

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

WALLACE MOOREHAND,

Petitioner,

vs.

Case No. 14-3733

STATE FARM,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

A formal hearing was conducted in this case on October 13, 2014, via video teleconference at locations in Pensacola, Florida, and Tallahassee, Florida, before Suzanne Van Wyk, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Glenn A. Crickenberger, Esquire  
Gary, Williams, Parenti and Watson, PLLC  
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Stuart, Florida 34994

For Respondent: J. Robert McCormack, Esquire  
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STATEMENT OF THE ISSUE

Whether Petitioner, Wallace Moorehand, was an employee of Respondent, State Farm Mutual Automobile Insurance Company, as defined by the Florida Civil Rights of 1992, at the time alleged discriminatory employment practice(s) took place.

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination against Respondent with the Florida Commission on Human Relations (Commission) on January 14, 2014. On July 11, 2014, after investigation of Petitioner's charge, the Commission found no cause to believe that an unlawful employment action had occurred.

Petitioner timely filed a Petition for Relief with the Commission on August 14, 2014. The Commission referred the case to the Division of Administrative Hearings (Division) on August 14, 2014. Neither party responded to the Initial Order entered on August 15, 2014, and the undersigned unilaterally set the hearing for October 13, 2014, via video teleconference in Pensacola, Florida, and Tallahassee, Florida.

On October 1, 2014, the parties moved to bifurcate the hearing and go forward solely on the issue of whether Petitioner was an employee of, or an independent contractor for, Respondent. The undersigned granted the motion and the hearing commenced as scheduled on October 13, 2014. Petitioner

testified on his own behalf. Petitioner's Exhibits AA, Y, Z, and X, were admitted into evidence. Respondent offered the testimony of Keith Flexsenhar. Respondent's Exhibits B, W, U, R, and V, were admitted into evidence, and the undersigned took official recognition of Respondent's Exhibits C, D, E, F, S, and T.

A Transcript of the proceedings was filed on November 4, 2014. The undersigned granted two separate extensions of time for the parties to submit Proposed Recommended Orders. Both parties timely filed Proposed Recommended Orders, which have been considered in preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner, Wallace Bruce Moorehand, is an African-American male residing in Ft. Walton Beach, Florida.

2. Petitioner holds Florida insurance agent license A183690, which was issued on February 27, 1991. Petitioner studied extensively and was subject to a formal examination in order to obtain his license.

3. Respondent, State Farm Mutual Automobile Insurance Company (State Farm),<sup>1/</sup> is a private entity headquartered in Bloomington, Illinois, engaged in the business of selling and servicing various types of insurance products including auto, health, and fire insurance for personal and business customers.

4. Petitioner maintains that he is an employee of State Farm, rather than an independent contractor therefore, allowing him to bring a claim of unlawful employment discrimination under the Florida Civil Rights Act of 1992.

5. Between March 1991 and February 1993, Petitioner worked as a Trainee Agent with State Farm. It is undisputed that Petitioner was a State Farm employee during his tenure as a Trainee Agent.

6. On March 1, 1993, Petitioner executed a State Farm Agent's Agreement. Among the relevant contractual provisions are the following:

The purpose of this Agreement is to reduce to writing the objectives, obligations, and responsibilities essential to the relationship between the Agent, operating as an independent contractor, and State Farm. [State Farm] believe[s] that agents operating as independent contractors are best able to provide the creative selling, professional counseling, and prompt and skillful service essential to the creation and maintenance of successful multiple-line companies and agencies. We do not seek, and will not assert, control of your daily activities, but expect you to exercise your own judgment as to the time, place, and manner of soliciting insurance, servicing policyholders, and otherwise carrying out the provisions of this Agreement. You have chosen this independent contractor relationship, with its opportunities for financial reward and personal satisfaction, in preference to one which would place you in an employee status.

\* \* \*

Section 1 - MUTUAL CONDITIONS AND DUTIES

\* \* \*

B. You are an independent contractor for all purposes. As such you have full control of your daily activities, with the right to exercise independent judgment as to time, place, and manner of soliciting insurance, servicing policyholders, and otherwise carrying out the provisions of this Agreement.

C. State Farm will furnish you, without charge, manuals, forms, records, and such other materials and supplies as we may deem advisable to provide. All such property furnished by us shall remain the property of [State Farm].

\* \* \*

D. Information regarding names, addresses, and age of policyholders of [State Farm]; the description and locations of insured property; and expiration or renewal dates of State Farm policies acquired or coming into your possession during the effective period of this Agreement, or any prior Agreement, except information and records of policyholders insured by [State Farm] pursuant to any governmental or insurance industry plan or facility, are trade secrets wholly owned by [State Farm]. All forms and other materials, whether furnished by State Farm or purchased by you, upon which this information is recorded, shall be the sole and exclusive property of [State Farm].

E. The expense of any office, including rental, furniture, and equipment; signs; supplies not furnished by us; the salaries of your employees; telegraph; telephone; postage; advertising; and all other charges or expense incurred by you in the performance of this Agreement shall be incurred at your discretion and paid by you.

\* \* \*

L. We retain the right to prescribe all policy forms and provisions; premiums, fees, and charges for insurance; and rules governing the binding, acceptance, renewal, rejection, or cancellation of risks, and adjustment and payment of losses.

7. Petitioner testified that it was his intent to enter into an independent contractor relationship with State Farm.

8. On January 1, 1997, Petitioner entered into a second State Farm Agent's Agreement, containing similar, if not identical, provisions.

9. The record was not clear why Petitioner entered into a second Agent's Agreement in 1997. Petitioner testified that State Farm eliminated some retirement benefits in 1997, requiring all agents to execute a new Agreement. However, on cross-examination, Petitioner testified, "I misspoke"<sup>2/</sup> and admitted that the original Agent's Agreement does not refer to a pension or other retirement benefit.

10. Petitioner has conducted business as an agent of State Farm at the same location in Mary Esther, Florida, for 21 years.

11. State Farm compensates Petitioner through commission on sales of insurance policies and other products. According to the Agent's Agreement, State Farm also offers a sales incentive of five percent of production earnings in the prior year. State Farm has never paid Petitioner a salary.

12. Pursuant to the Agent's Agreement, State Farm also compensates Petitioner by providing a life insurance policy of \$100,000 payable to his designated beneficiary upon his death, provided that Petitioner has not obtained age 70 or terminated the Agent's Agreement.

13. Petitioner has his own Federal employer tax ID number.

14. Petitioner owns the building in which his State Farm office is located.

15. Petitioner pays all the expenses of his office, including telephone, electricity, water, furniture, office supplies, and office equipment.

16. Petitioner currently has two employees, but has previously employed up to nine people at his State Farm office.

17. Petitioner pays his employees a salary, rather than on an hourly basis, at his choosing. Petitioner sets his employees' work schedules.

18. Petitioner pays his employees' payroll taxes, decides whether they will receive commissions, and, if so, the amount of said commissions. Petitioner offers his employees paid holidays, vacation time, and sick leave.

19. Petitioner does not receive either vacation time or sick leave from State Farm. Petitioner has elected to secure health insurance through State Farm for himself and his family.

Petitioner offers his employees the opportunity to participate in the same health insurance plan he has elected to purchase.

20. State Farm reports Petitioner's earnings to the Federal Government on IRS Form 1099, not Form W-2. State Farm does not withhold social security, Medicare, or federal income taxes, from Petitioner's commission checks.

21. Despite overwhelming evidence of Petitioner's independent contractor relationship with State Farm, Petitioner maintains that State Farm exercises a degree of control over Petitioner's livelihood that renders the independent contractor status a sham. Petitioner testified that State Farm controlled Petitioner's business, not only by contract, but also "by innuendo, by assertion, by intimidation."<sup>3/</sup>

22. First, Petitioner testified that there was no difference between the way State Farm managed Petitioner's business as a Trainee Agent and as an independent contractor. However, Petitioner admitted that only as a Trainee Agent was he required to submit daily time logs and weekly accountings of his activities.

23. Petitioner offered into evidence a letter in which a State Farm Agency Manager criticized Petitioner's priorities, time utilization, attitude, and required him to attend a series of training meetings. However, the letter was clearly written when Petitioner was a Trainee Agent.



24. Next, Petitioner argues that State Farm controls whom he hires at his agency, as well as the hours his agency must be open to the public.

25. Any employee of Petitioner who will be licensed to sell State Farm products on behalf of Petitioner is required to undergo background screening and enter into an Agent's Licensed Staff Agreement. The Agreement defines the nature of the employment as with the Agent, rather than State Farm; defines the scope of the employee's authority, i.e., the Agent may delegate to employees in-office binding authority on motor vehicle, residential risks, and personal property-casualty insurance coverage.

26. Petitioner's clerical staff, and any other non-licensed staff, is not required to undergo background screening or enter into an Agent's Licensed Staff Agreement.

27. Petitioner's office is open 9:00 a.m. to 5:00 p.m. each weekday. Petitioner testified that he chose those hours because those are the ones "clients most wanted." State Farm does not dictate the particular hours Petitioner works.

28. State Farm provides an after-hours call center from 5:00 p.m. to 9:00 a.m. on weekdays to take calls from clients and potential clients when Petitioner's office is closed. Petitioner maintains that because the call center is only

available after 5:00 p.m., State Farm dictates that his office remains open until 5:00 p.m. daily.

29. If Petitioner chose to close his office before 5:00 p.m. on weekdays, the only consequence would be missed business opportunities.

30. Next, Petitioner argues that State Farm controls his business by requiring Petitioner to sell "multiple lines" of insurance, rather than selling only automobile or homeowners' policies. Petitioner testified that State Farm pressures him to sell life and health insurance policies, as well as banking products more recently-available through State Farm.

31. State Farm does not set quotas for any product line. Agents are free to choose which products they will sell as part of their overall business decisions.

32. State Farm encourages its Agents to sell all products offered by the company in order to service the needs of clients.

33. Some State Farm products require special licenses, such as a securities license to sell mutual funds offered by State Farm.

34. State Farm does not require agents to obtain any specialty license.

35. Petitioner voluntarily obtained a securities license to offer mutual funds to his clients.

36. Next, Petitioner argues that State Farm does not allow him to operate his agency in a truly independent manner. Rather, Petitioner maintains that he is required to submit a business plan for approval by State Farm and attend extensive trainings which interfere with the independent nature of his relationship with State Farm.

37. State Farm requires agents to attend one training session per year. The training is on compliance with State Farm customer service guidelines. Agents may access the training online and do not need to travel to take the training.

38. State Farm provides a number of incentives to encourage agents to maximize their performance. For example, if an agent submits a business plan, laying out the goals and direction for his or her agency, the agent is eligible to receive leads on prospective clients that are received through the State Farm website. However, there are no negative consequences to those agents who choose not to submit a business plan.

39. Finally, Petitioner argues that State Farm restricts Petitioner from writing policies for other insurer's products. The parties offered a great deal of testimony regarding Petitioner's authority to write policies for "take-out companies" assuming coverage previously provided by Citizens'

Insurance, and flood insurance policies through the Federal Emergency Management Agency.

40. The undersigned finds this testimony irrelevant to the issue at hand. Petitioner is an agent of State Farm insurance company. He chose that relationship. He could have chosen to work with an independent insurance agency which writes policies for any number of companies. Petitioner did not.

#### CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction of the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2014).

42. Petitioner alleges State Farm engaged in a discriminatory employment action against Petitioner based upon his race, age, and gender, in violation of section 760.10, Florida Statutes.

43. Section 760.10(1)(a) prohibits discrimination only against employees or prospective employees. It does not protect independent contractors from discriminatory conduct. See Columbus v. Mutual of Omaha, Case No. 08-2575 (Fla. DOAH Dec. 29, 2008; FCHR Mar. 16, 2009) ("Inasmuch as Petitioner was not an employee of Respondent's at the time of the alleged unlawful employment practices described in her Complaint, the Complaint must be dismissed."); Assily v. Memorial Hosp. of Tampa, Case No. 04-1762 (Fla. DOAH Dec. 13, 2004; FCHR May 31,

2005) (“[I]ndependent contractors are not protected under Chapter 760, Florida Statutes.”); see also Brown v. J. Kaz, Inc., 581 F.3d 175 (3d. Cir. 2009) (affirming district court’s conclusion that Appellant was an independent contractor, not an employee, thus not covered under Title VII); Llampallas v. Mini-Circuits, Inc., 163 F.3d 1236, 1242 (11th Cir. 1998) (concluding that Title VII protects only individuals who are employees with regard to that individual’s terms and conditions of employment).

44. Whether Petitioner is an employee of State Farm is a threshold issue in the instant case.

45. Petitioner has the burden of proving that the relationship he has with State Farm is that of employer-employee. See Dep’t. of Banking and Ins. v. Osborne Stern and Co., 670 So. 2d 932, 934 (Fla. 1996) (the party asserting the affirmative of an issue has the burden of presenting evidence as to that issue).

46. The “hybrid economic realities test” applies to a determination of whether Petitioner is an employee of State Farm. Pursuant to this test, “it is the economic realities of the relationship viewed in the light of the common law principles of agency and the right of the employer to control the employee that are determinative.” Taylor v. BP Express, Inc., 2008 U.S. Dist. LEXIS 95313 \*7 (S.D. Ga. Nov. 24, 2008)

(citing Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir. 1982)).

47. The common law factors to be considered in conducting that analysis are: (1) the intention of the parties; (2) the skill required in the particular occupation; (3) the party furnishing the equipment and the place of work; (4) the method of payment, whether by time or by the job; (5) the type of employment benefits provided; (6) the manner in which the work relationship is terminated; (7) the importance of the work performed as part of the business of the employer; and (8) the manner in which taxes on income are paid. See Dahl v. Ameri-Life Health Serv. of Sara-Bay, LLC, 2006 U.S. Dist. LEXIS 73797 \*10-11 (M.D. Fla. Oct. 10, 2006). "In assessing the amount of control an employer exercises over the employee's work duties, courts look not only to the results that are to be achieved, but the 'manner and means by which the work is accomplished.'" Id. (citing Daughtrey v. Honeywell, 3 F.3d 1488, 1496 (11th Cir. 1993)).

#### Intention of the Parties

48. Petitioner's intention to operate as an independent contractor of State Farm is clearly reflected in the terms of the Agent's Agreement, which prescribe that Petitioner was "operating as an independent contractor," and that Petitioner chose "this independent contractor relationship, with its

opportunities for financial reward and personal satisfaction, in preference to one which would place you in an employee status." Moreover, Petitioner testified at hearing that it was his intent to be an independent contractor of State Farm.

49. State Farm's intent to enter into a contractual arrangement with Petitioner as an independent contractor is also clearly reflected in the Agent's Agreement, which provides,

"[State Farm] believe[s] that agents operating as independent contractors are best able to provide the creative selling, professional counseling, and prompt and skillful service to the creation and maintenance of successful multiple-line companies and agencies. We do not seek, and will not assert, control of your daily activities, but expect you to exercise your own judgment as to the time, place, and manner of soliciting insurance, servicing policyholders, and otherwise carrying out the provisions of this Agreement."

#### Skill Required in the Particular Occupation

50. The record clearly established that the sale of insurance and other financial products is a highly-specialized and heavily-regulated field. Petitioner had to study and pass exam, and obtain specialized licenses to sell insurance and financial products offered by State Farm. Petitioner must comply with both state and federal regulations governing the sale of insurance and banking products offered by State Farm. "The highly specialized nature of [Petitioner's] position is

indicative of an independent contractor rather than an employee.” Dahl, 2006 U.S. Dist. LEXIS 73797 \*12.

Party Furnishing the Equipment and Place of Work

51. The record clearly established that Petitioner provides his own place of work. Petitioner owns the building in which he chose to establish his agency. Petitioner provides his own office machines, furnishings, and supplies, with the exception of certain forms provided by State Farm. Petitioner pays his own utilities, and covers the other costs of operating his agency without reimbursement from State Farm.

52. As evidence of State Farm’s control of Petitioner’s equipment, Petitioner points to the State Farm-supplied integrated phone and computer platform he uses to access customer policy information. However, Petitioner leases this system from State Farm, which is further evidence of an independent contractor relationship. See Smith-Johnson v. Thrivent Financial for Lutherans, 2005 U.S. Dist. LEXIS 36715 \*14 (M.D. Fla. July 2005).

Method of Payment

53. Petitioner is paid strictly on commission for the insurance policies and other products delivered, as well as through sales incentives. Petitioner is not on salary, is not paid hourly, and is not otherwise compensated for the time spent in obtaining the policies delivered. Thus, Petitioner assumes



both the financial risks and benefits of the position. These facts are indicative of an independent contractor status. See Dahl, 2006 U.S. Dist. LEXIS 73797 \*13; Smith-Johnson, 2005 U.S. Dist. LEXIS 36715 \*14-15.

#### Benefits Provided

54. State Farm does not provide Petitioner with sick leave, vacation days, or paid holidays. Petitioner does not receive retirement benefits from State Farm. Pursuant to the Agreement, after termination thereof, Petitioner may receive continued earnings on the "average monthly premium" of policies sold prior to termination. These facts are further indicators of Petitioner's independent contractor status. See Dahl, 2006 U.S. Dist. LEXIS 73797 \*13; Smith-Johnson, 2005 U.S. Dist. LEXIS 36715 \*6.

55. State Farm does provide a life insurance policy of \$100,000 on behalf of Petitioner, payable to his designated beneficiary, effective until Petitioner attains that age of 70, or the Agreement is terminated.

#### Manner of Termination

56. Pursuant to the terms of the Agent's Agreement, the relationship terminates upon Petitioner's death. The Agreement may also be terminated by either party by written notice to the other party at any time. Termination does not require a "cause" finding on behalf of State Farm.

### Importance of the Work Performed

57. Petitioner's work on behalf of State Farm is integral to State Farm's business. Keith Flexsenhar, State Farm Agency Administration Leader, testified that State Farm's competitive advantage is its "exclusive agency system of over 18,000 agents." State Farm relies upon its agents to sell its insurance and banking products to make the company profitable.

58. State Farm provides a number of incentives to encourage agents to maximize their performance. For example, if an agent submits a business plan, laying out the goals and direction for his or her agency, the agent is eligible to receive leads on prospective clients that are received through the State Farm website. However, there are no negative consequences to those agents who choose not to submit a business plan.

59. State Farm encourages its agents to sell every product that it offers. However, State Farm does not set sales quotas for any product, or require agents to obtain specialty licenses to sell specialized banking products.

### Manner in Which Income Taxes Are Paid

60. The record is clear that State Farm reports Petitioner's earnings to the federal government using IRS Form 1099. State Farm does not withhold social security, Medicare, or federal income taxes, from Petitioner's commission checks.

These facts are further evidence of an independent contractor relationship between Petitioner and State Farm. See Dahl, 2006 U.S. Dist. LEXIS 73797 \*13-14; Smith-Johnson, 2005 U.S. Dist. LEXIS 36715 \*15.

### Conclusion

61. Several factors weigh in favor of finding an employer-employee relationship between State Farm and Petitioner. State Farm provides life insurance benefits to Petitioner, State Farm requires Petitioner to attend one compliance training a year, and State Farm owns customer information and the systems on which customer information is maintained. Further, the work performed by Petitioner is integral to the success of State Farm's business.

62. However, those factors are far outweighed by those supporting the conclusion that Petitioner is an independent contractor of State Farm. The clear intent of the parties was to enter into an independent contractor relationship; that relationship is memorialized in the explicit language of the Agent's Agreement; State Farm does not control the "time, place, or manner" in which Petitioner solicits new business, meets with clients, or binds policies; Petitioner controls his office hours, pays all the expenses of his agency business; hires and fires his own staff; manages his time, as well as that of his employees; pays his own income taxes; and determines the

products he will sell for State Farm, as well as whether to secure any specialized licenses to sell specific products. In essence, Petitioner controls the "manner and means by which the work is accomplished."

63. The "economic reality" is that Petitioner, not State Farm, controls Petitioner's ability to maximize profit or loss of Petitioner's insurance business.

64. Petitioner insists that the legal issue herein is governed by the definition of "employee" set forth in section 443.1216, Florida Statutes. Petitioner argues, in his Proposed Recommended Order, that section 443.1216 "defines an employee and thus determines whether Petitioner can avail himself of the Florida Civil Rights Act of 1992." Petitioner offers no precedent for this asserted legal position.

65. Chapter 443, Florida Statutes, is the "Reemployment Assistance Program Law," and governs eligibility and administration of unemployment benefits through the State of Florida. Section 443.1216 does not define an "employee" for purposes of the classification of workers for reemployment tax. However, that section does incorporate the "usual common-law rules applicable in determining the employer-employee relationship."

66. To the extent that Petitioner addressed the common-law test applicable to determining the employer-employee

relationship, Petitioner failed to prove by a preponderance of the evidence that Petitioner is an employee of State Farm.

67. Petitioner's independent contractor relationship with State Farm is beyond the scope of the protections afforded by section 760.10, Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations dismiss Complaint of Discrimination No. 2014-00242 filed by Wallace B. Moorehand on August 14, 2014.

DONE AND ENTERED this 6th day of January, 2015, in Tallahassee, Leon County, Florida.



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SUZANNE VAN WYK  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 6th day of January, 2015.

ENDNOTES

<sup>1/</sup> The operative Agent's Agreement is between Petitioner and State Farm Mutual Automobile Insurance Company, State Farm Life Insurance Company, State Farm Fire and Casualty Company, and

State Farm General Insurance Company. The Companies are collectively referred to herein as "State Farm."

<sup>2/</sup> T.74:12.

<sup>3/</sup> T.19:4-5.

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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.