

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

PETITIONER:

Employer Account No. - 3104157
AQUATIC INTERIORS DESIGN LLC
1887 ALLENDALE DR
CLEARWATER FL 33760-1426

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-104036L**

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 August 28, 2012, is MODIFIED to reflect a retroactive date of January 8, 2010. 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 March, 2013.



Altemese Smith,
Bureau Chief,
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 March, 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:

AQUATIC INTERIORS DESIGN LLC
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DEPARTMENT OF REVENUE
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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. 2012-104036L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: SECRETARY,
Bureau Chief,
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 August 28, 2012.

After due notice to the parties, a telephone hearing was held on December 13, 2012. The Petitioner represented by the Petitioner's sole member, appeared and testified. The Respondent, represented by a Tax Specialist II with the Department of Revenue, 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.

Whether the Petitioner filed a timely protest pursuant to Sections 443.131(3)(i); 443.141(2); 443.1312(2), Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a limited liability company that was formed on January 8, 2010. The Petitioner files for federal income tax purposes as a sole proprietorship. The Petitioner's sole member previously operated the business for 24 years as a sole proprietor. The Petitioner installs and maintains aquariums.

2. The Joined Party performed services for the Petitioner as an aquarium maintenance technician from January 8, 2010, until June 27, 2012. The Joined Party previously performed the same services when the business was operated as a sole proprietorship. The Joined Party obtained the work with the Petitioner's predecessor after responding to an advertisement for an aquarium maintenance technician. The Joined Party was told that her earnings would be reported on a form 1099. The Joined Party understood that to mean she would be responsible to paying her own taxes at the end of the year.
3. The Joined Party did not have prior experience in aquarium maintenance. The Joined Party was told how to clean tanks, lids, and filters, how to repair lights and pumps, how to purchase fish and supplies, how to bill the customers, and how to keep track of supplies.
4. The Joined Party worked Monday through Thursday from 9:00-9:30 a.m. until 4:30-5:00 p.m. The Joined Party began each day at the Petitioner's business location in order to load buckets of filtered water and other supplies needed for the maintenance of the customers' aquariums. The Joined Party sometimes worked with the Petitioner's sole member at customer locations and sometimes went to those locations alone. At the end of the day, the Joined Party returned to the Petitioner's office to unload coral and supplies and to clean buckets and other materials.
5. The Petitioner provided most of the equipment, tools, and supplies needed for the work. The Joined Party sometimes used her own buckets, sponges, siphon hose, and paper towels if she did not pick up those supplies from the Petitioner's office. The Petitioner supplied the Joined Party with tee shirts bearing the Petitioner's name and with business cards bearing the Petitioner's name, the name of the Petitioner's sole member, and the Joined Party's name. Unless the Joined Party rode with the Petitioner's sole member in the Petitioner's truck, the Joined Party used her own vehicle to travel to customer locations. The Petitioner gave the Joined Party money for fuel if the driving distance was greater than 10-15 miles.
6. The Petitioner determined the amounts charged to the customers. The Joined Party was paid on an hourly basis, and the Petitioner determined the rate at which the Joined Party was paid. The Joined Party was last paid at a rate of \$12 per hour. The Joined Party did not invoice for her services. The Petitioner and Joined Party jointly kept track of the number of hours worked by the Joined Party. The Petitioner paid the Joined Party additional compensation for large installation jobs. The Petitioner did not withhold taxes from the Joined Party's pay. The Joined Party did not receive sick pay, vacation pay, or holiday pay. The Petitioner shared Christmas bonuses received from customers with the Joined Party. The Petitioner reported the Joined Party's earnings on a form 1099-MISC.
7. The Joined Party did not operate an aquarium maintenance business. The Joined Party and her husband had a "handyman" business that the Joined Party's husband primarily operated.
8. The Joined Party filed a claim for unemployment compensation benefits effective July 15, 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.
9. On August 28, 2012, a Tax Auditor II with the Department of Revenue issued an *Employee Determination Notice* holding that the claimant was the Petitioner's employee, retroactive to January 1, 2008, and advising the Petitioner of its liability for the filing of quarterly wage reports. Among other things the determination states, "This letter is an official notice of the above determination and will become conclusive and binding unless you file a written application to protest this determination within twenty (20) days from the date of this letter."

10. On September 5, 2012, the Department of Revenue mailed a *Liability Notice* to the Petitioner notifying the Petitioner of its liability for the filing of quarterly wage reports. The *Liability Notice* was based upon the employee determination issued August 28, 2012. Among other things the notice states, "This letter is your official notice and becomes conclusive and binding within 20 calendar days of the 'Mailed on or Before' date shown above. If you disagree and wish to protest, you must do so in writing, explaining your reason for disagreement."
11. The Petitioner received the *Employee Determination Notice* dated August 28, 2012, by mail, on a date unknown. The Petitioner received the *Liability Notice* at about the same time. The Petitioner was uncertain whether the protest was due 20 days from the date of the *Employee Determination Notice* or from the "Mailed on or Before" date on the *Liability Notice*. On September 17, 2012, the Petitioner contacted the Tax Auditor II to respond to the determination. When the auditor was not in, the Petitioner left a message. The Petitioner spoke with the auditor on September 20, 2012, and was advised to file a written protest. The Petitioner submitted a protest on September 23, 2012.

Conclusions of Law:

12. Section 443.141(2)(c), Florida Statutes, provides:

(c) *Appeals*.--The Department and the state agency providing unemployment tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
13. Rule 73B-10.035(5)(a)1., Florida Administrative Code, provides:

Determinations issued pursuant to Sections 443.1216, 443.131-.1312, F.S., will become final and binding unless application for review and protest is filed with the Department within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
14. The determination issued by the Department of Revenue on August 28, 2012, does not contain a mailing date or any certification of the date that the determination may have been mailed to the Petitioner. The *Liability Notice* indicates that it was mailed on September 5, 2012.
15. The Petitioner filed the protest on September 23, 2012. The protest was filed within 20 days of the mailing date of the *Liability Notice*. Since no evidence was presented to show when the determination was mailed to the Petitioner, the Petitioner's protest is accepted as timely filed.
16. 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.
17. 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).
18. 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).
19. 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.

20. 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.

21. 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.

22. 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.

23. The Petitioner operates an aquarium installation and maintenance business. The Joined Party performed services for the Petitioner as an aquarium maintenance technician. 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.

24. 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." In this case the Petitioner exercised significant control over the details of the work. The Petitioner determined what work was performed, where the work was performed, when the work was performed and, through the training, how the work was performed.

25. The Petitioner provided the majority of the equipment and supplies needed for the work. The Joined Party occasionally used personal supplies for her own convenience. The Joined Party used her personal vehicle at times to travel to customer locations. The Petitioner provided a fuel subsidy for distances greater than 10-15 miles.
26. The Petitioner determined the rate and method of payment. The Joined Party was paid by time, rather than by the job. The fact that taxes were not withheld from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.
27. The Joined Party was not hired for a particular project or duration of time. The Joined Party worked for the Petitioner for over two and one-half years, and the term of the relationship was indefinite. These facts reveal the existence of an at-will relationship of relative permanence which suggests an employer-employee relationship.
28. It is concluded that the services performed for the Petitioner by the Joined Party as an aquarium maintenance technician constitute insured employment.
29. Section 443.1215(1)(a), 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.
30. The determination in this case holds the Petitioner liable for payment of reemployment assistance tax retroactive to January 1, 2008. However, the record shows the Petitioner was not in existence until January 8, 2010. The Joined Party performed services for the Petitioner from January 8, 2010, until June 27, 2012. Those services are sufficient to establish liability effective January 8, 2010, based on the fact that the Petitioner employed at least one individual in employment during twenty different calendar weeks during a calendar year.

Recommendation: It is recommended that the determination dated August 28, 2012, be MODIFIED to reflect a retroactive date of January 8, 2010. As MODIFIED, it is recommended that the determination be AFFIRMED.

Respectfully submitted on February 21, 2013.

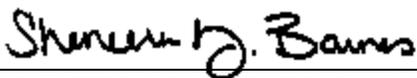


SUSAN WILLIAMS, Special Deputy
Office of Appeals

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.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
February 21, 2013

Copies mailed to:

Petitioner
Respondent
Joined Party

ROBIN C MURRAY
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SEMINOLE FL 33772

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