COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

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

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No. 95-0369

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MALCOLM STACK and DUNLOP ASSOCIATES, INC.,

Plaintiffs-Respondents-Cross Appellants,

v.

KELLY JOESTEN,

Defendant-Third Party Plaintiff-Appellant-Cross Respondent,

BELL LABORATORIES, INC.,

Third Party Defendant-Respondent-Cross Appellant.

APPEAL from a judgment of the circuit court for Dane County: MORIA KRUEGER, Judge. *Affirmed*.

Before Eich, C.J., and Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

PER CURIAM. This litigation was initiated when Malcolm Stack and Dunlop Associates, Inc., sued Kelly Joesten for the return of property Joesten allegedly kept after she left their employment. Joesten filed a counterclaim seeking unpaid overtime under federal and state law, unpaid wages and expenses, and compensation for health insurance benefits. Joesten also filed a third-party complaint against Bell Laboratories, a corporation owned principally by Stack. She made a similar claim for unpaid overtime from Bell and alleged various discrimination claims under Title VII against Stack, Dunlop and Bell.

Stack, Dunlop and Bell moved for summary judgment. The trial court granted Bell's motion, and dismissed all claims against it. The court also dismissed all of the Title VII claims, Joesten's claim for overtime against Dunlop and her claim for health insurance benefits. The trial court refused to dismiss Joesten's claim for overtime against Stack and for back wages and expenses against Stack and Dunlop. The trial court also denied a motion, filed by Stack, Dunlop and Bell, for sanctions under § 802.05, STATS.

On appeal and cross-appeal, the parties seek appellate review of the trial court's rulings adverse to them.[1] We affirm.

BACKGROUND FACTS

Stack is the president and majority stockholder of Bell, a manufacturer of rodenticides and related products. Other family members own the rest of the Bell stock. Stack also owns a pleasure farm in Ridgeway, where he stables horses. Linda Stack Hughes, Malcolm's daughter, is the president and sole stockholder of Dunlop, an advertising and public relations firm, whose major, but not sole, client is Bell. Bell and Dunlop are located in the same building. They share some equipment and services, such as a single

[1] The trial court's judgment dismissing all claims against Bell disposes of the entire matter in litigation as to Bell and therefore is a final judgment. *See* § 808.03(1), STATS. By order dated April 25, 1995, this court granted discretionary review of the nonfinal aspects of the judgment.

receptionist, but are largely separate. Dunlop pays rent to Bell for its space and the shared equipment and services.

Motomco, Ltd., is another Stack-family corporation. Motomco purchases rodenticides from Bell and distributes them under its own label. Some cattle owned by Motomco were kept at Stack's Ridgeway farm.

Stack met Kelly Joesten at a horse clinic in June 1992. Joesten was a recent college graduate with a degree in English and an interest in writing. Stack was interested in retaining Joesten's services as a horse trainer at his farm, but could not offer a full-time position. Stack approached Hughes and asked if Dunlop would hire Joesten as a writer. Stack proposed that he and Dunlop share Joesten's services. Hughes agreed, and Joesten was hired. Stack agreed to reimburse Dunlop for 50% of Joesten's salary. Dunlop issued Joesten's W-2 tax form.

Joesten began working for Dunlop and Stack in July 1992. By autumn, Joesten had moved into a vacant house on the farm, and was given a computer so she could do her Dunlop work at the farm. As part of her farm duties, Joesten hired other persons to assist with the farm work. Motomco and Bell issued those persons' W-2 forms.

In February 1993, Stack and Joesten traveled south for various horse shows and events. Hughes agreed that Joesten need not do any Dunlop work while on this trip. During the trip, Stack and Joesten had a falling-out, and Joesten eventually returned to Wisconsin alone. Joesten submitted a letter of resignation to Dunlop on March 24, 1993. Further facts will be stated below as necessary.

SUMMARY JUDGMENT METHODOLOGY

Section 802.08, STATS., provides summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. When reviewing a summary judgment, we follow the same methodology as the trial court. ***Kremers-Urban***

Co. v. American Employers Ins. Co., 119 Wis.2d 722, 733, 351 N.W.2d 156, 162 (1984). That methodology is stated in many cases, such as ***In re Cherokee Park Plat,*** 113 Wis.2d 112, 116, 334 N.W.2d 580, 582-83 (Ct. App. 1983). We need not repeat it. While a court cannot choose between competing inferences on summary judgment, ***Berg v. Fall,*** 138 Wis.2d 115, 119, 405 N.W.2d 701, 703 (Ct. App. 1987), a dispute as to irrelevant or immaterial facts or inferences does not preclude summary judgment. *See* ***Hilkert v. Zimmer,*** 90 Wis.2d 340, 342, 280 N.W.2d 116, 117 (1979).

DID BELL EMPLOY JOESTEN?

The trial court held that there was no material issue of fact as to whether Bell was Joesten's employer, or a joint employer with Stack and Dunlop. In addition to being dispositive as to Joesten's claims against Bell, Bell's status as an employer is crucial to Joesten's Title VII claims against Stack, Dunlop and Bell. Title VII applies only to employers in commerce that have fifteen or more employees. 42 U.S.C. § 2000e(b). Neither Dunlop nor Stack, nor Dunlop and Stack together, meet the fifteen-employee threshold. Therefore, Joesten must show that Bell was a joint employer with Stack and Dunlop in order to maintain any Title VII claims.

We agree with the trial court that there is no genuine issue of material fact, and that Bell is entitled to judgment as a matter of law.

We start with Joesten's admitted belief that she worked for Dunlop, and did not consider Bell to be her employer. While Joesten now describes that belief as a legal conclusion that she is ill-qualified to make, common sense tells us that a person's understanding as to who is one's employer carries great weight. The corroborating documentary evidence such as her W-2 form and resignation letter further establish that Joesten was employed by Dunlop.

Joesten admittedly performed various horse-related duties at the farm. Joesten's attempt to transform the farm into an arm of Bell is not persuasive. Dunlop subcontracted Joesten's services to Stack, in his personal

capacity, not to Bell and not to Stack as president of Bell. Bell has no ownership interest in the farm, and did not use the farm for any business purpose.[2]

In sum, we agree with the trial court that there is no genuine issue of material fact as to whether Bell was Joesten's employer.

We next consider whether Bell may be considered a "joint employer" with Stack or Dunlop. In addition to a basis for Joesten's claim for overtime under the federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.,* this inquiry is crucial to the viability of Joesten's Title VII claims.

For purposes of the FLSA, joint employment exists: (1) when there is an arrangement between the employers to share the services of the employee, for example, to interchange employees; (2) when one employer is acting directly or indirectly in the interest of the other employers in relation to the employee; or (3) when the employers are not completely disassociated, either directly or indirectly, in regard to the person's employment because "one employer controls, is controlled by or is under common control with the other employer." ***Karr v. Strong Detective Agency, Inc.,*** 787 F.2d 1205, 1207 (7th Cir. 1986) (citing 29 C.F.R. § 791.2(b)). The focus is on the "economic reality" of the situation. ***Id.***

The relevant factors under Title VII are similar: (1) the interrelation of operations such as common offices, common record keeping, shared bank accounts and equipment; (2) common management, directors and boards; (3) centralized control over labor relations and personnel; and (4) common ownership and financial control. ***Rogers v. Sugartree Products, Inc.,*** 7 F.3d 577, 582 (7th Cir. 1993). Again, the "economic reality" of the situation must be examined. ***Knight v. United Farm Bureau Mut. Ins. Co.,*** 950 F.2d 377, 380 (7th Cir. 1991).

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[2] Motomco housed cattle on the farm and paid the wages of Wayne Ballweg, a Bell employee who worked on the farm prior to Joesten, as well as those of Ballweg's successor. Those circumstances do not implicate Bell in the farm operation. We also see little significance in the fact that two persons Joesten hired to work on the farm were paid by Bell and were issued W-2 forms by Bell. That those persons may have been Bell employees does not mean that Joesten also was a Bell employee.

Applying those factors to the record before us, we conclude that Bell is not a joint employer for purposes of the FLSA and Title VII. As discussed above, there is no evidence that Joesten performed any work for Bell. Her services on the farm benefited Stack, not Bell. There is no evidence of any arrangement between Bell and either Stack or Dunlop to share Joesten's services. Similarly, there is no evidence that either Stack or Dunlop was acting directly or indirectly in Bell's interest in its dealings with Joesten.

Joesten relies heavily on the familial connections between Stack, Dunlop and Bell, and suggests that Dunlop and Bell should be treated as a single entity under Stack's control. While Hughes is Stack's daughter, there is no evidence that Stack controls her business, either personally or in his capacity as the president of Bell. Hughes owns 5% of Bell stock, but she does not take an active role in the company. Dunlop's business is totally unrelated to the manufacture of rodenticides. That Bell is a client of Dunlop's does not inexorably link the companies. Dunlop has other clients, and there is no evidence that Bell is afforded any special treatment by Dunlop. The fact that Joesten worked on Bell materials as part of her Dunlop responsibilities does not elevate Bell into employer status. Although Bell and Dunlop are located in the same building and share some common areas, Dunlop pays rent to Bell for its space and there is no evidence that the businesses are financially connected.

Joesten's claim for overtime against Bell under the federal Fair Labor Standards Act, 29 U.S.C. § 201 fails.[3] Because the fifteen-employee threshold of Title VII is not met, Bell, Dunlop and Stack are entitled to summary judgment dismissing Joesten's Title VII claims against them.

ARE DUNLOP AND STACK JOINT EMPLOYERS?

We next consider whether the trial court correctly dismissed Joesten's FLSA claims against Dunlop and Stack. Looking to the "joint

[3] Joesten also sought overtime from Bell under state law, but she makes no separate argument in support of her state claim. Joesten's state law overtime claim fails for the same reason that her FLSA claim fails, that is, Bell was not her employer.

employment" tests summarized in ***Karr,*** we conclude that the trial court correctly granted summary judgment.

While Joesten worked for both Stack and Dunlop, they did not share her services. Joesten's work for Dunlop was unrelated to her duties for Stack. Unlike the situation in ***Karr,*** Joesten's duties for Stack did not benefit Dunlop, and vice versa. *Cf.* ***Karr,*** 787 F.2d at 1207 (detective's surveillance work benefited both the detective agency and the store). Dunlop's advertising and public relations business and Stack's farm operate independently from each other and, as we noted above, Stack does not control Dunlop.

We further conclude that, as to Stack individually, the trial court correctly dismissed Joesten's FLSA claim. The overtime provisions of the FLSA apply to an "employer ... who ... is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. § 207(a). It is undisputed that Stack was not engaged in commerce in the operation of the farm. *See* 29 U.S.C. § 203(s)(1).

As to Dunlop, the trial court properly relied on Joesten's admission that she never worked more than forty to fifty hours per month for Dunlop. Thus, there is no factual basis for an FLSA claim against Dunlop.[4]

JOESTEN'S CLAIM FOR HEALTH INSURANCE BENEFITS

The trial court granted summary judgment dismissing Joesten's claim for health insurance benefits. It is undisputed that Dunlop agreed to make health insurance available to Joesten and that, for reasons not apparent from the record, health insurance was never extended to Joesten. Joesten concedes that she was carried on her father's health policy during her

[4] Joesten's claim for overtime from Dunlop under state law suffers from the same factual deficiency. For that reason, we need not address Dunlop's argument, made in its cross-appellant's brief, that Joesten was not covered by state overtime law because she was a professional employee.

employment with Dunlop and Stack and that her father did so voluntarily. Joesten claims a "moral obligation" to repay her father for the value of the insurance premiums.

Joesten's claim sounds in contract, that is, that Dunlop and Stack breached the employment contract when they failed to provide health insurance coverage. A necessary element of any breach of contract action, however, is damages. *See* ***Pleasure Time, Inc. v. Kuss,*** 78 Wis.2d 373, 385, 254 N.W.2d 463, 469 (1977) (contractual damages compensate a person for losses necessarily and foreseeably flowing from the breach, but the person is not entitled to be placed in a better position than if the contract had been performed). Because there is no allegation that Joesten sustained any compensable loss, the trial court correctly dismissed Joesten's claim for health insurance benefits.

CROSS-APPEAL

Bell, Dunlop and Stack cross-appeal various trial court rulings adverse to them. First, Stack argues that summary judgment should have been granted dismissing Joesten's claim against him for overtime under state law. Stack contends that, as to him, Joesten was an independent contractor and thus Joesten cannot maintain a cause of action for overtime.[5] Alternatively, Stack argues that Joesten cannot recover overtime because she was engaged in "agricultural" work, as defined in 29 U.S.C. § 203(f).

Independent Contractor

The parties agree that whether Joesten was an independent contractor hinges on "whether the worker is economically dependent upon the business to whom he renders services." ***Brock v. Lauritzen,*** 624 F. Supp. 966, 968 (E.D. Wis. 1985), *aff'd*, 833 F.2d 1529 (7th Cir. 1987), *cert. denied*, 488 U.S. 898 (1988).

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[5] If successful, Stack's independent contractor argument would also defeat Joesten's FLSA claim against Stack.

> In determining whether a worker is an employee or an independent contractor, courts should consider the degree of control which an employer has over the manner in which the work is performed, the opportunities for profit or loss dependent upon the managerial skill of the worker, the worker's investment in equipment or material, the skill required, the permanence of the working relationship, and whether the service rendered is an integral part of the alleged employer's business.

Id.

We concur with the trial court's conclusion that Joesten was not an independent contractor. While Joesten exercised considerable freedom in the performance of her duties at the farm, it is undisputed that Stack retained the power to discharge Joesten and otherwise modify the employment setting. Although Stack's supervision apparently was "minimal," he had not ceded his authority in that regard to Joesten. *See* ***id.***

Prior to her hiring by Stack, Joesten was not in the horse-training business. There is no evidence that she held herself out as such after working at the farm. We agree with the trial court's description of the minimal outside income generated by Joesten while employed by Stack as "moonlighting."

Joesten owned some personal tack and related equipment that she used at the farm. However, Stack provided the housing, feed and transportation for the farm animals, and contributed the bulk of the equipment used at the farm. Although Joesten had developed the specialized skills necessary to employment as a horse-trainer, she chose to apply them in a farm or stable setting that primarily benefited Stack. She did not choose to apply them in a fashion that might have benefited herself, for example, as an instructor of many persons. Joesten's use of her skills for Stack alone suggests that she was his employee and not an independent contractor who might offer her skills to many persons.

Stack retained Joesten for an indefinite term. While their working relationship ended within several months of its beginning, there is no evidence that the parties contemplated such an abrupt end when Joesten was hired. The relatively short duration of Joesten's hire does not compel the conclusion that she was an independent contractor throughout her stay at the farm.

The farm was not operated as a business, but existed solely to house Stack's horses and to accommodate his interest in that hobby. The services that Joesten provided to the farm were central to its existence. This consideration also suggests that Joesten is an employee.

Lastly, the totality of the circumstances compel the conclusion that Joesten was economically dependent upon Stack. The circuit court aptly summarized this matter:

> The "economic reality" is that hiring and firing, the amount of income, the duties to be performed, the provision of the most expensive and extensive equipment, the actuality of [Joesten's] work hours were dictated, however gently and accommodatingly, by [Stack], in cooperation with Dunlop. The "position" consisting of an assignment with the advertising agency and of responsibilities at the farm was created by [Stack] and constituted [Joesten's] livelihood.

Agricultural Exemption

Stack also contends that Joesten was an agricultural employee and thus not eligible for overtime. We disagree. Stack's farm was not operated for profit, and its sole purpose was to stable horses for Stack's pleasure. "Agriculture," as defined in 29 U.S.C. § 203(f),[6] contemplates a commercial

[6] 29 U.S.C. § 203(f) states:

> Agriculture includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the

enterprise engaged in for profit. *See* ***Hodgson v. Ewing,*** 451 F.2d 526, 529 (5th Cir. 1971). There is no question that Stack maintained the farm for pleasure and hobby purposes. Thus, Joesten cannot be considered an agricultural employee for purposes of overtime law.

Miscellaneous Expenses

The second issue raised by Stack and Dunlop on cross-appeal concerns the trial court's refusal to dismiss Joesten's claim for miscellaneous expenses, such as food, mileage and motels. Stack and Dunlop characterized Joesten's claim as speculative. We agree with Joesten that whether Joesten is entitled to recoup any of these expenses is a factual question which cannot be resolved on summary judgment.[7]

Sanctions under § 802.05, STATS.

Lastly, Bell, Stack and Dunlop contend that the trial court erred when it denied their motion for sanctions under § 802.05, STATS. Under § 802.05(1)(a), an attorney who signs a pleading, motion or other paper warrants that to his or her best "knowledge, information and belief, formed after reasonable inquiry," the document is "well-grounded in fact."

(..continued)

> production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

[7] Stack also argues that Joesten's claim for overtime is speculative. As with the miscellaneous expenses, Joesten's claim for overtime also presents a factual issue.

Bell, Stack and Dunlop moved for sanctions under this statute because they felt Joesten's summary judgment motion and supporting papers "lack[ed] support in the record, [were] misleading, or in fact [were] entirely contrary to the record." The trial court denied the motion for sanctions, concluding that "[f]or the most part, the problems ... are far from major. In many instances, the complained of language is interpretive or argument."

This court reviews a denial of a motion for sanctions under the erroneous exercise of discretion standard. ***Riley v. Isaacson,*** 156 Wis.2d 249, 256, 456 N.W.2d 619, 622 (Ct. App. 1990). This court will uphold a discretionary decision "if the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** at 256-57, 456 N.W.2d at 622.

The parties submitted voluminous documents, and the trial court was well acquainted with their divergent viewpoints on the factual and legal issues in litigation. We defer to that court's assessment of the claimed misstatements, and conclude that the trial court properly exercised its discretion.

No costs to any party.[8]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[8] As a final observation, we note that on several occasions, both parties "incorporated by reference" arguments made in briefs filed with the trial court. Counsel for Bell, Stack and Dunlop bluntly conceded that he was doing so because of this court's page limitations. However, those limitations exist for good reason, and parties may not circumvent them by incorporating by reference material found in the record or appellate appendix.