

Iowa Department of Inspections and Appeals
Administrative Hearings Division
Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

Josh O’Neil dba Josh O’Neil Designs and)	
Josh O’Neil Designs LLC)	
1334 220 th St.)	Case No. 23IWDM0016
Shenandoah, IA 51601,)	
)	
Appellant,)	
)	
v.)	ADMINISTRATIVE LAW JUDGE
)	DECISION
Iowa Workforce Development,)	
)	
Respondent.)	

STATEMENT OF THE CASE

Josh O’Neil, the appellant, appealed from a decision by Iowa Workforce Development (IWD) that an employer-employee relationship existed between his businesses and Blake Luna and other workers. The matter was transmitted by IWD to the Administrative Hearings Division to schedule a contested case hearing. A telephone hearing was held on March 10, 2023. IWD was represented by its attorney, Jeffrey Koncsol. Field auditor Deborah Pendleton appeared and testified for IWD. O’Neil appeared and testified.

IWD submitted its 63-page Appendix, which includes the decision letter, the appeal letter, IWD’s synopsis, and other evidence. During or after the hearing, both parties submitted additional exhibits. O’Neil submitted a number of photographs from Facebook and copies of an “independent contractor agreement” signed by a few of his workers. IWD submitted documents from a related unemployment benefits case. These were all admitted.

ISSUES

Whether an employer-employee relationship existed between Josh O’Neil dba Josh O’Neil Designs, Blake Luna and/or other workers performing services for Josh O’Neil dba Josh O’Neil Designs.

Whether an employer-employee relationship existed between Josh O’Neil Designs LLC, Blake Luna and/or other workers performing services for Josh O’Neil Designs LLC.

FINDINGS OF FACT

A public tip in August 2022 led to an investigation of Josh O'Neil, Josh O'Neil Designs, and Josh O'Neil Designs LLC (collectively, O'Neil). Deborah Pendleton conducted the investigation.

In September, Pendleton spoke to O'Neil. He told her he handled designs and he had workers build based on his designs. He reported the workers were paid hourly for labor, with checks written every Friday. (App. 22).

Pendleton sent questionnaires to eleven of O'Neil's workers. Two responded: Denver Sickler and Tucker Scott.

Sickler reported he was a laborer who had performed work for O'Neil from May to August of 2021. He reported he obtained the job via application, although O'Neil said he's never had an application. He was paid hourly and reported to O'Neil. He performed work under the firm's name. He reported his work was reviewed by his supervisor and the supervisor had the right to direct and control the manner in which the services were performed. The firm had priority over his services. The firm assigned him work and decided how the work assignments were completed. If the work was not satisfactory, the firm could fire a worker. Sickler reported the firm provided equipment, supplies, materials, tools, and a vehicle. The firm required fixed hours of work and had policies and instructions to be followed. (App. 38-41; O'Neil testimony).

Scott reported much the same. (App. 42-46). O'Neil takes issue with Scott's responses because he believes the handwriting on the form is not Scott's but rather is Scott's mother's. One response on the sheet is, "I just received a ~~monthly~~ weekly check," and O'Neil believes this is proof Scott's mother filled out the form because one does not forget whether one received a weekly or monthly check. The undersigned also notes the form appears to have been faxed from a number belonging to an April L. Scott. These factors perhaps slightly diminish the weight assigned to Scott's form, except that Scott's responses are virtually identical to Sickler's. That corroboration offsets the other concerns.

Pendleton located some Facebook reviews of the business. (App. 48-49). There are some stray comments on posts that the tribunal does not assign much weight. In one, for example, O'Neil wrote, "The guys and I are busier than ever." IWD has highlighted that phrase, implying "the guys and I" are part of a concerted firm. The tribunal thinks this is probably a colloquial expression that doesn't mean a whole lot.

Pendleton found none of the workers had contractor's registrations. (Pendleton testimony). Pendleton found none of the workers acquired their jobs via bidding. (App. 31-36). O'Neil did not provide invoices for any worker. (App. 31-36). Pendleton did not find evidence of any of the workers hiring assistants. (Pendleton testimony).

O'Neil provided multiple checks he wrote to workers. In many of them, he wrote, "Payroll," in the comment line. Again, the tribunal thinks this is probably sloppiness more than proof of a

going business with employees. The check amounts do not appear to be standard among workers or even for the same worker week-to-week. There are a few checks with comments like, "Davison drywall" or "Johnson job," that appear to be for one job in whole. Those checks are also larger (four figures) than the ones with "payroll" or "labor" as a comment (three figures). Those larger, job-specific checks are not written to any of the workers at issue in this matter. The "Davison drywall" check is written to "Drywall Plus Tim Shackelford" and the "Johnson job" check is written to "Drywall Plus," for example. There is also an odd check written in December 2019 to Bennet Blane for "Christmas bonus" that the tribunal notes. (App. 50-62).

Pendleton compiled a table of the workers who were paid by O'Neil, which the tribunal reproduces on the next page.

Worker	2018		2019		2020		2021		Total Payment Count	Total Payments
	Payment Count	Sum of Payments	Payment Count	Sum of Payments	Payment Count	Sum of Payments	Payment Count	Sum of Payments		
Alan Dulley			20						20	\$
Avery Martin							19		19	\$
Bennet Blane			29		50		51		130	\$
Blake Luna	18								18	\$
Brad Riley	22		8						30	\$
Chris Swanson	3								3	\$
Connell Racine					1		7		8	\$
Dalton Dulley			21						21	\$
Dave Warkentien							7		7	\$
Denver Sickler							17		17	\$
Derek Anderson	22				22				44	\$
Douglas Miller	48		15						63	\$
Dusty Meyer					6				6	\$
Marcus Birt			2		18		11		31	\$
Skyler Fuller	16						4		20	\$
Tanner Peterson							22		22	\$
Tucker Scott			11						11	\$
Total	129		106	\$	97		138		470	\$

(App. 63).

Pendleton concluded seventeen workers should be classified as employees: Alan Dulley, Avery Martin, Bennet Blane, Blake Luna, Brad Riley, Chris Swanson, Connell Racine, Dalton Dulley, Dave Warkentien, Denver Sickler, Derek Anderson, Douglas Miller, Dusty Meyer, Marcus Birt, Skyler Fuller, Tanner Peterson, and Tucker Scott. (App. 29).

Pendleton concluded two factors indicated some independence for the above workers: (1) the workers provided some of the equipment necessary to complete the job, and (2) the workers had some flexibility in the schedule. But she concluded more factors supported a determination that they were employees:

- The workers performed duties in the regular service of the employer
- The work was performed under the name of the employer
- The service provided by the workers was an integral part of the business
- The workers did not have a financial investment in the business
- The workers could end the relationship without incurring liability
- The employer could fire the workers without incurring liability
- The workers had a continuing relationship with the employer
- The workers were paid on a regular basis
- The workers did not have a contractor's registration or invoice O'Neil for their work
- The workers did not have business insurance or worker's compensation insurance

(App. 29).

O'Neil submitted a number of exhibits at hearing. These included Facebook posts from some of the listed workers promoting their own work, seemingly separate from work done for O'Neil. Workers whose posts O'Neil submitted include Derek Anderson, Denver Sickler, and Chris Swanson. O'Neil also submitted independent contractor agreements signed by Tanner Peterson, Bennet Blane, Dave Warkentien, and Skyler Fuller.

O'Neil reported paying workers hourly depending on the work they did for him. He also testified workers were at a job site while he was testifying because he felt comfortable "turn[ing] them loose." (O'Neil testimony).

CONCLUSIONS OF LAW

For purposes of unemployment compensation, the term "employer" is defined under Iowa law as an employing unit that, in any calendar quarter in the current or preceding calendar year, paid wages for service in employment. Iowa Code § 96.19(16)(a). "Employment" is defined as service performed for wages or under any contract of hire, written or oral, express or implied. *Id.* § 96.19(18)(a). "The burden of proof shall rest with an employing unit . . . which considers

itself not an employer subject to the Act, to establish that it is not an employer subject to the Act by presenting proper records, including a record of the identity of the employees, number of individuals employed during each week, and the particular days of each week on which services have been performed, and the amount of wages paid to each employee.” Iowa Admin. Code r. 871-23.55(2).

“In the unemployment compensation context, it is well settled that the right to control the manner and means of performance is the principal test in determining whether a worker is an employee or independent contractor.” *Gaffney v. Dep’t of Emp’t Servs.*, 540 N.W.2d 430, 434 (Iowa 1995). “An independent contractor represents the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.” *Meredith Publ’g Co. v. Iowa Emp’t Sec. Comm’n*, 6 N.W.2d 6, 10 (Iowa 1942).

The factors used to determine whether a worker is an employee or independent contractor are set forth in the Iowa Administrative Code. See Iowa Admin. Code r. 871-23.19. I will now discuss the factors set forth in the administrative rule.

23.19(1).

“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. The right to discharge or terminate a relationship is also an important factor indicating that the person possessing that right is an employer. Where such discharge or termination will constitute a breach of contract and the discharging person may be liable for damages, the circumstances indicate a relationship of independent contractor. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools, equipment, material and a place to work to the individual who performs the services. 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. Professional employees who perform services for another individual or legal entity are covered employees.” Iowa Admin. Code r. 871-23.19(1).

The right-to-control factor tends to show these workers are employees. O’Neil had the right to discharge them. He had the right to control the manner in which their services were performed. He supplied tools, equipment, and material. There are facts relevant here that tend to show that the workers were independent contractors: workers were not always directed by O’Neil, and it may be that discharge would constitute a breach of contract. But on the whole, this factor tends to show the workers were employees.

23.19(2).

“The nature of the contract undertaken by one for the performance of a certain type, kind, or piece of work at a fixed price is a factor to be considered in determining the status of an independent contractor. In general, employees perform the work continuously and primarily their labor is purchased, whereas the independent contractor undertakes the performance of a specific job. Independent contractors follow a distinct trade, occupation, business, or profession in which they offer their services to the public to be performed without the control of those seeking the benefit of their training or experience.” *Id.* r. 871-23.19(2).

Many of the workers here worked for O’Neil continuously. Witness the several employees who received dozens of weekly paychecks from O’Neil. But there are some who received but a few paychecks. Generally, the tribunal finds a positive correlation between more paychecks and a greater likelihood of being an employee.

23.19(3).

“Independent contractors can make a profit or loss. They are more likely to have unreimbursed expenses than employees and to have fixed, ongoing costs regardless of whether work is currently being performed. Independent contractors often have significant investment in real or personal property that they use in performing services for someone else.” *Id.* r. 871-23.19(3).

There was no showing that these workers risked a loss. This factor tends to show they were employees.

23.19(4).

“Employees are usually paid a fixed wage computed on a weekly or hourly basis while an independent contractor is usually paid one sum for the entire work, whether it be paid in the form of a lump sum or installments.” *Id.* r. 871-23.19(4).

O’Neil testified he paid his workers on an hourly basis. This tends to show they were employees.

23.19(5).

“The right to employ assistants with the exclusive right to supervise their activity and completely delegate the work is an indication of an independent contractor relationship.” *Id.* r. 871-23.19(5).

Nothing indicated these workers could hire assistants. This tends to show the workers were employees.

Discussion.

A presumption exists in favor of a finding of employment. *Id.* r. 871-23.19(6). As the Supreme Court of Kansas has persuasively put it, “the goal is not to simply compare the number of factors favoring one result against the number of factors favoring the other result. To the contrary, we are tasked with viewing the factors as a whole.” *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 80 (Kan. 2014).

Here the tribunal finds these workers were employees. While the tribunal has some hesitancy about some of the workers who worked but a few weeks for O'Neil, his treatment of his workers tends to show that for the short while they were with him, they were employees. That is, he controls the work his workers do and has the ability to determine how the work is done. O'Neil has the burden to show otherwise and he has not met that burden. IWD's decision is affirmed.

DECISION

IWD's decision is affirmed. IWD shall take any steps necessary to implement this decision.

Dated this March 29, 2023.



Joseph Ferrentino
Administrative Law Judge

cc: Joshua O'Neil, 1334 220th St., Shenandoah, IA 51601, joshoneil@hotmail.com (by email and mail)

Lisa Irvin, lisa@neweratax.com (by email)

Brittany Spooner (by AEDMS)

Deborah Pendleton, IWD Lisa.Gaeta@iwd.iowa.gov (by AEDMS)

Barbara Corson, IWD Barbara.Corson@iwd.iowa.gov (by AEDMS)

Jeffrey Koncsol, IWD Jeffrey.Koncsol@iwd.iowa.gov (by AEDMS)

APPEAL RIGHTS

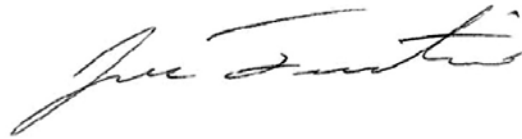
This decision constitutes final agency action.

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.

Case Title: JOSH O'NEIL DESIGNS LLC V. IOWA WORKFORCE
DEVELOPMENT
Case Number: 23IWDM0016
Type: Final Decision

IT IS SO ORDERED.



Joseph Ferrentino, Administrative Law Judge