FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-5309

ABC FINE WINE & SPIRITS, FLORIDA INDEPENDENT SPIRITS ASSOCIATION, and PUBLIX SUPERMARKETS,

Appellants,

v.

TARGET CORPORATION, TOPGOLF INTERNATIONAL, INC., and WALMART, INC. and DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,

Appellees.

On appeal from a Final Order of the Division of Administrative Hearings.
John D.C. Newton, II, Administrative Law Judge.

May 19, 2021

M.K. THOMAS, J.

Appellants challenge a final order declaring Florida Administrative Code Rule 61A-3.055 (the existing rule) invalid. The existing rule attempts to define items "customarily sold in a

restaurant" as that term is used in section 565.045, Florida Statutes, for the purpose of issuing Consumption on Premises (COP) liquor licenses. Appellants intervened in a rule challenge brought by Target, Walmart, and Topgolf, (Petitioners) in support of the existing rule. We affirm the Administrative Law Judge's (ALJ) holding that the existing rule is an invalid exercise of delegated legislative authority for the reasons set forth in *Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco v. Target Corporation*, No. 1D18-5311 (Fla. 1st DCA May 19, 2021). However, we agree with Appellants that the ALJ erred in finding they lacked standing to intervene and, therefore, reverse that portion of the final order.

Pursuant to section 565.045, a COP licensee may not sell "anything other than the beverages permitted, home bar and party supplies and equipment (including but not limited to glassware and party-type foods), cigarettes, and *what is customarily sold in a restaurant*." § 565.045(2)(a), Fla. Stat. (emphasis added). The existing rule attempts to clarify what "is customarily sold in a restaurant." It provides:

> (1) As used in section 565.045, F.S., items customarily sold in a restaurant shall only include the following:
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> (a) Ready to eat appetizer items; or
> (b) Ready to eat salad items; or
> (c) Ready to eat entree items; or
> (d) Ready to eat vegetable items; or
> (e) Ready to eat dessert items; or
> (f) Ready to eat fruit items; or
> (g) Hot or cold beverages.
>
> (2) A licensee may petition the division for permission to sell product other than those listed, provided the licensee can show the item is *customarily sold in a restaurant*. This petition shall be submitted to the director of the division . . . and must be approved prior to selling or offering the item for sale.

Fla. Admin. Code R. 61A-3.055(1)–(2) (emphasis added).

After Petitioners sought invalidation of the existing rule, Appellants, as COP license holders, attempted to intervene in support of the existing rule. Petitioners opposed the intervention, claiming that although Appellants would have standing to challenge the rule, they do not have standing to intervene in support of the rule. The ALJ granted the motion, subject to proof of standing at the final hearing. After the final hearing, the ALJ concluded that Appellants lacked standing to intervene in support of the existing rule because they did not prove a real or immediate injury. The ALJ noted that, if the rule was to be found invalid, the effects upon the Appellants would only be to remove restrictions upon what they could sell.

Standing is a question of law subject to de novo review. *See Office of Ins. Regulation v. Secure Enters., LLC*, 124 So. 3d 332, 336 (Fla. 1st DCA 2013) (citing *Palm Beach Cty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot.*, 14 So. 3d 1076, 1077 (Fla. 4th DCA 2009)). Pursuant to section 120.56(1)(a), Florida Statutes, "Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the validity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." To establish standing under the "substantially affected" test, a party must show: (1) that the rule or policy will result in a real or immediate injury in fact; and (2) that the alleged interest is within the zone of interest to be protected or regulated. *Jacoby v. Fla. Bd. of Med.* 917 So. 2d 358, 360 (Fla. 1st DCA 2005). To satisfy the sufficiently real and immediate injury in fact element, an injury must not be based on pure speculation or conjecture. *Lenoue v. Fla. Dep't of Law Enforcement*, 751 So. 2d 94, 97 (Fla. 1st DCA 1999).

Appellants claim standing to intervene in the proceeding because they are regulated by the rule at issue and will lack guidance if the rule is found invalid. Under section 120.56(1)(e), Florida Statutes, a substantially affected party may intervene in rule challenge proceedings. Generally, the fact that a party is regulated by a rule "is alone sufficient to establish that their substantial interests will be affected." *Coal. of Mental Health Prof. v. Dep't of Prof. Regulation*, 546 So. 2d 27, 28 (Fla. 1st DCA 1988); *see also Televisual Communications, Inc. v. Dep't of Labor & Emp't Sec./Div. of Workers' Comp.*, 667 So. 2d 372, 374 (Fla. 1st DCA

1995) (holding that where a proposed rule has the collateral effect of regulating an industry, representatives of that industry have standing to challenge the proposed rule). Additionally, this Court has held that participation in a rule challenge proceeding is not limited to those parties seeking to intervene on behalf of the petitioner; rather, a party may intervene on behalf of the agency. *See Fla. Elec. Power Coordinating Grp., Inc. v. Manatee Cty.*, 417 So. 2d 752, 752 (Fla. 1st DCA 1982).

In finding Appellants lacked standing, the ALJ cited to *K.M. v. Florida Department of Health*, 237 So. 3d 1084 (Fla. 3d DCA 2017). However, we regard that case distinguishable because K.M. was not regulated by the rule at issue in that case. Here, there is no question that, as COP license holders, Appellants are subject to the regulations set forth in the existing rule. This is sufficient to satisfy standing. Our holding is consistent with the supreme court's contention that standing should be liberally applied. *See NAACP v. Fla. Bd. of Regents*, 863 So. 2d 294, 300 (Fla. 2003). Therefore, to the extent the ALJ found Appellants lacked standing to intervene in the rule challenge, the final order is reversed.

AFFIRMED in part, REVERSED in part.

LEWIS, J., concurs; WINOKUR, J., concurs specially with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

WINOKUR, J., concurring specially.

I concur with the decision to reverse the denial of Appellants' petition to intervene. I concur with the decision to affirm the ALJ's decision to invalidate the rule for the reasons indicated in my specially concurring opinion in *Fla. Dep't of Bus. & Pro. Regul. v. Target Corp.*, No. 1D18-5311 (Fla. 1st DCA May 19, 2021).

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Elliot H. Scherker, Brigid F. Cech Samole, and Katherine M. Clemente of Greenberg Traurig, P.A., Miami, for Appellee Walmart, Inc.

William N. Spicola, Tallahassee, for Appellees Target Corporation, Topgolf International Inc., and Walmart Inc.