

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:

Employer Account No. - 2619487
RIPTIDE POOL SERVICES INC
5331 10TH ST N
ST PETERSBURG 33703-2709

PROTEST OF LIABILITY
DOCKET NO. 0019 3444 56-01

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

ORDER

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated June 3, 2013, is AFFIRMED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this 14th day of April, 2014.



Magnus Hines
Magnus Hines,
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanendra Y. Barnes
DEPUTY CLERK

4.11.14
DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the 14th day of April, 2014.

Shanendra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

By U.S. Mail:

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DEPARTMENT OF REVENUE
WILLA DENNARD
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

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RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
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c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated June 3, 2013.

After due notice to the parties, a telephone hearing was held on February 6, 2014. The Petitioner was represented by its attorney. The Petitioner's president testified as a witness. The Respondent was represented by a Department of Revenue Tax Auditor. A Tax Auditor testified as a witness.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were received from the Petitioner.

ISSUE: Whether services performed for the Petitioner constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which operates a business providing a weekly swimming pool maintenance service for the Petitioner's customers. The business also performs other swimming pool maintenance cleaning and services that are not performed on a routine or weekly basis. The Petitioner has a county occupational license to perform swimming pool maintenance. The Petitioner's president is active in the operation of the business.
2. The Florida Department of Revenue selected the Petitioner for an audit of the Petitioner's books and records for the 2012 tax year to ensure compliance with the Florida Reemployment Assistance Program Law. The Petitioner directed the Department of Revenue to contact the Petitioner's attorney for the audit.

3. The Petitioner's attorney provided the Petitioner's books and records to the Tax Auditor electronically. Among other documents and records, the Tax Auditor examined the Petitioner's payroll ledger, check register, bank statements, federal income tax return, federal payroll tax reports, and state payroll tax reports.
4. The Tax Auditor discovered payments made to two individuals which were not included in the payroll ledger. The Tax Auditor inquired about the nature of the payments and was informed that one individual operated a business as an automobile mechanic and had been paid for repairing the Petitioner's vehicles. The other individual operated a swimming pool maintenance business similar to the Petitioner's business. If the Petitioner had surplus business which the Petitioner was not able to perform, the work was provided to the other swimming pool maintenance business. The Tax Auditor confirmed that the other business was a licensed swimming pool maintenance business. The Tax Auditor concluded that the mechanic and the swimming pool company were valid independent contractors.
5. The examination revealed that one of the Petitioner's employees, Gary Whistler, was hired by the Petitioner during 2012. The first pay check issued to Gary Whistler was in the amount of \$160. The \$160 was not included in the wages reported by the Petitioner. The Tax Auditor inquired about the nature of the payment and was informed that the payment was for assisting the Petitioner's president. The Tax Auditor concluded that the \$160 was wages that should have been included on the reemployment assistance tax reports.
6. The Tax Auditor discovered payments made to two other individuals, Jimmy McLaughlin and Chad Weingart, and that those payments were not included in the payroll ledger and were not reported as wages. The Tax Auditor inquired about the nature of the payments and was informed that both individuals had assisted the Petitioner's president.
7. A bank needed to have swimming pools cleaned up at homes that were in foreclosure or had been repossessed by the bank. The Petitioner gave the bank estimates of the amounts that the Petitioner would charge the bank for cleaning up the pools. The bank accepted the Petitioner's offer and entered into an agreement with the Petitioner. As part of the agreement the Petitioner was required to provide the bank with photographs showing the swimming pools before clean-up, during clean-up, and after clean-up.
8. The Petitioner placed an ad on Craigslist seeking extra help for general labor. Jimmy McLaughlin responded. Jimmy McLaughlin is an individual who was training to enter the Navy. He did not have any prior experience cleaning up swimming pools but the work did not require any training or supervision. He did not have an occupational license. Jimmy McLaughlin cleaned up three swimming pools and was paid a set amount per pool based on an amount that the Petitioner felt the work was worth. The Petitioner retained the right to terminate the relationship at any time. Jimmy McLaughlin provided the before, during, and after photographs to the Petitioner. The Petitioner did not obtain a social security number for Jimmy McLaughlin, did not withhold payroll taxes from the pay, and did not issue a Form 1099. The Petitioner paid Jimmy McLaughlin a total of \$1,476.00.
9. Chad Weingart is the cousin of the Petitioner's president. Chad Weingart cleaned up one pool during 2012 for which the Petitioner paid him \$327.50, an amount which the Petitioner determined was appropriate, plus reimbursement for materials or tools. No taxes were withheld from the pay. Chad Weingart did not have an occupational license.
10. On June 3, 2013, the Department of Revenue issued a *Notice of Proposed Assessment* notifying the Petitioner of the results of the audit. The Tax Auditor reclassified the payment made to Gary Whistler in the amount of \$160.00, the payments made to Jimmy McLaughlin in the amount of \$1,476.00, and the payment made to Chad Weingart in the amount of \$327.50, as wages resulting in additional tax due in the amount of \$29.64. The Petitioner filed a timely protest by letter dated June 19, 2013.

Conclusions of Law:

11. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Reemployment Assistance Program Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.
12. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).
13. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Department is limited to applying only Florida common law in determining the nature of an employment relationship.
14. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.
15. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
 - (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.
 - (2) The following matters of fact, among others, are to be considered:
 - (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
 - (b) whether or not the one employed is engaged in a distinct occupation or business;
 - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - (d) the skill required in the particular occupation;
 - (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
 - (f) the length of time for which the person is employed;
 - (g) the method of payment, whether by the time or by the job;
 - (h) whether or not the work is a part of the regular business of the employer;
 - (i) whether or not the parties believe they are creating the relation of master and servant;
 - (j) whether the principal is or is not in business.
16. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties.
17. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly

classified an employee or an independent contractor often can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

18. The Petitioner acknowledges that the initial payment made to Gary Whistler in the amount of \$160 was wages subject to the Florida Reemployment Assistance Program Law. The Petitioner does not contest the reclassification of the \$160 as wages.
19. The services performed by Jimmy McLaughlin and Chad Weingart were not separate and distinct from the Petitioner's business but were an integral part of the Petitioner's business. It was not shown that Jimmy McLaughlin and Chad Weingart operated their own businesses, offered services to the general public, or that they were at risk of suffering a financial loss from performing services. The workers did not bill the Petitioner or submit an invoice for payment and the Petitioner may have reimbursed the workers for expenses. The Petitioner determined the rate of pay based on what the Petitioner felt the work was worth.
20. The work performed by Jimmy McLaughlin and Chad Weingart was unskilled labor which did not require training or supervision. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)
21. The Petitioner had the right to terminate the workers at any time without incurring liability for breach of contract. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."
22. The "extent of control" referred to in Restatement Section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).
23. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error. The Petitioner's evidence is not sufficient to show that the determination of the Department of Revenue is in error.
24. The Petitioner submitted Proposed Findings of Fact and Conclusions of Law. In its proposed findings #9 and #18 the Petitioner asserts that the parties did not intend to enter into an employer/employee relationship. Neither Jimmy McLaughlin nor Chad Weingart, the individuals found by the Tax Auditor to be the Petitioner's employees, participated in the hearing and no written agreements between the Petitioner and the workers were submitted in evidence. No competent evidence was submitted which establishes the intent of the workers. Thus, proposed findings #9 and #18 are not supported by the evidence and are rejected.

Recommendation: It is recommended that the determination dated June 3, 2013, be AFFIRMED.

Respectfully submitted on March 5, 2014.



R. O. Smith, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke Lòd Rekòmande a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd ken z jou apati de dat ke Lòd Rekòmande a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

March 5, 2014

Copies mailed to:

Petitioner

Respondent

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