

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELISA L. SCOTT,)
)
 Petitioner,)
)
 vs.) CASE NO. 94-5635
) FCHR NO. 94-8311
 MICHAEL W. TITZE COMPANY, INC.,)
 d/b/a VILLAGE INN,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Notice was provided, and a formal hearing was held on January 6 and 20, 1995. Authority for conducting the hearing is set forth in Section 120.57(1), Florida Statutes. The Hearing was held at the Offices of the Division of Administrative Hearings, Tallahassee, Florida. Charles C. Adams was the hearing officer.

APPEARANCES

For Petitioner: Patricia A. Renovitch, Esquire
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For Respondent: Stephen Marc Slepín, Esquire
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1114 East Park Avenue
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STATEMENT OF THE ISSUES

Did Respondent engage in unlawful employment practices directed to Petitioner, as defined in Section 760.10(1), Florida Statutes? In particular, did Respondent knowingly maintain a sexually-hostile and abusive environment for its female servers which unreasonably interfered with their work, exposing the female employees to disadvantageous working conditions to which male employees were not exposed? Was the work place for female servers permeated with discriminatory ridicule and insults? Did Respondent maintain an intimidating environment which caused Petitioner's constructive discharge? Is Petitioner entitled to take up her former duties as a server at Respondent's restaurant? Has Petitioner sustained damages, including loss of back and future pay and related benefits?

PRELIMINARY STATEMENT

On August 26, 1994, the Florida Commission on Human Relations gave notice to Petitioner and Respondent that the Commission had reasonable cause to believe that an unlawful employment practice had occurred based upon Petitioner's sex.

Following this determination and consistent with the instructions set forth in the notice, Petitioner filed a Petition for Relief on September 29, 1994 setting forth the allegations described in the Statement of Issues.

On October 6, 1994, the Commission notified Respondent that Respondent had 20 days to answer the Petition for Relief. On October 26, 1994, Respondent filed an Answer in opposition to the Petition for Relief.

On October 6, 1994, the Commission requested the Division of Administrative Hearings to assign a hearing officer to conduct proceedings to resolve the dispute. On that same date, Respondent had requested the referral of the dispute to the Division of Administrative Hearings.

The case was assigned to a hearing officer. The hearing was conducted on the aforementioned dates.

Both parties presented witnesses and exhibits, as described in the Appendix to the hearing transcript. Respondent made a Motion in Limine to exclude the testimony of Jeri Williams. Petitioner responded to the motion. A ruling was made on the motion, as set forth in the hearing transcript. That ruling denied the motion.

At hearing, the attorneys agreed to submit their proposed recommended orders within three (3) weeks of the filing of the transcript. That request for filing proposed recommended orders within (3) weeks of the filing of the transcript was accepted by the hearing officer. The transcript was filed on March 2, 1995. Counsel then asked for a further extension of time for filing proposed recommended orders. The new due date became March 28, 1995. The hearing officer advised counsel that the extension of time was granted. Proposed recommended orders were filed on March 28, 1995. Having requested that the proposed recommended orders be filed more than ten (10) days from the date upon which the transcript was filed, the parties waived their right to have the recommended order entered within 30 days from the date upon which the transcript was filed. See Rule 60Q-2.031, Florida Administrative Code.

Petitioner requested and Respondent consented to have corrections made to Petitioner's proposed recommended order. That request for corrections is granted.

Petitioner moved to strike Respondent's proposed recommended order, which contained 19 pages and additional 58-page Addenda. Respondent replied in opposition to the motion. The motion is denied; however, only those facts set forth in the 19-page proposed recommended order are deemed appropriate for fact finding in the recommended order. The Addenda are perceived as argument. The proposed facts in Respondent's 19-page proposed recommended order and those facts in the Petitioner's proposed recommended order are discussed in an Appendix to the recommended order.

Upon agreement of counsel, consideration of the issue of reasonable costs of litigation, to include attorney's fees, was postponed until the Commission has entered its final order concerning the merits of the case. Under this arrangement, the hearing officer retains jurisdiction of the case for the limited purpose of entertaining evidence directed to reasonable costs of litigation, to include attorney's fees, should the Commission find in favor of Petitioner.

FINDINGS OF FACT

1. Respondent owns four (4) restaurants. Two are located in Tallahassee, Florida. One is located in Mary Esther, Florida; and one is located in Pensacola, Florida.

2. The Tallahassee restaurants are located on North Monroe Street and Apalachee Parkway. It is the Apalachee Parkway restaurant that is the subject of this case.

3. At times relevant to the inquiry, the Parkway restaurant operated with an average staff of 16-18 servers, who are mostly female, and 9-10 cooks, who are males.

4. The Parkway restaurant had a high volume of business during the period under inquiry. At peak volume, the employees felt under pressure and were not especially respectful of fellow employees.

5. Petitioner was employed at the Parkway restaurant from February 12 through May 15, 1993.

6. Petitioner is approximately 30 years old. Petitioner is a female, whose stature is one of average height and weight.

7. Petitioner was hired by a manager at the Parkway restaurant. That manager was Erin Stowell.

8. Respondent empowered Mr. Stowell to hire and fire employees at the Parkway restaurant and to impose the necessary controls to conduct business at the restaurant. Mr. Stowell had the supervisory authority to conduct the everyday business at the Parkway restaurant in the capacity of supervisor of servers and cooks.

9. At times relevant to the inquiry, Petitioner worked the day shift. Mr. Stowell was her manager. On that shift, most servers were female. In Petitioner's latter tenure, there was one male server working the day shift.

10. At times relevant, a manual detailing appropriate employee conduct was in place. Among the expectations for employees was that the employees not engage in profane and vulgar language. Moreover, employees were expected to engage in moral and proper behavior.

11. Petitioner was given the employee manual.

12. In the restaurant operation, servers were expected to fill out customer food order tickets that accurately described the food orders. This accuracy was vital to the restaurant's financial operation. All food items served were to be charged for. The cooks had a corresponding responsibility to make certain that the tickets were accurate and that they not prepare food that was not described on the food order ticket. These arrangements led to conflicts between the servers and the cooks concerning food preparation and its timely delivery to the customer.

13. Christopher Titze is the son of Michael Titze. Michael Titze owns Respondent. Beth Titze is Michael Titze's wife and mother of Christopher Titze.

14. Christopher Titze worked at the Parkway restaurant at times relevant to the inquiry. He served as a host who greeted customers.

15. In the event that problems occurred between servers and cooks that affected service to the customer, Christopher Titze would mediate disputes between servers and customers. In addition, if there were other problems between cooks and servers, the server would seek Christopher Titze's intervention or the cook might seek Christopher Titze's intervention as mediator. This mediation function took place once or twice a day at most. Specifically, cooks would ask for assistance if the servers were not charging for food and when servers did not properly space the time for delivering food order tickets to the cooks. Servers would complain when cooks were not getting the food prepared fast enough.

16. Christopher Titze observed that Petitioner often did not wear the proper uniform for a server. She wore shoes that were other than required and did not wear pantyhose as required. As host, Christopher Titze was expected to inform Petitioner that she was not wearing the appropriate uniform. He did inform her. These reminders were given to Petitioner on 15-20 occasions. Christopher Titze did not have the authority to discipline Petitioner for noncompliance with the uniform requirements.

17. Christopher Titze would occasionally remind other servers that they were not in proper uniform from time to time. By contrast, Petitioner was chronically out of uniform.

18. Christopher Titze was working at the restaurant on the Petitioner's last day of employment. He overheard Petitioner yelling. He observed that several customers in the lobby area to the restaurant were looking at him during the outburst. Christopher Titze felt embarrassment and went running to the area where Petitioner was located. When he arrived at that area, Petitioner and a cook named O.C. Mack were there. Mr. Mack was a 250-pound man.

19. Christopher Titze observed that Petitioner was "carrying on". Mr. Mack appeared upset and seemed not to be paying attention to Petitioner. Petitioner was getting more upset with Mr. Mack and was yelling and screaming and cursing at him. At that time, the manager, Mr. Stowell was not in attendance in the area where Petitioner and Mr. Mack were engaged.

20. In particular, Christopher Titze heard Petitioner say to Mr. Mack: "This is fucking bullshit and I don't have to put up with this shit from you or anyone else".

21. Christopher Titze tried to ascertain what had caused the outburst. It took a couple of minutes for Petitioner to calm down and quit yelling. During this time, Mr. Mack was cooking.

22. Mr. Mack explained that Petitioner had not charged a customer for hollandaise sauce.

23. Petitioner told Christopher Titze that the problem had to do with hollandaise sauce for a customer.

24. Christopher Titze told Mr. Mack that he needed the hollandaise sauce right now. Mr. Mack told Christopher Titze that he was not going to get it. Christopher Titze then went up front and asked Mr. Stowell to go back and take care of the problem. Before Christopher Titze went up front to get Mr. Stowell,

Mr. Mack told Christopher Titze that he was not going to give the hollandaise sauce to him until it was charged for on the ticket.

25. When Christopher Titze found Mr. Stowell he told Mr. Stowell that Petitioner and Mr. Mack were having an argument and that he could not straighten it out and that Mr. Stowell needed to go back there.

26. Christopher Titze made sure that a server other than Petitioner delivered the hollandaise sauce to the customer.

27. Later, Christopher Titze observed Petitioner yelling and screaming and saw her take her purse and comment "this is unfair" and that "she was leaving."

28. The May 15, 1993 incident was the only occasion upon which Petitioner complained to Christopher Titze about Mr. Mack's conduct. Other servers had complained to Christopher Titze about Mr. Mack's conduct. They told Christopher Titze that Mr. Mack was hard to work with and that he was very particular on tickets, making sure that customers were charged for food. The servers reported to Christopher Titze that Mr. Mack was concerned about food costs and that Mr. Mack skimped on some things. The other servers reported that Mr. Mack was rude about the way he went about doing his job and adhering to rules in the restaurant.

29. Christopher Titze observed that Mr. Mack was loud when operating under stress. Mr. Mack especially did not like it when tickets were not properly written, and he complained about it. Christopher Titze observed that Mr. Mack would use the word "shit" and similar language when he was under stress. He would direct his remarks to servers: "You need to write this shit right".

30. Christopher Titze heard the kitchen staff call the servers "bitches" on one or two occasions. Christopher Titze has no recollection of doing anything in response to the remarks by the kitchen staff directed to the servers.

31. Christopher Titze never observed nor heard servers complain that the cooks were not getting out their orders quickly as a means of being spiteful to the servers.

32. Christopher Titze never observed the kitchen staff holding or manipulating their genitals in the presence of servers.

33. Lori Helms was a server who worked on the shift with Christopher Titze. She reported to Christopher Titze that a cook named Wendell Holmes had been requested to prepare an employee meal for her, to which Mr. Holmes stated: "I'll make you a cum sandwich." When the incident was reported to Christopher Titze, he told Mr. Stowell. Mr. Stowell sent Mr. Holmes home that day. Mr. Holmes was subsequently fired, having never been allowed to come back and work at the restaurant beyond the day he was sent home.

34. By Christopher Titze's observation Ms. Helms was made to cry by Mr. Holmes' conduct.

35. Christopher Titze has no recollection of the conduct of Mr. Mack causing Ms. Helms to cry or observing her to cry on any occasion other than the incident with Mr. Holmes.

36. Terri Dixon was a server at the Parkway restaurant from November 2, 1992 until April 1993, when she was fired by Mr. Stowell.

37. Ms. Dixon observed that Mr. Mack was rude and that he would use vulgar language. She observed that Mr. Mack would raise his fist at you and that his conduct seemed threatening. Mr. Mack referred to Ms. Dixon as "you little white girl", "you little bitch", and "you little honkey girl".

38. Cooks would refer to Ms. Dixon as "whitey" "honkey" and "you white bitch". This made her feel intimidated. Which cooks other than Mr. Mack made these remarks was not proven.

39. Ms. Dixon complained to a cook named Jason about an order that she believed was not being prepared in a timely manner. Apparently, her customers were complaining about the timeliness. Jason responded to her by saying, "shut up, you white bitch" and "I will stomp your white ass into the ground".

40. Ms. Dixon observed other cooks shaking spatulas at her.

41. Ms. Dixon explained that when she thought that the cooks had had ample time to prepare the food she complained to the cooks. The response by the cooks was to the effect, "I will give you your food when I get well and ready to."

42. Ms. Dixon had the experience that when service of the food was delayed, customers did not want to tip her.

43. A food preparation employee made a number of attempts at asking Ms. Dixon to go out with him. She considered his actions to be harassment. This same person also offered her drugs. Ms. Dixon complained to Mr. Stowell about that conduct by the male employee. After her complaint, the situation did not improve. What action, if any, that Mr. Stowell took to address her complaint is not clear. Ms. Dixon did not indicate that she reported back to management to inform management that she was continuing to be approached by the food preparation employee.

44. Ms. Dixon observed the incident between Ms. Helms and Mr. Holmes. She saw Mr. Holmes grab his genitals and say "well how about I give you a cum sandwich."

45. Ms. Helms worked at the Parkway restaurant from around January or February, 1993, until sometime in May 1993. She quit her job as a server at about the same time that Petitioner last worked at the restaurant.

46. Ms. Helms describes what she considered to be rude conduct by Mr. Mack. These comments were directed to Ms. Helms pertaining to the manner in which she hung or presented the customer food order tickets to the cook. He made remarks calling her "stupid", "that drugs had eaten her brain" that "she was crazy" and would refer to her as "bitch". Mr. Mack yelled at her and she was afraid of him. These circumstances usually occurred when the restaurant was busy. Otherwise, Mr. Mack was nice to Ms. Helms when she first came to work in the morning. At busy times Mr. Mack would complain to Ms. Helms that she was not writing her tickets right and would grab them off the wheel where they were placed. To Ms. Helms, it seemed as if Mr. Mack would be under pressure and would take it out on her.

47. In the exchanges where Mr. Mack would use the terms "bitch, stupid and crazy" directed to Ms. Helms, the food that she was responsible to serve would

be sitting at the service window and available to be served. On these occasions Ms. Helms would direct argument back to Mr. Mack. She would then go back to the bathroom area to collect herself sufficiently to serve the food. Under these circumstances the food service would be delayed.

48. At times when Ms. Helms complained about the delays in serving food to the customers when the restaurant was especially busy, responses from the cooks would be "hold on a damn second, baby, I can't do everything at once." At times these remarks were made in a manner which Ms. Helms believed to be screaming. The cooks would also say, "I'm going to do it and you are the one who messed it up in the first place and this wouldn't never have happened in the first place if you would have written the damn ticket wrong."

49. Ms. Helms observed cooks dancing around and grabbing their crotches. She did not indicate complaining about these observations to management.

50. While working at the restaurant Ms. Helms would cry often. In this respect Ms. Helms acknowledges that she is a very sensitive person and that when she was yelled at, this made her cry. This conduct hurt her feelings. In instances when she would cry Ms. Helms would go to Mr. Stowell and he would console her by telling her to stop crying and go about her business and that it would be okay and that Ms. Helms should not allow the conduct by the other employees to get to her.

51. Ms. Helms describes the incident with Mr. Holmes in which she asked Mr. Holmes to make a sandwich for her and he replied, "baby I'll make you a cum sandwich". She responded by telling Mr. Holmes not to talk to her that way. The incident was one of the reasons that led her to quit her position at the Parkway restaurant. As described before, Ms. Helms reported the incident to Mr. Stowell. Soon after the incident with Mr. Holmes, Ms. Helms quit her job.

52. As Ms. Helms observed, Mr. Stowell was present when cooks would use words such as "bitch", "fuck", "shit", "damn" and "ass", in Ms. Helms' presence. She considered these remarks to be directed to her. With the exception of the word "bitch", it is not clear that the use of profane language was directed to Ms. Helms as opposed to merely being stated in her presence.

53. On Petitioner's last day, Ms. Helms, although she was not in the immediate vicinity of the incident, overheard part of the exchange between the Petitioner and Mr. Mack. She heard both Mr. Mack and the Petitioner yelling back and forth about the hollandaise sauce. Ms. Helms then observed the Petitioner go to the back of the restaurant to smoke a cigarette and that the Petitioner was crying. Ms. Helms took the customer the hollandaise sauce.

54. Ms. Helms was told not to wear socks as part of the attire for servers because the servers were expected to wear pantyhose. Nonetheless, she wore socks again after being told not to do so.

55. Ms. Helms observed that cooks wore their clothes loosely and that they would hang down to the extent where she could see their underwear and could see Mr. Mack's "butt crack". She did not indicate that she complained about these observations to management.

56. Ms. Helms also had problems with a female server Kim Tuten whom Ms. Helms described as making her feel unwelcome and treating her in a rude manner. One time Ms. Tuten told Ms. Helms "I'll kill you." Ms. Tuten called Ms. Helms "stupid." Ms. Helms said that she "hates Ms. Tuten." Ms. Helms observed Ms.

Tuten using profane language. Ms. Tuten used the words "fuck, damn, shit and ass". Ms. Tuten also called Ms. Helms "a bitch".

57. Linda McCord began work at the Parkway restaurant in 1992, working on the night shift. She quit her position as a server at the restaurant because of a conflict with her school schedule. She came back to work at the restaurant and quit a second time because of Beth Titze's actions in "dressing down" Ms. McCord.

58. Although Mr. Mack worked on a different shift than Ms. McCord, the shifts overlapped to some extent this allowed her to watch Mr. Mack perform as a cook. She observed Mr. Mack to be intimidating. She saw him early in the morning on weekends. When Mr. Mack first arrived he acted as if nothing was right and "would just raise hell at everybody, whether you were a server, a dishwasher, you know whatever."

59. Ms. McCord observed Mr. Mack and his son Governor Mack, another cook, use the words "fuck, fuck you and mother fucker", sometimes directed to her but a lot of times in conversation between the cooks or with a dishwasher or with other servers.

60. Ms. McCord observed the cooks on Mr. Mack's shift, to include Mr. Mack, "brag about their physical anatomy and what they do and how they do and that they would talk sexually about women." The words that were used in the discussions between the cooks about sexual matters made Ms. McCord feel uncomfortable and offended.

61. Ms. McCord complained to Mr. Stowell about the profane language by the cooks. His response to the complaints was "I'll see about it". She made similar complaints to the night manager who said he would talk to the day manager who was Mr. Stowell. It is not clear whether Ms. McCord received a satisfactory response to her complaint.

62. Donna Land was a server at the Parkway restaurant. She is and has been the Petitioner's roommate since 1989. Her employment at the Parkway restaurant lasted a few days. She quit her job at the restaurant shortly after Petitioner's last day as a server.

63. Ms. Land observed that Mr. Mack was "fussy" on the day that Petitioner was last employed at the restaurant. Ms. Land was standing near the window where the food is delivered when she saw Petitioner approach that area. Petitioner asked Mr. Mack to do her a favor and get the Petitioner some hollandaise sauce. At that time Ms. Land observed that Mr. Mack was real busy. The ticket holder was full and Mr. Mack said "I've got to have a ticket in order to do that." To which Petitioner responded that Mr. Stowell was coming with the ticket. Shortly thereafter Mr. Stowell came into the conversation. After Stowell showed up Mr. Mack started yelling and cursing Petitioner and shaking his spatula in her direction. Mr. Mack said "I'm not going to get you this, god damn this." Mr. Mack called Petitioner a "fucking white bitch" and told the Petitioner to "drop dead" and that he was "going to kill her." At this juncture Petitioner started to cry. Mr. Stowell then slid a bowl across and told Mr. Mack to give Mr. Stowell some hollandaise sauce. Mr. Mack slid the bowl back and said "you go to hell, I'm not giving you it either." Mr. Mack then said "get that fucking white bitch out of my face before I stomp her to the ground." As Ms. Land recalls, Mr. Stowell then told Petitioner to go home. Petitioner replied "I can't believe you are letting him talk to me like this." Mr. Stowell told Petitioner again to "go". Petitioner stepped away and remarked to the

effect that, "I'm not going anywhere" and asked Mr. Stowell if he was firing her. Mr. Stowell then responded by telling the Petitioner that she was fired.

64. It appears that Mr. Stowell was trying to remove Petitioner from a threatening situation, not intending to fire her until Petitioner refused to leave. Petitioner walked out of the restaurant at that time.

65. Ms. Land was upset by these events. Mr. Stowell told Ms. Land that the Petitioner would be all right and that he would give her a call later.

66. In the conversation between the Petitioner and Mr. Mack that was overheard by Ms. Land, Petitioner remarked that while the customer had been served hollandaise sauce that it was not enough and the man wanted more as a side order. The extra hollandaise sauce had not been put on the ticket as required by restaurant policy.

67. Ms. Land overheard the kitchen staff using the words "fucking, pussy and bitch." Ms. Land perceived that the words were directed at her and she felt a little embarrassed.

68. Ms. Land observed the kitchen staff put their hands in their pants, which they wore very low, meaning placing their hands in their groin area. Ms. Land is not sure whether the manager, Mr. Stowell, observed this conduct and she did not make a complaint about the conduct.

69. Ms. Land observed cooks in the kitchen yell at Ms. Helms and that Ms. Helms cried a lot.

70. Ms. Land worked with a male server named Joe. She never observed the cooks give Joe "a hard time."

71. Angela Brumblough worked at the Parkway restaurant from September 1992 into August 1994 as a hostess, server and closing manager. She also lived with Michael and Beth Titze for four months. Christopher Titze was her friend during the time Ms. Brumblough worked at the restaurant.

72. During the time that Ms. Brumblough worked at the restaurant she overheard curse words and profanity from cooks, servers, bus-boys and dishwashers. Those words that she heard were "damn, shit, and fuck." Among others, she heard Petitioner use those words. The context in which she heard those words used was related to a general griping about something that was not going right while working at the restaurant. By example, food orders that did not come out fast enough or someone getting in the way of employees' movements or a customer that was too demanding. The context was one in which the situation was stressful due to the time constraints for preparing and delivering food orders.

73. Ms. Brumblough observed that Mr. Mack was a stickler about marking things that were to be charged for on the tickets. If they were not marked, and other cooks were not enforcing the policy about requiring the tickets to be marked so that items could be charged for, he would "get on" those other cooks.

74. Ms. Brumblough never heard cooks refer to Petitioner as "fucking white bitch."

75. Ms. Brumblough never observed what she considered to be a sexual problem involving employment discrimination.

76. Ms. Brumblough observed Petitioner's overall disposition as being happy and excited one minute and "pissed off and bitching and yelling" the next minute.

77. Ms. Brumblough overheard Petitioner yelling about food being late coming out the window and in the course of these remarks Petitioner was profane.

78. Petitioner never mentioned to Ms. Brumblough that she considered that employment discrimination was being directed to the Petitioner based upon Petitioner's sex.

79. Ms. Brumblough observed kitchen personnel place their hands in their crotch area. She perceived these actions to be to adjust shorts or to scratch.

80. As hostess, Ms. Brumblough was expected to remind servers about the correctness of their uniforms. She gave these reminders. If a server was missing a bow tie she would get them another and at times when servers were missing hose there were hose available at the restaurant; if not available, the server was reprimanded and told to wear the hose.

81. Kim Taylor has worked as a server at the Parkway restaurant on and off for a period of ten years. She describes herself as a close friend of Petitioner.

82. Ms. Taylor worked on the day shift with Petitioner.

83. Ms. Taylor would cry when Mr. Mack yelled at her for not writing the tickets properly. She did not complain to management about this problem, but resolved the issue by working in an area separate from Mr. Mack.

84. Ms. Taylor heard kitchen employees refer to servers as "bitch".

85. Ms. Taylor observed that when problems developed between the servers and the cooks the food service was delayed and that influenced the amount of money the servers earned.

86. Ms. Taylor did not observe Mr. Stowell being present when the kitchen employees used profane language, but surmises that Mr. Stowell heard it because it could be heard throughout the restaurant. Furthermore, on those occasions Mr. Stowell would come and tell the kitchen employees to "chill out" or "you need to stop". In Ms. Taylor's view these attempts at correction were unavailing. However, Ms. Taylor does not appear to have reminded management that its attempts at correction were not successful.

87. After Petitioner's last day, Ms. Taylor talked to the Petitioner and following that conversation asked Beth Titze to rehire the Petitioner.

88. Beth Titze worked at the Parkway restaurant between the hours of 8:00 a.m. and 2:00 p.m. on weekdays and from around 8:00 to 8:30 a.m. to 2:30 to 4:00 p.m. on weekends.

89. Although Ms. Titze had no specific recollection as to the exact words of the profanity that were used, she does recall profanity being used by the cooks in her presence. When this occurred she told them to cease.

90. When circumstances would occur between servers or cooks that involved swearing and it was reported to her she would intercede. Usually this profanity was based upon provocations by servers yelling at cooks, but sometimes it involved cooks provoking servers. The circumstances for these exchanges were related to times of stress. When informed of the problems Ms. Titze would go into the area and yell, "watch your mouth", "what's the problem" or "what do you need" or "what is the situation here".

91. Ms. Titze expected Mr. Stowell to make decisions on whether an employee should be dismissed. If an employee was repeatedly late, Ms. Titze would remind Mr. Stowell that he had a problem and leave the decision to Mr. Stowell to dismiss a server if the server continued to be late. Her general experience was that most employees were on time for work.

92. When employees were not in the proper uniform Ms. Titze expected Mr. Stowell to see that they got into proper uniform. Whatever disciplinary action was to be taken for not being in proper uniform was left over to Mr. Stowell.

93. Ms. Titze has never observed a point in time when all servers were out of the proper uniform.

94. Ms. Titze established that the servers' earnings and benefits package was a payment of \$2.31 an hour, plus tips and a week's paid vacation for servers who had worked at the restaurant for a year.

95. Ms. Titze observed that Petitioner was often late for work, especially on weekends or occasions when it was important for the Petitioner to be on time. Ms. Titze indicated that Petitioner was habitually late for work.

96. Ms. Titze described the fact that Petitioner was not always in uniform, especially related to the refusal to wear nylons even in the instance where Ms. Titze had bought nylons to provide Petitioner.

97. Another problem that Ms. Titze observed was that the Petitioner did not wear appropriate shoes. Petitioner wore cloth shoes that were a type of canvas tennis shoes which were not acceptable foot wear.

98. When Ms. Titze spoke to Mr. Stowell about Petitioner's problems with being late for work and not being in the proper uniform, a conversation which she had with him on frequent occasions, Mr. Stowell responded that he, "did not have anyone to take her place at that time."

99. As described before, Petitioner sought reemployment from Ms. Titze. On that occasion Petitioner was in uniform, to include the proper foot wear. Petitioner remarked to Ms. Titze that she had the correct shoes and could she please have her job back. Ms. Titze replied that the fact that Petitioner was always late and that she could never depend on her, made Ms. Titze feel that she could not use Petitioner at that point. The decision on reemployment was made by Ms. Titze because she was managing the Parkway restaurant at that time.

100. Ms. Titze has no personal knowledge of any conduct directed to Petitioner that could be considered discrimination on the basis of sex and no conduct of that type was reported to Ms. Titze.

101. Contrary to testimony by other witnesses, Ms. Titze did not say, in jest, that she was going to cut Petitioner's legs with a razor blade, direct profanity at servers or make an obscene gesture at servers with her middle

finger. Ms. Titze does admit to swearing under her breath by using the word "damn" in certain circumstances that occur at the restaurant.

102. Ms. Titze has not observed the buttocks of the male cooks while they were working at the restaurant, nor seen those cooks grab their crotches.

103. Ms. Titze, from her observations, believed that the slow downs in service were related to the volume of business and not a deliberate ploy by the cooks. She is correct. Moreover, the delays in service created by arguments between servers and cooks explain why customers did not receive their food as quickly as they would have preferred, not the idea that cooks alone contrived to delay the service. As a consequence the servers' loss of tips for late service cannot be equated to unilateral action by the cooks to interfere with the tips received by servers.

104. Petitioner perceived the relationship with the kitchen employees as being an intense situation, especially when the restaurant was busy.

105. Mr. Mack in particular was seen by the Petitioner as being upset when the restaurant was busy. She observed him shaking his spatula and making gestures with his hands and yelling out slurs at the slower servers and picking out problems on the tickets which Petitioner did not believe to be a "big deal." Petitioner described the conduct by Mr. Mack as "ranting and raving." He would remark that he "was not going to do this damn food for you this way" and "this ain't the way its on the fucking menu."

106. By virtue of complaints which Petitioner made to Mr. Stowell there was a period in which Mr. Mack and the Petitioner "just laid off each other."

107. At times Mr. Mack and other cooks called Petitioner a "bitch" or "fucking bitch".

108. Cooks would also refer to Petitioner as "stupid bitch".

109. Petitioner heard cooks refer to Ms. Dixon as "stupid bitch" and Ms. Helms as a "dumb bitch". When this occurred Petitioner observed that Ms. Dixon and Ms. Helms would often cry.

110. Petitioner observed Mr. Mack tell Ms. Helms that she was "crazy", that "crack" drove her "crazy" and had "eaten her brain."

111. Governor Mack referred to Petitioner on one day as "damn bitch". She replied that he was a kid and should not talk to people that way.

112. Petitioner observed the cooks wearing loose clothing such that you could see part of their shorts with words written on the shorts like "yes" and "no". When the cooks bent over in the kitchen Petitioner could see their "cracks".

113. Petitioner considered the clothing that the cooks wore that allowed her to see their shorts to be sexually offensive. What she meant by that is further described as, she "did not like seeing a man with his pants half hanging down" and that "this was a restaurant setting and they were representing the restaurant and that they were dressed just like on the street" and that it was "vulgar to her."

114. Petitioner observed the cooks place their hands in their crotch area where the genitals are and at the same time observed that the cooks were talking about girls using terms like "that baby" or "I got her".

115. Petitioner felt degraded by the profanity directed to her and the conduct that she observed and the physical conduct that she observed on the part of the kitchen employees.

116. Petitioner made a general complaint to Mr. Stowell about the vulgar language used by the kitchen staff. She mentioned in "walking and talking lightly" to Mr. Stowell that he should tell the cooks "to pull up their pants or something and to tell the cooks to dress a little better."

117. Petitioner describes that she had problems getting her orders from the kitchen when she probably did something to irritate the cook. On a few occasions Petitioner believed that the cooks were deliberately delaying her orders, but acknowledges that those were circumstances in which she did not have her ticket correct, though she believes that it was correct enough to have gotten the order out. When these arguments were engaged in with the cooks concerning the delays, the food would be sitting there ready for serving, and it would not be served while the argument went on between Petitioner and the cook. On these occasions the cooks would say "I ain't gonna cook this shit for you" and would call the Petitioner a "bitch".

118. On her last day Petitioner was told by Mr. Mack that he was the only cook scheduled for his part of the restaurant and words to the effect that he "could not believe" that circumstance and complained that Mr. Stowell can't get things right and that he would be glad when Mr. Stowell was gone. Petitioner remarked to Mr. Mack to the effect "are you having a bad morning", and he replied that he was "sick of this." Throughout the morning Petitioner observed that Mr. Mack was under stress and that he was the only cook working in that area.

119. As Petitioner describes the situation on her last day, she delivered a customer a skillet that had broccoli and hollandaise sauce. The customer did not believe that it had enough hollandaise sauce and asked Petitioner to get more. Petitioner left the food order ticket with the customer and took up other duties. She then passed Mr. Stowell and asked him to get the ticket, because she needed to get the customer some more hollandaise sauce. Mr. Stowell said that he would. Petitioner then went to the kitchen area and asked Mr. Mack if he would give her some hollandaise sauce, "this man needs some". Mr. Mack asked where her ticket was for the extra hollandaise sauce. Petitioner told Mr. Mack that Mr. Stowell was coming with the ticket. Mr. Mack said "I ain't giving you shit". Petitioner made a further request for the hollandaise sauce and repeated that Mr. Stowell was coming with the ticket. During this exchange Mr. Mack told the Petitioner to "drop dead" and called her a "white fucking bitch" and that he was "going to stomp her into the ground." When he made these remarks he was yelling. When Mr. Stowell approached Petitioner and Mr. Mack, the cook continued his remarks by saying he was "going to kill" Petitioner and calling her a "fucking white bitch". Mr. Stowell said "here's your ticket, give me the hollandaise sauce now". Mr. Mack responded "I ain't giving you shit either." Mr. Mack told Mr. Stowell "you get that white fucking bitch out of my face, I'm going to kill her. Get her out of this building, get her out of here. I'm going to kill her or stomp her face into the ground".

120. Under these circumstances, in which Mr. Stowell perceived that the Petitioner was at risk, Mr. Stowell told Petitioner to leave and go home.

Petitioner started to leave, then told Mr. Stowell, "you are going to have to fire me if I have to leave this job for the way he just talked to me", referring to Mr. Mack's remarks. Petitioner said to Mr. Stowell "please fire me". Mr. Stowell then responded by saying, "go home, you're fired, Elisa; if that's what you want, you are fired". Petitioner then stated to Mr. Stowell "that's all I wanted to hear."

121. In her testimony Petitioner failed to acknowledge that she had been profane to Mr. Mack.

122. Petitioner felt threatened by Mr. Mack and cried.

123. At hearing Petitioner described her motivation on the last day to be that she was not going to quit the job. She was "not going to be cussed like a dog and then have to walk away" and that "it was better to have been fired." Under that arrangement Petitioner testified "I didn't have to ever come back there".

124. After she left the restaurant on the last day that Petitioner was employed at the Parkway restaurant, she told an acquaintance, Ruby Wilson, who works part-time at the Village Inn restaurant on North Monroe Street, and part-time at Jerry's restaurant at the airport, that Petitioner "quit" her job at the Parkway restaurant. Petitioner further told Ms. Wilson that she "wasn't worried about it and would go back, talk to Beth and get the job back".

125. Petitioner had also told the Unemployment Compensation Commission referee, in her hearing on unemployment compensation, that she was "going to make it final that day, and that day I finalized it." She also told the referee that she would have probably quit anyway if circumstances did not improve at the restaurant.

126. Petitioner acknowledged that she used profanity while working at the restaurant such as "damn it, they are not getting my food out for me" or "damn it, I can't believe I'm being cussed at again" or "I just can't take this shit no more". By contrast Petitioner denies profane exchanges with the cooks. That testimony related to exchanges is not accepted.

127. Petitioner remembers the reason Ms. Titze gave her for not reemploying Petitioner was because the Petitioner did not wear pantyhose.

128. An Unemployment Compensation Commission employee advised Petitioner to go back and try to obtain her job and this led to her conversation with Ms. Titze requesting reemployment.

129. Joseph Halladay has worked as a server with Respondent on and off for seven or eight years, but his employment on the shift with Petitioner was only for a couple of weeks at the end of Petitioner's employment. During times when he worked for the Respondent he did not receive any sexual or profane abuse by any of the cooks. He did not observe what he considered to be sexual harassment directed to any other server from the cooks.

130. Mr. Halladay noticed a difference in conduct by the employees at the restaurant when they were in the rush period. In that setting things were hectic. Mr. Halladay has heard employees yell things like "get out of my way or move".

131. On the last day that Petitioner worked at the restaurant Mr. Halladay observed Petitioner and Mr. Mack yelling back and forth one to the other. He does not recall exactly what was being said. He describes the matter as "quite a bit of bickering going on between both parties." As Mr. Halladay recalls, the exchange between Petitioner and Mr. Mack was real loud.

132. Mr. Halladay did not observe the cooks flaunting their genitals or grabbing their crotches or wearing their pants so low that the cooks buttocks could be seen. He did observe their underwear showing. He made no complaint about the latter observation.

133. Mary Darlene Roy worked ten years with Respondent to include part of the time with Mr. Mack. She left that employment at the beginning of 1994.

134. While employed, Ms. Roy did not detect what she considered to be sexual abuse or harassment by Mr. Mack or other cooks.

135. Ms. Roy did observe that when order tickets were not correctly filled out the cooks would get upset. In particular, when the tickets were not right and the cooks prepared the wrong food and had to redo the food preparation, this would upset them.

136. When Petitioner was late to work Mr. Stowell would ask other servers, to include Ms. Roy to cover Petitioner's work station.

137. On some occasions Mr. Stowell had requested Petitioner to pick up a server named Kitty Roe and bring her to work. This made the Petitioner late. On other occasions Petitioner was late for reasons of her own making.

138. On one occasion Ms. Roy overheard Mr. Stowell correct Petitioner for not having a bow tie on.

139. Ms. Roy heard Petitioner and Mr. Mack arguing "a lot". The arguments had to do with orders not being picked up that were "piling up" and tickets that were not being written right. Mr. Mack yelled at Petitioner about those problems. Ms. Roy recalls that Mr. Mack was a stickler about problems with tickets. In Ms. Roy's experience other cooks would get upset when tickets were not being written properly and orders were not being picked up on time. They were not as verbal about the problems as Mr. Mack would be.

140. Ms. Roy never heard Mr. Mack refer to Petitioner as "a fucking white bitch" or "a white bitch".

141. Mr. Titze established that Mr. Mack had worked for the Respondent for approximately five years in the capacity of lead cook. This meant that Mr. Mack was responsible for training cooks. Mr. Titze described Mr. Mack as being very high strung. When tickets were not correct Mr. Mack would pull them down and make the server correct them. If the tickets were not correct the cooks would prepare the wrong food and this would throw the cycle of work off. Under these circumstances Mr. Mack was observed by Mr. Titze to "fly off the handle".

142. Mr. Titze identified that the employee manual prohibits vulgar language or failure to follow a supervisor's instructions. The managers, according to the manual, are expected to squelch the profane language.

143. Mr. Titze confirmed that Mr. Holmes was fired for the sexual advances that he made to Ms. Helms. Other than the Holmes incident, Mr. Titze was not aware of conduct which might be considered sexual harassment.

144. Prior to the events involving the Petitioner's claims related to discrimination on the basis of sex, neither Mr. Titze nor Ms. Titze had received complaints of employment discrimination against Petitioner or other servers.

145. At the end of May, 1993, Petitioner applied for unemployment compensation. She was granted that compensation in July, 1993.

146. Before applying for unemployment compensation Petitioner tried to gain employment at several restaurants other than Respondent's restaurant. She managed to obtain a job at Banjo's restaurant in Tallahassee, Florida, but only worked there for a period of 20 minutes when she was told that she was being dismissed for reasons that were apparently unrelated to her performance at that restaurant.

147. In lieu of compensation, Petitioner participated in the Training Investment Program which allowed her to receive schooling directed toward a profession. That schooling was at Lively Vocational Technical School in Tallahassee, Florida, to become a barber. The tuition at Lively was paid by another program. The Training Investment Program paid \$69.00 per week through May, 1994, when Petitioner concluded her schooling to become a barber. In this arrangement Petitioner was not required to seek employment while in school. Petitioner began employment as a barber or hair stylist beginning June, 1994.

148. Petitioner's gross earnings for the period that she worked at the Parkway restaurant were \$3,167.50.

149. The value of the TIP income for the year that Petitioner received that money was \$3,588.00.

150. The \$3167.50 earned by Petitioner when employed by Respondent was for an 11-week period covered by a diary kept by Petitioner related to her earnings as extrapolated by an employe with the Unemployment Compensations Commission. When annualized to represent the period from the beginning of June 1993 until the end of May, 1994, when Petitioner was unemployed and attending barber's school, the anticipated earnings had Petitioner maintained her position with Respondent would have been \$14,971.00. That \$14,971.00 is offset by the \$3,588.00 which she was paid as a participant in the TIP program. Therefore, the backpay, including tips and wages, for the period that Petitioner was out of work would amount to \$11,383.00. The only benefit that Petitioner would be entitled to is a week's earnings for a vacation period amounting to \$72.00, representing a work week of 34 hours at \$2.13 per hour.

CONCLUSIONS OF LAW

151. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Section 120.57(1), Florida Statutes.

152. Petitioner is a "person" within the meaning of Section 760.02(6), Florida Statutes. Petitioner is an "aggrieved person" within the meaning of Section 760.02(10), Florida Statutes.

153. Respondent is an "employer" within the meaning of Section 760.02(7), Florida Statutes.

154. Petitioner claims that the Respondent has unlawfully discriminated against her based upon her gender. Again Petitioner claims that Respondent:

knowingly maintained a sexually hostile and abusive environment towards female servers that unreasonably interfered with their work, exposing them to disadvantageous working conditions to which male employees were not exposed. The work place for servers was permeated with discriminatory ridicule and insults. Respondent's maintenance of this intimidating environment caused Petitioner's discharge or constructive discharge.

155. The statutory basis for Petitioner's claim is set forth in Section 760.10(1)(a) and (b), Florida Statutes, which states:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire an 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.

(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color religion, sex, national origin, age, handicap, or marital status.

156. In resolving this dispute, reference may be made to the precedents set forth in Title VII of the Civil Rights Act of 1964, 42 U.S.C. s.2000e et seq., through court cases interpreting that law. This opportunity exists because Chapter 760, Florida Statutes, "Florida Civil Rights Act of 1992", is patterned after federal legislation. See Florida Dept. of Com. Affairs v. Bryant, 580 So.2d 1205 (Fla. 1st DCA 1991).

157. In the Bryant case the court indicated that to resolve the issue of discrimination one must question the facts presented and that includes dealing with issues of weight and credibility of the evidence.

158. Having alleged that the Respondent maintained a hostile work environment, Petitioner must offer objective proof about the environment, together with Petitioner's subjective perceptions that the environment was hostile. Moreover, Petitioner must show that the Respondent or its agents, to include Mr. Stowell and Ms. Titze, knew or should have known of the conduct constituting the hostile environment and with that knowledge failed to take appropriate corrective action. See Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986).

159. A sexually hostile or abusive environment exists "when the work place is permeated with 'discriminatory intimidation, ridicule, and insult' that is

'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' . . . ", Harris v. Forklift Systems, Inc., 114 S.Ct. 370 (1993). Concerning the alleged victim's subjective perception about the working environment, the Harris court stated, "so long as the environment would reasonably be perceived and is perceived, as hostile or abusive, there is no need for it to also be psychologically injurious". However, the affect of the alleged discrimination on the employee's psychological well-being has relevance in determining whether the employee perceived that the environment was abusive.

160. In the Harris opinion, at 114 S.Ct. at 371, the court described the test for measuring the quality of the environment and whether it constituted a sexually hostile or abusive environment when it stated:

. . . whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance . . . no single factor is required.

161. Again in the Harris case, at 114 S.Ct. 372, Justice Ginsburg in a concurring opinion commented on the test for a sexually hostile or abusive environment in this manner:

The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. . . . It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the Plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.

162. Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486 (MD Fla. 1991) speaks to the nature of the proof that must be demonstrated by Petitioner to prevail in her claim where it is stated:

Five elements comprise a claim of sexual discrimination based on the existence of hostile working environment;

- (1) Plaintiff belongs to a protected category;
- (2) Plaintiff was subject to unwelcomed sexual harassment;
- (3) The harassment complained of was based upon sex;
- (4) The harassment complained of affected a term, condition or privilege of employment; and
- (5) Respondeat superior, that is Defendants knew or should have known of the harassment and failed to take prompt, effective remedial action.

163. Those elements of proof follow the holding in *Jones v. Flagship International*, 793 Fed. 2d 714 (5th Cir. 1986).

164. Verbal abuse in an environment which allows verbal abuse of a female worker is not condoned even in the instances where the individual committing the harassment and the female worker/claimant do not like each other. See *Burns v. Gregory Electronics Industries, Inc.*, 989 F.2d 959 (8th Cir. 1993) and unwelcomed sexual harassment by a co-worker cannot be justified even in the instances where the Claimant is "unlady like". See *Carr v. Allison Gas Turbine Division, General Motors Corp.*, 32 F.3d 1007 (7th Cir. 1994).

165. As a female Petitioner belongs to a protected category.

166. Petitioner and other female servers were subject to unwelcomed harassment by the profane language and non-verbal conduct by the kitchen personnel. However, the overall circumstances point out that to some extent the servers contributed to the hostile working environment in times of stress through unpleasant exchanges with the cooks. In those instances interference with the servers' work performance was as much influenced by the servers as by the cooks.

167. The harassment complained of was not entirely based upon her sex (female). As a means to compare whether, but for the fact of her sex, Petitioner would not have been the object of the harassment, the circumstances were such that all servers were females save one male server. The male server worked as a server for a short period of time common to the period when Petitioner worked. During that short period of time he was not subjected to abusive treatment by the kitchen personnel. It was not shown that he did things that might give rise to abusive responses by the cooks. The exchanges between female servers and cooks were not so much in recognition of their gender, they were more related to their employment positions.

168. While the harassment that Petitioner was subjected to affected her basic condition of employment, there was no meaningful opportunity to compare the treatment of Petitioner and other female servers to male servers to determine whether male servers would be exposed to disadvantageous conditions of employment. Petitioner's terms and privileges of employment were unaffected by sexual harassment that male employees were principally responsible for, conduct unrelated to the exchanges about food orders.

169. The persons in charge of the restaurant knew about the questionable conduct by kitchen personnel in using profanity directed to or in the presence of the female servers. The remedial action taken in response to this conduct was prompt but ineffective. Management was not sufficiently apprised of the non-verbal conduct to be expected to take remedial action.

170. Petitioner and other female servers perceived and reasonably so, that the work environment was hostile and abusive.

171. However, on the whole Petitioner has failed to prove that she was the victim of sexual discrimination.

172. The basis upon which Petitioner left her employment with Respondent was unusual. She was a willing participant in the argument with Mr. Mack on that last day. Mr. Stowell took actions to remove Petitioner from a situation that was potentially harmful to Petitioner. When Petitioner would not leave the job for that day voluntarily, but rather insisted that the matter be brought to

conclusion concerning her ultimate employment with Respondent, Petitioner invited Mr. Stowell to fire her. He did so. By those actions he did not act in a discriminatory fashion. His decision is measured against Petitioner's employment history at the Parkway restaurant. Her performance was one in which she was often late for work and did not meet uniform requirements for servers. See Department of Corrections v. Chandler, 582 So.2d 1183 (Fla. 1st DCA 1991).

RECOMMENDATION

Based upon the findings of fact and the conclusions of law, it is,

RECOMMENDED:

That the final order be entered which dismisses Petitioner's claims of discrimination based upon sex.

DONE and ENTERED this 24th day of May, 1995, in Tallahassee, Florida.

CHARLES C. ADAMS, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of May, 1995.

APPENDIX

The following discussion is given concerning the proposed facts of the parties:

Petitioner's Facts:

Paragraphs 1 and 2 are not necessary to the resolution of the dispute.

Paragraphs 3 through 7 are subordinate to facts found.

Paragraph 8 is rejected.

Paragraphs 9 through 12 are subordinate to facts found.

Paragraph 13 is not necessary to the resolution of the dispute.

Paragraph 14 is subordinate to facts found with the exception of the latter phrases referring to "mother fuckers" and "fuck you, mother fucker" which phrases are rejected.

Paragraphs 15 and 16 are subordinate to facts found.

Paragraph 17 is rejected.

Paragraph 18 is subordinate to facts found with the exception of the reference to comments about breasts which is rejected.

Paragraph 19 is subordinate to facts found.

Paragraph 20 is contrary to facts found.

Paragraph 21 is accepted in the reference to verbal aggression and is rejected in the reference to physical aggression.

Paragraph 22 is subordinate to facts found with the exception of the phrase which says describing their genitals and "you want some of this baby" which is rejected.

Paragraph 23 is subordinate to facts found with the exception that the suggestion that the cooks were directing their conduct specifically to the Petitioner is rejected.

Paragraphs 24 and 25 are not necessary to the resolution of the dispute.

The first sentence to Paragraph 26 is subordinate to facts found. The latter sentence is rejected.

The first sentence to Paragraph 27 is rejected. The second sentence is subordinate to facts found.

Paragraphs 28 through 30 are subordinate to facts found.

The first sentence to Paragraph 31 is contrary to facts found. The second sentence is subordinate to facts found with the exception of the phrase that the attempts to stop the conduct did not do any good which phrase is rejected. The third sentence to Paragraph 31 is subordinate to facts found.

Paragraph 32 is subordinate to facts found in its first sentence. The first phrase in the second sentence is subordinate to facts found. The latter phrase is not necessary to the resolution of the dispute. The third sentence is contrary to facts found. The fourth and fifth sentences are rejected in the suggestion that the complaint by the server's father led to the dismissal of the cook. The last sentence in Paragraph 32 is subordinate to facts found with the exception of the suggestion that the complaint was to no avail, which is rejected.

Paragraph 33 is subordinate to facts found.

Paragraphs 34 and 35 are contrary to facts found in the suggestion that orders were deliberately slowed up resulting in lower tips to the servers. The offensive language that is commented on in Paragraphs 34 and 35 is subordinate to facts found.

Paragraphs 36 and 37 are subordinate to facts found.

Paragraph 38 is not necessary to the resolution of the dispute.

Paragraph 39 is rejected in its suggestion that the Petitioner's nonconformance with uniform requirements were comparable to the experience with other servers in terms of frequency.

Paragraph 40 is subordinate to facts found.

Paragraph 41 is not necessary to the resolution of the dispute.

Paragraph 42 is not necessary to the resolution of the dispute.

Paragraph 43 is contrary to facts found in the suggestion that Petitioner was occasionally late, is subordinate to facts found in the remaining phrase.

Paragraph 44 is subordinate to facts found.

Paragraph 45 is not necessary to the resolution of the dispute.

Paragraphs 46 and 47 are not necessary to the resolution of the dispute.

Paragraph 48 is subordinate to facts found.

Paragraph 49 is not necessary to the resolution of the dispute.

Paragraph 50 is subordinate to facts found with the exception of the last sentence which is not necessary to the resolution of the dispute.

Paragraph 51 is subordinate to facts found.

Paragraphs 52 through 54 are not necessary to the resolution of the dispute.

Paragraphs 55 through 63 are subordinate to facts found.

The first sentence to Paragraph 64 is not necessary to the resolution of the dispute. The latter sentence is subordinate to facts found.

Paragraphs 65, 66 and 67 in the non-parenthetical references are subordinate to facts found. The parenthetical references are an incomplete discussion of the facts found in the recommended order.

Paragraph 68 is subordinate to facts found.

Paragraphs 69 and 70 are not necessary to the resolution of the dispute.

The first sentence to Paragraph 71 is contrary to facts found. The second and third sentences are subordinate to facts found.

Paragraph 72 is contrary to facts found in its suggestion that Petitioner did not use profane language in the confrontation with the cook.

Paragraph 73 is contrary to facts found.

Paragraph 74 is a conclusion of law.

Paragraph 75 is contrary to facts found.

Paragraph 76 is not necessary to the resolution of the dispute.

Paragraph 77 is not necessary to the resolution of the dispute.

The first sentence to Paragraph 78 is not necessary to the resolution of the dispute. The latter sentence to Paragraph 78 is subordinate to facts found.

Paragraphs 79 and 80 are not necessary to the resolution of the dispute.

Paragraph 81 is contrary to facts found.

Paragraphs 82 through 88 are not necessary to the resolution of the dispute.

Concerning Paragraphs 89 and 90, whatever Petitioner's intentions prior to the confrontation with the cook, once that confrontation transpired Petitioner opted to be fired rather than be sent home to get away from the threats by the cook or to quit her employment of her own volition.

Paragraph 91 is subordinate to facts found.

Paragraphs 92 through 95 are rejected.

Paragraphs 96 through 99 are subordinate to facts found.

Paragraph 100 is not necessary to the resolution of the dispute.

Paragraph 101 is subordinate to facts found in the first sentence. The latter sentences in Paragraph 101 are irrelevant.

Paragraphs 102 through 104 are acknowledged as attempts at impeachment but are rejected in favor of the facts found in the recommended order.

Paragraphs 105 through 114 are subordinate to facts found.

Paragraph 115 is not necessary to the resolution of the dispute.

Paragraphs 116 and 117 are subordinate to facts found.

Paragraphs 118 through 120 are not necessary to the resolution of the dispute.

Paragraphs 121 through 124 are subordinate to facts found.

Paragraphs 125 through 133 are not necessary to the resolution of the dispute.

Paragraph 134 is irrelevant with the exception of the last sentence which is subordinate to facts found.

Paragraphs 135 through 145 constitute legal argument.

Respondent's Facts:

Paragraphs 1 and 2 are subordinate to facts found.

The first phrase to Paragraph 3 is accepted to the extent that conditions were stressful and the expectation of timely service to patrons. The remaining language in Paragraph 3 is rejected in that it was not established that the employees were aware of any signs that incrementally addressed the time standards for service.

Paragraphs 4 through the first two sentences of Paragraph 8 are subordinate to facts found. The phrase pertaining to Petitioner's former employment is not relevant. The remaining portions of Paragraph 8 are subordinate to facts found.

Paragraphs 9 and 10 constitute legal argument.

Paragraphs 11 through 13 are not necessary to the resolution of the dispute.

Paragraph 14 is subordinate to facts found.

Paragraph 15 is not necessary to the resolution of the dispute with the exception of the discussion of the basis for Petitioner's departure from the restaurant on May 15, 1993, which is subordinate to facts found.

Paragraphs 16 and 17 are not necessary to the resolution of the dispute.
Paragraph 18 is not relevant.
Paragraph 19 is subordinate to facts found.
Paragraph 20 is not necessary to the resolution of the dispute.
Paragraphs 21 through 24 are subordinate to facts found.
Paragraph 25 is not necessary to the resolution of the dispute.
Paragraph 26 and the first sentence to Paragraph 27 are subordinate to facts found. The remaining sentences within Paragraph 27 constitute legal argument.

Paragraph 28 is subordinate to facts found.

Paragraph 29 is contrary to facts found.

Paragraph 30 constitutes a correct portrayal of the process engaged in by the hearing officer; however, it is not necessary to report those activities in the fact finding.

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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.