

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF  
MASSAGE THERAPY,

Petitioner,

vs.

Case No. 19-2730PL

CAMERON KELLOGG, L.M.T.,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the  
Division of Administrative Hearings (DOAH), heard this case by  
video teleconference on August 14, 2019, at sites in  
St. Petersburg and Tallahassee, Florida.

APPEARANCES

For Petitioner: Jamal Burk, Esquire  
Gabriel Girado, Esquire  
Florida Department of Health  
Prosecution Services Unit  
Bin C-65  
4052 Bald Cypress Way  
Tallahassee, Florida 32399

For Respondent: Cameron Kellogg, pro se  
7125 Mayfield Drive  
Port Richey, Florida 34668

STATEMENT OF THE ISSUE

Did Respondent, Cameron Kellogg, L.M.T., attempt to induce patient, L.R.A., to engage in sexual activity as prohibited by section 480.0485, Florida Statutes (2018)?<sup>1/</sup>

PRELIMINARY STATEMENT

Petitioner, Florida Department of Health, Board of Massage Therapy (Board), filed its Administrative Complaint against Mr. Kellogg on January 14, 2019. The Complaint alleges Mr. Kellogg groped L.R.A.'s breasts, pinched her nipples, and asked her if she wanted him to perform oral sex. Mr. Kellogg disputed the charges and requested a formal administrative hearing. The Board referred the matter to DOAH.

The Board moved to compel Mr. Kellogg's deposition. Mr. Kellogg did not comply with an order directing him to respond to the motion. The undersigned rendered an Order Compelling Respondent's Deposition.

Before the hearing date, Mr. Kellogg filed a Motion for Summary Judgment, Case Dismissal, Removal of Complaint, and Lifting of Restriction, and a Motion for Relief. The undersigned rendered orders denying both motions.

The undersigned conducted the hearing on August 14, 2019. The Board did not present live testimony. It relied upon three videotaped depositions in lieu of live testimony. Board Exhibits 1 through 8 were admitted.

Mr. Kellogg testified on his own behalf. He did not offer any exhibits.

After the hearing, Mr. Kellogg filed two motions for mistrial. They were denied by an order stating the motions' arguments would be considered in preparation of the recommended order.

Mr. Kellogg filed five other motions after the hearing. They are: (1) Respondent's Motion for a Response (filed 8/29/19); (2) Respondent's Motion for a Second Hearing to Address New Evidence (filed 9/3/19); (3) Respondent's Motion to Grant Recommended Order (filed 9/13/19); (4) Respondent's Motion to Dismiss Case (filed 9/19/19); and (5) Respondent's Motion for Case Dismissal (filed 9/27/19). They are addressed at the end of this Order. The arguments advanced in the motions were considered in the preparation of this Recommended Order.

Mr. Kellogg created three purported subpoenas on September 1, 2019 (filed on September 3, 2019), commanding non-parties to appear at DOAH on September 4, 2019. The undersigned issued an order quashing the subpoenas.

The Transcript was filed September 12, 2019. Both parties timely filed proposed recommended orders. They have been considered in the preparation of this Recommended Order.

## FINDINGS OF FACT

1. Section 20.43 and chapters 456 and 480, Florida Statutes (2019), charge the Florida Department of Health and the Board with licensing and regulating massage therapy.

2. At all times material to the allegations of the Administrative Complaint, Mr. Kellogg was a licensed massage therapist.

3. In August of 2018, Mr. Kellogg was providing massage therapy services for guests of the Opal Sands Resort and Spa (Opal Sands). L.R.A. and her husband G.A. were guests at Opal Sands. August 30, 2018, was their last full day there. L.R.A. scheduled a massage for that day. Before the scheduled time, L.R.A. and G.A. were relaxing at the pool. They had a drink at the pool. There is no credible evidence indicating that either became intoxicated.

4. L.R.A. left the pool to attend her scheduled massage. G.A. stayed at the pool to wait for her.

5. When L.R.A. arrived at the spa, she was directed to a changing area. She removed her clothes and bra, leaving on her underwear, and put on a robe supplied by the spa. Afterwards she met Mr. Kellogg in the waiting room, and he escorted her to the massage room. He left the room. She removed the robe and laid face down on the table covered with a drape. The massage began uneventfully. Midway through the massage L.R.A. turned over at

Mr. Kellogg's request. This is typical in massages. During the massage, as is normal, L.R.A. became more and more relaxed, to the point of drowsiness.

6. At the end of the massage period, Mr. Kellogg was standing at L.R.A.'s head massaging her shoulders and clavicle. He slowly moved his hands beneath the drape and began groping and fondling L.R.A.'s breasts. Then he pinched her nipples.

7. L.R.A. was shocked and astonished. Naked and vulnerable, she was speechless and embarrassed. Then Mr. Kellogg asked her if she wanted him to perform oral sex saying, "Do you want me to eat your p---y?" Still speechless and shocked, L.R.A. shook her head no several times vigorously. Mr. Kellogg said "OK" and left the room.

8. The actions described in findings six and seven are not part of an appropriate massage and were not invited or consented to by L.R.A. in any way. Mr. Kellogg violated the massage therapist-patient relationship and used it to attempt to induce L.R.A. in sexual activity. His actions were also sexual activity engaged in through direct contact with L.R.A.

9. Still in shock, L.R.A. dressed, went to the front desk, and signed to charge the massage to her room account, leaving a \$5.00 tip. She returned to the pool to meet her husband. She was in emotional distress and trying to decide how to tell her

husband of Mr. Kellogg's assault. After meeting and talking a while at the pool, L.R.A. and G.A. went to their room to shower.

10. Afterwards they left the resort and walked to a nearby souvenir and ice cream stand. After leaving the stand, L.R.A. asked her husband to sit down because she had something to tell him. This was only two hours after Mr. Kellogg groped her. During that time L.R.A. was processing her reactions and shock and thinking about how to tell her husband. She recounted the events to G.A., but did not repeat Mr. Kellogg's crass language, at first. She did not tell him about Mr. Kellogg pinching her nipples until a few weeks later. She thought those details would cause too much stress and anger on top of the other events. L.R.A. and G.A. decided that reporting Mr. Kellogg's behavior to the resort management was important and returned to Opal Sands. They told the front desk attendant that they needed to speak to the manager about something that happened in the spa. The attendant asked if they wanted the manager to come to their room. They said yes.

11. The spa manager, Lexandra Gheradini, came to the room of L.R.A. and G.A. They told her about Mr. Kellogg's actions and request to perform oral sex. Ms. Gheradini apologized. But she did not ask them to complete any paperwork to document the assault. The resort only refunded the charge for the massage.

12. L.R.A. reported Mr. Kellogg's actions within a reasonable period of time given her shock and embarrassment. At first she did not contact the police because of her embarrassment. Also, she and G.A. were preparing to leave the next day to return to their home in Pennsylvania.

13. In Pennsylvania, L.R.A. told her friend K.E. about the incident. K.E. encouraged L.R.A. to report the incident to the police. L.R.A. reported it to the Clearwater police. She also reported the incident to the Florida Department of Health.

14. The videotaped depositions provided clear and distinct views of the faces of L.R.A. and G.A. while testifying. Their facial expressions, body language, and reactions to Mr. Kellogg's questions made their testimony compelling and persuasive.

15. Mr. Kellogg denied touching L.R.A.'s breasts. Mr. Kellogg, although he testified in person, was not persuasive. The majority of his testimony was argument about why L.R.A.'s testimony should not be accepted and complaints about how the charges have affected him. His denials were brief and unpersuasive. In addition, Mr. Kellogg testified that "I asked to eat her p---y." He minimizes this as "saying something stupid."

16. Mr. Kellogg argues that L.R.A., G.A., and K.E. should not be believed because, when testifying a year after events, they do not remember some details. The argument is not

persuasive. Forgetting some details peripheral to a shocking event a year afterwards is not unusual. The memories of L.R.A., G.A., and K.E. are distinct, clear, and consistent on the important facts. In addition, L.R.A.'s prompt reports of the incident to G.A. and the spa manager enhance her credibility. So too does the consistency of her description of events to K.E. Mr. Kellogg's testimony corroborates half of L.R.A.'s account. The record contains no evidence suggesting any motive for L.R.A. to fabricate her account.

#### CONCLUSIONS OF LAW

17. Sections 120.569 and 120.57(1), Florida Statutes (2019) grant DOAH jurisdiction over the subject matter of and the parties to this action.

18. Section 480.046(1)(p), Florida Statutes, authorizes the Board to impose discipline against a licensee for violating any provision of chapters 480 and 456, or the rules adopted by the Board.

19. The Board proposes to take disciplinary action against Mr. Kellogg's massage therapy license. Because this is a penal proceeding, the Board must prove its allegations by clear and convincing evidence. Nair v. Dep't of Bus. & Prof'l Reg., Bd. of Med., 654 So. 2d 205 (Fla. 1st DCA 1995). As the Supreme Court of Florida stated, quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983):



[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005).

20. L.R.A.'s testimony about the significant facts was credible. She distinctly remembered Mr. Kellogg groping her breasts and proposing to perform oral sex. Her testimony was precise and explicit. Her contemporaneous reports of the assault to G.A and to the spa manager enhance her credibility. Mr. Kellogg's admission to proposing oral sex confirms L.R.A.'s testimony on that subject. Further, it indicates his orientation toward sex at the time of the massage. This is consistent with testimony that he groped L.R.A.'s breasts and pinched her nipples.

21. In disciplinary proceedings, the statutes and rules allegedly violated must be strictly construed in favor of the licensee. Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988).

22. Strict construction of the statutes and rules involved is not an issue here. The statutes are clear. Mr. Kellogg's conduct plainly falls within their prohibitions.

23. Section 480.0485 prohibits sexual misconduct in the practice of massage therapy. It says:

Sexual misconduct in the practice of massage therapy means violation of the massage therapist-patient relationship through which the massage therapist uses that relationship to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of practice or the scope of generally accepted examination or treatment of the patient.

24. Florida Administrative Code Rule 64B7-26.010(4) defines sexual activity as follows:

any direct or indirect physical contact by any person or between persons which is intended to erotically stimulate either person or both or which is likely to cause such stimulation and includes sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse.

25. Touching a patient's breasts and vaginal area during a massage is sexual misconduct. Nath v. State Dep't of Health, 100 So. 3d 1273 (Fla. 1st DCA 2012). Offering oral sex to a massage therapist client is sexual misconduct. Dep't of Health v. Li, Case No. 18-0898PL (Fla. DOAH May 18, 2018; Fla. DOH Mar. 25, 2019).

26. Mr. Kellogg's groping of L.R.A.'s breasts was prohibited sexual activity. Asking if she wanted him to perform oral sex was an attempt to induce her to engage in sexual activity, including one specifically listed in the rule. The Board proved its charges by clear and convincing evidence.

27. Florida Administrative Code Rule 64B7-30.002 establishes disciplinary guidelines for massage therapists. Rule 64B7-30.002(3)(q)2. mandates a \$2,500 fine and license revocation for violation of section 480.0485. Florida Administrative Code Rule 64B7-30.002(4) lists aggravating and mitigating circumstances to consider. The only mitigating circumstance present are the absence of previous violations and the length of time Mr. Kellogg has practiced. Fla. Admin. Code R. 64B7-30.002(4)(c) and (d). Aggravating circumstances listed include danger to the public, recency of the violation, emotional damage to L.R.A., deterrent effect of the penalty, lack of rehabilitation effort, and the deliberateness of the violation (actual knowledge). License revocation and a \$2,500 fine are the proper penalties.

#### PENDING MOTIONS

28. Respondent's Motion for a Response (filed 8/29/19) - This motion complains about when and if the Board responds to Mr. Kellogg's many motions. The motion demands requiring L.R.A., K.E., and G.A. to turn over financial records as a remedy. There

is no authority for this at this stage in the proceedings. The information could also have been sought during discovery. The motion demands that Board counsel answer questions from Mr. Kellogg. There is no authority for this. In addition, the motion asserts that Board employees went to Mr. Kellogg's workplace seeking a massage in order to entrap him. If there is a factual basis for this claim, Mr. Kellogg should have presented it at the final hearing.<sup>2/</sup> If this claim were true, the alleged facts would not affect the outcome of this matter because the charges here involve events that occurred before the investigation began. The motion also complains about the Board's refusal to settle with Mr. Kellogg. This too is not grounds for relief. The motion is DENIED.

29. Respondent's Motion for a Second Hearing to Address New Evidence (filed 9/3/19) - This motion alleges that Board counsel scheduled a couples massage with Mr. Kellogg involving female guests between September 1, 2018, and December 12, 2018. This motion also claims the Board tried to entrap him. It recites Mr. Kellogg's suspicions and speculation. If the claim were true, it would not be grounds for relief since the charges in this case and all evidence presented involve events that occurred in August 2018. The motion is DENIED.

30. Respondent's Motion to Grant Recommended Order (filed 9/13/19) - This motion seeks dismissal of this proceeding on the

grounds that the Board did not timely file its proposed recommended order. Proposed recommended orders were due ten days after filing of the transcript. The transcript was filed September 12, 2019. Proposed recommended orders were not yet due on September 13, 2019, when Mr. Kellogg filed his motion. The Board timely filed its proposed recommended order on September 23, 2019. The motion is DENIED.

31. Respondent's Motion to Dismiss Case (filed 9/19/19) - This motion reiterates Mr. Kellogg's complaint that the Board failed to settle with him and had not timely filed a proposed recommended order. Refusal to settle is not grounds for dismissing a case. The board timely filed its proposed recommended order. The motion is DENIED.

32. Respondent's Motion for Case Dismissal (filed 9/27/19) - This motion repeats claims in earlier motions about Board employees going to Opal Sands after the events relevant to this proceeding and arguments about witness credibility. The credibility arguments have been considered. The claims about Board employees going to Opal Sands, if true, would not be relevant in this proceeding since nothing that happened at Opal Sands during that time period was the subject of the charges or evidence in this matter. The motion is DENIED.

COSTS OF INVESTIGATION AND PROSECUTION

33. Section 456.072(4), Florida Statutes, mandates the Board to "assess costs related to the investigation and prosecution of the case." Mr. Kellogg is required to pay the Board's costs of investigation and prosecution.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Florida Department of Health, Board of Massage Therapy, enter a final order:

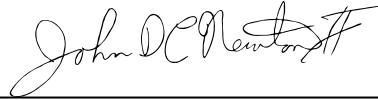
A. Finding that Respondent, Cameron Kellogg, LMT, violated section 480.0485, Florida Statutes.

B. Revoking the license of Cameron Kellogg, L.M.T.

C. Imposing a fine of \$2,500.00 on Cameron Kellogg, L.M.T.

D. Assessing costs of the investigation and prosecution of this case against Cameron Kellogg, L.M.T., to be paid to Petitioner, Florida Department of Health.

DONE AND ENTERED this 30th day of September, 2019, in  
Tallahassee, Leon County, Florida.



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JOHN D. C. NEWTON, II  
Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of September, 2019.

ENDNOTES

<sup>1/</sup> All citations to the Florida Statutes are to the 2018  
edition unless stated otherwise.

<sup>2/</sup> As stated in the Pre-Hearing Order rendered, August 1,  
2019, the undersigned explained the nature of these proceedings  
to Mr. Kellogg during the pre-hearing conference and suggested  
that he review the information available through the  
"Representing Yourself" link on the DOAH website.

COPIES FURNISHED:

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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.