COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-003

JESSICA L. NICHOLS **APPELLANT**

VS.

FINAL ORDER
SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

*** *** *** *** ***

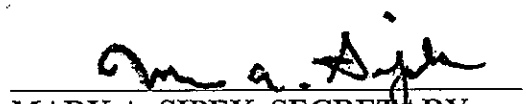
The Board, at its regular July 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated June 15, 2016, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **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 15th day of July, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Blake A. Vogt
Ms. Jessica L. Nichols
Mr. Jay Klein

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-003

JESSICA L. NICHOLS **APPELLANT**

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

CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

** ** ** ** **

This matter came on for an evidentiary hearing on May 2, 2016, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Jessica L. Nichols, was present at the evidentiary hearing and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Blake A. Vogt. Also present as Agency representative was Marcia Morganti.

This matter involves the termination of the Appellant while on initial probationary period by letter dated December 7, 2015 (a copy attached hereto and incorporated herein as **Recommended Order Attachment A**). The Appellant alleged she was dismissed due to discrimination or retaliation, either for having been injured, or through disability, or for having filed a Worker's Compensation claim. The burden of proof was placed upon the Appellant by a preponderance of the evidence to show that the termination was illegal for the alleged reasons. At the beginning, the Appellant announced she was not pursuing the claim that the filing of a Workers' Compensation claim was a basis for her termination.

BACKGROUND

1. Appellant's first witness was **LeAnne Fleming**. She has been employed by the Department of Community Based Services (DCBS) as a Social Service Aide. During the period of June through July 2015, she worked with the Appellant.

2. Fleming testified that she had never felt any danger in being around the Appellant and that she shared the driving responsibilities with the Appellant for transporting youths for various purposes.

3. On cross-examination, the witness clarified this to say that the youths transported ranged from infants through 15 years of age. Several of these transports involved journeys to correctional facilities.

4. Appellant's second witness was **Tammi York**. She is employed by the Agency as a Service Region Clinical Associate. She explained that the Appellant was a member of one of the teams under her supervision. She was Appellant's second-line supervisor. She stated that on either September 30 or October 1, 2015, she was informed that Appellant had fallen. She testified that she went over the process of filing a Worker's Compensation claim with the Appellant the following day. She added that following the filing, there was a lot of waiting to receive various doctors' reports and to receive a final Worker's Compensation decision.

5. The final Worker's Compensation decision, denying coverage to the Appellant, was rendered December 15, 2015. This was after the Appellant's termination on December 7, 2015.

6. The witness confirmed she had regular contact with the Appellant regarding the status of her ability to work and her Worker's Compensation claim from October 1 through October 30, 2015. [Appellant's Exhibit 2.] This communication was primarily through texts, emails and face shots.

7. During this interim, on September 17, 2015, Belinda Anderson, the Appellant's first-line Supervisor, was contacted by Tonya Payne, Supervisor over a team of Social Workers. This email reported to Anderson that there had been a concern raised about the way the Appellant had handled a transport on September 16, 2015. This was followed by a December 6, 2015 Request for Separation from Initial Probation, initiated by Marcia Morganti, the Service Region Administrator Associate for the region in which the Appellant worked.

8. York then confirmed that while the Appellant was responsible for transporting the child during this visit, she was not responsible for any DCBS supervision over the parent. This supervision was to be done by a family friend. [Appellant's Exhibit 3.]

9. Appellant's next witness was **Belinda Anderson**. She is employed with DCBS as a Social Service Aide. She serves as a Transportation Coordinator and, as such, coordinates any transports carried out by the Appellant. She confirmed that if the transport request has a "no" under supervision, the Cabinet employee is not to supervise the case.

10. She confirmed receipt of the September 17, 2015 email from Tonya Payne concerning Appellant's handling of the transport. The witness also added that after having been informed of the situation, she (Anderson) was not sure how it was supposed to have been handled. [Appellant's Exhibit 3 – last four pages.] (**Hearing Officer Note**: This entire matter appears to have revolved around a September 16, 2015 transport by Appellant with two children to visit their mother. Upon arrival, the Appellant observed the mother appeared to be under the influence of something and was unable to comprehend or talk with the Appellant. Appellant attempted to get in touch with Case Worker Jennifer Camp, who was not there. After finally contacting Camp, the Appellant and Camp decided they would jointly visit the mother. Since the

family friend, who was the designated supervisor for that visit, was at the home, the Appellant left for a short time and met Camp, whereupon they both returned to the house. At that point, Camp removed the children from the home. The Cabinet's position is that the Appellant should not have left the children at the home with the mother, even though an approved family friend supervisor was present. This relates back to Anderson's testimony that she would not have known how to handle that situation.)

11. **Appellant, Jessica L. Nichols,** then called herself as a witness. She testified that she primarily worked out of the Caldwell County, Kentucky, office transporting youths, mainly to western Kentucky counties, but also as far away as Louisville and Somerset. She was a Social Service Aide, Grade 9. She previously worked for the Department of Juvenile Justice for slightly less than one year.

12. Nichols explained her duties were to pick up children from schools or facilities and to take them to their families for visitation, or to other facilities. She added that normally she would supervise the visits during these transports, but not always.

13. She again pointed out that she was terminated following her injury. The termination occurred on December 15, 2015. Appellant also pointed out that at various times from the beginning of her employment, there had been some concerns raised about her appearance. She stated she had been accused of being over-medicated, of appearing sleepy and of having slurred speech at times. She explained this by saying she suffered from ADHD, fibromyalgia and anxiety. Because of these conditions, Appellant stated that since 2007 she had been on Xanax for anxiety, and hydrocodone for other ailments. Following her injury on September 30, 2015, she was taking hydrocodone twice a day. She was adamant she was not under the influence of anything or intoxicated, which seems to have been the basis for her colleagues' concerns that she may have presented a danger to children at times while transporting them.

14. On cross-examination, Appellant again reiterated that the medications did not affect her driving and, in fact, during the period following the injury to her ankle, she was on restrictions not to drive. She also added that on many of the transports, she and Supervisor Belinda Anderson would perform these with Anderson being the primary driver.

15. She also added that a DCBS Supervisor, Jennifer Camp, did not tell her at any point to not leave the children with their mother. However, she was told the following day, September 17, 2015, that she had handled the case wrong. This advice came from Supervisor Tonya Payne.

16. The Appellant closed.

17. The Appellee then made a Motion for Directed Verdict, which was **DENIED** by the Hearing Officer.

18. The Appellee called as its first witness **Jennifer Camp**. She has been an ongoing Social Worker II in Marshall County. She confirmed the Appellant's testimony that Appellant

reported to her the mother's condition upon arrival with the transport. She also confirmed that when the family friend arrived to take over supervision of the visit, she and the Appellant communicated, got together and went back to the house.

19. Camp also added that, upon reflection, she did not feel it appropriate for the Appellant to have left the children at the home, even though the family friend was there. She felt the children should not have witnessed the mother's condition and reaction. She added that she reported this to Tonya Payne the same day.

20. The Appellee's next witness was **Stephanie Scott**. She in employed by the Agency as a Social Service Clinician in the Caldwell County office. She testified that she had reported to her supervisor that on October 2, 2015, the Appellant appeared to be drowsy the previous day, and she knew the Appellant transported children. She also noticed some problems with Appellant's speech.

21. The Appellee's next witness was **Shameika Frazier**. She is a Family Services Office Supervisor (FSOS) with the Division of Permanency and Protection in Todd County. She testified that on July 24, 2015, a meeting was held in Todd County with the new Transportation Aides, including the Appellant. The witness noted that on that day, Appellant's speech appeared to be slow and slurred. She also apparently had difficulty concentrating. Shortly thereafter, she promptly notified Appellant's supervisor, Anderson. She also noted that on the day of transport in question, that Anderson drove and Appellant was only a passenger. She stated she accompanied the Appellant on a transport on September 28, 2015, where no questions were asked afterward.

22. The Appellee's next witness was **Marcia Morganti**. She is a Service Region Administrator Associate with the Agency and oversees all Human Resources issues. She made the request for separation of the Appellant up the chain of command on December 6, 2015.

23. She stated that prior to initiating this request, she had talked with Supervisors Tonya Payne, Tammi York and Shameika Frazier. She added that she knew nothing of the status of Appellant's Worker's Compensation claim.

24. The witness then stated that the policy in place at the time of transport (September 16, 2015) had been that Social Workers should never leave their kids when, during the home visitation, a parent appeared to be under the influence. She stated this generally was an application of common sense. However, she also added that this policy has now been clarified to apply to Transportation Aides as well. (Emphasis added.)

25. The Appellee's next witness was **Jay Klein**. He is employed by the Agency in the Office of Human Resources Management and, at the time of the separation letter, was the Appointing Authority. He explained that the December 7, 2015 separation letter given to the Appellant occurred while she was on six month probation and no cause was needed to effect the termination.

26. The Appellee closed.

27. KRS 18A.005(19) states:

> "Initial probation" means the period of service following initial appointment to any position under KRS 18A.010 to 18A.200 which requires special observation and evaluation of an employee's work and which must be passed successfully before status may be conferred as provided in KRS 18A.110 and by the provisions of this chapter. If the appointee is granted leave in excess of twenty (20) consecutive work days during this period, his initial probation shall be extended for the same length of time as the granted leave to cover such absence;

FINDINGS OF FACT

1. The Appellant, Jessica L. Nichols, was terminated during initial probation from her job as a Social Service Aide by letter dated December 7, 2015. A great portion of her duties involved the transportation of youth to various facilities.

2. The Appellant fell and injured her foot on or about September 30, 2015. This resulted in her receiving medical restrictions on her ability to drive.

3. Prior to her termination, at least two coworkers had notified management that at times Appellant appeared to be over-medicated, of appearing sleepy and of having slurred speech at times. The Appellant explained this by stating she suffered from ADHD, Fibromyalgia and anxiety relating back to 2007. She took various medications for these conditions. The primary focus of concern on Appellant's job performance appears to have stemmed from the way she had handled a transport on September 16, 2015. During that visit, the Appellant delivered two children to visit their mother. Upon arrival, the Appellant observed that the mother appeared to be under the influence of something, and was unable to comprehend or talk with the Appellant. A family friend had been previously designated to be the supervisor for that visit. After delivering the children, Appellant contacted the primary Caseworker Jennifer Camp, after which the Appellant left for a few minutes to meet Camp. The two then returned to the home.

4. Marcia Morganti stated that the policy in place at the time of transport had been that Social Workers should never their kids during the home visit, when a parent appears to be under the influence. No such clear policy was in place on September 16, 2015, which applied to Transportation Aides as well.

CONCLUSIONS OF LAW

1. *Firestone Textile Company v. Meadows*, 666 S.W.2d 730 (KY 1983), holds that "ordinarily, an employer may discharge his at-will employee for a good cause, for no cause or for a cause that some might view as morally indefensible."

2. *McDonell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Court 1817, 36 L.ed. 2d 668 (1973), sets forth the burden-shifting scheme established for civil rights complaints. The case holds that: (1) a Plaintiff alleging disability discrimination must establish a *prima facie* case by showing that [1] he is disabled; [2] he "otherwise is qualified" for the position with or without reasonable accommodation; [3] he suffered an adverse employment decision; [4] the employer knew or had reason to know of the Plaintiff's disability; and [5] the position remained open while the employer sought other applicants for the disabled Plaintiff's position and the Plaintiff was replaced. The employer must then offer a legitimate explanation for its action. If the employer satisfies this burden of production, the burden returns to the Plaintiff to introduce evidence showing the proffered explanation is pretextual.

3. In the case herein, the Appellant did not show she was disabled within the meaning of the case; it is presumed she was otherwise qualified for the position; she suffered an adverse employment decision through her termination; there was proof the employer knew of the Plaintiff's ankle injury, but insufficient proof to show that this injury had a causative effect on the decision to terminate.

4. Even though the Hearing Officer may have made a different decision regarding her termination in light of all the circumstances, the Hearing Officer must conclude as a matter of law that the employer offered a legitimate explanation for its action. The burden then returned to the Plaintiff (Appellant) to introduce evidence showing that the proffered explanation was pretextual. The Hearing Officer concludes as a matter of law that no such sufficient evidence was introduced to show pretext.

5. Therefore, the Hearing Officer must conclude as a matter of law that Appellant failed to carry her burden of proof by a preponderance of the evidence to show that her termination was based upon discrimination or retaliation, or for any disability which she felt she had.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JESSICA L. NICHOLS V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2016-003)** be **DISMISSED.**

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 R. Hanson Williams** this 15th day of June, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Blake A. Vogt
Ms. Jessica L. Nichols

Received
JAN 07 2016
Personnel Board

CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF HUMAN RESOURCE MANAGEMENT

Steven L. Beshear
Governor

275 East Main Street, 5C-D
Frankfort, KY 40621
502-564-7770
FAX 502-564-3129
www.chfs.ky.gov

Audrey Tayse Haynes
Secretary

December 7, 2015

Jessica L. Nichols

PERNR:

Re: Separation

Dear Ms. Nichols:

Pursuant to KRS 18A.111, you are advised that you will be terminated from your position as a Social Service Aide I, in the Department for Community Based Services (DCBS), The Lakes Service Region, effective December 8, 2015. Your last working day will be December 7, 2015. You shall not be certified on future registers for employment within DCBS unless DCBS so requests.

As an employee serving an initial probationary period as provided by KRS 18A.111, you do not have the right to appeal this action to the Kentucky Personnel Board. However, KRS 18A.095 provides that you may file a claim of discrimination with the Kentucky Personnel Board if you believe the action was based on unlawful discrimination. In accordance with KRS 18A.095, any claim of discrimination must be filed within thirty (30) days, excluding the date notification is sent. Such appeal must be filed in writing using the attached appeal form and in the manner prescribed on the form.

Sincerely,

Howard J. Klein
Appointing Authority

HJK: arc

Attachment: Appeal Form

c: Personnel Cabinet Secretary
Executive Director Mark Sipek, Personnel Board
Commissioner Teresa James, Department for Community Based Services
Service Region Administrator Renee Buckingham, The Lakes Service Region
Cabinet Personnel File

Recommended Order
Attachment A