THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

Charles F. Hurley Building • 19 Staniford Street • Boston, MA 02114
Tel. (617) 626-6400 • Office Hours: 8:45 a.m. to 5:00 p.m.

BOARD OF REVIEW
DECISION

BR-106002-XA (June 23, 2008) -- Contract attorney for law firm is an employee, not an independent contractor. *[Note: The District Court affirmed the Board of Review's decision.]*

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), which concluded that the claimant's services constituted employment within the meaning of G.L. c. 151A, § 2. We review pursuant to our authority under G.L. c. 151A, § 41, and affirm.

An unemployment benefits claim filed by the claimant triggered a DUA Status Unit inquiry into the employment relationship between the appellant employer and the claimant. In a determination issued on September 27, 2007, the agency determined that the services which the claimant performed were those of an employee, not an independent contractor. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant and employer, the review examiner affirmed the agency's determination in a decision rendered on January 11, 2008.

The review examiner concluded that the employer failed to prove that the claimant performed her services free of its direction and control, that her services were performed outside the scope of its usual business, and that she was able to engage in an independently established business of the same nature, and thus failed to sustain its burden of proof under G.L. c. 151A, § 2. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we offered the parties an opportunity to submit written arguments for our consideration. Only the employer responded. Our decision is based upon our review of the entire record, including the employer's written argument.

The issue on appeal is whether the employer satisfied its burden to prove that its relationship with the claimant was not that of employment within the meaning of G.L. c. 151A, § 2.

Findings of Fact

The DUA review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. [Employer] are a legal firm providing legal assistance to their clients. They are located at [address]. The claimant is a lawyer and licensed to practice law in the Commonwealth.

2. The claimant performed a service for [Employer] from September 11, 2006 through August 10, 2007. The claimant spent at least 40 hours a week performing legal services for [Employer]. Most of the claimant's work was spent in the offices located in [town] or spending time at court.

3. The claimant was assigned work by one of the partners of [Employer]. Initially the claimant's work was reviewed by one of the partners and on occasion work was sent back to the claimant for revisions. Once the claimant was familiar with the manner in which the partner wanted her to perform her services she was not supervised.

4. The claimant did not have her own practice. The claimant could have provided a service to clients other than the clients of [Employer].

5. The claimant was paid hourly for her work. She was paid between $20.00 and $25.00 an hour and received her monetary compensation weekly.

6. In 2006, she was paid $15,269.80 in wages. In 2007, she was paid $30,229.10 in wages.

7. [Employer] provided the claimant with an office desk, computer, telephone and other implements to perform her work. The claimant did not have a written contract. The work was on-going.

8. The claimant could quit her work without liability. The employer could terminate the claimant at any time.

9. The claimant was discharged due to insubordination.

Ruling of the Board

The Board adopts the DUA review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

Employment is defined under 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.

The three prongs of this "ABC" test are conjunctive. Therefore, if the employer fails to prove 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).

Section (a)—*free from direction and control*

We analyze prong (a) under common law principles of a master-servant relationship, including 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 v. Board of Review of the Department of Employment and Training, 439 Mass. 171, 177 (2003), *quoting* Maniscalco v. Dir. of Division of Employment Security, 315 Mass. 371, 372-373 (1944). "[T]he test is not so narrow as to require that a worker be entirely free from direction and control from outside forces." Id. at 178. It is a matter of degree. Id.

The parties did not have a written employment agreement. The indicia of control were gleaned exclusively from their working relationship.

Most of the facts are undisputed. For a period of time, one of the partners (owners) of the firm trained and closely supervised the claimant to be certain that she performed her services in the manner that the employer wanted. Once she was trained, she worked without supervision to

perform discovery, review documents produced in discovery, and appear in court on behalf of clients for case management and pre-trial conferences. (Memorandum of Employer submitted to the Board, page 1, hereinafter, "Employer Memorandum, p. ___.")

This level of initial supervision demonstrates that the claimant was not free from control and direction in connection with the manner of performing her work. The employer instructed her how to produce work; some was sent back for revisions until she produced it to the partner's specifications. That she was eventually able to work more independently does not change our analysis. Her work remained subject to the employer's direction.

As an attorney, a lesser degree of supervision was expected. "[C]ontrol . . . over the manner in which professional employees shall conduct the duties of their positions must necessarily be more tenuous and general than the control over non-professional employees." James v. Commissioner of Internal Revenue, 25 T.C. 1296, 1301 (1956)(pathologist was a hospital employee, not an independent contractor.) The Tax Court illustrated this point by referring to the many prominent corporate attorneys who are full-time employees and "who work with a minimum of direct supervision or control over their methods." Id.

Additionally, the employer in the present case provided the claimant with a steady stream of on-going work and paid her weekly based upon the number of hours worked, not by the task or case. She worked for the law firm and not for individual clients and her services were utilized on an on-going basis rather than by the job. See James, 25 T.C. 1296, 1300. The employer also provided her with the tools and equipment to perform her services, including an office, desk, computer, fax machine, copier, telephone, office supplies, as well as secretarial support, as needed. (Employer Memorandum, p. 12.) Compare this relationship to an attorney who is paid a fixed annual retainer to defend a company in any lawsuits that may arise. See Rev. Rul. 68-323, 1968-1 C.B. 432; 1968 WL 15359 (corporation does not have the right to exercise the direction and control over how the attorney's services are performed that is necessary to create a common law employer – employee relationship.)

The employer raises the point in its appeal memorandum that there were times when the claimant turned down assignments.[1] Typically, an employee must perform all work that is assigned to him or her. On balance, however, this does not tip the scale. Presumably, the claimant was allowed a certain amount of discretion in choosing her assignments simply because the employer had sufficient other work for her to do.

Given the nature of the relationship between the claimant and the law firm in this case, the claimant was not sufficiently free of the employer's direction and control to satisfy prong (a).

Section (b) -- *work performed outside the course or place of business*

[1] Employer Memorandum, p. 3. In the tape recorded hearing transcript, the employer testified that, on occasion, the claimant did refuse some boring assignments. Although this fact appears in the recorded hearing testimony, it does not appear in the DUA review examiner's findings of fact.

We reject the employer's argument that the claimant's litigation tasks were not part of the employer's usual course of business simply because it was not economical for the highly paid partners to perform those particular assignments. Her tasks constituted a necessary part of representing clients in the employer's litigation practice. As such, it would be almost farcical to characterize them as being "outside" the employer's usual course of business.

Nor were the claimant's services performed outside of all the places of business of the enterprise. The review examiner found that most of the claimant's work was done in the employer's [town] offices or in court. Whether she spent half her time in court is immaterial. The equipment and client files necessary to work on discovery or prepare for court were located at the employer's office. This required the claimant to spend a significant portion of her time there as well. Her practice was not like the work of a taxi driver or newspaper deliverer, who spends nearly all of his or her time on the road away from the employer's premises. See Comm'r. of Division of Unemployment Assistance v. Town Taxi of Cape Cod, 68 Mass.App.Ct. 426, 431 (2007) and Athol, 439 Mass. at 179.

In sum, we have no difficulty in concluding that the employer failed to satisfy prong (b).

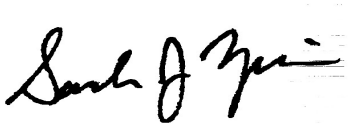
Section (c)—*engaged in an independent trade or business*

The SJC requires the following approach to evaluating part (c). In order to assess whether a service could be viewed as an independent trade or business, we must consider whether "the worker is capable of performing the service to anyone wishing to avail themselves of the services or, conversely, whether the nature of the business compels the worker to depend on a single employer…" Athol, 439 Mass. at 181. In the present case, the claimant did not perform legal services for anyone but the employer. The claimant certainly had the credentials to do so and nothing in the parties' oral agreement restricted her ability to do so. The review examiner concluded that the full-time nature of her work for the employer precluded the possibility of performing services for anyone else. However, we need not decide whether the claimant was capable of engaging in an independent trade or business under section (c), despite the time demanded of her engagement with the employer, since the employer failed to sustain its burden under prongs (a) and (b). Thus, regardless of the outcome of prong (c), the parties' relationship is deemed to be employment.

We, therefore, conclude as a matter of law that the appellant employer has not satisfied its burden of proof. The DUA review examiner's decision is affirmed. The claimant's services were "employment" within the meaning of G.L. c. 151A, § 2. The DUA review examiner's decision is affirmed.

BOSTON, MASSACHUSETTS
DATE OF MAILING - June 23, 2008

John A. King, Esq.
Chairman



Sandor J. Zapolin
Member

Member Donna A. Freni did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 12, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT- July 23, 2008

AB/rh