

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

Appeal Number: 10-IWD-002

Respondent (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

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

**SERVCORP LLC
FRANK COLOSI, VICE PRESIDENT
300 N. MARTINGALE ROAD
SCHAUMBURG, IL 60173-2407**

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

RUTH MEDBERRY


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

**IOWA WORKFORCE DEVELOPMENT
KIM CROSS, FIELD AUDITOR
1000 EAST GRAND AVENUE
DES MOINES, IA 50319-0209**

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

RUSS HOLLRAH
GENERAL COUNSEL
1850 K STREET NW, SUITE 390
WASHINGTON D.C. 20006

(Administrative Law Judge)

March 12, 2010

(Decision Dated & Mailed)

DAN ANDERSON, IWD
JOE BERVID, IWD
SANDRA TAYLOR, IWD
EMILY CHAFA, IWD
KAREN PFAB, IWD

STATEMENT OF THE CASE

As the result of an unemployment benefits claim filing and a missing wage investigation, Iowa Workforce Development (the Department) issued a Notice of Employer Status and Liability dated October 27, 2009 finding that an employer-employee relationship existed between ServCorp LLC (ServCorp) and Ruth Medberry and all other workers in Ms. Medberry's classification and requiring the business to report the compensation paid to the workers in that classification for unemployment purposes. ServCorp filed an appeal from the Department's decision.

A telephone hearing was held on February 1, 2010. ServCorp appeared through its General Counsel, Russ Hollrah. Mr. Hollrah presented the testimony of Frank Colosi,

Vice President of Promo Works, ServCorp's parent company. The Department was represented by attorney Emily Chafa. Field auditor Kim Cross presented testimony for the Department as did Ruth Medberry. The Department submitted Exhibit A, pages 1-64, which was admitted into the record as evidence.¹

FINDINGS OF FACT

Ruth Medberry applied for unemployment compensation benefits effective February 1, 2009. She named ServCorp, d/b/a Kit Moss Productions as her employer. As is its practice, the Department sent ServCorp notice of the claim. ServCorp responded that Medberry was not an employee of the company but worked as an independent contractor. Therefore, the Department initiated a missing wage investigation. The investigation was assigned to Field Auditor Kim Cross. (Exh. A, p.6; Cross testimony).

As part of her investigation, Cross sent out questionnaires to both ServCorp and Medberry. Medberry filled out her questionnaire and returned the same. (Exh. A, pp. 10-13). Cross received a telephone call from Russ Hollrah, General Counsel for ServCorp who informed her that the claimant was an employee of the business and he would not be filling out the questionnaire. Cross later received a telephone call from another field auditor who had been contacted by Frank Colosi, Vice President of ServCorp's parent company, stating that Medberry and other persons holding her position were independent contractors. Cross telephoned Colosi and then sent him the questionnaire which he filled out on behalf of ServCorp. (Exh. A, pp. 17-41, 49; Cross testimony).

In his response, Colosi provided some background as to the nature of the services performed by Medberry. He stated:

Worker was engaged to execute product-demonstration events for manufacturers. By way of background, the product-demonstration industry has been in existence for decades. It operates almost uniformly under the same basic business model; whereby manufacturers develop national marketing campaigns and contract with firms, such as [ServCorp], to find freelance product demonstrators who are willing to execute the campaigns at retail locations.

[ServCorp] offers self-employed product demonstrators referrals of opportunities to demonstrate products on behalf of manufacturers. It functions as a liaison between product demonstrators and the manufacturers that seek their services. As payment for its services, [ServCorp] splits with the product demonstrator, on a percentage basis, the fee that a manufacturer pays for executing the manufacturer's events.

¹ After the date of the hearing, the undersigned received additional documents sent by Ms. Chafa which she intended to become a part of the record. Since those documents were not received until after the close of the evidence in this matter, they have been placed in the administrative file but have not been considered by the undersigned.

Product-demonstration services commonly involve (i) handing out samples of a manufacturer's product to patrons at a store, or to individuals walking on a sidewalk, and (ii) offering brief product descriptions intended to persuade consumers to make a purchase. If the product is a device, the product demonstrator will demonstrate the device's operation.

(Exh. A, p. 21).

In answering the questionnaires, the parties were in agreement to some of the answers and they disagreed as to others. Both acknowledged that:

- Medberry performed services under the provisions of a written agreement;
- Medberry's actual working arrangements conformed to the parties' agreement;
- Medberry was engaged on a job-by-job basis;
- Medberry performed her services at retail stores;
- Medberry supplied her own vehicle and her own equipment;
- ServCorp did not reimburse Medberry for any expenses she might have incurred; and,
- Medberry could perform similar services for others.

(Exh. A, pp. 10-13, 17-41).

The parties disagreed as follows:

- Medberry stated she was required to perform the services personally and could not hire assistants while ServCorp stated she and others in the same position could and did hire assistants;
- Medberry claimed she was provided services and all advertising was done under ServCorp's name while ServCorp argued the services were performed and advertising supplied under the name of the manufacturer whose product Medberry happened to be demonstrating; (*Id.*).
- Medberry claimed she was paid by the hour while ServCorp stated she was paid by the product demonstration event;
- Medberry claimed ServCorp provided the supplies necessary to perform product demonstrations while ServCorp stated those supplies were provided by the product manufacturer;
- Medberry stated she bore no risk of financial loss while ServCorp stated she did;
- Medberry answered that ServCorp retained the right to direct and control the manner in which she performed services, while ServCorp disagreed;
- Medberry stated that ServCorp supervised her provision of supervisors by sending in "secret shoppers". ServCorp denied it did or even that it could directly supervise Medberry;
- Medberry answered that both she and ServCorp had the right to terminate their relationship at anytime without penalty while ServCorp argued the parties' agreement did not provide for such; and,
- Medberry claimed that ServCorp had a priority over her services, a fact which ServCorp denied.

(*Id.*).

Colosi provided Cross with a copy of an *Agreement Between Independent Contractor (you) And Kit Moss Productions, Inc.*² The document states that Medberry is engaged in and independent business. The document also specifically notes that Medberry is entitled to “be engaged in the same type of activities for other clients and that [ServCorp] is not or does not have to be [Medberry’s] only client or customer...”. The parties’ agreement also states that Medberry “retains the sole and exclusive right to control or direct the manner or means by which the work ... is to be performed.” ServCorp agrees to transmit any information from the product manufacturers or retailers regarding “in-store procedures”, dress or security guidelines. The contract states that Medberry was to be paid “by the job” based on a 6-7 hour shift and Medberry was responsible for supplying all equipment, tools, materials and supplies except those provided by the “manufacturer, broker or retailer”. The parties agreed in the contract that no workers’ compensation insurance would be obtained by ServCorp for Medberry and that Medberry had the right to work for any other retailer or agency, could refuse any assignment offered by ServCorp and could register as a product demonstrator with multiple agencies. The agreement required seven days notice prior to termination for any reason other than for cause. (Exh. A, p. 28).

Cross also spoke with Medberry and Colosi to discuss the parties’ relationship. (Cross testimony).

Based on the information she had collected, Cross reached the determination that an employer-employee relationship existed between ServCorp and Medberry. She rested her decision on the following facts:

- Medberry told Cross she was required to wear a specific uniform including a white blouse, black pants, apron and a hat. The apron and hat had to be purchased from ServCorp;
- Medberry told Cross if she was required to use her own equipment when samples needed to be served hot, she was paid an additional \$5;
- Medberry was given a card to purchase the product to be sampled and had no out-of-pocket expenses;
- Medberry was reimbursed for mileage if the site where she was to demonstrate the product was more than thirty miles from home; and,
- Medberry told Cross she could not employ assistants and that she had to work if she when scheduled to do so.

(Exh. A, pp. 49-50;; Cross testimony).

On October 27, 2009 the department issued its decision holding there was an employer-employee relationship between Ruth Medberry, and all others in her classification, and ServCorp. (Exh. A, p. 57). ServCorp filed this appeal. (Exh.A, p. 57, 61).

² ServCorp acquired Kit Moss Productions, Inc. in April 2008. (Colosi testimony). All references to Kit Moss Productions, Inc. contained in the contract have been changed to refer to ServCorp in this decision.

At hearing Medberry testified she began working for Kit Moss Productions, Inc. in December 2003. Over the years, Medberry has demonstrated pizza, chili, cheeses, chips, hand lotion, and Tylenol. She has worked in WalMarts, Fareway stores and Super Valu stores. She stated she was \$8 to \$10 per hour and received extra compensation if she had to drive more than thirty miles and/or had to use any of her own appliances. However, on cross-examination Medberry indicated she was actually paid \$60 for each event, i.e., when she was offered the job the supervisor would tell her it was “a \$60 event.” That amount was paid to her regardless of how long it took her to set up and tear down her stand for the event. Medberry stated she was allowed to refuse jobs, but if demonstrators did so, they would not be offered additional jobs. (Medberry testimony).

Medberry stated the company told her to buy a long-sleeved, white blouse, black pants, shoes, an apron and a ball cap. She purchased the apron from Kit Moss Productions, Inc. She testified that she would receive a box of supplies prior to an event with directions about how to conduct the demonstration. The supplies would include a hair net, paper cups or plates, napkins, and utensils. The instructions would indicate how her table was to be set up, i.e., what color table cloth, where to place items. She would also be directed as to how big the samples were to be and what she was to say. Medberry stated she would also receive a debit card to buy the product she would be demonstrating. (Medberry testimony).

Medberry admitted that she had never been on the premises of Kit Moss Productions, Inc. or ServCorp. She testified that her supervisor came to a demonstration on one occasion to observe and that the company employed “secret shoppers” who would observe demonstrations. (Medberry testimony).

Frank Colosi testified that he is a Vice President of Promo Works, the parent company of ServCorp. ServCorp acquired Kit Moss Productions, Inc. in April 2008 and that company’s operations were integrated into those of ServCorp’s. Colosi testified that prior to the acquisition, Kit Moss Productions had been involved in litigation in Illinois where it was determined product demonstrators were employees. Thereafter, the company began reporting wages in all states for unemployment purposes but for federal tax purposes product demonstrator were treated as independent contractors. Their wages were reported on 1099’s. Late in 2008 or early in 2009 the ServCorp consolidated its field offices and the pay responsibilities for all offices were transferred to his office in Schaumburg, Illinois. At that time Colosi’s office began looking more closely at how Kit Moss Productions had been treating the product demonstrators and determined they should be treated as independent contractors for all purposes. He noted that ServCorp is going through the process of attempting to have product demonstrators treated as independent contractors for unemployment purposes in all states. (Colosi testimony).

Colosi testified that ServCorp treats product demonstrators as independent contractors. They receive no benefits, no vacation and no training. The company also hires District Coordinators who are treated as employees who are non-exempt for purposes of the Fair Labor Standard Act; they have no management or supervisory responsibilities. District Coordinators report to Area Managers who are treated as FLSA-exempt

supervisory employees.³ (Colosi testimony).

Colosi explained that ServCorp is only an intermediary between product manufacturers and product demonstrators. The manufacturer sets the time and date of the event as well as the fee. The manufacturer provides the supplies and instructions for the event, while ServCorp simply puts the pieces together for the product demonstrators. The “secret shoppers” discussed by Medberry are contracted by the product manufacturers, not ServCorp. A specific uniform is usually dictated by the retail establishment where the demonstration will be held. WalMart requires the white blouse, black pants, shoes, apron and ball cap. (Colosi testimony).

Colosi emphasized the contract between Kit Moss Productions and Medberry. He noted that Medberry was free to hire assistants if she so pleased. He stated that had she done so, she would have been responsible for paying them. Colosi testified that ServCorp did not expect to be Medberry’s sole source of events. He noted that product demonstrators work for many different clients and pointed out resumes submitted to the department which reflect that fact. (Colosi 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.⁴ In turn, “employment” means service “performed for wages or under any contract of hire, written or oral, expressed or implied.”⁵ 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.⁶ Iowa law defines an employee as “[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee....”⁷

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.”⁸

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

³ Colosi noted that the supervisor Medberry stated stopped in to observe her demonstration on one occasion lived in the immediate area. He stressed that over all the years Medberry accepted events from Kit Moss Productions and ServCorp, a supervisor visited her event on only that one occasion.

⁴ Iowa Code section 96.19(16)(a).

⁵ Iowa Code section 96.18(a).

⁶ 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.”).

⁷ Iowa Code section 96.19(18)(2).

⁸ *Gaffney v. Department of Employment Services*, 540 N.W.2d 430, 434 (Iowa 1995).

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.⁹

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.¹⁰ 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;
- Right to employ assistants with the exclusive right to supervise their activity and completely delegate the work.¹¹

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.¹²

Here, Medberry furnishes her own equipment and vehicle and while the manufacturer whose product she demonstrates might furnish supplies appropriate for the specific product and the retailer might furnish the place to work, ServCorp does not. Further, Medberry is employed on an event-by-event basis and is paid a fixed fee regardless of how long the event takes from start to finish. While she does receive extra pay if she has to drive any distance or if she has to cook for a demonstration, that pay is also at a fixed rate regardless of the distance or how much cooking is involved. Medberry is free to accept or reject events. She can work for other, similar businesses and ServCorp

9 871 Iowa Administrative Code (IAC) 23.19(1).

10 See generally 871 IAC 23.19.

11 871 IAC 23.19.

12 871 IAC 23.19(7).

has no claim of priority on her services. Medberry can hire assistants to help her and, if she does so, they would be under her control rather than under the control of ServCorp.

Further, while it is clear that both the product manufacturers and retailers exert significant control and direction over Medberry by requiring certain dress and providing specific instructions as to how to set up the demonstration, sample size and talking points, ServCorp does not. These factors lead to the conclusion that Medberry was an independent contractor.

Courts in other jurisdictions have considered the status of product demonstrators as employees or independent contractors for the purpose of unemployment compensation insurance coverage. The outcomes of those cases support the conclusion reached here. While courts in Arkansas, Washington, Illinois and Missouri have determined that product demonstrators operating under facts similar to those at hand were employees, in each of those cases, the unemployment laws of the state in question provide a three-prong test for determining the status of a worker.¹³ Those statutes require a finding that an individual is an employee unless he or she has been and will continue to be free from control and direction, the services performed by the individual are either outside the usual course of the business for which the services are performed or are performed outside the places of business of the enterprise involved, and the worker is customarily engaged in an independently established trade or occupation of the same nature as that involved in the services performed.¹⁴

On the other hand, courts in Mississippi and Utah have held that product demonstrators are independent contractors.¹⁵ Both of those jurisdictions require, as does Iowa, that the relationship be reviewed under common law rules applicable to the employer-employee relationship.¹⁶ Finally, the Department of Employment Security in Minnesota has adopted a specific rule stating that product demonstrators “are statutory employees even though they are independent contractors under common law rules.”¹⁷

13 *Barb's 3-D Demo Service v. Arkansas Employment Security Dep't.*, 69 Ark.App. 350, 13 S.W.3rd 206 (2000); *Jerome v. Employment Security Dep't.*, 69 Wash.App. 810, 850 P.2d 1345 (1993); *Jack Bradley, Inc. v. Dep't. of Employment Security*, 204 Ill.App.3d 708, 562 N.E.2d 345 (1990); *Sample & Sell, Inc. v. Labor and Industrial Relations Commission*, 764 S.W.2d 109 (Mo.App. 1988).

14 *Barb's 3-D Demo Service v. Arkansas Employment Security Dep't.*, 69 Ark.App. at 357, 13 S.W.3rd at 210 citing Ark.Code Ann§11-10-210(e) (Repl. 1996)); *Jerome v. Employment Security Dep't.*, 69 Wash.App. at 814, 850 P.2d at 1347 (citing RCW 50.04.140(1)); *Jack Bradley, Inc. v. Dep't. of Employment Security*, 204 Ill.App.3d at 710, 562 N.E.2d at 348 (citing Ill.Rev.Stat.1989, ch 48, par.322, §212); *Sample & Sell, Inc. v. Labor and Industrial Relations Commission*, 764 S.W.2d at 11 (citing V.A.M.S. §288.034, subd. 5)).

15 *Mississippi Dep't of Employment Security v. Product Connections, LLC*, 963 So.2d 1185 (Miss.App. 2007); *Taster's Ltd., Inc. v. Dep't of Employment Security*, 863 P.2d 12 (UtahApp. 1993)

16 *Mississippi Dep't of Employment Security v. Product Connections, LLC*, 963 So.2d at 1186 (citing Mississippi Code Annotated Section 71-5-11J(14)(Supp.2006)); *Taster's Ltd., Inc. v. Dep't of Employment Security*, 863 P.2d at 27-28 (citing Utah Code Ann. §35-4-22(j)(5)(Supp.1989)).

17 *A-Plus Demonstrations, Inc. v. Commissioner of Jobs and Training*, 494 N.W.2d 522, 524 (Minn.App. 1993)(citing Minn.R. 3315.0515 (1988)).

The department's rules provide a rebuttable presumption that services performed for remuneration constitute employment.¹⁸ In this case, ServCorp has successfully rebutted that presumption. Medberry is an independent contractor.

DECISION

The Department's decision that Ruth Medberry was an employee of ServCorp is REVERSED. The Department shall take any action necessary to implement this decision.

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