
INVESTIGATIVE FINDING OF THE WASHINGTON STATE HUMAN RIGHTS COMMISSION

CASE NAME: Justin Wetherell v. Alaska Airlines
CASE NUMBER: WSHRC: 17EX-0549-20-1 EEOC: 38G-2021-00254 Date Filed: 12/30/2020
FINDING: REASONABLE CAUSE

ALLEGATION(s): Complainant alleges discrimination in employment based on gender identity (non-binary) and gender expression (fluid). Complainant alleges that Respondent discriminated against them by implementing a uniform policy that divides the uniforms into ‘male’ and ‘female’ styles and by refusing to make an exception to this binary uniform policy for Complainant based on their gender identity and gender expression.

JURISDICTION: Respondent is an “employer” as defined by RCW 49.60.040(11). Timeliness and all other jurisdictional requirements have been met.

LEGAL THEORY: Disparate Treatment – Unequal Terms and Conditions

ELEMENTS OF PROOF: 1. Complainant is a member of a protected class; 2. Complainant was subjected to an adverse employment action by Respondent; 3. Respondent treated Complainant less favorably than similarly situated employees not of Complainant’s protected class; 4. There is a causal link between Complainant’s protected class and the adverse action.

FINDINGS OF FACT:

1. Complainant’s gender identity is non-binary and their gender expression is fluid. Complainant dresses and grooms in a manner that is neither typically male nor female.
2. Respondent is an airline that operates domestic and international flights. Its company headquarters is located in SeaTac, Washington. Respondent hired Complainant on July 7, 2015 as a Flight Attendant. Complainant currently works for Respondent as both a Flight Attendant and a Flight Attendant Instructor.
3. Respondent has a uniform policy that applies to customer-facing positions (including Flight Attendants). This uniform policy contains standards for all aspects of an employee’s appearance, including clothing, hair, grooming, cosmetics, jewelry, and shoes. When working as a Flight Attendant, Complainant must comply with Respondent’s uniform policy by dressing and grooming according to the standards of the policy. When working as a Flight Attendant Instructor, Complainant is not required to follow Respondent’s uniform policy and only needs to dress and groom in a professional manner.
4. When Complainant was hired by Respondent in 2015, Respondent had a uniform policy in place that divided employee uniforms into ‘male’ and ‘female’ uniform kits and established a corresponding set of grooming standards for each uniform. Complainant wore the ‘male’ uniform at this time but felt this did not allow them to fully dress and groom according to their gender identity and expression because long hair, makeup, nail polish, earrings, and uniform pieces from the ‘female’ uniform kit were not permitted to be worn with the ‘male’ uniform.

5. In February 2016, Respondent announced new uniforms would be designed for its customer-facing positions, including Flight Attendants. In November 2019, Respondent created its 2020 Uniform Policy to detail the dress and grooming standards for the new uniforms, which were implemented company-wide by March 2020.
6. These newly designed uniforms were divided into 'male' and 'female' uniform kits. The two uniform kits share some pieces, such as dress shirts, pants, and jackets – though the fit and styling of these pieces differs between the two kits. The 'male' uniform kit includes several uniform pieces not present in the 'female' kit, such as vests and ties. The 'female' uniform kit includes several pieces not present in the 'male' kit, such as dresses, skirts, and scarves.
7. Respondent's 2020 Uniform Policy (created in November 2019) expanded some dress and grooming options for employees, including allowing employees wearing the 'male' uniform kit to wear long hair, makeup, nail polish, and earrings. However, the 2020 Uniform Policy specifies different standards for wearing these items in the 'male' and 'female' uniform kits. For example, in the 'male' uniform kit, employees are prohibited from wearing any makeup other than light concealer or tinted moisturizer, while those wearing the 'female' uniform are allowed to wear a broad range of makeup items, including eye shadow, eye liner, mascara, blush, and lipstick. In the 'male' uniform, employees are only allowed to wear clear nail polish; in the 'female' uniform, employees can wear nearly any color of nail polish and can wear nail designs. Employees dressing in the 'male' uniform are only allowed one small earring per ear whereas employees dressing in the 'female' uniform are allowed up to two earrings per ear that can be of a larger size. In the 'female' uniform, employees may wear their hair down except during service. In the 'male' uniform kit, employees with hair that is shoulder-length or longer must keep their hair tied back at all times. Facial hair is only permitted in the 'male' uniform kit.
8. Respondent's employees are allowed to self-select either the 'male' or 'female' uniform kit, regardless of their sex assigned at birth or their gender identity, but they are not allowed to mix pieces from the two uniform kits. According to Respondent, non-binary employees may choose to wear either the 'male' or 'female' uniform kit. Based on the dress and grooming standards of Respondent's 2020 Uniform Policy, Complainant felt forced to wear the 'male' uniform kit. For the Complainant, the 'male' uniform's standards began to feel increasingly more uncomfortable and restrictive on their ability to dress and groom according to their gender identity and expression, especially after coming out as non-binary and gender fluid in 2019.
9. In September 2019, Complainant previewed Respondent's new 2020 Uniform Policy, which was officially released in November 2019. After previewing the uniform policy, Complainant emailed several members of Respondent's management, including Respondent's Vice President of Human Resources, Vice President of Inflight, Vice President of Marketing, and Vice President of Legal and General Counsel. In this email, Complainant expressed their concerns with the 2020 Uniform Policy and requested that Respondent implement a gender-neutral uniform policy that would allow employees to 'mix and match' uniform pieces and grooming standards from the 'male' and 'female' uniform kits.
10. In response to Complainant's September 2019 email, several members of Respondent's management, including the Director of Diversity, Equity, and Inclusion and a Human Resources Manager, met with Complainant on December 17, 2019. At this meeting, Complainant expressed concern that the new uniform policy was discriminatory towards employees who do not identify as either male or female. Complainant also proposed a gender-neutral uniform for Respondent's employees.
11. After this meeting with Respondent's management, Complainant's union asked them to serve as a 'subject matter expert' on the topic of gender identity. In this capacity, Complainant met with Respondent's

management several more times throughout the next year as part of the union's larger efforts to make Respondent's uniform policy more inclusive.

12. Respondent's newly designed 'male' and 'female' uniform kits were implemented company-wide by March 2020. In October 2020, Respondent informed Complainant that it would not make any of the changes to its uniform policy or grooming standards that Complainant had requested. However, Respondent informed Complainant that they could request an individual exception to the uniform policy by contacting Respondent Human Resources.
13. On November 2, 2020, Complainant sent an email to Respondent's People Resource Line to request an individual exception to Respondent's uniform policy in order to be allowed to dress and groom according to their gender identity. In this email, Complainant wrote that "the current binary standard ("male" and "female") does not provide for my gender identity or expression" and requested the following exceptions to the 'male' uniform policy standards:
 - a. Ability to wear makeup, nail polish, earrings, and heels in accordance with 'female' uniform standards;
 - b. Ability to wear hair down at all times except during service in accordance with the 'female' uniform standard;
 - c. Ability to order and wear both 'male' and 'female' uniform pieces, and wear these pieces in conjunction with each other and the above exceptions to the uniform policy.
14. On November 20, 2020, Complainant sent another email to multiple members of Respondent's management team, including various Human Resources Managers, Respondent's Senior Vice President of People, and Respondent's Senior Vice President of Legal and General Counsel. In this email, Complainant argued that Respondent's uniform policy is discriminatory and expressed frustration that their efforts over the previous year to create a more inclusive uniform policy have "proven fruitless". In this email, Complainant wrote:

"I spent over a year and a half fighting for this change. I provided research supporting the validity of my gender identity. I crafted an updated policy and an implementation timeline, as well as multiple other documents requested by management. I have endured stress, anxiety, insomnia, and depression as a direct result of putting my gender identity and personal truth on the line to try and move this company forward."
15. While working as a Flight Attendant, Complainant has felt forced to present as 'male' due to the requirements of Respondent's uniform policy. This has led to Complainant being misgendered at work, exacerbated Complainant's stress, anxiety, depression, and insomnia, and caused Complainant to frequently avoid working as a Flight Attendant in favor of working as a Flight Attendant Instructor so that they can dress and groom in a manner consistent with their gender identity. Additionally, Complainant has experienced panic attacks leading up to shifts when they were scheduled to work as a Flight Attendant. These panic attacks resulted in Complainant trading out of shifts or calling out sick multiple times.
16. In response to Complainant's email sent on November 20, 2020, Respondent's Vice President of Marketing scheduled a meeting with Complainant and other members of management to discuss the uniform policy. On December 5, 2020, Respondent cancelled the planned meeting with Complainant and stated it would be discussing the uniform policy directly with Complainant's union instead. On this same day, Complainant reiterated to Respondent's Vice President of Marketing that their intent was to meet with Respondent as an individual employee to discuss individual uniform exceptions that would "resolve the discriminatory

impact of the current [uniform policy] in the short term while [Complainant's union] and management work to find a long term solution.”

17. On December 8, 2020, Respondent's Vice President of Marketing wrote in an email to Complainant:

“I want to be fully transparent with you. The company worked hard to provide employees with flexibility when choosing uniform pieces with regard to factors such as body type, gender identity, and personal level of comfort. Our uniform is a critical component of our brand, especially for customer facing employees such as flight attendants. Therefore, we do ask that an employee choose between a male or female uniform kit and corresponding grooming standards....Again, in full transparency, we do not anticipate that our general approach will change.”

18. On December 17, 2020, Complainant filed an ethics complaint with Respondent in which Complainant alleged discrimination on the basis of gender identity and gender expression. In response to Complainant's complaint, Respondent stated that its uniform policy and grooming standards are not discriminatory and wrote:

“Our dress code provides employees of either sex with the ability to dress in a relatively gender neutral manner if they so choose. In addition, Alaska Airlines does not require a person who has transitioned or is transitioning from male to female to dress and present as a male, or a person who has transitioned or is transitioning from female to male to dress and present as female. Overall, Alaska Airlines' uniform policy and grooming standards are consistent with guidance from the WA Human Rights Commission on application of a company's dress code to transgender employees. I understand this is not the outcome you were seeking, however, your concern of discrimination was unsubstantiated based on the law.”

19. Complainant clarified to Respondent that they are non-binary, not transgender, and took issue with Respondent's use of “employees of either sex” because this language does not account for non-binary employees. Complainant wrote, “The [uniform] policy does in fact require employees to dress and present as either male or female. I am neither, but I am forced to dress and present as male or female because the policy invalidates my identity as gender-fluid/non-binary.” On January 5, 2021, Respondent reiterated to Complainant that its uniform policy and grooming standards are not discriminatory and stated, “While we support furthering discussion around gender identity and our Flight Attendant uniform, we do not feel it would be productive to continue this discussion directly with you. Management will continue any future discussions with [Complainant's union].”

20. On January 22, 2021, Respondent sent Complainant a letter denying the Complainant's November 2, 2020 request for individual exceptions to Respondent's uniform policy (see point 13 of these findings). In this letter, Respondent's Human Resource Manager wrote:

“After a careful review of your request, we have determined that we are unable to permit the requested changes to the uniform policy at this time. Alaska Airlines' uniform policy and grooming standards are a component of the company's branding and intended to maintain a consistent image for customers. Your requests are inconsistent with this business purpose. Alaska Airlines continues to permit employees to dress in a manner that is consistent with their gender identity or expression, while still complying with its uniform policy and grooming standards.”

21. Respondent has failed to show how Complainant's requests for individual exceptions to the uniform policy are inconsistent with Respondent's brand or image.

22. On June 4, 2021, the American Civil Liberties Union (ACLU) sent a letter to Respondent on behalf of Complainant. In this letter, the ACLU argued that Respondent's uniform policy and grooming standards discriminate against non-binary employees by requiring these employees to dress and groom according to the binary standard of Respondent's 'male' and 'female' uniform kits.
23. Also on June 4, 2021, Respondent announced to its employees that it would be making changes to its uniform policy soon. These changes included allowing all employees to wear their hair down (except during service) regardless of whether they wear the 'male' or 'female' uniform. Additionally, employees would now be able to order and wear the pants and arctic parka from either the 'male' or 'female' uniform kit. In this announcement, Respondent stated that these "uniform and grooming updates have been in the works for some time and are unrelated to [the letter sent by the ACLU]".
24. The changes Respondent announced on June 4, 2021 allowed Complainant to wear their hair down (except during service) but did not address the two other uniform exception requests that Complainant made on November 2, 2020. Additionally, Complainant still felt forced to wear the 'male' uniform because the announced changes neither modified nor standardized the different dress and grooming standards in place for the two uniform kits.
25. On July 23, 2021, Respondent submitted its position statement to the Washington State Human Rights Commission ("the Commission") in response to Complainant's discrimination complaint filed with the Commission on December 30, 2020. In this position statement, Respondent stated that it relied upon guidance published by the Commission in 2014 regarding dress codes for transgender employees, despite acknowledging that this guidance does not apply to non-binary or gender fluid employees.
26. On October 1, 2021, the Commission encouraged Respondent to review its uniform policy with respect to WAC 162-32-050(2), which states: "Covered entities cannot require an individual to dress or groom in a manner that is not consistent with that individual's gender expression or gender identity."
27. On March 28, 2022, Respondent publicly announced it would be making several changes to its uniform and grooming standards. According to this announcement, these changes would include: renaming the 'male' and 'female' uniforms to 'masculine' and 'feminine' looks; the creation of a new gender-neutral uniform kit; providing optional pronoun pins for employees to wear to identify their preferred pronouns; allowing for tattoos in more places; allowing more hair style options; allowing all employees to wear up to two earrings per ear and one nose piercing; and allowing all employees to wear fingernail polish and makeup.
28. Respondent also provided its employees with its new 2022 Uniform Policy Guide on March 28, 2022. This guide outlined the same uniform policy changes that were announced publicly but included more details about certain restrictions that would still be in place regarding some dress and grooming standards. For example, all employees would now be allowed to wear makeup, but those wishing to wear tinted lip gloss or red, bright pink, or berry colored lipstick can only do so in the 'feminine' look. Additionally, facial hair is only permitted when wearing the 'masculine' look.
29. Respondent's 2022 Uniform Policy Guide also requires employees to dress and groom according to the 'masculine' uniform standards when wearing the vest, tie, or pocket square. Similarly, employees must dress and groom according to the 'feminine' uniform standards when wearing uniform pieces such as the dress, skirt, and scarf. The 2022 Uniform Policy Guide did not include any information about the dress and grooming standards for Respondent's proposed gender-neutral uniform.
30. The uniform policy changes that Respondent announced on March 28, 2022 went into effect that same day. However, Complainant still feels forced to wear the 'masculine' look because this look is the only option

available for employees like Complainant who have facial hair. Complainant would typically prefer to wear the uniform pieces that Respondent has designated as part of the 'feminine' look because these pieces allow Complainant to dress in a manner consistent with their gender identity. However, under the 2022 Uniform Policy, Complainant is not permitted to wear these 'feminine' uniform pieces while also having facial hair. Complainant still feels unable to dress and groom in a manner consistent with their gender identity and expression because, in order to comply with Respondent's uniform standards, they must choose between keeping their facial hair or wearing the uniform pieces they prefer from the 'feminine' look.

CONCLUSION AND RECOMMENDATION: REASONABLE CAUSE FINDING

A preponderance of the evidence supports a finding that Complainant was discriminated against in employment on the basis of gender identity and gender expression. Under RCW 49.60.180(3), it is an unfair practice for employers to discriminate against any person in the terms and conditions of employment because of sexual orientation. According to RCW 49.60.040(27), "'sexual orientation' means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, 'gender expression or identity' means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth". Additionally, WAC 162-32-050(2) prohibits employers from requiring an individual to dress or groom in a manner that is not consistent with that individual's gender expression or gender identity.

The evidence in this investigation supports that Complainant was subjected to the adverse employment action of being required to dress and groom in a manner that is not consistent with their gender identity and gender expression. Complainant was treated less favorably than Flight Attendants not of their same protected class because male and female employees had uniform kits specifically designed for them and their gender identities, whereas Complainant has been forced to try fitting into a binary uniform system despite identifying as neither male nor female and making multiple requests for exceptions to the uniform policy that would have allowed them to dress and groom according to their gender identity.

Pursuant to RCW 49.60.240 and WAC 162-08-098, it is recommended that a finding of Reasonable Cause be entered.

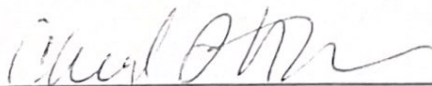
EXPLANATION OF FINDING: A REASONABLE CAUSE FINDING means that there is sufficient evidence to show that an unfair practice has occurred as defined by RCW 49.60, Washington State Law Against Discrimination. This Commission action does not preclude the Complainant from filing a civil action in a court of competent jurisdiction [RCW 49.60.030(2)]. It should be noted that private civil actions must be filed in court within limited periods from the date of the alleged unfair practice.



Madison Imiola, Civil Rights Investigator

8/31/2022

Date



Cheryl Strobert, Interim Executive Director

8/31/2022

Date