COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOHN D. CRISAMORE, DANIEL L. RYAN, GERALD J. SWEENEY, JR., Complainants	:	
vs.	:	Docket No. E-5309
CITY OF YORK, PENNSYLVANIA, ELI EICHELBERGER, MAYOR; DEPARTMENT OF PUBLIC SAFETY, LESLIE JACKSON, DIRECTOR; BUREAU OF POLICE, ELMER C. BORTNER, CHIEF, Respondents	:	

BRIEF FOR COMPLAINANTS

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INDEX

TABLE OF CASES AND AUTHORITIES

SUMMARY OF ARGUMENT

I. THE RESPONDENTS' GROOMING CODE, WHICH IMPOSES RESTRICTIONS ONLY UPON MALE MEMBERS OF THE YORK BUREAU OF POLICE REGARDING THE LENGTH OF THEIR HAIR, AND IMPOSES CERTAIN PENALTIES FOR VIOLATION OF SUCH POLICY, CONSTITUTES AN UNLAWFUL DISCRIMINATORY PRACTICE IN VIOLATION OF THE SEX DISCRIMINATION PROVISIONS OF THE PENNSYLVANIA HUMAN RELATIONS ACT.

II. PRACTICES SIMILAR TO THOSE IN WHICH THE RESPONDENTS HAVE ENGAGED HAVE BEEN FOUND TO CONSTITUTE UNLAWFUL DISCRIMINATORY CONDUCT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

A. Decisions by the Federal Courts of the United States

B. Decisions of the Equal Employment Opportunity Commission

III. RESPONDENTS' ACTIONS IN DISCIPLINING THE MALE COMPLAINANTS BECAUSE OF THEIR HAIR LENGTH CONSTITUTES AN INFRINGEMENT OF THE COMPLAINANTS' CONSTITUTIONAL RIGHTS.

ARGUMENT

I. THE RESPONDENTS' GROOMING CODE, WHICH IMPOSES RESTRICTIONS ONLY UPON MALE MEMBERS OF THE YORK BUREAU OF POLICE REGARDING THE LENGTH OF THEIR HAIR, AND IMPOSES CERTAIN PENALTIES FOR VIOLATION OF SUCH POLICY, CONSTITUTES AN UNLAWFUL DISCRIMINATORY PRACTICE IN VIOLATION OF THE SEX DISCRIMINATION PROVISIONS OF THE PENNSYLVANIA HUMAN RELATIONS ACT.

Section 5 of the Pennsylvania Human Relations Act (hereinafter the "Act") provides in relevant part, as follows:

> "It shall be an unlawful discriminatory practice, unless based on a bona fide occupational qualification...for any employer because of the...sex...of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required". 43 P.S. §955(a) (Supp. 1973)

Accordingly, unless based upon a bona fide occupational qualification, any practice or policy of an employer which singles out a class of persons protected under the Act for discriminatory treatment, or otherwise impacts adversely against them, is unlawful. The grooming code of Respondent York Bureau of Police here in question constitutes such a policy, both in its intent and in its application. Although the Police directive of October 27, 1972, imposing restrictions on long hair is addressed to "All Police Personnel" (Stipulation at Par. 6), it is clear that its application was directed only at the male members of that Bureau. For as Respondents admit, "no female member of the York Bureau of Police, including meter maids, who have authority to make arrests, were (sic) directed to comply with the requirements for hair lengths set forth in the manual, although most if not all of them were not in compliance". (Stipulation at Par. 8). When the three male Complainants herein were singled

out for disciplinary action upon their refusal to comply with this directive, it became abundantly clear that its promulgation and enforcement discriminated against the Complainants because of their sex in violation of the Act.

As will be seen from the discussion that follows, the clear weight of administrative and judicial authority compels a finding of unlawful discrimination in this case. This authority, although based largely upon determinations made under Title VII of the Civil Rights Act of 1964, certainly requires a similar finding in this matter if the Pennsylvania Human Relations Act is to be "...construed liberally for the accomplishment of the purposes..." of safeguarding the right of all individuals to obtain and hold employment without discrimination because of one's sex, as madated by Sections 2 and 12(a). See also Pa. Human Relations Commission v. Chester School District, 427 Pa. 157, 233 A.2d 290 (1967) for an in-depth discussion by Justice Roberts of the requirement that the Act be read broadly.

The substantive provisions of Title VII of the Civil Rights of 1964 are nearly identical to the provisions of the Pennsylvania Human Relations Act. Section 703 of Title VII provides, in part:

> "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin...". 42 U.S.C. §2000e - 2(a)(1) (1970).

It is clear, therefore, that decisions rendered pursuant to Title VII by judicial and administrative bodies are due great deference by this Commission and are dispositive of the questions of law presented for decision by this case.

II. PRACTICES SIMILAR TO THOSE IN WHICH THE RESPONDENTS HAVE ENGAGED HAVE BEEN FOUND TO CONSTITUTE UNLAWFUL DISCRIMINATORY CONDUCT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

A. Decisions by the Federal Courts of the United States

Several notable decisions by the Federal Courts of the United states shed light on an appropriate construction of the Pennsylvania Human Relations Act. The observations of Judge Ferguson of the U.S. District Court, Central District of California in the case of Aros v. McDonnell Douglas Corp., 348 F. Supp. 661 (C.D. Cal. 1972) are especially relevant. That case involved 42 U.S.C. §2000e - 2 and a complaint by a long haired male of sex discrimination. Judge Furguson said:

> The issue of long hair on men tends to arouse the passions of many in our society today. In that regard the issue is no different from the issues of race, color, religion, national origin and equal employment rights for women, all of which are raised in Title VII. When this Nation was settled it was hoped that there would be established a society where every individual would be judged according to his ability rather than who his father was,or what part of town he happened to live in, or what the color of his skin was. Since then millions of individuals have landed on our shores in search of opportunity which was denied them in their homelands because of rigid class structures and irrational group stereotypes. The Civil Rights Act of 1964 was born of that hope. Although the legal technicalities are many, the message of the Act is clear: every person is to be treated as an individual, with respect and dignity. Stereotypes based upon race, color, religion, sex or national origin are to be avoided...
>
> Males with long hair conjure up exactly the sort of stereotyped responses Congress intended to be discarded. On a visceral level, long hair may be associated with youth, campus riots, unemployed hippies and "troublemakers". Some employers argue that their professional image and reputation may suffer from hiring men who prefer to wear their hair in longer styles. Title VII does not permit the employer to indulge in such generalizations. The Act requires that every individual be judged according to his own conduct and performance. (emphasis added) 348 F. Supp at 666.

A similar result was reached in the case of Donohue v. Shoe Corporation of America, 337 F. Supp. 1357, 1359 (C.D. Cal.

1972, per Pregerson, J.). In denying defendant employer's Motion to Dismiss a Complaint alleging that plaintiff shoe salesman was discharged due to his hair length while similarly situated female employees were permitted to wear long hair, the Court found that the plaintiff had alleged a prima facie violation of §703 of Title VII of the Civil Rights Act of 1964. As the Court explained,

> Unless sex is a bona fide occupational qualification for the job in question...the Act forbids employers to refuse to hire or retain employees "based on stereotyped characterizations of the sexes."...The application of a hiring or retention standard to one sex but not to the other violates the Act.

In Roberts v. General Mills, Inc., 337 F. Supp. 1055 (N.D. Ohio 1971), the plaintiff argued that since women were allowed to wear hair nets and remain on a job which involved exposed food, so also should men be permitted to wear hairnets. Defendant argued that its grooming regulations were reasonable and further argued that an employer has an absolute right to make such rules as he wishes regarding his employees. The court said, "this is true only to a degree, and great perspecacity is not required to realize that the Civil Rights Act of 1964 negates an employer's right to discriminate, classify, or otherwise make rules which are based upon race, religion, sex or national origin" 337 F. Supp. at 1056.

A recent case in the United States Court of Appeals for the Fifth Circuit agrees. "We find that a grooming code requiring different hair lengths for male and female job applicants discriminates on the basis of sex within the meaning of (Title VII)".

Willingham v. Macon Telegraph Publishing Co., 482 F.2d 535, 538 (5th Cir. 1973), rehearing en banc granted, 482 F.2d 535.

Another decision on this subject deserves mention despite the fact that it contradicts the clear weight of authority as enunciated by the three preceeding cases and is patently incorrect on its face. In the case of Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973), customer complaints resulted in grooming standards being set by the company. Plaintiff was suspended because his hair length violated these standards. The Court in a poorly reasoned opinion, held that the suspension was lawful in that hair length is not an "immutable characteristic" - that is, it can be changed at the will of the person. The D.C. Circuit in Fagan read Congressional intent with regard to Title VII to say "no exercise of (a business' managerial) responsibility may result in discriminatory deprivation of equal opportunity because of immutable race, national origin, color, or sex classification". 481 F.2d at 1125 (Court's emphasis). The Court then dropped a footnote: "likewise no discrimination can be based upon constitutionally protected rights such as religion". 481 F.2d at 1125 n.22[1]

It is submitted that there are two compelling reasons that the Pennsylvania Human Relations Commission should follow the Donohue, Roberts and Willingham line of cases rather than the D.C. Circuit's Fagan Opinion. First, Congress has not

[1]It should be noted that several courts have held that there is a constitutional right to wear one's hair the length one desires e.g. Dwen v. Barry ___F.2d___ (2d Cir. Decided August 22, 1973), Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972).

explicitly or implicitly made a distinction in Title VII based on the immutability of certain characteristics. Second, the Court in Fagan misread a relevant decision of the United States Supreme Court regarding "sex-plus" discrimination.

The first reason for not following Fagan becomes apparent by comparing the language quoted from the D.C. Circuit's opinion, supra, with the language of the statute itself. Section 703(a)(1) of Title VII reads in full: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin". 42 U.S.C. §2000e - 2(a)(1970). Nowhere is the immutability of characteristics referred to as a relevant factor.

It is also clear that Congress did not intend such a distinction to be implied in the statute. In Title VII, religion, plainly not an immutable characteristic, is given the same level of importance as race, color, sex and national origin. The same is true with respect to the Pennsylvania Human Relations Act which outlaws unlawful discriminatory practices based on an individual's "race, color, religious creed, ancestry, age, sex or national origin". 43 P.S. §955 (Supp. 1973-4) Religious discrimination is not, as the D.C. Circuit implies, included in the statute as an afterthought because it is a constitutionally protected right. Indeed, Congress broadened the definition of religion in the 1972 amendments to Title VII. CCH Employment Practices Guide, Paragraph 1164. If Congress intended to cover

only immutable characteristics in Title VII, religious discrimination would not have been included in the Civil Rights Act of 1964 and likewise, if the Pennsylvania State Legislature intended to cover only immutable characteristics in the Pennsylvania Human Relations Act, it too could have excluded discrimination as to religious creed from its protection.

A further reason for rejecting the holding in Fagan is provided in the Willingham case, supra. In Willingham the Fifth Circuit quoted the United States Supreme Court decision in Phillips v. Martin - Marietta Corp., 400 U.S. 543 (1971), which held that "persons of like qualifications must be given employment opportunities irrespective of their sex". 400 U.S. at 544. The Fifth Circuit concluded, therefore, that "Section 703 (of Title VII), is not limited to situations in which the employer's discriminatory employment practice is based solely on sex but extends to all differences in the treatment of men and women resulting from sex stereotypes". 482 F. 2d at 537. The Fifth Circuit explains that this latter form of sex discrimination has been termed "sex-plus" discrimination because it involves the classification of employees on the basis of sex, plus one other characteristic. In the case at bar the "sex-plus" discrimination is male plus long hair. It was this type of "sex-plus" discrimination that was held unlawful in Phillips v. Martin-Marietta Corp., supra.

As further support for the position that discrimination against males with long hair is unlawful, the Court in Willingham recognized that an amendment was offered to Title VII which would have restricted its scope solely to sex discrimination, as

compared to "sex-plus" discrimination. The amendment was rejected. 482 F.2d at 537 n. 2, citing 110 Cong. Rec. 2728 (1964).

Although the court in Fagan discussed Phillips, it evidently found its rationale inapplicable to males with long hair because of the immutability argument which it offered. It is a basic principle of law, however, that the Opinion of the United States Supreme Court in Phillips v. Martin - Marietta Corp., supra, is controlling in the case at bar, and that the Phillips, Willingham and similar cases are far more persuasive authority than Fagan. Accordingly, the Commission should follow that line of authority and find that Respondents' conduct in this case constituted unlawful sex discrimination.

B. Decisions of the Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission ("EEOC") has uniformly held discrimination against long haired males to be unlawful sex discrimination under Title VII. The first such case decided by the EEOC was Decision No. 71-1529, CCH EEOC Decisions (1973), Paragraph 6231, which involved a male with long hair who was denied employment as a production worker. The EEOC found that "had Charging Party been female, long hair would not have been a factor in the refusal to hire Charging Party"...Thus, the EEOC concluded that "Charging Party was discriminated against because of his sex by Respondent's unequal application of its long hair policy". CCH EEOC Decisions (1973) Paragraph 6231 at p. 4410.

An EEOC decision even more on point is Decision No. 71-2343, CCH EEOC Decisions (1973), Paragraph 6256, where a Cargo

Serviceman was suspended from his job without pay until such time as he would comply with Respondent's Grooming Standards. In this decision, even though the EEOC found that "Cargo Servicemen were required to wear uniforms and also deal with the public" the EEOC held that "Respondent's hair-length policy as applied to males is an unlawful employment practice...", CCH EEOC Decisions (1973), Paragraph 6256 at pp. 4453-4. For other similar EEOC Decisions see Decisions No. 72-0979, CCH EEOC Decisions (1973), Paragraph 6343, and Decision No. 72-1380, CCH EEOC Decisions (1973), Paragraph 6364.

This interpretation of the sex discrimination provisions of Title VII rendered by the EEOC must be given great deference. Griggs v. Duke Power Co. 401 U.S. 424, 91 S. Ct. 849 (1971). Of additional importance is the fact that the Pennsylvania Human Relations Commission, as a designated "706 Agency" under Section 706 of Title VII, is bound to "...administer its law in such a manner that, in fact, the practices prohibited and remedies required are comparable in scope to those practices prohibited and remedies required under Federal law..." 29 CFR 1601.12(h).

Section 706(c) and 706(d) of Title VII provide for deferral of charges filed with the EEOC to certain state fair employment practice agencies. 42 U.S.C. §§ 2000e - 5(c)(d). The Pennsylvania Commission has been designated as a "706 Agency" upon a finding by the EEOC that the law which it administers, (1) Protects persons from discrimination on essentially all of the grounds covered by Title VII as amended; and (2) Includes in the practices prohibited essentially all of the practices prohibited by Title VII as amended; and ...(4) Is administered

and interpreted by the agency so that it does, in fact, prohibit the practices prohibited by Title VII and does, in fact, require the remedies required by Title VII.

Accordingly, it is urged that because the EEOC has consistently held discrimination against long haired males to be unlawful, this Commission must give substantial weight to that line of authority and adopt the legal interpretation of its sister agency.

III. RESPONDENTS' ACTIONS IN DISCIPLINING THE MALE COMPLAINANTS BECAUSE OF THEIR HAIR LENGTH CONSTITUTES AN INFRINGEMENT OF THE COMPLAINANTS' CONSTITUTIONAL RIGHTS

In addition to the above-mentioned arguments that the actions of Respondent are unlawful under the Pennsylvania Human Relations Act, Complainants also have a substantial claim that their Constitutional rights have been infringed.

There have been several recent federal and state cases which have discussed the issue of long hair on policemen in a constitutional context. Some of these cases hold that policemen can be precluded from wearing long hair because a police force is a "para-military" organization which requires that strict discipline be maintained at all costs. See Stradley v. Anderson, 478 F.2d 188 (8th Cir. 1973); Greenwald v. Frank, 40 App. Div. 717, 337 N.Y.S.2d 225 (1972), aff'd without opinion, ___N.Y.___ (May 30, 1973). However, Dwen v. Barry, ___F.2d___ (2d Cir. August 22, 1973), is convincing authority for distinguishing a local police department from the military.

Thomas Dwen, individually and as president of the Suffolk County Benevolent Association, filed a civil rights action in the United States District Court for the Eastern District of New York, seeking to invalidate hair grooming regulations of the Suffolk County Police Department as a violation of patrolmen's rights under the First and Fourteenth Amendments. Chief Judge Jacob Mishler denied a preliminary injunction and summarily dismissed the case. Dwen appealed to the United States Court of Appeals for the Second Circuit. No. 862 - September Term, 1972; Docket No. 72-1037. The Second Circuit reversed in a decision rendered on August 22, 1973.

In reversing the District Court, which had analogized the uniformed police to the military, a unanimous panel of the Second Circuit concluded that "extension to the uniformed civilian services of the police and fire departments of the unique judicial deference accorded to the military...seems...not warranted. While these services have been characterized as paramilitary organizations...the characterization is hardly justified either historically or functionally." Dwen v. Barry, slip opinion at p. 5030.

The court's scholarly analysis deserves extensive quotation:

> The civilian police force is a relatively recent development. It arose out of the need to supplement the private citizens role in keeping the peace.[3] Any "para-militarism" of the force stems not from its origin nor from the nature of its duty but from the adoption of an organization with a centralized administration and a disciplined rank and file for efficient conduct of its affairs.[4] The use of such organization evolved as a practical administrative solution and not out of any desire to create a military force. See R. Fosdick, American Police Systems ch. 2 (1920); W. Lee, A History of Police in England (1901) (1971 ed.). The police force remains significantly different in character from the military. It is still locally controlled and organized... and subject to more direct control of the electorate... .

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[3]"The Anglo-Saxon police tradition...springs from a configuration of attitudes which were profoundly suspicious of central authority and hostile to the idea of guarding the local peace with militia. Taft & England, Criminology, 317, 318 (4th ed. 1964); see also Hall, Legal and Social Aspects of Arrest Without Warrant, 49 Harv. L. Rev.566, 579 (1936); Hall, Police and Law in a Democratic Society, 28 Ind. L. Rev. 133, 135-7 (1953)". (The Court's footnotes are used. The missing numbers have been omitted.)

[4]Clearly distinct from the continental tradition of a police system which was part of the military establishment under the control of the central state, the Anglo-Saxon police system in England, followed in the United States, developed from a system of local property owners responsible for keeping the peace in their own towns or villages. Statute of Winchester, 13 Edw. 1 §2 (1285). See 49 Harv. L.Rev, supra, n 3 at 587-90. W. Lee, A History of Police in England at 248... .

> Discipline although essential to an effective police force as it is to the miliatry is clearly of a different type. Instant unquestioning obedience has been found essential to a soldier in action and his training and its attendant discipline is designed to develop such obedience. The same type of instant unquestioning obedience is not necessary for an effective police force. See Greenwald v. Frank, supra, at 231-232 (Shapiro, J. dissenting); cf. Orloff v. Willoughby, 345 U.S. 83,94 (1953). Rather it has been suggested that the military model of organization and discipline must not be followed too closely as a policeman unlike a soldier frequently acts individually on his own initiative and not subject to the immediate supervision of his superiors. See W. Lee, A History of Police in England at 401-402. Dwen v. Barry, slip opinion 5030-5032.

The Second Circuit concluded that "there is a substantial constitutional issue raised by regulation of the plaintiff's hair length. The question is whether the government may interfere with the physical integrity of the individual and require compliance with its standard of personal appearance without demonstrating some legitimate state interest reasonably requiring such restriction on the individual. The first, third, fourth, seventh and eighth circuits have held that the Constitution limits the state's right to regulate the personal appearance of its citizens. We agree. Dwen v. Barry, slip opinion at 5033.

The Court further determined that this right has been found in the First Amendment, Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972); the Ninth Amendment, Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); the Equal Protection Clause of the Fourteenth Amendment, Massie v. Henry, 455 F.2d 779 (4th Cir. 1972), and the due process guarantees of the Fifth and Fourteenth Amendments, Stull v. School Board of the Western Beaver Junior-Senior High School, 459 F.2d 339 (3rd Cir. 1972); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Massie v. Henry, supra. Its holding the Court asserted, was based upon the guarantee under the Due

Process Clause of personal liberty, of "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints..." Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J. dissenting). cf. Roe v. Wade U.S. 1973 ; Rochin v. California, 342 U.S. 165 (1952).

In conclusion, the Court stated, "We hold only that choice of personal appearance is an ingredient of an individual's personal liberty and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation. Here the department has failed to make the slightest showing of the relationship between its regulation and the legitimate interest it sought to promote." Dwen v. Barry, slip opinion at 5035.

In Dwen v. Barry, the sole presentation by the police department was an affidavit submitted by the Deputy Commissioner which commented only that the long hair regulation was directed at both uniformed and non-uniformed officiers but was silent on the question of the necessity for the regulation in maintaining discipline. Likewise, in the case at bar there is nothing in the Stipulation that refers to a need for discipline as a justification for the challenged regulation. Clearly, therefore, the case of Dwen v. Barry, is overwhelming authority for a finding by the Pennsylvania Human Relations Commission that police departments should not be treated any differently than private respondents in cases involving grooming codes which impose prohibitions on the wearing of long hair by men.

CONCLUSION

For all of the foregoing reasons it is respectfully urged that the Pennsylvania Human Relations Commission find that the Respondents herein have engaged in unlawful discriminatory practices in violation of the Pennsylvania Human Relations Act, and that an appropriate Order be entered directing the Respondents to cease and desist from such practices and ordering such other relief as the Commission determines to be just and proper.

Respectfully submitted,

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