STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

JANNEL CHERRINGTON,

Petitioner,

v.

BARRY UNIVERSITY,
SNHS-ANESTHESIOLOGY,

Respondent.
_____/

EEOC Case No. 15D200603592
FCHR Case No. 2006-01744
DOAH Case No. 06-4648
FCHR Order No. 07-047

JANNEL CHERRINGTON,

Petitioner,

v.

WOLVERINE ANESTHESIA
CONSULTANTS,

Respondent.
_____/

EEOC Case No. 15D200603593
FCHR Case No. 2006-01691
DOAH Case No. 06-4650
FCHR Order No. 07-047

ORDER REMANDING COMPLAINTS OF DISCRIMINATION TO COMMISSION'S OFFICE OF EMPLOYMENT INVESTIGATIONS FOR INVESTIGATION

This matter is before the Commission for consideration of the Recommended Order, dated June 1, 2007, issued in the above-styled consolidated cases by Administrative Law Judge Robert E. Meale.

Pursuant to notice, public deliberations were held on August 22, 2007, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the Recommended Order.

Findings of Fact and Conclusions of Law

Petitioner Jannel Cherrington alleged that Respondent Barry University SNHS-Anesthesiology discriminated against her on the basis of her race (Black) by terminating her from a graduate nursing program and alleged that Respondent Wolverine Anesthesia Consultants discriminated against her on the basis of her race (Black) in the clinical portion of the graduate nursing program in which Petitioner was enrolled by assigning her to a certified registered nurse anesthetist longer than it assigned non-Black students even though her skill average was well above average.

The issue in these consolidated cases is not whether the alleged discrimination occurred, but whether the Florida Civil Rights Act of 1992 confers jurisdiction over the Respondents to the Commission and Division of Administrative Hearings. (The Commission's investigation yielded a "Determination: No Jurisdiction" in both the cases.)

Judge Meale recommended the Commission dismiss the Petitions for Relief in these consolidated cases, concluding that the relationship between Petitioner and Respondents did not convey jurisdiction over the Respondents.

Specifically, the Administrative Law Judge concluded that jurisdiction did not exist in this case because neither Respondent is Petitioner's "employer" within the meaning of the Florida Civil Rights Act of 1992 (Recommended Order, ¶ 23), and that neither Respondent is a covered individual with regard to the section of the Florida Civil Rights Act of 1992 dealing with discrimination in licensing (Recommended Order, ¶ 26).

allegations of discrimination suggesting an employer / employee relationship between Respondents and Petitioner

The Florida Civil Rights Act of 1992 states that "[i]t is an unlawful employment practice for an *employer*.....to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's.....race [emphasis added]." Section 760.10(1), Florida Statutes (2005).

In conclusions of law adopted by a Commission panel, it has been stated, "Absent a showing that [Petitioner] was an applicant for employment or that she became an employee, the Petitioner lacks a statutory basis for seeking relief from an unlawful employment practice." Huth v. National Admark Corporation, FCHR Order No. 01-050 (September 25, 2001), adopting conclusions of law in the Recommended Order of DOAH Case No. 00-4633, dated May 30, 2001.

In a case brought under the predecessor law to the Florida Civil Rights Act of 1992, the Human Rights Act of 1977, as amended, it was found that the Florida Commission on Human Relations properly refused to act on the claim of a student that she was the victim of discrimination when she received a grade of "B" instead of "A" in her German I class, because there was nothing in the law that "suggests the Commission is empowered to investigate and

take other action with regard to alleged discrimination of this sort." See Honig v. Florida Commission on Human Relations, et al., 659 So. 2d 1236 (Fla. 5th DCA 1995).

In the instant case, the Administrative Law Judge concluded that "Petitioner was never hired by either [R]espondent. Thus, as to Petitioner, neither [R]espondent is an employer, so no jurisdiction exists..." Recommended Order, ¶ 23.

Applying the statements of law, above, to the facts found by the Administrative Law Judge, the Administrative Law Judge's conclusion that jurisdiction does not exist, in our view, is a correct application of the law to the facts with regard to Petitioner's allegations of discrimination that suggest that Respondents were her "employers."

allegations of discrimination in Petitioner's attempt to gain licensure as a CRNA

The Florida Civil Rights Act of 1992 states, "Whenever, in order to engage in a profession, occupation, or trade, it is required that a person receive a license, certification, or other credential, become a member or an associate of any club, association, or other organization, or pass any examination, it is an unlawful employment practice for *any person* to discriminate against any other person seeking such license, certification or other credential, seeking to become a member or associate of such club, association, or other organization, or seeking to take or pass such examination, because of such other person's race, color, religion, sex, national origin, age, handicap, or marital status [emphasis added]." Section 760.10(5), Florida Statutes (2005).

We re-emphasize that for this section it is an unlawful employment practice for "any person" to discriminate as indicated, not just an "employer." See, also Section 760.11(1), Florida Statutes (2005) where this is clearly indicated.

The issue before us, then, is whether either Respondent in this case is "any person" within the meaning of this statutory section.

In concluding that neither Respondent fell within this meaning of "any person," the Administrative Law Judge concluded, "Although it is, of course, unnecessary to find an employer-employee status to find liability under a statute addressing discrimination in licensing, neither [R]espondent administered an examination directly required for licensure...Section 760.10(5) is not applicable to educational institutions whose degrees are necessary, but not sufficient, conditions for licensure, any more than this statute is applicable to universities, whose bachelor's degree may be a necessary, but not sufficient, condition to becoming a nurse or a physician...Section 760.10(5) applies instead to entities more directly involved in the licensing process -- in this case, the Council on Certification of Nurse Anesthetists." Recommended Order, ¶ 26.

We respectfully disagree on this issue.

With regard to interpreting the Florida Civil Rights Act of 1992, the Act, itself, states, "The Florida Civil Rights Act of 1992 shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this section and the

special purposes of the particular provision involved." Section 760.01(3), Florida Statutes (2005).

As indicated, above, Section 760.10(5), Florida Statutes, prohibits "any person," as opposed to an "employer," from discriminating against another in efforts to attain a license.

The Florida Civil Rights Act of 1992 defines "person" to include "an individual, association, corporation, joint apprenticeship committee, joint-stock company, labor union, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, or unincorporated organization; any other legal or commercial entity; the state; or any governmental entity or agency." Section 760.02(6), Florida Statutes (2005).

In our view, the Respondents fall within this definition of "person." (Note that the Administrative Law Judge found that both Respondents would fall within the statutory definition of "employer," which includes the term "person," although not Petitioner's employer. See Recommended Order, ¶ 17 and Section 760.02(7), Florida Statutes (2005), indicating, "'Employer' means any *person*...[emphasis added].")

The Administrative Law Judge indicated that "Section 760.10(5) is not applicable to educational institutions whose degrees are necessary, but not sufficient, conditions for licensure, any more than this statute is applicable to universities, whose bachelor's degree may be a necessary, but not sufficient, condition to becoming a nurse or a physician." Recommended Order, ¶ 26. While we agree that in the situation where a bachelor's degree is required to become a physician, the bachelor's degree program seems too distant to be covered as a "person" who could discriminate in another person's attempt to gain licensure as a physician, we do not agree that this is true for the program involved in this case.

The Administrative Law Judge found that Petitioner enrolled at Barry University to fulfill the educational requirements for certification as a Certified Registered Nurse Anesthetist (CRNA). Recommended Order, ¶ 3. The Administrative Law Judge further found that the benefit to Barry of its arrangement to have students placed with Wolverine "is that Wolverine's supervision of its students in the clinical practice allows Barry to offer a comprehensive anesthesiology program that qualifies its students to sit for the CRNA examination." Recommended Order, ¶ 6. Further, the conclusions of law set out by the Administrative Law Judge seem to clearly identify that the successful completion of a "formal post-basic program or awarding of the masters' degree in a nursing clinical specialty" is a requirement for licensure as a CRNA. Recommended Order, ¶ 25.

In our view, this is a different situation from a bachelor's degree that could be used for multiple purposes (e.g., get a job, go to graduate school, go to professional school). Rather, it seems that the sole purpose of the masters degree program Petitioner was enrolled in at Barry University is to enable the students enrolled to attain licensure as a CRNA, and completion of such a program is a specific requirement of licensure.

For this reason, we conclude that the plain meaning of Section 760.10(5), Florida Statutes (2005), would suggest that under the facts of this case Respondents are "persons" who could discriminate against another person as that other person attempts to gain licensure as a CRNA, and that therefore Commission jurisdiction exists in this case as to the allegations brought under

Section 760.10(5), Florida Statutes (2005). Further, since these allegations have not yet been substantively investigated by the Commission, we remand the case to the Commission's Office of Employment Investigations for further investigation leading to the eventual issuance of a Determination of whether there is or is not reasonable cause to believe that Respondents unlawfully discriminated against Petitioner under the provisions of Section 760.10(5), Florida Statutes (2005).

In modifying these conclusions of law of the Administrative Law Judge, we conclude: (1) that the conclusions of law being modified are conclusions of law over which the Commission has substantive jurisdiction, namely the interpretation of a specific provision of the Florida Civil Rights Act of 1992; (2) that the reason the modifications are being made by the Commission is that the conclusions of law as stated are not consistent with the liberal construction of the Florida Civil Rights Act of 1992 required by the provisions of the Florida Civil Rights Act of 1992, itself; and (3) that in making these modifications the conclusions of law being substituted are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(l), Florida Statutes (2005).

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Exceptions to Recommended Order by Petitioner," received by the Commission on June 19, 2007.

Petitioner's exceptions take issue with the facts found, facts not found and inferences drawn from the evidence presented.

Petitioner excepts to statements in Recommended Order, ¶ 5 and ¶ 12, that Petitioner "withdrew" from the program, arguing that Petitioner was dismissed from the program. It would seem that Petitioner's testimony on page 245 of Volume II of the transcript that she was "terminated" because she would not accept probation is sufficient for the Administrative Law Judge to draw the inference that Petitioner "withdrew."

Petitioners exceptions to Recommended Order, ¶ 6 and ¶ 7, essentially suggest revision to or provide comment on facts found regarding the financial relationship of the Respondents.

Petitioner's exceptions to Recommended Order, ¶ 8, ¶ 9, ¶ 10, and ¶ 11, all relate to the inference drawn by the Administrative Law Judge that neither Respondent is Petitioner's employer.

The Commission has stated, "It is well settled that it is the Administrative Law Judge's function 'to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them.' Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986)." Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999).

These exceptions are rejected.

Petitioner excepts to conclusions of law set out at Recommended Order, ¶ 17 through ¶ 23, all of which relate to the ultimate conclusion that Respondents are not Petitioner's "employer" and therefore Commission jurisdiction does not exist over Petitioner's claims of "employment" discrimination.

For reasons discussed in this Order, supra, we conclude that the Administrative Law Judge's application of the law to facts reflects a correct disposition of this issue.

These exceptions are rejected.

Petitioner excepts to the conclusions of law set out in Recommended Order, ¶ 26, which reflect that Respondents are not "persons" who could unlawfully discriminate against Petitioner under Section 760.10(5), Florida Statutes (2005), relating to discrimination against persons attempting to gain a licensure.

For reasons discussed in this Order, supra, this exception is accepted.

Remand

The Complaints of Discrimination are hereby REMANDED to the Commission's Office of Employment Investigations for further investigation consistent with this Order.

DONE AND ORDERED this 30th day of August, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Onelia A. Fajardo

Filed this 30th day of August, 2007,
in Tallahassee, Florida.

Violet Crawford

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Robert E. Meale, Administrative Law Judge, DOAH

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I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 30th day of August, 2007.

By: Violet Crawford
Clerk of the Commission
Florida Commission on Human Relations