Appendix 9

BELINDA JOELLE SMITH VS. CITY OF JACKSONVILLE CORRECTIONAL INSTITUTION

INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY, INC.

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I.C.T.L.E.P.

Note from the Executive Director:

The following decision is an example of what can happen in this decade IF you decide to fight for your job and IF your attorney understands transgender issues and IF the court possesses a "realist" jurisprudential philosophy.

As to the initial "IF," only you can decide for yourself when you are going to live a full life and fight for your right to employment.

As to the second "IF," insure your attorney understands transgender issues. Insist that your attorney study ICTLEP "Proceedings."

As to the final "IF," beware of those who preach that judges must practice "judicial restraint." Judicial-restraint judges believe in positivism — a jurisprudence based on the "black letter of the law" — and would not have written the following opinion. The judges who wrote this opinion believe in "realism" — a jurisprudence based on the evolution of law to encompass real situations as they arise.

Your advocate for legal awareness,

Phyllis Randolph Frye, Attorney
Executive Director, ICTLEP, Inc.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BELINDA JOELLE SMITH, f/k/a William H. Smith, Petitioner,	)	
vs.	)	CASE NO. 88-5451
CITY OF JACKSONVILLE/ JACKSONVILLE CORRECTIONAL INSTITUTION, et al., Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice a formal hearing was held in this matter before Diane Cleavinger, a duly designated Hearing Officer of the Division of Administrative Hearings, on February 20-22, 1991, in Jacksonville, Florida.

APPEARANCES

FOR PETITIONER: Samuel Jacobson and
David A. Garfinkel, Esquire
2902 Independent Square
Jacksonville, Florida 32202

FOR RESPONDENT: Cheryl R. Peek, Esquire
421 West Church Street
Suite 715
Jacksonville, Florida 32202

STATEMENT OF THE ISSUES

The issue in this case is whether the Petitioner has been subjected to unlawful employment discrimination in violation of Chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

On January 17, 1986, Petitioner, Belinda Joelle Smith, f/k/a William H. Smith, filed a charge of discrimination based on sex and handicap against Respondent, City of

Jacksonville/Jacksonville Correctional Institution, et al. On September 23, 1988, the Florida Commission on Human Relations filed a determination of "No Cause/No Jurisdiction as to Sex" on Smith's charges of discrimination. On October 18, 1988, Ms. Smith filed a Petition for Relief which was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified in her own behalf and called three additional witnesses. Petitioner also offered six exhibits into evidence. Respondent called one witness to testify and offered two exhibits into evidence.

Petitioner and Respondent filed Proposed Recommended Orders on May 23, 1991, and April 8, 1991, respectively. The parties Proposed Findings of Fact have been considered and utilized in the preparation of this Recommended Order, except where such proposals were not shown by the evidence, or were immaterial, irrelevant, cumulative or subordinate. Specific rulings on the parties' Proposed Findings of Fact are contained in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. From 1972-1985, Petitioner was employed by the City of Jacksonville at the Jacksonville Correctional Institution.

2. The Jacksonville Correctional Institution was and is the City's facility for confinement of offenders sentenced to nonstate prison incarceration usually lasting less than a year. The facility housed approximately three hundred (300) male and one hundred (100) female inmates. Most inmates were assigned to

work crews, either in or outside the institution. The Institution also provided training and educational programs. The City is an "employer" within the meaning of Sections 760.02 and 760.10, Florida Statutes.

3. During the entire time, Petitioner was employed at the Institution, Petitioner functioned as a male and was known as William H. Smith. Petitioner is an "individual" within the meaning of Section 760.10, Florida Statutes. [1]

4. The majority of people in this world are of the opinion that humankind is divided into males and females. That viewpoint is incorrect. Put simply, there is a certain percentage of humankind that are a mixture of male and female characteristics.

5. Sometimes the mixture consists of physical characteristics and sometimes the mixture consists of opposing physical, i.e. sexual, characteristics and mental, i.e. gender, characteristics. Transsexuality is the term of common parlance for the condition known to mental health professionals as gender dysphoria. Transsexuals essentially believe themselves to be opposite in gender to their anatomic characteristics and to have been born in the wrong body. Gender dysphoria is a persistent sense of discomfort and inappropriateness about one's anatomic

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[1] In September, 1990, Smith underwent a gender change operation. After the operation, Smith was judicially determined to be a female. Therefore, Smith will be referred to in the feminine gender, even though at all times prior to September, 1990, Smith was a male.

sex accompanied by a persistent wish to be rid of one's genitals and to live as a member of the other sex.

6. Transsexualism is often misunderstood by lay people. It is not homosexuality and it is not transvestism. Both homosexuals and transvestites are comfortable with the gender dictated by their physical bodies. A transsexual differs markedly from persons with homosexual or transvestite traits. Transsexualism is quite literally having the physical form of one sex and the mental form of the opposite sex.

7. Little is understood of how such halflings result. This lack of insight into the phenomena is in part due to psychology's very poor understanding of how personality and self concepts are developed in human beings and how those traits interact with sexual orientation or sexual preference. However, it can be deduced that transsexualism is a result of a very fundamental or combination of fundamental physical and mental attributes. The desire of the transsexual to live and be recognized as the opposite sex begins at a young age. The desire is nonvolitional. The person so afflicted will progressively take steps to live in the opposite sex role on a full-time basis, often resulting in hormonal treatment and surgery to make the anatomy fit the mental form. The unaltered transsexual is a tormented person, beset with fundamental conflict and persistent rejection of self. Depending on the symptoms, transsexualism can result in a handicap. Petitioner, Belinda Joelle Smith, is a transsexual. In Petitioner's case, Petitioner physically had the male form but mentally was a female.

8. Petitioner grew up in a career Navy family. Her father was a chief petty officer. The family moved frequently because her father was often transferred from place to place.

9. Ms. Smith first began to realize that she was a transsexual when she was around four years old. Her earliest specific memory is of a fight with her sister over who would be the mommy in playing house. Smith thereafter continued to have feelings of femininity. In growing up, she felt uncomfortable with boys and was more comfortable with girls. She cross-dressed in female clothes when home alone. All during her youth she experienced considerable personal confusion.

10. Around age eleven, she read a magazine article about transsexuality and discovered that there was a scientific basis for the feelings she was experiencing as a male child. The article discussed surgical gender reassignment. At that time, Petitioner realized that gender reassignment was what she needed and wanted. She dressed in her sister's clothes and went to her mother to explain her new awareness. When she approached her parents about what she had discovered about herself, the reaction was one of moral indignation and she was told never to talk about it again. There was some discussion about sending her to a psychiatrist. But nothing was done. Thereafter, she kept her transsexualism hidden to the best of her ability. However, the struggle to unify the physical and mental aspects of her character was tremendous. Additionally, the struggle to maintain the outward appearance of a normal male was tremendous.

11. Upon discharge of Smith's father from the Navy, the family settled in Liberal, Missouri, a rural farm community. Petitioner attended high school in Liberal, graduating in 1966. While in high school, she felt guilty about her transsexual feelings and attempted to deny them by excelling at traditionally male endeavors. She competed actively in sports, lettering in basketball, baseball, and track. She felt constantly conflicted.

12. Petitioner began to date a girl while in high school. Petitioner told the girl of Petitioner's transsexuality, and she permitted Petitioner to cross-dress with her. Upon graduation, they married. However, the marriage lasted less than a year. Smith could function sexually only as long as she imagined herself as female and her partner as male. Petitioner's transsexuality was the reason for the breakup of the marriage.

13. Petitioner commenced college, but had to withdraw because her father died. She then enlisted in the Navy to support herself and to contribute to the support of her family. She remained in the Navy for three and a half (3 1/2) years, serving as a machinist mate on a destroyer.

14. While in the Navy, Smith consulted a Navy psychiatrist about her transsexuality. The psychiatrist diagnosed her as transsexual and explained that she might eventually have to get sexual reassignment to achieve any real sense of adjustment. Smith was retained by the Navy despite the psychiatrist's diagnosis because she was not homosexual. Smith accordingly served out her full enlistment in the Navy and in 1970 or 1971 was honorably discharged.

15. Around the time she was leaving the Navy, Smith reconciled with her wife. Upon Petitioner's discharge from the Navy, the couple settled in Jacksonville. During the marriage, Smith lived entirely as a male with episodes of cross-dressing. A son was born to the marriage.

16. In 1972, Petitioner began working for the correctional authority in Jacksonville. During the time she was employed by the City, the Institution was overcrowded and understaffed.

17. She began with the City as an entry level corrections officer. She was attracted to corrections work because, "It seemed like something that might help other people. You could serve the public and maybe help rehabilitate somebody, redirect their lives."

18. Correctional officers are considered law enforcement personnel. Such law enforcement personnel work as part of a pari-military organization in which discipline, respect and cooperation are extremely important. Correctional officers are correctional officers twenty-four hours a day. They are accountable for their behavior during duty hours because poor behavior reflects on the individual officer and the officer's employment. However, there are some very real distinctions between law enforcement police officers and law enforcement correctional officers in their respective codes of ethics and the standards to which they are held when engaged in private conduct. See General Orders Manual, G.O. III-1. One such distinction is that police officers have a higher standard of conduct in their private lives than correctional officers.

19. During the time relevant to Petitioner's complaint as well as currently, correctional officers wore unisex uniforms. Male and female officers had common restroom facilities. Both male and female officers patrolled all parts of the institution, including inmate bathing areas. Both male and female officers had direct contact with male and female prisoners.

20. Petitioner advanced rapidly. She was a floor officer at a time floor officers had broad responsibilities. She then became the youngest officer ever to be put in charge of road crews.

21. Smith was made a provisional sergeant by administrative appointment six (6) months prior to being able to take the sergeants exam. This involved being advanced over officers of much greater seniority.

22. Upon passing the sergeants exam, Smith was made a permanent sergeant. While a sergeant, she was promoted to relief watch commander (substitute watch commander) at the City Jail. Smith was the only sergeant permitted to function as a relief watch commander.

23. As watch commander, Petitioner's job was largely administrative, and she was basically in charge of internal operations for the institution during her watch. She worked out of an office designated for the watch commanders. She spent most of her time doing evaluations, preparing reports, making assignments, working up leave schedules, holding musters, and inspecting calls. Most of her work was paperwork. She

occasionally sat on disciplinary boards and participated in disciplinary hearings. Little inmate contact was required, but did occur. She supervised approximately thirty-five (35) employees. The employees included both males and females.

24. Eventually, Petitioner was made a provisional lieutenant by administrative appointment. Again, the appointment was prior to taking the requisite examination. Once again, she was jumped over officers of much more seniority. When she took the examination, she had the highest score of those tested and was promoted to permanent lieutenant. She continued her watch commander duties, but as a watch supervisor instead of relief watch commander.

25. Smith regularly received excellent performance evaluations. These evaluations included outstanding ratings for interactions with other people due to her knack for relating well with both coemployees and inmates. She was good at her job and was promoted more rapidly than other correctional officers. The evidence demonstrated that inmates are unpredictable as a group and that the ability of any person to gain respect and cooperation from them is a subtle quality often found in unlikely people. However, Petitioner through fourteen years of exemplary service demonstrated that she had such an ability. Ms. Smith felt her rapport with inmates resulted from "the fact that I treated them with respect as an equal and left them room to express their feelings, and just generally my conduct towards them was reflected in their conduct towards me."

26. After nine years of unhappy marriage, Smith and her wife separated around 1980 or 1981 and eventually divorced. Petitioner's wife retained custody of their son. After separation and divorce, Smith lived as a male in public and as a female at home. However, sometime after the divorce, the boy's mother was unable to control him, and it became necessary for Petitioner to take custody of their son. Smith therefore reverted to living full-time as a male. Petitioner retained custody of her son and lived as a male until the son was approximately sixteen (16) years old. At that time, in 1984 or 1985, the son's behavioral problems had been straightened out, and he went back into residence with his mother.

27. With the passage of years and the enforced male living, Smith found it increasingly difficult to deny her femaleness. She felt intense stress and internal conflict. She began to drink heavily. She developed a severe bleeding ulcer. Both of these problems progressively worsened. She was began to undergo a major depression and began to consider suicide. Clearly, by 1984 or 1985, Petitioner was experiencing impairment of at least two significant life functions, i.e. health and life. The impairment was directly due to her handicap of transsexualism. The impairment of those life functions causes Petitioner's handicap to fall within the definition of handicap developed under Chapter 760, Florida Statutes.

28. By July, 1985, Smith was feeling greater and greater stress. On July 8, while on vacation, she went out in the middle of the night to a very private, unpopulated, nearby

beach wearing a woman's wig, makeup, a woman's burgundy French-cut bikini bathing suit with false breasts, a pink ladies' beach coat, and pink ladies' sandals. She was dressed this way as a manifestation of her transsexuality. While out, Smith had a flat tire. A passing patrolman stopped to help with the tire. Initially, Petitioner identified herself as Barbara Joe Smith. The officer who stopped to assist Smith ran Smith's tag and discovered that Smith's true name was William, not Barbara Joe. The officer filed a general offense report of the encounter with the City.

29. Once the report was filed, copies of this report were immediately circulated throughout the jail in sufficient quantity to "paper the walls." Smith became aware of the publication of the events of July 8, 1985. Smith did not participate or promote the circulation of the offense report and it was only the City's actions which caused the incident to become public.

30. The next time Smith was to report to work after her encounter with the police officer, Smith was experiencing problems with her bleeding ulcer and called in sick. By that time Smith's encounter with the patrol officer had reached her superiors and Smith was summoned for a conference with the Director of Corrections and the Director of Police Services. On July 12, 1985, while still on sick leave, Petitioner at then-Director and now Sheriff, James McMillan's request visited McMillan's office to discuss the July 8 incident. The Directors wanted Smith's explanation of the incident. Smith explained that

she was transsexual and that the event had been a manifestation of her transsexuality. The Directors asked Smith if she would be willing to accept counseling, but Smith explained to them that counseling would not "cure" her and that the only effective treatment would be sexual reassignment. Smith told McMillan that she was going to go ahead and pursue a sex change operation and would live as a female , including dressing as a female, for one year prior to the operation. The Directors thereupon decided that Smith could not be retained and the City's course of action would be to terminate her. They tried to persuade Smith to resign. The City's testimony is that Smith in fact agreed to resign because of concerns about the way other people would react to her. Smith denies agreeing to resign. She was, however, sympathetic to the reaction of her coworkers and in that vain indicated she would be agreeable to resigning if certain conditions could be met. These conditions were not met. Whatever may have been the perceptions of the parties, it is clear that Petitioner ultimately refused to resign, and she resisted termination. Smith's eventual termination can only be considered involuntary since she sought to remain employed and was denied the right to do so.

31. Smith acknowledges that there would have been problems from continuing in her employment. She expected some finger pointing, name calling, and giggling from a few people. But she felt she could deal with that. The evidence did not demonstrate that any problem would have arisen from Petitioner's continued employment which would have been either dangerous or insurmountable.

32. The City operates its civil service under a system of progressive discipline. See General Order Manual, G.O. II-4. In essence, an officer generally will not be terminated for any single incident. Termination would generally occur only after a series of reprimands and/or suspensions. Misconduct was classified as follows:

> A. Serious misconduct involves criminal violations of the law or actions on the part of the employee which warrant a detailed investigation by the Internal Affairs Unit and which could lead to suspension, demotion or termination of the employee. Examples are: commission of a crime, immoral conduct, corruption, malfeasance in office, official misconduct, D.U.I., violation of the civil rights of another, and excessive use of force.
>
> B. Minor misconduct is that which does not require detailed, formal investigation by the Internal Affairs Unit but may warrant informal counseling by one's supervisor, remedial training or minor disciplinary action. It is usually handled by the employee's supervisor and resolved at or below the division level.

33. The events of July 8 did not result in an internal affairs investigation or a violation of law.

34. On July 19, 1985, the Sheriff served Smith with a "Notice of Proposed Immediate Suspension Without Pay With a Dismissal to Follow." The Notice outlined the charges against Petitioner as follows:

> CHARGE I
>
> Violation of Civil Service Rule 10.06(1), which reads as follows:
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> 10.06(1): Cause shall include, but is not limited to. . . . inefficiency or

> inability to perform assigned duties . . . conduct unbecoming a public employee which would affect the employee's ability to perform the duties and responsibilities of the employee's job . . . .
>
> CHARGE II
>
> Violation of Civil Service Rule 561.01(1)(a), which reads as follows:
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> 10.06(1)(a): The employee has violated any lawful official regulation or order or failed to obey any proper direction made and given by a superior officer.
>
> and
>
> 10.06(4)(a)(5): The retention of the employee would be detrimental to the interests of the City Government."

35. This was the first time Petitioner had been charged with conduct unbecoming an officer and was the first offense on Smith's record which could be used against her in determining any punishment. The City's disciplinary guidelines recommended that an officer receive a written reprimand for the first offense of conduct unbecoming an officer. However, the Sheriff and City did not follow the guidelines since they considered transsexuality and its treatment prohibitive of Petitioner's continued employment.

36. Following her receipt of this Notice, Smith requested a hearing before the Jacksonville Civil Service Board (Board). The hearing was held on October 8, 1985. Petitioner was present and was represented by counsel. Several coemployees testified on behalf of Smith at the civil service hearing. No employees testified in support of the City's position that they could no longer work with Smith and had lost respect for Smith.

In fact, at the administrative hearing in this case, Sheriff McMillan acknowledged that he did not expect all of Smith's coemployees to be adverse to her. He said that he had not himself lost respect for Smith and that he could have continued to maintain a satisfactory working relationship with her. The Sheriff also testified that Sheriff's office employees are carefully screened for adaptability and flexibility. The Sheriff had no reason to suppose that his compassion and humanity were greater than that of other department employees. The fact that coemployees came forward to testify for Smith before the Civil Service Board tends to confirm the Sheriff's statements about Smith's coemployees.

37. The Board determined by a vote of four to one that the evidence at the hearing conclusively showed Smith had engaged in conduct unbecoming a public employee. Based on its findings of fact, the Board upheld the Sheriff's decision to dismiss Smith. The evidence did not support any dismissal based on Smith taking sick leave after the incident occurred. Her illness at that time was genuine.

38. The City's entire basis for terminating Smith was supposition that as a known transsexual she would not be able to command the respect of coemployees and inmates and would generally discredit the City. Sheriff James E. McMillan (who had been the Director of Police Services at the time of Smith's termination and had subsequently become Sheriff) testified:

> "Q: But you didn't think that by virtue of transsexuality there had been any diminution or impairment of Lieutenant Smith's faculties, did you?

A: No.

"Q: So, as I understand it. Lieutenant Smith wasn't terminated because he was illegal or bad or immoral in and of itself?

A: That's correct.

"Q: It was entirely because of your concerns about the reactions of other people?

A: That's correct, and his ability . . . not to his own doing . . . to be able to carry out his duties because of those."

39. The City concedes that Smith's transsexuality involved no illegality or immorality. There is no contention that she ever conducted herself inappropriately in connection with her employment or on City time. There is no suggestion that she ever sought to exploit or publicize her employment with the Sheriff while cross-dressing. The City does not contend that she ever engaged in homosexual conduct or entertained any homosexual ideas.

40. Importantly, at the time of Smith's termination in 1985, nothing had changed in Petitioner's abilities to perform her job. This was the same transsexual person who had rendered exemplary service for the past 14 years. No reasonable accommodation of Petitioner's handicap was explored or attempted by the City. Given, the Sheriff's testimony regarding his ability to accept Petitioner, the screening undergone by correctional officers, the fact that coemployees stepped forward on behalf of Smith and Smith's experience in other jobs after her

termination demonstrate that the City's apprehensions were unjustified and were not concerns which could not be reasonably accommodated as was done with female correctional officers and black correctional officers when those groups entered the correctional work force.

41. The evidence showed that inmate reaction to a transsexual is a "big unknown" and that a known male correctional officer holding himself out as a woman within the confines of a correctional facility may theoretically be disruptive and may theoretically be adverse to the best interest of the agency. However, there was no evidence which indicated that any inmates were aware of the July 8 incident or were cognizant of Petitioner's transsexuality. Additionally, the evidence demonstrated that an inmate's ability to discern a transsexual who is cross-dressing while at work may be difficult since correctional officers wear the same uniform and have strict rules regarding their appearance. See General Orders Manual, G.O. III-9. No evidence was submitted as to what changes would have occurred in Petitioner's appearance had she been allowed to be female at work.[2] Moreover, all of the theoretical problems which

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[2] At the hearing, Petitioner's appearance was very conservative. She is of medium height and build for a woman, with blond hair and pale features. She did wear light makeup and fingernail polish. Her hair was pulled back. However, it is diffucult to say whether in 1985 Petitioner would have worn makeup and fingernail polish around other people, given her empathy for other people's reactions and the fact that she still had male features such as a beard and a regulation short haircut. Jewelry was prohibited under the general orders.

may or may not occur could have been reasonably accommodated by restricting any overt appearance of Petitioner while at work.

42. Finally, the City had extensive general orders and personnel rules and regulations requiring that employees be respectful and courteous toward one another and forbidding disrespectful, mutinous, insolent, or abusive language towards a supervisory employee or any other employee. It also had prohibitions against speaking disparagingly about any coemployees or defaming or demeaning the nationality, creed, race, or sex of any person. Various punishments or administrative actions were prescribed for violations of these orders. Such respective behavior was demanded toward black and female correctional officers. The evidence did not demonstrate any legitimate reason for not demanding such behavior toward Petitioner.

43. After termination, Smith worked at a series of jobs. In almost each instance, her employers knew of her transsexuality and the fact that she was cross-dressing at work. Her experience at those jobs was basically what she had predicted she would have encountered if she had continued with the Sheriff's Office -- that is, initial snickering and then general acceptance. For example, she worked as part of a clean up crew at a construction site at which there were approximately (300) construction workers. Smith testified that at first she was subjected to some taunts and name calling, but that this shortly subsided. By the end of the construction site job, she had achieved general acceptance and had received apologies from

various of the taunters. In most of her post-termination jobs, Smith successfully oversaw and supervised other workers. The only exception to Petitioner's successful employment occurred when she was employed by Pic-N-Save as a sales manager. Apparently, the Pic-N-Save had segregated male and female restroom facilities and there was great concern over which restroom Petitioner would use.

44. Lost income calculated from July, 1985, until April 13, 1989, when Smith requested a continuance in this cause, was $99,070. Lost income from July, 1985, through February, 1991 was $136,435.00. (These calculations include a 20% wage differential and set-off for Petitioner's earnings). Since all the parties at one time or another requested continuances in this case, Respondent is not entitled to a set-off for the period of time after Smith's continuance of April 13, 1989. Both parties delayed the action at a time when the other party was ready to proceed. Moreover, Respondent is entitled to a set-off for any earnings of Petitioner after the April 13 continuance. Therefore, Petitioner is entitled to $136,435.00. in back pay through the end of February, 1991, plus any additions through reinstatement, less deductions for any earnings of Petitioner during this time.

44. Smith ultimately was accepted into a gender reassignment program. As part of that program, she was required to live as a female for a two (2) year adjustment and demonstration period. She successfully accomplished the adjustment. In 1990, she underwent her gender reassignment

surgery. Since then, she has been living entirely as a female and has been judicially determined to be a female.

45. Since the gender reassignment surgery, Petitioner is now doing well. She feels much more at peace with herself and much happier than when she was a male. She has quit drinking altogether and no longer suffers from stomach ulcers. She no longer thinks about suicide. She has received acceptance by her brothers and sisters, and also by her son. She is working successfully as a salesperson for a retail tile company.

CONCLUSIONS OF LAW

1. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes (1987).

2. Chapter 760, Florida Statutes prohibits discrimination in the work place and declares such discrimination to be an unlawful employment practice. Specifically, Section 760.10(1), Florida Statutes, in pertinent part, defines an unlawful employment practice as:

> (a) To discharge or fail to 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.

3. As a general proposition, Petitioner bears the initial burden of demonstrating a prima facie case of discharge because of handicap. See, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Green v. Mark III Industries, 12 FALR 1888 (FCHR 1990). To establish a prima facie case, Smith must show (1) that

she was handicapped, (2) that she was qualified for her position and that she satisfactorily performed her duties, and (3) that she was terminated despite satisfactory performance. Green v. Mark III Industries, 12 FALR 1988 (FCHR 1990); Wolfe v. Department of Agriculture and Consumer Services, 8 FALR 426 (FCHR 1985). If a prima facie case is established, the burden then shifts to the employer to show that absence of the handicap is a bona fide occupational qualification. Andrews v. Albertson's, Inc., 11 FALR 4874 (FCHR 1989); Wolfe v. Department of Agriculture and Consumer Services, 8 FALR 426 (FCHR 1985). The employer's burden includes proof of a good faith attempt to accommodate the handicap and/or a showing of undue hardship in attempting a reasonable accommodation. E.E.O.C. v. Townley Engineering and Mfg. Co., 859 F.2d 610 (9th Cir. 1988); Anderson v. General Dynamics Convair Aerospace Division, 589 F.2d 397 (9th Cir. 1978), cert. den. 442 U.S. 921 (1979); Andrews v. Albertson's, Inc., 11 FALR 4874 (FCHR 1989).

4. Smith indisputably established the second and third parts of the three part requirements of a prima facie case. She was a transsexual from the outset of her employment with the City. Her work during those years of transsexuality was outstanding. She continued to be the same person after her transsexuality became known. So far as her abilities were concerned, she remained as capable of performing as she previously had been. However, she nonetheless was terminated because of feared prejudicial perceptions of other people and the effect of that prejudice on Petitioner's ability to perform.

Therefore, the only question left in regards to Petitioner's prima facie case is whether transsexualism constitutes a handicap under Chapter 760, Florida Statutes.

5. The Legislature provided no definition of the term "handicap" in the Human Rights Act as originally passed. The Act then was amended in 1989 to add the following definition:

> 'Handicap' means:
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> (a) A person who has a physical or mental impairment which substantially limits one or more major life activities, or who has a record of having, or is regarded as having, such physical or mental impairment;" Section 760.02, Florida Statutes (1989).

Ordinarily it might be necessary to decide whether the new definition should apply retrospectively to this case. See, e.g., Kawasaki of Tampa, Inc. v. Calvin, 348 So.2d 897 (Fla. 1st DCA 1977). In this case, however, it is immaterial whether the new definition applies. In promulgating the Act in 1976 the Legislature gave the Human Relations Commission responsibility and authority to implement the Act's "purposes and policies." Sections 764.04 - 760.06, Florida Statutes (1977). In carrying out that responsibility the Commission formulated its own definition of "handicap." See, e.g., Thomas v. Floridin Company, 8 FALR 5457 (FHRC 1986). The Legislature's 1989 statutory definition only codified the Commission's definition. Therefore, the amendment brought about no change in the law to be applied in this case. See, e.g. Fenesy v. GTE Data Services, Inc. DOAH Case No. 80-473, FCHR Order No. 81-042 (FCHR August 11, 1981). Chicago, Milwaukee, St. Paul and Pacific Railroad Co. v.

Washington State Human Rights Commission, 577 [sic] P.2d 307 (Wash. 1976), State v. Turner, 209 N.E. 2d 475 (Ohio 1965), Chicago, Milwaukee, St. Paul and Pacific Railroad v. Department of Industry, Labor and Human Relations, 215 N.W. 2d 443 (Wis. 1974).

6. Generally "handicap" connotes a condition that prevents normal functioning in some way: "A person with a handicap does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties." Chicago, Milwaukee, St. Paul and Pacific Railroad Co. v. Washington State Human Relations Commission, supra. In this case, the record demonstrates that Smith was handicapped. Petitioner's transsexualism caused ongoing suicidal ideation, situational alcohol abuse, and poor health due to bleeding ulcers. By any view, these symptoms interfered with Petitioner's full and normal use of her mental and physical faculties and limited Petitioner's major life activities, i.e. life and health. The disparity between Smith's physicality and her feelings about herself caused her to be at odds with the rest of her world. That disparity, and her need to hide it, left her unable to merge the mental or physical aspects of her identity, manifesting in the loss of her health, depression and the will to live. Smith's day to day existence consequently was much more fundamentally burdened by handicap than if she had been subject to a multitude of conditions which would have been recognized beyond dispute as handicaps. Based upon the plain meaning of the term "handicap" and the medical evidence presented, an individual with gender

dysphoria is within the coverage of the Human Rights Act of 1977 in that such individual "does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties and in this case has had at least two major life activities impaired." Cf. Blackwell v. U.S. Department of Treasury, 44 FEP Cases 1856 (D.C. Cir. 1987); Doe v. U.S. Postal Service, 37 FEP Cases 1867 (D.D.C. 1985). Thomas v. Floridin Company, 8 FALR 5457, at (FHCR 1986). See also Kelly v. Bechtel Power, 633 F.Supp. 927, 931 (SD Fla. 1986).

7. However, apart from actual handicap, Smith was handicapped because of the attitudes with which she was confronted by her employer. A handicap can result from the perception of others that a condition is handicapping, particularly if the perception is held by an employer. The City adamantly insists that Smith's condition impaired her ability to function effectively and continue in her chosen field of work. A person's inability to continue working in that person's chosen field is an impairment of a major life function regardless of whether it is caused by a physical or mental handicap, including a handicap caused by the perceptions of the employer. See, Blackwell v. United States Department of the Treasury, 639 F.Supp. 289 (D.D.C. 1986) See, School Board of Nassau County v. Arline, 480 U.S. 273, 283 (1987); Doe v. U.S. Postal Service, 37 FEP Cases 1867 (D.D.C. 1985) (a federal Rehabilitation Act case).

8. In this case, the City's main line of defense for terminating Smith is that an absence of transsexuality was a bona fide occupational qualification (BFOQ) for her position. Section 760.10(8), Florida Statutes, states:

> (8) 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.

The City contends that even if Smith could have performed the specific tasks of her position, she would not have been able as a known transsexual to command respect from coemployees, inmates, or members of the public and would consequently have been impaired as a corrections lieutenant.

9. Under the BFOQ defense, persons able to do a job may be denied employment by reason of religion, sex, nationality, or other protected status, because the protected status or condition itself precludes performance. Absence of the status or condition accordingly is a BFOQ and such absence must be required for satisfactory performance. For example, a Moslem cannot be a Baptist minister, and a male cannot be a ladies room attendant.

10. The BFOQ defense is a very narrow exception to the antidiscrimination purpose of Chapter 760, Florida Statutes, and can present exceedingly difficult questions involving a highly delicate balancing of values. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (sex discrimination case). However, a BFOQ will not be recognized for mere employer convenience. See, Usery v.

Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) (age discrimination).[3]

11. As stated previously, the burden of proving a BFOQ is upon the employer. See e.g., Andrews v. Albertson's, Inc., 11 FALR 4874 (FCHR 1989). An employer may rely on a BFOQ defense only upon a showing that the handicapped employee cannot be accommodated in any reasonable way. E.E.O.C. v. Townley Engineering and Mfg. Co., 589 F.2d 610 (9th Cir. 1988); Anderson v. General Dynamics Convair Aerospace Division, 589 F.2d 397 (9th Cir. 1978), cert. den. 442 U.S. 921 (1979); Andrews v. Albertson's, Inc., 11 FALR 4874 (FCHR 1989). Employers have an "affirmative obligation" to provide reasonable accommodation. School Board of Nassau County v. Arline, 480 U.S. 273, fn 19 (1987). An employee who can perform "the essentials of the job if afforded reasonable accommodation" is entitled to relief. Treadwell v. Alexander, 707 F.2d 473, 477 (11th Cir. 1983).

12. In this case, the City provided virtually no evidence to discharge its burden of proving a BFOQ. Its entire case consisted of the opinions of the Sheriff and his surmise and assumption about the responses of Petitioner's coemployees and inmates.

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[3] Normally the BFOQ defense does not apply to handicap cases. Generally speaking, if a handicapped person can perform the job, there is ipso facto no BFOQ. However, this does not mean that there can never be a BFOQ defense in a handicap case. Obviously, a public restaurant would not be required to employ a typhoid carrier as a food handler. On the other hand, a person cannot automatically be denied employment because of having a communicable disease. See, School Board of Nassau County v. Arline, 480 U.S. 273 (1987). In these cases, whether the handicap can be reasonably accomodated is the critical factor.

13. The City offered no witness - coemployee, inmate, or citizen - who testified on personal knowledge to any actual loss of respect for Smith or to any actual erosion of working relationships. The only evidence presented was that the general offense report was circulated in quantity. At best, this evidence only demonstrates that Petitioner's coemployees found the July 8 incident humourous.

14. There was no indication that the City attempted in any way to determine whether it really needed to terminate Smith. It simply terminated her out of hand after learning she was a transsexual. There was no checking, testing, or verification of any kind. Smith was given no chance to see if she could perform effectively. There was no inquiry, investigation, or interviewing to ascertain whether she would be rejected by coemployees, inmates, or other persons.

15. There was no attempt to become informed or educated in any way about transsexuality. There was no checking or inquiry to determine whether other transsexuals had successfully managed to preserve working relationships upon coming into the open. The City instead made a snap decision based on the personal predilections and perspectives of the Directors who met with Smith, without any effort then or later to assess the validity of their assumptions.

16. Moreover, the evidence demonstrated that there probably would not have been any significant impairment of working relationships with coemployees and if some individuals did have a prejudicial attitude toward Petitioner then

appropriate discipline was in order for the holder of such an attitude.

17. Neither was there any showing of an adequate basis in fact for assuming that inmates would be adverse to Smith. The City expressly conceded that Smith had demonstrated a good record for relating to inmates. The person 'Smith' had not changed. Moreover, there was no evidence indicating that the inmates knew or would have become aware of Smith's transsexuality.

18. Finally, the record is barren of any attempt to accommodate Smith. The City decided at the outset that there was no way to accommodate her and thereafter made no effort to do so. This represented a clear failure of its affirmative obligation to attempt reasonable accommodation. An employer which seeks to terminate an employee for handicap must provide the employee a reasonable opportunity to demonstrate ability to perform. Bowe v. Colgate-Palmolive Company, 416 F.2d 711, 717 (7th Cir. 1969). If nothing else, the City's accommodation could have consisted of an effort to uphold and support Smith against such disrespect, if any, as might have materialized as is required under its own civil service rules. Yet the City made no attempt to apply or enforce any such rules with regard to Smith.

19. More important, even if the City had met its burden of showing an adverse reaction to Smith's transsexuality, it does not follow that the reaction would be entitled to the dignity of a BFOQ. Any adverse reaction to Smith solely because of her transsexuality would have been sheer prejudice. The very purpose of the Human Rights Act is to provide protection against

that kind of intolerance. Smith's condition was wholly involuntary. There was nothing illegal, immoral, wrong, or bad about it. It was entirely personal to her and was harmful to no one else. She was as undeservedly afflicted as someone born with a physical deformity. Her condition accordingly was no less entitled to protection than any of the other protected conditions or status categories of the Human Rights Act.

20. As the Supreme Court stated in School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987), the basic purpose of laws against handicap discrimination is "to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." The Supreme Court went on to point out in Arline that laws against handicap discrimination have been "carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments:" 480 U.LS. at 285. The Supreme Court additionally pointed out that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." 480 U.S at 284.

21. Simply put, prejudice cannot be a basis for a BFOQ. Permitting negative third party reactions - whether malignant bigotry or unthinking narrowmindedness and ignorance - to be elevated to a BFOQ would be to turn the Human Rights Act inside out and upside down. Not every adverse reaction can be honored, regardless of merit or worth. Third party reactions

must be deserving of deference to receive it. Otherwise, bigotry and prejudice would need only to be entrenched to be upheld. Obviously that cannot be the law. In order for an handicap to be considered a BFOQ some amount of evidence beyond mere speculation must be ascertained by the employer which would justify its conclusion of unemployability and that the handicap cannot be reasonably accommodated.

22. In this case, the City has failed to show, either directly or indirectly, the existence of sufficient loss of respect to constitute a BFOQ defense. The evidence, to the contrary, tends to negate a BFOQ. Further, the City has not shown any attempts to accommodate Smith and has made no showing that she could not have been accommodated. Perhaps most important, the City's asserted BFOQ would contravene the purposes of the Human Rights Act and even if proved could not on this record be recognized as a legitimate BFOQ.[4] Therefore, Respondent committed an unlawful employment practice against Petitioner when it fired her because of her handicap of transsexualism and Petitioner is entitled to reinstatement to a position similar in nature to the one she was terminated from or to a position employees in positions similar to Petitioners in 1985 were transferred to when the institution reorganized its

[4] The only exception is if the City had demonstrated, with more than speculation, that Petitioner's transsexualism would have caused a dangerous situation involving inmates. See, Dothard v. Rawlinson, 433 U.S. 321 (1977). No such showing was made in this case.

employment classes, back pay through the date of reinstatement and attorney's fees and costs.

23. Jurisdiction is reserved for determination of reinstatement, back pay, appropriate attorneys' fee and costs in this proceeding if the parties cannot agree.

RECOMMENDATION

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

RECOMMENDED that the Human Relations Commission enter a Final Order reinstating Petitioner, awarding back pay and attorneys' fees and costs and reserving jurisdiction should the parties fail to agree on appropriate reinstatement, back pay and attorney's fees and costs.

DONE AND ENTERED this 2d day of ~~September~~ October, 1991, in Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 2d day of ~~September~~ October, 1991.

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS:

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. SOME AGENCIES

ALLOW A LARGER PERIOD WITHIN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.

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APPENDIX TO CASE NO. 88-5451

APPENDIX

The facts contained in paragraphs 1, 5, 6, 7, 8, 12, 13, 14, 15, 24, and 28 of Respondent's Proposed Findings of Fact are adopted in substance, insofaras material.

The facts contained in paragraphs 2, 3, 9, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 29, 30, 31, 32, 36, 37, 38 and 39 of Respondent's Proposed Findings of Fact are subordinate.

The facts contained in paragraph 4 of Respondent's Proposed Findings of Fact are adopted in substance, except as to the heaviness of the makeup which was not shown by the evidence.

The facts contained in paragraphs 40, 42, 46, 47, 48, 49, 51, 54, 55, 61 and 62 of Respondent's Proposed Findings of Fact were not shown by the evidence.

Petitioner's paragraphs in its Proposed Recommended Order were unnumbered. The factual findings appear to begin with the paragraph following the subheading 'Transsexuality' and end at the subheading 'Governing Principles'. For ease, in identifications Petitioner's paragraphs have been numbered consecutively beginning with the paragraph following the sub heading 'Transsexuality'.

The facts contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 of Petitioner's Proposed Findings of Fact are adopted in substance, insofaras material.

The facts contained in paragraphs 13 and 31 of Petitioner's Proposed Findings of Fact are subordinate.