STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADALYNN A. SHEPLEY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-1906
	)	
LAZY DAYS RV CENTER, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

On September 1, 2005, an administrative hearing in this case was held in Tampa, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Craig L. Berman, Esquire
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For Respondent: Richard C. McCrea, Jr., Esquire
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STATEMENT OF THE ISSUE

The issue in the case is whether the Respondent unlawfully terminated the employment of the Petitioner.

PRELIMINARY STATEMENT

On May 24, 2005, the Florida Commission on Human Relations (FCHR) forwarded to the Division of Administrative Hearings, a Petition for Relief filed by Madalynn A. Shepley (Petitioner) against Lazy Days RV Center, Inc. (Respondent).

The hearing was initially scheduled for July 29, 2005, and was continued upon the joint request of the parties.

The Petitioner, an anatomical male, is a pre-operative transsexual person living as a female. In respect to the Petitioner's wishes, the Petitioner was addressed as female during the hearing; however, because the Petitioner is legally a male, he is referred to as a male for purposes of this Recommended Order.

At the hearing, the Petitioner presented the testimony of Allen Kelley and testified on his own behalf. The Respondent presented the testimony of Allen Kelley and had Exhibits 1 and 2 admitted into evidence.

The one-volume Transcript of the hearing was filed on September 11, 2005. Proposed Recommended Orders were filed on October 3, 2005, pursuant to an agreement by the parties.

FINDINGS OF FACT

1. The Petitioner was born in 1964 as an anatomical male named Andrew Allen Shepley. The Petitioner married a female in 1984. The couple separated in December 2000. During the course

of the marriage, the couple produced four children. They divorced in July 2002.

2. The Respondent is a large recreational vehicle dealership located in Seffner, Florida. The winter months are the busy season for sales and service of recreational vehicles, and the Respondent may employ several hundred employees at that time.

3. In August 1999, the Petitioner began employment as a technician (essentially a mechanic) with the Respondent. His duties as a technician included inspections and service and repair responsibilities for recreational vehicles. He also sometimes performed "walk-throughs" with vehicle purchasers at the time of delivery during which features and operations of the vehicle are discussed with the new owner.

4. The Petitioner worked for the Respondent for approximately one year, and then in about August 2000, he moved with his wife and children to Chicago where his wife's family was located.

5. In December 2000, the Petitioner returned to Florida after separating from his wife. He sought a job and was again employed as a technician by the Respondent.

6. Although the Petitioner was born anatomically male, he psychologically identifies himself as female. The Petitioner has been aware of the issue since his early childhood. For

various reasons, in Spring 2001, the Petitioner began a course of psychotherapy.

7. During the psychotherapy, the Petitioner was diagnosed with gender identity disorder, a condition wherein the psychological perspective of a person does not correspond to the anatomical gender into which the person was born.

8. After the diagnosis, the Petitioner continued with psychotherapy and in June 2001 began transitioning into living as a female, initially on a part-time basis. He lived as a female during non-work hours and as a male during his hours of employment. As time passed, the Petitioner decided to begin living as a female on a full-time basis.

9. In July 2001, the Petitioner requested approval from the Respondent to take the last week of the year as vacation during which he planned to visit his children in Chicago. He also intended to begin living full-time as a female during the vacation.

10. Some co-workers were already aware of the Petitioner's intent to begin living as a female. The Respondent's technicians work in teams of between six and ten employees per team. Each team has a foreman. Andrew Dietz was the foreman for the Petitioner's team. The Petitioner advised Mr. Dietz at some point in mid-2001 that he had been diagnosed with gender identity disorder and was planning to transition to life as a

female. The Petitioner believes that for various reasons other employees may have been aware of the situation.

11. In August 2001, the Petitioner informed the Respondent's human relations office that he intended to begin living as a female on a full-time basis and would return to work after the December vacation as a female. The human relations office apparently was supportive of the Petitioner's decision.

12. The human relations office informed Allen Kelley of the Petitioner's intent to begin living as a female. Mr. Kelley was the manager in charge of the Respondent's service and delivery operations. There is no evidence that Mr. Kelley had any concerns about or objections to the Petitioner's decision to live as a female.

13. In September 2001, the Petitioner began hormone treatments which resulted in physical changes to the Petitioner's body including breast development, but the Petitioner testified that the changes were not likely visible to an "untrained eye."

14. The Petitioner also began to let his hair grow longer than he had previously. He began to wear acrylic fingernail extensions without polish. His ears were pierced.

15. In December 2001, the Petitioner received a merit pay increase and was part of a team of technicians receiving an award for superior service.

16. As planned, the Petitioner took the last week of December 2001 as vacation.

17. During the Petitioner's vacation, Mr. Kelley conducted a series of meetings with the teams of service personnel and advised them that the Petitioner would return to employment as a female. Some employees expressed discomfort with the Petitioner's decision during the meetings, but Mr. Kelley advised them that the Respondent was going to "work as best we can to accommodate him."

18. Also during the Petitioner's vacation, the Respondent re-labeled an existing single-user lockable restroom (previously identified as a women's facility) as a "unisex" facility to provide restroom access for the Petitioner.

19. On January 2, 2002, the Petitioner returned as a female to his employment with the Respondent. He wore the same uniform he wore prior to the vacation. He put colored nail polish on the acrylic fingernails he had already been wearing. He added breast forms under the bra he had been wearing prior to his vacation. He wore makeup, including eye shadow and lipstick.

20. The Respondent provided to the Petitioner, a nametag for his uniform identifying him as "Madalynn."

21. There is no evidence that any person employed by the Respondent in a management position made any derogatory comments

about the Petitioner, suggested that there should be any change in the Petitioner's appearance or behavior, or was otherwise unsupportive of the Petitioner's decision to return to work as a female.

22. Mr. Kelley testified that beginning with the Petitioner's return to work on January 2, 2002, Mr. Kelley spent approximately two hours of each day dealing with issues related to the Petitioner's return to work as a female.

23. Mr. Kelley testified without contradiction that there were complaints from several unidentified customers, to him and to sales staff, about having to interact with the Petitioner. The Petitioner acknowledged being aware of one specific customer who complained.

24. Mr. Kelley testified that he advised customers that the Petitioner was a good technician, but that other employees were available to work with customers upon request. Mr. Kelley subsequently decided to address the issue by assigning other technicians to conduct vehicle walk-throughs with customers, and so informed the Petitioner.

25. Mr. Kelley had to twice warn one employee (Bruce Dickens) who was loudly unhappy with the Petitioner's decision to live as a female, but after Mr. Kelley advised Mr. Dickens that further disruption by Mr. Dickens would result in unpaid

suspension, Mr. Dickens refrained from continuing his complaints.

26. Mr. Kelley testified as to "threats" relayed to him by employees who claimed to have knowledge that other employees were planning some unidentified action against the Petitioner, but Mr. Kelley was unable to recall the names of any of the employees involved in either the threats or the reporting of the threats. He did not advise the Petitioner of the alleged threats. He did not contact law enforcement about the situation. He made no written record related to the threats. Mr. Kelley monitored the employee parking area to ascertain whether any inappropriate activity was occurring, but observed nothing of concern.

27. Mr. Kelley testified that between six to twelve times daily, 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 conversations, but assumed that the conversations were related to the Petitioner.

28. An incident involving graffiti placed in the "unisex" bathroom was resolved by removal of the graffiti after the Petitioner reported it to management.

29. On January 7, 2002, the Petitioner was called to the human resources office where Mr. Kelley informed him that he was

a substantial disruption in the workplace and that his employment was being terminated.

30. Mr. Kelley testified that he was solely responsible for making the termination decision. There is no evidence that Mr. Kelley discussed the termination with the owner of the Respondent, or that any other employee was involved in Mr. Kelley's decision.

31. The Respondent employed several homosexual technicians during the period of the Petitioner's employment who were not subjected to any adverse employment action.

32. The Respondent employed a female employee who underwent breast enlargement surgery during the time the Petitioner was employed by the Respondent. The Petitioner testified that the female was a "distraction" at work that was not subjected to any adverse employment action.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2005).

34. This case involves an alleged violation of the Florida Civil Rights Act of 1992, Sections 760.01-10, Florida Statutes, (the "Act"). Subsection 760.10(1)(a), Florida Statutes (2005), provides 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, color, religion, sex, national origin, age, handicap, or marital status.

35. Florida courts have determined that Title VII federal discrimination law should be used as guidance when applying the provisions of the Act. Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385 (11th Cir. 1998); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

36. The United States Supreme Court established the analysis that must be applied in considering an employment discrimination claim under Title VII in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), as refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

37. The Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination. In order to meet the initial burden, the Petitioner must establish that (1) he is a member of a protected class; (2) he was subjected to adverse employment action; (3) the Respondent treated similarly situated employees more favorably; and (4) he was qualified to do the job.

38. If the Petitioner succeeds in establishing a prima facie case, the Respondent must then articulate some legitimate, nondiscriminatory reason for the employment decision. The Respondent need not persuade the trier of fact that it was actually motivated by the reasons, but must merely set forth, through the introduction of admissible evidence, the reason for those actions. Burdine, at 254-255.

39. Once the Respondent articulates a reason for the action taken, the evidentiary burden shifts back to Petitioner who must prove that the reason offered by the Respondent is not the true reason, but is merely a pretext for discrimination.

40. The ultimate burden of persuading the trier of fact that Respondent intentionally discriminated against Petitioner remains at all times with Petitioner. Burdine, at 253.

41. Here, the Petitioner has failed to establish a prima facie case of sex discrimination.

42. The evidence clearly establishes that the Petitioner was qualified to do his job and was subjected to an adverse employment action.

43. As to whether the Respondent treated similarly situated employees more favorably, the evidence is scant. There is no evidence that the Respondent employed any other transgendered persons. Perhaps, given the rationale offered by the Respondent for the Petitioner's termination, the sole

similarly situated employee was a woman whom the Petitioner asserted was a distraction after undergoing breast enhancement surgery; however, the evidence is insufficient to establish that the distraction related to the employee's breast implants was as disruptive to the workplace as the Petitioner's decision to alter his gender.

44. In any event, the primary reason that the Petitioner has failed to establish a prima facie case of sex discrimination is because the Petitioner is not a member of a protected class.

45. Although the original charge of discrimination asserted grounds of "physical disability," the subsequently filed Petition for Relief states that the Petitioner is not pursuing the complaint on grounds of disability. The Petition for Relief sets forth three theories under which this claim of sex discrimination has been pursued.

46. The Petitioner's Petition for Relief asserts that the Respondent discriminated against the Petitioner as a "transgendered" or "transsexual" individual. Title VII provides no protection against discrimination on the basis of "transgender" or "transsexualism." Ulane v. Eastern Airlines, 742 F.2d 1081 (7th Cir. 1984), cert. denied 471 U.S. 1017 (1985).

47. The Petitioner's Petition for Relief asserts that the Respondent discriminated against the Petitioner as a female in

that anatomical female technicians were not terminated from employment. However, the Petitioner is by his own acknowledgement legally and anatomically male.

48. Even were the Petitioner to undergo a surgical procedure to alter his physical presentation from male to female, he will remain male under existing Florida law. See In re Marriage of Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. 2d DCA 2004), review denied, 898 So. 2d 80 (Fla. 2005), wherein the district court invalidated a marriage between a post-operative transsexual (female to male) and her female partner, relying on a finding that the statutory meaning of "male" and "female" referred to "immutable traits determined at birth." Accordingly, the Petitioner's claim of discrimination as a female must fail because he is not female.

49. The Petitioner's Petition for Relief also asserts that the Respondent discriminated against the Petitioner as a male. Clearly, males are protected by the prohibition against sex discrimination. Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998). However, in this case, the theory under which the Petitioner proceeds is that he was a victim of "sex stereotyping" and that he was discriminated against because he failed to conform to a social expectation of male behavior and appearance.

50. The Petitioner relies on Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) to support his claim. In Price Waterhouse, the partners at an accounting firm initially declined to act upon a female senior manager's candidacy for partnership and then, in the following year, refused to reconsider her candidacy. According to the Court's opinion, one partner described the candidate as "macho." Another partner stated that she "overcompensated for being a woman." The partner responsible for explaining the decision to the candidate advised her that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The candidate charged the firm with discrimination on the basis of sex. The Supreme Court held that the comments reflected sex stereotyping and were evidence of sex discrimination.

51. Here, there is 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. There is no evidence that the Respondent was unsupportive of the Petitioner's decision to return to work as a female.

52. Further, 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 was born.

53. In Oiler v. Winn-Dixie, 2002 WL 31098541 (E.D. La. 2002), a male truck driver for Winn-Dixie was terminated for engaging in "cross-dressing" during non-work hours. The district court held that such behavior was not protected under Title VII prohibitions against sex discrimination, stating:

> After much thought and consideration of the undisputed facts of this case, the Court finds that this is not a situation where the plaintiff failed to conform to a gender stereotype. Plaintiff was not discharged because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male employee . . . . The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women's clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman named "Donna."

Id. at *5.

54. The court further wrote:

> This is not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex. After a review of the legislative history of Title VII and the authorities interpreting the statute, the Court agrees with Ulane and its progeny that Title VII prohibits discrimination on the basis of sex, i.e. biological sex. While Title VII's

> prohibition on the basis of sex includes sexual stereotypes, the phrase "sex" has not been interpreted to include sexual identity or gender identity disorders.

Id. at *6.

55. More recently, in Etsitty v. Utah Transit Authority, 2005 WL 1505610 (D. Utah 2005) a pre-operative transsexual employee challenged his termination on the basis of gender non-conformance and transsexuality. In rejecting the claim, the court stated:

> There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman. Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes.

Id. at *5.

56. The Petitioner has offered no case law that could support a conclusion that transsexuality is no more than a failure to conform to stereotype, or that the protections of either Title VII or the Act have been extended to address discrimination against an employee who is transsexual.

57. It should be noted that the Respondent has asserted that even if the Petitioner were entitled to legal protection under the Act, the disruption to the Respondent's business was sufficient to support the Petitioner's termination. The primary case cited in support of the assertion is Matima v. Celli, 228

F.3d 68 (2d Cir. 2000). However the facts of that case are sufficiently distinguishable to render the case inapplicable here.

58. In Matima, the Court found that the evidence established that the terminated employee was confrontational and antagonistic, and that the termination was supportable on those grounds even in the absence of unlawful rationale for the termination.

59. In this case, there is 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. Five days after his return, Mr. Kelley decided to end the Petitioner's employment with the Respondent, and the Petitioner has no recourse under the Florida Civil Rights Act for the decision.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order DISMISSING the complaint of discrimination filed by the Petitioner in this case.

DONE AND ENTERED this 8th day of November, 2005, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.