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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-921**

Marilynn Miller,
Respondent,

vs.

Jane Nolan,
Relator,

Department of Employment and Economic Development,
Respondent.

**Filed February 8, 2011
Affirmed in part and remanded
Ross, Judge**

Department of Employment and Economic Development
File No. 24255172-2

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

UNPUBLISHED OPINION

ROSS, Judge

In this unemployment benefits case, Jane Nolan asserts that an unemployment-law judge (ULJ) erred by determining that Marilyn Miller, a woman who worked for Nolan from Nolan's home, was Nolan's employee rather than an independent contractor. Because Nolan substantially controlled the manner in which Miller performed her job duties, we affirm the ULJ's determination that Miller was an employee for unemployment-benefits purposes. We remand in part to allow the ULJ to amend his decision, limiting it to the facts and the parties involved.

FACTS

Jane Nolan operates a survey-participant recruiting business, Nolan Medical, out of her home. Companies hire Nolan to solicit individuals to complete marketing surveys or to participate in focus groups. Nolan finds and interviews potential participants by telephone. Marilyn Miller began working for Nolan in 2004. She signed a contract that stated that she is an "independent contractor" and that Nolan would not withhold taxes from her pay or reimburse her for her expenses. Miller worked for Nolan on a project-by-project basis, was paid per recruit, and maintained other employment while working for Nolan.

Although Miller theoretically could have worked from anywhere, she worked from Nolan's home. Nolan described this arrangement as a favor to Miller, allowing her to avoid incurring the cost of long-distance and internet service. Because of the arrangement, over time, Nolan observed Miller's work and offered work-related advice

and received Miller's regular progress updates. Miller worked from Nolan's home even when Nolan was away. Nolan had other recruiters but, unlike Miller, they worked from their own homes.

Each time Nolan accepted a new project, she advised Miller and the other recruiters about the project expectations. Nolan required that each recruiting project be completed by a certain deadline and that each recruiter use a script. Miller used Nolan's telephone, her toll-free number, her computer, and her office supplies for her work. Nolan required Miller to maintain project details and to report them to Nolan. Occasionally Nolan listened to Miller's recruiting calls and coached her to improve her performance. And Miller occasionally asked Nolan for advice to improve her work. Sometimes Nolan told Miller when to arrive to work, when she should make calls, and when she could leave for the day. Nolan became frustrated when Miller arrived later than the time Nolan specified, because in addition to making recruiting calls, Miller "needed to be there to help answer the phones." When they fell behind on a project, Nolan directed Miller to "pick up the pace."

Nolan never discharged Miller, but between projects Miller applied for unemployment benefits. Because Nolan had not filed any wage detail reports for Miller with the Department of Employment and Economic Development (DEED), the department conducted an audit pursuant to Minnesota Statutes section 268.186 (2008), which resulted in its determination that Miller was an employee and that Nolan must pay unemployment taxes on Miller's wages. Nolan appealed and the ULJ affirmed the determination that Miller was an employee. It also concluded that Nolan's other

recruiters were also employees rather than independent contractors. Nolan requested reconsideration, and the ULJ affirmed the order. This certiorari appeal follows.

D E C I S I O N

Nolan asserts that Miller was not an employee but was an independent contractor as a matter of law. 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, Minn. Stat. § 268.035, subd. 25 (2010), but payment to independent contractors does not constitute wages. *Nicollet Hotel Co. v. Christgau*, 230 Minn. 67, 68, 40 N.W.2d 622, 622–23 (1950). Whether an employment 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 fact findings if they are supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5) (2010). “We defer to an agency’s conclusions regarding conflicts in testimony . . . and the inferences to be drawn from testimony.” *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). Where the facts are not disputed, employment status is a question of law. *Neve*, 552 N.W.2d at 48. We review de novo questions of law. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

An “employee” performs “services for an employer in employment.” Minn. Stat. § 268.035, subd. 13(1) (2010). Employment for unemployment-benefits purposes

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). The parties’ contract terms alone do not decide the question. *St. Croix Sensory Inc. v. Dept. of Emp’t & Econ. Dev.*, 785 N.W.2d 796, 800 (Minn. App. 2010). We look instead to the actual nature of the relationship of the parties based on their experience. *Id.*

We generally balance five factors to determine whether a person 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.” *Id.* (citing *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964)). The most important factor is the right to control performance. *Id.*; *see also* Minn. R. 3315.0555, subp. 1(A) (2009) (listing control as one of two most essential factors). “‘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). The right of control concerns not merely “*what* is to be done,” but “*how* it is to be done.” *Neve*, 552 N.W.2d at 48 (quotation omitted).

We agree with the ULJ’s assessment that, on the undisputed evidence, the preponderance of the factors shows that Miller and Nolan had an employment relationship. The record supports his findings that Nolan “dictated who Miller would call and what Miller would say,” and that “Nolan Medical provided the tools and material used to do the job, [and] controlled the premises where the work was performed.” Miller

worked almost exclusively from Nolan's home. In doing so, Miller not only made outgoing calls but also answered incoming calls made to Nolan's toll-free number. Nolan requested that Miller arrive and depart at specific times of the day and complete her work by set deadlines. More important, Nolan's requirements for Miller's hours and working style were not only grounded in the details and definition of the projects, but they were demands that Miller perform in a certain manner for greater effectiveness. Nolan gave instruction relating to "when, where and how" Miller's services should be performed, which indicates control. Minn. R. 3315.0555, subp. 3(B) (2009). These factors imply a level of control beyond an independent-contractor relationship.

Other traditional factors also indicate employment status. The right to discharge a worker without incurring liability is another important factor. Minn. R. 3315.0555, subp. 1(B) (2009). Nolan could discharge Miller at anytime, facing little, if any, liability under their contract. Also, work on the employer's premises implies that the employer has control. Minn. R. 3315.0555, subp. 3(D) (2009). Miller worked from Nolan's home on all but two occasions and was free to be there even when Nolan was not. Nolan controlled the premises where the work was done; she made clear when Miller should and should not be there, that she needed Miller to answer the phone, and how she preferred Miller to conduct her phone calls. Nolan further exerted control by furnishing tools and materials, including her long-distance phone service, her computer and high-speed internet, legal pads, and writing utensils. And not only did Nolan provide supplies, she expected that the work product generated with those supplies would be turned in to her.

We do not suggest that this is a clear case. Certain details of the relationship do suggest independent-contractor status. For example, Miller signed an independent-contractor agreement expressly reflecting the relationship that the parties intended to create at the outset. Miller worked on a project-by-project basis and was paid per recruit. She had other part-time jobs, was not reimbursed for expenses, was responsible for her own taxes, and—at least theoretically—she originally had the right to work from wherever she chose. We acknowledge that these factors weigh against our holding that Miller was Nolan’s employee. *See* Minn. R. 3315.0555, subps. 2(B), 3(J), (L) (2009) (payment per job, less than full time work, and lack of expense reimbursement is customary when worker is independent); *St. Croix Sensory*, 785 N.W.2d at 804 (noting that a worker’s responsibility for tax obligations indicates independent-contractor status).

But we hold that, on balance, the factors indicating an employment relationship outweigh those indicating an independent-contractor relationship. We therefore affirm the ULJ’s decision that Miller was Nolan’s employee for the purpose of unemployment taxation.

We limit our affirmance to the ULJ’s determination of the Nolan-Miller relationship. The ULJ also purported to decide that *all* others who perform similar services for Nolan are also employees. The record does not suggest that this issue was actually before the ULJ or that the ULJ had any factual basis to decide that question in this dispute involving only Miller, Nolan, and DEED. We deem the ULJ’s statement in its February 25, 2010, findings of fact and decision that “any others performing similar services for Nolan Medical are performed in employment” to be dicta with no binding

effect on Nolan. We affirm the decision as to Miller and remand for the ULJ to amend its decision, limiting it to the parties and evidence before it.

Affirmed in part and remanded.