

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADELYN VICTOR,)
)
 Petitioner,)
)
 vs.) Case No. 06-0343
)
 RAMADA PLAZA RESORTS,)
)
 Respondent.)
 _____)

PARTIAL RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings conducted the final hearing on June 12, 2006, by videoconference in Tallahassee, Florida. The parties, attorneys for the parties, witnesses, and court reporter appeared in Ft. Lauderdale, Florida.

APPEARANCES

For Petitioner: John de Leon
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For Respondent: Richard W. Epstein
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STATEMENT OF THE ISSUE

The issue is whether Petitioner has proved that Respondent employed the requisite number of employees to establish

jurisdiction in the Florida Commission of Human Relations over an alleged claim of employment discrimination against Respondent.

PRELIMINARY STATEMENT

By Employment Charge of Discrimination dated September 6, 2005, Petitioner alleged that "Ramada Plaza Resorts/South FL Business Ventures" discriminated against Petitioner in employment on the basis of sex, race, and national origin. The charge cites several instances of discrimination and adds that the employer retaliated against her after she reported the incidents to her supervisor.

By Determination: No Jurisdiction (not employer) dated December 16, 2005, the Florida Commission on Human Relations (Commission) determined that Ramada Plaza Resorts did not employ 15 or more persons for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, nor was Ramada Plaza Resorts an agent of a person employing such persons for such period of time. Accordingly, on December 16, 2005, the Clerk of the Commission issued a Notice of Determination: No Jurisdiction.

By Petition for Relief dated January 19, 2006, Petitioner alleged that Ramada Plaza Resorts used several companies to circumvent the jurisdictional limitations of the Florida Civil Rights Act of 1992 (Act). The Petition for Relief incorporates

the Charge of Discrimination and refers to the employer as "Respondents, including Respondent Ramada Plaza Resorts." The Petition for Relief alleges that Ramada Plaza Resorts was Petitioner's employer. In the alternative, the Petition for Relief alleges that Ramada Plaza Resorts was Petitioner's "joint employer" "and/or" engaged in a "common enterprise" with "SFBV" "and/or" they were "integrated employers."

The Petition for Relief claims that Ramada Plaza Resorts was Petitioner's employer because the employment advertisement to which Petitioner responded named it as the employer; as instructed, Petitioner answered the phone at work, "Thank you for calling Ramada Plaza Resorts"; all letterhead at the office at which Petitioner worked stated "Ramada Plaza Resorts"; and all management and supervision were provided by employees of Ramada Plaza Resorts.

In response to the jurisdictional basis for the Notice of Determination: No Jurisdiction, the Petition for Relief is limited to allegations of employer status, except to the extent that it incorporates the allegations of the Charge of Discrimination.

At the hearing, the Administrative Law Judge bifurcated the issues in the case so that the hearing on June 12, 2006, would address only the issue of whether Respondent was an employer under the Act, which raised specific issues of the identity of

the employer(s), the number of employees of the employer(s), and the identity of the legal entity or entities serving as the employer(s).

Respondent contended that, if the Administrative Law Judge determined that the Commission had jurisdiction over the claims of discrimination, he should not proceed directly to conduct an evidentiary hearing on those claims, but should instead relinquish jurisdiction to the Commission for the purpose of conducting an investigation, making a determination on the substantive claims of jurisdiction, and transmitting the petition to the Division of Administrative Hearings. Except for a reference to the Petition for Relief, the Transmittal of Petition, which is dated January 24, 2006, does not otherwise identify the issues that the Commission wants the Administrative Law Judge to address. However, after re-examining the charging documents and Notice of Determination: No Jurisdiction, the Administrative Law Judge is granting Respondent's request not to proceed to an evidentiary hearing on the substantive issues, but instead to relinquish jurisdiction to the Commission for consideration of this Partial Recommended Order.

Relinquishing jurisdiction to the Commission with a Partial Recommended Order determining that Respondent is a covered employer will permit the Commission to conduct an investigation on the substantive allegations--something that the Commission

evidently has not yet done. This procedure will also permit the Commission to rule on the Administrative Law Judge's jurisdictional conclusions of law prior to requiring the parties to present evidence on the substantive claims of discrimination. A determination that Respondent is an employer includes conclusions of law within the substantive jurisdiction of the Commission, not the Administrative Law Judge, so the Commission will have the final word, as between the Commission and Administrative Law Judge, concerning such conclusions, which could effectively result in a determination that the Commission lacks jurisdiction.

At the hearing, Petitioner called three witnesses and offered into evidence two exhibits: Petitioner Exhibits 1 and 2. Respondent called one witness and offered into evidence three exhibits: Respondent Exhibits 1-3. All exhibits were admitted.

The court reporter filed the transcript on June 19, 2006. Petitioner and South Florida Business Ventures, Inc., submitted proposed recommended orders on June 29, 2006.

FINDINGS OF FACT

1. South Florida Business Ventures, Inc. (SFBV) was incorporated about ten years ago. For the past five years, SFBV has provided telemarketing services for "Ramada Plaza Resorts." These services provide substantially all of the revenue of SFBV.

2. For this case, "Ramada Plaza Resorts" is SFBV. A corporation known as "Ramada Plaza Resorts Orlando/Ft. Lauderdale Vacations, Inc." (RPR, Inc.) is in the business of selling timeshare units. The tradename "Ramada Plaza Resorts" enjoys wider use and not merely by RPR, Inc. or the legal owner of the tradename, if different from RPR, Inc. However, for this case, "Ramada Plaza Resorts" does not refer to RPR, Inc., or the owner of the tradename.

3. Petitioner earlier filed a charge of discrimination directly against SFBV, which the Commission has dismissed. Petitioner did not continue to prosecute that case after its dismissal, but has instead prosecuted this case against "Ramada Plaza Resorts." Regardless of the wisdom of abandoning the case against the proper legal entity and proceeding against a fictitious name, Petitioner's present claim, as a matter of fact, is against SFBV, doing business as "Ramada Plaza Resorts" or as sales agent of RPR, Inc. To avoid confusion, this Partial Recommended Order shall refer to Respondent simply as SFBV, and not as SFBV doing business as Ramada Plaza Resorts or as agent of RPR, Inc.

4. During 2003 and 2004, RPR, Inc., entered into contracts with several telemarketers, not only SFBV. The role of SFBV was to sell to the public three- or five-night "vacations" to Orlando, Ft. Lauderdale, or Las Vegas--essentially providing

potential timeshare purchasers to RPR, Inc., which would promote its timeshare units to the "vacationers" during their "vacations." At the end of each telemarketing call that resulted in a sale by SFBV, the telemarketers transferred the call to a call center operated in Ft. Lauderdale by RPR, Inc., where a person employed by RPR, Inc., confirmed the sale and the accuracy of the material representations made by the telemarketer.

5. In June 2004, Petitioner saw a newspaper advertisement seeking a receptionist. The advertisement states in part: "Ramada Plaza Resorts Industry leader hiring . . ." Petitioner telephoned the number listed, which belonged to SFBV, and was given an interview at an office in Boynton Beach, which was the headquarters of SFBV. Nothing in the advertisement mentioned SFBV.

6. The office building to which Petitioner was directed bore a sign, "Ramada Plaza Resorts." Entering the office, which bore no sign indicating that it was the office of SFBV, Petitioner asked for Kelly Mincey, as she had been instructed to do by the person with whom she had spoken on the telephone. SFBV employed Ms. Mincey as its administrator. Among her duties for SFBV was human relations, including the hiring of secretaries. Ms. Mincey has worked for SFBV for four years.

7. During the interview, Ms. Mincey explained to Petitioner that the receptionist was required to answer telephone calls, perform data entry, and fax memos to the Ft. Lauderdale office. Specifically, Ms. Mincey directed Petitioner to answer the telephone, "Ramada Plaza Resorts. How may I direct your call?" In entering data, Petitioner inputted the identification number for each buyer. In faxing memos to Ft. Lauderdale, Petitioner's testimony did not establish whether these documents went to SFBV's Ft. Lauderdale office or RPR, Inc., whose main office was in Ft. Lauderdale.

8. Ms. Mincey gave Petitioner an employment application. It was a form that did not bear the name of the employer. After examining the completed application and performing the job interview, Ms. Mincey offered the job to Petitioner, who accepted it and, shortly after the interview, began working at the Boynton Beach office of SFBV.

9. SFBV employed Petitioner. SFBV issued her payroll checks, which bore the name of SFBV. Petitioner's W-2 form bore the name of SFBV as her employer. Any claim of Petitioner that she was employed by some other entity alone or in conjunction with SFBV is unsupported by the evidence. The evidence supports the subordinate finding of a sales agency relationship between SFBV and RPR, Inc., so as to support the ultimate finding that "Ramada Plaza Resorts," as used in this case to identify

Respondent, means SFBV. However, the evidence is not sufficient to find an employment agency relationship for the purpose of finding that Respondent was employed by RPR, Inc., or the owner of the tradename, or co-employed by RPR, Inc., or the owner of the tradename. In any event, such evidence would be irrelevant anyway because of the absence of evidence as to the number of employees, during 2003 or 2004, of RPR, Inc., or the owner of the tradename.

10. At various times, SFBV operated offices in Boynton Beach, Delray Beach, West Palm Beach, and Ft. Lauderdale. The Ft. Lauderdale office, which was actually in Oakland Park, was open from September through December 2004.

11. SFBV concedes that it employed Warren Iazard as president, Kirk Iazard as vice-president, Gabriel Iazard as an operations employee, Ms. Mincey, and eight receptionists at the four offices operated during 2004. SFBV thus employed these 12 employees in 2004.

12. The jurisdictional dispute centers around the proper classification of two other categories of workers: the persons making the telephone calls and their sales managers. SFBV contends that these persons were independent contractors of SFBV, and Petitioner contends that they were employees of SFBV. A third classification of worker--general manager was restricted to one person, Enrico Merada, so, even if he had been an

employee, the total number of employees would still have been less than the jurisdictionally required 15--thus, his status is irrelevant.

13. During 2003 and 2004, 25-100 telemarketers worked at SFBV offices at any given time. However, it is unnecessary to determine whether the telemarketers were employees of SFBV. SFBV employed more than two sales managers during 2004 so that, if they were determined to have been employees, the jurisdictional prerequisite of 15 employees over 20 calendar weeks would have been satisfied. The evidentiary basis for characterizing the sales managers as employees is largely undisputed while the evidentiary basis for characterizing the telemarketers as employees would require discrediting the testimony of SFBV's witnesses, who claimed that the telemarketers were not required to work specific shifts.

14. Two sales managers worked at each of the four offices during 2004. At times during 2004, a total of eight sales managers worked at SFBV's offices. There was little turnover among sales managers. Mr. Merada supervised these sales managers, who, in turn, supervised the telemarketers. Interestingly, Ms. Mincey twice characterized the sales managers as employees of SBFV, distinguishing them from the telemarketers, whom she described as independent contractors.

15. SFBV employed the sales managers and receptionists in pairs because it needed one person in each position at each office for each of the two shifts that it ran daily: a day shift and a night shift. SFBV strictly controlled the work of the sales managers, evidently in an effort to avoid misrepresentations by the telemarketers to purchasers. As required by SFBV, sales managers provided scripts to telemarketers, who were required to stick to the scripts and prohibited from certain acts, such as uttering profanities. As required by SFBV, sales managers provided telemarketers with rebuttals for certain responses from potential buyers and guidelines for what could be said. As required by SFBV, sales managers informed telemarketers that they could make no personal calls and could not sell for other companies while telemarketing for SFBV. To ensure that telemarketers complied with these rules, as required by SFBV, sales managers randomly listened in on calls made by telemarketers. As required by SFBV, sales managers helped telemarketers with the paperwork following sales and sometimes telemarketed directly to potential buyers.

16. SFBV paid the sales managers weekly with SFBV checks and required that they perform their job duties, which included hiring and firing telemarketers, at the SFBV office to which they were assigned and during the shift to which they were assigned. SFBV paid the sales managers based on total sales, so

that each sales manager made the same amount during the same pay period, provided they were scheduled for, and actually worked, the same number of shifts.

17. Even if SFBV had operated only three offices, thus with six receptionists and six sales managers, SFBV would have employed 16 employees, if the sales managers were employees. Although at times SFBV may have had only one sales manager at an office, the evidence is clear that, during substantial parts of 2004, including at least 20 weeks, SFBV employed at least six sales managers and six receptionists, and, for the last 17 weeks of 2004, it employed eight sales managers and eight receptionists.

18. In its proposed recommended order, SFBV states: "SFBV sometimes will monitor a Direct Seller's selling pitch" This statement implies an employer-employee relationship between SFBV and the person monitoring the calls of telemarketers, and these employee-monitors were the sales managers. A few lines later, SFBV baldly asserts that sales managers were also "Direct Sellers, not employees."

19. But the contrasts that SFBV draws between sales managers and telemarketers suggest otherwise. Accepting strictly for the sake of discussion SFBV's characterization of its telemarketers, they were not required to work specific shifts, but sales managers had specific shifts for which they

had to be in the office to monitor the calls of, and help, the telemarketers.

20. Telemarketers were paid strictly on the basis of what they sold, but sales managers were paid on the basis of the sales during the shifts that they worked. This means that the compensation of sales managers was tied directly to the time that they were in the office working, as opposed to the compensation of the telemarketers, whose pay was not so time-dependent. The effect of this difference is obvious upon consideration that the sales managers were paid equally, if they worked an equal number of shifts, but the telemarketers were paid based on sales, not at all on the amount of time they spend working.

21. Also, there was much churning of telemarketers, unlike the situation with sales managers. And the sales managers had a stricter dress code than did the telemarketers.

22. For both sales managers and telemarketers, SFBV supplied the telephone and office equipment, including computers to automatically dial prospective purchasers. All of this equipment was necessary for the work to be performed. For both sales managers and telemarketers, SFBV provided the names and telephone numbers of potential buyers to be called--also crucially important to the success of the telemarketing effort. The only thing that some telemarketers routinely provided were

telephone headsets, which were not necessary to perform their duties.

23. In general, SFBV did not provide fringe benefits to sales managers. But the telemarketing work that they supervised and occasionally performed provided substantially all of the revenue of SFBV. Also, SFBV tightly governed the means by which the sales managers performed their duties. SFBV structured its contract and withholding and reporting practices so as to maximize its prospects for regulatory characterizations of its relationships with telemarketers and sales managers as those of employer and independent contractor, not employer and employee. However, at least as to the sales managers in the context of the jurisdictional requirements of the Act, these practices did not reflect the economic realities of the employer-employee relationship that actually existed between SFBV and its sales managers.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 760.11(7), Fla. Stat. (2005).

25. Section 760.10(1)(a), Florida Statutes, prohibits discrimination on the basis of race, sex, or national origin by an "employer" against any individual. Section 760.02(7), Florida Statutes, defines "employer" as "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." The key question in determining the jurisdictional issue in this case is whether the sales managers were "employees" of SFBV; if so, the Commission has jurisdiction.

26. In determining whether an individual is an employee under Title VII of the Civil Rights Act of 1964, the Eleventh Circuit Court of Appeals uses an "economic realities" test. As explained in Cuddeback v. Florida Board of Education, 381 F.3d 1230 (11th Cir. 2004):

the term "employee" is "construed in light of general common law concepts" and "should take into account the economic realities of the situation," "viewed in light of the common law principles of agency and the right of the employer to control the employee." [*Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 340-41 (11th Cir. 1982).] Specifically, the court should consider factors such as whether the defendant directed the plaintiff's work and provided or paid for the materials used in the plaintiff's work. *Id.* at 341.

381 F.3d at 1234.

27. In this case, Petitioner has proved that, based on the economic realities of the relationship between SFBV and its sales managers, the sales managers were employees, not independent contractors. SFBV supplied all customer leads, all office and computer equipment, and all scripts that, in turn,

the sales managers supplied to the telemarketers under their supervision. The sales managers trained and monitored the telemarketers, who performed the core business of SFBV. SFBV required the sales managers to be in the office at specified shifts and compensated all of them equally, if they worked an equal number of shifts.

28. Because the sales managers were employees, SFBV employed at least 15 persons for each working day for at least 20 calendar weeks during 2004.

29. Petitioner has failed to prove that any other entity operated as a joint employer, common enterprise, or integrated employer with SFBV, or as the employment principal of SFBV, so that the employees of such other entity could be counted with the employees of SFBV to satisfy the jurisdictional requirements set forth above.

RECOMMENDATION

It is

RECOMMENDED that the Florida Commission on Human Relations enter a Partial Final Order determining that it has jurisdiction over the claims of Petitioner against South Florida Business Ventures, Inc., doing business as Ramada Plaza Resorts or as sales agent of Ramada Plaza Resorts Orlando/Ft. Lauderdale Vacations, Inc., and take such additional action on the claims as is required by law.

DONE AND ENTERED this 11th day of August, 2006, in
Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 11th day of August, 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 must be filed with the agency that will issue the final order in this case.