

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

PETITIONER:

Employer Account No. - 2615513
SPOILED INC
7689 CARDINAL COURT
WEST PALM BEACH FL 33412

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-97526L**

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 March 16, 2011, 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, 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 July, 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:

SPOILED INC
7689 CARDINAL COURT
WEST PALM BEACH FL 33412

KARIE MARSHALL
45950 E SUNRISE DR
LEXINGTON PARK MD 20653

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

ROGATINSKY & ASSOCIATES
BEN ROGATINSKY
3113 STIRLING ROAD STE 103
FORT LAUDERDALE FL 33312

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2615513
SPOILED INC
7689 CARDINAL COURT
WEST PALM BEACH FL 33412

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-97526L**

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Unemployment Compensation 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 March 16, 2011.

After due notice to the parties, a telephone hearing was held on June 4, 2012. The Petitioner, represented by its Public Accountant, 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.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 73B-10.035(18).

Findings of Fact:

1. The Petitioner is a corporation which was formed April 26, 2005. The Petitioner operated a hair salon until March 31, 2009, when the Petitioner sold the salon.

2. The Petitioner hired the Joined Party to work at the front desk in August 2007. The Joined Party's duties included answering the telephone, scheduling appointments, and doing the books. The Petitioner trained the Joined Party how to answer the telephone and how to do the books.
3. There was no written agreement or contract between the Joined Party and the Petitioner.
4. The Joined Party did not have any investment in a business, did not have an occupational or business license, did not have business liability insurance, did not offer her services to the general public, and did not perform services for others.
5. The Petitioner provided the place of work, a desk, telephone, computer, and all of the supplies that were needed to perform the work. The Joined Party did not have any expenses in connection with the work.
6. The Joined Party had a regular work schedule which was determined by the Petitioner. The work schedule was Tuesday through Saturday from 9 AM until close. If the Joined Party was not able to work on a scheduled work day she was required to contact the Petitioner at least two hours before the start time to report the absence. The Joined Party was not allowed to hire others to perform the work for her.
7. The Joined Party was paid by the hour at a rate of pay determined by the Petitioner. The Joined Party was not required to punch a time clock or complete a time sheet. The Joined Party did not bill the Petitioner for her services. The Petitioner kept track of the hours worked by the Joined Party and paid the Joined Party on a weekly basis.
8. The Petitioner did not withhold any payroll taxes from the pay and did not provide any fringe benefits to the Joined Party. At the end of 2007, 2008, and 2009, the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.
9. Either party could terminate the relationship at any time without incurring liability for breach of contract.
10. When the Petitioner sold the business on March 31, 2009, the Joined Party continued working for the company that purchased the business.
11. The Joined Party filed an initial claim for unemployment compensation benefits effective July 25, 2010. When the Joined Party did not receive credit for her earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.
12. The Department of Revenue provided forms to be completed by the Joined Party and by the Petitioner. The Department of Revenue received the completed forms from the Joined Party but did not receive the completed forms from the Petitioner. On November 29, 2010, the Department of Revenue issued a determination holding that the Joined Party was the Petitioner's employee retroactive to January 1, 2009. Subsequently, the Department of Revenue received the completed forms from the Petitioner. Upon receipt of the additional information the Department of Revenue issued a re-determination on March 16, 2011, superseding the November 29, 2010, determination. The March 16, 2011, determination holds that the Joined Party was the Petitioner's employee retroactive to August 1, 2007. The Petitioner's Public Accountant filed a timely protest by mail postmarked March 24, 2011.
13. Pursuant to the Petitioner's protest a telephone hearing was scheduled to be held on April 10, 2012. At the scheduled time of the hearing the special deputy attempted to contact the Petitioner's Public Accountant at the telephone number shown on the Petitioner's letter of protest. There was no answer and the special deputy left two voice mail messages. On April 10, 2012, an order was issued recommending that the Petitioner's protest be dismissed for failure to prosecute the protest.

14. The Public Accountant did not answer the telephone because the calls were not received due to a problem with a router. When the Public Accountant did not receive the call for the hearing the Petitioner requested rescheduling of the hearing by mail postmarked April 10, 2012.

Conclusions of Law:

15. Rule 73B-10.035, Florida Administrative Code, provides:
 - (18) Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause exists for a party's failure to attend the previous hearing. If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.
16. Rule 73B-10.035(19)(c), Florida Administrative Code, provides that any party aggrieved by the Recommended Order may file written exceptions to the Director or the Director's designee within 15 days of the mailing date of the Recommended Order.
17. The Petitioner failed to participate in the April 10, 2012, hearing due to reasons beyond the Petitioner's control. The Petitioner's Public Accountant exercised due diligence by immediately requesting rescheduling of the hearing. Thus, good cause has been established.
18. The issue in this case, whether services performed for the Petitioner by the Joined Party 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.
19. 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).
20. 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.
21. 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.
22. 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.
23. 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.
24. 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.
25. 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."
26. The Petitioner operated a hair salon. The Petitioner engaged the Joined Party to work in the salon as the front desk person to answer the telephone, schedule appointments, and to do the books. The Petitioner provided everything that was needed to perform the work and the Joined Party did not have any expenses in connection with the work. 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 a financial investment in a business, did not offer services to the general public, did not have business expenses, and was not at risk of suffering a financial loss from performing services.
27. The Petitioner controlled the Joined Party's days and hours of work and determined both the method of pay and the rate of pay. The Petitioner paid the Joined Party by time worked rather than by the job or based on production. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.
28. The Joined Party's assigned duties included answering the telephone, scheduling appointments, and doing the books. Although the Petitioner provided some training to the Joined Party it was not shown that the duties required any skill or special 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)

29. The Joined Party performed services exclusively for the Petitioner for a period of almost two years before the Petitioner sold the business. Either party could terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence, typical of an employer-employee relationship. 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."
30. The Petitioner determined what work was performed, when it was performed, where it was performed, and how it was performed. The Petitioner controlled the financial aspects of the relationship. 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.
31. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

Recommendation: It is recommended that the determination dated March 16, 2011, be AFFIRMED.

Respectfully submitted on June 7, 2012.



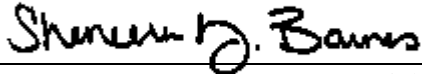
R. O. SMITH, Special Deputy
Office of Appeals

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:

June 7, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

KARIE MARSHALL
45950 E SUNRISE DR
LEXINGTON PARK MD 20653

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

ROGATINSKY & ASSOCIATES
BEN ROGATINSKY
3113 STIRLING ROAD STE 103
FORT LAUDERDALE FL 33312