STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SANDRA T. COLUMBUS,

Petitioner,

vs.

MUTUAL OF OMAHA,

Respondent.

Case No. 08-2575

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on October 15, 2008, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Elizabeth Athanasakos, Esquire
2631 East Oakland Park Boulevard
Suite 205
Fort Lauderdale, Florida 33306-1618

For Respondent: Kelly Cruz Brown, Esquire
Daniel Hernandez, Esquire
Carlton Fields, P.A.
215 South Monroe Street, Suite 500
Tallahassee, Florida 32301-1866

STATEMENT OF THE ISSUE

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).

PRELIMINARY STATEMENT

On or about February 8, 2007, Petitioner dual-filed a charge of discrimination (Complaint) with the federal Equal Employment Opportunity Commission (EEOC) and FCHR, alleging that Respondent had discriminated against her based on her "sex" (female) and "national origin" (Greek) and, in addition, had retaliated against her. In her Complaint, Petitioner gave the following "particulars":

> 1. During [my] tenure as an Insurance Agent, Ron Green, Assistant General Manager, subjected me to varying terms and conditions of employment and he harassed me because of my national origin, Greek, and my sex, female. I was subsequently terminated in retaliation for complaining about the unlawful conduct.
>
> 2. The Respondent failed to take prompt remedial action to stop the discriminatory conduct.
>
> 3. I believe that I have been discriminated against because of my national origin, Greek[,] and my sex, female, in violation of Title VII of the Civil Rights Act of 1964, as amended and specifically, section 704(a) prohibiting retaliation.

On April 22, 2008, the FCHR, following the completion of its investigation of the Complaint (which "focused on [its] jurisdiction over [the matter]"), issued a Notice of Determination: No Jurisdiction.

Petitioner, on or about May 22, 2008, filed with the FCHR a Petition for Relief, in which she alleged that "Respondent ha[d] violated the Florida Civil Rights Act of 1992 , [a]s [a]mended, in the manner specifically described below":

> Discrimination on [the basis of] national origin
> Sexual discrimination
> Retaliation- Complained to Mr. Chojnacki, GM[,] & Mr. Ron Green retaliated against me.

On May 27, 2008, the FCHR referred the matter to DOAH for the assignment of an administrative law judge to "conduct all necessary proceedings required under the law and submit recommended findings to the [FCHR]."

The undersigned was subsequently assigned the case. On June 4, 2008, he issued an order advising the parties that the final hearing in this case would be held on August 7, 2008.

On July 9, 2008, Respondent filed an Unopposed Motion to Reschedule/Continue Hearing Date and an Unopposed Motion to Bifurcate. In the latter motion, Respondent stated the following:

> Counsel for the parties agree that the issue of whether the Petitioner was an employee is a threshold issue, which must be resolved before the secondary issue of whether the Respondent committed the unlawful employment practices alleged in the Charge of Discrimination.
>
> Counsel for the parties further agree that the threshold and secondary issues should be bifurcated in order to simplify the

> proceedings, reduce costs, and to further convenience and judicial economy. Counsel for the parties agree that a bifurcated hearing would require less time, far fewer witnesses, far less evidence, and it could eliminate the need for a hearing on the secondary issue[s].

On July 10, 2008, the undersigned issued an order continuing the final hearing in this case and a separate order on the motion to bifurcate. The latter order provided, in pertinent part, as follows:

> Upon consideration, Respondent's Unopposed Motion to Bifurcate Issues is granted. A hearing will first be held on the "threshold" issue of "whether the Petitioner was an employee" of Respondent's at the time of the alleged unlawful employment practices. The date, time, and location of this hearing will be announced by subsequent order. No hearing on the "secondary" issue of "whether the Respondent committed the unlawful employment practices alleged in the Charge of Discrimination" will be held before this "threshold" [issue] is resolved.

A hearing on the "threshold" issue of "[w]hether Petitioner was an employee of Respondent's at the time of the alleged unlawful employment practices" was subsequently scheduled to be held on October 15, 2008.

On October 6, 2008, the parties filed a Joint Prehearing Stipulation, which contained the following "[s]tatement of [f]acts that are admitted" (Stipulations of Fact):

> 1. Petitioner was licensed as a life and life and health insurance agent by the Florida Department of Financial Services.

2. Respondent is authorized to transact insurance in the State of Florida.

3. Respondent contracts with and appoints licensed insurance agents to sell insurance on its behalf.

4. During December 2004 through January 2005, Petitioner completed a mandatory course regarding the transaction of insurance and took a state examination.

5. The business of insurance is highly regulated.

6. Prior to becoming an agent with Respondent, Petitioner was familiar with the concept of being paid by commissions but not in the insurance field.

7. Petitioner was appointed by Respondent to sell life and health insurance and annuities on behalf of Respondent.

8. On or about March 31, 2005, Petitioner met with Mr. Chojnacki, General Manager of Respondent.

9. Petitioner completed and signed a "Statement of Qualifications-Agent Candidate" for OMAHA on April 1, 2005.

10. The "Statement of Qualifications-Agent Candidate" is not an employment application.

11. Petitioner signed a document called "Agent Agreement" with Respondent with an effective date of April 27, 2005.

12. The "Agent Agreement" gave Petitioner the right to terminate the "Agent Agreement" at any time by giving written notice to Respondent.

13. Petitioner did not read the "Agent Agreement" before signing it.

14. Petitioner paid Respondent for prospective insurance customer leads.

15. Petitioner's current home address and signature appears on a document entitled "Errors & Omissions Program Agreement."

16. Petitioner did not read the "Errors & Omissions Program Agreement" before signing it.

17. Petitioner was responsible for securing and keeping in effect any necessary insurance licenses to represent Respondent as an agent.

18. Petitioner was charged by Respondent for any customer prospects she obtained from Respondent.

19. Respondent did not pay Petitioner a commission on an insurance policy she sold until Respondent issued the insurance policy to the policyholder. The is the usual manner of doing business in the insurance field.

20. Petitioner did not receive paid sick leave from Respondent.

21. Petitioner did not receive paid vacation from Respondent.

22. Petitioner received a Form 1099 MISC Statement on Non-Employee Compensation Earnings for 2006 from Respondent.

23. Petitioner was responsible for withholding her own federal personal income taxes while an agent of Respondent['s].

24. Petitioner was responsible for withholding her own social security taxes while an agent of Respondent['s].

25. Petitioner purchased her own life and disability insurance policies from Respondent.

26. Petitioner was paid by Respondent a commission for the life and disability insurance policies referenced in paragraph 25 above.

27. After Petitioner terminated her Agent Agreement with Respondent, Petitioner stopped paying these policies and they lapsed for non-payment of premium.

28. Petitioner was not reimbursed for mileage by Respondent for travel associated with meeting clients.

29. Due to the nature of the business, Petitioner as well as other agents at her office location, worked from home from time to time.

30. Petitioner was not told by Respondent that working from home was prohibited.

31. Petitioner's signature appears on Petitioner's Medicare Part D Certification and Coventry Medicare Part D Plan forms.

32. Petitioner sold one Medicare Part D Plan.

33. Petitioner received a computer allowance from Respondent.

34. Petitioner signed Respondent's document entitled "Financial Profiles Forecaster Schedule."

35. Petitioner signed Respondent's document entitled "Computer Software License Amendment."

36. Petitioner was not required to file any time sheets with Respondent to account for her time.

37. Petitioner was not required by Respondent to clock in or clock out or to account for her time as there was no time clock in that office nor was anyone required to prepare any time slips.

38. Petitioner used a cubicle located at Respondent's District Office located at 2240 Woolbright Road, Ste. 400, Boynton Beach, FL 33426.

39. Petitioner paid self-employment tax in years 2005 and 2006.

40. On February 10, 2006, Petitioner terminated her agent contract with Respondent.

41. On February 8, 2007, Petitioner filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and the Florida Commission on Human Relations ("FCHR")[,] a complaint alleging that Respondent discriminated against her based on ethnic origin and sex and that Respondent also retaliated against her.

42. On February 9, 2007, Petitioner was advised by the EEOC that her Complaint had been transferred to the FCHR.

43. After an investigation, the FCHR issued a Determination: No Jurisdiction and Notice of Determination on April 22, 2008.

44. On May 22, 2008, Petitioner filed a Petition for Relief with attachment.

45. On May 27, 2008, the case was transmitted by the FCHR to the Division of Administrative Hearings.

On October 8, 2008, Respondent filed a Notice of Correction of Scrivener's Error made in that portion of the Joint

Prehearing Stipulation containing Respondent's position statement.

On October 13, 2008, the parties filed a pleading containing the following "additional prehearing stipulations":

> 1. Petitioner received IRS Form 1099s from Respondent for years 2005 and 2006 (see attached Exhibit A).
>
> 2. Petitioner never received a W-2 form from Respondent.
>
> 3. The deposition of Carolyn Mickley may be used by the parties in lieu of her live testimony at the October 15, 2008 hearing in the above-styled cause.

As noted above, the hearing on the above-described "threshold" jurisdictional issue in this case was held on October 15, 2008, as scheduled.

Five witnesses gave live testimony at the hearing: Petitioner, Victoria Hughes, Neal Morien, Michael Chojnacki, and Howard Everette. In addition, 36 exhibits were offered and received into evidence: Joint Exhibit 1 (which was the transcript of the deposition of Carolyn Mickley); Petitioner's Exhibits 1 and 2; and Respondent's Exhibits 1 through 33).

At the close of the evidentiary portion of the hearing, the undersigned, on the record, set a December 8, 2008, deadline for filing proposed recommended orders.

The Transcript of the final hearing (consisting of two volumes) was filed with DOAH on November 12, 2008.

Respondent and Petitioner filed their Proposed Recommended Orders on December 8 and 9, 2008, respectively.

On December 8, 2008, Respondent filed a motion requesting that the undersigned take official recognition of the provisions of Sections 626.015(3) and 626.112(1)(a), Florida Statutes, and Florida Administrative Code Rule 69O-150.018. No response to the motion has been filed. Upon consideration, the motion is granted.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made to supplement and clarify the extensive factual stipulations set forth in the parties' Joint Prehearing Stipulation and their October 13, 2008, pleading[2]:

1. Petitioner is a college graduate with a communications degree.

2. She has held a Florida life, variable annuity, and health insurance agent (2-15) license issued by the Department of Financial Services since March 8, 2005.

3. Respondent's home office is located in Omaha, Nebraska.

4. At all times material to the instant case, Respondent had a divisional office located at 2240 Woolbright Road, Suite 400, Boynton Beach, Florida (Boynton Beach Office) staffed by a general manager (Michael Chojnacki), a district sales manager

(Ronald Green), and two secretaries (Victoria Hughes and Carolyn Mickley).

5. Mr. Chojnacki, Mr. Green, Ms. Hughes, and Ms. Mickley were salaried employees of Respondent's paid by check issued by the home office. They enjoyed employee benefits that included vacation time; sick leave; health, vision, and dental coverage; disability and life insurance; and a retirement plan.

6. These benefits were described in an employee handbook that were given to each of Respondent's employees.

7. Mr. Chojnacki was responsible for overseeing the day-to-day operations of the Boynton Beach Office, including insurance application review and processing and agent recruitment.

8. In late March 2005, Petitioner contacted Mr. Chojnacki by telephone to inquire about the possibility of her becoming an insurance agent for Respondent.

9. Thereafter, on April 1, 2005, Petitioner went to the Boynton Beach Office and met with Mr. Chojnacki. Mr. Chojnacki talked to Petitioner about what she needed to do to become an agent for Respondent and how agents were compensated. He explained that Respondent paid its agents on a commission-only basis, based on the amount of business they produced for Respondent.

10. During her April 1, 2005, visit to the Boynton Beach Office, Petitioner executed a Statement of Qualifications-Agent Candidate form (referenced in the parties' Stipulations of Fact 9 and 10) with which Mr. Chojnacki had provided her. The form, which sought "[j]ust basic information" about the candidate, contained the following disclaimer and acknowledgement:

> This is a statement of qualifications to become contracted as an agent and is not an application of employment.
>
> * * *
>
> I understand that if contracted as an agent, this document, the agent's contract, the training materials I may receive, and any other manuals and documents, are not contracts of employments. Further, if contracted with the Mutual of Omaha Insurance Company as an independent contractor, I may terminate the agent's contract with or without cause, at any time, as may Mutual of Omaha Insurance Company.

11. Mr. Chojnacki subsequently e-mailed Petitioner and requested that she complete a career profile test (designed to measure how Petitioner "would do in the insurance and in the sales industry").

12. Petitioner scored a ten out of 19 on the test, sufficient to keep her candidacy for an agent position alive. Mr. Chojnacki thus sent the Statement of Qualifications-Agent Candidate form Petitioner had executed on April 1, 2005, to the home office for processing.

13. A background check on Petitioner was then done.

14. The background check revealed nothing in Petitioner's past that would disqualify her from becoming an agent for Respondent.

15. After learning that the home office had cleared her, Mr. Chojnacki gave to Petitioner for her to study various booklets Respondent had developed for its agents to educate them about its product offerings. At the beginning of each booklet was the following statement:

> As an independent contractor, the ultimate decision regarding your participation in these programs is yours and yours alone. Neither Mutual of Omaha nor its representatives can dictate the time or place and manner by which you sell its products and acquire the knowledge and skills necessary to effectively sell its products. Therefore, the Career Development Program is voluntary. However, due to the complexity and sophistication of the companies' products, you must be able to demonstrate a mastery of the material contained in this program to be able to offer these products to prospective clients.
>
> This program has been developed to offer a structured methodology which has proven to be a highly effective way to master the knowledge and skills to sell our products. In addition, it is our judgment that this method provides an efficient approach to achieve the required mastery and, therefore, we recommend it.
>
> Discussion and follow-up from your manager does not change the voluntary nature of your participation, but only serves to assist you in mastering the material and enables the

> companies to fulfill [their] public
> obligation to ensure that all
> representatives are fully trained and
> knowledgeable.

16. Each booklet Mr. Chojnacki provided to Petitioner had a unique identifying serial number and included a corresponding tear-out test answer sheet with the same unique identifying serial number to be used to answer questions concerning material covered in the booklet.

17. After reading the booklets and answering the questions posed therein, Petitioner furnished Mr. Chojnacki with her completed test answer sheets (which she had torn from the booklets). Mr. Chojnacki then faxed these answer sheets to the home office to be graded. He subsequently received an e-mail from the home office advising him that Petitioner had received passing grades on all of the tests.

18. After receiving this e-mail, Mr. Chojnacki met with Petitioner "to get her ready" to become an agent. During the meeting, he again discussed with Petitioner Respondent's commission-only, production-based compensation program for agents, including the opportunities available to agents to receive bonuses in addition to their base commissions. He further informed her that, as an agent, she would be an independent contractor who "gets paid off a 1099."

19. On April 11, 2005, Petitioner received a copy of

Respondent's Agency Sales Compliance Manual (Manual), which gave an overview of the legal requirements applicable to the activities of agents in the sale of Respondent's products. On page 9 of the Manual was the following discussion regarding "Continuing Education":

> Mutual of Omaha encourages the professional development of producers through training and participation in industry organizations that promote ethical sales practices, as well as through the continuing education required to maintain a license. It is the policy of Mutual of Omaha to provide producers with insurance-related training, including training that qualifies for continuing education. Mutual of Omaha provides continuing education courses and makes continuing education courses available through a variety of methods. These methods include self-study courses through vendors, industry designation courses such as CLU, CFP, ChFC, LUTC and specialized training provided by Mutual of Omaha.
>
> As an independent contractor, it is your responsibility to ensure that continuing education requirements are satisfied, whether through training provided by Mutual of Omaha or independently taken training. If a license lapses or is cancelled, commission payments may be stopped until such time as the license is reinstated or a new license is obtained. Questions regarding continuing education should be directed to your Manager or the Home Office at (402)351-4949.

Page 27 of the Manual contained the following advisement:

> In order to help ensure ethical market conduct practices, integrity and fair competition on the part of its producers, producers are prohibited from engaging in

> solicitation, marketing and sales practices that are illegal, unethical or contrary to the requirements established by Mutual of Omaha Insurance Company and its affiliates.

At no time did Mr. Chojnacki give Petitioner a copy of Respondent's employee handbook.

20. On April 11, 2005, Petitioner signed a W-9 (Request for Taxpayer Identification Number and Certification) form, an Internal Revenue Service (IRS) tax form that Respondent's agents are routinely given to sign.

21. Petitioner also executed on that date Respondent's Errors and Omissions Agent Insurance Program form (referenced in the parties' Stipulations of Fact 15 and 16). The following statement appeared immediately above the signature line on the form:

> All agents are reminded that they are independent contractors under contract with the Company. As such, they are personally responsible for any claims, demands or lawsuits made by third parties arising from allegations of breach of contract, negligence or other wrongdoing on the part of the agent. The undersigned affirms that the foregoing is true, correct, and complete, and has read the "Enrollment Form Instructions" and understands same.

22. On April 12, 2005, Petitioner was formally appointed as an agent for Respondent and United World Life Insurance Company, an affiliate of Respondent's.

23. Petitioner and Mr. Chojnacki (on behalf of Respondent) signed an Agent's Contract (referred to in the parties' Stipulations of Fact 11 through 13 and 27 as the "Agent Agreement"), which had an effective date of April 27, 2005. Ms. Mickley then submitted the contract to the home office for signature. This was the only Agent's Contract that Petitioner signed. At no time did she sign another contract.

24. Section B. of the Agent's Contract was entitled, "General Provisions," and provided, in pertinent part, as follows:

> 1. Appointment. The Company [Respondent] appoints the Agent [Petitioner] to personally solicit and procure applications for Products and provide such service as may be required. This appointment is not exclusive.
>
> * * *
>
> 5. License. The Agent is responsible for securing and keeping in effect any licenses and appointments required to represent the Company. The Agent agrees not to solicit for Products unless the proper license has been obtained.
>
> * * *

25. Section C. of the Agent's Contract described the "Agent's [d]uties" as follows:

> The Agent shall, in accordance with applicable Company rules:
>
> 1. Procure Applications. Solicit and procure applications for Products.

2. <u>Submit Applications</u>. Immediately submit to the Company applications procured.

3. <u>Collect Moneys</u>. Collect all Moneys as trust funds and immediately turn them over to the Company without deduction. All Moneys are the property of the Company.

4. <u>Service Clients</u>. Render all service incidental to the development and conservation of the Company's business which may be deemed necessary by the Company.

5. <u>Obtain Bond and Insurance</u>. If requested by the Company, obtain and maintain in force:

(a) a bond covering fidelity losses; and

(b) errors and omissions insurance.

The amount and nature of both must be satisfactory to the Company.

6. <u>Protect Proprietary Materials</u>. Agent shall:

(a) Use Proprietary Material for authorized business purposes only. Agent is only authorized to obtain and use Proprietary Material which is necessary to perform [his or her] duties;

(b) Hold in the strictest confidence all Proprietary Material received and shall not disclose any Proprietary Material to any third party or parties without the prior written consent of the Company;

(c) Use appropriate safeguards commonly available, such as anti-virus, firewalls and encryption, to prevent use or disclosure of Proprietary Material. This shall include compliance with all existing and enacted laws and regulations;

(d) Report any incidents involving Proprietary Material to Mutual of Omaha's Field Assistance Center within 24 hours of discovery. All details of the incident should be provided so that Company can assess the scope and impact and take additional action as necessary to safeguard the information.

(e) Return any Proprietary Material received from the Company to the Company immediately upon termination of this Contract.

(f) Adequately brief [his or her] staff, if any, on the conditions documented in this Section.

7. Follow Company Practices. Adhere to and comply with all Company practices and procedures.

8. Act Ethically. At all times act in an ethical, competent and professional manner, including without limitation, with respect to any compensation disclosure obligations it may have governing its relationships with Clients.

9. Comply with Laws. Comply with applicable laws and regulations.

26. "Office [p]rivileges" were addressed in Section E. of the Agent's Contract, which provided as follows:

> The Company may provide for the Agent's use office facilities, supplies, clerical support and other property or services. The Company may withdraw or charge for these privileges at any time.

27. In Section F. of the "Agent's Contract" was the following discussion regarding "[c]compensation":

1. Attachments. The compensation of the Agent for all acts performed hereunder or otherwise during the term of this Contract, and for expenses incurred or property acquired, is specified in the Attachments. No compensation shall be payable until the Project on which compensation is claimed is actually issued.

2. Compensation Continuance. The Company is obligated to pay compensation due under this Contract only while:

(a) this Contract is in effect; and

(b) the Agent is performing the duties specified in the Section entitled AGENT'S DUTIES; provided, however, compensation indicated as "vested" or "deferred" in the Attachments shall not be withheld pursuant to this provision.

3. Agent's Account.

(a) Compensation payable under this Contract shall be subject to an offset for any indebtedness of the Agent to the Company and shall not be due until such indebtedness is satisfied. Such indebtedness shall include, but not be limited to:

1. Chargeback of any compensation paid or credited to the Agent under this or any other contract, if the Moneys on which such compensation was based are not collected or are refunded by the Company;

2. Any amount paid by the Company which, in the Company's determination, resulted from any fraud, misrepresentation or other improper conduct on the part of the Agent;

3. Any expenses incurred by the Company on behalf of the Agent;

4. Any advances made by the Company to the Agent; and

> 5. Any other amounts which the Agent owes the Company.
>
> (b) The Agent, shall upon request by the Company, immediately repay in full any indebtedness. Any amount remaining unpaid shall be subject to collection by such legal means as are available to the Company.
>
> (c) The Company shall have the right to withhold payment of any credit balance in the Agent's account for not more than 13 months after termination of this Contract to assure that funds are available to reimburse the Company for any indebtedness. Thereafter, any net credit balance shall become due and payable.

28. "Termination" was discussed in Section H. of the Agent's Contract, which provided as follows:

> 1. With Notice. The Company or the Agent shall have the right at any time to terminate this Contract, with or without cause, by written notice to the other party.
>
> 2. Without Notice. This Contract shall be automatically terminated should the Agent fail to submit an application for a Product for a period of 180 days.
>
> 3. Procedural Guidelines. The Company may from time to time adopt procedural guidelines applicable to agent contract terminations. Adoption of these guidelines and any failure to observe them shall neither grant any rights to the Agent, nor impose any duties upon the Company and shall not be deemed to limit the Company's rights as set forth in this Contract.
>
> 4. Return of Material. Upon termination of this Contract, the Agent shall immediately return to the Company all: Proprietary Material, material identifying the Agent as

a representative of the Company, and property owned by the Company.

5. Forfeiture. If the Agent is notified in writing that the Agent has:

(a) Committed a fraudulent or illegal act in conjunction with any transaction under this Contract; or

(b) violated any provisions of the Section entitled LIMITATIONS or UNACCEPTABLE PRACTICES;

then the Company shall not be obligated to pay any compensation otherwise payable while this Contract is effect, or after its termination.

29. Section I. of the Agent's Contract contained "[m]iscellaneous" items, including the following:

* * *

4. Determination of Issuance and Product Type. The determination to issue a Product and the type of Product to be issued shall be at the Company's sole discretion.

* * *

6. Award, Recognition and Incentive Programs. If eligible, the Agent may participate in award, recognition and incentive programs of the Company. The Agent agrees to abide by the rules of each program. The Company reserves the right to change, limit or cancel any program, rule or award at any time. In such event, the Agent may not be able to obtain certain awards.

7. Beneficiary Designation. The Agent designates as beneficiary for payment of any benefits becoming due after the Agent's death the beneficiary specified on the signature page of this Contract or such

> other party or parties as the Agent may designate by written notice delivered to and acknowledged by the Company.
>
> 8. <u>Independent Contractor</u>. The Agent is an independent contractor and not an employee. None of the terms of this Contract shall be construed as creating an employer-employee relationship and the Agent shall be free to exercise the Agent's own judgment as to the persons from whom the Agent will solicit and the time, place and manner and amount of such solicitation.

30. "[T]he beneficiary specified on the signature page of [Petitioner's Agent] Contract" was her mother.

31. Petitioner's Agent's Contract included an Interim Sales and Marketing Amendment, also effective April 27, 2005, signed by Petitioner and Mr. Chojnacki, which, on its first page, provided as follows:

> The Company and Agent agree to place Agent in an "Interim Sales and Marketing" status. The terms and conditions are as follows:
>
> I. <u>PURPOSE</u>
>
> The Company and Agent agree to the terms and conditions of this Amendment in order that both the Company and Agent may determine whether to continue their association under the terms of the Contract.
>
> II. <u>EFFECTIVE DATE</u>
>
> This Amendment shall become effective on the date the Contract becomes effective.
>
> III. <u>TERMINATION</u>
>
> This Amendment shall remain in effect a minimum of seven days. Thereafter, this

Amendment shall automatically terminate upon:

A. Cancellation of the Contract;

B. Notice given from the Company to Agent; or,

C. The acceptance of the Career Financing Plan Amendment (211) or (235).

IV. TERM

If this Amendment has not been terminated in accordance with Section III of this Amendment within 90 days after the effective date of the Contract, the Contract, and all other Amendments, shall automatically terminate.

V. MISCELLANEOUS

While this Amendment is in effect, Agent is not eligible for any other compensation, except as specifically set forth in the Schedules which are a part of the Contract.

32. The Agent's Contract and Interim Sales and Marketing Amendment that Petitioner executed are standard instruments used by Respondent in contracting with its agents.

33. During the time that the Interim Sales and Marketing Amendment is in effect, an agent engages in "real job sampling" by observing a mentor make sales, and he or she may also make sales of his or her own.

34. Petitioner was mentored initially (for the first seven to ten days) by Mr. Green and thereafter by Mr. Chojnacki.

35. The Interim Sales and Marketing Amendment remained in effect until June 10, 2005, when Petitioner and Respondent executed a Career Financing Plan Amendment (as part of Petitioner's Agent's Contract).

36. The Career Financing Plan is a three-year program devised by Respondent to help its new agents "build their business[es]." It provides for bonus payments "on top of the base commission that an agent gets," if monthly production requirements are met. An agent not wanting "to be tied to any of [these] production requirements" can decline to participate in the program.

37. Other attachments, in addition to the Career Financing Plan Amendment, that were made a part of Petitioner's Agent's Contract, included an Agent Prospecting Amendment, a New Agent Computer Equipment Allowance Schedule, an Agent Production Bonus Schedule, and a 2005+ Deferred Compensation Schedule.

38. The Agent Prospecting Amendment was signed by Petitioner and Mr. Chojnacki and had an effective date of June 10, 2005. It read, in pertinent part, as follows:

> V. SOURCES OF CREDIT
>
> A. In order to provide the Agent with prospect information, the Agent and Company agree that credits to acquire prospecting related materials and services may be accumulated in an Agent Prospecting Account. The Company may discontinue or modify the

sources and amounts of credit provided by the Company upon notice to the Agent.

> B. Credits may be used only for prospecting activities authorized by the Company. Any credits which remain unused at the time the Contract or this Amendment are cancelled shall be forfeited by the Agent.
>
> VI. NON-REFUNDABLE PARTICIPATION FEE
>
> A. The Agent authorizes the Company to deduct a non-refundable Participation Fee directly from compensation due the Agent in an amount and frequency as set forth in the Agent Prospecting Schedule.
>
> B. Company may deduct the Participation Fee up to 30 days following written notice by Agent to the Company to terminate this Agreement.

39. The New Agent Computer Equipment Allowance Schedule provided for the receipt of, for a maximum of 12 months, "a [monthly] credit [of either $75 or $100] to help the Agent defray computer equipment and other start-up expenses incurred based on the Agent's performance." Under the schedule, if minimum monthly production requirements were not met, no credits would be received.

40. The "purpose" of the Production Bonus was "to reward Agents based on their Manufactured Product production." The Agent Production Bonus Schedule set forth the applicable Production Bonus Rates for different levels of production over a threshold amount.

41. The 2005+ Deferred Compensation Schedule implemented Respondent's Deferred Compensation program, pursuant to which Respondent made "contributions . . . dependent on the production that an agent ha[d] during a given calendar year."

42. On October 19, 2005, Petitioner signed a Coventry Medicare Part D Plan Addendum form (referenced in the parties' Stipulation of Fact 31) and faxed the form to Respondent's "Sales Support" for processing. Among the form's provisions was the following:

> Independent Contractor. Nothing in this Addendum will be construed to create a relationship of employer-employee between Producer [Petitioner] and Coventry or Distributor [Respondent]. Producer will be free to, and is required to, exercise his/her independent judgment in performance of this Addendum and with respect to which Medicare Part D plans Producer will offer to Medicare Part D enrollees and potential enrollees based upon Producer's judgment as to the needs of such enrollee or potential enrollee.

43. The termination of Petitioner's Agent's Contract (referenced in the parties' Stipulation of Fact 40) was accomplished by Petitioner's submitting the following letter, dated February 10, 2006, to Mr. Chojnacki:

> It is with deep regret that I resign as of February 10, 2006. I have to move on with my career.
>
> I want to sincerely thank you for all your help.

44. Mr. Chojnacki responded by sending Petitioner the following letter, also dated February 10, 2006:

> This is to acknowledge receipt of your letter terminating your Mutual of Omaha Insurance Company Agent's Contract effective February 10, 2006.
>
> Your authorizations to represent Mutual of Omaha Insurance Company and its affiliated companies have also been cancelled effective February 10, 2006.
>
> The balances of your agent's statement may be affected by additional entries necessary to finalize pending business. You will continue to receive statements on a regular basis as in the past. As soon as the balances have stabilized, any net credit balance will be released in accordance with the provisions of Paragraph F3(c) of your contract.
>
> If your agent's statements presently reflect a debit balance or if a debit balance arises in the future, you are required to repay this amount immediately. Failure on your part to repay any debt balance will result in further action to collect debit balance.
>
> All client and prospect information, materials and supplies are the property of Mutual of Omaha Insurance Company. You are required by Paragraph H4 of your contract to return such material immediately.

45. At no time during the period that her Agent's Contract was in effect (April 27, 2005, through February 10, 2006, hereinafter referred to as the "Contract Period") did Petitioner receive a salary or any of the employee benefits enjoyed by Mr. Chojnacki, Mr. Green, Ms. Hughes, and Ms. Mickley.

46. Although she had Respondent-issued life and disability insurance policies, these policies were not given to her as an employee benefit. She had to pay for this coverage.

47. On her application for the disability insurance policy she obtained from Respondent, in response to the question, "Are you Self-Employed, a Sole Proprietor, or a partner in a Partnership," she answered "yes."

48. The only compensation Petitioner received from Respondent was in the form of commissions and other payments (including computer allowances) based solely on her production.

49. The compensation checks she received from Respondent were prepared and signed at the Boynton Beach Office, not at Respondent's home office (where employee checks are cut).

50. The amounts of these checks reflected deductions that were made by Respondent for items that Respondent had provided Petitioner or had paid for on her behalf, including postage, agent licenses, voicemail, errors and omissions insurance coverage, folders, business cards, and certain leads. The leads she paid for cost anywhere from ten to 25 dollars a lead.

51. Petitioner did not have to pay for everything that she received from Respondent. Although it had a right to do so under Section E. of her Agent's Contract, Respondent did not charge Petitioner for the use of cubicle space and equipment at

the Boynton Beach Office, nor for the company brochures and letterheads that were available to agents at the office.

52. The 2005 and 2006 federal tax returns that Petitioner filed with the IRS were prepared by a Certified Public Accountant.

53. For the 2005 tax year, on her IRS Form 1040, Petitioner reported $0 for "[w]ages, salaries, and tips" (line 7), and $7,220 in "[b]usiness income" (line 12), and she deducted from her "total income" $510 for "[o]ne-half of self-employment tax" (line 27) and $1,243 for "[s]elf-employed health insurance" (line 29). She included a Schedule C (Profit and Loss From Business-Sole Proprietorship) and a Schedule SE (Self-Employment Tax) with her IRS Form 1040.

54. On her Schedule C, Petitioner identified her "[p]rincipal business or profession" as "[i]nsurance [a]gencies & [b]rokerages"; represented that her business address was the same as her home address (which was on her IRS Form 1040); and reported that her "[g]ross income" was $18,758 (line 7), and that she had "[c]ar and truck expenses" of $6,305 (line 9), an "[o]ffice expense" of $1,488 (line 18), and "[o]ther expenses" of $3,745 (line 27), for a total of $11,538 in business expenses (line 28). The "[o]ther expenses" she reported (on line 27) were broken down as follows: "Business Telephone"- $3,549; and license fees and dues- $196.

55. The IRS Form 1099 that Petitioner received from Respondent for the 2005 tax year reflected that she had received $18,757.99 in "nonemployee compensation" (which matches the "rounded up" amount of "[g]ross income" Petitioner reported on the Schedule C she filed for that tax year).

56. For the 2006 tax year, on her IRS Form 1040, Petitioner reported $0 for "[w]ages, salaries, and tips" (line 7), and "1099 MISC OTHER INCOME" of $1,615. No entry was made for "[b]usiness income" (line 12). Petitioner deducted $114 from her "total income" for "[o]ne-half of self-employment tax" (line 27). She included a Schedule SE with her IRS Form 1040.

57. The IRS Form 1099 that Petitioner received from Respondent for the 2006 tax year reflected that she had received $1,615.43 in "nonemployee compensation" (which matches the "rounded down" amount of "1099 MISC OTHER INCOME" Petitioner reported on the IRS Form 1040 she filed for that tax year).

58. During the Contract Period, Petitioner was not required to work out of the Boynton Beach Office or to adhere to any Respondent-imposed work schedule.

59. Training sessions were held by Mr. Chojnacki (usually on Mondays) at the office, but attendance at these meetings was not mandatory.

60. Agents had to be present at the office to enjoy what was referred to as "floor time," where the agent would receive

incoming telephone phone calls made to the office from prospects, without having to pay for these leads. "Floor time" was a privilege that agents could turn down. Petitioner averaged approximately two to three days of "floor time" a month.

61. As an essential part of the work she performed for Respondent, Petitioner made sales calls to prospects in the field.

62. At Petitioner's request, Mr. Chojnacki accompanied her on approximately four sales calls during the beginning of the Contract Period.

63. After a while, Petitioner "start[ed] going on sales calls by herself." During the Contract Period, she went on more than 40 or 50 such solo sales calls. At no time was Petitioner required to go on sales calls with Mr. Chojnacki or any other company representative, nor did she need the approval of any company representative before she could make a sales call.

64. There were occasions, when Petitioner was out on a sales call alone, that she telephoned Mr. Chojnacki to ask him a question about a technical matter or to express her excitement about having made a sale. Petitioner, however, was never told she had to maintain telephonic contact with Mr. Chojnacki or any other company representative while on sales calls.

65. Petitioner and the other agents were allowed to advertise Respondent's products, but any advertisement they used had to be approved by the company. Respondent had "pre-approved advertising material that[] [was] on [its] company [intranet] website."

66. Petitioner did not have an exclusive arrangement with Respondent that prevented her from representing other insurers during the Contract Period. She was not, what is referred to in the insurance business as, a "captive agent."

67. While associated with Respondent, Petitioner was also appointed to act as an agent on behalf of John Alden Life Insurance Company, Humana Health Insurance Company, and Humana Medical Plan, Inc. (companies that were separate and distinct from Respondent).

CONCLUSIONS OF LAW

68. The Florida Civil Rights Act of 1992 (Act) is codified in Sections 760.01 through 760.11, Florida Statutes, and Section 509.092, Florida Statutes. "The Act, as amended, was [generally] patterned after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000, et seq., as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623. Federal case law interpreting [provisions of] Title VII and the ADEA is [therefore] applicable to cases [involving counterpart provisions of] the Florida Act." Florida State University v.

Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); see also Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000)("The [Act's] stated purpose and statutory construction directive are modeled after Title VII of the Civil Rights Act of 1964."); City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008)("Federal case law interpreting Title VII and the ADEA applies to cases arising under the [Act]."); Guess v. City of Miramar, 889 So. 2d 840, 846 (Fla. 4th DCA 2004)("The FCRA [Act] is patterned after Title VII; federal case law on Title VII applies to FCRA claims."); and School Board of Leon County v. Hargis, 400 So. 2d 103, 108 n.2 (Fla. 1st DCA 1981)("Florida's job discrimination statute is patterned on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.").

69. Among other things, the Act makes certain acts prohibited "unlawful employment practices," including those described in Section 760.10(1)(a) and (7), Florida Statutes, which provide as follows:

> (1) It is an unlawful employment practice for an employer:[[3]]
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

*   *   *

> (7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

70. Section 760.10(1)(a), Florida Statutes, prohibits discrimination only against employees or prospective employees. It does not protect independent contractors from discriminatory conduct. See Assily v. Memorial Hospital of Tampa, No. 04-1762, 2004 Fla. Div. Adm. Hear. LEXIS 2482 *25 (Fla. DOAH December 13, 2004)(Recommended Order)("[I]ndependent contractors are not protected under Chapter 760, Florida Statutes."); Worthy v. Florida Times Union, No. 03-0045, 2003 Fla. Div. Adm. Hear. LEXIS 515 *5 (Fla. DOAH April 11, 2003)(Recommended Order)("Independent contractors are not covered under Chapter 760, Florida Statutes, or Title VII."); see also Taylor v. ADS, Inc., 327 F.3d 579, 581 (7th Cir. 2003)("Title VII protects only employees . . . ."); Hunt v. Missouri Department of Corrections, 297 F.3d 735, 741 (8th Cir. 2002)("The law is well established that Title VII protects employees, not independent contractors, from discriminatory employment practices."); Schwieger v. Farm Bureau Insurance Co., 207 F.3d 480, 483 (8th Cir. 2000)("Title

VII, which makes it an unlawful employment practice for an employer to discharge any individual because of that individual's sex, protects only employees, not independent contractors.")(citation omitted); Llampallas v. Mini-Circuits, Inc., 163 F.3d 1236, 1242 (11th Cir. 1998)("Title VII prohibits discrimination against 'any individual' with regard to that individual's terms and conditions of employment or application for employment. The statute does not define 'any individual,' and although we could read the term literally, we have held that only those plaintiffs who are 'employees' may bring a Title VII suit.")(citation omitted); Cilecek v. Inova Health System Services, 115 F.3d 256, 257-258 (4th Cir. 1997)("We must decide in this case whether Dr. James W. Cilecek, a physician under contract to provide emergency medical services at two hospitals, was an employee covered by Title VII of the Civil Rights Act of 1964 or an independent contractor and therefore not so covered."); Cobb v. Sun Papers, Inc., 673 F.2d 337, 340 (11th Cir. 1982)(quoting with approval from Mathis v. Standard Brands Chemical Industries, No. 2525, 1975 U.S. Dist. LEXIS 13731 *5 (N.D. Ga. February 20, 1975)("Employment must be distinguished from the independent contractual associations of business entities for the latter are not covered by Title VII."); and Smith-Johnson v. Thrivent Financial for Lutherans, No. 8:03-cv-2551-T-30EAJ, 2005 U.S. Dist. LEXIS 36715 *9 (M.D. Fla. July 20,

2005)("The protections afforded by Title VII . . . extend only to the employment relationship and not to independent contractors.").

71. Because it is not an "unlawful employment practice" remediable under the Act to discriminate against an independent contractor, neither is it an "unlawful employment practice" (under Section 760.10(7), Florida Statutes) to retaliate against a person for having "opposed" such discrimination.

72. In view of the foregoing, as both parties recognize, "whether the Petitioner was an employee of Respondent['s] [at the time of her alleged mistreatment] is a threshold issue" in the instant case.

73. The parties were provided the opportunity to present evidence on this issue at the hearing held on October 15, 2008.

74. Petitioner had the burden of proving at this hearing that the relationship she had with Respondent during the relevant time period was that of employee-employer. See Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996)("'The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."'); and Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 414 (Fla. 4th DCA 1974)("[T]he

burden of proof is 'on the party asserting the affirmative of an issue before an administrative tribunal.'"); see also Atkins v. Computer Sciences Corp., 264 F. Supp. 2d 404, 408 (E.D. Va. 2003)("[P]laintiff bears the burden of demonstrating that she is an employee of an employer under Title VII because she bears the burden of proving that subject matter jurisdiction exists.").

75. To determine whether a complainant was an employee of the respondent a "hybrid economic realities test" is used. Pursuant to this test, "it is the economic realities of the relationship viewed in light of the common law principles of agency and the right of the employer to control the employee that are determinative." Taylor v. BP Express, Inc., No. CV 407-182, 2008 U.S. Dist. LEXIS 95313 *7 (S.D. Ga. Nov. 24, 2008)(citing Cobb, 673 F.2d at 339).

76. "Among the common law factors that are to be considered in conducting the analysis are: (1) the intention of the parties; (2) the skill required in the particular occupation; (3) the party furnishing the equipment and the place of work; (4) the method of payment, whether by time or by the job; (5) the type of employment benefits provided; (6) the manner in which the work relationship is terminated; (7) the importance of the work performed as part of the business of the employer; and (8) the manner in which taxes on income [are] paid. In assessing the amount of control an employer exercises

over the employee's work duties, courts look not only to the results that are to be achieved, but the 'manner and means by which the work is accomplished.'" Dahl v. Ameri-Life Health Services of Sara-Bay, LLC, No. 8:05-CV-66-T-17TBM, 2006 U.S. Dist. LEXIS 73797 *10-11 (M.D. Fla. Oct. 10, 2006).

77. Dahl is a case that is particularly instructive herein. It too involved the question of the status of a Florida-licensed insurance agent who claimed to have been the victim of employment discrimination at the hands of an insurance company whose products the agent had sold. Finding that the agent was an independent contractor, not an employee of the insurance company, the court explained as follows:

> Although there are some aspects of the parties' relationship that are consistent with an employer-employee relationship under the common law and control factors, the weight of the evidence supports Defendant's contention that Plaintiff operated as an independent contractor for Ameri-Life. First, both parties clearly intended for Plaintiff to operate as an independent contractor. The terms of the Contract stated in unambiguous terms that the Plaintiff was to operate as an independent contractor and "nothing would be construed as creating the relationship of employer and employee for any purpose."[[4]] Plaintiff's understanding of his employment status was also demonstrated after the Contract was signed when he treated himself as an independent contractor for federal tax purposes by filing his business expenses on Schedule C to IRS Form 1040. Under federal tax laws, independent contractors report their business expenses on Schedule C, while

employees use Schedule A to report their business expenses.[5] See generally, Internal Revenue Service Publication 1779 (Rev. 12-99).

Second, the sale of insurance and other financial products is a highly specialized and heavily regulated field. Plaintiff had to study and pass multiple exams, obtain licenses to sell these products, and comply with various federal and state laws before he could operate as an insurance agent. The Plaintiff advised his clients without a supervisory presence. The highly specialized nature of Plaintiff's position is indicative of an independent contractor rather than an employee.[6]

Third, Plaintiff was primarily responsible for the costs he incurred as an insurance agent for Ameri-Life. The contract provided that the Plaintiff was responsible for any expenses incurred in conducting business under the terms of the agreement. Plaintiff was responsible for the routine business expenses he incurred such as rent, utilities, telephone, cell phone, computer, stationary, transportation, licensing fees, and continuing education costs. Plaintiff also maintained an office at home, where he used and paid for his own equipment, including telephone, transportation and utilities without reimbursement from the Defendant. Although the lease agreement that the Plaintiff entered into with Ameri-Life entitled the Plaintiff to the use of a desk, chair, copier, fax machine, basic secretarial services, and fifty assorted leads per month for a nominal [not market rate] fee of $50.00 per month, the Plaintiff claimed the aforementioned costs as business expenses for federal tax purposes on a schedule C.[7]

Fourth, the parties' financial arrangement also supports a finding that Plaintiff was an independent contractor. Plaintiff was

compensated by commission and sales incentives rather than being paid a salary with a guaranteed, but fixed level of income, thereby placing the financial risks and benefits of the position on Plaintiff.[8] Plaintiff also did not receive any fringe benefits such as sick leave, vacation time or retirement benefits.[9]

Fifth, the Defendant treated the Plaintiff as an independent contractor because it did not pay social security, Medicare, or withhold federal income tax from the Plaintiff's commission checks. Under federal tax laws, employers must withhold federal income tax from their employees['] wages, but not for payments made to independent contractors.[10] See generally, Internal Revenue Service Publication 15, Circular E, Employer's Tax Guide, Part 2., p.7; Internal Revenue Service Publication 15-A, Employer's Supplemental Tax Guide, Part 1, p. 4-5 (January 2005).

Plaintiff treated himself as an independent contractor for federal tax purposes by deducting his business expenses on Schedule C to IRS Form 1040, allowing him to receive the full benefit of these deductions without being subject to the limitations that apply to employees. Taxpayers classified as employees may deduct business expenses only if they itemize their deductions, and these deductions are subject to a reduction equal to two percent of the taxpayer's adjusted gross income. Independent contractors do not have their deductions reduced by this amount. See generally, Internal Revenue Service Publication 1779 (Rev. 12-99).

Finally, the means and method by which Plaintiff operated support Defendant's contention that he was an independent contractor. The Plaintiff assumed fiscal responsibility for the success or failure of his business by generating his own sales through finding leads for himself,

purchasing leads from telemarketers or advertising, getting referrals from clients, self-prospecting or giving speeches. The Plaintiff was not required to work at specified times of the day or week, he was not required to maintain office hours, and he decided the location of his work. Specifically, the Plaintiff set his schedule, dictated his driving route, made most of his own appointments and advised his clients without a supervisory presence. Ameri-Life did not control the Plaintiff's ability to form a corporation and/or to hire and pay for his own staff. All these facts are inconsistent with an employer-employee relationship.

There are some factors that indicate that Defendant interfered with the Plaintiff's right to control the manner and the means by which he operated. Plaintiff's work for Ameri-Life was an integral part of the company's business. Plaintiff could be disciplined for selling another company's product without the Defendant's consent[[11]] and he was required to attend certain company meetings and training sessions. Additionally, the plaintiff was required to use the corporate address and telephone number on his business card and wear company attire. Plaintiff had to use approved forms, which were checked over by the secretary and regional manager before submission. Although the Plaintiff did not receive paid vacation time from the Defendant, he had to seek management approval to take the time off. Moreover, the Plaintiff was terminated without the requisite fifteen days notice under the Contract. When considered along with all of the other common law factors and the considerable control Plaintiff had over his daily operations, these facts fail to convert Plaintiff into an employee for purposes of Title VII.

> The parties' intentions, actions and overall arrangement are entirely consistent with the independent contractor relationship set forth in the Contract, not an employer-employee relationship. Accordingly, Defendant is entitled to summary judgment on Plaintiff's Title VII claim.

Dahl, 2006 U.S. Dist. LEXIS 73797 *11-16.

78. While the facts of the instant case are not identical to those in Dahl,[12] they are sufficiently similar in material respects to warrant the same result. Present in the instant case are the following facts that closely mirror those the Dahl court found to be inconsistent with employee status: Petitioner and Respondent both "clearly intended for [Petitioner] to operate as an independent contractor"; her Agent's Contract "stated in unambiguous terms that [she] was to operate as an independent contractor" and that nothing therein would be construed as creating an employer-employee relationship; "[Petitioner's] understanding of [her] . . . status was . . . demonstrated after the Contract was signed when [she] treated [herself] as an independent contractor for federal tax purposes by filing [her] business expenses on Schedule C to IRS Form 1040"; Petitioner worked in the "highly specialized and heavily regulated field" of insurance sales, for which she needed a license (that she obtained after taking and passing a licensure examination); Petitioner was allowed to service clients "without a supervisory presence"[13]; she incurred substantial unreimbursed

business expenses as an insurance agent for Respondent[14]; Petitioner "was compensated by commission and sales incentives rather than being paid a salary with a guaranteed, but fixed level of income, thereby placing the financial risks and benefits of the position on [Petitioner]"; she "did not receive any fringe benefits such as sick leave, vacation time or retirement benefits"; Respondent "treated the [Petitioner] as an independent contractor" by "not withhold[ing] federal income [or social security] tax from [Petitioner's] commission checks"; Petitioner "treated [herself] as an independent contractor for federal tax purposes by deducting [her] business expenses on Schedule C to IRS Form 1040, allowing [her] to receive the full benefit of these deductions without being subject to the limitations that apply to employees"; Petitioner "assumed fiscal responsibility for the success or failure of [her] business by generating [her] own sales"; she "was not required to work at specified times of the day or week"; she "was not required to maintain office hours, and [she] decided the location of [her] work"; she "set [her own] schedule, dictated [her] driving route, [and] made . . .[her] own appointments"; and Respondent did not have any control over how Petitioner structured and staffed her business.

79. There are in the instant case, as there were in Dahl, some factors weighing in favor of finding an employer-employee

relationship, including the importance of the work Petitioner performed to Respondent's business (a factor that was also present in Dahl), as well as the control that Respondent exercised over Petitioner's advertising of Respondent's products. These factors, however, are far outweighed by those supporting the conclusion that there no such relationship between Respondent and Petitioner. E.g., Farlow v. Wachovia Bank of N.C., N.A., 259 F.3d 309, 316 (4th Cir. 2001)("Upon review of all of these factors, it is clear that, although some may weigh in favor of a finding that Farlow was an employee, the vast majority of them, including the most significant, weigh in favor of the conclusion that Farlow was an independent contractor."); Oestman, 958 F.2d at 306 ("With regard to the provision in the contracts requiring Appellant to obtain Appellees' written permission before advertising any of Appellees' products, we agree with the district court that this is not the type of control that establishes an employer/employee relationship. Appellees have a substantial interest in controlling the advertising of their products because Appellees may be liable for Appellant's misstatements or misrepresentations."); Alberty-Velez v. Corporacion de P.R. para la Difusion Publica, 361 F.3d 1, 8 (1st Cir. 2004)("A company may require that it provide prior approval before an independent contractor takes an action or associates with an entity that

could reflect poorly on the company."); Lockett, 364 F. Supp. 2d at 1378 ("Furthermore, Plaintiff argues that Defendant exercises control over him by requiring him to seek approval for various business activities. Plaintiff mentions the restrictions Defendant places on advertising, but advertising restrictions do not make Plaintiff an employee."); and Dahl, 2006 U.S. Dist. LEXIS 73797 *11-16.

80. Inasmuch as Petitioner was not an employee of Respondent's at the time of the alleged unlawful employment practices described in her Complaint, the Complaint must be dismissed.

RECOMMENDATION

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

RECOMMENDED that the FCHR issue a final order dismissing Petitioner's Complaint because she was not an employee of Respondent's at the time of the alleged unlawful employment practices described in the Complaint.

DONE AND ENTERED this 29th day of December, 2008, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of December, 2008.

ENDNOTES

1/ All references to Florida Statutes in this Recommended Order are to Florida Statutes (2008).

2/ The undersigned has accepted these factual stipulations. See Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So. 2d 670, 673 (Fla. 1951)("When a case is tried upon stipulated facts the stipulation is conclusive upon both the trial and appellate courts in respect to matters which may validly be made the subject of stipulation."); Schrimsher v. School Board of Palm Beach County, 694 So. 2d 856, 863 (Fla. 4th DCA 1997)("The hearing officer is bound by the parties' stipulations."); and Palm Beach Community College v. Department of Administration, Division of Retirement, 579 So. 2d 300, 302 (Fla. 4th DCA 1991)("When the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In addition, no other or different facts will be presumed to exist.").

3/ An "employer," as that term is used in the Act, 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."

4/ See also Amedas, Inc. v. Brown, 505 So. 2d 1091, 1092 (Fla. 2d DCA 1987)("The words found in a contract are to be given meaning and are the best possible evidence of the intent of the contracting parties. The Amedas/Brown sales representative agreement provided that Brown was to be considered an independent contractor. The remaining contractual provisions are consistent with that relationship.")(citation omitted); Adcock v. Chrysler Corp., 166 F.3d 1290, 1293 (9th Cir. 1999)("Finally, the intention of the parties supports the finding that the relationship was to be one of independent contractual affiliation. The Agreement explicitly provides, 'this Agreement does not create the relationship of principal and agent between [Chrysler] and [the dealer], and under no circumstances is either party to be considered the agent of the other.' This clear language, though not dispositive, reflects the parties' intention that Adcock would have been an independent contractor, not an employee."); Birchem v. Knights of Columbus, 116 F.3d 310, 313 (8th Cir. 1997)("We agree with the district court that Birchem and KOC had an independent contractor relationship. First, each Field Agent Contract expressly provided that 'nothing contained in this Agreement shall be construed to create the relationship of employer and employee between' KOC and Birchem, KOC and Wentz, or Wentz and Birchem."); Oestman v. National Farmers Union Insurance Co., 958 F.2d 303, 306 (10th Cir. 1992)("Beyond the manner in which Appellant conducted his daily business, the parties' intentions as expressed in the local agent agreements indicate that Appellant was an independent contractor. The language of Section 7(b) of the contract is clear: '(b) Nothing contained herein shall be construed as creating the relationship of employer and employee between the LOCAL AGENT and INSURER or GENERAL AGENT.'"); and Moody v. Coliseum Psychiatric Center., LLC, No. 5:04-CV-364 (DF), 2006 U.S. Dist. LEXIS 38781 *27-28 (M.D. Ga. June 12, 2006)("Finally, with respect to the intention of the parties, it is more than clear from the contractual provisions discussed above that both Med-Source and AAS (and therefore Coliseum) expected that Med-Source's employees would be treated as independent contractors of the medical facilities to which they were assigned. That expectation is plainly reflected in the terms of the contract (generally the best evidence of intent) between Med-Source and AAS, under which Med-Source is to be considered the independent contractor of AAS (and by extension the independent contractor of Coliseum) and

Med-Source's personnel are to be considered Med-Source's employees only.").

5/ See also Smith-Johnson, 2005 U.S. Dist. LEXIS 36715 *12-13 ("Plaintiff's understanding of her employment status was also demonstrated after the Agreements were signed when she treated herself as an independent contractor for federal tax purposes by filing her business expenses on Schedule C to IRS Form 1040.").

6/ See also Lockett v. Allstate Insurance Co., 364 F. Supp. 2d 1368, 1374 (M.D. Ga. 2005)("Plaintiff is a professional, his position [as an insurance agent] requires substantial training, licensing, and expertise, so the second factor points towards his status as an independent contractor."); and Schwieger v. Farm Bureau Insurance Co., No. 4:97CV3219, 1998 U.S. Dist. LEXIS 23480 *11 (D. Neb. Nov. 23, 1998), aff'd, 207 F.3d 480 (8th Cir. 2000)("I also note that in the Title VII context, federal courts have consistently held insurance agents to be unprotected independent contractors, and Plaintiff has not identified any authority to the contrary.").

7/ See also Smith-Johnson, 2005 U.S. Dist. LEXIS 36715 *12-14 ("Although there are aspects of the parties' relationship that are consistent with an employer-employee relationship under the common law and control factors, the weight of the evidence supports Defendant's contention that Plaintiff operated as an independent contractor for Thrivent. . . . Third, Plaintiff was primarily responsible for the costs she incurred as a financial associate for Thrivent. Although Thrivent supplied Plaintiff with computer software and financial calendars that she used in her sales efforts, as well as an employee i.d. and password she used to gain access to Thrivent's computer database, Plaintiff paid for all of the other expenses associated with her work.").

8/ See also Lockett, 364 F. Supp. 2d at 1374 ("Plaintiff is paid by commission, he receives a set amount for each policy he sells and each policy he maintains. Thus, his compensation is determined by his productivity, which indicates, by the fifth factor, that he is likely an independent contractor."); and Sica v. Equitable Life Assurance Society, 756 F. Supp. 539, 542 (S.D. Fla. 1990)("Sica's method of compensation was by commission, as opposed to on a salary basis -- a further indication of his status as an independent contractor.").

9/ See also Kirk v. Harter, 188 F.3d 1005, 1008 (8th Cir. 1999)("Harter received no medical, retirement, or vacation

benefits while working for Iowa Pedigree. Iowa Pedigree's failure to provide employment benefits or withhold any payroll taxes is probative evidence of Harter's status as an independent contractor, as 'every case since Reid that has applied the test has found the hired party to be an independent contractor where the hiring party failed to extend benefits or a social security taxes.'").

10/ See also Adcock, 166 F.3d at 1293 ("Chrysler does not pay social security taxes for the dealer, nor does it provide retirement, health care, worker's compensation or vacation benefits to the dealer or the dealer's employees, all of which are usually associated with employment."); and Oestman, 958 F.2d at 306 ("Other aspects of the relationship between the parties also lead to the conclusion that Appellant was an independent contractor instead of an employee. . . . Appellees did not withhold taxes from Mr. Oestman's pay and did not pay social security taxes for him.").

11/ See also Lockett, 364 F. Supp. 2d at 1378 ("Plaintiff points to his inability to sell insurance for other companies. However, when considering the restriction on an agent to sell exclusively for one insurance company and whether that restriction determined if the agent was an independent contractor, other courts have noted that '[a]n insurance agent's status as a captive agent, . . ., is no more determinative of the issue presented than, for example, a manufacturer's representative's agreement to market the manufacturer's products exclusively.' And, therefore, the fact that Plaintiff is an exclusive agent for Defendant does not make him an employee of Defendant.")(citation omitted).

12/ For instance, in Dahl, the agent "entered into [a contract] with Ameri-Life [which] entitled [him] to the use of a desk, chair, copier, fax machine, basic secretarial services, and fifty assorted leads per month for a nominal [not market rate] fee of $50.00 per month," whereas in the instant case, Petitioner paid for neither the use of cubicle space and equipment at the Boynton Beach Office (although, under her Agent's Contract, Respondent could have "charge[d] [her] for these privileges at any time"), nor for "floor time" leads, but she did have to pay (from ten to 25 dollars each) for other Respondent-provided leads. Compare with Thompson v. DDB Needham Chicago, No. 95 C 7114, 1996 U.S. Dist. LEXIS 9738 *20 (N.D. Ill. July 3, 1996)("Defendant provided Plaintiff at various times with office space and access to telephones, secretarial

services, business machines and various office equipment when it retained Plaintiff for specific projects in 1987, 1988, 1990 and 1992. . . . However, the Seventh Circuit has held that this factor alone is not dispositive to the question of whether an employer-employee relationship exists."). Other examples of factual contrast are that, unlike Petitioner, the agent in Dahl "could be disciplined for selling another company's product without . . . consent and he was required to attend certain company meetings and training sessions" and "to seek management approval to take the time off" (facts which the Dahl court acknowledged "indicate[d] that [the company] interfered with the [the agent's] right to control the manner and the means by which he operated," thus militating in favor of finding an employer-employee relationship). Additionally, in Dahl, in contrast to the situation in the instant case, it was the insurance company, not the agent, that terminated their relationship, and it did so "without the requisite fifteen days notice under the Contract" (another fact that the Dahl court found to be consistent with an employer-employee relationship).

13/ She did, however, on occasion seek managerial assistance and advice when in the field.

14/ According to her 2005 tax return, Petitioner incurred a total of $11,538 in business expenses to generate a gross business income of $18,758.

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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.