

STATE OF INDIANA)
)ss:
COUNTY OF MARION)

MARION SUPERIOR COURT
CIVIL DIVISION 10
CAUSE NO. 49D10-0403-CT-00484

JENNY KERR,)
)
Plaintiff,)
)
vs.)
)
WISHARD MEMORIAL HOSPITAL and)
ALLIED BUILDING SERVICES,)
)
Defendants.)

ORDER DENYING DEFENDANTS’ MOTION TO DISMISS

Statement of Case

Plaintiff Jenny Kerr (“Kerr”) seeks damages for personal injuries during temporary work for Defendant Wishard Memorial Hospital (“Wishard”). Wishard moves to dismiss, arguing Kerr was its “employee” and her remedies are exclusively within the Indiana Workmen’s Compensation Act (“Act”). The Court finds Wishard fails to show Kerr was an “employee” of Wishard, the Court therefore retains subject matter jurisdiction, and denies the motion to dismiss.

Issue

Was Kerr an “employee” of Wishard?

Background

Kerr, a registered nurse, was an employed by Care Staff, an agency that assigns nurses to work at understaffed health care facilities. In August of 2002, Kerr was placed at Wishard under a three (3) month contract. On October 1, 2002, as Kerr was injured when she slipped and fell on a newly waxed floor.

The undisputed facts show:

- Wishard had the right to refuse Kerr as a worker at its facility, but could not terminate her employment at Care Staff.
- Care Staff paid Kerr directly, provided her workmen's compensation insurance, and withhold taxes. Wishard signed her time card to document her work.
- Wishard supplied the tools and equipment for Kerr used.
- Wishard understood that Kerr would be treated as an employee, but Kerr believed she was an employee of Care Staff.
- Wishard determined Kerr's work hours and days, and answered any questions Kerr had regarding her work. However, a skills test and classroom orientation from Wishard was self-administered by Kerr prior to her start date.
- Kerr was contracted through Care Staff to work three months at Wishard.
- Wishard established Kerr's assignments, instructed her about her duties, and how to exit the building.

Kerr now sues for injuries, claiming Wishard was negligent. The Complaint states no facts demonstrating any employment relationship with Wishard, but mainly alleges: "the fall and resultant permanent injuries of plaintiff were caused by the negligence of the defendants who failed to utilize reasonable care in the inspection and maintenance of said floor," and acts of negligence "on the part of the defendants were the proximate cause of the injuries sustained by the plaintiff." Wishard moves to dismiss, arguing Kerr was an employee of Wishard and therefore limited to an exclusive remedy –

Indiana workmen's compensation - and this Court accordingly lacks subject matter jurisdiction.

The Court conducted oral argument without an evidentiary hearing, and a paper review of the claims. The relevant facts are not disputed.

Law

The Act is the exclusive remedy for personal injuries to "employees," and a civil court lacks subject matter jurisdiction over cases within the statute. I.C. 22-3-2-6; Williams v. R.H. Marlin, Inc. (1995), Ind.App., 656 N.E.2d 1145. Indiana law holds the Act is in derogation of common law, and must be strictly construed against limiting an injured party's right to bring suit. McQuade v. Draw Tite, Inc. (1995), Ind., 659 N.E.2d 1016, 1018. The Act permits actions against third parties provided fellow employees or employers are not included. I.C. 22-3-2-13. The Act also provides that one worker may have two employers when the employers "so associate themselves together that both are in direct control of the employee and he is made accountable to both, he will be considered an employee of both employers . . ." I.C.22-3-3-31; U.S. Metalsource Corp. v. Simpson (1995), Ind. App., 649 N.E.2d 682, 685.

The Indiana Supreme Court prescribes seven criteria to determine whether a person is an "employee" within the Act:

- Right to discharge.
- Mode of payment.
- Supplying tools or equipment.
- Belief of the parties in the existence of an employer-employee relationship.
- Control over the means used and the results reached.

- Length of employment
- Establishment of the work boundaries.

GKN Co. v. Magness (2001), Ind. 744 N.E.2d 391, 402 (quoting Hale v. Kemp (1991), Ind., 579 N.E.2d 63, 67).

In addition, the employer bears the burden of proving an alleged employee's claim falls within the scope of the Act unless the employee's own complaint demonstrates the existence of an employment relationship. Id. at 404. Most importantly, GKN explains that all factors must be weighed against each other as part of a balancing test as opposed to a mathematical formula, and a court should give the greatest weight to the extent to which an employer has "the right to control the manner and means by which the work is to be accomplished . . . the single most important factor in determining the existence of an employer-employee relationship." Id. at 402-403.

Discussion

First of all, Kerr's Complaint does not recite any facts demonstrating an employer-employee relationship with Wishard. Therefore, Wishard has the burden here. Secondly, Wishard fails to show an employer-employee relationship was established between Kerr and Wishard, in view of GKN factors and other circumstances.

Right of discharge. Like the worker in GKN, Kerr's work with Wishard could be terminated, but Wishard could not terminate her employment with Care Staff. Under GKN, this factor weighs in favor of an employment relationship.

Mode of payment. Care Staff made all payments to Kerr, and Wishard neither withheld taxes nor provided benefits. This factor weighs against an employment relationship.

Supplying tools and equipment. Wishard supplied Kerr with the tools that she needed to perform her nursing duties. This factor weighs in favor of an employment relationship.

Belief of parties in the existence of an employer-employee relationship. Wishard understood that Kerr would be treated as an employee since it had the same or similar expectations, assignments, and duties as its nursing employees. Kerr, however, regarded her position as being distinct from that of a Wishard employee because her performance was related more to professional nursing standards than Wishard's direction or control.

Under Degussa Corp. v. Mullens, 744 N.E.2d 407 (Ind. 2001), if both companies conduct performance reviews, this is evidence that they believed they were co-employers. Here, Kerr's performance reviews were conducted by Care Staff on behalf of Wishard.

This factor is therefore inconclusive.

Control over the means used/results achieved. This Court is instructed here by Justice Dickson's dissent in Degussa Corp. v. Mullins, *supra*. at 415:

Mullins was employed by Martin, not hired as an employee of Agritek. Throughout Mullins' employment, she was paid by Martin . . . Mullins believes she was employed by Martin, not Agritek. *The frequency of contact between Mullins and Agritek does not convince me that Agritek's right to control Mullins was superior to Martin's . . .* (emphasis supplied)

Although Degussa shows a fair amount of contact between its two parties, Justice Dickson balances the "frequency of contact" with the other factors to determine "the most significant factor," that is, control. This seems to be the view that GKN espouses, and which this Court adopts as well.

On one hand, Wishard shows Kerr referred questions, if any, to Wishard supervisors, that Wishard was responsible for determining Kerr's work schedule, and

Kerr was required to follow certain policies and procedures. On the other hand, Kerr shows her nursing responsibilities, ethical considerations, and overall professional performance is largely controlled by generic standards for which the entire nursing profession is held accountable. Also, Kerr was required to pass written examinations and attend classroom orientation, prior to working at Wishard. Although developed by Wishard, the implements to fulfill the skills test requirements were provided to Kerr by Care Staff.

Overall, the control factor here is inconclusive.

Length of employment. Kerr was assigned to Wishard for a three-month period. She ended up working at the facility from August to October 2002. In GKN, a three-month span of employment “cannot be said to weigh in favor of finding an employment relationship.” *Id.* at 406. In this case, therefore, the length of employment is an inconclusive factor.

Establishment of work boundaries. Wishard controlled the jobs to which Kerr was assigned and instructed her regarding how to exit the building. This factor weighs in favor of the employment relationship.

Among the four GKN factors that have any weight, only one weighs against the employee relationship. The single most important factor, control, is inconclusive.

[Overall, this was simply a scant temporary work assignment with little or no direction. The Act is in derogation of common law, and should not be interpreted to include an employment relationship that is so short and inconclusive.]

Conclusion

Wishard has shown Kerr was an “employee” of Wishard, is covered by the Act, and this Court lacks subject matter jurisdiction.

Order

Wishard's motion to dismiss is granted.

Dated this day of 2005. _____
David J. Dreyer, Judge
Marion Superior Court