

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. - 3087452
ORLANDO OUTDOOR LANDSCAPING LLC
ATTN KARYN VANDESTREEK
8650 TARA OAKS COURT
ORLANDO FL 32836-5970

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-66108L**

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 4, 2012, 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 _____ day of November, 2012.



Altemese Smith,
Assistant Director,
Reemployment Assistance Services
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

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 _____ day of November, 2012.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

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LLC
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8650 TARA OAKS COURT
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY

Reemployment Assistance Appeals

MSC 347 CALDWELL BUILDING

107 EAST MADISON STREET

TALLAHASSEE FL 32399-4143

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**PROTEST OF LIABILITY
DOCKET NO. 2012-66108L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Reemployment Assistance Services
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 4, 2012.

After due notice to the parties, a telephone hearing was held on August 7, 2012. The Petitioner, represented by its Owner/Member, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

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 not received.

Issue:

Whether services performed for the Petitioner by the Joined Party constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner has operated a landscaping and lawn service business since 2004. The Petitioner's members also operate, through a separate entity, an inflatable advertising business under the name A-1 Balloon. The Petitioner and the other entity maintain separate employer identification numbers. The two businesses are operated from the same location.

2. The Joined Party performed services for the Petitioner from October 2010 until December 23, 2011. The Joined Party's duties included answering the telephone, filing, taking customer orders, handling customer payments, making collection calls, and performing general clerical work. The Joined Party performed similar services during the same time period for A-1 Balloon.
3. The Joined Party's work was performed at the Petitioner's business location. For the majority of the time the Joined Party performed her services, the Petitioner operated the business from the home of the Petitioner's members. Toward the end of the work relationship, the Petitioner operated the business from a commercial office location.
4. The Petitioner furnished the telephones, computer and fax machine needed for the work. The Joined Party did not have any expenses in connection with the work.
5. At the time of hire, the Joined Party was told she would be working 40 hours per week. The Joined Party was required to work from 8:30 a.m. to 5:00 p.m. The Joined Party could leave for a medical or other appointment during working hours. The claimant was required to notify the Petitioner if she was unable to report for work. The Joined Party was required to keep a weekly timesheet and was paid only for time worked. The Joined Party was not required to differentiate between time spent performing tasks for the Petitioner and time spent performing tasks for A-1 Balloon.
6. The Joined Party was not restricted from performing work for a competitor of the Petitioner. The Joined Party could not subcontract or hire others to perform her work.
7. At the time of hire, the Petitioner told the Joined Party she would be paid at a rate of \$10 per hour. The Joined Party later received an increase to \$11 per hour. The Joined Party was paid by check on a weekly basis. Some checks reflected the Petitioner's name and other checks reflected the name A-1 Balloon. The Joined Party did not receive fringe benefits such as sick pay, vacation pay, or holiday pay. The Joined Party received a Christmas bonus.
8. The Petitioner told the Joined Party that taxes would not be deducted from her pay. The Petitioner did not withhold taxes from the Joined Party's pay. The Joined Party's earnings for 2010 were \$6,387. The Joined Party's earnings for 2011 were \$20,870.75. The Joined Party's earnings were reported on forms 1099-MISC for 2010 and 2011. The earnings were reported using the Petitioner's employer identification number, although the payer was identified on the forms as A-1 Balloon.
9. The Joined Party terminated the relationship because she found another position that offered benefits.
10. The Joined Party filed a claim for unemployment compensation benefits effective March 11, 2012. When the Joined Party did not receive credit for her earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.
11. On June 4, 2012, the Department of Revenue issued a determination holding that the services performed by the Joined Party, as administrative assistant, constitute insured employment retroactive to October 24, 2010.

Conclusions of Law:

12. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Unemployment Compensation 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.
13. 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).
14. 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).
15. 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.
16. 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.
17. 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.
18. 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 cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

19. The record shows the Joined Party performed services contemporaneously for the Petitioner and another business entity operated by the Petitioner's members.
20. The record reflects the Petitioner exercised significant control over the details of the work. The Petitioner assigned specific tasks to the Joined Party, prioritized the work to be performed, and provided instructions as to how the Joined Party was to perform the work. The Petitioner directed the Joined Party in her work on a daily basis. The Joined Party was required to perform her work during the Petitioner's regular office hours. The Petitioner supplied the work space, equipment and supplies. The Joined Party was required to personally perform the work. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that the basic test for determining a worker's status is the employing unit's right of control over the manner in which the work is performed. The Court, quoting Farmer's and Merchant's Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), stated: "[I]f the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor; if he is subject to the control of the person being served as to the means to be used, he is not an independent contractor."
21. The Petitioner controlled the financial aspects of the relationship. The Petitioner determined the rate of pay. The Joined Party was required to keep a timesheet. The Joined Party was paid hourly and not by the job. These factors are more indicative of an employer-employee relationship. The fact that the Petitioner did not withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.
22. The Petitioner's business is a landscaping and lawn service. The Joined Party answered the Petitioner's business telephone, took messages and otherwise assisted the customers of the Petitioner's business. The work performed by the Joined Party was not separate and distinct, but rather was an integral and necessary part of the Petitioner's business.
23. The Joined Party performed services for the Petitioner for more than one year. Either party could terminate the relationship at any time without incurring liability. These facts reveal the existence of an at-will relationship of relative permanence. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court, quoting Larson, Workmens' Compensation Law, Section 44.35, stated: "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."
24. It is concluded that the services performed for the Petitioner by the Joined Party as an administrative assistant constitute insured employment.
25. Section 443.1215, Florida Statutes, provides:
 - (1) Each of the following employing units is an employer subject to this chapter:
 - (a) An employing unit that:
 1. In a calendar quarter during the current or preceding calendar year paid wages of at least \$1,500 for service in employment; or
 2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.
26. The Joined Party performed services for the Petitioner from October 2010 until December 23, 2011. The Joined Party was paid wages of \$6,387 in the fourth quarter 2010. Those wages are sufficient to establish liability based upon the payment of wages of at least \$1,500. No evidence

was presented to distinguish between wages paid by the Petitioner and payments made by the other entity.

27. Rule 73B-10.035(7) Florida Statutes, states 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 in the instant case failed to provide sufficient competent, substantial evidence to establish by a preponderance of the evidence that the determination was in error. Therefore, the determination will remain undisturbed.

Recommendation: It is recommended that the determination dated June 4, 2012, be AFFIRMED.

Respectfully submitted on October 4, 2012.



SUSAN WILLIAMS, 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 kenz 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.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
October 4, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

SHARON HASTINGS
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