Case No. 20-3226

United States Court Of Appeals
FOR THE SIXTH CIRCUIT

WALID JAMMAL, et al.,
Plaintiffs-Appellees,

v.

AMERICAN FAMILY INSURANCE COMPANY, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Ohio, No. 1:13-cv-00437-DCN

BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION IN SUPPORT OF APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-3226

Case Name: Walid Jammal, et al. v. American Family Insurance Company, et al.

Name of Counsel: Daniel B. Kohrman

Pursuant to 6th Cir. R. 26.1, AARP makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: *No.*

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest: *No.*

CERTIFICATE OF SERVICE

I certify that on June 10, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/ Daniel B. Kohrman
Daniel B. Kohrman

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s/ Daniel B. Kohrman
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INTERESTS OF AMICI CURIAE[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation, through participation as amici curiae in state and federal courts,[2] seek to protect older Americans' pension, health, and other benefit rights guaranteed under the

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[1] Amici certify that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certifies that no person, other than amici, contributed money intended to prepare or submit this brief. FED. R. APP. P. 29(c)(5). Counsel for both parties have consented to the filing of this brief.

[2] *E.g.*, *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008); *Am. Council of Life Insurers v. Ross*, 558 F.3d 600 (6th Cir. 2009).

Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. § 1001. This case presents a fundamental issue: whether companies can escape responsibilities under ERISA by classifying workers as independent contractors when they are, in fact, employees. The panel opinion would permit companies to reap the benefits of imposing control over workers like that imposed on their recognized employees, while denying such workers the benefits of being classified as employees.

AARP and AARP Foundation previously filed amicus briefs urging affirmance of the district court's sound application of the factors for assessing employee status set forth in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318, 323-24 (1992), and in support of rehearing en banc. Amici now urge this Court to vacate the first panel's decision reversing the district court. A proper resolution of this case will significantly enhance workers' abilities to participate in company benefit plans and, hence, significantly enhance their retirement security, as intended by Congress in enacting ERISA.

SUMMARY OF ARGUMENT

It is imperative for a court to apply the factors set forth in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992),

without elevating any one factor over another. So said the Supreme Court in *Darden* itself, and multiple U.S. Courts of Appeals have agreed. Instead, the first panel placed undue weight on contract terms drafted by American Family, suggesting that, contrary to facts found by the district court, the agents were contractors, not employees. The first panel compounded its deviation from precedent by reviewing de novo the district court's assessments of each *Darden* factor. That panel should have applied a "clear error" standard as have other Courts of Appeals.

Companies should not be permitted to circumvent the courts' examination of workers' proper classification merely by requiring workers to sign a contract with a provision declaring that they are independent contractors. Permitting this enables companies to engage in a contract labeling exercise to deny employees their rightful benefits. To correct the panel's departure from settled law and to preserve ERISA's intended protections, this Court should correct the first panel's error and reinstate the district court's initial decision.

ARGUMENT

THE FIRST PANEL DECISION CONFLICTS WITH CONTROLLING PRECEDENT AND RULINGS BY SISTER CIRCUITS, APPLIES AN IMPROPER REVIEW STANDARD, PLACES UNDUE WEIGHT ON CONTRACT TERMINOLOGY, AND ENABLES DENIAL OF ERISA-PROTECTED EMPLOYEE BENEFITS.

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Airlines, Inc.* 463 U.S. 85, 90 (1983). ERISA's underlying policy is to protect the interests of employees in employee benefit plans by "establishing standards of conduct, responsibility, and obligation for fiduciaries" and "by providing for appropriate remedies [and] sanctions" for violations of these fiduciary standards. ERISA § 2(b), 29 U.S.C. § 1001(b). If workers are not employees, then the plan cannot cover them,[3] and ERISA's protections are unavailable.

Under ERISA a company cannot have it both ways—treating workers as employees and yet denying them corresponding benefits. The first panel's decision adopted a novel, unduly intrusive standard of

[3] Although not pertinent to this case, a person could be covered under a plan as a beneficiary; generally, beneficiaries are spouses or dependent children of an employee. ERISA § 3(8), 29 U.S.C. § 1002(8).

review and improperly inflated the importance of contract language, facilitating precisely this form of unfairness.

A. The First Panel's Decision Applying a De Novo Review Standard in Assessing the District Court's Findings on the *Darden* Factors Conflicts with Rulings of Multiple Other Courts of Appeals

The Supreme Court in *Darden* had to explain how to determine employee status under ERISA because the statutory definition of "employee" — "any individual employed by an employer," ERISA § 3(6), 29 U.S.C. § 1002(6) — "is completely circular and explains nothing." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). The Supreme Court held that "who qualifies as an 'employee' under ERISA" is to be decided by reference to the common law of agency. *Id.* at 319, 323. Accordingly, *Darden* set forth various non-exhaustive and non-exclusive factors for determining whether an individual is an employee, the first being "the hiring party's right to control the manner and means by which the product is accomplished." *Id*. at 323. Further, "[s]ince the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being

decisive.'" *Id*. at 324 (quoting *Nat'l Labor Relations Bd. v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

In this case, the district court, after a full trial, weighed all of the *Darden* factors equally to reach its finding that American Family agents were employees. *Jammal v. Am. Family Ins. Grp*., No. 1:13-CV-437, 2017 U.S. Dist. LEXIS 120684, *63-64 (N.D. Ohio July 31, 2017). In reversing the district court, the first panel took several dramatic steps out of line with *Darden* and decisions applying it. One of these was to treat the district court's rulings on each *Darden* factor as a non-binding application of law to facts, instead of a presumptively binding finding of fact. Hence, the panel reassessed each of the district court's conclusions regarding the *Darden* factors de novo. *Jammal v. Am. Family Ins. Co.*, No. 17-4125, 2019 U.S. App. LEXIS 2905, *15 (6th Cir. Jan. 29, 2019).

This holding is out of step with the other Circuits that have addressed the issue. Four Circuits have held that the determination of employment status is a purely factual question reviewed for clear error. *Sw. Areas Pension Fund v. Nagy*, 714 F.3d 545, 551-52 (7th Cir. 2013); *Eren v. Comm'r*, 180 F.3d 594, 596 (4th Cir. 1999); *Hockett v. Sun Co.*, 109 F.3d 1515, 1525-26 (10th Cir. 1997); *Cent. States, Se. & Prof'l &*

Chin v. United States, 57 F.3d 722, 725 (9th Cir. 1995). Two others have held that while the ultimate question of employment status is a legal question, the underlying factors are fact issues reviewed for clear error. *Berger Transfer & Storage v. Cent. States, Se. & Sw. Areas Pension Fund*, 85 F.3d 1374, 1377-78 (8th Cir. 1996) (the "existence and degree" of each factor is a question of fact); *Aymes v. Bonelli*, 980 F.2d 857, 860-61 (2d Cir. 1992).

Because the fact-specific nature of the company-worker relationship is vital to the case-by-case analysis mandated in *Darden*, maintaining appropriate deference to the fact-finder's application of the *Darden* factors also is vital. The Court should give deference to the fact-finder's assessment, whether it is "on the existence and weight of each common-law [i.e., *Darden*] factor," *id.* at 9, or, instead, an"ultimate finding of employee status.". As the Supreme Court has explained, Rule 56(a)(2), which sets forth the "clearly erroneous" standard of review for a lower court's factual findings:

> [The rule] sets forth a 'clear command. . . . It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous . . . Accordingly, the Rule applies to both subsidiary and ultimate facts. . . . And we have said that, when reviewing

> the findings of a " 'district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.

Teva Pharms. USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 324 (2015) (internal quotations and citations omitted).

B. The First Panel's Placement of Undue Weight on Contract Terminology Characterizing the Status of American Family Agents Conflicts with *Darden* and Multiple Rulings of This Court.

The first panel also strayed from precedent in emphasizing unduly that the contract at issue identified American Family agents as independent contractors. As the panel itself observed, it applied *Darden* by giving "great weight" to that designation. *Jammal v. Am. Family Ins. Co.*, 2019 U.S. App. LEXIS 2905, *22. This further legal detour warrants course correction.

Darden has worked well for over 25 years. Courts, companies, and workers are experienced in applying the *Darden* factors as equal parts of a totality-of–the–circumstances approach. There was no justification for the first panel elevating one factor over another.

Formal designations of worker status do not end a court's inquiry. Nor does contract text control when an employer deviates from an original agreement. Rather, "all of the incidents of the relationship

must be assessed." *Darden*, 503 U.S. at 324; *see also Weary v. Cochran*, 377 F.3d 522, 525 (6th Cir. 2004) ("no one factor [is] decisive" as to whether workers are employees (quoting *Darden*, 503 U.S. at 324)).

Failure to look behind the face or form of an employment policy or agreement can provide employers "an incentive to adopt formal policies" but "no incentive to enforce those policies." *Hall v. Consol. Freightways*, 337 F.3d 669, 675 (6th Cir. 2003). Moreover, this Court has approved fact-intensive inquiries like those *Darden* requires in a wide variety of contexts. *See, e.g.*, *Hall*, 337 F.3d at 675 ("for any employer to show that it engaged in good faith efforts so as to avoid liability for punitive damages, it is not enough that the employer have a written or formal anti-discrimination policy . . . the employer must demonstrate that it engaged in good faith efforts to *implement* the policy.") (emphasis in original). *See also Weeks v. Mich. Dep't of Cmty. Health*, 587 F. App'x 850, 857 (6th Cir. 2014) (formal, non-discriminatory hiring policy is insufficient, standing alone, to preclude a finding of discriminatory conduct); *Sorah v. Sorah (In re Sorah)*, 163 F.3d 397, 401 (6th Cir. 1998) (bankruptcy courts must determine if a debtor's obligation to a spouse "is actually support" regardless of the wording in a divorce decree);

Flynn v. Greg Anthony Constr., 95 F. App'x 726, 733-39 (6th Cir. 2003) (piercing the corporate veil where the corporate form acts merely as the owner's alter ego, mandating liability for employer obligations under ERISA); *Am. Cas. v. FDIC*, 39 F.3d 633, 636 (6th Cir. 1994) (looking beyond labeling of shareholder suit to decide if it was brought "on behalf of" the FDIC); *N.H. Ins. v. Home S&L*, 581 F.3d 420, 424 (6th Cir. 2009) (whether an insurance policy is a "maritime contract" is not certain "[s]imply because [it] relates to boats and a marina."). In short, "if something looks like a duck, walks like a duck, and quacks like a duck, then [labels notwithstanding] it is probably a duck." *S. Bertram Inc. v. Citizens Ins. Co. of Am.*, 657 F. App'x 477, 478 (6th Cir. 2016) (quoting *Sorah*, 163 F.3d at 401) (internal quotation marks omitted).

In defiance of this body of Circuit precedent, the first panel's ruling is likely to motivate employers to insist that workers sign a contract stating that they are independent contractors–denying them pensions, healthcare plans, and other benefits—and then control their work and income options as though they are true employees. This result is contrary to ERISA's purposes.

C. The First Panel's Decision Opens the Door for Employers to Deny Vital Employee Benefits Protected by ERISA

Some employers use independent contractor status as a means of avoiding benefit obligations and costs. The denial of deserved benefits is a huge detriment to the economic security of affected workers who are, in reality, employees. The previous panel decision fails to acknowledge the ease with which employers may evade a duty to provide employee benefits under its reading of ERISA.

The importance of proper worker classification cannot be overstated. Independent contractors generally have access to far fewer benefits and legal protections than employees.[4] Employees are entitled to such protections as a minimum wage, paid overtime, and benefits such as splitting Social Security and Medicare payroll taxes with the employer, and having income taxes withheld from their paychecks. Employees may also have access to health insurance, workplace retirement plans, and sick and vacation leave. In contrast, independent contractors have none of these rights or benefits. They must manage

[4] David Weil, *Lots of Employees Get Misclassified as Contractors. Here's Why It Matters*, Harv. Bus. Rev. (July 5, 2017), goo.gl/5Y1vBv.

their own income tax withholding, pay both employer and employee shares of Social Security and Medicare taxes, and provide for their own health insurance and retirement savings.[5] Thus, misclassification also puts employers who play by the rules at a competitive disadvantage.[6]

Deferring to the labeling of a company-worker relationship in a contract, without equitably analyzing all the *Darden* factors—as the first panel did here—empowers companies to impose onerous restrictions on its workers in the first instance, or to impose new restrictions at a later date, without any consequence. Such restrictions may warrant classifying (or reclassifying) workers as employees, thereby requiring the provision of employee benefits. But under the panel's decision, the contractor label is likely to preclude access to such benefits. Thus, it is critical that the courts analyze *the actual relationship* between the worker and the company to determine

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[5] *Exploring the "Gig Economy" and the Future of Retirement Savings*: *Hearing Before the Subcomm. on Primary Health and Retirement Security of the S. Comm. on Health, Education, Labor & Pensions*, 115th Cong., 2d Sess. (2018) (statement of Monique Morrissey, Economist, Economic Policy Institute), goo.gl/ZnspK2.

[6] Weil, *supra* note 4.

employee status, regardless of how the parties' contract characterizes that relationship.

CONCLUSION

For the foregoing reasons, the Court should reverse the first panel's decision and reinstate the initial district court decision.

Dated: June 10, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a) and 32(a)(7) because the brief contains 2,452 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Century Schoolbook font.

Dated: June 10, 2020

/s/ Daniel B. Kohrman
Daniel B. Kohrman

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2020, I filed the foregoing Brief of Amici Curiae AARP and AARP Foundation in Support of Appellants with the Clerk of the United States Court of Appeals for the Sixth Circuit via the CM/ECF system, which will send notice of such filings to all registered CM/ECF users.

Dated: June 10, 2020

/s/ Daniel B. Kohrman
Daniel B. Kohrman