STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2033

Helen Chorolec,
Respondent,

vs.

Marketing Architects, Inc.,
Relator,
Department of Employment and Economic Development,
Respondent.

Filed July 18, 2011
Reversed
Stauber, Judge

Department of Employment and Economic Development
File Nos. 26051027-2; 25279267-2

Helen Chorolec, Columbia Heights, Minnesota (pro se respondent)

Dawn C. Van Tassel, Sarah A. Horstmann, Maslon, Edelman, Borman & Brand, L.L.P., Minneapolis, Minnesota (for relator)

Lee B. Nelson, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

Relator challenges the decision by the unemployment-law judge (ULJ) that respondent actor performed services in employment for relator, where relator selected respondent to act in a one-time television commercial it produced after relator's talent agency sent respondent and others to relator to audition for the part. Relator argues that there was no employer-employee relationship and instead respondent actor was an independent contractor. Because we conclude that respondent was not an employee of relator under Minnesota unemployment-benefits law, we reverse.

FACTS

Respondent Helen Chorolec works sporadically as an actress and model. She is represented by Moore Creative Talent, Inc., a talent agency that refers individuals like respondent (known as "talent") for jobs and auditions. Because this work is inconsistent, respondent maintained a full-time job with Pratt Homes. Although it is not in the record, respondent's primary employment with Pratt Homes was terminated at some point. She applied for unemployment benefits and the Minnesota Department of Employment and Economic Development (DEED) conducted an audit after respondent disclosed on a questionnaire that she also received income from Moore Creative.

DEED issued a determination finding that an employer-employee relationship existed between respondent and Moore Creative. Moore Creative appealed, and a ULJ held a hearing on the matter. A representative of Moore Creative appeared at this hearing and testified about the working relationship between her company and the talent they

represent. She testified that clients contact Moore Creative with specific requests for talent, and her company refers to them talent meeting the criteria. If a job is secured and completed, payment is sent from the client to Moore Creative. Moore Creative then issues the payment to the talent after deducting a commission fee.

Following this hearing, the ULJ determined that the hearing should be reopened to allow for additional testimony from SuperValu, Inc. and relator Marketing Architects—two companies for which respondent performed work after being referred by Moore Creative. The ULJ sent SuperValu and Marketing Architects letters stating that "[i]t would be in [their] interest" to attend the next hearing because it was "possible [respondent] could be determined an employee of your company." Respondent and representatives from Moore Creative, SuperValu, and Marketing Architects appeared at this hearing. The testimony at the hearing revealed that respondent was hired by SuperValu on one occasion for a print photo shoot. Respondent was hired through Moore Creative and the photo shoot lasted only "a couple of hours." Respondent was also hired on one occasion by Marketing Architects to act in a television commercial it was producing. Respondent was hired through Moore Creative and the shoot took less than three hours. Respondent testified that she considered herself an independent contractor and not an employee of Moore Creative, SuperValu, or Marketing Architects.

The ULJ issued a decision finding that (1) services performed for Moore Creative by respondent and "any others performing the same or similar services" did not constitute employment under Minnesota unemployment-insurance law and (2) services performed for SuperValu and relator by respondent and "any others performing the same or similar

services" *did* constitute employment under Minnesota unemployment-insurance law. Relator requested reconsideration and the ULJ affirmed her decision. This certiorari appeal followed.

On appeal, relator argues that the ULJ erred as a matter of law by determining that respondent and relator had an employer-employee relationship. DEED has filed a letter in lieu of a brief and agrees that the ULJ's decision must be reversed because respondent is not an employee of Marketing Architects.

D E C I S I O N

The distinction between "employee" and "independent contractor" is significant in the unemployment-benefits context because employers must contribute to the unemployment trust fund based on wages paid to employees. *See* Minn. Stat. § 268.035, subd. 25 (2010) (stating that employers are taxed based on wages paid to employees). But payments to independent contractors do not constitute wages under Minnesota unemployment law. *Nicollet Hotel Co. v. Christgau*, 230 Minn. 67, 68, 40 N.W.2d 622, 622–23 (1950).

Whether an employer-employee relationship exists for purposes of unemployment benefits is a mixed question of fact and law. *Neve v. Austin Daily Herald*, 552 N.W.2d 45, 47 (Minn. App. 1996). We review factual findings in the light most favorable to the decision, *Skarhus v. Davanni's Inc*., 721 N.W.2d 340, 344 (Minn. App. 2006), and will affirm a ULJ's findings if they are supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5) (2010). When the facts are not disputed, the existence of an employment relationship is a question of law. *Neve*, 552 N.W.2d at 48. We review

questions of law de novo. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

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). Under Minnesota common law, five factors are traditionally considered in deciding whether an employer-employee relationship exists: "(1) [t]he 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) (adopting the five common-law factors). Of these five factors, the most important are the right to control performance and the right to discharge without incurring liability. *Guhlke*, 268 Minn. at 143, 128 N.W.2d at 326; Minn. R. 3315.0555, subp. 1.

The ULJ did not analyze respondent's employment status under Minnesota law, but instead relied on Internal Revenue Service (IRS) guidelines addressing worker classification in the film and video industry for tax purposes. Although both parties agree the ULJ erred by finding that respondent was an employee of Marketing Architects, DEED notes that the ULJ also erred by applying the IRS guidelines rather than Minnesota law. We agree. The statutes and rules provide that the five-part common-law test applies to determine whether an employer-employee relationship exists for purposes

of unemployment benefits. Minn. Stat. § 268.035, subd. 15(a)(1); Minn. R. 3315.0555, subp. 1. In certain industries, the statutes provide specific criteria or guidelines to be considered in determining whether an employment relationship exists. *See, e.g.*, Minn. Stat. §§ 268.035, subds. 9a (construction industry), 11 (agricultural industry), 25b (trucking and messenger/courier industries) (2010). However, the statutes provide no specific exception for television commercial production, and therefore the five-part common-law test applies. *See* Minn. Stat. § 268.035, subd. 15(a)(1).

I. Control

The Minnesota Rules define "control" as "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). Control is determined by the totality of the circumstances, but the Minnesota Rules provide 13 specific criteria to be considered. Minn. R. 3315.0555, subp. 3 (2009).[1] The criteria are to be evaluated in context and none are

[1] These 13 criteria are:

> (A) whether the employer has authority over assistants; (B) whether the individual is required to comply with detailed instructions or the employer has the right to instruct or direct the method of doing work; (C) whether regular reports relating to how the services are performed must be submitted to the employer; (D) whether the work is done on the employer's premises; (E) whether services must be personally rendered to the employer; (F) whether a continuing relationship exists between the parties; (G) whether the employer can terminate the individual without incurring liability; (H) whether set work hours are established; (I) whether training is given; (J) whether the employment is full-time; (K) whether the employer furnishes tools, supplies, and materials; (L) whether expenses are paid; and (M) whether the

considered dispositive. *See St. Croix*, 785 N.W.2d at 800–01 (concluding that employer did not control performance despite the fact that several criteria indicated control).

The record indicates that respondent's work for Marketing Architects consisted of a single shoot that took less than three hours. There was no ongoing relationship between the parties. Respondent provided her own wardrobe, with the exception of a lab coat that Marketing Architects provided for her to wear in her role as a cosmetics salesperson. Marketing Architects provided respondent with a script prior to the shoot and instructed her when to arrive. But respondent read the script and prepared for the shoot on her own. Marketing Architects' representative testified:

> [A]ctresses and actors, we actually hire them to put their personality into it. So we do provide a script but we rely on the actor or the actress to kind of bring themselves to it, if you will. So that's really why we chose her. We liked the way she delivered her lines. . . . So it wasn't so much we told her how to deliver the lines as much as we told her the words to say, but then she, we're paying for her talent, I guess, is the best way of saying that.

Respondent also paid for her own marketing and training expenses, including photographs and acting classes.

This evidence, when considered in light of the 13 criteria, indicates that Marketing Architects did not exercise sufficient control to be considered respondent's employer. This was a one-time job with no continuing relationship. *See* Minn. R. 3315.0555, subp.

> employer is required to enforce standards imposed by regulatory agencies."

St. Croix Sensory Inc. v. Dep't of Emp't & Econ. Dev., 785 N.W.2d 796, 800-01 (Minn. App. 2010); Minn. R. 3315.0555, subp. 3.

3(F). Relator had no authority over respondent's assistants, there was no set schedule other than an arrival time, and none of respondent's expenses were paid. *See id.*, subp. 3(A), (H), (L). Respondent provided the majority of her own wardrobe, she provided her own training, and she was under no obligation to provide continuing reports or services. *See id.*, subp. 3(C), (I), (K). The only criteria indicating control by Marketing Architects is that it directed the method and manner of respondent's work. *See id.*, subp. 3(B). However, this criterion is less significant given the nature of the work—filming a commercial—which requires that a "director" provide actors and actresses with "direction." This control is also exercised only during the shoot; Marketing Architects could not direct respondent's actions at any other time. The right-to-control factor therefore indicates that Marketing Architects lacked control over respondent's means and manner of performance. This suggests that respondent was not an employee.

II. Right to discharge

The second important factor in the independent-contractor analysis is whether an employer can discharge an individual without regard to his or her performance and without incurring liability for doing so. *St. Croix*, 785 N.W.2d at 803. If so, this suggests an employer-employee relationship exists. *Id.* "An independent worker generally cannot be terminated without the firm being liable for damages if [the worker] is producing according to his or her contract specifications." Minn. R. 3315.0555, subp. 3(G). Control may be indicated "particularly if the individual may be terminated with little notice, without cause, or for failure to follow specified rules or methods." *Id.*

Marketing Architects testified that it felt it had the right to send an actor or actress home with no liability, but only if performance was unsatisfactory. There was no indication that Marketing Architects could discharge an actor or actress for no reason without incurring liability. SuperValu also testified that it believed it could send a model like respondent home, but only if it was unhappy with the model's performance at a shoot, or if the model was "misrepresented" (i.e., did not look as the model was advertised by the agency). SuperValu's representative stated that if it booked a model through an agency like Moore Creative, she felt "it is best to go forward with those plans," unless there was an issue with the model's performance. Therefore, because the record indicates that Marketing Architects could not discharge respondent for no reason without regard to her performance, this factor indicates that an employer-employee relationship does not exist.

III. Other factors

The Minnesota Rules also provide additional factors to be considered in determining whether an employment relationship exists: (1) whether the individual makes services available to the public; (2) whether the individual is compensated on a job basis or by the hour; (3) whether the individual is in a position to realize a profit or loss as a result of the services offered; (4) whether the individual may end the relationship without incurring liability; (5) whether the individual made a substantial investment in the facilities used to perform the services; (6) whether the individual works simultaneously for multiple firms; (7) whether the individual is accountable for his or her own actions

while working; and (8) whether the services performed by the individual are in the course of the employer's organization, trade, or business. Minn. R. 3315.0555, subp. 2 (2009).

The majority of these factors weigh in favor of a finding that respondent is an independent contractor. The record indicates that respondent makes her services available to the public through her agent, Moore Creative, who shops her services to potential clients. *See id.*, subp. 2(A). Respondent uses marketing materials such as headshots, photographs, and resumes to obtain work. Respondent is also generally compensated on a job basis rather than by the hour. *See id.*, subp. 2(B). For instance, Marketing Architects paid her a set fee for the right to use her likeness for a period of six months. Respondent was also free to pursue simultaneous contracts. *See id.*, subp. 2(F). Although she testified that the work was "sporadic" and she might only have two or three jobs a year, nothing in the record indicates that she was limited to working for one client, or that any client had the ability to control respondent's ability to pursue other work.

It is unclear from the record whether respondent had the right to end the relationship with Marketing Architects without incurring liability, or whether she or Marketing Architects would have been liable for any negligent actions by respondent during the shoot. *See id.*, subp. 2(D), (G). A fact that may indicate respondent was an employee is that relator furnished the equipment and premises for the work. *See id.*, subp. 2(E). Also, the fact that respondent was not in a position to realize a profit or loss may indicate she was an employee; however, there is some evidence that respondent could have received an additional fee from Marketing Architects if the commercial ran longer than six months. *See id.*, subp. 2(C). On balance, these additional factors indicate

that no employer-employee relationship existed between respondent and Marketing Architects.

We conclude that no employer-employee relationship existed between Marketing Architects and respondent for purposes of Minnesota unemployment-benefits law. Because we conclude that no employer-employee relationship exists, we need not address the additional issue raised by Marketing Architects of whether Marketing Architects can be bound by the ULJ's decision when it was never a party to the initial determination or subsequent appeal.

Reversed.