STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

MADALYNN A. SHEPLEY,

Petitioner,

v.

LAZY DAYS RV CENTER, INC.

Respondent.
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EEOC Case No. NONE

FCHR Case No. 23-00302

DOAH Case No. 05-1906

FCHR Order No. 06-016

FINAL ORDER AWARDING RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE

On October 25, 2002, Petitioner, MADALYNN A. SHEPLEY, filed a complaint of discrimination pursuant to Florida Civil Rights Act of 1992, Sections 760.01-760.11, Florida Statutes, alleging that the Respondent, LAZY DAYS' RV CENTER, INC., committed an unlawful employment practice by terminating him due to his disability and sex (gender). The initial determination of the Executive Director was that the Commission lacked jurisdiction to investigate the complaint. Subsequently, the Petitioner filed a Petition for Relief and a hearing was held on May 7, 2004, in Tampa, Florida. At the hearing, the results of a telephone conference call held between counsel for both parties and Administrative Law Judge Daniel Manry on May 6, 2004, along with the parties' joint stipulations, were placed into the record. The ALJ, having considered the filed materials, issued his Recommended Order of Dismissal dated June 22, 2004, upholding the decision of the Executive Director and recommending dismissal of the Petition. A Commission panel reviewed the recommended order and found that the Commission had jurisdiction to investigate the complaint on the basis of sexual (gender) discrimination and lacked jurisdiction on the basis of disability. FCHR Order # 04-140.

The allegations set forth in the complaint were remanded for investigation and on April 18, 2005, the Executive Director issued his determination that there was no reasonable cause to believe that a discriminatory act occurred. Subsequently, the Petitioner filed a Petition for Relief and was given a formal evidentiary hearing in Tampa, Florida, on September 1, 2005, before Administrative Law Judge William F. Quattlebaum. The ALJ issued his recommended order for dismissal on November 4, 2005.

The Commission panel designated below considered the record of this matter, heard oral arguments on January 26, 2006, and determined the action to be taken on the Recommended Order.

Findings of Fact

The Administrative Law Judge found that the Petitioner was a male and was initially employed by the Respondent in August 1999 as a technician (mechanic). In August 2000, the Petitioner moved with his wife and four children to Chicago, Illinois. Subsequently, during December 2000, the Petitioner separated from his wife and moved back to Tampa at which time he was reemployed by the Respondent. During the Spring 2001, the Petitioner was diagnosed with a gender identity disorder and entered into a course of psychotherapy. During the psychotherapy, the Petitioner began transitioning into living as a female; initially, on a part-time basis (off work hours), and, finally, on a full-time basis (January 2002).

Respondent's management, along with some co-workers, were aware of Petitioner's intent to begin living as a female. At some point in mid-2001, he informed his immediate supervisor of his course of treatment and, in August 2001, he informed the Respondent's Human Resources Office and Management of his intent to begin living as a female and his plan to return to work after his December vacation as a female.

In September 2001, the Petitioner began hormone treatments which resulted in some physical changes and began to let his hair grow longer; wear acrylic fingernail extensions (without polish); and pierced his ears. He continued, however, to appear at work as a male named Andrew. In December 2001, he received a merit pay increase and was a member of a team of technicians (mechanics) that received an award for superior service. As planned, the Petitioner took the last week of December 2001 as vacation and returned as Madalynn, a female. She wore the same "unisex" uniform as did other male and female technicians. She used colored nail polish, added breast forms under the bra she had been wearing for several months and wore makeup, including eye shadow and lipstick.

The Respondent provided Petitioner a nametag as "Madalynn" instead of "Andrew." During Petitioner's vacation, the Respondent had also re-labeled an existing single-user lockable restroom (previously identified as a "women's" facility) as a "unisex" or "family" facility and had conducted a series of meetings with the teams of service personnel advising them of the situation. Some employees expressed discomfort with Petitioner's decision, but the Service Manager conducting the meetings advised them that the Respondent was going to "work as best we can to accommodate him." The ALJ found "no evidence that any person in management made any derogatory comments about the Petitioner or suggested that there should be any change in appearance or behavior" and further found "no evidence that the Petitioner was other than a good employee who received both a pay raise and a service award immediately prior to his return to work as a female."

Upon Petitioner's return, the Service Manager testified that there were several unidentified customers who complained about having to interact with Petitioner and were assigned to other mechanics for their "walk through." There was one identified employee who was loudly unhappy; however, after being advised that further disruption by him would result in unpaid leave, the employee ceased complaining. The Service Manager also testified that he observed various groups of technicians standing around talking and that he had to enter the service area and direct them to return to work. He did not overhear any of the conversations but assumed they related to Petitioner. He also testified that he received allegations of "threats" being made against Petitioner but was unable to recall either the names of the employees

reporting the "threats" or involved in making the "threats." He did not advise the Petitioner of such "threats;" nor did he report them to law enforcement; and made no written record related to them.

The ALJ found that, on January 7, 2002, five days after the Petitioner returned to work as a female, the Petitioner was called to the Human Resources Office where the Service Manager terminated his employment because "he was a substantial disruption in the workplace." The ALJ further found that Respondent employed several homosexual technicians and several female technicians during the period of Petitioner's employment. None of them were subjected to any adverse employment action.

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

Conclusions of Law

The Administrative Law Judge concluded that the Petitioner failed to establish a prima facie case of sex discrimination. The ALJ specifically stated in his conclusion that the Petitioner failed to state a prima facie case because the Petitioner was not a member of a protected class.

The Commission has adopted conclusions of law that, to establish a prima facie case of discrimination in "termination" cases, the employee must prove (1) he/she was terminated; (2) he/she belongs to a group protected by the statute; (3) he/she was qualified for the job; and (4), after his/her termination, the employer hired a person, or retained persons having comparable or lesser qualifications, not in petitioner's protected class. Felidio Martinez v Orange County Fleet Manager, 21 F.A.L.R. 163, at 164 (FCHR 1997); Arnold v. Department of Health and Rehabilitative Services, 16 F.A.L.R. 576, at 582 (FCHR 1993). The evidence demonstrated that all four conditions were met in this case: (1) termination; (2) protected group-male; (3) qualified; and (4) retention of other employees not in protected group.

In addition, the ALJ further analyzed the case in light of the three theories presented in the Petition for Relief. The ALJ concluded that Title VII and Florida Statute Chapter 760 provide no protection against discrimination on the basis of "transgender" or "transexualism." The ALJ further concluded that the Petitioner was a male and, as such, cannot sustain an action based upon discrimination as a female. The ALJ did, however, conclude that, on one of the three theories (grounds) stated in the Petition for Relief, the Petitioner was a member of a protected class (male). These conclusions are consistent with Commission's Order # 04-140 that remanded the case for further investigation and, ultimately, initiated the Petition for Relief upon which the ALJ conducted his formal evidentiary hearing at DOAH.

The Petitioner relies on Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), to support his claim that he was discriminated against because he failed to conform to a social expectation of male behavior and appearance. The ALJ noted that there was no evidence, prior to termination, that any person in management made any derogatory comments or took any action not supportive of the Petitioner's desire to return to work as a female. He further concluded that "the courts have not extended Price Waterhouse to encompass factual situations wherein the person alleging sex discrimination has assumed the dress and behavior of a gender other than that into which the complainant/petitioner was born." The ALJ cited two federal district court cases (one in Louisiana and the other in Utah) to support his view.

The ALJ seems to ignore several federal circuit court cases cited by Petitioner in his proposed recommended order and, further, in his exceptions to the Recommended Order. The cases of Smith v City of Salem, 378 F.3d 566 (6th Cir. 2004) and Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) were specifically cited in the Petitioner's proposed order where Petitioner cited the Smith court holdings:

> "*After Price Waterhouse, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.*" 378 F.3d at 574
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> "*Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.*" Id. at 575.

The Petitioner also provided, as further supporting cases: Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) citing Smith in support of a transsexual's claim of discrimination based on sexual stereotyping; James v. Platte River Steel Co., 113 Fed.Appx. 864 (10th Cir. 2004) that a plaintiff can establish a Title VII claim if he can show, at 867, "that [he was harassed] due to the fact that he failed to conform to gender stereotypes;" Medina v. Income Support Div., New Mexico, 413 F.3d 1131 (10th Cir. 2005) that, at 1135, "[A] plaintiff may satisfy her evidentiary burden [in a Title VII case] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes;" Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3rd Cir. 2001) upholding a claim of sex discrimination under Title VII where, at 262, the "harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender;" Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir 2001) that found harassment, at 874, "based upon the perception that [the plaintiff] is effeminate," is discrimination because of sex in violation of Title VII; Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999) that found, at 261, n.4, "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity...a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity;" Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997) that, at 581, "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of his sex,'" vacated and remanded on other grounds, 523 U.S. 1001 (1998); and Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000).

The Respondent cited Dawson v. Bumble & Bumble, 398 F.3d 211 (2nd Cir. 2005), along with several U.S. District Court cases, in their response to the Petitioner's Exceptions to support their view. However, the court in Dawson found that, whether or not Title VII applied, N.Y. law clearly allowed a determination on the merits of her claim; that she was terminated for a legitimate, non-discriminatory business reason (poor performance); and that no evidence of pretext was demonstrated.

The ALJ's conclusions that the Petitioner failed to present a prima facie case and that courts have not extended Price Waterhouse to encompass factual situations as presented in this case are in error. Upon additional analysis, we find that these errors are material, and not harmless.

Upon the establishment of a prima facie case, the Respondent has the burden of presenting a legitimate, non-discriminatory business reason for the action(s) taken. The reason given by the Respondent was that the disruption caused to the Respondent's business was sufficient to support the Petitioner's termination. The ALJ properly concluded that the only case cited by the Respondent to support their view, Matima v. Celli, 228 F3d 68 (2nd Cir. 2000), was clearly distinguishable and not applicable.

The Respondent acknowledged and supported the Petitioner's decision to return to work as a female following his Christmas leave and was adequately responding to the burden of providing a non-discriminatory workplace free of sexual harassment. The fact that additional management time was required to discipline individuals in its workplace who by the Respondent's own admission were engaging in sexually harassing behavior is clearly a legitimate "cost of doing business." The choice by Respondent to terminate the Petitioner, within 5 days of her return to work, because of "disruption to its business" without proving any loss of business or other significant burdens beyond providing a discrimination-free workplace clearly demonstrates that the Respondent was not motivated by a legitimate, non-discriminatory business reason for its action. Accordingly, based on the findings of fact by the ALJ and as a matter of law, we conclude that the reason proffered was merely a pretext for discrimination.

We note that, in rejecting the conclusion of law of the Administrative Law Judge, we conclude:

(1) that the conclusion of law being rejected is a conclusion of law over which the Commission has substantive jurisdiction, namely a conclusion of law defining what constitutes a prima facie case under the Florida Civil Rights Act of 1992;
(2) that the reason the rejection is being made by the Commission is that the conclusion of law as stated runs contrary to previous Commission decisions on the issue; and
(3) that, in making this rejection, the conclusion of law we are substituting is as or more reasonable than the conclusion of law which has been rejected. See, Section 120.57(1)(l), Florida Statutes (2005).

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order of Dismissal in FCHR Case # 23-00302 (DOAH # 05-1906) in a document entitled, "Petitioner Madalynn A. Shepley's Exceptions to the Recommended Order Entered by ALJ." Respondent filed a response to Petitioner's Exceptions in a document entitled, "Respondent Lazy Days' Response to Petitioner's Exceptions to the Recommended Order."

The Petitioner filed 9 numbered exceptions to the Administrative Law Judge's conclusions of law.

Exception I is a restatement of the law relating to the Commission's standard of review and is applied by the Commission. This exception should be accepted for what it is—merely a restatement of the law as to standards of review.

Exception II argues that the "law of the case" should apply as to Shepley's status as within a "protected class." Although the prior ruling by a Commission panel (FCHR # 04-140) found that a transsexual can pursue a sexual discrimination case as a male or female, it made no findings as to the case before it. The ALJ was proper in his analysis of the case before him on remand in trying to determine which of the "three theories (bases) of discrimination" should apply. He ultimately determined that the Petitioner could maintain an action based upon being discriminated against as a male. This exception is accepted as to the basis of being able to maintain an action as a male and meet the requirements for a prima facie case; but, not as to the "law of the case."

Exception III challenges the ALJ's selective reliance on lower court opinions. As seen in the analysis above under "conclusions of law," the Commission panel has reviewed other cases, primarily from various federal Courts of Appeal, in its analysis and declines to adopt the legal analysis provided by the ALJ for his conclusions. This exception is accepted.

Exception IV argues that Petitioner established a prima facie case of sex (gender) discrimination. As seen in the analysis above under "conclusions of law," this exception is accepted.

Exception V argues that the Petitioner does not have to show a similarly situated employee to establish a prima facie case. Again, our analysis, under "conclusions of law" above, would agree with this point. This exception is accepted.

Exception VI argues that whether Petitioner establishes a prima facie case is irrelevant after a case is fully tried on the merits. Based on the Commission's conclusion that a prima facie case exists, this exception is not applicable to the case before us and the Commission does not find it necessary to rule as to whether to accept or reject it.

Exceptions VII and VIII argue that Respondent's reason for discharge did not meet the test of being a legitimate, non-discriminatory business reason and was pretextual. Based on their analyses, both the Commission and the ALJ agree that the facts of this case support the view that the Respondent's reason was pretextual. This exception is accepted to the extent it supports the Commission's decision.

Exception IX is related to damages and is accepted to the extent is supports the Commission's decision.

Respondent's response to the Petitioner's Exceptions was unnumbered. The Respondent first argued against the application of the "law of the case" and is correct. The Respondent then accepted the "three theory analysis" proposed by the ALJ which supported his conclusion that a prima facie case could be made by a male. They further argued that the Petitioner was wrong in seeking to apply the "sex stereotyping" analysis of Price Waterhouse and that sex stereotyping did not occur. Based on our analysis, we reject the Respondent's responses to the Petitioner's Exceptions except for those portions consistent with the Commission's determination.

Affirmative Relief Awarded

Through our adoption of the Administrative Law Judge's findings of fact and modifying his conclusions of law, as set out above, we find that the Respondent committed an act of unlawful discrimination and award the following affirmative relief to the Petitioner.

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;

(2) to reinstate the Petitioner into his previous position or an equivalent position with the same pay including any pay increases generally given since Petitioner's last employment;

(3) to remit back pay to Petitioner in the amount agreed upon by the parties or determined by the Administrative Law Judge;

(4) to pay Petitioner lost benefits in the amount agreed upon by the parties or determined by the Administrative Law Judge;

(5) to pay Petitioner the statutorily-established interest on the amounts awarded Petitioner in (3) and (4) above;

(6) to pay Petitioner's attorney fees that have been reasonably incurred in this matter by Petitioner; and

(7) to pay Petitioner the amount of costs that have been reasonably incurred in this matter by Petitioner.

The Commission reserves jurisdiction over the determination of the precise remedy in this matter, including, but not limited to, amounts of back pay, interest, attorney fees and costs awarded Petitioner.

If, within 30 days of the date of the filing of this Order by the Clerk of the Commission, the parties have agreed to the appropriate monetary remedy for the unlawful employment practice found to have occurred, the parties shall prepare and submit to the Commission a Joint Stipulation of Settlement.

If, within 30 days of the date of the filing of this Order by the Clerk of the Commission, the parties are unable to reach agreement as to the appropriate monetary remedy for the unlawful employment practice found to have occurred, the Petitioner is directed to file with the Commission a Notice of Failure of Settlement, and the case will be remanded to the Administrative Law Judge for determination of the appropriate remedy amounts in this matter, as ordered above.

The Commission shall offer its mediation services to the parties to facilitate settlement within the specified 30-day period

DONE AND ORDERED this 6th day of February, 2006.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Rita B. Craig, Chairperson
Commissioner Gayle Cannon
Commissioner Roosevelt Paige

Filed this 6th day of February, 2006
in Tallahassee, Florida.

Violet Crawford

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William F. Quattlebaum, Administrative Law Judge
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 6th day of February, 2006.

BY: Violet Crawford
Clerk of the Commission
Florida Commission on Human Relations