STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

KIMBERLY N. WILLIAMS,

Petitioner, AT

v.

SAILORMAN, INC., d/b/a POPEYE'S CHICKEN AND BISCUITS,

Respondent.

EEOC Case No. NONE

FCHR Case No. 22-01287

DOAH Case No. 02-3995 TKW-Clos

FCHR Order No. 04-037

FINAL ORDER DISMISSING PETITION FOR RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE

Preliminary Matters

Petitioner Kimberly N. Williams filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2001), alleging that Respondent Sailorman, Inc., d/b/a Popeye's Chicken and Biscuits, committed an unlawful employment practice on the basis of Petitioner's age (DOB: 11-11-84) when it terminated Petitioner from her position on December 1, 2001.

The allegations set forth in the complaint were investigated, and, on July 15, 2002, the Executive Director issued his 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 in Sanford, Florida, on June 5, 2003, before Administrative Law Judge T. Kent Wetherell, II.

Judge Wetherell issued a Recommended Order of dismissal, dated August 15, 2003.

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 and Conclusions of Law

We adopt the Administrative Law Judge's findings of fact and conclusions of law to the extent that they reach the ultimate finding that no unlawful employment practice occurred as to the Petitioner in this case. We comment on aspects of the Administrative Law Judge's conclusions of law we find troublesome, for the purpose of providing guidance in the application of the outcome of this case to other situations.

Commission panels have long concluded that the Florida Civil Rights Act of 1992 and its predecessor law the Human Rights Act of 1977, as amended, prohibited age discrimination in employment on the basis of any age "birth to death." See Green v. ATC/VANCOM Management, Inc., 20 F.A.L.R. 314 (1997), and Simms v. Niagara Lockport Industries, Inc., 8 F.A.L.R. 3588 (FCHR 1986). A Commission panel has indicated that one of the elements in determining a prima facie case of age discrimination is that Petitioner is treated differently than similarly situated individuals of a "different" age, as opposed to a "younger" age. See Musgrove v. Gator Human Services, c/o Tiger Success Center, et al., 22 F.A.L.R. 355, at 356 (FCHR 1999). The Commission has concluded that, unlike the federal Age Discrimination in Employment Act (ADEA), the age 40 has no significance in the interpretation of the Florida Civil Rights Act of 1992. See Green, supra, at 315.

We specifically adopt the Administrative Law Judge's conclusion that the Florida Civil Rights Act of 1992 "protects 'all individuals,' including minors, from age discrimination," (Recommended Order, ¶ 60), and we note that this includes protection from discrimination against younger individuals in favor of older individuals. See Musgrove, supra.

We find troublesome the Administrative Law Judge's finding that Respondent met its burden to prove that being 18 years of age is a Bona Fide Occupational Qualification (BFOQ) for its crew members. Recommended Order, ¶ 72. While we determine that we are limited by the Administrative Procedure Act to accept this finding as to Petitioner in this case, we do not see how such a broad conclusion could be made as to all minors Respondent might employ. We are concerned that the misapplication of this decision by employers could result in decreased job prospects for those under the age of 18 in Florida.

The position set out in the Recommended Order appears to be that since the child labor laws are difficult to comply with, not being a minor is a BFOQ for employment by Respondent.

The Florida Civil Rights Act of 1992 states, "Notwithstanding any other provision of this section, it is not an unlawful employment practice under ss. 760.01-760.10 for an employer, employment agency, labor organization, or joint labor-management committee to: (a) Take or fail to take any action on the basis of religion, sex, national origin, age, handicap, or marital status in those certain instances in which religion, sex, national origin, age, absence of a particular handicap, or marital status is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related ....(c) Take or fail to take any action on the basis of age, pursuant to law or regulation governing any employment or training program designed to benefit persons of a particular age." Section 760.10(8)(a) and (c), Florida Statutes (2003).

Citing Whitehead v. Miracle Hill Nursing and Convalescent Home, Inc., 18 F.A.L.R. 1515 (FCHR 1995), the Administrative Law Judge indicates that to establish a BFOQ defense Respondent must prove that: "(1) The qualification is 'reasonably necessary' to the essence of the business operation; and (2a) There was reasonable cause to believe, that is, a factual basis for believing all, or substantially all, of the excluded class would be unable to perform safely and efficiently the duties of the job involved; or (2b) It is impossible or highly impractical to deal with the members of the group on an individualized basis." Recommended Order, ¶ 64.

The Administrative Law Judge concluded, "The evidence establishes that operating the bakery-type machines used to make biscuits is a part of the job duties of a crew member, that crew members are often required to work after 11:00 p.m., and that it is highly impractical to give crew members 30-minute breaks every four hours because of the small number of crew members on each shift. The evidence further establishes that these duties are part of the 'essence' of the duties of crew members and of Respondent's fast-food business. Because the child labor laws prohibit minors from operating bakery machines, working after 11:00 p.m., and working more than four hours without a 30-minute break, it is concluded that minors are not able to perform all of the duties required of crew members and, therefore, Respondent met its burden to prove that being 18 years of age is a BFOQ for crew members." Recommended Order, ¶ 72. In addition, the Administrative Law Judge concluded, "Respondent's decision to fire Petitioner is not an unlawful employment practice based on Section 760.11(8)(c), which permits employers to take employment action based upon laws which, like the child labor laws, are designed to benefit persons of a particular age group." Recommended Order, ¶ 73.

It is clear from the facts found by the Administrative Law Judge that there were duties performed by crew members that did not violate child labor laws. For example, cleaning the interior and exterior of the store, working with cash registers, and washing dishes. Recommended Order, ¶ 6. Thus, a determination that crew members under the age of 18 could not somehow be accommodated would to us seem to depend on a case by case basis, looking at such factors as how many minors were scheduled on any given shift or employed at any given location, and the job assignments within the shift or location that could be made to accommodate the minor. As indicated, above, we note that the Administrative Law Judge concluded "that crew members are *often* required to work after 11:00 p.m., and that it is *highly impractical* to give crew members 30-minute breaks every four hours because of the small number of crew members on each shift [emphasis added]." Recommended Order, ¶ 72. While that may be the facts found in this instance, we do not see how this could be said to be true of other of Respondent's work locations, without fact finding as to the factors we have suggested.

Indeed, the fact that Respondent did not immediately terminate all minors upon deciding not to employ minors further, but rather, upon adopting the policy on August 6, 2001 (Recommended Order, ¶ 21), required that all minor employees be "phased out" by December 1, 2001 (Recommended Order, ¶ 25), begs the question as to whether not being a minor is a BFOQ to serve as one of Respondent's crew members. Respondent appears to have conducted business for nearly four months between the establishment of the policy and the policy's final implementation with minors in its employ.

We limit the finding that not being a minor is a BFOQ for serving as a crew member for Respondent to the facts relating to the Petitioner in this case.

Exceptions

Neither party filed exceptions to the Administrative Law Judge's Recommended Order.

Dismissal

The Petition 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 2nd day of June, 2004.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Roosevelt Paige, Panel Chairperson;
Commissioner Dominique B. Saliba; and
Commissioner Billy Whitefox Stall

Filed this 2nd day of June, 2004,
in Tallahassee, Florida.

Violet Crawford

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T. Kent Wetherell, II, 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 2nd day of June, 2004.

By: Vicki Crawford
Clerk of the Commission
Florida Commission on Human Relations