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Independent Contractor Status Further Defined in Hargrave v. Aim Directional Services

Employment Law, FLSA / May 26, 2021 / Andrea Johnson

In a big win for the energy industry, and in particular the energy-service industry, Judge Morales of the Southern District of Texas—Corpus Christi Division—recently dismissed an overtime lawsuit brought by Plaintiff Marcus Hargrave, ultimately finding that he was an "independent contractor" and thus, AIM Directional Services ("AIM") was not subject to the Fair Labor Standards Act ("FLSA") or the New Mexico Minimum Wage Act ("NMMWA"). *Hargrave v. Aim Directional Services, LLC*; Cause No. 2:18-cv-00449.

Judge Morales' determination follows the decision in *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369 (5th Cir. 2019), in which the Fifth Circuit reversed and rendered in favor of an employer on this precise issue. While the *Parrish* decision has had its share of detractors, particularly in the plaintiff's bar (terming it "unique" and "of limited application"), the decision has remained in place, and the *Hargrave* decision solidifies that *Parrish* is not so "unique" after all. In the end, *Hargrave* offers, perhaps, a broader application, especially in the energy-service industry. *Hargrave* is the first summary judgment following *Parrish* in argument, application, and result.

Hargrave, like its predecessor, involved a worker that performed highly-skilled services as a directional driller, who, in the rough and tumble and yet sophisticated world of oil and gas drilling, provided the expertise for energy companies to drill deep into the earth and find the best, most efficient and productive path to oil and gas—and do so safely. The seeming catch in cases like this is that these workers are often directly employed by the drilling companies or brought in, project by project, as contract workers. In other words, companies like AIM use both employee directional drillers and contractors for the same work (a fact that neither the *Parrish* nor the *Hargrave* courts found dispositive or sufficient to change their contractor analysis).

When working as independent contractors, these workers sometimes come through separate placement companies or have their own businesses. Service companies like AIM must use contractors to fill gaps, as work in the energy industry is not always predictable; prices have reached more than a $100 a barrel in a given month[1] and then plummeted to $20 or less, when periodic crashes happen.[2] The industry cannot be sustained in any other mode, a fact that the Fifth Circuit has recognized and a fact that many workers who have worked in the industry for years have recognized and benefited from.

Marcus Hargrave was no exception. He had worked as a contract worker for many years, using the tax advantages that his contractor position allowed, and enjoying his life otherwise. In 2018, Mr. Hargrave started to post his services for hire through a third-party company known as RigUp. AIM engaged him through that third-party service (paying RigUp, not Hargrave), and he affirmed with RigUp that he was a contractor and was paid that way. Over about a six-month period, AIM retained Mr. Hargrave through RigUp, from time to time, though not continuously, for various directional drilling projects. When each project ended, Mr. Hargrave would have to wait for the company to call him again, if needed, or he would have to look for work elsewhere, which is something he chose not to do, instead he chose to "enjoy life" during these gap periods.

The periodic AIM assignments ended, however, when Hargrave was picked up by the law, and his directional drilling career, at that point, became derailed. Out of work, it seemed his next step was to sue AIM and claim that he was an employee, despite years of operating as a contractor; he sought several thousand dollars in overtime wages. While he also sought the formation of a class, that class never came together, and none of Mr. Hargrave's contractor colleagues joined the suit.

The issue of contractor status is one that has confused and befuddled employers and courts. However, the *Hargrave* case, coupled with the *Parrish* case, provides some clarity in this area and greater support for the energy industry, which has struggled in the last several years with numerous overtime lawsuits, often resulting in class formations and millions of dollars moving from the owner/employer-side of the table to the worker/employee side. Law firms have formed and become wealthy, avidly pursuing regional and national overtime claims on behalf of workers who are described as beleaguered and taken advantage of given the FLSA. In turn, that process of paying out millions has resulted in a learning experience for many companies—from the biggest, such as Schlumberger and Halliburton, to the smallest mom and pop service company. Assumed and "typical" ways of doing things have given way to some better understanding of the FLSA, in the hope of avoiding costly lawsuits.

Understanding who is a contractor is never easy, as the color continuum of facts has a lot of gray. This, and the risk of high defense fees, often weighed in favor of case resolution sooner not later.

Hargrave following *Parrish* teaches again that a directional driller, who brings unique skills to a well site, who operates business and tax-wise as a contractor, and whose work is project to project connected, is very likely a contractor, regardless of whether a company also staffs directional driller employees. That he/she must follow common safety rules or even be affiliated with a hiring company while on the job does not change the nature of the contractor's status. Mr. Hargrave tried to distinguish his situation from that in *Parrish*, arguing that AIM had engaged him often and over several weeks, but the Court found the difference unpersuasive, noting that Hargrave had taken advantage of his contractor tax status and his choice of "enjoying life" in down times was just that, his choice. Like the *Parrish* case, the *Hargrave* decision also discounted the fact that AIM might have supplied certain expensive equipment at the work site. Overall, the Court simply found that, on balance, the factors of contractor versus employee status weighed in favor of finding Mr. Hargrave a contractor, just as he had represented he was for years.

Andrea Johnson and Emily Green of Kane Russell Coleman Logan PC represented AIM, while Plaintiff was represented by Michael Josephson and William Liles of Josephson Dunlap Law Firm, and by Richard Burch of Bruckner Burch PLLC.

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[1] Salzman, Avi $100 Oil is Looking More Possible. Energy Stocks May Have "Monster Upside," Barron's (Feb. 25, 2021).

[2] Kelly, Stephanie, *U.S. Oil Plunges 25%, Brent Falls Below $20 a Barrel*, Reuters (Apr. 26, 2020).

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