STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

CAROLYN M. CLEVELAND,	EEOC Case No. 15D200800411
Petitioner,	FCHR Case No. 2008-01170
v.	DOAH Case No. 08-4552
WESTGATE HOME SALES, INC.,	FCHR Order No. 11-062
Respondent.	

_____/

ORDER FINDING THAT UNLAWFUL EMPLOYMENT PRACTICE OCCURRED AND REMANDING CASE TO ADMINISTRATIVE LAW JUDGE FOR ISSUANCE OF RECOMMENDED ORDER RECOMMENDING RELIEF

Preliminary Matters

Petitioner Carolyn M. Cleveland filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2007), alleging that Respondent Westgate Home Sales, Inc., committed unlawful employment practices on the basis of Petitioner's sex (female) by sexually harassing Petitioner, on the basis of Petitioner's age (DOB: 1-11-64) by paying women who are "much younger" than Petitioner doing the same level of work more money than Petitioner, and on the basis of retaliation by firing Petitioner for refusing to "do something" unethical regarding billing.

The allegations set forth in the complaint were investigated, and, on July 31, 2008, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

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

An evidentiary hearing was held on February 1 and 2, 2011, in Gainesville, Florida, before Administrative Law Judge Barbara J. Staros.

Judge Staros issued a Recommended Order of dismissal, dated May 5, 2011.

The Commission panel designated below considered the record of this matter and determined the action to be taken on the Recommended Order.

Findings of Fact

We find the Administrative Law Judge's findings of fact as set out in Recommended Order, ¶ 1 through ¶ 47, to be supported by competent substantial evidence.

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We adopt the Administrative Law Judge's findings of fact as set out in Recommended Order, ¶ 1 through ¶ 47.

Conclusions of Law

The Administrative Law Judge concluded that Petitioner established a prima facie case of hostile work environment based on sexual harassment (Recommended Order, ¶ 82), but concluded that Respondent was not an employer within the meaning of the Florida Civil Rights Act of 1992 (Recommended Order, ¶ 57 through ¶ 68).

Specifically, with regard to Respondent's status as an employer under the Florida Civil Rights Act of 1992, the Administrative Law Judge found, "There is no dispute that [Respondent] itself did not employ 15 or more employees during the relevant time period. The dispute concerns whether other entities owned or managed by certain members of the Frier family should be considered a single-employer for purposes of the Florida Civil Rights Act." Recommended Order, ¶ 7.

In determining whether two or more ostensibly separate entities should be consolidated and counted as a single, integrated enterprise when determining whether an "employer" has a sufficient number of employees to come within coverage of the Florida Civil Rights Act, the following factors are looked at: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management, and (4) common ownership or financial control. See Enzor v. Florida Developers, Inc., FCHR Order No. 08-057 (September 16, 2008), adopting conclusions of law set out in the Recommended Order of DOAH Case No. 08-1228.

In applying this test, the Administrative Law Judge concluded that Petitioner failed to establish that Respondent should be combined with other "Frier companies" (see Recommended Order, ¶ 53) for the purpose of determining whether Respondent had the requisite number of employees to be covered by the Florida Civil Rights Act of 1992. Recommended Order, ¶ 57 through ¶ 68.

We disagree with the conclusions of law of the Administrative Law Judge which conclude that Respondent was not a single, integrated enterprise with other "Frier companies," with sufficient employees to be covered by the Florida Civil Rights Act of 1992.

We agree with the Administrative Law Judge's conclusion that in applying the above-stated test, "The totality of the circumstances controls, thus, no single factor is conclusive, and the presence of all four factors is not necessary to a finding of single employer." Recommended Order, ¶ 55.

Respondent stipulated at the final hearing in this matter, that if Respondent were combined with the other "Frier companies," the integrated entity would have sufficient employees to be an "employer" subjected to the provisions of the Florida Civil Rights Act of 1992. See transcript of proceeding at pages 485 to 487.

In applying the test, we conclude that the Recommended Order contains findings of fact sufficient to conclude that Respondent was an integrated enterprise with the other "Frier companies."

Specifically, sufficient interrelation of operations is established by findings of fact at Recommended Order, ¶ 8 and ¶ 9; sufficient centralized control of labor relations is established by findings of fact at Recommended Order, ¶ 12 and ¶ 17; sufficient common management is established by findings of fact at Recommended Order, ¶ 13, ¶ 14, ¶ 16, and ¶ 17; and sufficient common ownership or financial control is established by findings of fact at Recommended Order, ¶ 8, ¶ 9, ¶ 10, and ¶ 16.

While admittedly the findings of fact support some of the test elements more strongly than others, we conclude that the totality of the circumstances set out in the findings of fact indicate that Respondent is an integrated enterprise with the other "Frier companies," with sufficient employees, as stipulated to by Respondent at the final hearing, to subject Respondent to the Florida Civil Rights Act of 1992.

In correcting these conclusions of law of the Administrative Law Judge, we conclude: (1) that the conclusions of law being corrected are conclusions of law over which the Commission has substantive jurisdiction, namely conclusions of law dealing with whether an entity is an "employer" subjected to the provisions of the Florida Civil Rights Act of 1992; (2) that the reason the corrections are being made by the Commission is that the application of the conclusions of law to the facts set out in the Recommended Order appears contrary to the liberal construction intended by law (see Enzor, supra); and (3) that in making these corrections the conclusions of law being substituted are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(l), Florida Statutes (2010).

With regard to the issue of whether Respondent committed an unlawful employment practice, the Administrative Law Judge concluded, "Petitioner has met her burden of establishing a prima facie case of hostile work environment based upon sexual harassment. Respondent offered no legitimate non-discriminatory reason for its actions." Recommended Order, ¶ 82.

The Commission has stated that "when the burden of producing evidence shifts to the Respondent following the establishment of a prima facie case of discrimination, and Respondent remains silent, the failure to introduce evidence 'will cause judgment to go against [Respondent] unless [Petitioner's] prima facie case is held to be inadequate at law or fails to convince the fact finder.'" Whitehead v. Miracle Hill Nursing and Convalescent Home, Inc., 18 F.A.L.R. 1515, at 1517 (FCHR 1995).

We adopt the conclusions of law of the Administrative Law Judge concluding that unlawful sexual harassment occurred in this matter.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Petitioner's Exceptions."

Generally, it can be said that Petitioner excepts to the conclusions of law that indicate Petitioner did not meet its burden to satisfy the test that Respondent, along with the other "Frier companies" constituted a single, integrated employer for purposes of establishing that Respondent was an "employer" subject to the provisions of the Florida Civil Rights Act of 1992.

We have discussed this issue in detail in the Conclusions of Law section of this Order.

To the extent Petitioner's exceptions are in agreement with our discussion of this issue, above, they are accepted.

Remand

Through our adoption of the Administrative Law Judge's conclusions of law concluding that unlawful sexual harassment occurred in this case we find that an unlawful employment practice occurred in this matter in the manner found by the Administrative Law Judge.

This matter is REMANDED to the Administrative Law Judge for further proceedings to determine the appropriate relief for the discrimination found to have occurred and the issuance of a Recommended Order as to that relief.

DONE AND ORDERED this 2nd day of August, 2011.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Watson Haynes, II; and
Commissioner Mario M. Valle

Filed this 2nd day of August, 2011,
in Tallahassee, Florida.

/s/
Violet Crawford, Clerk
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Barbara J. Staros, 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 2nd day of August, 2011.

By: /s/
Clerk of the Commission
Florida Commission on Human Relations