

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

Appeal Number: 10-IWD-058

Respondent (2)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

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

**RUSTIN B. GATES
FREDA B. LYNN**

[REDACTED]

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

JULIE STAUB

[REDACTED]

2. Either party may petition the District Court WITHIN THIRTY (30) DAYS after the date below.

**IOWA WORKFORCE DEVELOPMENT
GERRY O'REILLY, FIELD AUDITOR
1700 S. 1ST AVENUE, STE 11B
IOWA CITY, IA 52240-6036**

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

(Administrative Law Judge)

August 26, 2010

(Decision Dated & Mailed)

JOE BERVID, IWD
SANDRA TAYLOR, IWD
SHANNON ARCHER, IWD
JODI DOUGLAS, IWD

STATEMENT OF THE CASE

As the result of an investigation, Iowa Workforce Development (the Department) issued a Notice of Employer Status and Liability dated April 30, 2010 finding that an employer-employee relationship existed between Rustin B. Gates and Julie Staub and the remuneration paid to Ms. Staub was reportable for unemployment insurance contribution purposes. Mr. Gates and his wife, Freda B. Lynn filed this appeal.

A telephone hearing was held on July 15, 2010. Freda Lynn and Rustin Gates appeared and participated as did Julie Staub. The Department was represented by attorney Emily Chafa. Field auditor Gary O'Reilly presented testimony for the Department. The Department submitted Exhibit A, pages 1-49, which was admitted into the record as evidence.

FINDINGS OF FACT

In April 2009 Freda Lynn and Rustin Gates engaged the services of Julie Staub to

provide care for their child, [REDACTED]. Lynn and Gates sent Staub a letter outlining their vision of the parties' relationship. That document provided:

We would like to hire you to be [REDACTED] primary caregiver during working hours for the academic year 2009-1010 (Summer 2009, Fall 2009, and Spring 2010). Specifically, this contract applies to the period from June 1, 2009 until May 31, 2010. also, for this same period, we would like to hire you to (1) photograph/document [REDACTED] and members of the Lynn/Gates family and (2) provide grocery shopping services for our family.

Specifically, we would like to hire you to help our family in the following ways:

- Provide love and care to [REDACTED]
- Teach/help [REDACTED] develop basic language and physical coordination skills
- Help discipline [REDACTED] in a way that is consistent with family views
- Supervise and be responsible for [REDACTED] activities (e.g. music classes)
- Grocery shopping for household (~1x/week)

Per your request, the following applies to this contract:

- Contract renewal will be considered in the spring of 2010.
- We will provide wireless access and a workspace in our home for you to use.
- We will pay on a bi-weekly schedule using personal check.
- We agree to have you transport [REDACTED] in your car with your car seat as you deem necessary.
- We agree to let you use childcare time to attend to personal business (sop long as [REDACTED] is being cared for).
- We agree to pay you \$1,900 per month to be paid over 12 months for 40 hrs of childcare per week.
- We agree to pay you \$100 per month for photographs/documentation of the Lynn/Gates Family.
- We agree to pay you as necessary for your shopping services.

Several notes and contingencies apply to this contract:

- *Flexibility and priorities:* While we are flexible with regards to your hours, note that one priority for the Lynn/Gates household is our teaching schedule during the Fall and Spring academic semesters.
- *Termination:* Lynn/Gates may terminate at will when unsatisfied with caregiving.

(Exh. A, p. 14).

IWD Field Auditor Gerry O'Reilly was assigned to investigate whether, for purposes of

unemployment benefits, Staub was an independent contractor or an employee of Lynn and Gates.¹ He began his investigation by contacting Rustin Gates who stated he and Lynn had hired Staub as an independent contractor to provide care for their son. O'Reilly then sent a *Report to Determine Liability* to Gates and Lynn to be filled out and a *Questionnaire for Determining Status of Workers* to Gates and Lynn and to Staub.

Lynn and Gates and Julie Staub filled out the questionnaires and returned them to O'Reilly. The answers provided by the Lynn/Gates family and Staub were consistent. The stated that the actual performance of services did not differ from the terms of the letter hiring Staub. They stated Staub usually worked around six hours per day and, while she picked █████ up at the Lynn/Gates home every morning, child care and other services were provided in many different places, not just the Lynn/Gates home. Both the family and Staub noted that Staub was entitled to and did provide child care and photography services for others without limitation or prior approval from █████ parents. They agreed that the Lynn/Gates family did not have priority over Staub's services. Were Staub to be absent for an extended period of time, it would be the Lynn/Gates family's responsibility to find replacement child care. The parties agreed that Lynn and Gates did not have the right to exercise control or direction over the manner in which Staub provided services and that either party could terminate the relationship at any time without penalty. They noted that Staub's services were contracted for a specific period of time and stated that she was paid in a lump sum. The Lynn/Gates family and Staub agreed that Staub provided her own vehicle and equipment while both parties provided supplies. Staub was not reimbursed for any expenses and she bore all risk of loss financially. Finally, the parties agreed that Staub was entitled to hire assistants to assist in the provision of services who were not subject to approval or control by █████ parents. (Exh. A, pp. 10-18).

O'Reilly compared the answers provided by the parties to hiring letter. He determined there were inconsistencies between the documents and gave more weight to the letter agreement than the questionnaire answers. Relying on the letter, O'Reilly determined Staub was paid a fixed wage on a periodic basis. O'Reilly also noted the family provided workspace and a wireless connection for Staub. Finally, O'Reilly arrived at the conclusion that the Lynn/Gates family retained the right to exercise control and direction over the manner in which Staub cared for and disciplined █████. Under these circumstances, O'Reilly determined Staub was an employee of the Lynn/Gates household rather than an independent contractor. (Exh. A, pp. 37-38).

At hearing Freda Lynn testified that Staub, who no longer provides care for █████, would pick the child up in her car and place him in a car seat she owned every morning. After that, Staub acted as a "traveling day care". Staub would take █████ to a child development home with which she was associated or to her apartment or to meetings. Lynn testified Staub spent 85-90% of her time outside of the Lynn/Gates home. (Lynn testimony).

¹ The record indicates O'Reilly's investigation also involved a previous individual who provided child care for the family prior to Ms. Staub's involvement. Lynn and Gates admitted that individual was an employee and they were liable for unemployment insurance contributions on the wages paid to her. The status of that individual is not at issue in this appeal. (Exh. A, pp. 45-46).

Lynn stated that Staub asked to be treated as an independent contractor. She has a photography business, a personal shopping business and sells Tupperware. Staub wanted the freedom to continue to pursue these opportunities while she also provided care for [REDACTED]. Lynn noted that while Staub rarely employed a substitute care provider for [REDACTED], she had the right to do so in the event she had an appointment or a photo shoot. (Lynn testimony).

Lynn also explained how the parties arrived at Staub's pay. She stated she and Gates set aside \$24,000 for one year of child care. They originally attempted to hire Staub as an employee but, upon her insistence, they agreed on the independent contractor arrangement. The parties agreed to pay the sum of \$22,800 for child care for the year and \$1,200 for photography, all of which would be doled out on a bi-weekly basis. Lynn noted that she and Gates did not always pay Staub bi-weekly but paid at her request. (Lynn testimony).

Lynn emphasized that Staub could and did pursue her other businesses and was entitled to watch other children while caring for [REDACTED]. She also noted that the workspace supplied by the family for Staub was the kitchen table which Staub used in her other businesses. Staub was never reimbursed for any expenses she incurred while caring for [REDACTED]; if she took [REDACTED] out to lunch, Staub paid the bill. Lynn testified that the arrangement was reviewed by the parties' tax professionals who advised they were properly treating Staub as an independent contractor. (Lynn testimony).

Julie Staub testified she wished to provide [REDACTED] care as an independent contractor. She wanted to continue to pursue her other business ventures while providing care for the child. Staub sought professional advice as to how to accomplish that and her arrangement with the Lynn/Gates household was reviewed and approved by a tax professional. (Staub testimony).

Staub also testified that only the time at which she picked up [REDACTED] and when she brought him home were subject to his parent's direction. Otherwise, she planned their days and his activities. She did take [REDACTED] to music lessons, at his parents' request, once each week. (Staub testimony).

Staub stressed that she did find substitute care providers when she was unable to care for [REDACTED]. While this did not happen often, it was both her right and her responsibility to find a replacement. When these occasions occurred, she would discuss the substitute with the family. She stated Gates did approve of the substitute providers. (Staub testimony).

REASONING AND CONCLUSIONS OF LAW

For purposes of unemployment compensation law, the term "employer" is defined to mean any employing unit which paid at least \$1,500 in wages in any calendar quarter during the current or preceding calendar year or which employed at least one individual

during the current or preceding calendar year.² In turn, “employment” means service “performed for wages or under any contract of hire, written or oral, expressed or implied.”³ The department presumes that services performed for wages constitute employment unless it is shown that the individual performing the services is and will continue to be free from control or direction.⁴

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.”⁵

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.⁶

The Department’s regulations set out in some detail the factors to be considered in determining whether a worker is an employee or an independent contractor.⁷ Factors that support the existence of an employer-employee relationship include:

- Right to discharge an employee without being held liable for damages for breach of contract;
- Furnishing of tools, equipment, material, and a place to work;
- Continuous performance of work for the employer;
- Payment of a fixed wage on a weekly or hourly basis.

Factors that support an independent contractor relationship include:

- Performance of a specific job at a fixed price;
- 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 his or her training or experience;
- Unreimbursed expenses and fixed, ongoing costs regardless of whether work is currently being performed;
- Significant investment in real or personal property that is used in performing services for someone else;

2 Iowa Code section 96.19(16)(a).

3 Iowa Code section 96.18(a).

4 Iowa Code section 96.19(6)(f); 871 IAC 22.7(3) (“Whenever an employing unit claims that any employment is not employment under this Act, the burden shall be on the employer to prove the exemption claimed.”).

5 *Gaffney v. Department of Employment Services*, 540 N.W.2d 430, 434 (Iowa 1995).

6 871 Iowa Administrative Code (IAC) 23.19(1).

7 See generally 871 IAC 23.19.

- Right to employ assistants with the exclusive right to supervise their activity and completely delegate the work.⁸

The regulations also provide that if, upon examination of the facts of a case, an employer-employee relationship exists, the designation or description by the parties of their relationship as anything other than an employer and employee is immaterial.⁹

In this case, as in the majority of cases where there is a dispute as to whether a worker is an independent contractor or an employee, there are facts that weigh in favor of finding an employee relationship and facts that weigh in favor of finding an independent contractor relationship. No one factor is dispositive and the relationship as a whole must be considered to determine the status of the parties' relationship.

Many facts weigh in favor of a finding Staub was an independent contractor. First, despite O'Reilly's determination she was employed on a continuous basis, the parties' agreement and their testimony clearly demonstrate her services were engaged for a specific "project"; providing care for █████ during the 2009-2010 school year. Additionally, Staub provided her own vehicle and car seat to transport █████. Staub cared for █████ some of the time in her own home. She clearly had a substantial financial interest in the "tools" necessary to provide traveling day care services. Further, Staub was not reimbursed for any expenses. All risk of financial loss from the relationship rested solely on her.

There are certain elements of the parties' relationship which are indicative of an employer/employee relationship; both the Lynn/Gates family and Staub had the right to terminate the relationship at any time without penalty, █████ family provided Staub with a workplace and wireless connection in their home and, despite their protestations to the contrary, the parties' agreement shows Staub was paid a lump sum per month which was divided into bi-weekly payments.

Considering the divergence in the evidence, this case truly does boil down to whether the Lynn/Gates family retained the right to direct and control both the result to be accomplished by Staub's services and the details and means by which that result was to be accomplished. I find they did not.

It is inherent in the parent/child care provider relationship that the child's family retains the right to define the parameters of the services provided. No reasonable parent would place his or her child in another's care without some instruction. In the context of unemployment law, then, it is clear that the Lynn/Gates family had control over the result to be accomplished; that █████ be safe and happy and his needs seen to while his family was working. The provision of the parties' agreement that Staub would provide discipline consistent with █████ family's values is indicative of this. So is the fact that Lynn/Gates household dictated when █████ was to be picked up and when he was to be returned home and requested that he be taken to music lessons once each week.

8 871 IAC 23.19.

9 871 IAC 23.19(7).

However, the preponderance of the evidence demonstrates that, while [REDACTED] parents retained the right to control the result of the services, they relinquished control to Staub control over the means by which she attained those results. Staub had discretion over [REDACTED] daily activities. Those activities were reported to his family after the fact for informational purposes but not for approval. Staub was free to provide her services at the Lynn/Gates home, her own home, a day care with which she was affiliated or anywhere else she might be on a given day. Freda Lynn testified Staub provided care for [REDACTED] outside of the Lynn/Gates home 85-95% of the time. Staub was free to, and did, pursue her other businesses while providing care for [REDACTED]; she operated a photography business, a personal shopping business and was a Tupperware representative. Further, Staub was free to take on the responsibility of providing care for other children while she watched [REDACTED]. Staub also had the responsibility of finding other, suitable care for [REDACTED] if, in her discretion, her activities prohibited her from providing care for the child. Once she did, she discussed her decision with [REDACTED] s parents who approved her choice of substitute. Finally, there is no evidence in this case of either Lynn or Gates providing detailed, daily instruction to Staub as to [REDACTED] care such as nap times, diet, etc.

The department's initial skepticism regarding the parties' relationship was not without reason. There is a long history in this country of misclassification of nannies, au pairs and babysitters as independent contractors when, in fact, they are subject to the direction and control of the charges' parents and, as such, are employees. However, Lynn, Gates and Staub were successful in structuring a unique type of care giving—a "traveling day care"—that fit the needs of all involved. In order to achieve this, [REDACTED] parents placed their faith in Staub and relinquished control over the details of [REDACTED] daily care. As a result, the parties correctly believed Staub to be an independent contractor and the department's decision that an employee/employer relationship existed must be reversed.

DECISION

The Department's decision that Julie Staub was an employee of Rustin Gates and Freda Lynn is REVERSED. The Department shall take any action necessary to implement this decision.

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