

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**MARC W. KNICKERBOCKER,**

Complainant,

v.

**ABSOLUTE DISTRIBUTION, INC.,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10106223

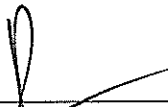
**PLEASE TAKE NOTICE** that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on February 21, 2008, by Christine Marbach Kellett, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE KUMIKI GIBSON, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

**PLEASE TAKE FURTHER NOTICE** that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is

the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

**ADOPTED, ISSUED, AND ORDERED**, this 17th day of March, 2008.

  
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KUMIKI GIBSON  
COMMISSIONER

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

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MARC W. KNICKERBOCKER,  
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ABSOLUTE DISTRIBUTION, INC.,  
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RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER

Case No. 10106223

SUMMARY

Complainant, who delivered newspapers for Respondent, charged Respondent with unlawful discriminatory practices in employment on the basis of disability and retaliation. Respondent challenged the jurisdiction of the Division over the complaint on the basis that Complainant was an independent contractor. The evidence produced at the public hearing established Complainant was an independent contractor. The complaint should be dismissed.

PROCEEDINGS IN THE CASE

On June 14, 2005, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Peter Gemellaro, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on May 10, 11, 2007, and July 17, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by Ronald R. Benjamin, Esq. Respondent was represented by Jeffrey M. Raider, Esq.

Permission to file post-hearing briefs was granted. Respondent timely filed a post hearing brief.

When ALJ Gemellaro left the Division, the case was reassigned to Christine Marbach Kellett, another ALJ with the Division.

By letter dated September 11, 2007, Complainant’s attorney requested an administrative convenience dismissal for the purpose of filing in federal court. On September 12, 2007, Respondent’s attorney opposed the dismissal request. On February 5, 2008, ALJ Kellett denied the request.

### **FINDINGS OF FACT**

1. Complainant charged the Respondent engaged in discriminatory practices in employment in violation of the Human Rights Law on the basis of his disability (asthma) in three ways: first, it failed to reasonably accommodate Complainant’s request for a smoke free environment in the warehouse where the papers were bundled and picked up; second, after he complained about co-workers smoking, Respondent reduced his paper route; third, after he complained to the State Health Department about smoking at the worksite, Respondent terminated his employment. (ALJ’s Exh. I)

2. Respondent denied illegal discrimination, claiming that it enforced the no-smoking rules, explaining the reduction in route size and payment to loss of a major customer in 2004, and reporting that Complainant was terminated for insubordination. (ALJ's Exh. III)

3. Respondent challenged the jurisdiction of the Division over the complaint by claiming Complainant was an independent contractor. (ALJ's Exh. III)

4. Respondent, a Pennsylvania corporation, leases space in a warehouse in Conklin, New York to support its distribution of newspapers in the Binghamton, New York area. (Tr. 31, 221).

5. Delivery of the newspapers from the warehouse to the public is accomplished by deliverers who sign a Delivery Service Agreement ("DSA") for specific delivery routes. (Joint Exh. 1; Respondent's Exh. D; Tr. 224, 227)

6. Complainant executed a number of Delivery Service Agreement ("DSA") for different delivery routes and fees with Respondent between the years 2000 and 2004. (Complainant's Exh. 2; Joint Exh. 1)

7. Under the first DSA Complainant executed, he received \$200 weekly for delivery of the *USA Today* to designated vending machines and Blue Chips. (Complainant's Exh. 2)

8. Under the last DSA Complainant signed, Complainant received \$375 weekly for the so-called Endicott route which included both delivery and preparation of the papers for delivery ("bundling"). (Joint Exh. 1)

9. Each DSA, including the ones Complainant executed, denominated the person agreeing to deliver the newspapers as "deliverer", and as an "independent contractor" with the sole right to determine the method and manner of deliveries and the operation of its business, and specified the person was not an employee or servant of the Respondent. (Respondent's Exh. A; Complainant's Exh. 2; Joint Exh. 1)

10. As a deliverer with a DSA, Complainant was responsible for prompt and satisfactory deliveries. (Joint Exh.1; Complainant's Exh. 2; Tr. 27-29, 33)

11. Under the DSA either party could terminate the agreement upon notice to the other; Respondent could also terminate for cause. (Joint Exh. 1; Complainant's Exh. 2)

12. Under the DSA, Respondent does not provide the deliverer, and did not provide Complainant, with a vehicle, gasoline, medical insurance, car insurance, vacation, holiday or sick leave, health insurance or pension plan, or other benefits provided to Respondent's regular employees. (Tr. 83, 90, 227-233)

13. Under the DSA, Complainant was obligated to hold the Respondent harmless from all claims and liabilities to any third party for injuries and damages arising out any actions or omissions on the part of Complainant, Complainant's employees or agents in the course of the DSA. (Complainant's Exh. 2; Joint Exh. 1)

14. Under the DSA, Complainant could, and upon occasion did, subcontract his route to another, or hire a substitute deliverer. (Joint Exh. 1; Complainant's Exh. 2; Tr. 29)

15. Complainant, whose principal occupation was a jeweler with his own store, admitted he received a 1099 form each year from Respondent for reporting the DSA income, carried his own car insurance, arranged for and paid his own substitute driver, provided his own vehicle, paid for his own gasoline for his vehicle, paid for repairs for his vehicle, provided his own car insurance, and delivered the newspapers without direct supervision from or by Respondent. (Respondent's Exh. A; Tr. 79-80, 83, 90)

### OPINION AND DECISION

Human Rights Law §296.1 prohibits an employer from discriminatory practices in employment on the basis of disability. N Y Executive Law § 296.1 However, the Human Rights

law does not provide protections to independent contractors. *Mehtani v. New York Life Insurance Co.* 145 A.D.2d 90, 537 N.Y.S.2d 800 (1<sup>st</sup> Dept., 1989), *appeal dismissed in part, denied in part*, 74 N.Y.2d 835, 546 N.Y.S.2d 341, 545 N.E.2d 631 (1989). The record established that Complainant's relationship to the Respondent was that of an independent contractor. The complaint should be dismissed.

In order to determine if an individual is an employee or an independent contractor for purposes of the Human Rights Law, four factors must be considered: the selection and engagement of the servant, the payment of salary or wages, the power of dismissal, and the power of control of the individual's conduct of the business. *SDHR (Emrich) v. GTE*, 109 A.D.2d 1082, 487 N.Y.S.2d 234 (4<sup>th</sup> Dept. 1985)

The most significant factor is the element of control over how the contracted work is accomplished. *See Peck v. Democrat and Chronicle/Gannett Newspapers*, 113 F.Supp2d 434, 437 (W.D.N.Y. 2000) (in which the court held a newspaper carrier was an independent contractor and not an employee for Title VII purposes); *Wells v. Utica Observer-Dispatch and Utica Daily Press, Inc.*, 87 A.D.2d 960, 451 N.Y.S. 2d 213 (3<sup>rd</sup> Dept. 1982, *aff'd* 59 N.Y.2d 638, 463 N.Y.S.2d 189, 449 N.E.2d 1267) (in which the court determined a newspaper carrier was an employee for unemployment insurance purposes.)

Complainant and Respondent entered several contracts which established a set weekly payment for Complainant's delivery service and established the duties and obligations between the parties. Respondent's obligation was to have newspapers to be delivered. Complainant's obligation was to promptly deliver the newspapers. How the newspapers were delivered, when the newspapers were delivered and by whom they were delivered was determined by Complainant.

Complainant argued that since his deliveries were to minimarts and service stations which required the newspapers as early in the morning as possible, he had no real control over the delivery schedule. The requirement that newspapers be delivered within a certain time does not create an employer-employee relationship. *Santella v. Andrews*, 266 A.D.2d 62 (1999) (holding that that a newspaper delivery driver was given a preferred time of delivery is insufficient to show more than “the most general supervisory control.”); *Marino v. Vega*, 12 A.D.3d 329, 786 N.Y.S.2d 17 (1<sup>st</sup> Dept., 2004) (holding that a newspaper distributor did not exercise sufficient control over the actual delivery process to be vicariously liable for deliverer’s actions.)

In the instant case, the factors of control in favor of the Complainant such as the contract describing the contractual relationship as one of an independent contractor, the obligation to indemnify and hold harmless the Respondent, the payroll, tax and benefit treatment of Complainant, and the control Complainant exercised over the actual delivery of the newspapers outweigh the factors of control in favor of Respondent such as assignment to specific route, and payment of a set amount per week. These factors of control in favor of Complainant support a determination that Complainant was an independent contractor. *See Peck v. Democrat & Chronicle/Gannett Newspapers*, 113 F.Supp2d 434, 437 (W.D.N.Y. 2000).

As the Complainant is determined to be an independent contractor, the complaint should be dismissed.

#### **ORDER**

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division’s Rules of Practice, it is hereby



ORDERED, that the complaint be and the same hereby is, dismissed.

DATED: February 15, 2008  
Bronx, New York

A handwritten signature in cursive script that reads "Christine Marbach Kellett".

Christine Marbach Kellett  
Administrative Law Judge