

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. - 3083577
PRO-PLUS PLUMBING
ATTN: LOREN NELSON
13995 SW 61ST PLACE ROAD
OCALA FL 34484-7186

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2012-61278L**

O R D E R

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated May 3, 2012, is MODIFIED to hold that the Petitioner is liable for payment of reemployment assistance taxes effective January 1, 2011. It is further ORDERED that the determination is AFFIRMED as modified.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [DEPARTMENT OF ECONOMIC OPPORTUNITY] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou 1 kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt *Lòd* sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribunal la pou 1 prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou 1 prepare apati de kopi anrejistremán seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 2012**.



Altemese Smith,
Assistant Director,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanedra Y. Barnes

DEPUTY CLERK

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of September, 2012.

Shanedra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

PRO-PLUS PLUMBING
ATTN: LOREN NELSON
13995 SW 61ST PLACE ROAD
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TIMOTHY SPIVA
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SILVER SPRINGS FL 34488

DEPARTMENT OF REVENUE
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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
MSC 347 CALDWELL BUILDING
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PROTEST OF LIABILITY
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RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated May 3, 2012.

After due notice to the parties, a telephone hearing was held on August 9, 2012. The Petitioner, represented by its owner, appeared and testified. The vice president of AAA Ocala All Services Inc testified as a witness. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working in plumbing constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner, Pro-Plus Plumbing, LLC, was formed effective September 9, 2010, to operate a business as a licensed plumbing contractor. The Petitioner is classified as a corporation for federal

income tax purposes. The Petitioner's owner is active in the operation of the business and is the license holder for the business. He receives a weekly salary from the Petitioner.

2. The Joined Party has a history of employment with licensed plumbing contractors. In 2010 the Joined Party was working for a plumbing company which was experiencing financial problems. The Joined Party had worked for that employer for six years but the company was not able to provide sufficient work for the Joined Party. The Petitioner's owner had previously worked for the same employer and had developed a friendship with the Joined Party. After the Petitioner's owner obtained his plumbing contractor's license and formed the LLC, the owner contacted the Joined Party. Although the Petitioner did not have work for the Joined Party at that time the owner agreed to contact the Joined Party in the future when work was available. The owner suggested that in the future the Joined Party could work with the Petitioner either as a partner or as an employee.
3. In approximately April or May 2011 the Petitioner had work available for the Joined Party and the owner contacted the Joined Party. Initially, it was the owner's plan for the Joined Party to become a partner in the business. The owner informed the Joined Party that the Petitioner would pay the Joined Party a portion of the income resulting from the Joined Party's work. The amount of that portion would be at the Petitioner's discretion based on what the owner felt was a fair amount. The Petitioner informed the Joined Party that the Joined Party would be responsible for paying his own taxes at the end of the year and showed the Joined Party how the Joined Party could deduct mileage expenses from his income.
4. Operating on his belief that he was going to be a partner in the Petitioner's business the Joined Party purchased a truck, tools, and supplies. He had the Petitioner's name and license number painted on the truck. The Petitioner paid for half of the cost of painting the sign on the truck. The Petitioner provided the Joined Party with uniform shirts bearing the Petitioner's name which the Joined Party was required to wear while working. The Petitioner provided the Joined Party with business cards containing both the Joined Party's name and the name of the Petitioner's owner.
5. The Joined Party contacted contractors, bid on jobs, and obtained work for the Petitioner. The Joined Party did not bid on jobs for his own benefit but only in an attempt to grow the Petitioner's business. The Joined Party believed that it would be a conflict of interest to perform work as a competitor of the Petitioner. The Joined Party was required to personally perform the work for the Petitioner. He was not allowed to hire others to perform the work.
6. The Petitioner's owner told the Joined Party what jobs to perform and when to perform them. The owner and the Joined Party usually worked side by side performing the work. Sometimes the Joined Party used his own tools and sometimes he used tools and equipment provided by the Petitioner.
7. The Petitioner paid the Joined Party for the work before the Petitioner collected the money from the Petitioner's customers. No taxes were withheld from the pay.
8. During the first few months the Joined Party pressed the Petitioner's owner to create a partnership agreement. Although the owner claimed to be working on the agreement the owner eventually told the Joined Party that he was not willing to enter into a partnership agreement with the Joined Party. At that time the owner changed the method and rate of pay. The Joined Party was told that he would be paid a salary of \$500 per week and that the Petitioner would cover the Joined Party under the Petitioner's workers' compensation insurance policy. The regularly established payday was on Friday of each week. Although the Petitioner changed the method of pay the Petitioner continued to not withhold any payroll taxes from the pay.
9. In the fall of 2011 the Joined Party experienced family problems that resulted in his absence from work. On or about November 11, 2011, the Petitioner's owner informed the Joined Party that he

did not believe that the Joined Party's heart was in the business and that they should go their separate ways. The Joined Party understood that statement to mean that he was discharged.

10. At the end of 2011 the Petitioner reported the Joined Party's earnings for 2011 on Form 1099-MISC as nonemployee compensation in the amount of \$16,405.00.
11. The Joined Party filed a claim for reemployment assistance benefits effective February 12, 2012. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request For Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor. Upon receipt of the investigation the Department of Revenue discovered that the Petitioner had never registered with the Department of Revenue for payment of taxes.
12. On May 3, 2012, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing plumbing services for the Petitioner are the Petitioner's employees and that the Petitioner was liable for payment of reemployment assistance taxes retroactive to May 20, 2011. The Petitioner filed a timely protest by letter dated May 12, 2012.

Conclusions of Law:

13. The issue in this case, whether services performed for the Petitioner constitute employment subject to the Florida Reemployment Assistance Program Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.
14. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).
15. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987). In Brayshaw v. Agency for Workforce Innovation, et al.; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Department is limited to applying only Florida common law in determining the nature of an employment relationship.
16. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.
17. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
 - (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.
 - (2) The following matters of fact, among others, are to be considered:
 - (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
 - (b) whether or not the one employed is engaged in a distinct occupation or business;
 - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - (d) the skill required in the particular occupation;

- (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
 - (f) the length of time for which the person is employed;
 - (g) the method of payment, whether by the time or by the job;
 - (h) whether or not the work is a part of the regular business of the employer;
 - (i) whether or not the parties believe they are creating the relation of master and servant;
 - (j) whether the principal is or is not in business.
18. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties.
19. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.
20. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."
21. There was no written agreement or contract between the Petitioner and the Joined Party. Initially, the Joined Party worked under the assumption that the owner and the Joined Party would be partners in the business. In spite of that assumption it is clear that the Joined Party never had any ownership in the business and did not share in the profits of the business. The Joined Party worked under the control of the owner. The owner, in his sole discretion, determined the amount of the Joined Party's income.
22. The Petitioner is a licensed plumbing contractor. The Joined Party performed the plumbing work assigned to him by the owner. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.
23. Initially, the Petitioner paid the Joined Party based on a percentage of the income derived from the Joined Party's work rather than by time worked. The owner, in his sole discretion, determined the amount based on what the owner felt was a fair amount. After a few months the owner, in his sole discretion, changed the pay to a set amount per week. At that point the Joined Party was paid by time worked rather than by the job or based on production. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Reemployment Assistance Program Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash.
24. The Joined Party performed services exclusively for the Petitioner from approximately April or May 2011 until November 2011. The evidence reveals that it was the intent of the parties to create

a long term relationship, however, either party had the right to terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."

25. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.
26. The control exercised by the Petitioner over the Joined Party reveals the existence of an employer-employee relationship as found by the Department of Revenue. The determination issued by the Department of Revenue also holds that the Petitioner is liable for payment of reemployment assistance tax retroactive to May 20, 2011.
27. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.
28. Section 443.1216(1)(a), Florida Statutes, provides in pertinent part:
The employment subject to this chapter includes a service performed, including a service performed in interstate commerce, by:
 1. An officer of a corporation.
29. Members of limited liability companies classified as corporations for federal income tax purposes are statutory employees. The Petitioner is a limited liability company which is classified as a corporation for federal income tax purposes. The Petitioner's owner has been active in the operation of the business since inception in September 2010 and is an employee of the Petitioner.
30. Section 443.1215, Florida States, provides:
 - (1) Each of the following employing units is an employer subject to this chapter:
 - (a) An employing unit that:
 1. In a calendar quarter during the current or preceding calendar year paid wages of at least \$1,500 for service in employment; or
 2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.
 31. The Petitioner's owner was not an employee of the Petitioner during twenty weeks of 2010 because the Petitioner was not formed until September 2010. No evidence was presented to show

the amount of the owner's earnings from the Petitioner during 2010. However, the owner did perform services for the Petitioner during 2011 for more than twenty weeks. Thus, the Petitioner is liable for payment of reemployment assistance taxes effective January 1, 2011.

Recommendation: It is recommended that the determination dated May 3, 2012, be MODIFIED to hold that the Petitioner is liable for payment of reemployment assistance taxes effective January 1, 2011. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on August 13, 2012.



R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke *Lòd Rekòmande* a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke *Lòd Rekòmande* a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopí kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopí yo.

A handwritten signature in black ink that reads "Shanedra Y. Barnes".

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
August 13, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

TIMOTHY SPIVA
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DEPARTMENT OF REVENUE
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