COURT OF APPEALS DECISION DATED AND RELEASED

MAY 20, 1997

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. 96-3515

STATE OF WISCONSIN | **IN COURT OF APPEALS DISTRICT III**

WILLIAM J. RHODE, D/B/A BEANSNAPPERS COUNTRY ROSE BAR,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRIAL REVIEW COMMISSION AND DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

DEFENDANTS-RESPONDENTS.

RECEIVED
MAY 19 1997
ENFORCEMENTS SECTION

APPEAL from an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

Before Cane, P.J. and LaRocque and Myse, J.J.

LaROCQUE, J. William J. Rhode, d/b/a Beansnappers Country Rose Bar, appeals an order affirming a Labor and Industry Review Commission's

determination that Beansnappers owes unemployment compensation contributions for exotic dancers who entertained customers at Beansnappers. LIRC determined that the dancers were subject to Beansnapper's direction and control and were therefore employes within the meaning of § 108.02(12), STATS. We affirm.

Beansnappers is a tavern in Outagamie County featuring nude entertainment. Beansnappers utilizes five nude dancers each night, with each dancer performing three to five sets lasting approximately twenty minutes each. The dancers are paid $400 per week if the dancer is from Wisconsin and $450 per week if the dancer is from out of state. The weekly payment is set by Beansnappers and is ordinarily not negotiable.

If a dancer accepts work at Beansnappers, she is given an entertainer registration form, which must be filled out. The registration form details Beansnappers' "rules and regulations" as follows:

> 1. NO SOLICITING OF DRINKS OR TABLE DANCES.
>
> 2. NO TABLE DANCES WILL BE GIVEN ON STAGE FOR TIPS, THIS MEANS WHILE YOU ARE ON STAGE THERE WILL BE NO RUBBING PARTS OF YOUR BODY IN CUSTOMERS FACE FOR TIPS. KEEP BOTH FEET ON STAGE AT ALL TIMES. **NO EXCEPTIONS!**
>
> 3. DANCERS ARE ALLOWED ONLY 10 MINUTES IN THE DRESSING ROOM AFTER EACH SET, FINES WILL BE ISSUED AFTER THE FIRST WARNING.
>
> 4. ALL DANCERS MUST BE AT THE CLUB AND READY TO GO ON STAGE AT THEIR DESIGNATED STARTING TIME, IF YOU ARE LATE, 1ST **OFFENSE $25.00 FINE, 2ND OFFENSE - $25.00 FINE AND $25.00 EACH TIME AFTER.**
>
> 5. ALL SETS ARE 20 MINUTES IN DURATION. UNLESS OTHERWISE OK'D BY MANAGEMENT.

6. OIL OR PAINT MAY BE USED, BUT YOU MUST USE A BLANKET AND STAY ON THE BLANKET.

7. ALL DISAGREEMENTS BETWEEN DANCERS AND EMPLOYEES WILL BE REPORTED TO BOB OR BILL ONLY. FIGHTING WILL RESULT IN DISMISSAL WITHOUT PAY.

9. IF YOU ARE SICK, YOU MUST CALL IN BY NOON THAT DAY.

10. RESPECT OTHER DANCERS BY NOT TALKING ABOUT THEM OR DISTRACTING FROM THE STAGE WHILE OTHERS ARE PERFORMING.

11. DISCUSSION OF PAY IS LIMITED BETWEEN MANAGEMENT AND DANCERS, DANCERS **WILL NOT DISCUSS PAY WITH OTHER DANCERS.**

12. ABSOLUTELY NO DRUGS OF ANY KIND ALLOWED ON THE PROPERTY OR IN THE DANCE CLUB. **VIOLATORS WILL BE DISMISSED IMMEDIATELY WITHOUT PAY AND BANNED FROM THE CLUB AND AUTHORITIES MAY BE NOTIFIED.**

13. **DANCERS WILL NOT FRATERNIZE WITH MANAGEMENT OR EMPLOYEES OF THE CLUB DURING WORKING HOURS. YOU ARE HERE TO ENTERTAIN OUR CUSTOMERS ONLY.** ***FINES WILL RESULT.***

14. NO BOYFRIENDS OR HUSBANDS IN CLUB DURING WORKING HOURS.

15. LIMIT 2 PHONE CALLS PER NIGHT WITH 2 MINUTE TIME LIMIT. EMERGENCIES ARE AN EXCEPTION. *FINES WILL BE ISSUED WITHOUT WARNING.*

16. COSTUMES WILL REMAIN ON FOR 1ST SONG.

17. DO NOT TAKE CUSTOMERS ABUSE INTO YOUR OWN HANDS. CONSULT MANAGEMENT, OTHERWISE *FINES WILL RESULT.* (Emphasis in original.)

Prior to signing the registration form, the bartender on duty explains these rules to the dancer. The rules state that violations will result in warnings, fines or dismissal. Beansnappers monitored the dancers' conduct to ensure they conformed to these rules. Although not included on the registration form, Beansnappers also requires each dancer to remove all clothing and dance fully nude. Beansnappers also establishes the dancers' rotation each night.

In 1994 the Wisconsin Department of Industry, Labor and Human Relations issued an initial determination assessing Beansnappers for additional unemployment compensation taxes for the last three quarters of 1993 and the first quarter of 1994. This ruling was premised upon DILHR's belief that the dancers featured by Beansnappers were employees within the meaning of § 108.02(12), STATS. Beansnappers filed a timely appeal, and a hearing was held before an administrative law judge who issued a decision affirming the initial determination. That decision was appealed to LIRC, which affirmed DILHR. Finally, Beansnappers brought an action for judicial review of the LIRC decision. The court affirmed LIRC, and this appeal ensued.

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 a dancer is an employee within the meaning of § 108.02(12)(a), STATS., is a mixed question of fact and law, requiring the application of a statutory standard to findings of fact. *See* ***Larson v. LIRC***, 184 Wis.2d 378, 385-86, 516 N.W.2d 456, 459 (Ct. App. 1994). We will uphold LIRC's findings of fact if they are supported by credible and substantial evidence in the record. Section 102.23(6), STATS. Given those facts, however, the determination 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).

A court is not bound by an agency's conclusions of law. ***UFE, Inc. v. LIRC***, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996). However, in some circumstances an agency's legal conclusions are entitled to deference. 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) that the interpretation of the agency is one of long-standing; (3) that the agency employed its expertise or specialized knowledge in forming the interpretation; and (4); that the agency's interpretation will provide uniformity and consistency in the application of the statute.

Id. at 284, 548 N.W.2d at 61 (quoting ***Harnischfeger Corp. v. LIRC***, 196 Wis.2d 650, 660, 539 N.W.2d 98, 102 (1995)). We will review the agency's legal conclusions de novo when the issue is clearly one of first impression or when the agency's position has been so inconsistent so as to provide no real guidance. ***Id.*** at 285, 548 N.W.2d at 62. The final level of deference, the due weight standard, is appropriate when the agency has some experience in an area, but has not developed the expertise that necessarily places it in a better position to make judgments regarding the interpretation of a statute than a court. ***Id.*** at 286, 548 N.W.2d at 62.

Applying the four factors discussed in *UFE*, we conclude that the agency's legal conclusions in this case are entitled to great weight. First, the legislature has charged LIRC with administration of the worker's compensation statute. Second, the record reveals that in five decisions spanning eleven years

LIRC has consistently determined that exotic dancers are employees for unemployment compensation purposes. We conclude that this interpretation of the statute is sufficiently long-standing to warrant great weight deference. Third, LIRC applied its extensive expertise in reaching its conclusion in this case. This court has previously held that LIRC has "extensive experience" in interpreting § 108.02(12), STATS. ***Lifedata Medical Servs. v. LIRC***, 192 Wis.2d 663, 671-72, 531 N.W.2d 451, 455 (Ct. App. 1995). Finally, LIRC's interpretation in this case will provide uniformity and consistency in the application of the unemployment compensation statute to exotic dancers.

An individual is not an employee under § 108.02(12)(b), STATS., if the employer lacked control and direction over the individual and if the individual is engaged in an independently established trade, business or profession. ***Keeler***, 154 Wis.2d at 631, 453 N.W.2d at 904. In this case, LIRC determined that Beansnappers failed to meet its burden of proving that it lacked direction and control over the dancers. *See **id.*** (Once LIRC establishes that the individual in question performed services to the employer for pay, the burden shifts to the employer to establish that the individual is nevertheless not an employee.). LIRC's findings on whether Beansnappers possessed sufficient control over the dancers are findings of fact that are controlling on this court if supported by credible and substantial evidence. *See* § 102.23(6), STATS. There is substantial credible evidence to support LIRC's findings.

The registration form details numerous rules and regulations designed to control the conduct and performance of the dancers. These rules control the performance of the dancers in significant ways: Dancers are not allowed to solicit drinks or table dances, they must remain on stage for their entire set, which must last twenty minutes, they may not touch customers during their

set, they must use blankets if their set includes oils or paints, they must leave costumes on for the first song, and ultimately they must remove all clothing and dance fully nude.

Other conduct of the dancers is also strictly controlled by the rules. Dancers are only allowed ten minutes in the dressing room after a set. Boyfriends and husbands are not allowed in the club during working hours. Dancers must arrive at a certain time, which was set by the club, and if sick must notify Beansnappers by noon. Dancers may not discuss their pay with other dancers, may not fraternize with other employees, and may make only limited phone calls each night. Finally, disagreements with customers, employees or other dancers must be redressed only through Beansnappers' management.

A dancer at Beansnappers must agree to follow these rules, or the dancer will not be employed. These rules were carefully explained to each dancer before accepting employment with Beansnappers. In addition, Beansnappers monitors the conduct and performances of the dancers to ensure compliance. Violations may result in warnings, fines or even dismissal. We conclude that these rules significantly control not only the dancers' performance but also their overall conduct while at Beansnappers. We therefore conclude that there is sufficient and credible evidence from which LIRC could find that Beansnappers possessed significant control and direction over the dancers.

Giving great weight to LIRC's legal conclusions and deference to its findings means that the dancers were Beansnappers' employees under the plain language of § 108.02(12)(a), STATS. Because we conclude that Beansnappers exercised sufficient control and direction over the dancers, we need not address whether the dancers were engaged in an independently established trade or

profession. *See* ***Keeler***, 154 Wis.2d at 631, 453 N.W.2d at 904 (If employer fails to meet the burden of proof on either the control test or the independently established business test, the employer/employee relationship is established.).

Beansnappers recites many other facts and circumstances they argue tend to show that the dancers were not controlled by Beansnappers. However, our task is not to look for evidence to support a decision LIRC could have, but did not, make. ***William Wrigley, Jr. Co. v. DOR***, 153 Wis.2d 559, 576, 451 N.W.2d 444, 451 (Ct. App. 1989). Beansnappers also attempts to analogize the facts of this case to facts present in other cases interpreting § 108.02(12), STATS. Because we have already determined that LIRC's findings of fact are supported by substantial and credible evidence, it is not necessary to address how the facts of other cases are similar or different from the facts of this case.

By the Court.—Order affirmed.

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