State of Wisconsin **Labor and Industry Review Commission**

In the matter of

EMPLOYEE

Hearing Nos. __
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v.

EMPLOYER, Inc.

Employee's Brief

I. Introduction

In these cases, two issues are presented: (1) whether EMPLOYEE ("EMPLOYEE") was an employee or independent contractor of EMPLOYER, Inc. ("EMPLOYER"), and (2) whether EMPLOYEE quit from EMPLOYER with good cause if he was indeed an employee of EMPLOYER. The factual and legal issues at stake in these particular cases are relatively simple, and the administrative law judge who first heard this case did a good job in examining these matters. There is no significant reason to overturn his findings and conclusions.

But, because these cases raise a third issue that frequently recurs in Wisconsin unemployment cases and because the Unemployment Compensation Appeals Clinic needs training materials on all three of these issues, a somewhat lengthy analysis ensues.

II. Statement of the Issues

1. How are determinations of employee status handled in Wisconsin and what is at stake in those determinations for the employee and for the employer?

2. Was EMPLOYEE an employee or independent contractor when performing services for EMPLOYER?

3. Did EMPLOYEE quit for good cause when he stopped working for EMPLOYER?

III. Statement of Facts

EMPLOYEE is a German national who also has permanent residence status in the United States. He has a doctorate in music history and is fluent in several languages.

After having in May 2011 unsuccessfully applied for work with EMPLOYER, EMPLOYEE contacted EMPLOYER via an e-mail message dated 20 March 2012 to inquire if there were other available job openings there. Ex.2 at R2. MAIN MANAGER ("Mr. MANAGER") responded by indicating that EMPLOYER had recently spent $6,000 for the translation of a manual in French and inquired with EMPLOYEE whether he wanted to work as a consultant doing similar work. Mr. MANAGER asked EMPLOYEE if he was familiar with Adobe FrameMaker software and suggested that EMPLOYER and EMPLOYEE could "test the waters by quoting a few translations though you." Id. After follow-up phone calls, a deal was struck for EMPLOYEE to translate two manuals from English to German for $3,200. Id.; Ex.3 at E2. The first was a smaller manual, and the second was a larger manual of around 80 pp. Ex.3 at E2.[1] In an e-mail message dated 13 April 2012 from EMPLOYEE to Mr. MANAGER, EMPLOYEE explained that he was in financial difficulty and needed payment for the first manual when completed rather than only receiving payment after both manuals were completed. Ex.2 at R2-3. EMPLOYER agreed that EMPLOYEE would receive $500 for the first, smaller manual and $2,700 for the second, more complex manual. At the suggestion of Mr. MANAGER, Ex.2 at R3, EMPLOYEE subsequently issued an invoice dated 23 April 2012 of $500 for his work on the smaller manual, and EMPLOYER paid that amount. Ex.6.

EMPLOYEE did the translation work on an older computer he inherited from a former employer that he did not use regularly. On 8-9 April 2012, he downloaded a copy of Adobe FrameMaker to use for thirty days before purchase (at $999) was

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1 Ex.4 is the English version of the smaller manual, and Ex.5 is the finished German translation of that manual that, in part, includes some of EMPLOYEE's translation efforts.

required and installed that software on that computer. Ex.3 at E3. In the meantime, EMPLOYEE also began asking about how freelance writer jobs were generally handled in the United States and what steps he needed to follow to set up a freelance translation business. That advice came from local attorneys, friends, and Mr. MANAGER. Ex.2 at R3; Ex.3 at E3-4.

From 9-24 April, EMPLOYEE worked on his translation of the first manual in his apartment. Ex.3 at E5-6. Other than the requirement that he follow the design template EMPLOYER had established in Adobe FrameMaker, EMPLOYEE determined when and how much time he spent on the layout, design, and translation of the first manual as well as how he went about that assignment. Id. EMPLOYEE had difficulty printing his translated pages of the first manual, Ex.3 at E3, because of limitations of his computer and printer. His computer was also very slow when using the FrameMaker software. In total, EMPLOYEE estimates that he took twenty to thirty hours completing the technical translation, design, and layout of the first manual.[2]

During his translation, design, and layout of the first manual, EMPLOYEE regularly spoke on the phone and via e-mail messages with TECH WRITER ("Ms. WRITER"), an in-house technical writer for EMPLOYER, about formatting, design, and software questions he had.[3] In an e-mail message dated 25 April 2012, Ms. WRITER informed EMPLOYEE of EMPLOYER's operational procedures for manual translation. Unlike prior translation work EMPLOYEE had done for music texts and performance notes that just wanted the words translated, EMPLOYER wanted him to prepare final

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2 For the second, more complex manual, EMPLOYEE estimated that he would need 100 hours to complete that technical translation and layout.

3 It was through her that EMPLOYEE obtained a copy of a Helvetica font that was needed for EMPLOYER's manuals. She also answered EMPLOYEE's questions about EMPLOYER's design and layout requirements in FrameMaker.

proofs of the manuals for printing. Ex.3 at E6-7.[4] He would be responsible for making sure the final proofs were satisfactory to EMPLOYER.[5]

In an e-mail message dated 26 April 2012, Ms. WRITER indicated that, besides FrameMaker, EMPLOYEE would need Adobe Design Premium for the translation of the second manual. Ex.3 at E7. This software would cost $1,899. Id. at E8.[6] After consulting friends about being required to purchase all of this software in advance on his own, Ex.3 at E8, EMPLOYEE decided to end his translation work for EMPLOYER. With a payment of $2,700 remaining for the second manual, the two software packages would cost EMPLOYEE around $2,900 ($999 plus $1,899), and EMPLOYEE would probably need a new laser printer and a new computer, which would probably cost him another $1,000 in total. In an e-mail message dated 29 April 2012, EMPLOYEE indicated that he could no longer work as a technical writer/translator for EMPLOYER, in part, because of $2,500 in software he needed to purchase to complete the second manual that, even if purchased, probably would not work on his current computer. Ex.1.

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4 On this point, EMPLOYEE disagrees with the administrative law judge who likened EMPLOYEE's prior translation jobs as similar to the technical translation, design, and layout services that EMPLOYER requested. The two kinds of translation assignments were actually quite different. For EMPLOYER, EMPLOYEE was being asked not only to translate the words at issue but also prepare graphic layout files of the finished translation for final publication. EMPLOYEE had no prior experience as a graphic designer, however. Accordingly, this translation, design, and layout assignment for EMPLOYER was much different from anything EMPLOYEE had done previously.

5 Ultimately, EMPLOYER turned to a third-party entity to complete the final version of the short manual that EMPLOYEE had started after concluding that there were mistakes in the draft EMPLOYEE had prepared.

6 At this time, only version 6 of the software was available, while EMPLOYER used version 5. Ex.3 at E8. As EMPLOYEE never purchased this software, he did not find out whether the two versions were compatible with each other or not.

EMPLOYEE did not have business cards for his technical translation work with EMPLOYER, and he did not market himself as a provider of technical writing/translation services. He had no liability insurance for this work.

At the time of the hearings in these cases, EMPLOYEE had qualified for a weekly benefit rate of $127. Exclusion of the $500 in earnings from EMPLOYER from his current benefit year would not change that weekly benefit rate other than reducing by approximately one week the total amount of regular unemployment compensation available to EMPLOYEE in his current benefit year.

IV. Argument

A. Determinations of employee status involve multiple proceedings where the interests of claimants and employers can shift to a significant extent, but claimants and employers rarely consider these strategic matters during the course of these multiple proceedings.

Wis. Stat. § 108.02(12) sets forth the definition of employee for unemployment purposes. Paragraph (a) defines an employee as "any individual who is or has been performing services for pay for an employing unit, whether or not the individual is paid directly by the employing unit, except as provided in par. (bm) . . ." Paragraph (bm) (to be discussed in greater detail below) lays out the criteria for establishing whether an individual's services are being performed as an independent contractor rather than as an employee. Paragraph (e) provides:

> This subsection shall be used in determining an employing unit’s liability under the contribution provisions of this chapter, and shall likewise be used in determining the status of claimants under the benefit provisions of this chapter.

In other words, the definition of employee is controlling for both determining whether an individual's wages will be included in his or her benefit year eligibility and for determining whether an employer owes unemployment taxes for those wages.[7] Only if

7 In regards to determining which wages are to be included in calculating a benefit year, Wis. Stat. § 108.02(4m)(a) defines wages as: "All earnings for wage-earning service which are paid to an employee during his or her base period as a result of

an individual is an independent contractor and not an employee will these questions not apply to the employee's benefit year eligibility or the employer's unemployment tax burden.

But, even though the definition of employee may be controlling for both questions, the matters are still adjudicated separately from each other. Wis. Stat. § 108.09 sets forth the process for adjudicating benefit determinations for claimants, while Wis. Stat. § 108.10 describes the process for determining whether an employer is liable for unemployment taxes based on those wages. And, Wis. Stat. § 108.101(2) mandates that: "No finding of fact or law, determination, decision or judgment made with respect to rights or liabilities under s. 108.09 is binding in an action or proceeding under s. 108.10." Accordingly, a hearing over whether an individual qualifies as an employee in order to determine whether the wages at issue can be included in that individual's benefit year is completely separate and has no bearing on the hearing over whether the employer owes any unemployment taxes on the individual's wages. Bentheimer v. Bankers Life & Casualty Company, Hearing No. 10006546JV (16 August 2011) (commission notes that case at hand does not involve the issue of the employer's liability for contributions but only involves a question over the amount of benefits for which the claimant is eligible). It could very well be that in the benefit year decision, the individual is classified as an employee and the wages included in that individual's benefit year but in the unemployment tax decision the

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employment for an employer." The wages subject to unemployment taxes that an employer must pay are calculated according to Wis. Stat. § 108.07 (benefits payable to a claimant and which are chargeable to the account of an employer turn on the paid base period wages the claimant has received from that employer) and Wis. Stat. § 108.17 (contribution rates are only for employers based on covered employment). Base period wages are defined, in part, in Wis. Stat. § 108.02(4m)(a) as "All earnings for wage-earning service which are paid to an employee during his or her base period as a result of employment for an employer[.]"

individual is classified as an independent contractor and the wages at issue are subsequently excluded from unemployment taxes.[8]

In both of these situations, however, the employer has the burden of proof to show that the individual is not an employee but an independent contractor under the criteria set forth in Wis. Stat. § 108.02(12)(bm). Dane County Hockey Officials, Hearing No. S9800101MD (22 February 2000) (Wis. Stat. § 108.02(12)(a) creates a presumption that a person who provides services for pay is an employee, and it requires the entity paying the individual for those services to bear the burden of proving that he or she is not an employee), Quality Communications Specialists, Inc., Hearing No. S0000094MW, (30 July 2001) (same). Notwithstanding the difficult burden employers have in initially establishing the factors specified in sub-section (bm), employers are also faced with the added difficulty in these matters that much of the information needed in regards to these factors is in the hands of claimants and not employers. While employees and employers are in theory opposed to each other in these unemployment cases, they also depend on each other to bring forth evidence that the other side needs in order to succeed in its claims. Employers, after all, likely do not have any direct knowledge about how individual claimants qua independent contractors market their services to others, account for their business expenses and income, manage their own place of business, obtain their own liability insurance, pay for their recurring operational costs, and how many other clients they might or might not have.[9] As a result, employers who actually hope to avoid payment of

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8 While it is theoretically possible that an individual can be determined to not be an employee for purposes of calculating benefit year wages but then be classified as an employee for the employer's unemployment taxes, the Department does not apparently pursue the employer's unemployment tax question if the individual benefit year wage question has led to the individual being classified as an independent contractor.

9 Employers also cannot without careful planning seek to have just a few employees testify on behalf of a larger cohort. MSI Services, Inc., Hearing No. S0600129AP (5 September 2008) (the testimony of certain individual workers is not properly

unemployment taxes for the services at issue are dependent on the claimant's cooperation in the Wis. Stat. § 108.10 proceeding to determine whether the claimant is an employee or independent contractor. Without the claimant providing key information needed to qualify him or herself as an independent contractor, an employer simply cannot hope to win a determination that the wages at issue are not subject to unemployment taxes.

For example, in the case at hand, the $500 of wages EMPLOYEE received are basically inconsequential to EMPLOYEE's benefit year calculation. The only matter of any consequence to him is a determination that, if he is an employee of EMPLOYER, that he quit for good cause when his employment ended. A decision that his quit was not for good cause would suspend his eligibility for unemployment benefits until he re-qualified through new earnings. Accordingly, employees like EMPLOYEE would in practical terms welcome employers who do not contest eligibility, especially when unemployment taxes are not at issue at all.

If there is little at stake for EMPLOYEE in this matter, there is both legally and practically even less of legal consequence at issue in this case for EMPLOYER. Pursuant to Wis. Stat. § 108.101(2), this proceeding has no bearing on whether unemployment taxes are owed for the $500 EMPLOYER paid EMPLOYEE. But, should the Department take up the question of unemployment taxes, EMPLOYER will need testimony from EMPLOYEE if it ever hopes to show that he was not an employee. In this regard, then, employers like EMPLOYER need the cooperation of individuals like EMPLOYEE, and they must make strategic decisions about how to obtain that cooperation when it is needed. To do otherwise is simply to foreclose any chance at all of winning the case over their unemployment taxes.

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considered to represent the testimony of a larger group of workers in the absence of stipulation by the parties, or competent evidence, that the employee witnesses are indeed representative).

But, as seen here and in countless other unemployment cases, it is all too common for the parties to fight without consideration of what is actually at stake. Strategic and practical concerns are no longer clear to employers and claimants, as the dueling procedures and antagonisms inherent in unemployment proceedings create a thick fog that obscures what should be obvious. As a result, unemployment matters in Wisconsin lead to hearings and decisions that accomplish nothing for the parties and do little more than create busy work for Department of Workforce agents and the administrative law judges charged with carrying out the mandates of unemployment law.

B. EMPLOYEE was an employee of EMPLOYER.

The factors for determining whether an individual's services for an employing unit qualify that individual as an independent contractor are set forth in Wis. Stat. § 108.02(12)(bm).[10] It is these statutory requirements that govern, and the terms used in a private agreement do not, by themselves, establish an individual's status as an independent contractor or a statutory employee. Roberts v. Industrial Commission, 2 Wis.2d 399 (1957), Knops v. Integrity Project Management, Hearing No. 06400323AP (12 May 2006).

These statutory factors have changed significantly over the last several years and currently consist of a two-part examination. First, an employer must show that the services at issue "are performed free from control or direction" of the employer. The following factors, among any others that may be relevant, are examined:

> a. Whether the individual is required to comply with instructions concerning how to perform the services.
> b. Whether the individual receives training from the employing unit with respect to the services performed.
> c. Whether the individual is required to personally perform the services.

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10 For services that involve governmental units, non-profits, logging companies, and trucking companies, a different test for whether the claimant is an independent contractor is set forth in Wis. Stat. § 108.02(12)(c).

d. Whether the services of the individual are required to be performed at times or in a particular order or sequence established by the employing unit.
e. Whether the individual is required to make oral or written reports to the employing unit on a regular basis.

Wis. Stat. § 108.02(12)(bm)(1). As explained in Cortez-Robles v. Pro One Janitorial Inc, Hearing No. 11403642AP (3 May 2012), "Each factor is a separate indicator of an employing unit's exercise of direction or control over the claimant, none of them are essential in any case, and each factor may be weighted differently depending upon the facts of each case."

Second, the employer must demonstrate that six of the following nine conditions are met:

a. The individual advertises or otherwise affirmatively holds himself or herself out as being in business.
b. The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.
c. The individual operates under multiple contracts with one or more employing units to perform specific services.
d. The individual incurs the main expenses related to the services that he or she performs under contract.
e. The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.
f. The services performed by the individual do not directly relate to the employing unit retaining the services.
g. The individual may realize a profit or suffer a loss under contracts to perform such services.
h. The individual has recurring business liabilities or obligations.
i. The individual is not economically dependent upon a particular employing unit with respect to the services being performed.

Wis. Stat. § 108.02(12)(bm)(2). The Commission has developed extensive case law on these factors, and Wisconsin's appellate courts have often weighed in on these issues as well. *See, e.g.*, Princess House, Inc. v. DILHR, 111 Wis. 2D 46, 62, 330 N.W.2d 169, 177 (1983) (definition of employee should be liberally construed to effect unemployment coverage). Accordingly, these factors present a high burden that is rarely met in practice. *See, e.g.*, Cortez-Robles, *supra*. (because independent contractor factors not met, franchisee cleaning agent is employee of commercial

cleaning entity), Smith v. Coverall of Milwaukee, Hearing No. 09609802MW (27 May 2010) (same).

For EMPLOYEE's translation, design, and layout services for EMPLOYER, the first test is a mixed bag that tips the scales in favor of EMPLOYEE being an independent contractor. While EMPLOYEE communicated frequently with Ms. WRITER about meeting the employer's expectations for design and layout and in getting advice and assistance about how to use FrameMaker software, EMPLOYEE was free to do the technical translation and writing of the manual according to his own work preferences and schedule. Accordingly, EMPLOYEE was free from EMPLOYER's direction and instruction in how he performed his job, but he relied on and received initial training from EMPLOYER about layout and design tasks.[11] Since the agreement to perform the translation, layout, and design job here was between EMPLOYER and EMPLOYEE personally, the personal performance factor has not been met. But, while the order of which manual would be translated first was set in the employment agreement, EMPLOYEE was free to determine on his own when he actually did the services at issue here and in what order he did the various parts of the smaller manual. Furthermore, no deadline for the finished manuals was set. As a result, the factor of

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11 The administrative law judge reasoned that EMPLOYEE was subject to the employer's instructions but free from employer training. EMPLOYEE's disagreement with the conclusion regarding the instructions factor is because the instructions at issue for the smaller manual were more like requirements for how the final product should look rather than instructions for how EMPLOYEE would accomplish that design. *Cf*. Bentheimer, *supra*. (instruction factor not met because claimant was required to follow all policies, practices, and procedures required by employer in performing her job duties) *with* Owen Jensen, Hearing No. 11401161AP (19 August 2011) (the instruction factor met because claimant has autonomy in determining how to perform his services without direction from employer even though employer provided claimant with information as to what each assignment entailed). The training factor is a much closer call. Given EMPLOYEE's lack of any experience in doing the kind of graphic design and layout service at issue here, he relied on advice and guidance from Ms. WRITER to achieve the required results with FrameMaker. *See* Owen Jensen, *supra*. (claimant brings to the assignments the skills and experience he has obtained through his previous jobs).

when and in what order the services were performed has been met. Finally, there was no requirement that EMPLOYEE file reports of some kind on his progress, and so this final factor has been met.

The second set of tests, as with most independent contractor cases, is not satisfied here, as EMPLOYEE's services for EMPLOYER meet only one of the nine conditions.[12]

a. Own business

To satisfy this condition, the individual must hold him or herself out as a business through advertising or marketing of some kind that identifies the individual as a business entity separate from the putative employer. Cortez-Robles, *supra*.

EMPLOYEE did not advertise or market himself as someone providing design, layout, and translation services. He did not even have a business card for this kind of service. *Cf*. Traaholt v. Robert Oien & Co, Hearing No. 99200331MW (25 August 1999) (a telephone listing and a business card would at least imply that the claimant had a business separate from the appellant's business). There is no evidence in the record indicating that he had a FEIN or file self-employment or business income tax returns for the services in question. Accordingly, this condition is not met.

b. Office

The focus here is whether a separate business, i.e., an enterprise created and apart from the relationship with the putative employer, is being maintained with the individual's own resources. Princess House, Inc., v. DILHR, 111 Wis. 2d 46, 330 N.W. 2d 169 (1983); Larson v. LIRC, 184 Wis.2d 378, 516 N.W. 2d 456 (Wis. Ct. App. 1994). *See also* Lozon Remodeling, Hearing No. S9000079HA (24 Sept. 1999). All parts of the test articulated in this condition must be met in order for the putative employer to

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12 The administrative law judge found that only four conditions — d, f, g, and i — were met. As indicated below, his reasoning in regards to conditions f, g, and i was too generous.

satisfy its burden. Quality Communications Specialists, Inc., Hearing No. S0000094MW (30 July 2001). As a result, even when a claimant has a separate office for the services at issue, there still needs to be evidence that the services involve more than just the putative employer. Christman v. Cybrcollect Inc., Hearing No. 06201682EC (9 Feb. 2007) (although claimant had a separate office, materials, and equipment for work with employer, record did not show that she performed or even sought similar work with other entities or had an enterprise that existed separate and apart from her work for the named employer); Ronald Smith dba Smith Field Service, Hearing No. S0300197MD (29 Mar. 2006) (although offices and equipment were maintained at claimants' own expense at their homes, the central inquiry is whether the activity engaged in by the claimants is genuinely separate from the activity of the putative employer).

Here, EMPLOYEE did not have an office dedicated to this kind of service, as he instead worked out of his home using an old personal computer, and this service was only done for EMPLOYER. This condition is not met.

c. Multiple contracts

The Commission explained in Cortez-Robles, *supra*. that:

> As noted in Thomas Gronna dba The Floor Guys, UI Dec. Hearing No. S9900063WU (LIRC Feb. 22, 2000), the requirement of multiple contracts is based on sound legislative policy, as it "tends to show that an individual is not dependent upon a single, continuing relationship that is subject to conditions dictated by a single employing unit." The commission has consistently stated that this requirement may be satisfied by multiple contracts with separate entities or by multiple serial contracts with a putative employer if it is established that those contracts have been negotiated "at arm's length," with terms that will vary over time and will vary depending on the specific services covered by the contract. *See, e.g.*, Preferred Financial of Wisconsin, Inc., UI Dec. Hearing No. S0600240MW (LIRC Oct. 23, 2008); Stark v. 3246 LLC, UI Dec. Hearing No. 07401621SH (LIRC Mar. 12, 2008); Zoromski v. Cox Auto Trader, [Hearing No. 07000466MD (31 August 2007)] (a single, continuing relationship with conditions dictated by the putative employer does not satisfy the multiple contracts requirement). *See also* Dane County Hockey Officials Association, Inc., [UI Hearing No. S9800101MD (LIRC Feb. 22, 2000)] (condition not met, officials do not negotiate and

> re-negotiate pay rates with DCHOA, but accept rates provided for matches to which they are assigned).

Merely accepting multiple job assignments or customer accounts does not satisfy this condition. There needs to be evidence in the record that the additional jobs are being negotiated individually and at arms length. *See* Cortez-Robles, *supra*. (claimant either accepted or declined customer accounts through his continuing relationship with the named employer for obtaining those accounts, and he remained subject to provisions contained in his franchise agreement with the named employer).

Here, there is no evidence that EMPLOYEE accepted any other jobs for layout, design, and translation services. Indeed, he stopped these services before attempting to complete the second manual, and so the services at issue here encompass just one contract *in toto*. This condition is not met.

d. Expense responsibility

The Commission explained in Cortez-Robles, *supra*. that:

> In analyzing this condition, it is necessary to determine what services were performed under the contract, what expenses were related to the performance of these services, which expenses were borne by the person whose status is at issue, and whether these expenses constitute the main expense. *See, e.g.*, Quality Communications Specialists, Inc., [UI Hearing Nos. S0000094MW, etc. (LIRC July 30, 2001)]; J Lozon Remodeling, UI Dec. Hearing No. S9000079HA (LIRC Sept. 24, 1999). In that regard, the commission has consistently held that, without a quantification of these expenses or an obvious conclusion as to the expenses borne by the respective parties, it must be found that condition [d] has not been met. *See, e.g.*, Schumacher v. Spar Marketing Services, Inc., UI Dec. Hearing No. 11203182EC (LIRC Mar. 21, 2012); Gustavson v. Carpenters Inc., UI Dec. Hearing No. 09400168AP (LIRC April 30, 2009); Preferred Financial of Wisconsin, Inc, [UI Dec. Hearing No. S0600240MW (LIRC Oct. 23, 2008)]; Stark v. 3246, [UI Dec. Hearing No. 07401621SH (LIRC Mar. 12, 2008)].

Here, the record shows that EMPLOYEE was responsible for all software needed for translating the manuals — approximately $2,900 for Adobe FrameMaker and Adobe Design Premium CS6. If EMPLOYEE had attempted the second manual, he would also have needed a new printer and a new computer, which also would have been his sole responsibility. Accordingly, this condition is met.

e. Unsatisfactory work

The issue here is who is responsible for correcting mistakes in the completed product. "Evidence establishing, for example, not only an obligation to do such re-work but an expectation that it will be done, as well as a penalty for not doing so, would satisfy this condition." Spencer Siding Inc, Hearing Nos. S0300142GB, S0300133G (2 June 2006). The mere fact that an individual will not get paid for faulty craftsmanship or incomplete tasks or that they could lose future jobs does not, without additional evidence, satisfy this condition, as this evidence is indistinguishable from an employee paid on a piecework basis. MSI Services, Inc., Hearing No. S0600129AP (5 September 2008). Typically, this condition is met through indemnification clauses in a services contract in which the claimant agrees to indemnify the putative employer for mistakes or corrections. Id. (indemnity provision requiring the mystery shoppers/claimants to indemnify and hold employer harmless for any claims or loss "arising out of or resulting from the performance of" services by the mystery shoppers/claimants).

Here, there is nothing in the record to indicate that EMPLOYEE was required to correct any mistakes or problems with his layout, design, and translations at his own expense. While he expressed concerns about meeting EMPLOYER's expectations and volunteered to make any changes EMPLOYER wanted in his draft of the first, smaller manual, there was no contractual requirement making EMPLOYEE responsible for covering the costs of those corrections himself. *See* Marv Mews & Sons, Inc., Hearing No. S0800184MW (24 March 2009) (factor met when the subject workers "suffered the penalty of having part of the cost of leasing equipment, hiring workers, and purchasing materials to do the re-work deducted from their share of corporate profits"), Thomas J. Harris, Hearing No. S0400220HA (15 June 2006) (condition met because penalty to workers for repairing defects in their work included that they were expected to pay for repair/replacement materials), Diane M. Egan, Hearing No. S0300071JV (15 April 2005) (condition met because if workers failed to remedy their work without additional

pay, they would be penalized by non-payment of the underlying exam fee), *and* Quale & Associates, Inc., Hearing No. S0200201MW (19 Nov. 2004) (condition met because workers were liable "for the cost of re-work if performed by a third party"). Indeed, after EMPLOYEE declined to complete the second manual, EMPLOYER hired a third-party entity to complete the design, layout, and translation of the first manual without any further involvement from EMPLOYEE. As a result, there is no factual basis for alleging that this condition has been met.

f. The relationship between the claimant's services to the employer's business

This condition is satisfied when the individual's services are unrelated to the main business operations of the named employer. In Keeler v. LIRC, 154 Wis.2d 626, 631 (Wis. Ct. App. 1990), the Court of Appeals explained that when a tinsmith repaired the gutter of a company engaged in a business unrelated to the repair or manufacture of gutters there was no relationship between what the tinsmith did and the business of the putative employer.

Here, EMPLOYER manufacturers various kinds of weighing and weight related process control equipment. EMPLOYEE was responsible for the design, layout, and translation into German of a manual for a EMPLOYER scale that would then be sold in Germany. Without that manual, the German version of the scale would be incomplete from the American version and not marketable in Germany. The fact that EMPLOYER had a third-party entity complete the manual that EMPLOYEE started indicates how essential this manual was to marketing that scale in Germany. Bentheimer, *supra*. (claimant, as an insurance agent, performed services that were integrated into the business of the employer, an insurance company), Owen Jensen, *supra*. (claimant wrote scripts and provided narration for insurance videos that were related to and integrated into the employer's business of producing instructional and informational videos concerning insurance products and topics). Accordingly, this condition is not met.

g. Individual's profit or loss from the service contract

The test for this condition is whether financial profit or loss is realistically possible for the contractual services at issue. Zabel v. Snyder's of Hanover, Hearing No. 10000988MD (2 Sept. 2010) (even though claimant suffered losses during certain weeks, there was no realistic possibility of loss over term of agreement). An assessment over the life of the contract is needed, and one-time possible losses are not at issue here. "The test is not whether the claimant might suffer a loss on one assignment from being required to re-do services without additional payment, or from overpaying a subcontractor on an assignment or accepting an assignment far away with higher travel expenses." Cortez-Robles, *supra*. As explained in Alsheski v. Codeworks, Inc., Hearing No. 09403672AP (26 Feb. 2010), in assessing whether a realistic possibility of loss exists, the proper evaluation is whether there is a genuine business risk if the services are completed as contracted and "not whether, given the universe of possibilities, something could occur that could result in a loss." Mere possibility of a loss is not enough. There needs to be evidence in the record that the claimant is at significant risk for losses because of an acknowledged possibility of lack of income or increase in costs. Cortez-Robles, *supra*. at n.7 (evidence of the loss needs to be grounded in the "inherent unpredictability that would be found in a genuine business enterprise"). *Cf*. Owen Jensen, *supra*. (when an individual's expenses, even including transportation, were clearly less than his earnings and he was always paid for those services in an amount that always covered his costs, there was no realistic prospect of experiencing a loss under the contract) *with* Bentheimer, *supra*. (with claimant paid on a commission basis, there was a realistic possibility that she could suffer a loss for unproductive sales calls when no insurance products were sold but travel costs still had to be paid).

Here, EMPLOYEE had agreed with EMPLOYER to prepare the design, layout, and translations of two manuals for $3,200. His cost for the required software was

approximately $2,900, and a new printer and computer would likely have added at least another $1,000 in costs. In other words, EMPLOYEE would very likely have lost money if he had completed both manuals. Only by limiting his service to the first manual and avoiding the software, printer, and computer costs that the second manual would have necessitated did EMPLOYEE eke out a profit for his service. These costs and profits, however, are fixed and known based on each manual, and so they have little to do with the the inherent risks of running a business and have more to do with an employee managing his pay opportunities through the selection of his job assignments. *Cf.* MSI Services, *supra*. (claimants/mystery shoppers were essentially guaranteed payment for satisfactorily performance of their job duties and could select their own assignments, and so financial loss not a realistic possibility) *with* Smith v. Coverall of Milwaukee, *supra*. (condition met because an increase in customers could lead to greater profit but, because the claimant could not easily terminate the franchise agreement even if the venture proved unprofitable for him, he bore the risk of unsuccessful retention/attraction of customer accounts and so could suffer a loss when those accounts declined). Accordingly, this condition is not met.

h. Recurring business liabilities

This condition requires proof of an ongoing business cost that occurs even during a period of no activities, such as office rent, professional and license fees, and insurance. Clear Choices Inc., Hearing No. S0300202EC. (26 Oct. 2005) (recurring expenses are those expenses that occur regardless of the level of actual business activity); Gamble v. American Benefit LTD, Hearing No. 04004847MD (15 Feb. 2005) ("overhead expenses that cannot be avoided by ceasing to perform services"). Basic license requirements, however, may not qualify as a recurring business expense. In MDP Maximize Dealer Performance Ltd, Hearing No. S0700135EC (11 Dec. 2009), the Commission reasoned that the licensure expense for selling cars was insufficient to

satisfy this condition. Accordingly, to be considered as recurring business liabilities, evidence in the record must demonstrate that those expenses are more than *de minimus*. Id.

Here, there is nothing in the record to suggest that EMPLOYEE has any recurring business liabilities for rent, insurance, licensing, or membership dues, and so this condition is not met.

i. Economic independence from a particular employing unit

In Larson v. LIRC, 184 Wis. 2d 378, 392, 516 N.W.2d 456 (Wis. Ct. App. 1994), the Appeals Court explained:

> [E]conomic dependence is not a matter of how much money an individual makes from one source or another. Instead, it refers to the survival of the individual's independently established business if the relationship with the putative employer ceases to exist.

The Commission has consistently held that this condition is met when there is evidence to show that, if the individual's relationship with the employing unit at issue ceased to exist, the individual's business would continue. Elie v. City Business USA LLC, Hearing No. 11608771MW (28 March 2012). Analysis of this condition is made on a case-by-case basis, taking into consideration each claimant's circumstances and whether there are the characteristic signs of a viable independently established business. Id. An individual who can simply transfer his or her skills to a new employer after losing a position, however, is insufficient to meet this condition. *Cf*. Bentheimer, *supra*. (claimant who sold insurance was dependent on one employer, and fact that she could perform services for another after losing one job and then moving on to another with her skills and experience was not doing so as an independently established business) *with* Elie v. City Business USA LLC, Hearing No. 11608771MW (28 Mar. 2012) (claimant who holds herself out as a business providing services as a journalist and writer does so for numerous different entities, and the termination of those services with the putative employer would not end the services being performed for other

entities). *See also* Schumacher v. Spar Marketing Services Inc., Hearing No. 11203182EC (21 Mar. 2012) (if relationship with putative employer were to cease, no evidence that individual would move on to perform the services independently for other entities).

Here, the record shows that EMPLOYEE had no other business clients for the layout, design, and translation services he performed for EMPLOYER.[13] And, without EMPLOYER, these services would be non-existent. Accordingly, this factor is not met.

C. The quit at issue here was for good cause.

In his decision, the administrative law judge noted that EMPLOYEE, as someone who had previously not done any design, layout, and translation jobs, was not aware of the cost of the software EMPLOYER required him to purchase. Had EMPLOYEE been aware of that cost, the administrative law judge reasoned, it is likely that EMPLOYEE would have asked for a higher price for the second manual to cover the cost of that software and not initially agreed to the $3,200 price. As a result, the administrative law judge held that EMPLOYEE quit for good cause. Farmers Mill of Athens, Inc. v. ILHR Dept., 97 Wis.2d 576 (Wis. Ct. App. 1980) (a unilateral change in the conditions of employment on the part of the employer through a change in commuting distance or other essential factor of the job and which led to a significant pay reduction to the employee constitutes good cause attributable to the employer for quitting).

In the alternative, the Commission could find that EMPLOYEE's pay for the 100 hours of work EMPLOYEE estimated that he needed to complete the remaining manual would have left him with an hourly wage of $2/hr after purchasing the needed software at the $2,500 price tag ($2,700 - $2,500 = $200 and $200 / 100 hours = $2 per hour).

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13 The design and layout requirements for translating the manuals made these tasks fundamentally different from the translation jobs EMPLOYEE had previously done. Furthermore, there were equipment and software essential to the services with EMPLOYER that EMPLOYEE never previously used in these ways and with which he was completely unfamiliar.

Since that hourly wage is below the statutory minimum wage allowed in Wisconsin, there was good cause for quitting this job. *See* Norton v. Industrial Tools Inc., Hearing No. 02604133WB (13 March 2003) (an employee who quits his or her job because the employer fails to fulfill its legal obligation to pay overtime for hours worked in excess of 40 per week has good cause attributable to that employer for quitting) *and* Strangeway v. Dallas Health & Rehabilitation Center, Hearing No. 89-200536RL (31 August 1989) (a request, directive or suggestion by the employer that the employee violate law gives a worker good cause to quit). Or, the Commission could find that the costs EMPLOYEE had to bear for software purchases, a new computer, and a printer would easily surpass the $2,700 he would receive for the second manual. Without any pay whatsoever available to him for this work after accounting for his expenses, EMPLOYEE had good cause to quit. Moss v. AHCP Independent Agent, Hearing No. 09001232MD (30 November 2009) (lack of any wages for a twelve-week period of time justified the employee's decision to quit), Medina v. Acacia Mental Health Clinic LLC, Hearing No. 10611087MW (31 March 2011) (during employment that lasted almost three months, the employee received only 20% of what she had earned, amounting to a little more than $100 per week, and the resulting financial insecurity and extreme anxiety provided good cause for quitting).[14]

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14 Another possibility for qualifying EMPLOYEE for unemployment benefits lies in Wis. Stat. § 108.04(7)(e). Under this provision, the quit disqualification of Wis. Stat. § 108.04(7)(a) does not apply if the employee accepted work which could have been refused under Wis. Stat. § 108.04(9) and terminated the employment within the first ten weeks after starting. Given EMPLOYEE's complete lack of design and layout experience and the requirement that he upgrade his computer and printer as well as purchase approximately $2,900 in software, EMPLOYEE properly terminated his work with EMPLOYER during the ten week trial period available to him in Wis. Stat. § 108.04(7)(e).

V. Conclusion

EMPLOYEE submits that, for all of the foregoing reasons, he was an employee of EMPLOYER and that he quit for good cause. Accordingly, the Commission should affirm the decisions of the administrative law judge in these matters.

Respectfully Submitted
on behalf of EMPLOYEE,

Victor Forberger

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