STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JULIA GRIFFITH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-2422
	)	
BRADFORD COUNTY FARM BUREAU,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on January 18, 2013, by video teleconference at sites in Tallahassee, Florida and Gainesville, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jamison Jessup, Qualified Representative
557 Noremac Avenue
Deltona, Florida 32728

For Respondent: Robert E. Larkin, III, Esquire
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STATEMENT OF THE ISSUE

Whether the Petitioner proved the elements necessary to demonstrate that she was subject to an unlawful employment

practice as a result of Respondent, Bradford County Farm Bureau, maintaining a sexually-hostile work environment.

PRELIMINARY STATEMENT

On or about November 22, 2011, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) naming the Bradford County Farm Bureau as her employer, and as the entity responsible for sexual harassment and maintaining a sexually-hostile work environment in violation of the Florida Civil Rights Act of 1992. The allegations were investigated, and on June 8, 2012, FCHR entered a Determination: No Cause and issued a Notice of Determination: No Cause.

A Petition for Relief was filed by Petitioner on or about July 12, 2012. FCHR transmitted the case to the Division of Administrative Hearings on July 13, 2012. A Notice of Hearing was issued setting the case for final hearing on September 20, 2012. On August 18, 2012, Petitioner moved for a continuance. The motion was granted, and the final hearing was rescheduled for October 29, 2012. On October 26, 2012, Petitioner filed an Unopposed Motion for Continuance, which was granted. Upon the filing of an Updated Status Report, an Order Rescheduling Hearing was entered on November 9, 2012, which set the final hearing for January 18, 2013. The final hearing was thereupon held as scheduled.

At the final hearing, Petitioner testified on her own behalf, and offered the testimony of James Gaskins, the President of the Board of Directors of the Bradford County Farm Bureau; Brent Huber, an insurance agent authorized to transact business on behalf of the Florida Farm Bureau Insurance Company; and Virginia Linzy, a part-time secretary for the Bradford County Farm Bureau. Petitioner's Exhibits 1-3 were received into evidence. Respondent offered the testimony of Mr. Huber and Mr. Gaskins. Respondent's Exhibits 1, 2, and 5-7 were received into evidence. After having left the record open at the conclusion of the final hearing, the undersigned entered an order closing the record effective on February 26, 2013.

The hearing was not transcribed. The time for filing proposed recommended orders was extended to March 15, 2013. Petitioner filed a notice advising that she would not be filing a proposed recommended order. Respondent timely filed its Proposed Recommended Order, which has been considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2012) unless otherwise noted.

FINDINGS OF FACT

1. At all times material to this proceeding, Petitioner was employed by Respondent, Bradford County Farm Bureau (BCFB or

Respondent). She worked for the BCFB from December 15, 2006 until January 1, 2012.

2. The BCFB is an organization created to work for and provide support to farmers in Bradford County. The BCFB has its office in Starke, Florida.

3. At all times relevant to this proceeding, James Gaskins was the President of the BCFB Board of Directors. He served in that capacity as an unpaid volunteer. The alleged actions of Mr. Gaskins towards the Petitioner form the basis for her claim of employment discrimination.

4. Section 760.10(1), provides that:

> It is an unlawful employment practice for an employer:
>
> (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.
>
> (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

5. Section 760.02(7) defines "employer" as follows:

> '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.

6. The threshold issue in this proceeding is whether the BCFB had the requisite number of employees to bring it under the jurisdiction of the Florida Civil Rights Act of 1992 as Petitioner's "employer." If Petitioner fails in her proof of that issue, any discussion of acts that may have constituted sexual harassment or resulted in the creation of a sexually-hostile work environment become superfluous and unnecessary.

Facts Regarding the BCFB as an "Employer"

7. At all times relevant to this proceeding, the BCFB had two paid employees. Ms. Griffith was the office manager and bookkeeper. Ms. Linzy was a part-time secretary and receptionist, although she worked full-time when Ms. Griffith was out. Ms. Linzy retired in October, 2012.

8. In addition to the foregoing employees, the BCFB has a five-member board of directors. Although Mr. Gaskins, who was a member of the Board, served as an unpaid volunteer, there was no evidence as to whether the remaining members were paid for their services. For purposes of this Recommended Order, it will be presumed that they were.

9. Based solely on the number of its employees, BCFB is not an "employer" as defined by section 760.10. Therefore, in order to prove the threshold element of her claim for relief, Petitioner must establish that employees of other entities should be imputed to the BCFB due to integrated activities or common control of BCFB's operations or employees.

10. Petitioner presented evidence of the relationship between the BCFB, the Florida Farm Bureau, and the Florida Farm Bureau Insurance Company (FFBIC) to establish the requisite integration or common control necessary to impute their employees to the BCFB.

Florida Farm Bureau

11. The Florida Farm Bureau has more than 15 employees.

12. The Florida Farm Bureau has a mission similar to that of the BCFB of providing goods, services, and other assistance to farmers, though on a state-wide basis. Each county in Florida has an independent county farm bureau.

13. The Florida Farm Bureau has no common corporate identity with the BCFB. The BCFB is incorporated as a legal entity unto itself.

14. The Florida Farm Bureau and the BCFB have no common officers, directors, or employees.

15. The Florida Farm Bureau does not share or comingle bank accounts with the BCFB. The BCFB maintains its own

finances, and has a bank account with the Capital City Bank Group.

16. The Florida Farm Bureau has no operational control over the BCFB. The BCFB Board of Directors makes all employment decisions for the BCFB, has exclusive authority to hire and fire employees of the BCFB, and has exclusive control over the pay and the terms and conditions of BCFB employees. Employees of the BCFB are paid by the BCFB, and not by the Florida Farm Bureau.

17. The Florida Farm Bureau has the telephone numbers of all of the county farm bureaus, and can transfer calls received by the Florida Farm Bureau to any of the county farm bureaus. Other than that, as stated by Ms. Linzy, the county farm bureaus "are all on their own."

Florida Farm Bureau Insurance Company

18. The Florida Farm Bureau Insurance Company is affiliated with the Florida Farm Bureau. The nature and extent of the relationship between those entities was not established. The relationship between those two entities does not affect their relationship, or lack thereof, with the BCFB.

19. Petitioner introduced no evidence as to the FFBIC's total number of employees.

20. The FFBIC has no common officers or directors with the BCFB, nor do they share or comingle bank accounts.

21. Brent Huber and Travis McAllister are insurance agents authorized to transact business on behalf of the FFBIC. They are self-employed independent contractors. Mr. Huber does business as "Brent Huber, Inc." Neither Mr. Huber nor Mr. McAllister is an employee of the FFBIC.

22. Mr. Huber is not employed by the BCFB, and does not perform duties on behalf of the BCFB. The evidence suggests that Mr. McAllister's status, vis-à-vis the BCFB, is the same as that of Mr. Huber.

23. Local FFBIC agents are selected by the FFBIC. Given the close relationship with local farmers/customers, the FFBIC selection of a local agent must be ratified by the county farm bureau in the county in which the agent is to transact business. Once ratified, an FFBIC agent cannot be terminated by the county farm bureaus.

24. Mr. Huber and Mr. McAllister, having been appointed to transact business in Bradford County as agents of the FFBIC, maintain an office at the BCFB office in Starke.

25. There being only four persons in the office, the relationship among them was friendly and informal. Mr. Huber described the group as "tight-knit" and "like a family."

26. Mr. Huber had no supervisory control over Petitioner or her work schedule. Due to the small size of the BCFB office, and limited number of persons to staff the office,

Ms. Griffith's absences would cause problems for the office as a whole. However, Mr. Huber never evaluated Ms. Griffith's performance and never disciplined Ms. Griffith.

27. The FFBIC provided sexual harassment, employment discrimination, workers' compensation, and minimum wage informational signs that were placed in the BCFB office break room. Those signs were "shared" between the Florida Farm Bureau Insurance Company and the BCFB. Thus, the BCFB did not maintain a separate set of signs.

28. The BCFB office has a single telephone number, and calls are routed internally. If Mr. Huber was out of the office, Petitioner or Ms. Linzy would take messages for him. If Mr. Huber was alone in the office, he would answer the telephone.

29. Petitioner or Ms. Linzy would occasionally make appointments for Mr. Huber, and assist him when clients visited the office. Mr. Huber did not pay Petitioner or Ms. Linzy for those services.

30. At some point, Mr. Huber and Ms. Griffith determined that it would be mutually advantageous if Ms. Griffith were allowed to speak with FFBIC customers about insurance when Mr. Huber was out of the office. To facilitate that arrangement, Ms. Griffith, at Mr. Huber's suggestion, obtained a license as a customer service representative, which allowed her

to sell policies under Mr. Huber's insurance agent license. The customer service representative license was not a requirement of Ms. Griffith's position with the BCFB.

31. Ms. Griffith would sell insurance policies only when Mr. Huber was out of the office. Mr. Huber compensated Ms. Griffith for writing insurance policies through "Brent Huber, Inc." Ms. Griffith continued to be paid as a full-time employee of the BCFB because she thought the BCFB "would be OK with it."

CONCLUSIONS OF LAW

32. For purposes of this proceeding, the Division has jurisdiction over the parties and the subject matter pursuant to sections 120.569, 120.57(1), and 760.11, Florida Statutes.

33. Petitioner has the burden of proving by a preponderance of the evidence that the BCFB committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3rd DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat.

34. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. It is well established that "if a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype."

Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); see also Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3rd DCA 2009); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

35. A threshold question in this case is whether the BCFB is an "employer" as defined in section 760.02(7), which is a prerequisite for Petitioner's claim to be actionable under the Florida Civil Rights Act of 1992. The United States Supreme Court has determined that question to be an element of a person's claim for relief. Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006), accord, Morrison v. Amway, 323 F.3d 920 (11th Cir. 2003). The FCHR has expressed its agreement with that determination, and in that regard has determined that:

> whether a Respondent has the requisite number of employees to be governed by the Florida Civil Rights Act of 1992 is not a jurisdictional issue, but rather is an element of Petitioner's claim for relief . . . .

Hill v. Goga Bap Corp., d/b/a Subway Store No. 13268, Case No. 12-0886 (DOAH Jan. 7, 2013; FCHR Mar. 11, 2013).

36. For Petitioner to meet her burden of proof, she must demonstrate that the BCFB employed 15 or more individuals for each working day in 20 or more weeks during the year in question. Walters v. Metro. Educ. Enter., Inc., 519 U.S. 202,

212 (1997). Counting the members of the Board of Directors as "employees," the BCFB has, at most, seven employees, which is not sufficient for it to meet the definition of an "employer."

Attribution of Employees

37. In order for Petitioner's claim to be cognizable, it is necessary that the employees of the BCFB be aggregated with another entity so that the combined number of employees is 15 or more. In determining whether such aggregation is warranted, the Eleventh Circuit Court of Appeals has held that:

> We have identified three circumstances in which it is appropriate to aggregate multiple entities for the purposes of counting employees. First, where two ostensibly separate entities are " 'highly integrated with respect to ownership and operations,' " we may count them together under Title VII . . . . This is the "single employer" or "integrated enterprise" test. Second, where two entities contract with each other for the performance of some task, and one company retains sufficient control over the terms and conditions of employment of the other company's employees, we may treat the entities as "joint employers" and aggregate them . . . . This is the "joint employer" test. Third, where an employer delegates sufficient control of some traditional rights over employees to a third party, we may treat the third party as an agent of the employer and aggregate the two when counting employees. . . . This is the "agency" test. (internal citations omitted)

Lyes v. City of Riviera Beach, 166 F.3d 1332, 1341 (11th Cir. 1999); see also Martinolich v. Golden Leaf Mgmt., Inc., 786 So. 2d 613, 615 (Fla. 3d DCA 2001).

"Joint Employer" Test

38. In determining the applicability of the "joint employer" test, the courts have applied the following rationale:

> The basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus the joint employer concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment.

Virgo v. Riviera Beach Assocs., Ltd., 30 F.3d 1350, 1360 (11th Cir. 1994)(citing NLRB v. Browning-Ferris Industries, Inc., 691 F.2d 1117, 1122 (3d Cir. 1982)).

39. Petitioner introduced no evidence of any contract between the BCFB and either the Florida Farm Bureau or the FFBIC under which those entities shared or co-determined matters governing any terms and conditions of employment of BCFB employees. The only "contract" for which evidence was provided was that between Petitioner and "Brent Huber, Inc." That agreement did not directly affect either the BCFB or the FFBIC. Thus, the evidence in this case is not sufficient to form the basis for an attribution of employees to the BCFB under the "joint employer" test.

"Agency" Test

40. In determining the applicability of the "agency" test, the courts have applied a variant of the common law of agency to determine whether one entity is acting as an agent of another, based on the "right to control the manner and means by which the work is accomplished." Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A., 104 F.3d 1256, 1266 (11th Cir. 1997).

41. Petitioner introduced no evidence that the BCFB delegated any control of traditional rights over its employees to the Florida Farm Bureau or the FFBIC. Decisions regarding employee hiring, supervision, terms and conditions of employment, discipline, and firing all remained the exclusive responsibility of the BCFB. Thus, the evidence in this case is not sufficient to form the basis for an attribution of employees to the BCFB under the "agency" test.

"Single Employer" Test

42. The final test set forth in Lyes is the "single employer" test. In its analysis of the "single employer" test, the Court held that:

> In determining whether two non-governmental entities should be consolidated and counted as a single employer, we have applied the standard promulgated in NLRA cases by the National Labor Relations Board . . . . This standard sets out four criteria for determining whether nominally separate entities should be treated as an integrated enterprise. (internal citation omitted).

> Under the so-called "NLRB test," we look for "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control."

Lyes v. City of Riviera Beach, 166 F.3d at 1341; see also Reeves v. DSI Servs., 331 Fed. App'x. 659, 663 (11th Cir. 2009). The Court went on to hold that "[c]ourts applying the NLRB 'single employer' test to private entities in Title VII cases have held that not every factor need be present, and no single factor is controlling." Id. at 1341, fn.5; see also E.E.O.C. v. Dolphin Cruise Line, Inc., 945 F. Supp. 1550 (S.D. Fla. 1996).

43. It is Petitioner's burden to establish the existence of an integrated enterprise. Guaqueta v. Universal Beverages, LLC, 2010 U.S. Dist. LEXIS 69660 *17 (S.D. Fla. 2010)(citing Cardinale v. S. Homes of Polk Cnty., Inc., 310 F. App'x 311, 312 (11th Cir. 2009)).

44. In determining whether the first criterion of "interrelation of operations" is met, courts look to whether the companies share employees and resources. Guaqueta, supra, at *18 (citing Walker v. Boys & Girls Club of Am., 38 F. Supp. 2d 1326, 1331 (M.D. Ala. 1999)) ("[T]he National Labor Relations Board has identified seven indicia of interrelatedness: (1) combined accounting records; (2) combined bank accounts; (3) combined lines of credit; (4) combined payroll preparation;

(5) combined switchboards; (6) combined telephone numbers and (7) combined officers.").

45. Applying the above analysis, the evidence establishes that none of the indicia of interrelatedness exist in this case. The closest factor is that the Florida Farm Bureau is able to transfer a call received by it directly to a county farm bureau, and that Mr. Huber, as an independent contractor agent of the FFBIC took his calls through the BCFB telephone system. Those facts do not establish that the telephone numbers of the Florida Farm Bureau or the FFBIC are "combined" with that of the BCFB in any real sense of the term.

46. In determining whether the second criterion of "centralized control of labor relations" has been met, courts look to "which company has the power to hire and fire employees and control employment practices." Guaqueta, supra, at *20 (citing Fike v. Gold Kist, Inc., 514 F. Supp. 722, 727 (N.D. Ala. 1981))("[T]he 'control' of labor relations is not potential control but active control of day-to-day labor relations.").

47. The preponderance of the evidence established that neither the Florida Farm Bureau nor the FFBIC had any control whatsoever of the day-to-day labor relations of the BCFB.

48. The third criterion of "common management" is dependent on there being common directors and officers. Guaqueta, supra, at *22 (citing Fike, supra, at 727)("Cases

treating two separate corporate entities as a single employer have placed heavy emphasis on the existence of common directors and officers.").

49. The preponderance of the evidence established that the BCFB had no common directors or officers with the Florida Farm Bureau or the FFBIC.

50. The fourth and final criterion of the "single employer" test is "common ownership and financial control." Courts have held that a finding of common ownership or financial control alone is, in itself, insufficient to establish the single employer or integrated enterprise criterion absent proof of the other factors. Guaqueta, supra, at *24. Even if Petitioner had proven other elements of the single employer or integrated enterprise test -- which she did not -- the following analysis of the necessary degree of financial control is instructive:

> In Player v. Nations Biologies, Inc., 993 F. Supp. 878, 883 (M.D. Ala. 1997), the plaintiff established financial control where the main company maintained a centralized account pooling the profits of all the other companies to cover the losses of the less successful companies. By contrast in Fike, the district court did not find common ownership where one company did not exercise financial control over the other company, revenues and operating expenses were not comingled, and one company

> did not borrow funds from the other. 514 F. Supp. at 727.

Guaqueta, supra, at *24-25.

51. The preponderance of the evidence established that there is no common ownership or financial control between the BCFB and either the Florida Farm Bureau or the FFBIC. Thus, the evidence in this case is not sufficient to form the basis for an attribution of employees to the BCFB under the "single employer" test.

Conclusion

52. Having applied the criteria set forth in the case law analyzed above, there is not a scintilla of competent, substantial evidence to support a conclusion that the BCFB has the requisite number of employees to be an "employer" as defined in section 760.02(7). Thus, Petitioner's claim is not actionable under section 760.10.

53. There being no evidence that the BCFB falls under the purview of the Florida Civil Rights Act, there is no purpose to be served by proceeding with a determination of whether or not Petitioner met her burden of establishing sexual harassment and the maintenance of a sexually-hostile work environment. To do so would amount to, essentially, the issuance of an advisory order, which the undersigned declines to do.

RECOMMENDATION

Upon the consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered by the Florida Commission on Human Relations that, based upon Petitioner's failure to meet her burden of proof to establish that Respondent, Bradford County Farm Bureau, is an "employer" as defined in section 760.02(7), the Employment Complaint of Discrimination be dismissed.

DONE AND ENTERED this 6th day of May, 2013, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 6th day of May, 2013.

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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.