

**STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS**

|                                |   |                         |
|--------------------------------|---|-------------------------|
| <b>CAROLYN HADLEY,</b>         | ) | EEOC Case No. NONE      |
| <b>Petitioner,</b>             | ) | FCHR Case No. 22-01703  |
|                                | ) | DOAH Case No. 04-001601 |
| <b>vs.</b>                     | ) | FCHR Order No. 04-147   |
|                                | ) |                         |
| <b>MCDONALD`S CORPORATION,</b> | ) |                         |
| <b>Respondent</b>              | ) |                         |

**ORDER REMANDING PETITION FOR RELIEF FROM AN UNLAWFUL  
EMPLOYMENT PRACTICE**

This matter is before the Commission for consideration of the Recommended Order, dated September 22, 2004, issued in the above-styled matter by Administrative Law Judge Jeff B. Clark.

Conclusions of Law

The Administrative Law Judge concluded that “a [P]etitioner has the burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. If that prima facie case is established, the [R]espondent must articulate a legitimate, nondiscriminatory reason for the action taken. The burden then shifts back to the [P]etitioner to go forward with evidence to demonstrate that the offered reason is merely a pretext for unlawful discrimination.” Recommended Order, ¶ 13.

Further, the Administrative Law Judge concluded, “In order to establish a prima facie case, Petitioner must establish that she is a member of a protected class or group; that she is qualified for her position; that she was subjected to an adverse employment action; that she was treated less favorably or differently than similarly situated persons outside her protected class; and that there is some causal connection between her membership in the protected class and the adverse employment action. Recommended Order, ¶ 15.

The Administrative Law Judge ultimately concluded that Petitioner failed to advance a prima facie case, stating, “There is no dispute in this case that Petitioner is a member of a protected class or that she was qualified for her job; however, she has failed to demonstrate that she suffered an adverse employment action or that she was treated dissimilarly than persons outside her protected class.” Recommended Order, ¶ 16 and 17.

In our view, the Administrative Law Judge committed an error of law in the statement of the appropriate test for establishing a prima facie case, and we hereby correct the error as explained below.

As indicated, above, the Administrative Law Judge concluded that one of the elements for the test for establishing a prima facie case of discrimination is that it must be shown that there is a causal connection between Petitioner’s protected group and the adverse employment action to which Petitioner was subjected. Recommended Order, 15.

The Commission has indicated that this element is actually what a Petitioner is attempting to show by establishing a prima facie case of discrimination, and that this element should not, itself, be an element of the test for a prima facie case. See, Baxla v. Fleetwood Enterprises, Inc., d/b/a Fleetwood Homes of Florida, Inc., 20 F.A.L.R. 2583, at 2585 (FCHR 1998), citing Pugh v. Walt Disney World, 18 F.A.L.R. 1971, at 1972 (FCHR 1995), and Martinez v. Orange County Fleet Manager, 21 F.A.L.R. 163, at 164 (FCHR 1997). See, also, Curry v. United Parcel Service of America, 24 F.A.L.R. 3166, at 3167 (FCHR 2000). Accord, King v. Service Master Professional, FCHR Order No. 04-119 (September 22, 2004), Lewinson-Evans v. Gambro Healthcare, Inc., FCHR Order No. 04-050 (June 2, 2004), Christensen v. City of Orlando, FCHR Order No. 04-040 (March 9, 2004), and McCrimmon v. DaimlerChrysler Corporation, FCHR Order No. 03-076 (December 26, 2003).

In modifying the conclusions of law of the Administrative Law Judge as explained, supra, we find: (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 a prima facie case of unlawful discrimination under 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 as stated run contrary to previous Commission decisions on the issue; and (3) that in making these modifications the conclusions of law we are substituting are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(l), Florida Statutes (2003).

In addition, while the analysis of how a discrimination case is to be proved, as set out by the Administrative Law Judge with our indicated correction, is appropriate for analyzing Petitioner's allegations that she was unlawfully denied the opportunity to enter Respondent's management training program (see Charge of Discrimination), for example, it would not appear to us to be the appropriate analysis to determine whether Petitioner, unlawfully based on her race, was required to wear a sticker on her forehead in front of the customers or whether, unlawfully based on her race, her supervisor smeared ice cream on her face.

These allegations appear to us to go to whether race-based harassment has occurred or whether a hostile work environment was created for Petitioner based on her race.

In conclusions of law adopted by a Commission panel in a case involving allegations of racial harassment it has been stated, "To show hostile work environment, Petitioner must prove that: (a) she belongs to a protected group; (b) she had been subject to unwelcome harassment; (c) the harassment was based on a protected characteristic; (d) the workplace is permeated with discriminatory intimidation, ridicule and insult sufficiently severe or pervasive to alter the terms or conditions of employment and to create an abusive working environment; and (e) the employer is liable either directly or vicariously for the abusive environment. To satisfy the fourth element, an employee must prove that: (a) he or she subjectively perceived the conduct to be abusive; and (b) a reasonable person objectively would find the conduct at issue hostile and abusive. [citation omitted.] To determine whether an employee felt harassed subjectively, a court may look to see if the employee reported the incident, quit, avoided the workplace, reacted angrily or exhibited some physical or psychological reaction to the environment. [citation omitted.] To determine whether the conduct at issue objectively is hostile or abusive, a court should look at the totality of the circumstances using several factors including: (a) the frequency of the conduct; (b) its severity; (c) whether it was physically threatening or humiliating or whether it was merely offensive; and (d) whether it unreasonably interfered with the employee's job performance. [citation omitted.] These factors taken together must reveal conduct extreme enough to 'amount to a change in terms and conditions of employment.' [citation omitted.]" Alexander v. Boehm, Brown, Seacrest, Fischer & Lefever, P.A., FCHR Order No. 03-054 (FCHR August 11, 2003), adopting conclusions of law set out in the Recommended Order of DOAH Case No. 02-4524.

Further, it has been stated that in cases involving allegations of unlawful hostile work environment an employer may raise an affirmative defense by showing: "(a) that the employer exercised reasonable care to prevent and correct promptly any...harassing behavior, and (b) that the plaintiff employee unreasonably failed to take

advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.”  
Id.

Also, a Commission panel has concluded that, depending on the circumstances, the occurrence of a single egregious act can constitute an unlawful hostile work environment. See Blackburn v. John Hancock Mutual Life Insurance Company, 11 F.A.L.R. 4084, at 4086 to 4088 (FCHR 1989).

Recognizing that the ultimate finding of whether discrimination occurred is a finding of fact (see Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, at 1209 (Fla. 1st DCA 1991), we conclude that this matter should be remanded to the Administrative Law Judge to apply the facts found to the indicated legal principles relating to harassment and hostile work environment to determine whether unlawful race-based harassment occurred in this matter and whether an unlawful race-based hostile work environment was created by Respondent.

#### Exceptions

Neither party filed exceptions to the Administrative Law Judge’s Recommended Order of Dismissal.

#### Remand

The Petition for Relief and Complaint of Discrimination are REMANDED to the Administrative Law Judge for further proceedings consistent with this Order.

DONE AND ORDERED this 7th day of December, 2004  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Dominique B. Saliba; and  
Commissioner Rita Craig; and  
Commissioner Roosevelt Paige;

Filed this 7th day of December, 2004,  
in Tallahassee, Florida

/s/

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Jeff B. Clark, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

By: /s/

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Violet Crawford,  
Clerk of the Commission  
Florida Commission on Human Relations