

convictions and also from his discussions with Kevin Warford, that Appellant might have had a disability, and certainly Hayter had reason to know of this.

B. **Delete** Finding of Fact number 19 and substitute the following:

19. The Board finds that Commissioner Hayter did believe that Appellant's two DUIs demonstrated poor judgment, and finds that Commissioner Hayter was legitimately concerned about extending a job offer to Appellant (with previous DUIs) when the job involved driving. The Board finds the Appellee met its burden of proof to show a legitimate, non-discriminatory reason for rescinding Appellant's conditional job offer.

C. **Delete** Findings of Fact number 22, 23 and 24 and substitute the following:

22. The Board finds credible evidence presented by Commissioner Hayter that he would not hire someone with a record of two or more previous DUIs.

23. The Board finds that while there may be persons employed by DJJ with DUIs, the Board specifically finds that in this instance, Commissioner Hayter decided for legitimate reasons to rescind the offer of employment to Appellant due to her previous DUI convictions. The Board finds this appeal is about the Appellant and not other unnamed individuals who were apparently currently working at DJJ with DUIs. No facts were introduced as to the circumstances of their hire, thus, it is not appropriate to further consider such.

D. **Delete** the Conclusions of Law and substitute the following:

The Board concludes the Appellee, Department of Juvenile Justice, met its burden in showing a legitimate, non-discriminatory reason for rescinding Appellant's conditional

job offer as stated in the Findings of Fact, above.

B. **Delete** the Recommended Order, and substitute the following:

IT IS HEREBY ORDERED that the appeal of **DAWN M. WILKERSON V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE (APPEAL NO. 2014-197)** is **DISMISSED**.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, be, and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order and the Appellant's appeal is **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 19th day of May, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. William F. Codell
Hon. Ben Basil
Grace Smith

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-197**

DAWN M. WILKERSON

APPELLANT

**V. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

**JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF JUVENILE JUSTICE**

APPELLEE

** ** * * *

This matter came on for an evidentiary hearing on November 5, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Dawn M. Wilkerson, was present at the evidentiary hearing and was represented by the Hon. Ben Basil. The Appellee, Justice and Public Safety Cabinet, Department of Juvenile Justice, was present and represented by the Hon. William Codell. Also present as agency representative was Commissioner Bob Hayter.

This matter involved the rescission of a conditional offer of employment made to Appellant on September 2, 2014, for the position of Corrections Program Administrator with the Quality Assurance Branch of the Department for Juvenile Justice. Appellant alleges the offer was withdrawn based on her disability, alcoholism. The burden of proof was placed on Appellant regarding her claim of discrimination.

BACKGROUND

1. The Appellant, **Dawn M. Wilkerson**, testified on her own behalf. Appellant is currently employed as an Office Clerk at Penske Logistics. Prior to that, she was a Project Coordinator at The Moss Group, a criminal consulting agency. From 2001 to 2005, she worked as a Youth Worker with the Department for Juvenile Justice; from 2006 to 2013, she was employed at DJJ as a Training Instructor. Appellant stated that she left her position as a Training Instructor because the job she was offered at The Moss Group had a higher salary, and gave her the ability to work from home.

2. When employed as a Youth Worker at DJJ, Appellant stated she received no disciplinary actions. When employed as a Training Instructor, she received a written reprimand on May 18, 2011, for "poor work performance" for failure to attend a training meeting, and

“misconduct” for failure to notify her supervisor of an arrest prior to her scheduled shift. Appellant explained that she did not go to work the day in question because she had been arrested the night before for the offense of Driving Under the Influence (DUI).

3. Appellant stated she had pled guilty to two DUI offenses, one in 2009 and one in 2011. Appellant was not on-duty or driving a state vehicle when she was charged with either DUI. She denied that she ever drank on the job.

4. Appellant testified that she stopped drinking alcohol on September 6, 2013, because she had blacked out from alcohol intoxication the night before. To help her stop drinking, Appellant increased her participation in Alcoholics Anonymous (AA) meetings.

5. Appellant stated that she suffers from “alcohol abuse” and “alcohol dependence.” She based that determination, in part, on the “client diagnosis” prepared pursuant to the “Driving Under the Influence Program” offered by the Cabinet for Health and Family Services, Division of Mental Health and Substance Abuse, that she completed on July 14, 2009. This program is offered to individuals who have been convicted of a DUI, as a condition of getting their driver’s license reinstated.

6. Dave Harmon, LCSW (Licensed Clinical Social Worker), CADC (Certified Alcohol and Drug Counselor), completed Appellant’s assessment. According to Harmon, Appellant’s diagnosis was “Alcohol Abuse.” When assessing the severity of Appellant’s alcohol abuse/dependence, Harmon rated Appellant a “3”, on a scale of one to five. According to the form, “3” is considered to be “moderate.” The Driving Under the Influence Program Completion form, dated 7/14/09, was introduced into the record as Appellant’s Exhibit 1.

7. Appellant completed a second DUI Program on April 3, 2012 (for the 2011 DUI). In order to complete this program, Appellant attended 49 “groups”—classes that lasted one and a half to two hours per week. She also met with a counselor once a month. The Completion Form for this program, which had a different format than the 2009 program format, was introduced into the record as Appellant’s Exhibit 2.

8. Appellant stated that when she was drinking, she could not stop until she became intoxicated. She sometimes drank to the “blackout” stage, and both her DUIs occurred when she had blacked out. Appellant testified that when she was intoxicated, her intoxication impaired her ability to walk, see, hear, drive, and speak. When Appellant stopped drinking, she suffered withdrawal symptoms, such as headaches, sweating, nausea and loss of motivation.

9. Currently, Appellant is attending AA meetings three to four times weekly. When asked what would happen if she stopped going to AA, Appellant answered, “I would start drinking again.”

10. On July 8, 2014, Appellant emailed Kevin Warford, Quality Assurance Branch Manager, to inquire about a possible job opening due to the retirement of an employee in his

office. Warford informed Appellant that the job had not yet been posted, but when it had, she would be “welcome to apply for the opening.” (Appellant’s Exhibit 3.)

11. On July 31, 2014, Appellant applied for the position of Corrections Program Administrator (CPA), a Grade 15 position, in the Department of Juvenile Justice. The minimum qualifications of the CPA position are a Bachelor’s degree, and four years of professional experience (a Master’s degree can substitute for one year of the required experience). Under the category of “Special Requirements (Age, Licensure, Regulation, Etc.),” the job specification states: “None.” Under the category of “Additional Requirements,” the job specification states: “Upon appointment, employees in this class may be required to maintain a valid driver’s license and required to drive a licensed vehicle....Applicants and employees in this job title may be required to submit to a drug screening test and background check....” (Appellant’s Exhibit 8).

12. On the state government Application For Employment that Appellant completed, the first page asks applicants to “List ALL convictions (even if previously disclosed). A conviction is the act or process of judicially finding someone guilty of a crime; the state of having been proved guilty. A conviction is not an automatic rejection. Specifics will be reviewed under KRS 335B.020.”

13. On Appellant’s state Application For Employment, she listed the following convictions:

DUI 1 st	Feb. 17, 2009
DUI 2 nd	April 18, 2011

(Appellant’s Exhibit 5.)

14. On July 31, 2014, Appellant sent a resumé and cover letter (addressed to Kevin Warford) with her state application. In her cover letter, Appellant noted that she believed she would be a good fit for the position of CPA because she had three years auditing experience with the American Correctional Association (ACA). She also noted that as a former DJJ employee, she was familiar with DJJ policy and procedure. (Appellant’s Exhibit 5.)

15. On August 20, 2014, Kevin Warford emailed Appellant informing her that she had been “approved as qualified,” and arranged to interview her. Warford advised Appellant to bring a valid driver’s license to the interview, and informed her that she would have to undergo a background check if recommended for the job. (Appellant’s Exhibit 6.)

16. Appellant interviewed with Warford and two other DJJ employees, Stephanie Reynolds and LaShana Harris on August 26, 2014. In Appellant’s opinion, the interview went well.

17. On September 2, 2014, Warford sent Appellant a "Memorandum of Conditional Offer of Employment" for the CPA position. The Memorandum states: "This will serve as notice to you as a Conditional Offer of Employment. A final determination will be made by the Appointing Authority, and upon completion of verification of information on your application, a Criminal History check, Criminal Abuse/Neglect check and if applicable to the position, verification of your operator's license." (Appellant's Exhibit 7.)

18. On September 4, 2014, Warford emailed Appellant to inform her that Commissioner Hayter would not authorize her appointment. (Appellant's Exhibit 9.) Appellant then called Warford to discuss the situation with him. Appellant testified that Warford told her that the Commissioner made a "discriminatory" remark about her: "Once a drunk, always a drunk."

19. On cross-examination, Appellant's May 18, 2011 Written Reprimand was introduced into the record. Appellant stated she had initially been suspended for one day, but her appeal to the Personnel Board resulted in the suspension being amended to the reprimand. The disciplinary action was issued because Appellant had been arrested the night before a scheduled work day, and placed in jail. She had been unable to call in prior to her next shift, which DJJ determined was evidence of "poor work performance" and "misconduct." (Appellee's Exhibit 2.)

20. Appellant testified that at the time she applied for the CPA position, she was not drinking alcohol. Appellant agreed that during this timeframe, her alcoholism was not limiting her ability to work.

21. **Kevin Warford** is a Quality Assurance Branch Manager at DJJ, a position he has held since August 9, 2014. He was responsible for filling the CPA position and conducted the interviews with the assistance of two other Branch Managers, Stephanie Reynolds and LaShana Harris.

22. Warford was asked if he was aware Appellant had received two prior DUI convictions. He stated that he knew she had at least one, because they had worked together at the Training Branch when she received her April 2011 DUI, and Appellant had reported it to him.

23. On August 15, 2014, Sharon Cook, an employee in DJJ's Personnel Branch, sent Warford a list of eight applicants who had been "Approved to Offer Interview," and six applicants who had been deemed "Rejected (cannot offer interview)." Appellant's name was not on either list. On August 20, 2014, Cook sent Warford a second email which stated: "Dawn Wilkerson [Appellant] and Patty Wireman are approved to interview." (Appellant's Exhibit 12.)

24. After conducting the interviews, Warford decided that Appellant was the most qualified person for the position. Warford emailed his supervisor, Stacy Floden, Director of Program Services, to inform her of his decision to make a conditional offer of employment to

Appellant. Floden copied Warford on the email she sent to Commissioner Hayter on September 4, 2014, which stated:

Commissioner Hayter, I approve Kevin Warford's decision in offering Dawn Wilkerson [Appellant] a position within Program Services in the Quality Assurance Branch as the Correction Program Administrator. I would like to move forward and bring Ms. Wilkerson in effective 9/16/14. Please advise on next steps. (Appellant's Exhibit 13.)

25. Warford rescinded the conditional offer of employment to Appellant on September 4, 2014, because "Commissioner Hayter decided not to allow the appointment."

26. Warford testified that Appellant called him when she learned that the job offer was being rescinded. She asked Warford if the withdrawal of the offer had to do with her DUIs. Warford told her "I thought it did, based on my conversation with Commissioner Hayter. I asked him for a meeting after he decided not to appoint her. Commissioner told me he wanted me to start over in the hiring process. I asked him what I should tell Dawn [Appellant]. He told me that we don't have to tell her anything. I said to him: 'If this is about the DUI/alcohol issues, we have a lot of people here with those issues.' He replied: 'I didn't hire those people.' I told him that Dawn had been sober for more than a year; that she was going to meetings and he could call her sponsor if he wanted verification of this.' He responded that he wished he had a dime for every drunk that had told him they weren't drinking, and then had gone off in a closet somewhere and had a drink."

27. Warford stated that in his opinion, Appellant was the best candidate for the job, and he had made an appointment to speak with Commissioner Hayter because he felt it would be unfair if she was not offered the position. As for her DUI convictions, Warford stated that it had been a concern for him, but he discussed the situation with her, and he believed her statements about how she was addressing her alcohol issues.

28. Jarrod Holbrook was ultimately offered the CPA position. He had been interviewed initially. After Appellant's conditional offer was withdrawn, Holbrook, along with several other candidates, was interviewed a second time. Warford stated that Holbrook is doing "fine" in his current position.

29. On cross-examination, Warford was asked to explain the responsibilities of the Quality Assurance Branch. Warford stated that his branch monitors residential juvenile facilities to ensure that they are in compliance with the standards of the American Correctional Association (ACA). All of DJJ's facilities are accredited by ACA; his department "makes sure the facilities receive accreditation and keep it."

30. Warford addressed the Corrections Program Administrator position. He stated that the employee in this position is assigned a certain number of facilities to monitor throughout the state. Warford stated the position involves a large amount of driving, sometimes alone.

31. **Mary Presley** has been employed by DJJ since 2002. She is currently employed as a Corrections Program Administrator. She is personal friends with Appellant—they worked together in the Training Branch. Presley stated that she did not know if other employees at DJJ were of aware of Appellant’s DUIs.

32. At the end of Presley’s testimony, the Appellant rested her case. The Appellee’s Motion for a Directed Verdict was **DENIED**.

33. The Appellee called its first witness. **Jarrod Holbrook** is currently employed as a Corrections Program Administrator at DJJ. He graduated from Morehead State University in 2000, and then began working in the field of adult corrections. He began his career with DJJ in 2005, when he was hired as a Corrections Training Coordinator II. He worked in that position until his promotion; Holbrook was offered the CPA position after the conditional offer of the job to Appellant had been withdrawn.

34. Holbrook described the CPA job as “making sure facilities are ACA-compliant.” When asked if his job involved driving, he responded: “It is feast or famine. This month, I’ve driven a lot. In the summer, not so much.” Holbrook is responsible for facilities in Eastern and Western Kentucky.

35. **Commissioner Bob Hayter** is the Commissioner of the Department of Juvenile Justice, a position he assumed in May 2014. He oversees all aspects of the organization.

36. Hayter is a graduate of Western Kentucky University, and worked forty years in the military. He is a retired Colonel.

37. Hayter stated that applicants for positions at DJJ must undergo criminal background checks because DJJ is “tasked with the safety and security of the youth” assigned to it.

38. Hayter denied that he had ever hired an applicant with DUI convictions. Hayter added, “When I saw two DUIs, it gave me pause. I was appointed by the Governor to oversee the operation. Two DUIs means poor judgment. That job involves a lot of driving. It’s not smart to expose the state to potential liability.”

39. Hayter was asked if he knew Appellant was an alcoholic. Hayter answered that Warford indicated that Appellant had a “drinking issue,” but he did not know if she was an alcoholic.

40. Hayter was asked what he meant when he told Warford he “wished he had a dime for everyone that had told him they had stopped drinking.” Hayter responded that statement was made in reference to a friend of his who had died of alcoholism. He denied that the remark was said in reference to Appellant.

41. Hayter denied that he discriminated against Appellant. He stated that he believed he made the right decision in withdrawing the Conditional Offer of Employment. When asked if an applicant's DUI indicated that he or she was an alcoholic, Hayter responded, "No, people make mistakes. But in [Appellant's] case, one time is a mistake. The second time shows poor judgment." Hayter stated that when deciding to rescind Appellant's conditional job offer, he "absolutely" took into account the fact that the CPA position involved driving on the job. He added that he would consider the [Appellant] for other jobs at DJJ as long as they did not involve driving. Hayter concluded, "The DUIs were recent, and happened back-to-back. If it had happened ten years ago, that would have made a difference."

42. The stipulation between the parties was introduced into the record. The stipulation can be summarized as stating that individuals who have been convicted of or pled guilty to driving under the influence, or other misdemeanors, were working for DJJ in September 2014, and are also working there currently. The stipulation is attached as **Recommended Order Attachment A**.

FINDINGS OF FACT

1. The Appellant was an applicant for the position of Corrections Program Administrator ("CPA") in the Quality Assurance Branch, Department of Juvenile Justice. She was issued a Conditional Offer of Employment for the job on September 2, 2014. The offer was rescinded 2 days later. Appellant filed an appeal to the Personnel Board on September 5, 2014, alleging she had had been discriminated against based on her disability, alcoholism, when the job offer was rescinded.

2. Appellant is currently employed as an Office Clerk at Penske Logistics. Prior to assuming that position, she worked as a Project Coordinator at The Moss Group, a criminal consulting agency. From 2001 to 2011, she was employed at DJJ, first as a Youth Worker, and later as a Training Instructor. She also has three years auditing experience within the American Correctional Association.

3. Appellant testified that she suffers from the disability of "alcohol abuse" and "alcohol dependence." She based that determination, in part, on the "client diagnosis" prepared by Certified Alcohol and Drug Counselor, Dave Harmon, in July, 2009. She has been convicted of two DUIs, one in 2009 and one in 2011. (She was not on duty or driving a state vehicle during either DUI.) Appellant testified that when she drinks alcohol, she cannot stop drinking until she reaches the point of intoxication. She has sometimes suffered "blackouts" when drinking. Appellant stated that when she is intoxicated, her ability to walk, see, hear, drive and speak is substantially impaired.

4. Appellant has been sober for over a year. Currently she attends Alcoholics Anonymous meetings approximately four times per week. She testified that if she were to stop attending AA meetings, she believes she would start drinking again.

5. On July 31, 2014, Appellant applied for the CPA position in the Quality Assurance Branch of DJJ. This branch is responsible for monitoring residential juvenile facilities to ensure that they are in compliance with protocols mandated by the American Correctional Association.

6. Appellant met the minimum education and experience qualifications for the CPA position, as well as the job's "additional requirement" of having a valid driver's license.

7. On August 20, 2014, Sharon Cook, an employee in DJJ's Personnel Branch, informed Quality Assurance Branch Manager, Kevin Warford, that Appellant was "approved to interview."

8. Warford (along with two other DJJ Branch Managers) interviewed several applicants for the CPA position, including Appellant. At the end of the interview process, Warford determined that Appellant was the most qualified individual for the position. Warford emailed his supervisor, Stacey Floden, Director of Program Services, to inform her of his decision. Floden approved Warford's request to offer Appellant a Conditional Offer of Employment.

9. The conditional offer was made to Appellant on September 2, 2014. On September 4, 2014, the offer was rescinded at Commissioner Hayter's direction.

10. When Warford learned that Hayter had not approved Appellant's conditional job offer, he requested a meeting with him. Warford felt it would be "unfair" not to offer the job to Appellant because she was "the best candidate for the position."

11. At their meeting, Warford told Hayter that if his reluctance to hire Appellant was due to her DUIs, he assured him that Appellant had been sober for over a year, was attending AA meetings, and stated that Hayter could speak to Appellant's AA sponsor if he needed verification of this. According to Warford, Hayter responded that he "wished he had a dime for every drunk that had told him they weren't drinking, and then had gone off into a closet somewhere and had a drink."

12. Hayter testified at the evidentiary hearing that he considered Appellant's two DUIs to show "poor judgment." In his opinion, the CPA position involved "a lot of driving. It's not smart to expose the state to potential liability." While denying that he knew Appellant was an alcoholic, he testified that he "absolutely" took into account the fact that the CPA position involved driving when deciding to withdraw the job offer. He stated that he would consider Appellant for other jobs at DJJ as long as they did not involve driving. He characterized Appellant's 2009 and 2011 DUIs as "recent" and occurring "back to back." He stated that if the DUIs "had happened ten years ago, that would have made a difference."

13. Hayter told Warford to start over in the hiring process. Warford conducted a second round of interviews, and ultimately Jarrod Holbrook was offered the CPA position.

14. The American with Disabilities Act (“ADA”) prohibits employers from discriminating against employees based on their disabilities if they are otherwise qualified to perform their jobs. 42 U.S.C. Sec. 12112. There is no dispute that alcoholism is a disability within the protection of the ADA. *Mararri v. WCI Steel, Inc.* 130 F.3d 1180, 1182 (6th Cir. 1997). To establish a *prima facie* case of disability discrimination under the ADA, the plaintiff must show that (1) she is disabled, (2) she is otherwise qualified for the position, with or without reasonable accommodation, (3) she suffered an adverse employment decision, (4) the employer knew or had reason to know of her disability, (5) the employer either replaced her or left the position open while seeking other applicants. If the plaintiff shows a *prima facie* case of disability discrimination, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the action taken. If the employer does so, then the burden shifts back to the plaintiff to show that the reason “is actually a pretext for unlawful discrimination.” *Howard v. Magoffin County Bd. Of Educ.*, 830 F.Supp.2d 308, 314 (2011).

A). **APPELLANT ESTABLISHED THAT SHE WAS DISABLED AT THE TIME HER CONDITIONAL JOB OFFER WAS RESCINDED.**

Appellant presented evidence that she suffers from the disability of alcoholism. She testified that when she drank she was unable to stop drinking until she had reached the point of intoxication. When intoxicated, Appellant sometimes suffered blackouts. Appellant stated that when she is intoxicated, her ability to work, see, hear, drive or speak is substantially impaired. Her testimony was corroborated by the fact that she has two DUI convictions, and that a certified alcohol and drug abuse counselor, Dave Harmon, assessed Appellant as suffering from “alcohol abuse.” (Appellant’s Exhibit 1.)

Appellant testified that currently she does not drink. She maintains her sobriety by attending Alcoholics Anonymous meetings approximately four times per week.

Under the ADA Amendments Act of 2008, Congress amended the statutory definition of disability to include an “impairment that is episodic or in remission...if it would substantially limit a major life activity when active.” 42 U.S.C.A. § 12102(4)(D). “The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as...learned behavioral...modifications.” 42 U.S.C. § 12102(4)E(I)(IV).

Appellant is no longer drinking because of behavioral modifications she has undertaken, specifically, she is regularly attending AA. Under the ADA Amendments Act, Appellant's impairment is currently "in remission." The determination of whether she is "disabled" pursuant to the Act is not affected by the fact that she is not currently drinking. The evidence of record sufficiently showed that Appellant's alcoholism, when active, substantially limits her major life activities. The Hearing Officer concludes that Appellant's disability of alcoholism is covered by the ADA's definition of disability, and that she was a qualified individual with a disability at the time her conditional job offer was rescinded.

B). APPELLANT WAS OTHERWISE QUALIFIED FOR THE POSITION, WITH OR WITHOUT A REASONABLE ACCOMMODATION.

It was uncontested at the evidentiary hearing that the hiring supervisor, Kevin Warford, had determined that Appellant was the most qualified applicant for the Corrections Program Administrator position. Appellant had approximately 12 years prior experience working in DJJ, first as a Youth Worker, then as a Training Instructor. She also had 3 years auditing experience with the American Correctional Association. She met the minimum qualifications of the CPA position in education and experience. She also met the "additional requirement" of maintaining a valid driver's license. Sharon Cook of DJJ's Personnel Branch deemed Appellant "approved to interview." (Appellant's Exhibit 12.) Warford testified that he found Appellant to be "the best candidate" for the position, and informed his supervisor, Stacy Floden, of this decision. A Conditional Offer of Employment was extended to Appellant on September 2, 2014.

Appellant testified that she is not currently drinking alcohol. No evidence was presented at the evidentiary hearing that Appellant was not qualified for the CPA position, or that she needed an accommodation of any kind to perform it. While the position did require a valid driver's license, which Appellant had, nothing in the job description stated that a DUI conviction prevented an applicant from being considered for the job. It is also worthy to note that the Appellee stipulated that individuals who have been convicted or pled guilty to DUIs are currently employed by DJJ.

C). **APPELLANT SUFFERED AN ADVERSE EMPLOYMENT ACTION.**

The hiring supervisor, Kevin Warford, determined that Appellant was the best candidate for the CPA position and made a Conditional Offer of Employment to her. Commissioner Hayter declined to approve the offer, and it was rescinded. The withdrawal of a conditional job offer is an adverse employment action as contemplated by the ADA. 42 U.S.C. § 12112(a).

D). **THE DEPARTMENT KNEW OR HAD REASON TO KNOW OF APPELLANT'S DISABILITY.**

Commissioner Hayter testified that he rescinded Appellant's job offer because of her two prior DUIs. His testimony made clear that it was only jobs involving driving that he felt she was unsuitable for. Hayter considered Appellant's two prior DUI convictions to render her unable to perform an essential function of the CPA position, driving. His testimony corroborates Appellant's assertion that Hayter viewed her as an alcoholic, and was afraid she might drink while driving on duty.

Hayter further demonstrated his knowledge of Appellant's alcoholism when he stated his opinion regarding "drunks." Hayter refused to reconsider Appellant's application even after Warford assured him Appellant was no longer drinking, attended AA, and that Hayter could speak to her AA sponsor. Hayter directed Warford to re-open the job application process with full knowledge of Appellant's disability status.

E). **THE DEPARTMENT LEFT THE POSITION OPEN WHILE SEEKING OTHER APPLICANTS.**

It was uncontested at the evidentiary hearing that after Appellant's conditional job offer was rescinded, the selection process for the CPA position began anew. Hayter directed Warford to "start the hiring process over" and interview applicants other than Appellant. The successful applicant, Jarrod Holbrook, along with several other candidates, was interviewed a second time – after Appellant's offer was rescinded.

15. The Hearing Officer concludes that Appellant met her burden of proof to show a *prima facie* case of disability discrimination when her conditional offer of employment was rescinded.

16. After a *prima facie* case of disability is shown, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the action taken. If the employer does so, then the burden shifts back to the plaintiff to show that the reason is actually a pretext for unlawful discrimination.

17. The Appellee Cabinet asserts that Appellant's job offer was rescinded because her two prior DUI convictions were indicative of "poor judgment." The Cabinet expressly denies Appellant's assertion that the real reason for her rejection was Hayter's fear that she would drink while driving. (Appellee's Response to Appellant's Post-Hearing Brief, p. 8).

18. Hayter testified, "When I saw two DUIs, it gave me pause. I was appointed by the Governor to oversee the operation. Two DUIs meant poor judgment. That job involves a lot of driving. It's not smart to expose the state to potential liability." Hayter further stated that he "absolutely" took into account that the CPA position involved driving on the job. He added that he would consider Appellant for other positions as long as they did not involve driving.

19. If Commissioner Hayter truly believed that two DUIs demonstrated "poor judgment," it is reasonable to conclude that he would not have agreed to extend a job offer to Appellant under any circumstance. However, Hayter made it clear that Appellant was banned only from jobs that involved driving. Hayter stated he worried about "liability" for the state, presumably because he was concerned she might drink and drive in a state vehicle. Hayter was also very strident in his opinion (expressed to Warford) regarding the ability of "drunks" to be rehabilitated. Based on Hayter's testimony, the Hearing Officer finds that Hayter's real reason for rescinding Appellant's conditional job offer was her alcoholism, not "poor judgment." Therefore, the Hearing Officer finds that the Appellee failed to meet its burden of proof to show a legitimate, non-discriminatory reason for rescinding Appellant's conditional job offer.

20. Appellee also asserts that the statute 42 U.S.C. § 12114(C)(4) provides an additional defense to Appellant's ADA claim.

Under this provision of the ADA, an employer:

May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." 42 U.S.C. § 512114(c)(4).

21. Appellee interprets this provision to support its position that Commissioner Hayter acted correctly in denying Appellant employment. Appellee asserts, "the evidence demonstrated that an applicant with two or more DUIs would not be hired for a driving job regardless of whether the applicant was alcoholic." (Appellee's Brief, pgs. 6-7.)

22. In fact, the only evidence presented at the hearing regarding the hiring of applicants with two or more DUIs was Hayter's own testimony that he would not hire someone with such a record. Appellee did not present evidence regarding the number of individuals with DUIs who had applied for positions with DJJ in the past (before or after Hayter became Commissioner), and whether or not they had been rejected for employment due to their driving or criminal record. Furthermore, Commissioner Hayter, by his own admission, had not participated in many employment hires since he began his position with DJJ in May 2014, a mere four months before Appellant's job offer was rescinded. The record is silent as to how many offers of employment, if any, Hayter had ever rescinded.

23. Appellee's argument is further weakened by the stipulated fact that the Appellee has under its employ individuals who have been convicted of (or pled guilty to) DUIs. The Appellee did not develop the record to address the number of DUIs these employees have, whether their positions involve driving, or how their situations are distinguishable from Appellant's. In fact, the evidence shows only that a record of having a DUI, or other misdemeanor conviction, does not render an employee disqualified from employment at DJJ.

24. The purpose of the ADA is to "...address the major areas of discrimination faced day to day by people with disabilities." 42 U.S.C. § 12101(b). The present case amply demonstrates how unjust and outmoded societal attitudes can deny a disabled individual equal opportunity of employment.

CONCLUSIONS OF LAW

1. Appellant met her burden of proof to show a *prima facie* case of disability discrimination when her job offer was rescinded by the Cabinet.

2. The Appellee Cabinet failed to meet its burden of proof to show a legitimate, non-discriminatory reason for rescinding Appellant's conditional job offer.

3. Commissioner Hayter rescinded Appellant's conditional job offer because of Appellant's alcoholism, in violation of the American with the Disabilities Act.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **DAWN M. WILKERSON V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF JUVENILE JUSTICE, (APPEAL NO. 2014-197)** be **SUSTAINED** and that the Appellant be placed into to the position of Corrections Program Administrator with the Quality Assurance Branch of the Department of Juvenile Justice or a position of like pay and status, effective October 1, 2014, with back pay and that she otherwise be made whole. [**KRS 18A.105 and 200 KAR 12:030.**] It is further **ORDERED** that Jarrod Holbrook be removed from his position as Corrections Program Administrator and returned to his previous position or a position of like pay

and status, and that he otherwise be made whole. Mr. Holbrook may retain the salary which he received for the promotion until issuance of the Personnel Board's Final Order in this matter.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Colleen Beach** this 22nd day of February, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. William F. Codell
Hon. Ben Basil

Received

JUN 16 2015

Personnel Board

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-197**

DAWN M. WILKERSON

APPELLANT

v.

STIPULATION

**JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF JUVENILE JUSTICE**

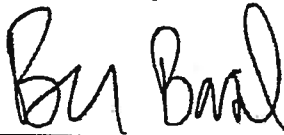
APPELLEE

*** **

Comes now the Appellee, Justice and Public Safety Cabinet Department of Juvenile Justice (the "DJJ"), and the Appellant, Dawn M. Wilkerson, by and through respective counsel, and for their stipulation of fact, state as follows:

1. Individuals that have been convicted of or pled guilty to driving under the influence are currently working for the DJJ. Individuals that have been convicted of or pled guilty to driving under the influence were working for the DJJ in September, 2014. Individuals that have been convicted of or pled guilty to misdemeanors are currently working for the DJJ. Individuals that have been convicted of or pled guilty to misdemeanors were working for the DJJ in September, 2014.

WHEREFORE, the Appellee, Justice and Public Safety Cabinet Department of Juvenile Justice, and the Appellant, Dawn M. Wilkerson, respectfully request that this document serve as their written stipulation.



Ben Basil
Priddy, Cutler, Naake & Meade, PLLC
800 Republic Building
429 W. Muhammad Ali



William Codell
Justice & Public Safety Cabinet
Department of Juvenile Justice
1025 Capital Center Dr., 3rd Floor

Louisville, Kentucky 40202
Telephone: 502-632-5296
Facsimile: 502-632-5297
COUNSEL FOR APPELLANT

Frankfort, Kentucky 40601
Telephone: 502-573-2738
Facsimile: 502-573-0836
COUNSEL FOR APPELLEE