STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FELTON J. BOYD,

Petitioner,

vs. Case Nos. 19-4342
19-5255

SPORT CLIPS, INC.,

Respondent.
_____/

RECOMMENDED ORDER

On June 9 and 10, 2020, Administrative Law Judge W. David Watkins of the Division of Administrative Hearings ("DOAH") conducted a hearing in this proceeding by Zoom teleconference.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent, Sport Clips, Inc., is Petitioner's "employer" under the Florida Civil Rights Act of 1992, chapter 760, Florida Statutes ("FCRA").

PRELIMINARY STATEMENT

Felton J. Boyd ("Mr. Boyd") filed a charge of discrimination with the Florida Commission on Human Relations ("Commission") on September 24, 2018, against Sport Clips, Inc. ("SCI") under the FCRA. Mr. Boyd alleged that he "was employed by Respondent as a hair dresser" and was subjected to racial discrimination and a hostile work environment by his supervisor, Kristi Turner ("Ms. Turner"). Mr. Boyd further alleged that he and his co-workers complained about Ms. Turner on December 13, 2017, to their area manager, Cristin Kelley ("Ms. Kelley"), and they were fired after they complained.

In response to Mr. Boyd's charge, the Commission issued a "Determination: No Reasonable Cause." In doing so, the Commission found that the "investigation did not support his allegations" and more specifically, the "investigation did not support that [Mr. Boyd] was [SCI's] employee." The Commission found that SCI "franchises business in Florida, but does not own any businesses in Florida or have any control over business operations in Florida."

Dissatisfied with the Commission's conclusion, Mr. Boyd filed a Petition for Relief challenging the Commission's determination. In his Petition, Mr. Boyd asserted the following:

> c. During the time that Mr. Boyd was employed by Respondent, Mr. Boyd, an African American male, was subjected to racial discriminate [sic] by Ms. Turner.

> d. Specifically, Mr. Boyd was subjected to the following from Manager Ms. Turner:
>
> i. Ms. Turner required Mr. Boyd to work until close on Sundays despite Mr. Boyd's request to attend church on Sundays.
>
> ii. Ms. Turner repeatedly and constantly criticized Mr. Boyd with no valid reason.
>
> iii. When Mr. Boyd was doing a good job, Ms. Turner stated " ... you have proved me wrong."
>
> iv. Ms. Turner had told employees that she only wanted "pretty little white girls" working in the store.
>
> v. Ms. Turner had requested for employees to dye their hair blonde or wear blonde wigs
>
> vi. Ms. Turner created a hostile work environment.
>
> e. On December 13, 2017, Mr. Boyd's co-workers had complained to Cristin Kelley regarding the discrimination by Ms. Turner to Mr. Boyd and to his co-workers.
>
> f. Ms. Kelley assured Mr. Boyd's co-workers that the matter would be handled; however, Mr. Boyd and his co-workers were terminated in December of 2017 after voicing their concerns regarding Ms. Turner.

The Commission transmitted the case to DOAH to conduct all necessary proceedings and submit recommended findings to the Commission.[1] The parties agreed to bifurcate the potential issues in the case and the undersigned agreed that the hearing would be limited to the issue of whether

[1] Two separate Petitions for Relief involving identical parties and the same issues of fact and law were filed with DOAH and assigned Case Numbers 19-4342 and 19-5255, respectively. These cases were ordered consolidated on January 22, 2020.

SCI is Mr. Boyd's employer. All evidence at the hearing related to the employment relationship was accepted and considered.

On June 8, 2020, the parties filed a Corrected Joint Pre-hearing Stipulation, which included eight stipulated facts. To the extent relevant, those stipulated facts have been incorporated in the Findings of Fact below.

At the hearing, the parties presented testimony of JV-SC Investments, LLC ("JV-SC"), Managing Member Drew C. Hopper; Petitioner Felton J. Boyd; and SCI Chief Executive Officer ("CEO") Gordon B. Logan (now retired). Joint Exhibits 1 through 5, SCI's Exhibits 1 through 6, and Petitioner's Exhibit 2 were admitted into evidence.

At the conclusion of the hearing, the parties indicated their intention to order a transcript of the proceedings. The parties requested that they be afforded 20 days from the date of filing of the official transcript at DOAH to submit their proposed recommended orders. The undersigned agreed to that request.

The four-volume hearing Transcript was filed with DOAH on June 22, 2020. On July 13, 2020, Respondent timely filed its Proposed Recommended Order. Petitioner did not file a proposed recommended order.

Except where otherwise indicated, all references to the Florida Statutes in this Recommended Order are to the 2019 edition.

FINDINGS OF FACT

Based upon the credibility of the witnesses and evidence presented at the final hearing and on the entire record of this proceeding, the following Findings of Fact are made:

1. SCI is a Texas corporation, whose sole office is located at 110 Sport Clips Way, Georgetown, Texas, 78628. SCI's Chief Executive Officer at the time of the alleged discriminatory events was Gordon B. Logan.

2. SCI is the owner of the "Sport Clips" trademarks and business system. It licenses the Sport Clips trademarks and business system to independent business people. Each Sport Clips franchisee signs a franchise agreement under which SCI licenses its trademarks and the franchisee agrees to abide by certain operating rules that protect the Sport Clips trademarks and brand. In addition, each franchisee pays to SCI a royalty and advertising fee, as well as other fees.

3. Sport Clips is a sports-themed hair-cutting salon which provides customers with haircuts, shampoo, and beard trims. There are approximately 1,800 Sport Clips franchise stores and an additional 75 Sport Clips stores owned and operated by SCI.

4. SCI provides operating rules to its franchisees in a confidential operating manual.[2] The operating manual does not cover employment policies, employee compensation, or employee benefits. These employment matters are determined by the individual franchisee. Instead, the operating manual focuses on business operations. According to Gordon Logan, CEO of SCI, the company trademark "[is] the essence of the business. You have to have a trademark and protect that trademark in order to have a viable system, one that franchisees can present in a consistent manner and the public knows what to expect when they come into a franchise business using that trademark." The purpose of the procedures and specifications in the operating manual is to protect the Sport Clips trademark and brand. If SCI failed to enforce its trademark and brand standards, it could lose the right to use the trademark. Further, it ensures that the public's expectations are met

[2] Neither party introduced a copy of the confidential operating manual into evidence at the hearing and therefore it is not part of the record of this case.

no matter which store they visit in the country, and protects the franchisees' investments in the franchise.

5. The procedures and specifications set forth in SCI's franchise agreement and operating manual, including requiring franchisees to participate in specific training, use Sport Clips uniforms, and use a particular point of sales system, are typical of the franchise industry.

6. JV-SC is a Florida Limited Liability Company managed by Drew C. Hopper. JV-SC's sole corporate office is located at 708 Main Street, Houston, Texas.

7. No SCI officer, employee, or representative holds any position with JV-SC, nor does any JV-SC officer, employee, or representative hold any position with SCI. Likewise, SCI has no ownership interest in any of Mr. Hopper's Sport Clips stores or business entities, and Mr. Hopper and his business entities have no ownership interest in SCI.

8. Over the last 21 years, Mr. Hopper has been involved in approximately 30 Sport Clips stores as a franchisee. Through JV-SC, Mr. Hopper operates eight Sport Clips franchise stores for profit in North Central Florida, including two locations in Gainesville. Mr. Hopper hired Ms. Kelley to manage the day-to-day operations of the Gainesville stores, and Ms. Kelley hired Ms. Turner, with Mr. Hopper's approval, to manage and cut hair at one of JV-SC's Gainesville stores.

9. JV-SC has a franchise agreement with SCI with regard to the Gainesville location managed by Ms. Turner ("Franchise Agreement"). Under the Franchise Agreement, SCI granted JV-SC "a non-exclusive and personal license to operate one unit of the Franchised Business in strict conformity with the Franchisor's standards and specifications" at 2231 Northwest 13th Street, Suite 20, Gainesville, Florida 32608 ("13th Street Location").

10. Ms. Kelley and Ms. Turner were responsible for recruiting and hiring hair stylists at the 13th Street Location. Ms. Turner was responsible for

supervising the stylists at the 13th Street Location. Employees in JV-SC's corporate office in Houston also handled human resources functions for JV-SC. Mr. Hopper ultimately decided what to pay stylists on behalf of JV-SC. JV-SC set employee expectations and Ms. Kelley and Ms. Turner were responsible for handling employee misconduct and firing decisions at the 13th Street Location. Ms. Kelley and Ms. Turner were also responsible for ensuring that the 13th Street Location was properly equipped with necessary tools and inventory.

11. Mr. Boyd was a hair stylist at the 13th Street Location. He was hired by Ms. Turner on August 30, 2017, and his rate of pay was set by JV-SC at $10 per hour. When he was hired, he completed a new hire form which states in bold print at the top: "JV-SC Investments LLC DBA Sport Clips FL901."

12. Mr. Boyd's employment was terminated less than three months after he was hired by Ms. Turner for a violation of JV-SC policy related to a customer complaint. SCI had no involvement in Mr. Boyd's hiring or termination of employment.

13. During his employment, Mr. Boyd's work schedule was established by Ms. Turner and his benefits, including holidays, vacation pay, and health insurance, were determined by JV-SC. If Mr. Boyd was going to be late or absent from work, he needed to contact Ms. Turner. Ms. Turner supervised Mr. Boyd's appearance and conduct while on duty at the 13th Street Location and she conducted his performance reviews. SCI has never exercised control over Mr. Boyd, including his working hours, pay, and vacation benefits.

14. Mr. Boyd's personnel records were created and maintained by JV-SC and the records repeatedly identify JV-SC as Mr. Boyd's employer. Mr. Boyd's paychecks and W-2 were issued by JV-SC and make no reference to SCI. Likewise, Ms. Turner and Ms. Kelley were hired and paid by JV-SC and JV-SC created and maintained their personnel records. SCI has no employment records indicating that Mr. Boyd, Ms. Turner, or Ms. Kelley were ever employed by SCI.

15. JV-SC had an employee handbook based on a template it received from SCI. The handbook was modified by JV-SC and could be modified by JV-SC at any time. Indeed, SCI expressly advised JV-SC to modify the form handbook to ensure it complied with local laws and to reflect the business practices of JV-SC.

16. The employee handbook identifies JV-SC in bold red print on the front cover and provides "Sport Clips stores are independently owned and operated franchises. Team Members working in franchised stores are employed by the franchisee (Team Leader) and are not employed by Sport Clips, Inc." JV-SC's employee handbook was provided to its employees, including Mr. Boyd. JV-SC's employee handbook required Mr. Boyd to report complaints of discrimination to his manager, Ms. Turner, or if he had a complaint concerning her, to Mr. Hopper at JV-SC.

17. Under section XVI of the Franchise Agreement, JV-SC "acknowledges and agrees that [JV-SC] is an independent business person and independent contractor." Further, this section provides in relevant part:

> Nothing in the Agreement is intended to make either party an agent, legal representative, subsidiary, joint venturer, partner, employee or servant of the other for any purpose whatsoever.
>
> During the term of this Agreement, [JV-SC] shall hold itself out to the public as an independent contractor operating the Franchised Business pursuant to a license from [SCI] and as an authorized user of the System and the Proprietary marks which are owned by [SCI]. [JV-SC] agrees to take such affirmative action as may be necessary to do so, including exhibiting to customers a sign provided by [SCI] in a conspicuous place on the premises of the Franchised Business.

18. In compliance with this section of the Franchise Agreement, JV-SC posted at its 13th Street Location a sign in the front of the store which states:

"This Sport Clips store is owned and operated by JV-SC Investments, LLC an independent Sport Clips franchisee."

19. With regard to JV-SC's employees, the Franchise Agreement provides that "[SCI] shall not have the power to hire, manage, compensate or fire [JV-SC's] employees and it is expressly agreed that [SCI] has no employment relationship with [JV-SC's] employees." The Franchise Agreement further provides:

> Franchisees are responsible for hiring, managing and compensating their employees within the laws of any jurisdiction in which they operate and are encouraged to consult their own legal counsel to ensure their compliance with all applicable laws. Franchisee and Franchisor recognize that Franchisor neither dictates nor controls labor and employment matters for the Franchisee or the Franchisee's employees.

20. Over the last 21 years, SCI has never told Mr. Hopper "who to hire, how to hire, how much [he] should hire them for, how much [he] should pay [employees]. It's always been up to [him]."

21. With regard to JV-SC's funds and store premises, the Franchise Agreement provides "[e]xcept as herein expressly provided, [SCI] may not control or have access to [JV-SC's] funds or the premises of the Franchised Business, or in any other way exercise dominion or control over the Franchised Business." SCI has no control or ownership interest over JV-SC's bank accounts, set up by Mr. Hopper; SCI is only authorized to withdraw from the accounts the specific royalties and fees set forth in the Franchise Agreement. Proceeds from the sales at the 13th Street Location are deposited into JV-SC's bank account.

22. SCI does not lease or own the property at the 13th Street Location or any of the 23 locations Mr. Hopper franchises from SCI. JV-SC leases the property from a third party. SCI does not own any real estate in common with or lease any property to Mr. Hopper or his related business entities.

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the parties and the subject matter of this case pursuant to sections 120.569 and 120.57(1), Florida Statutes.

24. The FCRA prohibits an "employer" from "discriminat[ing] against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race" and retaliating against "any person because that person has opposed any practice which is an unlawful employment practice under this section." § 760.10(1)(a) and (7), Fla. Stat.

25. The Commission's enforcement authority as to employment discrimination and retaliation is limited to acts committed by an "employer" as defined by section 760.02(7):

> "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.

26. FCRA's definition of "employer" corresponds to the definition of employer found in Title VII of the Civil Rights Act of 1964 ("Title VII") at 42 U.S.C. § 2000e(b), which provides in relevant part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . .

27. Because the FCRA was modeled on Title VII, Florida courts have determined that federal case law interpreting Title VII applies when a court is called upon to construe the FCRA. *See Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 21 (Fla. 3d 2009); *Fla. State Univ. v. Sondel*, 685 So. 2d 923, 925 (Fla. 1st DCA 1996); *Fla. Dep't of Cmty. Affairs v. Bryant*, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

28. Petitioner has the burden of proving by a preponderance of evidence that Respondent is his "employer" under the FCRA. *See Sondel*, 685 So. 2d at 926-929; *Fla. Dep't of Transp. v. J.W.C. Co. Inc.*, 396 So. 2d 778, 788-89 (Fla. 1st DCA 1981).

29. In this case, Petitioner named SCI as the sole Respondent in this proceeding, alleging that SCI was his "employer." SCI, a franchisor with its only office in Texas, denied that it was Petitioner's employer and submitted evidence that its franchisee, JV-SC, a Florida company, was Petitioner's employer.

30. In determining whether two entities, SCI and JV-SC in this instance, should both be viewed as an "employer," they must by extension of Title VII case law meet the "single or joint employer" test. Joint employment is primarily a factual issue. Supervision of day-to-day activities, authority to hire or fire, promulgation of work rules, and authority to make work assignments can all be indicia of a joint employment relationship. *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 306 (1st Cir. 1993). The record in this cause does not prove the existence of any of these factors.

31. DOAH administrative law judges have routinely applied the "single or joint employer test" in cases involving the question of whether the Respondent is Petitioner's "employer" under the FCRA. *See Harrison v. The MG Herring Group, Inc.*, Case No. 17-5067 (Fla. DOAH May 11, 2018; Fla. FCHR July 19, 2018); *Moss v. HCA, Inc.*, Case No. 11- 3983 (Fla. DOAH Oct. 2, 2012; Fla. FCHR Dec. 19, 2012); *Winsor v. Pathway Technologies, LLC*, Case No. 10-1830 (Fla. DOAH May 5, 2011; Fla. FCHR July 14, 2011).

32. "The predominant trend in determining whether two businesses should be treated as a single or joint employer under § 2000e(b) is to apply the standards promulgated by the National Labor Relations Board (NLRB). The NLRB factors include: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. The showing required to warrant a finding of

single employer status has been described as 'highly integrated with respect to ownership and operations.'" *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987)(internal citations omitted).

33. Application of the *McKenzie* criteria to the facts in the instant case does not lead to the conclusion that SCI and JV-SC were "highly integrated" in their ownership and operations.

34. In terms of the first factor, interrelation of operations, courts consider "whether the two entities have common offices, common record keeping, shared bank accounts and equipment." *Gray v. McDonald's USA, LLC*, 874 F. Supp. 2d 743, 750 (W.D. Tenn. 2012)(internal quotations omitted). In the instant case, there is no evidence indicating interrelation of operations. Rather, the undisputed evidence established that SCI and JV-SC operated wholly independent corporate offices and SCI did not own or lease any property with JV-SC, including the 13th Street Location. At all relevant times, JV-SC maintained its own records, including personnel records for Petitioner and his managers. JV-SC owned and operated its bank accounts at Wells Fargo, with SCI only being authorized to debit specific royalties and fees due to it under the Franchise Agreement. JV-SC supplied its own equipment for its stores, including the 13th Street Location, albeit with equipment that met the standards and specifications set forth by SCI.

35. In terms of the second factor, JV-SC controlled its own labor relations. JV-SC hired and fired its own employees, including Petitioner. JV-SC also managed its own payroll, including issuing paychecks to Mr. Boyd; set hours of work and rates of pay for its employees, including Mr. Boyd; and had its own employees, including Manager Ms. Turner and Area Manager Ms. Kelley, who supervised employees, including Mr. Boyd, and performed other human resource functions. Although there is evidence that SCI provided training to JV-SC managers and employees from time to time, no evidence indicates SCI maintained or exercised the ability to hire, manage, compensate, or fire JV-SC employees. The Franchise Agreement expressly

prohibits it, and there is no evidence SCI had any involvement in the hiring, managing, compensating, or firing of Petitioner or his managers.

36. While the Franchise Agreement imposes a number of obligations on JV-SC, these obligations relate to ensuring franchisees honor the Sport Clips business system to protect the Sport Clips trademark and business, not personnel management. One federal court found in a discrimination case against a franchisor, McDonald's, "[a]ny directives relating to personnel management—including obligating franchisees to employ adequate personnel so as to operate the Restaurant at its maximum capacity and efficiency and to ensure all employees wear uniforms, present a neat and clean appearance, and render competent and courteous service – are far too general to constitute control rising to the level of employment." *Id.* Likewise, SCI's typical franchise requirements related to employing a full-time, trained manager; proper staffing levels; Sport Clips uniforms; and method for serving customers are far too general to constitute control rising to the level of employment.

37. With regard to the third factor, no evidence indicates SCI and JV-SC shared common management. Both entities have different officers and executives involved with operating their businesses. It is undisputed that JV-SC had its own managers, Ms. Kelley and Ms. Turner, both of whom were hired by Mr. Hopper. Although SCI employs inspectors to inspect Sport Clips stores to ensure compliance with the Sport Clips system (an inspection Petitioner experienced only once during his employment and which had nothing to do with his termination of employment), this minimal supervision is insufficient as a matter of law to rise to the level of common management. *See Id.*

38. Finally, the fourth factor as to whether the two entities share "common ownership and financial control" is not met "[i]f neither of the entities is a sham." *Id.* It is undisputed that neither SCI nor JV-SC is a sham

entity. SCI is therefore not Mr. Boyd's employer under the single or joint employer test.

39. It is undisputed that SCI did not set Mr. Boyd's wage rate, select the benefit plans he could participate in, determine his work hours, or terminate his employment. Instead, only JV-SC had substantial and direct control over Mr. Boyd's terms and conditions of employment. Furthermore, requiring certain store hours, training, a full-time manager, and conducting sporadic inspections to ensure franchised businesses were meeting standards are insufficient under the rule to prove SCI was a joint employer.

40. Petitioner relies on *Del Pilar v. DHL Global Customer Solutions (USA), Inc.*, 993 So. 2d 142 (Fla. 1st DCA 2008), *Parker v. Domino's Pizza, Inc.*, 629 So. 2d 1026 (Fla. 4th DCA 1993), *Kane Furniture Corp. v. Miranda*, 506 So. 2d 1061 (Fla. 2d DCA 1987), and *Nazworth v. Swire Florida, Inc.*, 486 So. 2d 637 (Fla. 1st DCA 1986), to argue SCI is liable as Boyd's employer because as a franchisor, SCI had the right to control the means to be used by its franchisee, JV-SC.[3] However, this case law is inapplicable to the instant case in which Petitioner must prove SCI was his employer to impose liability under the FCRA, as these cases all involve plaintiffs injured in car accidents seeking to hold defendants liable in tort under a theory of vicarious liability. Further, all of the cases cited by Petitioner involve third-party plaintiffs who have no previous relationship with the defendants. "Those cases therefore focus on appearances as an indicator of agency because they involve plaintiffs who relied on the appearance of agency arguably because they had no other knowledge of the actual relationship between the franchisee and the franchisor." *Gray*, 874 F. Supp. 2d at 752. In this case, Petitioner had an employment relationship with JV-SC, a franchisee, which he had knowledge of given his personnel and payroll records, as well as the conspicuous signage

[3] Petitioner's Motion for Summary Final Order, filed December 9, 2019.

posted at the 13th Street Location and employee handbook informing him of this fact.

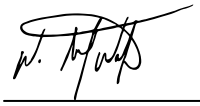
41. In any event, the *Parker, Kane Furniture,* and *Nazworth* cases were effectively superseded by the Florida Supreme Court in *Mobile Oil Corporation v. Bransford*, 648 So. 2d 119 (1995), which held that the simple existence of a franchise agreement between a franchisor and a franchisee is insufficient as a matter of law to establish vicarious liability of the franchisor.

42. A demonstration that Respondent was an "employer" as defined in section 760.02(7) is an essential, threshold element of Petitioner's prima facie case of employment discrimination. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006). Petitioner's evidence was insufficient as a matter of law to establish that SCI was his employer. Therefore, Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby RECOMMENDS that the Florida Commission on Human Relations issue a final order finding that Petitioner failed to prove that Sport Clips, Inc. is an "employer" pursuant to section 760.02(7), Florida Statute, and dismissing the Petitions for Relief filed in these consolidated cases.

DONE AND ENTERED this 12th day of August, 2020, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 12th day of August, 2020.

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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.