

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

0-0

CIV. 06-4274

SUNBEAM NECKLACE, as Special
Administrator of the Estate of Walter T.
Thornton, Jr.,

Plaintiff,

vs.

UNITED STATES OF AMERICA, acting
through the Bureau of Indian Affairs,

Defendant.

:

:

:

:

:

:

:

REPLY BRIEF IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT ON BEHALF OF
SUNBEAM NECKLACE

0-0

I. Primeaux was an employee of the Yankton Sioux Tribe at the time of the accident.

To determine whether an individual performing work on behalf of another is an employee or independent contractor, the determinative factor is the hiring party's right to control the physical conduct of the person giving the service. Restatement (Second) Agency §220. As stated by the United State's Supreme Court the inquiry is "the hiring party's right to control the manner and means by which the product is accomplished." Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52, 109 S.Ct. 2166 (1989) (citing Restatement §220(1)) (noting that the Court has routinely looked for guidance from the Restatement of Agency). For example, an employee performs services

Civ 06-4274

Reply Brief in Support of Motion for Summary Judgment on Behalf of Sunbeam Necklace

Page 2

in which his physical activities and his time are surrendered to the control of the employer whereas an independent contractor has complete control over the time and manner of rendering a service. Farm Bureau Co-op Mill & Supply Inc. v. Blue Star Foods Inc., 238 F.2d 326, 335 (8th Cir. 1956) (citing Restatement (Second) Agency §220, cmt. e).

The United States claims that the fact that Primeaux was hired by Shields and not Richard Leisure, the acting roads manager at the time of the accident, is indicative of Primeaux's status as an independent contractor. However, in light of Shields' high-ranking position as Tribal Administrator, his role in hiring Primeaux produces the opposite result. (Exhibit J of Affidavit of William P. Fuller.) As the Tribe's Administrative Officer, Shields was authorized to hire individuals on a temporary basis without requiring clearance or the involvement of the personnel office. (Sully Dep. at 7-8, 13.) Because he oversaw various departments in the Tribe, Shields could authorize Primeaux to use Tribal equipment regardless of what department maintained it. (Shields Dep. at 46.) In comparison, Leisure could only authorize employees to use a couple pieces of equipment, consisting of a pay loader, a maintainer, a snow truck, and a pickup. (Leisure Dep. at 27.) Shields was also authorized to compensate Primeaux with 638 contract funds. (Shields Dep. at 49, 63.) Accordingly, Shields could exercise far greater control over Primeaux and the scope of his duties in comparison to Richard Leisure's role as roads manager.

Civ 06-4274

Reply Brief in Support of Motion for Summary Judgment on Behalf of Sunbeam Necklace

Page 3

While the United States places emphasis on the fact that Primeaux was not supervised on the day that he cleared the pathway, “it is the *right* to control, rather than the actual exercise of control that is significant.” ARA Leisure Services v. N.L.R.B., 782 F.2d 456, 460 (4th Cir. 1986). The right to control “is not narrowly focused on direct supervision,” but rather on the totality of the working relationship. Id. Accordingly, “[t]he right to control requires only such supervision as the nature of the work requires.” In re Associated Bicycle Service, Inc., 128 B.R. 436 (N.D.Ind. 2000) (citing McGuire v. United States, 349 F.2d 644 (9th Cir. 1965)). Shields had the *right* to control the manner in which Primeaux cleared the Wagner Pathway. Shields instructed Primeaux to use the Tribe’s truck, trailer, and skid loader and told him where to locate the equipment. (Shields Dep. at 66.) In accordance with Shields’ instructions, Primeaux located the equipment and filled out a Transfer/Loan Agreement documenting his use of the Tribe’s 1989 Chevy truck. (Exhibit H of Affidavit of William P. Fuller.) All Tribal employees were required to fill out this document. (Shields Dep. at 38.) The Transfer/Loan Agreement included the following provision: “the employee listed below is requesting the use of a Tribally owned vehicle and that the vehicle is needed for the employee’s job duties and responsibilities.” (Exhibit H of Affidavit of William P. Fuller.) Primeaux signed the document as the borrowing party. (Exhibit H of Affidavit of William P. Fuller.)

After locating the equipment, Primeaux inquired with Bryan Heth, an employee of

Civ 06-4274

Reply Brief in Support of Motion for Summary Judgment on Behalf of Sunbeam Necklace

Page 4

the Tribe's Utilities Department, about the Tribe's method of securing the skid loader to the trailer. (Primeaux Dep. at 35). Although Primeaux would have normally used chains and tie downs to transport the skid loader, he was told that the Tribe did not own tie downs and that he would have to haul the skid loader with the equipment that was available. (Primeaux Dep. at 52, 53, 55, 56.) Primeaux followed these instructions as well. As to the details of removing the snow and ice from the pathway, Shields instructed Primeaux on the proper method. Shields instructed Primeaux to break up the ice with the skid loader and then remove the debris. (Shields Dep. at 37.) Primeaux followed these instructions and was prepared to alter his performance in accordance with any instructions Shields gave him. (Primeaux Dep. at 51.) Primeaux was not working on his own time table or at a location of his choosing. He was required to clear the Wagner Pathway on the day he was hired and could not hire another person to complete the job. (Primeaux Dep. at 51, 52.)

Shields also had the right to inspect and supervise Shields' job performance. If Shields was not satisfied with the manner in which Primeaux cleared the pathway, he could require Primeaux to do the job again and could also remove Primeaux from the job. (Shields Dep. at 64, 65.) In addition, Shields could assign Primeaux additional work. (Shields Dep. at 72.) Control being the determinative factor, Primeaux was an employee of the Tribe when he was hired to clear the Wagner Pathway.

The United States claims that Primeaux was an independent contractor because

Civ 06-4274

Reply Brief in Support of Motion for Summary Judgment on Behalf of Sunbeam Necklace

Page 5

“Shields documented his intention to hire Primeaux to perform contractual work in a ‘contract agreement’ that failed to mention employment with the YST.” However, the fact that Shields recorded Primeaux’s work in a document entitled “contractual agreement” is of no significance. Employees often enter into contracts with their employers. See SDCL 60-1-2 (defining contract of employment). The mere existence of a contract is not determinative of an individual’s agency status. Hunt v. State of Missouri, Dept. of Corrections, 297 F.3d 735, 741 (8th Cir. 2000). This is true even where the contract expressly provides that the hired party is an independent contractor. Id. Shields regularly used these contracts to hire individuals to perform work who were not full-time employees of the Tribe. (Sully Dep. at 7, 13.) (Shields Dep. at 65.) Shields’ position as Tribal Administrator allowed him to hire employees without the involvement of the Tribe’s personnel office. (Sully Dep. at 7, 13.) While the personnel office may have required certain documentation for full-time employees, it had no policy concerning “contract employees.” (Sully Dep. at 7.) Furthermore, an individual’s employee status is not dependent on the presence of the proper paperwork, nor is it created by following a set of standard procedures. Rather, it is determined by a fact-intensive inquiry with all of the incidents of the relationship being assessed and weighed. Hunt, 297 F.3d at 741 (noting that the determination of whether an individual is an employee or independent contractor involves a fact-intensive inquiry).

As a guide to this fact-intensive inquiry, the United States Supreme Court has

Civ 06-4274

Reply Brief in Support of Motion for Summary Judgment on Behalf of Sunbeam Necklace

Page 6

instructed courts to consider the non-exclusive list of factors in section 220 of the Restatement (Second) of Agency. Community for Creative Non-Violence, 490 U.S. at 751-52 (considering the factors listed in section 220 of the Restatement of Agency); see also Wojewski v. Rapid City Regional Hospital, Inc., 450 F.3d 338, 342-43 (8th Cir. 2006) (discussing the factors in section 220 of the Restatement of Agency). The factors include:

- (a) the extent of control which, by agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the discretion of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplied the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is part of the regular business of the employer;
- (i) whether or not the parties believe they are creating a relationship of master and servant; and
- (j) whether the principal is or is not a business.

Restatement (Second) of Agency §220; see also Wojewski, 450 F.3d at 342-43; Lerohl v. Friends of Minnesota Sinfonia, 322 F.3d 486, 489 (8th Cir. 2003) (citing the factors from section 220). In weighing these factors, “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” Wojewski, 450 F.3d at 342-43 (citing Lerohl, 322 F.3d at 489).

Civ 06-4274

Reply Brief in Support of Motion for Summary Judgment on Behalf of Sunbeam Necklace

Page 7

The requisite skill level required to complete the job is indicative of the agency relationship between the parties. See Lerohl, 322 F.3d at 491 (noting that musicians are highly skilled professionals and are considered independent contractors). The less skill required by a job, the greater the indication that the worker is an employee and not an independent contractor. “Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that he may nominally contract to do a specified job for a specified price.” Restatement (Second) Agency §220 cmt. i. This point is further illustrated in the cases cited on page 19 of the United States brief. In each case, the Eighth Circuit Court of Appeals concluded that a highly-skilled professional was an independent contractor and not covered by the FTCA. See Bernie v. United States, 712 F.2d 1271 (8th Cir. 1983) (involving two physicians); Knudsen v. United States, 254 F.3d 747, 750 (8th Cir. 2001) (involving a psychologist); Rutten v. United States, 299 F.3d 993, 955 (8th Cir. 2002) (involving a physician). Therefore, the fact that clearing the Wagner Pathway was not a job that required a highly skilled worker is indicative of Primeaux’s status of employee. See Restatement (Second) of Agency §220, cmt. j. (noting that an individual may be an employee despite the short duration of work if the work is not skilled and the employer supplies the instrumentalities).

The fact that the Tribe supplied Primeaux with the equipment to clear the pathway is a strong indication that he was an employee of the Tribe. See Restatement (Second)

Civ 06-4274

Reply Brief in Support of Motion for Summary Judgment on Behalf of Sunbeam Necklace

Page 8

Agency §220 cmt. k. It is irrelevant which tribal department owned the equipment.

Rather, the relevant fact is that Primeaux did not provide any of the equipment to clear the pathway. (Primeaux Dep. at 56.) The comments to the Restatement of Agency describe why this factor is important: “[I]f the worker is using his employer’s tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is a master.” Restatement (Second) Agency §220 cmt. k. The equipment Primeaux used was of substantial value, which serves as further evidence of the control Shields’ exercised over Primeaux.

The remaining relevant factors also indicate Primeaux was an “employee” of the Tribe. Primeaux was paid by the hour for his work. (Shields Dep. at 67.) When Primeaux was hired to clear the pathway, he believed he was as an “employee” of the Tribe. (Exhibit I of Affidavit of William P. Fuller) This belief was also shared by Shields, who considered Primeaux an “employee” of the Tribe. (Shields Dep. at 64.)

Considering all of the relevant factors together, the facts weigh in favor of assigning Primeaux employee status -- the Tribe supplied the equipment, Primeaux was paid by the hour, and the job did not require a high level of skill. More importantly, these factors resolve the ultimate inquiry - Shields exercised control over the manner and means of Primeaux’s job performance. Accordingly, Primeaux was an “employee” of the Tribe when he was hired to clear the Wagner Pathway.

Civ 06-4274

Reply Brief in Support of Motion for Summary Judgment on Behalf of Sunbeam Necklace

Page 9

Sunbeam Necklace's claim against the United States does not rise and fall exclusively upon the employment status of Primeaux. Sunbeam Necklace's Complaint alleges that the Yankton Sioux Tribe was negligent "in among other things," in failing to provide proper and adequate equipment and in failing to properly inspect, maintain and repair the equipment. (Necklace Complaint ¶7.) The Tribe and not Primeaux provided the equipment. The Tribe and not Primeaux inspected, maintained and repaired the equipment. Primeaux used the Chevrolet pickup, the trailer and the skid loader at the specific direction of Gordon Shields. Primeaux had concerns about the lack of tie-downs and chains, but no tie-downs or chains were available. Primeaux had nothing to do with the hitch system. The inadequacy of the hitch system is a primary factor in Necklace's claim against the United States which stands in the shoes of the Tribe. Irrespective of Primeaux's status, Sunbeam Necklace has a viable claim against the Tribe. The Tribe is deemed to be a part of the Bureau of Indian Affairs in carrying out the maintenance of the pedestrian pathway with inadequate and improper equipment.

II. Primeaux was acting pursuant to a self-determination or 638 contract when he was en route to clear the Wagner Pathway of snow and ice on the morning of January 23, 2006.

The United States claims that Primeaux was not acting under the auspices of the 638 contract because the Wagner Pathway was not part of the contract and the procedure to amend the contract was not followed. The government cites a provision from the 638 contract that requires all modifications to the contract be in writing as well as 25 U.S.C. §

Civ 06-4274

Reply Brief in Support of Motion for Summary Judgment on Behalf of Sunbeam Necklace

Page 10

452f (2), which it claims requires the same. However, the government fails to acknowledge the fact that the parties to the contract - the Tribe and the BIA - conducted the maintenance and funding of the Wagner Pathway as though it was included in the 638 contract. See Goshey v. ITT Life Ins. Corp., 590 F.2d 737, 740 (8thCir. 1979) ('a provision purporting to prohibit modification of a contract except by a specified method does not prevent the parties to the contract from modifying it by some other method.');

Hofeldt v. Mehling, 2003 S.D. 25, ¶11, 658 N.W.2d 783, 787 (stating that contractual rights and remedies may be modified or waived by the subsequent conduct of the parties); Truhe v. Turnac Group, LLC, 1999 S.D. 118, ¶26, 599 N.W.2d 378, 383 (holding that a contract may be rescinded by an oral agreement despite a provision in the contract requiring a writing); Moe v. John Deere Company, 516 N.W.2d 332, 336 (S.D. 1994) (recognizing that the parties' subsequent conduct may modify a contract); 6 Corbin on Contracts §1295 at 206 (1962).

The majority of funds used to construct the Wagner Pathway were provided by the BIA. (Shields Dep. at 57.) Since the pathway's completion in 2002, the BIA has included the pathway in its annual inspection of roads within the BIA Road System. (Erdmann Dep. at 18, 19.) The Tribe has paid for the maintenance of the pathway with funds from the BIA via the 638 contract's road maintenance budget. (Shields Dep. at 59, 60.) The Tribe and the BIA believed that the pathway was part of the BIA Road System and included in the 638 contract. (Shields Dep. at 59.) From the time the pathway was

Civ 06-4274

Reply Brief in Support of Motion for Summary Judgment on Behalf of Sunbeam Necklace

Page 11

constructed, the BIA and the Tribe have demonstrated an intent to include the pathway in the 638 contract. Accordingly, through the conduct of both parties, the 638 contract has been modified to include the Wagner Pathway.

Both of the required elements have been established to invoke the application of the FTCA – Primeaux was an employee of the Tribe and was acting pursuant to a 638 contract at the time the accident occurred. With both elements being met, Necklace may pursue her claim against the Tribe. Accordingly, Necklace respectfully requests that the Court grant her motion for summary judgment.

Dated this 4th day of October, 2007.

FULLER & SABERS, LLP

/s/ William P. Fuller
William P. Fuller
7521 S. Louise Avenue
Sioux Falls, SD 57108
Phone 605-333-0003
Fax 605-333-0007
Email bfuller@fullerandsabers.com
Attorneys for Plaintiff Sunbeam Necklace

Civ 06-4274

Reply Brief in Support of Motion for Summary Judgment on Behalf of Sunbeam Necklace

Page 12

Certificate of Service

I certify that on the 4th day of October, 2007, I sent a true and correct copy of the foregoing Reply Brief in Support of Motion for Summary Judgment on Behalf of Sunbeam Necklace was served upon the following:

Diana Ryan
Assistant U.S. Attorney
P.O. Box 3303
Sioux Falls, SD 57101-3303
Attorneys for Defendant

☐ U.S. Mail
☒ E-Filing
☐ Hand Delivery

/s/ William P. Fuller
One of the Attorneys for Defendant