STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1337

Kathryn Porten,
Respondent,

vs.

PepprTech, Inc.,
Relator,

Department of Employment and Economic Development,
Respondent.

Filed August 13, 2012
Affirmed
Collins, Judge[*]

Department of Employment and Economic Development
File No. 27466582-3

Kathryn Porten, Hugo, Minnesota (pro se respondent)

Steven R. Hedges, James H. Gilbert Law Group, PLLC, Eden Prairie, Minnesota (for relator)

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

Considered and decided by Peterson, Presiding Judge; Chutich, 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.

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

COLLINS, Judge

Relator challenges the unemployment-law judge's (ULJ) determination that respondent was relator's employee, not an independent contractor. Relator further argues that the ULJ's decision should have been limited to respondent. Because the ULJ correctly concluded that respondent was relator's employee and that the same was "true for all workers performing similar services with PepprTech, Inc.," we affirm.

FACTS

Respondent Kathryn Porten worked as a project management consultant for relator PepprTech, Inc. from September to December 2010. She was engaged to work on a project for Blue Cross Blue Shield (BCBS), which was expected to last approximately 12-16 weeks.

After the project ended, Porten established a benefit account with respondent Minnesota Department of Employment and Economic Development (DEED). Because PepprTech believed Porten to be an independent contractor and had not filed any wage-detail reports for her, DEED conducted a field audit. The audit resulted in a determination of eligibility on the ground that an employer-employee relationship existed between PepprTech and Porten and that PepprTech was "required to report wages paid to all workers performing similar services." The effect of the determination was that wages paid to Porten could be used to establish an unemployment insurance account and that any unemployment benefits paid would be used in computing PepprTech's future unemployment tax rate.

PepprTech appealed that determination, and a ULJ conducted a de novo hearing. In his decision, the ULJ stated that Porten's services "performed for PepprTech, Inc. from September to December 2010 were performed as an employee, not as an independent contractor; this is also true for all workers performing similar services with PepprTech, Inc." PepprTech filed a request for reconsideration, and the ULJ affirmed his initial decision. This certiorari appeal followed.

D E C I S I O N

I.

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision are "(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d) (2010). Minnesota courts have defined substantial evidence 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 ULJ determined that Porten was PepprTech's employee, not an independent contractor, and that this was also true for all workers performing similar services for

PepprTech. "Whether an individual is an employee or an independent contractor is a mixed question of law and fact." *St. Croix Sensory Inc., v. Dep't of Emp't and Econ. Dev.*, 785 N.W.2d 796, 799 (Minn. App. 2010). "We review factual findings in the light most favorable to the decision." *Id.* "But where the facts are not disputed, a legal question is presented." *Id.* "We review questions of law de novo." *Id.*

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 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) (2010). Unemployment taxes are those money payments "to be paid into the trust fund by an employer on account of paying wages to employees in covered employment." *Id.*, subd. 25 (2010). "The remuneration of independent contractors does not constitute taxable wages covered by the unemployment-benefits law." *St. Croix Sensory*, 785 N.W.2d at 799.

Traditionally, five factors are considered to determine whether a worker 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.* at 800 (quotation omitted). "Of these five factors, the two most important are the right or the lack of the right to control the means and manner of performance, and the right or the lack of the right to discharge the worker without incurring liability." *Id.* (quotation omitted). "Finally, it is well settled that the nature of the relationship of the

parties is to be determined from the consequences which the law attaches to their arrangements and conduct rather than the label they might place upon it." *Id.* (quotation omitted). "Therefore, whether the parties have entered into a contract defining their relationship is not determinative." *Id.* "In employment-status cases, there is no general rule that covers all situations, and each case will depend in large part upon its own particular facts." *Id.*

Control Factor

PepprTech argues that it "did not exercise the kind of control over the 'means and manner of performance' of Ms. Porten to make the relationship one of employment." "The right of control is the most important factor for determining whether a worker is an employee." *Id.* "The determinative right of control is not merely over *what* is to be done, but primarily over *how* it is to be done." *Id.*, (quotation omitted).

PepprTech engaged Porten to serve as a project management consultant for BCBS. Porten performed the majority of the work on this project at BCBS's facility, though she performed a small part of the work from her home. Porten was expected to work approximately 30 hours per week and to frequently attend meetings with PepprTech's owner and their BCBS contact where they set forth their plans for the project. PepprTech also expected Porten to be on site as needed, in order to have face-to-face contact with BCBS personnel and to ensure that the project went smoothly. The ULJ noted that "[t]he pace was set by [BCBS], not Porten, and Porten was required to report her progress to both [BCBS] and to PepprTech." And PepprTech's owner stated at the hearing that he

wanted to keep his clients happy and that he "was responsible for the contract and to make sure that we delivered what we contracted to deliver." The ULJ further noted that

> [n]ot only did PepprTech draft the agreements signed by Porten, but in those agreements PepprTech required Porten to not work for the client for at least one year after the end of the project, as well as to assign any and all intellectual property to PepprTech that may be created during the course of the project.

In addition, Porten was not authorized to hire a subcontractor to perform her work; PepprTech did not simply care that the work got done, but specifically cared who performed it. Porten worked under PepprTech's authority, followed its instructions as to the scope and type of work performed, and took guidance from BCBS's contact as directed by PepprTech. As the ULJ noted: "PepprTech had the right to control the means and manner of Porten's performance; deferring that control to client BCBS is less significant than the fact that Porten did not make the decision to defer this control, PepprTech did."

PepprTech relies heavily on the fact that the parties signed a subcontractor agreement that identified Porten as an "Independent Contractor," and that Porten believed herself to be an independent contractor. But "it is well settled that the nature of the relationship of the parties is to be determined from the consequences which the law attaches to their arrangements and conduct rather than the label they might place upon it." *Id.* (quotation omitted). Because our analysis indicates that PepprTech maintained control over the means and manner of Porten's performance, it is irrelevant what the

parties believed. The ULJ did not err by concluding that this factor supported an employee-employer finding.

Discharge-Without-Liability Factor

The right to discharge a worker without incurring liability is the other most important factor in determining whether a worker is an employee or independent contractor. *Id.* It is undisputed that PepprTech could terminate Porten at any time and for any reason. If the project was completed early, or for cause, PepprTech could terminate the relationship without notice. Otherwise, the contract required 30-days' notice, but carried no specific penalty for breach of this notice requirement. PepprTech's owner testified at the hearing that it would have incurred no penalty for terminating the contract early.

On appeal, however, PepprTech argues that because "failure to give the 30-day notice could result in a liability to PepprTech . . . in excess of $10,000, clearly a significant amount," it would have incurred a penalty for terminating Porten.[1] First, this argument contradicts PepprTech's testimony before the ULJ, where its owner stated that early termination would not result in a penalty. Therefore, it is not clear that this argument should be considered. *See* Minn. Stat. § 268.105, subd. 7(a) (2010) (stating that this court reviews "the unemployment law judge's decision"); *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (stating that appellate review is limited to issues raised and addressed below). Moreover, this liability, if any, would have been based on

[1] PepprTech calculated its liability (in excess of $10,000) by multiplying Porten's hourly wage ($86.40) by the number of hours she worked per week (30) by the number of weeks (4).

PepprTech's failure to provide notice, not on its termination of the contract. PepprTech was still entitled to terminate the contract without penalty, albeit with notice in certain circumstances. And requiring notice before termination it is not uncommon in the employment context.

If BCBS cancelled the project, if it ended early, or if PepprTech simply decided to cancel the contract, Porten was, at most, entitled to 30-days' notice. Porten was like any other hourly employee whose employment could be terminated. This factor therefore weighs in favor of an employee-employer finding.

In sum, PepprTech controlled the means and manner of Porten's performance and had the right to discharge her without incurring liability. These two factors are given the most weight when determining employment status. Additionally, Porten was paid hourly, rather than by the job, and BCBS provided Porten with a laptop to use for the project. We agree with the ULJ's decision, based on the totality of the circumstances, that Porten's services for PepprTech "were performed as an employee, not as an independent contractor."

II.

PepprTech argues that the ULJ erred by extending his decision that Porten was an employee to "all workers performing similar services with PepprTech," essentially arguing that the record does not indicate that any such issue was presented to the ULJ or that the ULJ had any factual basis to make that determination in this case involving only Porten, PepprTech, and DEED. DEED also urges this court to reverse the ULJ's decision on this point, describing it as "boilerplate" language that should be discouraged.

This court must review the ULJ's decision and may reverse only if, in relevant part, the findings are unsupported by substantial evidence in the record or the ULJ erred as a matter of law. Minn. Stat. § 268.105, subd. 7(a), (d). The record shows that the ULJ specifically stated at the start of the hearing that the issues were whether Porten was "an independent contractor or an employee and therefore, also whether workers performing similar services would be considered the same." Both of these issues had been decided adversely to PepprTech in the determination of eligibility from which PepprTech had appealed. At the hearing, PepprTech's president testified as to the type of consultants the company uses to perform the company's work; describing them as independent contractors who are primarily business entities, but from time to time PepprTech hires independent contractors, such as Porten, in their individual capacity. After the ULJ issued his initial decision, PepprTech requested reconsideration, arguing that the ULJ erred in ruling that Porten was an employee and that workers performing similar services would also be considered employees, and the ULJ affirmed. Because (1) the issue was explicitly raised and decided by the ULJ; (2) the record contains substantial evidence showing that, as with Porten, PepprTech occasionally hires workers in their individual capacity to perform similar work for PepprTech; and (3) it is not shown that the ULJ erred as a matter of law, we must affirm the ULJ's decision on this issue as well.

Affirmed.