

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-147**

COURTNEY BLAKEMORE

APPELLANT

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

CABINET OF HEALTH AND FAMILY SERVICES

APPELLEE

*** **

The Board, at its regular November 2017 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated October 5, 2017, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Background paragraph 23 and substitute the following:

23. **Howard J. Klein** was the next witness. For the past 17 years, Mr. Klein has been employed by the Cabinet for Health and Family Services, Office of Human Resource Management, Division of Employee Management. He is also the approved Appointing Authority for purposes of testifying for the Appointing Authority of the Cabinet for Health and Family Services.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer as Altered 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 8th day of November, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Lucas Roberts
Ms. Courtney Blakemore
Mr. Jay Klein

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-147**

COURTNEY BLAKEMORE

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 July 18, 2017, at 9:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by KRS Chapter 18A.

The Appellant, Courtney Blakemore, was present and not represented by legal counsel. She was accompanied by her mother, Rosie Blakemore. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Lucas Roberts. Also present as Agency representative was Dominic English.

The issues examined were Appellant's claims of race and gender discrimination when she was terminated from her employment as a Patient Aide I during her initial probationary period at Western State Hospital. The burden was on the Appellant to prove her case by a preponderance of the evidence.

The rule separating witnesses was invoked and employed throughout the course of the hearing. It was noted Appellant had not filed a witness and exhibit list. The Hearing Officer ruled that there would be no surprise or prejudice to the Appellee should Appellant choose to testify or to call witnesses listed on the Appellee's witness list. Furthermore, Appellant would be able to introduce into evidence any documents listed by the Appellee on its exhibit list. The parties waived presentation of opening statements.

BACKGROUND

1. **Courtney Blakemore**, the Appellant, was the first witness. She had been hired December 16, 2015, as a Patient Aide I at Western State Hospital (WSH). She was fired and feels it was the result of discrimination and that she had not been allowed due process of law.

2. Appellant had not reported to her employer that, during her employment, she had been charged with Second Degree Burglary, a Class C felony, which carried a possible sentence

of five to ten years in prison. The employer learned about the charge from the newspaper. She testified she had five days from her return to work on the 20th to report it. The parties stipulated Appellant had been acquitted of the charges of Second Degree Burglary by a jury in Christian County, Kentucky, on June 27, 2017.

3. The incident regarding the charges did not happen on state property and she testified she had no problem with patients at work. She had been told "my work ethic was A-1."

4. On March 29, 2016, she received a written verbal warning from her employer. She did not agree with its contents, so she did not sign it. She was placed on a Performance Improvement Plan (PIP) and thereafter completed all requirements of the PIP. She believes she was supposed to have been re-evaluated, but this never occurred.

5. Appellant claimed she was not the only employee at WSH who had been charged with a crime. There are other employees who have been similarly charged, but still hold their employment positions. She believed the Cabinet should have allowed her criminal case to conclude prior to making a decision on her employment.

6. She testified that Mike Nichols, an African-American male employee of WSH, had been charged with a gun violation in December 2015, off state property. This matter was reported in a newspaper. He was allowed due process and to keep his job, and is still employed at WSH. He was a probationary employee at the time. Subsequently, he was found not guilty of the charge.

7. Gavin Stevenson, a white male, had been "pulled to the carpet four times."¹ He has an anger problem and had been accused of beating patients. The institution kept sweeping it under the rug, advising it was going to work with him. She questioned why the hospital gets rid of their female employees and sweeps problems pertaining to male employees under the rug.

8. "Pierre" (last name unknown), an African-American male, fell asleep on the job. He was also "pulled to the carpet" and maintains his employment.

9. The Cabinet just fired "Kimber" (last name unknown) for a "one-to-one" incident. The Cabinet found out they were wrong, and called her back to work.

10. Candace Calloway, a white female, assaulted a current WSH employee on June 6, 2017, and violated an Order of Protection. This incident had been reported in the Clarksville Now newspaper. Ms. Calloway still maintains her job.

11. Appellant believes publication of her charge resulted in her termination.

¹ Appellant testified that those who conduct investigations at WSH, as well as employees in the Human Resources Department, have offices where the building is carpeted. When an employee is called in to those offices, it is known as being "pulled to the carpet."

12. The next witness for the Appellant was **Dominic English**. Since July 16, 2017, Mr. English has been employed by the Cabinet at WSH as Director of Human Resources. He had been Acting Director since December 2016. Prior to that, he had been Assistant Director of Human Resources.

13. After Appellant had been charged with Second Degree Burglary, she met with Mr. English to discuss the matter. Mr. English testified he would have given her advice how to appeal her termination, as he would have given such advice to any other employee. He would not, however, have given her his opinion or an opinion whether there was discrimination. They talked about her criminal case. Her separation letter was not issued until two days after this meeting. During the meeting they never discussed discrimination. Thereafter, Appellant submitted her written statement explaining the charges against her, which statement was identified as Appellant's Exhibit 1. He did not know there were any issues of discrimination until after Appellant had been terminated.

14. He identified Appellee's Exhibit 1 as the June 22, 2016 Request for Major Disciplinary Action which had been sent to Jay Klein for processing. If an employee is charged with any kind of violent crime or felony, WSH immediately contacts the Office of Human Resource Management (OHRM) and its Executive Director, Jay Klein. OHRM is asked for direction. It is OHRM that makes a final decision on dismissals. The Request for Major Disciplinary Action was sent due to Appellant's charge of Second Degree Burglary.

15. He acknowledged that Candice Calloway, a registered nurse, was a contract employee at WSH. If there were an issue with a contract employee, Mr. English would discuss it with that employee's agency, as that agency is the contract employee's direct employer. If a problem arose with a state employee, he would discuss it with Mr. Klein. WSH gives a recommendation as to discipline of contract employees and it is up to the contracting agency whether or not to institute same.

16. He acknowledged that Mike Nichols was also a contract employee; but Gavin Stevenson was a state employee. Mr. Stevenson had been accused of abuse. After investigations of four to five reported incidents, all allegations were found "unsubstantiated." This nature of allegation occurs regularly in the hospital. More often than not, such allegations are found to be unsubstantiated.

17. At the time of Appellant's separation, WSH had about 250 Patient Aide I individuals on staff. Currently 35 percent of all staff are African-American, with 80 percent of all employees being female and 20 percent male.

18. In this situation, Mr. English provided certain information to OHRM. OHRM requested additional documents when they became available. Those documents were produced and sent to OHRM. OHRM first mentioned separation on June 20, 2016, in its correspondence with the hospital.

19. **Ron Stewart** was the next witness. For the past 10 years, he has been employed by the Cabinet for Health and Family Services at WSH as a Nurse Program Supervisor. He had been Appellant's immediate supervisor on the day shift from April 2016 for a period of two and one-half months through her separation.

20. Appellant would have had a performance evaluation in 2016. He testified it would have been unlikely that Appellant, as a new employee, would have received all "4s" as scores on her evaluation. Upon review of part of Appellant's probationary period performance evaluation of March 29, 2016, he observed and testified that Appellant received all "3s" on that evaluation, which meant she was meeting expectations.

21. Mr. Stewart supervises 48 employees of different job titles, including Patient Aide I. He estimates 90 percent are female and slightly more than 50 percent are African-American, Hispanic or Asian.

22. He does not recall any employees under his supervision, other than Appellant, who had ever been charged with a felony.

23. **Howard J. Klein** was the next witness. For the past 17 years, Mr. Klein has been employed by the Cabinet for Health and Family Services, Office of Human Resource Management, Division of Employee Management. He is also the approved Appointing Authority for purposes of testifying for the Appointing Authority of the Personnel Cabinet.

24. When WSH has employee disciplinary issues, such matters are referred to Mr. Klein. WSH sends a Request for Major Disciplinary Action, which Mr. Klein reviews. He then assigns it to the appropriate branch in the division. That branch drafts a disciplinary letter, which Klein reviews, and if all is correct, he delivers the letter to the appropriate Appointing Authority for signature. At some point in the process he agreed that Appellant should be separated from employment. He approved the separation letter and brought it to the Appointing Authority.

25. Prior to making that recommendation, he had examined materials provided by WSH. Those materials included the Citation and police report, the written verbal warning and the PIP. There were many elements here pertaining to Appellant's behavior with clients and with coworkers. Other elements included time and attendance issues, and that she had been required to sign a form where she agreed to bring in doctor's notes for any absences. One is usually required to sign that form if there is a pattern of absences.

26. Probationary employees have been separated for any one of the items listed above. If Appellant had never been arrested, she might still have been separated. It was very rare, and hardly ever seen by Klein, that a probationary employee would have been required to sign the medical form. It was also very rare to be placed on a PIP during probation. "They gave this lady more chances than I have seen."

27. WSH has not previously informed Klein about any of the incidents through the prior Spring, particularly issuance of the verbal warning. "I have never seen a verbal warning

given to someone on probation...” or issuance of a PIP or required verification of medical information. The Medical Verification form was an extremely small element considered by Klein.² Klein believed that WSH really tried to help Appellant during her probation. The arrest and its attendant fact pattern was another element he considered.

28. While on probation, one can be fired for any reason or no reason, so long as the reason is not discriminatory. No reason is required to be stated in the separation letter. The Cabinet does not wait for a conviction to happen. Sometimes a conviction takes a long time or never happens. One cannot give out a suspension, written reprimand, or verbal warning to a person on probation. One may only be separated from employment. All of the elements considered in this matter presented a “red flag” and each element alone was sufficient to warrant separation.

29. Under the separation letter, Appellant cannot be certified on future registers for employment solely within DBHDID unless DBHDID so requests. He identified Hearing Officer Exhibit 1 as the June 27, 2016 letter advising Appellant she was separated from employment. The letter was signed by J. Alan Sisk, Appointing Authority.

30. He identified Appellee’s Exhibit 2 as the March 29, 2016 verbal warning issued to Appellant. He identified Appellee’s Exhibit 3 as the Performance Improvement Plan issued to Appellant on March 28, 2016. He identified Appellee’s Exhibit 4 as the Uniform Citation issued by the Hopkinsville Police Department against the Appellant, which set out the charge of Burglary, Second Degree and the statement of the police. Klein had considered all of these documents during the process.

31. In deciding whether to dismiss an employee, he also considers what is in the best, legitimate interest of the Cabinet. One being charged with a Class C felony, and working closely with patients at WSH, is a critical concern.

32. At no time did Appellant’s race or gender play a role in Klein’s recommendation.

33. At this point, Appellant raised a question whether she was still a probationary employee on the date of her separation. The Hearing Officer and the parties examined the statutes and the regulations. The Hearing Officer then took judicial notice of the fact that, according to 101 KAR 1:325, a Patient Aide I has a probationary period of nine months and, therefore, Appellant was a probationary employee at the date of her separation.

34. Appellant rested her case. The Appellee presented a Motion for Directed Verdict, to which Appellant responded. The Hearing Officer advised he would hold a ruling on the motion in abeyance.

² Appellant, in argument, stated that due to a shortage of staff, all WSH staff members were required to sign this form. Such argument, however, was not a part of the testimony or evidence.

35. The Appellee rested its case without calling any witnesses and renewed its Motion for Directed Verdict. The Hearing Officer again advised he would reserve a ruling at this time.

FINDINGS OF FACT

1. At the time the Appellant, Courtney Blakemore, was terminated from her position as a Patient Aide I with the Cabinet for Health and Family Services, Department for Behavioral Health, Developmental and Intellectual Disabilities, Western State Hospital, effective June 28, 2016, she was a probationary employee pursuant to 101 KAR 1:325.

2. Appellant had been hired to her position on December 16, 2015.

3. Appellant received a written "verbal" warning for poor work performance and unprofessional behavior, issued by Jan Moore, Program Shift Supervisor, on March 29, 2016 (Appellee's Exhibit 2). As a result, she was issued a Performance Improvement Plan the same day (Appellee's Exhibit 3).

4. On June 17, 2016, Appellant was charged with second Second Degree Burglary in Hopkinsville, Kentucky, and arrested on June 18, 2016 (Appellee's Exhibit 4).

5. Appellant met with Dominic English, Western State Hospital Director of Human Resources, and discussed the charge against her. Subsequently, she advised her employer of this matter by letter dated June 20, 2016 (Appellant's Exhibit 1).

6. The parties stipulated to the following fact: Appellant had been acquitted of the charges of Second Degree Burglary by a jury in Christian County, Kentucky, on June 27, 2017.

7. Disciplinary matters pertaining to contract employees are referred to and decided by that employee's agency. Disciplinary matters pertaining to state employees are referred to Jay Klein, an Appointing Authority. Ms. Blakemore was a state employee.

8. On June 22, 2016, Roger Westfall, Facility Director, sent a Request for Major Disciplinary Action to Jay Klein, Executive Director and Appointing Authority (Appellee's Exhibit 1).

9. Mr. Klein examined all pertinent materials provided to him, including the Citation and police report, written verbal warning, and the Performance Improvement Plan. A probationary employee may be terminated upon the issuance of any one of these three items, as well as for any reason or no reason, so long as the reason is not discriminatory.

10. The consideration of the matter was handled properly by Appellee, as well as by Mr. Klein and his department. Mr. Klein approved the format and substance of the termination letter. The June 27, 2016 letter, signed by J. Alan Sisk, Appointing Authority, was properly

issued and notified Appellant of her termination effective June 28, 2016 (Hearing Officer Exhibit 1).

11. Appellant timely filed her appeal with the Kentucky Personnel Board.

CONCLUSIONS OF LAW

1. Courtney Blakemore, who had been employed as a Patient Aide I by the Cabinet for Health and Family Services, was at all times during her employment through the date of termination, a probationary employee according to 101 KAR 1:325 (Judicial Notice of the Hearing Officer). Pursuant to KRS 18A.005(19):

‘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.

2. As provided in KRS 18A.111(1):

...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.

3. Any employee, applicant for employment, or eligible on a register who believes that he has been discriminated against may appeal to the Board. KRS 18A.095(14)(a). Ms. Blakemore, a probationary employee, appealed to the Personnel Board with claims that she had been terminated due to race and/or gender discrimination. This matter, therefore, is properly before the Personnel Board.

4. Federal law prohibits racially discriminatory employment practices:

It shall be an unlawful employment practice for an employer (1) to fail or refuse or hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, work privileges of employment, because of such individual's race, color, religion, sex, or national origin...42 U.S.C. § 20e-2a.

Likewise, in Kentucky, it is an unlawful practice for an employer to discharge any individual or otherwise to discriminate against any such individual because of an individual's race, color, religion, national origin, sex, age 40 and over. KRS 344.040(1).

5. In order to establish a violation of the Kentucky Civil Rights Act, a party must prove the same elements as required for a *prima facie* case of discrimination under Title VII of Federal law. *Talley v. Bravo Pitino Restaurant, LTD*, 61 Fed. 3d 1241 (6th Cir. 1995).

6. In order to establish a *prima facie* case of discrimination under Title VII, a party must demonstrate:

- (1) She was a member of a protected class;
- (2) She was subject to adverse employment action;
- (3) She was qualified for the job;
- (4) She was replaced by a person outside of the protected class; or, in disparate treatment cases, this element may be replaced with the requirement that the plaintiff show she was treated differently from similarly-situated individuals.
McDonald-Douglas Corp. v. Green, 411 U.S. 792, 1993 S. Ct. 1817, 36 L. ed. 2d 688 (1973); *PolICASTRO v. Northwest Airlines, Inc.*, 297 Fed. 3d 535, (6th Cir. 2002); *Perry v. McGinnis*, 209 Fed. 3d 597, 601 (6th Cir. 2000).

7. As an African-American, Courtney Blakemore is a member of a protected class for the purposes of Title VII.

8. The evidence also shows that Ms. Blakemore, having been terminated from her employment position with the Commonwealth of Kentucky, was subject to an adverse employment action.

9. It is undetermined from the facts whether Ms. Blakemore was qualified for the position. The evidence shows that during the probationary period, Ms. Blakemore had been issued a written verbal warning and a Performance Improvement Plan; that she had been required to sign a form where she agreed to bring in doctors' notes for any absences; and that she had been cited and charged with, and later acquitted of, Second Degree Burglary. Howard J. Klein, with the Office of Human Resource Management, Division of Employee Management, testified that, in his experience, probationary employees have been separated from employment for any one of the items listed above. Even if Appellant had never been arrested, she might still have been separated. Furthermore, the Cabinet was prohibited from giving out a suspension, written reprimand or verbal warning to anyone on probation. The only remedy for one or all of the above behaviors was separation from employment.

10. Ms. Blakemore testified that she believed she was subject to disparate treatment. She testified that Mike Nichols, an African-American male probationary employee of WSH, had been charged with a gun violation off state property, but is still employed at the facility. That Gavin Stevenson, a white male, had been "pulled to the carpet four times", had been accused of beating patients, but remains employed; Candace Calloway, a white female employee, assaulted a current WSH employee and violated an Order of Protection - Ms. Calloway still maintains her job; "Pierre" (last name unknown to Appellant), an African-American male, fell asleep on the

job, but maintains his employment; and an employee named "Kimber" (last name unknown), was fired; that the Cabinet reversed its decision and returned her to work.

11. Dominic English, Director of Human Resources at WSH, testified that a contract employee is an employee of a non-governmental agency, and disciplinary measures for such an employee may only be instituted by that separate agency. He stated that Candace Calloway, a Registered Nurse, was a contract employee, as well as Mike Nichols. While Gavin Stevenson was a state employee, each accusation against him had been investigated and each of the allegations were found "unsubstantiated." Therefore, the Agency had no grounds to terminate Mr. Stevenson.

12. Unfortunately, the Hearing Officer was presented with no other testimony or documentary evidence pertaining to "Pierre" or "Kimber" and, therefore, feels the statements made by Appellant pertaining to these two individuals were somewhat less than credible.

13. As the evidence has shown that Ms. Blakemore had a history of corrective and disciplinary measures during her probationary period, and apparently did not receive disparate treatment nor had she been treated differently from similarly-situated individuals, she failed to establish a *prima facie* case of discrimination based on race or gender.

14. Assuming *arguendo* that Appellant had made a *prima facie* case of discrimination, then it would have been up to the Cabinet to articulate a legitimate, non-discriminatory reason why the adverse job action was taken. *Kentucky Center for the Arts v. Handley*, 827 SW 2d. 697 (Ky. App. 1992). Following the Cabinet's articulation of an alternate explanation for its action, the burden of proof then shifts to the Appellant to show that such explanation is "pre-textual." *Williams v. Wal-Mart Stores, Inc.*, 184 SW 3d. 492, 497 (Ky. 2005).

15. The testimony of Mr. Klein showed clearly that the Cabinet had articulated a legitimate, non-discriminatory, reason why Ms. Blakemore was separated from her employment position during the probationary period. There was no evidence to show that such explanation by the Cabinet was "pre-textual." The Hearing Officer believes the Appellee articulated a legitimate, non-discriminatory reason for its action.

16. Appellant has failed to prove by a preponderance of the evidence that she had been subject to either race or gender discrimination when she was terminated from her employment as a Patient Aide I during her initial probationary period at Western State Hospital.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **COURTNEY BLAKEMORE V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2016-147)** 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 Roland P. Merkel** this 5th day of October, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Lucas Roberts
Ms. Courtney Blakemore