

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JOSEPH DELEO, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 09-0714  
 )  
 PROPERTIES OF THE VILLAGES, )  
 INC., )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on May 14, 2009, in The Villages, Florida.

APPEARANCES

For Petitioner: Carla D. Franklin, Esquire  
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For Respondent: Stephen W. Johnson, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to seek relief pursuant to the Florida Civil Rights Act of 1992 under the jurisdiction of the Florida Commission on Human Rights.

PRELIMINARY STATEMENT

Petitioner, Joseph DeLeo (Mr. DeLeo), during all times pertinent, sold real estate pursuant to the business model of Respondent Property of The Villages, Inc. (POV). Subsequent to Mr. DeLeo's claimed discharge, he filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission). He claimed his discharge was based on age and disability discrimination. Further, he complained that having made an allegation of discrimination, he suffered discharge in retaliation.

On January 8, 2009, the Commission made a determination that it lacked jurisdiction to act because POV was not Mr. DeLeo's employer, but rather had an independent contractor relationship with him, and issued a Notice of Determination: No Jurisdiction. On February 9, 2009, Mr. DeLeo timely filed a Petition for Relief. The Petition for Relief was transmitted to the Division of Administrative Hearings on February 10, 2009.

At the May 14, 2009, hearing, only the question of jurisdiction was considered. This is because a recommended order finding jurisdiction, if adopted by the Commission, would trigger the investigation required by Subsection 760.11(3), Florida Statutes (2008). Or, in the alternative, a recommended order finding no jurisdiction, if adopted by the Commission, would end the case.

As will be addressed in more detail below, the party asserting the Commission's jurisdiction, Mr. DeLeo, has the burden of proving it. If Mr. DeLeo was an employee of POV, the Commission has jurisdiction. If Mr. DeLeo was an independent contractor, the Commission does not have jurisdiction.

At the hearing, Petitioner presented the testimony of two witnesses and offered four exhibits into evidence. Respondent presented the testimony of two witnesses and offered six exhibits into evidence.

A Transcript was filed on June 19, 2009. After the hearing, Petitioner and Respondent filed their Proposed Findings of Fact and Conclusions of Law on June 29, 2009.

References to statutes are to Florida Statutes (2008) unless otherwise noted.

#### FINDINGS OF FACT

1. Mr. DeLeo is a former Miami homicide detective, who received a disability retirement. He has held a real estate salesman license and real estate broker's license since about 1986. Both licenses were issued by the State of Florida. Official recognition was taken that he is over 40 years of age.

2. POV is the sales arm of a venture known as The Villages of Lake Sumter (The Villages). The Villages is a large community located south of Ocala, Florida. It is a development that caters to persons 55 years of age and older and provides

recreational opportunities, including golf. Sales of new homes in The Villages are handled exclusively by POV.

3. The typical real estate broker-salesperson relationship is clearly one of principal and independent contractor, and cases in Florida and elsewhere describe it thus. However, The Villages mass markets its concept and its properties, nationally, and as a result, POV's relationship with its salespersons is not typical.

4. In the course of marketing its real estate, The Villages advertises nationally. This marketing effort attracts large numbers of potential buyers to visit. A guest coordinator, who is an employee of The Villages, books visits for potential buyers. When guests arrive they are greeted by the guest coordinator who connects them with a sales representative, like Mr. DeLeo.

5. Mr. DeLeo worked in the real estate business for about 21 years prior to becoming involved with POV. He entered into a contract with POV on September 30, 2004. The contract is entitled, "Independent Contractor Agreement" (Agreement). The Agreement was drafted by POV, and Mr. DeLeo had no opportunity to negotiate its terms. As will be discussed below, it is the actual relationship between the parties that controls the outcome of this case, not the title of the Agreement.

6. The Agreement provided that either party could terminate the contract at will. Mr. DeLeo learned that he had been terminated on April 7, 2008.

7. Mr. DeLeo attended an extensive training program provided by POV. He completed the training in February 2001 and thereafter began selling property pursuant to the Agreement.

8. According to the Agreement, Mr. DeLeo could only sell houses marketed in The Villages. He was specifically prohibited from selling property not located in The Villages. He sold new properties owned by The Villages and property marketed by individuals in The Villages, in accordance with the Agreement. In a typical broker and salesperson relationship, the salesperson is not limited to selling in a geographically defined area.

9. The Agreement had an attachment to it that was entitled Commission Structure. This set forth the details of how Mr. DeLeo was to receive compensation. Mr. DeLeo was satisfied with the commission arrangement. He received no salary. If a dispute arose over splitting a commission, the dispute was resolved by POV. Typically, disputes between real estate sales persons are resolved by committees of realtors acting under the auspices of a multiple listing service.

10. POV provided Mr. DeLeo, as well as all salespersons, with an office, telephones, computer support, and all other

items needed to complete a real estate sale except for an automobile which Mr. DeLeo provided. The computer provided a shared database which maintained information about potential buyers, and the information in the database was reviewed by management. Mr. DeLeo was required to provide liability insurance, business cards, certain signs, lock boxes, and on occasion, to pay the salaries of personal assistants, who are provided by POV.

11. Paragraph 4 of the Agreement recites that "The parties agree that the Sales Representative is an independent contractor and not an agent, joint venturer, or employee of POV or The Villages, and nothing in this Agreement shall be construed to be inconsistent with this relationship or status. Hours devoted by the Sales Representative is [sic] entirely within the Sales Representative's control, and POV will rely upon the Sales Representative to work those hours that the Sales Representative deems necessary to perform the job in a competent and professional manner."

12. Mr. DeLeo testified that he was required to work a set schedule and that he was required to obtain permission from a "team leader" prior to taking vacation time. Vacation time was limited. The team leader evaluated the performance of salespersons and provided feedback on ways to improve performance. The team leader was a salaried employee of POV.

This sort of supervision is not typical in the real estate business.

13. POV asserted that they did not exercise control over their salespersons with regard to working hours. However, it is unlikely that The Villages would import a large group of potential buyers and merely hope that sufficient staff would be available to make sales. Clearly, POV required salespersons to be available when needed by POV. Accordingly, the weight of the evidence proves that Mr. DeLeo's work schedule was controlled by POV. Therefore, the testimony of Mr. DeLeo is deemed accurate.

14. Supervision of the team leader included accompanying the salespersons to meetings with clients and listening in on telephone contacts to critique the salesperson's performance. The close supervision is different from the usual relationships found in the real estate business. It is more controlling than that found in independent contractor relationships.

15. In late 2007, POV introduced a new sales program called ValueMatch. Mr. DeLeo was required to participate in the ValueMatch sales training and utilize the ValueMatch sales approach. Mr. DeLeo was required to document his compliance with the ValueMatch sales program via a worksheet at every client contact. This requirement demonstrates that POV maintained close control over its sales and marketing representatives.

16. POV provided an information packet to Mr. DeLeo and other sales and marketing representatives in 2006 and again in 2008.

17. The 2006 version listed numerous "Essential duties and responsibilities." It includes a duty to be "Present and prepared for work when noted by various rotation options and/or customer needs" and "Attend training opportunities, team huddles and meetings."

18. The 2008 version includes, "Present and prepared for work when noted by various appointments to include Open Homes, New Home showcase, 1st and 2nd Step CMA's, Resident Touches, Rotation, Pre Owned Home Floor Time, and any other customer opportunities. All appointments are expected to be logged in the customer AS400 account allowing various members of the support staff to assist in the process."

19. The information packets present these requirements as imperatives and thus exhibit an exercise of close control over sales and marketing representatives.

20. The 2006 version, under "Some Recommendations," sets out a detailed dress code. The 2008 version merely requires maintaining a professional appearance. It is clear that these requirements are imperative in nature thus reveal the exercise of close control over sales and marketing representatives.



21. Both information packets address rotation (or work) schedules that are consistent with maintaining close control over the work schedules of sales and marketing representatives.

22. Upon consideration of all of the evidence, and despite the title of the contract to the contrary, it is clear that POV maintained tight controls over the activities of their sales and marketing representatives, and, of course, over Mr. DeLeo.

#### CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.11, Fla. Stat.

24. Mr. DeLeo is an aggrieved person within the meaning of Subsection 760.02(10), Florida Statutes. Mr. DeLeo has the burden of proof. See Balino v. Department of Health & Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). The standard of proof is by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

25. The Florida Civil Rights Act (Act), Section 760.01 et seq., Florida Statutes, is patterned after Title VII of the Federal Civil Rights Act, 42 U. S. C. Section 2000e, et seq. Federal case law interpreting Title VII and similar federal legislation is applicable to cases arising under the Florida Act. See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385,

1387 (11th Cir. 1998). The Act provides protection for employees. It does not protect independent contractors.

26. In Cobb v. Sun Papers, Inc., 673 F.2d 337, 340-41 (11th Cir. 1982), it was asserted by plaintiff/appellant that some wider net should be cast in order to find the existence of an employer-employee in civil rights cases. However, the court rejected that theory and held that courts should use a common law analysis in deciding the question of whether plaintiff was an employee or an independent contractor.

27. The court in Cobb adopted the test explained in Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979), when it articulated a test requiring an analysis of the economic realities of the work relationship and stated:

This test calls for application of general principles of the law of agency to undisputed or established facts. Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor to review here, as it is at common law . . . . If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist.

28. The court in Spirides then listed additional factors which are relevant to the consideration of this issue:

(1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

29. Virtually identical criteria are set forth in F. L. Enterprises v. Unemployment Appeals Commission, 515 So. 2d 1340 (5th DCA 1987). The recently unemployed Ms. Jouben operated in a slightly different relationship with her employer than did Mr. DeLeo. In F. L. Enterprises it was Ms. Jouben's job to approach tourists at central Florida hotels, shopping malls, and the like, to arrange for them to tour particular resorts. Ms. Jouben was permitted to work for other business entities and did work at other business entities. Factually, F. L. Enterprises is quite different from this case. She was found to be an independent contractor.

30. The court in Cobb also noted that courts must consider that when "an employer has the right to control and direct the

work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer-employee relationship is likely to exist." Cobb, 637 F.2d at 340. As was pointed out in VIP Tours v. State, Department of Labor & Employment Security, 449 So. 2d 1307 (Fla. 5th DCA 1984), "Of all the factors, the right of control as to the mode of doing the work is the principal consideration." Mr. DeLeo's work activities were closely controlled by POV.

31. Analyzing the facts in this case in light of the Spirides factors, it is found that:

(1) Typically a real estate salesperson operates with little supervision. Mr. DeLeo was a real estate salesperson, but he was closely supervised by POV which was in the business of developing residential areas and selling homes;

(2) Typically a real estate salesperson must, if he or she is to be successful, have excellent marketing skills. Marketing skills, except to a limited extent, were not required of Mr. DeLeo because The Villages operated a national mass marketing program;

(3) POV provided Mr. DeLeo with an office, office equipment, data processing hardware, communications, and training in a specific sales technique.

(4) Mr. DeLeo worked for POV for less than four years. The length of employment in this case is not a factor in the determining whether an employer-employee relationship existed.

(5) Mr. DeLeo was not paid by the hours he worked. He was paid a commission based on the sales he made. Or, stated another way, he was paid by the job. On the other hand his availability to make sales

was closely controlled and his production was closely monitored.

(6) Mr. DeLeo could end his employment at will, and POV could discharge him at will.

(7) Mr. DeLeo was required to adhere to a schedule, notify a team leader if he took a day off, and seek approval for vacation time. Such close control is not typical of the relationship between broker and salesperson found in the usual case.

(8) Mr. DeLeo's work was an integral part of the business plan of POV and The Villages. Obviously, POV and The Villages could not arrange for large numbers of potential purchasers to arrive at The Villages and merely hope that salespersons would appear. Moreover, he was required to work exclusively for POV.

(9) There is no information in the record demonstrating that POV provided a retirement plan for its salespersons, or that it did not.

(10) Mr. DeLeo was provided with an IRS Form 1099 each year. This indicates that he was treated as an independent contractor by POV. No evidence was provided indicating this decision was made subsequent to the submission of a properly completed IRS Form SS-8, "Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding," which is the form that the Internal Revenue Service uses in order to determine whether an employment relationship exists.

(11) The evidence of record indicates that both parties intended an independent contractor relationship at the time they entered into the Agreement in September 30, 2004. The intent of the parties is important, just as the Agreement is important, in determining the nature of the relationship. However, the parties can't "intend" a relationship to exist that factually does not exist.

32. A real estate agent was found to be an independent contractor in the case of a workers' compensation claim. See Florida Industrial Commission v. Schoenberg, 117 So. 2d 538 (Fla. 3d DCA 1960). Conversely, in a suit under the Florida Equal Access to Justice Act, Section 57.111, Florida Statutes (1990), a real estate agent was found to be an employee rather than an independent contractor. See Jayne R. Phoenix vs. Department of Professional Regulation, Division of Real Estate, Case No. 91-3598F (DOAH October 1, 1991).

33. As noted by Judge Cave in Phoenix, "In the instant case, the evidence establishes too many ties that bind between Phoenix and Earhart Realty. She was not truly independent since Earhart Realty exercised substantial control over her activities." Such is the situation in this case.

34. In the case of Golden v. A. P. Oleans, Inc., 681 F. Supp. 1100 (E.D. Pa. 1988), there was an agreement explicitly reciting an independent contractor relationship between the salesperson and a real estate developer. However, the actual relationship in Golden was remarkably similar to the facts of this case, and the court found an employment relationship.

35. Upon consideration of the facts developed by testimony and other evidence of record, it is found that Mr. DeLeo was an employee of POV.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations assert jurisdiction over Petitioner Joseph DeLeo and Respondent Properties of The Villages, Inc., and commence proceedings pursuant to Section 760.11, Florida Statutes.

DONE AND ENTERED this 16th day of July, 2009, in Tallahassee, Leon County, Florida.



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HARRY L. HOOPER  
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Filed with the Clerk of the  
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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.