

COOK COUNTY COMMISSION ON HUMAN RIGHTS

69 West Washington Street, Suite 3040
Chicago, Illinois 60602

Terri FOSTER, Complainant)	
)	
v.)	Case No. 2013E026
)	
SYNERGY BANK CONSULTING, INC.,)	Entered: May 9, 2014
Respondent)	

ORDER

Complainant Terri Foster (“Foster”) filed the above-captioned matter on August 20, 2013, alleging sexual harassment against Respondent Synergy Bank Consulting, Inc. (“Synergy”), in violation of Section 42-35(b) of the Cook County Human Rights Ordinance (“Human Rights Ordinance”).¹ In response, Synergy moved to dismiss Foster’s complaint with the argument that it is not an employer for the purposes of the Human Rights Ordinance and therefore cannot violate Section 42-35(b). The Commission agreed, granting Synergy’s motion and dismissing Foster’s complaint on November 22, 2013. *Foster v. Synergy*, 2013E026 (CCHRC Nov. 22, 2013). Foster filed a timely motion to reconsider,² which the Commission now denies.

DISCUSSION

Foster begins her motion to reconsider by asserting that the Commission has jurisdiction over her complaint and that venue is proper. Foster Mot. to Reconsider.³ This is true, but also irrelevant.

Neither a lack of jurisdiction nor improper venue was the basis of the Commission’s November 22, 2013 order to dismiss Foster’s complaint. *See Foster*, 2013E026 at *2 (Nov. 22, 2013) (“[T]he Commission GRANTS Synergy’s Motion to Dismiss and orders that complaint

¹ Counsel for Foster incorrectly identifies July 10, 2013 as the date his client filed with the Commission. July 10, 2013 is the date that Foster signed her complaint. For whatever reason, she did not file this signed complaint with the Commission until August 20, 2013.

² Foster filed her motion to reconsider on January 22, 2014. Parties typically only have 30 days from the date of an order to submit such a motion. CCHR Pro. R. 480.100(A). The Commission, however, on December 23, 2013, extended Foster’s time to file a motion to reconsider to January 22, 2014 because she had obtained new counsel. *Foster v. Synergy*, 2013E026 (CCHRC Dec. 23, 2013).

³ Foster’s motion for reconsideration does not have page numbers to which the Commission can cite.

2013E026 be DISMISSED for LACK OF SUBSTANTIAL EVIDENCE of a violation of the Human Rights Ordinance.”). Instead, the basis of the order that Foster is asking the Commission to reconsider is that Synergy is not an “employer” for the purpose of the provision of the Human Rights Ordinance that prohibits employment discrimination. *Id.* (“Without even one employee, Synergy is not a covered employer under the Human Rights Ordinance[.]”). This section of the ordinance protects “individuals” (*i.e.* “employees” and others, including independent contractors) from unlawful employment discrimination but can only be violated by an “employer” that meets the statutory definition of that term in the Human Rights Ordinance. *See* Cook County Code of Ordinance (“County Code”), §§ 42-35(b)(1) (prohibiting unlawful discrimination against an individual by an “employer”), 42-31 (defining an “employer” as “[a]ny person employing one or more employees, or seeking to employ one or more employees (a) [i]f the person has its principal place of business within Cook County or (b) [d]oes business within Cook County.”).

Foster next argues that she is an “employee,” as that term is used in the Human Rights Ordinance, despite being an independent contractor for all other purposes. Foster Mot. to Reconsider. Foster notes that the Human Rights Ordinance defines an “employee,” in relevant part, as “[a]ny individual whether paid or unpaid, *engaged in employment* for an employer[.]” *See id.* (citing County Code, § 42-31 (emphasis supplied)). Her argument appears to be that because the phrase “engaged in employment” is not itself a defined term in the Human Rights Ordinance, the Commission should interpret the phrase to include so-called “independent contractor employment and non-independent contractor employment.” Foster Mot. to Reconsider. The Commission, however, cannot ignore the common legal understanding of the phrase “engaged in employment,” which draws a distinction between those individuals who are employees and those individuals who are independent contractors. *See, e.g., Bailey & Assocs. v. Dep’t of Employment Sec.*, 289 Ill. App. 3d 310, 316-17 (4th Dist. 1997) (interpreting an Illinois statute to treat a salesperson as “an independent contractor and not considered to be engaged in employment”); *Isenberg v. California Employment Stabilization Comm’n*, 30 Cal. 2d 34, 38-39 (Cal. 1947) (determining the question of “whether or not a person is an independent contractor or is engaged in employment”). If an individual is an independent contractor, he or she is not an “employee,” as that term is used in the Human Rights Ordinance.⁴

Foster’s argument in the alternative – that she was a traditional employee, rather than an independent contractor – is equally unpersuasive. The consulting agreement that defines the legal relationship between Foster and Synergy states:

Nothing in this Agreement shall be deemed to make or constitute Project Manager [(*i.e.* Foster)] an employee of SYNBC [(*i.e.*

⁴ That is not say that independent contractors are categorically excluded from the protections of the Human Rights Ordinance. The Commission’s decision in *Freiburg v. South Cook Broadcasting, Inc.* stands for the proposition that the Human Rights Ordinance extends to individuals formally labeled as independent contractors so long as they are in what functions as an employment relationship with a respondent who otherwise meets the ordinance’s definition of an employer. 1994E068 (CCHRC May 5, 1998).

Synergy)]. It is expressly understood by both parties that Project Manager is and shall act as an independent contractor.

Synergy Mot. to Dismiss, Exh. 3 (Consulting Agreement). Moreover, this contract left Foster “free to pursue any outside interests . . . she desire[d]” and reserved to her “control [of] the means and methods of performance of Services.”⁵ *Id.*

Foster asks the Commission to ignore these facts because she had access to Synergy’s files and email accounts. Foster Mot. to Reconsider. While the furnishing of tools for the job is a factor for consideration in determining whether an individual is an employee or an independent contractor, this factor alone cannot outweigh the primary consideration of the right to control the means (versus merely the ends) of production. As the Illinois Supreme Court explained in *Coontz v. Industrial Comm’n*:

No single facet of the relationship between the parties is determinative, but many factors, such as the right to control the manner in which the work is done, the method of payment, the right to discharge, the skill required in the work to be done, and the furnishing of tools, materials or equipment have evidentiary value and must be considered. . . . Of these factors, the right to control the work is perhaps the most important single factor in determining the relation . . . inasmuch as an employee is at all times subject to the control and supervision of his employer, whereas an independent contractor represents the will of the owner only as to the result and not as to the means by which it was accomplished.

19 Ill. 2d 574, 577 (1960) (internal citations omitted).

Foster states that Synergy “controlled the manner and means of her work performance,” but provides no evidence to support that claim. *See* Foster Mot. to Reconsider (citing Foster Aff., ¶¶ 14, 18, 19, 22-24, 26-29) (Jan. 21, 2014)). Foster’s affidavit on reconsideration does not provide any evidence at the paragraphs cited by her counsel that Synergy controlled the means, rather than merely the ends, of Foster’s work. Instead, Foster’s affidavit reiterates, as discussed above, that Synergy furnishing some tools for the job, Foster Aff., ¶ 14, and then took them back, *id.* at ¶ 26. The affidavit provides new evidence that Foster subjectively believed herself to be an employee despite signing a consulting agreement to the contrary, *id.* at ¶¶ 23-24. But again Foster’s subjective belief is not evidence of Synergy’s actual control over the manner and means of her work performance. Similarly, Foster states that she met Synergy’s reasonable expectations, *id.* at ¶ 22, but that Synergy stopped assigning her new projects, *id.* at ¶¶ 27-28. Yet, the failure to assign new projects speaks to the ends of an individual’s work and does not distinguish employees from independent contractors. Finally, Foster’s testimony that she was

⁵ Foster obtained a contractual right to require that Synergy give “due consideration to Project Manager’s other business and personal commitments when requesting any Services, provided that Project Manager agrees to perform an any Services he or she agrees to provide on a priority basis.” Synergy Mot. to Dismiss, Exh. 3.

once invited to networking event at a strip club is certainly seedy, *id.* at ¶¶ 18-19, but it does not establish a pattern and practice by which Synergy controlled the manner and means of her work so as to undercut her express rights as an independent contractor under the consulting agreement.

That Foster is not a Synergy employee matters because only an “employer” can violate the particular provision of that ordinance that is at issue here.⁶ *Foster*, 2013E026 at *2 (Nov. 22, 2013). A necessary precondition to being an “employer” under the Human Rights Ordinance is that a person must “employ[] one or more employees.” County Code, § 42-31. Given that the Commission lacks substantial evidence that Foster is a Synergy employee, Foster argues on reconsideration that Ancin Cooley is. Foster Motion to Reconsider. But once again, Foster fails to provide the necessary evidence to support her claim at this stage of the proceedings.

Foster did not provide the Commission with the Secretary of State Records she referenced in her motion that supposedly show Cooley as Synergy’s agent. If she had, the designation would not have necessarily been dispositive. An individual can be the agent of an Illinois corporation without automatically becoming its employee. There are a number of individuals and entities whose business is to contract with Illinois corporations to act as professional registered agents. *See, e.g.*, Incorp, “Illinois Registered Agent Service,” available online at <http://www.incorp.com/illinois-registered-agent.aspx> (last visited May 2, 2014); *see also* Illinois Secretary of State, “Corporation Registered Agent and/or Registered Office,” available online at http://www.cyberdriveillinois.com/departments/business_services/agent_change/corpagentchange.html (last visited May 2, 2014) (allowing an Illinois corporation to designate a natural person or artificial legal entity as an agent).

Similarly, Foster states that Cooley derives an income from Synergy but provides no more than her attorney’s say so as proof. A party seeking reconsideration of a Commission decision that there is a lack of substantial evidence to proceed with a case must do more than simply assert that evidence exists to the contrary; the moving party must actually show the Commission the evidence that is allegedly sufficient to allow for the case to be reinstated. Foster has failed to meet this heavy burden and so the only evidence upon which the Commission can base its decision remains Cooley’s repeated affidavits that Synergy has no employees, including Cooley himself.

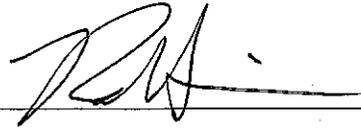
⁶ Foster’s final argument appears to be that the Human Rights Ordinance should protect contracting parties against sexual harassment, even outside of an employment relationship. *See* Foster Motion to Reconsider (“Respondent solicited services from an Independent contractor, Complainant, located in Cook County, and the Complainant is now complaining of sexual harassment resulting from the business relationship initiated and consummated in Cook County.”). The Human Rights Ordinance does protect individuals in a non-employment relationship from sexual harassment in housing transactions, the enjoyment of public accommodations, the extension of credit and access to County facilities, programs and contracts, *see* County Code, §§ 42-36 – 42-40, but the law as currently enacted by the Cook County Board of Commissioners does not extend these protections to every business transaction that occurs within the County.

CONCLUSION

For the foregoing reasons, the Commission DENIES Foster's Motion to Reconsider the dismissal of complaint 2013E026.

May 9, 2014

By delegation:

A handwritten signature in black ink, appearing to be 'R. Hakim', written over a horizontal line.

Ranjit Hakim
Executive Director of the Cook County
Commission on Human Rights