

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

PETITIONER:

Employer Account No. - 3113746
BIRDSTRIKE CONTROL PROGRAM
ATTN NICKOLAS B CARTER ESQUIRE
16051 E FM 1097 ROAD
WILLIS TX 77378-4077

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2013-6277L**

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 October 30, 2012, is MODIFIED to reflect a retroactive date of liability of December 1, 2009. As modified, it is ORDERED that the determination 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 July, 2013.



Altemese Smith,
Bureau Chief,
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

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 July, 2013.

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:

BIRDSTRIKE CONTROL PROGRAM
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16051 E FM 1097 ROAD
WILLIS TX 77378-4077

RYAN MEINERZ
9244 RIVERBEND AVE
PARLIER CA 93648

DEPARTMENT OF REVENUE
ATTN: JODY BURKE - CCOC #1-4866
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TALLAHASSEE FL 32314-6417

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

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PROTEST OF LIABILITY

DOCKET NO. 2013-6277L

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
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 October 30, 2012.

After due notice to the parties, a telephone hearing was held on May 20, 2013. The Petitioner, represented by a partner, 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, Birdstrike Control Program, is a partnership consisting of Nicholas Carter and his wife, Kelly Carter.
2. The Petitioner operates a business which contracts to remove birds and other wildlife from airports and military bases. The Petitioner uses Border Collies to remove and control the birds and other wildlife.

3. The Petitioner hired the Joined Party to work as an ecologist, at a facility located in Texas, in February 2009 with an annual wage of \$35,000. In approximately December 2009 the Petitioner obtained a contract from the United States Air Force to remove wildlife from McDill Air Force Base located in Tampa, Florida. The Petitioner transferred the Joined Party from Texas to work at McDill Air Force Base in approximately December 2009, with an increase in pay.
4. The Joined Party worked for the Petitioner as an ecologist at McDill Air Force Base until February 2012. The Joined Party was paid wages by the Petitioner, not by the Federal government or the United States Air Force. The Petitioner withheld payroll taxes from the Joined Party's wages and at the end of each year the wages were reported to the Internal Revenue Service on Form W-2 Wage and Tax Statement.
5. It was the Petitioner's belief that the Petitioner was exempt from payment of unemployment tax to Florida and other states if the employment occurred on federal land or a federal enclave, such as McDill Air Force Base. The Petitioner has paid Federal unemployment compensation tax on the Joined Party's wages to the Federal Government.
6. The Joined Party filed a claim for unemployment compensation benefits, now known in Florida as Reemployment Assistance Program benefits. When the Joined Party did not receive credit for his Florida wages an investigation was assigned to the Department of Revenue to determine if the Petitioner was liable for payment of unemployment tax to Florida.
7. On October 30, 2012, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to February 2, 2009, and that the Petitioner was liable for payment of unemployment tax to Florida. The Petitioner filed a timely protest by letter dated November 13, 2012.

Conclusions of Law:

8. The issue in this case, whether services performed for the Petitioner by the Joined Party 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.
9. The Petitioner does not dispute the Joined Party's status as an employee of the Petitioner. The dispute is whether the Joined Party's wages from employment are exempt from coverage under the Florida Reemployment Assistance Program Law, previously known as the Florida Unemployment Compensation Law.
10. Section 443.036(19), Florida Statutes, provides that "employer" means an employing unit subject to this chapter under s. 443.1215.
11. In advancing its argument that the Petitioner is not subject to the Florida Reemployment Assistance Program Law the Petitioner relies on Section 443.1216(13)(e), Florida Statutes, which provides that service performed in the employ of the Federal Government or of an instrumentality of the Federal Government which is wholly or partially owned by the United States is exempt from coverage under the Florida Reemployment Assistance Program Law.
12. The Joined Party performed services for the Petitioner as an employee of the Petitioner, not as an employee of the Federal Government. The Petitioner also argues that the Florida Reemployment Assistance Program Law does not define "instrumentality." The Petitioner is a partnership owned by its partners, Nickolas and Kelly Carter. No evidence was presented to show that the Petitioner is wholly or partially owned by the United States. Thus, the Petitioner is not an instrumentality which is owned wholly or partially by the United States.
13. The Florida Reemployment Assistance Program Law does not contain any exemption or exclusion of employment if the employment services are performed on a federal enclave or on federal land.

14. Title 26 United States Code 3305 provides that the legislature of any state may require any instrumentality of the United States, and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law and that no person shall be relieved from compliance with a State unemployment compensation law on the ground that services were performed on land or premises owned, held, or possessed by the United States, and any state shall have full jurisdiction and power to enforce the provisions of such law to the same extent and with the same effect as though such place were not owned, held, or possessed by the United States.
15. It is concluded that the Joined Party performed services for the Petitioner in insured Florida employment beginning in December 2009 when the Joined Party began performing services at McDill Air Force Base.
16. Section 443.1215, Florida Statutes, provides in pertinent part:
 - (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 the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.
 - (g) An employing unit that is not otherwise an employer subject to this chapter under this section:
 1. For which, during the current or preceding calendar year, service is or was performed for which the employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment fund.
17. It has not been shown that the Petitioner had an employee in Florida for twenty weeks during 2009 nor has it been shown that the Petitioner had a quarterly Florida payroll of \$1,500 during 2009. However, it has been shown that the Petitioner was liable for payment of Federal unemployment compensation tax for 2009. Thus, the Petitioner is liable for payment of Florida unemployment compensation tax for 2009.
18. The determination of the Department of Revenue holds the Petitioner liable for payment of unemployment compensation tax to Florida retroactive to February 2, 2009, the date the Joined Party began performing services for the Petitioner in Texas. The Florida Reemployment Assistance Program Law does not have jurisdiction over wages paid to Texas employees. The Joined Party's beginning date of employment in Florida occurred during the fourth calendar quarter 2009. Thus, the Petitioner is liable for payment of taxes to Florida beginning December 1, 2009.

Recommendation: It is recommended that the determination dated October 30, 2012, be MODIFIED to reflect a retroactive date of liability of December 1, 2009. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on May 23, 2013.

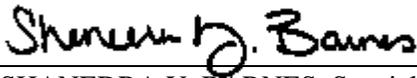


R. O. SMITH, Special Deputy
Office of Appeals

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 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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
May 29, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

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