

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED
07 DEC -4 AM 11:13
DIVISION OF
ADMINISTRATIVE
HEARINGS

MADALYNN A. SHEPLEY,

EEOC Case No. NONE

Petitioner,

FCHR Case No. 23-00302

v.

DOAH Case No. 05-1906

LAZY DAYS RV CENTER, INC.,

FCHR Order No. 07-066

Respondent.

**FINAL ORDER AWARDING AFFIRMATIVE RELIEF
FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

This matter is before the Commission for consideration of the Recommended Order on Back Pay and Attorney's Fees, dated June 5, 2007, issued in the above-styled matter by Administrative Law Judge William F. Quattlebaum.

Pursuant to notice, public deliberations were held on November 27, 2007, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the Recommended Order on Back Pay and Attorney's Fees.

Statement of the Case

This is the fourth time this case is before a Panel of Commissioners. The first time the case came before a Commission Panel the Panel was asked to decide whether the Commission had jurisdiction over the matter, and the Panel decided that it did. The second time the case came before a Panel of Commissioners the Panel was asked to decide whether unlawful discrimination had occurred when Petitioner was fired from her position, and the Panel decided that it had. The third time the case came before a Commission Panel the deliberation was continued at Respondent's request to allow Commission consideration of Respondent's exceptions to the Recommended Order on Back Pay and Attorney's Fees which were initially mistakenly filed in the wrong forum, the Division of Administrative Hearings (DOAH). Now the matter is before the Commission to consider the Administrative Law Judge's recommendations as to the remedy for the unlawful discrimination found to have occurred.

Specifically, the Commission found that Petitioner, Madalynn A. Shepley, was unlawfully terminated from her position as a recreational vehicle mechanic on the basis of her sex (male) by Respondent Lazy Days RV Center, Inc. Petitioner, diagnosed with gender identity disorder, is a male transitioning to living as a female. The facts of the case are summarized in FCHR Order

No. 06-016, which is incorporated by reference herein, in which the Commission found that Petitioner's termination was unlawful, awarded affirmative relief, and provided for remanding the case to DOAH if the parties could not settle the matter. The case was remanded to DOAH for determination of the relief, and the resulting Recommended Order on Back Pay and Attorney's Fees is the Order before us at this time.

Findings of Fact

We find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

We adopt the Administrative Law Judge's findings of fact.

Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

We adopt the Administrative Law Judge's conclusions of law.

Petitioner's Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order on Back Pay and Attorney's Fees in a document entitled "Petitioner Madalynn A. Shepley's Exceptions to Recommended Order entered by the ALJ as to Back-Pay and Attorney's Fees on June 5, 2007," received by the Commission on June 10, 2007. Petitioner's exceptions document contains six numbered exceptions.

Exceptions I, II, and III, essentially take issue with the Administrative Law Judge's stopping the time frame for which Petitioner is entitled to back pay on August 1, 2003, the date Petitioner was terminated from One Source.

Petitioner's testimony before Judge Quattlebaum on November 7, 2006, reflects that upon her termination from One Source on August 1, 2003, Petitioner ceased looking for employment comparable to the employment she had with Respondent and began looking for office work. See Transcript, page 36. In addition, Petitioner acknowledges that this new direction would result in less pay. See Transcript, page 16.

We affirm August 1, 2003, as the cut-off date for back pay liability, and, consequently, these exceptions are rejected.

Exception IV takes issue with the Administrative Law Judge's finding that "Petitioner would not have continued to work overtime at Lazy-Days had she not been discharged."

Actually, the Administrative Law Judge did not find that Petitioner would not have continued to work overtime had she continued to work for Respondent, but rather that "[t]he evidence is insufficient to establish 'overtime' employment would have continued on a routine basis." Recommended Order, ¶ 4. Commission panels have denied recovery for compensation

components for which insufficient evidence existed to construct the award. See, e.g., Howe v. Western and Southern Financial Group, FCHR Order No. 07-035 (June 4, 2007) wherein despite initially having awarded compensation for “lost benefits,” a Commission panel adopted the Administrative Law Judge’s finding on remand that there was insufficient evidence to compute that amount.

This exception is rejected.

Exception V argues that Petitioner is entitled to additional post-hearing damages, such as (1) back pay until the date of FCHR’s entry of its judgment in this matter; (2) front pay; and (3) Petitioner seeks leave to provide computation of prejudgment interest on the correct back pay amount.

With regard to the argument that Petitioner is entitled to back pay until the time of the Commission’s entry of its order, we have adopted the Administrative Law Judge’s recommendation that Petitioner’s entitlement to back pay terminates on August 1, 2003, and, therefore, this portion of this exception is rejected.

Petitioner argues that she is entitled to “front pay.” The Commission has stated, “With regard to whether Petitioner is entitled to front pay, we note that, generally, front pay is ‘compensation for future economic loss stemming from present discrimination that cannot be remedied by traditional rightful-place relief such as hiring, promotion or reinstatement.’ [citation omitted]. Some of the factors which can make traditional rightful-place relief inappropriate include the lack of a reasonable prospect that Petitioner can obtain comparable employment, the existence of an employer-employee relationship that is pervaded with hostility, and the existence of only a relatively short period of time for which front pay is to be awarded. [citation omitted].” Whitehead v. Miracle Hill Nursing and Convalescent Home, Inc., 19 F.A.L.R. 1525, at 1528 (FCHR 1996).

In the instant case, the Commission has already ordered reinstatement. See, FCHR Order No. 06-016 (February 6, 2006). In addition, Petitioner testified in the November 7, 2006, proceeding before Judge Quattlebaum that she would accept reinstatement to her position with Respondent. See Transcript, page 24.

Consequently, in our view, this is not a case in which an award of front pay is appropriate, and this portion of this exception is rejected.

The remaining part of this exception requests leave to present calculations of prejudgment interest on the correct amount of back pay.

The Commission has adopted conclusions of law that reflect that interest on back pay awards is applied as a matter of law. See Howe v. Western and Southern Financial Group, FCHR Order No. 07-035 (June 4, 2007). Since the Commission has already ordered that interest be awarded on the back pay award in this matter (See FCHR Order No. 06-016 (February 6, 2006)), this portion of this exception is rejected.

Exception VI argues that Petitioner is entitled to “a contingent-based enhancement or multiplier on the issue of attorney’s fees.”

In the past, cases such as this, brought pursuant to Section 760, Florida Statutes, have been found to be appropriate for an award of enhanced attorney's fees, and the Commission has been found to have not departed from its discretion in awarding reasonable attorney's fees when it applied a multiplier of 1.5 to a Petitioner's "lodestar" attorney's fee amount. See Weaver v. School Board of Leon County, 624 So. 2d 761 (Fla. 1st DCA 1993), a case brought under the Human Rights Act of 1977; see also, Whitehead v. Miracle Hill Nursing and Convalescent Home, Inc., 19 F.A.L.R. 1525 (FCHR 1996), also brought under the Human Rights Act of 1977, in which a "multiplier" of 2.0 was used to enhance the attorney's fee award; further, see Brown v. Capital Circle Hotel Company, d/b/a Sleep Inn, FCHR Order No. 05-015 (January 31, 2005), a public accommodations case brought under the Florida Civil Rights Act of 1992 in which the Commission upheld a "multiplier" of 1.5 applied by the Administrative Law Judge to the attorney's fee award of the prevailing Petitioner; and see Landry v. Charlotte County, FCHR Order No. 03-089 (December 29, 2003), a case brought pursuant to the Florida Civil Rights Act of 1992, in which a Commission panel acknowledged, "The Commission has recognized that what is a reasonable attorney's fee can vary depending on the circumstances of the case, even to the point of allowing an enhanced fee by applying a multiplier to the amount determined by multiplying the 'reasonable hours expended' times the 'reasonable hourly rate.'"

A review of the above-cited cases reveals that the Commission's position in each was based on either the First District Court of Appeals decision in Weaver, supra, or on Whitehead, supra, which was, itself, based on Weaver, supra.

On April 26, 2007, the First District Court of Appeal issued its decision in Winn Dixie Stores, Inc. v. Reddick, 954 So. 2d 723 (Fla. 1st DCA 2007), in which it held, "[a] review of pertinent law leads us to conclude that contingency fee multipliers are not permitted under the [Florida Civil Rights Act of 1992]." The decision, inexplicably, makes no mention of the Court's own decision fourteen years earlier in Weaver. Nevertheless, in our view, the legal basis for the Commission allowing attorney's fee multipliers, i.e. the Weaver case, essentially has been overturned in Reddick, by the very Court that decided Weaver.

This exception is rejected.

Respondent's Exceptions

Respondent filed exceptions to the Recommended Order in a document entitled "Respondent's Exceptions to Recommended Order on Back Pay and Attorney's Fees."

The document excepts to the Recommended Order's failure to set forth recommended Conclusions of Law regarding Petitioner's continuing failure to mitigate her damages following her termination by One Source, arguing that Petitioner is not entitled to back pay from August 1, 2003.

One of Respondent's filings notes that should the Commission adopt the Recommended Order on Back Pay and Attorney's Fees, Respondent's exceptions would be moot. See Respondent's Motion for Consideration of Respondent's Exceptions to Recommended Order on Back Pay and Attorney's Fees, ¶ 4.

Since we have above adopted the findings of fact and conclusions of law contained in the Recommended Order on Back Pay and Attorney's Fees, and since we have above rejected Petitioner's exceptions to the findings that back pay liability of the Respondent ends on August 1, 2003, Respondent's exceptions are rejected as moot.

Affirmative Relief

Through our adoption of the Administrative Law Judge's findings of fact and conclusions of law, as set out above, and through our incorporation by reference of FCHR Order No. 06-016, we find that unlawful discrimination occurred in this matter and have adopted the Administrative Law Judge's recommendations for the remedy of the discrimination, recognizing that interest is to be applied to the back pay amount owed as a matter of law.

Respondent is hereby ORDERED:

(1) to cease and desist from discriminating further in the manner it has been found to have unlawfully discriminated against Petitioner, as ordered in FCHR Order No. 06-016;

(2) to remit back pay to Petitioner in the amount of \$6,160.00 in the manner recommended by the Administrative Law Judge in the "Recommended Order on Back Pay and Attorney's Fees," dated June 5, 2007;

(3) to pay Petitioner attorney's fees in the amount of \$11,025.00 for Karen Doering, \$337.50 for Shannon Minter, and \$17,482.50 for Craig Berman, in the manner recommended by the Administrative Law Judge in the "Recommended Order on Back Pay and Attorney's Fees," dated June 5, 2007;

(4) to pay Petitioner costs in the amount of \$638.00, in the manner recommended by the Administrative Law Judge in the "Recommended Order on Back Pay and Attorney's Fees," dated June 5, 2007; and

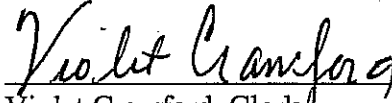
(5) to reinstate the Petitioner into her previous position or equivalent position with the same pay including any pay increases generally given since Petitioner's last employment, as ordered in FCHR Order No. 06-016.

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 3rd day of December, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Onelia A. Fajardo

Filed this 3rd day of December, 2007,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
(850) 488-7082

Copies furnished to:

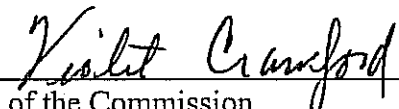
Madalynn A. Shepley
c/o Craig L. Berman, Esq.
Berman Law Firm, P.A.
111 Second Avenue Northeast, Suite 706
St. Petersburg, FL 33701

Lazy Days RV Center, Inc.
c/o Richard C. McCrea, Jr., Esq.
Greenberg Traurig, P.A.
Courthouse Plaza
625 East Twiggs Street, Suite 100
Tampa, FL 33602

William F. Quattlebaum, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed
addressees this 3rd day of December, 2007.

By: 
Clerk of the Commission
Florida Commission on Human Relations