

Where the employing unit never appeared for the hearings, it failed to show that claimant's services as a managing and content editor met prong (a) of the ABC test. Claimant was heavily trained in the employing unit's computer system, he was subject to the direction and supervision of various manager, and he had to give regular reports and updates to the employing unit regarding his progress on the marketing campaigns.

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Issue ID: 0021 5645 27

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Marielle Abou-Mitri, a review examiner of the Department of Unemployment Assistance (DUA), which concluded that the services performed by the claimant for the employing unit did not constitute employment under G.L. c. 151A, § 2. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On April 15, 2017, the DUA sent the claimant a Monetary Determination stating that the claimant was not eligible for an unemployment claim, as he had no wages upon which to base a claim.¹ The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination in a decision rendered on July 12, 2017.

The review examiner concluded that no employment relationship existed between the claimant and the employing unit pursuant to G.L. c. 151A, § 2, as the record supported a conclusion that all of the elements of that statute were met to establish that the claimant was an independent contractor. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to take additional evidence regarding all three components of the test laid out in G.L. c. 151A, § 2. The claimant attended the remand hearing, along with a representative of the DUA's Employer Liability Unit. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the services performed by the claimant as a managing editor for the employing unit's programmatic advertising company did not constitute employment, pursuant to G.L. c. 151A, § 2, is supported by substantial and credible evidence and is free from error of law.

¹ In concluding that no wages existed for a claim, the DUA was implicitly finding that no employment relationship existed between the claimant and the employing unit.

Findings of Fact

The review examiner's consolidated findings of fact are set forth below in their entirety:

1. The claimant filed a claim for unemployment benefits on April 12, 2017. The effective date of the claim was determined to be April 2, 2017.
2. The claimant's base period is the 2nd quarter of 2016 through the 1st quarter of 2017.
3. The Department of Unemployment Assistance (DUA) determined the claimant did not earn sufficient wages in his base period because the DUA also determined the service performed by the claimant was not covered employment within the meaning of Section 2.
4. The Company is a programmatic advertising company that provides services to clients, travel bureaus from different cities in the United States. The Company creates content and determines how to distribute the content. The Company's main office is in [City A]. The Company had a second office in [City B], California.
5. The claimant worked as the managing editor for content marketing. The claimant acted as a liaison between the client and the consultants. The claimant worked with the clients to create a campaign and managed and distributed the client's content. The claimant worked with other freelance writers to provide content for the client.
6. The claimant performed services for the Company from March of 2014 until April 4, 2017.
7. The claimant lived in [City B], California from the start of his employment until May of 2015 when he moved to his mother's home in [City C], Massachusetts.
8. The claimant's first month of employment consisted of "onboarding." The claimant did not work from home during this time. Once the onboarding was complete, the claimant began splitting his time equally between the [City B] office and working from home. The claimant worked 20 hours in the [City B] office and spent the rest of his week working from home in [City B], this went on for a two month period. By the claimant's fourth month of employment, the claimant was working a majority of the time in his home in [City B] and went into the [City B] office sporadically.
9. After moving to [City C], Massachusetts in May of 2015, the claimant worked strictly from his mother's home in [City C].

10. During the claimant's onboarding period, the claimant met with the Director of Content Creation and the Vice President of Content. The claimant was trained on the Company's system, "All Voices," which the claimant used to file and publish his stories. At this time, the All Voices software was still being built and had not been used by anyone.
11. Prior to working for the Company, the claimant had experience in content marketing and editing. The claimant did not need to be trained on substantive aspects of his job during the onboarding. During the onboarding phase, the claimant was given documentation about how he needed to deal with the Company's clients. The claimant also worked with the Director of Content Creation and the Vice President of Content on building a pool of freelancers responsible for creating the content. The claimant was taught how to manage the workflow through the All Voices system and was shown reports and spreadsheets that he needed to maintain to keep track of the freelance work, clients, and content.
12. During the claimant's onboarding, the claimant was groomed by the Director of Content Creation and the Vice President of Content on the Company's clients. The claimant participated in kick off meetings with clients and conference meetings. The claimant was taught about how to follow up with the client and pass the client on to an account manager. The claimant was also trained on completing monthly audit reports.
13. The claimant completed substantive work during his first month of onboarding.
14. The claimant was not paid for the onboarding period.
15. The claimant was paid for the time he spent working in the [City B] office on substantive work.
16. The claimant did not have a set schedule of hours. The claimant could work between 30–40 hours during one week and 15–20 hours during another week, depending on the campaign contracts. The Company did not guarantee the claimant work.
17. Each campaign contract the claimant was assigned required that the claimant write a certain number of stories per month. The claimant was paid by the story. The claimant was paid between \$125–\$150 per story.
18. The claimant was assigned multiple campaign contracts per month.
19. Since the start of the claimant's work with the company, the claimant was paid on a 1099. The claimant paid his own taxes.

20. The claimant did not receive paid vacation time, paid sick time or bonuses from the Company.
21. The claimant made his own schedule of hours. The claimant did not have to clock in or clock out when he was working for the Company.
22. If the claimant needed to take time off from his work due to illness, the claimant did not need to notify the Company. The claimant did not need approval from the Company to take time off from his work.
23. The claimant provided the Company with weekly campaign updates by updating a spreadsheet. The claimant had deadlines, established by managers, and was responsible to update the spreadsheet to determine if deadlines were being met. Each month, the claimant was responsible for content analytical reporting which reviewed performance and a content audit report. The claimant also participated in monthly conference calls with account representatives and content marketing managers to update them on his work.
24. At the start of his employment, the claimant reported to two content marketing managers. By the end of his employment, the claimant was reporting to one content marketing manager. The claimant had story content and budgets approved by the managers. The claimant would discuss what kind of freelancers he would hire with the managers. The claimant had daily contact about story topics with his managers and discussed any software issues.
25. The Company did not provide the claimant with any tools, equipment or supplies. The claimant used his own laptop to complete his work. The claimant was provided with an email address to log in to the Company's system. The claimant used the company provided email address to communicate with management and clients. The freelance writers were not provided with company issued email addresses. The claimant had a badge to get into the [City B] and the [City A] offices.
26. After the claimant completed the onboarding, the claimant would tell the managers what he was doing. As the managing editor, the claimant did not need to be told what to do from the managers.
27. The claimant needed a laptop, a phone, and the Company's software, All Voices, to complete his job. The claimant also needed the spreadsheets and Google Documents provided by the Company to complete his job duties.
28. In 2016, the claimant earned \$22,950.00 in compensation from the Company.
29. The claimant did not sign any document with the Company which prohibits him from performing similar services (advertising and content distribution) for another company or entity.

30. The claimant could have worked as an editor, created content or helped a business with an advertising campaign without relying on the Company's computer system or infrastructure. The claimant could have done similar work on his own.
31. The claimant could not do the Company's specific work without the computer system and infrastructure. The claimant needed the Company's software to distribute the Company's content.
32. The claimant stopped working for the company on April 4, 2017 because the Company transferred all of the claimant's work to an advertising/digital agency. The Company did not have any more work to offer the claimant.
33. In 2012, the claimant established his own a Limited Liability Corporation, an advertising agency. The claimant dissolved the LLC in 2015. The claimant has never had his own advertising clients. The claimant never had clients when his LLC was active.
34. The claimant did not perform similar services for any other business, entity or person, while he performed services for the company.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we conclude that the claimant's services were employment and the monies he was paid by the employer constitute wages for purposes of Chapter 151A.

Employment is defined in G.L. c. 151A, § 2, which states, in relevant part, as follows:

Service performed by an individual . . . shall be deemed to be employment subject to this chapter . . . unless and until it is shown to the satisfaction of the commissioner that—

- (a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and
- (b) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

(c) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

By its terms, this statute presumes that an employment relationship exists, unless the employing unit carries its burden to show “that the services at issue are performed (a) free from the control or direction of the employing enterprise; (b) outside of the usual course of business, or outside of all the places of business, of the enterprise; and (c) as part of an independently established trade, occupation, profession, or business of the worker.” Athol Daily News v. Board of Review of Division of Employment and Training, 439 Mass. 171, 175 (2003). The test is conjunctive, and it is the employing unit’s burden to meet all three prongs of this “ABC” test. Should the employer fail to meet any one of the prongs, the relationship will be deemed to be employment. Coverall North America, Inc. v. Comm’r of Division of Unemployment Assistance, 447 Mass. 852, 857 (2006).

The review examiner concluded that the services the claimant performed for the employing unit did not constitute employment. She implicitly concluded that the employing unit, although it did not attend the initial hearing, carried its burden as to all three prongs of the ABC test. Because we conclude that the employer did not carry its burden with respect to prong (a), we disagree with the review examiner’s legal conclusion that the claimant was an independent contractor.

Under G.L. c. 151A, § 2(a), we analyze whether the worker is free from supervision “not only as to the result to be accomplished but also as to the means and methods that are to be utilized in the performance of the work.” Athol Daily News, 439 Mass. at 177, *quoting* Maniscalco v. Dir. of Division of Employment Security, 327 Mass. 211, 212 (1951). “The essence of the distinction under common law has always been the right to control the details of the performance,” but “the test is not so narrow as to require that a worker be entirely free from direction and control from outside forces.” Athol Daily News, 439 Mass. at 177–178.

In this case, the claimant made his own schedule of hours, he used his own equipment (such as a computer) to do his work, and he was the one to tell his managers what he was doing on a day-to-day basis. However, he also received extensive training by the employing unit in how he was to do his editing and marketing work. In order to do his work for the employer, which included passing along stories created by freelance writers and documenting the progress of client marketing campaigns, the claimant had to use the employing unit’s “All Voices” system, a company-specific system he had no previous experience using. The claimant also provided the employer unit with weekly updates on his progress. He had to participate in conference calls with his managers, and he had to meet deadlines established by his managers. Consolidated Finding of Fact # 23. The content of the stories for the marketing campaigns, as well as the budgets for the campaigns, were subject to approval of his managers. Consolidated Finding of Fact # 24. As to how the claimant dealt with clients, the review examiner found that the employing unit’s Director of Content Creation and Vice President of Content taught the claimant how to follow up with clients and how to direct them to the appropriate account manager. He was also taught how to audit and analyze the progress of a marketing campaign.

All of these aspects of the relationship between the claimant and the employing unit show that the claimant was directed in how he performed his services. Even if the claimant had some of

his own editing and marketing experience, he reported directly to managers who appear to have kept a very close watch on what the claimant was doing. This amount of direction and control is sufficient to conclude that the employing unit has not met its burden with respect to prong (a) of the ABC test. See Driscoll v. Worcester Telegram & Gazette, 72 Mass. App. Ct. 709, 713–716 (2008).

The employing unit's failure to show that the claimant performed his services free from its direction and control is sufficient to show that the claimant's services were employment. Consequently, it is not necessary for the Board to consider whether the employing unit carried its burden under prongs (b) and (c) of the ABC test.

We, therefore, conclude as a matter of law that the review examiner's initial decision, which concluded that the services the claimant performed were not employment pursuant to G.L. c. 151A, § 2, is not supported by substantial and credible evidence or free from error of law, because the employing unit failed to show that it met prong (a) of the ABC test.

The review examiner's decision is reversed. The services the claimant performed as a managing editor for content marketing constituted employment. His earnings constituted wages under G.L. c. 151A, § 1(s)(A), and the wages shall be used to establish an unemployment claim.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 8, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.