

Memo

Date: September 29, 2006

To: Michele Dion

From: John Gause 

Re: 

06-0049

You asked for my assistance in determining whether Complainant is an employee or independent contractor. Complainant alleges sexual harassment, and the MHRA employment provisions do not apply to harassment against an independent contractor. See 5 M.R.S.A. § 4572(1)(A)(referring to discrimination by an "employer"); *Gavrilovic v. Worldwide Language Res.*, 2006 U.S. Dist. LEXIS 51317 *24 (D. Me. 2006). Complainant cites the correct test to determine whether there is an employee/employer relationship, which considers the following factors:

(1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer.

Taylor v. Kennedy, 1998 ME 234, ¶ 8, 719 A.2d 525 (Me. 1998) (quoting *Murray's Case*, 130 Me. 181, 186, 154 A. 352, 354 (1931)). Control is the most important factor, which "includes the rights both to employ and to discharge subordinates and the power to control and direct the details of the work." *Legassie v. Bangor Publ. Co.*, 1999 ME 180, ¶ 6, 741 A.2d 442 (Me. 1999). "The essence of the 'independent nature of the business' and the 'right to control the progress of the work' factors is the freedom of the employee or independent contractor to do the work without direction, so long as the work gets done." *Id.* at ¶ 12.

Applying this test to the facts of this case (gathered thus far), there are sufficient allegations to support a finding that Complainant was employed by Respondent rather than being an independent contractor. With respect to the most important factor of control, Respondent admits that it terminated Complainant's "lease" in 1997 because of substance abuse and its negative effect on her performance and the reputation of the shop. He admits that he would not have rented her a booth in 2002 had he known that she had just been indicted for unlawful trafficking. While she was working, Respondent told Complainant that her manner of dress was inappropriately suggestive. He says he would have "terminated her lease" if it had gotten out of hand.

Complainant alleges that she was required to do the work herself and was not permitted to subcontract the haircutting to someone else. She states that Respondent set her work hours and schedule, required her to use particular supplies (creams and gels) in her work, assigned customers to her at particular times, and, early on, gave her direction about how he wanted hair to be cut and ensured that she followed them.

Assuming these allegations are true, it would be permissible for you to find that Complainant was an employee rather than an independent contractor.