

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

Appeal Number: 11IWD007

Respondent (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**ZOE INSTITUTE
SHERRY MORTON, PRESIDENT
610 TIMEA STREET STE 76
KEOKUK, IA 52632**

**IOWA WORKFORCE DEVELOPMENT
ROSE FISCHER, INVESTIGATOR
1000 EAST GRAND AVENUE
DES MOINES, IA 50319**

JOE BERVID, IWD
NICHOLAS OLIVENCIA, IWD
PATRICIA HEINRICH, IWD
JODI DOUGLAS, IWD
TARA KNOCHE, PARTY

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.

(Administrative Law Judge)

September 30, 2011

(Decision Dated & Mailed)

Iowa Code section 96.7-4 – Employer Liability Determination

STATEMENT OF THE CASE

The misclassification unit for Respondent Iowa Workforce Development (“IWD”) initiated an investigation of the relationship between Appellant Zoe Institute (“Zoe”) and Tara Knoche. IWD issued a decision on May 1, 2010 finding an employer-employee relationship existed between Zoe and Knoche that Zoe was liable for unemployment insurance contributions effective May 1, 2010. Zoe timely 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 on July 19, 2011. Attorney Richard Fenseke represented Zoe. Sherry Morton, Cynthia Bergman and Patti Lindley appeared on behalf of Zoe. Attorney Nicholas Olivencia represented Respondent Iowa Workforce Development (“IWD”). Rose Fischer and Tara Knoche appeared and testified on behalf of IWD. Exhibit A, with documents 1 through 65 and 16A through 19A, was admitted into the record. During the direct examination of Knoche, Knoche raised a potential conflict-of-interest with Fenseke’s representation of Zoe. Fenseke requested a continuance to explore the conflict. Fenseke determined a conflict existed and withdrew from the case. The hearing was continued to September 19, 2011.

The contested case hearing resumed on September 19, 2011. Attorney Artemio Santiago represented Zoe. Bergman, Chelsie Morton, Lindley, and Sherry Morton appeared and testified on behalf of Zoe. Olivencia represented IWD. Knoche appeared and testified on behalf of IWD. Fischer appeared on behalf of IWD.

ISSUE

Whether there was an employer/employee relationship between Zoe Insitute and Tara Knoche.

FINDINGS OF FACT

Knoche has twenty-three years experience as a cosmetologist and is licensed in Illinois and Iowa. Knoche has an Iowa cosmetology instructor's license, but is not licensed as an instructor in Illinois. Knoche operates a salon in Warsaw, Illinois and is currently an employee of American Hair Academy, where she works as a cosmetology instructor.

Sherry Morton operates Millennium Health and Fitness, Inc. ("Millennium"). Sherry Morton decided to open Zoe as a beauty school. Zoe offers cosmetology and nail technician diplomas. Zoe opened in May 2010 and is located in the same building as Millennium.

Chelsie Morton is Sherry Morton's daughter. Chelsie Morton runs the daily operations at Zoe as its administrator. Chelsie Morton commenced her employment for Zoe in April 2010.

Cynthia Bergman also works for Sherry Morton. Bergman assisted Sherry Morton in establishing policies and procedures for Zoe. Bergman testified she was not involved in daily activities or any classroom instruction at Zoe.

While Knoche was working for another beauty school Sherry Morton contacted Knoche and asked her to work as instructor at Zoe. Knoche agreed to help Sherry Morton establish the school. Sherry Morton testified that during an Advisory Board Meeting in October 2009 Knoche recommended the Milady Program, which Zoe implemented for its curriculum. The Milady Program contained an instructor's manual, a book for the students, and compact discs with the tests for the students.

Sherry Morton testified that in exchange for their tuition, students of the school received a book from the Milady system, a kit with scissors, and 2,100 hours of instruction.

Bergman negotiated and drafted an Independent Contractor Agreement ("Agreement") with Knoche. Knoche testified she had some input into the drafting of the Agreement, including her pay and the method by which she would perform her services. Bergman and Sherry Morton testified Zoe offered Knoche 50% of the tuition for each student who enrolled in Zoe. Bergman and Sherry Morton reported Knoche wanted guaranteed compensation of \$17 per hour. The Agreement provided that Knoche was to be paid \$17 per hour, for up to 24 hours per week. Knoche could substitute for other instructors to

increase her number of hours. If students failed to attend the school or were behind on their tuition payments, Knoche's compensation was not effected.

Cosmetology instruction occurred every Monday, Wednesday, Thursday and Friday from 7:30 a.m. until 4:00 p.m., and on Tuesday from 11:00 a.m. until 7:00 p.m. Neither party could assign or delegate its duties without the prior written consent of the other party. If Knoche was unable to teach due to illness or other reason, she was to arrange for a substitute instructor to teach at Zoe.

The Agreement required Knoche to develop a lessons plan in accordance with Iowa law. The lesson plans had to be filed with Zoe and were considered proprietary to Zoe. Knoche reported that Iowa law required Zoe to retain the lesson plans.

Knoche had the right to perform professional services for other businesses, but was required to maintain a current cosmetology instructor license and to pay her own expenses to and from work. All of the supplies used for teaching the students and student records were Zoe's property.

Zoe did not restrict Knoche from working elsewhere. Knoche agreed she was able to work at her own business while working for Zoe.

The parties dispute how Knoche's hours of work were determined. Knoche reported she was originally to work forty hours per week, which was reduced to twenty-four hours. Bergman testified the initial draft of the Agreement stated that Knoche would work 7:30 a.m. through 4:30 p.m. Tuesday through Saturday. Bergman reported Knoche wanted to work 7:30 a.m. to 4:00 p.m. Monday, Wednesday, Thursday and Friday, and from 11:00 a.m. to 7:00 p.m. on Tuesday. Bergman researched other beauty schools and found that most were closed on Monday, but open on Saturday.

After Knoche commenced her instructor position a strain developed between Zoe and Knoche. Knoche believed she would have complete freedom to instruct under Iowa law, as set forth in the Agreement. Knoche reported that after she commenced working for Zoe she had no control over instruction. Knoche stated all of her teaching materials tests were reviewed by Chelsie Morton and Sherry Morton. Knoche testified Sherry Morton developed lessons plans to be used in instructing the students.

Knoche testified that Chelsie Morton insisted on instructing the nail technician students herself for the first month. Knoche reported Chelsie Morton determined the assignments the students would receive and administered tests to the students without Knoche's input. Knoche testified she told Chelsie Morton she was violating Iowa law because she was not licensed.

Chelsie Morton testified she filed documents in the student files, entered grades into the electronic grade book and managed the time clock for the students. Chelsie Morton denied grading student tests or homework.

Knoche testified Sherry Morton would show up in her classroom and give her own independent assignments to the students, including hair styling contests. Sherry Morton testified she has been a guest speaker for the students on how to start a business, but reported the instructor was always present when she spoke with the students. Sherry Morton denied preparing lesson plans or making changes to lesson plans.

Knoche stated she attended daily meetings with Bergman and Chelsie Morton. During the meetings Knoche would present ideas, but Zoe would not follow her recommendations.

Knoche was only paid for the hours she worked. Knoche wrote down her hours and gave her hours to Bergman or Chelsie Morton for payment. Knoche testified she did not have the ability to earn more income working for Zoe. The Agreement provided Knoche with the right to earn more income from Zoe by working as a substitute.

Bergman and Sherry Morton testified that when Knoche commenced her work she received four keys to the outside door, the classroom, the supply room and the Zoe office where the student files were kept. Bergman could not recall if she gave Knoche the code for the alarm system. Sherry Morton recalled giving Knoche the general code for the building alarm system. Sherry Morton denied restricting when Knoche could be in the building. According to Sherry Morton, Knoche could have been in the building at 6:00 a.m. or at midnight.

Knoche denied having access to Chelsie Morton's office where the student files were kept, the outside door and the supply room. Knoche testified she only had one key to the classroom and did not have the code to the building alarm. She stated the overhead projector use used was locked and she did not have a key to the room. Knoche claimed she did not have access to the students' tests, which were locked in Chelsie Morton's office. Knoche stated she could not instruct the students during hours outside of the regular schedule because she had no exterior key to the facility.

Chelsie Morton agreed the student files were located in her office, which is locked. Chelsie Morton stated Iowa law required the files to be locked, but Knoche had a key to her office. Chelsie Morton reported that a key to the file cabinets containing the student files was kept in her office above the file cabinets.

Lindley works for Millennium, which is located in the same building as Zoe. Lindley testified that Knoche brought a compact disc to her and asked her to print off tests and information for the students. Lindley stated she only received direction to print off tests and information from Knoche.

Chelsie Morton testified Knoche used a substitute, Jennifer Wilkerson, on two occasions. Sherry Morton testified Zoe never denied a substitute candidate Knoche presented. She stated the only requirement was that the substitute be licensed. According to Chelsie Morton, the first time Knoche used Wilkerson as a substitute Knoche paid Wilkerson directly. Chelsie Morton testified Zoe paid Wilkerson the

second time because Wilkerson complained to Zoe that Knoche did not pay her timely. Knoche testified that initially she was able to find her own replacement, but later she could not, and then Zoe took the money used to pay the substitute out of her pay. During cross-examination Knoche testified that a substitute was hired twice to work for her and the substitute's pay was deducted from her pay.

Knoche was not restricted from hiring an assistant. She reported she could not afford to hire an assistant at the rate she was being paid.

Sherry Morton testified Knoche brought her own shears and hair color to class. When Knoche taught a clinic on hair coloring, she let the students color her hair with Redken products. The parties agreed Knoche was not reimbursed for expenses. Knoche reported she did not incur any expenses to perform her instruction.

Knoche denied bringing her own shears and clippers to class. She said the only items she brought to class were a tablet and a pen. Knoche reported Zoe provided the instructor's manual for Knoche and old movies from Dayton's. Knoche testified that any supplies had to be obtained through Chelsie Morton or Bergman.

Zoe sold product to retail customers at the school. Knoche reported she did not have the ability to sell retail product at Zoe.

Chelsie Morton reported Knoche took the students on three field trips to Normal, Illinois, Quincy, Illinois and to Knoche's Illinois salon. Chelsie Morton reported Knoche took the students to her salon to show them her computer software and to complete a pedicure. Chelsie Morton stated the trips were educational in nature. Chelsie Morton attended the first field trip where the students went to a beauty supply store.

Knoche denied taking three trips with the students. She stated she took the students on one field trip and that Chelsie Morton insisted on coming. Knoche denied taking her students to her salon to watch a pedicure. Knoche reported it would be illegal to provide instruction to the students in Illinois because she was not licensed as an instructor in Illinois. Knoche testified all instruction occurred in Zoe's building.

Chelsie Morton testified she observed Knoche violate Iowa law by releasing the students fifteen minutes to one hour early from class and later punching out their time cards. Chelsie Morton reported the students were provided with a thirty minute lunch break and on several occasions Knoche would allow the students to have a sixty minute lunch break and Knoche punched the students' timecards early. Knoche testified she requested Zoe move the time clock out of Chelsie Morton's office, but Zoe refused.

Chelsie Morton reported she did not speak to Knoche the first time she observed Knoche punch out the students incorrectly. She stated she spoke with Knoche on the second occurrence, and told Knoche the students needed to attend the training a certain number of hours. Chelsie Morton testified Knoche stated she would stop. Zoe did not contemporaneously document the conversation or alleged problems with Knoche.

Knoche denied releasing the students early and punching their timecards. She testified that if the students were released early they were released by Chelsie Morton.

Zoe terminated the Agreement during a meeting between Bergman and Knoche on July 1, 2010. Lindley, who works for Sherry Morton, but not Zoe, served as a witness during the meeting. Bergman reported she terminated Knoche for releasing the students early and punching their timecards incorrectly in violation of Iowa law. Zoe did not provide any documentation to IWD during its investigation showing Knoche had been terminated for violating Iowa law.

Bergman reported that when she terminated the Agreement Knoche returned all four keys. Lindley testified she witnessed Knoche return the keys. Bergman did not keep any documentation showing she gave Knoche the keys or that Knoche returned the keys.

Zoe did not report Knoche's violations of Iowa law to the Iowa Board of Cosmetology and Health Sciences ("Board"). Knoche did not report her observed violations of Iowa law to the Board.

After Zoe terminated Knoche's Agreement, IWD's Misclassification Unit commenced an investigation to determine whether Knoche was properly classified by Zoe as an independent contractor. Fischer interviewed Sherry Morton, Bergman, and Knoche. Each party completed a Questionnaire for Determining Status of Workers. Fischer also reviewed the Agreement.

Fischer determined Knoche was an employee of Zoe because: (1) the Agreement was for a set period of time; (2) the time of service was set by Zoe because Knoche did not have a key to the building; (3) the classroom, supplies and teaching materials were provided by Zoe; (4) licensure is incidental to the service provided because Iowa law requires a teacher to have specific credentials; (5) teaching is a normal routine of the cosmetology school, Knoche represented Zoe, not herself and her lesson plans became Zoe's property; (6) the Agreement indicated Knoche could perform services for other companies and operated her own salon in Warsaw, Illinois, but did not provide cosmetology instruction to others and she had to schedule her salon appointments outside of the hours assigned by Zoe, which indicates Zoe had the right to first service; and (7) all records remained Zoe's property. Fischer found Zoe provided direction and control by setting the location and hours of service, providing teaching materials, retaining ownership of all lesson documents and supervising Knoche on a daily basis.

REASONING AND 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

¹ Iowa Code § 96.9(1).

² *Id.* § 96.11(1).

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 An employer is defined 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.”⁴ An employing unit includes any individual or organization that has in its employ one or more individuals performing services for it in Iowa.⁵ The term “employment” is defined as service “performed for wages or under any contract of hire, written or oral, express or implied.”⁶ 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.”⁷

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.⁸ 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.⁹ IWD has also adopted rules with factors to consider in determining whether a worker is an independent contractor or employee.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

The right to discharge or terminate a relationship is “an important factor indicating that the person possessing that right is an employer.”¹² If the discharging party may be liable for damages for breach of contract, the circumstances are indicative of an independent contractor relationship.¹³

³ *Id.* § 96.7(4).

⁴ *Id.* § 96.19(16)a.

⁵ *Id.* § 96.19(17).

⁶ *Id.* § 96.19(18)a.

⁷ *Id.* § 96.19(18)a(2).

⁸ *Gaffney v. Dep’t of Employ. Servs.*, 540 N.W.2d 430, 434 (Iowa 1995).

⁹ 871 IAC 23.19(6).

¹⁰ *Id.* 23.19.

¹¹ *Id.* 23.19(1).

¹² *Id.*

¹³ *Id.*

The furnishing of tools, equipment, materials, and place to work to the individual who performs the service are characteristic of an employer.¹⁴ “In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, that individual is an independent contractor.”¹⁵

One factor includes the nature of the worker’s contract for the performance of a certain type, kind or piece of work at a fixed price.¹⁶ 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.¹⁷

An independent contractor 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.¹⁸ 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.¹⁹ Professional employees who perform services for another individual or business are covered employees.²⁰

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.²¹ Independent contractors have the right to employ assistants with the exclusive right to supervise their activity and completely delegate work.²²

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.²³ Independent contractors often have significant investment in real or personal property that they use in performing services for others.²⁴

Services performed by an individual for remuneration are presumed to be employment, unless proven otherwise.²⁵ An individual or business bears the burden of proving the individual or business is exempt from coverage under Iowa Code chapter 96.²⁶ If an

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* 23.19(2).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* 23.19(1).

²⁰ *Id.*

²¹ *Id.* 23.19(4).

²² *Id.* 23.19(5).

²³ *Id.* 23.19(3).

²⁴ *Id.*

²⁵ *Id.* 23.19(6).

²⁶ Iowa Code § 96.19(18)*f*; *Id.* 22.7(3).

employer-employee relationship exists, the designation or description of the relationship by the parties as anything other than an employer-employee relationship is immaterial.²⁷ In this case Zoe bears the burden of proving it is exempt from coverage under Iowa Code chapter 96.

Knoche works as a cosmetologist and a cosmetology instructor. This case concerns work she performed as a cosmetology instructor for Zoe. While Knoche continued to operate her own salon as a cosmetologist during her time she worked for Zoe, Knoche did not perform any work for other cosmetology schools.

Both Knoche and Zoe had the right to terminate the Agreement. The Agreement does not contain a provision stating that if Knoche were in breach, she could be liable for damages. The Agreement provided that the parties could not assign their rights or delegate their duties without the prior written consent of the other.

It is undisputed Knoche was paid on an hourly basis for the work she actually performed, as opposed to one sum for the entire work. The school could have elected to pay Knoche \$5,000 to teach the course. Instead, it agreed to pay her \$17 per hour, and only for the hours she actually worked. Knoche was paid irrespective of whether students paid their tuition. She did not share any of the risk with Zoe if students failed to pay their tuition or attend.

Knoche had unreimbursed expenses of traveling to and from the school. She did not have fixed, ongoing costs for the cosmetology instruction, regardless of whether the instruction was being performed.

The Agreement did not preclude Knoche from hiring assistants and from supervising their activity. Knoche testified she did not hire any assistants because she could not afford to. The Agreement required Knoche to find her own substitute if she were absent from class.

Zoe furnished the overhead projector and facilities where Knoche instructed the students. Zoe also furnished the Milady instructor manual and other supplies. There is a dispute as to whether Knoche furnished her own shears, clippers, curling iron, blow dryer, and flat iron. Even assuming Knoche furnished her own shears, clippers, curling iron, blow dryer, and flat iron, these items are similar to a personal tool kit kept by carpenters working in the construction trade. Knoche was not allowed to sell retail products at Zoe, only Zoe sold retail products. Zoe also provided the supplies the students used during instruction. Knoche did not supply the students' scissors, shampoo, or other supplies.

This case involves issues of credibility. Knoche's testimony is inconsistent with Sherry Morton's, Chelsie Morton's, Lindley's, and Bergman's testimony. There are many factors used when considering the credibility of witness testimony. Some of the most common standards are as follows:

²⁷ 871 IAC 22.19(7).

1. Whether the testimony is reasonable and consistent with other evidence you believe.
2. Whether a witness has made inconsistent statements.
3. The witness' appearance, conduct, age, intelligence, memory and knowledge of facts
4. The witness' interest in the trial, their motive, candor, bias and prejudice.²⁸

Certainly Knoche has an interest in this matter. If she was an employee of Zoe, then she may be entitled to unemployment insurance benefits following her discharge. Sherry Morton, Bergman, and Chelsie Morton also have an interest in this matter. While Lindley is not an owner of Zoe, she is an employee of Sherry Morton's. If Knoche is properly classified as an employee of Zoe, then Zoe is responsible for paying unemployment insurance contributions.

Knoche contends Zoe controlled her work and access to the building. Zoe contends Knoche prepared her own lesson plans and had access to the building. Several factors weigh against Zoe in this case. Zoe did not keep any contemporaneous records showing that keys were delivered to Knoche or returned from Knoche when Zoe terminated the Agreement.

Sherry Morton, Bergman and Chelsie Morton testified Knoche was terminated for allowing students to leave instruction early or return late from lunch and inaccurately recording the student's instruction on their timecards, in violation of Iowa law. Zoe did not mention this to Fischer during the investigation.

Zoe is licensed by the Board as a cosmetology school. Zoe did not report the alleged violation to the Board. Likewise, Knoche reported Zoe and Chelsie Morton were violating Iowa law because Chelsie Morton was providing instruction to the students and grading assignments and tests when she was not licensed. As licensees, Zoe and Knoche may be liable for disciplinary action for "failure to report another licensee to the board of any violations listed" in the Board's rules, pursuant to Iowa Code section 272C.9.²⁹ Neither licensee followed the mandate to report the alleged violations they saw to the Board.

Zoe bears the burden of proof in this case. Zoe had the opportunity to provide information to IWD during its investigation showing Knoche was an independent contractor. Zoe did not keep any contemporaneous records showing Knoche received and returned keys to the various rooms in the building. Zoe did not keep any contemporaneous records about the problems it experienced with Knoche, or report those problems to IWD during its investigation.

²⁸ *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996).

²⁹ 645 IAC 65.2(31).

Zoe paid Knoche on an hourly basis. While Sherry Morton and Bergman insist Knoche wanted to be paid on an hourly basis, Zoe could have paid Knoche a flat rate for teaching the course. Knoche shared no risk if students failed to attend or pay their tuition.

Knoche did not provide her own teaching manual. Zoe provided the instructor's manual, student books, and student supplies. The lesson plans and student records were proprietary to Zoe. If Knoche wants to use the lesson plans in the future, she must first obtain the permission of Zoe before using any of the lesson plans she generated.

The Agreement required Knoche to work specific hours for Zoe. She was not free to set her own hours of classroom instruction with the students, the Agreement set forth the hours she was to work. While Knoche operates a beauty salon, she had to arrange her work at her salon around her schedule for Zoe. I conclude IWD correctly found an employer-employee relationship existed between Zoe and Knoche.

DECISION

Iowa Workforce Development correctly determined that an employer-employee relationship existed between Zoe and Knoche. Iowa Workforce Development shall take any steps necessary to implement this decision.

hlp