STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAWN GEORGETTE MYERS, Petitioner, vs. CENTRAL FLORIDA INVESTMENTS, INC., Respondent.	)	Case No. 02-3580

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 23, 2003, in Orlando, Florida, before T. Kent Wetherell, II, the designated administrative law judge of the Division of Administrative Hearings.

APPEARANCES

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For Respondent: Richard W. Epstein, Esquire
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STATEMENT OF THE ISSUE

The issue is 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.

PRELIMINARY STATEMENT

On or about September 14, 2001, Petitioner filed an amended charge of discrimination against Respondent with the Florida Commission on Human Relations (Commission). In the amended charge, Petitioner alleged that Respondent discriminated against her when it terminated her employment as Executive Spa Director in December 2000.

Based upon the Commission staff's investigation of the amended charge, the Executive Director of the Commission issued a determination of "no jurisdiction" on August 6, 2002. Notice of that determination was provided to Petitioner by mail on that same date. The determination did not address the merits of the amended charge, and specifically stated that "[s]ince the Commission lacks jurisdiction over the Complaint, this Determination will not address the merits of the allegations in the Complaint."

On September 10, 2002 (35 days after the date of the notice of determination), Petitioner faxed a letter to the Commission requesting an extension of time pursuant to Rule 60Y-5.008(2), Florida Administrative Code, to file her petition for relief. The Commission did not take any action on that request.

On September 11, 2002, the Commission received a one-paragraph letter from Petitioner requesting "review" of the Commission's determination by the Division of Administrative Hearings (Division). Thereafter, the Commission referred the matter to the Division for the assignment of an administrative law judge to conduct a formal administrative hearing in accordance with Section 120.57, Florida Statutes.

On September 20, 2002, after the matter had been referred to the Division, Petitioner filed a request for a 30-day extension of time to file her petition for relief. The request cited Rule 60Y-5.008(2), Florida Administrative Code, as the legal authority for the request. Attached to the request was a copy of the letter which Petitioner faxed to the Commission on September 10, 2002.

Petitioner's request was treated as a motion to amend the request for a hearing that she filed with the Commission on September 11, 2002 (see 28-106.202, Florida Administrative Code), because Rule 60Y-5.008, Florida Administrative Code, governs proceedings before the Commission not proceedings before the Division and because the Commission apparently considered Petitioner's September 11, 2002, letter to be her petition for relief since it transmitted it to the Division as such. By Order dated October 3, 2002, Petitioner was granted leave to

file an amended petition for relief, which she did on October 10, 2002.

The final hearing was held on January 23, 2003. At the hearing, Petitioner testified in her own behalf and also presented the testimony of Gail Miller. Petitioner's Exhibits P1 through P19 were received into evidence. Respondent did not call any witnesses. Respondent's Exhibits R1 through R4 were received into evidence.

The two-volume Transcript of the hearing was filed with the Division on February 7, 2003. The parties initially agreed to file their proposed recommended orders (PROs) within 10 days after the date the Transcript was filed with the Division, but they subsequently requested and were granted extensions of time through March 21, 2003, to file their PROs.[1] The parties' PROs were given due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing, the following findings are made:

A. Parties

1. Petitioner is a white female. At the time of the events giving rise to the amended charge of discrimination, Petitioner was 35-years-old.

2. Respondent Central Florida Investments, Inc. (CFI), is a corporation which, either itself or through related legal entities, owns and operates the Westgate timeshare resorts in the Orlando, Florida, area. The resorts include Westgate Lakes and Westgate Vacation Villages.

3. One of the related legal entities is CFI Sales and Marketing, Ltd. (CFI Sales). CFI Sales is referred to as a "division" of CFI on at least one of the forms received into evidence.

4. CFI's human resources department processed Petitioner's benefits forms. Those forms designated Petitioner as an employee of CFI; they did not reference CFI Sales even though that was the entity through which Petitioner was paid.

5. The human resources department also processed a salary increase for Petitioner in August 1999.

6. David Siegel is the president of CFI. Mr. Siegel controls the operation of the Westgate resorts through CFI and its related legal entities.

7. Petitioner reported directly to Mr. Siegel in her position as Executive Spa Director even though she was "employed" by and paid through CFI Sales.

B. Petitioner's "Employment" With Respondent

1. Selling Timeshare Units

8. Petitioner first started working for Respondent[2] in 1986 as a salesperson. In that position, she was responsible for selling timeshare units at the Westgate resorts owned by Respondent.

9. Petitioner worked as a salesperson for Respondent continuously from 1986 through 1998, except for a period of a couple of years that she worked at a spa in Winter Park.

10. Petitioner was an independent contractor during the period that she was a salesperson. She had a written contract with Respondent which expressly designated her as an independent contractor, and she was paid commissions from the timeshare units that she sold.

11. Petitioner did not receive any insurance or other benefits from Respondent during the time that she was a salesperson.

2. Executive Spa Director

12. At some point after she left the Winter Park spa and returned to work as a salesperson for Respondent, Petitioner approached Mr. Siegel regarding the establishment of a spa as an amenity at Westgate Lakes.

13. Mr. Siegel directed Petitioner to put together a business and marketing plan for the spa, which she did. After

some period of time, Mr. Siegel approved the spa and put Petitioner in charge of its development.

14. During the initial period that Petitioner was working on the development of the spa, she continued to sell timeshare units for Respondent.

15. In January 1998, Petitioner was placed on salary with Respondent and given the title of Executive Spa Director. From that point through the opening of the spa in 1999, Petitioner focused exclusively on the development of the spa.

16. Petitioner oversaw the construction of the spa and, among other things, Petitioner was responsible for the spa's interior design and its name, Papillon the Spa at Westgate Lakes (Papillon).

17. The spa was considered an amenity of the Westgate resorts. It was available for use by Westgate timeshare unit owners and their guests. It was also used by salespersons as a tool to close sales to prospective purchasers of Westgate timeshare units.

18. The spa offers a variety of services, including nail care, hair care, spa body treatments, body wraps, waxing, skin care, and massage therapy. The spa also includes a fitness center.

19. After the spa opened, Petitioner continued in the position of Executive Spa Director. In that capacity, she was

responsible for all aspects of the day-to-day management and operation of the spa, including supervision of the spa's staff.

20. Petitioner reported directly to Mr. Siegel. The managers of other resort amenities reported to the general manager of the resort, not to Mr. Siegel.

21. When Petitioner was put on salary as the Executive Spa Director, she was also given benefits by Respondent. Those benefits, which became effective on April 1, 1998, included health, life, dental and long-term disability insurance.

22. Petitioner's benefits were terminated effective December 31, 1999. The reason that Petitioner was given for the termination of her benefits was that Mr. Siegel "could get into a lot of trouble" for giving her employee benefits while treating her as an independent contractor for tax purposes.

23. Petitioner did not have set days or hours which she was required to work at the spa, but she was expected by Mr. Siegel to be there all of the time. Because Petitioner was most familiar with the spa's operation, that expectation is not entirely unreasonable.

24. Petitioner did not accrue vacation time or retirement benefits from Respondent in her position as Executive Spa Director. Petitioner rarely took time off and, when she did,

she had to obtain Mr. Siegel's personal approval to be away from the spa.

25. A lawsuit is pending between the parties in circuit court in Orange County regarding Mr. Siegel's alleged agreement to pay for repairs at Petitioner's home as compensation for the vacation time that she was not given as Executive Spa Director.

26. Petitioner was required to personally perform her duties as Executive Spa Director; she could not delegate them to another member of the spa's staff.

27. Petitioner did not have a written contract with Respondent during the period that she was in the Executive Spa Director position. As a result, there was nothing to preclude her from leaving the position at any time, nor was there anything to preclude Respondent from firing her at any time.

28. Petitioner was told by Mr. Siegel that she could not consult with other spas or provide her services to others during the period that she was in the Executive Spa Director position. Petitioner did not work for any other entity during the period that she was Executive Spa Director.

29. Petitioner was not authorized to make purchases for the spa without approval of Mr. Siegel or someone else in Respondent's management team. However, as discussed below in connection with Petitioner's tax returns, that did not stop Petitioner from expending her own money on the spa.

30. Petitioner was required to provide Mr. Siegel with monthly reports detailing the operation of the spa. The reports included information such as the number of spa treatments given, the number of unit owners and guests who utilized the facility, and the amount of income produced during the period.

31. Petitioner wanted to market Papillon to the general public as a "day spa" rather than just limiting its use to Westgate unit owners. However, Mr. Siegel would not approve outside marketing.

32. When Petitioner did outside marketing of the spa on her own with her own money, Petitioner was reprimanded by Mr. Siegel and another member of Respondent's management team.

33. Petitioner did not employ the staff at the spa. They were employees of and paid by Respondent.

34. Petitioner participated in the hiring and firing of the staff, but she did not have autonomy over that process. Prospective staff were screened by Respondent's human resources department before they could be interviewed by Petitioner, and Petitioner's decisions to hire and fire staff had to comply with policies adopted by the human resources department.

35. Petitioner was paid on a weekly basis as Executive Spa Director. No taxes or other amounts were withheld from Petitioner's weekly paychecks.

36. Petitioner's salary was not tied to the profitability of the spa. Her salary was established by Mr. Siegel based upon the information presented to him by Petitioner regarding the salaries of directors at spas comparable to Papillon.

37. Petitioner has a cosmetology license which allows her to perform all of the services in the spa except massage therapy. Petitioner paid the fee for the license and, because she was not reimbursed by Respondent, she reported the fee as a "business expense" on her tax return.

38. On occasion, Petitioner performed services (such as nail care) at the spa. Petitioner was not compensated for performing those services, so the cost of the service went directly into the spa's profit.

39. In December 2000, Petitioner was placed on a five-day suspension while Respondent audited the spa. Thereafter, on December 15, 2000, Petitioner was terminated from her position as Executive Spa Director.

40. After Petitioner was terminated, Respondent brought in the Nicki Bryant consulting firm to manage the spa. The firm was on a 90-day contract with Respondent, the specific terms of which are not part of the record.

C. Petitioner's Tax Returns from 1998 Through 2000

41. At the end of each year that she worked for Respondent, including 1998 through 2000 when she was Executive

Spa Director, Petitioner received a 1099 tax form from Respondent rather than a W-2 tax form.

42. Petitioner was not given the option of the type of tax form that she received from Respondent.

43. The 1099 form designated Petitioner's earnings from Respondent as "nonemployee compensation."

44. In 1998, Petitioner received compensation from Respondent in the amount of $78,030.00 In 1999, her compensation from Respondent was $87,115.44, and in 2000 her compensation from Respondent was $102,223.14.

45. Petitioner used the 1099 forms she received from Respondent to complete her federal income tax forms. The only income that Petitioner reported for the 1998, 1999, and 2000 tax years was the compensation that she received from Respondent.

46. In each tax year, that compensation was reported on Schedule C of Petitioner's tax return. That schedule, as its title indicates, is used to compute "profit or loss from business (sole proprietorship)."

47. Each tax year, Petitioner deducted a significant amount of expenses on Schedule C. In 1998, she deducted expenses of over $48,000; in 1999, she deducted expenses of over $63,000; and in 2000, she deducted expenses of over $64,000.

48. The following table identifies some the categories in which Petitioner reported expenses, and the amount of such expenses reported in the 1998, 1999 and 2000 tax years:

Category	1998	1999	2000
Advertising	$ 625	$ 2,400	$ 5,418
Car expense	$ 7,767	$ 7,855	$ 6,102
Office expense	$ 625	$ 2,200	$ 2,895
Supplies	$11,355	$10,500	$11,524
Travel	$ 2,630	$ 2,538	$ 6,125
Meals and entertainment	$13,531	$13,540	$14,285
Postage / Fed Ex	N/A[3]	$ 4,323	$ 8,107
Gifts	N/A	$12,946	$ 6,528
Cellular phone	N/A	$ 3,108	$ 2,856
Uniforms	N/A	$ 1,490	$ 2,175
Seminars / Continuing education	N/A	$ 888	$ 2,354

49. These expenses reflect the expenses that were not reimbursed by Respondent. Petitioner testified at the hearing that she was reimbursed for her travel to several seminars for some of her other expenses as well. However, corroborating evidence of those reimbursements was not introduced at the hearing.

50. Petitioner gave her accountant receipts for all of these expenses. Petitioner, not her accountant, was responsible for categorizing the receipts into the "appropriate" category.

51. The significant amount of expenses reported by Petitioner and the categories in which amounts reported call into question her testimony at the hearing that she was not permitted to advertise the spa or make independent decisions regarding the spa's operation, and that she was required to be at the spa all day, every day. However, the tax returns do not entirely undermine the credibility of Petitioner's hearing testimony.

52. In addition to the $2,400 in advertising expenses reported in 1999, Petitioner also reported expenses of $1,150 for "promotion." The postage and Fed Ex expenses also related to the advertising of the spa since they were for mailings from Petitioner to the owners to whom Petitioner had sold timeshare units.

53. The car expenses, which Petitioner attributed to her travel around the state and around the Orlando area to talk about the spa and learn about the spa industry, suggest that there were significant amounts of time that she was not at the spa. In 1999 alone, Petitioner reported that she drove more than 25,000 miles (not including commuting miles) on business. That mileage is different from the travel expenses that

Petitioner reported on her tax returns and, at hearing, attributed to her attendance at spa industry trade shows and conferences.

54. The amounts reported as "supplies" were for items that Petitioner bought through conferences, trade shows, and spa industry publications to try out at the spa such as bath salts, oils, and spa equipment. The day-to-day supplies necessary for operation of the spa were provided by Respondent.

55. The amounts reported as "gifts" were for services (such as nail care) rendered at the spa by Petitioner for which Petitioner was not compensated, as well as gifts that Petitioner purchased for vendors or other Westgate department heads who had done something nice for Petitioner.

56. The amounts reported as "office expense" related to a home office that Petitioner used to complete work that she brought home from the spa. Petitioner also had an office at the spa which was furnished by Respondent with a desk, computer, telephone, and other items essential to the operation of the spa.

57. Petitioner also promoted the spa through word-of-mouth. The amounts reported as meal expenses were for lunches or dinners paid for by Petitioner at which she discussed or mentioned the spa.

58. After deduction of expenses, Petitioner reported "business income" of $29,987 in 1998, $23,714 in 1999, and $38,207 in 2000 on her tax returns.

59. Petitioner paid self-employment tax in each of those years.

60. Above Petitioner's signature on the tax returns for 1998, 1999, and 2000 is the following statement: "Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete."

61. Petitioner testified at the hearing that she intends to amend her returns to reflect her status as an employee rather than an independent contractor and, presumably, eliminate those expenses which would not be deductible by an employee. However, as of the date of the hearing, Petitioner had not taken any formal action to amend her returns.

CONCLUSIONS OF LAW

A. Jurisdiction and Timeliness

62. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes. (All references to Sections are to the 2002 edition of the Florida Statutes. All references to Rules are to the current version of the Florida Administrative Code.)

63. Respondent did not contest the timeliness of Petitioner's request for an administrative hearing, and because the Commission has consistently held that the time for requesting a hearing is not jurisdictional, see, e.g., Ambroise v. O'Donnell's Corp., FCHR Order No. 02-100, at 2-3 (Jan. 2, 2003) (Remand Order in DOAH Case No. 02-2762), Respondent has waived that issue.[4]

B. Is CFI the Proper Respondent?

64. Respondent suggests for the first time in a footnote in its PRO that Petitioner's amended charge of discrimination was "filed against the wrong entity" because it named CFI rather than CFI Sales as the Respondent.

65. Respondent arguably waived this argument by not raising it through an answer to the petition for relief/request for hearing,[5] or by expressly putting the matter into issue at any point in this proceeding prior to its PRO. Cf. R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 41 (Fla. 3d DCA 1996) (arguments found only in footnote in appellant's brief are not properly presented to appellate court for review). To the extent that the argument was not waived, it is rejected for the reasons that follow.

66. Respondent produced no evidence at the hearing to dispute Petitioner's characterization of CFI as the "umbrella" corporation over CFI Sales and other related legal entities

controlled by Mr. Siegel and involved in the operation of the Westgate timeshare resorts. Nor did Respondent produce any evidence to contradict the testimony of Petitioner and Ms. Miller that Mr. Siegel actively and personally controls the operation of the Westgate resorts whether through CFI, CFI Sales, or otherwise.

67. Petitioner's testimony and characterization of the CFI/CFI Sales/Mr. Siegel relationship is reasonable and is corroborated by other items in the record. Specifically, the pleading filed by Respondent on January 14, 2003, confirms that Mr. Siegel is the president of CFI, and the job description for the Executive Spa Director position indicates that the position reported directly to Mr. Siegel even though Petitioner was paid through CFI Sales. Moreover, Petitioner's insurance and benefit forms indicate that they were processed by the human resources department of CFI and several identify CFI as Petitioner's "employer," rather than CFI Sales. Indeed, one of the forms characterizes "sales and marketing" as the "division" of CFI in which Petitioner worked.

68. Thus, even though the record does not reflect the precise legal relationship between or management structure of CFI and CFI Sales, the evidence is sufficient to demonstrate that there is a significant interrelationship between the management and operation of CFI and CFI Sales involving

Mr. Siegel at a high level. As a result, CFI and CFI Sales can and will be regarded as a "single employer" for purposes of this case. See generally McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930 (11th Cir. 1987); Baker v. Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1977)

C. Is Petitioner an Independent Contractor or Employee?

69. The Florida Civil Rights Act of 1992 ("the Act"), codified in Sections 760.01 though 760.11, was patterned after Title VII of the Civil Rights Act of 1964. As a result, the Act is construed in a manner consistent with Title VII. See Florida State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

70. Section 760.10(1)(a) provides that:

> It is an unlawful employment practice for an employer . . . [t]o discharge . . . any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

(Emphasis supplied).

71. The federal courts have construed the similar language in Title VII -- 42 U.S.C.A. Section 2000e-2(a), which also refers to "any individual" -- to extend protection only to

employees and not to independent contractors. See, e.g., Llampallas v. Mini-Circuits Lab, 163 F.3d 1236, 1242-43 (11th Cir. 1998) ("The statute [Title VII] does not define 'any individual,' and although we could read the term literally, we have held that only those plaintiffs who are 'employees' may bring a Title VII suit.").

72. In light of the determination of "no jurisdiction" issued in this case, the Commission apparently now construes Section 760.10 in a similar manner. However, at one time, the Commission expressed a different, and seemingly contrary interpretation of the statute. See Florida Comm'n on Human Relations v. Brevard County Sheriff's Dept., 1981 WL 180342 (Feb. 22, 1982):

> The Commission refuses to interpret these provisions [including the predecessor to Section 760.10(1)(a)] as requiring an individual to establish the relationship of master/servant, which is commonly referred to as employer/employee, to be an aggrieved person within the meaning of Section 23.167(10), Florida Statutes [which is now codified in Section 760.11(1)].

Id. at *17, quashed on other grounds, 429 So. 2d 1235 (Fla. 5th DCA 1983).

73. Petitioner also appears to concede that the Act does not apply to independent contractors despite the broad language in Section 760.10(1)(a). Indeed, Petitioner has not argued that she is protected under the Act even if she is found to be an

independent contractor; she has simply argued that she was an employee of Respondent and not an independent contractor.

74. To determine whether a person is an employer or independent contractor for purposes of Title VII, the Eleventh Circuit and most of the other federal Circuits apply a multi-factored test derived primarily from the common law test for determining the nature of a principle-agent relationship. See, e.g., Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir. 1982) (characterizing the test as a hybrid between the common law test and a test focusing on the "economic realities" of the parties' working relationship). And cf. Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 323-24 (1992) (applying a similar multi-factor test in determining whether the plaintiff was an employee or independent contractor for purposes of the Employee Retirement Income Security Act of 1974, which has a scope of coverage similar to that of Title VII).

75. In Cobb, the Eleventh Circuit identified the following factors to be considered in making the determination:

> (1) the kind of occupation, with reference to whether the work usually is done under direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work

> relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Cobb, 673 F.2d at 340. See also Eisenberg v. Advance Relocation and Storage, Inc., 237 F.3d 111, 114 (2nd Cir. 2000) (applying a 13-factor test which includes many of the same factors as in Cobb); Cattin v. Gov't Employees Ins. Co., DOAH Case No. 88-5687, 1989 WL 645106, at *6 (Nov. 1, 1989) (applying a similar test based upon the Restatement (Second) of Agency); IRS Revenue Ruling No. 87-41 (identifying 20 factors that the IRS uses in determining whether a person is an employee or independent contractor for tax purposes, many of which are similar to the factors in Cobb).

76. Not all of the factors are implicated in every case. Those factors which are "irrelevant or [] of 'indeterminate' weight--that is, those factors that are essentially in equipoise and thus do not meaningfully cut in favor of either the conclusion that the worker is an employee or the conclusion that he or she is an independent contractor" must be disregarded. Eisenburg, 237 F.3d at 114. "[O]nly those factors that are actually indicative of agency in the particular circumstances

[of the case at issue]" should weigh into the balance. Id. (citation omitted).

77. No factor is determinative, but "special weight should ordinarily be placed on the extent to which the hiring party controls the 'manner and means' by which the worker completes her assigned tasks, rather than on how she is treated for tax purposes or whether she receives benefits." Id. at 119. See also Daughtrey v. Honeywell, Inc., 3 F.3d 1488, 1492 (11th Cir. 1993) ("While the characterization of the hired party as an independent contractor or an employee may be probative of the parties' intent, all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.") (internal quotations omitted).

78. Indeed, the Second Circuit expressly stated in Eisenberg, 237 F.3d at 117, that "courts should not ordinarily place extra weight on the benefits and tax treatment factors." (Emphasis in original). Accord Nowlin v. Resolution Trust Corp., 33 F.3d 498, 506 (5th Cir. 1994).

79. The "manner and means" factor is evaluated by focusing on whether the alleged employer has the right to hire and fire the individual, the right to supervise the individual, and the right to set the individual's work schedule. See, e.g., Deal v. State Farm County Mutual Ins. Co., 5 F.3d 117, 119 (5th Cir. 1993).

80. Applying the factors identified in the cases cited above to the circumstances of this case presents a close question. Some of the factors weigh in favor of finding Petitioner to be an independent contactor, while others weigh in favor of finding Petitioner to be an employee of Respondent. On balance, the preponderance of the credible evidence and the majority of the relevant factors demonstrate that Petitioner was an employee of Respondent, despite Respondent's characterization of her as an independent contractor for tax purposes and the resulting tax returns that Petitioner filed based upon that characterization.

81. The 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.

82. The nearly three-year term and continuing nature of Petitioner's work as Executive Spa Director also suggests an employer/employee relationship. Indeed, during that period, Petitioner was on salary, she was paid on a weekly basis, and

for almost two of her three years as Executive Spa Director she was provided benefits by Respondent.

83. Furthermore, the spa was an important aspect of Respondent's business, and all of the spa staff (with the exception of Petitioner) were employees of Respondent. The spa was an amenity used by Westgate unit owners and it was also used as a sales tool in selling timeshare units at Westgate.

84. Although Petitioner's hours were not specifically set by Respondent, the fact that Mr. Siegel expected Petitioner to be at the spa at all times is an indicia of Respondent's control over the "manner and means" of Petitioner's employment. Another indicia of Respondent's control is the monthly written reports that Petitioner was required to submit to Mr. Siegel detailing the operation of the spa. Respondent's control over Petitioner's employment is further evidenced by the fact that Petitioner was required to perform her services personally, that she did not have her own employees to whom she could delegate her duties, and that Respondent could (and ultimately did) fire Petitioner without notice or contractual liability.

85. None of these indicia of control is individually determinative. Collectively, however, they indicate that Respondent exercised some (even if not full) control over the "manner and means" that Petitioner did her job. Those indicia of control outweigh the contrary indicia reflected in

Petitioner's tax returns including Petitioner's independent (and apparently unapproved) marketing of the spa. Indeed, there is no evidence that Petitioner's promotional efforts (to the extent that the expenses reported on the tax returns were indeed legitimate "business expenses") provided any benefit to Petitioner such as through an increase in her salary because of an increase in the spa's profitability.

86. Petitioner's work, for the most part, was done on Respondent's premises at the spa. Respondent furnished the tools necessary for Petitioner to run the spa -- e.g., the staff, the spa equipment, a desk and computer. The fact that Petitioner also had a home office where she worked on spa business "after hours" is not unreasonable, given Petitioner's title and job function, and it is not significant in this instance.

87. Petitioner was not a business in the traditional sense. Her only income was the compensation that she received as Executive Spa Director and, as a result, Petitioner was economically dependent upon Respondent. See Cobb, 673 F.2d at 339. Petitioner did not employ any assistants and she was not responsible for paying the spa staff. The fact that Petitioner paid self-employment tax and liberally deducted expenses on her tax return appears to be more a function of the manner in which

Respondent chose to pay her than of the actual nature of the parties' relationship or Petitioner's status as a business.

88. The undersigned has not overlooked the factors which would support the determination that Petitioner was an independent contractor, such as Respondent's apparent intent to treat Petitioner as an independent contractor by using a 1099 form to pay her and by not withholding federal, state, or social security taxes from her paychecks. That intent is undercut (at least in part) by the benefits that Respondent provided to Petitioner for two of the three years that she was in the position of Executive Spa Director, as well as by Petitioner's unrebutted testimony regarding the level of control that Mr. Siegel exerted over her work.

89. Nor has the undersigned overlooked Respondent's argument that Petitioner is estopped by her tax returns from now claiming that she was an employee rather than an independent contractor. However, Petitioner's tax returns were a direct result of Respondent's tax treatment of Petitioner and, as a result, the tax returns are not determinative of Petitioner's employment status for purposes of this case. See Eisenberg, 237 F.3d at 117; Nowlin, 33 F.3d at 506.

90. Moreover, the cases relied upon by Respondent in its PRO in support of its estoppel argument are distinguishable. Each of those cases involved situations where a party took

contrary positions during the course of litigation involving the same adverse party or an adverse party with similar interests. See Dubois v. Osborne, 745 So. 2d 479, 481 (Fla. 1st DCA 1999) (party's current position was inconsistent with that taken in prior appeal); Standford v. CSX Transportation, Inc., 637 So. 2d 37, 38 (Fla. 2nd DCA 1994) (party's current position allegedly inconsistent with position taken at the outset of the case); Blumberg v. USAA Casualty Ins. Co., 790 So. 2d 1061, 1066 (Fla. 2001) (party's current position was inconsistent with the position that it took in a very similar prior suit).

91. Here, there is no mutuality of parties because the statements which Petitioner allegedly repudiated in this proceeding were made to the Internal Revenue Service (IRS), not Respondent. Moreover, as noted in Blumberg, 790 So. 2d at 1066, "[t]here can be no estoppel where . . . the conduct relied on to create the estoppel was caused by the act of the party claiming the estoppel, or where the positions taken involved solely a question of law." The conduct relied upon as the basis of the estoppel -- i.e., Petitioner's filings with the IRS – resulted in large part from the 1099 forms given to Petitioner in the first instance; and, to the extent that the "position" taken by Petitioner with the IRS was that she was an independent contractor, that is a question of law. See, e.g., Cobb, 673 F.2d at 340-41.

92. That said, it certainly appears that Petitioner took advantage of the fact that she was paid through 1099 forms rather than W-2 forms by liberally deducting a variety of expenses on her tax returns. The nature and extent of the deductions taken by Petitioner weighed into the undersigned's evaluation of Petitioner's credibility and, ultimately, the Cobb factors. The propriety of those deductions, however, is a matter that Petitioner will have to deal with in another forum.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations issue a final order which:

1. determines that Petitioner was an employee of Respondent rather than an independent contractor for purposes of the Florida Civil Rights Act of 1992; and

2. directs the Commission staff to re-open its investigation into the merits of Petitioner's amended charge of discrimination against Respondent.

DONE AND ENTERED this 17th day of April, 2003, in Tallahassee, Leon County, Florida.

T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of April, 2003.

ENDNOTES

1/ On March 21, 2003, Petitioner filed an unopposed motion for an additional extension of time -- through March 24, 2003, at noon -- to file her PRO. That request is hereby granted nunc pro tunc March 21, 2003.

2/ In light of the interrelationship between CFI and CFI Sales, all subsequent references to "Respondent" in this Recommended Order include both entities unless the context indicates otherwise. And see Conclusions of Law, Part B.

3/ The copy of the 1998 tax return introduced at the hearing (Exhibit R2) did not include the second page of Schedule C which itemizes the "other expenses" reported by Petitioner. However, Petitioner testified that such expenses were of the same type as those listed on the tax returns for the subsequent years.

4/ Nevertheless, it must be pointed out that the 35-day period set forth in the Commission's determination letter with which Petitioner complied does not appear to have any basis in statute or rule. That period is presumably derived from the 35-day periods set forth in Section 760.11(6) and (7), but those statutes are only implicated where the Commission issues a determination of "cause" or "no cause." In this case, the Commission issued a determination of "no jurisdiction" not a

determination of "cause" or "no cause." The Commission's own rules provide only a 30-day period to request a hearing to contest the Commission's determination of "no jurisdiction." See Rule 60Y-5.008(1). Of course, as pointed out in the Recommended Order in Ambroise, the Commission's procedural rules are ineffective (and have been since at least 1998) to the extent that they conflict with the Uniform Rules of Procedure adopted pursuant to Section 120.54(5). See Ambroise, DOAH Case No. 02-2762, Recommended Order at 10-11, remanded on other grounds, FCHR Order No. 02-100 (Jan. 2, 2003). See also Plaisime v. Marriott Key Largo Resort, DOAH Case No. 02-2183, at 6-10 (Feb. 14, 2003); Waldron v. Wackenhut Corrections Corp., DOAH Case No. 02-4048, at 7-9 (Apr. 1, 2003). The 30-day period provided in Rule 60Y-5.008(1) is in direct conflict with Rule 28-106.111(2) which requires a petition for hearing to be filed "within 21 days of receipt of written notice of the [agency's] decision." Accordingly, a request for an administrative hearing based upon the Commission's determination of "no jurisdiction" must be filed with the Commission (i.e., received by the Clerk of the Commission, see 28-106.104(1)) within 21 days after the date that the Petitioner receives the Commission's determination. The record does not reflect the date that Petitioner actually received the Commission's determination either personally or through her prior counsel (see Woodard v. Fla. State Univ., 518 So. 2d 336, 337 (Fla. 1st DCA 1997)), but if the Commission's "constructive notice" analysis from its Remand Order in Ambroise is applied, the 21-day period would be computed from August 11, 2002 (i.e., 5 days after the date of the Commission's determination letter). Using that date, the request would be untimely under Rule 28-106.111(2) since it was received 31 days thereafter. Ultimately, however, this issue is academic in this case (although it clearly needs to be brought to the Commission's attention so that the notices issued in future cases involving "no jurisdiction" determinations can be corrected) because Respondent did not contest the timeliness of Petitioner's request for an administrative hearing. Accordingly, it is equally unnecessary to determine whether the doctrine of equitable tolling might save Petitioner's untimely request for a hearing in this case. See Machules v. Dept. of Administration, 523 So. 2d 1132 (Fla. 1988)(setting forth the standards for application of the doctrine of equitable tolling); Cann v. Dept. of Children & Family Servs., 813 So. 2d 237 (Fla. 2nd DCA 2002) (excusable neglect no longer saves an untimely request for an administrative hearing, but equitable tolling might).

5/ See Rule 60Y-5.008(5)(c) (stating that the failure to plead an affirmative defense in an answer to the petition for relief constitutes waiver of that defense). But cf. Plaisime, supra, at 6-10 (concluding that the Rule 60Y-5.008(5) is "a nullity" because it is in conflict with Rule 28-106.203 which is part of the Uniform Rules of Procedure).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.