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H. L. & Irene Leach dba Rusco Window Company v. Board of Review of the Industrial Commission of Utah et al : Brief of Plaintiff and Appellant

Utah Supreme Court

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Herbert B. Maw; Attorneys for Plaintiffs and Appellants;

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IN THE SUPREME COURT
of the
STATE OF UTAH

H. L. & IRENE LEACH, dba RUSCO
WINDOW COMPANY,

Plaintiffs,

— vs. —

BOARD OF REVIEW of the IN-
DUSTRIAL COMMISSION OF
UTAH, DEPARTMENT OF EM-
PLOYMENT SECURITY,

Defendant.

Case No. 7751

FILED
MAR 8 1952

Clerk, Supreme Court, Utah

BRIEF OF PLAINTIFF AND APPELLANT

HERBERT B. MAW,

Attorneys for Plaintiffs
and Appellants,
214 Boston Bldg.,
Salt Lake City, Utah.

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BRIEF OF PLAINTIFF AND APPELLANT

The parties are referred to herein as follows: H. L. & Irene Leach, doing business as RUSCO WINDOW COMPANY, as plaintiffs, and BOARD OF REVIEW of the INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, as defendant.

This is a petition for Writ of Review of an order of the defendant affirming the appeal tribunal's decision

directing the plaintiffs to pay into the State Unemployment Compensation Fund contributions on the earnings of Franchise Dealers, who make contracts for the sale of Plaintiff's products, and of Contract Installers of Plaintiff's products.

STATEMENT OF FACTS

Plaintiff is a partnership engaged in the business of distributing Rusco Windows and other products manufactured by F. C. RUSCO COMPANY of Cleveland, Ohio. Substantially all of said distribution of said windows is done by the plaintiffs through Franchise Dealers in the manner described as follows :

Plaintiffs contract in writing with both individuals and corporations, who are designated as Franchise Dealers. Under the terms of said contracts, the Franchise Dealers are given the exclusive right to do business within an assigned area, but are permitted to contract for jobs involving 25 or more window openings in a building in any area. The nature of the work done by said Franchise Dealers is that of contacting owners of buildings that are being constructed or remodeled and of entering into written agreements with them for the sale and installation of Rusco Windows and Products. These agreements are made in the names of the Franchise Dealers and the customers and are in no way binding upon the plaintiffs. They provide for the installation of Rusco Window and Products at prices listed by the plaintiff. Franchise Dealers pay all of their own expenses, work when and as they desire, are unsuper-

vised by the plaintiff, hire their own help and pay the salaries of their helpers, make no reports to the plaintiffs, operate from their own homes or offices, and are free from all control of the plaintiffs. They find their own customers and are independent operators.

Prior to entering into a contract with prospective Franchise Dealers, Plaintiffs offer them training. Said training is optional on the part of the prospective dealers and consists primarily of making the prospective dealers acquainted with the nature of Rusco Windows and Products, and of instructing them regarding rules and regulations of the Federal Housing Administration. During said period of training, which might last from one day to several days—depending on the previous experience and the desire of the trainee—the trainee is considered as an employee of the plaintiff and is paid a salary.

After a Franchise Dealer has made a contract with a customer for the installation of Rusco Products, he offers it to the plaintiffs for purchase. It is usually purchased by the plaintiffs when an investigation shows that the credit rating of the customer is good, in which case the Franchise Dealer becomes entitled to a percentage of the contract price as commission. If the plaintiff does not purchase it, the Franchise Dealer receives nothing for his efforts because the plaintiffs are the exclusive dealers of the windows and products of F. C. Rusco Company in this state and are therefore the only ones to whom such contracts can be sold by Franchise Dealers.

The Franchise Dealers have nothing to do with the contracts they make with their customers after they are sold to the plaintiffs. Thereafter the plaintiffs assume all obligation under said contracts and at their own expense install the windows and products covered by the contract. They pay the Franchise Dealer's commission from the money they collect from the customer after they have installed the windows and complied with the terms of the agreement they had purchased from the Franchise Dealer.

The installing work is done through contracts entered into between the plaintiffs and qualified carpenters or installers. Said installers agree to install Rusco Windows and Products in accordance with specifications furnished by the plaintiffs and for a price agreed upon by both parties. The installers agree to install said windows and products in a workmanlike manner and in accordance with said specifications and to furnish all of the tools, equipment and transportation and labor necessary to install and service the installations. Payments on these contracts are made after the installations have been completed. Installers receive no supervision while doing their work, they work when and as long as they desire, and are completely free of direction from the plaintiffs. When the installations are completed their duties to the plaintiffs end.

ASSIGNMENT OF ERROR

The plaintiffs make the following Assignments of Error:

1. The defendant erred in finding that the Franchise Dealers who did business with plaintiffs during the period from September 30, 1948 to December 31, 1950 were employees of the plaintiff and, being such, the plaintiff must contribute to the State Unemployment Compensation Fund on the basis of the amount paid as commissions to said Franchise Dealers.

2. The defendants erred in finding that the Contract Installers who did business with the plaintiffs during the period from September 30, 1948, to December 31, 1950 were employees of the plaintiff and, being such, the plaintiffs must contribute to the State Unemployment Compensation Fund on the basis of the amount paid them on installation contracts.

ARGUMENT

DEFENDANTS ERRED IN FINDING THAT THE FRANCHISE DEALERS WHO DID BUSINESS WITH THE PLAINTIFFS DURING THE PERIOD FROM SEPTEMBER 30, 1948 TO DECEMBER 31, 1950 WERE EMPLOYEES OF THE PLAINTIFF AND BEING SUCH, THE PLAINTIFFS MUST CONTRIBUTE TO THE STATE UNEMPLOYMENT COMPENSATION FUND ON THE BASIS OF THE AMOUNT PAID AS COMMISSIONS TO SAID FRANCHISE DEALERS.

This court has repeatedly held that the term "Employee" as defined by the Utah Unemployment Compensation Laws is broader in its scope than the Common Law definition and than that of a mere master and servant relationship. In determining the liability of the plaintiff for contributions to the unemployment fund,

the tests being laid down in the act must be followed. It is upon that premise that plaintiffs base their arguments.

In the instant case the plaintiffs were not engaged in the same business as was carried on by the Franchise Dealers. They solicited no business nor did they contact prospects for the purpose of entering into contracts with them for the installation of Rusco Products. They had no lists of customers or prospects. The fields of their service was entirely different from that of the Franchise Dealers, who solicited contracts. The plaintiffs did not solicit contractors. Their business was confined to the installation of Rusco Products and the *purchasing* of contracts entered into between others in their own names. Under such circumstances, it is difficult to conceive of how an employer-employee relationship could exist between the plaintiffs and the dealers who did business with them.

TESTS OF EMPLOYER-EMPLOYEE RELATIONSHIP

In *Christean v. Industrial Commission* (196 P 2d 502) this court stated certain matters of fact to be considered in determining whether, under the provisions of the Unemployment Act one acting for another is a servant or an independent contractor. They are as follows:

a. The extent of control which, by agreement, the master may exercise over the details of the work. (In the instant case he could exercise no control.)

b. Whether or not the employed is engaged in a distinct occupation or business. (Here Franchise Dealers were not only engaged in a distinct business, but in one which was entirely different from that of the plaintiffs.)

c. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision. (In the State of Utah, hundreds of persons solicit business of various kinds from residents of the state without any supervision or direction of any employer. A successful solicitor of business requires special skills and a pleasing personality which cannot usually be supplied by supervision.)

d. The skill required in the particular occupation. (Acquiring contracts from prospects for Rusco products, which are nationally advertised and are easily demonstrated as being a superior product, requires no unusual skills which can be supplied or improved by supervision or direction. Through a simple demonstration, the product sells itself.)

e. Whether the employer or the workman supplies the instrumentalities, tools, and place of work for the person doing the work. (The Franchise Dealers, not the plaintiffs, furnish all of the supplies [even their own cards] the transportation, the labor and everything needed in their business, operated out of their own offices or homes, furnished their own business phones, and take care of their own needs in the carrying on of their businesses. Advertising is done on a National scale by

F. C. Rusco Company, the manufacturer, not by the plaintiffs. The plaintiff merely supplied the contract forms to the dealers.)

f. The length of time for which the person is employed. (The life of the contract under which the Franchise Dealers operated was of indefinite duration and was subject to cancellation by either party on five days' written notice.)

g. The method of payment, whether by the time or by the job. (Franchise Dealers received no pay from the plaintiff for their services. Their only compensation was the commission they received from the sale of their contracts to the plaintiffs.)

h. Whether or not the work is a part of the regular business of the employer. (Here the plaintiffs were not engaged in the business of soliciting contracts, so the Franchise Dealers were not engaged in the regular business of the plaintiffs for they neither installed windows or bought contracts.)

i. Whether or not the parties believed they were creating the relationship of master and servant. (The contract entered into between the plaintiffs and the Franchise Dealers specifically provided as follows: "12. It is understood and agreed that the franchise dealer shall be an independent contractor and not an agent or employee of the Distributor." [Plaintiffs' Exhibit A, §12.] The witnesses testified that they did not believe they were employees. [Tr. P. 15 L. 44-47; P. 30 L. 40-45] So far as the record shows, no Franchise Dealer ever ap-

plied for Unemployment Benefits, which is evidence that none of them considered themselves as being employees of the plaintiff.)

The plaintiff in the *Christean* case, *supra*, was an insurance agent. This court held in that case that criteria b, c, d, e, and h, listed above, indicated that the relationship between the plaintiff and the company he represented was that of employer and employee but due to the fact the contracting parties *intended* that the relationship be that of independent contractor and *believed* the relationship so to be (criteria "i") and because the company exercised no control over his activities (criteria "a") the relationship was that of an independent contractor. *In so deciding the court declared that "the extent of control that can be exercised by the principal is by all cases and textbooks, the important test factor."*

The evidence in the *Christean* case, *supra*, indicated that the company exercised far more control over its plaintiff than the plaintiff was able to exercise in the instant case, for here the Franchise Dealers were completely free of supervision and control. The testimony is undisputed that these dealers had no supervision, paid their own expenses, were engaged in a different business than the plaintiff, worked when and as they liked, hired and paid for their own help, made no reports, operated from their own homes or offices, and were completely free to carry on their business as they chose, making their contracts in their own names and with customers of their own choosing.

Though their contracts with the plaintiffs required that Franchise Dealers shall not handle, sell or distribute any other product (Plaintiffs' Exhibit "A", §13) both the plaintiffs (Tr. P. 18, L. 11) and the Franchise Dealer (Tr. P. 24, L. 36-43) declared that it was permissible for the dealers to handle other lines.

The above rule of law that *the right to control* is the determining factor in cases such as this one is pointed out by Justice Woolfe in the case of *Sommerville v. Industrial Commission* (196 P. 2d, 718) in the following language:

"It is now well settled in this jurisdiction that the crucial factor in determining whether an applicant for workman's compensation is an employee or an independent contractor is whether or not the person for whom the services were performed *had the right to control the execution of the work.*"

In the following Utah cases the court has reiterated the "right to control" principle and in each held that the control exercised by the principal was not such as to require a finding of employer-employee relationship.

Angel v. Ind. Comm., 64 Utah 105; 228 P. 509;

Lukes Sand and Gravel Co. v. Ind. Comm., 82 Ut. 188; 23 P. 2d 225;

Gagoff v. Ind. Comm., 77 Ut. 355; 296 P. 229;

Murch Bros. Con. Co. v. Ind. Comm., 84 Ut. 494; 36 P. 2d 1053;

Gibson v. Ind. Comm., 81 Ut. 580; 21 P. 2d 536;

Miller v. Ind. Comm., 97 Ut. 226; 92 P. 2d 342;

Parkinson v. Ind. Comm., Ut. 172 P. 2d 136;

Kinder v. Ind. Comm., 106 Ut. 448; 150 P. 2d 109.

EMPLOYED FOR WAGES

Before an employer can be required to contribute to the State Unemployment Security Fund it must be established that his employee "performed services and earned wages." (*Utah Code Annotated*, 42-2a-19-(j) (1)) On this point the Supreme Court of Utah has held that the Unemployment Security Act applies only to:

"individuals who are employed for wages. It does not cover every status of employment, nor does it cover every individual who receives from another remuneration for work done. It covers only individuals who have been, or are in employment and who receive therefore wages as those two terms are defined in the act." (*Fuller Brush Co. v. In. Comm.*, 99 Ut. 97; 104 P. 2d 201)

The question in this case, therefore, resolves itself into the proposition of whether the Franchise dealers rendered personal services to the plaintiff for wages or under a contract of hire. In the language of the court in the *Fuller Brush* case:

"Did he render personal services? If so, did he or was he entitled to receive therefore remuneration based upon such personal service?"

In the instant case Franchise Dealers (1) rendered no personal service to the plaintiff. They worked for themselves. They found their own customers, made contracts in their own names with their customers, paid their own expenses, used their own equipment, provided their own offices and telephone services, made no reports to the plaintiffs, worked when and as they wanted, were free from all control and direction from the plaintiffs. The plaintiffs were in effect merely customers to whom they sold their contracts.

(2) They received no wages or remuneration for services rendered to the plaintiffs. In fact the only income they received was from the sale of their contracts to the plaintiffs. This court said in the *Fuller Brush* case:

“The essential element of wages are that they form a direct obligation against the employer, in favor of the employee; that when the service is performed the compensation, if any, accrues and becomes payable regardless of the success or failure of the undertaking; that any profits or earnings over and above costs of the service accrues to the employer, and any loss as a result of the undertaking or service must be borne by the employer. It is not essential that the wage move directly from the employer to the employee, as where the employee works on commission, deducts his commission from a collection and remits the ‘nets,’ but it is essential that the remuneration accrues from the product or service of the employer, and would accrue to him except for the fact that the employee is entitled to retain or receive it as remuneration under his contract of hire.”

Applying the above definition to the instant case we find that the work or services performed by the Franchise Dealers formed no "direct obligation against" the plaintiff. They could have entered into a thousand contracts with customers for the installation of Rusco Windows and Products without obligating the plaintiff in any way to pay them for what they did. Their remuneration is based, not on any services rendered, but on the commission they receive from a sale of contracts to the plaintiffs. *Their work of entering into contracts with their customers for the installation of Rusco Products impose no obligations on the plaintiffs to either the Franchise Dealers or their customers. Their remuneration depends entirely on the results of a vendor-vendee relationship between them and the plaintiffs.* Furthermore the evidence plainly shows that it was the intentions of all of the parties—Franchise Dealers and Plaintiffs alike—that an employer-employee relationship should not be set up between them through the execution of their contracts with each other.

EXEMPTIONS FROM THE ABOVE RULES

Even though the court should hold that the Franchise Dealers were performing services, as defined by the Act, for the plaintiff "for wages or under a contract for hire;" it is the plaintiffs' contention that they would be exempt from paying the contributions in question under the provisions of 42-2a-19-(j)-(5), (a), (b), (c), *Utah Code Annotated*, 1943, which this Honorable Court has held was an exemption to the provisions of 42-2a-19-

(j)-(1) and, therefore, exempted "certain persons who otherwise come within the act as 'rendering personal services for wages.'" (*Singer Sewing Machine Co. v. Ind. Comm.*, Ut. 134 P 2d 479)

"42-2a-19-(8)-(5) Services performed by an individual for wages or under contract for hire, written or oral, express or implied, shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the Commission that —

"(A) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of hire and in fact; and — "

(In the instant case as shown above all Franchise Dealers are completely free from control and direction by the plaintiffs over the performance of the services they perform.)

"(B) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and — "

(The services rendered by the Franchise Dealers are both outside and different from the usual course of the plaintiffs' business as well as from the nature of the plaintiffs' business, and are performed entirely away from all places of business of the plaintiffs; each Franchise Dealer maintaining his own separate offices and contacting his own customers.)

“(C) such individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service. — ”

(Each Franchise Dealer is customarily engaged in an independently established business of salesmanship. Each, according to the testimony, is at liberty to carry separate lines. The fact that the selling of contracts to the plaintiffs was more to their advantage during the period in question than the handling of several lines might have been, in no way should modify the fact that each one of them was actually and customarily engaged in the independent business of salesmanship while they were selling contracts to the plaintiff.)

DEFENDANT ERRED IN FINDING THAT THE CONTRACT INSTALLERS WHO DID BUSINESS WITH THE PLAINTIFFS DURING THE PERIOD FROM SEPTEMBER 30, 1948 to DECEMBER 31, 1950 WERE EMPLOYEES OF THE PLAINTIFFS AND, BEING SUCH, THE PLAINTIFFS MUST CONTRIBUTE TO THE STATE UNEMPLOYMENT COMPENSATION FUND ON THE BASIS OF THE AMOUNT PAID THEM ON INSTALLATION CONTRACTS.

The second group of contractors who did business with the plaintiffs and for whom the plaintiffs were ordered to contribute to the State Unemployment Compensation Fund are the Contract Installers. The facts relating to them are as follows:

After the plaintiffs purchase a contract from a Franchise Dealer, they proceeded at once to carry out the terms thereof which included the installation of

Rusco Windows and Products. This work was done through contractors. Plaintiffs as a rule made up the windows in their shops and then contracted for the installation of them.

Written contracts were entered into between the plaintiffs and Installers. (Ptf's Ex. "B") These contracts required that the installers "shall provide and furnish all tools, equipment and transportation necessary to install and service the installations" of the products; to do the work in a workmanshiplike manner, to assume reponsibility for all materials turned over to them; and "shall make every attempt to secure completion certificates on installation when his work is completed. "Payment for installations were to be made after the jobs were completed. The parties agreed in the contract that the installers were Independant Contractors and not agents or employees of the plaintiffs, and that th econtract could be cancelled by either party on 5 days notice.

Plaintiff testified that he had no right of control over the Installers, that they were free to work when, how, and as they desired, that either standard or special specifications were drawn for each job, and that the installation price was agreed upon by the parties in advance. (Tr. P. 25) The Installers provided transportation for the Products to the premises where they were to be installed, paid their own expenses, hired their own help, furnished their own tools and equipment, and did the jobs in accordance with the specifications and without supervison. (Tr. P. 25)

The amount of installation work available was limited and did not, as a rule, require the full working time of the Installers, consequently most of them did the work in connection with other employment.

The Installers were in the main carpenters or mechanics. There was no evidence as to the extent that any of them carried on similar activities as side line methods of earning extra money. The only contacts the defendant made with any of them, according to the record, was over the telephone, and it appears that no inquiries were made as to whether any of them were carrying on similar businesses on the side. The evidence is undisputed, however, that each Contract Installer operated as contractors when they did business with the plaintiffs as installers.

Plaintiffs contend that under the rules of law discussed in the first section of this brief, the Contract Installers were independent contractors and not employees of the plaintiffs, and were completely free of all direction and supervision of the plaintiffs. They worked according to written specifications on each installation job they did as most contractors do, and furnished whatever labor, tools, equipment, and transportation that was necessary to do the job. There was no criteria of an employer-employee relationship between them and the plaintiffs. *They did not perform services for wages or under any contract of hire written or oral, express or implied, as defined in the Act.*

But even if the court should find that they were employees of the plaintiff for wages or under a contract of hire, they could be readily classified under the exceptions provided in 42-2a-19-(j)-(5)-(A), (B), (C), Utah Code Annotated, 1943, for

(A) They were completely free from plaintiffs control.

(B) They did all their work away from the Plaintiff's places of business.

(C) Each of them were customarily engaged in independently established trades that were of the same nature as would be required for the installation of Rusco Products; at times as employees of other companies and at times as individual contractors on a full time or part time basis but always within the fields of their related independently established trades.

CONCLUSION

The same principles of law discussed herein in relation to Franchise Dealers apply to the Contract Installers. It is the plaintiffs' contention that in both, those performing services did so as independant contractors and not as employees of the plaintiffs for whom contributions to the State Unemployment Compensation Fund must be made. Plaintiffs, therefore, pray that the findings of the defendants that said Franchise Dealers

and Contract Installers were employees of the plaintiffs as defined by the act, be reversed.

Respectfully submitted,

HERBERT B. MAW,

*Attorneys for Plaintiffs
and Appellants,*

214 Boston Bldg.,

Salt Lake City, Utah.