

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

PETITIONER:

Employer Account No. - 3090972
LAW OFFICE OF Y J HARRELL PLLC
ATTN YVETTE HARRELL
1371 SAWGRASS CORPORATE PARKWAY
SUNRISE FL 33323-2889

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-66109L**

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 6, 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 December, 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 December, 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:

LAW OFFICE OF Y J HARRELL PLLC
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MISTY WHEELER
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DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
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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

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**PROTEST OF LIABILITY
DOCKET NO. 2012-66109L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
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 6, 2012.

After due notice to the parties, a telephone hearing was held on October 4, 2012. The Petitioner, represented by the Petitioner's Manager/Member, appeared and testified. An attorney testified as a witness on behalf of the Petitioner. 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.

Issues:

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 is a single member limited liability company that operates a law practice.

2. The Joined Party performed legal secretarial services for the Petitioner from March 1, 2011, until May 19, 2011. The Joined Party obtained the work with the Petitioner after responding to an advertisement placed by the Petitioner on a career site. During an interview, the parties discussed the Joined Party's work experience, the services needed by the Petitioner, the number and flexibility of the work hours, and the rate of pay. Following the interview, the Petitioner told the Joined Party the Petitioner would pay her \$17 per hour for approximately 25 hours of work per week. The Petitioner told the Joined Party there would be an opportunity for increased compensation if the relationship proved to be beneficial to the Petitioner. The Joined Party accepted the offer. The parties did not enter into a written agreement.
3. The Joined Party had prior experience as a legal assistant. The Petitioner did not provide any formal training to the Joined Party.
4. The Joined Party's services included scheduling hearings and meetings, typing pleadings, letters, and contracts, greeting clients, answering the telephone, making copies, and filing. The Joined Party met with the Petitioner in the mornings to review the status of cases and to obtain direction from the Petitioner as to any follow-up required. The Petitioner told the Joined Party how the Petitioner wanted pleadings prepared. On some occasions the Petitioner provided the Joined Party with a form to use in performing the work. After typing a document, the Joined Party emailed the document to the Petitioner for review. The Petitioner provided clarification or additional instructions to the Joined Party by email or in person. If the document contained errors, the Petitioner sometimes corrected the document rather than returning it to the Joined Party for correction.
5. The Joined Party performed the work at the Petitioner's office location. The Petitioner provided the Joined Party with a desk, computer, scanner, copier, and telephone for use in performing the work.
6. The Joined Party was required to report for work at 9:00 a.m. The Joined Party usually worked Monday through Thursday. The Joined Party left work between 2:00 p.m. and 4:00 p.m., depending upon the workload.
7. The Joined Party was paid approximately every two weeks. The Joined Party submitted the hours worked in a format requested by the Petitioner. On March 8, 2011, the Joined Party received an initial payment of \$715, representing \$714 for hours worked and \$1 for postage. The Joined Party received a check in the amount of \$883 on March 24, 2011. The Joined Party received four checks totaling \$3,247 in the second quarter 2011. The Petitioner did not withhold taxes from the Joined Party's pay.
8. The Petitioner did not provide any fringe benefits to the Joined Party.
9. The Joined Party was not restricted from performing similar services for others while working for the Petitioner, as long as the other services did not interfere with the Joined Party's work for the Petitioner.
10. Either party could terminate the relationship without a penalty or liability for breach of contract. The Petitioner terminated the relationship with the Joined Party after receiving a number of complaints concerning the Joined Party's demeanor.

11. The Joined Party did not have her own business, business card, or occupational license. The Joined Party did not advertise her services to the general public. The Joined Party performed limited secretarial services for another attorney after the Joined Party's relationship with the Petitioner ended.

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 evidence presented in this case does not reveal the existence of an express agreement between the parties as to the status of the work relationship. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995), the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
20. The Petitioner’s business is a law practice. The Joined Party performed legal secretarial services on a part-time basis. The work performed by the Joined Party was not separate and distinct from the Petitioner’s business, but was an integral and necessary part of the Petitioner’s business. The Joined Party did not have her own business. The Joined Party did not have any expense or financial risk associated with the work performed for the Petitioner.
21. The Joined Party performed the work at the Petitioner’s place of business. The Petitioner provided the work space, equipment, and supplies needed for the work.
22. The Joined Party was paid by time rather than by the job. The Petitioner determined the rate and method of payment. The fact that the Petitioner chose not to withhold taxes from the Joined Party’s pay does not, standing alone, establish an independent contractor relationship.
23. The Petitioner exercised sufficient control over the details of the work to establish an employer-employee relationship. The Joined Party was required to report to the Petitioner’s office at a set time. The Petitioner determined what work was to be performed. Although the Joined Party had prior experience as a legal assistant, the Petitioner directed the Joined Party as to how the Petitioner wanted the work performed.
24. It is concluded that the services performed for the Petitioner by the Joined Party as a legal 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 in employment for the Petitioner from March 1, 2011, until May 19, 2011. The Joined Party received wages in the amount of \$1,597 in the first quarter 2011. Those wages are sufficient to establish liability based on the payment of wages of at least \$1,500 in a calendar quarter.

Recommendation: It is recommended that the determination dated June 6, 2012 be AFFIRMED

Respectfully submitted on November 9, 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:
November 9, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

MISTY WHEELER
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