

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BARBARA SALBER,)	
)	
Petitioner,)	
)	
vs.)	Case No. 06-3535
)	
ATLASS INSURANCE,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to Notice, a hearing was held in this case before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, on November 28, 2006, in Melbourne, Florida.

APPEARANCES

For Petitioner: Barbara Salber, pro se
200 South Banana River Boulevard, No. 1604
Cocoa Beach, Florida 32931

For Respondent: Kimberly A. Gilmour, Esquire
Kimberly A. Gilmour, P.A.
4179 Davie Road, Suite 101
Fort Lauderdale, Florida 33314

STATEMENT OF ISSUES

Whether Petitioner can prove that Respondent, Atlass Insurance, qualifies as an "employer" under Section 760.02(7), Florida Statutes (2005),¹ so that the Florida Commission on Human

Relations has jurisdiction to conduct an investigation under Section 760.06(5), Florida Statutes.

PRELIMINARY STATEMENT

Petitioner filed a charge of discrimination with the Florida Commission on Human Relations (FCHR) on February 13, 2006, alleging that Respondent, Atlass Insurance, had violated the Florida Civil Rights Act of 1992, on the basis of the Petitioner's age. An investigation was conducted and FCHR issued a Determination of No Jurisdiction, on August 11, 2006. It was held that the "Commission lacks jurisdiction over the Complaint of Discrimination based on the fact that the Respondent is not an "Employer" within the meaning of Section 760.02(7), Florida Statutes.

Petitioner timely filed a Petition for Relief. This matter was referred to the Division of Administrative Hearings (DOAH) on September 15, 2006, and was set for hearing. Respondent filed a Motion to Dismiss, which was denied without prejudice. On motion of the parties, the final hearing was continued until November 28, 2006, and the issue was limited to the question of whether Petitioner can prove that Respondent was an "employer" under the statute.

At the final hearing, Petitioner testified on her own behalf, and offered Exhibits 1 through 7, which were received in evidence. An e-mail, dated January 26, 2006, was offered by

Petitioner, but was not received in evidence. Respondent called James Okonski as a witness. Respondent also entered in evidence Exhibits 1 through 4.

A transcript of the hearing was ordered and filed on December 15, 2006. Petitioner filed two letters, dated December 7 and 21, 2006, respectively, which have been considered as proposed findings of fact. Respondent filed its Proposed Recommended Order on December 18, 2006.

FINDINGS OF FACT

1. Petitioner, Barbara Salber, was an employee of Florida Hiway Insurance, Inc., beginning in 2005 and worked at an office located at 55 Goodwin Drive, Suite 103, Merritt Island, Florida, until she was terminated in December, 2005. Early in 2005, the corporation was purchased by buyers from the Ft. Lauderdale area, who became officers and stockholders of the corporation. In May, 2005, the company changed its name to Atlass Insurance Merritt Island, Inc.

2. Petitioner admitted that she does not know who her actual employer was, Atlass Insurance Group, Inc., or Atlass Insurance Merritt Island, Inc. Petitioner was unable to testify as to the number of employees working at the Atlass Insurance Merritt Island office in July, August, September, October, November or December of 2005.

3. Petitioner testified that she was an employee of only one company from July through December 2005, and she only received paychecks from that company during that time period. The W-2 that Petitioner received for working in 2005 was from Florida Hiway Insurance, Inc., not Atlass Insurance Group, Inc., Jim Okonski or Frank Atlass. The name Atlass Insurance Merritt Island, Inc., did not appear on the W-2 for 2005.

4. Jim Okonski is an officer and stockholder in the two corporations, Atlass Insurance Group, Inc., and Atlass Insurance Merritt Island, Inc.

5. Atlass Insurance Group, Inc., is located in Ft. Lauderdale, Florida, and it did not employ Barbara Salber at any time. The UCT-6 forms for Atlass Insurance Group lists employees during each quarter, and Barbara Salber was never listed as an employee in 2005. The most employees during any quarter in 2005, employed by Atlass Insurance Group, Inc., was ten.

6. Florida Hiway Insurance, Inc., was formed in 1994, and is a licensed Florida Insurance Agency. In May 2005, it changed its name to Atlass Insurance Merritt Island, Inc. Records prepared by IRS and the State of Florida still showed the former company name. Petitioner was listed on the UCT-6 form for Florida Hiway Insurance n/k/a Atlass Insurance Merritt Island, Inc. as an employee during 2005. The maximum number of

employees Atlass Insurance Merritt Island, Inc. had in 2005, was thirteen.

7. The UC account numbers for the two different corporations are different from each other. Each corporation has its own UC account number. The same is true for the Federal Employer Identification number. Each corporation has its own Florida Employment ID number. Separate bank accounts were kept for each corporation. There was no showing that the corporate funds were ever co-mingled.

8. Russell Jamieson was responsible for the day-to-day operations of the Atlass Insurance Merritt Island Company in 2005, and was Petitioner's supervisor. He was not connected with the day-to-day operations of Atlass Insurance Group, Inc. in Ft. Lauderdale.

9. The hours of operation for the two companies are different, and each company has its own workers' compensation insurance. They also have different general liability insurance policies. Although Petitioner was under the belief that there was a merger between Atlass Insurance Group, Inc., and Florida Insurance, Inc., in 2005, the best evidence showed that Frank Atlass purchased stock from Florida Hiway Insurance, Inc., and eventually the company's name was changed in May of 2005.

10. Petitioner never worked in Ft. Lauderdale, and she never visited the Atlass Insurance Group, Inc., whose only office is located in Ft. Lauderdale.

11. Petitioner testified that throughout 2005 and 2006 there were only eight employees in the Merritt Island office. Even when Petitioner testified as to the names of the employees in the office, while she worked there, she could not list and did not list more than ten names.

12. Petitioner was an employee of Florida Hiway Insurance, Inc. n/k/a Atlass Insurance Merritt Island, Inc., and, during the calendar year 2005, it never employed fifteen employees or more.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569, 120.57(1), and 760.10, Fla. Stat.

14. The FCHR is empowered to investigate complaints alleging any discriminatory employment practice under the Florida Civil Rights Act of 1992. § 760.02(7), Fla. Stat.

15. It is an unlawful employment practice for an employer to discharge or otherwise discriminate against any individual because of such individual's age. § 760.10(1)(a), Florida Statutes.

16. In order to investigate a complaint of alleged age discrimination, the person or corporation alleged to have committed an unlawful employment practice must qualify as an "employer" under the statutes.

17. An "employer," as that term is used in the Florida Civil Rights Act of 1992, is defined in, Section 760.02(7), Florida Statutes, 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." Petitioner has the burden of proving that her employer meets this definition. Florida Department of Transportation v J. W. C. Co. Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

18. Respondent contends that Petitioner has not met her burden, that the FCHR has no jurisdiction over the employer, Atlass Insurance of Merritt Island, Inc., or over Atlass Insurance Group, Inc., since neither company had fifteen or more employees during the relevant time, and the two companies together are not a single employer or a joint employer. The evidence at the hearing demonstrates that Petitioner failed to meet her burden as to the jurisdiction of the FCHR. Petitioner was unsuccessful in providing any evidence at the hearing that either Atlass Insurance Merritt Island, Inc., or Atlass Insurance Group, Inc., had the required number of employees.

19. It is clear from the evidence that the employer of the Petitioner was Atlass Insurance Merritt Island, Inc., and she was never employed by Atlass Insurance Group, Inc. The two corporations are separate and distinct legal entities and are not a single employer or an integrated enterprise. Cf. Lyles vs. City of Riviera Beach, Fla., 166 F.3d 1332, 1341 (11th Cir. 1999).

20. Therefore, there is no jurisdiction for the FCHR to investigate the complaint, since Atlass Insurance Merritt Island, Inc., does not have the required number of employees pursuant to the Florida Civil Rights Act of 1992, and further, Atlass Insurance Group, Inc., was not the employer of the Petitioner.

RECOMMENDATIONS

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

RECOMMENDED that:

The Florida Commission on Human Relations enter a final order dismissing, with prejudice, the Petition for Relief because it lacks jurisdiction over the employer, Atlass Insurance Merritt Island, Inc., or Atlass Insurance Group, Inc.

DONE AND ORDERED this 1st day of February, 2007, in
Tallahassee, Leon County, Florida.



DANIEL M. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of February, 2007.

ENDNOTE

1\ All references to Florida Statutes are to Florida Statutes
(2005), unless otherwise indicated.

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.