

Appellant-Plaintiff Maria Espinoza appeals from the trial court's grant of the motion to dismiss filed by Appellees-Defendants Rosa Martinez, Mi Familia Tienda, and Nassirou Gado (collectively, "Defendants"). Espinoza contends that the trial court erroneously concluded that it did not have subject matter jurisdiction over her claim. We affirm.

FACTS AND PROCEDURAL HISTORY

On October 8, 2005, Espinoza was attacked by Nassirou Gado¹ at Mi Familia Tienda ("Mi Familia") in Indianapolis, where she was working as a cashier. Martinez was the proprietor of the store. At the time, Espinoza was also working full time at Home Goods Distribution Center and had already been trained as a cashier. Early in 2007, Espinoza testified at Gado's trial regarding her work at Mi Familia:

Q. Do you remember where Mi Familia was located?

A. Yes. On High School and 38th.

Q. Had you worked there long?

A. Four weeks.

Q. And how often did you work?

A. Five p.m., to nine p.m.

Q. How many days a week then?

A. Every day.

Q. Who hired you to work at the store?

A. Mrs. Rosa Martinez.

Appellant's App. p. 43.

Regarding Espinoza's work at Mi Familia, Martinez testified as follows:

Q. Ms. Martinez, do you know someone named Maria Espinoza?

A. Yes.

¹ Among other things, the attack resulted in Gado being convicted of Class A felony attempted murder and Class B felony criminal confinement. *See Gado v. State*, 882 N.E.2d 827, 830 (Ind. Ct. App. 2008), *trans. denied*.

Q. And how did you know Ms. Espinoza?

A. She was helping me at [Mi Familia].

....

Q. Now, you said that [Espinoza] had helped you out at the store; how often had she helped you?

A. It was I think the third time she'd been helping me.

Appellant's App. pp. 102, 103.

Regarding October 8, 2005, the day of the attack, Espinoza testified as follows:

Q. Do you remember the day that happened?

A. I remember it was October 8th because it's my daughter['s] birthday.

Q. What time did you go to work that day?

A. At nine a.m.

Q. And who was working with you that day?

A. Just [Gado²] and I.

Q. How long were you supposed to work?

A. I was working from nine a.m. to nine p.m.

Appellant's App. pp. 44-45.

On October 5, 2007, Espinoza filed suit against Defendants, claiming that Martinez and Mi Familia had been negligent in the hiring and supervising of Gado and that Defendants had intentionally inflicted emotional distress on her and seeking punitive damages. On October 1, 2010, Defendants filed a motion to dismiss for lack of subject matter jurisdiction on the basis that Espinoza was an employee of Mi Familia and therefore limited to pursuing her claim pursuant to the Indiana Worker's Compensation Act ("the Act"), to which they attached several documentary exhibits. On January 12, 2011, Espinoza filed a response, in which she contended that she was not an employee of Mi Familia and to which she attached several documentary exhibits.

² There is some dispute as to whether Gado was also employed at Mi Familia or merely a customer who spent a great deal of time there. Gado's status, however, is irrelevant to the jurisdictional question at issue in this appeal.

Included in the attachments was an affidavit sworn out by Espinoza on January 4, 2011. Espinoza averred, *inter alia*, that Martinez had asked her to help out in her store, Mi Familia, in September of 2005 and offered to pay her \$9.00 per hour, her work was very informal, she was paid in cash, Martinez never gave her any direction regarding her work, she alone determined when and how long she would work, and Martinez had no input regarding what she would do when working. On March 28, 2011, the trial court held a hearing on the motion to dismiss at which argument was heard but no additional evidence was heard. On March 31, 2011, the trial court granted Defendants' motion.

DISCUSSION AND DECISION

Standard of Review

“The [Act] provides the exclusive remedy for recovery of personal injuries arising out of and in the course of employment.” *GKN Co. v. Magness*, 744 N.E.2d 397, 401-02 (Ind. 2001) (citing Ind. Code § 22-3-2-6). The threshold question is whether Espinoza was an employee of Mi Familia or an independent contractor. If the former, Espinoza's remedies arise solely through the Act and the trial court did not have subject matter jurisdiction over the case. “When an employer defends against an employee's negligence claim on the basis that the employee's exclusive remedy is to pursue a claim for benefits under the Indiana Worker's Compensation Act, the defense is properly advanced through a motion to dismiss for lack of subject matter jurisdiction under Indiana Trial Rule 12(B)(1).” *Id.* at 400 (citing *Foshee v. Shoney's, Inc.*, 637 N.E.2d 1277, 1280 (Ind. 1994)). “In ruling on a motion to dismiss for lack of subject matter jurisdiction, the trial court may consider not only the complaint and motion but also any affidavits or evidence

submitted in support.” *Id.* (citing *Ind. Dep’t of Highways v. Dixon*, 541 N.E.2d 877, 884 (Ind. 1989); *Borgman v. State Farm Ins. Co.*, 713 N.E.2d 851, 854 (Ind. Ct. App. 1999), *trans. denied*). “In addition, the trial court may weigh the evidence to determine the existence of the requisite jurisdictional facts.” *Id.* (citing *Borgman*, 713 N.E.2d at 854). In such cases, “the standard of review is dependent upon: (i) whether the trial court resolved disputed facts; and (ii) if the trial court resolved disputed facts, whether it conducted an evidentiary hearing or ruled on a ‘paper record.’” *Id.* at 401.

Here, some of the facts regarding Espinoza’s status when working at Mi Familia are in dispute, and the trial court did not hold an evidentiary hearing.

[W]here the facts are in dispute but the trial court rules on a paper record without conducting an evidentiary hearing, then no deference is afforded the trial court’s factual findings or judgment because under those circumstances a court of review is “in as good a position as the trial court to determine whether the court has subject matter jurisdiction.” *MHC Surgical Ctr. Assocs., Inc. v. State Office of Medicaid Policy & Planning*, 699 N.E.2d 306, 308 (Ind. Ct. App. 1998). *See also Farner v. Farner*, 480 N.E.2d 251, 257 (Ind. Ct. App. 1985) (agreeing with the proposition that “where a case is tried wholly upon documents or stipulations, the appellate tribunal is in as good a position as the trial court to determine the force and effect of the evidence.”) Thus, we review *de novo* a trial court’s ruling on a motion to dismiss where the facts before the court are disputed and the trial court rules on a paper record.

Id.

Whether the Trial Court Erred in Determining that Espinoza was an Employee

Pursuant to the Act, “‘Employee’ means every person, including a minor, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation, or profession of the employer.” Ind. Code § 22-3-6-1 (2005). The Indiana

Supreme Court has applied a ten-factor analysis to aid in resolving the question of whether one is an employee or an independent contractor:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

Moberly v. Day, 757 N.E.2d 1007, 1010 (Ind. 2001) (citing Restatement (Second) of Agency § 220(2) (1958)). “We consider all factors, and no single factor is dispositive.”

Id. (citing *Mortgage Consultants, Inc. v. Mahaney*, 655 N.E.2d 493, 496 (Ind. 1995)).

A. Extent of Control Which May be Exercised

Espinoza points primarily to her affidavit, in which she averred that she worked when and how she wanted, etc., as establishing that Martinez had very little control over her work. The drafters of the Restatement elaborated on the concept of control in the comments to section 220:

Although control or right to control the physical conduct of the person giving service is important and in many situations is determinative, the control or right to control needed to establish the relation of master and servant may be very attenuated. In some types of cases which involve persons customarily considered as servants, there may even be an

understanding that the employer shall not exercise control. Thus, the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking.

Restatement (Second) of Agency § 220 cmt. d (1958).

The disputes in evidence pertain mostly to this important factor, with Espinoza pointing to evidence that she worked essentially autonomously and Defendants pointing to evidence that she worked regular hours, was paid a regular wage on a weekly basis, and was hired by Martinez. We note, however, that the evidence relating to this factor tending to show that Espinoza was an independent contractor comes entirely from her 2011 affidavit, which was prepared in response to Defendants' motion to dismiss. In contrast, the more-detailed evidence tending to show that Espinoza worked a regular schedule, which implies that it was determined by Martinez, comes from Espinoza's trial testimony in early 2007, notably given before she had any motive to establish that she was an independent contractor, or, for that matter and just as importantly, any apparent motive to establish that she was an employee. Our evaluation of the documentary evidence leads us to the conclusion that the earlier trial testimony is more credible than the later, somewhat contradictory, affidavit.

With this in mind, we find that this factor tips the balance in favor of Espinoza being an employee, despite the fact that there is no evidence that Martinez actually exerted control over the minute details of Espinoza's work. As this court has noted, it is the *right* to control the work and not the actual exercise of control that is crucial. *Dague v. Ft. Wayne Newspapers, Inc.*, 647 N.E.2d 1138, 1140 (Ind. Ct. App. 1995), *trans. denied*. Espinoza worked a regular schedule, implying that Martinez controlled that

aspect of her work. Beyond that, Espinoza does not explain precisely what aspects of her work Martinez could have been expected to directly control. Like a cook, a cashier is generally not the sort of worker who is expected to require constant supervision. In any event, there is no indication that Martinez could not have exercised complete control over Espinoza's work had she been so inclined. The extent of Martinez's right to control Espinoza's work is, at best, neutral but, if anything, tends to show that she was an employee.

B. Occupation or Business of One Employed

Espinoza appears to have worked as a cashier at Mi Familia and at Home Goods Distribution Center, where she worked full-time. At the very least, Espinoza admits that she came to Mi Familia fully trained as a cashier such that Martinez did not have to train her at all. Because Espinoza was only doing for Mi Familia what she seemingly was already doing for another company full-time, this factor also weighs in favor of her being an employee. *Cf. Moberly*, 757 N.E.2d at 1011 (concluding that operating a backhoe was distinct enough from the worker's normal job as a truck driver and heavy equipment operator to weigh slightly in favor of independent contractor status).

C. Kind of Occupation

Again, there is a slight dispute as to what Espinoza's responsibilities at Mi Familia actually were. Although there is no dispute that she worked as a cashier, stocked the shelves, assisted customers, and cleaned the restroom, Espinoza also averred in her post-lawsuit affidavit to have been an "adviser" to Martinez. There is, however, no other evidence that Espinoza acted as an adviser and her earlier trial testimony was given

before she had any motive to embellish her job duties. We do not find the claim that Espinoza acted as an adviser to Martinez to be credible. What we are left with, then, are tasks that would seldom require a great deal of control, especially if one does not need to be trained, as was the case with Espinoza. This factor weighs in favor of employee status.

D. Skill Required

There is no indication in the record that any special skill was required to be a cashier, stock shelves, assist customers, and clean the restroom at Mi Familia. “Unskilled labor is usually performed by those customarily regarded as servant.” Restatement (Second) of Agency § 220 cmt. i (1958). This factor weighs in favor of employee status.

E. Supplier of Equipment, Tools, and Work Location

Espinoza concedes that she provided none of the equipment used in her job at Mi Familia, so this factor weighs in favor of employee status.

F. Length of Employment

Conflicting evidence indicates that the day Espinoza was attacked was either her third day or that she had worked there every day for a month. Either way, the relationship was not a long one, so this factor weighs in favor of independent contractor status. *See Id.* at cmt. h (explaining that “employment over a considerable period of time with regular hours” indicates an employee-employer relationship).

G. Method of Payment

Although Espinoza was paid in cash, did not clock in or out, and was not issued government tax forms, she was paid at an hourly rate of nine dollars, as opposed to being paid an agreed-upon amount for completing certain tasks. Payment by the hour or month is an indication of employee status. *See Moberly*, 757 N.E.2d at 1012 (citing Restatement (Second) of Agency § 220(2) cmt. h. (payment by hour or month indicates employer-employee relationship)). This factor weighs in favor of employee status.

H. Regular Business of Employer

Espinoza concedes that this factor weighs in favor of her being considered an employee of Mi Familia.

I. Belief of the Parties

Espinoza points to Martinez's testimony that Espinoza was "helping" her at Mi Familia as evidence that Martinez believed that she was not an employee. "It is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one and submission to control by the other." Restatement (Second) of Agency § 220 cmt. m (1958). Although we do not believe that Martinez's testimony is evidence of a belief that Espinoza was an independent contractor, neither does it indicate a belief that she was an employee. After all, both independent contractors and employees are there to "help" the business. On the record before us, we consider this factor to be neutral.

J. Whether Principal is in Business

There is no dispute that Mi Familia was a business, so this factor weighs in favor of employee status.

Summary

Only one of the ten factors adopted by the Moberly court clearly leans in favor of independent contractor status, that factor being length of employment. Factors that are neutral are the belief of the parties and, perhaps, the extent of control. All other factors, however, clearly indicate that Espinoza was an employee of Mi Familia. Taken as a whole, the record supports the trial court's conclusion that it lacked subject matter jurisdiction because Espinoza was an employee of Mi Familia.

The judgment of the trial court is affirmed.

KIRSCH, J., and BARNES, J., concur.