FILED
10-21-2019
CIRCUIT COURT
DANE COUNTY, WI
2019CV001043

BY THE COURT:

DATE SIGNED: October 21, 2019

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

Plaintiff,

v.

Case No. 19CV1043

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, *et al.*,

Defendants.

DECISION AND ORDER ON JUDICIAL REVIEW

After losing her job, Regina R. Rhyne began driving for Lyft, Inc., a ride-hailing company that Wisconsin classifies as a "transportation network company." She filed for unemployment benefits. And the Department of Workforce Development (DWD) determined that the payments she earned while driving for Lyft must be reported for unemployment-compensation purposes because Rhyne, according to the department, was an "employee" under the Unemployment Compensation Act, Wis. Stat. Ch. 108. The Labor Industry Review Commission (LIRC) disagreed and concluded that Rhyne was not an "employee." The DWD now seeks judicial review of the commission's decision.

The court will affirm. Although LIRC's decision was made unduly complicated by the fact that it relied on a statute outside the unemployment-compensation context, *see* Wis. Stat. § 440.41, LIRC's decision also relied on a previous administrative decision that applied Wis.

Stat. § 108.02(12). Section 108.02(12) is a section of the Unemployment Compensation Act that states that those who are (1) "free from [the] control" of an employer, *id.* § 108.02(12)(bm)1., and (2) economically independent of that employer, *id.* § 108.02(12)(bm)2., are not employees for the purposes of unemployment compensation. The facts in this case supports the conclusion that Rhyne was free from the control and economically independent of Lyft, so the court will not set aside the commission's decision.

BACKGROUND

The record in this case does not provide a full background into Regina Rhyne's loss of employment. As best as the court can tell, Rhyne suffered a loss of employment sometime before August 2018. The loss of employment, and the subsequent filing for unemployment benefits related to that loss, is not the subject of review in this case. This case centers around when Rhyne started driving for Lyft.

Rhyne began driving for Lyft on August 18, 2018. R. 160. Lyft is a ride-hailing company that Wisconsin classifies as a "transportation network company." *See* Wis. Stat. § 440.41. What that designation means is a source of controversy in this case, as indicated below. But suffice it to say that the company mainly operates through a smartphone application, or "app," which people can use to request rides from designated Lyft drivers. Dkt. 16, at 51 (affidavit from a Lyft paralegal). A person becomes a Lyft driver by completing an application process (not the same as the smartphone "app") and agreeing to the company's terms of service. *Id.* When a user of the "app" requests a ride, the nearest designated driver can accept or decline. *Id.*

After becoming a designated Lyft driver, Rhyne filed for unemployment benefits. The DWD determined that Rhyne's earnings from Lyft must be reported to the department because she qualified as an "employee" of Lyft under the Unemployment Compensation Act, Wis. Stat.

Ch. 108. R. at 145. The determination meant that Rhyne's weekly unemployment take-home could be affected because her earnings from Lyft was considered "wages" under the Act. (The definition of "wages" under the Act is not at issue in this case.)

LIRC disagreed. R. at 2. The commission's decision was multilayered and will be further fleshed out below as it becomes relevant. But the upshot of LIRC's decision was that Rhyne was not an employee under the Unemployment Compensation Act because "Lyft simply provided the technology platform that [Rhyne] and riders used to connect with each other." *Id.* at 4. The commission's decision was based on the following findings of fact.

- Lyft is a licensed "transportation network company" licensed to operate in Wisconsin. Dkt. 16, at 51 (affidavit from a Lyft paralegal).
- Lyft operates through a smartphone application ("app") which connects people seeking automobile transportation services with designated drivers willing to provide those services. *Id.*
- To use Lyft's smartphone application, riders and drivers download the app onto their smartphones. *Id.*
- Lyft has tutorials that explain how the app works. Dkt. 16, at 23:22-24 (Rhyne's testimony). Lyft drivers are not required to view those tutorials before becoming designated drivers. *Id.* at 25:1-7.
- People wishing to use Lyft's app must accept Lyft's terms of service. Dkt. 16, at 51.
- A person seeking to drive for Lyft must agree to Lyft's terms of service and complete an application (different from the smartphone app) through Lyft's app and pass a criminal-background check. *Id.* The terms-of-service agreement requires the driver to have a current and valid driver's license, carry automobile insurance that conforms to state law, and to maintain their vehicle. *Id.* The terms-of-service agreement contains a provision that holds Lyft harmless for acts of the Lyft driver. *Id.*

As for Regina Rhyne's relationship with Lyft, the commission found the following facts.

- Regina Rhyne started driving for Lyft on August 18, 2018. R. 160. When driving for Lyft, Rhyne uses her own car. Dkt. 16, at 21:16-18 (Rhyne's testimony). She is not reimbursed for any costs associated with maintaining her car. *Id.* at 23:3-5.

For every ride that Rhyne completes, Lyft takes 25 percent of the fare. *Id.* at 22: 16-18.

- Rhyne's chooses the times that she drives for Lyft. *Id.* at 30:18-25. She also choses the area, *id.* at 34:24-15, 35:1-4, and the routes to take, *id.* at 28:5-16. The only time she sends reports to Lyft is when a rider has been delivered to the requested location. *Id.*at 32:5-9; Dkt. 16, at 51. The report is sent through Lyft's app.

- Rhyne can use other smartphone apps, like Uber, to provide rides, but she chooses not to. Dkt. 16, at 46:4-8.

The DWD filed a complaint for judicial review on April 15, 2019.

ANALYSIS

Whether Rhyne is an employee under the Unemployment Compensation Act is a mixed question of law and fact. The court upholds LIRC's factual findings if they are supported by "credible and substantial evidence." *Am. Mfrs. Mut. Ins. Co. v. Hernandez*, 2002 WI App 76, ¶ 11, 252 Wis. 2d 155, 642 N.W.2d 584. But whether those factual findings support the conclusion that Rhyne is an employee is a question of law that the court reviews de novo. *See Drivers Local No. 695 v. Labor & Indus. Review Comm'n*, 154 Wis. 2d 75, 82, 452 N.W.2d 368 (1990). Under the old caselaw, de novo meant that that the court would still accord deference to an agency's interpretation of a statute when certain factors were met. *See Cargill Feed Div./Cargill Malt & AIG Cas. Co. v. Labor & Indus. Review Comm'n*, 2010 WI App 115, ¶ 15, 329 Wis. 2d 206, 789 N.W.2d 326. But recently, the Wisconsin Supreme Court has "decided to end [the] practice of deferring to administrative agencies' conclusions of law." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21. Accordingly, the court will give "respectful, appropriate consideration to [] [LIRC's] views," but

the court will exercise independent judgment in deciding whether Rhyne is an employee for unemployment-compensation purposes.[1]

Whether a person is an employee under the Unemployment Compensation Act involves a two-step process. *Keeler v. Labor & Indus. Review Comm'n*, 154 Wis. 2d 626, 631, 453 N.W.2d 902 (Ct. App. 1990). The court first determines whether an individual has performed services for pay. *Id.* The DWD carries the burden of proof on this question. *Id.* If the department meets its burden, the person is presumed to be an employee for purposes of unemployment compensation. *Id.* The burden then shifts to the employer to prove that the person falls under one of the exceptions listed under Wis. Stat. § 108.02(12). *Id.*

LIRC's decision in this case did not address whether the DWD met its burden in demonstrating that Rhyne's work for Lyft was done for pay, so the court will presume that Rhyne is an employee for unemployment-compensation purposes. The next question is whether one of the exceptions to § 108.02(12) applies. Here, LIRC's decision was made unduly complicated by the fact that it did not explicitly rely on exceptions listed in § 108.02(12). Rather, LIRC provided two reasons divorced from § 108.02(12). First, the Wisconsin Legislature, according to LIRC, has explicitly provided that "transportation network companies" like Lyft were "not considered to control, direct, or manage [] participating driver[s]" under the state's

[1] The parties disagree over whether *Tetra Tech*'s mandate that courts give "due weight" to administrative-agency decisions applies in this case. The DWD maintains that the court owes no deference to LIRC's decision in this case because due-weight deference was derived from Chapter 227 (the state's Administrative Procedure Act) and this case arises under Chapter 108 (the state's Unemployment Compensation Act). LIRC maintains that *Tetra Tech*'s lead opinion explicitly states that *Tetra Tech* "applies to judicial review of *all* administrative agency decisions." 2018 WI 75, ¶ 11 n.8, 382 Wis. 2d 496, 914 N.W.2d 21 (emphasis added). The debate is largely academic because "[d]ue weight is a matter of persuasion, not deference." *Id.* ¶ 78 (internal quotations omitted). So whether the court gives due weight (or not) to LIRC's decision results in the same standard of review: LIRC's decision in this case is considered a matter of persuasion, not deference.

licensing statute for ride-hailing companies. *See* Wis. Stat. § 440.41(2). And second, a previous LIRC decision—*Ebenhoe v. Lyft In.,* UI Dec. Hearing No 16002409MD (LIRC Jan. 17, 2017)—had already found that Lyft drivers were not employees. The parties in this case spend a considerable amount of time addressing these issues.

The court need not decide whether § 440.41(2) applies to unemployment-compensation cases. As stated above, LIRC's decision in this case partly relied on *Ebenhoe*, which applied § 108.02(12). Section 108.02(1) is a section of the Unemployment Compensation Act, so the court can apply that section here. Applying the section, the court concludes that Rhyne is *not* an employee of Lyft for the purposes of unemployment compensation.

A. Wis. Stat. § 108.02(12)

As stated above, § 108.02(12) states that those performing services for pay are considered "employees" under the Unemployment Compensation Act. The section has a variety of exceptions, the most relevant one in this case being the one listed under Wis. Stat. § 108.02(12)(bm). Under subsection (bm), a person is not considered an employee if the person is (1) free from the control or direction of the employing unit, and (2) economically independent from that employing unit. Wis. Stats. §§ 108.02(12)(bm)1., 108.02(12)(bm)2. (Lyft being the employing unit in this case.) Both conditions must be met in order for the person to be considered not an employee. *Id.* § 108.02(12)(bm).

1. Free from the control or direction of the employing unit.

A person is considered free from the control and direction of the employing unit if the following balance of factors are met. Those factors are:

- The individual is required to comply with instructions concerning how to perform the services.

- The individual receives training from the employing unit with respect to the services performed.
- The individual is required to personally preform the services.
- The services of the individual are required to be performed at times or in a particular order or sequence established by the employing unit.
- The individual is required to make oral or written reports to the employing unit on a regular basis.

Wis. Stat. § 108.02(12)(bm)1. The factors are nonexhaustive, so other factors can be considered.

The balance of factors indicate that Rhyne is free from the control and direction of Lyft. To become a Lyft driver, Rhyne received no formal training. Dkt. 16 at 25:1-7 (Rhyne's testimony stating that Lyft provided tutorials, but they were not mandatory). And when driving for Lyft, Rhyne chose the time, *id.* at 30:18-25, the place , *id.* at 34:24-15, 35:1-4, and the routes to take, *id.* at 28:5-16 ([T]hey don't monitor me. If --- if the app tells me to turn right on Beacon Street, but the [B]eltline is backed up . . . I'm not going right on Beacon and I'm certainly not going on the [B]eltine."). As for whether she was required to make oral or written reports, the only time Rhyne sent reports to Lyft was when a rider had been delivered to the requested location. *Id.* at 32:5-9; Dkt. 16, at 51. The fact that Rhyne got to choose when to drive for Lyft meant that she was not required to send reports on a regular basis.

The DWD contends that several provisions from Lyft's terms-of-service agreement indicates that Lyft directed some of Rhyne's work. Rhyne, for instance, was required to follow the law, make sure her car was in good working order, and stay above a certain "cancellation threshold," which the court takes to mean that Rhyne had to avoid turning down too many rides. But these facts alone are not enough to offset the factors finding in favor of Lyft. All drivers (and people in general) are required to follow the law. And although Lyft approved Rhyne's car, there's nothing in the record that indicates that Lyft instructed Rhyne on *how to maintain* her car.

The fact that Rhyne has to stay above a certain cancellation threshold has more sway. But that does little to offset the fact that Rhyne still had a choice of accepting or declining a certain number of rides in the first place. The DWD's point would be more persuasive if the record indicated that Lyft mandated that drivers accept a certain number of rides *from particular passengers*—i.e., effectively assigning drivers to riders. But a more general requirement that a driver must not turn down too many rides is not enough to tip the balance of factors away from the finding that Rhyne was free from the direction and control of Lyft.

The DWD contends that the consideration of other factors would cut against the finding that Rhyne was free form the direction and control of Lyft. Lyft sets the prices of Rhyne's fare, the DWD says. And Lyft can prevent Rhyne from using the Lyft app if her passengers rate her poorly. At the outset, the latter point is unpersuasive because Lyft has no formal benchmarks for driving. *See* Dkt. 16 at 25:1-7 (Rhyne's testimony stating that Lyft provided tutorials, but that they were not mandatory). Had Lyft had more formal benchmarks—say, a requirement that drivers take the shortest or quickest route—Lyft's ability to "discharge" Rhyne for a failure to meet those benchmarks would indicate a degree of control over her work. *See Lifedata Med. Servs. v. Labor & Indus. Review Comm'n*, 192 Wis. 2d 663, 668-69, 531 N.W.2d 451 (Ct. App. 1995) (concluding that a network of nurses, emergency medial technicians, and paramedics were employees of a company because the company required them to follow an instruction manual and could effectively discharge them). But here, Lyft's "discharge" of Rhyne would be based on the subjective views of her passengers, not Lyft's management. So the fact that Lyft could prevent her from using the Lyft app if her passengers' rated her low does not indicate a level of control over her work. (Rhyne, for instance, could be getting excellent ratings even if her driving was abysmal.)

The former point—that Lyft sets the prices that Rhyne charges her passengers—has more sway. But this fact alone is not enough to offset the other factors which indicate that Rhyne is free from the direction and control of Lyft.

2. Economically independent from the employing unit

The next question is whether Rhyne is economically independent from Lyft. To be considered economically independent, Rhyne must meet at least six of the nine following conditions:

1. The individual advertises or otherwise affirmatively holds himself or herself out as being in business.
2. The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or material in performing the services.
3. The individual operates under multiple contracts with one or more employing units to perform specific services.
4. The individual incurs the main expenses related to the services that he or she performs under contract.
5. The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.
6. The services performed by the individual do not directly relate to the employing unit retaining the services.
7. The individual may realize a profit or suffer a loss under contracts to perform such services.
8. The individual has recurring business liabilities or obligations.
9. The individual is not economically dependent upon a particular employing unit with respect to services being performed.

Wis. Stat. § 108.02(12)(bm)2.

Here, the second, third, and ninth conditions are easily met. Rhyne uses her own car when driving for Lyft, Dkt. 16, at 21:16-18 (Rhyne's testimony), and she chooses the time, *id.* at 30:18-25, the place , *id.* at 34:24-15, 35:1-4, and the routes to take, *id.* at 28:5-16 (condition 2).

Rhyne is also not prohibited from driving for other ride-hailing companies, like Uber, either while working for Lyft or whenever Lyft decides to prevent her from using the app (conditions 3 and 9). *Id.* at 46:4-8. So the controversy boils down to whether Rhyne meets conditions 1, 4, 5, and 6. (LIRC has effectively conceded that Rhyne does not meet conditions 7 and 8. *See* R. at 57 (*Ebenhoe* decision)). With three conditions already met, LIRC needs three of the four remaining conditions in order to be affirmed.

The court begins with fourth condition, which asks whether Rhyne incurs the main expenses related to driving for Lyft. LIRC found that Rhyne incurred all the costs associated with her driving because Lyft does not reimburse drivers for the costs associated with the driving and maintaining of their cars. The DWD maintains, though, that Lyft pays for "advertising, providing commercial insurance, developing and maintaining the Lyft software application, licensing, payment processing, background checks, and driver bonuses." Dkt. 20, at 25. These payments, the DWD maintains, outweigh any costs that Rhyne would incur when driving for Lyft.

The problem with the DWD's argument is that there has been no facts developed below to support it. (The DWD's brief, for example, provides no factual citations to support the point. *See* Dkt. 20, at 25.) Although it may seem reasonable to infer that Lyft pays for advertising and the associated costs of keeping the company operational, there is nothing in the record that suggests that these costs are (1) the main costs associated with Rhyne's driving, (2) exceed the costs associated with Rhyne's driving, (3) or some combination of the two. (Advertising, licensing, and operational costs, for example, may be *costs* but they may not be the *main* costs associated with Rhyne's driving). Without these facts, the court is left to speculate as to how these costs apply to the particulars of Rhyne's driving, which the court will not do. The facts in

record establishes that Rhyne bore all the costs of maintaining and driving her car. Dkt. 16, at 23:3-5. (Rhyne's testifying that she is responsible for paying all the costs associated with driving and maintaining her car.) Maintaining and driving her car is essential to Rhyne driving for Lyft. Rhyne meets the fourth condition.[2]

The fifth condition asks whether Rhyne was obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work. Here, LIRC concluded that Rhyne was subject to a monetary penalty for bad driving because Lyft's terms-of-service agreement provided that Rhyne would indemnify (i.e., compensate) Lyft for "any claims, actions, suits, losses, costs, liabilities and expenses [] relating to or arising out of [her] use of the Lyft Platform." Dkt. 16, at 55. The DWD's argument against the indemnity provision is difficult to follow. But as best as the court can tell, the DWD maintains that the indemnity provision should not be considered a monetary penalty because doing so, according to the DWD, would make it harder for people to qualify for unemployment benefits. According to the DWD, it would be better to require that the monetary penalty be a *fixed sum*—say, $300 for every accident—rather than an open-ended dollar amount, as the indemnity provision does here, so that more people would be covered by the Unemployment Compensation Act. The argument is poorly developed, and the court rejects it. But even if the court were to consider it, the court is unpersuaded by the bare-bones public-policy argument. The court agrees with the DWD's hearing examiner, who concluded that Rhyne's agreement to indemnify Lyft meant that she was

[2] No facts were probably developed below because the DWD is raising the issue of Lyft's advertising and operational costs for the first time on appeal. *See* R. at 13 (The DWD's administrative law judge concluding that "[t]he fourth factor *was* met as the claimant [Rhyne] bore the main expenses associated with her driving services, such as fuel and vehicle maintenance."). This is because the DWD did not participate in the proceedings below.

subject to a monetary penalty for unsatisfactory work. *See* R. at 50. Rhyne meets the fifth condition.

The sixth condition asks whether Rhyne's driving services directly relate to Lyft's business. LIRC concluded that Lyft was primarily a technology company, so Rhyne's driving was not integral to Lyft's business. The DWD maintains that that Lyft's primary source of revenue is through its drivers. Without its drivers, says the DWD, there would be no revenue for Lyft.

To a certain extent, the DWD has a point. Lyft would most likely cease to be the company one knows today if it had no drivers. But the same could be said about any internet company that requires users. (Craiglist, for example, depends on its users to post job postings (or the like) yet no one can honestly say that those users are employees of Craiglist.) Adding complication to the DWD's argument, Lyft's revenue is derived from taking 25 percent of the driver's fare for every ride. *See* Dkt. 16, at 15:2-6 (Wabiszewski testimony). A reasonable argument could be made that the driver pays the Lyft to use the company's smartphone app, not the other way around.

This controversy highlights the limited nature of administrative review. Had the court been deciding this case as a factfinder, the court would have required more than an affidavit from Lyft's legal department. *See* Dkt. 16, at 51. The court would have required documents and testimony from Lyft's management, or senior people who could actually speak to Lyft's main form of business without resorting to hearsay. But the court is not deciding this case as a factfinder. The court is also not deciding this case in a perfect world, where administrative agencies have unlimited resources. Rather, the court is reviewing this case on administrative review. And here, LIRC chose to credit the affidavit from Lyft's legal department (and the

corroborating testimony from Lyft's lawyer at the ALJ hearing). The affidavit states that Lyft is primarily a technology company that connected drivers to riders, not a company that paid drivers to provide riders a ride. *See* R. at 3:¶ 2 ("Lyft created and maintains a smartphone application ('app') to connect individuals seeking automobile transportation with individual drivers willing to provide such transportation."). Nothing in the record contradicts this finding, so the court sees no reason to upset LIRC's conclusion. Rhyne meets the sixth condition.[3]

In short, Rhyne is economically independent from Lyft.

CONCLUSION

Because Rhyne is free from the direction and control and economically independent of Lyft, the court concludes that Rhyne is not an employee under the Unemployment Compensation Act. LIRC's decision in this case is affirmed.

This is a final order for the purposes of appeal. Wis. Stat. § 808.03(1).

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[3] The DWD argues that Lyft's terms-of-service agreement contradicts the finding that Lyft is primarily a technology company. The terms-of-service agreement refers to Lyft drivers as part of the "Lyft community," *see* Dkt. 16, at 73 ("If you decide to join our Lyft driver community . . . ."), so Lyft drivers, the DWD says, are more integral to the Lyft's business model than the company lets on. The court is skeptical that a terms-of-service agreement can offer insight into a company's business. (The terms-of-service agreement between Lyft and Rhyne is an agreement between a Lyft driver and Lyft—no one else—so of course the driver would come off as a central figure if the agreement was read as Lyft's business model.) But even if the agreement did offer insight, the agreement also states that Lyft *riders* are part of the "Lyft community." *See, e.g.*, Dkt. 16, at 72 ("Below, we explain how you can share with other riders and drivers in the Lyft community as part of our mission . . . ."); *id.* at 73 ("When you join the Lyft community, you can create a Lyft Profile to share fun facts about yourself, and discover mutual friends and interests."); *id.* at 74 ("Riders and Drivers may rate and review each other[.]"). So the agreement can actually be read to support LIRC's conclusion that Lyft is a primarily a technology company in the business of connecting drivers with riders. *See Bernhardt v. Labor & Indus. Review Comm'n*, 207 Wis. 2d 292, 298, 558 N.W.2d 874 (Ct. App. 1996) ("Credible and substantial evidence" is less of a burden than preponderance of the evidence in that "any reasonable view of the evidence is sufficient.").