

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

**Appeal Number: 12IWD025**

**Respondent (1)**

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**KIM DAVID & LORA DAVID, LLC**

**IOWA WORKFORCE DEVELOPMENT  
CHARLES RUMMERY, FIELD AUDITOR  
680 MAIN STREET 2<sup>ND</sup> FLOOR  
DUBUQUE IA 52001-6818**

JOE BERVID, IWD  
NICHOLAS OLIVENCIA, IWD  
CARIE O'BRIEN, IWD  
SUSAN DAMERON, 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.

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(Administrative Law Judge)

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SEPTEMBER 19, 2012

(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination

### **STATEMENT OF THE CASE**

Tabitha Schnittjer applied for unemployment insurance benefits, claiming Kim David and Lara David, LLC was her employer. IWD completed an investigation and determined an employer-employee relationship exists between Kim David and Lora David, LLC and its workers. The employer appealed.

IWD transferred the case to the Iowa Department of Inspections and Appeals, Division of Administrative Hearings to schedule a contested case hearing. A contested case hearing was held by telephone conference call on August 20, 2012. Kim and Lora David appeared and testified. Charles Rummery appeared and testified on behalf of IWD. The administrative file was admitted into the record.

### **ISSUE**

Whether an employer-employee relationship existed between Kim David and Lora David, LLC, Tabitha Schnittjer, and all other workers performing services for company.

## **FINDINGS OF FACT**

The Davids operate a fitness club, Dubuque Fitness-The Gym. The intent of the Davids was to have two types of employees: regular employees who work the front desk for regular hours and then independent contractors who would teach class (instructors) and act as personal trainers. The personal trainers would be responsible for seeking out their own clients and if they needed to miss a session they would have another trainer cover the session.

The Davids purchased the business in 2010. In 2011 they attempted to change the status of the employees as outlined above. An employee, \_\_\_\_\_, was considered to be an independent contractor. She was let go over performance issues. It was not a friendly parting. Ms. Schnittjer filed for unemployment benefits after her release.

Iowa Workforce Development field auditor Charles Rummery conducted an investigation to determine the status of workers at the Davids' business. At the conclusion of his investigation, Rummery determined an employer-employee relationship exists between Dubuque Fitness-The Gym and its workers. Rummery found that the employer has a continuing working relationship with the independent contractors. Another indication of an employer and employee relationship is that the employer pays the independent contractors' hourly wages for services performed at their facility. The employer provides the equipment and supplies to the independent contractors for them to perform their services.

Additionally the employer monitors independent contractors' activities by requiring them to turn exercising class timesheets and training session schedule sheets. The clients paid the employer directly for the training sessions and exercise classes they participate in. No information was provided by the parties showing the independent contractors' operate their own businesses or advertisement showing their services being offered to the public.

IWD sent the Davids a letter indicating the decision to find an employer-employee relationship existed between Dubuque Fitness-The Gym and those working in the facility. The Davids appealed.

In the hearing the Davids explained their intent in setting up an independent contractor status with the trainers and instructors. After the determination of employee-employer status was made known to them they contacted their accountant. They have made changes to their relationship with their employees to correctly set up the right relationship.

## REASONING AND CONCLUSIONS OF LAW

IWD oversees the unemployment compensation fund in Iowa, which is governed by Iowa Code chapter 96.<sup>1</sup> IWD's Director administers Iowa Code chapter 96 and is charged with adopting administrative rules.<sup>2</sup> IWD determines all issues related to employing units and employer liability, including the amount and rate of contribution and successorship.<sup>3</sup> IWD determined an employer-employee relationship exists between Dubuque Fitness-The Gym and its workers.

The governing statute defines an employer 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.”<sup>4</sup> An employing unit includes any individual or organization that employs one or more individuals performing services in Iowa.<sup>5</sup> The term “employment” is defined as service “performed for wages or under any contract of hire, written or oral, express or implied.”<sup>6</sup> 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.”<sup>7</sup>

A presumption exists that an individual is an employee if the individual receives services for compensation.<sup>8</sup> An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.<sup>9</sup> 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.<sup>10</sup>

In the unemployment compensation context, the right of control, as developed through the common law, is the principal test for determining whether a worker is an employee or independent contractor.<sup>11</sup> 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.<sup>12</sup>

In addition to the common law test, IWD has adopted a rule with factors to consider in determining whether a worker is an independent contractor or employee.<sup>13</sup> The factors include: (1) the right to control and direct the means and details by which the result is to be accomplished; (2) the right to discharge or terminate the relationship; (3) the

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<sup>1</sup> Iowa Code § 96.9(1).

<sup>2</sup> *Id.* § 96.11(1).

<sup>3</sup> *Id.* § 96.7(4).

<sup>4</sup> *Id.* § 96.19(16)a.

<sup>5</sup> *Id.* § 96.19(17).

<sup>6</sup> *Id.* § 96.19(18)a.

<sup>7</sup> *Id.* § 96.19(18)a(2).

<sup>8</sup> 871 IAC 23.19(6).

<sup>9</sup> Iowa Code § 96.19(18)f; *Id.* 22.7(3).

<sup>10</sup> 871 IAC 22.19(7).

<sup>11</sup> *Gaffney v. Dep't of Employ. Servs.*, 540 N.W.2d 430, 434 (Iowa 1995).

<sup>12</sup> 871 IAC 23.19(6).

<sup>13</sup> *Id.* 23.19.

furnishing of tools, equipment, materials, and a place to work; (4) the nature of the worker's contract for the performance of a certain type, kind or piece of work at a fixed price; (5) whether the worker is involved in distinct trade, occupation, business or profession; (6) payment of fixed or hourly wages; and (7) the ability of the worker to sustain a profit or loss.<sup>14</sup>

An independent contractor typically 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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup> Each day Dubuque Fitness-The Gym notifies the workers of the location where they are to perform the services and schedule the classes they are to teach.

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.<sup>19</sup> Independent contractors often have significant investment in real or personal property that they use in performing services for others.<sup>20</sup> There is no evidence Dubuque Fitness-The Gym workers have fixed, ongoing costs independent of the work they perform for Dubuque Fitness-The Gym.

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service are characteristic of an employer.<sup>21</sup> Dubuque Fitness-The Gym provides the tools and equipment its workers use.

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 in a lump sum or installments.<sup>22</sup> Dubuque Fitness-The Gym pays the workers by the hour, as opposed to by the class. The workers do not have the ability to make a profit or loss on a given project.

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<sup>14</sup> *Id.* 23.19(1)-(7).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* 23.19(1).

<sup>17</sup> *Id.* 23.19.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* 23.19(3).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* 23.19(4).

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.<sup>23</sup>

### **DECISION**

Iowa Workforce Development correctly determined that an employer-employee relationship existed between Dubuque Fitness-The Gym, \_\_\_\_\_, as its workers. Iowa Workforce Development shall take any steps necessary to implement this decision.

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<sup>23</sup> *Id.* 23.19(2).