

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED

2009 MAR 18 A 10:48

DIVISION OF
ADMINISTRATIVE
HEARINGS

SANDRA T. COLUMBUS,

EEOC Case No. N000000000

Petitioner,

FCHR Case No. 2008-01083

v.

DOAH Case No. 08-2575

MUTUAL OF OMAHA,

FCHR Order No. 09-025

Respondent.

**FINAL ORDER DISMISSING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

Petitioner Sandra T. Columbus filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2005), alleging that Respondent Mutual of Omaha committed unlawful employment practices on the bases of Petitioner's sex (female) and National Origin (Greek) by subjecting Petitioner to harassment and varying terms and conditions of employment, and on the basis of retaliation by terminating Petitioner for complaining about the unlawful conduct.

The allegations set forth in the complaint were investigated, and, on April 22, 2008, the Executive Director issued a "Determination: No Jurisdiction," finding that the Commission did not have jurisdiction of the matter because Petitioner was not Respondent's "employee," but rather was an "independent contractor" not entitled to the protections of the Florida Civil Rights Act of 1992.

Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and the case was transmitted to the Division of Administrative Hearings.

An evidentiary hearing on the issue of whether Petitioner was Respondent's "employee" was held on October 15, 2008, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida, before Administrative Law Judge Stuart M. Lerner.

Judge Lerner issued a Recommended Order of dismissal, dated December 29, 2008, recommending that the Commission dismiss Petitioner's complaint because Petitioner was not an "employee" of Respondent at the time the alleged unlawful employment practices occurred.

Pursuant to notice, public deliberations were held on March 12, 2009, 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 200, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the Recommended Order.

Findings of Fact

We find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

We adopt the Administrative Law Judge's findings of fact.

Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

We adopt the Administrative Law Judge's conclusions of law.

Exceptions

Petitioner filed exceptions to the Recommended Order in a document entitled, "Exceptions to Recommended Order," received by the Commission on January 13, 2009.

With regard to exceptions to Recommended Orders, the Administrative Procedure Act states, "The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Section 120.57(1)(k), Florida Statutes (2007); see, also, Bartolone v. Best Western Hotels, FCHR Order No. 07-045 (August 24, 2007).

A review of Petitioner's exceptions document suggests that it does not comply with this statutory provision.

Nevertheless, it can be said that the document generally excepts to facts found, facts not found, and / or inferences drawn from the evidence presented, all leading to the Administrative Law Judge's finding that Petitioner was not an "employee" of Respondent, but rather an "independent contractor."

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). Accord, Bowles v. Jackson County Hospital Corporation, FCHR Order No. 05-135 (December 6, 2005). See Assily v. Memorial Hospital of Tampa, FCHR Order No. 05-059 (May 31, 2005), for an example where this pronouncement is specifically applied to facts found leading to the conclusion that a Petitioner was an "independent contractor," rather than an "employee."

Petitioner's exceptions are rejected.

Dismissal

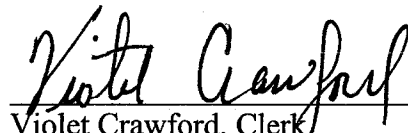
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 16th day of March, 2009.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Patty Ball Thomas

Filed this 16th day of March, 2009,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 200
Tallahassee, FL 32301
(850) 488-7082

Copies furnished to:

Sandra T. Columbus
c/o Elizabeth Athanasakos, Esq.
2631 East Oakland Park Boulevard, Suite 205
Fort Lauderdale, FL 33306-1618

FCHR Order No. 09-025


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Mutual of Omaha
c/o Kelly Cruz Brown, Esq.
c/o Daniel Hernandez, Esq.
Carlton Fields, P.A.
215 South Monroe Street, Suite 500
Tallahassee, FL 32301-1866

Stuart M. Lerner, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 16th day of March, 2009.

By: 
Clerk of the Commission
Florida Commission on Human Relations

FLORIDA COMMISSION ON HUMAN RELATIONS

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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SANDRA T. COLUMBUS,

Petitioner,

CASE NO: 08-2575

2008-01083

vs.222

MUTUAL OF OMAHA,

Respondent.

EXCEPTIONS TO RECOMMENDED ORDER

Petitioner, SANDRA T. COLUMBUS, files these Exceptions to the Recommend Order of the Administrative Law Judge of the Administrative Hearing (DOAH).

1. The Court failed to follow the law.
2. The Court failed to follow the facts of the case.

Since the case was bifurcated, there was only one issue to consider:

Whether Petitioner was an employee of Respondent's at the time of the alleged unlawful employment practices described in the employment discrimination complaint Petitioner filed with the Florida Commission on Human Relations (FCHR).

FACTS:

The Joint Stipulation #1 is true. Petitioner was licensed but had to place the license with Respondent. The limited license that Petitioner had was only for Respondent and then for its subsidiaries or affiliates, not for other insurance carriers.

Joint Stipulation #3 agrees that Respondent appoints agents to sell insurance on its behalf. There was no testimony or proof that Petitioner wrote any insurance for other carriers not subsidiaries or affiliates of Respondent.

Again, in Joint Stipulation #7, it states that "Petitioner was appointed by Respondent to sell life and health insurance and annuities on behalf of Respondent."

As to Paragraphs 20 and 21 relating to sick leave and paid vacations, Petitioner testified that she was not out sick and was not there long enough for any paid vacation.

As to #36 and 37, there were no time clocks or time slips for anyone in the office.

Petitioner did not have to pay for the use of the cubicle or any office equipment or brochures or letterheads, (#38).

The definition of a Captive Agent is:

"Insurance agent working exclusively for one company. Such an agent will tend to have more in-depth knowledge of that company's policies than an Independent Agent who can sell policies from many companies. Captive agents are usually paid on a combination of salary and commissions earned from selling policies, in the first few years they sell policies. Later, they are usually paid exclusively on a commission basis."

In the instant case, Petitioner was under the Career Financing Program provided for new people hired by Respondent. Petitioner was paid in two ways. She received commissions, which were computed by the office in which she worked. In addition, Petitioner received moneys under the Career Financing Program. The account was computed by the home office of Respondent in Omaha. (See Deposition of Carolyn Mickley, pages 9, beginning on line 10 through page 10). As to the calculations by the home office, see line 1 on the lower part of page 10. The moneys received under the Career Financing Program was not debt of Petitioner. It did not have to be repaid and it was only for new hires. (Mickley deposition lines 1-8, page 42).

Employees were paid by checks from the home office (C. Mickley deposition, page 14, lines 15 - 17((also lines 21 - 24 of page 15).

Carolyn Mickley also clearly stated that the employees' checks came from the home office

and the Independent Contractors she prepared the checks (Mickley deposition lines 16 - 19, page 15).

In her deposition, Carolyn Mickley confirmed that Petitioner did not pay for the cubical she used at the office that new agents received an allowance for the computer, eligible for deferred compensation 100% matched by Respondent, Mutual of Omaha.

Mr. Chojnacki testified on page 214, of Volume II, lines 11 - 13, that when Petitioner is appointed by Respondent with the State of Florida, she can go out with an agent. Petitioner had the appointment and she was required by her supervisor, Ron Green, to have him with her at appointments with potential clients with prior approval by him. Ron Green did not testify. When friction came about between Mr. Green and Petitioner, Petitioner came under the immediate supervisor of Mr. Chojnacki who then accompanied Petitioner or instructed Petitioner to be in contact with him by telephone.

Petitioner testified that Ron Green instructed her to be in the office each day, which she did. Petitioner kept a daily log. Mr. Chojnacki did too, but when he was asked to produce it, he said he "discarded" it.

The testimony of Howard Everette was overlooked. He testified on page 222 of Volume II that there was a training procedure for new agents. Howard Everette also testified that Mr. Chojnacki had a vested interest in keeping on top of and following Petitioner's appointments by phone contact or in person because he was paid based on the success of the new agent. (Vol. II of II..age 233, lines 19-25 and Page 234, lines 1-25)

Mr. Everette talked about going out with new agents when Mr. Chojnacki was not available (page 225, Volume II lines 4 - 6). (Page 233, lines 19 - 25, lines 1 - 3, Page 234).

The facts are important because they relate to who is in fact an employee. There are

certain factors that Petitioner set forth that differentiates an employee from an Independent Contractor. It does not matter what the Respondent called a person; it is the manner in which the Petitioner was treated.

Testimony from a former employee, Carolyn Mickley, and also the witness for MUTUAL OF OMAHA, NOEL MORIEN, Vice President, admitted there had been two contracts previously. This is also admitted by Carolyn Mickley former employee of approximately 32 years of MUTUAL OF OMAHA. Employees were dealt with in a different manner. If it were a new, inexperienced agent, that agent would be entitled to go into the Career Financing Program for a period of not more than three years. At that time they would receive moneys directly from the Omaha office. This amount was not determined by the local corporate office or any other branch office. This was a benefit to the new agents.

Petitioner contends that she was a Captive/Career Agent which meant that she exclusive worked for MUTUAL OF OMAHA or its other companies. There was only one item that was brought to the Court by MUTUAL OF OMAHA and that was a small policy written with Humana for coverage not available through MUTUAL OF OMAHA and according to the Petitioner, was written at the direction and insistence of Mr. Chojnacki who generated the lead from his computer. Petitioner received \$5.55 per month as commission for not more than 7 months.

During the time that Petitioner was with MUTUAL OF OMAHA, she was under the control of Mr. Chojnacki and/or Mr. Green. She could not independently write any policies and had to report to them and give them in advance any contacts she made with prospective clients. The method described by the Petitioner was also verified by their witness, Howard Everette, who is now an independent contractor but when he initially went to work with MUTUAL OF

OMAHA, he also had the control placed on him similar to that described by the Petitioner.

Economic realities of this matter was that the income that the Petitioner had was from MUTUAL OF OMAHA and not from any other sales to anyone else.

Petitioner claims that she was also given life insurance in this matter without paying for it, but MUTUAL OF OMAHA denies this statement.

Petitioner received brochures free of charge, letter head, the use of office space and equipment. She received a computer allowance of \$150.00 per month which was to be for 12 - 18 months. She received training by MUTUAL. She had to tell her Supervisors the list of persons that she was going to see and she could not see them alone, but with either Mr. Green or Mr. Chojnacki or on the telephone with them to describe what was going on during the meeting. Petitioner did not have any investment in any other office and is totally dependent upon MUTUAL OF OMAHA. She was working exclusively for MUTUAL OF OMAHA and not for anyone else. MUTUAL had the right to terminate the agent at any time.

MUTUAL OF OMAHA continues to call the Petitioner an Independent Contractor and points to various writings in the Brochures referring to Independent Contractors. The law is very clear that it does not make any difference what you call a person. The Courts follow the simple way of determining as to whether the person is an Independent Contractor or an employee. This is true even if they are paid by a 1099 and the employer continues to call them Independent Contractor.

A letter sent to Petitioner on October 19, 2007 from the home office of Respondent refers to Petitioner as a career agent (Petitioner's Additional Exhibit) (copy of letter attached)

CASE LAW

In VERNON WILLIAMS, Appellant vs. BERNARD HOPKINS, JR., et. Al.

Appellees, 2007 PA Sup. Ct. Briefs 120; 2007 PA Sup. Ct. Briefs LEXIS 1127 July 9, 2007, in Section III, the Court said there was documentary evidence suggesting an employer employee relationship which is true in this case. In the Williams case there was an implied contract but in the current case there is in fact a contract between the Petitioner and Respondent. "Williams is an employee because Hopkins had control over Williams' performance under the contract with regards to the first prong, an "extremely important" consideration is the power of the employer to terminate the relationship at any time with or without cause; this "tends strongly" to show that the worker is not an independent contractor but an employee. FELLER v. NEW AMSTERDAM CAS. CO. 70 A.2d 299, 301 (Pa. 1950)" In the Williams case his schedule was fixed and he was expected to be with Hopkins at certain times and he could not perform all of his duties on his independent schedule. Hopkins exerted his authority over various employee relations. In the present case, both the Sales Manager and General Manager exerted control over the Petitioner. She had to be in at certain hours all day in order to get referrals. She could not go out on her own to see clients without either Mr. Green or Mr. Chojnacki being with her or if they wanted, she would be able to go but she had to be in constant communication with them on the telephone. This control did not cover independent contractors who wrote business for other companies in addition to that of the Respondent. They had investments of their own moneys, usually their own office at a location, telephones and advertising. This was not true of the Petitioner.

In SHARP EQUIPMENT, 808 A.2d at 1024 the Courts look at whether the worker could operate free from the control of any individual. Even though the worker signed an Independent Contractor Agreement in the Sharp Equipment case, she was an employee because she was not in the business of doing work for anyone else other than the employer and since she worked for the employer from 9:00 a.m to 5:00 p.m. she did not have the opportunity to work for anyone else.

The fact that taxes were not withheld from the workers wages did not keep her from being an employee.

In K & D AUTO BODY, INC. Appellant, vs. DIVISION OF EMPLOYMENT SECURITY. Respondent, 171 S.W. 3d 100, 2005 Mo. App. LEXIS 1211, the Court refers to the IRS identification of 20 factors to consider in determining whether sufficient control is present to establish an employer employee relationship. See Rev. Rul. 87-41, 1987-1, C.B. 296. These factors are: (1) instructions; (2) training; (3) integration; (4) services rendered personally; (5) hiring, supervising and paying assistants; (6) continuing relationship; (7) set hours of work; (8) full time required; (9) doing work on employer's premises; (10) order or sequence set; (11) oral or written reports; (12) payment by hour, week, month; (13) payment of business and/or traveling expenses; (14) furnishing of tools and materials; (15) significant investment; (16) realization of profit or loss; (17) working for more than one firm at a time; (18) making service available to general public; (19) right to discharge; and (20) right to terminate.

As to number 1, a worker is required to comply with another person's instructions about when, where and how he or she is to work as ordinarily is done with an employee. In the present case, Petitioner was told how to work and had to do it under the direct supervision of either Mr. Green or Mr. Chojnacki.

As to training, Petitioner herein was required to be trained by an experienced employee to work with the worker which in this case was Mr. Green and Mr. Chojnacki. There were also training classes that were given periodically at the place of business.

As to integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of the business depends to an appreciable degree upon the performance of certain services, the workers

who perform those services must necessarily be subject to a certain amount of control of the business. In the current case, the Petitioner was under direct supervision of the General Manager and the Sales Manager and had to perform in order to assist in the success of the Respondent.

The services were rendered personally by the Petitioner for the benefit of the respondent.

There was a continuing relationship between the Petitioner and the Respondent and the work that was performed was daily at recurring and regular intervals.

The Sales Manager established set hours of work by the Petitioner for whom the services are performed and this is another indication of control of the Petitioner by the Respondent.

Petitioner had to devote her full time to the business of the Respondent and not for anyone else.

All the work that the employee, Petitioner herein, performed were on the premises of the employer, Respondent. The only work that took place at home was also for the Respondent in that telephone calls had to be made if people were not available during the day time. Petitioner also had to read items that were presented to her in the form of booklets from the Respondent which had to be done on her own time in the evening. The Respondent provided a work place for the Petitioner, a desk and other tools such as brochures, letterheads and any other items that were required for her to complete her work. All of those items were provided free of charge by the Respondents.

The Petitioner was not allowed to follow her own pattern of work but had to comply with the patterns shown to her by Mr. Green and Mr. Chojnacki and she was limited in who to contact and what products of the Respondent she could sell and how they were to be sold.

Petitioner had to report to her direct supervisor as to who she was contacting and what products of the Respondent she was going to present and had to do this all with either of the supervisors in charge or in direct contact with them. Mr. Chojnacki and/or Mr. Green reviewed

each of the Petitioner's proposed Applications for policies and had to sign off on them in order for them to be processed by the Respondent's corporate office in Omaha.

As to payment, the Petitioner was under the career financing program provided for new people hired by the Respondent. She received these funds even though she may not have made sales. The amount was calculated by Respondent's main office in Omaha and not by the local district office in which she worked. Any commissions she made were paid from the local district office. Petitioner was not on straight commission. Petitioner was also entitled to participate in the Deferred Compensation Program. The testimony by several parties in the current case indicated that the financing of new people was only for a period of not more than three years at which time they were totally on commission.

Petitioner did not invest in the facilities that she used in performing the services. All of those facilities, tools and materials were furnished by Respondent. Petitioner received the career financing sum, deferred compensation and also commissions and bonuses. If there was a loss, she still received moneys from the career financing program. Petitioner did not work for any other firm at the time. She was 100% working for the Respondent and she could not make her services available to the general public or to any other insurance carrier.

The Respondent had a right to discharge Petitioner and the Petitioner had the right to terminate her relationship with the Respondent, which she did after several matters occurred in relation to the business and its employees.

Again, under *FELLER v. NEW AMSTERDAM CASUALTY CO.*, (Pa. 1950), it states that if a contractor is under the control of the employer he is servant but if not under such control, he is an independent contractor, and it is not the fact of actual interference or exercise of control

by employer but the existence of the right or authority to interfere or control which renders one a servant rather than independent contractor.

CAPTIVE AGENT: An insurance agent working exclusively for one company. Such an agent will tend to have more in-depth knowledge of that company's policies than an independent agent who can sell policies from many companies. Captive Agents are usually paid on a combination of salary, commissions and deferred compensation earned from selling policies, in the first few years they sell policies. Later they are usually paid exclusively on a commission basis.

In the instant case, Petitioner, SANDRA T. COLUMBUS, was entitled to or subject to the following:

(a) Deferred compensation; (b) Control by her supervisors; (c) Economic realities given that Respondent is her only source of income and she did not invest in any office space or needs; (d) Life insurance; (e) Career financing which was computed by the home office in Omaha and went for 24 - 36 months and was not refundable by the agent; (f) Received free brochures, letterheads; (g) Had the use of office space and equipment free; (h) Any advertising that the Petitioner may have wanted to do had to be approved by Respondent; (i) Petitioner received a computer allowance for 12 -18 months in the amount of \$150.00 per month; (j) Received training by Respondent; (k) Petitioner had to advise Respondent of her list of persons that she was going to see and had to have the Supervisor with her or on the telephone while she was at the person's residence, if she was allowed to see them; (l) There is lack of investment by Petitioner in the facilities and she was dependent upon Respondent for supplying them; (m) Petitioner worked only for Mutual and no one else; (n) Mutual had the right to terminate Petitioner at any time.

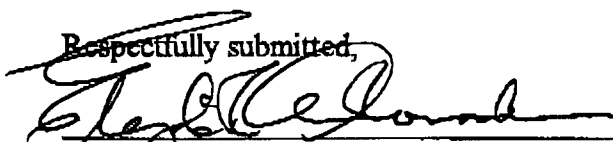
It appears that from the testimony of the parties and their witnesses that the above existed

and that there was sufficient control by the Respondent over the Petitioner to determine that she was, in fact, an employee and not an independent contractor. Had she stayed with Mutual for an extended period of time, that is two to three years, and no longer qualified for the career financing and could write for other companies other than Respondent, MUTUAL OF OMAHA, she would then have attained the level of independent contractor. At that point the benefits that she received, that is, the office and other tools would not have been available to her.

CONCLUSION:

Petitioner respectfully requests that the exceptions be granted and that the Court recognize Petitioner as an employee of Respondent. Had Petitioner remained with Respondent and completed the 2 - 3 years which were guidelines for new agents, she would then have become an Independent Contractor.

Respectfully submitted,



ELIZABETH ATHANASAKOS, ESQ.

Attorney for Petitioner

2631 East Oakland Park Blvd., Suite 205

Fort Lauderdale, FL 33306-1618

954/564-7545 / Fax 954/564-7611

FBN: 002520

CERTIFICATE OF SERVICE

I CERTIFY that the foregoing was mailed to Denise Crawford, Agency Clerk, Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, FL 32301, Kelly Cruz-Brown, CARLTON FIELDS, P.A., P.O. Drawer 190, Tallahassee, FL 32308, Jaret J. Fuente, CARLTON FIELDS, P.A., Post Office Box 3239, Tampa, FL 33601, this 17 day of January, 2009.

