



# MISSOURI COURT OF APPEALS - WESTERN DISTRICT

## SPECIAL DIVISION (PFEIFFER, C.J., WITT AND GABBERT, JJ.)

### JULY 11, 2016 • LAKE OZARK, MO

#### WD78835

**Penny Schrock, Respondent  
vs. Xinsheng (Randy) Gan, Appellant**

Mr. Gan (Appellant) appeals from a judgment entered by the Circuit Court of Cole County, reversing the decision of the Administrative Hearing Commission (AHC) that found racial factors contributed to the decision to dismiss him from employment with the Missouri Department of Social Services, Division of Finance and Administrative Services, and that it was not for the good of the service. Appellant began work as a Research Analyst III in October of 2006. In 2011 and sometime before, Appellant was observed sleeping at his desk. Some employees observed him snoring on occasion and found it disruptive. In 2012 Appellant was also thought to be sleeping on occasion, but was actually meditating. Appellant's superiors told him that "appearing to be asleep at an employee's work station" was considered "discourteous and unprofessional conduct." Appellant was directed to meditate in the break room. In April of 2012, one of Appellant's supervisors observed him visiting non-work-related websites. Appellant's website use was subsequently audited. Finally, in December of 2012, Appellant requested to take 40 hours of sick leave, after experiencing a change in blood pressure medication. Although Appellant had a large amount of sick leave hours available his request was denied, and he was told he needed a "health care certification." A request for a shorter period of sick leave was denied as well. Ultimately, Appellant was dismissed from employment in February of 2013. Prior to his dismissal he had filed internal grievances and filed complaints with the Missouri Commission on Human Rights. He received right to sue letters in March and April of 2013, and filed suit in June of the same year.

Appellant's point on appeal:

The Administrative Hearing Commission erred in overturning Gan's dismissal, because the Commission misapplied the law when it determined Gan was dismissed for racial reasons, in that Gan was not dismissed for racial reasons, rather he was dismissed because, as the Commission found, "Gan violated several Department policies" and was insubordinate for failing to follow his employer's instructions.

#### WD79053

**Timster's World Foundation, Appellant vs.  
Division of Employment Security, Respondent**

Timster's World Foundation (Appellant), a not-for-profit corporation, contracted with the Missouri Department of Social Services to provide parent aide and/or family assistance services. In May of 2012, the Division of Employment Security (Respondent) received an Unemployment Registration form from Appellant indicating the use of independent

contractors. In August of 2012, Respondent mailed Worker Relationship Questionnaires to Appellant, as well as several workers. After receiving no response, a second questionnaire was mailed out. Some of the workers responded. In the fall of 2012, a Specialist reviewed the questionnaires received and determined that the workers were employees of Appellant. Respondent requested a hearing before the Appeals Tribunal. The Appeals Tribunal made a determination that Respondent engaged 11 individual to perform child treatment services for “wages” in “employment”. The Appeals Tribunal decision was later affirmed by the Missouri Labor and Industrial Relations Commission.

Appellant’s point on appeal:

The Labor and Industrial Relations Commission erred in finding that the parent aides/family assistance workers are employees of Appellant rather than independent contractors in that there is not competent and substantial evidence in the record as a whole that Appellant possessed the right of control of an employer evaluated under the IRS’S “twenty-factor” test as applied by the Commission and the overwhelming weight of the evidence under the common law agency “right to control” test is that they are independence contractors.

A. The Commission’s conclusion that the majority of factors in the IRS’s twenty-factor test indicate an employer-employee relationship is not supported by competent and substantial evidence in the record as the competent and substantial evidence indicates 15 of the factors support the conclusion of independent contractor and only 5 support the conclusion of employer-employee.

B. The overwhelming weight of the evidence on the most important factor, the common law “agency test,” is that the parent aides/family assistance workers were independent contractors and not employees in that Appellant did not retain the right to control the manner in which the work is performed.

## WD79465

### **Daryl Majors, Respondent vs. Treasurer of the State of Missouri as Custodian of The Second Injury Fund, Appellant**

On March 29, 2012, Daryl Majors (Respondent) was working as a street sweeper for the city of Marshall, Missouri, when he sustained a work injury. He slipped when he stepped out of his truck onto a cobblestone curb, and twisted his right knee. Respondent was later diagnosed with a meniscal tear and underwent arthroscopic surgery to repair the damage. Prior to this incident, Respondent had sustained numerous injuries to his left knee resulting in a total left knee replacement in 2002. Respondent filed a claim against the Second Injury Fund (Appellant). Respondent retained Dr. James A. Stuckmeyer, an orthopedic surgeon, to provide a report of his medical condition, and Terry L. Cordray, a certified rehabilitation counselor, to perform a vocational assessment. A final hearing was held on May 20, 2015. The ALJ ruled that there was no physician certification of permanent total disability, Respondent could not receive permanent total disability benefits, and Respondent was entitled to \$9,746.16 in permanent partial disability benefits from Appellant. Respondent filed an application for review with the Labor and Industrial Relations Commission. The Commission modified the award and ordered Appellant to pay permanent total disability benefits.

Appellant’s point on appeal:

The Commission erred in awarding permanent total disability benefits because Employee did not meet the statutory requirements for such benefits in that no physician demonstrated and certified permanent total disability status as required by §287.190.6(2) RSMo.