

COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2017-149

DUSTIN ADAMS

APPELLANT

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

TOURISM, ARTS AND HERITAGE CABINET,  
DEPARTMENT OF FISH AND WILDLIFE RESOURCES

APPELLEE

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The Board, at its regular April 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 6, 2019, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer 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 16<sup>th</sup> day of April, 2019.

KENTUCKY PERSONNEL BOARD

  
MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. William Adams  
Mr. Dustin Adams  
Ms. Misty Judy

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2017-149**

**DUSTIN ADAMS**

**APPELLANT**

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

**TOURISM, ARTS AND HERITAGE CABINET,  
DEPARTMENT OF FISH AND WILDLIFE RESOURCES**

**APPELLEE**

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This matter came on for a pre-hearing conference on September 7, 2017, at 10:00 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Dustin R. Adams, was present and was not represented by legal counsel. The Appellee, Tourism, Arts and Heritage Cabinet, Department of Fish and Wildlife Resources, was present and represented by the Hon. Amber Arnett.

The purposes of the pre-hearing conference were to determine the specific penalization(s) alleged by Appellant, to determine the specific section of KRS 18A which authorizes this appeal, to determine the relief sought by Appellant, to define the issues, to address any other matters relating to this appeal, and to discuss the option of mediation.

**BACKGROUND**

1. The Appellant, Dustin Adams, filed Appeal No. 2017-149 on July 14, 2017, from a dismissal. Appellant also alleged discrimination; specifically, that he "was not treated the same as other staff." By way of explanation, Appellant alleged at the pre-hearing conference that other staff received uniforms and were provided feedback regarding their work performance, but he had not. Appellant further contended that he was reinstated to his position at the Kentucky Department of Fish and Wildlife (KDFWR), and was not serving initial probation when dismissed. He based this conclusion on the fact that he had previously been employed at the Department of Corrections, and only approximately a year had lapsed before he was hired by KDWR.

2. During the pre-hearing conference, Appellant also alleged that his dismissal may have been the result of disability discrimination; specifically, that he had taken some time off from work due to medical reasons, but always provided documentation for the time off.

3. By an extension order, Appellee was granted to and including October 6, 2017, to file a Motion to Dismiss. The Appellee's motion was filed on October 6, 2017.

4. Appellant was given to and including November 6, 2017, in which to file a response. To date, Appellant has not responded to the motion. This matter has been submitted for a ruling to Hearing Officer Colleen Beach.

5. In its Motion to Dismiss, Appellee denied that Appellant had been reinstated to the position of Fish and Wildlife Technician I with KDFWR from his position as a Correctional Industries Production Coordinator with the Department of Corrections, which he voluntarily left approximately a year prior. Consequently, Appellant was required to serve an initial probationary period.

6. As for Appellant's assertion at the pre-hearing conference that other staff had received uniforms while he had not, Appellant stated that KDFWR only orders uniforms twice a year, and Appellant's uniform had been scheduled to go out on July 12, 2017, two days after his dismissal.

7. Appellee further argued that Appellant had failed to state a claim of disability discrimination. Attached to Appellee's Motion to Dismiss were certain timesheets from March 27, 2017, to July 7, 2017. These timesheets showed that Appellant was absent twenty-two days of seventy-seven with the flu and dental work. Appellant used a combination of paid and unpaid leave. (Exhibit D, Appellee's Motion to Dismiss). Appellee argued that under 42 USC § 12112(b)(5)(A), discrimination occurs when an employer takes adverse action because of a disability or when an employer fails to make reasonable accommodations. Appellee urged that Appellant's appeal be dismissed as a matter of law as he failed to establish a *prima facie* claim of discrimination because he does not have a disability under the amended American with Disabilities Act and was never denied an accommodation.

8. KRS 18A.111(1) and (8) read, in pertinent part:

- (1) Except when appointed to a job classification with an initial probationary period in excess of six (6) months, and except as provided in KRS 18A.005 and this section, an employee shall serve a six (6) months probationary period when he is initially appointed to the classified service. An employee may be separated from his position, reduced in class or rank, or replaced on the eligible list during this initial probationary period and shall not have a right to appeal, except as provided by KRS 18A.095. The employee may be placed on an eligible list but shall not be certified to the agency from which he was separated unless that agency so requests. Unless the appointing authority notifies the employee prior to the end of

the initial probationary period that he is separated, the employee shall be deemed to have served satisfactorily and shall acquire status in the classified service.

- (8) Notification to an employee on initial or promotional probation of the reason the probationary employment has been terminated by the appointing authority shall not confer a right to appeal to the board.
9. KRS 18A.095(12) reads as follows:
    - (12) Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age forty (40) and above. Nothing in this section shall be construed to preclude any classified or unclassified employee from filing with the Kentucky Commission on Human Rights a complaint alleging discrimination on the basis of race, color, religion, national origin, sex, disability, or age in accordance with KRS Chapter 344.
  10. KRS 18A.095(14)(a) reads as follows:
    - (14)(a) Any employee, applicant for employment, or eligible on a register, who believes that he has been discriminated against, may appeal to the board.
  11. 101 KAR 1:335, Section 5, states:

Section 5. Reinstatement.

    - (1) A request for reinstatement shall be submitted by the appointing authority to the secretary of Personnel.
    - (2) The request shall include a finding that the candidate for reinstatement:
      - (a) Meets the current qualifications for the job classification to which the employee is being reinstated; and
      - (b) Has previously held status at that grade level or higher.
    - (3) If the reinstatement is to a classification outside of the classification series where the employee has previously held status, the candidate shall pass the appropriate examination prior to reinstatement.

- (4) The request for reinstatement shall contain a copy of the board's order ordering reinstatement, if applicable.

### FINDINGS OF FACT

The Hearing Officer makes the following findings by a preponderance of the evidence:

1. Appellant, Dustin Adams, was employed as a Fish and Wildlife Technician I with the Kentucky Department of Fish and Wildlife Resources, Tourism, Arts and Heritage Cabinet. While serving his initial probationary period, he was notified that he was separated from his position without cause on July 10, 2017.

2. Appellant filed this appeal with the Personnel Board on July 14, 2017. On his appeal form, he alleged discrimination because no one ever counselled him that his job performance needed improvement, and because he took work off due to medical reasons. (See Appellant's Appeal Form).

3. At the pre-hearing conference on September 7, 2017, Appellant added that he believed he had been reinstated when he began working for KDWFR because he had only been gone from state government for approximately one year or less. Appellant also alleged that his dismissal was the result of disability discrimination.

4. Appellee filed a Motion to Dismiss alleging that Appellant had not been reinstated and was serving his initial probationary period when dismissed. Appellee further alleged that, because Appellant failed to state a claim of disability discrimination, he has no right to appeal his separation during probation.

5. Although given an opportunity to respond to the Motion to Dismiss, Appellant did not respond.

6. The Hearing Officer finds there is enough information in the record through the appeal form, the statements at the pre-hearing conference, the Motion to Dismiss, and the dismissal letter to decide this appeal.

### CONCLUSIONS OF LAW

1. Appellant was dismissed from his position as a Fish and Wildlife Technician I while serving his initial probationary period. He filed an appeal with the Personnel Board alleging discrimination and disability discrimination.

2. The Hearing Officer concludes that Appellant was not "reinstated" into his position at KDFWR, as Appellant alleges. In order to be reinstated, the appointing authority must submit a request for the action to the Secretary of Personnel Cabinet. (101 KAR 1:335,

Section 5). This is not an automatic action bestowed to state employees who get rehired less than a year from leaving their prior position. Nothing in the record indicates that the appointing authority of KDFWR made this request or that it was granted. In fact, Appellant's dismissal letter states clearly that he was being dismissed during his initial probationary period as provided by KRS 18A.111.

3. Because the Appellant was dismissed during initial probation, he could only appeal to the Personnel Board based on discrimination. [KRS 18A.111 and KRS 18A.095(12) and (14)(a)].

4. In order to establish a *prima facie* case of discrimination, the employee must show that he is a member of a protected class, and that he suffered an adverse employment action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In this case, Appellant has not identified that he is a member of a protected class. Instead, his allegations of discrimination are based solely on his perception that he "was not treated the same" as other employees, specifically, that he did not receive an uniform or performance counselling. He does not claim that the above actions were based on his race, religion, national origin, gender, or age, pursuant to KRS 18A.095(12). Therefore, his discrimination claim must fail as a matter of law.

5. As for Appellant's claim of disability discrimination, Appellant has failed to show that he suffered from a disability. Under the Americans with Disabilities Act, a "disability" is defined as: "(A) Physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 USC § 12102(2). "Temporary non-chronic impairments of short duration with little or no long-term impact are usually not disabilities." *Heintzman v. Runyon*, 120 F3d 143 (8th Cir.). Appellant's inability to work while recovering from a bout of influenza or dental work is not a permanent impairment, and, therefore, not a disability. See *McDonald v. Pennsylvania Department of Public Welfare*, 62 F3d 92 (3rd Cir., 1995).

6. There are no genuine issues of material fact, and the record contains sufficient information to decide this appeal, including the appeal form, the statements made at the pre-hearing conference, the Motion to Dismiss, and the dismissal letter.

### **RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **DUSTIN ADAMS V. TOURISM, ARTS AND HERITAGE CABINET, DEPARTMENT OF FISH AND WILDLIFE RESOURCES (APPEAL NO. 2017-149)** 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 Colleen Beach** this 6<sup>th</sup> day of February, 2019.

**KENTUCKY PERSONNEL BOARD**



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**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. William Adams  
Mr. Dustin Adams