STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS
TALLAHASSEE, FLORIDA

JANE SMITH

Claimant,

vs. FCHR NO.: 22-09999

WEST FLORIDA PEDIATRICS, INC.,
a Florida Corporation,

Respondent.
_____/

RESPONDENT WEST FLORIDA PEDIATRICS, INC.'S

MEMORANDUM OF LAW

IN SUPPORT OF ITS

MOTION TO DISMISS FOR LACK OF JURISDICTION

COMES NOW the Respondent, West Florida Pediatrics, Inc., by and through its undersigned counsel, and files this Memorandum of Law to discuss the legal authority that exists to support its Motion to Dismiss for Lack of Jurisdiction, and states:

I. BACKGROUND AND FACTS

Jane Smith began work at West Florida Pediatrics, Inc. in January 1997. On October 8, 2001, Ms. Smith's employment was terminated by West Florida Pediatrics, Inc. On March 21, 2002, Ms. Smith filed a complaint of discrimination with the Florida Commission on Human Relations, alleging racial discrimination by her employer under the Florida Civil Rights Act (FCRA) and Title VII of the Federal Civil Rights Act of 1964. West Florida Pediatrics, Inc. is located in Deltona, Florida. It is a small professional association consisting of three medical

doctors whoa re the owners. At the time of this incident, in October 2001, West Florida Pediatrics only had eleven (11) employees, including Ms. Smith. At the present time, it only has nine (9) employees. At no time during the year prior to Ms. Smith's termination nor at any time since Ms. Smith's termination did West Florida Pediatrics have fifteen (15) employees.

The affidavit of Dr. G.B. Shaw, the President of West Florida Pediatrics, Inc., attached to the Motion to Dismiss, shows that West Florida Pediatrics, Inc., is a professional association (Inc.) owned by three doctors for which each of the following is true:

1. They each have contributed capital to form or operate the Professional Association.
2. They each are directors of the Professional Association.
3. They each participate in all significant management decisions of the Professional Association.
4. They each receive compensation based on the profits of the Professional Association.
5. If this Professional Association was not a Professional Association and then they each would be partners as this is how they function in their decision making and management of this medical practice.
6. They each have an equal number of shares and an equal voting right in all of the Professional Association's decisions.
7. Each of them has an equal voting right in all major decisions concerning hiring, termination, offers of employment, offers of partnership (shareholder status) to other physicians, and contracting with outside parties.
8. They each share in a percentage of the Professional Association’s profits.

9. They each share in and participate in the setting of all significant firm policies and major decisions of the Professional Association.

10. They each consider themselves to be shareholders, owners and partners and not "employees."

11. Reimbursement to each of them, the owners/shareholders is based solely on the profits of the Professional Association.

12. At the time of Jane Smith's termination in October 2001, the Professional Association only had eleven (11) employees, including Ms. Smith. It currently has only nine (9) employees; at no time in the year prior to Ms. Smith's termination or since that time has the Professional Association had fifteen (15) or more employees.

II. DISCUSSION OF LAW

The Florida Civil Rights Act of 1992 (FCRA) states, in pertinent part, that it is an unlawful employment practice for an employer 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. Section 760.10 (1)(a), Fla. Stat. Ann. In order to bring a civil claim under the FCRA, the aggrieved party must first file a complaint with the Florida Commission on Human Relations, who then has the responsibility of determining whether there is reasonable cause to believe that a discriminatory practice has occurred in violation of the Act.

The FCRA applies to acts of discrimination committed by a person or entity that meets the statutory definition of "employer." An employer is defined as any person employing 15 or more

employees for each working day in each of 20 or more calendar weeks in current or preceding calendar year, and any agent of such a person. Section 760.02(7), Fla. Stat.

If an employer does not employ 15 or more employees for 20 weeks in the current or preceding calendar year, the employer will not be considered a statutory employer for purposes of the Florida Civil Rights Act. As a result, the FCRA will not apply and the Florida Commission on Human Relations will lack subject matter jurisdiction.

The Florida Civil Rights Act does not provide a definition of employee and there is a dearth of Florida case law interpreting the definition of employer under the FCRA. The is no Florida case law interpreting the meaning of employee as referred to in the definition of employer found in the FCRA. More specifically, there is no Florida case law addressing the issue of whether shareholders are considered employees for the purposes of this act. Without a statutory definition or relevant case law, we must look elsewhere for clarification of this issue.

Florida courts have held that when a Florida statute is modeled after a federal law on the same subject, the Florida statute should be interpreted in the same way as its federal prototype. Brand v. Florida Power Corporation, 633 So. 2d 504 (Fla. 1st DCA 1994). This doctrine has been applied to the FCRA and its federal counterpart, the Civil Rights Act of 1964. In Urquiola v. Linen Supermarket, Inc., 1995 U.S. Dist. LEXIS 9902, No. 94-14- Civ-Orl-19, 1995 WL 266582(M.D. Fla. March 23, 1995), the Middle District of Florida held that in light of the wording of Section 760.10 Florida Statutes, and Title VII of the Civil Rights Act of 1964 being almost identical and "in the absence of a contrary interpretation of the statute by a Florida court," it would follow Title VII jurisprudence.

We may therefore look to the federal statute for guidance on interpreting the Florida

statute. Title VII provides a definition of employee:

> ". . . an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States." 42 U.S.C. Section 2000e

The definition of employee in the federal statute provides little clarification on the issue of whether shareholders are deemed employees for the purposes of the act. However, there is federal case law interpreting the federal Civil Rights Act and clarifying who qualifies as an employee under that Act.

In Ziegler v. Anesthesia Assoc. of Lancaster, 2002 U.S. Dist. LEXIS 4031, No. 00-4803 (E.D. Penn. March 12, 2002), the court addressed the issue of whether shareholders are employees for Title VII purposes. The court stated that "in deciding whether the shareholders of a professional corporation should be considered employees under Title VII, courts in the best reasoned cases have looked beyond the formal organization of the entity and considered all factors relevant to the pertinent relationship and the "economic reality" of the firm's existence and operation." Ziegler v. Anesthesia Assoc. of Lancaster, 2002 U.S. Dist. LEXIS 4031 at 5.

The court proceeded to set forth factors as part of its analysis to determine whether the role

of the shareholders in the organization was essentially that of an owner or an employee. The "economic reality" analysis focuses on the extent to which a shareholder manages, controls, and owns the business. See Fountain v. Metcalf, Zima & Co., P.A., 925 F. 2d 1398, 1400-01 (11th Cir. 1990) based on actual role in management and control shareholder in professional corporation was in reality partner and not "employee" for purposes of the Age Discrimination in Employment Act (ADEA)). In general, the analysis determines whether the shareholder functions more like an owner or an employee. A shareholder in a professional corporation who contributes capital, participates in all significant management decisions, receives compensation based on profits and essentially functions as a partner is in reality, and should be deemed, an employer and not an employee. Ziegler v. Anesthesia Assoc. of Lancaster, 2002 U.S. Dist. LEXIS 4031 at 5. We will examine each below.

The first of the major factors is whether the shareholder is allowed to participate in all significant management decisions. In Ziegler, the court found the fact that the shareholders were accorded equal voting rights in virtually all matters including hiring, termination, offers of partnership and contracting with outside parties to be evidence that they were owners. The decision in Ziegler seems to suggest that actual exercise of this authority is less important than having the authority. See also Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 (8th Cir. 1996) (shareholders of professional corporation deemed owners for Title VII purposes where they participated in all significant management decisions and set firm policy); Saxon v. Thompson Orthodontics, 71 F. Supp. 2d 1085, 1090 (D. Kan. 1999) (shareholders who participate in all management decisions and set firm policy are employers); Moebus v. Ob-Gyn Assocs., Inc., 937 F. Supp. 867, 870 (E.D. Mo. 1996) (shareholders who participated in all major decisions not

employees for purposes of ADEA).

The second major factor in the analysis set forth in Ziegler is whether the shareholders make a capital contribution. Contributed capital demonstrates an ownership interest and the individual should be treated accordingly. Also, the court in the Ziegler case indicated that the shareholders compensation arrangement will be indicative of their role as either employer or employee. Shareholders that receive compensation based on a percentage of the company's profits will likely be acting as owners. In addition, the court indicated that the absence of any supervision over the shareholder will be evidence of ownership rather than employment. See also, Devine, 100 F.3d at 81 (contributions to firm capital and compensation based on profits indicate shareholder is employer); Schmidt v. Ottawa Medical Center, P.C., 155 F. Supp. 2d 919, 922 (N.D. Ill. 2001) (economic reality that a shareholder is like a partner in a partnership is supported by the fact he shares in the profits); Reddy v. Good Samaritan Hosp. and Health Ctr., 137 F. Supp. 2d 948, 979 (S.D. Ohio 2001) (position of shareholder in professional corporation which included "significant management control and a share of the profits" not employee for purposes of Title VII).

The court in Ziegler dismissed the receipt of pension and health benefits under a firm benefit plan and the withholding of taxes as evidence of an employment relationship. See, Devine, 100 F.3d at 81; Baker v. Berger, 2001 U.S. Dist. LEXIS 14081, 2001 WL 1028394 at 4 (N.D. Ill. Sept. 6, 2001).

The court in Ziegler also dismissed the fact that the shareholders signed employment agreements as evidence of their employment. First, the court stated that it would look at the function of the individuals, not merely titles. Second, the court found the execution of shareholder

agreements by the shareholders to be equally indicative of an ownership interest. In addition, the language within an employment agreement may be evidence of the function of the individual. If the language specifies the number of hours to be worked per week and a fixed annual salary, it may indicate an employment relationship. Agreements that do not refer to a fixed salary but, as mentioned above, refer to a percentage of profits in addition to suggesting a full-time work schedule may indicate an ownership relationship. Ziegler v. Anesthesia Assoc. of Lancaster, 2002 U.S. Dist. LEXIS 4031 at 14

The three shareholders of West Florida Pediatrics each hold an ownership interest in the company. Each is entitled to equal decision making authority that is exercised frequently. Further, the compensation of each shareholder is based on a percentage of profits of West Florida Pediatrics.

III. CONCLUSION

An entity must employ at least 15 employees each workday for at least twenty weeks in the current or preceding year to be an "employer" for purposes of coverage under the Florida Civil Rights Act (Chapter 760, Florida Statutes). An absence of Florida case law interpreting whether shareholders qualify as employees under this statute necessitates review of case law interpretations of Title VII of the Civil Rights Act of 1964 to obtain guidance.

Federal case law establishes the "economic reality" analysis to determine whether a shareholder is functioning as an owner or an employee. If it is determined that the shareholder is in fact functioning as an employer, he or she will not be counted among the employees under Title VII. The court in Ziegler employed the "economic reality" analysis, which focuses on the extent

to which a shareholder manages, controls, and owns the business. If a shareholder holds an ownership interest, is compensated based on company profits, and functions in a managerial capacity, that shareholder will not be considered an employee under Title VII.

The three shareholders of West Florida Pediatrics should not be considered employees based on their profit-based compensation, ownership interests, and management roles. Furthermore, at no time in the year prior to Ms. Smith's termination nor since that time has Respondent West Florida Pediatrics, had fifteen (15) employees. As a result, Ms. Smith's complaint should be dismissed for lack of subject matter jurisdiction as it does not meet the statutory definition of "employer."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document has been served as follows:

Original filed with (per instructions of the Florida Commission on Human Relations):

Customer Service Unit
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

With a copy served on:

Ms. Jane Smith
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Deltona, Florida

by United States mail, postage prepaid, this _____ day of _____, 200____.

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