

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STUART WINSOR,)
)
 Petitioner,)
)
 vs.) Case No. 10-1830
)
 PATHWAY TECHNOLOGIES, LLC,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on August 23, 2010, in Sanford, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Stuart Winsor, pro se
1036 Greenwood Boulevard
Lake Mary, Florida 32746

For Respondent: Charles J. Thomas, Esquire
Thompson, Sizemore, Gonzalez
& Hearing, P.A.
201 North Franklin Street, Suite 1600
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue is whether Respondent, Pathway Technologies, LLC ("Pathway Technologies"), is an "employer" under the Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "Act"), sections 760.01 through 760.11 and 509.092, Florida

Statutes, and, if so, whether Respondent committed unlawful employment practices contrary to section 760.10, Florida Statutes (2009),^{1/} by discriminating against Petitioner based on his religion.

PRELIMINARY STATEMENT

On or about December 21, 2009, Petitioner Stuart Winsor ("Petitioner") filed with the Florida Commission on Human Relations ("FCHR") a Charge of Discrimination, dated December 10, 2009, against Pathway Technologies. Petitioner alleged that he had been discriminated against pursuant to chapter 760, Florida Statutes and Title VII of the Federal Civil Rights Act as follows:

My religion is of Christian faith. On or about December 2008, I was hired by the Respondent to work in the position of Sales Representative. One of the primary reasons I accepted the job offer was their bold Christian mission statement and ministry outreach by the company and the profession of Christian faith by the company principles [sic].

The job began with a company meeting held in Bonita Springs, Florida during the period of January 13-18, 2009. During the meeting and when socializing after work, I was quite surprised by the behavior of the principles [sic] and management team. Their behavior was not consistent with a Christian witness.

On January 18, 2009, after the meeting, I voiced my concern to Michael Gans, about the behavior of what I witnessed. Mr. Gans thanked me for my candor and let me know he was looking forward to working with me. The

following day, January 19, 2009, Mr. Gans terminated my employment and the reason given was that they chose not to work with me.

I believe that I have been discriminated and retaliated against in violation of Title VII of the Civil Rights Act of 1964, as amended.

The FCHR investigated Petitioner's Charge of discrimination. On March 11, 2010, the FCHR issued its determination that there was no reasonable cause to believe that it had jurisdiction of this matter. The reason for this conclusion was: "The Respondent is not an employer as defined in the Florida Civil Rights Act of 1992, Section 760.02(7), Florida Statutes."

On April 2, 2010, Petitioner timely filed a Petition for Relief with the FCHR. On April 6, 2010, the FCHR referred the case to the Division of Administrative Hearings ("DOAH"). The case was assigned to Administrative Law Judge J.D. Parrish and scheduled for hearing on June 9, 2010. The hearing was continued once, at Respondent's request, by order dated June 8, 2010. The case was rescheduled for August 23, 2010. Due to an illness in Judge Parrish's family, the case was transferred to the undersigned on August 20, 2010. The hearing was held as scheduled on August 23, 2010.

At the hearing, Petitioner testified on his own behalf and presented the testimony of Gary Davis, founding pastor of Church

in the Winds. Petitioner's Exhibits 2 through 5, 8, 9, 15, 19, 37 through 39, 43, 56, 57, 62, 68, 69, 70, 75, 78, and 79 were admitted into evidence. Respondent presented the testimony of Michael Gans, an owner, member and officer of Pathway Technologies; David Robinson, an employee of Marriott Golf; and Michael Hamilton, director of operations at Pathway Technologies during the period relevant to this proceeding. Respondent's Exhibits 1 through 5 were admitted into evidence.

Petitioner testified in rebuttal.

The two-volume transcript was filed at the Division of Administrative Hearings on September 13, 2010. On September 22, 2010, one day before the due date for filing proposed recommended orders, Respondent filed a motion for extension of time. The motion suggested that, given the length of the hearing and complexity of the issues presented, an extension of the time for filing proposed recommended orders to October 4, 2010, would be appropriate. The motion stated that counsel for Respondent had attempted to contact Petitioner to ascertain his position on the motion, but that the phone number on Petitioner's pleadings was no longer in service. The motion stated that Respondent had sent an email to Petitioner's electronic address, but had received no response. Based on Respondent's motion and the representations made therein, the

undersigned granted the motion for extension of time by order dated September 23, 2010.

Respondent, unsure whether its motion would be granted and in an abundance of caution, filed its Proposed Recommended Order on the original due date, September 23, 2010. Petitioner filed his Proposed Recommended Order after the close of business on October 4, 2010. Respondent did not object to the late filing and Petitioner's Proposed Recommended Order has been considered in the writing of this Recommended Order.

On September 29, 2010, Petitioner filed a written objection to the order granting extension. Petitioner claimed that Respondent had made several factual misrepresentations regarding its efforts to reach him, and asserted that the undersigned had violated Petitioner's due process rights by granting the motion for extension before hearing Petitioner's objections. The undersigned declined to address Petitioner's objection for the simple reason that granting Petitioner's request and withdrawing the order granting extension would have operated to Petitioner's detriment. Respondent had met the original deadline.

Petitioner had not met the deadline, and would not have had his Proposed Recommended Order considered absent the extension.

On October 1, 2011, Petitioner filed a Motion for Mistrial. The motion is without merit and hereby denied without further discussion.

On March 3, 2011, Petitioner filed a document styled "Submission of New and Compelling Evidence," consisting of documents culled from In re: Pathway Holdings, LLC, Case No. 8:11-bk-01162-MGW, United States Bankruptcy Court for the Middle District of Florida, Tampa Division. Petitioner claims that these documents disprove testimony provided by Respondent's witnesses in the instant case as to the number of persons employed by Pathway Technologies. Petitioner filed the documents after the closing of the record in this proceeding. The undersigned nonetheless reviewed the documents in order to determine whether the record should be re-opened in light of the "new and compelling evidence" asserted by Petitioner. However, the documents on their face purport only to name employees of Pathway Holdings, LLC, as of the date of the debtor's motion to the bankruptcy court for an order authorizing payment of pre-petition wages, salaries and benefits to the persons named therein. The date of the motion was January 28, 2011, more than two years after the events relevant to this proceeding, and more than one year after Petitioner filed his initial Charge of Discrimination. Thus, Petitioner's new evidence, even if it were admissible, is irrelevant to this case.

The Proposed Recommended Orders of both parties have been considered in the writing of this Recommended Order.

FINDINGS OF FACT

1. Pathway Technologies is a turf management company. Its main clients are golf courses. Pathway Technologies was registered in 2006 as a Florida-limited liability company, with a principal address of 5004B U.S. 41 North in Palmetto.

2. Michael Gans is an owner, member and officer of Pathway Technologies. He has owned 50 percent of the stock and served as its president since the company's inception.

3. Michael Gans described Pathway Technologies as a small company that required him to "wear multiple hats," working in operations and production, and as both a sales manager and a salesman. Mr. Gans has been involved in every facet of the business. No one else at Pathway Technologies has ever had the authority to supervise Mr. Gans' work or to fire him from the company.

4. The other 50 percent of Pathway Technologies' stock is owned by Mr. Gans' father, Stephen Gans, who formerly served as the company's chief executive officer. Stephen Gans was not subject to supervision by any other person at Pathway Technologies.

5. Stephen and Michael Gans have been the only stockholders in and members of Pathway Technologies since shortly after its inception.

6. In their capacities as owners, members and officers of Pathway Technologies, Michael and Stephen Gans made strategic decisions for the company as equals. They shared in the profits and losses of the company.

7. Payroll tax records presented at the hearing indicated that, excluding Michael and Stephen Gans, Pathway Technologies had zero employees during the first two quarters of 2008, two employees during the third and fourth quarters of 2008, nine employees during the first quarter of 2009, 11 employees during the second and third quarters of 2009, and ten employees during the fourth quarter of 2009.

8. Pathway Holdings, LLC ("Pathway Holdings") is a Florida-limited liability company registered in 2008, with a principal address of 5002B U.S. 41 North in Palmetto. Pathway Holdings was created in July 2008 to purchase Organica Technologies, LLC ("Organica"), a Pennsylvania company that manufactured biological products for sale to retail lawn and garden centers. From the time of its creation through the end of 2009, Pathway Holdings was neither a parent nor a subsidiary of Pathway Technologies.

9. Pathway Holdings' articles of organization stated that the company's members at the time of organization were Stephen Jaeb and Stephen Gans. The same two men are listed as "managing members/managers" in each subsequent annual report filed with

the Division of Corporations. At the hearing, Michael Gans testified that he has an ownership interest in and acts as a managing partner of Pathway Holdings.

10. Pathway Holdings purchased Organica in August 2008.

11. Michael Gans testified that, after Pathway Holdings purchased Organica, Pathway Technologies conducted business with Organica at arm's length. Pathway Technologies purchased Organica's products, such as lawn boosters and microbial soil conditioners, for use by its turf division. Pathway Technologies was also a distributor of its own products and those of other manufacturers, and purchased Organica's products for resale. Organica invoiced Pathway Technologies for these sales, and Pathway Technologies paid the invoices. There was never an exclusive purchasing or distributorship arrangement between Pathway Technologies and Organica.

12. Through the end of 2009, Organica's principal place of business remained in the Philadelphia, Pennsylvania area.^{2/}

13. Through the end of 2009, no employee of Pathway Technologies was ever employed at the same time by Organica. No employee moved from one company to the other. The companies did not share employees. Employees of one company were never given assignments to perform for the other.

14. Through the end of 2009, Stephen Gans was the chief operating officer of Organica, Steve Register was president of Organica, and Stephen Jaeb was the managing partner of Organica.

15. During the months of July and August 2009, Mr. Register and Organica's vice president of marketing Dee Merica worked out of offices at 5002B U.S. 41 North in Palmetto. With that exception, all of Organica's employees were located outside the State of Florida from the time Pathway Holdings acquired the company through the end of 2009.

16. Organica hired and fired its own employees. Organica had its own employee handbook and its own employee, Beverly Monroe, to perform human resources duties. Organica had its own federal employer identification number and handled its own payroll. Organica had a separate telephone number from either of the Pathway companies.

17. After Pathway Holdings acquired Organica in August 2008, employees of Pathway Technologies were required to sign a document titled, "Pathway Technologies, LLC and/or Organica Technologies, LLC Company-Employee Confidentiality Agreement." The document is a standard agreement under which the employee agrees not to disclose confidential information or trade secrets to which the employee is exposed during the course of his duties. For the purposes of the matters at issue in this proceeding, the relevant datum is that the document refers to

Pathway Technologies "and/or" Organica "collectively or individually" as "the Company."

18. Michael Gans testified that the confidentiality agreement was created at his direction. Mr. Gans wanted both companies covered by a single document because Pathway Technologies salespeople would be selling Organica products. In order to knowledgeably and aggressively sell Organica products, the Pathway Technologies salespeople would need to know confidential information about the formulation, fermentation and preparation of those products. Ms. Gans wanted to be certain that the confidentiality provisions covering Organica employees would also apply to Pathway Technologies' salespeople.

19. Petitioner introduced a document that he obtained from the Organica website at some time between April and early June 2010. This document carried the heading "Company Directory" and listed 20 names, with phone numbers and email addresses for each name. Based on the email addresses, only six of the 20 names appearing in the Company Directory were those of Organica employees. With the exception of Stephen Gans, who listed a personal email address, the remainder of the names had Pathway Technologies email addresses.

20. Michael Gans testified that the Organica web site was the work of an independent web designer named Stephen Wells, who worked under contract to create web sites for both Pathway

Technologies and Organica. Mr. Gans testified that the web sites for Organica and Pathway Technologies were not high priorities for these small companies, and that Mr. Wells was not given a great deal of direction in creating the sites. Mr. Gans stated that Mr. Wells mistakenly inserted information for Pathway Technologies into the Organica directory.

21. Further, Mr. Gans testified that several of the people listed with Pathway Technologies email addresses were not employees of either Pathway Technologies or Organica. Mr. Gans stated that some non-employees who performed services for the company were permitted to maintain Pathway Technologies email accounts for ease of communication. Larry Kimbro is a friend of Mr. Gans and owns a commercial kitchen design business. Mr. Kimbro performed some unpaid public relations work for Pathway Technologies and was given a company email account to facilitate his efforts. Pathway Technologies did not direct the manner or means of the services provided by Mr. Kimbro. Mark Warren was a friend of Mr. Gans, who was also a partner in Pathway Holdings. Mr. Warren had a Pathway Technologies email account though he never performed any work for the company. Michael Gans' mother, Judy Gans, performed unpaid services for the company and had a Pathway Technologies email address.

22. The name of at least one other person who was not an employee of Pathway Technologies appeared on the company's web

site for a short period. Barney Cherry was briefly a consultant and independent sales representative for Pathway Technologies, but was not an employee of or paid by Pathway Technologies. While he consulted for Pathway Technologies, Mr. Cherry was the head sales manager for The Andersons, Inc., another manufacturer and marketer of turf products and plant nutrients.

23. In any event, this "Company Directory" demonstrated at most that there may have been some integration of the two companies as of April, May or June of 2010, long after Petitioner's involvement with Pathway Technologies. It is undisputed that Pathway Technologies was merged into Pathway Holdings in January 2010, giving Pathway Technologies and Organica a common owner as a preliminary step to creating an integrated company. However, the companies' status as of mid-2010 has no bearing on Petitioner's claim regarding Pathway Technologies' allegedly improper termination of his employment in January 2009.

24. In January 2010, Organica's corporate address was changed from Pennsylvania to 5002B U.S. 41 North in Palmetto. Also in January 2010, Pathway Technologies and Pathway Holdings merged, with Pathway Holdings remaining as the surviving entity. Following the merger, the employees of Pathway Technologies became employees of Pathway Holdings. As of the date of the

hearing, Pathway Technologies had no employees and was in the process of being formally dissolved.

25. Petitioner offered into evidence two business directories, one created by the Economic Development Council of the Manatee Chamber of Commerce, and the other released under the general auspices of the Manatee County Chamber of Commerce. The Economic Development Council directory listed Pathway Technologies' address as 5002B U.S. 41 North, whereas the general Chamber of Commerce directory listed Pathway Technologies' address as 5004B U.S. 41 North.

26. Mr. Gans testified that this information had been provided to the Chamber of Commerce by Mr. Kimbro, acting as Pathway Technologies' outside public relations contact. Mr. Gans explained the address disparity in terms of the dates of the directories. When Pathway Technologies merged with Pathway Holdings in January 2010, the former's address changed from 5004B U.S. 41 North to 5002B U.S. 41 North. Therefore, the Economic Development Council directory must have been created in 2010, and the general Chamber of Commerce directory must have been produced in 2009 or earlier.

27. Petitioner had no firsthand knowledge of how many employees Pathway Technologies employed at any given time. Using internet research, Petitioner created a list of

"confirmed" and "suspected" Pathway Technologies employees that he used to refresh his memory as he testified.³

28. As to the names on Petitioner's list, Michael Gans testified that Delores and Glenn Anderson had never been associated with Pathway Technologies. In fact, Mr. Gans had never heard of them.

29. Deepa Mehta was a member of Pathway Technologies at its inception in 2006, but left the company shortly thereafter for personal reasons. Ms. Mehta was never an employee of the company, nor was she paid a salary by the company.

30. Stephen Jaeb is a member of Pathway Holdings, but has never been a member or employee of Pathway Technologies.

31. Wendell Cave, Roger Welker, and Jerry Mills worked for a company named Independent Turf Partners ("ITP"), a Stuart based company. In November 2008, Pathway Technologies explored the possibility of using ITP as the distribution arm of its turf division. However, nothing came of this exploration, and Messrs. Cave, Welker and Mills were never employed or paid by Pathway Technologies.

32. Mr. Gans testified that 11 people on Petitioner's list had been employed by Pathway Technologies at one time or another over the course of 2008 and 2009: Eastland Collen, Michael Dean, Richard Gray, Michael Hamilton, William Nye, Dwight Pickett, Charles Turvin, Toby Washburn, Jeff Wells, Scott Reidel, and

Ryan Brooks. All of these individuals are accounted for in Pathway Technologies' payroll records.

33. The evidence established that at no time relevant to this proceeding did Pathway Technologies employ more than 11 people.

34. Michael and Stephen Gans mutually ran Pathway Technologies. Neither of them could be hired or fired by the company. Their work could not be regulated or supervised by the company. They did not report to someone higher in the company. Neither man had a contract of employment with the company. Both men shared in the profits, losses and liabilities of the company. Thus, Michael and Stephen Gans could not be considered employees of Pathway Technologies.

35. Even if Michael and Stephen Gans were counted as employees, the total number of individuals directly employed by Pathway Technologies at any one time would reach only 13.

36. Petitioner contends that Pathway Technologies and Organica should be considered a "single employer" or "integrated employer" under prevailing precedents, meaning that their employees could be aggregated to reach the threshold number of 15 for purposes of the Florida Civil Rights Act.

37. The evidence established that, during 2008 and 2009, Pathway Technologies and Organica had their places of business in different states and did not share employees. The companies'

business operations were conducted at arm's length. Pathway Technologies purchased Organica's products for distribution, and for use in its own consultative turf management operation.

38. In 2008 and 2009, Organica controlled its own labor relations: it hired and fired its own employees, managed its own payroll, maintained its own employee handbook, and had its own employee assigned to perform human resources duties.

39. Stephen Gans was a member of both Pathway Technologies and Pathway Holdings, the latter of which owned Organica after August 2008. Stephen Gans was listed as a manager/member in the Division of Corporations filings of both Pathway Technologies and Organica.

40. Michael Gans is listed as a manager/member in the Pathway Technologies filings with the Division of Corporations. He is not named in the filings for Organica, though he testified that he in fact has an ownership interest in Organica and acts as a managing partner in Organica's parent, Pathway Holdings.

41. As more fully explained in the Conclusions of Law below, Petitioner has failed to establish that Pathway Technologies is an "employer" as that term is defined in section 760.02(7) which is an indispensable threshold element of Petitioner's claim for relief. Therefore, there is no need to make findings as to the remainder of Petitioner's claim.

CONCLUSIONS OF LAW

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

43. The Florida Civil Rights Act prohibits discrimination in the workplace, and prohibits retaliation against an employee for engaging in protected activity such as filing a charge of discrimination with the FCHR.

44. The FCHR's enforcement authority as to workplace discrimination is limited to acts committed by an "employer" as defined by section 760.02(7):

"Employer" means 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.

45. The Florida Civil Rights Act's definition of "employer" corresponds to the definition of employer found in Title VII of the Civil Rights Act of 1964 ("Title VII") at 42 U.S.C. § 2000e(b), which provides in relevant part:

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person....

46. Because the Florida Civil Rights Act was modeled on Title VII, Florida courts have determined that federal case law

interpreting Title VII applies when a court is called upon to construe the Florida Civil Rights Act. See Valenzuela v. GlobeGround North America, LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009); Patterson v. Consumer Debt Mgmt. and Educ., Inc., 975 So. 2d 1290, 1291 (Fla. 4th DCA 2008); Byrd v. BT Foods, Inc., 948 So. 2d 921, 925 (Fla. 4th DCA 2007).

47. Under Title VII, the phrase "current or preceding calendar year" refers to the calendar year in which the alleged discrimination or retaliation occurred, and to the calendar year that preceded the act. Komorowski v. Townline Mini-Mart and Rest., 162 F.3d 962, 966 (7th Cir. 1998); Mousa v. Lauda Air Luftfahrt, A.G., 258 F. Supp. 2d 1329, 1334 (S.D. Fla. 2003).

48. The unlawful acts in this case were alleged to have occurred in January 2009. Therefore, Petitioner was required to demonstrate that Pathway Technologies had 15 or more employees during each working day in 20 or more calendar weeks in 2008 or 2009 to be covered under the Florida Civil Rights Act. McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 932 (11th Cir. 1987).^{4/}

49. The United States Supreme Court has held that persons who control an enterprise are not "employees" to be counted when determining coverage under Federal antidiscrimination legislation. Clackamas Gastroenterology Assoc., P.C. v. Wells, 538 U.S. 440 (2003).^{5/} In Clackamas, the Court determined that

common law master-servant concepts should be applied to arrive at a definition of "employee" where the statutory definition is "a mere 'nominal definition' that is 'completely circular and explains nothing.'" 538 U.S. at 444 (quoting Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 323 (1992)). The Court found the following six factors relevant in determining whether a shareholder or director should be counted as an employee:

Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;

Whether and, if so, to what extent the organization supervises the individual's work;

Whether the individual reports to someone higher in the organization;

Whether and, if so, to what extent the individual is able to influence the organization;

Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and

Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-450 (quoting Equal Employment Opportunity Commission Compliance Manual § 605:0009).

50. Applying the Clackamas test to the findings of fact concerning Michael and Stephen Gans, it is concluded that neither man was an employee of Pathway Technologies for purposes

of section 760.02(7). Michael and Stephen Gans were owners, members and officers of Pathway Technologies. The company did not supervise either of the men in their work. Neither man reported to anyone higher in the company. Michael and Stephen Gans supervised the company's business, made strategic decisions for the company, and shared in the company's profits and losses. There was no evidence of an employment agreement between the company and either Michael or Stephen Gans.

51. The United States Supreme Court has ruled that the proper basis for determining whether an employer has an employment relationship with an individual on a given day is the "payroll method," i.e., whether the individual appears on the employer's payroll records for the day in question. Walters v. Metropolitan Educ. Enter., Inc., 519 U.S. 202, 206-207 (1997), followed by Laurie v. Ala. Court of Criminal Appeals, 256 F.3d 1266, 1268-1269 (11th Cir. 2001).

52. Not including Michael or Stephen Gans, no more than two persons appear on Pathway Technologies' payroll records at any given time during 2008, and no more than eleven individuals appear on Pathway Technologies' payroll records at any given time during 2009. Even if Michael and Stephen Gans were counted as employees, the payroll of Pathway Technologies never reached the fifteen employee threshold set by Section 760.02(7), Florida Statutes, during the years 2008 or 2009.

53. In McKenzie, 834 F.2d at 933, the court set forth the standard for determining whether two or more entities should be treated as a single employer for purposes of Title VII:

The predominant trend in determining whether two businesses should be treated as a single or joint employer under § 2000e(b) is to apply the standards promulgated by the National Labor Relations Board (NLRB). The NLRB factors include: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. The showing required to warrant a finding of single employer status has been described as "highly integrated with respect to ownership and operations." (Citations and footnote omitted)

54. Petitioner contended that Pathway Technologies and Organica should be treated as a single employer, and that their employees should be aggregated for purposes of reaching the statutory threshold of fifteen employees.

55. Application of the McKenzie criteria to the facts in the instant case does not lead to the conclusion that Pathway Technologies and Organica were "highly integrated" in their ownership and operations. There was clearly an element of common ownership, as Michael and Stephen Gans were the controlling members of Pathway Technologies and also had an ownership interest in Pathway Holdings, which purchased Organica in August 2008. However, common ownership alone is insufficient to establish that two entities meet the "integrated employer"

test in the absence of other indicia of integration. See Kolczynski v. United Space Alliance, LLC, 2005 U.S. Dist LEXIS 20508, 11-13 (M.D. Fla. 2005); Cruz-Lovo v. Ryder System, Inc., 298 F. Supp. 2d 1248, 1254 (S.D. Fla. 2003).

56. The evidence established that during 2008 and 2009, Pathway Technologies and Organica operated in different states and that they did not share employees. They conducted business with each other at arm's length. In 2008 and 2009, Organica controlled its own labor relations: it hired and fired its own employees, managed its own payroll, maintained its own employee handbook, and had its own employee assigned to perform human resources functions.

57. The companies had one officer in common, Stephen Gans. Pathway Technologies and Organica shared an employee confidentiality agreement in order to protect Organica's trade secrets. These factors were the only indicia of operational integration between the two companies, and do not establish that the companies were "highly integrated" with respect to their operations. Pathway Holdings took actions in 2010 that resulted in greater integration of the companies, but those actions were taken long after Petitioner's involvement with Pathway Technologies had ended.

58. A demonstration that Respondent was an "employer" as defined in section 760.02(7) is an essential, threshold element

of Petitioner's prima facie case of employment discrimination. Arbaugh, 546 U.S. at 516. Petitioner's evidence was insufficient to establish that Pathway Technologies employed 15 or more employees for each working day in each of 20 or more calendar weeks in 2008 or 2009. Therefore, Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Petitioner failed to prove that Pathway Technologies, LLC is an "employer" pursuant to section 760.02(7) and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 5th day of May, 2011, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of May, 2011.

ENDNOTES

^{1/} Citations shall be to Florida Statutes (2009) unless otherwise specified. Section 760.10, Florida Statutes, has been unchanged since 1992.

^{2/} Petitioner offered corporate filings for Organica that indicated an address of 5004B U.S. 41 North in Palmetto as the company's registered office in 2008 and 2009. Michael Gans testified that these filings were incorrect and that Organica's principal business address did not change from Pennsylvania to Florida until January 2010. The undersigned is persuaded that the company employed a Florida address as its "registered office" for purposes of its Division of Corporations filings, but that it continued to have a principal place of business in Pennsylvania through the end of 2009.

^{3/} In his Proposed Recommended Order, Petitioner stated that his list was entered into evidence at the hearing, over his objection. In fact, the list was not entered into evidence. Because Petitioner was testifying from the list, the undersigned directed Petitioner to show the list to counsel for Respondent. Neither party moved the list into evidence.

^{4/} The McKenzie court characterized the plaintiff's burden as "proving that subject matter jurisdiction exists," 834 F.2d at 932. The United States Supreme Court has since held that Title VII's "employee numerosity" requirement is not a question of subject matter jurisdiction but an ingredient of the plaintiff's claim for relief. Arbaugh v. Y&H Corp., 546 U.S. 500, 516 (2006). This distinction was relevant in Arbaugh because the defendant raised the numerosity question only after the evidentiary hearing. If numerosity were jurisdictional, then defendant could raise it at any point in the proceedings; if it were an element of plaintiff's claim, then the defendant had waived the issue by failing to raise it at the hearing. In the instant case, the distinction does not avail Petitioner because the numerosity question was raised by Respondent at the outset of the case and was fully litigated at the hearing.

^{5/} Clackamas dealt with the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. Mehta v. HCA Health Servs. of Fla., Inc., 2006 U.S. Dist. LEXIS 79536 (M.D. Fla. 2006), applied the Clackamas test in the Title VII context.

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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.