

4-17-03

STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS

FILED  
03 DEC 30 PM 2:44  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

DAWN GEORGETTE MYERS,

EEOC Case No. 15DA20098

Petitioner,

FCHR Case No. 21-03436

v.

DOAH Case No. 02-3580

TKW-CLOS

CENTRAL FLORIDA INVESTMENTS,  
INC.,

FCHR Order No. 03-088

Respondent.

**ORDER DETERMINING COMMISSION JURISDICTION  
AND REMANDING FOR FURTHER INVESTIGATION**

Preliminary Matters

Petitioner Dawn Georgette Myers filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (1999), alleging that Respondent Central Florida Investments, Inc., committed unlawful employment practices on the basis of Petitioner's sex (female) and on the basis of retaliation, by sexually harassing Petitioner and by terminating Petitioner from her position.

The allegations set forth in the complaint were investigated, and, on August 6, 2002, the Executive Director issued his determination (Determination: No Jurisdiction) finding that the Commission lacked jurisdiction over the complaint of discrimination on the basis that Petitioner was not an employee of Respondent, but rather an independent contractor, and that, therefore, Petitioner had no employment relationship with Respondent covered by the Florida Civil Rights Act of 1992.

Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and the case was transmitted to the Division of Administrative Hearings for further proceedings.

An evidentiary hearing was held in Orlando, Florida, on January 23, 2003, before Administrative Law Judge T. Kent Wetherell, II, solely on the issue of "whether Petitioner was an employee of Respondent rather than an independent contractor, thereby giving the Florida Commission on Human Relations jurisdiction over Petitioner's amended charge of discrimination against Respondent."

Judge Wetherell issued a Recommended Order, dated April 17, 2003, recommending to the Commission that it issue an order which "determines that Petitioner was an employee of Respondent rather than an independent contractor for purposes of the Florida Civil Rights Act of 1992; and ... directs the Commission staff to re-open its investigation into the merits of Petitioner's amended charge of discrimination against Respondent."

Pursuant to notice, public deliberations were held on November 13, 2003, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the Recommended Order.

#### Findings of Fact

We find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

We adopt the Administrative Law Judge's findings of fact.

#### Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

We adopt the Administrative Law Judge's conclusions of law.

#### Exceptions

Respondent filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Central Florida Investment, Inc.'s Exceptions to Recommended Order."

The document contains three main arguments: (1) Finding of Fact No. 23 contains impermissible hearsay which is not supported by competent substantial evidence and as such must be rejected as a matter of law; (2) The recommended Findings of Fact contradict the Hearing Officer's conclusion that Petitioner was Respondent's employee; and (3) Petitioner is estopped from claiming that she is an employee. See Filing.

Respondent's first argument specifically takes issue with the Administrative Law Judge's finding that Petitioner "was expected by Mr. Siegel to be there all of the time..." Respondent argues that this finding was based solely on Petitioner's speculation and hearsay which would not be admissible over Respondent's objection in a civil action.

Even assuming this argument to be true, it is difficult to see how accepting this exception would affect the outcome of the case. The Administrative Law Judge specifically found that "[t]he most significant factors which indicate that Petitioner was an employee rather than an independent contractor are the absence of a written contract between the parties (despite the fact that Respondent's "independent contractor" salespersons had contracts as did the consulting firm brought in after Petitioner was terminated), and the fact that Petitioner was not permitted to and did not provide her spa management services to any other entity." See Recommended Order, ¶ 81.

Further, it would seem that the argument really takes issue with the inferences drawn by the Administrative Law Judge from the evidence presented.

The Commission has stated, "It is well settled that it is the Administrative Law Judge's function 'to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them.' Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986)." Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999).

Respondent's second argument, that the recommended findings of fact contradict the hearing officer's conclusion that Petitioner was Respondent's employee, likewise takes issue with the inferences drawn by the Administrative Law Judge from the facts found.

As indicated above, it is the Administrative Law Judge's function to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them. See Barr, supra.

The third argument, that Petitioner is "estopped" from claiming she is an "employee" because she filed her tax returns as if she were an independent contractor, was dealt with by the Administrative Law Judge at Recommended Order, ¶ 89 through ¶ 91. It would appear that the inconsistencies between the allegations in this case and the representations made by Petitioner on her tax returns go to the credibility of the Petitioner. And, the Administrative Law Judge said as much when he concluded, "...[t]he nature and extent of the deductions taken by Petitioner weighed into the undersigned's evaluation of Petitioner's credibility and, ultimately, the Cobb factors." Recommended Order, ¶ 92.

Credibility is an issue within the purview of the Administrative Law Judge. See Barr, supra.

Petitioner's exceptions are rejected.

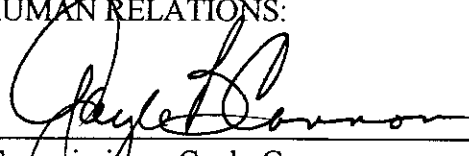
#### Disposition

In adopting the Administrative Law Judge's findings of fact and conclusions of law, we also adopt the recommended disposition of this matter.

Consequently it is determined that Petitioner was an employee of Respondent rather than an independent contractor for purposes of the Florida Civil Rights Act of 1992, and the Commission staff is hereby directed to re-open its investigation into the merits of Petitioner's amended charge of discrimination against Respondent.

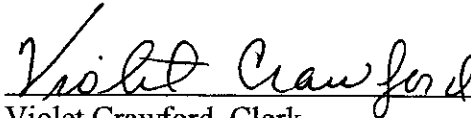
Further, the Clerk of the Commission is directed to send Petitioner the Commission's "Election of Rights" form.

DONE AND ORDERED this 29<sup>th</sup> day of December, 2003  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:



Commissioner Gayle Cannon,  
Panel Chairperson;  
Commissioner Donna Elam; and  
Commissioner Gilbert M. Singer

Filed this 29<sup>th</sup> day of December, 2003,  
in Tallahassee, Florida.



Violet Crawford, Clerk  
Commission on Human Relations  
2009 Apalachee Parkway, Suite 100  
Tallahassee, FL 32301  
(850) 488-7082

Copies furnished to:

Dawn Georgette Myers  
c/o Lisa K. Tietig, Esq.  
Tietig & Tietig, P.A.  
6065 South Tropical Trail  
Merritt Island, FL 32952

Central Florida Investments, Inc.  
c/o Richard W. Epstein, Esq.  
c/o Myrna Maysonet, Esq.  
Greenspoon, Marder, Hirschfeld,  
Rafkin, Ross & Berger  
Trade Center South, Suite 700  
100 West Cypress Creek Road  
Fort Lauderdale, FL 33309

T. Kent Wetherell, II, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 29<sup>th</sup> day of DECEMBER, 2003.

By: Kieth Crawford  
Clerk of the Commission  
Florida Commission on Human Relations