

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
Employment Security Appeals Referees' Office
830 Punchbowl Street, Room 429
Honolulu, Hawaii 96813

DECISION IN THE MATTER OF: 1403960

INTERESTED PARTIES:

Date Appeal Filed: October 31, 2014

Claimant:

[REDACTED]
[REDACTED]
[REDACTED]

Section of Hawaii Employment Security Law:
HRS 383-1, 383-2, 383-6, 383-10

Appellant: Taxpayer

Participating: in-person
Sent via: mail

Date, Time, and Place of Hearing:

[REDACTED]
Hilo State Office Building
75 Aupuni Street, Room 108
Hilo, HI 96720-5293

Taxpayer:

[REDACTED]
[REDACTED]
[REDACTED]

Parties Present: Claimant, Taxpayer, Department

Participating: in-person
Sent via: mail

Unemployment Insurance Division:

Participating: Yes

ISSUES ON APPEAL:

The taxpayer appealed an October 28, 2014 Department decision which held that services performed by claimant constitute covered employment under Chapter 383, Haw. Rev. Stat. The Department's determination arose after claimant filed a claim for unemployment insurance benefits.

RULING: The Department's decision is AFFIRMED.

STATEMENT OF FACTS:

The taxpayer operates an online dating service that provides websites for customers to create personal profiles and arrange to date Filipino females in the Philippines. The taxpayer conducts business via Skype, maintains a data base of profiles for customers and Filipino females, provides webinars on dating Filipino females, and helps customers secure visas. The taxpayer has a staff working in the Philippines to provide customer service.

The taxpayer posted an ad on Craigslist, seeking help on a project called "[REDACTED]" for his online dating service. Claimant sent his resume to the taxpayer in response to the ad. According to claimant's resume, as of 2008, claimant was an events photographer, and as of 2009, claimant was the owner of a business that designed and constructed websites for businesses and non-profits, trained clients on website management, wrote website content to meet customers' needs, etc. Claimant maintained a website for his business, but did not perform any services related to the website after 2010. Claimant updated the website by putting a drawing of a tree on the site in 2013 and had a copyright for 2014. Claimant told the taxpayer that he and his wife were

small business owners, but claimant had not done business in the computer or photography field for several years. Claimant does not have a general excise license. Prior to working for the taxpayer, claimant was doing landscaping labor work. Claimant performed services for the taxpayer from March 11, 2014 to October 3, 2014.

The taxpayer wanted claimant to work as an independent contractor and had claimant sign an "At Will Employment Agreement", which the taxpayer prepared. The Agreement contained a "Non-Competition Agreement" clause, which required that claimant not accept employment or engage in any business or activity which was directly or indirectly in competition with the taxpayer, either during employment with the taxpayer or for a period of two years thereafter.

The taxpayer asked claimant to work on projects to develop and expand its business. Claimant's duties included conducting interviews of clients via Skype, updating and making changes to the taxpayer's client database, maintaining records of the taxpayer's clients and their involvement with the taxpayer's business, working with a computer programmer and graphic designers to design web pages for the taxpayer's website and software development, video/photography work, creating webinars, creating flyers and webpages for the taxpayer, interviewing prospective employees, and managing and handling inquiries from the taxpayer's customer service staff in the Philippines. Claimant also wrote emails to clients on the taxpayer's behalf, made updates to the taxpayer's client records and database, and was required to attend company meetings. Claimant had the flexibility to work from home, using his own computer, software, internet connection, and video equipment. When he had to work at the taxpayer's office, claimant was required to notify the taxpayer twenty minutes in advance of when he was going to leave work.

Claimant and the taxpayer initially agreed that claimant would be paid a fixed rate. The taxpayer paid claimant for two projects in March 2014 on a per project basis. The taxpayer then requested that claimant be online during the day to help the employer's customer service staff online, and paid claimant \$15.00 per hour during an initial training period and \$20.00 per hour from April or May 2014. Claimant worked Monday to Friday, 8 hours or more a day, and some weekends and nights, and was required to record his hours of work, maintain a log of his daily activities for the taxpayer's daily accountability sheet, and give the taxpayer a link to his daily tasks. The taxpayer paid claimant twice a month. On September 30, 2014, after the taxpayer's projects were completed, the taxpayer told claimant that he no longer needed claimant to work on the projects, but claimant could be involved in future photography and video work. Claimant worked on a short training video for the taxpayer and did not have work thereafter. After claimant filed a claim for unemployment benefits, in early October 2014, the taxpayer blocked claimant's access to the employer's computers so claimant would not be able to Skype anymore.

REASONS FOR DECISION:

The relevant issue is whether claimant's services for the taxpayer constitute employment under Haw. Rev. Stat. §383-1, 2, 6, 10.

Haw. Rev. Stat., §383-1, defines "employing unit" as any individual or type of organization, including the State, and any of its political subdivisions, any instrumentality of the State or its political subdivisions, any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee, or successor of any of the foregoing, or the legal representative of a deceased person, which has or subsequent to January 1, 1937, had one or more individuals performing services within this State.

- (1) All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be performing services for a single employing unit for all the purposes of this chapter.

- (2) Each individual employed to perform or to assist in performing the work of any person in the service of an employing unit shall be deemed to be engaged by the employing unit for all the purposes of this chapter, whether the individual was hired or paid directly by the employing unit or by such person, provided the employing unit had actual or constructive knowledge of the work.

Haw. Rev. Stat. §383-2(a), defines "employment", subject to §§383-3 to 383-9, to mean service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, expressed or implied.

Haw. Rev. Stat. §383-10, defines "wages", subject to section 383-11, to mean all remuneration for services from whatever source, including commissions or bonuses, tips or gratuities paid directly to an individual by a customer of the employer and reported to the employer, and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the Department of labor and Industrial Relations.

In this case, claimant provided services to develop, improve, and maintain the taxpayer's web-based dating service business. Consequently, pursuant to the definition of "wages", under Haw. Rev. Stat. §383-10, the taxpayer's remuneration to claimant, for such services, constitutes wages.

Haw. Rev. Stat. §383-6, provides that services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists unless and until it is shown to the satisfaction of the Department of Labor and Industrial Relations that:

- (1) The individual has been and will continue to be free from control or direction over the performance of such service, both under a contract of hire and in fact; and
- (2) The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed; and
- (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of service.

Haw. Admin. R. §12-5-2. Master and servant relationship. (a) Services are deemed to be in employment if Haw. Rev. Stat. §§383-2 and 383-10, are satisfied, unless and until it is shown to the satisfaction of the department that all of the three-fold conditions or "ABC" test under Haw. Rev. Stat. §383-6, are met. In applying Haw. Rev. Stat. §383-6, to an individual's services, the following definitions shall apply:

- (1) "Contract of hire" is a written or oral, express or implied, agreement between two or more individuals which creates an obligation to do or not to do a particular thing and where such agreement demonstrates a promise of wages for services performed.
- (2) "Control or direction over the performance of such service" means general control and need not extend to all details of the performance of service. The employer need not actually exercise control; it is sufficient that there is a right to do so.
- (3) (A) "Outside the usual course of the business" refers to services that do not promote or advance the business of the employer, or services that are merely incidental to, and not an integral part of, that business.
(B) "Outside of all the places of business of the enterprise" refers to places other than the business's home office, headquarters or territory in which the business operates;
- (4) "The individual is customarily engaged in an independently established trade, occupation, profession, or business" refers to an individual who is performing services and is established in the business of performing these services independent of whatever connection the individual

may have with an employer and that the individual must have a proprietary interest in such business, something in which the individual has a right of continuity, which the individual can sell or give away, and which is not subject to cancellation or destruction upon severance of the relationship with the employer.

- (b) As an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. The twenty factors set forth below are designed only as guides for determining whether an individual is an employee and the degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed.
- (1) The employer for whom services are being performed requires the individual to comply with instructions regarding when, where, and how services are performed;
 - (2) The employer for whom services are being performed requires particular training for the individual performing services;
 - (3) The services provided by the individual are part of the regular business of the employer for whom services are being performed;
 - (4) The employer for whom services are being performed requires the services be performed by the individual;
 - (5) The employer for whom services are being performed hires, supervises or pays the wages of the individual performing services;
 - (6) The existence of a continuing relationship between the employer for whom services are being performed with the individual performing services which contemplates continuing or recurring work, even if not full-time;
 - (7) The employer for whom services are being performed requires set hours during which services are to be performed;
 - (8) The employer for whom services are being performed requires the individual to devote substantially full-time to its business;
 - (9) The employer for whom services are being performed requires the individual to perform work on its premises;
 - (10) The employer for whom services are being performed requires the individual to follow a set order or sequence of work;
 - (11) The employer for whom services are being performed requires the individual to make oral or written progress reports;
 - (12) The employer for whom services are being performed pays the individual on a regular basis such as hourly, weekly or monthly;
 - (13) The employer for whom services are being performed pays expenses for the individual performing services;
 - (14) The employer for whom services are being performed furnishes tools, materials, and other equipment for use by the individual;
 - (15) There is a lack of investment in the facilities used to perform services by the individual;
 - (16) There is a lack of profit or loss to the individual as a result of the performance of such services;
 - (17) The individual is not performing services for a number of employers at the same time;
 - (18) The individual does not make such services available to the general public;
 - (19) The employer for whom services are being performed has a right to discharge the individual;
 - (20) The individual has the right to end the relationship with the employer for whom services are being performed without incurring liability pursuant to an employment contract or agreement.

Haw. Rev. Stat., §383-6, establishes a presumption of employment. In determining whether an individual's services shall be excluded as employment, all three clauses of Haw. Rev. Stat. §383-6, must be satisfied to overcome the presumption. The burden of proof rests on the taxpayer.

Clause (1) raises the issue of whether the service provider was free from control or direction over the performance of his services. In addressing this issue, the Hawaii Supreme Court held, in Bailey's Bakery v. Tax Commissioner, 38 Haw. 16, 50(1948):

Control reserved to the principal for unemployment compensation purposes need not extend to all the details of the physical performance of the services by the worker that may be essential to the master-servant relationship but may be merely a general one exercisable, directly or indirectly, over the physical activities and time surrendered by the worker.

In the instant case, the evidence of claimant's services and his working relationship with the taxpayer met the elements of "control", under Haw. Admin. R. §12-5-2(a)(2) and (b). Haw. Admin. R. §12-5-2(a)(2) defines "control or direction over the performance of such service" to mean "general control" which need not extend to all details of the performance of the service. The employer need not actually exercise control; it is sufficient that there is a right to do so." The evidence showed that the taxpayer exerted significant control over claimant's activities. Although claimant and the taxpayer agreed that claimant would perform his services as an independent contractor and claimant previously had a business designing and constructing websites, the taxpayer required claimant to perform specific tasks for its business that went beyond the scope of claimant's previous business of website services.

In addition to assisting with the design and development of the taxpayer's web-based projects, creating webpages, and doing video/photography work at the taxpayer's request, claimant had to interview and create personal profiles for the taxpayer's customers, maintain and update the taxpayer's data base, manage the taxpayer's customer service staff, send emails to customers on the taxpayer's behalf, and attend company meetings. Under Haw. Admin. R. §12-5-2(b)(3), services provided by the individual that are part of the regular business of the employer for whom services are being performed are an indicia of employment. Claimant was also required to notify the taxpayer twenty minutes in advance of when he was going to leave work, maintain a daily time accountability sheet, create a log of his daily tasks, and provide the taxpayer a link to his daily tasks. Under Haw. Admin. R. §12-5-2(b)(11), an indicia of "control" is when the employer for whom services are being performed requires the individual to make oral or written progress reports.

Furthermore, under the Non-Compete clause in the taxpayer's At-Will Employment Agreement, claimant was not allowed to accept employment or engage in any business or activity which was in competition with the taxpayer, while he worked for the taxpayer or for a period of two years thereafter. In view of the foregoing, the taxpayer clearly exerted control over claimant's services. Therefore, clause (1) has not been met.

Clause (2) raises the issue of whether claimant's services were outside the usual course of the taxpayer's business or outside all of the taxpayer's places of business. In this case, claimant's services were clearly essential to the taxpayer's web-based online dating business. Claimant performed services that were integral to the taxpayer's web-based business, such as assist in the design and development of the taxpayer's website; interview and create profiles of the taxpayer's customers, maintain the taxpayer's database, send emails to customers on the taxpayer's behalf, and do video/photography work for the taxpayer's projects. While claimant had the flexibility to work from home, claimant was also expected to perform his work at the taxpayer's office and notify the taxpayer when he left the office. In view of the foregoing, Clause (2) has not been met.

Clause (3) raises the issue of whether the claimant was customarily engaged in an independently established business, functioning, usually and to an appreciable extent, as an independent business enterprise, holding himself out to the general public as such, and assuming all of the business risks of an entrepreneur.

In this matter, Haw. Adm. R. §12-5-2(b)(12), (16), (17), (19) recognize, as an indicia of employment, when the employer for whom services are being performed pays the individual on a regular basis; there is a lack of profit or loss to the individual as a result of the performance of such services; the individual is not performing services for a number of employers at the same time; and the employer for whom services are being performed has a right to discharge the individual.

In this case, claimant did not submit an invoice to the taxpayer to receive payment for his services, as is customary of individuals engaged in an independently established business. The taxpayer paid claimant a set remuneration for the first two projects he worked on and then hourly-based wages paid twice a month for his services thereafter. There is no evidence claimant exacted any profit or loss as a result of performing his services for the taxpayer, other than what he received as wages, or assumed any degree of liability for his services to the taxpayer, as he was guaranteed a set remuneration for his services. Although claimant maintained a website for his personal business, claimant had not used that website to conduct any business or provide services to other entities since 2010 and claimant was not performing services for any other entity while he worked for the taxpayer. Lastly, the taxpayer demonstrated its right to discharge claimant after claimant completed the taxpayer's projects and training video. In view of the foregoing, Clause (3) has not been met.

The evidence of claimant's services to the taxpayer meets the factors, under Haw. Admin. R. §12-5-2 (a) and (b), to show that claimant had an employer-employee relationship with the taxpayer. Based on the foregoing, the taxpayer failed to meet its burden of proof to establish that **all three clauses of Haw. Rev. Stat. §383-6** are satisfied. Therefore, the services performed by claimant for the taxpayer constitute employment and payments made by the taxpayer to claimant for such services are wages subject to Haw. Rev. Stat., Chapter 383.

DECISION:

The Department's decision is affirmed. Services performed by claimant for the taxpayer constitute employment. Therefore, remuneration paid to claimant for such services are subject to Haw. Rev. Stat., Chapter 383.

Date mailed/delivered: [REDACTED]

[REDACTED SIGNATURE]

Appeals Officer

This decision becomes final 30 days from the mailing date. See attached blue sheet for further appeal rights

I do hereby certify that the foregoing is a full, true and correct copy of the original file in this office. [REDACTED]