

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Janet E. Smith, :  
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 Petitioner :  
 :  
 :  
 v. : No. 1584 C.D. 2009  
 : Submitted: January 22, 2010  
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 Unemployment Compensation :  
 Board of Review, :  
 :  
 Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FRIEDMAN FILED: March 17, 2010

Janet E. Smith (Claimant) petitions for review of the July 15, 2009, order of the Unemployment Compensation Board of Review (UCBR) affirming the decision of the referee to deny Claimant unemployment compensation benefits under section 402(h) of the Unemployment Compensation Law (Law).<sup>1</sup> The UCBR

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(h). Section 402(h) of the Law provides that a person shall be ineligible for benefits for any week in which he or she is engaged in self-employment. 43 P.S. §802(h). Although the Law does not define “self-employment,” our courts look to the definition of “employment” in section 4(l)(2)(B) of the Law, which states:

Services performed by an individual for wages shall be deemed to be employment subject to this act, unless and until it is shown to the satisfaction of the department that—(a) such individual has been and will continue to be free from control or direction over the performance of such services both under his contract of service and in fact; and (b) as to such services such individual is customarily engaged in an independently established trade, occupation, profession or business.

concluded that Claimant was a self-employed, independent contractor while performing services for Pennsylvania Financial Consultants (PFC) and, thus, was ineligible for benefits. We affirm.

Claimant worked for PFC as an administrative assistant from May 1, 2008, through October 31, 2008, pursuant to a contract between Claimant and David E. Mickley, the owner of PFC. (UCBR's Findings of Fact, No. 1.) The contract stated, in relevant part, as follows:

[Claimant] is now in the business of providing administrative services on a contract basis.

...

Due to the nature of services being provided by [Claimant], compensation, expense arrangements, and mutually independent working relationships between the two parties, [Claimant]'s compensation will be paid to her as an independent contractor.

(O.R., Item No. 10, Ex. 1 at 1.) Either party could terminate the contract upon thirty days' written notice of intent to terminate. (*Id.* at 2.) Based on Claimant's twenty-seven years of experience as an administrative associate, (*id.* at 1), Mickley entered into the contract with the understanding that Claimant would need minimal supervision and training to perform her duties. (UCBR's Findings of Fact, No. 12.)

Under the terms of the contract, Claimant was paid a percentage of PFC's gross revenue for her services, and she shared in the cost of administrative and

other office expenses.<sup>2</sup> (UCBR's Findings of Fact, Nos. 4-5.) Claimant also hired subcontractors to perform some of her duties.<sup>3</sup> (UCBR's Findings of Fact, No. 6.) Claimant was free to set her own hours as long as the office phones were answered and was free to work from home if she so desired. (UCBR's Findings of Fact, Nos. 7-8.) Claimant presented an invoice for her services to Mickley, who provided Claimant with a Form 1099 for tax purposes. (UCBR's Findings of Fact, Nos. 9-10.) Claimant also had the ability under the contract to perform similar services for others independently. (UCBR's Findings of Fact, No. 11.)

During the course of the contract, it became evident to Mickley that Claimant would require more hands-on supervision to ensure that her work was completed. (UCBR's Findings of Fact, No. 13.) Therefore, by letter dated October 3, 2008, Mickley notified Claimant that he was terminating the contract at the end of the month because the work Claimant was contracted to perform was not getting done. (UCBR's Findings of Fact, No. 14.)

Claimant applied for unemployment benefits, which the local service center granted. PFC timely appealed. An evidentiary hearing was held before the referee at which Claimant and Mickley testified. Based on the testimony, the referee

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<sup>2</sup> Claimant was paid fifteen percent of PFC's gross revenues but would be entitled to a greater percentage once she obtained an insurance license. (O.R., Item No. 10, Ex. 1 at 1.)

<sup>3</sup> Mickley testified that Claimant hired two subcontractors, Kristen Colbeth and Dorinda Dobias, to perform certain duties and that Claimant paid both of their salaries and issued each of them a Form 1099 for tax purposes. (N.T., 4/7/09, at 10-11.) Claimant agreed that she hired Dobias, but she testified that Mickley interviewed and hired Colbeth without Claimant's input. Claimant admitted, however, that she paid Colbeth's salary. (*Id.* at 15, 17.)

reversed, concluding that Claimant was a self-employed, independent contractor who was ineligible for benefits under section 402(h) of the Law. Claimant appealed to the UCBR, which adopted the referee's findings and conclusions in their entirety and affirmed. Claimant now appeals from that decision.<sup>4</sup>

On appeal, Claimant asserts that although the contract identified her as an independent contractor, her actual working relationship with PFC established that she was an employee. She claims that she operated entirely under Mickley's direction and control and that she was not engaged in an independent trade or occupation. Thus, she claims that she is entitled to benefits under the Law. We disagree.

The Law presumes that a person rendering services for wages is an employee; the burden to overcome that presumption rests with the employer. *Resource Staffing, Inc. v. Unemployment Compensation Board of Review*, 961 A.2d 261, 264 (Pa. Cmwlth. 2008). To meet that burden, an employer must prove that: (1) the person was free from control or direction over the performance of his or her services, both under the contract of service and in fact; and (2) the person was customarily engaged in an independently established trade or business. 43 P.S. §753(l)(2)(B). Both prongs must be satisfied in order for a person rendering services

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<sup>4</sup> Our scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or findings of fact were unsupported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

for wages to be considered an independent contractor. *Resource Staffing*, 961 A.2d at 264.<sup>5</sup>

### **1. Direction or Control**

Although Claimant does not dispute that the contract she signed clearly defined an independent contractor relationship, she nonetheless argues that she was not free from PFC's direction or control "in fact." 43 P.S. §753(l)(2)(B)(a). To determine whether an employee is free from control, our courts consider several factors, including: who controls the manner in which the work is completed; whether the employee is responsible for the result only; the terms of the agreement between the parties; the skill level required for performance; who is responsible for supplying the tools; whether payment is made by the time or by the job; and whether the employer has the right to terminate employment at any time. *Holt v. Unemployment Compensation Board of Review*, 840 A.2d 1071, 1073 (Pa. Cmwlth. 2004). No single factor is dispositive; therefore, the determination of control must be based on a totality of the circumstances. *Resource Staffing*, 961 A.2d at 264.

Here, the UCBR found that Claimant was free to set her own hours as long as the phones were answered and could work from home as long as her work was completed. In fact, Claimant testified that she worked from home occasionally and that when she did, she used her own equipment and supplies. (N.T., 4/7/09, at 18-19.) Moreover, Mickley testified that he wanted the phones answered during business hours but that Claimant was free to hire someone else to answer the phones

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<sup>5</sup> Whether a person is an employee or an independent contractor is a question of law subject to our review. *C E Credits OnLine v. Unemployment Compensation Board of Review*, 946 A.2d 1162, 1167 n.7 (Pa. Cmwlth. 2008), *appeal denied*, 601 Pa. 689, 971 A.2d 493 (2009).

if she was not physically present in the office. Claimant did, in fact, hire subcontractors to perform certain tasks, including answering the phones. (UCBR's Findings of Fact, No. 6.)

Claimant failed to offer any credible testimony regarding Mickley's exercise of control over the means of accomplishing her work. While it is true that Mickley exercised some direction over Claimant's work product,<sup>6</sup> particularly toward the end of her employment, (Referee's Decision at 2), we cannot conclude that such limited control converted Claimant's status to that of an employee under the Law. To the contrary, once Mickley realized that Claimant would require more supervision over the manner of her work performance, he exercised his option to terminate the contract. (*Id.*)

Based on the totality of the circumstances, we conclude that the UCBR properly found that Claimant was free from direction or control in fact.

## **2. Independent Trade or Business**

Our court has identified two factors to consider when determining whether a person is engaged in an independently established trade or business: (1) whether the person is capable of performing services for another entity; and (2) whether the nature of the business compels the person to look to a single employer

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<sup>6</sup> Claimant testified that Mickley was "very exact" about what he wanted and sometimes interrupted her to tell her what to say to clients on the phone. (N.T., 4/7/09, at 14, 21.) This testimony, however, goes to Mickley's exercise of discretion over Claimant's work product. An employer's expectations regarding the final work product do not constitute control over the means of accomplishing the work. *See C E Credits OnLine*, 946 A.2d at 1169 (concluding that claimant did not operate under employer's control even though employer closely monitored substance and quality of claimant's online postings to clients).

for work. *Beacon Flag Car Company, Inc. v. Unemployment Compensation Board of Review*, 910 A.2d 103, 108-09 (Pa. Cmwlth. 2006).

Claimant asserts that because she had no prior experience in the insurance industry, she was not working in a field in which she was customarily engaged in an independent business.<sup>7</sup> This argument, while creative, has no support in the record.

The contract itself specified that Claimant had “27 years of financial services experience” and that she was “in the business of providing administrative services on a contract basis.” (O.R., Item No. 10, Ex. 1 at 1.) It is undisputed that Claimant performed administrative tasks for PFC, including answering the phones, filling out forms, and responding to general client inquiries. To the extent that some of Claimant’s duties were specific to the insurance business, Claimant had the option of hiring subcontractors to assist her.

More importantly, however, the UCBR found that, in addition to Claimant’s ability to set her own hours, work from home and hire subcontractors, she could perform similar administrative services for PFC’s competitors. (UCBR Order at 1.) Although Claimant did not ultimately perform administrative work for others, there was no credible evidence that PFC precluded her from doing so. *See Borough of Grove City v. Unemployment Compensation Board of Review*, 928 A.2d 371, 377 (Pa. Cmwlth. 2007) (concluding that claimant was engaged in independent business where there was no competent evidence that employer prevented him from

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<sup>7</sup> Claimant’s prior administrative experience was in the brokerage industry, whereas PFC was in the financial planning and insurance businesses. (N.T., 4/7/09, at 17, 21.)

performing outside work). Therefore, we agree with the UCBR that Claimant was engaged in an independent business under the Law.

Accordingly, because we find no error in the UCBR's determination that Claimant was a self-employed, independent contractor, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge



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Petitioner	:	
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	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 17th day of 2010, 2010, the order of the Unemployment Compensation Board of Review, dated July 15, 2009, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Senior Judge