

IOWA DEPARTMENT OF INSPECTIONS AND
APPEALS
DIVISION OF ADMINISTRATIVE HEARINGS
Wallace State Office Building
DES MOINES IOWA 50319

Appeal Number: 13IWD015

Respondent (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**CARRI TOPPERT
TOTSPOT**

**IOWA WORKFORCE DEVELOPMENT
1000 EAST GRAND AVENUE
DES MOINES, IA 50319**

JOE BERVID, IWD
NICHOLAS OLIVENCIA, IWD
CARIE O'BRIEN, IWD
JUSTIN DEMSKY, IWD

**This Decision Shall Become Final, as of the date of
mailing stated below unless:**

1. Either party files a WRITTEN application for a rehearing WITHIN TWENTY (20) DAYS AFTER the date below. The written application must state the specific reasons for the rehearing and the relief sought. If the request for a rehearing is denied or if the rehearing decision is not satisfactory, either party may petition the District Court WITHIN THIRTY (30) DAYS of either action;
OR
2. Either party may petition the District Court WITHIN THIRTY (30) DAYS after the date below.

YOU DO HAVE THE RIGHT TO HIRE A LAWYER at your own expense to represent you in these proceedings.

(Administrative Law Judge)

June 14, 2013

(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination

STATEMENT OF THE CASE

Justin Demsky, a Field Auditor for Iowa Workforce Development (“IWD”) completed an investigation into an allegation the appellant had incorrectly classified employees from 2010 through 2012, thereby avoiding unemployment insurance contributions. Mr. Demsky determined that an employee-employer relationship existed between the appellant’s business, Totspot, and ten workers during that time period. IWD issued a decision on January 3, 2013, stating that Ms. Toppert and Totspot were determined to be liable for payment of unemployment insurance tax contributions effective January 1, 2010. Ms. Toppert timely appealed.

On May 14, 2013, IWD transferred the case to the Iowa Department of Inspections and Appeals, Division of Administrative Hearings to schedule a contested case hearing. The matter proceeded to a hearing by telephone on June 14, 2013. Appellant Carri Toppert appeared pro se and testified, and called Doris Hawkins, of H & R Block, as a witness. Mr. Demsky appeared and testified for IWD. Mr./ Demsky prepared and submitted an appeal summary, with pages 1 through 25, which entered the record without objection.

ISSUE

Whether Iowa Workforce Development correctly determined that an employer-employee relationship existed between Ms. Toppert/Totspot and ten people who worked there from 2010 through 2012.

FINDINGS OF FACT

Totspot was a day care facility in Bettendorf, Iowa, owned and operated by Ms. Toppert as a sole proprietorship from January 1, 2010, through February 10, 2012. When IWD received a tip that workers had been misclassified, he requested information from Ms. Toppert. The appellant provided:

- IRS forms 1040 from 2007 through 2011;
- IRS form 1099 for 2011;
- A letter detailing all workers and the amounts paid to them; and
- Copies of checks written by Ms. Toppert.

Based on the information provided, Mr. Demsky identified ten persons who worked for Ms. Toppert at Totspot and earned wages exceeding \$1,500 in a calendar quarter. (Exhibit pp. 7, 8, 17; Demsky, Toppert testimony).

Ms. Toppert explained. "...I hired Paula Dixon, another teacher, as my co-provider. She was licensed to Totspot along with myself. I did have a contract with her requiring scheduled hours and responsibilities." "...Eva Hahn approached me while Paula was still employed with me and wanted to know if she could help out...She would come and help me out and I would pay her what I could. There was no set wage...Eva came and went as she pleased." "...Maggie Oberhaus worked for the Handicapped Development Center with job coach, Adrienne Sheppard, who happened to be one of the parents of two of the children I cared for. Adrienne approached me asking if I would be interested in giving Maggie some work experience. Maggie seemed to be more comfortable with cleaning up the table and cleaning the floors than interacting with the children." "Stephanie Strichtfield was the parent of another child I cared for and helped me take the children on a 'field trip'." "Ashley and Samantha Ramirez were related to another provider friend of mine. They came over one day to help out while I attended my father in law's funeral. Ashley even made the statement, 'Carri you don't have to pay me anything, that's not why I'm here'." "My niece, Desiree Darling came in and painted the faces of the children and read to the children while she waited for her son to be born. After he was born, she came and went throughout the year on occasion to attend field trips and play with the children." (Exhibit pp. 7, 8).

Ms Toppert's letter and testimony also explained the basis for her appeal. "My only intention was to help family and friends who approached me with a desire to help out. Yes, I paid them, but I don't think anyone would have worked for free, nor should anyone be expected to help out without being compensated; with the exception of Paula, there were no set wages determined." (Exhibit p. 8; Toppert testimony).

Mr. Demsky pointed out that the daycare business is regulated by law in the State of Iowa. The Iowa Administrative Code, at 441 IAC 109.2(1) and (2), requires daycare providers to be licensed. At Totspot, only the appellant and Paula Dixon had licenses. The other persons who worked there could not be independent contractors because they did not have licenses. (Demsky testimony).

REASONING AND CONCLUSIONS OF LAW

IWD oversees the unemployment compensation fund in Iowa, which is governed by Iowa Code chapter 96.¹ IWD's Director administers Iowa Code chapter 96 and is charged with adopting administrative rules.²

IWD initially determines all issues related to liability of an employing unit or employer, including the amount of contribution, the contribution rate, and successorship.³ An employer is defined as "any employing unit which in any calendar quarter in either the current or preceding calendar year paid for service in employment wages of one thousand five hundred dollars or more."⁴ An employing unit includes any individual or organization that has in its employ one or more individuals performing services for it within Iowa.⁵ The term "employment" is defined as service "performed for wages or under any contract of hire, written or oral, express or implied."⁶ Employment includes service performed by "[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."⁷

IWD contends that ten people were Totspot employees. The appellant admits that Paula Dixon was an employee, and her wages should have been reported to IWD, but disagrees and contends that the other workers were independent contractors.

In the unemployment compensation context, the right of control is the principal test for determining whether a worker is an employee or independent contractor, as developed through the common law.⁸ Whether an employer-employee relationship exists under the usual common law rules is determined based upon an analysis of the individual facts in each case.⁹ IWD has also adopted rules with factors to consider in determining whether a worker is an independent contractor or employee.¹⁰

Under IWD's rules,

¹ Iowa Code § 96.9(1).

² *Id.* § 96.11(1).

³ *Id.* § 96.7(4).

⁴ *Id.* § 96.19(16)a.

⁵ *Id.* § 96.19(17).

⁶ *Id.* § 96.19(18)a.

⁷ *Id.* § 96.19(18)a(2).

⁸ *Gaffney v. Dep't of Employ. Servs.*, 540 N.W.2d 430, 434 (Iowa 1995).

⁹ 871 IAC 23.19(6).

¹⁰ *Id.* 23.19.

The relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. An employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.¹¹

The right to discharge or terminate a relationship is “an important factor indicating that the person possessing that right is an employer.”¹² If the discharging party may be liable for damages for breach of contract, the circumstances are indicative of an independent contractor relationship.¹³

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service is characteristic of an employer.¹⁴ “In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, that individual is an independent contractor.”¹⁵

One factor includes the nature of the worker’s contract for the performance of a certain type, kind or piece of work at a fixed price.¹⁶ Generally an employee performs the work continuously and his or her labor is primarily purchased, whereas an independent contractor undertakes the performance of a specific job.¹⁷

An independent contractor follows a distinct trade, occupation, business or profession in which the worker offers his or her services to the public to be performed without the control of those seeking the benefit of the worker’s training or experience.¹⁸ Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, occupation, business, or profession, in which they offer services to the public, are independent contractors and not employees.¹⁹ Professional employees who perform services for another individual or business are covered employees.²⁰

An employee is typically paid a fixed wage on a weekly or hourly basis, whereas an independent contractor is typically paid one sum for the entire work, whether it is paid

¹¹ *Id.* 23.19(1).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* 23.19(2).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* 23.19(1).

²⁰ *Id.*

in a lump sum or installments.²¹ Independent contractors have the right to employ assistants with the exclusive right to supervise their activity and completely delegate work.²²

Independent contractors can make a profit or loss and are more likely to have unreimbursed expenses than employees and to have fixed, ongoing costs regardless of whether work is currently being performed.²³ Independent contractors often have significant investment in real or personal property that they use in performing services for others.²⁴

Services performed by an individual for remuneration are presumed to be employment, unless proven otherwise.²⁵ An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.²⁶ If an employer-employee relationship exists, the designation or description of the relationship by the parties as anything other than an employer-employee relationship is immaterial.²⁷

Application of the facts to the factors to be considered in determining whether a work relationship involves an employee or an independent contractor found in 871 IAC 23.19, reveals the following:

Ms. Toppert owned the business and had the right to terminate the employment of any worker. Such a discharge would not raise a claim for breach of contract for the fired worker;

Each of the workers performed general labor. Their duties were not specific to a project;

The workers received hourly wages only for the time spent working. None faced a risk of work related economic loss;

No worker at Totspot had the right to hire assistants; and

Ms. Toppert controlled the work. None of the other workers, except Paula Dixon was properly licensed. The work done by others could only be legally performed if it occurred under Ms. Toppert's supervision.

All of these factors support the finding of an employer-employee relationship. The only factors supporting an independent contractor status involve the descriptions of the relationship by Ms. Toppert. Per 871 IAC 23.19, these descriptions are immaterial.

²¹ *Id.* 23.19(4).

²² *Id.* 23.19(5).

²³ *Id.* 23.19(3).

²⁴ *Id.*

²⁵ *Id.* 23.19(6).

²⁶ Iowa Code § 96.19(18)f; *Id.* 22.7(3).

²⁷ 871 IAC 22.19(7).

Under 871 IAC 23.19(6), services performed by an individual for remuneration are presumed to be employment unless and until it is shown to the satisfaction of the department that the individual is in fact an independent contractor.

MS. Toppert and Totspot bear the burden of proof in this case to overcome the presumption that the ten named workers were employees. They have failed to meet that burden of proof. IWD properly found an employer-employee relationship existed between Ms. Toppert and the other workers at Totspot.

DECISION

IWD's decision that that the ten named workers were employees of Carri Toppert and Totspot is affirmed. IWD shall take any steps necessary to implement this decision.

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