

12-4-03

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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DIVISION OF
ADMINISTRATIVE
HEARINGS

ROSE YOUNGS,

Petitioner,

AT

EEOC Case No. NONE

FCHR Case No. 21-00425

v.

DOAH Case No. 03-2457

BSS

TOUCAN'S RESTAURANT,
Respondent.

FCHR Order No. 04-116

(WS)

**FINAL ORDER DISMISSING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Petitioner, ROSE YOUNGS, filed a complaint of discrimination pursuant to Florida Civil Rights Act of 1992, Sections 760.01-760.11, Florida Statutes, alleging that the Respondent, TOUCAN'S RESTAURANT, committed an unlawful employment practice. The complainant was forced to cease her employment ("constructive termination") because of sexual harassment. The allegations set forth in the complaint were investigated and on May 23, 2003, the Executive Director issued his determination that there was reasonable cause to believe that a discriminatory act occurred. The Petitioner filed a Petition for Relief and was granted a formal evidentiary hearing which was held by video teleconference in Tallahassee and Daytona Beach, Florida, on September 23, 2003, before Administrative Law Judge Barbara J. Staros ("ALJ").

Judge Staros issued a Recommended Order of Dismissal dated December 4, 2003..

The Commission panel designated below considered the record of this matter and determined the action to be taken on the Recommended Order.

Motion for Rehearing and/or Reopen Hearing to Receive New Evidence

The Commission received several post-recommended order filings from the Clerk of the Division of Administrative Hearings ("DOAH"). One was a Petitioner's Motion for Rehearing requesting the ALJ to reopen evidence taking. Another was the Respondent's Objection to the Petitioner's Motion.

The basis for the Petitioner's Motion seems to be in the nature of newly discovered evidence. Although the Uniform Rules of Administrative Procedure does not have a provision which allows new evidence to be admitted after an order has been issued, Florida Rule of Civil Procedure 1.540 allows the Judge in civil cases to "relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing."

The Motion which sought relief from the recommended order involved several findings of material facts. Therefore, the Commission advised the ALJ in a letter of June 6, 2004, that the Commission would be glad to relinquish its current jurisdiction back to DOAH, if the ALJ

desired to take up the Motion and Objections. On June 18, 2004, the ALJ declined to request a relinquishment of Commission jurisdiction.

The Commission panel, therefore, took up the Motion during its hearing as a "preliminary matter/motion." The panel heard oral argument from both sides and used the standards set forth in the Florida Rule of Civil Procedure 1.540. Consequently, Petitioner has the burden to show that she exercised due diligence in preparing for the hearing and presenting her evidence.

In the instant case, the "newly discovered evidence" seems to have been readily available from the Florida Department of State's Corporate Information web-site prior to the hearing on September 23, 2003. There is nothing in the Motion or record to show that the Petitioner could not have found, and introduced, the evidence at the hearing. The Motion was, therefore, denied.

Findings of Fact and Conclusions of Law

The ALJ found that the Petitioner was employed by Respondent as a cocktail waitress. The ALJ further found that the exact legal entity that owned Toucan's Restaurant was not established; however, it was apparent that Mrs. Pistilli was an officer/owner of the corporation and acted in the capacity of manager. There is no evidence in the record that Mrs. Pistilli's husband, was an owner or manager of the restaurant; nor that he was frequently in the restaurant. He had, however, on occasion, given directions to employees on certain issues. For example, he evidently directed the bartender as to the amount of liquor she should put in a customer's drink. The extent of Mrs. Pistilli's (manager) knowledge of this activity was not established.

The ALJ further found that Petitioner often performed a dance on Friday night during Karaoke entertainment. On the night of March 18, 2000, Mr. Pistelli, evidently intoxicated, sexually harassed the Petitioner during an incident in which he tried to get her to dance for his friend who was having a birthday. No competent evidence was presented that Mrs. Pistilli knew or should have known of the incident or that Mr. Pistelli engaged in such activity prior to the incident. The Petitioner quit her job that night.

With regard to the steps necessary for establishing that an unlawful employment practice has occurred, it has been stated, "The initial burden is upon Petitioner to establish a prima facie case of discrimination. Once Petitioner established a prima facie case, a presumption of unlawful discrimination is created. The burden then shifts to Respondent to show a legitimate, nondiscriminatory reason for its action. If Respondent carries this burden, Petitioner then must prove by a preponderance of the evidence that the reason offered by the Respondent is not its true reason, but only a pretext for discrimination." See conclusions of law adopted by a Commission panel in Spradlin vs. Washington Mutual Bank, d/b/a Great Western, 23 F.A.L.R. 3359, at 3364, 3365 (FCHR 2001), citations from the quoted statement omitted.

In the instant case, the ALJ concluded that the Petitioner failed to establish a prima facie case of discrimination. The ALJ stated that a prima facie case of sexual harassment as a result of a hostile work environment requires proof that: (1) she is a member of a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently severe or pervasive to alter a term, condition, or privilege of employment by creating an abusive working environment; and (5) respondeat

superior, that is, the employer knew or should have known of the harassment in question and failed to take remedial action.

The ALJ found that the first four elements were met by the Petitioner. Although the harassment was not pervasive, it was certainly severe enough to alter a condition of employment. However, the ALJ found that the Petitioner had failed to meet the fifth element. The ALJ found that the accused party was not in a supervisory, managerial or ownership position that would impute automatic liability to the Respondent and that the accused party did not take any adverse employment action. In addition, the evidence was clear that the owner/manager did not know about the inappropriate actions by her husband until well after the fact and well after the Petitioner left her employment. The Petitioner did not report the incident to the owner/manager. Accordingly, even if the accused was determined to be someone within the authority of the Respondent, Petitioner did not prove that the employer knew or should have known about the complained-of behavior.

We adopt the Administrative Law Judge's findings of fact and conclusions of law

Exceptions

Petitioner filed two exceptions to the Administrative Law Judge's Recommended Order in a one page document entitled, "Exceptions to Judge Staros's Proposed Order dated 12/04/03."

The first exception raises an exception to factual finding number fourteen (14) in which the Petitioner asserts facts that are not in the record (hearing transcript) and reorders and reweighs the facts to support his responses.

The second exception raises an exception to the ultimate conclusion that Mr. Pistilli, was not found to be an "employee, owner, or other responsible party which could trigger potential responsibility of the employer." The Petitioner asserts that enough evidence was introduced, and not rebutted, to show that "if not an actual employee, Mr. Pistilli was at least an apparent agent of the business, and, as such, could subject the business to potential liability." The weighing of the evidence, drawing inferences therefrom, and determination as to the findings of fact that Mr. Pistilli was not an agent or employee/supervisor of the Respondent is within the discretion of the ALJ. The Commission may overturn such a finding **only if, after reviewing the complete record of the case, the Commission determines that the finding is not supported by competent substantial evidence in the record** or that the proceeding leading to the determination did not comply with the essential requirements of law. See Florida Department of Community Affairs v. Bryant, 586 So2d 1205, at 1210 (Fla. 1st DCA 1991). See also, Department of Health and Rehabilitative Services v. Yhap, 680 So2d 559 (Fla. 1st DCA 1996); Southpointe Pharmacy v. Department of Health and Rehabilitative Services, 596 So2d 106 (Fla. 1st DCA 1992); Clay County Sheriff's Office v. Loos, 570 So2d 394 (Fla. 1st DCA 1990); National Industries, Inc. v. Commission on Human Relations, 527 So2d 894 (Fla. 5th DCA 1988); Howard Johnson Co. v. Kilpatrick, 501 So2d 59 (Fla. 1st DCA 1987); Holmes v. Turlington, 480 So2d 150 (Fla. 1st DCA 1985); Brevard County Sheriff's Department v. Florida Commission on Human Relations, 429 So2d 1235 (Fla. 5th DCA 1983); and School Board of Leon County v. Hargis, 400 So2d 103 (Fla. 1st DCA 1981).

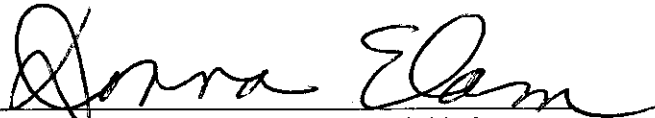
Based on the foregoing, I recommend Petitioner's exceptions be stricken.

Dismissal

The Request for Relief and Complaint of Discrimination are DISMISSED with prejudice.

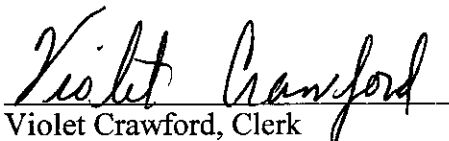
The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 22nd day of September, 2004.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS



Commissioner Donna Elam, Panel Chairperson
Commissioner Roosevelt Paige
Commissioner Gilbert M. Singer

Filed this 22nd day of September, 2004
in Tallahassee, Florida.



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Honorable Barbara J. Staros, Administrative Law Judge (DOAH)

Jim Tait, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 22nd day of September, 2004.

BY: *Kristin Crawford*
Clerk of the Commission
Florida Commission on Human Relations