

**COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION**

Loretta Evans, :
 :
Plaintiff, : CASE NO. 14CV-3675
 :
-vs- : **JUDGE SERROTT**
 :
Ohio Department of Job & Family Services, :
 :
Defendant. :

**MODIFIED DECISION AND ENTRY REVERSING THE ORDER OF APPELLEE OHIO
DEPARTMENT OF JOB & FAMILY SERVICES**

Rendered this 27th day of October, 2015

SERROTT, J.

Pursuant to the Tenth District Court of Appeals remand order issued in *Evans v. Director, Ohio Dept. of Job and Family Servs.*, 10th Dist. No. 14AP-743, 2015-Ohio-3842, the Court hereby issues the following modified decision.

I. PRELIMINARY STATEMENT

A. Procedural History:

This matter is before the Court upon the administrative appeal of Loretta Evans, hereinafter Appellant, from an order from Ohio Department of Job and Family Services, hereinafter Appellee. Appellee determined that Appellant had improperly classified truck drivers operating leased trucks as independent contractors when in reality they were her employees. Thus, Appellee determined that Appellant owed unemployment contributions for a number of previous years. Appellant timely filed this appeal of that determination.

B. Statement of Facts:

Appellant is the owner of a number of trucks that she leased to Multi-Modal Transit, LLC (“Multi-Modal”), a company owned and operated by her husband and son and that hires and provides trucks to drivers to haul freight. Appellant provided trucks through a lease to “Multi-Modal” and “Multi-Modal” interviewed and provided drivers to operate the trucks and haul freight. (TR. 2010 P. 39 and P. 54) “Multi-Modal” also leases trucks from other companies and obtains drivers for them wholly independent of its relationship with Appellant.

The drivers would be “vetted” by “Multi-Modal” to ensure they had the proper driving licenses, insurance, and were otherwise qualified. (2010 TR.39 lines 7-15.) Appellant would contract with drivers that did not have their own trucks and agreed to pay them 35% of the 70% she received from “Multi-Modal” for furnishing the trucks. (2010 TR.39) “Multi-Modal” would also hire drivers that owned their own trucks to haul freight. (2010 TR. 36) “Multi-Modal” maintained its own office at 850 Distribution Drive in Columbus, Ohio. Appellant did not have an office there and, at most, was on site perhaps two times in seven (7) years.

Appellant’s contract with the drivers provided that they were independent contractors. The agreement required the drivers themselves to maintain worker’s compensation coverage and to pay all applicable taxes (Id.) (TR 2010 P. 1-4 Exhibit 4) “Multi-Modal” advertised for the drivers, interviewed them, and hired them. (2010 TR. 42-46) “Multi-Modal” directed and dispatched the drivers. (2010 TR 47). “Multi-Modal” made sure the logs were kept, and the required “placards” with DOT numbers were from “Multi-Modal”. (2010 TR pp.9-10) “Multi-Modal” maintained the insurance covering the drivers and the contents of the loads. (2010 TR 7-9, 47.)

The Appellee’s witness Mr. Dixon testified he had no direct knowledge of any control that Appellant exercised over the drivers and further admitted that he had no evidence Appellant owned,

controlled, or acted as an agent for “Multi-Modal” (2010 TR 30-35.) Mr. Evans even admitted that he had no information that Appellant had any control over the drivers that used her trucks. (2010 TR 30-32.) He admitted that if “Multi-Modal” was not paid for the haul then Appellant did not get paid and neither did the driver of the leased truck. (2010 TR. 31) Thus, the driver did risk the loss of his or her time and therefore could sustain a loss (Id.)

“Multi-Modal’s” owner, Kevin Evans, testified that Appellant had no control over the drivers, Appellant never met the drivers, and the drivers would sometimes work for two (2) days and never return. (Tr. 2010 P.38, 40, 46-47.) Appellant had her own mechanics and had no ownership interest in “Multi-Modal” and no ability to control or direct “Multi-Modal” in anything it did. (Id.)

Based upon the above evidence, the hearing officer and the Director of Appellee concluded that the drivers were employees of Appellant because “Multi-Modal” acted as her agent. (See Decision April 26, 2012. Findings of Fact and Reasoning PP. 4-5) A review of the applicable law will establish that the Appellee’s decision is not supported by substantial, reliable, and probative evidence and is contrary to law.

II. STANDARD OF REVIEW

In an administrative appeal, pursuant to R.C. 119.12, the common pleas court reviews an agency’s order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with law. *Klaiman v. Ohio State Univ.*, 10th Dist. No. 03AP-683, 2004 Ohio 1137, ¶ 7. In performing this review, the court may, to a limited extent, consider the credibility of the witnesses as well as the weight and probative character of the evidence. *Id.* This standard of review permits the common pleas court to substitute its judgment for that of the administrative

agency; however, the court must give due deference to the administrative resolution of evidentiary conflicts. *Id.*, citing *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 407 N.E.2d 1265 (1980).

III. LEGAL ANALYSIS

The issue in this case is whether or not the drivers were “employees” and whether “Multi-Modal” acted as an agent of Appellant in hiring, controlling, and directing the “employee” drivers. For worker’s compensation purposes, R.C. 4141.01 (B)(1) defines “employment” as follows:

“Employment” means service performed by an individual for remuneration under any contract of hire, written, oral, express or implied, including service performed in interstate commerce and service performed by an officer of a corporation, without regard to whether such service is executive, managerial, or manual in nature, and without regard to whether such officer is a stockholder or a member of the board of directors of the corporation, unless it is shown to the satisfaction of the director that such individual has been and **will continue to be free from direction or control over the performance of such service**, both under a contract of service and in fact. The director shall adopt rules to define “direction or control.”

Under the statute the key language is whether the individual is free from the employer’s “direction or control over the performance of such service.” “Such service” in this case would involve the driving of a truck as hauling of freight. Pursuant to the statute the director promulgated a regulation defining and explaining when an employer-employee relationship exists. O.A.C. § 4141-3-05 provides the following verbatim:

(A) Except as specifically provided in division (B)(2)(k) of section 4141.01 and section 4141.39 of the Revised Code, a worker is in employment when an "employer-employee" relationship exists between the worker and the person for whom the individual performs services and the director determines that:

- (1) The person for whom services are performed has the right to direct or control the performance of such services; and
- (2) Remuneration is received by the worker for services performed.

(B) As an aid to determining whether there is sufficient direction or control present, the common law rules identify twenty factors or elements. When present, each of these factors serves to indicate some degree of direction or control. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. The twenty factors set forth in paragraphs (B)(1) to (B)(20) of this rule are designed only as guides for determining whether sufficient direction or control exists and must be considered in totality:

(1) The worker is required to comply with the instructions of the person for whom services are being performed, regarding when, where, and how the worker is to perform the services;

(2) The person for whom services are being performed requires particular training for the worker performing services;

(3) The services provided are part of the regular business of the person for whom services are being performed;

(4) The person for whom services are being performed requires that services be provided by a particular worker;

(5) The person for whom services are being performed hires, supervises or pays the wages of the worker performing services;

(6) A continuing relationship exists between the person for whom services are being performed and the worker performing services that contemplates continuing or recurring work, even if not full time;

(7) The person for whom services are being performed requires set hours during which services are to be performed;

(8) The person for whom services are being performed requires the worker to devote himself or herself full time to the business of the person for whom services are being performed;

(9) The person for whom services are being performed requires that work be performed on its premises;

(10) The person for whom services are being performed requires that the worker follow the order of work set by the person for whom services are being performed;

(11) The person for whom services are being performed requires the worker to make oral or written progress reports;

(12) The person for whom services are being performed pays the worker on a regular basis such as hourly, weekly or monthly;

(13) The person for whom services are being performed pays expenses for the worker performing services;

(14) The person for whom services are being performed furnishes tools, instrumentalities, and other materials for use by the worker in performing services;

(15) There is a lack of investment by the worker in the facilities used to perform services;

(16) There is a lack of profit or loss to the worker performing services as a result of the performance of such services;

(17) The worker performing services is not performing services for a number of persons at the same time;

(18) The worker performing services does not make such services available to the general public;

(19) The person for whom services are being performed has a right to discharge the worker performing services;

(20) The worker performing services has the right to end the relationship with the person for whom services are being performed without incurring liability pursuant to an employment contract or agreement.

The director shall make a determination, based on the factors listed in this rule, as to whether or not an employment relationship exists for purposes of Chapter 4141 of the Revised Code.

In the case at bar, even the hearing officer in the decision stated “the evidence establishes that she, Loretta Evans, did not personally direct these individuals.” However, the hearing officer

concluded the drivers were employees of Appellant because she had the “right to control these drivers.... [and] she permitted “Multi-Modal” to exercise these rights of control herself.” (Decision April 26, 2012, p. 4)

In performing a limited weighing of the evidence, this Court concludes that the evidence establishes the Appellant did not have the right to direct or control the drivers in the “performance of [their] service[s].” Application of the factors in the regulation as to the evidence supports the Court’s conclusion.

Appellant merely leased the trucks to “Multi-Modal”. She did not advertise, interview, or hire the drivers. In her contract with the drivers, the drivers acknowledge that they are independent contractors. The drivers are free to leave or quit whenever they want to and are free to drive for other companies. Appellant did not train the drivers and had no control over their routes, hours, or how they performed their jobs. She did not supervise any of the drivers and the drivers were not required to work set or recurring hours. She did not keep the logs or require any work reports. She did not pay the expenses for the drivers. The drivers could sustain a loss. If the owner of the freight failed to pay “Multi-Modal,” then neither Appellant nor the drivers were paid. The drivers made their services available to the general public or other employers. The work was also not performed on the premises of Appellant. The Appellant did pay the drivers if she was paid by “Multi-Modal,” but the pay was not on a regular basis. They were merely paid a percentage of the amount Appellant received from “Multi-Modal”. The remuneration was for that load only. It was not a regular amount pay check or hourly. She did lease the trucks to “Multi-Modal” which provided the trucks to the drivers.

In summary, the evidence in the record overwhelmingly meets almost all the regulatory criteria for concluding the drivers were not employees of Appellant in performing their hauling

services for “Multi-Modal”. Next, resolution of this appeal requires an analysis of whether “Multi-Modal” acted as Appellant’s agent. If “Multi-Modal” as an employer controlled and directed the employees, and was also acting as Appellant’s agent, then Appellant would be an “employer” liable for unemployment contributions on behalf of the employees.

In Ohio, agency is generally a contractual relationship that is created by either an express or implied agreement between parties. Marshall v. Aaron (1984), 15 Ohio St. 3d 48 and Amerifirst Savings Bank v. Krug Auto Sales 136 Ohio App. 3d 468 at 483-485. For an agency relationship to exist, the principal or employer must have the right to control the means and manner that the agent performs the tasks. Marshall, Id at 49 and Amerifirst, Id at 484. The principal must control the performance and details of the work of the agent. An “independent contractor is defined as one who in the exercise of an independent employment contracts to do piece work according to its own methods, and without being subject to the control of the [principal] employer except as to the product or result of his work.” Id. at 484.

In the case at bar, Appellant and “Multi-Modal” characterized their relationship as an independent contractor relationship. Such formal designation is not binding but is one indicia of the nature of the relationship. Marshall, Id. 484. Appellant did not control the method or direct how “Multi-Modal” conducted its hauling business. Nor did she even have the power to do so. “Multi-Modal” determined what freight to haul, what methods to employ, the routes, the drivers and decided and managed all the details of hiring and employing, and directing the drivers. Appellant merely furnished the trucks and was uninvolved in “Multi-Modal’s” daily business affairs and had no legal right to control “Multi-Modal” in any way. Her only connections to “Multi-Modal” were that she leased the trucks on a contractual basis and she was related to the owners of “Multi-Modal.” While the fact she was related may leave to “suspicions” or speculation that she in some way helped

own or run “Multi-Modal,” no such evidence exists in the record. “Multi-Modal” was a separate legal entity with its own physical location and its own owners and managers. Appellant had absolutely no control over actual day to day operations of “Multi-Modal’s” licenses. The record is devoid of any evidence establishing a principal-agent relationship between Appellant and “Multi-Modal.” For all the reasons set forth herein, the Court concludes the following:

- (1) The drivers executing independent contractor agreements with Appellant were not her employees for unemployment contribution purposes; and
- (2) “Multi-Modal” was not acting as the agent of Appellant, and Appellant had no ability or legal right to control or direct “Multi-Modal” in any of its operations.

Accordingly, the decision of the Director was not supported by substantial, reliable, probative evidence and was not in accordance with law. The decision is therefore REVERSED. Pursuant to Civ. R. 58, the Clerk of Courts is to provide all parties notice of and the date of this judgment. Costs to Appellee.

IT IS SO ORDERED.

Franklin County Court of Common Pleas

Date: 10-27-2015
Case Title: LORETTA EVANS -VS- OHIO DEPT JOB & FAMILY SERVICES
ET AL
Case Number: 14CV003675
Type: DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in black ink that reads "Mark Serrott". The signature is written over a circular blue seal. The seal contains the text "COMMON PLEAS COURT" at the top, "FRANKLIN COUNTY, OHIO" in the middle, and "ALL THINGS ARE POSSIBLE" at the bottom. The seal also features a central emblem with a sun and a banner.

/s/ Judge Mark Serrott

Court Disposition

Case Number: 14CV003675

Case Style: LORETTA EVANS -VS- OHIO DEPT JOB & FAMILY
SERVICES ET AL

Case Terminated: 18 - Other Terminations