STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KELLI LAWHEAD,

Petitioner,

vs. Case No. 13-1911

ADAMS AND REESE, FORMERLY d/b/a IGLER & DOUGHERTY LAW OFFICES, P.A.,

Respondent.
_____/

REVISED RECOMMENDED ORDER OF DISMISSAL

A Motion hearing was conducted in this matter on January 10, 2014, in Tallahassee, Florida, before Suzanne Van Wyk, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lauren F. Strickland, Esquire
Marie A. Mattox, P.A.
310 East Bradford Road
Tallahassee, Florida 32303

For Respondent: Leslie A. Lanusse, Esquire
Adams and Reese, LLP
701 Poydras Street
4500 One Shell Square
New Orleans, Louisiana 70139

STATEMENT OF THE ISSUE

Whether Respondent was Petitioner's employer at the time of Petitioner's alleged unlawful termination, or is otherwise

liable to Petitioner for alleged unlawful termination under any theory of successor liability.

PRELIMINARY STATEMENT

On January 18, 2013, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR), alleging that Respondent discriminated against her based on her disability. The basis for the charge was Petitioner's dismissal from employment following an extended hospital stay for migraine headaches.

An investigation of the charge was made by FCHR. On April 12, 2013, FCHR issued its Notice of Determination: No Cause and Determination: No Cause, which concluded that there was no reasonable cause to believe that a discriminatory employment practice had occurred.

Petitioner disagreed with FCHR's determination and timely filed a Petition for Relief (Petition) on May 17, 2013. The petition was forwarded to the Division of Administrative Hearings for a formal hearing.

The final hearing was scheduled for August 28, 2013, but was canceled and placed in abeyance upon Petitioner's Unopposed Motion for Continuance and representation that the parties were discussing settlement and that Petitioner would be seeking to amend her Petition. The undersigned requested a status report on or before September 25, 2013. No status report was filed.

On October 1, 2013, Petitioner filed an Amended Petition naming "Igler & Dougherty Law Offices, P.A." (Igler & Dougherty), as an additional Respondent. The undersigned sua sponte entered an Order to Show Cause why Igler & Dougherty should not be dismissed for lack of jurisdiction because the entity was not named in Petitioner's original charge of discrimination. Both parties timely filed a Response thereto, and Petitioner requested an evidentiary hearing on the matter.

In addition to its Response to the Order to Show Cause, Respondent filed a Motion for Summary Judgment requesting the undersigned to dismiss Adams and Reese because it was not Petitioner's employer at the time the alleged act of discrimination occurred and did not assume any liabilities of her employer. The undersigned denied Respondent's Motion for Summary Judgment and requested available dates from the parties for an evidentiary hearing on the issue of whether Adams and Reese was Petitioner's employer at the time of her dismissal, or otherwise responsible for the alleged discriminatory act.

A hearing was scheduled for December 4, 2013, but rescheduled to January 10, 2014, on Petitioner's Unopposed Motion for Continuance. The hearing commenced as scheduled.

At the hearing, the parties offered the testimony of Petitioner and Charles P. Adams, Adams and Reece's Managing

Partner. Petitioner's Exhibits 1 and 2 were admitted into evidence. Respondent's Exhibits 1, 3-6, and 8-10 were admitted.

At the close of the hearing, the undersigned ruled in the negative on the issue of whether Adams and Reese was Petitioner's employer at the time of her dismissal, or was otherwise responsible for the alleged discriminatory employment practice. That ruling is memorialized herein. The undersigned's ruling on the jurisdictional issue is made in an Order Striking Petitioner's Amended Petition for Relief entered on March 20, 2014.

The undersigned entered a Recommended Order of Dismissal in this case on March 20, 2014. On June 11, 2014, the Commission entered an Agency Order Remanding Petition for Relief from an Unlawful Employment Practice, explaining that the undersigned failed to make findings of fact and conclusions of law to support her ruling that Respondent "was not otherwise liable for the alleged discriminatory practice." The undersigned accepted remand by Order dated June 13, 2014, and instructed the parties to file proposed recommended orders solely on the issue of successor liability within 20 days of the date of the Order.

Respondent timely filed a Proposed Recommended Order, which was considered in the preparation of this Order. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. Petitioner was employed as a Legal Assistant by Igler & Dougherty Law Offices, P.A. (Igler & Dougherty), in Tallahassee, Florida, for approximately three-and-a-half years.

2. Petitioner was terminated by Igler & Dougherty by letter dated February 6, 2012, allegedly for failure to make "adequate progression to date."

3. Petitioner alleges that she was unlawfully terminated after treatment for migraine headaches during an extended hospital stay.

4. Respondent, Adams and Reese, LLP, is a limited liability law partnership headquartered in Louisiana, with offices in Louisiana, Mississippi, Tennessee, Texas, Alabama, Florida, and Washington, D.C.

5. Charles P. Adams, Jr., is Respondent's Managing Partner.

6. In mid-summer 2012, Respondent approached George Igler, Partner in Igler & Dougherty, about the possibility of joining Adams and Reese to establish the firm's Tallahassee office.

7. Mr. Adams was primarily responsible for all discussions with Mr. Igler and other members of Igler & Dougherty who eventually joined Respondent.

8. On October 1, 2012, Respondent announced the official opening of its Tallahassee office. The new office was located

at 2457 Care Drive, the building that formerly housed Igler & Dougherty.

9. At no time before October 1, 2012, did Respondent maintain an office or employ individuals in Tallahassee, Florida.

10. Mr. Igler and Mr. Dougherty joined Respondent as partners. Other former Igler & Dougherty lawyers joined Respondent as partners and associates.

11. Respondent also hired some of the support staff from Igler & Dougherty. Respondent did not hire Petitioner.

12. Respondent did not merge with Igler & Dougherty, did not acquire the assets of Igler & Dougherty, and did not assume the liabilities of Igler & Dougherty.

13. Igler & Dougherty retained its accounts receivable and work in progress, and Mr. Igler and Mr. Dougherty continued to wrap up the business of Igler & Dougherty after joining Adams and Reese.

14. Respondent is managed by its Managing Partner and an Executive Committee comprised of six partners. None of the attorneys or employees of Igler & Dougherty hired by Respondent are Executive Committee members.

15. Respondent has two classes of partners, capital partners and income partners. Only capital partners have an ownership interest in the firm.

16. Only one of the seven attorneys hired by Respondent from Igler & Dougherty, Mr. Igler, is a capital partner. On October 12, 2012, the date Respondent opened its Tallahassee office, Respondent had 114 additional capital partners, none of whom had worked for Igler & Dougherty.

17. At no time did Respondent employ Petitioner. Respondent did not participate in Petitioner's termination nor did it have any role in the decision to terminate her.

18. At the time Petitioner filed her Charge of Discrimination with the Commission, the Florida Secretary of State website showed that Igler & Dougherty, P.A., was an active Florida registered corporation.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.57(1), Fla. Stat. (2013).

20. Section 760.10, Florida Statutes (2012), provides, in pertinent part:

> (1) 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.

21. Petitioner maintains that Adams and Reese, particularly Mr. Dougherty, discriminated against her on account of her disability.

22. The term "employer" is defined in section 760.02(7) 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 person." Though not explicit in the statute, the "employer" must have an employee-employer relationship with the person alleging discrimination in order to be liable for an unlawful employment practice under section 760.10(1).

23. The facts do not support a conclusion that Adams and Reese was Petitioner's employer at the time Petitioner was terminated, or that Adams and Reese was responsible for her termination. Petitioner was neither employed nor terminated by Adams and Reese.

24. Nor can Adams and Reese be liable to Petitioner for alleged unlawful termination of Petitioner under any theory of successor liability. Traditional corporate law holds that the liabilities of a predecessor corporation may not be imposed on the successor corporation unless:

> The successor expressly or impliedly assumes obligations of the predecessor; (2) the transaction is a de facto merger; (3) The successor is a mere continuation of the

> predecessor; or (4) The transaction is a fraudulent effort to avoid the liabilities of the predecessor.

Bernard v. Kee Mfg. Co., 409 So. 2d 1047, 1049 (Fla. 1982); Anders for Anders v. Jacksonville Elec. Auth., 443 So. 2d 330 (Fla. 1st DCA 1983).

25. Applying this rule in the instant case, the undersigned finds no facts on which liability could be imposed on Respondent for Petitioner's alleged unlawful termination.

26. It is undisputed that Respondent did not aquire the accounts receivable or work in progress from Igler & Dougherty. There was no merger of the two companies. There is no evidence that Respondent otherwise assumed the assets or liabilities of Igler & Dougherty. Thus, Respondent is not liable to Petitioner under the first theory of successor liability.

27. A de facto merger occurs when one corporation is absorbed by another without formal compliance with statutory requirements for a merger. See Lab. Corp. of America v. Prof'l Recovery Network, 813 So. 2d 266, 270 (Fla. 5th DCA 2002)(citations omitted)(de facto merger occurred where the corporations were governed by a sole officer and shareholder, shared the same attorney and registered agent, conducted the same business, had substantially the same employees and customers, the same telephone and fax numbers, and the same accounting system and computerized databases).

> To determine if a de facto merger has occurred, the finder of fact may look at any factors reasonably indicative of commonality or distinctiveness. 'The bottom-line question is whether each entity has run its own race, or whether there has been a relay-style passing of the baton from one to the other'. Id. (citations omitted).

28. "To find a de facto merger there must be a continuity of the selling corporation evidenced by the same management, personnel, assets and physical location; a continuity of the stockholders, accomplished by paying for the acquired corporation with shares of stock; a dissolution of the selling corporation; and assumption of the liabilities." Munim v. Azar, 648 So. 2d 145, 153-54 (Fla. 4th DCA 1994).

29. In Serchay v. NTS Ft. Lauderdale Office Joint Venture, 707 So. 2d 958, 960 (Fla. 4th DCA 1998), the court refused to impose successor liability on an entity solely because the successor entity used some of the predecessor's equipment and office space and took on former employees of the predecessor. The court also noted that the dissolution of the predecessor, the timing of which is a key element in assessing whether a de facto merger occurred, was involuntary. Id.

30. In the case at hand, there was no de facto merger of Igler & Dougherty with Respondent. Management of Respondent does not include the same management team as that of Igler & Dougherty. Respondent is managed by Charles Adams, Jr. and an

Executive Committee, none of whom are former Igler & Dougherty managers. Respondent did not hire all the former employees of Igler & Dougherty. Respondent had "run its own race" with over 590 attorneys and staff members prior to hiring attorneys and staff from Igler & Dougherty.

31. Finally, there was no evidence that Igler & Dougherty dissolved shortly after Respondent opened its Tallahassee office. In fact, there was no evidence that Igler & Dougherty ever dissolved.

32. The evidence did show that Respondent opened its Tallahassee office in the same space formerly occupied by Igler & Dougherty, for which Respondent entered into a lease separate from Igler & Dougherty, and utilized some of the same office equipment and phone lines. However, those facts alone are insufficient for a determination that a de facto merger occurred.

33. Respondent is not liable to Petitioner for alleged unlawful termination on a de facto merger theory of successor liability.

34. A continuation of business that results in liability of the successor corporation is merely a continuation or reincarnation of the predecessor corporation under a different name. Munim, 648 So. 2d at 154. The "purchasing corporation

must not merely be a 'new hat' for the seller with the same or similar entity or ownership." Id. While having common attributes does not automatically impose liability on a successor corporation, merely repainting the sign on the door and using new letterhead certainly gives the appearance that the new corporation is simply a continuation of the predecessor corporation. Lab. Corp., 813 So. 2d at 270. The key element of a continuation is a common identity of the officers, directors, and stockholders in the two corporations. See Serchay, 707 So. 2d at 960; Munim, 648 So. 2d at 154.

35. None of the attorneys Respondent hired from Igler & Dougherty serve as either Respondent's managing partner or as members of Respondent's Executive Committee. While Mr. Igler was hired as capital partner, having an ownership interest in the firm, he is one of approximately 140 capital partners. None of the other capital partners ever worked for Igler & Dougherty. Thus, the Tallahassee office of Adams and Reese was not just a mere continuation of the business of Igler & Dougherty, and cannot be liable to Petitioner for alleged unlawful termination under this theory of successor liability.

36. "Florida has long recognized the principle that a voluntary conveyance by one who is indebted is presumptively fraudulent when attached by a judgment creditor upon a debt

existing at the time of the conveyance." Munim, 648 So. 2d at 152.

37. Section 726.105, Florida Statutes (2013), prohibits any transfer of business "with actual intent to hinder, delay, or defraud" any present or future creditor. When determining whether there was actual intent, considerations may be given to several factors, including the timing of the transfer." § 726.105(2), Fla. Stat. A suit or threatened suit before the transfer is made or obligation incurred would be suggestive of actual intent. See Id; Perrot v. Frankie, 605 So. 2d 118, 120 (Fla. 2d DCA 1992)(transfer of property to daughter by quitclaim deed during pendency of personal injury litigation against father held to be fraudulent transfer to protect the asset).

38. In the case at hand, no such fraudulent intent can be inferred. Respondent opened its Tallahassee office and hired Mr. Igler and other lawyers and employees of Igler & Dougherty in October 2012. Petitioner did not file her Charge of Discrimination until January 18, 2013. Petitioner presented no evidence that Igler & Dougherty had knowledge of any possible claim relative to Petitioner's previous employment which would prompt a transfer of corporate liability. In fact, Petitioner presented no evidence that Igler & Dougherty was ever served

with her Complaint of Discrimination or had actual or constructive knowledge of her Complaint.

39. Petitioner presented no evidence from which the undersigned can infer actual intent to defraud. Thus, Respondent cannot be liable to Petitioner for alleged unlawful termination under this theory of successor liability.

40. Chapter 760, Part I, is analogous to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Cases interpreting Title VII are, therefore, applicable in construing and applying chapter 760. Brand v. Fla. 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).

41. Petitioner has the burden of proving by a preponderance of the evidence that Respondent 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).

42. The United States Supreme Court has established the requirements for proving a prima facie case of discrimination, which can vary depending on differing factual situations.

McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973); see also, Schwartz v. State of Fla., 494 F. Supp. 574, 593 (N.D. Fla. 1980). In short, those requirements are:

> [t]hat a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act."

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1977)(citing Teamsters v. U.S., 431 U.S. 324, 358 (1977)).

43. If a Petitioner proves a prima facie case of discrimination, the burden shifts to the employer "to articulate some legitimate nondiscriminatory reason" for the adverse employment action. McDonnell-Douglas Corp. v. Green, 411 U.S. at 802.

44. Once the employer succeeds in carrying its burden of producing a nondiscriminatory reason for the challenged action, the employee must show that the employer's reason is pretextual. The final and ultimate burden of persuading the trier-of-fact, by a preponderance of the evidence, remains at all times with the employee. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-508 (1993); Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 257 (1981).

45. In this case, Petitioner failed to prove that Respondent was her employer, thus failing in her initial prima facie case of discrimination. Respondent did not discharge Petitioner, or otherwise discriminate against Petitioner with respect to compensation, terms, conditions, or privileges of employment, because the evidence is uncontroverted that Respondent was not in an employee-employer relationship with Petitioner.

46. Likewise, Petitioner failed to prove that Respondent was liable to Petitioner for alleged unlawful termination based on any theory of successor liability.

47. Petitioner simply filed her complaint against the wrong entity. While Mr. Igler and Mr. Dougherty were members of Respondent's law firm at the time Petitioner filed her complaint, Igler & Dougherty remained an independent, legal corporate entity capable of being sued in its own name.

48. The hearing in this case was limited to a determination of the employer-employee relationship between Petitioner and Respondent as well as Respondent's liability under any theory of successor liability. Based upon the limited scope of the proceeding, the issue of whether Petitioner was discriminated against or was the subject of an unlawful employment practice by Respondent was not reached. Thus, this order should not be construed as having any stare decisis effect

in any subsequent proceeding involving Petitioner's actual employer.

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 dismissing the Petition for Relief filed by Kelli Lawhead in FCHR No. 2013-00581.

DONE AND ENTERED this 21st day of July, 2014, in Tallahassee, Leon County, Florida.

Suzanne Van Wyk
Administrative Law Judge
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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.