

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-151**

TINA BACK

APPELLANT

VS.

**FINDINGS OF FACT, CONCLUSION OF LAW
AND RECOMMENDED ORDER**

**CABINET FOR HEALTH AND FAMILY SERVICES
J. P. HAMM, APPOINTING AUTHORITY**

APPELLEE

** ** * * *

This matter came on for an evidentiary hearing on December 11, 2012, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Tina Back, was present at the hearing, and represented by the Hon. Melissa C. Howard. Appellee, Cabinet for Health and Family Services, was present and was represented by the Hon. Cary B. Bishop. Appearing as the Agency representative was Robert Wade Caudell.

The Appellant was an initial probationary employee who was separated from service as a Family Support Specialist I by letter dated April 26, 2012.

At issue at the hearing were the Appellant's claims of age and disability discrimination. The Appellant was assigned the burden of proof by a preponderance of the evidence to prove these claims.

BACKGROUND

1. The Appellant, **Tina Back**, called herself as her first witness. She is currently employed by the Kentucky River Community Association. She first became employed by the Agency as a Family Support Specialist I on December 16, 2011. She is currently 52 years old, and her birth date is June 16, 1960.

2. Prior to being employed by the Agency, the Appellant operated a hair and nail salon for approximately 24 years, until forced to give up that business. At age 45, she went back to Morehead State University where she graduated in three years with a degree in social work.

The witness indicated that during this college time, she did have some trouble operating computers.

3. Upon first being employed, she was assigned to the Lee County Support Office. At that time, the supervisor was Lisa Banks, who was actually based in Breathitt County. Shortly after being hired, the Appellant went to the Breathitt County office for two days to do her paperwork and later returned for one date to “shadow” an employee for three hours. She states that she initially told Banks that she suffered from anxiety disorder and was taking Xanax and Zoloft.

4. Banks initially assured the Appellant that she would receive training and when she went back to the Lee County office, she was supposed to shadow a Principal Worker, Mr. Daniel Mayabb. At this time, the Appellant became aware that he had never trained anyone before.

5. Appellant claims that approximately six weeks into her employment, Mayabb made negative comments about her computer skills in front of a pair of clients. She also said that he made comments referencing the fact that she was older when she went back to Morehead State. She summarized that as the training went on, it was apparent that Mayabb did not want to be bothered by her questions.

6. She further testified that after training and “shadowing” Mayabb, she was not allowed to use the practice sites, which would have allowed her to become familiar with the computer screens, which were necessary to her job. She added that she was never told that she was failing anything; rather she was sitting most of each day with Mayabb and doing nothing.

7. She also mentioned to Mayabb that she suffered from what she felt was an anxiety disorder and he replied “that must be hard.” She did begin doing some work, such as writing up the 117s, which was a form of writing up a part of each case. In her opinion, she seemed to be doing well at this. She later attended a second training for one week, being trained on the computer screens, and the Family Support System. She thinks that she passed the pre- and post-tests which were given and that her trainer never told her she was not doing well.

8. She then testified that she saw supervisor Banks after the second training and was told to continue her shadowing. However, she was told to stay off the practice sites, while others were allowed to use those as a way of becoming familiar with the screens. She also added that neither Banks nor supervisor Caudell ever watched her put a case on the computer. She again commented that Mr. Mayabb seemed very impatient with her, which raised her anxiety.

9. Next, Wade Caudell, began as the Lee County supervisor. At that time, he too was in training as a Principal Worker. He never told her that she was doing well.

10. Finally, during the last three weeks before her termination, a Mr. Neil Terry became her Principal Worker and trainer. She stated that she felt better with him as her trainer,

for he let her practice cases and was encouraging. She commented that she had also pointed out to Mr. Caudell concerning her anxiety.

11. The Appellant concluded by saying that she never received any performance evaluations under either Banks or Mayabb and during her final three weeks, Mr. Caudell told her to do applications only. She had no warning that anything was wrong with her performance before she received the termination letter. Rather, she testified that each of her trainers always encouraged her by saying “you’ll get it.” In summary, the Appellant testified that she felt she was terminated more on the basis of her anxiety than of her age.

12. On cross-examination, the Appellant admitted that while at Morehead, she took the basic introductory course for computers, Computer 101. She stated that after beginning at the Lee County office, she attempted to do some applications, some case changes, and admitted there were many screens to use on the computer programs. It was difficult to go back and forth between screens unless one was allowed to do repetitious work on them. In essence, there was one system, but multiple screens to be used for all the programs contained in her job description.

13. Although she felt Mayabb’s comments about going back to college at a later age and about her lack of computer skills were hurtful and discriminatory, she did not file a discrimination claim. She stated that she was trying to get along, and she felt like she was “a new kid on the block.” She also stated that Mr. Caudell never made any comments about her age.

14. She again stated that she felt her anxiety disorder affected her work and repeated that she had told supervisor Banks about the medicine she was taking. She did not mention this to Mr. Caudell. She also admitted that she never asked for a meeting with Mr. Caudell in order to ask for any accommodations concerning her anxiety. The Appellant added that she had the initial one-week training and the one-week additional training at Morehead where Laura Adams gave the training on the computer system. She felt this was very helpful. In addition, the Appellant was also allowed to take a third week of training at Lexington. She summarized by saying that she thinks she was terminated because her age and anxiety, but was never told that.

15. On re-direct, the Appellant added that she thought that not being allowed to do the repetitious work on the practice sites caused her to not be able to become familiar with the screens and to become proficient at her work. The Appellant then closed.

16. The Appellee’s first witness was **Shauna Moore**. She has been a Health and Family Services Service Region Administrator Associate for the past five years. In this job she handles all personnel issues in a thirteen-county area and is one of four regional EEO officers.

17. She explained that employees are made aware of the EEO process when initially employed. Further, the procedures for filing a complaint are explained to these employees, which they have available to them to prevent retaliation in the workplace.

18. She explained that the typical resolution of a disability claim is an accommodation of some sort which is afforded the employee. The witness was not aware of any disability claims ever received from the Appellant.

19. The Appellee's next witness was **Kellie Malone**. She is the Assistant Director of the Training Branch at the Eastern Kentucky University. In that role, her branch provides training for the Department of Community Based Services (hereinafter "DCBS") employees with the state.

20. She testified she was aware of the three weeks of training given to the Appellant on the Kentucky Automatic Management Eligibility System (hereinafter "KAMES"). The three levels of training which the Appellant received are all required in order to do the job of a Family Support Specialist I. After training, each trainer fills in a Progress Report which this witness reviews and then forwards to the DCBS managers.

21. She explained the Progress Reports are scored on ratings 1 through 4, with 1 being the most distinguished proficiency and ratings of 3 and 4 indicating "needs professional support" and "does not meet the standards," respectively. She also testified that if a trainee receives a score of 4, the trainer must report that to her DCBS manager.

22. The witness then introduced Appellee's Exhibit 1, a Progress Report on the Appellant after the initial training at Morehead in January 2012. This report gave me Appellant a rating of 4 in the categories of: (1) Unable to navigate or finish over 50 percent of the practice cases; (2) Unable to complete the practice work in a timely manner; and (3) Unable to log on or locate policy manuals. If located, unable to find appropriate volumes or policy to apply.

23. This report was sent to supervisor Lisa Banks.

24. The witness next introduced Appellee's Exhibit 2, a Progress Report on the second training received by the Appellant in February 2012. This report gave the Appellant a rating of 3 (needs professional support) in the areas of: (1) Unable to navigate through screens without error or asking repeatedly for assistance; (2) Unable to complete practice work without asking repeatedly for assistance. Inaccurately completes assignments including KAMES, or hard forms, or FS 103; and (3) Asked repeatedly for policy clarifications and system entries were sometimes inconsistent with policy.

25. The report was sent to trainer/supervisor Wade Caudell.

26. The witness introduced Appellee's Exhibit 3, a Progress Report from the third week of training given to the Appellant in March 2012 which covered usage of the computer system. This report gave the Appellant a rating of 3 (needs professional support) in the areas of: (1) Unable to navigate through screens without error or asking repeatedly for assistance. Enters information inaccurately or in wrong fields; (2) Unable to complete practice work without asking repeatedly for assistance. Inaccurately completes assignments including KAMES, or hard copy

forms, or FS 103; (3) Asked repeatedly for policy clarifications and system entries were sometimes inconsistent with policy. This report was also sent to supervisor Caudell.

27. The witness also noted in the “comments” section at the bottom Appellee’s Exhibit 3. This read as follows:

Tina struggled completing the KAMES system entry and FS103’s in a timely manner compared to the rest of the class. When I sat down and worked with her, she was able to understand and get these items correct. Tina was dedicated and often worked through her lunches and breaks to catch up. However, she would benefit from more practice with KAMES navigation, calculator codes and FS103’s.

28. In summary, the witness stated that the scores given to the Appellant were not sufficient for her to go to the next level of training.

29. On cross-examination, Malone admitted that she did not know if the Service Region Associate Administrator, Rhonda Bell, ever showed the Appellant the rating she had received. She added that these reports show a willingness to learn, but that the Appellant needed much more practice. It was her understanding that the Appellant was allowed to use the practice sites to work on her cases; however, the Appellant denies this. The witness also added that it was possible to have passed the post-tests based on actual knowledge, but not have the ability to apply this knowledge to using the system. She concluded by stating that all training participants were given “practice codes” after training which they could use to practice on the system. An individual trainee would have to go through either their trainer or the SRAA.

30. Appellee’s next witness was **Laura Adams**. Prior to April 26, 2012, she was employed as a Regional Training Coordinator Assistant through Eastern Kentucky University. Her duties included assisting with training for DCBS employees.

31. She was assigned to give a second round of training to the Appellant in February 2012 in order to help her improve her Progress Report scores. After the Appellant’s initial week of training, this witness was told that the Appellant need to be rescheduled for that same training another week. As a result, she worked with the Appellant on February 1, 3, 10, and 23. Her impression of the Appellant after working with her was that she just did not understand the calculation codes for the “income” screens. As a result, she sent a Progress Report (Appellee’s Exhibit 4, dated 2-9-12) to SRAA Rhonda Bell explaining this and adding that, “I wonder how she will ever grasp family related medical but I guess we will just worry about one training at a time.”

32. She related that the Appellant had told her that she got frustrated with herself for having trouble learning the KAMES system, but she never mentioned anxiety disorder or age as a concern.

33. The witness indicated that the Appellant was very receptive to practice sessions wherein she would put in cases and added that she was a “wonderful person” and possessed many great qualities. She also complimented the Appellant on generally caring about people and willing to try and do anything she is asked; however, she again reported on April 20, 2012 (Appellee’s Exhibit 5) to Rhonda Bell that, “She didn’t think she would ever be able to fully grasp the policies and income calculations necessary for food benefit determinations, as well as the family medical issues.

34. In summary, this witness felt that the Appellant had been given a fair opportunity for training, having been given three individual weeks of training.

35. On cross-examination, this witness confirmed the Appellant had told her that she was not able to use the practice system and practice codes because for some unknown reason she was not allowed to do so. She also added that Daniel Mayabb, her trainer, confused her.

36. The witness concluded by saying that in April 2012, SRAA Rhonda Bell had asked her for her assessment of the Appellant, so as to make a decision regarding her continued employment.

37. Appellee’s next witness was **Robert Wade Caudell**. He has been the Family Services Supervisor for Family Support in Owsley and Lee Counties, since February 2012. As a result he worked with and supervised the Appellant from February through April 26, 2012.

38. He testified that the Family Support workers must work through the KAMES computer system and that there are 23 different programs in this system. The witness stated that it was an essential job function of a Family Support Specialist worker to be able to work with the KAMES system. He pointed out Appellee’s Exhibit 1 as documentation that the Appellant was not proficient in using this system. The witness was then asked why he had not allowed the Appellant to input cases on the practice sites. He replied that she had mistakenly put a practice case on the actual KAMES system and this could have led to many problems had this not been discovered. He reported this to SRAA Rhonda Bell in a February 7, 2012 e-mail (Appellee’s Exhibit 6). Caudell then examined Appellee’s Exhibit 2, the Progress Report of Appellant after her second training. He stated that this again showed her lack of progress in learning the KAMES system. He stated that after her second training, he tried to get Principal Worker Daniel Mayabb to help her since he was the only Principal Worker available in the Lee County office.

39. The witness also introduced Appellee’s Exhibit 9, handwritten notes of a February 24, 2012 meeting with the Appellant. These notes reflect that she was again having trouble navigating the system and also showed that this witness was very encouraging to her, telling her to become more relaxed. These notes also indicated that the Appellant was getting stressed to the extent that she could not remember what she was doing. He also added the thought that with more training “she would be fine.”

40. The witness also added that he was in the Lee County office every day until lunch, whereupon he would go to Owsley County. During his time in the Lee County office, he never had a conversation with the Appellant relating to either age or an anxiety disorder. He added that neither of the two Principals who worked with the Appellant ever mentioned her age to him.

41. The witness next introduced Appellee's Exhibit 10. This is a March 22, 2012 e-mail in which he memorialized his own thoughts to his file. In this e-mail, he noted that his observation of the Appellant was that, "I really don't think she can be a successful caseworker due to having so much difficulty with the SNAP program. That when she has to start working family medical, K-TAP and AMA she is going to struggle and not complete the trainings."

42. He further testified that he took into account the three Progress Reports and documentation from trainers in trying to form a decision as to whether to recommend that the Appellant continue through her probationary period. As a result, this witness sent a February 20, 2012 memo through Rhonda Bell (Appellee's Exhibit 11) recommending that the Appellant not be allowed to finish the probationary period.

43. On cross-examination, this witness confirmed that he first went to the Lee County office on January 24, 2012. He never had any initial discussions with then supervisor Lisa Banks concerning the Appellant.

44. He indicated that he was gone from the Lee County office most of March due to training sessions he was involved with. As a result, he relied significantly on what Daniel Mayabb reported to him about the Appellant. He stated that he did have some conversation with Mayabb about the anxiety which the Appellant faced and added that Mayabb himself is also a highly stressed person.

45. This witness does not recall reviewing the three Progress Reports concerning the Appellant with the Appellant herself. He also added that there was no thought by him of offering her a secretary position.

46. Appellee's next witness was **Daniel Mayabb**. He has been employed in the Lee County office of Family Support Specialist II for approximately five years. His duties include determining eligibility for food stamps, Medicaid, K-Tap, all of which involve the use of the Kames system. He testified that Lisa Banks asked him to train the Appellant sometime around December 2011 or January 2012.

47. The witness testified that initially he was told to introduce the Appellant to the various forms which she would be using and to try to help her navigate the screens in the KAMES system. He also initially observed that the Appellant was very good at interacting with clients.

48. As training progressed, Mayabb sent a February 23, 2012 e-mail to Mr. Caudell (Appellee's Exhibit 14) expressing that the Appellant was having trouble with processing applications and re-certifications. He added that he gave no thought to her age and also does not recall making comments about the Appellant's lack of computer skills in front of a pair of clients. Directed to the Appellant's claims that he held her age against her, this witness testified that if he asked her why she had gone back to college at a later age, it was only because of his curiosity. He flatly denied that he told her, "Go back to working hair." He also does not recall that the Appellant ever told him about medication she was taking for anxiety.

49. The witness explained that on March 20, 2012, he sent a User Guide to the Appellant which he thought would help her in understanding the KAMES system. Also on that same day, he e-mailed Mr. Caudell detailing that the Appellant did a good job of interviewing her clients, but was still having difficulty with navigating the KAMES system. He also noted that she was still having difficulty following her own notes on navigation.

50. Mayabb also sent e-mails to Mr. Caudell dated April 2 and April 6, 2012, detailing the Appellant's progress through the end of March (Appellee's Exhibits 17 and 18). In Appellee's Exhibit 17 he expressed his thoughts that Appellant did seem to be making some progress in navigating the system on her own. However, in Appellee's Exhibit 18, he expresses his thoughts to Caudell that the Appellant is "just not getting the navigation of the system." This e-mail also expresses that the Appellant has a good attitude and that this witness wants her to succeed, but she is really struggling.

51. Mayabb's April 19, 2012 e-mail to Caudell (Appellee's Exhibit 19) again conveyed his thoughts that she was having problems navigating the KAMES system. Lastly, the witness denied that the Appellant had ever complained to him about the way he trained her.

52. On cross-examination, the witness was asked if the tone of his e-mails changed concerning the Appellant after Caudell became the office supervisor in February 2012. He denied same, but explained that Caudell had asked him to send weekly progress reports concerning the Appellant. He informed her of this.

53. The witness also denied that he became frustrated himself with the Appellant whenever she asked him for help. He said that he is the one who followed through with the Appellant's request to transfer to another trainer.

54. With that, the testimony ended.

FINDINGS OF FACT

1. The Appellant was employed by the Agency as a Family Support Specialist I on December 16, 2011, and was terminated during her initial probationary period by letter of April 26, 2012. No cause was given.

2. The Appellant was given three separate weeks of training on the KAMES system. The ability to competently use the system and to navigate the screens between its twenty-three (23) different programs, is the most essential job function of one in her position.

3. Each Progress Report filed by trainers after the Appellant's three weeks of training showed a lack of proficiency in: (1) Navigating or finishing over 50 percent of practice; (2) Unable to complete work in a timely manner; (3) Ability to navigate through screens without error or asking repeatedly for assistance; (4) Entering information accurately and in the correct fields; and (5) Lack of policy knowledge.

4. The Appellant was described by trainer Laura Adams as a "wonderful person" who was dedicated, hardworking and caring about clients. This description was rebutted by no one.

5. The Appellant initially told supervisor Banks that she suffered from anxiety disorder and was taking Xanax and Zoloft. She also mentioned to Mayabb and Caudell she felt anxiety was affecting her work. No medical confirmation of an anxiety disorder was furnished and the Appellant never filed any disability claims with the human resources office nor sought any accommodations from her supervisors.

6. Although Mayabb may have asked once why the Appellant returned to college at a later age, the Hearing Officer finds no discriminatory intent and finds plausible Mayabb's explanation that he was "merely curious."

7. The Hearing Officer finds the Appellant was placed in a difficult situation in which to be adequately trained. First, supervisor Banks was located in a different county, then supervisor Caudell split his time between Lee and Owsley counties, and was absent from the Lee County office most of March. Although Mayabb attempted to help the Appellant to some degree, the Appellant was allowed to flounder somewhat on her own.

8. However, the Hearing Officer finds the underlying reason for the Appellant's termination was her inability to learn and navigate through the KAMES system and its many programs.

9. The Hearing Officer rejects the Appellant's claims that the decision to terminate her was based on her age or any anxiety she felt.

CONCLUSION OF LAW

The Appellant has failed to carry her burden of proof to show that her termination was based upon age or disability discrimination.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **TINA BACK VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2012-151)** 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).

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 ____ day of January, 2013.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. Cary B. Bishop
Hon. Melissa C. Howard