rights and protections at work which they are entitled to.

For the most part, feminists have forgotten about sex workers when they advocate for equal rights for women.¹²⁶ Many feminists may be resistant to offering support to exotic dancers because they do not want to be perceived as endorsing stripping. However, the reality is that assisting these sex workers to attain basic

employment rights supports the position that female workers should not be exploited at the hands of male club owners.

The more that sex work is legitimized, some fear, the more the government is condoning the “perpetuation of men’s sexual access to a class of women.”¹²⁷ I acknowledge that this argument has some validity. However, if the law is removed from what goes on in the legal sex industry, harm is done as well. We as a society must start focusing on the actual harms which occur within the sex industry, instead of the inherently general harmful nature of the industry itself.

Personally, I still do have certain qualms with stripping. I fear for the strippers’ emotional well-being. I fear for all the dancers that go into dancing innocently enough to earn money for college and then become addicted to drugs. I feel sorry for all the women that start out in the sex industry by stripping and then get involved with prostitution on the side.

I cringe when I think of all the exotic dancers who ruin their relationship with their family by stripping. It is sad to think about all those men who would rather spend an evening looking at naked women dance around than meet and talk with individuals of the opposite sex. I wince when I think about all the young girls growing up in a culture which sends the message that sex sells. So if you have the body, sell yourself!

But, in the end, I am the most perturbed by all those club owners who abuse the law and exploit exotic dancers.

¹ For purposes of this paper, exotic dancer refers to a **female** dancer that performs a striptease dance and works in strip clubs. The term exotic dancer, dancer, nude dancer, and stripper will be used interchangeably in this paper. Sex

workers and adult entertainers, as used in this paper, include women in pornographic films and magazines, bachelor party dancers, peep booth performers, internet dancers.

² Margot Rutman, *Exotic Dancers' Employment Law Regulations*, by, 8 Temp. Pol. & Civ. Rts. L. Rev. 515, 515 (1999).

³ Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment Protection: Can It Support a Hostile Work Environment Claim Brought By a Nude Dancer?*, by, 24 N.Y. U. Rev. L. & Soc. Change 271, 273 (1998).

⁴ 8 Temp Pol & Civ Rts. L. Rev at 516.

⁵ Fischher, Carrie, *Employee Rights in Sex Work: The Struggle for Dancer's Rights as Employees*, 14 Law Ineq. 521, 526 (1996).

⁶ Wilmet, Holly, *Naked Feminism: The Unionization of the Adult Entertainment Industry*, 7 Am U.J. Gender Soc. Pol'y Civ Rts. L. Rev. 465, 465 (1999). See Also Harrell v. Diamond Entertainment, 992 F. Supp. 1346 (1997), Déjà vu Entertainment v. U.S. 1 F. Supp. 2d 964 (1998), JJR, Inc. v. U.S. 950 F.Supp. 1037 (1997), Martin v. Priba Corp. 1992 WL 486911 (1992), State v. Acropolis 945 P.2d. 647 (1997), Cy Investments, Inc. v. National Council on Compensation Insurance, 846 P.2d (1994), Matson v. 7455, Inc., 2000 WL 1132110 (2000).

⁷ 8 Temp. Pol. & Civ Rts. L. Rev. at 556.

⁸ 24 N.Y.U. Rev. L. & Soc. Change at 274.

⁹ Lisa Sanchez, *Boundaries of Legitimacy: Sex, Violence, Citizenship & Community in a Local Sexual Economy*, 22 Law & Soc. Inquiry, 543, 557. (1999). See also Machen, Hiedi, *Women's Work: Attitudes, Regulations, and Lack of Power Within the Sex Industry*, 7 Hastings Women's L.J. 177, 182 (1996).

¹⁰ 8 Temp. Pol & Civ Rts. L. Rev. at 516.

¹¹ The names Daniella, Stevie and Magic are not the real names of the women. Daniella and Stevie are the names these two dancers currently use on stage. Magic is the name that was currently used as a stage name by one of the women.

¹² Doran v. Salem Inn, 422 U.S. 922 (1975).

¹³ Doran at 932 (1975).

¹⁴ Barnes v. Glen Theatre, Inc. 501 U.S. 560, 565 (1991).

¹⁵ Barnes at 567.

¹⁶ United States v. O'Brien 391 U.S. 367, 377 (1968).

¹⁷ Hansen, Clinton, *To Strip or Not to Strip: The Demise of Nude Dancing & Exotic Expression Through Cumulative Regulations*, 35 Val U.L. Rev. 561, 562 (2001).

¹⁸ Katie Fielaid, the City Recorder, met and explained the Prohibited Nudity Eugene Ordinance.

¹⁹ Michelle at the City Recorder's office, telephone conversation on 4.3.02

²⁰ Helen at the City Recorder's office, telephone conversation on 4.15.02

²¹ Zoning Ordinance law explained by Katie Feilaid, City Recorder for Eugene.

²² Zoning Ordinance law explained by Dave Pratt, City Recorder's office in Salem.

²³ Neptune's Restaurant, Inc. v. Oregon Liquor Control Commission, 15 Or.App. 16, 18 (1973).

²⁴ Baldwin, Margaret, *A Million Dollars & an Apology: Prostitution & Public Benefits Claims*, 10 Hastings Women's L.J. 189, 191 (1999). See also 22 Law & Soc. Inquiry at 545. See Also Baldwin, Margaret, *Split at the Roots: Prostitution and Feminist Discourse of Law Reform* 47, 51, 57, 60 (1992).

²⁵ 8 Temp. Pol. & Civ Rts. L.Rev. at 525 & 7 Am U.J. Gender So. Pol. & Law at 450, 10 Hastings Women's L.J. 189, 14 Law & Ineq at 522, 24 N.Y. U. Rev. L. & Soc. Change 271, 7 Hastings Women's L.J. at 182.

²⁶ 8 Temp. Pol. & Civ. Rts. L. Rev. at 525, 7 Am U.J. Gender So. Pol. & Law at 452, 10 Hastings Women's L.J. 192, 14 Law & Ineq at 525, 24 N.Y. U. Rev. L. & Soc. Change 272, 7 Hastings Women's L.J. at 184.

²⁷ 8 Temp. Pol & Civ. Rts. L. Rev. at 526.

²⁸ ORS 653.025 is the statute that governs the minimum wage requirements.

²⁹ 14 Law & Ineq at 522.

³⁰ 8 Temp. Pol. & Civ. Rts. L. Rev. at 526.

³¹ Title 51 Labor and Employment Chapter 659A. ORS 659A.030 Discrimination because of race, color, sex, national origin, marital status or age prohibited.

³² 8 Temp. Pol. & Civ. Rts. L. Rev. at 526.

³³ Id.

³⁴ Id.

³⁵ Hastings Women's L.J. at 200.

³⁶ 7 Am U.J. Gender Soc. Pol’y & L. at 491.

³⁷ 8 Temp. Pol. & Civ. Rts L. Rev. at 527.

³⁸ 7 Am U.J. Gender Soc. Pol’y & L. at 480.

³⁹ 29 U.S.C. § 203(e)(1), See Real v. Driscoll Strawberry Asslicates, Inc. 603 F.2d 748, 754 (1979).

⁴⁰ 42 U.S.C. s 2000e-z., Frankel v. Bally, Inc., 987 F.2d 86, 89 (1993).

⁴¹ Spencer, Cliff, *Oregon’s Independent Contractor Statute: A Legislative Placebo for Employment*, 31 *Willamette L. Rev.* 647, 672 (1995).

⁴² Nationwide Mutual Insurance Co. v. Darden, 112 S. Ct. 1344, 1348 (1992). The right to control test is sometimes called the common law test.

⁴³ Nationwide Mutual Insurance Co. v. Darden, 112 S.Ct. 1344, 1350 (1992). Loomis Cabinet Co. v. Occupational Safety & Health Review Comm’n 20 F. 3d 938 (1994).

⁴⁴ ORS 653.0003-0026 General Employment Conditions (minimum wage provisions).

⁴⁵ The court in Chard v. Beauty-N-Beast Salon 148 Or. App. 623, the court held that the right to control test was the appropriate test to apply under ORS 653.025. The court said the Oregon Bureau of Labor and Industries employs the right to control test when examining claims under 653.025.

⁴⁶ Cantua v. Creager, 169 Or. App. 81, 84 (2000).

⁴⁷ 31 *Willamette L.Rev.* at 650.

⁴⁸ ORS 670.060 sets forth the following factors to be used: (1) The individual or business entity providing the labor or services is free from direction and control over the means and manner of providing the labor or services, subject only to the right of the person for whom the labor or services are provided to specify the desired results; (2) The individual or business entity providing labor or services is responsible for obtaining all assumed business registrations or professional occupation licenses required by state law or local government ordinances for the individual or business entity to conduct the business; (3) The individual or business entity providing labor or services furnishes the tools or equipment necessary for performance of the contracted labor or services; (4) The individual or business entity providing labor or services has the authority to hire and fire employees to perform the labor or services; (5) Payment for the labor or services is made upon completion of the performance of specific portions of the project or is made on the basis of an annual or periodic retainer; (6) The individual or business entity providing labor or services is licensed under ORS chapter 701, if the individual or business entity provides labor or services for which licensure is required; (7) Federal and state income tax returns in the name of the business or a business Schedule C or farm Schedule F as part of the personal income tax return were filed for the previous year if the individual or business entity performed labor or services as an independent contractor in the previous year; and (8) The individual or business entity represents to the public that the labor or services are to be provided by an independently established business. Except when an individual or business entity files a Schedule F as part of the personal income tax returns and the individual or business entity performs farm labor or services that are reportable on Schedule C, an individual or business entity is considered to be engaged in an independently established business when four or more of the following circumstances exist:

- (a) The labor or services are primarily carried out at a location that is separate from the residence of an individual who performs the labor or services, or are primarily carried out in a specific portion of the residence, which portion is set aside as the location of the business;
- (b) Commercial advertising or business cards as is customary in operating similar businesses are purchased for the business, or the individual or business entity has a trade association membership;
- (c) Telephone listing and service are used for the business that is separate from the personal residence listing and service used by an individual who performs the labor or services;
- (d) Labor or services are performed only pursuant to written contracts;
- (e) Labor or services are performed for two or more different persons within a period of one year; or
- (f) The individual or business entity assumes financial responsibility for defective workmanship or for service not provided as evidenced by the ownership of performance bonds, warranties, errors and omission insurance or liability insurance relating to the labor or services to be provided. [Formerly 701.025; 1997 c.398 §2; 1999 c.402 §9].

⁴⁹ See S-W Floor Cover Shop, 318 Or. 614, 625 (1994). See also Blackledge Furniture Co., Inc. v. National Council on Compensation Insurance, 318 Or. 632 (1994) & Lake Oswego Hunt, Inc. v. National Council on Compensation Insurance, 318 Or. 636 (1994).

⁵⁰ See S-W Floor Cover Shop, 318 Or. 614 (1994).

⁵¹ See S-W Floor Cover Shop, 318 Or. 614 (1994).

⁵² I will not explain the “nature of the work” test in detail in the paper. Thus, here are the factors that make up the test: (1) the individual’s requisite skill; (2) whether the skill is an integral part of the employer’s business; (3) whether the services rendered are regular part of the employer’s regular business; (4) whether employment is continuous or intermittent and whether its duration is sufficient to constitute continuous services, rather than contractually related to a particular job; and (5) whether the individual functions in a capacity that allows for the distribution of the risk of injury.

⁵³ Fair Labor Standards Act 29 U.S.C. § 203(e)(1).

⁵⁴ 7 Hastings Women’s L.J. at 186. See Reich v. Circle C Investment, 998 F.2d 324, 327 (1993), Reich v. Priba Corp., 890 F.Supp. 586 (1995), Reich v. ABC/York-Estates Corp., 1997 WL 264379 (1997), Jeffcoat v. State Dept. of Labor 732 P.2d 1073 (1987), Matson v. 7745, Inc., 2000 WL 1132110 (2000), Martin v. Priba, 1992 WL 486911 (1992), Déjà Vu Entertainment v. U.S., 1 F. Supp. 2d 964 (1998), Mlandinich v. U.S., 379 F. Supp. 117 (1974).

⁵⁵ 7 Am U.J. Gender Soc. Pol’y & L at 474.

⁵⁶ Id. at 475.

⁵⁷ 7 Hastings Women’s L.J. at 187.

⁵⁸ Id. at 191.

⁵⁹ 8 Temp. Pol. & Civ. Rts. L. Rev. at 540.

⁶⁰ 7 Hastings Women’s L.J. at 192.

⁶¹ Id.

⁶² Id. at 193.

⁶³ 14 Law Rev & Ineq. At 549.

⁶⁴ Jeffcoat v. Alaska Dept. of Labor, 732 P.2d 1073, 1077 (1987), Reich v. Circle C. Investments, Inc. 998 F.2d 324 (1993), Brock v. Mr. W. Fireworks, Inc. 814 F.2d. 1042, 1043 (1987).

⁶⁵ 14 Law Rev. & Ineq. 549. & 7 Hastings Women’s L.J. at 192.

⁶⁶ 7 Hastings Women’s L.J. at 193.

⁶⁷ Id.

⁶⁸ Id. at 194.

⁶⁹ 14 Law & Ineq at 548.

⁷⁰ 7 Hastings Women’s L.J. at 194.

⁷¹ 14 Law & Ineq at 550.

⁷² 8 Temp. Pol. & Civ. Rts. at 548. See In re Hanson v. BCB Inc., 754 P.2d 444 (1988), Cy Investments v. National Council on Compensation Insurance, 128 Or. App. 579 (2000), Mylan Inc., U.S. 934 F. Supp. 1204 (1996), Bynre v. Stern, 431 N.E.2d 1073 (1981),

⁷³ The court in Oregon Country Fair v. National Council on Comp. Ins. 129 Or. App. 73, 78, 877 P.2d 1207 (1994) clearly defined the factors for the “right to control test.” See also, 14 Law & Ineq at 537.

⁷⁴ 14 Law & Ineq at 545.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id. at 546.

⁷⁸ Id.

⁷⁹ State ex rel Roberts v. Acropolis McLoughlin, Inc. I, 149 Or. App. 220 (1997), State ex rel. Roberts v. Acropolis Mc Loughlin II, 150 Or. App. 180 (1997), State ex rel. Roberts v. Bombareto, 153 Or. App. 183 (1998), Cy Investments v. National Council on Compensation Insurance, 128 Or. App. 579 (1994), Matson v. 7455, 2000 WL 1132110 (2000).

⁸⁰ State ex rel Roberts v. Acropolis McLoughlin, Inc. I, 149 Or. App. 220 (1997), State ex rel. Roberts v. Acropolis Mc Loughlin II, 150 Or. App. 180 (1997), State ex rel. Roberts v. Bombareto, 153 Or. App. 183 (1998).

⁸¹ State ex rel. Roberts v. Acropolis Mc Loughlin II, at 186-187.

⁸² Matson v. 7455, 2000 WL 1132110 (2000).

⁸³ Matson v. 7455, 2000 WL 1132110 (2000) &), State ex rel. Roberts v. Bombareto, 153 Or. App. 183 (1998).

⁸⁴ State ex rel. Roberts v. Bombareto, 153 Or. App. 183 (1998).
⁸⁵ State ex. rel. Roberts v. Acropolis McLoughlin, Inc., 149 Or. App. 220 (1997).
⁸⁶ Id. at 222.
⁸⁷ Id.
⁸⁸ Id. at 223.
⁸⁹ Id. at 224.
⁹⁰ Id. at 225-226.
⁹¹ Id. at 227.
⁹² State ex. rel Roberts v. Acropolis McLoughlin, Inc. II., 150 Or. App. 180 (1997).
⁹³ Id. at 185-191.
⁹⁴ Id. at 188.
⁹⁵ Id. at 192-193.
⁹⁶ State ex rel. Roberts v. Bombareto, 153 Or. App. 183 (1998).
⁹⁷ Id. at 187.
⁹⁸ Id. at 188.
⁹⁹ Matson v. 7455, 2000 WL 1132110 (2000)
¹⁰⁰ Id. at 2
¹⁰¹ Id. at 4.
¹⁰² Cy Investments v. National Council on Compensation Insurance, 128 Or. App. 579 (1994).
¹⁰³ Id. at 581.
¹⁰⁴ Id. at 582.
¹⁰⁵ Id. at 583.
¹⁰⁶ Id. at 584. Unfortunately, I was unable to attain the trial court opinion in time. My guess would be that the exotic dancers did not win-even when the nature of the work test was applied.
¹⁰⁷ 8 Temp. Pol. & Civ. Rts. at 528-529.
¹⁰⁸ Id.
¹⁰⁹ Id.
¹¹⁰ Harrell v. Diamond Entertainment, 992 F. Supp. 1346 (1997), Déjà vu Entertainment v. U.S. 1 F. Supp. 2d 964 (1998), JJR, Inc. v. U.S. 950 F.Supp. 1037 (1997), Martin v. Priba Corp. 1992 WL 486911 (1992), State v. Acropolis 945 P.2d. 647 (1997), Cy Investments, Inc. v. National Council on Compensation Insurance, 846 P.2d (1994), Matson v. 7455, Inc., 2000 WL 1132110 (2000), State ex rel. Roberts v. Bombareto, 153 Or. App. 183 (1998).
¹¹¹ The other California suit, based in Los Angeles has not been settled. The Las Vegas suit, Roe v. Chettah's Lounge is unsettled, as well.. See 7 Am U.J. Gender So. Pol'y at 474.
¹¹² ORS 659.030, the Employment Discrimination statute in Oregon & 42 U.S.C. § 2000e (1988 & Supp. 1991).
¹¹³ Westlaw search done 4.18.2002 drew up zero cases.
¹¹⁴ Harris v. Forklift at 22.
¹¹⁵ Id. at 23.
¹¹⁶ Powell v. Las Vegas Hilton Corporation, 841 F. Supp. 1024 (1991), EEOC v. Hacienda Hotel, 881 F.2d 1504 (1989), Llewellyn v. Celanese Corp., 693 F. Supp. 369 (1988), Magnuson v. Peak Technical Services, 808 F. Supp. 500 (1999), Hernandez v. Miraide Velez, 1994 WL 394855 (1994).
¹¹⁷ Burlington v. Ellerth, 118 S.Ct. 2257 (1998), Faragher v. City of Boca Raton, 118 S.Ct. 2257 (1998).
¹¹⁸ Horton, Amy, *Of Supervision, Centerfolds & Censorship: Sexual Harassment, the First Amendment, & the Contours of Title VII*, 46 U Miami L. Rev. 403, 436 (1997).
¹¹⁹ Powell v. Las Vegas Hilton Corporation, 841 F. Supp. 1024 (1992).
¹²⁰ Harris v. Forklift at 23.
¹²¹ 24 N.Y.U. Rev. L. & Soc. Change at 276-277.
¹²² 7 Hastings Women's L.J. at 195.
¹²³ 8 Temp. Pol. & Civ. Rts. at 541
¹²⁴ 8 Temp. Pol. & Civ. Rts. at 555.
¹²⁵ 14 Law and Ineq. at 556.
¹²⁶ Am U.J. Gender Soc. Pol'y & L at 476.
¹²⁷ 14 Law & Ineq at 552.