

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

**PETITIONER:**

Employer Account No. – 3246148  
JAMES DUGGAN  
1730 BAY RD  
MIAMI BEACH FL 33139-1414

**PROTEST OF LIABILITY  
DOCKET NO. 0024 2641 63-02**

**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 September 26, 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 anrejistremman 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 21<sup>st</sup> day of April, 2015.



*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.

*Shanendra Y. Barnes*

DEPUTY CLERK

*4.21.15*

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 21<sup>st</sup> day of April, 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:

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

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Reemployment Assistance Appeals  
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**PETITIONER:**

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JAMES DUGGAN  
BAY ROAD ANIMAL CLINIC OF MIAMI  
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**PROTEST OF LIABILITY  
DOCKET NO. 0024 2641 63-02**

**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 September 26, 2014.

After due notice to the parties, a telephone hearing was held on February 9, 2015. The Petitioner appeared and testified. The Respondent, represented by a Department of Revenue Tax Audit Supervisor, 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 employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

**Findings of Fact:**

1. The Petitioner, James Duggan, is an individual who has operated a veterinary clinic since 1992. For a period of approximately six years the business was operated through a limited liability company, Bay Road Animal Clinic of Miami Beach, LC. James Duggan resumed operating the clinic as a sole proprietor on or about April 1, 2010.
2. The Petitioner's secretary was scheduled to take a predetermined vacation from the middle of November 2013 until the end of December 2013. The Petitioner hired the Joined Party to be a "temporary employee" during the absence of the Petitioner's secretary.

3. The Joined Party completed an application for the position and was interviewed by the Petitioner to determine if the Joined Party was capable of handling the job. During the interview the Joined Party explained that she was currently unemployed, was looking for a job, and that she had previous experience working for a veterinarian. The Petitioner told the Joined Party that the rate of pay was \$12 per hour and that the Joined Party would be an independent contractor. The parties did not enter into any written agreement or contract. The Joined Party began work on November 25, 2013.
4. The Petitioner's regular office hours are from 9 AM until 5 PM on Monday, Tuesday, Wednesday, and Thursday. On Friday the office hours are from 9 AM until 3 PM. The Petitioner did not provide the Joined Party with a key to the office and the Joined Party was restricted to working only during the Petitioner's regular office hours.
5. All of the Joined Party's work was performed from the Petitioner's office. The Petitioner provided the work space, a desk and chair, telephone, computer, and all other office equipment and supplies that were needed to perform the work. The job did not require any license or certification. The Joined Party was required to wear scrubs in the office. The Joined Party had her own scrubs, however, if the Joined Party had not had her own scrubs the Petitioner would have provided them.
6. Sixty to seventy percent of the Joined Party's duties consisted of answering the telephone and filing. The duties also included cleaning the office and assisting the Petitioner. During the first two days of work the Petitioner told the Joined Party how to answer the telephone, how to file, and how to perform the other duties. The Petitioner's desk was near the Joined Party's desk and the Petitioner was able to observe as the Joined Party performed the assigned duties. There were occasions when the Joined Party did not perform the duties to the Petitioner's satisfaction and on those occasions it was necessary for the Petitioner to correct the Joined Party.
7. The Joined Party was not permitted to perform services for others while performing services for the Petitioner. The Joined Party was required to personally perform the work. She was not allowed to hire others to perform the work for her.
8. The Petitioner did not withhold any payroll taxes from the pay. The Petitioner did not provide any fringe benefits such as paid holidays, paid sick days, or paid vacations.
9. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. On December 13, 2013, the Joined Party quit her job when she informed the Petitioner that her son was ill and that she had to stay home to take care of him.
10. The Petitioner's accountant prepared a Form W-2 *Wage and Tax Statement* showing that wages in the amount of \$2,508 were paid to the Joined Party during 2013 and that federal income tax, social security tax, and Medicare tax were withheld. The Petitioner had not withheld any income tax, social security tax, or Medicare tax. The amount reported as wages paid to the Joined Party was in excess of the amount paid to the Joined Party by the Petitioner.
11. On March 21, 2014, the Petitioner again hired the Joined Party to be a "temporary employee" under the same terms and conditions.
12. On April 28, 2014, the Petitioner's regular secretary resigned her employment to relocate with her husband. At that time the Petitioner hired the Joined Party to be a permanent replacement for the secretary. The Petitioner reduced the Joined Party's rate of pay from \$12 per hour to \$11 per hour because the Petitioner intended to withhold payroll taxes from the pay. The Joined Party continued working until August 1, 2014, when she left her employment.
13. The Joined Party filed a claim for reemployment assistance benefits. When the Joined Party did not receive credit for her earnings from the Petitioner 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.

14. After speaking to the Petitioner's accountant the Department of Revenue Tax Auditor learned that the accountant had been filing reemployment assistance tax reports under the limited liability company, Bay Road Animal Clinic of Miami Beach, LC, rather than as the sole proprietorship of James Duggan. The accountant submitted forms to transfer the tax liability from the limited liability company to the sole proprietorship effective April 1, 2010.
15. Based on the 2013 W-2 Form, copies of 2014 paystubs showing that payroll taxes had been withheld, and information obtained from the accountant, on September 26, 2014, the Department of Revenue issued a determination holding that the Joined Party performed services for James Duggan as an employee retroactive to November 25, 2013, and holding that James Duggan was liable for payment of reemployment assistance tax retroactive to April 1, 2010. The Petitioner filed a timely protest by letter postmarked October 3, 2014.

### Conclusions of Law:

16. The issue in this case, whether services performed for the Petitioner 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.
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). 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.
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. 1<sup>st</sup> 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. 1<sup>st</sup> 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.
  23. The parties in this case did not enter into a written agreement or contract. The only evidence of the verbal agreement is the testimony of James Duggan. That testimony reveals that James Duggan told the Joined Party that she would be an independent contractor. 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."
  24. James Duggan operates a veterinary clinic. The Joined Party was hired to perform office clerical duties for the clinic such as answering the telephone, filing, cleaning, and assisting the Petitioner. The Petitioner provided everything that was 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. The Joined Party did not have any expenses in connection with the work and was not at risk of suffering a financial loss from performing services.
  25. The testimony of the Petitioner reveals that the Joined Party was not required to have any type of license or certification, that the job did not require any special knowledge or skills, and that the only training consisted of simply telling the Joined Party how to do the work. 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. 2<sup>d</sup> DCA 1980)
  26. The Joined Party was paid by time worked rather than by the job or based on production. The Petitioner determined both the method of pay and the pay rate. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish 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.
  27. The Joined Party was employed intermittently from November 25, 2013, until August 1, 2014. Either party had the right to 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. 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."
  28. The Petitioner controlled what work was performed, where it was performed, when 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.

29. It is determined that the services performed for James Duggan by the Joined Party constitute insured employment retroactive to November 25, 2013.

**Recommendation:** It is recommended that the determination dated September 26, 2014, be AFFIRMED.

Respectfully submitted on March 12, 2015.



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 resumen 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 kenx 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:**

**March 12, 2015**

Copies mailed to:

Petitioner

Respondent

Joined Party

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