

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

PETITIONER:

Employer Account No. - 2894211
AMBIENT TECHNOLOGIES INC
ATTN ANNE LEMOS VP
4610 CENTRAL AVE
ST PETERSBURG FL 33711-1008

RESPONDENT:

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

PROTEST OF LIABILITY
DOCKET NO. 0019 3444 61-01

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 6, 2013, 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 25th day of **March, 2014**.



Magnus Hines

Magnus Hines,
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.

Shanetra Y. Barnes

DEPUTY CLERK

3-26-14

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 25th day of March, 2014.

Shanetra 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:

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AMBIENT TECHNOLOGIES INC
ATTN ANNE LEMOS VP
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LAMAR MASON
1039 OAK STREET
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DEPARTMENT OF REVENUE
WILLA DENNARD
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2450 SHUMARD OAK BLVD
TALLAHASSEE FL 32399

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

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

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RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith
Bureau Chief,
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 6, 2013.

After due notice to the parties, a telephone hearing was held on December 31, 2013. A managing member appeared for the Petitioner; the Joined Party appeared; and a Senior Tax Specialist appeared for the Respondent. No proposed findings of fact or conclusions of law were received. The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted.

Issue:

Whether services performed for the Petitioner constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner has been in existence since 2009. It is a subsidiary of Ambient Technologies, Inc., which has been in existence since 1993. The parent company engages in a variety of cartographic and geographic services. ATI Companies LLC specializes in mapping, surveying, and drilling, while a sister subsidiary specializes in the use of ground penetrating radar.
2. The Petitioner has used computer assisted design (CAD) technicians since 2009. Some of those technicians work on the Petitioner's premises, and others work as independent contractors off the Petitioner's premises.
3. The Joined Party began work as a CAD technician on June 25, 2012. The position of CAD technician requires specialized skill. The Joined Party was skilled in CAD work prior to starting with the Petitioner.

4. The Joined Party signed a document titled, *Agreement of ATI Companies LLC and Subconsultant*, agreement under which the Joined Party was to be paid \$14 per hour, and \$15 per hour after 30 days. The agreement provided that the Joined Party would be responsible for all taxes and insurance coverage for himself. The agreement provided for the Petitioner to reimburse the Joined Party for business expenses, upon the Joined Party providing proper documentation. The agreement provided for termination of the agreement upon written notice by either party. The agreement term was stated as: "...shall commence June 25, **2012** and continue for 60 *working* days until **August 31, 2012** or by written termination by either party." [emphasis in bold and italics as in the original]
5. The Joined Party was aware that his status was designated as that of a subcontractor. He believed that this meant that he was a specialist with a special relationship to the Petitioner. The Joined Party hoped to be taken on as a regular employee of the Petitioner.
6. The Petitioner employed a licensed surveyor, and maintained an association with a lead CAD technician who worked for the Petitioner under an agreement similar to that of the Joined Party.
7. The Joined Party was scheduled to work according to the Petitioner's workload. The Joined Party would speak to the lead CAD technician or to the licensed surveyor to determine if he would be working on the following day. Either the lead CAD technician or the licensed surveyor would advise the Joined Party of what projects he would be working on. The Joined Party would submit his work to the licensed surveyor for review. If the licensed surveyor found the work unsatisfactory, the Joined Party would make the required corrections and resubmit the work.
8. The Joined Party's primary work was making "as-built" drawings based upon data supplied by field surveyors. In addition, the Joined Party would help the Petitioner prospect for business by downloading construction plans from which the Petitioner could submit bids for work to be done. The Joined Party would help review the bids before they were submitted. On one occasion the Joined Party was asked to photograph a particular site, so that drawings could be made of the area. The Petitioner paid the Joined Party the same hourly rate for all of the work he did, whether making drawings, correcting them, researching, or making photographs in the field. The claimant submitted his hours on a time sheet supplied by the Petitioner.
9. The Joined Party used the Petitioner's computer and software. He worked on the Petitioner's premises.
10. The Joined Party worked for a national retail chain during part of the time that he worked with the Petitioner. He would perform his work for the Petitioner at times he was not scheduled to work for the retailer. If a competitor of the Petitioner had been willing to give work to the Joined Party, he could have worked for the competitor instead of the retailer. However, the Joined Party was not offered any work by any competitor of the Petitioner.
11. The Joined Party last worked for the Petitioner on or about December 21, 2012. The amount of work the Petitioner supplied to the Joined Party had been declining, and when the Joined Party finished his last assigned work he was advised that there was no other work for him at that time. The Joined Party contacted the Petitioner from time to time after that, but the Petitioner did not offer any further work.

Conclusions of Law:

12. 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. In Cantor v. Cochran, 184 So. 2d 173 (Fla. 1966), the Supreme Court of Florida adopted the test in 1 Restatement of Law, Agency 2d Section 220 (1958) used to determine whether an employer-employee relationship exists. Section 220 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 the one employed is 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 worker supplies the instrumentalities, tools, and a 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 time or job;
 - (h) whether or not the work is 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.
14. 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.
15. 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. The factors listed in Cantor v. Cochran are the common law factors that determine if a worker is an employee or an independent contractor. See, e.g., Brayshaw v. Agency for Workforce Innovation, 58 So. 3d 301 (Fla. 1st DCA 2011).
16. The relationship of employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Co., 247 So. 2d 461 (Fla. 4th DCA 1971); La Grande v. B.&L. Services, Inc., 432 So. 2d 1364 (Fla. 1st DCA 1983).
17. In Keith v. News and Sun-Sentinel Co., 667 So.2d 167, 171 (Fla. 1995) the Florida Supreme Court stated:
- Hence, courts should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status. In the event that there is no express agreement and the intent of the parties cannot otherwise be determined, courts must resort to a fact-specific analysis under the Restatement based on the actual practice of the parties. Further, where other provisions of an agreement, or the actual practice of the parties, belie the creation of the status agreed to by the parties, the actual practice and relationship of the parties should control.

18. Section 73B-10.035, Florida Administrative Code, provides:
- (1) (7) Burden of Proof. The burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
19. The evidence shows that there are certain factors that seem to weigh in favor of the Joined Party being an independent contractor. While the written agreement uses the term “subconsultant” it appears that this term was supposed to be considered synonymous with “subcontractor” or “independent contractor.” The Joined Party had some control over his hours of work, at least after he started working for the retailer. The Petitioner’s witness gave unrebutted testimony that the Joined Party could have done the same kind of work for a competitor. But these factors are not controlling. The designation of a worker as an independent contractor does not automatically determine the status of a worker. See, Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972); Lee v. American Family Assurance Co., 431 So.2d 249, 250 (Fla. 1st DCA 1983). Working two jobs is as consistent with employment as it is with independence. The issue of the Joined Party working for a competitor of the Petitioner never arose in practice.
20. The Joined Party worked on the Petitioner’s premises, using the Petitioner’s equipment. He was paid by the hour. The Petitioner is in business, and the Joined Party’s work was part of the regular business of the Petitioner. These factors, out of those mentioned above, tend to show that the Joined Party was an employee and not an independent contractor.
21. Further, when the Joined Party had to do something over it was at the expense of the Petitioner, not at his own expense. This shows that the Petitioner was controlling the methods of work as opposed to simply requiring a specific result.
22. The lead CAD technician and the licensed surveyor acted as supervisors, assigning work, reviewing it, and correcting it. A supervisor directing the work implies that the work is employment. See, for example, Collins, cited above.
23. More of the determining factors weigh in favor of the Joined Party being an employee rather than an independent contractor. The Petitioner has not carried the burden of proof on it of showing that the determination of May 6, 2013 was incorrect.

Recommendation: It is recommended that the determination dated May 6, 2013, finding the Joined Party to be an employee, be AFFIRMED. Respectfully submitted on January 24, 2014



J. Jackson Houser

J. Jackson Houser, 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 ken z 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:

January 24, 2014

Copies mailed to:

Petitioner
Respondent
Joined Party

Joined Party:

LAMAR MASON
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Other Addresses:

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