



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
HUMAN RIGHTS COMMISSION

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Joe Manchin III
Governor

Martha Yeager Walker
Secretary

**Via Certified Mail-
Return Receipt Requested**

January 23, 2006

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Paul Hanna
c/o The Greenbrier
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Re: Gray-Terry v. CSX Hotels, Inc. dba The Greenbrier Hotel
EAD-272-01

Dear Parties:

Enclosed please find the Commission's Final Order in the above-referenced matter, which incorporates the Final Decision of Chief Administrative Law Judge Phyllis H. Carter and a Notice of Right to Appeal.

January 23, 2006
Page Two

Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached Notice of Right to Appeal for more information regarding your right to petition a court for review of this Final Order.

Sincerely,

A handwritten signature in black ink, appearing to read "Ivin B. Lee". The signature is written in a cursive style with a large initial "I" and "L".

Ivin B. Lee
Executive Director

IBL/mst

Attachments

cc: The Honorable Bette Ireland
Secretary of State

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DYANNA GRAY-TERRY,

Complainant,

v.

Docket Numbers: EAD-272-01

EEOC Numbers: 17JA10175

**SCX HOTELS, INC.,
DBA THE GREENBRIER HOTEL,**

Respondent.

FINAL ORDER

On January 12, 2006, the Members of the West Virginia Human Rights Commission reviewed the Administrative Law Judge's Final Decision issued by Chief Administrative Law Judge Phyllis H. Carter in the above-captioned matter.

After due consideration of the aforementioned and there being no petition for appeal of the Final Decision to the Commission, the Commission decided to, and does hereby, adopt said Administrative Law Judge's Final Decision as its own, without modification or amendment.

It is, therefore, the Order of the Commission that the Administrative Law Judge's Final Decision, be attached hereto and made a part of this Final Order.

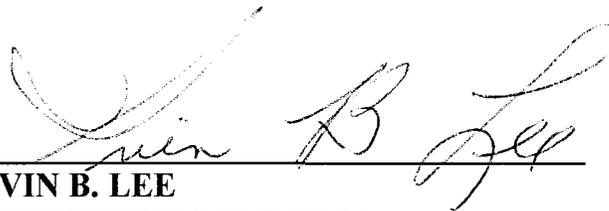
By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the

parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto as Exhibit A.

It is so **ORDERED**.

Entered for and at the direction of the West Virginia Human Rights Commission this 23 day of January 2006, in Charleston, Kanawha County, West Virginia.

WV HUMAN RIGHTS COMMISSION

A handwritten signature in cursive script, appearing to read "Ivin B. Lee", is written over a horizontal line.

IVIN B. LEE
EXECUTIVE DIRECTOR
Rm 108A, 1321 Plaza East
Charleston, WV 25301-1400
Ph: 304/558-2616 Fax: 558-0085

EXHIBIT A

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this Order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this Order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, person or entity against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the Commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the Commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this Order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11 and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DYANNA GRAY-TERRY

Complainant,

v.

Docket No. EAD-272-01
EEOC No. 17JA10175

CSX HOTELS, INC.,
d/b/a/ THE GREENBRIER HOTEL

Respondent.

ADMINISTRATIVE LAW JUDGE'S

FINAL DECISION

A public hearing in this matter was held on January 22, 23, 24, 2003, and April 24, 2003 in Greenbrier County at the Greenbrier Valley Employment Service Office before the undersigned administrative law judge.

The Complainant, Dyanna Gray-Terry (Mrs. Gray-Terry), appears in person and by her attorney, Robert Goldberg, Assistant Attorney General. The Respondent, CSX Hotels, Inc. d/b/a THE GREENBRIER HOTEL (THE GREENBRIER), appears by its counsel Jeff Rodgers, Karl Terrell, and Anne-Marie Mizel.

The undersigned considers and reviews, in relation to the adjudicatory record developed in this matter, the parties' proposed findings of fact, conclusions of law and arguments and Dr. Dorris A. Ragsdale's evidentiary deposition, taken on January 20, 2003. The undersigned adopts the parties' proposed findings of fact, conclusions of law and arguments that substantial evidence supports and are in accordance with the findings, conclusions, and legal analysis of the undersigned. To the extent that the parties' proposed findings, conclusions and argument are inconsistent, the undersigned rejects them and does not credit them.

I.

CONTENTIONS

The Commission alleges that Mrs. Gray-Terry is a qualified person with a disability as that term is defined by the West Virginia Human Rights Act, and that THE GREENBRIER fails to accommodate Mrs. Gray-Terry's disability by placing her in a vacant position which she is able and competent to perform. The Commission also alleges that THE GREENBRIER discriminates against Mrs. Gray-Terry because of her age.

THE GREENBRIER defends against the Commission's allegations by arguing that it did attempt to accommodate Mrs. Gray-Terry; that it engaged in an interactive process; that Mrs. Gray-Terry was in fact placed in an alternative job, but Mrs. Gray-Terry did not successfully perform that job. THE GREENBRIER contends Mrs. Gray-Terry was not and never became "able and competent" to perform any other job at THE GREENBRIER once she became disabled as a waitress. THE GREENBRIER asserts also that it offered opportunities for Mrs. Gray-Terry to improve her qualifications for jobs at THE GREENBRIER, but that she never availed herself of these opportunities. In essence, THE GREENBRIER asserts that no reasonable accommodation exists for Mrs. Gray-Terry to remain employed at THE GREENBRIER. Furthermore THE GREENBRIER argues that the majority of its workforce is more than forty (40) years of age and that it did not discriminate against Mrs. Gray-Terry because of her age.

II.

FINDINGS OF FACT

1. The Complainant Dyanna Gray Terry is a resident of White Sulphur Springs, West Virginia. (Hr. Tr. Vol. I, at 11, 42).

2. The Respondent, CSX Hotels, Inc., does business as THE GREENBRIER, and is an employer as the term is defined by W. Va. Code § 5-11-3(d) West Virginia Human Rights Act. (Hr. Tr. Vol. V, at 163-164).

3. Mrs. Gray-Terry begins her employment at THE GREENBRIER on April 20, 1995 at which time she was 48 years old. (Hr. Tr. Vol. I, at 11, Resp. Exh. 1-1 and 15.). She was terminated in August 2000. (Hr. Tr. Vol. I, at 93).

4. Mrs. Gray-Terry begins working for the respondent as a “roll girl.” Her job duties and responsibilities consist of filling up bread baskets, serving bread to customers, occasionally carrying food, and serving mid-afternoon tea in the lobby. The bread baskets are no heavier than 10 pounds. Occasionally Mrs. Gray-Terry carries heavier food trays. (Hr. Tr. Vol. I, at 45, 48).

5. At the time, Mark Liebendorfer, Director of Dining Services, is Mrs. Gray-Terry’s Supervisor. (Hr. Tr. Vol. I, at 48, 263).

6. Tony Senn, former assistant headwaiter and Mark Liebendorfer are members of the committee that make the decision to retain Mrs. Gray-Terry as a waitress upon the expiration of her thirty-day trial period. (Hr. Tr. Vol. V, at 216).

7. Mr. Liebendorfer, Director of Dining Services, completes an evaluation of Mrs. Gray-Terry’s performance and includes comments such as “She needs to smile more and show a little more initiative.” (Hr. Tr. Vol. V, at 210).

8. Mrs. Gray-Terry starts in the “scrub program,” which is a server training program. Upon completion of the program, Mrs. Gray-Terry continues working as a roll girl for about a year, then begins serving meals. (Hr. Tr. Vol. I, at 49, 50, 52).

9. In 1996, Mrs. Gray-Terry begins working as a waitress, primarily at the Sam Sneed Golf Club, then eventually in the main dining room. Waitresses who work at Sam Sneed’s Golf

Club must “carry very heavy, plates that are lined with a sort of crock plate, and another plate set on top of that. (Hr. Tr. Vol. I, at 59, 62, Hr. Tr. Vol. I, at 58-266).

10. Gail Lanek is her supervisor. (Hr. Tr. Vol. I, at 59-60).

11. In February 1998, Dr. Dorris Ragsdale, Mrs. Gray-Terry’s doctor, diagnoses Mrs. Gray-Terry with fibromyalgia, high cholesterol, gastric reflux disease, high blood pressure, depression and pneumocausal problems. The fibromyalgia, and its accompanying symptoms cause Mrs. Gray-Terry to develop depression. (Hr. Tr. Vol. II, at 13 and Ragsdale Evidentiary Deposition at 7 and 8).

12. Dr. Dorris Ragsdale’s notes reflect “She [Mrs. Terry] really dates her depression back too around the time she developed fibromyalgia, which was February of 1998.” Mrs. Gray-Terry acknowledges the accuracy of Dr. Ragsdale’s statement. Dr. Ragsdale treats Mrs. Gray-Terry for her depression. (Ragsdale Evidentiary Deposition, at 20, 34).

13. Dr. Ragsdale also treats Mrs. Gray-Terry for spinal stenosis. Arthritis in the cervical spine causes this condition. In Mrs. Gray-Terry’s case the condition is especially painful because of a bony encroachment where the nerve roots exit the spinal cord. (Ragsdale Evidentiary Deposition, at 20, 34).

14. The fibromyalgia adversely impacts Mrs. Gray-Terry’s daily life. Mrs. Gray-Terry is limited in her ability to do yard work, exercise, lift heavy objects, carry heavy trays, silver coffee pots and urns; and get a good night’s sleep. (Hr. Tr. Vol. I, at 83-84).

15. The spinal stenosis affects the upper part of Mrs. Gray-Terry’s back limiting her ability to lift over her head. (Hr. Tr. Vol. I, at 84).

16. Mrs. Gray-Terry begins to suffer from a separate condition, epicondylitis, which is a localized pain in the elbow and forearm severe enough to prevent her from picking up anything with

the affected arm, her right arm. (Hr. Tr. Vol. I, at 84-85).

17. Early in 1998 as a result of Mrs. Gray-Terry's fibromyalgia, and in part due to additional medical conditions, she becomes unable to perform the physical requirements of the job of waitress, either at the Main Dining Room or at the Sam Snead's Golf Club. (Hr. Tr. Vol. I, at 77; Hr. Tr. Vol. I, at 84-85, 171-172, 186-187, 265-266; Ragsdale Evidentiary Deposition, at 13-14, 26).

18. In September or October of 1998, THE GREENBRIER receives a complaint letter from a guest which indicates that Mrs. Gray-Terry's service was poor. Following receipt of this letter, Gail Lanek, Golf Club Manager, meets with Mrs. Gray-Terry to discuss the matter. Mrs. Gray-Terry indicates that she is in constant pain and attributes her difficulty to a sleep disorder which does not allow her body to rest. This affects her interpersonal skills and customer service skills. Mrs. Gray-Terry states that her muscles are fatigued and she has tendinitis. (Resp. Ex. 41, Hr. Tr. Vol. IV, at 281-282; Resp. Ex. 21; Hr. Tr. Vol. I, at 61; Tr. Vol. IV, at 285).

19. In a follow up with Mrs. Gray-Terry, Gail Lanek, recommends THE GREENBRIER'S EAP Program. (Resp. Ex. 21).

20. Tony Senn sends Mrs. Gray-Terry a letter informing her that she is suspended because she has been absent eight and one half days and that she is expected to return to work for breakfast on December 30, 1998. (Hr. Tr. Vol. I, at 67-68, Commission Ex. 1).

21. Mrs. Gray-Terry takes sick leave, beginning December 15, 1998.

22. Mrs. Gray-Terry files a worker's compensation claim on December 16, 1998. Her claim for Temporary Total Disability benefits covers only the period from December 16, 1998 through February 8, 1999. (Hr. Tr. Vol. I, at 73; Hr. Tr. Vol. V, at 127-129; Hr. Tr. Vol. II, at 65).

25. Mrs. Gray-Terry's sick leave and seasonal layoff combination are for the period

December 16, 1998 through April 20, 1999. (Hr. Tr. Vol. I, at 29).

26. Dr. Pence releases Mrs. Gray-Terry to return to work on February 9, 1999. On February 9, 1999, Mrs. Gray-Terry's sick leave is converted to a seasonal layoff. Mrs. Gray-Terry is to return to work on April 24, 1999. On April 24, 1999, she calls in sick. (Resp. Exh. 16; Hr. Tr. Vol. I, at 250-251; Resp. Exh. 17-18-19; Hr. Tr. Vol. I, at 252-255; The affidavit of Lois Pendleberry, at 4, 10). She presents a doctor's note excusing her from work due to illness from April 24, 1999 to May 5, 1999. (Hr. Tr. Vol. I, at 255-256; Respondent's Ex. 19).

27. In March of 1999, Mrs. Gray-Terry informs THE GREENBRIER that she is no longer able to perform as a waitress because of a combination of the fibromyalgia and epicondylitis. Mrs. Gray-Terry states "I just got to the point where I couldn't use my arm." (Hr. Tr. Vol. I, at 85-86).

28. In May 1999, Mrs. Gray-Terry and her husband meet with Marvin Terry, Rod Stoner, and Tony Senn. At the meeting Mrs. Gray-Terry informs them of her fibromyalgia, and requests to work one meal when possible. She requests an accommodation. (Hr. Tr. Vol. I, at 88-89).

29. Mr. Stoner and Mr. Senn agreed to the accommodation. Mr. Vaud, the headwaiter at the Sam Sneed did not agree.

30. There is a fairly complicated scheduling system that regulates when and where people can work, and it is set up in such a way that it fairly distributes the work among all the servers. It is not possible for Mrs. Gray-Terry to work one meal a day. (Hr. Tr. Vol. I, at 86-89, 243-244).

31. Between the months of March and August 1999, Mrs. Gray-Terry applies for fourteen transfers. (Hr. Tr. Vol. I, at 95).

32. Mrs. Gray-Terry withdraws her bid from five of the fourteen transfers.

33. THE GREENBRIER posts job openings in the Human Resources office, on bulletin boards, at the union hall, distribution lists sent throughout the hotel, and on a voice mail system that recites all the job openings at THE GREENBRIER. (Hr. Tr. Vol. IV, at 261; Resp. Ex. 24).

34. Paul Hanna encourages Mrs. Gray-Terry to place a verbal bid on any job she is interested in, and to come into the Human Resources office to obtain any additional information she requires about the job. (Hr. Tr. Vol. II, at 180-181, 195).

35. Employees with five or more absences in the previous calendar year usually are not permitted to transfer to another position within THE GREENBRIER. (Hr. Tr. II, 129-130). Ms. Terry is permitted to bid on this position and subsequent positions in 1999 and thereafter. THE GREENBRIER makes an exception for Mrs. Gray-Terry.

36. The first position Mrs. Gray-Terry bids on is the position of Beverage Cart/Snack Bar Attendant.

37. Ms. Terry makes a verbal and written bid on this position. (Terry, Hr. Tr. I, at 96, 99). At the time she submits a written bid, she speaks with Paul Hanna and informs him that the reason she is seeking a new job is because she has difficulty using her right arm and is no longer able to carry the heavy trays in the dining room. (Hanna, Hr. Tr. II, at 120-122).

38. The Beverage Cart/Snack Bar Attendant fills the cart with ice, beverages and snacks up to six times per day, drives the cart onto the golf course, sells snacks and beverages to the guests on the golf course, and interacts with customers in a pleasant and friendly manner. (Hr. Tr. III, at 46, Hr. Tr. IV, at 338-339; Comm Exh. 4; Resp. Exh. 26). Pleasant and friendly customer interaction is an essential function of the job. (Resp. Exh. 26 and 27; Hr. Tr. IV, at 338-340; Hr. Tr. III, at 46 and Comm.Exh.4).

39. The Beverage Cart/Snack Bar Attendant job requirements include lifting and carrying 25 to 50 pounds as many as six times per day to stock the beverage cart, lifting similar weights several times per day to stock the snack bar, and maintaining the cleanliness of the snack bar. Beverage Cart/snack bar attendants work alone and it is not possible to enlist the aid of others in carrying out the lifting requirements. (Hr. Tr. IV, at 345-349; Hr. Tr. III, at 46-48, Resp. Exhs. 26, 27). Ms. Terry “can’t do lifting with [her] arms. It makes them unbearable.” (Hr. Tr. I, at 151, 171; Resp. Exh. 1 at p. 21). She can’t lift anything more than 20 pounds. (Hr. Tr. I, at 177).

40. The snack bar attendant cleans and stocks the snack bar and sells snacks and drinks to customers. (Hr. Tr. III, at 46-48; Resp. Exh. 27).

41. Mrs. Gray-Terry interviews with Mr. Hanna, and the three co-managers Sabato Seguri, Robert Mickey and Colin O’Hanlon who, at that time, are co-managers of The Sam Sneed Golf Club. (Hr. Tr. Terry Vol. I, at 99; Hr. Tr. IV, at 336, 341, 351).

42. Mrs. Gray-Terry is not able to perform the physical functions of the Beverage Cart or Snack Bar Attendant positions because she cannot lift the bags of ice and cartons of can beverages that weigh more than the weight she can lift at any given time and because the job requires repetitive lifting and stooping. The interviewers state that Mrs. Gray-Terry does not have proper personal skills. (Hr. Tr. Vol. I, at 192-194 and Hr. Tr. Vol. III, at 44- 46)

43. Even with an accommodation of the lifting, driving and cleaning requirements of this job, Mrs. Gray-Terry cannot perform the essential physical functions nor the essential function of exhibiting good interactive and customer service skills. (Hr. Tr. IV, at 345-349; Hr. Tr. III, at 46-47; Resp. Exh. 36 at 2).

44. Mrs. Gray-Terry testifies that “my arms hurt when I drive.” She states she cannot

operate a riding lawnmower. (Resp. Exh. 1 at p. 22; Hr. Tr. I, at 153, 169). She has difficulty getting in and out of vehicles. (Hr. Tr. I, at 171). She has difficulty with cleaning and vacuuming. (Hr. Tr. I, at 154, 161-162, 176). Ms. Terry states, "I get so tired, I have to lie down if I get the chance." (Hr. Tr. I, at 160; Resp. Exh. 1 at p. 26).

45. Ms. Terry is not offered the position because even with an accommodation, she still cannot perform the essential functions of the job. At the interview, she does not smile, is not friendly, and does not behave as if she really wants the job. Her demeanor during her interview reveals poor interactive and customer service skills. (Hr. Tr. III, at 45, Hr. Tr. IV, at 341-343). The positions were offered to other applicants who had presented themselves as friendly and outgoing during their interviews and thus revealed the excellent interpersonal skills required by the position. (Hr. Tr. IV, at 338-339, 356, 366-368).

46. On or about April 12, 1999, Mrs. Gray-Terry bids on a subsequent part-time Beverage Cart/Snack Bar attendant position. This is the second job she bids on. Mrs. Gray-Terry then decides she does not want a part-time position, and withdraws her bid. (Hr. Tr. Vol. I, at 196-199; Resp. Exh. 3).

47. On or about May 3, 1999, Mrs. Gray-Terry bids on a Hostess position at Draper's Café, but withdraws this bid also, during her interview, because of the pay rate of \$6.50 per hour. (Hr. Tr. Vol. I, at 198-199; Hr. Tr. Vol. II, at 200). This is the third job she bids on.

48. On or about May 3, 1999 Mrs. Gray-Terry bids on a subsequent Snack Bar Attendant posting, but withdraws her bid after Paul Hanna explains to her that there is a substantial amount of heavy lifting involved, and that the position is temporary. This is the fourth job she bids on. (Hr. Tr. Vol. I, at 103-104-202; Hr. Tr. Vol. III, at 53-55; Comm. Exh.5)

49. On or about May 24, 1999 Mrs. Gray-Terry bids on a posting for the position of Reservation Agent, but later withdraws her bid after she determines that she is not able to pass the typing test, which requires the ability to type 25-30 words per minute. This is the fifth job she bids on. (Hr. Tr. Vol. II, at 149, 198-199; Hr. Tr. Vol. III, at 50; Resp. Exhs. 6 and 28). The record does not support a finding that Mrs. Gray-Terry can perform the essential functions of the job with an accommodation.

50. Mrs. Gray-Terry subsequently takes a typing test at a latter date in March of 2000, after she bids on a position as Human Resources Receptionist. This is the sixth job she bids on. (Resp. Exh. 7 at 4 and 5; Hr. Tr. I, at 107-108, 206-209; Hr. Tr. III, at 77-78; Hr. Tr. IV, at 17-20; Hr. Tr. V, at 227-230).

51. Mrs. Gray-Terry's score on this test is 9.4 words per minute. (Hr. Tr. Vol. I, at 107-108, 206-209; Resp. Exh. 7 at 4 and 5). Mrs. Gray-Terry tells Myra Windon, test administrator, she is not sure why Mrs. Gray-Terry is taking the test because she was not good on technical skills and is not good on the computer. (Hr. Tr. Vol. V, at 228). Mrs. Gray-Terry is unable to pass the typing test. The record does not support a finding that Mrs. Gray-Terry can perform the essential functions of the job with an accommodation.

52. THE GREENBRIER offers free classes to all its employees in all the Microsoft Office software, including Word, Excel, and Power Point. Mr. Hanna suggests to Mrs. Gray-Terry that she takes some of these classes, or takes secretarial classes at the community college that THE GREENBRIER publicizes for its employees. Mrs. Gray-Terry never takes any of the offered classes (Hr. Tr. Vol. II, at 253-256, 275-276; Hr. Tr. Vol. IV, at 169-170, 174-177).

56. In June of 1999, Mrs. Gray-Terry bids on the position of Security Guard, which requires the ability to lift 50 pounds at any time in response to emergency situations, the ability to walk

long distances, stand for hours, effectively use a sidearm such as a pistol, physically subdue and apprehend other persons. Applicants for this position are required to have a current certification as a West Virginia firefighter. Mrs. Gray-Terry does not have a certificate and her physical impairments prevent her from getting one. This is the seventh job she bids on. Mrs. Gray-Terry admits that she cannot lift 50 pounds. Mrs. Gray-Terry does not meet the job requirements for the position of security guard. (Hr. Tr. Vol. I, at 211; Hr. Tr. Vol III, at 61; Resp. Exh. 8 at 3, 5, and 9). Mrs. Gray-Terry was not awarded this position. The record does not support a finding that Mrs. Gray-Terry can perform the essential functions of the job with an accommodation.

57. Mr. Hanna encourages Mrs. Gray-Terry to continue using THE GREENBRIER's job bidding hotline, and contact the Human Resources office, regarding what qualifications she needs to improve upon to make her more successful in obtaining a new position. She does not respond to this offer. (Resp. Exh. 8 at 14).

58. In July of 1999, Mrs. Gray-Terry bids on the position of Telephone Operator. (Resp. Exh.9). This is the eighth job she bids on. The essential functions of this position are typing and computer skills. (Hr. Tr. Vol. III, at 64; Resp. Exh.30). Mrs. Gray-Terry's typing and computer skills are not at a level that qualifies her for this position.

59. Mrs. Gray-Terry is not selected for this position. Mr. Hanna encourages her to continue using THE GREENBRIER's job bidding hotline. (Hr. Tr. Vol. III, at 64-66; Resp. Exh. 30; Resp. Exh. 9 at 6). The record does not support a finding that Mrs. Gray-Terry can perform the essential functions of the job with an accommodation.

60. On August 16, 1999, Mrs. Gray-Terry bids on the position of Front Desk Clerk. This is the ninth job she bids on. (Resp. Ex. 10 at 9).

61. The essential function of the Front Desk Clerk position requires computer skills and typing 25-30 words per minute, as well as a friendly, outgoing demeanor and the ability to handle stressful situations. (Resp. Exh. 10; Resp. Exh. 31).

62. Mrs. Gray-Terry talks to Paul Hanna regarding her level of computer skills, and they agree that her skills are insufficient to meet the needs of this position. Mrs. Gray-Terry declines to take a typing test. She is not selected for the position. Mr. Hanna encourages Mrs. Gray-Terry to continue using THE GREENBRIER's job bidding hotline. (Hr. Tr. Vol. I, at 217-218; Hr. Tr. Vol. II, at 149-150; Resp. Exh. 10 at 20).

63. On or about August 30, 1999, Mrs. Gray-Terry bids on the position of Retail Assistant Manager. This is the tenth job she bids on. Mrs. Gray-Terry withdraws once she discovers that the retail outlet is more than fifty miles away from White Sulphur Springs. (Hr. Tr. Vol. I, at 219; Hr. Tr. Vol. III, at 70-71).

64. Throughout 1999 and 2000, Mr. Hanna talks to Mrs. Gray-Terry about available positions at THE GREENBRIER and the job bidding process. (Hr. Tr. Vol. III, at 134-135).

65. In September of 1999, a part time Room Service Clerk position becomes available within the Food and Beverage Department at THE GREENBRIER. No one within THE GREENBRIER bids on the position, including Mrs. Gray-Terry. (Hr. Tr. Vol. III, at 126-127-182).

66. Mr. Hanna calls Mrs. Gray-Terry and recommends that she bids on the Room Service Clerk position. (Hr. Tr. Vol. II, at 182).

67. After discussing the job responsibilities with Room Service Manager Tommy Given, Mrs. Gray-Terry bids on and accepts the position as Room Service Clerk. At the time Mrs. Gray-Terry accepts the room service clerk position, she has a pending Worker's Compensation claim but is

not receiving benefits. (Hr. Tr. Vol. I, at 118-119, 286-287; Hr. Tr. Vol. I, at 199).

68. When a full time employee transfers into a part time position, that employee becomes a temporary employee, at which point he or she loses his or her benefits, and when the position expires, he or she is terminated from the hotel with no rights to come back. (Hr. Tr. Vol. II, at 182).

69. In Mrs. Gray-Terry's case, THE GREENBRIER makes an exception to the collective bargaining agreement, and allows her to take the position without ending her benefits and terminating her at the end of the job if it did not become full time. Mrs. Gray-Terry is aware that the position is temporary. (Hr. Tr. Vol. II, at 182-183; Hr. Tr. Vol. I, at 120).

70. Mrs. Gray-Terry starts as Room Service Clerk in September or October 1999.

71. Mrs. Gray-Terry's duties include taking telephone orders from guests, clocking in the order, assigning the order to the appropriate waiter, calculating money and distributing money to the appropriate waiter. (Hr. Tr. Vol. I, at 119-121-125).

72. Mrs. Gray-Terry experiences problems as a Room Service Clerk. She makes errors in taking the orders, such as failing to identify the number of guests to be served, failing to clearly indicate the time at which the meals are to be served, and failing to indicate clearly the precise items that had been ordered. (Hr. Tr. Vol. IV, at 292-293; Hr. Tr. Vol. V, at 42-43, 47-48, 66-67).

73. Mrs. Gray-Terry fails to calculate "table money" correctly despite the fact that there was a chart in the room service booth indicating the proper amounts. The clerks who come in the next morning routinely had to recalculate the table money numbers calculated by Mrs. Gray-Terry the night before. (Hr. Tr. Vol. IV, at 293-296; Hr. Tr. Vol. V, at 56-58).

74. A waiter loses a \$50.00 tip to another waiter because Mrs. Gray-Terry incorrectly assigns the wrong waiter to deliver the order. (Resp. Exh. 45).

75. Mrs. Gray-Terry fails to record orders for the next day clearly enough to be understood by the individuals who will deliver the orders on that day. (Hr. Tr. Vol. I, at 299-300, 303-309).

76. Mrs. Gray-Terry's timidity results in her failing to repeat back orders to guests, so that incorrect orders are taken and ultimately delivered to guests, and also from asking the other operators for assistance. These mistakes result in unhappy guests, waiters and clerks. (Hr. Tr. IV, at 300-301, Hr. Tr. V, at 50-52).

77. As a result of Mrs. Gray-Terry's fibromyalgia, she has difficulty concentrating and following written or spoken directions. Mrs. Gray-Terry states in own words that she "gets confused when I have to do more than one thing. I can't understand if more than one person is speaking". (Hr. Tr. Vol. I, at 155-157, 164-165).

78. These difficulties made it hard for her to perform the Room Service Clerk position. She has problems concentrating, and difficulty finishing one task before starting another and keeping her mind on the task at hand. (Hr. Tr. Vol. I, at 157-158, 163-168, 178-179, 174-179).

79. This is a position you learn on the job. (Hr. Tr. Vol. I, at 121-122).

80. Mrs. Lanek and Mr. Given have a meeting on October 6, 1999 with Mrs. Gray-Terry to discuss the things she needs to improve upon which includes being more personable on the phone, repeating orders, recording things correctly, understanding importance of the role of operator, and table money calculations. (Resp. Exh 44).

81. Mrs. Lanek and Mr. Given warn Mrs. Gray-Terry she is nearing the end of the 30 day probationary period and will be monitored closely during the remainder of the probationary period. (Resp. Exh 44).

82. The first thirty days of any non-supervisory position at THE GREENBRIER is a probationary period pursuant to the collective bargaining agreement between Local 863 and THE GREENBRIER. The bargaining agreement gives THE GREENBRIER the right to return an employee to his or her old job if she/he is not performing satisfactorily by the end of that thirty-day period, and also gives the employee the option to return to his/her old job if he or she is not happy in the new one. (Resp. Exh. 24).

83. Mrs. Gray-Terry's performance in the Room Service Clerk position does not improve and she is not retained as a Room Service Clerk at the end of her probationary period. (Hr. Tr. Vol. IV, at 315).

84. Following her removal from the Room Service Clerk position, she contacts Vicky DeLeo, Respondent's Head of Personnel. Mrs. Gray-Terry tells Mrs. DeLeo about her physical limitations and medical condition. (Hr. Tr. Vol. I, at 130-131, Vol. I, 132).

85. Mrs. DeLeo's suggests that Mrs. Gray-Terry use the job hotline. (Hr. Tr. Vol. I, at 132).

86. THE GREENBRIER transfers Mrs. Gray-Terry back to her old position of waitress on October 12, 1999, and she returns to sick leave status. (Hr. Tr. Vol. I, at 228; Hr. Tr. V, at 138-140).

87. Under the terms of the collective bargaining agreement, a successful bidder on a job within THE GREENBRIER is not permitted to bid on another job for 180 days after his or her successful bid, whether or not he or she remains in the position for which the bid was accepted. (Resp. Exh. 24 at 25; Hr. Tr. Vol. II, at 186-187).

88. Mrs. Gray-Terry is permitted to bid on additional jobs after she is unsuccessful in her probationary period as Room Service Clerk. (Hr. Tr. Vol. I, at 222 ; Hr. Tr. Vol. II, at 187-188).

89. THE GREENBRIER has accommodated other individuals with disabilities by permitting them to work a less demanding job. Kevin Carpenter a waiter who, like Mrs. Gray-Terry, became physically unable to perform the waiter job and was placed as a Room Service Clerk. He performed that job successfully until he regained some of his physical abilities and moved onto another position. (Hr. Tr. Vol. II, at 189-190).

90. In November of 1999, Mrs. Gray-Terry makes a verbal bid on the position of Help Desk Administrator, a job in the Management Information Systems department of THE GREENBRIER. This is her twelfth bid. She did not make a written bid as required by the collective bargaining agreement. (Hr. Tr. Vol. III, at 71-73 Resp. Exh. 24.).

91. The essential functions of the Help Desk Administrator position required strong computer skills, including the ability to install software, experience with Microsoft Office or word processing/spreadsheet experience and computer troubleshooting abilities. Mrs. Gray-Terry lacks the specialized computer skills to perform this job. (Hr. Tr. Vol. III, at 73-74; Resp. Exh. 12 at 6). The record does not support a finding that Mrs. Gray-Terry can perform the essential functions of the job with an accommodation.

92. In January of 2000, THE GREENBRIER became aware that Mobil, the preeminent organization that rates hotels and resorts downgraded THE GREENBRIER's ranking from Five Stars to Four Stars. (Hr. Tr. Vol. II, at 171).

93. According to THE GREENBRIER, the primary reason for the downgrade was the substandard customer service that THE GREENBRIER's employees offer the guests. Hr. Tr. Vol. II, at 169; Hr. Tr. Vol. IV, at 35, 249).

94. THE GREENBRIER immediately begins taking steps to upgrade its customer

service by filling open positions with employees who can provide outstanding customer service. (Hr. Tr. Vol. II, at 175; Hr. Tr. Vol. IV, at 137-138,250-251). 95.

THE GREENBRIER creates the new position of Greeter whose essential functions

require computer and typing skills; interpersonal skills; greeting guests; sitting at the Concierge desk making reservations and other arrangements for the guests. (Hr. Tr. Vol. II, at 271-272; Hr. Tr. Vol. III, at 75).

96. In March of 2000, Mrs. Gray-Terry bids on the new Greeter position. She is awarded an interview with Paul Hanna and Karen Grigsby, who is to be the supervisor of the Greeters. (Hr. Tr. Vol. I, at 224).

97. Mr. Hanna and Mrs. Grigsby inform Mrs. Gray-Terry that her demeanor is not appropriate for the position of Greeter. (Hr. Tr. Vol. I, at 226; Hr. Tr. Vol. III, at 76).

98. They discuss with her the fact that she is shy and timid, which Mrs. Gray-Terry acknowledges. (Hr. Tr. Vol. II, at 207-208; Hr. Tr. Vol. IV, at 100, 102-106, 140-141).

99. Mrs. DeLeo and Mrs. Gray-Terry specifically discuss the Greeter position, and Mrs. DeLeo indicated to Mrs. Gray-Terry that the job requires tremendous customer service skills which Mrs. Gray-Terry does not demonstrate in the 15 or 20 minutes that the two of them had been talking; she tells Mrs. Gray-Terry that she wasn't smiling, and seemed timid and not an outgoing person. Mrs. Gray-Terry explains this by indicating that she is nervous, and Mrs. DeLeo then suggests that she set up mock interviews with Paul Hanna so that she can become more comfortable with the interviewing process. (Hr. TR. Vol. V, at 144-146).

100. Mrs. DeLeo asks Ms. Gray-Terry what her skills were in an effort to match up Mrs. Gray-

Terry's skills with a job. When Mrs. Gray-Terry indicates that she did not know what her skills are, Mrs. DeLeo suggests that Mrs. Gray-Terry goes back to the previous supervisors, who really like her, and ask them what her strengths are so that she could build up her self-esteem a little bit. (Hr. Tr. Vol. V, at 147-148).

101. During this meeting, Paul Hanna offers to coach Mrs. Gray-Terry with her interviewing skills to improve her chances of obtaining a position. (Hr. Tr. Vol. I, at 282-283; Hr. Tr. Vol. III, at 76; Hr. Tr. Vol. IV, at 266-268). The record does not support a finding that Mrs. Gray-Terry accepts Mr. Hanna's offer.

102. Mrs. Gray-Terry also bids on the job of Concierge in March of 2000. This is her fourteenth bid. (Hr. Tr. Vol. IV, at 10).

103. The Concierge manages the greeter staff, a staff of eight to twelve people, and runs the concierge desk, which handles reservations for all activities at THE GREENBRIER. (Hr. Tr. Vol. IV, at 11-13).

104. The position requires computer and typing skills, and a college degree in hospitality and supervisory experience is preferred. (Hr. Tr. Vol. IV, at 11-13).

105. Mrs. Gray-Terry is not qualified for this position and was informed of that during her interview. (Hr. Tr. Vol. IV, at 11-12). Mrs. Gray-Terry does not have a college degree and no supervisory experience.

106. There were a number of job openings at THE GREENBRIER in the spring of 1999 and the spring of 2000. Mrs. Gray-Terry is not qualified to perform the jobs advertised in those postings that she applies for, because of her physical limitations, lack of guest-contact skills, and lack of specialized skills such as clerical, supervisory, culinary, etc. (Com. Exhibits. 15-20; Hr. Tr. Vol. II, at

196-197, 203-251; Hr. Tr. Vol. IV, at 42-43, 64-79, 90-224, 246, 251-255, 268-273).

107. Mrs. Gray-Terry's limitations prevent her from holding the jobs she takes since leaving THE GREENBRIER. She works at Open Doors for one week but leaves because of her medical condition. She works at Eldercare Resource Corporation but leaves the same month due to her medical condition. Mrs. Gray-Terry works at Wise Foods, Incorporated but leaves during the same month because of her medical condition. She works at Professional Sleep Diagnostics for approximately seven months. She is unable to keep these jobs due to her lifting and strength limitations, and she are unable to hold one job which required working at night because of her sleeping difficulties. (Hr. Tr. Vol. I, at 229-235).

108. As of the date of the hearing, Mrs. Gray-Terry works collecting insurance premiums in a "work when you want to" position. (Hr. Tr. Vol. I, at 42).

109. The West Virginia's Division of Rehabilitation Services performs a vocational evaluation assessment which indicates that Mrs. Gray-Terry requires repeated explanations of the test instructions or sample problems. Her scores are in the 5th percentile or less. The subjects tested are clerical skills such as filing, comparing information, copying information, using tables, proofreading, addition and subtraction, and reasoning with numbers. The report concludes that Mrs. Gray-Terry will not be able to succeed in a clerical position unless it is one "requiring few responsibilities and easily demonstrated job skills." (Resp. Exh-2).

III.

DISCUSSION

This is a reasonable accommodation case. The West Virginia Human Rights Act imposes an affirmative duty on the respondent to reasonably accommodate "qualified disabled person[s]." *West*

Virginia Human Rights Commission's Legislative Rules Regarding Discrimination Against Individuals With Disabilities, W. Va. C.S.R. § 77-1-4.5 (1994); See Morris Memorial Convalescent Nursing Home, Inc. v West Virginia Human Rights Commission, 189 W. Va. 314, 431 S.E.2d 353 (1993); Coffman v. West Virginia Board of Regents, 182 W. Va. 73, 386 S.E.2d 1 (1988). “[R]easonable accommodation means reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable an individual with a disability to be hired or remain in the position for which he or she was hired.” Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1999), at SYL. pt. 1 (*quoting in part* W. Va. C.S.R. § 77-1-4.4).

The Human Rights Commission’s legislative regulations define the term “disability” as follows:

- 2.1.1 A mental or physical impairment which substantially limits one or more of a person’s major life activities; or
- 2.1.2 A record of such impairment; or
- 2.1.3 Perception of such an impairment.
- 2.1.4 This term does not include persons whose current use of or addiction to alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat (as defined in Rule 4.8) to property or the safety of others.

W. Va. C.S.R. § 77-1-2.1. (1994).

The term “Qualified Individual with a Disability” is defined in Rule 4.2 of the Commission’s Legislative Rules Regarding Discrimination Against Individuals with Disabilities as an “individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job[.]”

...”

The term “Able and Competent” as defined in Rule 4.3 of the Commission’s Legislative Rules Regarding Discrimination Against Individuals with Disabilities “means that, with or without reasonable accommodation, an individual is currently capable of performing the work and can do the work without posing a direct threat (as defined in Section 4.8) of injury to the health and safety of other employees and the public.”

The term “Major Life Activities” is defined in Rule 2.6 of the Commission’s Legislative Rules Regarding Discrimination Against Individuals with Disabilities means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, **working**, transportation, and adapting to housing.

Mrs. Gray-Terry has a physical impairment that substantially limits her major life activity of working. She has a record of such impairment and is regarded by THE GREENBRIER as having a physical impairment that substantially limits her major life activity of **working** and she requires an accommodation to perform the essential functions of the waitress job.

If an accommodation is possible and it would allow the complainant to perform the essential functions of the job, then the respondent must provide the accommodation, unless it would impose an undue hardship upon the respondent’s business. W. Va. C.S.R. § 77-1-4.6. Failure by the respondent to reasonably accommodate is unlawful discrimination, notwithstanding motive.

The West Virginia Human Rights Commission has duly promulgated guidelines for interpreting the West Virginia Human Rights Act prohibition against disability discrimination. W. Va. C.S.R. § 77-1-4 *et seq.* Because these regulations are legislative rules, they have the force and effect equivalent of the Human Rights Act itself and are entitled to controlling weight. See Appalachia Power Co. v. State

Tax Dept. of West Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995); West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital, 196 W. Va. 326, 472 S.E.2d 411 (1996).

Further, the Commission's 1994 legislative rules regarding accommodation provide that "[r]easonable accommodations include, but are not limited to:...[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position for which the person is able and competent to perform . . . and similar actions[.]" W. Va. C.S.R. § 77-1-4.5. et seq. See generally Skaggs, 479 S.E.2d at 582 (*discussed in Page v. Columbia Natural Resources, Inc.*, 198 W. Va. 378, 480 S.E.2d 817,830,n.14 (1996)). A complainant must prove, by a preponderance of the evidence, every element of the failure to reasonably accommodate claim. See generally Lutz v. Orinick, 184 W. Va. 531,401 S.E.2d 464, 467 (1990) (citations omitted).

To state a claim for breach of the duty of reasonable accommodation under the West Virginia Human Rights Act, W.Va. Code, 5-11-9 (1992), a plaintiff must allege the following elements: (1) the plaintiff is a qualified person with a disability; (2) the employer was aware of the plaintiff's disability; (3) the plaintiff required an accommodation in order to perform the essential functions of a job; (4) a reasonable accommodation existed that met the plaintiff's needs; (5) the employer knew or should have known of the plaintiff's need for the accommodation; and (6) the employer failed to provide the accommodation.

Skaggs, at Syl. Pt. 2.

Under the West Virginia Human Rights Act, W. Va. Code, 5-11-9 (1992), once a complainant requests a reasonable accommodation, a respondent must assess the extent of a complainant's disability and how it can be accommodated. If the complainant cannot be accommodated in his or her current position, however it is restructured, then the respondent must inform the complainant of potential job opportunities within the company and, if requested, consider transferring the complainant to fill the open position.

The Human Rights Act does not necessarily require a respondent to offer the precise

accommodation a complainant requests, at least as long as the respondent offers some other accommodation that permits the complainant to fully perform the job's essential functions. Skaggs, at Syl. Pt. 1.

In addition to the above, and of particular significance here, the fact finder must also scrutinize the “process by which accommodations are adopted.” Skaggs, 479 S.E.2d at 577. Such process, said the Skaggs Court, “ordinarily should engage both management and the affected employee in a cooperative, problem solving exchange.” Id. Skaggs quote approvingly 29 C.F.R. § 1630.2(o)(3), a regulation promulgated pursuant to the Americans With Disabilities Act, 42 U.S.C. §§12101 et seq., which provides that:

To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o)(3) (1995).

Skaggs also cites to 29 C.F.R. § 1630.9 (Appendix, at 414), which provides that “[T]he employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible interactive process that involves both the employer and the [employee] with a disability.” 479 S.E.2d at 577.

Finally, the Skaggs Court admonished that both sides bear responsibility for the success of the process:

Neither the West Virginia statutes nor the federal law assigns responsibility for when the interactive process is not meaningfully undertaken, but we infer that neither party should be able to cause a breakdown in the process. The trial court should look for signs of failure to participate in good faith or to make reasonable efforts to help the other party determine what specific accommodations are necessary and viable. A party that obstructs or delays the interactive process or fails to communicate, by way of initiation or

response, is acting in bad faith.

479 S.E.2d at 577-578.

The complainant, Dyanna Gray Terry, was employed by the respondent, THE GREENBRIER, on April 20, 1995 as a roll girl and then at a later date as a waitress. In 1998, Mrs. Gray-Terry began suffering from fibromyalgia, high cholesterol, gastric reflux disease, high blood pressure, depression, pneumocausal problems and tendinitis. These limitations made it impossible for Mrs. Gray-Terry to perform her waitress job even with an accommodation.

Mrs. Gray-Terry acknowledged both in her testimony and on her Social Security Disability application that she developed fibromyalgia in 1998 and that, because of her fibromyalgia and related conditions, she could not lift without great pain and need to rest frequently. Her difficulties manifested themselves in 1998 in both frequent absences and sub-par performance when she did report for work. These restrictions precluded her from performing the job of waitress, whether full- or part-time. Her doctor refused to release her for work as a waitress, despite THE GREENBRIER's repeated requests in May of 1999 for either a release or specific restrictions. THE GREENBRIER was entitled to rely upon the written advice from Mrs. Gray-Terry's physician that Mrs. Gray-Terry could not lift trays as required by the waitress job.

The record evidence shows that the waitress job cannot be done without the need to lift trays or heavy plates, whether for one meal or several meals. Mrs. Gray-Terry acknowledges she cannot lift trays or heavy plates even for one meal. She never returns to her waitress job after December 15, 1998.

THE GREENBRIER is made aware of Mrs. Gray-Terry's permanent inability to return to the job of waitress in March of 1999, when Mrs. Gray-Terry indicates to Paul Hanna that she could no longer lift trays. Her November 1998 conversations with Gail Lanek did not inform Mrs. Lanek either of the

fibromyalgia or a lifting restriction. Mrs. Gray-Terry told Mrs. Lanek only that she was having difficulty sleeping and was therefore fatigued. Moreover, her workers' compensation claim, filed about a month later, sought only "temporary total disability" benefits, which presume by their nature that the disability in question is temporary. She sought such benefits through February 8, 1999, after which she went on a seasonal layoff.

I therefore find that THE GREENBRIER's obligation to engage in an "interactive process" with Mrs. Gray-Terry to try to find her another job within THE GREENBRIER does not arise until March of 1999, when she begins bidding on jobs and informs Paul Hanna that she is doing so because of her inability to lift trays as a waitress. There is no evidence in the record that Mrs. Gray-Terry asks to return to the position of roll girl.

Once Mrs. Gray-Terry notifies THE GREENBRIER about her disability, Mrs. Gray-Terry and THE GREENBRIER engage in an extensive, active and ongoing "interactive process." The evidentiary record indicates that THE GREENBRIER went above and beyond the requirements of W. Va. C.S.R. § 77-4.5.2 (1994). For example, THE GREENBRIER refers Mrs. Gray-Terry to the hotel's job postings regularly. Job vacancies at THE GREENBRIER are made known to employees in a myriad of ways, including postings on the bulletin board in the employees' cafeteria, postings at the union hall, and most relevant for purposes of this case, postings on the "jobs hotline," a telephone system by which employees can call a particular telephone number and hear all the different available job openings.

It is undisputed that Mrs. Gray-Terry is aware of the jobs' hotline and utilizes it on many occasions to place bids on alternative open positions after she can no longer perform her job as waitress.

Mr. Paul Hanna, recruiter/interviewer for THE GREENBRIER, offers Mrs. Gray-Terry numerous tutoring opportunities. He tells about community college computer classes, secretarial classes and other

course offerings. The evidentiary record supports a finding that Mrs. Gray-Terry did not take advantage of any of Mr. Hanna's tutoring opportunities, community college computer classes, secretarial classes and other course offerings. There is an inference in West Virginia that neither party should be able to cause a breakdown in the process by failing to participate in good faith or to make reasonable efforts to help the other party determine what specific accommodations are necessary and viable. A party that obstructs or delays the interactive process or fails to communicate, by way of initiation or response, is acting in bad faith. Mrs. Gray-Terry knew that she had certain shortcomings that affected her qualifications for certain jobs she applied for. Her failure to take advantage of any of Mr. Hanna's tutoring opportunities, community college computer classes, secretarial classes and other course offerings puts into question whether she engaged in the interactive process in good faith.

Mrs. Gray-Terry applies for approximately 14 transfers. She withdraws her bid on five of the fourteen transfers, namely, a hostess in the Draper Café, May 1999; part-time snack bar attendant, May 1999; part-time beverage cart attendant/snack bar attendant, April 1999; reservation agent, May 1999 retail assistant manager, August 1999 and Help Desk Administrator, May 1999.

Mrs. Gray-Terry applies for several jobs whose minimum qualifications she does not possess, namely, security guard; retail assistant manager; human resources' receptionist; telephone operator, greeter, concierge, beverage cart attendant, front desk clerk and help desk administrator. Her admitted physical limitations do not permit her to perform the Beverage Cart/Snack Bar Attendant job or the Security Guard job. She lacks the computer and typing skills to qualify her for the positions of Telephone Operator, Front Desk Clerk, Reservation Agent, Greeter and Concierge. She simply does not qualify for these positions. Moreover, the vocational performance assessment administered by the West Virginia Division of Rehabilitation Services indicates that Mrs. Gray-Terry's clerical skills are poor and

she requires repeated instruction on how to take the test.

Mrs. Gray-Terry's lack of interpersonal skills disqualifies her from many of these positions as well as others. THE GREENBRIER presents ample evidence of the importance of customer service to its status as a luxury resort, and that its importance increases even more after it was downgraded by the Mobil rating service in January of 2000.

Finally, there is significant testimony from several witnesses, including Mrs. Gray-Terry, that Mrs. Gray-Terry's demeanor is timid, shy, not outgoing and not outwardly friendly, which, in the opinion of the witnesses translate into weak customer service skills. The depression associated with her fibromyalgia appears to have worsened her customer service skills, and she presents herself poorly in interviews for new positions. She also declines to avail herself of opportunities to improve her interviewing skills.

Although she meets the qualifications for a room service clerk, the position does not work out for her because of her poor work performance. Gail Lanek and Tommy Given testify extensively about Mrs. Gray-Terry's shortcomings in that role. Mrs. Gray-Terry admits that her fibromyalgia makes it difficult for her to concentrate or focus on a task – particularly in a stressful environment such as the room service booth – and that she also has difficulty understanding written or spoken directions, and “get[s] confused when I have to do more than one thing. I can't understand if more than one person is speaking.” I find that Mrs. Gray-Terry's performance in the room service clerk job demonstrates that she is not “able and competent” to do the room service clerk's position, and that THE GREENBRIER did not fail to accommodate Mrs. Gray-Terry when it transferred her out of room service after her unsuccessful tenure there.

Mrs. Terry argues that she can perform the essential functions of her waitress job with an

accommodation of working one meal a day. Rod Stoner admits that he and Anthony Senn agreed to allow Ms. Terry to work one meal a day at Sam Snead's whenever possible. The operative language is "whenever possible." Mrs. Gray-Terry wants to work one meal a day. But THE GREENBRIER is not required to create a make work job just to accommodate the complainant's needs. Even if THE GREENBRIER allows Mrs. Gray-Terry to work one meal a day, she would still need to lift "heavy trays." And she makes it clear that she is unable to lift heavy trays or carry heavy plates. The West Virginia Human Rights Act does not require an employer to place an individual in a job for which she is not qualified **nor create a make-work job** (emphasis added) or retain someone it does not need." Skaggs at 479 S.E. 2d at 579. An employer need not "alter the essential functions of a job in order to accommodate a disabled employee. . . . "Essential functions" are "the fundamental job duties of the employment position the individual with a disability holds or desires." Corrigan v. Perry, 139 F. 3d.888, 895.

Furthermore, there is a collective bargaining agreement the terms of which bind THE GREENBRIER and Mrs. Gray-Terry. There is no evidence in the record that Rod Stoner and Anthony Senn are authorized to change the terms and conditions of employment as agreed to by THE GREENBRIER and the Union.

Mrs. Gray-Terry argues she has an insurance license, CNA certification, health and first aid certification and certification in beginning computers. (Hr. Tr. Vol. I pp.136-137). The positions she applies for, however, do not require an insurance license, CNA certification, health and first aid certification. Although she has a certification in beginning computers, her typing scores were not sufficient to qualify for the typing positions she applied for. Mrs. Gray-Terry admits to Paul Hanna that her typing skills were insufficient and this was confirmed by the results of a typing test she took in

March 2000 when her test scores revealed that she typed 9.4 words per minute.

Mrs. Gray-Terry argues that she can perform the Beverage Cart/Snack Bar Attendant position by wrapping a towel around the heavy cans of ice and pulling the cans with a towel. Also, Robert Mickey, Assistant Manager of Food and Beverage, admits that dollies are available to lessen the lifting requirements. There is no medical evidence in the record to support a finding that “pulling heavy cans of ice with a towel” or placing heavy cans of ice on dollies and pulling the dollies to the beverage cart are reasonable accommodations. There is evidence in the record that Mrs. Gray-Terry’s fibromyalgia limits her ability to lift heavy serving trays, coffee pots, and urns. Additionally, Mrs. Gray-Terry suffers from epicondylitis which prevent her from picking up anything with her right arm.

Mrs. Gray-Terry is proceeding under a disparate treatment theory. A discrimination case may be proven under a disparate treatment theory which requires that the complainant prove a discriminatory intent on the part of the respondent. The complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); and, adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). Under this formula, the complainant must first establish a prima facie case of discrimination; the respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the complainant must show that the reason proffered by the respondent is not the true reason for the decision, but rather pretext for discrimination.

The term “pretext” has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989). A proffered reason is

pretext if it is not the true reason for the decision. Conway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W.Va. 1986). Pretext may be shown through direct or circumstantial evidence of falsity or discrimination. Where pretext is shown, discrimination may be inferred. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995). Although, discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S., 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

There is also the “mixed motive” analysis under which a complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed.2d 268 (1989); and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, supra. “Mixed motive” applies where the respondent articulates a legitimate nondiscriminatory reason for its decision which is not pre-textual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis, the complainant needs only show that the complainant’s protected class played some part in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if the complainant’s protected class had not been considered. Barefoot, 457 S.E.2d at 162, N. 16; 457 S.E.2d at 164, N. 18.

Finally, a complainant proves a disparate treatment case by direct evidence of discriminatory intent. The burden shifts to the respondent to prove by a preponderance of the evidence that it would have terminated the complainant even if it does not consider the illicit reason.

Applying these standards, Mrs. Gray-Terry is a member of a protected status in that she is disabled because of fibromyalgia, high cholesterol, gastric reflux disease, high blood pressure, depression, pneumocausal problems and tendinitis. Eventually, she is terminated by THE GREENBRIER. Mrs. Gray-Terry does not satisfy the third prong of the prima facie case because she

does not present sufficient evidence to establish a link between the action taken by THE GREENBRIER and Mrs. Gray-Terry's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. Mrs. Gray-Terry does not establish a prima facie case.

Even if Mrs. Gray-Terry had established a prima facie case, THE GREENBRIER has shown by a preponderance of the evidence that it had a legitimate business reason for terminating Mrs. Gray-Terry. The evidence overwhelmingly supports a finding that Mrs. Gray-Terry could not perform the waitress job even with an accommodation and that she did not meet the qualifications for the jobs she applied for. Although she met the qualifications for the room service clerk job, she was removed from the position because of poor performance.

Under the burden shifting formula of McDonnell Douglas Mrs. Gray-Terry failed to show by a preponderance of the evidence that the reasons advanced by THE GREENBRIER for the termination was pretextual. Under the mixed-motive analysis of Price-Waterhouse THE GREENBRIER has shown that Mrs. Gray-Terry would have been terminated absent any unlawful discriminatory animus on its part.

Mrs. Gray-Terry also alleges age discrimination. In order to support her claim of age discrimination, Mrs. Gray-Terry must show that she is more than 40 years old, that she suffered an adverse employment action, and that she would not have suffered the adverse employment action had it not been for her age. Mixer v. M. K. Ferguson, 17 F.Supp.2d 569, 576 (S.D.W.Va. 1998), citing Barlow v. Hester Industries, Inc., 198 W.Va. 118, 479 S.E.2d 628, 645-646 (1996). Mrs. Gray-Terry fails to introduce any evidence to support this claim. Instead, the evidentiary record shows that approximately 1,000 of 1,800 employees at THE GREENBRIER are over the age of 40; Mrs. Gray-Terry was hired at the age of 48; it is usual for employees at THE GREENBRIER to have tenures there of

thirty and even fifty years; Mrs. Gray-Terry's father worked at THE GREENBRIER for thirty years prior to his retirement. One employee who works as a snack bar attendant on the golf course is 82 years of age. I find that THE GREENBRIER did not discriminate against Mrs. Gray-Terry on account of her age. Therefore, the age discrimination claim is dismissed.

IV.

CONCLUSIONS OF LAW

1. At all times relevant hereto, Mrs. Gray-Terry, the complainant, is a person and was an employee of the respondent, THE GREENBRIER, within the meaning of W. Va. Code §§ 5-11-3(a) and (e).
2. THE GREENBRIER, the respondent, is an employer and person as defined by W. Va. Code § 5-11-1 et seq. and is subject to the provisions of the West Virginia Human Rights Act.
3. The complaint in this matter was properly filed in accordance with W. Va. Code § 5-11-10.
4. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to W. Va. Code § 5-11-9 et seq.
5. The prima facie burden to show the existence of a reasonable accommodation is on Mrs. Gray-Terry, the complainant. Mrs. Gray-Terry fails to meet this burden.
6. Mrs. Gray Terry fails to prove, by a preponderance of the evidence, every element her failure to reasonably accommodate claim against THE GREENBRIER..
7. Mrs. Gray-Terry fails to establish a prima facie case of age discrimination and fails to prove by a preponderance of the evidence that THE GREENBRIER discriminated against her

because of her age.

8. Mrs. Gray-Terry has not proven that she is a qualified person with a disability as it relates to her job as a waitress because she cannot perform the essential functions even with a reasonable accommodation.

9. Respondent, THE GREENBRIER articulated a legitimate nondiscriminatory motive for terminating Mrs. Gray-Terry from employment.

V.

RELIEF AND ORDER

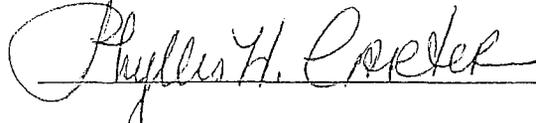
Pursuant to the above findings of fact and conclusions of law, this administrative law judge orders the following relief:

1. That the above captioned matter is dismissed against the Respondent CSX HOTELS, INC. d/b/a/ THE GREENBRIER HOTEL with prejudice and stricken from the docket.

It is so ORDERED.

Entered this 24th day of June 2005.

WEST VIRGINIA HUMAN RIGHTS COMMISSION



PHYLLIS H. CARTER
Administrative Law Judge
1321 Plaza East, Room 108-A
Charleston, WV 25301-1400
Phone: 304-558-2616 Fax 304-558-0085

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

Dyanna Gray-Terry,

Complainant,

v.

Docket Number: EAD-272-01

EEOC Number: 17JA10175

CSX HOTELS INC.,
d/b/a THE GREENBRIER HOTEL

Respondent.

CERTIFICATE OF SERVICE

I, Phyllis H. Carter, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE, by depositing a true copy thereof in the U.S. Mail, postage prepaid this *July 1, 2005* to the following:

Dyanna Gray-Terry
321 West Main Street
White Sulphur Springs, WV 24986

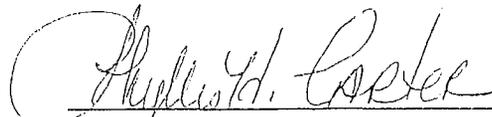
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PHYLLIS H. CARTER
CHIEF ADMINISTRATIVE LAW JUDGE