STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2265

Steven Morrow,
Respondent,

vs.

Alpha & Omega USA, Inc.,
Relator,

Department of Employment
and Economic Development,
Respondent.

Filed September 19, 2011
Affirmed
Hudson, Judge
Dissenting, Ross, Judge

Department of Employment
and Economic Development
File No. 25232676

Steven Morrow, Shakopee, Minnesota (pro se respondent)

Jeffrey H. Olson, Minnetonka, Minnesota (for relator)

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

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Ross, Judge.

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

HUDSON, Judge

Relator transportation company challenges the determination by an unemployment-law judge (ULJ) that respondent, who performed medical-transportation services for relator, performed those services in employment, rather than as an independent contractor, so that he was eligible for unemployment-compensation benefits based in part on wage credits earned at the company. Because the ULJ did not err by concluding that respondent was an employee for the purpose of obtaining unemployment benefits, we affirm.

FACTS

Respondent Steven Morrow worked as a driver for relator Alpha & Omega USA, Inc., d/b/a Travelon Transportation, from August 2007–February 2010. Most of Travelon's business involves performing non-emergency transportation for clients of the Minnesota Department of Human Services.

Under Travelon's system, the company schedules delivery trips, and a dispatcher notifies a driver that a trip is available; the driver then chooses whether to accept that trip. If the driver accepts the trip, the driver takes the client to the requested location and obtains a required signature for processing. The driver is paid on commission, based on what the delivery clients paid for their transportation.

Morrow was typically available to drive for Travelon for more than 60 hours per week and generally worked over 50 hours per week. According to Morrow, company representatives told him that drivers typically made themselves available for 12-hour

periods, and they were told to designate times they were available. He believed that a driver was assumed to be available every day during the designated timeframe. He indicated that drivers control the routes and the time it takes to complete a trip.

Morrow was required to provide a van with a wheelchair ramp, but he had the choice whether to provide his own vehicle or lease one from Travelon. Morrow, along with most of Travelon's drivers, leased his vehicle from the company. He paid Travelon a fee of $400 per month for using Travelon's dispatch services and additional fees for maintenance and vehicle repair, insurance, and a data phone to log in to accept jobs from a company dispatcher. He was responsible for fuel costs and was permitted to keep the vehicle at home for personal use or other business if he chose to do so.

When Morrow began working for Travelon, he signed an agreement titled "Independent Contractor Agreement," which included a provision that either party could terminate the agreement without cause after giving 30-days' notice, but that if Morrow left without giving 30-days' notice, he would pay Travelon $100 for each day short of the notice period.

Travelon indicated that if a customer complained about a driver, the company would counsel the driver to correct the behavior. Travelon received a number of customer complaints about Morrow's work and counseled Morrow relating to his performance based on those complaints. In February 2010, Travelon terminated Morrow's services.

Morrow applied for unemployment-compensation benefits, and the Minnesota Department of Employment and Economic Security (DEED) conducted an audit, which

resulted in a determination that Morrow held employee status with Travelon, so that his payment amounted to wages for the purpose of determining his eligibility for unemployment-compensation benefits. Travelon appealed, and, after a hearing, a ULJ concluded that Morrow's services for Travelon were performed in employment, and Morrow was entitled to unemployment-compensation benefits based on his employment. Travelon requested reconsideration, and the determination was affirmed. This certiorari appeal follows.

D E C I S I O N

This court may affirm a decision of the ULJ, or it may remand, reverse, or modify a decision if the substantial rights of the petitioner were prejudiced because the findings, conclusions, or decision are affected by an error of law or are unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008). This court reviews a ULJ's factual findings in the light most favorable to the decision and will not disturb them when they are sustained by substantial evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court reviews de novo questions of law. *Id.* Whether a person is considered an employee or an independent contractor presents a mixed question of law and fact. *Nelson v. Levy*, 796 N.W.2d 336, 339 (Minn. App. 2011). On undisputed facts, the issue of whether a person is an employee presents a legal issue. *Id.*

Employers in Minnesota must contribute to the unemployment trust fund when wages are paid to employees. Minn. Stat. § 268.035, subd. 25 (2008). But compensation paid to independent contractors does not constitute wages. *Nicollet Hotel Co. v. Christgau*, 230 Minn. 67, 68, 40 N.W.2d 622, 622–23 (1950). An "employee" performs

"services for an employer in employment." Minn. Stat. § 268.035, subd. 13(1) (2008). Employment includes 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) (2008). The parties' contract terms do not determine whether an employer-employee relationship exists; rather, this court examines the actual arrangements and conduct of the parties to decide this issue. *St. Croix Sensory Inc. v. Dep't of Emp't & Econ. Dev.*, 785 N.W.2d 796, 800 (Minn. App. 2010). "[E]ach case will depend in large part upon its own particular facts." *Id*.

Five essential factors are considered in determining whether a person is an employee or an independent contractor: "(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), *codified in* Minn. R. 3315.0555, subp. 1(A), (B) (2009). The two most important of these factors are "the right to control the means and manner of performance" and the right "to discharge the worker without incurring liability." Minn. R. 3315.0555, subp. 1(A), (B). The right to control performance is determined under the total circumstances. *Id*., subp. 3 (2009).

Right to control means and manner of performance

Subpart 3 sets out the "criteria for determining if the employer has control over the method of performing or executing services." *Id*. Of these criteria, those relevant to this case include the existence of a continuing relationship, the amount of time devoted to the

work, the establishment of set hours of work, and whether the worker is paid by the job and is required to pay incidental expenses. *Id.*, subps. 3(F), (J), (H), (L).

"The existence of a continuing relationship between an individual and the person for whom an individual performs services . . . tend[s] to indicate the existence of an employer-employee relationship." *Id.*, subp. 3(F). "Continuing services may include work performed at frequently recurring . . . intervals, either on call of the employer or whenever work is available." *Id.* Here, the record shows that Morrow performed work for Travelon daily and that he generally worked over 50 hours per week. This working relationship continued for over two years. We conclude that the ULJ correctly determined that this factor weighs in favor of employee status.

A related factor regarding control concerns whether an individual has set hours of work. "The establishment of set hours of work by the employer indicates control." *Id.*, subp. 3(H). If "fixed hours are not practical because of the nature of the occupation, a requirement that the worker work at certain times is an element of control." *Id.* The dissent asserts that, because Morrow could determine his hours of availability and reject specific jobs offered during that time, this factor weighs in favor of independent-contractor status. But Morrow testified that he was expected to be available during the work hours he designated, which generally amounted to 12-hour periods from Monday through Friday, a 60-hour-per-week period of availability. The ULJ's finding that this work obligation effectively amounted to set hours of work is supported by substantial evidence, and the ULJ did not err by concluding that this factor supported a determination of employee status.

The ULJ also cited Travelon's counseling of Morrow regarding his job performance as a factor tending to indicate control over his performance. If certain factors relate only to the definition of an alleged employee's task, rather than the means of accomplishing that task, those factors are not relevant to an employment-status inquiry. *Neve v. Austin Daily Herald*, 552 N.W.2d 45, 48 (Minn. App. 1996). Travelon suggests that its standards relate only to quality control of the ultimate outcome of transporting medical-services clients. But Travelon's counseling of Morrow relating to customer complaints goes beyond mere outcome and relates instead to the manner of Morrow's performance on the job; this indicates an employer-employee relationship.

The dissent asserts that Morrow's ability to hire assistants demonstrates a lack of control over the means and manner of his performance. "Control over the individual is indicated when the employer hires and pays the individual's assistants and supervises the details of the assistant's work." Minn. R. 3315.0555, subp. 3(A). But this did not occur here because Morrow's job of providing medical transportation did not involve using assistants. Although Morrow had the ability to hire assistants under the contract, this does not show lack of control because Morrow did not, in fact, hire assistants in his job with Travelon. *See St. Croix Sensory*, 785 N.W.2d at 800 (stating that this court examines parties' actual conduct to determine whether a worker is an employee or an independent contractor).

Based on the parties' two-year continuing relationship in which Morrow made himself available to work more than 60 hours per week and actually worked approximately 50 hours per week, and Travelon's counseling Morrow on complaints

about his work, the ULJ correctly determined that Travelon controlled the means and manner of Morrow's performance.

Right to discharge the worker without incurring liability

An additional important factor relating to the determination of employee or independent-contractor status concerns the right to discharge a worker without incurring liability. *Id.*, subp. 1(B). "The right to discharge is a very important factor indicating that the right to control exists particularly if the individual may be terminated with little notice, without cause, or for failure to follow specified rules or methods." *Id.*, subp. 3(G). On the other hand, "[a]n 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." *Id*. But "[c]ontracts which provide for termination upon notice or for specified acts of nonperformance or default are not solely determinative of the right to control." *Id*.

This court has previously characterized workers as independent contractors when work-related agreements contained a requirement of giving some notice before terminating the relationship. *See, e.g.*, *Neve*, 552 N.W.2d at 46, 49 (requirement of three-weeks' notice by either party to discontinue relationship, except in case of material breach, supported determination of independent-contractor status); *Boily v. Comm'r of Econ. Sec.*, 532 N.W.2d 607, 609 (Minn. App. 1995) (when each party could terminate contract with 30-days' notice, provision showed mutual understanding of dentists' status as independent contractors), *aff'd as modified on other grounds*, 544 N.W.2d 295–96 (Minn. 1996). But these cases have not addressed the language of Minn. R. 3315.0555,

subp. 3(G), which indicates that contracts allowing termination upon notice are not solely determinative of control. Further, they contain additional factors supporting independent-contractor status, such as a worker's actual hiring of assistants, which are not present in this case. *See Neve*, 552 N.W.2d at 47; *Boily*, 532 N.W.2d at 608–09.

The ULJ found that "the obligations imposed [under the agreement] are imposed upon [Morrow]," who could be held liable for liquidated damages of $100 per day if he breached the agreement without providing the required 30-days' notice. There is no corresponding liquidated-damages provision relating to Travelon's breach. The dissent indicates that the failure to include such a clause does not show Travelon's control because Morrow would still retain a remedy of contract damages in the event of Travelon's breach. But even if this proposition is true, it is not determinative. We conclude that under the circumstances of this case, the contract notice provision did not effectively limit Travelon's right to discharge Morrow, and this factor supports the ULJ's determination of an employment relationship.

Additional factors

Travelon argues that the additional factor of Morrow's potential availability to the public for other work supports independent-contractor status. But this factor applies only when "an individual makes services available to the general public on a continuing basis." Minn. R. 3315.0555, subp. 2(A) (2009). Although Morrow does not dispute that he had the ability to seek other work, the ULJ correctly noted that the record contains no indication that he actually did so on a continuing basis. Instead, the evidence shows that

Morrow worked more than full time for Travelon for over two years and performed no work for other entities; this strongly suggests that he worked as Travelon's employee.

An additional control factor relates to the furnishing of facilities for the work performed. "A substantial investment . . . in facilities used by [a] person in performing services for another tends to show an independent status." *Id.*, subp. 2(E); *see, e.g.*, *Blue & White Taxi v. Carlson*, 496 N.W.2d 826, 828–29 (Minn. App. 1993) (concluding that employment relationship existed when employer leased cabs to driver, and driver had no "substantial investment in facilities" when he did not have exclusive use of a particular cab, could not bring cab home, and did not maintain cab). Travelon argues that, because Morrow had control over the van during the lease period, he had a substantial investment in the facilities used in performing his work. But we agree with the ULJ's finding that Morrow's ability to terminate his agreement with Travelon on 30-days' notice, which included the lease of the required van, demonstrates that he did not have a substantial investment in the equipment used to perform his work.

The dissent maintains that the ULJ improperly failed to consider the additional factor of the payment arrangement between the parties, noting that Morrow was required to submit invoices to be paid and that Travelon failed to deduct payroll or FICA taxes from his pay. "Payment on a job basis is customary where the worker is independent." *Id.*, subp. 2(B). We note that the record is sparse on the actual tax treatment of Morrow's pay; it contains only a single W-9 form, which Morrow signed after he was terminated from Travelon. But even if we assume that this factor supports independent-contractor

status, we conclude that it does not outweigh the important factor of Travelon's control of Morrow's means and manner of performance.

Finally, Travelon argues that Morrow's ability to realize a profit or loss in his work and his responsibility for incidental expenses indicate that he performed work as an independent contractor. *See id*., subps. 2(C), 3(L). Although we agree that these factors tend to indicate independent-contractor status, they are not determinative in light of the total circumstances of Morrow's relationship with Travelon.

In summary, based on application of the relevant factors, we conclude that Travelon misclassified Morrow as an independent contractor, and substantial evidence supports the determination that Morrow worked in employment for Travelon. The ULJ did not err by concluding that Morrow was an employee for the purpose of determining entitlement to unemployment-compensation benefits.

Affirmed.

ROSS, Judge (dissenting)

I dissent from the majority's conclusion that Morrow was a Travelon employee rather than one of its independent contractors. When the relevant facts are certain, whether a person is an employee is a question of law. *Lakeland Tool & Eng'g, Inc. v. Engle*, 450 N.W.2d 349, 352 (Minn. App. 1990). The facts here are undisputed, and they point strongly in one direction.

The majority lays out the Minnesota caselaw identifying the various factors that bear on the issue, but, in my view, it draws the wrong conclusion because the facts overwhelmingly favor holding that Morrow is an independent contractor rather than an employee: Morrow and Travelon Transportation entered into an agreement that expressly contemplates an independent-contractor relationship; Morrow was paid based on the jobs he performed rather than on a salary; he had to pay Travelon various fees in the completion of his services; he leased his service vehicle from Travelon; he could suffer a net loss on given jobs depending on various circumstances; he could at his own discretion select and engage assistants to complete his duties; and Travelon could not terminate the relationship without 30 days' notice. These facts all indicate an independent-contractor relationship and not employment.

Adding to this compelling list of facts indicating an independent-contractor relationship is Morrow and Travelon's payment arrangement. Their agreement required that Morrow be paid periodically only after he submitted invoices for his services and that Travelon pay him without deducting any FICA or other payroll taxes. This arrangement also has the distinct flavor of an independent contract. The ULJ did not even

mention the payment arrangement directed by the contract, let alone work it into his analysis when deciding—I think erroneously—that Morrow was a Travelon employee. Together with the other facts, in my view this should lead to the conclusion that Morrow was an independent contractor as a matter of law.

I do not find persuasive the ULJ's explanation that the few other mentioned facts can overcome this conclusion. But the majority does. It recognizes that our caselaw directs us to give considerable weight to whether a purported employer can end the relationship without notice and without engaging in a breach of contract. But it then treats Travelon's 30-day notice-of-termination requirement as indicating an employment relationship rather than indicating an independent-contractor relationship. It does so simply because the parties' contract does not expressly indicate the amount of damages that Travelon would incur for breaching this contract provision. I am not convinced that the absence of a specific liquidated damages amount supports the majority's implied conclusion that *no* damages would arise from Travelon's breach of the provision. No Minnesota case so holds and I can conceive of no reason why it should. The question is whether Travelon would be subject to a meritorious breach-of-contract claim for terminating the arrangement without sufficient notice (not whether the amount of damages arising from that breach is expressly identified in the agreement), and the answer to that question is, clearly, yes.

The majority accurately observes that Morrow had set hours of work, but, contrary to the majority's view, I do not think this weighs in favor of the ULJ's finding of an employment relationship; the set hours were the consequence only of Morrow's *decision*

to accept the jobs that he had consistently *chosen* to accept—jobs that the company apparently could not, by its arrangement with Morrow, have *required* him to accept.

I do not see this as a close case in which we might be tempted to defer to the ULJ's assessment. The controlling facts are not only undisputed, the combination of them overwhelmingly favors an independent-contractor holding. I have found no precedent that would lead me to characterize as an "employee" rather than as an "independent contractor" a contracted worker who (1) must submit an invoice to the entity before payment for each job; (2) has no payroll taxes or FICA deducted by the entity from his compensation; (3) leases his key equipment from the entity; (4) must pay fees to the entity; (5) can suffer a net loss on any job after balancing his payments *from* the entity against payments he must make *to* the entity; (6) can hire any assistant or assistants without entity restriction and direct them to perform some (or all) of the work he has agreed to perform for the entity; (7) may, at his own discretion and without penalty, refuse any job offered by the entity; (8) cannot be removed from service by the entity unless the entity gives him 30 days' notice; and (9) operates under a contract that, not surprisingly, expressly defines his relationship with the entity as an "independent contractor" and not as an "employee."

Because I am convinced that we cannot both affirm the ULJ's decision and follow precedent based on this undisputed combination of facts, I would hold that Morrow is an independent contractor and reverse the ULJ's decision.