COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3118 Cir. Ct. No. 2009CV2872

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

START RENTING, INC.,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed.*

Before Vergeront, P.J, Lundsten and Sherman, JJ.

¶1 PER CURIAM. Start Renting, Inc., appeals from an order affirming a decision of the Wisconsin Labor and Industry Review Commission (LIRC) determining unemployment tax liability. The issue is whether persons classified

as employees pursuant to WIS. STAT. § 108.02(12)(a)[1] are nevertheless exempt as independent contractors by operation of § 108.02(12)(bm). We affirm.

¶2 Start Renting produces a magazine that advertises rental property. It distributes its magazine and a number of other publications four days a week to locations in Madison, Milwaukee, and the Fox Valley. Delivery drivers are responsible for specific routes. They use their own vehicles, cover their own expenses and are paid "per drop."[2]

¶3 Following an audit, the Unemployment Insurance Division of the Wisconsin Department of Workforce Development (DWD) initially determined that a total of thirty-six drivers had performed services as employees for state unemployment tax purposes. On appeal before a DWD administrative law judge, the department's attorney stipulated that two of the drivers should not have been reclassified as employees. The administrative law judge issued a decision affirming the initial determination as to the employee status of the remaining

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] "Per drop" was explained by one driver as follows:

> DWD: Just to make sure that I understood some of your previous testimony, if you're delivering, let's say, two magazines to a certain stop, you get two drop off fees then? Is that how it works?
>
> SR: Yeah, basically they pay us—it's usually $1 per magazine. And then ... for each particular magazine per stop. So if you're dropping four different publications, you'd be being paid $4 for that particular stop. And that's how ... they basically do it. There's some other things they alter a little bit depending if you're further out, they may give you $1.25 if they think the stops are tougher to get to and there's more gas being used. They will move the pay up slightly. But for the most part it's $1 per publication and per stop.

thirty-four drivers. LIRC affirmed the administrative law judge's decision. The circuit court affirmed LIRC's decision. Start Renting now appeals.

¶4 We review LIRC's decision, not that of the circuit court, and the scope of our review is the same as that of the circuit court. ***Gilbert v. LIRC***, 2008 WI App 173, ¶8, 315 Wis. 2d 726, 762 N.W.2d 671. Start Renting concedes that it does not challenge LIRC's findings of fact on appeal. As we recently concluded in ***Gilbert***, LIRC's interpretation of law is entitled to great weight deference in circumstances such as those presented here, as it has "extensive experience in construing and applying this statute in determining whether a worker is an employee under the Wisconsin Unemployment Compensation Law." *Gilbert*, 315 Wis. 2d 726, ¶11.[3] Under great weight deference, we uphold an agency's reasonable statutory interpretation unless it is directly contrary to the statute's clear meaning. *Id.*, ¶9.

¶5 We begin with the premise that "the [unemployment insurance] act itself should be put in perspective, and the underlying purpose of the act should be given paramount consideration." ***Princess House, Inc. v. DILHR***, 111 Wis. 2d 46, 61, 330 N.W.2d 169 (1983). As the court concluded, "the statute is remedial in nature and should be liberally construed to effect unemployment compensation

[3] Start Renting argues the great weight deference as set forth in *Gilbert v. LIRC*, 2008 WI App 173, ¶11, 315 Wis. 2d 726, 762 N.W.2d 671, is not controlling. Start Renting asserts *Gilbert* "did not involve the plain language or constitutional challenges at issue here." Moreover, Start Renting contends, "Mr. Gilbert did not challenge the standard of review." Start Renting also insists, "unlike this case, Mr. Gilbert appealed LIRC's findings of fact." Start Renting is in error. In *Gilbert*, as in this case, LIRC interpreted and applied WIS. STAT. § 108.02(12)(b) and (bm). *See Gilbert*, 315 Wis. 2d 726, ¶¶8, 52. Furthermore, our conclusion that LIRC's decision was entitled to great weight deference was independent of any agreement by LIRC and Gilbert. *See id.*, ¶11. Finally, we noted, "Gilbert does not challenge LIRC's findings of fact on appeal. *Id.*, ¶8.

coverage for workers who are economically dependent upon others in respect to their wage-earning status." *Id.* at 62.

¶6 In *Princess House*, the court noted that the public policy which impelled the act was set forth by the legislature in WIS. STAT. § 108.01: "[u]nemployment in Wisconsin is recognized as an urgent public problem, gravely affecting the health, morals and welfare of the people of this state," and "[e]ach employing unit in Wisconsin should pay at least a part of this social cost, connected with its own irregular operations, by financing benefits for its own unemployed workers." *Princess House*, 111 Wis. 2d at 61 (quoting WIS. STAT. § 108.01(1)). The statute provides that "[a] sound system of unemployment reserves, contributions and benefits should induce and reward steady operations by each employer, since the employer is in a better position than any other agency to share in and to reduce the social costs of its own irregular employment."[4] § 108.01(2).

¶7 With the underlying purpose in mind, determining whether persons are employees for unemployment compensation purposes requires a two-step analysis. *Gilbert*, 315 Wis. 2d 726, ¶33 (citation omitted). The first step is to determine whether the individuals have performed services for pay. *Id.* Here,

[4] Despite this clear statement of legislative purpose, Start Renting argues "the legislature has made clear that the policy of this state is to facilitate the establishment of the independent contractor status." Start Renting cites to a document appended to its circuit court brief, entitled "Management Proposal #2," prepared on June 22, 1999. Based on this document, Start Renting insists the unemployment compensation law should be interpreted to favor independent contractor status. This argument is disingenuous. Indeed, DWD responds in its brief to this court that the "Proposal represents nothing more than the thoughts of the employer side of the [Unemployment Insurance Advisory] Council as to how the then existing employee definition [(12)(b)] should be changed." DWD further contends this proposal "was, in fact, never enacted into law." Start Renting does not reply to this argument. We therefore deem it conceded. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Start Renting does not dispute that the department proved the drivers performed services for pay during the relevant period. Therefore, the drivers are presumed to be employees for purposes of unemployment compensation. The second step is to determine whether the individuals are exempt under WIS. STAT. § 108.02(12)(bm). *Id.* The burden shifted to Start Renting to prove the drivers were exempt by satisfying at least seven of the following ten statutory conditions:

> 1. The individual holds or has applied for an identification number with the federal internal revenue service.
>
> 2. The individual has filed business or self-employment income tax returns with the federal internal revenue service based on such services in the previous year or, in the case of a new business, in the year in which such services were first performed.
>
> 3. The individual maintains a separate business with his or her own office, equipment, materials and other facilities.
>
> 4. The individual operates under contracts to perform specific services for specific amounts of money and under which the individual controls the means and methods of performing such services.
>
> 5. The individual incurs the main expenses related to the services that he or she performs under contract.
>
> 6. The individual is responsible for the satisfactory completion of the services that he or she contracts to perform and is liable for a failure to satisfactorily complete the services.
>
> 7. The individual receives compensation for services performed under a contract on a commission or per-job or competitive-bid basis and not on any other basis.
>
> 8. The individual may realize a profit or suffer a loss under contracts to perform such services.
>
> 9. The individual has recurring business liabilities or obligations.

> 10. The success or failure of the individual's business depends on the relationship of business receipts to expenditures.

WIS. STAT. § 108.02(12)(bm).

¶8 In *Gilbert*, we held the employer failed to meet its burden of proof as to four of the ten conditions specified in WIS. STAT. § 108.02(12)(bm). *Gilbert*, 315 Wis. 2d 726, ¶50. Here, too, we conclude that LIRC correctly determined these four conditions were not satisfied.

¶9 LIRC correctly determined Start Renting did not meet its burden of proof as to the third condition because the record does not establish the drivers maintained a separate business with the features of an actual business. WIS. STAT. § 108.02(12)(bm)3. The statute requires an individual to own and maintain an office, equipment, materials and other facilities, which are typical indicators of an existing business. *Id.* LIRC stated:

> It is undisputed that the drivers used their own equipment, i.e., their own vehicles, to perform subject services.
>
> However, the only evidence as to the existence of separate offices was the testimony of delivery drivers Scott Radliff (Radliff), Josef Bieniek (Bieniek), and Michael Melloch (Melloch).
>
> Radliff testified that he had a file cabinet in his kitchen where he maintained records relating to the services he performed for Start Renting, and that he did not deduct space for an office on his Schedule C.
>
> Bieniek testified that he kept records relating to the services he performed for Start Renting "at home."
>
> Melloch testified that he kept such records "at my house" and "on my home computer," and that he did not deduct space for an office on his Schedule C.
>
> This testimony is insufficient to establish that Radliff, Bieniek, or Melloch had separate offices or separate spaces in their homes devoted primarily to a business purpose.

See ***Campbell v. Speedmark***, UI Hearing No. 08002536MD (LIRC, April 27, 2009).

¶10 Testimony regarding whether the drivers had their own offices was also given by distribution manager James Theres:

> DWD: Do you have any personal knowledge as to whether these individuals had offices outside of their place of residence?
>
> [J.T.]: I do not know that.
>
> DWD: Do you have any personal knowledge as to whether they had offices in their own home that they utilized in connection with their delivery services?
>
> [J.T.]: I don't know that.

¶11 LIRC's interpretation of an office as constituting a separate place in the home devoted primarily to a business purpose is reasonable and consistent with *Gilbert*. *See Gilbert*, 315 Wis. 2d 726, ¶41. Start Renting failed to satisfy this condition.

¶12 The fourth condition concerns the worker's pay arrangement with the employer and the degree of control the worker has over the means and methods of providing services. WIS. STAT. § 108.02(12)(bm)4. LIRC noted the record established the drivers controlled the means and method of performing services for Start Renting. This condition also requires that the individual "operates under contracts to perform specific services for specific amounts of money ...." *Id.* LIRC explained that this condition requires proof of more than one contract, which may take the form of multiple contracts with separate entities, or multiple contracts with the putative employer if the contracts were shown to have been negotiated at arms length, with terms that will vary over time, and depending on the specific services covered by the contract. LIRC further explained that the existence of bona fide multiple contracts tends to show the

individual either has multiple customers, or that there are the periodic opportunities for arms length negotiations with the putative employer, and the individual is not dependent on a single continuing relationship subject to conditions dictated by a single employing unit.

¶13 LIRC held that the record established that none of the drivers had multiple contracts with Start Renting, and only Scott Radliff and Vern Black had contracts for services with employing units other than Start Renting. We conclude LIRC's determination was based on a reasonable interpretation of condition four. With the exceptions of Radliff and Black, condition four was not satisfied.[5]

¶14 The seventh condition requires that the drivers be paid on a commission, per-job, or competitive-bid basis. WIS. STAT. § 108.02(12)(bm)7. Start Renting argues the driver's payment on a "per-drop" basis constitutes either competitive-bid or per-job compensation. However, Start Renting's argument regarding competitive bid is based on testimony regarding negotiation with the employer, which is not the same as two or more workers submitting bids for the same job to the employer. The testimony of Theres was as follows:

> DWD: Were there situations where you had two or more people interested in the same route that actually each gave you "I'll do it for this much" and the other guy said "I'll do it for this much"?
>
> [J.T.]: Not that I am aware of.

¶15 Even if negotiations by a single driver over his reimbursement rate per drop could be considered "competitive bidding," the record demonstrates that

[5] DWD and Start Renting stipulated at the hearing as to the applicability of the first and second conditions. The record establishes Black did not meet condition two.

such "negotiations" rarely, if ever, took place. Radliff testified that, once Start Renting established what the per-drop pay would be for a particular route, there was no negotiating for a higher rate of compensation. Bieniek testified that Start Renting determined how much a driver was paid per drop and that once the amount was determined "... that's what you receive. It's up to them." He further testified he had no personal knowledge of anyone who ever negotiated a higher amount per drop than what Start Renting said it would pay.

¶16 LIRC determined "[t]he per-drop basis upon which the delivery drivers are paid is more akin to payment on a piecework basis than to payment on a per-job basis." Although LIRC noted other cases where delivery drivers were held to have been compensated on a per-job basis, it concluded "those drivers, in contrast to the delivery drivers here, were paid by the route, not by the drop." LIRC's conclusion is reasonable under the great weight standard. Start Renting did not satisfy the seventh condition.

¶17 The tenth condition asks whether the fortunes of the worker's business hinge on business receipts and expenditures. WIS. STAT. § 108.02(12)(bm)10. As in ***Gilbert***, Start Renting fails to cite to evidence in the record supporting a conclusion that the drivers assumed the type of entrepreneurial risk associated with this criterion. ***Gilbert***, 315 Wis. 2d 726, ¶¶48-49. The argument is therefore insufficiently developed and we decline to address it further. *See* ***id.***, ¶49.

¶18 We therefore reject Start Renting's challenges to LIRC's determinations on the four conditions discussed above. We also conclude Start Renting failed to meet its burden of proof as to condition nine, which requires the individual has recurring business liabilities or obligations. WIS. STAT.

§ 108.02(12)(bm)9. Start Renting argues the drivers had recurring obligations, including gas, vehicle maintenance, insurance, and driver's license fees. However, Start Renting fails to adequately distinguish these obligations from "expenses related to the services he or she performs," which is the subject of the fifth condition. *See* WIS. STAT. § 108.02(12)(bm)5. Furthermore, the vehicles the drivers used to perform their services for Start Renting were their private vehicles. Thus, when the vehicle ceased being used as a business vehicle, these obligations were no longer business obligations. LIRC reasonably concluded the costs of operating and maintaining their vehicles, as well as the costs of insurance and a driver's license, did not constitute a business liability or obligation within the meaning of the ninth condition.

¶19 We conclude LIRC's determination that the drivers were employees of Start Renting was reasonable with regard to each of the above five conditions and not contrary to the statute's clear meaning. Start Renting has failed to prove at least seven out of ten conditions as required to prevail under WIS. STAT. § 108.02(12)(bm). Because we conclude that none of the drivers satisfied at least seven of the statutory conditions, we need not address Start Renting's challenges to the remaining conditions.

¶20 We reject Start Renting's argument that LIRC improperly "added requirements" by interpreting the language of the statutory conditions contrary to its plain meaning. Administrative agencies and commissions interpret statutes and rules on a daily basis, and here LIRC did so reasonably and did not add requirements to the statute. By way of example, the third condition by its specific terms requires proof of an "office." By interpreting exactly what constitutes an office within the meaning of that condition, LIRC did not add requirements to the

statutory condition. Consistent with our decision in ***Gilbert***, interpreting what constitutes an office in a given case is well within LIRC's proper authority.

¶21 Start Renting insists a contrary result is compelled by ***Grutzner S.C. v. LIRC***, 154 Wis. 2d 648, 453 N.W.2d 920 (Ct. App. 1990). Start Renting asserts, "The Supreme Court has already warned LIRC that when interpreting Section 108.02, it may not add statutory requirements not required by the legislature."[6] In ***Grutzner***, we concluded LIRC erroneously interpreted the statute to require the employer to demonstrate that the alleged employees were customarily engaged in an independent business on a full-time basis. ***Id.*** at 650, 654. However, we determined there was no evidence LIRC regularly interpreted the phrase "customarily engaged" vis-à-vis part-time employment. Therefore, we reviewed LIRC's conclusion without deference. ***Id.*** at 652.

¶22 We also concluded in ***Grutzner*** that LIRC's interpretation was inconsistent with the public policy underlying the Unemployment Compensation Act. *See* ***id.*** at 653. Eighteen years later in ***Gilbert***, we determined "the commission has extensive experience in construing and applying this statute in determining whether a worker is an employee under the Wisconsin Unemployment Compensation Law." ***Gilbert***, 315 Wis. 2d 726, ¶11. Start Renting's reliance on ***Grutzner*** is unavailing.

¶23 Start Renting also argues LIRC's decision in the present case is inconsistent with its prior decision in ***Donald Floerchinger v. Nestle***

[6] Start Renting cites to "Supreme Court" language in ***Grutzner S.C. v. LIRC***, 154 Wis. 2d 648, 453 N.W.2d 920 (Ct. App. 1990). This court decided that case, and the supreme court denied a petition to review.

Transportation, Claim No. 2000-17699, 2001 WL 1019954 (LIRC, Aug. 15, 2001). However, that case involved whether an owner-operator truck driver was an employee under the worker's compensation act. Start Renting fails to provide citation to legal authority for the proposition that LIRC is obligated to apply its interpretations in a worker's compensation case to an unemployment compensation case.

¶24 In addition, ***Floerchinger*** and this case are factually distinguishable. For example, Floerchinger owned and utilized a Kenworth semi-tractor in the performance of his services as an owner-operator. Thus, at the outset there is a significant difference between the monetary investments by the workers in the two cases. As stated by the circuit court in the present case:

> Donald Floerchinger's Kenworth semi-tractor is a far cry from the drivers' personal vehicles used to deliver rental magazines.

¶25 It was also established that Floerchinger had a federal employer identification number and filed a business tax return, and this satisfied the first and second conditions. Here, it is undisputed that some of the drivers did not meet the first condition, some did not meet the second condition, and some did not meet either the first or second condition. LIRC also concluded in ***Floerchinger*** that the fourth condition was satisfied, whereas here LIRC held there was no proof of multiple contracts, with the exception of two drivers. LIRC also determined in ***Floerchinger*** that each hauling job constituted a separate job which was compensated on a per-job basis. In the present case, LIRC determined that payment on a per-drop basis was more akin to piecework. In short, the circumstances presented in ***Floerchinger*** differ in several key regards, accounting for the different outcomes in the cases.