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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1206**

Terri Elias,
Respondent,

vs.

Annica, Inc.,
Relator,

Department of Employment and Economic Development,
Respondent.

**Filed March 26, 2012
Affirmed
Bjorkman, Judge**

Department of Employment and Economic Development
File No. 26492258-3

Terri Elias, Marine on St. Croix, Minnesota (pro se respondent)

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Paul, Minnesota (for respondent Department of Employment and Economic
Development)

Considered and decided by Schellhas, Presiding Judge; Johnson, Chief Judge; and

Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Relator Annica, Inc. challenges the unemployment-law judge's (ULJ) determination that respondent Terri Elias was Annica's employee, rather than an independent contractor. Because consideration of the employee-independent contractor factors indicates an employment relationship, we affirm.

FACTS

Annica is a franchisee of Mad Science Group that operates under the name Mad Science of Minnesota. Annica engages individuals (Mad Scientists) to teach after-school and other extra-curricular science courses for elementary school children in the Twin Cities area. Annica's instructors are required to sign an "Independent Contractor Agreement," which establishes Annica's obligation to provide appropriate equipment and materials for each assignment, and the instructor's obligations to attend meetings; to assume responsibility for equipment and manuals provided by Annica; and to work with Annica to find a substitute instructor if the instructor is unable to fulfill an assignment. Instructors receive assignments based on their declared availability to teach a four- to eight-week set of classes on a particular subject. And instructors are paid a flat rate per class, which is disbursed on a bi-weekly pay schedule with no taxes withheld.

Elias worked as an instructor for Annica's predecessor franchisee starting in 2002 and then continued with Annica through 2010. When she established an unemployment-benefits account with respondent Minnesota Department of Employment and Economic Development (DEED) in October 2010, she reported her work for Annica. Because

DEED did not have wage detail reports for Elias from Annica, DEED conducted an audit to determine Elias's employment status. DEED determined that Elias had an employer-employee relationship with Annica and therefore Annica is required to pay taxes on the wages she earned working for Annica. *See* Minn. Stat. § 268.035, subd. 25 (2010). Annica appealed that determination. After a hearing, a ULJ decided that the services Elias performed for Annica were in employment. Annica requested reconsideration, and another ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

Whether an individual is an employee or an independent contractor is a mixed question of law and fact. *Nelson v. Levy*, 796 N.W.2d 336, 339 (Minn. App. 2011). But “[o]nce the controlling facts are determined, the question whether a person is an employee becomes one of law.” *Id.* (quotation omitted). We review questions of law de novo. *St. Croix Sensory Inc. v. Dep’t of Emp’t & Econ. Dev.*, 785 N.W.2d 796, 799 (Minn. App. 2010).

An employee is an “individual who is performing or has performed services for an employer in employment.” Minn. Stat. § 268.035, subd. 13(1) (2010). Employment means services performed by “an individual who is considered an employee under the common law of employer-employee and not considered an independent contractor.” *Id.*, subd. 15(a)(1) (2010). It is the actual nature of the parties’ relationship, rather than the label the parties use, that defines whether an individual is an employee or an independent contractor. *St. Croix Sensory*, 785 N.W.2d at 800. We consider five principal factors to determine whether an individual is an employee or an independent contractor: “(1) The

right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge.” *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964); *see also* Minn. R. 3315.0555, subp. 1 (2009) (codifying common-law factors). The two most important of these factors are the right to control the means and manner of performance and the right to discharge the individual without incurring liability. Minn. R. 3315.0555, subp. 1.

The parties do not dispute the facts relevant to the five factors. Accordingly, we review the ULJ’s determination that Elias was an employee de novo and conclude that three of the five principal factors, including the two most important, indicate an employment relationship.

Control

“Control” is “the power to instruct, direct, or regulate the activities of an individual whether or not the power is exercised.” Minn. R. 3315.0501, subp. 2 (2009). Although we consider the totality of the circumstances, Minn. R. 3315.0555, subp. 3 (2009), identifies numerous criteria to use when evaluating whether the employer has the right to control the means and manner of the individual’s performance. Not all of them apply here, and DEED concedes that some of the criteria suggest independence, such as the flexibility afforded to instructors to determine whether and how much to work. *See* Minn. R. 3315.0555, subps. 3.H, J. On balance, however, we conclude that the working relationship between Annica and its instructors is marked by control. We discuss each of the three most significant indicators in turn.

First, “[c]ontrol is indicated when an individual is required to comply with detailed instructions about when, where, and how to work including the order or sequence in which the service is to be performed.” *Id.*, subp. 3.B. Annica requires its instructors to comply with the provisions of a written policy guide, which includes a dress code requiring instructors to wear a “Mad Science” lab coat for all assignments. Annica directs instructors when and where to perform their work. Annica also provides instructors a manual for each assignment that includes detailed lesson plans and preparation instructions for the presentation. *See id.* (indicating that instructions may be oral or in the form of manuals or written procedures).

Annica argues that providing instructions, even requiring its instructors to comply with them, does not indicate control because instructors such as Elias are permitted to add their own “flair” to the classes and to supplement the lesson plans by, for example, bringing items from a personal rock collection to a geology class. But Annica’s director acknowledged that the agreement with the customer dictates the subject matter to be taught and that it would be “very hard” for an instructor to perform an assignment without using the materials Annica provides. The requirement that Elias and other instructors teach a detailed curriculum in a manner essentially consistent with the assignment-specific instructional manual provided by Annica indicates control and, therefore, an employment relationship. *See Frankle v. Twedt*, 234 Minn. 42, 47, 47 N.W.2d 482, 487 (1951) (stating that the “determinative right of control” is not merely over what is to be done, but over how it is to be done).

Second, control is indicated if the individual must personally render services to the employer, and lack of control may be indicated when an individual has the right to hire a substitute without the employer's knowledge or consent. Minn. R. 3315.0555, subp. 3.E. Annica requires each instructor to personally teach the assigned classes. When an instructor is unable to teach a class, he or she is responsible for finding a substitute. Annica assists in finding a substitute if an instructor is unable to find one, which often is the case.

Annica argues that this factor does not indicate control because instructors have broad authority to hire a substitute, limited only by the requirement that the substitute have passed Annica's background checks. We disagree. Instructors have discretion and authority to hire as substitutes only those individuals that Annica had already approved and trained. In essence, therefore, instructors can hire a substitute without Annica's knowledge only if Annica has previously consented to the substitute. Accordingly, we conclude that the personal-service factor indicates control.

Third, an employer's provision of training to the individual, such as required attendance at meetings, indicates control, especially if the training is given periodically or at frequent intervals. *Id.*, subp. 3.I. Annica requires and pays its instructors to attend extensive training. Annica does not require that instructors have any scientific background or teaching experience but uses proprietary manuals, videos, and demonstrations by experienced instructors to train instructors on everything they need to know about the classes, classroom management, safety policies, and care of the equipment that Annica provides. And while Annica pays more to instructors who are

licensed teachers, there is no evidence that licensed teachers are exempted from training. All instructors are required to attend subject-specific training for each assignment and expected to attend periodic refresher trainings.

Annica argues that this training does not control an instructor's work because he or she has discretion to make adjustments within the lesson plans that the instructor believes would best suit the students in the class. As discussed above, however, the discretion afforded instructors is limited because they are not permitted to make substantive changes to the lesson plans. Moreover, an instructor's discretion to deliver the lesson in his or her own way is only possible after attending training sessions to know what to teach and the limits of how to do so. This factor indicates control.

Furnishing of materials and tools

The furnishing of tools, materials, and supplies by the employer is another strong indicator of an employment relationship. *See Guhlke*, 268 Minn. at 143, 128 N.W.2d at 326; Minn. R. 3315.0555, subp. 3.K. Annica undisputedly provides its instructors all of the necessary tools and materials for each assignment. Annica discounts this fact, arguing that “the most crucial tool (the ability to engage the class) is supplied by the worker.” We are not persuaded. Annica cites no authority for this argument. And we rejected such an expansive interpretation of “tool” in *St. Croix Sensory*, where a sensory laboratory argued that the individuals who performed smell tests were independent contractors because they used “their own noses, which is arguably the most important tool for their job.” 785 N.W.2d at 803. We reasoned that “the nose is a tool that would certainly be customarily supplied by every worker in the sensory-assessor trade,” and the

laboratory provided all physical tools necessary to testing, so the individual's provision of that "tool" did not indicate lack of control. *Id.* Because Annica provides all of the physical materials and tools necessary to an instructor's work, this factor strongly indicates an employment relationship.

Right to discharge

The right-to-discharge factor also indicates that Elias was an employee. An employee generally may be terminated with little notice, without cause, or for failure to follow specified rules or methods, whereas an independent worker generally cannot be terminated without the firm being liable for damages if he or she is producing according to his or her contract specifications. Minn. R. 3315.0555, subp. 3.G.

The record on Annica's right to discharge Elias is not extensive, but it does support the ULJ's determination that Annica could discharge Elias "at any time with little or no notice and without liability for breach of contract by declining to offer [her] another assignment." Neither the instructor policy guide nor the "Independent Contractor Agreement" places any limits on Annica's authority to discharge instructors. *Cf. St. Croix Sensory*, 785 N.W.2d at 804 (noting that contract required written notice before termination in concluding that employer would incur "some liability" upon discharging a worker). And the instructor policy guide provides for immediate cessation of the relationship between the instructor and Annica under several scenarios, including an instructor's unapproved absence from an assignment or an instructor losing one of the assignment manuals.

Annica argues that its ability to discharge instructors is limited based on its director's testimony that Annica "would still pay" an instructor who was discharged mid-class, "because you know they agreed and we agreed and arranged it." But Annica has never discharged an instructor mid-class, so the director's testimony is merely hypothetical. Moreover, the director did not testify that an instructor discharged in the middle of a class would be paid. Rather, she indicated that if an Annica representative identified a major problem during a class, she would expect the Annica representative to "walk in and make sure the class ran well," then Annica would pay the instructor for the class, "but we wouldn't have them doing more classes." In other words, the instructor could be discharged mid-assignment and would not teach or be compensated for the remaining classes in that assignment. This is consistent with Elias's testimony that she believed Annica had the right to discharge her at any time for failure to follow instructions or for poor performance, without incurring liability for damages. Because there is no evidence that Annica's ability to discontinue its relationship with an instructor at any time is restricted, this factor indicates employment.

In sum, the relationship between Annica and its instructors is marked by control over the instructors' preparation for and manner of performance, facilitated by Annica's provision of all necessary materials and tools, and terminable at the will of either party. On this record, we conclude that the ULJ properly determined that Elias was an employee of Annica.

Affirmed.