STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

HOLLY MATHIS,

Petitioner,

v.

O'REILLY AUTO PARTS,

Respondent.
_____/

EEOC Case No. 15D201500600

FCHR Case No. 2015-01444

DOAH Case No. 16-1072

FCHR Order No. 16-048

INTERLOCUTORY ORDER FINDING THAT AN UNLAWFUL EMPLOYMENT PRACTICE OCCURRED, AWARDING AFFIRMATIVE RELIEF AND REMANDING CASE TO ADMINISTRATIVE LAW JUDGE FOR ISSUANCE OF RECOMMENDED ORDER REGARDING MONETARY AMOUNTS OWED PETITIONER

Preliminary Matters

Petitioner Holly Mathis filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2014), alleging that Respondent O'Reilly Auto Parts committed unlawful employment practices on the basis of Petitioner's sex (female) by treating Petitioner differently than male employees and by subjecting Petitioner to sexual harassment.

The allegations set forth in the complaint were investigated, and, on January 29, 2016, the Executive Director issued a determination finding that there was reasonable cause to believe that an unlawful employment practice had occurred.

Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

An evidentiary hearing was held on May 13, 2016, in Panama City, Florida, before Administrative Law Judge Garnett W. Chisenhall.

Judge Chisenhall issued a Recommended Order of dismissal, dated July 13, 2016.

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

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 error in the Administrative Law Judge's application of the law to the facts, and consequently conclude that Respondent did commit, and is liable for, an unlawful employment practice, namely the sexual harassment of Petitioner.

The Administrative Law Judge concludes, "...While the undersigned found that Ms. Mathis proved her allegations regarding the sexual harassment by Mr. Stephenson by a preponderance of the evidence, the case law demonstrates that Ms. Mathis cannot prevail on her tangible employment claim because O'Reilly did not have an opportunity to correct the situation. In other words, O'Reilly cannot be held vicariously liable for Mr. Stephenson's actions because Ms. Mathis did not utilize the reporting procedures O'Reilly made available to her." Recommended Order, ¶ 62.

We disagree with the conclusion that Respondent cannot be held vicariously liable for Mr. Stephenson's sexual harassment of Petitioner.

In conclusions of law adopted by a Commission Panel, it has been stated, "Pursuant to Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 753 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998), courts should no longer use the labels 'quid pro quo' and 'hostile environment' to analyze claims of employer liability in sexual harassment cases. However, these terms continue to be relevant when there is a 'threshold question whether a plaintiff can prove discrimination.' Ellerth, 524 U.S. at 743. Instead, cases involving claims that an employer is liable for sexual harassment should be separated into two groups: (a) harassment that results in a tangible employment action such as a discharge, demotion or undesirable assignment; and (b) harassment not involving a tangible employment action but which is sufficient to constructively alter an employee's working conditions. Ellerth, 524 U.S. at 761-763; Faragher, 524 U.S. at 790, 807. As a general proposition, only a supervisor, or other person acting with the authority of the employer, can cause an injury that results in an adverse tangible employment action. Ellerth, 524 U.S. at 762. Therefore, an employer is automatically vicariously liable when a supervisor engages in harassment that results in an adverse tangible employment action. See Ellerth, 524 U.S. at 763; Faragher, 524 U.S. 790. A supervisor or any other co-employee may be guilty of harassment that does not result in an adverse tangible employment action. In such a case, the employer can avoid liability by proving the following two elements as an affirmative defense: '(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the plaintiff employee reasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.' Faragher, 524 U.S. at 807." See Jensen v. Tetra Tech, Inc., Recommended Order, ¶ 73 through ¶ 76, in DOAH Case No. 02-4583 (May 23, 2003), adopted by the Commission in FCHR Order No. 03-066 (November 20, 2003).

The Administrative Law Judge specifically found that Mr. Stephenson was the highest ranking employee at the Panama City Beach store, and therefore, "Mr. Stephenson had supervisory authority over Ms. Mathis." Recommended Order, ¶ 16.

The Administrative Law Judge further found, "...When Ms. Mathis asked to leave early so that she could spend time with her newborn, Mr. Stephenson repeatedly asked her to expose her breasts to him. Ms. Mathis refused Mr. Stephenson's requests but was eventually allowed to leave work early. *However, Ms. Mathis had been under the impression that she would not be allowed to leave early unless she complied with Mr. Stephenson's request* [emphasis added]. Recommended Order, ¶ 17 and ¶ 18.

The Administrative Law Judge specifically found that "...Ms. Mathis proved by a preponderance of the evidence that Mr. Stephenson sexually harassed her in April of 2015 as described above." Recommended Order, ¶ 30; see also Recommended Order, ¶ 35, ¶ 47, and ¶ 62.

We conclude that under the statement of law set out above a supervisor's requiring of an employee to expose her breasts as a condition for obtaining a favorable response to a request to leave work early is a tangible employment action for which the employer is vicariously liable.

Applying this to the instant case, we further conclude that given the findings of fact made by the Administrative Law Judge as set out above, Respondent is vicariously liable for the unlawful sexual harassment found by the Administrative Law Judge to have been committed by Mr. Stephenson on Petitioner.

In modifying these conclusions of law of the Administrative Law Judge, we conclude: (1) that the conclusions of law being modified are conclusions of law over which the Commission has substantive jurisdiction, namely conclusions of law stating what must be demonstrated to establish liability of a Respondent in a sexual harassment case brought pursuant to the Florida Civil Rights Act of 1992; (2) that the reason the modifications are being made by the Commission is that the conclusions of law being modified incorrectly conclude that Respondent could not be held vicariously liable for the sexual harassment committed by its manager under the facts as found by the Administrative Law Judge; and (3) that in making these modifications the conclusions of law being substituted are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(l), Florida Statutes (2016).

With regard to the appropriate remedy for the unlawful employment practice found to have occurred, we note that in her proposed recommended order Petitioner has requested, "1. Fair compensation for lost wages; 2. Compensation for damages to professional reputation, mental anguish, and financial hardship; 3. Payment of reasonable attorney fees and costs." See Petitioner's Proposed Recommended Order, page 8.

We conclude that Petitioner is not entitled to compensation for lost wages because Petitioner voluntarily left her position with Respondent. Recommended Order, ¶ 19 and ¶ 22.

We conclude that Petitioner is not entitled to compensation for damages to professional reputation or mental anguish because the Commission does not have the authority to award that type of "compensatory" relief. See McIntosh v. Dollar General, FCHR Order No. 10-047 (May 25, 2010).

We conclude that Petitioner would be entitled to compensation for "financial hardship" caused by the unlawful employment practice, if such an amount could be specifically proved. See, generally, McIntosh, supra, in which the Commission concluded that Petitioner would be entitled to compensation for medical bills incurred that were the result of Respondent's unlawful failure to accommodate Petitioner's disability.

We conclude that Petitioner is entitled to compensation for reasonable attorney's fees and costs incurred in the bringing of this action. Section 760.11(6), Florida Statutes (2016).

We conclude that Petitioner is entitled to an order prohibiting the unlawful employment practice that occurred. Id.

Finally, we conclude that the matter should be remanded to the Administrative Law Judge for a determination of the dollar amount of "financial hardship" incurred by Petitioner as a result of the unlawful employment practice, a determination of the reasonable attorney's fees and costs for which Petitioner is entitled to be compensated, and the issuance of a Recommended Order as to those amounts.

Exceptions

Petitioner filed "Petitioner's Exceptions to Recommended Order" with the Division of Administrative Hearings, on August 11, 2016.

Respondent filed a motion to strike Petitioner's exceptions as untimely, on August 15, 2016.

The Administrative Procedure Act states, "The agency shall allow each party 15 days in which to submit written exceptions to the recommended order." Section 120.57(1)(k), Florida Statutes (2016). The Recommended Order, itself, advises the parties, "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." See Recommended Order, page 27. Finally, the Florida Administrative Code section dealing with the filing of exceptions to Recommended Orders states, "No additional time shall be added to the time limits for filing exceptions or responses to exceptions when service has been made by mail." Fla. Admin. Code R. 28-106.217(4).

Petitioner's exceptions to the Recommended Order were filed with the Division of Administrative Hearings rather than the Commission, but the Commission has long held that exceptions timely-filed mistakenly in the wrong forum will be viewed as being timely-filed with the Commission, if the Commission becomes aware of them. See Orr v. Ameri-Scapes Landscape Management, Inc., FCHR Order No. 15-075 (December 16, 2015), and cases cited therein.

The date of the Recommended Order is July 13, 2016, and, as indicated above, Petitioner's exceptions were received by the Division of Administrative Hearings on August 11, 2016, 29 days after the date of the Recommended Order.

Petitioner's exceptions are untimely. See Chun v. Dillard's, FCHR Order No. 14-029 (August 21, 2014) and Johnson v. Apalachee Mental Health, FCHR Order No. 12-028 (June 27, 2012). Accord, Scott v. P.E.B. Purveyors, d/b/a McDonald's, FCHR Order No. 16-039 (August 4, 2016), De Matas v. H and R Block Enterprises, FCHR Order No. 15-074 (December 16, 2015), Drayton v. Lowe's Home Centers, Inc., FCHR Order No. 12-015 (April 23, 2012) and Barbagallo v. Ocean Park Condominium Association, FCHR Order No. 11-060 (July 13, 2011).

Petitioner's exceptions are rejected as untimely. This rejection of Petitioner's exceptions as untimely should not in any way be viewed as a ruling by the Commission on the substantive arguments made in Petitioner's exceptions document.

Affirmative Relief and Remand

Through our adoption of the Administrative Law Judge's findings of fact and our modification of the conclusions of law, as set out above, we find that an unlawful employment practice occurred in this matter. We conclude the case should be remanded to the Administrative Law Judge for determination of the compensation owed Petitioner for the "financial hardship" caused by the unlawful employment practice and for determination of the amounts of attorney's fees and costs owed 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 pay Petitioner reimbursement for the "financial hardship" caused Petitioner by the unlawful employment practice that occurred;

(3) to pay Petitioner the amount of attorney's fees that has been reasonably incurred in this matter by Petitioner; and

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

This matter is REMANDED to the Administrative Law Judge for further proceedings to determine the amount of reimbursement for "financial hardship" owed Petitioner, as well as the amounts of attorney's fees and costs owed Petitioner, and for the issuance of a Recommended Order as to those amounts.

DONE AND ORDERED this 29 day of Sept., 2016.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Rebecca Steele, Panel Chairperson;
Commissioner Donna Elam; and
Commissioner Gilbert M. Singer

Filed this 29 day of Sept., 2016,
in Tallahassee, Florida.

Tammy Barton

Clerk
Commission on Human Relations
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Garnett W. Chisenhall, 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 29 day of Sept., 2016.

By: Tammy Barton
Clerk of the Commission
Florida Commission on Human Relations