

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

PETITIONER:

Employer Account No. – 3225000
KING LINDSEY PA
200 SE 6TH ST STE 507
FORT LAUDERDALE FL 33301-3424

**PROTEST OF LIABILITY
DOCKET NO. 0023 4520 49-02**

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 May 29, 2014, 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 23 day of **January, 2015**.



Magnus Alines

Magnus Alines,
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

1-26-15

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 26th day of January, 2015.

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:

KING LINDSEY PA
200 SE 6TH ST STE 507
FORT LAUDERDALE FL 33301-3424

RHEIANNA MCLEOD
10709 N PRESERVE WAY
APT 103
MIRAMAR FL 33025-6553

DEPARTMENT OF REVENUE
WILLA DENNARD
CCOC BLDG #1 SUITE 1400
2450 SHUMARD OAK BLVD
TALLAHASSEE FL 32399

MYRA TAYLOR
TALLAHASSEE CENTRAL SERVICE
CENTER
FLORIDA DEPARTMENT OF
REVENUE
COMPLIANCE CAMPAIGNS
PO BOX 6417
TALLAHASSEE FL 32314-6417

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

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

PETITIONER:

Employer Account No. - 3225000
KING LINDSEY PA
200 SE 6TH STREET
FT LAUDERDALE FL 33301-3427

PROTEST OF LIABILITY
DOCKET NO. 0023 4520 49-02

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
RA Appeals Manager,
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 May 29, 2014.

After due notice to the parties, a telephone hearing was held on October 28, 2014. The Petitioner, represented by its Director, appeared and testified. The Petitioner's Certified Public Accountant testified as a witness. The Respondent, represented by a Department of Revenue Senior Tax Specialist, appeared and testified. The Joined Party did not appear.

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 employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

ISSUE: Whether the Petitioner's corporate officers received remuneration for employment which constitutes wages pursuant to §443.036(21); 443.036(40); 443.1216, Florida Statutes; Rule 73B-10.025(2), Florida Administrative Code.

ISSUE: Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions pursuant to §443.036(19); 443.036(21); 443.1215, Florida Statutes.

Findings of Fact:

1. The Petitioner, King Lindsey, P.A., is a Florida subchapter S corporation which has operated the law practice of the Petitioner's Director, Kemie King, since February 8, 2012. Kemie King has been active in the operation of the business since inception.
2. The Joined Party is an individual who contacted the Petitioner seeking work. The Joined Party informed the Petitioner's director that she was attending school at a community college and that she wanted to get insight into the legal field and get knowledge concerning the practice of law. From time to time the Petitioner had engaged individuals to perform work as paralegals and classified those individuals as independent contractors. Although the Joined Party was not a paralegal the Petitioner engaged the Joined Party to answer the telephone, to do basic typing, and to take paperwork across the street to the courthouse.
3. The parties did not enter into a written contract or agreement. The Petitioner's Director told the Joined Party that the Petitioner would pay her \$10.00 per hour, that the Joined Party would work on an as-needed basis, and that the job was temporary. The Joined Party accepted the offer of work and began work on or about October 21, 2013.
4. The Petitioner shares office space with another law firm and the other law firm provides a receptionist for the joint office. The Petitioner provided the Joined Party with working space, a computer, a printer, a telephone, and any other equipment or supplies that were needed to perform the work. The Joined Party did not have any expenses in connection with the work. The Petitioner did not provide the Joined Party with a key to the office and the Joined Party was restricted to working only during normal office hours or when the Petitioner's Director was in the office after hours.
5. The Petitioner's Director had to provide training for the Joined Party because the Joined Party did not know very much concerning how a law office is operated. Because the Petitioner's Director is a sole practitioner, the Director was frequently out of the office. If the Director was going to be out of the office, the Director would give the Joined Party a list of what needed to be done. The Joined Party was required to keep the Director informed concerning the progress of the work. The Petitioner's Director supervised the Joined Party's work.
6. The Joined Party was required to personally perform the work. The Joined Party was not allowed to hire others to perform the work because the Director was familiar with the Joined Party's work.
7. The Joined Party completed a weekly timesheet from which she was paid by the Petitioner on a weekly basis. No payroll taxes were withheld from the pay and the Petitioner did not provide any fringe benefits such as health insurance, retirement benefits, paid holidays, or other paid time off.
8. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. On or about December 11, 2013, the Petitioner terminated the relationship with the Joined Party because of dissatisfaction with the Joined Party's work and other issues.
9. At some point in 2014 the Petitioner's Director engaged a Certified Public Accountant to prepare the Petitioner's income tax reports. The Director informed the Certified Public Accountant that the Petitioner did not have any employees other than the Director. The Certified Public Accountant prepared the Petitioner's federal income tax returns for 2012 and 2013 and prepared 1099 forms for the Joined Party and the other individuals classified by the Petitioner as independent contractors. The Form 1099-MISC issued to the Joined Party reported earnings of \$1,270.00 as nonemployee compensation. The Certified Public Accountant advised the Petitioner that the Director should receive a salary from the Petitioner and that payroll taxes should be withheld from the salary.
10. The Joined Party filed a claim for reemployment assistance benefits effective April 20, 2014. When the Joined Party did not receive credit for her earnings with the Petitioner an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.

1. On May 29, 2014, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to October 21, 2013, that officers of corporations are statutorily covered employees of the corporation, and that wages paid to the officers are reportable for unemployment compensation tax. The determination holds that the Petitioner is liable for filing *Employer's Quarterly Reports* (Form RT-6) effective January 1, 2013. The Petitioner filed a timely protest by mail postmarked June 18, 2014.

Conclusions of Law:

12. 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.
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). 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.
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 can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.
19. There was no written agreement between the parties. The Director merely told the Joined Party that the position was temporary, that the Joined Party would work on an as-needed basis as determined by the Petitioner, and that the Petitioner would pay the Joined Party \$10.00 per hour. 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 can not 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 the practice of law. The Joined Party was engaged to answer the telephone, to do basic typing, and to deliver paperwork. The Petitioner provided the place of work and all equipment and supplies that were needed to perform the work. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was a necessary and integral part of the Petitioner's business. It was not shown that the Joined Party performed similar services for others, that the Joined Party had any investment in a business, that the Joined Party had any expenses in connection with the work, or that the Joined Party was at risk of suffering a financial loss from performing services.
21. It was not shown that the Joined Party had any skill or special knowledge. In fact, according to the Petitioner's testimony, the Joined Party wanted to work in a law office to gain knowledge and insight and that the Petitioner had to provide training because the Joined Party lacked knowledge. 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)
22. The Joined Party was paid by time worked rather than by production or by the job. The Petitioner determined not only the method of pay but the hourly pay rate. Since the Joined Party was engaged to work only the hours needed by the Petitioner, the Petitioner controlled the hours worked. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, create an independent contractor relationship. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Reemployment Assistance Program Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash.
23. The Petitioner engaged the Joined Party to be a temporary worker. The Florida Reemployment Assistance Program Law does not discriminate between temporary and permanent workers or between part time and full time workers. The fact that a worker is engaged to work on a temporary basis does not establish that the worker is an independent contractor. Although there was an understanding that the Joined Party was to be a temporary worker, there was no definite date on which the work assignment would end. It was an on-going work assignment which either party could terminate at any time without incurring liability for breach of contract. These facts reveal an at-will relationship of indefinite duration. The Petitioner exercised its right to

terminate the relationship after approximately two months of work. 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."


24. The Petitioner controlled what work was performed, when it was performed, where it was performed, by whom it was performed, and how it was performed. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.
25. It is determined that the Joined Party performed services for the Petitioner as an employee and not as an independent contractor.
26. Section 443.1215, Florida States, 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 the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.
27. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.
28. The Petitioner's Director is a statutory employee of the Petitioner. Kemie King has performed services for the Petitioner during each week since the inception of the business in February 2012. Thus, the Petitioner has had at least one employee during twenty weeks of a calendar year retroactive to 2012 and has established liability for payment of reemployment assistance taxes on the wages of employees.
29. In Spicer Accounting, Inc. v. United States, 918 F.2d 90 (9th Cir. 1990), the court determined that dividends paid by an S corporation to an officer of the corporation who performed services for the business, were wages subject to federal employment taxes, including federal unemployment compensation taxes. The court relied upon federal regulations which provide that the "form of payment is immaterial, the only relevant factor being whether the payments were actually received as compensation for employment."

30. In a subchapter S corporation the earnings of the corporation pass through to the shareholders of the corporation. The Petitioner's earnings are attributable to the services performed by Kemie King as an employee of the corporation and are received by Kemie King as compensation for employment. The Petitioner is required to pay a reasonable wage to Kemie King and to pay reemployment assistance tax on the wage.

Recommendation: It is recommended that the determination dated May 29, 2014, be AFFIRMED.

Respectfully submitted on December 12, 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 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:

December 12, 2014

Copies mailed to:

Petitioner
Respondent
Joined Party

RHEIANNA MCLEOD
UNIT 108
4529 SW 112TH TERRACE
MIRAMAR FL 33025-7920

WILLA DENNARD
FLORIDA DEPARTMENT OF REVENUE
CCOC BLDG #1 SUITE 1400
2450 SHUMARD OAK BLVD
TALLAHASSEE FL 32399

MYRA TAYLOR
FLORIDA DEPARTMENT OF REVENUE
PO BOX 6417
TALLAHASSEE FL 32314-6417