

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD MULZET, ON BEHALF : CIVIL ACTION
OF HIMSELF AND ALL OTHER :
SIMILARLY SITUATED PERSONS, :
AND ON BEHALF OF HIMSELF AND :
ALL OTHER SIMILARLY :
SITUATED EMPLOYEES, :
Plaintiff, :
v. : NO. 00-4769
R.L. REPPERT, INC., RICHARD REPPERT, :
DIANA REPPERT, TIM REPPERT, :
THE R.L. REPPERT MEDICAL PLAN, :
THE R.L. REPPERT 401K PLAN, and :
THE R.L. REPPERT INCENTIVE BONUS :
PLAN, :
Defendants. :

MEMORANDUM AND ORDER

BUCKWALTER, J.

December 4, 2001

I. FINDINGS OF FACT

1. Plaintiff, Richard Mulzet, is, by trade, a carpenter. (N.T. 14).
2. R.L. Reppert, Inc., a defendant, is a corporation, in business as a commercial wall and ceiling contractor. Drywall is a part of the business. (N.T. 162).
3. Richard L. Reppert, a defendant, is the president of R.L. Reppert, Inc. (N.T. 162).
4. Diana Reppert, a defendant, is the wife of Richard L. Reppert, and owns 40% of the corporate stock. (N.T. 162).

5. On December 2, 1998, Mulzet filled out a four-page application for employment with Reppert, Inc. (Plf. Exh. 1) after seeing an ad in the paper.

6. Mulzet claims he was seeking a job as an employee so he would get benefits and would not “have to pay my taxes.” (N.T. 17).

7. It is also true that as an independent contractor, Mulzet’s pay was not subject to garnishment for his child support and arrearage which was substantial. (N.T. 60, 98).

8. Christopher Becker, project manager for Reppert, Inc., met with Mulzet after he completed his application. (N.T. 17). Becker would not hire him as an employee because he did not have a driver’s license. (N.T. 18, 121).

9. The reason for the driver’s license policy is that Reppert, Inc. found over years it had so much difficulty scheduling employees who did not have a license. They either could not get to a job or once at a job, could not move to another job site, maybe because their spouse was not available or the guy who they were depending on was not going to that job. (N.T. 220).

10. The same reason does not apply to independent contractors. Reppert, Inc. has 90 or more employees that they rely upon heavily to man its jobs. “Subcontractors (same as independent contractors) come and go, they just fill in when needed.” (N.T. 221).

11. When Mulzet was turned down as an employee, Becker told him he could be hired as an independent contractor. (N.T. 19, 122, 123).

12. Mulzet filled out an independent contractor application dated December 21, 1998. (Plf. Exh. 2). In that form, he signed the following:

“By my signature below, I attest that I am an independent contractor and that all information is true and correct.”

13. Mulzet also signed an Independent Contractor Agreement dated March 26, 1999. The agreement provided as follows:

As an Independent Contractor, I reserve the right to work for other contractors during and after this agreement has been fulfilled, as long as my work is performed in a timely manner, as per this agreement. If I do not fulfill my duties in a timely manner, RLR, Inc. has the right to void this agreement, and deduct any monies paid by RLR, Inc. to complete the balance of work in this agreement. I understand I am not an employee and I will not receive any benefits from RLR, Inc. I am aware that I will receive a 1099 during January of the year following that which I worked as a Independent Contractor. I am also aware that any taxes due are my sole responsibility, as are Liability Insurance, Worker’s Compensation Insurance, Health Insurance and any other coverage I deem necessary.

It is agreed that RLR, Inc. will supply all material for the job and I, as Independent Contractor will supply all transportation, tools, equipment, and labor cost under this agreement.

I, as an Independent Contractor, will hire, supervise and pay any workers under my direction.

14. Mulzet also signed a request for taxpayer identification number, IRS Form W-9. (Plf. Exh. 4). Mulzet knew this was a form he had to sign as an independent contractor. (N.T. 22).

15. Mulzet did not have general liability insurance because he could not afford it. Consequently, Reppert, Inc. deducted money from his earnings to cover liability insurance. (N.T. 21, 28).

16. Mulzet started with Reppert, Inc. in December of 1998. (N.T. 23). He ended in June of 2000. He was not incorporated, had no letterhead or business card and did not advertise his services as a drywall contractor. (N.T. 39).

17. Mulzet would submit bills to Reppert, Inc. weekly, containing thereon his name, address, dates, description and hours of work. (Plf. Exh. 5) (N.T. 25).

18. Mulzet worked with a Reppert, Inc. employee named John Heil, and did substantially the same work as he did. (N.T. 107).

19. Mulzet had to bring his personal hand tools, like his pouch, utility knife, tape measure, hammer, clamps, levels, T-square, cords and screwdriver to work. (N.T. 29, 30).

20. Reppert supplied scissor lifts, scaffolding, ladders, Hilti guns (similar to a power hammer), chop saws, lasers and drywall framing materials. (N.T. 31).

21. Mulzet testified on direct that he worked once as an independent contractor prior to working at Reppert, Inc. (N.T. 42). On cross-examination, it appears that this answer was not correct. He worked for Ceilings and Drywall in 1998 (N.T. 53), Budwick Drywall (N.T. 55), and Cedar Crest Drywall (N.T. 56). He also worked for Diamond Drywall & Painting Company in 1999 and Hickory Hill Builder. On all those occasions, he was paid on a 1099 as an independent contractor. Also on those occasions, he supplied his own tools while the company supplied materials and larger equipment. (N.T. 53-58).

22. Mulzet claims he asked Tim Reppert if he could hire an employee to work along with him, but Reppert denied it. (N.T. 90). Tim Reppert does not recall this. (N.T. 10/18/01 at 33).

23. Mulzet never complained to Richard Reppert that he was misclassified as an independent contractor. (N.T. 221, 222).

24. Mulzet was not paid over time by Reppert, Inc. for work in excess of 40 hours per week, and was not paid overtime for Saturday work, since he was an independent

contractor. (N.T. 73). He never billed for time and a half for any work week in excess of 40 hours. (N.T. 74, 75).

25. Mulzet did not work at Reppert, Inc. corporate office, but at various project sites. (Plf. Exh. 5).

26. Mr. Mulzet filed a 1998 Federal Tax Return indicating that he had income from a business. On the Schedule "C" attached to the 1998 Return, Mr. Mulzet stated that his business was Drywall Contracting and that he materially participated in the operation of his business during 1998. (Def. Exh. 5) (N.T. 77).

27. On the Schedule "C" for the 1998 Return, Mr. Mulzet indicated that he had \$10,515 of gross receipts or sales. Mr. Mulzet took business expenses of \$1,525 for car and truck expenses, and \$1,061 for work clothing, work boots and work tools. (Def. Exh. 5) (N.T. 77, 78).

28. Mr. Mulzet also filed a PA-40 Tax Return for 1998 indicating that he had business income of \$7,929. (Def. Exh. 5) (N.T. 80).

29. Mr. Mulzet also filed and claimed the self employment tax of \$1,120 for 1998 because of his independent contractor status. (Def. Exh. 5) (N.T. 78).

30. Mr. Mulzet signed his 1998 Federal Tax Return on August 3, 2001, declaring under penalty of perjury that he had examined the Return and the accompanying Schedule and statements, and to the best of his knowledge and belief, that they were true, correct and complete. (Def. Exh. 5) (N.T. 78, 79).

31. Mr. Mulzet signed his PA-40 1998 Return declaring the same under penalty of perjury (Def. Exh. 5).

32. In 1998, Mr. Mulzet received on a Form 1099, reflecting an amount of \$7,529.25 for work as an independent contractor from Ceiling and Drywall Company. (Def. Exh. 5).

33. In 1998, Mr. Mulzet received on a Form 1099 reflecting an amount of \$1,127.50 for work performed as an independent contractor for Budwick Drywall. (Def. Exh. 5).

34. In 1998, Mr. Mulzet received on a Form 1099 from R.L. Reppert, Inc., reflecting an amount of \$1,195.11 for work as an independent contractor. (Def. Exh. 5).

35. In 1998, Mr. Mulzet received a Form 1099, reflecting an amount of \$663.17 for work performed as an independent contractor for Cedarcrest Drywall, Inc. (Def. Exh. 5)

36. In 1999, Mr. Mulzet filed a Form 1040 Federal Tax Return indicating that he had business income of \$26,144 and self employment tax of \$1,847. (Def. Exh. 6) (N.T. 80, 81).

37. For the year 1999, Mr. Mulzet attached a Schedule "C", Profit or Loss from a Business, to his income tax return on which he indicated that his principal business was Drywall Contracting and that he materially participated in the operation of that business during 1999. The gross income reflected on the Schedule "C" filed was an amount of \$33,873, and Mr. Mulzet claimed car and truck expenses of \$4,152, insurance of \$300, supplies of \$185, and expenses for tools and work clothing of \$1,968. The total of business expenses was \$7,729. (Def. Exh. 6) (N.T. 81, 82).

38. Mr. Mulzet filed a PA-40 1999 Pennsylvania Income Tax Return where he also claimed net income from the operation of a business in the amount of \$26,144. (Def. Exh. 6) (N.T. 84).

39. In 1999, Mr. Mulzet received Form 1099 income in the amount of \$3,204.10 from Diamond Drywall and Painting Company for work as an independent contractor during that year. (Def. Exh. 6) (N.T. 59).

40. In 1999, Mr. Mulzet received on a Form 1099 compensation in the amount of \$30,669.43 from R.L. Reppert, Inc. for work as an independent contractor during that year. (Def. Exh. 6).

41. Mr. Mulzet signed his 1999 Federal and State tax returns on August 3, 2001, declaring under penalty of perjury that he examined the Return and accompanying Schedules and statements, and to the best of his knowledge and belief, they were true, correct and complete. (Def. Exh. 6) (N.T. 82, 83).

42. Mulzet was an experienced drywall contractor, doing it for 20 years. No one told him how to do his work. He was simply told where to start, and that's where he started. (N.T. 93).

43. Like all contractors or subcontractors, he was bound by drawings, plans and specifications of the job. (N.T. 10/18/01 at 10, 11).

44. Other characteristics of Mulzet's relationship with Reppert, Inc. were:

(a) When requesting manpower for a particular project, R.L. Reppert, Inc.'s supervisors did not distinguish between independent contractors and employees.

(b) R.L. Reppert, Inc.'s supervisors exercised the same level of supervision and scrutiny over Plaintiff's work as those treated as employees.

(c) Plaintiff and employees stored their hand tools in the same job box on the job site.

(d) R.L. Reppert, Inc. required Plaintiff and its employees to attend safety meetings.

(e) Plaintiff Richard Mulzet signed the attendance sheets at safety meetings even when it was not required by R.L. Reppert, Inc.'s general contractor.

(f) R.L. Reppert, Inc. indiscriminately paired Plaintiff and others classified as independent contractors with employees to perform tasks on its job sites.

(g) Both Plaintiff and employees reported to the job box in the morning to be told where to begin work. They were given the same instructions as to where to work.

(h) R.L. Reppert, Inc. never deducted hours or reduced Plaintiff's pay for poor performance or failure to complete work on time.

(i) Plaintiff Richard Mulzet was hired by R.L. Reppert, Inc. for an indeterminate period of time at an hourly rate.

(j) Plaintiff Richard Mulzet submitted his hours weekly to R.L. Reppert, Inc. and was paid on an hourly basis on the same day and at the same time as other employees.

(k) Mulzet, although he was not, could be back charged for poor workmanship. Employees could not. (N.T. 10/18/01 at 16-18).

II. CONCLUSIONS OF LAW

Both plaintiff and defendants agree that Nationwide Mutual Insurance Company v. Darden, 503 U.S. 318, 112 S.Ct. 1344 (1992) sets forth the factors to be considered in determining whether a person is an employee or independent contractor for purposes of ERISA.

Those factors are:

- (1) the skill required;
- (2) source of the instrumentalities and tools;
- (3) location of the work;
- (4) duration of the relationship between the parties;
- (5) whether the hiring party has the right to assign additional projects to the hired party;
- (6) the extent of the hired party's discretion over when and how long to work;
- (7) the method of payment;
- (8) the hired party's role in hiring and paying assistants;
- (9) whether the work is part of the regular business of the hiring party;
- (10) whether the hiring party is in business;
- (11) the provision of employee benefits; and
- (12) the tax treatment of the hired party.

It bares mentioning that the above are “among the other factors relevant” to determining whether a hired party is an employee or independent contractor.

Briefly looking at the above factors, it is clear that the skill required to hang drywall was based upon years of experience. In other words, Reppert, Inc. did not have to teach Mulzet anything.

Mulzet had to supply his own tools, which he did. This was spelled out in the contract dated March 26, 1999. Other persons who worked for Reppert, Inc. apparently also supplied some of their own tools.

The location of the work was not at the offices of Reppert, Inc. It could vary from week to week. There was no fixed factory or building at which Mulzet worked.

The duration of the work was somewhat intermittent over a period of about a year and a half from December, 1998 to June of 2000. In 1998, Mulzet did independent contracting for other companies and he did some as well in 1999.

Reppert, Inc. and Mulzet had an arrangement by contract that as long as Mulzet did his duties in a timely manner, Mulzet could work for other contractors during the time he was under agreement with Reppert, Inc. The discretion as to when to work and how long was completely up to Mulzet, although realistically, he would not be getting any work from Reppert, Inc. if he did not perform in a timely manner.

Mulzet was paid in accordance with an invoice he submitted at the end of each week. He was not paid overtime for work in excess of 40 hours. His payments were shown on a form 1099. No taxes were withheld.

Mulzet could have hired employees, supervised and paid them if he chooses. Mulzet said he requested to do so. Reppert claims this did not happen. In either case, Mulzet's claim that he requested to hire and pay employees suggests that he knew he was an independent contractor.

Reppert, Inc. was in the regular business of ceiling and wall construction and would frequently hire subcontractors (independent contractors) on its various projects. Like Mulzet, they received no employee benefits.

The tax treatment of Mulzet was as an independent contractor, both by Reppert and Mulzet.

An analysis of the above factors suggest that Mulzet was an independent contractor even though some of the factors considered cut both ways. In addition to these factors, there is the Independent Contractor Agreement. This, while not conclusive on the issue, cannot be ignored. *See* discussion in Smith v. Torchmark Corporation, 82 F.Supp.2d 1006 (1999 W.D. Missouri) and Holtzman v. The World Book Company, Inc., 2001 WL 936492 (E.D. Pa.).

It is strong evidence that in weighing all the other factors, tips the scales decidedly in favor of the conclusion that Mulzet was an independent contractor, as the court so finds.

Consequently, the following order is entered:

AND NOW, this 4th day of December, 2001, on all claims, judgment is entered in favor of defendants R.L. Reppert, Inc., Richard Reppert, Diana Reppert, Tim Reppert, The R.L. Reppert Medical Plan, The R.L. Reppert 401K Plan, and the R.L. Reppert Incentive Bonus Plan, and against plaintiff Richard Mulzet.

This case is **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.