STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KIM ANNE BROWN, Petitioner, vs. WESTERN STEER/STARKE FOODS, INC., Respondent.	)	Case No. 05-1905

RECOMMENDED ORDER

This cause came on for final hearing, as noticed, before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted in Starke, Florida, on February 27, 2006. The appearances were as follows:

APPEARANCES

For Petitioner: Kim Anne Brown, pro se
15113 Southeast 25th Avenue
Starke, Florida 32055

For Respondent: Melissa A. Dearing, Esquire
Coffman, Coleman, Andrews & Grogan, P.A.
Post Office Box 40089
Jacksonville, Florida 32203

STATEMENT OF THE ISSUE

Whether the Respondent Employer has committed an unlawful employment practice, as defined by the Florida Civil Rights Act,

Chapter 760, Part I, against Petitioner, on the basis of her age and/or handicap.

PRELIMINARY STATEMENT

On January 12, 2005, the Petitioner Kim Anne Brown ("Ms. Brown") filed a complaint of discrimination against the Respondent, Western Steer/Starke Foods, Inc. ("Western Steer") alleging that she was suspended from her position as a server because of her age and handicap (alcoholism), in violation of the Florida Civil Rights Act of 1992 ("FCRA"). A Determination of No Cause was entered by the Florida Commission on Human Relations (Commission) on April 18, 2005.

The Petitioner timely filed a Petition for Relief on May 18, 2005, which was referred to the Division of Administrative Hearings. The matter was transmitted to the undersigned and was noticed for a hearing to be conducted on the above date.

The hearing was conducted as noticed. During the hearing, the Petitioner testified on her own behalf and presented the testimony of Ken Weaver and Sheila Lee. The Petitioner also admitted into evidence Exhibit P-1 and Composite Exhibit P-2. The Respondent elicited testimony from the foregoing witnesses through cross-examination, and also conducted the direct examinations of Donald Robert Thomas, Jr., and Harry M.

Hatcher III. In addition, Western Steer admitted into evidence, without objection, Exhibits R-1 through R-10.

A transcript was filed on May 8, 2006, and the parties timely submitted Proposed Recommended Orders.

FINDINGS OF FACT

1. The Respondent Western Steer hired the Petitioner as a server for its Starke, Florida restaurant approximately ten years ago.

2. As a result of an alcohol abuse problem, in February 2002, the Petitioner joined the local Alcoholics Anonymous. The Petitioner contends that she has not imbibed in alcoholic beverages in over three years.

3. The Petitioner believes that she may have disclosed her sobriety to Ken Weaver in September 2002 after receiving a negative performance evaluation, although she is certain that she would have disclosed it to him in February 2003. In that regard, the Petitioner displayed a medallion signifying sobriety to Western Steer's owner, Harry Hatcher, and the General Manager, Ken Weaver. Both Mr. Hatcher and Mr. Weaver expressed that they were proud of her accomplishment. Furthermore, the Petitioner acknowledged that she considered Mr. Hatcher to be "a wonderful man" and a friend, and acknowledged that he had helped her financially throughout her employment for Western Steer. The Petitioner also recalls that, in approximately 2004, she

advised floor manager Don Thompson that she was a recovering alcoholic, and that he likewise encouraged her to maintain her sobriety.

4. The Petitioner complained that, thereafter, in September 2002, she and three other Western Steer employees received performance evaluations. The Petitioner contends that, with the exception of one of the employees, all employees who were evaluated in 2002, including her, received negative evaluations. The Petitioner acknowledged, however, that the two other individuals receiving negative evaluations were younger than her, and that she did not have any information to suggest that these individuals were alcoholics or had some other disability. Further, the Petitioner admits that she disclosed alcoholism only in reaction to having received the negative evaluation.

5. The Petitioner contends that, in April 2003, two co-workers informed her of a comment made by Assistant Manager Sheila Lee that Petitioner should be in a rehabilitation facility. The Petitioner did not believe that, in making this statement, Ms. Lee was discriminating against her because of her status as a recovering alcoholic; rather, she believed that Ms. Lee made this statement because ". . . she was angry with [Petitioner] because [Petitioner] can get sober and she can't." In any event, the Petitioner claims to have reported Ms. Lee's

comment to Mr. Hatcher and Mr. Weaver, and the Petitioner recalls that both men were very supportive of her, and did not condone Ms. Lee's alleged comment. Indeed, after the Petitioner reported Ms. Lee's alleged comment to Mr. Hatcher and Mr. Weaver in April 2003, the Petitioner acknowledged that she did not hear any other comments after that. Notably, when asked if anyone ever made any comments about her alcoholism, the Petitioner recalled Western Steer employees and managers telling her that "they're proud" of her continuing to abstain from alcohol use. Petitioner also recalled that during her April 2003 conversation with Mr. Weaver and Mr. Hatcher, she volunteered to take a drug test, but that both men told her that was unnecessary.

6. On February 9, 2004, the Petitioner met with then floor manager Don Thompson to discuss the Petitioner's developing pattern of tardiness and customer complaints. Specifically, Mr. Thompson discussed with Petitioner the pattern of tardiness that was developing as reflected in her time cards for January and February 2004, and also addressed complaints he had received from other servers regarding the Petitioner's strange behavior and her inability to keep-up with her station. The Petitioner admits that she was advised at that time that any future violations would result in termination.

7. Notwithstanding Mr. Thompson's warning that future violations would result in termination, Mr. Thompson had to

counsel the Petitioner on April 8, 2004. During that counseling session Mr. Thompson again discussed with the Petitioner his concern over her continued pattern of tardiness and her strange behavior.

8. Finally, on July 8, 2004, the Petitioner was suspended indefinitely, and subsequently was asked to undergo a medical, drug, and alcohol exam, which she agreed to do.

9. The Petitioner's suspension, however, was motivated by the Petitioner's pattern of tardiness, as well as the behaviors that had surfaced in the months leading up to her suspension. In that regard, while the reporting time for servers had always been either 10:00 a.m. or 10:45 a.m., the Petitioner had developed a pattern of reporting to work well after the designated start time. Specifically, on July 25, 2004, Petitioner was scheduled to begin work at 10:45 a.m. When the Petitioner still had not arrived by 11:45 a.m. - one hour into her shift - Ms. Lee contacted the Petitioner at home, apparently waking her. The Petitioner acknowledged that she had overslept and asked Ms. Lee if she should still report to work. Because it was so far into her shift, however, Ms. Lee advised the Petitioner that it was not necessary for her to report to work.

10. In addition to the Petitioner's pattern of tardiness, the Petitioner engaged in very bizarre behavior, including: talking very loud, talking to herself, appearing to be unaware

of her surroundings, and incoherent. She exhibited great difficulty in keeping up with her section. In fact, while the servers are expected to assist one another in keeping up with their sections, the Petitioner's fellow servers repeatedly complained about having to render excessive assistance to the Petitioner. Moreover, there was a report regarding the Petitioner sticking her finger in food at the buffet, and taking food out while licking her fingers. The Petitioner acted in a very theatrical manner in the presence of customers, including howling, singing loudly, skipping, and "sashaying" through the restaurant.

11. Western Steer was receiving an increasing number of customer complaints regarding the Petitioner, including requests by customers to be seated in a station other than the Petitioner's station, or to be moved from the Petitioner's station after initially being seated there.

12. In light of all of these attendance and behavioral issues, Mr. Hatcher and Mr. Weaver determined that a suspension was appropriate. Mr. Weaver met with the Petitioner to advise her of the suspension on July 28, 2004.

13. In the interim, Mr. Weaver and Mr. Hatcher also discussed their concern that there may be something motivating the Petitioner's behavior. Notwithstanding that Mr. Hatcher's initial inclination was to terminate the Petitioner for failure

to improve her attendance and performance, despite numerous counseling sessions, since the Petitioner had previously volunteered to take a drug and/or alcohol test, Mr. Hatcher and Mr. Weaver decided such a test was a reasonable method of determining if the Petitioner was fit for duty. Since the Petitioner complained about not feeling well, and Mr. Weaver had personally observed her difficulties in getting around the restaurant, they also agreed that a medical examination may be useful in determining whether such issues might be affecting her performance. Mr. Weaver therefore requested that the Petitioner submit to a medical, drug, and alcohol exam, which she agreed to do.

14. While the Petitioner asserts that various managers criticized her performance, the Petitioner acknowledged that no one at Western Steer ever linked her performance deficiencies or her status as an alcoholic or recovering alcoholic.

15. The Petitioner also acknowledged that alcoholism did not impact her ability to breathe, walk, sleep, engage in sexual relations or reproductive activity, work, care for herself, perform manual tasks, hear, speak, learn, or perform any other major life activity. Indeed, the Petitioner admitted that she could pretty much do anything that she did before she ever started consuming alcohol.

16. Additionally, aside from displaying her medallion to Mr. Hatcher and Mr. Weaver in February 2003, the Petitioner has provided no other documentation to Western Steer regarding her status as a recovering alcoholic.

17. Other than her speculation that she was discriminated against because of her alcoholism, the Petitioner admits that nobody at Western Steer ever made any comments or engaged in any conduct which would suggest that they were discriminating against her on the basis of her alcoholism or status as a recovering alcoholic.

18. Finally, the Petitioner presented no evidence indicating that Mr. Hatcher, Mr. Weaver, or anyone else discriminated against her on the basis of age. Notably, the Petitioner acknowledged that Mr. Hatcher was older than her, and Mr. Weaver and Ms. Lee were approximately the same age.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2005).

20. The Florida Civil Rights Act of 1992, as amended, Chapter 760, Florida Statutes, proscribes discrimination against any individual with respect to terms, conditions, or privileges of employment on the basis of, among other attributes, age or handicap. § 760.10(1)(a), Fla. Stat. (2005).

20. Since the FCRA was patterned after Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e17 ("Title VII"), the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Sections 621-623 ("ADEA"), and the Americans With Disabilities Act of 1990, as amended, 42 U.S.C. Section 12101-12213; case law interpreting Title VII, the ADEA and the ADA is applicable to cases arising under the FCRA. Florida State Univ. v. Sondel, 685 So. 2d 923, 925 n. 1 (Fla. 1st DCA 1996).

21. The Petitioner has the burden of establishing a prima facie case of discrimination. Combs v. Meadowcraft, Inc., 106 F.3d 1519, 1527-1528 (11th Cir. 1997), cert. denied, 522 U.S. 1045 (1998). Disparate treatment claims require proof of discriminatory intent either through direct, statistical or circumstantial evidence. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001). Since the Petitioner has failed to set forth any direct evidence, she must rely on circumstantial evidence to prove discriminatory intent, using the framework established in McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973).

22. If the Petitioner carries her burden, the burden then shifts to the employer to rebut the inference of discrimination by articulating a non-discriminatory reason for its employment action. Reeves v. Sanderson Plumbing Prod. Inc., 530 U.S. 133,

142 (2000); Holifield v. Reno, 115 F.3d 1555, 1564 (11th Cir. 1997). This burden, however, is "exceedingly light." 115 F.3d at 1564. The employer need only offer admissible evidence sufficient to raise a genuine issue of fact as to whether it had a legitimate reason for taking the contested employment action. Chapman v. A.I. Transport, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc).

23. Once the employer articulates a legitimate, non-discriminatory reason for its actions, the inference of discrimination disappears, and the burden shifts back to the Petitioner to prove that the proffered reason was merely a pretext for intentional discrimination. Reeves, 530 U.S. at 142; Schoenfield v. Babbitt, 1257 at 1269 168 F.3d (11th Cir. 1999).

24. The Supreme Court of the United States, in Reeves, supra. clarified the circumstances in which an employer is entitled to judgment as a matter of law under the burden shifting mechanism, stating:

> There will be instances where, although the Petitioner has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the Petitioner created only a weak issue of

> fact as to whether the employer's reason was untrue and there was abundant and
>
> uncontroverted independent evidence that no discrimination had occurred.

Id. at 148.

25. The Reeves Court further explained that the determination of whether judgment as a matter of law is appropriate in a given case will turn on "the strength of the Petitioner's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case that may properly be considered on a motion for judgment as a matter of law." Id. at 148-149.

26. "Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact [in issue] without inference or presumption." Earley v. Chamption International, Corp., 907 F.2d 1077, 1081 (citing Carter v. City of Miami, 870 F.2d 578, 581-582 (11th Cir. 1989) (emphasis in original); see Holifield, 115 F.3d at 1561.

27. Here, the Petitioner has not produced any admissible evidence of discriminatory statements by a decisionmaker that could be considered direct evidence of age or disability discrimination.

28. Because the Petitioner has no direct evidence of discrimination, the Petitioner must produce circumstantial evidence of handicap discrimination. Specifically, the Petitioner must prove by a preponderance of the evidence that she" (1) is handicapped; (2) is a qualified individual; and (3) was subjected to unlawful discrimination because of her handicap. Hilburn v. Murata Elec. North America, Inc., 181 F.3d 1220, 1226 (11th Cir. 1999); Brand v. Florida Power Corp., 633 So. 2d 504, 510, n. 10 (Fla. 1st DCA 1994).

29. Even if the Petitioner were considered a qualified individual, the Petitioner has not submitted competent evidence to establish that she was handicapped, or that she was subjected to unlawful handicap discrimination.

30. The Petitioner cannot establish that she is handicapped or disabled under any of the definitions contained in 42 U.S.C. § 12102(2), which is part of the Americans With Disabilities Act. That section defines "disability" as:

> (a) A physical or mental impairment that substantially limits one or more of the major life activities of an individual;
>
> (b) a record of such impairment; or,
>
> (c) being regarded as having such impairment.

42 U.S.C. § 12102(2).

31. Under the first definition, the Petitioner must establish that her alleged impairment substantially limits one or more major life activities. The U.S. Equal Employment Opportunity Commission defines "major life activities" to include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 CFR § 1630.2(i).

32. The regulations further specify that, in order to establish a substantial limitation in any one of these major life activities, the Petitioner must show that she is:

> (a) unable to perform a major life activity that the average person and the general population can perform; or
>
> (b) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major live activity.

33. During the hearing on this matter, the Petitioner admitted that she was not substantially limited in any of the foregoing major life activities as a result of her alcoholism or status as a recovering alcoholic. The Petitioner acknowledged that alcoholism did not impact her ability to breathe, walk, sleep, engage in sexual relations or reproductive activity, work, care for herself, perform manual tasks, speak, learn, or perform any other life activity. Indeed, the Petitioner

admitted that she could pretty much do anything that she did before she ever started consuming alcohol. Therefore, the Petitioner did not show she is disabled by being substantially limited in a major life activity and Western Steer is entitled to dismissal of the Petitioner's handicap claim premised on this portion of the definition.

34. To the extent that the Petitioner maintains that she is disabled by virtue of a record of an impairment, the record of impairment definition includes a person that "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k). This definition is satisfied "if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment . . ." There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records. Hilburn v. Murata Elec. North America, Inc., 181 F.3d 1220, 1229 (11th Cir. 1999) (citing 29 C.F.R. pt. 1630, App. § 1630.2(k) (1997)). Regardless of whether the Petitioner proceeds under the classification or misclassification theory, the Petitioner must show that the impairment indicated in the record substantially limited one or more of her major life activities.

35. The Petitioner did not identify any records, of the Respondent or otherwise, indicating either that she was an alcoholic or that the condition substantially limited any of her major life activities. The record evidence establishes that the Petitioner was not substantially limited in any major life activity as a result of her alcoholism or status as a recovering alcoholic. Accordingly, Western Steer is entitled to dismissal of the Petitioner's FCRA disability or handicap claims to the extent that those claims are premised on the theory that she had a record of an impairment.

36. The Petitioner also cannot establish that she was regarded as having an impairment under 42 U.S.C. § 12102(2)(C). A person is regarded as having an impairment where he or she:

> (a) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (b) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (c) Has none of the impairments defined in . . . this section but is treated by a covered entity as having a substantially limiting impairment.

37. To satisfy her burden of establishing a perceived impairment under the FCRA it is not enough for Petitioner to show that Western Steer regarded her as an alcoholic; she must

also show that Western Steer regarded her alcoholism as substantially limiting one of her major life activities. See Zenor v. El Paso Healthcare System, Ltd., 176 F.3d 847, 859 (5th Cir. 1999).

38. Moreover, to constitute a perceived impairment under this regulation, the United States Court of Appeal for the Eleventh Circuit has explained that the impairment must be substantially limiting and significant. Gordon v. E.L. Hamm & Assoc., Inc., 100 F.3d 907, 913 (11th Cir. 1996), cert. denied, 522 U.S. 1030 (1997). A "significant" impairment is "one that is viewed by the employer as generally foreclosing the type of employment involved, not just a narrow range of job tasks." Id. (citing 29 C.F.R. § 1630.2(j)(e) and Ellison v. Software Spectrum, Inc., 85 F.3d 187, 192 (5th Cir. 1996)). The Eleventh Circuit has focused on the alleged impairment's effect upon the attitude of others. 100 F.3d at 913.

39. The Petitioner does not contend that her alcoholism affected her ability to work or perform any of her job duties. Further, other than the Petitioner's contention that she was criticized for her job performance, the Petitioner has no evidence that anyone at Western Steer believed she was unable to work or perform her job duties as a result of her alcoholism. Moreover, the Petitioner acknowledged that she had no evidence to suggest that anyone at Western Steer thought she was

foreclosed from performing a broad range of jobs. Absent such evidence, the Petitioner cannot establish that she was regarded as having an impairment, thus precluding a finding in her favor as to this element of proof of disability. See Sullivan v. Neiman Marcus Group, Inc., 358 F.3d 110, 118 (1st Cir. 2004).

40. Additionally, Mr. Weaver's request that the Petitioner submit to a medical, drug, and alcohol test was entirely reasonable in light of the behaviors that surfaced in the months leading up to the Petitioner's suspension. Consequently, the Petitioner cannot establish that Western Steer perceived her as substantially limited in any major life activity.

41. To establish a prima facie case of age discrimination, the Petitioner must adduce evidence: (1) that she was in a protected age group and was adversely affected by an employment decision; (2) that she was qualified for her current position or to assume another position at the time of the adverse employment action; and (3) by which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of age in reaching the decision at issue. Earley v. Champion Intern. Corp., supra at 1082 (11th Cir. 1990).

42. Other than her contention that Mr. Thompson allegedly asked the Petitioner if she was okay or why she was limping, the Petitioner acknowledged that she has no other evidence to suggest that she was discriminated against on the basis of her

age. Indeed, according to the Petitioner, it was the Florida Commission on Human Relations that included the reference to age discrimination in her charge, and no one at Western Steer made any comments or engaged in any conduct that she construed as discriminatory on the basis of her age. Notably, it is undisputed that Mr. Weaver and Ms. Lee are the same age as the Petitioner, and that Mr. Hatcher is older than the Petitioner. Accordingly, because the Petitioner has not produced evidence demonstrating that she was discriminated against on the basis of her age, Western Steer is entitled to an order dismissing the Petitioner's age discrimination claim.

RECOMMENDATION

Having considered the foregoing findings of fact, conclusions of law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief in its entirety.

DONE AND ENTERED this 10th day of July, 2006, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of July, 2006.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.