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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0964**

Bankers Media Group, Inc.,
Relator,

vs.

Flowrean O. Brown,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed May 13, 2008
Affirmed
Connolly, Judge**

Department of Employment and Economic Development
File No. 17613 06

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Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and
Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CONNOLLY, Judge

Relator challenges the unemployment-law judge's (ULJ) finding that respondent Flowrean Brown was an employee rather than an independent contractor. Because the ULJ's decision is supported by substantial evidence in the record, we affirm.

FACTS

Respondent Flowrean Brown worked as a saleswoman for relator Banker's Media Group, Inc. She first worked for relator in 1987. After a break, she sold advertising space in relator's publications continuously from January 2004 until her termination on September 15, 2006. She worked under a marketing representative agreement that was signed on January 16, 2004. After her termination, an audit by the Department of Employment and Economic Development (DEED) determined that relator had an employer-employee relationship with Brown. Relator filed a protest, arguing that Brown was an independent contractor. In response, DEED issued an affirmation of its employment status finding. Relator appealed. After a de novo hearing, a DEED ULJ found employment status. This decision was based on the ULJ's determination that a preponderance of the evidence demonstrated that Brown was an employee rather than an independent contractor. Relator filed a request for reconsideration with the ULJ. The ULJ affirmed his initial decision. This appeal follows on a writ of certiorari relator obtained under Minn. Stat. § 268.105, subd. 7(a) (2006), and Minn. R. Civ. App. P. 115. DEED is the primary party to any judicial action involving a ULJ's decision. Minn. Stat. § 268.105, subd. 7(e) (2006).

DECISION

Whether an individual is an independent contractor or an employee is a mixed question of law and fact. *Lakeland Tool & Eng'g v. Engle*, 450 N.W.2d 349, 352 (Minn. App. 1990). This court views the ULJ's factual findings "in the light most favorable to the decision." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (citing *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996)). We affirm a ULJ's factual findings if they are supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5) (2006). Substantial evidence is defined as: "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). The substantial evidence test is satisfied when there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *In re Interstate Power Co.*, 574 N.W.2d 408, 415 (Minn. 1998) (quotation omitted).

Five factors are traditionally used to determine whether a worker is an employee or an independent contractor. These factors are: "(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). Of these five factors, the Minnesota Rules, as promulgated under Minn. Stat. § 14.386 (2006), specify that the ability to "discharge the worker without incurring

liability” and the “right to control” are the two most important considerations in determining whether a worker is an employee or an independent contractor. Minn. R. 3315.0555, subp. 1 (2007).

In this case, these two factors are determinative. First, relator had the authority to terminate Brown without incurring liability. The marketing representative agreement that relator signed with Brown provided that “[t]his Agreement may be terminated by either party by giving fourteen (14) days written notice to the other party.” This clause unambiguously gave relator the authority to terminate Brown without incurring liability. While relator may be liable to Brown for services that she rendered prior to her termination, no liability stems from the actual termination under the language of the marketing representative agreement. We conclude that this factor clearly provides substantial support for the ULJ’s finding that Brown was an employee rather than an independent contractor.

Second, relator had the right to control the manner and means of Brown’s performance. When determining control, the Minnesota Rules provide a number of factors that are relevant in determining whether an employer has control over a worker. Minn. R. 3315.0555, subp. 3 (2007). It is important to remember that in employee independent-contractor cases, there is no general rule that covers all situations, and each case depends to a great extent upon its own particular facts. *Pettis v. Harken, Inc.*, 263 Minn. 289, 291, 116 N.W.2d 565, 567 (1962). Under the unique facts of this case, we conclude that the following control factors are decisive.

1. *Compliance with instructions.*

Control 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. Mere suggestions as to detail or necessary and usual cooperation where the work furnished is part of a larger undertaking, does not normally evince control. Some individuals may work without receiving instructions because they are highly proficient in their line of work; nevertheless, the control factor is present if the employer has the right to instruct or direct the methods for doing the work and the results achieved. Instructions may be oral or may be in the form of manuals or written procedures which show how the desired result is to be accomplished.

Minn. R. 3315.0555, subp. 3(B).

Brown had to comply with instructions from relator. She was prohibited from working in areas where other sales people worked.¹ Under the terms of the marketing representative agreement, Brown was required to comply with the sales terms provided by relator. Specifically, the agreement provided that “[Brown] shall not make any representations, warranties, conditions, or waive in verbal or written manner any terms on [relator’s] order or contract forms.” She did not have the discretion to vary the terms of any sales agreements without first receiving relator’s permission.

¹ When asked if she had the ability to select the towns that she performed ad sales in, Brown responded: “We couldn’t step on another salesperson’s territory according to [relator’s president.] If that salesperson had been working that town, we couldn’t just go and start working that town, go see those people and sign them up. We were prohibited from doing that.” This testimony is uncontroverted. Relator’s president only stated that the multistate sales territory listed in the marketing representative agreement was not exclusive. He did not refute Brown’s testimony that salespeople were prevented from working in the specific towns that other salespeople had programs in.

2. *Personal Performance.*

“Control is indicated if the services must be personally rendered to the employer.”

Minn. R. 3315.0555, subp. 3(E). Brown was required to personally perform services for relator. The marketing representative agreement provided that “[Brown] shall devote [her] time, effort, and energy to production of orders and contracts on behalf of [relator.]”

3. *Existence of a continuing relationship.*

The existence of a continuing relationship between an individual and the person for whom an individual performs services is a factor tending to indicate the existence of an employer-employee relationship. Continuing services may include work performed at frequently recurring, though somewhat irregular intervals, either on call of the employer or whenever work is available.

Minn. R. 3315.0555, subp. 3(F).

There was the existence of a continuing relationship. Brown and relator had a continuing relationship from January of 2004 until her termination on September 15, 2006.

4. *Right to discharge.*

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. 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. Contracts which provide for termination upon notice or for specified acts of nonperformance or default are not solely determinative of the right to control. That a right to discharge is restricted because

of a contract with a labor union or with other entities does not mean there is no control.

Minn. R. 3315.0555, subp. 3(G).

Under the terms of the marketing representative agreement, relator had the authority to terminate Brown with little notice and without cause. While the right to discharge without incurring liability is, on its own, an important factor in determining whether a worker is an employee, it is also an important factor in determining whether control exists under the control factors found in the Minnesota Rules.

5. *Training.*

“Training of an individual by an experienced employee working with the individual, by required attendance at meetings, and by other methods, is a factor of control especially if the training is given periodically or at frequent intervals.” Minn. R. 3315.0555, subp. 3(I).

When Brown first began her employment with relator, she received on-the-road training personally from relator’s president. This training provided Brown with the opportunity to see how to manage customer objections, perform sales presentations, and handle money. More recently, relator provided Brown with training manuals that contained sales presentations and a standard sales pitch Brown was encouraged to use.

6. *Amount of time.*

If the worker must devote full time to the activity, control is indicated. Full time does not necessarily mean an eight-hour day or a five- or six-day week. Its meaning may vary with the intent of the parties, the nature of the occupation and customs in the locality. Full-time services may be required even though not specified in writing or orally. For example, a

person may be required to produce a minimum volume of business which compels the person to devote all working time to that business, or the person may not be permitted to work for anyone else.

Minn. R. 3315.0555, subp. 3(J).

Brown testified that she had to devote full time to her sales activity.

7. *Tools and materials.*

The furnishing of tools, materials, and supplies by the employer is indicative of control over the worker. When the worker furnishes these items it indicates a lack of control, but lack of control is not indicated if the individual provides tools or supplies customarily furnished by workers in the trade.

Minn. R. 3315.0555, subp. 3(K).

Brown was required to use tools and materials provided by relator. The marketing representative agreement provided that “[Brown] shall use only [relator’s] prescribed contracts and order forms, it being expressly understood that the authority of [Brown] is directed to the solicitation of orders and contracts, and forwarding the same immediately to [relator’s] office for acceptance or rejection.”²

The ULJ’s finding that Brown was an employee of relator is supported by substantial evidence. Specifically, it is supported by evidence that relator had the right to control the manner and means of Brown’s performance and the right to discharge Brown without incurring liability. That relator had the right to discharge Brown without incurring liability is supported by the plain language of the marketing representative

² The marketing representative agreement also specified that “[a]ll checks received from customers, must be made payable to [relator]” rather than to Brown.

agreement. That relator had the right to control Brown is supported by the control factors discussed above.

Affirmed.