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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1165**

Amy Stevens,
Respondent,

vs.

Smart Parts Automotive, Inc.,
Relator,

Department of Employment and Economic Development,
Respondent.

**Filed March 27, 2017
Affirmed
Rodenberg, Judge**

Department of Employment and Economic Development
File No. 34358019-3

Amy Stevens, Rosemount, Minnesota (pro se respondent)

Brandon M. Schwartz, Michael D. Schwartz, Schwartz Law Firm, Oakdale, Minnesota (for relator)

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

Considered and decided by Cleary, Chief Judge; Ross, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Relator challenges a determination by an unemployment law judge (ULJ) that respondent sales representative was an employee, and not an independent contractor. Relator also challenges the ULJ's decision not to order an additional hearing on reconsideration. We affirm.

FACTS

Relator Smart Parts Automotive, Inc., is an auto-parts distribution company, owned by Dillon Saxhaug, and operated from Saxhaug's home. Relator advertises parts on a website, and customers call relator's telephone number to place orders and make purchases. Pro se respondent Amy Stevens was hired by relator in September 2014 to answer calls concerning sales, customer service, and warranty issues.

In December 2015, relator terminated Stevens's employment. Stevens applied for unemployment-insurance benefits. Respondent Department of Employment and Economic Development (DEED) determined that Stevens was eligible for benefits. Relator appealed, and an evidentiary hearing was held before a ULJ. Following the hearing, the record was left open for additional written submissions, and both Stevens and relator submitted additional documents.

The ULJ found that Stevens initially worked at Saxhaug's home, where she was trained by Saxhaug about the merchandise, how she should answer the phones, and how she should conduct sales calls. The parties had no written contract. Stevens's pay was entirely commission-based. Stevens used her own cellular phone to take calls. She was

required to purchase a new cellular phone in order to accommodate relator's call-forwarding system. Relator did not provide any materials or tools except for the use of the company's call-forwarding system. In the spring of 2015, Stevens and a second salesperson created a schedule for when each would be primarily responsible to take sales calls. If the first person did not answer, the call would be forwarded to the second salesperson. Saxhaug expected the calls to be answered at all times. Stevens was terminated when she was unavailable to go to Saxhaug's home to help with a business-related project. The ULJ concluded that Stevens had been relator's employee and was eligible for benefits.

Relator requested reconsideration of the determination of employment, and submitted additional affidavits supporting its contention that Stevens was an independent contractor and that she had testified falsely during the hearing. The ULJ affirmed the initial decision without ordering an additional evidentiary hearing.

This certiorari appeal followed.

D E C I S I O N

I. Employee or independent contractor

"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 & Econ. Dev.*, 785 N.W.2d 796, 799 (Minn. App. 2010). We review a ULJ's factual findings in the light most favorable to the decision, and we will not disturb those findings if there is "evidence in the record that reasonably tends to sustain them." *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016) (quotation omitted). Whether an employment relationship exists is

a legal question. *Neve v. Austin Daily Herald*, 552 N.W.2d 45, 48 (Minn. App. 1996). We therefore review the legal question de novo. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). On review, we may reverse or modify the ULJ’s decision if the substantial rights of the relator have been prejudiced by findings or conclusions that are unsupported by substantial evidence in the record. Minn. Stat. § 268.105, subd. 7(d)(5) (2016).

We consider five factors to decide whether an individual is an employee or an independent contractor: (A) which party has the right (or lack of right) to control the means and manner of performance; (B) the right of the employer to discharge the worker without incurring liability for damages;¹ (C) the mode of payment; (D) the furnishing of materials or tools; and (E) the control of the premises where the services are completed. Minn. R. 3315.0555, subp. 1 (2015 & Supp. 2016); *St. Croix Sensory Inc.*, 785 N.W.2d at 800. While we consider the totality of the circumstances, the right to control the means and manner of performance and the right to discharge without incurring liability are the two most important factors. *Moore Assocs., LLC v. Comm’r of Econ. Sec.*, 545 N.W.2d 389, 393 (Minn. App. 1996); Minn. R. 3315.0555, subp. 1.

¹ After relator petitioned for a writ of certiorari, Minnesota Rule 3315.055, subpart 1(B), was modified to state: “the right to discharge the worker without incurring liability *for damages*.” Minn. R. 3315.055, subp. 1(B) (Supp. 2016) (emphasis added); see 2016 Minn. Laws ch. 189, art. 10, § 7(a) at 1040. The ULJ used the 2015 standard: “the right to discharge the worker without incurring liability.” See Minn. R. 3315.0555 subp. 1(B) (2015).

Relator argues that the five factors weigh in favor of a finding that Stevens was an independent contractor of relator. The ULJ made express findings concerning all five factors.

Right to control the means and manner of performance

Control is defined as 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 (2015). “The determinative right of control is not merely over *what* is to be done, but primarily over *how* it is to be done.” *St. Croix Sensory Inc.*, 785 N.W.2d at 800 (quotation omitted).

Stevens testified and provided written statements that relator trained her concerning merchandise being sold and how to conduct calls. The ULJ found her testimony credible. Stevens testified that she was not free to provide certain services to customers without receiving relator’s permission. While Stevens may have been able to complete some of her duties independently, the degree of relator’s involvement with how and when Stevens should take calls, as well as relator’s requirement that Stevens receive permission in order to take certain actions, indicates a right to control. We agree with the ULJ’s determination that this factor favors a finding of employment.

Right to discharge without incurring liability

Generally, “an employer may terminate an employee for any reason or for no reason.” *Kratzer v. Welsh Cos.*, 771 N.W.2d 14, 18 n.7 (Minn. 2009). An agreement with an independent contractor typically cannot be terminated without liability if the contractor is fulfilling the terms of the contract. *St. Croix Sensory Inc.*, 785 N.W.2d at 803.

The ULJ found that, after termination, relator would only be liable to Stevens for commission on sales already completed. The record supports this finding. Relator cites *St. Croix Sensory Inc.* for the proposition that, because relator was still obligated to pay Stevens for commissions owed, this factor favors a finding of independent-contractor status. Relator misreads *St. Croix Sensory Inc.*, which involved an obligation to pay for work not completed at the time of termination. *Id.* at 804. Here, relator only owed Stevens for sales actually completed at the time of termination. Stevens makes no claim that relator owes her more than commissions already earned. We agree with the ULJ's determination that this factor favors a finding of employment.

Mode of payment

Relator argues that this factor favors an independent-contractor status because Stevens was paid straight commissions and payments were not characterized as wages for tax-reporting purposes. Worker responsibility for tax obligations may be indicative of independent-contractor status. *See id.* (examining tax-liability obligations). But payment based solely on commission is also present in employer-employee relationships. *See State by Spannaus v. Mecca Enters., Inc.*, 262 N.W.2d 152, 154-55 (Minn. 1977) (recognizing an employer-employee relationship where employees were paid solely on commission); *Boland v. Morrill*, 270 Minn. 86, 93, 132 N.W.2d 711, 716 (1965) (recognizing an employer-employee relationship where salesman was paid on commission). We agree with the ULJ that this factor is neutral.

Furnishing of materials or tools

On appeal, respondent DEED concedes that the furnishing of tools or materials does not favor a finding of employment in this case, because it is undisputed that Stevens provided her own phone, computer, and printer without reimbursement from relator. We agree. This factor suggests independent-contractor status.

Control of premises

As to the control of the premises where work was to be performed, the business operated from Saxhaug's home. Stevens was expected to be physically present "at work" on some occasions, as indicated by her termination for declining to meet with Saxhaug at his home. There is evidence in the record that respondent spent the early months of her employment working from Saxhaug's home, but was later able to take phone calls from various locations. Weighing the conflicting evidence concerning the amount of work Stevens was required to perform from Saxhaug's home against the finding that Stevens was terminated because she was not physically present for a work-related project, the ULJ concluded that this factor weighed in favor a finding of employment. The record supports the ULJ's conclusion.

Balance of the factors

The two most important factors favor a finding of employment. Only one factor favors a finding of independent-contractor status. On balance, the factors favor a finding of an employer-employee relationship.

To the extent that relator argues that the ULJ's conclusion to the contrary was not based on substantial evidence, we disagree. Our review of the record reveals support for

the ULJ's findings of fact and legal conclusions. The ULJ specifically found Stevens's testimony to be more "plausible" than Saxhaug's testimony, and found that it more credibly corresponded with the written submissions. Of course, had the ULJ made different factual findings, a different conclusion might follow. But we give deference to the ULJ's credibility decisions. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006); *see also* Minn. Stat. § 268.105 subd. 1a(a) (2016) (requiring a ULJ to explain findings concerning witness credibility if it has a significant effect on the outcome of a decision).

II. Additional hearing

Relator argues that the ULJ should have held an additional evidentiary hearing after relator presented affidavits contending that Stevens's testimony was likely false. We give deference to the ULJ's decision not to hold an additional hearing, and will reverse that decision only for an abuse of discretion. *Skarhus*, 721 N.W.2d at 345.

An additional evidentiary hearing is appropriate if the relator shows that the evidence submitted at the initial hearing was "likely false" and had an effect on the outcome of the hearing. Minn. Stat. § 268.105, subd. 2(c)(2) (2016). Although Stevens's testimony was contradicted by some of the information presented in the affidavits, the ULJ concluded that the new information failed to establish that the evidence relied upon by the ULJ was "likely false." The ULJ had heard and considered the testimony at the initial hearing along with the parties' earlier written submissions and was best positioned to gauge the significance of the new evidence. We see no abuse of the ULJ's discretion in denying an additional hearing.

Affirmed.