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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MEMORIAL PARK CEMETERY SALES

Appellant.

-v- Case No. 80-200878-AE

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Appellee.

ENTERED

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DEPUTY CLERK

OPINION

This case is before the Court today on Plaintiff's appeal from the Michigan Employment Security Commission Board of Review's determination[1] that services performed by cemetery plot salesman constituted employment within the meaning of §42 of the Michigan Employment Security Act (MESA). For the reasons set forth below, the finding of the Board of Review is reversed.

Plaintiff-Appellant Memorial Park Cemetery Sales has contracted with White Chapel Cemetery to sell cemetery plots. Plaintiff engages the services of sales representatives to effectuate this purpose. The salesmen are paid only on a commission basis and the terms and conditions of the sales are set by White Chapel. The salesmen have no set hours, no sales quotas and no specific territory to cover. Appellant does provide the sales representatives with certain supplies and office space, however the salesmen are not required to use these supplies and are not assigned to any specific desk or area in the office. Any expenses incurred by the representatives outside the office[2] are not reimbursed by Appellant

It is clear to the Court that the common law test of "control" is no longer determinate of the issue at bar. The test now is one of economic reality. as first enunciated by Justice Smith by way of dissent in Powell -v- Employment Security Commission, 345 MICH

1. Upholding the finding of the Referee.

2. Such as telephone bills, postage costs and automobile expenses The salesmen may receive a gasoline bonus, conditioned upon sales at a certain level rather than on mileage.

455, 462 (1956). See Tata -v- Muskovitz, 354 MICH 695 (1959), and Industro-Motive Corp -v- Wilke, 6 MICH APP 708 (1967). Several important factors to be considered in determining whether an employer-employee relationship exists under the economic reality test have been set forth as follows:

> First, what liability, if any does the employer incur in the event of the termination of the relationship at will?
>
> Second, is the work being performed an integral part of the employer's business which contributes to the accomplishment of a common objective?
>
> Third, is the position or job of such a nature that the employee primarily depends upon the employment for payment of his living expenses?
>
> Fourth, does the employee furnish his own equipment and material?
>
> Fifth, does the individual seeking employment hold himself out to the public as one ready and able to perform tasks of a given nature?
>
> Sixth, is the work or the undertaking in question customarily performed by an individual as an independent contractor?
>
> Seventh, control, although abandoned as an exclusive criterion upon which the relationship can be determined, is a factor to be considered along with payment of wages, maintenance of discipline and the right to engage or discharge employees.
>
> Eighth, weight should be given to those factors which will most favorably effectuate the objectives of the statute.
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> Mckissic -v- Bodine, 42 MICH APP 203, 208 (1972).

It must be recognized, however, that these considerations and the economic reality test generally are to be used in construing the requirement in the statute that the individual be under the employer's control or direction. MCL 421.42(5).[3] Applicable here are the words of the then Judge, now Justice, Levin:

3. §42(5) provides that: "Services performed by an individual for remuneration shall not be deemed to be employment subject to this act unless the individual is under the employer's control or direction as to the performance of the services both under a contract of hire and in fact.

In adopting the concepts expressed in the Powell dissent our Court did not mean to, nor could it, read out of §42 of the employment security act the definition of the term "employment" added as subsection 6 declares that an individual is not in the employment of another unless he is "under the employer's control or direction as to the performance of his services both under his contract for hire and in fact".

Industro-Motive adopted the philosophy and reasoning of Justice SMITH'S dissent as a sound approach to the construction of the words "control or direction as to the performance" in this statute.

The Powell dissent demonstrated that whether in a particular case the dominance by one contracting party of another justifies or requires a finding that the dominated party is an employee and the dominating party his employer and their relationship one of employment requires an interpretation of the total factual situation and cannot be resolved by applying traditional concepts of the law of agency, contracts and torts.

It would perhaps have been better if the legislature had left the matter at large without reintroducing the word "control" to the statutory definition with the inevitable tendency, as shown by the opinions of both the appeal board and the circuit court, of the common-law imagery again to come to the fore.

Be that as it may, the words "control or direction" are now back in the statute. Those words first appeared in the original 1936 act, together with other definitional language, as subsection 4 of §42; in 1943 the subsection was repealed. See footnote 3 for the statutory history.

In cases governed by the original statutory definition of "employment", the Michigan Supreme Court declared that the common-law rules concerning the master-servant relationship do not provide the controlling test as to whether one is in the employ of another under the employment security act.....

Industro-Motive says the same thing -- the common law tests do not control. The meaning of the present statutory definition is to be determined in light of the objectives sought to be achieved by the enactment of this legislation. Foster -v- Employment Security Commission, 15 MICH APP 96, 100-102 (1968).

Thus, while the construction or definition of employee is to be determined consistent with the economic realities of today, there

still must be control or direction. MCL 421.42(5); Foster, supra. The Court notes that "the ultimate question is whether or not the relationship is of the type to be protected". Powell, supra at 479. (J. Smith dissenting).

Applying the aforegoing principles to the facts of this case, the Court is convinced that the sales representatives are not employees within the meaning of §42 of MESA. A consideration of the several factors noted in Bodine is supportive of this conclusion. The salesmen are paid only on a commission and bonus basis, establish their own hours, use such sales aids and equipment as they desire, are assigned no specific sales territory, furnish their own transporation etc., etc. The salesmen are not, under the "control or direction" of Appellant under any definition of the term, and hence are not employees. MCL §421.42(5); Foster, supra.

Furthermore, the policy of the act is directed against involuntary unemployment and in favor of encouraging employers to provide stable employment. MCL §421.2 (Declaration of Policy). As noted above, the relations involved herewith are terminable at will, the salesman set their own hours and are not required to report to the office at all. In short, the work in question leaves the stability strictly up to the salesman. In other words, the relationship is not "of the type to be protected". Powell, supra.

Accordingly, the decision of the Board of Review is reversed.

DATED: October 15, 1980 GENE SCHMELZ, Circuit Court Judge