

**IN THE
SUPREME COURT OF MISSOURI**

MARY JEANETTE HAGGARD d/b/a JENNY'S HOUSECLEANING, and
JENNY'S HOUSECLEANING, INC.

APPELLANT,

v.

DIVISION OF EMPLOYMENT SECURITY,

RESPONDENT.

Transfer from the Missouri Court of Appeals
Western District

STATEMENT OF INTEREST OF THE UNITED STATES

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STATEMENT OF INTEREST OF THE UNITED STATES¹

The Unemployment Compensation for Federal Employees Program (UCFE), administered by states as agents of the federal government, provides for the payment of unemployment compensation, at federal expense, to eligible former federal civilian employees as if their federal service has been covered by the unemployment compensation law of the state where the employee last worked. 5 U.S.C. §§ 8502, 8504, 8505. Under the UCFE program, a state agency's determination with respect to unemployment compensation entitlement is "subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent." *Id.* § 8502(d); *see also* 20 C.F.R. § 609.7. If a federal agency employer disagrees with a state's determination of an individual's eligibility for, or entitlement to, UCFE, that federal agency "may seek appeal and review under the applicable State law." 20 C.F.R. § 609.7(d). Under this scheme, federal agency employers thus may contest state unemployment compensation determinations to the extent allowed by state law.

¹ Pursuant to federal statute, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of the State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

Missouri Supreme Court Rule 5.29 provides that, in proceedings before the Division of Employment Security (Division or state agency), “a corporation, partnership or other business entity authorized by law may be represented by an officer of the entity or a person in the full time employment of the entity in a managerial capacity who shall be afforded the opportunity to participate in the proceeding.” Mo. S.Ct. R. 5.29(c). As the Division explained in its application for transfer to this Court (at 10), state and local governmental agencies have been represented by managerial employees in employment security proceedings since the rule’s January 1, 1997 effective date. Acting pursuant to the federal government’s UCFE agreement with Missouri, and in reliance upon Rule 5.29(c), federal employers in Missouri have also been routinely represented by managerial employees in such proceedings.

On April 24, 2007, the court of appeals held that the phrase “corporation, partnership or other business entity” as used in Rule 5.29(c) does not encompass entities connected with the administration of government. *Haggard v. Division of Employment*, Nos. WD 66738 & WD66739, slip op. at 5 (Mo. Ct. App. W.D. April 24, 2007). As a result of the court of appeals’ decision, a governmental employer who appears before an appeals referee must now be represented by a licensed attorney.

The interest of the United States in this matter is twofold. First, in its brief, the Division points out that, if the appeal court’s decision is allowed to stand, that ruling will impose a tremendous burden on the operations of over 3,100 state governmental entities,

which will now be required to hire attorneys to represent them in employment compensation proceedings. *See* Resp. Br. 19-20. If this Court affirms the appellate court decision, federal agency employers will similarly have to use lawyers to appear in employment security proceedings, at considerable inconvenience and expense. Second, the United States agrees with the Division's argument that, for purposes of representation in administrative hearings, governmental entities should not be treated differently from business entities when they act as employers because, as in the situation of the United States Postal Service, the distinction between the two can be negligible. The United States submits this filing in support of the Division to briefly address these points.

ARGUMENT

I. THE COURT OF APPEALS' INTERPRETATION OF SUPREME COURT RULE 5.29(c) WILL IMPOSE AN UNDUE BURDEN ON FEDERAL AGENCY EMPLOYERS PARTICIPATING IN EMPLOYMENT COMPENSATION PROCEEDINGS BEFORE THE DIVISION OF EMPLOYMENT SECURITY

As noted above, the decision under review here will have a significant impact on the federal government. The Postal Service alone estimates that it participates in approximately 125 employment security proceedings before the Division annually in Missouri. Acting pursuant to its understanding of Supreme Court Rule 5.29(c), the Postal Service has routinely used non-lawyer Labor Relations Specialists to represent the

agency's interests in such proceedings. After learning of the appeals court's April 2007 ruling, however, Postal Service attorneys began appearing in Missouri employment security hearings in the middle of July and, in approximately one month, appeared in ten such hearings. Attorneys serving the Postal Service's Mid-America District, which covers the western and southern parts of Missouri, stopped appearing in hearings in early August. Attorneys serving the Postal Service's Gateway District, which covers the northern and eastern parts of Missouri, stopped appearing in hearings in mid-August because of the burden imposed on that office. The Postal Service is therefore not currently being represented in employment security proceedings in Missouri in light of the appeals court's April 2007 ruling.

As the experience of the Postal Service demonstrates, the court of appeals' interpretation of Rule 5.29(c) to require the representation of governmental entities by attorneys in employment compensation proceedings before the Division of Employment Security will not only impose a significant burden on the efficient operation of state governmental employers, but upon the federal government as well. Thus, scarce federal resources needed for numerous other purposes will have to be diverted to take on representation duties that have until now been handled effectively and efficiently by non-lawyers.

Significantly, the United States Department of Labor, which oversees the states' administration of the UCFE program, advises us that no other state prohibits non-

attorneys from representing federal agencies in state unemployment compensation hearings. Thus, if the court of appeals' interpretation of Rule 5.29(c) is correct, Missouri will stand alone in the nation in requiring representation of federal agencies by licensed attorneys in such proceedings.

**II. FOR PURPOSES OF SUPREME COURT RULE 5.29(c),
GOVERNMENTAL ENTITIES SHOULD NOT BE TREATED
DIFFERENTLY FROM OTHER BUSINESS ENTITIES WHEN THEY
ACT AS EMPLOYERS IN THE RELEVANT TYPE OF
ADMINISTRATIVE PROCEEDINGS**

The court of appeals held that “[u]nder the plain and ordinary meaning of the phrase ‘corporation, partnership or other business entity authorized by law,’ it is clear that Rule 5.29(c) is limited to private business entities and would not include entities connected with the *administration of government*.”² *Haggard v. Division of Employment*

² The court of appeals further explained that this Court held in *Reed v. Labor & Indus. Relations Comm’n*, 789 S.W.2d 19 (Mo. 1990) (*en banc*), that because a corporation is not a natural person, “but a ‘creature[] of statute,’” it may not “represent itself in legal matters, but must act solely through licensed attorneys.” Slip op. at 4 (quoting *Reed*, 789 S.W.2d at 21). The appeals court opined that Rule 5.29(c) was enacted to create an exception to allow private corporations and other business entities to be treated as “persons” with the right to appear without attorneys in proceedings before

Security, Nos. WD 66738 & WD66739, slip op. at 5 (Mo. Ct. App. W.D. April 24, 2007) (emphasis added). In its brief (at 19-20), the Division argues that, under Supreme Court Rule 5.29(c), state and local governmental entities should not be treated differently from private businesses when they act as employers (rather than as administrators of the law). We believe that the Division’s argument is correct with respect to federal governmental entities participating in the administrative proceedings at issue as well. Indeed, the distinction between a private employer and a governmental employer can often be blurred.

the Division. *Id.* We note that a “longstanding interpretive presumption” in federal jurisprudence is that “person” does not include the sovereign. *See Vermont Agency of Natural Resources v. United States ex. rel Stevens*, 529 U.S. 765, 780 (2000). The presumption is not a hard and fast rule, however, and the term “person” sometimes does include the sovereign, depending upon “‘the legislative environment’ in which the word appears.” *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 711 (2003). Thus, a federal or state entity is more likely to be considered a person if it stands in a position much like a private party. *Seen Georgia v. Evans*, 316 U.S. 159, 161 (1942) (state, as purchaser of asphalt shipped in interstate commerce, was a “person” qualified to seek redress under the Sherman Act); *cf. USPS v. Flamingo Indus.*, 540 U.S. 736, 746 (2004) (the Postal Service was not a “person” for purposes of antitrust laws).

For example, in enacting the Postal Reorganization Act in 1970, Congress “indicated that it wished the Postal Service to be run more like a business . . .” by establishing a new postal rate structure, 39 U.S.C. § 3621, that was “designed to make the Postal Service self-supporting.” *Franchise Tax Bd. v. USPS*, 467 U.S. 512, 519-20 & n.13 (1984); *see also* 39 U.S.C. § 201 (the Postal Service is “an independent establishment” of the Executive Branch); 39 U.S.C. § 401(5) (authorizing Postal Service to, *inter alia*, “acquire, in any lawful manner, such personal or real property, or any interests therein, as it deems necessary or convenient in the transaction of its business”); 39 U.S.C. §§ 1202-1209 (postal labor relations are to be governed as labor relations in private sector under National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*).

Clearly, when a federal agency employer appears before the Division to contest a an employment compensation claim, it is not acting in its role as administrator of the law it has responsibility for enforcing. Rather, its interests are closely akin to those of a private business employer in ensuring that unemployment compensation benefits are paid only to eligible former employees. For these reasons, we believe that the Division’s position on this point is correct, and should be adopted by this Court.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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AUGUST 2007

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Supreme Court Rule 84.06(c) that the foregoing brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 1,327 words as determined using the word count program in Microsoft Word 2003. I further certify that the accompanying floppy disk has been scanned and was found to be free of viruses.

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CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 84.06(g), I hereby certify that on this 24th day of August 2007, I caused to be served one hard copy of the foregoing “Statement of Interest of the United States,” and one electronic copy on floppy disk, *via* First Class U.S. mail, postage prepaid, upon the following counsel of record:

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