

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

PETITIONER:

Employer Account No. - 2890252
TEQUENOMANIA INC
ATTN: PARAMACONIA "PARA" HERNANDEZ
6720 SW 117TH AVENUE
MIAMI FL 33183-2828

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-6520L**

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 November 29, 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 **August, 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 August, 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:

TEQUENOMANIA INC
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SILVINO ALBELO
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DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
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TALLAHASSEE FL 32399

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

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 347 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2890252
TEQUENOMANIA INC
ATTEN: PARAMACONIA "PARA" HERNANDEZ
6720 SW 117TH AVENUE
MIAMI FL 33183-2828



**PROTEST OF LIABILITY
DOCKET NO. 2012-6520L**

RESPONDENT:

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

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 November 29, 2011

After due notice to the parties, a telephone hearing was held on April 27, 2012. The Petitioner, represented by the Petitioner's president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, 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.

Issues:

Whether services performed for the Petitioner by the Joined Party constitute insured employment, and if so, the effective date of liability, pursuant to Sections 443.036(19), 443.036(21), and 443.1216, Florida Statutes.

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

Findings of Fact:

1. The Petitioner is a corporation, formed in 2005, that is engaged in the operation of a wholesale and retail bakery. The Petitioner produces and sells a product known as a tequeno. A tequeno consists of a piece of cheese that is wrapped in thin dough and fried.
2. The Joined Party performed services for the Petitioner as a dough maker from June 2009, until September 2011. The Joined Party's duties included mixing dough, extending, or thinning, dough, and cutting dough into strips. During the time the Joined Party performed services for the Petitioner, the Joined Party also worked on weekends as a waiter.
3. At the time of hire, the Petitioner was looking for someone experienced in working with dough. The Joined Party was referred to the Petitioner by a social services agency. The Petitioner's president interviewed the Joined Party. The Joined Party told the Petitioner he had experience working with pizza dough. The Petitioner's president showed the Joined Party how the Petitioner wanted the dough processed to achieve the desired thickness. The Petitioner told the Joined Party he would be hired as an independent contractor and would be paid at a rate of \$10 per batch of dough produced.
4. On June 26, 2009, the Petitioner and Joined Party entered into a *Covenant Not To Disclose Trade Secrets*. The agreement, among other things, refers to the Joined Party as an independent contractor. The agreement prohibits the Joined Party from disclosing information such as formulas, recipes, processes, techniques, and methods belonging to the Petitioner. The Petitioner's president translated and explained the terms of the agreement to the Joined Party, because the Joined Party did not speak English.
5. The Petitioner supplied the work space, equipment, and tools needed for the work. The ingredients needed to produce each batch of dough were supplied by the Petitioner, and were pre-measured by another of the Petitioner's workers. The Joined Party was responsible for the cost of a hat and an apron that he was required to wear.
6. The Joined Party was required to perform his services between the hours of 7:00 a.m. and 3:00 p.m., Monday through Friday, when the Petitioner's production department operated. The time required to process a batch of dough was 45 to 50 minutes. The Petitioner's goal was to average eight batches per day. The Petitioner advised the Joined Party of the minimum number of batches needed each day. The Joined Party was permitted to take time off, as long as he notified the Petitioner in advance.
7. The Joined Party was paid on a weekly basis. The Joined Party recorded the number of batches produced on a production card maintained by the Petitioner. The Petitioner did not withhold taxes from the Joined Party's pay. The Petitioner reported the Joined Party's earnings on a form 1099-MISC. The Joined Party did not receive paid leave or health insurance. The Joined Party was covered under the Petitioner's workers' compensation insurance policy.
8. Either party could terminate the relationship at any time without a penalty.
9. The Joined Party filed a claim for unemployment compensation benefits effective September 25, 2011. When the Joined Party did not receive credit for his 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.
10. The Florida Department of Revenue issued a Determination dated November 29, 2011, holding that the Joined Party performed services for the Petitioner as an employee. The determination was mailed to the Petitioner on December 1, 2011. The Petitioner received the Determination within a few days of the mailing date. The Petitioner submitted a protest on December 20, 2011.

Conclusions of Law:

11. Section 443.141(2)(c), Florida Statutes, provides:
Appeals.--The Agency for Workforce Innovation 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.
12. Rule 73BB-10.035(5)(a)1., Florida Administrative Code, provides that determinations issued pursuant to sections 443.1216; 443.131-1312, Florida Statutes, 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 shall become final 20 days from the date the determination is delivered.
13. The determination was mailed to the Petitioner's address of record on December 1, 2011. The Petitioner submitted a written protest on December 20, 2011. Since the Petitioner submitted the protest within twenty (20) days of the mailing date of the Determination, the Petitioner's protest was timely filed.
14. 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.
15. 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).
16. 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).
17. 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.
18. 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.
19. 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.
 20. 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.
 21. The evidence presented in this case shows the Joined Party signed an agreement not to disclose trade secrets. The agreement referred to the claimant as an independent contractor. While an obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties, but upon all the circumstances of their dealings with each other. Lee v. American Family Assurance Company, 431 So.2d 249 (Fla. 1st DCA 1983); Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972).
 22. The record reflects the Petitioner exercised significant control over the details of the work. The Petitioner determined what work was performed, how the work was performed, when the work was performed, and where the work was performed. The Joined Party was required to perform the work during the Petitioner’s regular production hours. The Petitioner furnished the equipment and supplies needed for the work. 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. Vocolle, 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.”
 23. The Petitioner controlled the financial aspects of the relationship. The Petitioner determined the rate and method of payment. The Joined Party did not invoice for his services. Although the Joined Party was paid by the batch, rather than by time, the manner in which the dough had to be produced and the hours during which the Joined Party was permitted to work effectively limited the Joined Party’s rate of production. The fact that the Petitioner did not withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.
 24. The Petitioner operates a bakery. The Joined Party prepared the dough for use in making a particular product sold by the Petitioner, and was part of the Petitioner’s production team. 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.
 25. It was not shown that the Joined Party was engaged in a distinct occupation or business. The Joined Party had nominal expenses in connection with the performance of the work. Everything that was needed for the Joined Party to perform the work was provided by the Petitioner.
 26. Either party could terminate the relationship at any time without incurring liability. The Joined Party worked for the Petitioner for almost two years. Those factors indicate an at-will relationship

of relative permanence. In Cantor v. Cochran, 184 So.2d 173, 174, the court, quoting Larson, Workmens' Compensation Law, Section 44.35, stated: "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."

27. It is concluded that the services performed for the Petitioner by the Joined Party as a dough maker constitute insured employment.

Recommendation: It is recommended that the determination dated November 29, 2011, be AFFIRMED.

Respectfully submitted on June 26, 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:
June 26, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

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DEPARTMENT OF REVENUE
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DOR BLOCKED CLAIMS UNIT
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