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VENDING STAND IN PUBLIC BUILDING—FOR A VISUALLY HANDICAPPED PERSON—DIVISION OF SOCIAL ADMINISTRATION—STATE WELFARE DEPARTMENT—RELATIONSHIP OF MASTER AND SERVANT DOES NOT ARISE WHEN PERSON CONDUCTS BUSINESS AND PROFITS WHICH BELONG ENTIRELY TO HIM—PERSON NOT EMPLOYE OF STATE—DIVISION ESTABLISHES CERTAIN REGULATIONS UNDER WHICH BUSINESS OPERATED—RIGHT RESERVED TO CANCEL PERMIT IN CASE REGULATIONS ARE NOT MET.

SYLLABUS:

Under the existing plan whereby the Division of Social Administration, of the State Welfare Department provides and equips a vending stand in a public building for a visually handicapped person, in order that such person may conduct a business, the profits of which belong entirely to him, the relationship of master and servant does not arise, and such person is not an employe of the state, even though the Division establishes certain regulations under which such business must be operated, and reserves the right to cancel such permit in case such regulations are not complied with.

Columbus, Ohio, March 10, 1953

Hon. J. H. Lamneck, Director, Department of Public Welfare
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

"The Division of Social Administration of the State Welfare Department administers the services to the blind which were originally provided by the Ohio Commission for the Blind. It is the agency in Ohio recognized by the Federal Security Agency for the administration of Vocational Rehabilitation of the Blind and it also acts as licensing agent for vending stands operated in federal buildings.

"For many years the state has operated the vending stands in public buildings and to some extent in private industry. Attached is some material descriptive of the program. The essential features are these:

"1. Authority to operate a vending stand is given to the Division of Social Administration.

"2. The state furnishes the equipment and retains title to it.

"3. The state buys and maintains a stock of merchandise although the operator may have an inventory greater than the state's equity.

"4. The income of the stand goes to the operator except for a service charge collected by the state.

"The individuals who operate these stands have never been considered employees of the Division of Social Administration. However, the Bureau of Internal Revenue of the United States Government has held that the operators are employees of the state in the light of the tax laws and are therefore not permitted to contribute to the Social Security system as independent businessmen.

"We recognize that the ruling of the Attorney General of Ohio would not be binding on the Federal Government. However, since it is being suggested that the state should somehow work out a plan for covering the retirement of these operators, we would appreciate your opinion as to whether they can be considered in any sense employees of the state."

I note that vending stands are established by the Division of Social Administration, to be operated by the blind or persons visually handicapped. The General Assembly has recognized the propriety of permitting these stands to be placed in public buildings, and has authorized the various public authorities to permit the use of space for that purpose. Section 1369-1, General Code, provides that such permission may be given whenever in the judgment of the head of any department of the State or a county or municipality it shall be deemed desirable and proper to permit the same. When granted, it is provided that no license fee, rental or other charge shall be asked or received for such permit. This statute is indicative of the general policy of the State in giving assistance to persons who are handicapped by total or partial blindness.

From the information accompanying your letter, I note that when any such person is granted by the state agency permission to operate such stand, his license to do so is governed by certain regulations adopted by the state agency, whereby there is reserved the right to supervise the personal conduct of the operator and the manner in which the stand is kept and operated. The State reserves the right to discontinue his license, in the event his stand is not operated in accordance with the regulations prescribed. These regulations provide among other things, that the operator shall keep himself and the premises neat in appearance, that he will conduct

his stand in a businesslike manner, that he will make his purchases on a cash basis, and that he will make such reports and maintain such records as the State may require.

It is further provided that the state agency is to furnish all of the equipment for the stand, and the initial stock, and that such stock is to be replenished from time to time, by the operator. It is further provided that the operator is to pay the State a service charge of 3% of the gross sales.

The operator draws a set amount each week for his maintenance, and at the end of a reporting period withdraws and retains the remaining net profits derived from the operation.

Under no condition does the state pay the operator for his services, and under no condition does the state receive any benefit or profit from the enterprise. The regulations under which the enterprise is conducted specifically provide that *operators are to be considered independent business people, and not employes of the state.* No provision is made for state retirement benefits to the operators, and under the law relating to the Public Employes Retirement System they could not be regarded as employes of the state. Neither is there any procedure under civil service laws in the selection of the operators.

The entire program is manifestly philanthropic. Its sole purpose is to assist visually handicapped persons in becoming self-sustaining. The state acts as a financial sponsor purely for the benevolent purpose above indicated.

Having in mind these purposes and this procedure, I am unable to understand how it could possibly be claimed that these operators are public employes or how the state could be regarded as an employer. As stated in Volume 56, Corpus Juris Secundum, page 27:

> "The word 'employee' imports some sort of *continuous service* rendered for wages or salary and subject to the direction of the employer as to how the work shall be done. In its broad signification the term is used to designate one who is employed; one who *works for an employer or master;* a clerk or workman in the service of an employer; one who works for wages or a salary; one who gives his whole time and services to another for a financial consideration; a person hired to work for wages as the employer may direct.
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> " 'Employee' has also been defined as a person in constant and continuous service, one who *performs services for another* for a financial consideration exclusive of casual employment, one

> whose time and skill are occupied in *the business of his employer,* and not attending to his own business or pleasure separate and apart from such employment; anyone who renders labor or services to another." (Emphasis added.)

It is very well settled that the relationship of master and servant or of employer and employe, which are synonymous in the law, has its basis on *service rendered by the servant or employe to the master or employer.* In 56 Corpus Juris Secundum, page 40, that proposition is laid down and a number of cases are cited in support of it. Among others, I note the case of Walling v. Portland Terminal Company, 330 U. S., 148, where the court was considering the status of men who were in training for positions of yard brakemen of the railroad and who work during such training under the direction of regular employees. It was held that such a trainee is not an employe within the meaning of Section 2 (e) of the Fair Labor Standards Act. The court, in the course of the opinion, said:

> "The applicant's work does not expedite the company's business, but may and sometimes does, actually impede and retard it. * * * Accepting the unchallenged findings here that the railroads receive no 'immediate advantage' from any work done by the trainees, we hold that they are not employes within the Act's meaning."

To the same effect, Walling v. Railway, 330 U. S., 158.

In the case of Reed v. Rideout's Ambulance, 212 Ala., 428, it was held:

> "Essentials of relationship of employer and employe are *voluntary rendition of service,* its acceptance by employer and employer's right to direct and control employee. Payment of compensation being merely incidental thereto." (Emphasis added.)

In Patterson v. Barnes, 317 Mass., 731:

> "That alleged agent or servant *does something for or in behalf of alleged principal or master,* is a fundamental element in every master and servant or agency relationship." (Emphasis added.)

In Maltz v. Jackaway, 336 Mo., 1000, the court held:

> "Relationship of master and servant is *bottomed upon services* rendered by servant to master, and is characterized by right of control vested in master." (Emphasis added.)

In Sabl v. Laendenbank Wien Aktiengesellschaft, 30 N. Y. S., 608, it was held:

> "The essence of an 'employment relation' is the rendition of service by employe for employer."

To the same effect, Null v. State Compensation Commissioner, (W. Va.) 35 S. E. 2nd, 359; Pennsylvania Casualty Company v. Elkins (D.C. Ky.); 70 F. Supp., 155; Western Indemnity Co. v. Pillsbury, 172 Cal., 807; Rutherford v. Tobin, 336 Mo., 1171.

Cases without number could be cited sustaining the same proposition. Our own Supreme Court, in its definition of an "employe", in the case of Indemnity Company v. Plymouth, 146 Ohio St., 96, emphasizes the same element, to wit, the necessity of service. The first branch of the syllabus of that case reads as follows:

> "An employee is a person who works for another for salary or wages, and the term is usually applied only to clerks, workmen and laborers, and rarely to the higher officers of a corporation or government or to domestic servants."

I conclude, therefore, that unless the element of service rendered by one person to another pursuant to contract, can be found, the relationship of employer and employe does not exist. It is true that the right of control usually enters into a contract of employment, and it is true that the contract which we are considering here, reserves to the state agency certain rights of control, but it does not follow that the contract, for that reason becomes a contract of employment. Control is not peculiar to contracts of employment.

If we may assume that some bank or financial institution with a view to profit to itself, should undertake to furnish financial backing for a person desiring to embark on a business enterprise of his own, particularly one with no capital, certainly such institution could establish certain regulations under which such financial aid is granted, and reserve to itself any measure of control that the parties might agree upon so as to see that the business is so conducted as to make it profitable to the operator and safe to the institution. Under such an arrangement certainly no one would claim that the business man receiving such financial backing became the employe of the bank.

Likewise, it is quite possible that a charitable fund might be set up

by a philanthropist, to be used in assisting persons to get a start in an independent business and that the identical arrangements might be made with the applicant which are present in the plans set up by the State as set forth in your communication. It could not conceivably be contended that the business man who was thus assisted by this philanthropic institution became the employe of the institution.

I note in the correspondence attached to your letter, a suggestion that these persons who are being assisted by the State, might be considered as members of the Public Employes Retirement System. The laws of Ohio relative to that System make it very clear that such could not be done, consistent with the law. Section 486-32, General Code, defines a public employe as follows:

> "'Public employe' shall mean any person holding *an office,* not elective, under the state of Ohio, any county, municipality, park district, conservancy district, sanitary district, health district, township, metropolitan housing authority, state retirement board or public library, *or employed and paid* in whole or in part by the state of Ohio or any of the above named authorities in any capacity whatsoever." (Emphasis added.)

It is quite manifest that the persons who are being assisted by this program, do not hold any office under the State or any of its named subdivisions, and certainly are not "employed and paid in whole or in part by the State of Ohio."

If it were attempted to class these licensees as independent contractors, and therefore in a remote degree employes of the state, that attempt would fail, since even such relationship is based on the idea of *service* to an employer, an element which is totally lacking in the plan under consideration. The person who is by that plan set up in business by the state, is not a servant of the state, and is not an independent contractor rendering a service to the state. He is strictly an independent business man, assisted and financed by the state, for the sole purpose of enabling him to be self-supporting in spite of his handicap.

I may summarize what has been said by asserting:

1. The plan in question is based solely upon the charitable purpose of the state to assist a handicapped person in establishing a business out of which he can make a living.

2. No service or benefit to the state whatsover is contemplated or possible.

3. No wages or other compensation is paid to the operator.

4. The rights reserved to the state to control the operator, and to terminate the contract, are merely precautions designed to encourage the operator to use his best efforts for his own betterment and profit, and to protect the state's investment.

Accordingly, it is my opinion, and you are advised that under the existing plan whereby the Division of Social Administration of the State Welfare Department provides and equips a vending stand in a public building for a visually handicapped person, in order that such person may conduct a business, the profits of which belong entirely to him, the relationship of master and servant does not arise, and such person is not an employe of the state, even though the Division establishes certain regulations under which such business must be operated, and reserves the right to cancel such permit in case such regulations are not complied with.

Respectfully,

C. WILLIAM O'NEILL
Attorney General