

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

KAMAL ASSILY, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 04-1762  
 )  
 MEMORIAL HOSPITAL OF TAMPA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this cause came on for final hearing before Fred L. Buckine, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on October 28, 2004, by video teleconference at sites in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioner: Kamal Assily, pro se  
Post Office Box 3446  
Tampa, Florida 33601-3446

For Petitioner: Robert W. Horton, Esquire  
Bass, Berry & Sims, PLC  
315 Deaderick Street, Suite 2700  
Nashville, Tennessee 37238

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent violated the Florida Civil Rights Act of 1992, as amended, by discriminating against Petitioner by denying Petitioner

opportunities to establish an employment relationship afforded other workers of different national origin and by subjecting Petitioner to disparate treatment because of his national origin, as alleged in the Petition for Relief.

PRELIMINARY STATEMENT

On February 12, 2003, Petitioner, Kamal Assily, filed a Charge of Discrimination with the Florida Commission on Human Relations (Commission or FCHR) alleging that Respondent, Memorial Hospital of Tampa, had discriminated and retaliated against him in violation of the Florida Civil Rights Act of 1992, as amended, Sections 760.01 through 760.11, Florida Statutes (2000). The alleged discrimination was based on national origin.

On April 13, 2004, the Commission issued a letter of Determination: No Jurisdiction. The determination was based on the Commission's investigation and resulting memorandum submitted to the Office of the General Counsel who concurred with the conclusion of no jurisdiction.

On April 27, 2004, Petitioner filed a request for reconsideration of the determination with the Commission, and, on May 6, 2004, the Commission directed Petitioner to refute its determination of no jurisdiction by filing a petition for relief with the Division of Administrative Hearings (DOAH). On May 17, 2004, Petitioner's Petition for Relief, claiming discrimination

on the basis of his national origin, was filed with the Commission.

On May 19, 2004, the Commission referred the Petition for Relief, Notice of Determination, and the Employment Charge of Discrimination to DOAH, requesting assignment of an Administrative Law Judge to conduct all necessary proceedings.

On June 18, 2004, the Notice of Hearing, scheduling the final hearing for July 20, 2004, and Order of Pre-hearing Instructions were entered. By Order of June 28, 2004, the final hearing was rescheduled for August 27, 2004.

On August 9, 2004, Petitioner filed a Motion to Recuse Judge, and, by Order of August 16, 2004, Petitioner's Motion to Recuse Judge was denied.

On August 24, 2004, an Order granting Respondent's Motion for Continuance was entered, rescheduling the final hearing for September 17, 2004.

By Order dated August 31, 2004, Respondent's Motion to Confirm Qualified Representative was granted.

On September 2, 2004, Respondent filed a second Motion to Continue, and, by Order dated September 17, 2004, the final hearing was rescheduled for October 28, 2004.

On September 23, 2004, Petitioner filed a Motion to Remand the proceeding to FCHR and to direct FCHR to issue a final order that Petitioner was an employee of Respondent, and the motion

was heard via telephonic conference on October 1, 2004. By Order dated October 5, 2004, Petitioner's Motion to Remand was denied, and, by Order of the same date, Petitioner was required to comply with all outstanding discovery and make himself available for deposition no later than 14 days before the final hearing scheduled for October 28, 2004. Petitioner did not respond to Respondent's discovery and failed to comply with the October 5, 2004, Order.

By Order dated October 11, 2004, Petitioner was required to show cause within ten days why DOAH did not have jurisdiction after FCHR's determination of no jurisdiction, and both parties responded on October 21, 2004.

On October 19, 2004, an Amended Notice of Video Teleconference, scheduling the hearing via video teleconference with sites in Tallahassee and Tampa, Florida, on October 28, 2004, was entered.

The final hearing took place on October 28, 2004, via video teleconference with the parties located in Tampa, Florida, and the undersigned in Tallahassee, Florida.

At the final hearing, the parties were advised that all pending motions, motions for reconsideration of previously ruled upon motions, motions and counter motions for dismissal, motions for remand, and all other motions not previously heard and ruled

on would be taken under advisement pending the conclusion of the final hearing.

The undersigned took official recognition, identified and accepted as Court's (DOAH) exhibits: A-1, Respondent's confirmation of U.S. Postal Service tracking number of a September 2, 2004, confirmed delivery of discovery request to Petitioner's address of record, Post Office Box 3446, Tampa, Florida 33601-3446; A-2, Respondent's confirmation of U.S. Postal Service tracking number of delivery of discovery request to Petitioner's address of record July 16, 2004, post to Petitioner's address of record; and A3, Respondent's confirmation of U.S. Postal Service tracking number of a July 22, 2004, delivery of discovery request to Petitioner's address of record.

At the final hearing, Petitioner testified on his own behalf but was precluded from introducing into evidence any and all exhibits which were not provided to Respondent as directed by the Order of October 5, 2004.

Respondent presented the testimony of Robert Mitchell, director of the Respiratory Care Department for Respondent, and offered 28 exhibits, all of which were accepted into evidence.

All outstanding motions of Petitioner and Respondent were denied at the commencement of the final hearing. The parties

were given leave to renew any motion for the record during the conclusion phase of the hearing. Petitioner renewed his October 7, 2004, answer/motion titled: Answer to Respondent's Motion to Dismiss and Petitioner's Second Motion to Dismiss Respondent's Representative and Motion to Strike and to Sanction. Respondent renewed its October 15, 2004, motion titled: Respondent's Motion to Dismiss. Rulings on those motions are made infra.

The one-volume Transcript was filed on November 10, 2004, and the parties were provided ten days after receipt of the Transcript to file their proposed recommended orders.

On November 24, 2004, Petitioner requested an extension of time to file his proposed recommended order, and, by Order of November 29, 2004, the time for filing proposed recommended orders was extended to December 10, 2004. Each party filed a Proposed Recommended Order on December 13, 2004, and each party's proposal was given thoughtful consideration by the undersigned Administrative Law Judge.

#### FINDINGS OF FACT

Based upon the observation of the witnesses and their demeanor while testifying; stipulations by the parties; documentary materials received in evidence; evidentiary rulings made pursuant to Sections 120.569 and 120.57, Florida Statutes

(2003); and the entire record of this proceeding, the following relevant and material findings of fact are determined:

Relationship Between Petitioner and Respondent

1. At all times material, Petitioner, Kamal Assily, was an electroencephalogram (EEG) technician, and on June 1, 1996, Petitioner signed a written agreement, as an "independent contractor," between Respondent, Memorial Hospital of Tampa, and Town and Country Hospital, working as an on-call EEG technician to provided EEG services when needed.<sup>1</sup> The term "on-call" obligated Petitioner to respond and provide services when called by Respondent, and, given the time and date, Petitioner would make himself available to provide EEG services. Petitioner was free to offer and provide EEG services to both Respondent and to Town and Country Hospital, another hospital located in Tampa, Florida. Each "independent contractor" agreement was for a one-year (365 days) duration. Petitioner performed EEG services under the independent contractor's contract(s), invoiced Respondent, and was paid for services rendered. By admission, Petitioner acknowledged that Respondent: (1) did not withhold taxes (federal, state income) from compensation paid for his services, (2) did not provide health insurance benefits to Petitioner, (3) required Petitioner to secure and maintain personal liability insurance for work performed for Respondent, and (4) did not direct, control, or supervise Petitioner's

actual work and performance when he was engaged in performing service as an EEG technician.

#### Professional Liability Insurance Coverage

2. As an independent contractor, Petitioner was required by Respondent to secure, and Petitioner did secure, personal professional liability (EEG) insurance in the amount of one million dollars per occurrence and three million dollars aggregate throughout the duration of each yearly contract.

3. Petitioner continued his independent contractor relationship with Respondent from 1996 to 1997 through 1999 by signing yearly independent contracts. On December 29, 2000, Petitioner entered into and signed a written agreement, as an "independent contractor," with Respondent effective from December 29, 2000, until December 29, 2001.<sup>2</sup>

#### Billing and Payments for EEG Services

4. By invoice dated February 1, 2000, Petitioner invoiced Respondent for EEG services performed on four patients: M.F., November 2, 1999; D.C., December 1, 1999; R.G., December 20, 1999; and M.B., January 31, 2000, at a rate of \$200.00 per client for a total of \$800.00. Respondent approved this invoice for pay on February 22, 2000. Respondent withheld no income taxes, and no social security was withheld from payment to Petitioner for EEG services rendered. It is noted, and found, that Petitioner worked year after year with the aforesaid yearly



written agreement, as an "independent contractor," with Respondent from 1996 to 1997 through 1999 to 2000. Petitioner signed every written agreement as an "independent contractor," and neither did Petitioner request Respondent to, nor did an agent for Respondent, "sign" the yearly agreements. Having repeatedly entered into and signed each written agreement year after year and not requiring Respondent's agent's signature each year nullifies Petitioner's at-hearing argument that the agreements were not signed by Respondent and thus not binding nor sufficient to establish his relationship as that of an "independent contractor" and by inference established an "employer-employee relationship."

5. On April 1, 2000, Petitioner invoiced Respondent for EEG services performed on nine patients during the month of March 2000, at the rate of \$200.00 per EEG for a total of \$1,800.00. Respondent approved that invoice for payment on April 17, 2000.

6. On January 1, 2001, Petitioner invoiced Respondent \$800.00, for EEG services performed on January 1, 2001; February 1, 2001; September 1, 2000; and November 1, 2000. At all times material, Respondent did not provide Petitioner with health insurance benefits. Respondent withheld no income taxes, and no social security was withheld from payment to

Petitioner for EEG services rendered under the written agreement as an "independent contractor" and invoiced on January 1, 2001.

Federal Taxes Withheld from Payment to Petitioner for EEG Services Rendered

7. At the end of each year Petitioner worked for Respondent, from 1996 to 1997 through December 29, 2000, Petitioner received an Internal Revenue Service (IRS) 1099 income tax form from Respondent identifying and reporting the total income paid for services during the preceding tax year as "non-employee compensation." At no time during the 1996 through 2000 contractual relationship did Respondent provide, or Petitioner request, an IRS W-3 form, summarizing total wages paid during the preceding year and the amount of federal income taxes withheld from the employee's total wages as reported to the IRS. Petitioner's at-hearing, after-the-fact, argument that Respondent provided him "benefits" in the form of discount food in the hospital cafeteria is unworthy of serious consideration.

Limitation of Services and Equipment Provided

8. Petitioner was limited to providing EEG technician services only on an "as needed" basis and, when not working for Respondent, remained "on-call" subject to the schedule of Respondent's needs. During the times Petitioner was not providing EEG technician services to Respondent, he was free to

provide his EEG technician services to Town and Country Hospital.

9. Respondent provided the EEG equipment, the work facility location, and schedule of services. Petitioner was responsible, with respect to his EEG work product, to the physician requesting EEG services for his patients. Petitioner was responsible, with respect to notice of his work schedule, for maintenance and upkeep of EEG equipment and for reporting protocol and resolution of complaint to the director of "Hospital Manager of Respiratory Care." Petitioner was not permitted to subcontract or hire-out any EEG services provided Respondent under their written agreement.

Supervision of Petitioner's Performance of EEG services

10. As director of "Hospital Manager of Respiratory Care," Ronald Mitchell was responsible for the overall functions of the equipment and operators of the EEG equipment. Included in his overall responsibilities were assuring compliance with hospital protocol; at the request of physicians, providing EEG reports and EEG test results; entering EEG test results into the patients' charts; and cleaning and maintaining EEG machinery after each use. Mr. Mitchell was Petitioner's contact person with the hospital, but in no wise managed the "means and methods" in which Petitioner performed his EEG services and assignments.

Complaints Received From Hospital Staff and Patients About  
Petitioner

11. During mid-year of 2000, Mr. Mitchell became concerned about the overall services Petitioner was providing Respondent. One major concern was Petitioner's habit of placing a copy of the EEG test results on the requesting physician's desk but not ascertaining that the physician's report had been accurately transcribed. A second concern was Petitioner's failure to place the EEG test results on the patients' medical charts. Mr. Mitchell conferred with Petitioner regarding these matters, requesting that in the future Petitioner would correct the situation. Petitioner, relying on his independent contractual document, refused to comply with Mr. Mitchell's request without an agreement for additional compensation being paid to him over and above the amounts charged for the EEG testing. Respondent refused Petitioner's additional compensation request, insisting that the requested services were part and parcel of Petitioner's contractual obligations.

12. Mr. Mitchell also began to receive complaints from patients and some staff nurses regarding Petitioner's rude and abusive conduct toward them. In August of 1998, one nurse reduced her concerns to writing detailing Petitioner's rude conduct to a long-time patient who relayed her complaints to the nurse. Mr. Mitchell spoke to the patient, the patient's husband

and the nurse involved. These three persons confirmed experiencing rude and unprofessional conduct by Petitioner. Thereafter the complaining patient refused to permit Petitioner to do another test on her person. When Petitioner was confronted by Mr. Mitchell and given an opportunity to respond, Petitioner suggested the complaining patient suffered with "mental confusion."

13. On January 29, 2001, Petitioner wrote a letter to Connie Hawthorn, chief executive officer (CEO) of Respondent. The first two sentences stated:

I am a service provider of Electroencephalographic procedures (EEG) who is known to Memorial Hospital. Certain unsettling and growing concerns that involve your employee Director Ron Mitchell, have prompted me to seek your attention.

In the first sentence above, Petitioner identified himself and his relationship with the hospital, not as an "employee" as he identified Mr. Mitchell, but rather as one who independently provided services. A fair and unbiased reading of Petitioner's letter supports a reasonable inference that Petitioner did not consider himself, as he considered Mr. Mitchell, as an "employee," but rather as an independent contractor.

#### Care and Maintenance of EEG Machinery

14. As the user/operator of the EEG machine, it was the responsibility of Petitioner to maintain the EEG machine in

proper operating condition. This required the operator, after each use, to clean, care, adjust, and maintain the EEG machine used. In 1998, Mr. Mitchell received reports from other hospital staff responsible for the "routine" maintenance of hospital equipment that the EEG machine used by Petitioner was left in a "mess," resulting from improper wipe-down, clean-up, and after-use care. When confronted by Mr. Mitchell with this issue, as he had in the past, Petitioner denied responsibility for the condition of the EEG machine and suggested that the condition of the EEG machine was the result of improper service by the hospital's maintenance department.

#### Full-Time EEG Service Provider Hired by Respondent

15. In 1999 to 2000, Respondent hired an employee, Terry Pinkley, to provide full-time EEG services to the hospital. When Dr. Tyler (no first name in the record), a staff physician, became aware of the new EEG provider, he requested that Petitioner be allowed to continue providing intra-operative EEG services for his patients when he performed surgery, and Respondent acquiesced to Dr. Tyler's request. Petitioner was thereafter restricted to on-call intra-operative EEG services by request of only Dr. Tyler.

#### Purchase of New EEG Machine

16. In the fall of 1999, an outside service provider was called to provide overhaul maintenance service on the EEG

machine at Respondent's facility. During the maintenance process the service provider determined that the adjustment mechanisms on Respondent's EEG machine were inoperative. In early 2000, Respondent purchased a new EEG machine. The company's representative advised and cautioned Respondent that the new EEG machine should not be used during surgery because of the possibility of monitor failure. The "no surgery" restriction on the new EEG machine further reduced, to the point of eliminating, the need for Petitioner's intra-operative EEG services at the request of Dr. Tyler when one of his patients was going into surgery.

#### Contracting Out EEG Services

17. In May of 2000, Respondent determined that there was an insufficient demand for EEG testing to keep its EEG employee on staff. The EEG service was again offered to independent contract services for bid. Petitioner was informed of the bid offering, but failed to enter his bid in a timely manner. The independent contractor bid was awarded to Protech Neurology Services (Protech). By this time, Petitioner's dwindling workload that was previously restricted to intra-operative EEG services only when requested by Dr. Tyler, dwindled even further.

18. In mid 2000, Mr. Mitchell told Petitioner that the hospital required a new independent contract that accurately

reflected his restricted EEG services to intra-operative EEG services only when requested by Dr. Tyler. Petitioner submitted several proposed independent contracts, none of which was found acceptable by Respondent. Petitioner's last independent contact offer included an "exclusive non-compete status" clause that Respondent refused to accept. Petitioner's proposed "exclusive non-compete status" clause evidenced the intent of an independent contractor, not the intent of an employee seeking to retain his employment.

#### Last Independent Contractor Employment with Respondent

19. In January 2001, Mr. Mitchell met with Dr. Tyler, discussing with him Petitioner's refusal to enter into a new independent contractor's contract reflecting Petitioner's limited EEG service as intra-operative EEG services only when requested by Dr. Tyler. Dr. Tyler agreed to discontinue requesting and using Petitioner's EEG services. Having no further need for EEG services previously provided by Petitioner, Respondent, in February 2001, finalized and terminated its contractual relationship with Petitioner, by noting on Petitioner's February 2001 invoice that: "Kamal is no longer a service provider for Memorial Hospital. This is the last bill." Thereafter, Respondent never again called Petitioner to perform work as an EEG technician.



20. Prior to expiration of the Protech Neurology Services' May 2001 contract, Respondent, as was the past practice, requested bids from potential EEG providers, to include Petitioner. Petitioner refused to submit a bid for the May 2001 contractual EEG work with Respondent. Petitioner gave his reason for not bidding as follows:

[O]ngoing pre-existing open and documented employment interest in Memorial Hospital of Tampa . . . essentially precedes and supercedes the invitation-to-bid letter.

Petitioner's apparent intention of the above phrase, "[O]ngoing pre-existing open and documented employment interest," without providing an explanation of record, was an attempt to establish, by inference, the basis of an "employee-employer" relationship. An "employee-employer" relationship, not by circumstances or by after-the-fact, self-serving statements of Petitioner, is not inferred by the undersigned. The May 2001-2002 EEG technician contract was awarded to Protech.

After-Termination Activities by Petitioner

21. From May 29, 2001, until the filing of his initial complaint with the Commission on February 12, 2003, Petitioner engaged in an ongoing telephoning and letter-writing campaign with the CEO of the facility, with the division president of the owner of Respondent's facility, and with the operations counsel for the owners. Petitioner presented a written proposed

"settlement agreement" to resolve his disputed "ongoing pre-existing open and documented employment interest that precedes and supercedes the invitation to bid letter." On September 6, 2001, operations counsel of the owner of Respondent's facility wrote Petitioner informing him, as Respondent had repeatedly done so in the past, that there is no issue to settle and no desire for continued communication with him.

#### Filing of Charge of Discrimination by Petitioner

22. More than two years after Petitioner last billed for EEG services provided in February 2001 (when Respondent terminated its contractual relationship with Petitioner noting on Petitioner's February 2001 bill that "Kamal is no longer a service provider for Memorial Hospital"), Petitioner acknowledged, by itemizing those events he claimed in his Charge of Discrimination as: (1) the hiring of Mr. Pinkley in 1999, (2) the contracting with Protech in May 2000 and June 2001, (3) the conversation he had with Respondent's director in January 2001, and (4) termination of his service as intra-operative EEG technician for Respondent.

#### National Origin or Ancestry of Petitioner

23. Petitioner, a Title VII complainant, did not offer nor is there present in the record, evidence of Petitioner's racial minority status, either by establishing his national origin or his ancestry, as that term is defined in Subsection 760.02(5),

Florida Statutes (2003). Petitioner did not offer nor is there present in the record, evidence that the national origin or ancestry or racial status of Mr. Pinkley, who was hired by Respondent in 1999 as a full-time EEG technician, was different from that of Petitioner. The failure of Petitioner to establish his national origin or his ancestry or racial minority status resulted in an inability to satisfy the first prong of a prima facie case burden of proof requirement. Petitioner's failure is fatal.

24. The evidence is clear that during all times material, starting in 1996 until February 2001, when Respondent terminated his services, Petitioner performed EEG technician services for Respondent as an independent contractor.

25. The evidence is clear that the operative, factual, and legal relationship existing between Petitioner and Respondent, starting in 1996 and continuing, year after year by separate yearly written contracts, through February 2001, was at no time an "employer-employee" relationship.

26. The evidence is clear that during all times material, Respondent was an "employer" as that term is defined in Subsection 760.02(7), Florida Statutes (2003).

27. The evidence is clear that during all times material, Petitioner was an "aggrieved person" as that term is defined in Subsection 760.02(10), Florida Statutes (2003).

28. The evidence is clear that Petitioner did not establish his national origin or his ancestry, as that term is defined in Subsection 760.02(5), Florida Statutes (2003).

29. All the evidence of record, viewed most favorably, clearly demonstrated that Petitioner failed on the initial burden of establishing a prima facie case of discrimination. By the Findings of Fact hereinabove, all other motions raised by Petitioner and Respondent and taken under advisement are moot.

#### CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Section 120.569 and Subsections 120.57(1) and 760.11(7), Florida Statutes (2004).

31. Petitioner is a "person" within the meaning of Subsection 760.02(6), Florida Statutes (2003).

32. Petitioner is an "aggrieved person" within the meaning of Subsection 760.02(10), Florida Statutes (2003).

33. Respondent is an "employer" within the meaning of Subsection 760.02(7), Florida Statutes (2003).

34. Petitioner has made allegations under the Florida Civil Rights Act of 1992. This act was patterned after Title VII of the Civil Rights Acts of 1964 and 1991, Title 42 U.S. Code, Section 2000, et seq. See Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991); School

Board of Leon County v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981).

35. Petitioner has the burden of proving by the preponderance of the evidence that Respondent committed an unlawful employment practice. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

36. The United States Supreme Court set forth the following burden of proof that must be met by a Title VII plaintiff in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d (1973): The complainant must carry the initial burden of establishing a prima facie case of race discrimination. This may be done by showing that (1) complainant belongs to a racial minority; (2) complainant applied and was qualified for a job for which the employer was seeking applicants; (3) despite complainant's qualifications, complainant was rejected; and (4) after rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. After the complainant satisfies this burden, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection. If the employer articulates such a reason, the complainant must then be afforded a fair opportunity to show that the employer's stated reason was in fact, a

pretext. In Texas Department of Community Affairs v. Burdine, 450. U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), the U.S. Supreme Court reiterated that the plaintiff always retains the burden of persuasion. Once the plaintiff has established a prima facie showing of discrimination, the defendant need only articulate--it need not prove--the existence of a legitimate, non-discriminatory reason for its actions. The plaintiff then retains the burden of persuading the court that the offered reason is a pretext and that a discriminatory reason likely motivated the employer in its actions.

37. In this proceeding, Petitioner failed to adduce evidence in the record establishing the threshold burden of his national origin or ancestry to prove that by his national origin or ancestry he belonged to a racial minority. That failure is fatal to a Title VII complaint.

38. Title VII protects only employees, and not independent contractors. See Broussard v. L. H. Bossier, Inc., 789 F.2d 1158, 1160 (5th Cir. 1986). Likewise, independent contractors are not protected under Chapter 760, Florida Statutes.

39. The Eleventh Circuit has deemed the following economic reality factors relevant in determining whether one is an independent contractor or an employee: (1) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist

without supervision; (2) the skill required in the particular occupation; (3) the source of the tools and equipment; (4) the location of the work; (5) the method of payment; (6) the manner in which the work relationship is terminated; (7) the provision of employee benefits; (8) whether the work is an integral part of the business of the "employer"; (9) the tax treatment of the hired party; and (10) the intention of the parties. See Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 323-24, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992); 4139 Mgmt., Inc. v. DOL & Empl., 763 So. 2d 514, 517 (Fla. 5th DCA 2000).

40. Applying the factors identified in the cases cited above to the totality of circumstances established by the evidence of this case, the preponderance of the evidence clearly demonstrated that Petitioner qualifies as an independent contractor and not an "employee" of Respondent.

41. First, on June 1, 1996, Petitioner voluntarily entered into a written agreement identifying himself as an "independent contractor" with both Respondent and Town and County Hospital to specifically provide only electroencephalographic (EEG) technical services on an on-call basis.

42. Second, the intent of the parties to treat their working relationship as that of an independent contractor. Petitioner performed, on-call, technical EEG tests for Respondent's patients on a per case basis and billed Respondent

for his services on a per case, per patient basis. These "services on a per case, per patient basis" were continued for the duration of the parties' relationship, from June 1, 1996, through February 2001.

43. Third, Respondent used an IRS 1099 form to pay Petitioner for his "services on a per case, per patient basis." Petitioner did not request, and Respondent did not withhold federal taxes, states taxes, social security taxes or workers' compensation taxes from Petitioner's pay.

44. Fourth, benefits afforded Petitioner by Respondent consisted only of a discount for food consumed in Respondent's onsite cafeteria and flu inoculations.

45. Fifth, Petitioner was required to, and did, secure and maintain personal independent professional liability insurance.

46. Sixth, Petitioner, as a specialist, performed EEG technical services without direct supervision by Respondent.

47. Seventh, at all times material, Petitioner was eligible to perform EEG technical services for other hospitals or customers. Indeed, the 1996 contract included, as another of Petitioner's client, Town and Country Hospital of Tampa, Florida.

48. Eighth, Respondent provided the EEG equipment for Petitioner to perform his EEG technical services.



49. Ninth, the work relationship was terminated by Respondent only after complaints were received from patients and nursing staff and the lack of proper maintenance and upkeep of Respondent's EEG equipment. Thereafter, Petitioner was afforded an opportunity to bid anew for the independent contract work and refused to do so.

50. Tenth, after Petitioner's refusal to bid, Respondent retained the services of another specialist to perform EEG technical services on EEG equipment owned by Respondent.

51. Petitioner failed to establish, by evidence in the record, that at any time material that he was an "employee" of Respondent.

52. Having failed to establish, by the evidence of record, a prima facie case of discrimination, Petitioner's Petition for Relief must be dismissed, and the dismissal rendered moot all other pending motions of the parties.

#### RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter an Order DISMISSING the Petition for Relief filed by Petitioner, Kamal Assily.

DONE AND ENTERED this 16th day of March, 2005, in  
Tallahassee, Leon County, Florida.



---

FRED L. BUCKINE  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 16th day of March, 2005.

ENDNOTES

1/ The 1996 agreement provided, in material part:

This Agreement entered this 1st day of June 1996, by and between the KAMAL ASSILY, hereinafter referred to as the "CONTRACTOR," and MEMORIAL HOSPITAL OF TAMPA, Tampa, Florida, hereinafter referred to as the "HOSPITAL," and TOWN & COUNTRY HOSPITAL, Tampa, Florida, hereinafter referred to as the "HOSPITAL."

1. Contractor shall be Responsible for the following:

- A. Perform EEG procedures.
- B. Document performance of the EEG.
- C. Utilize hospital equipment and supplies.
- D. Provide thirty (30) days written advance notice upon terminating this agreement.

2. The Hospital shall be responsible for the following.

- A. Provide contractor exclusive non-compete status.
- B. Apply a basic fee schedule as proposed by the contractor, herewith, and agree to accept charges for any additional and all services provided by contractor.

- C. Compensate contractor within reasonable time.
- D. Treat this agreement and its terms confidentially.
- E. Provide thirty (30) days written advance notice upon terminating this agreement.

3. APPLICABLE LAW

This agreement shall be governed by and construed in accordance with the laws of the State of Florida.

4. PARTIES BOUND

This agreement shall apply to and bind the parties hereto, together with their respective heirs, successors, and assigns.

5. MODIFICATION

Any modifications, additions, or deletions from this agreement must be in writing and signed by both parties.

6. ARBITRATION

Disputes arising out of this agreement shall be addressed to binding arbitration.

7. TERMS OF THIS AGREEMENT

This agreement shall be in effect for twelve months from the date first written above.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed on the day herein above first written.

FOR THE CONTRACTOR FOR MEMORIAL HOSPITAL OF TAMPA AND TOWN & COUNTRY HOSPITAL

By: /s/ (Petitioner's signature)

By: (blank-no signature)

PROPOSED BASIC EEG FEES FOR MEMORIAL & T&C HOSPITALS (Hospital fiscal year 1996-1997)

Routine EEG -----\$35.00  
Wknd, holiday, stat, before & aftr hrs EEG-----\$45.00  
Intra-operative EEG -----\$200.00  
Death recordings & EEG requiring meds/sedations--\$45.00

\* \* \*

FOR THE CONTRACTOR  
/S/\_Kamal Assily

2/ In 2000, the identical agreement provided, in material part, this Agreement entered this 29th day of December 2000, by and between the KAMAL ASSILY, hereinafter referred to as the "CONTRACTOR," and MEMORIAL HOSPITAL OF TAMPA, Tampa, Florida, hereinafter referred to as the "HOSPITAL," but, restricted performance to only intra-operative EEG at compensation rate of \$200.00 per case. It is noted that each written agreement contained only the signature of Petitioner and none contained a signature of Respondent's Agent. It is also noted that Petitioner accepted each such agreement as binding, without the signature of Respondent's agent, performed thereunder, invoiced Respondent, and was paid for services rendered. By his conduct, Petitioner accepted the documents as binding agreements and cannot now disavow his past performance and acceptance of the terms and conditions thereof.

COPIES FURNISHED:

Kamal Assily  
Post Office Box 3446  
Tampa, Florida 33601-3446

Denise Crawford, Agency Clerk  
Florida Commission on Human Relations  
2009 Apalachee Parkway, Suite 100  
Tallahassee, Florida 32301

Robert W. Horton, Esquire  
Bass, Berry & Sims, PLC  
315 Deaderick Street, Suite 2700  
Nashville, Tennessee 37238

Cecil Howard, General Counsel  
Florida Commission on Human Relations  
2009 Apalachee Parkway, Suite 100  
Tallahassee, Florida 32301

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.