STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLENDE S. JEAN,

Petitioner,

vs. Case No. 20-3317

AHMED TEMPLE NO. 37 GRENADIER & SHRINE CLUB INCORPORATED, DESERTS OF FLORIDA, AND ANCIENT EGYPTIAN ARABIC ORDER NOBLE MYSTIC SHRINE,

Respondents.
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RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 11, 2021, by Zoom conference before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Louis J. Baptiste, Esquire
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For Respondent: Linda Bond Edwards, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner demonstrated that the Ahmed Temple No. 37 Grenadier & Shrine Club, Incorporated (the "Grenadier Club"), employed 15 or more employees for each working day in each of 20 or more calendar weeks

in the current or preceding calendar year, thus making it her "employer" for purposes of the Florida Civil Rights Act of 1992 ("the Act"). If Petitioner proves that the Grenadier Club is an employer under the Act, then a second hearing will be scheduled on the issue of whether she was subject to an unlawful employment practice as a result of the Grenadier Club maintaining a sexually-hostile work environment.

PRELIMINARY STATEMENT

On April 18, 2019, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations ("FCHR") naming the Ahmed Temple 37/Grenadier Club Lounge "Shriners Club" and the Ancient Egyptian Arabic Order Noble Mystic Shrine, collectively, as her employer, and as the entity responsible for sexual harassment and maintaining a sexually-hostile work environment in violation of the Act. The allegations were investigated, and on June 11, 2020, FCHR entered a Determination: No Reasonable Cause and a Notice of Determination: No Reasonable Cause.

A Petition for Relief was filed by Petitioner on July 16, 2020. FCHR transmitted the case to DOAH on July 23, 2020. A Notice of Hearing was issued setting the case for final hearing on September 22, 2020. On September 11, 2020, Respondent filed a Motion for Sixty-Day Continuance of Hearing, to which Petitioner objected. On September 17, 2020, this case was transferred to the undersigned. The motion for continuance was granted, and the final hearing was rescheduled to commence on October 26, 2020.

On October 19, 2020, Petitioner filed a Motion for Judicial Notice, requesting that the undersigned take judicial notice of sections of Leon County Ordinance Chapter 9: Human Rights. Petitioner has argued that it is appropriate for the Leon County Ordinance to be applied in this case. This case is not before the undersigned under a contractual assignment from Leon

County. In its absence, the undersigned does not have jurisdiction to interpret or apply Leon County ordinances. *See, e.g. Bradshaw v. Bott*, 205 So. 3d 815, 819 (Fla. 4th DCA 2016)("Although the Sheriff cannot pass ordinances, he could contract with [DOAH] to satisfy the provisions of the Act. Section 120.65(6), Florida Statutes (2016), provides: 'The division is authorized to provide administrative law judges on a contract basis to any governmental entity to conduct any hearing not covered by this section.'").

On October 20, 2020, Respondent filed a Dispositive Motion for Summary Judgment ("Dispositive Motion") in which it argued that the Grenadier Club did not meet the definition of an employer under the Act, thereby depriving DOAH of subject matter jurisdiction. The Dispositive Motion was accompanied by an Unopposed Motion to Continue Hearing Pending Outcome of Dispositive Jurisdictional Motion.

The October 26, 2020, hearing was canceled. On November 4, 2020, Petitioner filed a Response to the Dispositive Motion. Included with the Response was an Affidavit from Henry Parker, a former Deputy of Oasis for the Ahmed Temple No. 37. On November 17, 2020, a telephonic status conference was held.

On November 17, 2020, an Order Bifurcating Case and Notice of Hearing was entered which bifurcated the issue of Respondent's status as an "employer," and set an evidentiary hearing on that issue, pursuant to chapter 120, Florida Statutes, for December 14, 2020. The Notice of Hearing included an expedited discovery schedule for the December 14, 2020, hearing. On December 11, 2020, Petitioner filed a Motion to Continue which, after a telephonic motion hearing, was granted. An Order Granting Continuance and Rescheduling Hearing by Zoom Conference was entered on December 11,

2020, which set the final hearing for February 11, 2021. The hearing was then held as scheduled.

At the final hearing, Petitioner offered no testimony or evidence, relying instead on cross examination of Respondent's witnesses to establish that the Grenadier Club, either on its own or by attribution, had the requisite number of employees to meet the definition of an "employer" pursuant to section 760.02, Florida Statutes. Upon discussion on the record, the Affidavit of Henry Parker filed with the Response to the Dispositive Motion was accepted and given the weight merited. Since the Affidavit contained no averment that it was based on Mr. Parker's personal knowledge, the statements are hearsay, and insufficient on their own to support a finding of fact. § 120.57(1)(c), Fla. Stat. Petitioner also expressed the intent to use the deposition transcript of Mr. Parker. Mr. Parker was not deposed as a representative of any party, and there was no evidence that he met any of the criteria for using his deposition established in Florida Rule of Civil Procedure 1.330(a)(3). The transcript was ultimately not offered or received in evidence.

Respondent offered the testimony of Theophilus Baker, the Illustrious Potentate of Ahmed Temple 37; Pierre Rutledge, Deputy of the Desert; and Dr. William Hudson, Jr., a member of Ahmed Temple 37 and Chair of the Board of Governors of the Grenadier Club. Although Respondent submitted an exhibit book containing proposed exhibits 1 through 14, only Respondent's Exhibit 10, being the Book of Laws of the Ancient Egyptian Arabic Order Nobles of the Mystic Shrine of North and South America and its Jurisdictions, Inc. ("Book of Laws"), was received into evidence. Tr. 40:19 through 41:3.

The record was held open to allow for the review and filing of a current version of Respondent's Exhibit 10. Upon further investigation, it was

determined that the 2015 printing of the Book of Laws filed as Respondent's Exhibit 10 is the most current version. On February 17, 2021, a Notice Regarding Supplemental Exhibit was filed confirming that no supplemental exhibit was necessary.

A one-volume Transcript of the proceedings was filed on February 24, 2021. The time for filing proposed recommended orders was established as March 8, 2021. The parties each timely filed proposed recommended orders,[1] which have been considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2018) unless otherwise noted.[2]

FINDINGS OF FACT

Based on the stipulated facts, the testimony and documentary evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

Stipulated Facts

1. Prince Hall is the first African-American Masonry, established in Boston, Massachusetts. The Ancient Egyptian Arabic Order Nobles of the Mystic Shrine of North and South America and its Jurisdictions, Inc. (the "Imperial"), is the international Prince Hall of Shriners, a Masonic society, established in 1893. The Imperial Potentate, elected by its members, serves as the head member of the Imperial.

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[1] Petitioner's Proposed Recommended Order was filed after 5:00 p.m., and docketed at 8:00 a.m. on March 9, 2021. It is, nonetheless, deemed to have been timely filed and considered as such.

[2] Section 760.10 has been unchanged since 1992, save for a 2015 amendment adding pregnancy to the list of classifications protected from discriminatory employment practices. Ch. 2015-68, § 6, Laws of Fla. Likewise, section 760.02 has been unchanged since 1992, save for the addition of a definition for the term "public accommodations" in 2003. Ch. 2003-396, § 4, Laws of Fla.

2. Desert of Florida Temples and Courts (the "Desert") operates at the state level, and is composed of approximately 25 local temples in the state of Florida, including Ahmed Temple No. 37.

3. Ahmed Temple No. 37 (hereinafter referred to as the "Temple") is the local temple for members in Tallahassee, Florida. The Illustrious Potentate serves as the head member of the Temple.

4. The Imperial, the Desert, and the Temple are membership-based organizations.

5. The Grenadier Club is a social-club-and-bar business for persons 25 years of age and older.

6. The Grenadier Club is managed and controlled by a Board of Governors (the "BOG"). The BOG is composed of the Chairman, Vice Chairman, Treasurer, Secretary, and five additional members of the Temple. Members of the Temple vote to elect members of the BOG. Members of the BOG vote to elect the BOG Chairman. The Illustrious Potentate of the Temple is the Ex-Officio Chairman of the BOG.

7. Five voting members of the BOG constitute a quorum for the transaction of business.

8. At all times relevant, the BOG employed a manager who oversaw the operational management of the Grenadier Club.

9. At all times relevant, the Grenadier Club paid all of its employees' salaries.

10. At all times relevant, the Grenadier Club paid all of the Grenadier Club's expenses.

11. At all times relevant, the Grenadier Club kept and maintained its own books and records separate and apart from the Imperial, the Desert, and the Temple.

12. At all times relevant, the Grenadier Club filed its own tax returns separate and apart from the Imperial, the Desert, and the Temple.

13. At all times relevant, 25 percent of the Grenadier Club's monthly net revenue was submitted to the Temple to be used for charity.

14. At all times relevant, the Grenadier Club paid the Imperial a $250.00 annual operational fee.

15. In December of 2018, Henry Parker was the Deputy of Oasis for the Desert, which served as a conduit between the Temple and the Imperial. Mr. Parker was also a member of the Temple.

16. In December of 2018, Mr. Parker was designated by the then-Imperial Potentate to remove the then-Illustrious Potentate of the Temple and the Chairman of the BOG and to take over operations of Grenadier Club. Thereafter, Mr. Parker unilaterally, without approval, input, or vote by members of the Temple, appointed members to serve on the BOG.

17. From December of 2018 to August of 2020, Mr. Parker, as a member of the Temple, had total oversight over Grenadier Club operations.

18. From December of 2018 to August of 2020, the Grenadier Club's operations did not change.

19. From December of 2018 to August of 2020, there were no additional restrictions on the Grenadier Club at the direction of the Imperial.

20. From December of 2018 to August of 2020, when Mr. Parker was acting as the overseer of Grenadier Club, Mr. Parker did not exert any more control over the Grenadier Club employees than the Temple would have.

21. From December of 2018 to August of 2020, when Mr. Parker was acting as the overseer of Grenadier Club, Mr. Parker did not impose any additional financial requirements on the Grenadier Club.

Facts Adduced at Hearing

22. The Temple meets at a building located in Frenchtown, a locally well-recognized area near downtown Tallahassee.

23. The Grenadier Club operates under the auspices of the Temple from a location separate from the Temple. The current operating hours for the

Grenadier Club are Saturdays from 9:00 p.m. until 2:00 a.m., and Mondays from 7:00 p.m. to 12:00 a.m. However, Dr. Hudson indicated that the Grenadier Club has been operating "on and off" since the Covid-19 pandemic. There was no evidence of the operating hours in 2018.[3]

24. At all times material to this proceeding, Petitioner was directly employed by the Grenadier Club. She worked at the Grenadier Club as a server/bartender from April 2018 until August 2018.

25. The members of the Temple, including the BOG, are unpaid members/volunteers. The alleged actions of the then-Chairman of the BOG towards Petitioner form the basis for her Charge of Discrimination and Petition for Relief.

26. The threshold issue in this proceeding is whether the Grenadier Club had the requisite number of employees to bring it under the jurisdiction of the Act as Petitioner's "employer." If Petitioner fails in her proof of that issue, any discussion of acts that may have constituted sexual harassment or resulted in the creation of a sexually-hostile work environment become superfluous and unnecessary.

The Book of Laws

27. The Book of Laws consists of the Constitution, Bylaws, and General Laws governing the Ancient Egyptian Arabic Order Nobles of the Mystic Shrine of North and South America and its Jurisdictions, Inc. The Book of Laws establishes the hierarchy of the organizational entities that comprise the Imperial, the Desert, and the Temples. Although there is a hierarchy, and a general means established to ensure cohesiveness, uniformity, and compliance with the goals, customs, and governance of the organization, day-to-day management and administration is performed at the Temple level.

[3] The allegations in the Petition for Relief suggest that the operating "shifts" were greater in 2018 than they are now. However, the evidence adduced at the hearing was not sufficient to establish the 2018 operating hours.

28. The Book of Laws provides that the Imperial has a committee "to encourage, develop, and promote the establishment of Grenadier Clubs among the several Temples," and that "[t]he committee shall help improve club operations and accountability through established guidelines approved by the Imperial Potentate and the Imperial Divan."

29. A group of Nobles in a Temple is allowed to operate a Grenadier Club only by "first obtaining permission and a special dispensation from the Imperial Potentate." Once such has been received, membership in the Grenadier Club is limited to Nobles in good standing in their respective Temples, and all operations related to a Grenadier Club are within the exclusive control of the Temple, through the elected BOG. *See*, Book of Laws, Appendix II - Uniform Bylaws for Temples, Article XII, Grenadier Clubs.

Facts Regarding the Grenadier Club as an "Employer"

30. The Grenadier Club is incorporated as a legal entity unto itself. The evidence adduced at the hearing demonstrates that the Grenadier Club has paid employees, but the number of employees was not proven.

31. The Grenadier Club occasionally hires DJs and private security. The evidence established that they are not employees, but rather are independent contractors. The number of independent contractors and their schedules was not proven.

32. As set forth in the stipulated facts above, The Grenadier Club is managed and controlled by the nine-member BOG, which consists exclusively of members of the Temple. The BOG employed a manager who oversaw the operational management of the Grenadier Club.

33. There was no competent substantial evidence offered or received that the Grenadier Club employed 15 or more employees for each working day in each of 20 or more calendar weeks in the calendar year during Petitioner's employment at the Grenadier Club or the year preceding her employment at

the Grenadier Club. Thus, based on the evidence adduced at hearing, the Grenadier Club is not an "employer" as defined by section 760.10.

34. In order to prove the threshold element of her claim for relief, Petitioner must thus establish that employees of other entities should be imputed to the Grenadier Club due to integrated activities or common control of the Grenadier Club's operations or employees.

The Temple

35. The evidence adduced at the hearing demonstrates that the Temple has no employees. It is an organization operated entirely by its unpaid, volunteer members.

36. The members of the BOG are members of the Temple. The evidence adduced at the hearing demonstrates that the members of the BOG are not employees of either the Temple or the Grenadier Club.

37. The Book of Laws provides that, subject to the mandates of the Temple, the BOG has "sole control and management of the [Grenadier] Club, its property and employees." The Temple, through the BOG, makes all employment decisions for the Grenadier Club, and has exclusive control over the pay and the terms and conditions of Grenadier Club employees.

38. The Book of Laws provides that, subject to the mandates of the Temple, the BOG may employ a manager and other employees, determine their duties, and fix their compensation.

39. The BOG, consisting of and elected by members of the Temple, hired the manager of the Grenadier Club. Decisions regarding employee hiring, supervision, terms and conditions of employment, discipline, and firing of Grenadier Club employees were the exclusive responsibility of the BOG and the Grenadier Club manager.

The Desert

40. The evidence adduced at the hearing demonstrates that the Desert of Florida has no paid employees. It is an organization operated entirely by its unpaid, volunteer members. The Desert has its own organizational and management structure separate from that of the Imperial, the Temple, and the Grenadier Club.

41. The current Deputy of the Desert, who was the individual filling that position during the period of Petitioner's employment at the Grenadier Club, is not a member of the Temple.

The Imperial

42. The Imperial is an organization international in its scope. It maintains its headquarters in Memphis, Tennessee. Mr. Parker understood -- though not based on averred personal knowledge -- that the organization as a whole has approximately 350,000 members from 196 temples in the U.S.A., Canada, Brazil, Bolivia, Mexico, Panama, the Philippines, Europe, and Australia. That estimate is accepted not for the truth of the specific matters asserted, but as providing a general sense of the size and scope of the organization.

43. The evidence adduced at the hearing demonstrates that the Imperial has employees that work for the Imperial Council. The number of employees was not proven, and there was no competent substantial evidence offered or received that the Imperial employed 15 or more employees for each working day in each of 20 or more calendar weeks in the calendar year during Petitioner's employment at the Grenadier Club or the year preceding her employment at the Grenadier Club.

Relationship of the Imperial and the Desert to the Grenadier Club

44. The Book of Laws vests no authority for the management or operation of the Grenadier Club in either the Desert or the Imperial. Petitioner introduced no evidence that either the Grenadier Club or the Temple,

through the BOG, delegated any control of traditional rights over its employees to any other entity.

45. The evidence adduced at the hearing demonstrates that neither the Desert nor the Imperial have operational control over the Grenadier Club.

46. The Desert and the Imperial have no shared management of the Grenadier Club, and have no role in the hiring or firing of employees of the Grenadier Club.

47. Neither the Desert nor the Imperial had supervisory control over Petitioner or her work schedule. No member of the Desert or the Imperial evaluated Petitioner's performance or disciplined Petitioner.

48. Employees of the Grenadier Club are paid by the Grenadier Club, and not by the Desert or the Imperial.

49. The Desert neither gives nor receives funds from the Grenadier Club.

50. Other than the payment of the $250.00 annual operational fee from the Grenadier Club to the Imperial, the Imperial neither gives nor receives funds from the Grenadier Club.

51. There was no evidence offered or received that the Grenadier Club has common officers, directors, or employees with either the Desert or the Imperial.

52. There was no evidence offered or received that the Grenadier Club shares or comingles bank accounts with either the Desert or the Imperial.

CONCLUSIONS OF LAW

53. For purposes of this proceeding, DOAH has jurisdiction over the parties and the subject matter pursuant to sections 120.569, 120.57(1), and 760.11, Florida Statutes.

54. Petitioner has the burden of proving by a preponderance of the evidence that the Grenadier Club 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); § 120.57(1)(j), Fla. Stat.[4]

55. Chapter 760, Part I, is patterned after Title VII of the Civil Rights Act of 1964, as amended. It is well established that "if a Florida statute is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." *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).

56. A threshold question in this case is whether the Grenadier Club is an "employer" as defined in section 760.02(7), which is a prerequisite for Petitioner's claim to be actionable under the Act. The United States Supreme Court has determined that question to be an element of a person's claim for relief. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006), *accord*, *Morrison v. Amway Corp.*, 323 F.3d 920 (11th Cir. 2003). FCHR has expressed its agreement with that determination, and has concluded that:

> whether a Respondent has the requisite number of employees to be governed by the Florida Civil Rights Act of 1992 is not a jurisdictional issue, but rather is an element of Petitioner's claim for relief ...

Hill v. Goga Bap Corp., d/b/a Subway Store No. 13268, Case No. 12-0886 (DOAH Jan. 7, 2013; FCHR Mar. 11, 2013).

57. Section 760.10(1), provides that:

> It is an unlawful employment practice for an *employer*:

[4] This case was tried as a final hearing under chapter 120.57(1). It was not a motion hearing on the Dispositive Motion. Thus, the burden of proof was not on Respondent to prove that summary judgment should be granted, with all allegations being deemed to be true, and with every reasonable inference being applied in Petitioner's favor. Rather, this case was noticed and tried as a full evidentiary hearing on the issue of whether Respondent has the requisite number of employees to qualify as an "employer" under section 760.02(7), with the burden on Petitioner to prove the essential elements of her claim.

> (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.
>
> (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

58. Section 760.02(7) defines "employer" as follows:

> "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.[5]

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[5] Respondent argued that the definition of "employer" in Title VII of the Federal Civil Rights Act, 42 U.S.C. § 2000e(b), should be applied in this case. Though Federal interpretive caselaw is to be applied in cases under the Act, the underlying law to be applied is that enacted by the Florida Legislature. Thus, the specific Federal exclusion of "a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26," which does not appear in the Act, is not applicable here. Furthermore, there was no evidence entered into the record of the 501(c) tax status of any entity discussed in this proceeding. The undersigned declines to take post-hearing official recognition of the Imperial's 2017 and 2018 Federal tax returns as "[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned" pursuant to section 90.202(12), Florida Statutes. As to documents of that nature, the Florida Supreme Court has explained:

> ... first, the facts to be judicially noticed must be of common notoriety, and second, courts should exercise great caution when using judicial notice. As has been held in this state and elsewhere, judicial notice is not intended to "fill the vacuum created by the failure of a party to prove an essential fact."

Huff v. State, 495 So. 2d 145, 151 (Fla. 1986); *see also Maradie v. Maradie*, 680 So. 2d 538, 541 (Fla. 1st DCA 1996)("Thus, historically, 'judicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities.'").

59. Thus, for Petitioner to meet her burden of proof, she must demonstrate that the Grenadier Club employed 15 or more individuals for each working day in 20 or more weeks during the year in question. *Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202, 212 (1997).

60. Other than the hired manager of the Grenadier Club and Petitioner, there was no competent substantial evidence offered or received as to any "employees" of the Grenadier Club. The evidence is not sufficient to support a conclusion that the Grenadier Club is an "employer" as defined in section 760.02.

Attribution of Employees

61. Given the absence of competent substantial evidence of the number of employees of the Grenadier Club, an analysis is warranted to determine whether the employees of another related entity should be aggregated with those of the Grenadier Club so that the combined number of employees is 15 or more. In establishing the criteria to be applied for such aggregation, the Eleventh Circuit Court of Appeals has held that:

> We have identified three circumstances in which it is appropriate to aggregate multiple entities for the purposes of counting employees. First, where two ostensibly separate entities are "'highly integrated with respect to ownership and operations,'" we may count them together under Title VII. ... This is the "single employer" or "integrated enterprise" test. Second, where two entities contract with each other for the performance of some task, and one company retains sufficient control over the terms and conditions of employment of the other company's employees, we may treat the entities as "joint employers" and aggregate them. ... This is the "joint employer" test. Third, where an employer delegates sufficient control of some traditional rights over employees to a third party, we may treat the third party as an agent of the employer and aggregate the two when counting employees. ... This is the "agency" test. (internal citations omitted)

Lyes v. City of Riviera Beach, 166 F.3d 1332, 1341 (11th Cir. 1999); *see also Martinolich v. Golden Leaf Mgmt., Inc.*, 786 So. 2d 613, 615 (Fla. 3d DCA 2001).

62. Petitioner has relied exclusively on the application of the "enterprise test" as the basis for her claim that employees of other entities, specifically those of the Desert and the Imperial, should be attributed to the Grenadier Club.

"Single Employer"/"Integrated Enterprise" Test

63. In its analysis of the "single employer" test, the *Lyes* Court held that:

> In determining whether two non-governmental entities should be consolidated and counted as a single employer, we have applied the standard promulgated in NLRA cases by the National Labor Relations Board. ... This standard sets out four criteria for determining whether nominally separate entities should be treated as an integrated enterprise. (internal citation omitted). Under the so-called "NLRB test," we look for "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control."

Lyes v. City of Riviera Beach, 166 F.3d at 1341; *see also Reeves v. DSI Sec. Servs.*, 331 Fed. App'x. 659, 663 (11th Cir. 2009). The Court went on to hold that "[c]ourts applying the NLRB 'single employer' test to private entities in Title VII cases have held that not every factor need be present, and no single factor is controlling." *Lyes*, 166 F. 3d at 1341, n.5; *see also E.E.O.C. v. Dolphin Cruise Line, Inc.*, 945 F. Supp. 1550 (S.D. Fla. 1996).

64. In determining whether the first criterion of "interrelation of operations" is met, courts look to whether the companies share employees and resources. *Guaqueta v. Universal Beverages, LLC*, 2010 WL 2757193 at *6 (S.D. Fla. 2010)(citing *Walker v. Boys & Girls Club of Am.*, 38 F. Supp. 2d 1326, 1331 (M.D. Ala. 1999)) ("[T]he National Labor Relations Board has

identified seven indicia of interrelatedness: (1) combined accounting records; (2) combined bank accounts; (3) combined lines of credit; (4) combined payroll preparation; (5) combined switchboards; (6) combined telephone numbers and (7) combined officers.").

65. Applying the above analysis, the evidence establishes that none of the indicia of interrelatedness exist in this case. The factor closest to being pertinent is that the Illustrious Potentate of the Temple is invited to the Imperial's annual convention, a tenous thread.

66. In determining whether the second criterion of "centralized control of labor relations" has been met, courts look to "which company has the power to hire and fire employees and control employment practices." *Guaqueta* at *6 (citing *Fike v. Gold Kist, Inc.*, 514 F. Supp. 722, 727 (N.D. Ala. 1981))("[T]he 'control' of labor relations is not potential control but active control of day-to-day labor relations.").

67. The preponderance of the evidence established that neither the Imperial nor the Desert had any control whatsoever of the day-to-day labor relations of the Grenadier Club.

68. The third criterion of "common management" is dependent on there being common directors and officers. *Guaqueta* at *7 (citing *Fike* at 727)("Cases treating two separate corporate entities as a single employer have placed heavy emphasis on the existence of common directors and officers.").

69. The preponderance of the evidence established that neither the Imperial nor the Desert had common directors or officers with the Temple or the Grenadier Club.

70. The fourth and final criterion of the "single employer" test is "common ownership or financial control." Courts have held that a finding of common ownership or financial control alone is, in itself, insufficient to establish the single employer or integrated enterprise criterion absent proof of the other factors. *Guaqueta* at *7-8. Even if Petitioner had proven other elements of the

single employer or integrated enterprise test -- which she did not -- the following analysis of the necessary degree of financial control is instructive:

> In *Player v. Nations Biologics, Inc.*, 993 F. Supp. 878, 883 (M.D. Ala. 1997), the plaintiff established financial control where the main company maintained a centralized account pooling the profits of all the other companies to cover the losses of the less successful companies. By contrast in *Fike*, the district court did not find common ownership where one company did not exercise financial control over the other company, revenues and operating expenses were not comingled, and one company did not borrow funds from the other. 514 F. Supp. at 727.

Guaqueta at *8.

71. In another case involving strikingly similar facts, the District Court for the Northern District of New York dismissed an action under Title VII brought by a former employee/bartender of a local American Legion post after concluding that the national and state American Legion offices were not the Plaintiff's employers under Title VII. The Court, in dismissing the complaint of discrimination, determined that the local Post 489 was a separate entity, holding that:

> There was no integrated economic relationship between [the American Legion] and Post 489, nor did it enjoy authority or control over the post's employment practices affecting plaintiff.
>
> Plaintiff has not linked the American Legion with the American Legion–NY or Post 489's operations, labor relations, management, and ownership or financial control. The American Legion does not share offices, bank accounts or equipment with any local post. Each department and local post is responsible for its own funds, accounts and records. Nor is there any evidence of an interrelationship between the administrative operations of the American Legion and Post 489.

> The American Legion, American Legion–NY and Post 489 do not share management, either. Each has its own management organization, board of directors and/or officers. Local posts enjoy exclusive control over their government, administration and activities. The American Legion is powerless to intercede in the affairs and operations of the local posts; rather, its authority is limited to the formation and termination of a local post's charter.
>
> Additionally, the American Legion does not have control over labor relations and personnel of Post 489 or the American Legion–NY. Each local post ascertains its employment needs and establishes its own terms and conditions of employment. The American Legion does not participate in hiring, training, wage payment, supervision or disciplining of any of the local posts' employees. The American Legion and Post 489 have individual I.R.S. employment identification numbers, these entities do not have common ownership or consolidated financial control. Each has its own accounting system, financial records, and bank accounts.

Brown v. Am. Legion Cortland City Post 489, 64 F. Supp. 2d 96, 100–101 (N.D.N.Y. 1999)

72. The preponderance of the evidence established that there is no common ownership or financial control between the Imperial or the Desert and either the Grenadier Club or the Temple. The payment of the $250.00 annual operational fee from the Grenadier Club to the Imperial is not sufficient to form the basis for an attribution of employees to the Grenadier Club under the "single employer" test.

73. Finally, in the opening statements at the final hearing, Petitioner analogized the relationship between the Grenadier Club and the higher echelon entities as akin to that of a McDonald's franchise and McDonald's

Corporation, with the focus being the degree of control McDonald's Corporation exercises over its franchisees, from granting or revoking the franchises to setting the menu and décor. Petitioner argued that the relationship between the Grenadier Club and the Imperial should be evaluated using the franchisee/McDonald's Corporation model of pervasive control, concluding that the Imperial's employees should be attributed to the Grenadier Club.[6] In that regard, the courts have examined that very relationship in the context of a claim of discrimination under Title VII. In *Evans v. McDonald's Corporation*, 936 F.2d 1087, 1090 (10th Cir. 1991), the Court held that:

> Evans contends that control is the key issue in determining an employer/employee relationship, and alleges that McDonald's exerted "monumental control" over the operations of Everett Allen's franchises. Control is, we agree, an important factor in any determination of this issue. *See* [*Wheeler v. Hurdman*, 825 F.2d 257, 270 (10th Cir.), cert. denied, 484 U.S. 986, 98 L. Ed. 2d 501, 108 S. Ct. 503 (1987)](control over details and results of worker's performance is the most important factor in determining employer/employee relationship). In this case McDonald's did not exert the type of control that would make it liable as an employer under Title VII. McDonald's may have stringently controlled the manner of its franchisee's operations, conducted frequent inspections, and provided training for franchise employees. The record also indicates, however, that McDonald's did not have control over Everett Allen's labor relations with his franchise employees. *See* [*Armbruster v. Quinn*, 711 F.2d 1332, 1337-38 (6th Cir. 1983)] (control over elements of labor relations is a central concern); [*Carter v. Shop Rite Foods, Inc.*, 470 F. Supp. 1150, 1161 (N.D. Tex. 1979)](without control over labor relations, stringent control over details of independent

[6] Again, even if attribution of employees of the Imperial were appropriate -- which it is not -- there was no proof of the number of employees of the Imperial. Thus, there could be no finding that even with the Imperial's employees added, the total number of Imperial/Grenadier Club employees met the standard established in section 760.02(7).

> operators did not make defendant an employer of operator's employees). McDonald's did not have financial control over Everett Allen's franchises. Outside of the necessary control over conformity to standard operational details inherent in many franchise settings, McDonald's only real control over Everett Allen was its power to terminate his franchises. Thus, on the record before us, we hold, as a matter of law, that McDonald's did not have the control over Everett Allen's franchises necessary to make it liable as an employer of Everett Allen's employees under Title VII.

74. Similar to a franchise agreement, the Book of Laws sets forth the general structural relationship between the Imperial and its subordinate, but independent, entities. It does not establish financial control or control over labor relations that would make the Imperial liable as an employer of the Grenadier Club's employees under the Act.

Conclusion

75. Having applied the criteria set forth in the case law analyzed above, there was not sufficient competent, substantial evidence to support a conclusion that the Grenadier Club has the requisite number of employees to be an "employer" as defined in section 760.02(7).

76. Having applied the criteria set forth in the case law analyzed above, there was sufficient competent, substantial evidence to support a conclusion that the Temple had sufficient control over the Grenadier Club to allow for attribution of the Temple's employees to the Grenadier Club. However, the Temple has no employees. Thus, the inadequate number of employees of the Grenadier Club plus zero is still an inadequate number of employees to make the Grenadier Club an "employer" as defined in section 760.02(7).

77. Having applied the criteria set forth in the case law analyzed above, there was not sufficient competent, substantial evidence to support a conclusion that either the Desert or the Imperial had sufficient control over

the Grenadier Club to allow for attribution of their employees to the Grenadier Club.

78. There being no evidence that the Grenadier Club falls under the purview of the Act, there is no purpose to be served by proceeding with a determination of whether Petitioner met her burden of establishing discrimination on the basis of sex or as retaliation as alleged in her Complaint of Discrimination. To do so would amount to, essentially, the issuance of an advisory order, which the undersigned is not at liberty to do.

79. Petitioner's claim is not actionable under section 760.10.

80. This Recommended Order is limited to a determination of whether Respondent is liable for alleged employment discrimination against Petitioner pursuant to the Florida Civil Rights Act of 1992. The Petition for Relief also includes a count for Civil Battery and a count for retaliation pursuant to section 448.102, Florida Statutes. Furthermore, Petitioner has raised the issue of compliance with Leon County Ordinance Chapter 9: Human Rights. This Recommended Order is not intended to, and does not, rule on either of those counts, or on the application of any Leon County ordinance, and any rights Petitioner may have to bring an action based thereon in any court of competent jurisdiction is unaffected.

RECOMMENDATION

Upon the consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered by the Florida Commission on Human Relations dismissing the Employment Complaint of Discrimination, based upon Petitioner's failure to meet her burden of proof to establish that Respondent, Ahmed Temple No. 37 Grenadier & Shrine Club, Incorporated, is an "employer" as defined in section 760.02(7), either through its own employees or through attribution.

DONE AND ENTERED this 12th day of March, 2021, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of March, 2021.

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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.