UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5064
Summary Calendar

BEVERLY MARIE FRUGE,

Plaintiff-Appellant,

versus

CITGO PETROLEUM CORP., ET AL.,

Defendants,

CITGO PETROLEUM CORP.,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana
91 1510 LC

(June 4, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.*

GARWOOD, Circuit Judge:

In this Louisiana law diversity case, plaintiff-appellant, Beverly Marie Fruge (Fruge), appeals the district court's summary judgment in favor of defendant-appellee, Citgo Petroleum Company

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

(Citgo), on the grounds that Citgo was Fruge's statutory employer and therefore immune from tort liability. Because we agree with the district court that the summary judgment record establishes, without material factual dispute, that Citgo was Fruge's statutory employer, we affirm.

Facts and Proceedings Below

Citgo hired ARA Services, Inc. (ARA) to operate a twenty-four hour cafeteria at its Westlake petrochemical refinery in Lake Charles, Louisiana. Citgo needed an on site cafeteria to feed the 2000 or so employees that work at the plant at any given time and to comply with a union contract that required the company to provide a free meal to an employee each time that employee worked overtime. Employees pay for all of their own meals at the cafeteria except for the overtime meals provided by Citgo. Over the thirty-three years that the cafeteria had been in operation, Citgo never operated the cafeteria itself and had no employees in Lake Charles capable of doing that kind of work.

Pursuant to the contract, Citgo owned and maintained all of the capital equipment used in the cafeteria. ARA provided its own employees, non-capital supplies, and operated the cafeteria. ARA was allowed to sell its food products to anyone who walked in off the street, though its primary customers were Citgo employees and the employees of contractors working at the Citgo plant.

Fruge worked for ARA as a side-order grill cook at the Citgo cafeteria. On April 10, 1990, Fruge was electrically shocked and seriously injured while using a deep-fat fryer owned by Citgo.

Fruge sued Citgo alleging that the deep-fat fryer was negligently maintained and that Citgo, as the owner of the deep-fat fryer, was liable for her injuries. The district court granted Citgo's motion for summary judgment dismissing Fruge's claim on the grounds that Citgo was her statutory employer and therefore immune from liability for negligence under the Louisiana Worker's Compensation Act. Fruge appeals.

Discussion

"Under the Louisiana Worker's Compensation Act, a `principal' who engages a contractor to perform work that is `a part' of the principal's 'trade business, or occupation' is liable to pay worker's compensation benefits to the contractor's employees. LSA-R.S. 23:1061. Principals who fall within 23:1061 (known as `statutory employers') enjoy immunity from tort actions brought by their statutory employees for work-related injuries [that do not involve intentional torts]. LSA-R.S. 23:1032." *Becker v. Chevron Chemical Co.*, 983 F.2d 44, 45 (5th Cir. 1993).

The issue in this case is whether Citgo is immune from tort liability to Fruge because it qualifies as her statutory employer. The test for determining whether one is a statutory employer has recently been changed in Louisiana. La. Rev. Stat. Ann. §§ 23:1032 and 23:1061 (West Supp. 1993). Beginning in the 1950's Louisiana applied the integral relation test which liberally granted tort immunity. *Thibodaux v. Sun Oil Co.*, 49 So.2d 852 (1950). In the 1980's the Louisiana Supreme Court retreated from the expansive integral relation test, finally imposing a somewhat narrow definition of "statutory employer" in *Berry v. Holston Well Service, Inc.*, 488 So.2d 934 (La. 1986). Disagreeing with this narrowing of the statutory employer concept, the Louisiana Legislature amended section 23:1061 intending to overrule *Berry* and reinstate the more expansive integral relation test. La. Rev. State. Ann. § 23:1061 (West Supp. 1993).

The language of the 1989 amendments does not expressly state that the integral relation test applies to determine whether one is a statutory employer. Fruge contends that the district court erred in applying the integral relation test instead of a modified *Berry* test and that under a modified *Berry* type test, Citgo would not qualify for immunity as a statutory employer.

We agree with the district court that the 1989 amendments reinstate the integral relation test as interpreted by the Louisiana courts prior to *Berry*. Although no Louisiana courts have held that the integral relation test applies, we have. In *Becker*, 983 F.2d at 44; *Salsbury v. Hood Industries, Inc.*, 982 F.2d 912 (5th Cir. 1993); and *Harris v. Murphy Oil, U.S.A., Inc.*, 980 F.2d 991, 992 (5th Cir. 1992), we held that the 1989 amendment to 23:1061 repealed all three parts of the *Berry* test and reinstated the integral relation test.[1] *See Pierce v. Hobart Corp.*, 939 F.2d 1305 (5th Cir. 1991). In addressing the retroactivity of the 1989 amendments, several Louisiana courts of appeal have suggested in dicta that the integral relation test was reinstated by the 1989

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[1] Fruge contends that the integral relation test does not apply because the Louisiana Legislature amended the wrong statute SQ23:1061 in lieu of 23:1032. We explicitly rejected this theory in *Becker*, where we said: "In applying tort immunity to statutory employers, courts have always read the two provisions together, and we will continue to do so. We doubt that the Legislature intended to create two definitions of statutory employer." 983 F.2d at 46 (footnotes omitted).

amendments. *Carter v. Chevron Chem. Co.*, 593 So.2d 942, 945-46 (La. App. 4th Cir. 1992); *Hutchins v. Hill*, 609 So.2d 312, 315 (La. App. 3rd Cir. 1992). There is no need, therefore, to certify this question to the Louisiana Supreme Court.

"Under the integral relation test, a statutory employer relationship exists when the contract work is an integral part of the trade, business, or occupation of the principal." *Becker*, 983 F.2d at 46. "`The test for determining whether an activity is part of an employer's trade or business . . . is whether the particular activity is essential to the business. The fact that the employer or the industry as a whole always contracts out the activity is not controlling." *Salsbury*, 982 F.2d at 917 (quoting *Arnold v. Shell Oil Co.*, 419 F.2d 43, 50 (5th Cir. 1969)). Thus, it is not controlling that a contractor does not have its own employees available to perform the work, as long as the work performed by the subcontractor is an integral part of the contractor's trade, business or occupation.

Before *Berry*, several Louisiana cases with similar facts held that food service operations were an integral part of a business which was not itself in the food service business. *Foster v. Western Electric Co.*, 258 So.2d 153 (La. App. 2d Cir. 1972) (Western Electric not liable in tort for injury to subcontractor's cafeteria worker because it is statutory employer; plant operated twenty-four hours a day with 2400 employees); *Hankins v. Woman's Hosp.*, 517 So.2d 217 (La. App. 1st Cir. 1987) (hospital not liable in tort for injury to subcontractor's cafeteria worker because it is statutory employer). *See also Henderson v. Administrators of*

Tulane Univ., 426 So.2d 291 (La. App. 4th Cir. 1983) (Tulane not liable in tort to cafeteria worker).[2]

We therefore agree with the district court that the cafeteria operations were indisputably an integral part of Citgo's business. Citgo operated a large plant with over 2000 people on site twenty-four hours a day. Citgo needed to have food available for its employees at odd hours since the plant was open twenty-four hours a day and because of its union contracts. The cafeteria especially served the needs of employees with short lunch breaks who did not have time to take lunch elsewhere. The fact that no Citgo employee worked in the food service business does not suffice to create a fact issue on statutory employer status. Nothing suggests that if Citgo had been unable to find a contractor to run the cafeteria, it would not have hired its own employees to do so. This plant contained a cafeteria for at least thirty-three years. Under the circumstances, Citgo is Fruge's statutory employer.

Conclusion

We hold that because Citgo is Fruge's statutory employer, Citgo is immune from liability from any negligence on its part that caused Fruge's injury. Fruge's sole remedy is workers' compensation benefits. Accordingly, the judgment of the district

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[2] In returning to the integral relation test, we do not imply that all of the pre-*Berry* decisions will necessarily apply under the new standard. *Salsbury*, 982 F.2d at 916 & n.7 (the new amendments could be more expansive in finding statutory employer status than old decisions applying the integral relations test). *See also id*. at 917 n.8. We rely on the cases cited in the text because they involve closely analogous facts, we find their reasoning instructive, and we have no contrary guidance from Louisiana courts on how to apply the integral relation test under the 1989 amendments.

court is

Affirmed.