STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KIRA MORTON,

Petitioner,

vs. Case No. 18-3839

SPOONERS TIRES, LLC,

Respondent.
_____/

RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a hearing in this matter by video teleconference on December 4, 2018, at sites in St. Petersburg and Tallahassee, Florida.

APPEARANCES

For Petitioner: Christopher James Saba, Esquire
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For Respondent: Sheila Marie Lake, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent meets the definition of an employer within the meaning of section 70-51, Code of Ordinances, and, therefore, is subject to the discrimination ordinance enacted by Pinellas County (County).

PRELIMINARY STATEMENT

On June 9, 2016, Petitioner dual-filed a Charge of Discrimination with the Pinellas County Office of Human Rights (Office) and the Equal Opportunity Employment Commission. The Charge of Discrimination alleges that on March 22, 2016, Respondent, a tire company in St. Petersburg, violated section 70-53(a)(1)a., Code of Ordinances, by rejecting Petitioner's employment application on the basis of her religion (Muslim-Islam). After an investigation was conducted by the Office, it determined that reasonable cause exists to believe that unlawful discrimination had occurred. Pursuant to a contract with the Division of Administrative Hearings (DOAH), the matter was referred by the Office to DOAH on July 20, 2018.

On October 16, 2018, Respondent filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction (Motion) and Notice of Request to Take Judicial Notice.[1/] The Motion asserted that Respondent is not an "employer," as defined by section 70-51, Code of Ordinances, because it did not have at least five or more employees for each working day at any time during any 13-week period in 2015 or 2016. Because of a lack of factual support in the record at that time, the Motion was denied. For the sake of efficiency and to save resources, however, the final hearing on December 4, 2018, was limited to the jurisdictional

issue of whether Respondent was an employer within the meaning of section 70-51 during the relevant time period.[2/]

At the hearing, Petitioner offered Exhibits 1 through 5. Exhibit 5 was accepted, while a ruling was reserved on Exhibits 1 through 4. To the limited extent Exhibits 1 through 4 relate to the jurisdictional issue, they have been accepted and considered. Respondent presented one witness and offered Exhibits 1 and 2. Both exhibits are accepted in evidence.

A transcript of the proceeding was not prepared. The parties timely submitted proposed "Orders," and they have been considered in the preparation of this Recommended Order.[3/]

FINDINGS OF FACT

1. Respondent is a small tire company located at 5582 66th Street North, St. Petersburg, Florida. Richard Newberry is the owner of the business. This case began after Petitioner filed with the Office a Charge of Discrimination alleging that Respondent rejected her employment application on the basis of her religion. If proven, this action would be a violation of section 70-53(a)(1)a. of the County discrimination ordinance.

2. The narrow issue to be resolved at this stage of the case is whether Respondent "employs five or more employees for each working day of 13 or more calendar weeks in the current or preceding calendar year." § 70-51, Code of Ord. If Respondent

did not reach that threshold, the discrimination ordinance does not apply and Petitioner's Charge of Discrimination must be dismissed. Because the alleged discrimination occurred on March 22, 2016, by definition, only the years 2015 and 2016 are relevant in making this determination. Id.

3. To support its contention that it had less than five employees for each working day during any 13-week period in 2015 and 2016, Respondent submitted copies of its 2015 and 2016 reemployment (unemployment) wage/tax quarterly reports filed with the Department of Revenue. Resp't Ex. 1. Among other things, the reports reflect the number of employees that performed services for Respondent during each quarter. In addition, Respondent submitted its payroll journals for both years. Pet'r Ex. 5; Resp't Ex. 2. The journals were prepared by Respondent's accountant, Mr. Boylan, who verified their accuracy.

4. Respondent's 2016 quarterly reports reflect that, excluding Mr. Newberry, Respondent had no more than three employees at any time during that year. Respondent's payroll journals for the same time period corroborate this information. Respondent's 2015 quarterly reports reflect that it had no employees during the first three quarters of the year, and only one person on the payroll during the last quarter. The payroll journals for the same time period corroborate these facts.

Through the testimony of Mr. Boylan, this information was shown to be reliable and accurate.

5. Through cross-examination of Mr. Boylan, Petitioner sought to establish that Mr. Newberry may have been paying employees "off the books" (by cash), without Mr. Boylan's knowledge, and these employees would not be shown on the reports or journals. She also suggested that when preparing the reports and journals, Mr. Boylan may have relied on false or incomplete information given to him by the owner. However, these assertions are mere speculation without evidentiary support and have not been credited.

6. Petitioner also contended that Jessica Belt, the person who was hired by Respondent to fill the position, is not shown on the payroll journal until the first week of October 2016, or after she was offered the position at an earlier date. Pet'r Ex. 1. However, Ms. Belt's actual date of hire and first day of work are unknown, and Mr. Boylan's explanation that she may not have begun work until October 2016 has been accepted as being credible. Importantly, even if Ms. Belt began work several months earlier, Respondent still would have had no more than three employees in the second quarter of 2016 and two employees during the third quarter of that year.

7. Respondent had less than five employees during any 13-week period in calendar years 2015 and 2016.

CONCLUSIONS OF LAW

8. The undersigned has jurisdiction to hear this case pursuant to section 120.65(6), Florida Statutes (2018), and section 70-77, Code of Ordinances.

9. Whether a defendant is an employer within the meaning of the law is a threshold jurisdictional issue. See, e.g., Virgo v. Riviera Bch. Assocs., Ltd., 30 F.3d 1350, 1359 (11th Cir. 1994). To decide this issue, it is necessary to determine whether Respondent "employ[ed] five or more employees for each working day in each of 13 or more calendar weeks in the current or preceding calendar year." § 70-51, Code of Ord. Only the years 2015 and 2016 are at issue.

10. As the party seeking dismissal of the case, Respondent was assigned the burden of proving that it was not an employer within the meaning of the discrimination ordinance. By a preponderance of the evidence, Respondent has shown that it had no employees during the first three quarters of 2015; one employee during the last quarter of 2015; no employees during the first quarter of 2016; one employee during the second quarter of 2016; two employees during the third quarter of 2016; and three employees during the last quarter of 2016. Therefore, Respondent was not an employer during the relevant time period and is not subject to the discrimination ordinance.

11. At the hearing, Petitioner contended she was prejudiced by Respondent's failure to respond to discovery, agree to a date on which she could depose Mr. Newberry, and make Mr. Newberry available as a witness at the hearing. The undersigned has carefully considered these objections, and, for the reasons set forth below, finds them to be without merit.

12. First, on the afternoon before the hearing, Petitioner filed her Motion to Strike Respondent's Discovery Objections and Compel Responses to Petitioner's Discovery Requests (Motion to Strike). At hearing, the undersigned ruled that the Motion to Strike was untimely. In addition, in the main, the Motion to Strike seeks responses to discovery requests that relate to the merits of the case. This contravened an earlier ruling that stayed all discovery on the merits of the case until the jurisdictional issue was resolved. See Order, Nov. 26, 2018. No prejudice has been shown.

13. Petitioner also argued at hearing that she was prejudiced because Respondent refused to agree to a date on which she could take Mr. Newberry's deposition. Several weeks before the hearing, Petitioner submitted proposed dates to Respondent's counsel, along with 23 topics for Mr. Newberry to address at the deposition. With two exceptions, all topics related to the merits of the case. Because Petitioner would not agree to limit the deposition to the jurisdictional issue, a

deposition was never scheduled. Under these circumstances, no prejudice has been shown.

14. Finally, Petitioner contended she was prejudiced because Mr. Newberry did not testify at the hearing. However, Mr. Newberry was not listed on Respondent's witness list, and Petitioner did not seek to compel his attendance through a subpoena. Under these circumstances, no prejudice has been shown.

15. Given the foregoing considerations, the Charge of Discrimination must be dismissed, with prejudice, on the ground Respondent is not an employer within the meaning of the Code of Ordinances.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Charge of Discrimination by Petitioner against Respondent be DISMISSED, with prejudice.

DONE AND ENTERED this 21st day of December, 2018, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of December, 2018.

ENDNOTES

[1/] Official recognition was taken of Respondent's 2016 quarterly reemployment reports filed with the Department of Revenue. See Order, Nov. 13, 2018. However, due to several infirmities in the 2015 reports, official recognition was not taken of those reports. These deficiencies were later cured at the final hearing. The 2015 and 2016 reports have been admitted as Respondent's Exhibit 1.

[2/] During its investigation, the Office apparently made no effort to determine the number of employees on Respondent's payroll and assumed Respondent was subject to the Office's jurisdiction. The Office's Investigative Report noted that Respondent had "15+" employees, and the jurisdictional issue was "[n]ot raised by the respondent." At that time, however, Respondent was represented by its owner, a lay person, and until he hired counsel much later, undoubtedly he was unaware of the employee threshold. To save time and resources for the parties in future cases, it is suggested that the investigator make a diligent effort to determine whether the jurisdictional requirements have been met, or at least advise the employer of the threshold requirements in section 70-51, especially in cases which involve very small businesses.

[3/] In an employment discrimination case, the Code of Ordinances provides that a recommended order will be issued by the administrative law judge. § 70-77(g)(13), Code of Ord. It further provides that exceptions to the recommended order, if any, also will be filed with the administrative law judge, who will rule on the exceptions and issue a final order. There is no provision for filing a reply to the exceptions. The final order may be appealed to the circuit court. § 70-77(g)(14), Code of Ord.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order to be considered by the above-signed Administrative Law Judge should be filed with the Division of Administrative Hearings, which will issue the Final Order in this case. § 70-77(g)(13), Code of Ordinances.