

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM D. HUNT,)
)
 Petitioner,)
)
 vs.) Case No. 04-2424
)
 TPE STRUCTURES OF BAY COUNTY,)
 INC.,)
)
 Respondent.)
 _____)
 CHARLES C. WHITE,)
)
 Petitioner,)
)
 vs.) Case No. 04-2425
)
 TPE STRUCTURES OF BAY COUNTY,)
 INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Notice was provided and on November 22, 2004, at 10:00 a.m. a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes (2004). The hearing location was the DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida. Charles C. Adams, Administrative Law Judge, conducted the hearing.

APPEARANCES

For Petitioners: Daniel A. Perez, Esquire
Allen & Trent, P.A.
700 North Wickham Road, Suite 107
Melbourne, Florida 32935

For Respondent: Kenneth L. Karr, President
TPE Structures of Bay County, Inc.
Post Office Box 18155
Panama City Beach, Florida 32417

STATEMENT OF THE ISSUE

Is Respondent TPE Structures of Bay County, Inc. (TPE Bay County) an employer as defined in Section 760.02(7), Florida Statutes (2003), conferring jurisdiction on the Florida Commission on Human Relations (the Commission) to consider the complaint filed by Petitioner William D. Hunt (Petitioner Hunt) and Petitioner Charles C. White (Petitioner White) against TPE Bay County?

PRELIMINARY STATEMENT

On December 10, 2003, Petitioner Hunt filed an Amended Employment Charge of Discrimination naming "The Painting Experts of Bay County, Inc." as the offending employer. On that same date Petitioner White filed a separate Amended Employment Charge of Discrimination naming "The Painting Experts (TPE) of Bay County" as the offending employer. In context the employers named in the Amended Employment Charges of Discrimination are found to refer to TPE Bay County. The amended charges were processed by the Commission following assignment of case numbers. The case number for Petitioner Hunt was FCHR Case No. 2004-20649. The case number for Petitioner White was FCHR Case No. 2004-20650.

Following investigation, the Commission entered a Determination: No Jurisdiction in each case filed on June 8, 2004. Those determinations were provided the respective Petitioners. The basis for the determinations was that the Commission lacked jurisdiction over the individual complaints, given the opinion that TPE Bay County was not an "employer" in accordance with Section 760.02(7), Florida Statutes, in that Respondent did not employ "15 or more employees for each working day in each of 20 or more calendar weeks in the current or proceeding calendar year and any agent of such person." In turn the Commission declared that it did not have jurisdiction over the complaints of discrimination.

On June 8, 2004, the Commission gave written notice to the Petitioners of its Determination: No Jurisdiction in documents separate from the legal discussion concerning the determination itself.

On July 14, 2004, the Division of Administrative Hearings (DOAH) received separate transmittals of the Petitions for Relief from an Unlawful Employment Practice filed by the Petitioners calling for consideration of the matters pursuant to Section 120.57, Florida Statutes. This transmittal of the Petitions carried with it other attachments, including the Amended Charges of Discrimination, the respective Determinations: No Jurisdiction and Notices of Determination: No Jurisdiction.

DOAH provided case numbers for the individual cases as reflected in the style. The cases were assigned to Administrative Law Judge Suzanne F. Hood to conduct the proceedings. Being uncertain of the purpose of those proceedings before DOAH, and given the history of the cases at the Commission, Orders to Show Cause were entered inviting the parties to comment on whether the cases should be dismissed before DOAH for lack of subject matter jurisdiction. The show cause orders were dated July 26, 2004. All parties availed themselves of the opportunity to respond to the Orders to Show Cause.

On August 13, 2004, the cases were consolidated for hearing purposes. Having considered the proof at hearing the cases remain consolidated for purposes of entering a single Recommended Order.

The prior judge had also entered an order reserving ruling on the DOAH jurisdiction in the cases, pending proof at hearing concerning TPE Bay County's status as a "employer" within the meaning of Section 760.02(7), Florida Statutes (2003). That order reserving ruling was entered on August 13, 2004. It was determined at hearing that the cases should proceed to consider the jurisdiction of the Commission to investigate the underlying amended charges of discrimination in relation to TPE Bay County's status under terms set forth at Section 760.02(7), Florida Statutes (2003). In particular the hearing resolved the factual

dispute between the parties concerning whether TPE Bay County met the definition of "employer" set forth in Section 760.02(7), Florida Statutes (2003).

TPE Bay County's counsel filed an agreed motion for leave to withdraw which was granted in an order entered September 8, 2004.

Orders were entered responding to issues concerning discovery as reflected in the dockets for the cases.

The cases proceeded to hearing on the date previously described after one continuance.

The style in the cases was corrected to reflect the present style.

Immediately prior to the hearing date the cases were reassigned to the undersigned to conduct the final hearing and enter a Recommended Order.

Consistent with a prior order entered by Administrative Law Judge Hood, the parties filed a joint prehearing statement which was discussed with the parties at the final hearing and utilized in developing the hearing presentation.

Petitioners testified in their own behalf. They also presented the testimony of Edward Harrison. TPE Bay County president Kenneth L. Karr was called as a witness for Petitioners. He was not a witness for TPE Bay County. Petitioners' Exhibits numbered 1 through 3 and 6 through 19 were admitted. TPE Bay County called Gary Williams as its witness. TPE Bay County's Exhibits numbered 1, 3, and 5 were admitted,

with the exception that the cover letter to TPE Bay County's Exhibit numbered 1 was denied admission. TPE Bay County's Exhibit numbered 2 was denied admission. TPE Bay County's Exhibit numbered 4 was withdrawn.

No transcript was prepared at the conclusion of the final hearing. The parties elected to submit proposed findings of fact and orders pursuant to Section 120.57(1)(b), Florida Statutes (2004), and they have been considered in preparing the Recommended Order.

FINDINGS OF FACT

1. Petitioner Hunt worked for TPE Bay County from August 13, 2003, through October 4, 2003. Petitioner White worked for TPE Bay County from August 11, 2003, through September 6, 2003. These are the relevant time periods in this inquiry. Both Petitioners were terminated from employment. According to the Amended Employment Charges of Discrimination, the Petitioners accuse their supervisor/manager Gary Williams of sexual harassment while employed with TPE Bay County.

2. On August 21, 2000, TPE Bay County filed the necessary documents for incorporation with the Florida Department of State. It was incorporated as a Florida for profit corporation. As of April 11, 2002, the mailing address for the corporation was Post Office Box 18155, Panama City Beach, Florida 32417. Kenneth L. Karr is the registered agent for the corporation. He is the president and only director. Mr. Karr is the only shareholder in

the corporation holding 400 shares. Mr. Karr's address is 7109 Lagoon Drive, Panama City Beach, Florida 32408. This information concerning TPE Bay County and Mr. Karr pertained during the relevant time contemplated by the Amended Charges of Discrimination referred to before, with the exception that Mr. Karr had a prior address in Panama City Beach, Florida. Mr. Karr filed with the Florida Secretary of State a year 2004 for profit corporation annual report. That report was filed April 26, 2004. It is one in a series of reports filed with that agency since the inception of the corporation.

3. Earlier a corporation identified as TPE Structures, Inc. (TPE) had been formed. On March 26, 1999, the necessary documents were filed with the Florida Department of State to incorporate TPE. At times relevant, the principal address for TPE was 5970 Peninsula Avenue, No. 3, Key West, Florida 33040. The mailing address was Post Office Box 2066, Key West, Florida 33045. Mr. Karr serves as resident agent for TPE. His address is 7109 Lagoon Drive, Panama City Beach, Florida 32408 for those purposes. The 2004 TPE for profit corporation annual report was filed with the Florida Department of State on April 4, 2004. Before April 14, 2004, other for profit corporation business reports were filed with that agency. Mr. Karr was the president and only director for TPE from the inception and continues in those roles at present. He holds 500 shares in TPE that represents all shares.

4. At times relevant Mr. Karr received a salary from TPE Bay County and from TPE.

5. The Florida General Contracting license pertaining to TPE Bay County and TPE is No. CBC059131.

6. At times relevant TPE Bay County and TPE maintained separate employee telephone numbers or contact lists. Those lists set forth the names and addresses for the employees. Persons whose names and addresses are related in the TPE Bay County list and the TPE list do not overlap.

7. TPE Bay County is engaged in the business of concrete spalling, stucco repair, termite and water damage, waterproofing, caulking, texture coatings and painting. TPE is engaged in the business of concrete spalling, stucco repair, termite and water damage, waterproofing, caulking, texture coatings and painting. TPE Bay County in its breakout of work performed is involved 60 percent in waterproofing, 25 percent in stucco and wood repair and 15 percent in painting and texture coatings. By contrast TPE is involved with 80 percent concrete spalling, and 20 percent painting. TPE Bay County does work in Bay County, Florida. TPE does work in the lower Florida keys in Monroe County, Florida. The work is done through separate company employees assigned to those jobs from the business locations where the jobs are found. The work is not done by exchanging employees who work for TPE Bay County and TPE respectively.

8. TPE Bay County and TPE have separate managers whose job it is to estimate, promote, market, bid, solicit, and obtain contracts. Those managers do not communicate or deal with each other in the regular course of business.

9. Mr. Karr's job duties in relation to his companies is to deal with corporate functions, set goals for profit, set goals for sales, deal with the respective managers of the two companies, deal with cash-flow, oversee accounting, sign checks, and visit job sites routinely. Mr. Karr hired the managers for the two locations and would be responsible for firing those managers. He has a similar role in dealing with a single accounting staff that serves both companies.

10. Gary Williams serves as the manager for TPE Bay County. Stace Valensuelela manages TPE. Those managers are responsible for labor relations and safety activities.

11. The managers are responsible for approving time cards for payroll purposes and establishment of hourly wages for employees, for billing customers and approving invoices for payment.

12. The bookkeeping for the companies is done by Georgianne Davis who is overseen by Mr. Karr's wife.

13. The business records for TPE Bay County Respondent are maintained at 7915 North Lagoon Drive, Panama City Beach, Florida 32408. The mailing address for that company is Post Office Box 18155, Panama City Beach, Florida 32417. The telephone number

for TPE Bay County is (850) 235-4811. The fax number for TPE Bay County is (850) 230-3617. The e-mail address is ken@tpestructures.com.

14. The business records for TPE had been maintained at 5970 Peninsula Avenue, No. 3, Key West, Florida 33040. The mailing address for TPE was Post Office Box 2066, Key West, Florida 33045. The telephone number for TPE was (305) 292-4111. The fax number for TPE was (305) 292-4615. The e-mail address for TPE is ken@tpestructures.com. After September 29, 2004, the Key West office closed and the records of TPE were sent to the Panama City Beach address related to TPE Bay County for storage purposes.

15. TPE Bay County has assigned an FEIN number 59-3666286. TPE has assigned an FEIN number 65-0929637.

16. TPE Bay County does business with Peoples Bank in Panama City Beach, Florida. TPE has transacted banking business with First State Bank in Key West, Florida.

17. An occupational license was issued by Panama City Beach for TPE Bay County's operations in Bay County, whereas TPE's operations in Key West for Monroe County was issued a separate occupational license by that local government.

18. According to employee information for TPE Bay County and TPE, at times relevant nine persons were employed by TPE Bay County and 20-plus persons were employed by TPE.

19. At times relevant none of the persons employed by TPE Bay County worked on projects around south Florida. Similarly, none of the TPE employees worked on projects in the Florida panhandle.

20. No funds related to TPE Bay County were used to pay the debts for TPE. No funds for TPE were used to pay debts of TPE Bay County.

21. On advice of counsel Mr. Karr formed TPE Bay County as a separate corporation from TPE to limit debt liability. These arrangements were not intended in their design to avoid employment discrimination claims by employees.

22. A business card presented as evidence bearing Mr. Karr's name sets forth TPE as the company. It provides the post office address for TPE Bay County and TPE in their respective locations at Panama City Beach and Key West. It gives the telephone numbers for TPE Bay County and TPE. It gives the fax number for TPE. It has a website listed which is www.tpestructures.com.

23. A letterhead refers to TPE with a post office address for both the TPE Key West company and the TPE Bay County Panama City Beach company.

24. Advertising in several telephone book listing services refers to "TPE Structures, Inc." and "TPE" while containing the TPE Bay County's 7914 North Lagoon Drive, Panama City Beach, Florida address and telephone number at 235-4811. Those listings

bore the website address www.tpestructures.com with the contractors license number CBC059131. Two separate telephone listings bore the name "TPE Structures, Inc.," with the initials "TPE" the 5970 Peninsula Avenue address for TPE and the telephone number for TPE as (305) 292-4111. A website address in those listings was given as www.tpestructures.com.

25. A contact form soliciting information from outsiders refers to TPE, not TPE Bay County, at the location 7914 North Lagoon Drive, Panama City Beach, Florida 32408, with a telephone number of (850) 235-4811 and the fax number (850) 230-3617. That same form refers to TPE at telephone number (305) 292-4111 and fax number (305) 292-4615. It carries an e-mail addresses for general information as info@tpestructures.com and under the president as ken@tpestructures.com.

26. An information sheet referring to the "TPE" office staff shows photos of Mr. Karr as founder and president, Suzanne Karr, Gary Williams as manager of Panama City Beach, and Georgianne Davis, secretary and accounting at Panama City Beach, Florida. On that same page with photos unavailable is a reference to Stace Valensuelela as manager of Key West and an unnamed secretary at Key West, Florida.

27. A brief employment application form refers to joining the "TPE" team and sending the information to "TPE Structures, Inc." at 7914 North Lagoon Drive, Panama City Beach, Florida

32408. It provides the fax number (850) 230-3617 related to Panama City Beach.

28. At times relevant TPE Bay County had filed with the Florida Department of Revenue its employers quarterly report. TPE Bay County has filed a Form 940-EZ with the Internal Revenue Service related to the Employers' Federal Unemployment (FUTA) tax return for calendar year 2003. TPE Bay County had filed a Form 941 Employers' Quarterly Federal Tax Return for the quarter ending September 30, 2003, with the Internal Revenue Service.

29. In a document prepared that refers to the "TPE history", it is stated that in addition to the Key West office, TPE is proud to announce the opening of the Panama City Beach, Florida office at 7914 North Lagoon Drive on February 1, 2001. The phone numbers are (850) 235-4800 and fax (850) 230-3617 or toll free at 877-660-4811.

30. A truck used in the business related to TPE Bay County had signs displayed referring to "TPE." One sign on the truck indicated the telephone number for TPE Bay County's business, which is (850) 235-4811.

31. At times relevant employees working for TPE Bay County wore painter whites referring to "TPE Structures" that displayed the telephone numbers for Key West and Panama City Beach with a common 1-800 number.

32. When Petitioner White was hired, Mr. Karr told him that he has trying to keep Key West going and was having monetary trouble in that location. From the hearing record nothing additional was said to Petitioner White on the subject.

33. Mr. Karr told Petitioner Hunt that there was a Key West branch of his business. Notwithstanding this remark, Petitioner Hunt did not become personally familiar with the Key West operation.

CONCLUSIONS OF LAW

34. For purposes of this proceeding DOAH has jurisdiction over the parties and the limited subject matter pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2004), and Section 760.02(7), Florida Statutes (2003).

35. This case concerns the question of whether jurisdiction resides with the Commission to investigate Petitioners' Amended Employment Charges of Discrimination. In particular, is the named Respondent and "employer" subject to the "Florida Civil Rights Act of 1992" (the Florida Act)? Section 760.02(7), Florida Statutes (2003) defines the meaning of "employer" where it states:

Employer means any person employing 15 or more employees for each working week in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

36. In resolving factual disputes related to the jurisdictional threshold, the determination is made upon a preponderance of the evidence. § 120.57(1)(j), Fla. Stat. (2004).

37. The Florida Act on job discrimination is patterned after Title VII of the Civil Rights Act 1964, 42 U.S.C. § 2000e-2. For that reason federal cases related to Title VII are available to determine the outcome in this case. See School Board of Leon County v. Hargis and the Florida Commission on Human Relations, 400 So. 2d 103 (Fla. 1st. DCA 1981).

38. The parties recognized, and the proof at hearing confirmed, that Petitioners cannot achieve the jurisdictional threshold required by Section 760.02(7), Florida Statutes (2003), without counting employees working for TPE as well as TPE Bay County during the relevant time period. That time period as described is August 11, 2003 through September 6, 2003, for Petitioner White, and August 13, 2003 through October 4, 2003, for Petitioner Hunt.

39. The parties concur, and the proof confirms, that when the TPE employees and Respondent's employees within the relevant time period are added together, this would meet the definition of "employer" set out in Section 760.02(7), Florida Statutes (2003), as to numbers.

40. For Petitioners to be able to include the TPE employees in the count to establish the jurisdictional requirement by complying with the definition of "employer" at Section 760.02(8), Florida Statutes (2003), they must by extension of Title VII case law meet the "single employer" or "integrated enterprise" test. This test is one established in relation to Title VII actions. In that setting it is recognized by the courts as being part of a liberal construction pertaining to the term "employer" set forth in Title VII. See Lyes v. the City of Rivera Beach, Florida, 166 F.3d 1332, 1341 (11th Cir. 1999). The court in Lyes explained at 1341:

In keeping with this liberal construction, we sometimes look beyond the nominal independence of an entity and ask whether two or more ostensibly separate entities should be treated as a single, integrated enterprise when determining whether a plaintiff's "employer" comes within the coverage of Title VII.

We have identified three circumstances in which it is appropriate to aggregate multiple entities for the purposes of counting employees. First, where two ostensibly separate entities are 'highly integrated with respect to ownership and operations,' we may count them together under Title VII. McKenzie, 834 F.2d at 933 (quoting Fike v. Gold Kist, Inc., 514 F.Supp. 722, 726 (N.D.Ala.), aff'd, 664 F.2d 295 (11th Cir. 1981)). This is the "single employer" or "integrated enterprise" test.

In determining whether two non-governmental entities should be consolidated and counted as a single employer, we have applied the standard promulgated in NLRA cases by the National Labor Relations Board. See, e.g., McKenzie, 834 F.2d at 933. This standard

sets out four criteria for determining whether nominally separate entities should be treated as an integrated enterprise. Under the so-called "NLRB test," we look for "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control." . . .

41. Petitioners bear the burden to establish their jurisdictional claim consistent with the criteria above. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

42. Concerning the interrelation of operations for TPE Bay County and TPE, Kenneth L. Karr was the president for both companies. He hired and could fire managers for the companies as well as the accounting staff. The bookkeeping was done in the Panama City Beach Office for both companies. On the other hand, the principal operations for those companies were separate concerning the day-to-day activities and the immediate management. They had separate profit centers concerning cash-flow, notwithstanding Mr. Karr's establishment of goals for the two businesses and the necessity for his managers within those concerns to report back to him and his routine visits to the two operations. In this connection Mr. Karr received salaries from both companies. Mr. Karr helped with the bidding, soliciting, and the obtaining and approving of contracts with both companies, whereas the managers for both companies in the separate locations estimated, promoted, marketed, bid, solicited, and obtained contracts in their rolls for the separate markets and conduct of

business in discrete geographic locations. The respective managers for the two companies were responsible for billing customers, and approving invoices for payment.

43. On the subject of centralized control of labor relations, Mr. Karr made his managers for the two companies responsible for labor relations and safety activities. Those individuals were responsible for approving time cards related to payroll and hourly wages.

44. The management at the top for TPE Bay County and TPE was Kenneth L. Karr, the president and sole director. The day-to-day management for TPE Bay County and TPE was separate through the managers that had been hired. In the related standard, Mr. Karr was the common owner and exerted financial control over both entities.

45. On balance, having applied the criteria, TPE Bay County and TPE are not nominally independent entities, appropriately treated as a single integrated enterprise. The companies are meaningfully separate entities. They are not ostensibly separate entities. For that reason, in determining jurisdiction in this case, the additional employees working for TPE at the time should not be counted. Without them there were insufficient numbers of employees working for TPE Bay County to establish jurisdiction. Therefore, the Commission is without jurisdiction to proceed with the processing of the respective Amended Employment Charges of Discrimination.

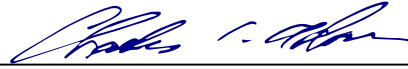
RECOMMENDATION

Upon the consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered by the Commission finding that it is without jurisdiction to proceed in these cases based upon Petitioners' failure to show that the Respondent is "an employer" as defined in Section 760.02(7), Florida Statutes (2003).

DONE AND ENTERED this 22nd day of December, 2004, in
Tallahassee, Leon County, Florida.



CHARLES C. ADAMS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of December, 2004.

COPIES FURNISHED:

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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.