

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

PETITIONER:

Employer Account No. - 3043853
QUALITY CLEANING & PAINTING INC
ATTEN GEORGE GARRIDO PRES
4843 HOPE SPRING DRIVE
ORLANDO FL 32829-8644

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2011-135365L**

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 September 6, 2011, is MODIFIED to hold that the Joined Party and other persons performing services for the Petitioner as cleaning supervisors are employees of the Petitioner effective August 9, 2010. It is further ORDERED that the determination is AFFIRMED as modified.

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 **April, 2012**.



Altemese Smith,
Assistant Director,
Unemployment Compensation 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.

Shanessa 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 April, 2012.

Shanessa Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Unemployment Compensation Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

QUALITY CLEANING & PAINTING INC
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4843 HOPE SPRING DRIVE
ORLANDO FL 32829-8644

JOANN CARVER
971 WEST 80TH PLACE
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

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

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

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

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**PROTEST OF LIABILITY
DOCKET NO. 2011-135365L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Deputy Director,
Interim 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 September 6, 2011.

After due notice to the parties, a telephone hearing was held on December 5, 2011. 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 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 and other individuals as cleaner/supervisor constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Whether the Petitioner meets liability requirements for Florida unemployment compensation 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, a Florida corporation, was formed in 2003 for the purpose of operating a cleaning and painting business. The business began operating in 2004 and continued to operate through

August 2010. The Petitioner elected not to file an Annual Report for 2011 with the office of the Secretary of State, and the corporation was administratively dissolved.

2. The Petitioner transacted business only in the month of August of each year. The Petitioner's business consisted of painting and cleaning off-campus student apartment units in Tallahassee, Florida. The duration of the business activity each year varied from two weeks to one month. The Petitioner obtained the contracts with the apartment complex owners or managers. The Petitioner's president oversaw the work performed at the job sites. The Petitioner hired cleaners and cleaning supervisors to perform the cleaning work. In its last two years of operation, the Petitioner subcontracted the painting work.
3. The Joined Party began working for the Petitioner in 2006 as a cleaner. She obtained the job through her daughter, who was a cleaner and supervisor for the Petitioner. The Joined Party's daughter told the Joined Party that the job would last approximately one month that she would be provided a room at the job site location, that she would be compensated based upon the number and size of the units she cleaned, and that she would be working for herself. The Joined Party accepted the job because she was unemployed at the time and needed money. The Joined Party worked as a cleaner in 2006 and 2007.
4. In 2008 the Joined Party was promoted to supervisor. She worked as a supervisor in 2008 and 2010. She did not work for the Petitioner in 2009. As a supervisor, the Joined Party was paid \$1,000 per week. She was also provided a room at the job site. In 2010, the Joined Party worked for two weeks beginning August 9, 2010, and was paid \$2,115.85. Of that amount, \$115.85 was reimbursement for the cost of a small television that was taken from the Joined Party's room at the job site.
5. The Petitioner utilized a one-page *Subcontract Agreement* that set forth the pay scale for the cleaners. The agreement provides that the worker will work as a "SUB CONTRACTOR" and will be paid by work completed, approved and inspected. The agreement states that no state or federal taxes will be withheld and that a 1099 will be issued at the end of the calendar year. The Petitioner's normal practice was to have the worker sign the *Subcontract Agreement* in the blank space provided in the first paragraph and print the worker's name, address, telephone number, social security number, and driver's license number at the bottom of the page.
6. In 2010 the Joined Party provided the requested information at the bottom of the *Subcontract Agreement*. She did not sign the agreement. The Petitioner's president did not believe the terms of the agreement applied to the supervisors. The Petitioner used the form primarily as a means to obtain information needed for the mailing of the 1099 form and for insurance purposes.
7. The Joined Party had some prior experience as a commercial cleaner for her brother's business. When she began working for the Petitioner as a cleaner the Joined Party was told which chemical to use for which purpose. She was instructed to concentrate on certain aspects of the work, such as the cleaning of ceiling fans, windows, or bathrooms, that were of particular importance to the apartment complex managers.

8. The Petitioner supplied all of the equipment, tools, and supplies needed for the cleaning work. They were kept in a company-owned trailer that the Petitioner's president would tow to the job site. The Petitioner also supplied tee shirts to all of the cleaners and supervisors so as to identify them as part of the Petitioner's cleaning crew. The Petitioner supplied walkie-talkies and checklists to the supervisors for their use in supervising the cleaners.
9. As a supervisor, the Joined Party was responsible for training new cleaners, supervising the cleaners, inspecting the apartment units after they were cleaned, accompanying complex managers on walk-through inspections, and occasionally performing some cleaning work. In 2010, there was one supervisor in addition to the Joined Party. Each morning at a time designated by the Petitioner, the supervisors met with the Petitioner to review the day's work assignments. The Petitioner assigned each supervisor a list of apartments to be cleaned that day. The Petitioner inspected, on a random basis, units that the Joined Party reported were completed.
10. The Joined Party and the other supervisor met the cleaners at the trailer, distributed the equipment and supplies, provided access to the apartment units, and inspected the units after completion. At the end of each day, the Joined Party reviewed the status of the work with the Petitioner.
11. The Petitioner hired all of the cleaners. The Joined Party did not have the right to hire or fire cleaners, although she could recommend that the Petitioner discharge a cleaner. The Joined Party could require the cleaners to correct work she found unacceptable.
12. The Joined Party lived in Hialeah, Florida. She provided her own transportation to and from the job site. She also used her vehicle to transport cleaners around the apartment complex. The Joined Party had no other expenses in connection with the work.
13. The Joined Party did not have her own business. She did not have a business license, did not have business liability insurance, did not have worker's compensation insurance, and did not offer her services to the general public. While working for the Petitioner, the Joined Party did not perform any services for others. She could not work for a competitor of the Petitioner without the Petitioner's consent. The Joined Party was required to personally perform the work for the Petitioner. She could not hire others to perform her work for her.
14. The Petitioner did not withhold any taxes from the Joined Party's pay. The Petitioner did not provide any benefits, such as health insurance, sick leave or vacation pay. At the end of 2010, the Petitioner reported the Joined Party's earnings on a Form 1099-MISC.
15. Either party had the right to terminate the relationship at any time without penalty.

Conclusions of Law:

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 record reflects the Petitioner exercised significant control over the details of the work. The Petitioner assigned the apartment units to the supervisors. The Petitioner supplied a checklist of the cleaning tasks that were to be performed. The Petitioner determined the days on which the work would be performed and the start time for each day. The Petitioner hired and fired the cleaners. The Petitioner supplied all of the cleaning equipment and supplies. The Joined Party was required to meet with the Petitioner at the beginning and end of each day to review the progress of the work. The Joined Party was required to personally perform the work, and could not hire others to perform the work for her. 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.”
24. The Joined Party was not engaged in a distinct occupation or business. The Joined Party did not advertise her services to the general public. The Joined Party had no financial risk in connection with the performance of the work. Everything that was needed for the Joined Party to perform the work, with the exception of transportation to the job location, was provided by the Petitioner
25. The Petitioner determined the rate and method of payment. The Joined Party did not invoice for her services. The Joined Party was paid a weekly salary and not by the job. These factors are more indicative of an employer-employee relationship. The fact that the Petitioner did not withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.
26. The Petitioner’s business is the cleaning and painting of apartment units. As a cleaning supervisor, the Joined Party was responsible for supervising the cleaners and checking their work. She also occasionally corrected or completed a cleaner’s work. Whether the Joined Party did the actual cleaning or supervised cleaners, her work was an integral and necessary part of the Petitioner’s business.

27. Either party could terminate the relationship at any time without incurring liability. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), 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."
28. In Adams, supra, the Court determined that the Department has the authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.
29. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals as cleaning supervisors constitute insured employment.
30. Section 443.1215, 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.
31. In the instant case, the Petitioner paid the Joined Party \$2,115.85 in the third quarter 2010. The Joined Party began her services on August 9, 2010. Accordingly, the Petitioner meets the liability requirements for Florida unemployment compensation contributions effective August 9, 2010.

Recommendation: It is recommended that the determination dated September 6, 2011, be modified to hold that the Joined Party and other persons performing services for the Petitioner as cleaning supervisors are employees of the Petitioner effective August 9, 2010. As modified, it is recommended that the determination be AFFIRMED.

Respectfully submitted on February 3, 2012.



SUSAN WILLIAMS, Special Deputy
Unemployment Compensation Appeals