

IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
CENTRAL PANEL BUREAU

Facility Cleaning International
Rachel Pang
10200 E Girard Ave Suite B-400
Denver, CO 80231

Appellant,

v.

Iowa Workforce Development,

Respondent.

Case No. 25IWD00004

**ADMINISTRATIVE LAW
JUDGE DECISION**

STATEMENT OF THE CASE

Facility Cleaning International, Inc. (FCI or the Appellant) appealed from a May 1, 2024, decision by Iowa Workforce Development (IWD) that an employer-employee relationship existed between FCI and Nicole Derifield. The matter was transmitted by IWD to the Administrative Hearings Division to schedule a contested case hearing. A telephone hearing was conducted on September 13, 2024. Wayne Pang represented FCI at the hearing and testified. Jay Belyea also presented testimony on behalf of FCI. Attorney Jeffrey Koncsol represented IWD. IWD Field Auditor Julie Schaefer also appeared and testified for IWD. Dane Hopwood also appeared and observed on behalf of IWD.

Prior to the hearing, IWD submitted a 48-page Case File, which included in part the decision letter; the appeal letter; the report to determine liability, a synopsis, the employer's contribution and payroll report, and the questionnaires from the worker and FCI. The documents were admitted into evidence without objection. The Appellant submitted an exhibit of an email between Jay Belyea, the project manager at the relevant time, and the worker Nicole Derifield. That exhibit was also admitted into the record without objection.

ISSUE

Whether an employer-employee relationship existed between Facility Cleaning International and Nicole A. Derifield who performed services for Facility Cleaning International.

FINDINGS OF FACT

Facility Cleaning International is a corporation providing commercial janitorial services. (IWD App. 44-45). Wayne Pang is the Director of Finance and Rachel Pang is an executive assistant. (IWD App. 8, 48, Pang Testimony). Jay Belyea is currently a vice president for the corporation, but at the time relevant to this appeal was a project manager. (Belyea Testimony).

IWD initiated an investigation of FCI due to a wage unemployment or business closing claim. IWD investigated FCI's status as a potential employer in the state of Iowa. Field Auditor, Julie Schaefer, was assigned to the case. (Schaefer Testimony). As part of the investigation, IWD spoke and communicated with both a representative of FCI and the worker. IWD also received Derifield's 1099s for 2023, and questionnaires from both FCI and Derifield. (IWD App. 17, 19-48; Schaefer Testimony).

On March 31, 2023, IWD issued a decision finding that FCI was liable for unemployment insurance contributions effective January 1, 2023. IWD determined that an employer-employee relationship existed between FCI and Nicole Derifield. The decision letter cited the following factors for the determination:

- Claimant was told where and when to work
- Claimant can't have loss
- Claimant was paid hourly and then a set amount
- Claimant didn't have to buy cleaning supplies
- No Independent contractor agreement

(IWD App. 9).

FCI and Nicole Derifield began their working relationship in May 2019. Around that time, FCI started a contract with Grainger in Waterloo to provide janitorial services. Grainger was a retail company that sold a variety of items and hired FCI to clean its facility. (Belyea Testimony; Schaefer Testimony; Appellant Exhibit; IWD App. 45). When FCI started its contract with Grainger, it inherited the janitorial crew from the previous janitorial provider. Grainger informed FCI that the supervisor on that crew was not working out and suggested Nicole Derifield as a replacement. Derifield had worked for a previous janitorial contractor. Grainger facilitated the meeting between Derifield and the project manager for FCI, Jay Belyea. (Belyea Testimony).

After this meeting, FCI decided to hire Derifield as the janitorial supervisor and fire the previous supervisor. Another person worked as part of the janitorial staff at that time, but that person did not stay on. (Belyea Testimony; Pang Testimony).

Derifield worked as a janitorial supervisor performing custodial duties or janitorial services for FCI at Grainger in Waterloo from May 2019 through March 15, 2024. (IWD App. 37, 45). Derifield's job was to oversee operations and provide custodial services. Derifield would determine whether other employees were necessary. Grainger had an expectation that there would be someone on site to communicate with regarding specifics of operations on a daily basis, and Derifield filled that role. (Belyea Testimony).

When FCI was onboarding Derifield for the position, it was FCI's intent that Derifield would be an employee. However, that changed. Belyea and Derifield discussed whether Derifield would be interested in starting her own business and taking on other clients. Within a day or so, FCI determined to hire Derifield as an independent contractor because she would be forming a limited liability corporation. Emails between Belyea and Derifield state FCI's original intent to hire her as an employee on May 27, 2019, but then discuss her establishment of a

business and issuing a 1099 by May 28. (Belyea Testimony; Pang Testimony; Appellant Exhibit). At no point did Derifield receive a W2, she only received 1099s. (IWD App. 19–26, 45; Pang Testimony). FCI and Derifield did not have a written independent contractor agreement. (Schaefer Testimony; IWD App. 45). Although FCI marked on the questionnaire for IWD that it carried workers' compensation insurance for Derifield, the form was marked in error. FCI did not have workers' compensation insurance for Derifield during their business relationship. (IWD App. 46; Pang Testimony).

After multiple years, FCI and Derifield concluded the business relationship. Grainger in Waterloo closed and FCI lost that account. At that point, there was no work left for Derifield. (Belyea Testimony; Pang Testimony; IWD App. 39, 47). Some time after this Derifield applied for unemployment benefits in Colorado, which is where FCI is based. (Pang Testimony).

Derifield did not bill FCI for her work; instead, she was paid hourly or based on her scope of work. Throughout her time with FCI, Derifield was paid semi-monthly. (IWD App. 27, 38, 46). Initially, Derifield was paid hourly and submitted her hours. However, in approximately, mid-year 2022, FCI and Derifield negotiated a pay raise, in which Derifield was paid \$1,600 two times a month based on the scope of work. At the time of the renegotiation, Derifield told FCI that her daughter would sometimes assist her. Derifield was to pay her daughter out of that set amount. (IWD App. 27; Belyea Testimony; Pang Testimony). Derifield did not receive benefits and was not reimbursed for anything. (IWD App. 27, 39, 47).

FCI has both employees and independent contractors, but none of the workers provide FCI with an invoice. FCI pays independent contractors a lump sum, generally. It is also not unusual for FCI to pay workers it deems subcontractors based on the hours worked. (Pang Testimony; Belyea Testimony).

When she began working, Derifield was given the scope of work and she worked until the scope of work was complete every day. She worked from 11 or 11:30 a.m. until 1:00 or 1:30 p.m. doing a "porter" shift in which she maintained the lunch room. Derifield then returned in the evenings to complete the statement of work. She physically reported to work at Grainger from Monday through Friday. Initially, Derifield had a set time that she needed to report to work in the evenings, but this expectation later became more flexible so Derifield could come in the evenings when she was ready. Derifield received her schedule from Belyea, but the hours were dictated by Grainger. It was typical for the client, in this case Grainger, to set the standards for a worker's schedule. (IWD App. 27, 37, 45; Appellant Exhibit; Pang Testimony; Belyea Testimony).

As mentioned above, Derifield was not only told where and when to work, but was also given assignments through the statement of work. However, Derifield may have had some discretion in determining how work assignments were complete if not specified in the statement of work. (IWD App. 37, 45, 46). Derifield received work assignments from the facility manager at Grainger, or the FCI project manager, but mostly the facility manager. The facility manager would report back to FCI. Derifield did have a set of instructions to be followed, however, FCI maintained that the customer, in this case Grainger set the standard for how Derifield was to perform tasks. (IWD App. 38, 46; Belyea Testimony).

FCI did not supply any of the tools necessary for Derifield to complete her assignments. The third-party client, Grainger, provided those supplies or Derifield may have purchased some things on her own. Again, FCI emphasized the customer, in this case Grainger, set the standard regarding supplies and equipment. Thus, Grainger supplied the necessary tools for Derifield to perform her work. (IWD App. 27, 38, 46; Pang Testimony; Belyea Testimony).

Despite Derifield's possible intention to start a business on her own, she did not hold herself out as a business separate from FCI. Derifield did not provide services to others or have her own business. She did not advertise her janitorial services or solicit customers. (IWD App. 27, 39). Derifield did not perform similar services for others, but based on the questionnaires, both she and FCI understood that FCI would have priority over her work. (IWD App. 38, 39, 46, 47). Additionally, Derifield could not incur financial risk or loss in her role. (IWD App. 39, 47). While at work during the day, Derifield was supposed to be wearing a uniform supplied by FCI. It does not appear that she ever received the uniform. (IWD App. 35; Appellant Exhibit; Belyea Testimony). As Derifield was a cleaning supervisor that provided janitorial services, her role was integral to FCI's business as a commercial janitorial service.

While the extent of the authority was unclear, Derifield could use assistants. Derifield was not only able to employ assistants, but did so as her daughter worked with her with FCI's knowledge. However, in her email and questionnaire to IWD, Derifield stated that she would have to discuss her hiring of an assistant with FCI, she was required to provide services personally, and that the assistants were subject to FCI's control or supervision. (IWD App. 27, 37–38). On the other hand, in its questionnaire FCI stated that Derifield could employ assistants and was not required to notify FCI of this, and the assistants were not subject to FCI's control or supervision. (IWD App. 46). In practice, Derifield had her daughter working with her. FCI was aware of this assistant and it was understood that the assistant would be paid out of Derifield's earnings rather than paid by FCI. (Belyea Testimony; Pang Testimony). However, Belyea testified that if Derifield's daughter ever substituted for her, he would have wanted to know and approve of the assistant performing the services without Derifield's presence. (Belyea Testimony).

Based on the questionnaires and the testimony in the record, either FCI or Derifield could end the relationship without incurring liability. When asked about this on the questionnaire, Derifield marked unknown if they could end the relationship without incurring liability, but also marked that FCI could discharge her at any time. On its questionnaire, FCI marked that the firm or worker could end the relationship at any time without incurring liability. (IWD App. 47). At the hearing, Belyea corroborated this when stating Derifield would have no legal obligation if she quit. (Belyea Testimony). FCI also marked that it could terminate Derifield's services if not satisfied and could discharge her any time as continued employment was based on work performance. (IWD App. 46–47). Belyea testified that if the scope of work was not complete to the client's satisfaction FCI would work with the employee or independent contractor, and if it could not get the worker on track, then FCI would terminate the worker. (Belyea Testimony). In this case, FCI and Derifield had no sort of agreement that would state the terms of any liability if the relationship was terminated by either party.

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 has adopted rules found at Iowa Administrative Code 871--23.

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 Services performed by an individual for remuneration are presumed to be employment, unless proven otherwise.⁴ An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.⁵

An "employer" is defined under Iowa law as "any employing unit which in any calendar quarter in either the current or preceding calendar year paid wages for service in employment."⁶ An employing unit includes any individual or organization that has in its employ one or more individuals performing services for it in Iowa.⁷ "The term "employment" is defined as service "performed for wages or under any contract of hire, written or oral, express or implied."⁸ 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."⁹

In the unemployment compensation context, the right to control the matter and means of performance is the principal test for determining whether a worker is an employee or independent contractor.¹⁰ Under IWD's rules:

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

1 Iowa Code § 96.9(1).

2 Iowa Code § 96.11(1).

3 Iowa Code § 96.7(4).

4 Iowa Administrative Code (IAC) 871—23.19(6).

5 Iowa Code § 96.1A(16)(f); IAC 871—22.7(3).

6 Iowa Code § 96.1A(14)(a).

7 Iowa Code § 96.1A(15).

8 Iowa Code § 96.1A(16)(a).

9 Iowa Code § 96.1A(16)(a)(2).

10 *Gaffney v. Dep't of Emp't Servs.*, 540 N.W.2d 430, 434 (Iowa 1995) (citations omitted).

11 IAC 871—23.19(1).

The Department's regulations outline several factors to consider in determining whether a worker is an independent contractor or an employee.¹² Factors that support the existence of an employer-employee relationship include:

- Employer's right to discharge an employee without being held liable for damages for breach of contract;
- Employer furnishes tools, equipment, material, and a place to work;
- Continuous performance of work for the employer and the labor is purchased;
- Professional employees who perform services for another individual or business;
- Payment of a fixed wage on a weekly or hourly basis.

Factors that support an independent contractor relationship include:

- Worker is subject to control or direction of another merely as to the result to be accomplished by the work, but not the means and methods for accomplishing the result;
- Performance of a specific job at a fixed price whether the payment be made in a lump sum or installments;
- Following a distinct trade, occupation, business, or profession in which an individual offers services to the public to be performed without the control of those seeking the benefit of their training or experience;
- Worker can make a profit or loss and are more likely to have unreimbursed expenses and fixed, ongoing costs regardless of whether work is currently being performed;
- Worker has significant investment in real or personal property that is used in performing services for someone else;
- Worker is usually paid one sum for the entire work, whether it be paid in the form of a lump sum or installments;
- Worker has the right to employ assistants with the exclusive right to supervise their activity and completely delegate the work.¹³

The regulations also provide that if an employer-employee relationship exists after examination of the facts, the parties' own designation or description of the relationship is immaterial.¹⁴ Whether an employer-employee relationship exists is determined based upon an analysis of the individual facts in each case, not necessarily on any label used to identify the parties in a contract.¹⁵ So although at various times both FCI and Derifield have referred to Derifield as an independent contractor or subcontractor, the parties' designation does not control the analysis in this case.

ANALYSIS

¹² IAC 871—23.19.

¹³ IAC 871—23.19.

¹⁴ IAC 871—23.19(7).

¹⁵ IAC 871—23.19(6); *Pennsylvania Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 813 (Iowa 2002) (quoting *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 684 n. 2 (Iowa 2001)).

As noted above, services performed by an individual for remuneration are presumed to be employment, unless proven otherwise and the business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96. The determination of whether the relationship is an employer-employee relationship or an independent contractor relationship is not limited to one single factor. As in most of these cases, there are factors in this case that support both an employer-employee relationship and an independent contractor relationship.

Factors supporting an independent contractor relationship include: Derifield's flexibility in her schedule as she was not required to work set hours in the evenings. She was able to leave once the work was finished and had some discretion on completing her assignments. Derifield was also able to employ an assistant or assistants, although the record indicates this ability was limited. Although Derifield could employ an assistant, both she and FCI agreed that she still had to perform the cleaning services personally, and would need to have FCI's approval for the assistant in certain situations. These are factors supporting an independent contractor relationship.

However, the factors supporting an employee-employer relationship are more persuasive. Derifield worked on a continuous basis for FCI for almost five years. Initially, she was paid hourly on a semi-monthly basis. She submitted her hours to FCI. At some point, she was paid based on the scope of work, but still was paid on a semi-monthly basis. Thus, she was always paid on a regular basis, which is not typical of an independent contractor. Additionally, Derifield did not submit invoices or bills to FCI. Thus, Derifield's pay is more indicative of an employer-employee relationship even though she had 1099s.

Derifield also did not have her own business or otherwise hold herself out separate from FCI. Derifield did not have her own business, she did not advertise or otherwise solicit customers. Although she stated her intention to start a business, she never acted on this in any way. She could not incur a loss from an assignment she performed for FCI. She was an integral part of FCI's business. Additionally, the parties did not have an independent contractor agreement, and FCI and Derifield would not incur liability from ending the work relationship.

There is also mixed evidence about some of the factors when determining whether Derifield was an employee of FCI or an independent contractor. Derifield was generally not able to entirely set her own hours, the location of her work, or her assignments. She did not necessarily have discretion over the means and methods for accomplishing her assignments. Both FCI and Grainger dictated where and to some extent when Derifield performed her assignments. Grainger also did provide some instruction over how Derifield performed her duties, although it is unclear based on the record to what extent Grainger dictated the means and methods of accomplishing the tasks and to what extent Derifield had discretion over how to accomplish the work. Additionally, neither FCI nor Derifield provided the tools and materials for the work, but instead the tools and supplies were supplied by Grainger, the third-party client. As such, these factors do not provide support for finding Derifield is either an employee or an independent contractor.

In sum, FCI has not presented sufficient evidence that the Derifield was an independent contractor. The relationship as defined by the business and the worker is not enough to establish such a relationship.¹⁶ The Appellant bears the burden of establishing the relationship is not an employer-employee relationship. There is some limited evidentiary support in the record of an independent contractor relationship; however, the evidence indicating an employer-employee relationship is more persuasive. Derifield worked for FCI on a continuous basis for years and was paid on a regular basis. Derifield did not hold herself out as separate from FCI and in fact was integral to the business. Derifield could not incur a loss and the parties would not incur liability from ending their relationship. The majority of the credible evidence shows Derifield was an employee. Finding no error, IWD's decision must be AFFIRMED.

DECISION

Iowa Workforce Development's decision is AFFIRMED. IWD correctly determined that an employer-employee relationship existed between Facility Cleaning International and Nicole Derifield. IWD shall take all steps necessary to effectuate this decision.

APPEAL RIGHTS

This decision constitutes final agency action. Any party may file with the presiding officer a written application for rehearing within 20 days after the issuance of the decision. A request for rehearing is deemed denied unless the presiding officer grants the rehearing request within 20 days after its filing. Any party may file a petition for judicial review in the Iowa district court within 30 days after the issuance of the decision or within 30 days after the denial of the request for rehearing.¹⁷

cc:

Rachel Pang, Facility Cleaning Int., 10200 E. Girard Ave. B-400, Denver, CO 80231 (by Mail and AEDMS)

Jeffrey Koncsol, IWD (By AEDMS)

Rhonda Hauge, IWD (by AEDMS)

Julie Schaefer, IWD (By AEDMS)

Stephanie Goods, IWD (By AEDMS)

Edvonna Pack, IWD (AEDMS)

Lisa Gaeta, IWD (AEDMS)

Deborah Pendleton, IWD (AEDMS)

Vu Vo, IWD (AEDMS)

Shamar Hill, IWD (AEDMS)

Charles Mercer, IWD (AEDMS)

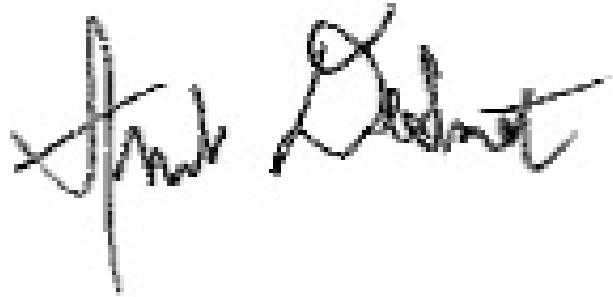
Roxana Marlene Devine, IWD (AEDMS)

¹⁶ IAC 871—23.19(7).

¹⁷ IAC 871—26.17(5).

Case Title: FACILITY CLEANING INTERNATIONAL, INC V. IOWA
WORKFORCE DEVELOPMENT
Case Number: 25IWDM0004
Type: Proposed Decision

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Amber DeSmet", written in a cursive style.

Amber DeSmet, Administrative Law Judge