COURT OF APPEALS
DECISION
DATED AND RELEASED

November 7, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0714

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

TMI, INC.

Plaintiff-Respondent,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Defendant-Appellant

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Defendants.

APPEAL from an order of the circuit court for Wood County: JAMES MASON, Judge. *Reversed*.

Before Dykman, P.J., Vergeront and Roggensack, JJ.

ROGGENSACK, J. The Labor and Industry Review Commission (LIRC) appeals from an order reversing LIRC's determination that TMI, Inc. owes unemployment compensation contributions for exotic dancers who entertained customers in a tavern owned by TMI. LIRC held that the dancers were employees within the meaning of § 108.02(12), STATS. The circuit court reversed. Because LIRC's conclusions, that the dancers performed services for TMI for pay and that they were not free from TMI's control or direction are reasonable, we affirm LIRC. Accordingly, we reverse the order of the circuit court. In light of our determination, we do not decide whether the dancers performed their services in an independently established trade, business or profession in which they were customarily engaged.

BACKGROUND

TMI operated a tavern called The Body Shop, which featured exotic dancers. The dancers initiated contact with TMI, seeking bookings, usually for a week at a time. Three dancers performed each night. Although the tavern kept no employment records, it estimated that the dancers earned as much or more in tips (approximately $50/night) as in wages ($30-$50/night). Some of the dancers worked for tips alone. Dancers did not report their tips to TMI, which withheld nothing from their earnings.

The dancers provided their own music, costumes, and routines. They also determined the length and order of their sets among themselves. The tavern provided a stage, lighting and sound equipment, and a dance license. Under a written contract implemented in 1992, the dancers were prohibited from soliciting for prostitution, using or selling illegal substances, or engaging in acts which might affect TMI's reputation. Certain state statutes and city ordinances also limited the dancers' conduct. Violations could lead to the revocation of TMI's liquor and dance licenses.

In 1992, the Department of Industry, Labor and Human Relations[1] (DILHR) found TMI had failed to pay unemployment compensation taxes for the dancers in 1990, 1991, and the first quarter of 1992. It assessed TMI for the

[1] DILHR is now known as the Department of Industry, Labor and Human Resources.

unpaid contributions and interest. TMI appealed DILHR's decision. On July 30, 1993, after an evidentiary hearing, the appeal tribunal affirmed DILHR's determination. It concluded that the dancers performed services for TMI for pay and that they were not free from TMI's control or direction because TMI had the right, even if not always exercised, to control various aspects of the dancers' work. For example, the dancers were expected to begin shows within one of hour of opening; TMI policed its dancers to be sure their conduct did not jeopardize TMI's licenses; and TMI would not rehire a dancer who was unpopular with the customers or did not show up for work for two nights. It also found there was no credible evidence to support the conclusion that the dancers' services were performed in an independently established trade, business, or profession in which they were customarily engaged. TMI appealed that decision to LIRC.

On February 28, 1994, LIRC adopted all of the appeal tribunal's factual findings. LIRC held that the dancers' services were not performed free from TMI's control or direction. It did not address whether the services were performed in an independently established trade, business or profession. TMI appealed to the circuit court. On January 19, 1996, the Wood County Circuit Court reversed LIRC and concluded LIRC's determination that the dancers were subject to the control or direction of TMI, was not supported by credible, substantial or probative evidence and that TMI had met its burden of proof sufficient to establish that the dancers were excepted from coverage by § 108.02(12)(b), STATS. LIRC appealed.

DISCUSSION

Scope of Review.

We review LIRC's decision rather than that of the circuit court. ***Stafford Trucking, Inc. v. DILHR***, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981). Whether an exotic dancer is an "employee" within the meaning of § 108.02(12)(a), STATS., or is exempt under § 108.02(12)(b), is a mixed question of fact and law, which requires the application of a statutory standard to findings of fact. *See* ***Larson v. LIRC***, 184 Wis.2d 378, 386, 516 N.W.2d 456, 459 (Ct. App. 1994). LIRC's factual findings must be upheld on review if there is credible and substantial evidence in the record upon which reasonable persons could rely to

make the same findings. Section 102.23(6), STATS.; ***Princess House, Inc. v. DILHR***, 111 Wis.2d 46, 54-55, 330 N.W.2d 169, 173-74 (1983) (concluding that the statutory requirement of § 102.23(6)[2] that "credible and substantial evidence" is necessary to support an agency's factual findings merely codified existing case law). Once the facts are established, however, the determination of whether those facts fulfill the statutory standard is a legal conclusion. ***Keeler v. LIRC***, 154 Wis.2d 626, 632, 453 N.W.2d 902, 904 (Ct. App. 1990). Therefore, we will review LIRC's determination that the dancers performed services for TMI over which TMI exercised control or direction, as a conclusion of law.

A court is not bound by an agency's conclusions of law. ***West Bend Educ. Ass'n v. WERC***, 121 Wis.2d 1, 11, 357 N.W.2d 534, 539 (1984). However, it may defer to those determinations. The supreme court has recently clarified both when to defer to an agency's legal conclusions, and how much deference the courts should give. *See* ***UFE, Inc. v. LIRC***, 201 Wis.2d 274, 548 N.W.2d 57 (1996).

An agency's interpretation or application of a statute may be accorded great weight deference, due weight deference or *de novo* review. ***Id.*** at 284, 548 N.W.2d at 61. We will accord great weight deference only when all four of the following requirements are met:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) … the interpretation of the agency is one of long-standing; (3) … the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) … the agency's interpretation will provide uniformity and consistency in the application of the statute.

Id., *citing* ***Harnischfeger Corp. v. LIRC***, 196 Wis.2d 650, 660, 539 N.W.2d 98, 102 (1995). We will accord due weight deference when "the agency has some experience in an area, but has not developed the expertise which necessarily

[2] Section 102.23(6), STATS., is applied to judicial reviews of LIRC unemployment compensation decisions by § 108.09(7), STATS.

places it in a better position to make judgments regarding the interpretation of the statute than a court." ***Id.*** at 286, 548 N.W.2d at 62. The deference allowed an administrative agency under due weight is accorded largely because the legislature has charged the agency with the enforcement of the statute in question. ***Id.*** This court will not overturn a reasonable agency decision that furthers the purpose of the statute unless we determine that there is a more reasonable interpretation under the applicable facts than that made by the agency. ***Id.*** We will employ *de novo* review when the legal conclusion made by the agency is one of first impression, or when the agency's position on the statute has been so inconsistent as to provide no real guidance. ***Id.*** (citations omitted).

We conclude that great weight deference cannot be accorded to LIRC's application of the facts to the statutory standard set forth in § 108.02(12)(b), STATS., because LIRC has not satisfied all four criteria for great weight deference required by the supreme court in ***UFE***. For example, there is no long standing agency determination of when an exotic dancer is an employee for purposes of unemployment compensation. LIRC's appendix cites only three such decisions, none of which resulted in a published appellate decision. That is not a sufficient historical record to support applying great weight deference to LIRC's conclusion of law. ***UFE*** at 285, 548 N.W.2d at 62. We also do not apply a *de novo* review to the agency's legal conclusion because DILHR has been charged by the legislature with administering the statute in question and its interpretation in this case is not one of first impression. Therefore, we conclude that because the agency has some experience in interpreting § 108.02(12)(b) with regard to exotic dancers, we will accord LIRC's conclusion of law due weight deference.

Liability for Unemployment Compensation Contributions.

Determining whether persons are employees for unemployment compensation purposes requires a two-step analysis. *See* ***Keeler***, 154 Wis.2d at 631, 453 N.W.2d at 904. First, DILHR has the burden of showing that the individuals performed services for an employing unit for pay. If that is proved, the individuals are presumed to be employees for purposes of unemployment compensation and the burden shifts to the employer to show that the persons should be exempt under the provisions of § 108.02(12)(b), STATS. That is, the employer must prove both (1) that the individuals were, and will continue to be, free from its control or direction in regard to the performance of the individuals' services, under their contracts and in fact, and (2) that the individuals performed their services in an independently established trade, business or profession, in which they were customarily employed. ***Id.***

The control or direction test is not one of degree; it is sufficient to show that the employer had the right to control its employees, whether that right was exercised or not. ***Stafford Trucking***, 102 Wis.2d at 263, 306 N.W.2d at 83. In ***Princess House***, the supreme court decided that a manufacturer of household products did not control or direct the services provided by its independent dealers. The dealers signed ten year contracts which could be terminated only for deceptive sales practices or for violations of state or federal laws. They set their own hours and could use any type of marketing method they preferred. They set their own resale prices. The only evidence of control of the dealers was the dealers' compliance with certain laws, for which compliance was in their own self-interests. The court did not consider the dealers' conformance with their own self-interests sufficient evidence of an employer's right to control. ***Princess House***, 111 Wis.2d at 67-68, 330 N.W.2d at 180.

In contrast, in ***Lifedata Medical Services v. LIRC***, 192 Wis.2d 663, 531 N.W.2d 451 (Ct. App. 1995), we applied a deferential standard of review to LIRC's conclusion that for purposes of unemployment compensation, networks of nurses, emergency medical technicians and paramedics were employees of a company that contracted with the insurance industry to provide qualified examiners for applicants. While Lifedata did not directly supervise the physical examinations, it did assert a right to check them periodically for quality control. Lifedata also required the examiners to follow a manual which explained how to conduct physical examinations; it prohibited the disclosure of test results and

required the examiners to either retain copies of the exams for six months or send them to Lifedata. ***Id.*** at 668, 531 N.W.2d at 453.

In the case at hand, TMI's exotic dancers were expected to comply with state and local ordinances. However, unlike the dealers in ***Princess House***, TMI held licenses which depended upon the compliance of its dancers. Moreover, some dancers signed a contract which prohibited soliciting for prostitution, using or selling illegal substances or engaging in acts which would harm TMI's reputation. TMI exerted no artistic control over the dancers' performances. But, like the employer in ***Lifedata***, TMI exerted some quality control over its dancers, by refusing to rehire them if they failed to show up for two nights, or if they were unpopular with its customers. And, it had the right to control any aspect of their performances that violated the statutes and ordinances upon which TMI's liquor and dance licenses depended.

All of the facts which LIRC found are supported by credible and substantial evidence. Therefore, we may not set them aside. Section 102.23(6), STATS. LIRC also determined that, given the facts found, TMI had failed to prove that the dancers were free from its control or direction over the performance of their services both under contract and in fact.

If LIRC's legal conclusion is reasonable, applying due weight deference to it, we must sustain it unless there is a more reasonable interpretation available. ***UFE*** at 287, 548 N.W.2d at 62. LIRC was persuaded by the facts it found, as set forth above, that TMI had the right to control or direct the dancers. We conclude those facts form a reasonable basis for the conclusion LIRC reached. Therefore, the question before us is whether the conclusion that TMI lacked control is *more reasonable* than LIRC's conclusion that it had control. If not, we must defer to LIRC's determination.[3] ***Id.***

In determining whether one conclusion is more reasonable than another, we consider the policy behind the statute being applied. ***Moorman Mfg. Co. v. Industrial Comm.***, 241 Wis. 200, 203, 5 N.W. 743, 744 (1942). We

[3] When deference is accorded an administrative agency, the agency's conclusion of law will be sustained if it is reasonable, even if an alternative is equally reasonable. ***DILHR v. LIRC***, 161 Wis.2d 231, 246, 467 N.W.2d 545, 550 (1990).

note that the Unemployment Compensation Act is remedial in nature, and thus should be "liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status." ***Princess House***, 111 Wis.2d at 62, 330 N.W.2d at 177. Its purpose is to relieve some of the burden of unemployment from workers and to provide compensation for as broad a base of workers as is practicable. ***Moorman Mfg. Co.***, 241 Wis. at 204-05, 5 N.W.2d at 745.

LIRC's conclusion furthers the purpose of the statute, since it requires TMI to bear part of the burden which dancers who are not able to maintain continuous employment will endure. The circuit court's conclusion does not further the purpose underlying § 108.02(12), STATS. Therefore, we hold that concluding that the dancers were, and will continue to be, free from TMI's control or direction is not more reasonable than LIRC's legal conclusion and we affirm LIRC.

By the court.—Order reversed.

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