STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRENDA VAN SANDT-FULLER, Petitioner, vs. COASTAL COSMETIC CENTER, INC., Respondent.	)	Case No. 05-4057

RECOMMENDED ORDER

A hearing was held pursuant to notice, on January 31, 2006, in Jacksonville, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: J. Eric Jones, Esquire
Post Office Box 44195
Jacksonville, Florida 32222

For Respondent: Patricia J. Hill, Esquire
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50 North Laura Street
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

Is Respondent, Coastal Cosmetic Center, Inc. (Coastal) an employer as defined in Section 760.02(7), Florida Statutes (2005), for purposes of conferring jurisdiction on the Florida Commission on Human Relations (FCHR) to consider the Charge of

Discrimination filed by Petitioner Brenda Van Sandt-Fuller against Coastal?

PRELIMINARY STATEMENT

On or about August 15, 2005, Petitioner filed a Charge of Discrimination with FCHR naming "Coastal Cosmetic Center, Inc." as the offending employer. The allegations were investigated, and on September 26, 2005, FCHR entered a Determination: No Jurisdiction and issued a Notice of Determination: No Jurisdiction. The basis for the determination was that FCHR lacked jurisdiction over the complaint in that FCHR determined that Coastal was not an "employer" in accordance with Section 760.02(7), Florida Statutes, because it 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."

A Petition for Relief was filed by Petitioner on or about October 27, 2005. FCHR transmitted the case to the Division of Administrative Hearings on or about November 3, 2005. A Notice of Hearing was issued setting the case for formal hearing January 31, 2006.

Prior to the hearing, the parties filed a Pre-Hearing Stipulation. Subsequently, Respondent filed a Motion to Quash Subpoena to Timothy Fee, M.D., or in the alternative Motion

for Protective Order. Oral argument was heard on the motion during a telephone conference call held on January 30, 2006, the day before the scheduled hearing. Based upon the arguments and representations of counsel, the motion was granted.

At hearing, Petitioner testified in her own behalf and presented the testimony of Leonard J. Spillert, and Stephanie Seran Fee. Petitioner's Exhibit numbered 1 was admitted into evidence. Respondent presented the testimony of Stephanie Seran Fee and Sandra Harms. Joint Exhibits numbered 1 and 2 were admitted into evidence.

A Transcript consisting of one volume was filed on February 27, 2006. On March 13, 2006, Petitioner filed a Response, Memorandum of Law, and Points of Authority with exhibits attached. On March 13, 2006, Petitioner also filed duplicate copies of Petitioner's Exhibit 1 and Joint Exhibit 2, already in evidence. On the same date, Respondent filed a Proposed Recommended Order.

On March 17, 2006, Respondent filed a Motion to Strike the exhibits attached to Petitioner's Response, Memorandum of Law and Points of Authority. These exhibits consisted of an affidavit of Francesca Tenebruso-Ball, a spreadsheet analysis prepared by Ms. Tenebruso-Ball, and copies of web pages purportedly from Respondent's website. On March 31, 2006,

Petitioner filed a response in which she voluntarily withdrew the affidavit of Francesca Tenebruso-Ball and made further substantive arguments regarding the desired outcome of this case. On April 5, 2006, Respondent filed a Motion to Strike Petitioner's Notice of Voluntary Withdrawal of the Affidavit in which Respondent continues to seek the exhibit consisting of web pages and arguments contained in Petitioner's Voluntary Withdrawal of the Affidavit stricken.

Petitioner's Motion to Strike the remaining exhibit attached to Petitioner's Response, Memorandum of Law and Points of Authority is granted. Petitioner's Motion to Strike the arguments contained in Petitioner's Notice of Voluntary Withdrawal is granted. With the exceptions noted above, the parties written post-hearing submissions have been considered in preparing this Recommended Order.

Unless otherwise indicated, all references are to Florida Statutes (2005).

FINDINGS OF FACT

1. At all times material to this proceeding, Petitioner was employed by Leonard J. Spillert, M.D. P.A. She worked for Dr. Spillert for 23 years until she was terminated on March 3, 2005. Accordingly, the relevant time period of her employment for purposes of determining jurisdiction is October 14, 2004 through March 3, 2005.

2. Dr. Spillert is a physician who specializes in plastic and reconstructive surgery. Petitioner was practice manager for Leonard J. Spillert, M.D. P.A. located on Salisbury Road in Jacksonville, Florida.

3. Dr. Timothy E. Fee is also a physician who specializes in plastic and reconstructive surgery. At times relevant to this proceeding, Dr. Fee practiced medicine in the same office as Dr. Spillert on Salisbury Road. He practiced under the name Timothy E. Fee, M.D. P.A.

4. Drs. Spillert and Fee had an office-sharing arrangement in which Timothy E. Fee, M.D. P.A. paid Leonard J. Spillert, M.D. P.A. overhead based on Dr. Fee's gross receipts each month. The monthly overhead check included Dr. Fee's use of office space, equipment and supplies, and employees who worked for Dr. Spillert.

5. Most of the persons working at the office on Salisbury Road were employees of Dr. Spillert. The Employer's Quarterly Report for Unemployment Compensation filed with the Florida Department of Revenue for the quarter ending December 31, 2004, by Leonard J. Spillert, M.D. P.A. reflects 13 employees in the first month of the quarter (October) and 12 employees for the second two months of the quarter (November and December). The same report for the first quarter of 2005 reflects that Leonard J. Spillert, M.D. P.A. had 13 employees

for the first month of the quarter (January), 17 employees for the second month of the quarter (February), and 15 employees for the third month of the quarter (March, of which only the first three days are relevant to this analysis).

6. Similarly, the Employer's Quarterly Report for Unemployment Compensation for Timothy E. Fee, M.D. P.A. reflects two employees for the first, second, and third months of the fourth quarter of 2004. The report for the first quarter of 2005 reflects one employee for each month of the quarter.

7. The employees who worked for Dr. Spillert, including Petitioner, were paid on checks with Leonard J. Spillert, M.D. P.A. imprinted on the top of the check. Similarly, the employees who worked for Dr. Fee were paid on checks with Timothy E. Fee, M.D. P.A. imprinted on the checks.

8. Notwithstanding the above, Petitioner considered herself to be an employee of Coastal Cosmetic Center. She, as well as other employees who worked at the Salisbury Road office, had business cards and uniforms with "Coastal Cosmetic Center" written on them. Petitioner received direction and instructions from both Drs. Spillert and Fee.

9. Testimony was conflicting as to how the telephone was answered. According to Stephanie Taylor, who left employment one month prior to Petitioner's leaving, she answered the

phone "Coastal Cosmetic Center". According to Sandra Harms who became practice administrator, she answered the phones using the individual doctors names (i.e., "Dr. Spillert and Dr. Fee's office") in January 2005, but later answered the phone "Coastal Cosmetic Center."

10. According to Ms. Harms, Drs. Spillert and Fee were listed separately in the telephone book under the heading, Physicians and Surgeons, when they were located at the Salisbury Road location. Ms. Harms reported payroll information to Dr. Spillert for him to issue checks. She did not report payroll information to Dr. Fee.

11. The sign outside the Salisbury Road location had both doctors' names on it: Leonard J. Spillert, M.D. P.A. and Timothy E. Fee, M.D. P.A.

12. Stephanie Seran Fee is Dr. Fee's wife and is employed by Dr. Fee. At times material to this analysis, her paycheck was written on checks with Timothy E. Fee, M.D. P.A. imprinted on them. Mrs. Fee was in charge of accounts payable. Mrs. Fee paid for Dr. Fee's malpractice insurance, car lease, car insurance, uniforms, lab jackets, anesthesia, and advertising from Timothy E. Fee M.D. P.A.'s checking account.

13. At all times material to this proceeding, Drs. Spillert and Fee's professional associations each had

separate checking accounts, separate employer identification numbers, and separate accountants.

14. Dr. Spillert did not pay a salary to Dr. or Mrs. Fee. Dr. Fee did not share in the profits or losses of Dr. Spillert's professional association.

15. Dr. Fee did not have the authority to fire any of Dr. Spillert's employees. Dr. Fee did sometimes participate in interviewing prospective employees of Dr. Spillert's.

16. At a time subsequent to Petitioner's leaving employment, the practices of Drs. Spillert and Fee moved to another location on Southpoint Drive in Jacksonville, Florida.

17. On October 1, 2005, the name Coastal Cosmetic Center, P.A. was filed with Florida's Secretary of State. Prior to that time, Coastal Cosmetic Center was a fictitious name.

18. Drs. Spillert and Fee currently work for Coastal Cosmetic Center, P.A. at the Southpoint Drive location.

CONCLUSIONS OF LAW

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

20. This case concerns the question of whether jurisdiction resides with FCHR to investigate Petitioner's

Employment Charge of Discrimination. In particular, is the named Respondent an "employer" subject to the Florida Civil Rights Act of 1992. Section 760.02(7), Florida Statutes, defines the meaning of "employer" as follows:

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

21. Petitioner bears the burden to establish her 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). Petitioner must establish this proof by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

22. The Florida Civil Rights Act on job discrimination is patterned after Title VII of the Civil Rights Act 1964, 42 U.S.C. § 2000e-2. In instances in which a Florida Statute is modeled after a federal law on the same subject, the Florida statute will take on the same construction as the federal law if such interpretation is harmonious with the spirit and policy of the Florida legislation. Brand v. Florida Power Corporation, 633 So. 2d 504, (Fla. 1st DCA 1994). The Florida Civil Rights Act is patterned after Title VII, and federal discrimination law should be used as guidance when construing Florida's law. Id. See School Board of Leon County v. Hargis

and the Florida Commission on Human Relations, 400 So. 2d 103 (Fla. 1st. DCA 1981).

23. "The ultimate touchstone under [the law] is whether an employer has employment relationships with 15 or more individuals for each working day in 20 or more weeks during the year in question." Walters v. Metropolitan Educational Enterprises, Inc., 519 U.S. 202, 212 (1997). The "payroll method" is the appropriate method to use in determining whether an employer "has" an employee for purposes of the 15-person threshold. Id. Accordingly, the time period in question as it relates to Petitioner herein is October 14, 2004 through March 3, 2005.

24. The actual payroll records are not in evidence. However, the payroll method when applied to the state quarterly unemployment compensation reports results in a determination that the 15-employee threshold for 20 weeks is not reached. That is, the Employer's Quarterly Report for Unemployment Compensation for Leonard J. Spillert, M.D. P.A. for the fourth quarter of 2004 reflected 13 employees in the first month of the quarter (October) and 12 employees for the second two months of the quarter (November and December). The same report for the first quarter of 2005 reflects 13 employees for the first month of the quarter (January), 17 employees for the second month of the quarter (February), and

15 employees for the third month of the quarter (March, of which only the first three days are relevant). Accordingly, Leonard J. Spillert, M.D., P.A. did not employ the requisite number of employees for 20 or more calendar weeks to meet the statutory jurisdictional requirements.

25. Similarly, the Employer's Quarterly Report for Unemployment Compensation for Timothy Fee, M.D. P.A. reflects two employees for the first, second, and third months of the fourth quarter of 2004. The report for the first quarter of 2005 shows one employee for each month of the quarter. Accordingly, Timothy Fee, M.D. P.A. did not employ the requisite number of employees to meet the statutory jurisdictional requirements.

26. Petitioner asserts that when the employees of Drs. Spillert and Fee are added together within the relevant time period, this total would meet the definition of "employer" set out in Section 760.02(7), Florida Statutes (2003), as to the requisite number of employees.

27. For Petitioner to be able to include the employees of Timothy Fee, M. D. P.A. in the count to establish the statutory 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.' . . .

28. Concerning the interrelation of operations of the professional associations of Drs. Spillert and Fee, the doctors practiced in the same office. Business cards and uniforms reflected the fictitious name, "Coastal Cosmetic Center." Telephones were answered by at least some employees as Coastal Cosmetic Center.

29. On the subject of centralized control of labor relations, employees took direction from either Dr. Spillert or Dr. Fee. However, Dr. Fee could not fire any employee of Dr. Spillert. Ms. Harms never provided payroll information to Dr. Fee. Dr. Spillert did not exercise supervisory control over Dr. Fee or Mrs. Fee.

30. As for the element of common management, Dr. Fee paid Dr. Spillert overhead based upon his monthly gross receipts. The overhead included Dr. Fee receiving help or support from Dr. Spillert's employees. Accordingly, the employees took direction from Dr. Fee. However, Dr. Fee did not have the authority to fire employees of Dr. Spillert. While their medical practices were located in the same office, Drs. Spillert and Fee had separate practices in an office-sharing arrangement.

31. Regarding common ownership or financial management, each doctor had his own professional association with its own

checking account and its own employer identification number. Each professional association hired a separate accountant.

32. On balance, having applied the criteria, Leonard J. Spillert, M.D. P.A. and Timothy E. Fee, M.D. P.A. are not nominally independent entities, appropriately treated as a single integrated enterprise. The two professional associations are meaningfully separate and independent entities. For that reason, in determining jurisdiction in this case, the additional employees working for Timothy E. Fee, M.D. P.A. during the relevant time should not be counted. Without them there were insufficient numbers of employees working for Leonard J. Spillert, M.D. P.A., for the requisite number of weeks to establish jurisdiction. Therefore, the Commission is without jurisdiction to proceed with the processing of the Employment Charge 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 this cases based upon Petitioner's failure to show that the Respondent is "an employer" as defined in Section 760.02(7), Florida Statutes.

DONE AND ENTERED this 20th day of April, 2006, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
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this 20th day of April, 2006.

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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.