COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2012-078, 2012-080, 2012-177 AND 2012-182

VICKIE BROCKMAN **APPELLANT**

VS.

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

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

** ** ** ** **

The Board at its regular April 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 6, 2014, (Appellant's exceptions returned as untimely) 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 16th day of April, 2014.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Mary Tansey
Hon. Robert Bertram
Hon. Anna Whites
J. P. Hamm

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

This matter came on for evidentiary hearing on July 24 and 25; August 30; September 5 and 6; and October 14 and 25, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Vickie Brockman, was present and represented by the Hon. Robert Bertram and the Hon. Anna Whites. Appellee, Cabinet for Health and Family Services, was present and was represented by the Hon. Mary S. Tansey.

BACKGROUND

1. Vickie Brockman was a classified employee with status, who was employed as a Social Service Clinician I, in the Department for Community Based Services, Russell County office.

2. By letter from Howard J. Klein, Appointing Authority, Cabinet for Health and Family Services, dated June 14, 2012, Appellant was informed of her dismissal. Said letter is attached hereto as Attachment 1.

3. Appellant filed Appeal No. 2012-78, on March 30, 2012, alleging that her supervisor, Melissa Dudley, had improperly changed her timesheets without Appellant's signature, resulting in unpaid leave. Appellant filed Appeal No. 2012-80 on March 30, 2012, alleging that she was the victim of a hostile work environment. Appellant filed Appeal No. 177 on August 3, 2012, appealing the decision of the Cabinet to withhold payment of her accrued annual leave upon her termination. Appellant filed Appeal No. 2012-182 on August 6, 2012, appealing her dismissal.

4. By Interim Order dated December 28, 2012, the above four appeals were consolidated, and it was established that the issues for the evidentiary hearing would be as follows:

A) Appellee bears the burden of proof to demonstrate the dismissal was neither excessive nor erroneous and was taken for just cause.

B) The burden of proof on the issue of Appellant's allegation that her supervisor falsified her timesheets is first upon Appellant to establish that her timesheets were changed. If the Appellant does so, the burden will shift to Appellee to show there was just cause for changing her timesheets.

C) The burden of proof shall be upon Appellant to establish that she was subjected to a hostile work environment, and that such a hostile work environment constituted an illegal penalization as the term is defined at KRS 18A.005(24) or illegal discrimination as set forth in KRS 18A.095(12) and (14).

D) The burden of proof shall be upon the Appellant to establish that she was penalized without just cause by the decision to withhold payment of her annual leave.

5. The Cabinet called its first witness. **Jenny Young** is a Human Resources Administrator in the Office of Human Resource Management (OHRM), a position she has held for the past ten years. Her duties include the review and investigation of Requests for Major Disciplinary Actions, and the preliminary determination regarding the appropriate level of discipline to be taken.

6. Young stated that after she first receives a request for major disciplinary action, she conducts an investigation. She then looks at actions the Cabinet has taken in the past for similar infractions and drafts a letter informing the employee of the level of discipline the Cabinet intends to take. This letter is reviewed by Young's supervisor (Shawn Estep), as well as the Cabinet's Legal Services and Equal Employment Opportunity (EEO) departments. The letter then goes to the Appointing Authority for final review.

7. Young testified she was the Human Resource Administrator assigned the Request for Major Disciplinary Action brought against the Appellant, who was employed in the Russell County DCBS office as a Social Services Clinician I. After conducting an investigation into the charges against Appellant, it was determined that dismissal was the appropriate action. After the intent to dismiss letter was issued, Appellant requested a pre-termination hearing, which was held on May 22, 2012. At this hearing, Appellant asserted that her supervisor, Melissa Dudley, had "harassed" her. Young found Appellant's allegations to be unfounded, and on June 14, 2012, the letter of dismissal was issued to Appellant. The charges against Appellant cited in the dismissal letter were poor time and attendance and failure to timely submit timesheets; falsified timesheets; and failure to timely complete Continuous Quality Assessments (CQA).

8. Young was asked to explain why she concluded that Appellant had failed to timely complete CQAs. Young responded that Appellant had been placed on "protective time" for four months, from September 12, 2011 to December 27, 2011. During that time, Appellant was assigned no new cases or home visits. Her only job was to finish documentation of her paperwork. She was given a voice-activated recording system so that she could dictate her case notes rather than type them. Her supervisor, Melissa Dudley, set the expectation that Appellant would complete three CQAs per day. Young stated that Appellant completed, on average, one CQA per day while on protected time. At the end of the assigned protected time, Appellant still had ten CQAs past due.

9. Young was asked to address why it is necessary for Cabinet employees to fill out timesheets. She answered that federal law requires that employees be paid for time worked. If an employee fails to properly fill out a timesheet, it becomes the supervisor's responsibility to do so. If that occurs, the employee is given an opportunity to review the timesheet the supervisor has completed.

10. On cross-examination, Young was asked how she determined when Appellant arrived at work. Young explained that she reviewed the "Sign In/Out" sheets used in the Russell County DCBS office. Young noted that on some days Appellant had not signed herself in, so someone else---the front desk worker or her immediate supervisor—signed the sheet for her. Young admitted that she had no personal knowledge of Appellant's actual arrival time, and that she relied on the time and attendance documents she reviewed.

11. Young stated that on numerous occasions Appellant had recorded on her timesheet that she worked a "straight seven and a half hours," but in fact, the "Sign In/Out" sheet revealed that Appellant had actually arrived late to work. This was done without prior notification to or approval by her supervisor, as required by Cabinet Standard Operating Procedure (SOP). Young elaborated that even if Appellant had stayed later in the evening, this change in schedule should have been noted on her timesheet as follows: The late arrival should have been coded as unauthorized leave, and the extra time worked in the evening should have been coded as overtime. However, Young noted, as with leave time, overtime must be authorized in advance by the employee's supervisor.

12. Young stated that the Cabinet had "zero tolerance" for falsification of records, and any employee who is found to have done so is automatically terminated. She added that "inaccurate recording on a timesheet is considered to be a 'falsification.'" If Appellant had arrived to work late (without the prior approval of her supervisor), and her timesheet did not note that tardiness as "unauthorized leave," Young would consider her timesheet to be "falsified" because "it was not correct."

A. Young was asked to address what prior disciplinary actions had been taken against Appellant. Appellant had received a written reprimand on July 30, 2010 for poor time and attendance issues (tardiness); a two-day suspension on July 30, 2010 for Lack of Good Behavior (working overtime without prior authorization) and Unsatisfactory Performance of Duties (failure to timely complete CQAs); and a ten-day suspension on April 5, 2011 for Lack of Good Behavior (poor time and attendance) and Unsatisfactory Performance of Duties (failure to timely complete CQAs).

B. Young was asked if she was aware that Appellant suffered from medical problems. Young replied that she had seen a few doctor's notes attached to some of Appellant's timesheets, and there had been "some mention" of Appellant's health issues at the pre-termination hearing.

13. **Melissa Dudley** is a Team Supervisor in the Russell County DCBS office. She is responsible for the supervision of staff members assigned to caseloads involving child abuse and neglect. Dudley was Appellant's first-line supervisor.

14. Through Dudley's testimony, the Russell County DCBS office call-in policy was introduced. The policy states that if emergency leave is needed, staff is to call in no later than 8:15 a.m. It is up to the supervisor to approve or deny leave based on circumstances of the type of leave requested, or office coverage needs. If this policy is not followed, leave will not be approved, and the absence will be coded "unauthorized leave without pay."

15. Dudley prepared Appellant's 2009 evaluation for which Appellant received an overall rating of "Good." However, on April 28, 2009, a Performance Improvement Plan (PIP) was implemented. The issues the PIP addressed were timely completion of investigations, assessments, and case plans.

16. Dudley completed Appellant's 2010 Performance Evaluation, for which Appellant received an overall rating of "Needs Improvement." That year Appellant was put on PIPs on April 26, 2010 and August 2, 2010 to address her lack of timely completion of case documentation. The August 2, 2010 PIP also addressed the proper use of overtime.

17. Dudley completed Appellant's 2011 Performance Evaluation for which Appellant received an overall rating of "Needs Improvement." On September 12, 2011, Appellant received a PIP for failure to timely complete CQAs, and time and attendance issues. At this time Dudley put Appellant on "protective time," meaning that she would not be given on-call duties or new cases in order for her to focus solely on finishing documentation of her previously assigned cases. Appellant was also put on notice that if she arrived late to work, it had to be coded on her timesheet as "unauthorized leave without pay."

18. Dudley explained that protected time was an opportunity for Appellant "to sit at her desk with no interruptions, no calls, no client conferences, so that she could complete her work assignments." Dudley testified that she discussed the situation with Appellant, who assured her that all the "leg work" in her overdue cases had been completed, she just needed to input information into the TWIST system. Dudley stated Appellant promised her that if she had no interruptions during protected time, she would be able to input all the necessary data. As of 8/29/11, Appellant had 82 cases past due, 55 of which were past due over 6 months. Dudley verbalized to Appellant her expectation that she would complete 3 cases per day, which would bring Appellant into "compliance" by October, 2011.

19. As for the time and attendance issues discussed in the 9/12/11 PIP, Dudley informed Appellant that if she arrived to work late, she could not make up the missed time by staying after 4:30p.m. The PIP also stated that if Appellant arrived to work after 8:00 a.m., that time would be coded as unauthorized leave without pay. Appellant was also put on "verification of personal leave," meaning that any unapproved leave would require a physician's note.

20. At this juncture, Dudley's testimony was temporarily interrupted, and by agreement of the parties, two witnesses were taken out of order.

21. **Melissa Corbin** appeared telephonically. She is employed as an LPN at Taylor Rural Health, a position she has held since 1998. Her duties include administering medications, processing lab work, and drawing blood. Corbin was asked if she knows Appellant. Corbin testified that "her name was familiar."

22. Corbin was asked to identify Appellee's Ex. 64A, "Certificate to Return to Work," dated March 3, 2011. Corbin stated that it was a "speed note," that is, a note pad the doctor can use for writing a quick note certifying that a patient can return to work or school. She identified both her handwriting, and the signature of Dr. Phillip Aaron. The note, under the letterhead of "Taylor Rural Health" reads: (Appellant) "was put on an anti-anxiety medication and this med (sic) may make her sleepy or be in a deeper sleep and be unable to arouse like she should from sleep."

23. Corbin stated that the anti-anxiety medication Appellant was prescribed was Xanax, 0.5 milligrams.

24. Corbin explained that the original of the "Certificate to Return to Work" is given to the patient, and a copy is kept in the office.

25. **Dr. John Langefeld** is the Chief Medical Officer of CHFS, Department of Medicaid Services. His job duties include the general oversight of Medicaid benefits and managed care for the Commonwealth of Kentucky. Dr. Langefeld is a graduate of the University of Louisville School of Medicine, and has been licensed to practice medicine in Kentucky since 1983. He has 30 years of clinical care experience, and his past employment includes a tenure in the 1990s as a Medical Director of a physicians' group. Dr. Langefeld testified that throughout his career he has routinely reviewed medical records.

26. Dr. Langefeld stated that he had reviewed the medical records of Appellant, including the "Certificate to Return to Work" from Taylor Rural Health, introduced as Appellee's Ex. 64A.

27. Dr. Langefeld was asked if he had formed an opinion of Appellant's health condition. He answered that he had "formed some thoughts," by reviewing Appellant's medical records, focusing primarily on the time frame during which the Certificate to Return to Work was written. Based on the records he reviewed, Dr. Langefeld made the following summary of Appellant's medical history:

> Appellant was seen by Dr. Aaron on November 8, 2010. Her chief complaints were: "sinus, headache, cold, chills, earache, right knee pain." Her diagnosis was sinusitis and depression. Appellant was prescribed Xanax, Aciphex, and Prozac.
>
> On December 7, 2010, Appellant complained of headaches, sinus pressure, earache, and coughing. Her diagnosis was: sinusitis, anxiety, and depression. Appellant was prescribed Lortab, Wellbutrin, and Xanax.
>
> On January 6, 2011, Appellant complained of right knee and calf pain. Her diagnosis was "calf tenderness and anxiety." An ultra-sound of Appellant's leg was ordered to assess for a possible blood clot. The results were negative.

28. The date of the Certificate to Return to Work was March 3, 2011. However, Dr. Langefeld could not find any documentation in Appellant's medical history that correlated to the language of the speed note. That is, he did not find any conversation documented in the records in which Appellant expressed concerns of drowsiness or an inability to wake up in the morning. Dr. Langefeld could not identify any indication of a complaint by Appellant that her medications were preventing her from getting out of bed. "I could not identify a discussion or any recommendation regarding this issue," Dr. Langefeld testified.

29. Appellant's next documented doctor's visit was on March 28, 2011, at which time Appellant was diagnosed as suffering from: "allergies, knee pain, headaches and bronchitis."

30. On cross-examination, Dr. Langefeld was asked if use of Xanax could cause drowsiness. Dr. Langefeld answered: "It varies by individual, but, yes, it can cause drowsiness."

31. Dr. Langefeld noted that the March 3, 2011 Certificate to Return to Work was the only note that did not have a correlating office visit documented. He explained: "Typically, if an event—such as an office visit or telephone call—occurs, there is usually documentation concurrent with it."

32. The second day of the evidentiary hearing was held on July 25, 2013. The Appellee Cabinet called its next witness out of order. **Howard J. Klein** is Division Director, Division of Employment Management, CHFS. His duties include the oversight of three branches: Training, Equal Employment Opportunity, and Disciplinary Matters.

33. Klein explained how a request for disciplinary action is processed. When the request is received by his office, it is assigned to a Human Resources Administrator in the Disciplinary branch, who investigates the matter and decides on the appropriate level of discipline. If the case is a dismissal, the Human Resources Administrator drafts an Intent to Dismiss letter, which is reviewed by the legal services office, and then the EEO branch. Klein then reviews "the final product."

34. Klein was asked what documents he reviewed before he signed the dismissal letter. He answered that he "did remember looking at some of the initial timesheets and attempts to get them corrected and Appellant's refusal to sign them." Klein added that he could not remember if he "looked at every single one, but did look at a lot of them."

35. Klein was asked what "falsification" means. He answered that, in the context of this case, "falsification is intentionally putting down incorrect time in order to get paid for a full day's work without working a full day or using the appropriate leave." Klein added that "some employees may actually work 7.5 hours, but if they don't fill out the CHFS-2 correctly—it must document your actual hours—they will get corrective action but not dismissal. For instance, working through lunch or staying late is considered overtime, which needs prior approval unless there is an unforeseen circumstance like a client, whom you need to see, coming into the office at 4:29 p.m." Klein continued: "Working 7.5 hours, but not accounting for it correctly, that wouldn't be a termination, but a corrective action. So if you are 15 minutes late but you work an extra 15 minutes, that's a little problem. It's an incorrect filling out of a timesheet."

36. Klein was asked: "Assume an employee came in twelve minutes late, is it appropriate for her to work overtime without approval?" Klein answered: "No, it is not appropriate."

37. Klein stated that "by regulation, if an employee, such as the Appellant, is terminated for misconduct, the employee will not receive her annual leave pay out."

38. Klein was asked to address the issue of ADA accommodations, specifically, whether it was incumbent upon supervisors to initiate ADA accommodations for an employee. Klein responded: "No, we don't want supervisors to try to accommodate employees on their own. The supervisor can direct the employee to the appropriate ADA form to begin the process."

39. Klein was asked if CHFS had a general policy concerning how far in advance an employee must request leave. He replied, "No, because the Cabinet is so big, different departments have different needs." He added "it is more reasonable to grant leave without too much notice if the employee is doing office work."

40. The Cabinet re-called **Melissa Dudley**. Dudley was asked to address her use of a PIP for the employees she supervises. She explained that the PIP helps the employee "focus on what needs to be completed." She stated that while the PIP is used often in her office, she does not need to implement one for every employee. As for the putting Appellant under a PIP, Dudley denied she had done so to harass Appellant. "It was an attempt to give her a manageable list of tasks to complete. The intent was to outline for her the most critical or important cases. It was meant to assist her in getting back on track." The expectation of the September 12, 2011 PIP, which put Appellant on protective time, was for Appellant to complete 3 tasks per day. Dudley expected her to finish all of her past due casework roughly by November. However, as of November 28, 2011, Appellant still had 32 cases past due (12 of which were older than 6 months). By Dudley's estimation, Appellant only completed, on average, one task per day.

41. Dudley was asked to address the matter of Appellant's timekeeping documentation. Dudley testified that on many occasions between May and December, 2011, Appellant came in late, usually 10 to 15 minutes late, without calling in first. She would then write down that she had worked 7.5 hours that day, and would not "code" the amount of time she was late as "unauthorized leave without pay." Dudley would then have to go back and correct Appellant's timesheets to reflect that Appellant had actually worked less than 7.5 hours.

42. After months of Appellant coming in late and not recording her tardiness properly on her timesheet as "unauthorized leave without pay," Dudley decided to take the situation to the "regional level," and contacted SRAA Myrna Roy. Roy compiled the necessary information and sent the Office of Human Resource Management a Request for Major Disciplinary Action.

43. The Cabinet re-called **Jenny Young**. Young was asked to address the documentation she examined investigating Appellant's case. Young explained that initially she looked at Appellant's timesheets and noticed that not every document had been properly signed or initialed by Appellant's supervisor, Melissa Dudley. Young sent those time-keeping records back to Dudley to ensure that the errors were corrected. Young testified that a small number of the documents had actual time-recording errors, such as on one occasion when Appellant had worked .25 hours and not been paid, or once when she had been paid for time she had not worked. Young did not remember every instance of when this type of error occurred. Young

added that her review of Appellant's time and attendance records were essentially "an audit—I corrected what was incorrect."

44. Once these documents were corrected, Dudley took them to Appellant and asked her to sign them, which she refused.

45. Young stated that she first received Appellant's time and attendance documents in January 2012. "It was clear from the Sign In/Out sheet that Appellant was coming in late. There were a few instances when she did not sign in at all. On those occasions, I took her supervisor's word regarding her arrival time." As for lunch breaks, Young noted that Russell County DCBS office does not use a sign in/out sheet for lunch. Instead, they use a white board on which workers note their absence due to lunch breaks or home visits.

46. On cross-examination, Young was asked if Appellant's original timekeeping records were changed in order to substantiate a case against Appellant. Young answered that the documents were not re-created but corrected. She continued: "Some of the original documents were missing signatures."

47. The third day of the evidentiary hearing was held on August 30, 2013. Appellee re-called **Melissa Dudley**, Appellant's first-line supervisor. Through Dudley's testimony, Appellant's time and attendance records for April 22, 2011 to December 31, 2011 were introduced. Dudley's testimony can be summarized as follows:

1) On 41 occasions, Appellant arrived to work late and did not account for her tardiness on her timesheet. Dudley corrected Appellant's timesheet and gave her .25 hours unauthorized leave without pay for these dates. (See **Addendum to Recommended Order Attachment A,** p. 1.)

2) Appellant did not fill out a timesheet for the following pay periods: 4/15-4/30/11; 7/1-7/15/11; 7/15-7/30/11; and 12/15-12/30/11. During this time frame, Appellant arrived to work late on approximately 20 occasions. Dudley created a timesheet for Appellant for these pay periods, and coded these tardies as unauthorized leave. (See **Addendum to Recommended Order Attachment A,** p. 2.)

3) For the pay periods that Appellant did fill out a timesheet, additional errors in her time-reporting were made as follows:

5/16: Appellant coded 7.5 hours as regular work, but she had previously requested annual leave.

5/31: Appellant called in at 8:40, saying she was not coming in. Appellant coded the day as 7.5 annual leave; Dudley revised the timesheet to reflect .75 hours of unauthorized leave without pay and 6.75 of annual leave.

6/10: Appellant called in at 10:32 to say she had to get an emergency shot and would not be in.

Appellant wrote down 7.5 hours of annual leave; Dudley revised it to reflect 2.5 unauthorized leave without pay, and 5 hours of annual leave.

6/16: Appellant arrived to work 15 minutes late, then left at 10:15 a.m., and returned at 2:00 p.m. Appellant told Dudley she had to go back to her home to let in an air conditioning repairman. Appellant coded the day as 7.5 regular work hours. Dudley revised her timesheet to reflect 2.75 unauthorized leave without pay, and 4.75 regular hours.

6/24: Appellant called in at 9:42 and said she was not coming in. Appellant coded her day as 7.5 hours annual leave. Dudley revised her timesheet to reflect 1.75 hours unauthorized leave without pay, and 5.75 hours sick leave.

6/28: Appellant called in sick at 9:46, and did not come in. Appellant coded her day as 7.5 annual leave. Dudley revised her timesheet to reflect 1.75 unauthorized leave without pay, and 5.75 sick hours.

8/4: Appellant called in at 10:03 a.m., and said she overslept and would be in as soon as possible. Appellant coded her day: 4.5 annual leave, 3 hours regular work, and 2.5 hours overtime. Dudley revised her timesheet to reflect: 2 hours unauthorized leave without pay, 2.75 compensatory time, and 2.5 hours overtime.

8/8: Appellant called in sick at 8:32 a.m. Appellant coded her day as 7.5 annual leave. Dudley revised her timesheet to reflect .5 unauthorized leave, and 7 hours sick leave.

9/2 Appellant called in at 12:02, and arrived at 12:45. Appellant coded her day as a 7.5 regular work day. Dudley revised her timesheet to reflect 4 hours unauthorized leave without pay, 2.75 regular work hours, and .75 compensatory time.

9/9 Appellant called in at 8:27 and said she had just awoke. She arrived to work at 11:08 a.m. Appellant put down 2 hours of comp time, 5.5 hours of regular time on her timesheet. Dudley corrected her timesheet to reflect .5 hours unauthorized leave (for 8:00 to 8:30), 2 hours comp time, from 8:30 to 11:00. Dudley could not remember why she did give her 2.5 hours of comp time.

9/13 Appellant had approved leave from 8:00 a.m. until 9:15 a.m., but she came in at 9:30. She gave Appellant .25 unauthorized leave. There is no notation on the CHFS2 that Appellant had leave that day. Dudley could not explain the discrepancy.

9/27 Appellant called in at 10:27 a.m., saying that she had taken a muscle relaxer and just awoke. She arrived in the office at 11:30 a.m. Appellant recorded her time that day as 7.5 hours of regular work. Dudley corrected the timesheet to reflect 2.5 hours of unauthorized leave (8:00 to 10:30 a.m.), and one hour of comp time (10:30 to 11:30).

10/3 Appellant came in 20 minutes late, and noted 7 hours of regular work time. Dudley corrected the timesheet to reflect .25 unauthorized leave, and 7.25 regular work time.

10/21 Appellant called in at 10:00 a.m., and said she had just awoke. She arrived at 11:07 a.m. Appellant recorded 3 hours of comp time, 4.5 hours of regular time. Dudley corrected her timesheet to reflect 2 hours of unauthorized leave (8:00 to 10:00 a.m.), and 1 hour of comp time.

10/24 Dudley could not remember why she had corrected Appellant's timesheet to reflect 45 minutes of unauthorized leave, when the dismissal letter stated Appellant had arrived 15 minutes late from approved leave.

11/3 The dismissal letter stated that Appellant arrived to work at 9:53 a.m. without first calling in. Appellant recorded on her timesheet 3 hours of comp time, and 4.5 hours of regular work. Dudley corrected the timesheet to reflect 2 hours of unauthorized leave, and one hour of comp time. Dudley could not recall if Appellant had called in at 9:53 or arrived to work at that time.

11/7 Appellant arrived to work 12 minutes late. Appellant recorded that she worked 7 hours of regular time that day. Dudley corrected her timesheet to reflect that she worked 7.25 hours, and had .25 hours of unauthorized leave.

11/15 Appellant arrived 15 minutes late from lunch. Appellant recorded on her timesheet that she worked 7.5 regular hours. Dudley corrected her timesheet to reflect 7.25 regular hours and .25 unauthorized leave.

11/22 Appellant called in at 11:58 a.m., and arrived at 1:05 p.m. Appellant recorded on her timesheet 4 hours comp time, 3.5 regular time. Dudley corrected her timesheet to reflect 4 hours of unauthorized leave and 3.5 hours of regular time.

11/29 Appellant called in at 11:44 a.m. (saying she had taken medication and just awoke), and arrived at 1:10 p.m. Appellant recorded on her timesheet 4 hours of comp time, and 3.5 regular time. Dudley corrected her timesheet to reflect 3.75 unauthorized leave and 3.75 regular hours.

12/1 Appellant called in at 12:30 (saying she had taken medication and just awoke), and arrived at 1:16 p.m. Appellant recorded on her timesheet 7.5 hours of regular work. Dudley corrected her timesheet to reflect 4.5 hours of unauthorized leave (8:00 to 12:30 p.m.), .75 comp time, and 2.25 regular time.

12/5 Appellant arrived to work at 1 p.m., and told Dudley neither her home nor cell phone was working. Appellant recorded on her timesheet 4 hours comp time, 3.5 regular work. Dudley corrected her timesheet to reflect 4 hours of unauthorized leave (8:00 to 12:00 p.m.; 12:00 to 1:00 p.m. was considered "lunch").

12/15 Appellant arrived 15 minutes late to work, and 15 minutes late from lunch. Appellant recorded on her timesheet 5.5 regular work. Dudley corrected her timesheet to reflect 7 hours of regular work and .5 of unauthorized leave.

4) For the time periods when Appellant did not fill out a timesheet (4/15-30/11; 7/1-7/15/11; 7/15-7/31/11; 12/15-12/31/11, Dudley created a timesheet for her and coded additional tardiness as unauthorized leave without pay as follows:

7/18 Appellant called the office at 12:35 p.m. and informed Dudley she had taken a muscle relaxer and had just awoke. She arrived at 1:35. Dudley coded Appellant's time that day as 4.5 unauthorized leave without pay, 2 hours comp time, 1 hour regular work. Dudley could not remember why she gave Appellant 2 hours comp time.

7/21 Appellant called in at 8:33 a.m. and arrived at 12:30. Dudley coded this tardiness as .5 hours unauthorized leave without pay, and 4 hours comp time.

7/22 Appellant came in an hour late, but followed the call-in policy. Dudley coded this tardiness as 1 hour comp time. Appellant arrived 45 minutes late from lunch. Dudley coded that tardiness as .75 hours unauthorized leave without pay.

7/28 Dudley testified Appellant came in 2 hours late without calling in first. Dudley coded that time as 2 hours of unauthorized leave without pay.

12/20 Appellant called Dudley at 11:35 and said she had a migraine and had just awoke. Appellant said she would report to work at 12:30, but she arrived at 12:50 p.m. Dudley coded this tardiness as 3.5 hours unauthorized leave without pay, and 1.25 hours of comp time.

12/22 Appellant called in at 9:00 a.m. and said she would be in at 11:00; she reported to work at 11:20. Dudley coded this tardiness as 1.25 hours of unauthorized leave (8:00 to 9:00 and 11:00 to 11:20).

48. Dudley was asked to recall the meeting that occurred with Appellant and Myrna Roy, SRAA, to discuss the Notice of Request for Major Disciplinary Action on January 6, 2012. Dudley stated that at that meeting, Roy brought up the idea of Appellant going on "flextime," that is, having her work day begin at 8:30 a.m. instead of 8:00 a.m. Dudley testified that Appellant responded that "she had been on flex time before, and she couldn't arrive to work on time then either." Through Dudley's testimony, Appellant's "Personalized Work Schedule Agreements" from 2000 to 2011 were admitted into the record. The first agreement, signed June 29, 2000, (when Larry Kimmler was her first-line supervisor), set her schedule as a "Five-Day Work Week with Flextime," specifically, Appellant was to work 8:30 a.m. to 5:00 p.m., with one hour for lunch. On January 10, 2005, Appellant's work schedule was changed to "Regular Work Hours," that is 8:00 a.m. to 4:30 p.m., with an hour for lunch. That schedule was altered on August 19, 2009, when Appellant went back to "flextime," and was scheduled to work 8:30 a.m. to 4:30 p.m., with a half-hour for lunch. On March 1, 2010, the agreement was reverted back to "Regular Work Hours," and on July 19, 2011, her specific break times and lunch hour were designated in the agreement. Dudley testified that placing Appellant back to a regular workday in March 2010, was Dudley's decision: "She was not coming in at 8:30 when she was on flextime. Flextime is a privilege and she was abusing that privilege."

49. Dudley was asked to address how much leave Appellant was authorized to take in 2011. Dudley testified that Appellant took 270.25 hours of leave (including sick, compensatory and annual leave). In 2012, Appellant took 185.25 hours of leave, most of which was sick leave. Appellant was dismissed effective June 14, 2012.

50. Dudley was asked to address Appellant's request for voice-activated data entry software. Dudley stated that upon Appellant's request, Dudley gave her a "CHFS Accommodation Request Form," which Appellant submitted on May 11, 2011, and an "Interactive Process Questionnaire" for her physician to fill out. By early June, Appellant had still not turned in the doctor's questionnaire, but the E.E.O. officer told Dudley to go ahead and order the equipment. On June 8, 2011, the microphone arrived. It did not meet Appellant's needs, so Dudley ordered a second one later that same month.

51. According to her Accommodation Request Form, Appellant had requested the voice-activated software because sitting at the computer put a strain on her back, neck, and shoulders. On August 16, 2011, Bill Daniels, in the Cabinet's EEO Compliance Office, received the faxed copy of Appellant's "Interactive Process Questionnaire," under the signature of Dr. Phillip Aaron, dated May 25, 2011. On the questionnaire, Dr. Aaron describes Appellant's "impairment" as "unable to sit in position to type at computer."

52. As for Appellant's complaint that the medication prescribed to her by Dr. Aaron rendered her unable to awake on some mornings, Dudley testified that the "Certificate To Work," introduced as Appellee's Exhibit #64, and dated March 3, 2011, was not given to Dudley by Appellant until November 22, 2011.

53. Dudley addressed Appellant's Performance Evaluations for the years 2001 and 2002. These evaluations were performed by Appellant's previous supervisor, Larry Kimmler. On the 7/29/02 (2nd Interim evaluation), Kimmler wrote that Appellant needed to be "more timely with her CQAs." He also noted that Appellant "needs to work harder at insuring that she always gets to work on time."

54. On cross-examination, Dudley was asked how she knows when an employee arrives at work. Dudley stated that she stands watching at the front door the majority of the time. She stated she could also observe the front door from the back porch of the office when she took smoke breaks. She admitted that there was no "sight-line" from her office to either the front door, or Appellant's office door.

55. Dudley was asked if she kept a log of all phone calls received from employees. She stated that if an employee has an ongoing time and attendance issue, she documents when that employee calls in sick or late. She makes these notations on whatever paper or post-it notes are handy on her desk, and stated that they are made at the time the event occurred. Dudley stated that she also occasionally writes attendance notations on the Sign-In sheet. Dudley testified that the use of these notations, plus her own personal observations, is how she kept track of Appellant's time and attendance.

56. Dudley was asked how an employee should note their arrival time on the Sign In sheet if they arrived at 8:00 a.m. but went straight to their office without signing in. Dudley stated that the sign in time should be 8:00 a.m. She added, however, that it became a pattern with Appellant that she would not sign in. Dudley stated: "I would tell her to sign in, but she wouldn't. So I had to do it for her."

57. Dudley stated that the Russell County office employees were supposed to sign in and sign out for the day, but that in practice, employees often did not sign out. When an employee failed to sign out, "it was up to the employee to accurately report their time" on their timesheet. Dudley assumed that if no prior request for overtime was made, the employee had left at their regularly scheduled departure time, which in Appellant's case was 4:30 p.m.

58. Dudley was asked to explain her office's policy on sick leave. Dudley answered that in accordance with Personnel Policy 5.13, all sick leave—except in an emergency—must be requested in advance. Dudley was asked how she would handle an employee calling in sick the morning of a regularly scheduled work day. Dudley answered that if calling in was a "rare occasion," she would code the absence as sick leave. "But if an employee habitually has a time and attendance issue, that is different."

59. Dudley was asked if she was aware of a policy allowing her to alter an employee's timesheet. She responded: "I know it is my responsibility that timesheets are accurate. If someone presents to me a timesheet I know is not accurate, I cannot sign it. So I fill it out to the best of my knowledge." Dudley stated that she showed Appellant the timesheet she had revised for her "at or near the time they were completed." She stated she would explain the

error on the timesheet to Appellant and give the corrected document to her to sign. She discussed the Cabinet's call-in policy at least every pay period. If Appellant had claimed she had been "caught" by a client or community partner in the parking lot before her actual arrival in the office, Dudley would not penalize her for that, and would code the tardiness as regular work time.

60. Dudley was asked if she made sure every employee arriving more than 7 minutes late coded their tardiness as "unauthorized leave without pay." Dudley responded: "I'm not perfect, but my intention is that time is accurately accounted for." As far as allowing someone to work a bit later in the day to make up for a tardy arrival, Dudley stated that if the call-in policy had been followed, she might allow it. But the extra time would have to be coded overtime because any time worked after an employee's regularly scheduled work day is considered overtime. It would also have to be documented on a CHFS2.

61. Dudley was asked to address Appellant's protected time. Dudley testified that she could only recall one time specifically that Appellant had to leave the office during this time (to interview someone who had been previously incarcerated). Appellant requested overtime to complete this task, which Dudley granted. Dudley added that she did recall a 2nd case which may have required an additional phone call to a community partner, but no other case required her to physically leave the office. "Finishing her CQA documentation was just a matter of inputting information," Dudley stated.

62. Dudley testified that in the past other employees had also been put on protected time, but for a much shorter period of time. These other employees were able to complete at least 3 CQAs per day. Dudley added that while Appellant was on protected time, and no longer receiving new cases, the other workers in the office had to take on more cases, and consequently, some of them got behind. But their cases were not as many days past due as Appellant's.

63. Dudley was asked if Appellant was "stressed" or "embarrassed" by being put on protected time. Dudley stated: "No, typically employees appreciate being put on protected time." And while Appellant was on it for an unusually long period of time (four months) Dudley stated "it shouldn't have lasted more than 6 to 8 weeks."

64. Dudley was questioned about the amount of time she spent monitoring Appellant's progress and preparing Appellant's weekly PIPs. "I spent about half of my work time on that," she testified.

65. **Myrna Roy** was employed by DCBS as an SRAA, Personnel, for the Cumberland Region, prior to her retirement on August 1, 2013. Before she became an SRAA for Personnel, she had been employed as an SRAA in Family Support, where she worked as the second-line supervisor of family support workers in her region.

66. Roy had been involved in processing Appellant's "Request for ADA Accommodations," which Appellant submitted in May, 2011. Roy stated that part of processing that request requires the employee to obtain an "Interactive Process Questionnaire" that is filled out and signed by a physician. Appellant did not submit that questionnaire until August 16, 2011, approximately three months later. Roy stated that despite Appellant's delay in providing that document, she was provided with a voice-activated microphone in June 2011.

67. As SRAA of Personnel, Roy was the staff member who had prepared the "Request for Major Disciplinary Action" against Appellant. She also assisted Melissa Dudley in meeting with Appellant on January 6, 2012, to inform her that disciplinary action had been requested. Roy testified that at the meeting she had brought up the idea of Appellant exploring a flex-time option, which Appellant dismissed, saying: "We tried that once and I couldn't get to work on time then either."

68. Roy had reviewed Appellant's time and attendance records, and stated that she was familiar with them. She noted that after Appellant had learned that disciplinary action was going to be taken against her, "her attendance problems improved greatly." Roy noted that from January 6, 2012 until she left for sick leave in March, 2012, Appellant was only late for work on two occasions.

69. Roy was asked to address the grievance Appellant had filed in March, 2012, alleging a hostile work environment in the Russell County office. Roy stated that she "sat down with the staff in that office and asked them how Melissa Dudley treated them. They denied there was hostility or harassment. They said Dudley treated them fairly." Roy added that one employee had informed Roy she had stopped carpooling with Appellant because she was always late. Another employee related that she had once gone on a work assignment with Appellant, and Appellant had "gone shopping on work time."

70. On cross-examination, Roy was asked what document she had received when she was preparing the Request for Major Disciplinary Action against Appellant. She responded that she had been sent Appellant's timesheets, CHFS2s, physician notes, Dudley's handwritten notes pertaining to Appellant's arrival times, and information regarding Appellant's past due cases and reports. She received these documents "across the course" of preparing the Request for Major Disciplinary Action. Roy estimated that these records came in from around October 2011 until December 2011, and she recalled that they were usually grouped together by pay period. She received this information via email, fax, and the U.S. Postal Service.

71. As far as a supervisor writing down "employee refused to sign" when , in fact, the employee had been home on leave and not asked to sign a corrected timesheet, Roy stated that she did not consider that "falsification" on the part of the supervisor: "I would have to look into the facts. It might be that for the first corrected timesheet the employee refused to sign, and the supervisor just repeated that on the second corrected timesheet." She admitted that under that fact scenario, the proper notation would be "Employee unavailable to sign."

72. Roy was asked to elaborate on her investigation into Appellant's allegations of a hostile work environment. Roy stated that she began the investigation, under the instruction of OHRM, in March 2012, sometime after Appellant's pre-termination meeting. She was looking at the "overall atmosphere" of the Russell county office, not at Appellant's relationship with Dudley specifically. She did not interview Appellant for this investigation.

73. The Cabinet re-called **Jenny Young**. Through Young's testimony, DCBS Standard of Practice 1.1, Ethical Practice, was introduced into the record (Appellee's Ex. 68). Young stated that Appellant violated Section 13 which reads: "DCBS employees…Do not use state resources, including time, facilities, equipment, supplies or uniforms for private benefit or advantage." Young stated that Appellant violated that SOP by using a state resource, the office fax machine, for personal benefit.

74. Appellant also violated Section #4 which reads: "DCBS employees…Are honest, objective and diligent in the performance of their duties and responsibilities. Young stated that the manner in which Appellant prepared, and sometimes failed to prepare altogether, her timesheets showed a lack of diligence in the performance of her duties.

75. Through Young's testimony, the Cabinet's Personnel Policy 2.1 Employee Conduct was admitted into the record. Young stated that this policy represented the minimum standard of conduct for Cabinet employees. Young testified that Appellant's behavior violated the following sections of SOP 2.1(II): #1, #10, #18, #20, #21, which read in relevant part as follows:

#1: Forbids the falsification of official documents, including timesheets
#10: Forbids the use of state government time and equipment for personal benefit.
#18: Requires employees to carry out assignments as directed by their supervisors.
#20: Requires employees to report for duty, leave work, and take meal and break periods as scheduled.
#21: States that employees are to have no expectation of privacy in their work areas.

76. On cross-examination, Young was asked to address the situation where an employee works through a regularly scheduled lunch break. Young stated that the employee must get prior approval before doing so, and it must be coded as "overtime" on her timesheet.

77. At the end of Young's testimony, the Cabinet rested its case.

78. The Appellant, **Vickie Brockman**, testified on her own behalf. Appellant has a B.A. in Human Services from Lindsey Wilson College. She began working with CHFS in 1999. She was dismissed from her position as a Social Service Clinician I on June 14, 2012. Currently, she is employed by Journey to Independent Living, a program for adults with mental challenges, where she works as a Direct Support Worker.

79. During Appellant's entire tenure with DCBS, she worked in the Russell County office. Her job duties included the provision of child protection and family services.

80. Appellant was asked if she could recall any unauthorized absences or tardiness on her part prior to Melissa Dudley becoming her supervisor in 2002. Appellant stated that she could not recall any time and attendance issues prior to 2002.

81. Appellant stated that she suffered a number of "life changing events" in 2009. These included the marriage of her daughter, the end of a 13-year relationship, her son moving away, and the illness of her parents. These life changes prompted Appellant to feel "very emotionally stressed." Her role as primary care-giver of her parents lasted from 2009 until 2012. During this time she had to physically lift her mother which caused Appellant to pinch a nerve. She sought medical treatment for this condition, and was also treated for stress, depression and anxiety. She also suffered arthritis in her leg, which made it hard to walk. In addition, her arms would occasionally go numb. Her physician prescribed Zoloft at first, then Xanax, and Hydrocodone. She was also prescribed Floricet and Lortab, both of which could make her drowsy. Appellant was also prescribed Neurontin which made her tired. She also took Singulair for allergies, but tried to only take those at night.

82. Appellant testified that all these medications caused her difficulty waking up in the morning. Appellant sought assistance from her physician in managing her morning drowsiness. Her doctor suggested she take the prescribed drugs earlier in the evening and cut down on the amount. Appellant stated that she tried that, but it didn't help. She also tried not taking the medications at all, but then she couldn't sleep.

83. Appellant testified that she went to Dudley and informed her that the medications were the cause of her tardiness. Dudley asked for a doctor's statement, which Appellant provided her in March, 2011. Appellant was asked if Dudley "worked with her" to manage her time and attendance issues. Appellant responded: "Melissa would not speak to me for a few days at a time. I said to her, 'I think you'd like to get rid of me.' Melissa wouldn't respond." Appellant estimated that her problems with Dudley began some time in 2010.

84. Appellant admitted that she was "sometimes late for work." She would set an alarm, and even ask someone to call her in the morning to ensure she was awake. "I didn't hear them," she stated. Appellant was aware that the office call-in policy was that an employee needed to call in by 8:15 a.m., but added: "If I can't wake up, how can I call in?"

85. Appellant stated that she did not always sign herself in when she arrived to work. "My arms were always full of stuff," she stated. "Very seldom did I sign in right as I walked in. I would go to my office and sign in later—sometimes even at the end of the day."

86. Appellant testified that if she had not signed the sign-in sheet on a particular day, she would keep a calendar and notebook at her desk and write her arrival time on that. She would rely on these notations to fill out her timesheet at the end of the pay period. Appellant testified that Dudley gave her a stack of corrected timesheets to sign in January 2012. Appellant spoke to an attorney who advised her not to sign them. Appellant denied that Dudley had ever asked her to sign a corrected timesheet prior to that date.

87. Appellant admitted that she "did not arrive to work at 8:00 a.m. every day." She was asked how she would record her tardiness on her timesheet. She answered: "Melissa said "just get your seven and a half hours in...I don't care if you're late.' So if I came in a little bit late, I would stay a little bit late. Other workers would do that, too." Appellant stated she did not code that extra time in the evening as overtime.

88. Appellant denied that she had ever been told by any staff member that it was important to record her arrival and departure times on the sign-in sheets. She admitted that she did not sign out at the end of the day. If she worked over-time, she would record the time she departed in a personal notebook. Sometimes she would compare her personal notations to the times Dudley had put on her "corrected" timesheet, but sometimes not. Appellant denied that Dudley had ever told her, prior to 2012, she had to claim over-time if she worked late to compensate for a tardy morning arrival. But some time in 2012, Dudley told Appellant she had to leave the office at 4:30 p.m. Appellant added that she occasionally took a half hour lunch if she needed to leave a half hour early. She denied that Dudley had ever explained to her that hours worked outside her normal schedule had to be coded as overtime on her timesheet. Appellant also denied that anyone had ever instructed her to request leave time in advance. "I was always told I could use my sick, comp, or annual time as needed."

89. Appellant was asked if the dates listed on the dismissal letter as times she had arrived late were accurate. She responded: "I can't say they are all accurate."

90. Appellant admitted that she would sometimes get "confused" about which codes to use on her timesheet. She testified that Dudley and the office secretary, Bernice Wilson, told her: "It doesn't matter. Use whatever code you want to."

91. As for Dudley's testimony that she usually observed employees arriving to work in the morning, Appellant stated that Dudley was often on the back porch smoking. And when Appellant left for lunch, Dudley was usually in the break room. When Appellant returned from lunch, Dudley was "rarely" in the front office.

92. Appellant was asked to address her "ADA request" for the microphone headset. Appellant stated that it was difficult for her to sit all day because of the pain caused by a pinched nerve and the numbness in her arm. The first headset she received would not pick up her voice. A couple of weeks later she received a second microphone that did work. However, the microphone did not help much, and Appellant stated that she still had trouble completing CQAs. "It was not just the pain—I had so much anxiety. I felt like I was being watched."

93. Appellant was asked how long it took her to complete a CQA. "I'm slow," she responded. "I go back and read it over and over. As far as an exact time frame, I don't know. I never timed myself." Appellant added that the pain in her arm made it "difficult to concentrate." Appellant testified that she felt Dudley "belittled" her. On one occasion Appellant had called Dudley's supervisor, Melinda Conover. She told Conover that she was "distraught about getting behind. I told her I had got behind when Larry Kimmel was my supervisor, and I was afraid it was going to happen again." After that phone call things "got worse" with Dudley. "She would look annoyed if I came into the room. If Melissa was around, my coworkers wouldn't talk to me either."

94. As for protected time, Appellant denied that it had helped her: "I was still in pain, and I couldn't think enough to function and input the information. Also, I felt like the others were talking about me. I heard Anna Noyola say: 'It's not fair that she got protected time.' It made me feel bad. Then no one would speak to me all day. I felt isolated."

95. Appellant stated she filed a "hostile work environment" grievance after she went on medical leave in March 2012. When asked why she felt the office environment was "hostile," Appellant answered: "Dudley said to me: 'I don't know what to do with you. You wear me out. I go home exhausted because of you.'" Appellant added that once a coworker yelled at her: "Are you going to get that phone?" and Dudley did nothing.

96. Appellant also cited other occasions when she considered herself to be the victim of office harassment. One time (Appellant could not remember the date) a co-worker, Anna Noyola, called the County Attorney's office to see if Appellant was there.

97. On another occasion, Appellant lost a piece of jewelry in an office sink. Appellant's father showed up to get the jewelry out. Dudley later admonished Appellant that she was not to call her father to fix anything on the premises. Appellant denied that she had been the one to call her father.

98. There was an office cookout, one day in 2010 or 2011, and no one told her when the food was ready, or asked her to join them.

99. Appellant stated that she first began feeling "isolated" from her co-workers in 2009 or 2010. Often her coworkers would walk by her office, look in at her, but not say hello. "They would just stare at me," she stated.

100. In March 2012, Appellant was placed on FMLA leave. Her doctor told her: "You are stressed out. I'm going to fax a statement to your office." While Appellant was on sick leave, she was placed on administrative leave by the Cabinet.

101. On cross-examination, Appellant was asked to refer to the 2002 performance evaluation prepared by Larry Kimmler, her first-line supervisor before Melissa Dudley. Appellant admitted that Kimmler had noted on 4/19/01, 9/6/01, and 7/29/02, that Appellant "had trouble arriving to work on time." Kimmler also reported in that evaluation that Appellant "continues to have problems getting CQAs completed in a timely manner."

102. Appellant was asked if it had been made clear to her by her supervisor, after receiving a two-day suspension on July 30, 2010 (for "working overtime without prior authorization"), that she could not claim overtime on her timesheet without approval. Appellant responded: "There were times Melissa would allow me to work late if I came in late," but she could not recall specific instances.

103. Appellant stated that while she kept a calendar and notebook to record her arrival times to work, she had "no set routine" about how she recorded time. She was not sure where the calendar and notebook were, or if she had made copies of them.

104. Appellant was asked to refer to a memorandum regarding a CHFS Accommodation Request Form sent to her by Myrna Roy on March 26, 2012. Roy sent it in response to a grievance Appellant filed indicating she had "difficulty waking due to prescribed medications." Appellant admitted she never submitted the ADA Accommodation Request form. She stated that she had been placed on administrative leave the day before and was under the impression she was not allowed to have contact with anyone at the Cabinet. When questioned why she made that assumption, Appellant cited the language in the letter placing her on administrative leave. The 3rd paragraph reads in part: "During this period of administrative leave, you will not be allowed admittance to any Cabinet for Health and Family Services premises, unless you have been scheduled for an appointment. Any unauthorized contact with staff or clients may be considered interference in the disciplinary process."

105. Through Appellant's testimony on cross-examination, the following documents were introduced into the record:

Ex. 86: An email from Melissa Dudley, dated October 3, 2005, in which Dudley informs her staff: "Today is the first day that we HAVE to sign in/sign out. Remember, I won't sign your timesheet if you haven't been utilizing the log."

Ex. 87: An email from Melinda Conover dated March 1, 2010, responding to Appellant's concerns regarding her 2009 year-end performance evaluation. In the email, Conover states: "I think you are aware that time and attendance issues continue to be a concern particularly with regard to getting to work on time and not submitting requests for overtime." The email also informed Appellant that she was being taken off a Flex Schedule due to her continual tardiness.

Ex. 88: A memorandum from Melissa Dudley to Appellant, dated July 1, 2010, informing Appellant that despite being advised through both a Performance Improvement Plan and a request for major disciplinary action (which resulted in a 10 day suspension) not to continue to work and submit overtime without prior approval, she continued to do so. The memo notes: "From this point on any overtime that you work and submit without prior approval will be denied and you will not be compensated for the overtime."

Ex. 89 to 92: Emails from Appellant to Melissa Dudley, all written in 2008, in which Appellant requests advance approval from Dudley for overtime.

106. On re-direct examination, Appellant was asked to review a number of sign in/out logs. Appellant noted that Dudley's name and arrival or departure times did not appear on many of the logs; many were also missing sign-in notations from all seven office employees. Appellant testified that the sign in log was not strictly enforced. "Sometimes we would sign in, sometimes not." Appellant admitted that there was never a period of time—even going back to 2005—where she signed in every single day.

107. Appellant called her next witness. **Deputy Clete McAnick** appeared telephonically. He is the Chief Deputy of the Sherriff's Office in Russell County, KY. He has been employed in the law enforcement field for the past 21 years.

108. Deputy McAnick testified that he has known the Appellant, in her role as a social worker in Russell County, for a number of years. McAnick stated that "If she was on call and we needed her—like with a child—she'd respond. Every time we called, she'd be there."

109. **Patricia Moore** appeared telephonically. She is an LPN who lives in Russell County, KY. She was asked if she was familiar with Bernice Wilson, secretary of the Russell County DCBS office. Moore stated that Wilson's daughter attended the same day care as Moore's in 2011 and 2012. When Moore dropped her child off, she would often run into Wilson. Moore estimated that they both usually dropped their child off at 7:30 a.m. Moore stated that the day care was approximately a ten to fifteen minute drive away from the DCBS office.

110. **Melissa Dudley** was re-called by Appellant. Dudley was asked if the rules regarding the sign-in sheet pertained to her. Dudley answered: "No. My supervisors are made aware any time I am out of the office. Any absences or need for overtime is brought to their attention." Dudley stated that Melinda Conover is her first-line supervisor.

111. Dudley was asked why Dudley's name appeared on some of the timesheets, but not all. Dudley answered, "I was trying to set the expectation of this policy for the employees." She agreed that the policy also applied to the office secretary, Bernice Wilson. Dudley and Wilson are both scheduled to arrive at 7:30 a.m. The other employees are scheduled to arrive at 8:00 a.m.

112. Dudley admitted that not every single employee signed in and out every single day. "If I was present, I observed their arrival time. If not, it was up to each employee to be honest and note their actual arrival time on their timesheet." However, Dudley stated that she continually had to remind employees to sign in. Dudley added that if an employee had a time and attendance problem, "I would make my own documentation—I had notes with dates and times." She stated that she provided all that documentation to Myrna Roy, and also possibly to Jenny Young. When she sent the timesheets she scanned them and attached them to an email. She also redacted the other names on the sign-in sheet, except Appellant's. Dudley denied that anyone had instructed her to do the redaction. She did it of her own volition to "protect the privacy of the other employees."

113. Appellant recalled **Jenny Young**. Young was asked when she decided that dismissal was the appropriate disciplinary action to take against Appellant. Young responded that it was the Appointing Authority, Jay Klein, who made that decision.

114. After receiving the assignment of Appellant's appeal, Young reviewed the memorandum and supporting documents: "I looked to see if all necessary documentation was provided." Young noticed that Melissa Dudley had failed to initial the CHFS2s in instances when she had determined that Appellant's leave was unauthorized. Young sent multiple emails to Dudley asking for clarifications. She also requested that the CHFS2s be corrected. Dudley re-sent the corrected CHFS2s and attached the corresponding timesheets with them. In the end, Young ended up with three sets of timesheets and CHFS2s: the ones originally sent to her by Dudley; a second batch of corrected documents that were not completely right; and a third set in which all the requested corrections had been properly made. It was the third and final set of documents that Young considered to be "fully executed," and those were the ones she used to draft the Intent to Dismiss letter.

115. As of March 7, 2012, Young was still attempting to track down documentation regarding some of the allegations against Appellant. Young stated that she finally received most of what she had requested, but added that if no documentation regarding a certain charge was provided, then it "was thrown out."

116. Young stated that she was not concerned that she was having to make so many corrections to the time and attendance documents. "Due to the sheer magnitude of the documents we were talking about, it is not uncommon to have these kinds of mistakes." Young added that the only corrections that were made were made to the CHFS2s, not the timesheets. (With the exception of 2 timesheets that had minor time-keeping errors: one overpaid Appellant by 15 minutes, one underpaid her by 15 minutes.)

117. On cross-examination, Young was asked if she was concerned that documents were "being made up after the fact." Young responded: "No, the timesheets had already been submitted. They had to be for Appellant to get paid. We were not changing the times she worked. I was just ensuring that Melissa Dudley had properly initialed the CHFS2s."

118. By agreement of the parties, Cabinet's rebuttal witness was taken out of order. **Angie Tucker** appeared telephonically. Tucker is an administrator for Lake Cumberland Drug Testing, also known as Accept, Inc. She has been employed by Accept for the past 7 years. Tucker explained that her employer performs drug screens for various entities, including the state court system.

119. Tucker interviewed the Appellant for a position with Accept. Tucker did not offer her a position, but did tell her that "if Accept picked up the court system in Taylor County, we would call her back."

120. Tucker denied that Accept has a contract with CHFS: "They don't do contracts. They give individuals a list of places they can go for drug tests." Tucker denied that anyone from the Cabinet told her not to hire the Appellant.

121. Appellant recalled **Myrna Roy** as her next witness. Roy acknowledged that the attachments to the Request for Major Disciplinary Action she sent to OHRM were all the records she had regarding Appellant's case, with the exception of some emails between Jenny Young and Melissa Dudley, which were written for "clarification" purposes.

122. On cross-examination, Roy stated she decided to seek disciplinary action against Appellant sometime during the first part of December, 2011, and explained: Appellant "had been given three and half to four months of protected time but she still hadn't completed all the CQAs. Plus, there were continuing time and attendance issues."

123. **Judy Candido** appeared telephonically. She is a Registered Nurse and works as a consultant for the Cabinet. She is familiar with the Appellant because they had worked on a child fatality case together in February and March, 2012. She was asked if the case had been completed. She responded: "I hadn't heard from (Appellant) for a while. Melissa Dudley ended up finishing the case."

124. On cross-examination, Candido was asked if the case came in May, 2011. She answered that she wasn't sure of the exact date, but acknowledged that it was several months old, possibly six months old, when she began working on it with Appellant.

125. At the end of Candido's testimony, Appellant rested her case.

126. The Cabinet called **Bernice Wilson** on rebuttal. Wilson appeared telephonically. She is the Office Support Assistant in the Russell County Protection and Permanency office. She has held that position since 2004. One of her job duties is time-keeping, and in that capacity she is custodian of all the time and attendance records for the employees in that office.

127. Wilson testified that for four payroll periods between April 2011 and December 2011, Appellant failed to file a timesheet. Specifically, Appellant did not file a timesheet for pay periods ending April 30, 2011; July 15, 2011; July 31, 2011; December 31, 2011. Wilson stated that she had to ask Appellant to turn in a timesheet in a "timely" manner almost every pay period. "I would go to her office and ask her for it. She'd say she was working on it or that she would do it in a minute."

128. Wilson stated that she also did a number of personal tasks for Appellant during the time they worked together: "I threaded needles for her, filed insurance claims, found her car keys, paid her bills, made dentist appointments for her daughter, got her lunch, and untangled her necklaces." On one occasion, Appellant got visibly angry when Wilson did not agree to get her lunch because Wilson had already eaten.

129. Wilson was asked to recall any office cookouts. Wilson first explained that sometimes the office did a cookout for an employee's birthday, or other celebratory reason. She remembered a particular cookout in July or August, 2010. It was for Appellant's and two other coworkers' birthdays. She recalled going to Appellant's office to tell her the food was ready. Appellant said "Just a minute," but didn't come. The food was getting cold. Wilson called Appellant from the break room and asked her again to join them. When Appellant finally came in, everyone had almost finished their meal. "She wouldn't eat with us," Wilson stated. "She got her food and left."

130. Wilson denied that she had ever seen co-workers walk by Appellant's office and stare at her.

131. Wilson was asked if she and Patricia Moore send their children to the same daycare. Wilson stated that she was not sure, but that her child attended daycare only for a month or so in the summer.

132. Wilson denied that the Russell County office was a "hostile work environment." She added that she personally had "been stressed" by having Appellant as a co-worker. "When I first started working in Russell County, all of my day was spent helping (Appellant). I got her work together. I covered for her. I made excuses to clients for her. But she spoke to me in a degrading way and she had a bad temper. One day I spoke to Melissa about it and she told me to stop. I began to feel better, but (Appellant) still treated me as if I was beneath her. She told me—not asked me—to do things for her."

133. Wilson denied that she had ever said to Appellant: "Just get your seven and a half hours in."

134. **Melissa Dudley** was recalled by the Cabinet on rebuttal. Dudley was asked to address "the sink incident." Dudley stated that one day she had returned to work and headed to the restroom. Bernice Wilson warned her: "Don't go in there. The sink is tore up." Dudley pressed Wilson for an explanation, and reluctantly Wilson told her that Appellant's jewelry had fallen down the sink, and Appellant's father had come to get it out. However, the pipe had not been reattached. The building's contract maintenance worker was called. He told Dudley he would not charge the Cabinet for the repair this time, but would if it ever happened again. Dudley went to Appellant and said to her "if it happens again, we would need to call maintenance . . . But most importantly, did you get your jewelry back?"

135. Dudley was asked to recall the cookout event which Appellant testified had caused her to feel "left out" by her co-workers. Dudley stated that she remembered the cookout, but not the exact date it was held. Dudley testified that after the food was prepared she had tried to get Appellant to "fix a plate," but Appellant kept saying "in a minute." When she finally did come to get her food, she took her plate right back to her office.

136. Dudley denied that she had ever told Appellant: "You wear me out."

137. When asked if one of Appellant's co-workers had ever yelled at Appellant, Dudley responded: "I do not tolerate screaming in my presence."

138. Dudley denied Appellant had ever told her she (Appellant) was stressed out and needed time off.

139. Dudley stated that sometime in 2011, Appellant said to Dudley: "I feel like you don't like me." Dudley stated that she tried to reassure Appellant that that was not the case. They had several conversations regarding this matter. Dudley asked Appellant for specific reasons why she felt that way: "If I said anything hurtful, I wanted to rectify the situation. Personally, I thought a lot of (Appellant)."

140. **Melinda Conover** appeared telephonically. She began working for the Cabinet in 1976 and retired in 2012. The last position she held with the Cabinet was SRAA for the Cumberland Service Region, which includes Russell County. In her capacity as SRAA, she was Melissa Dudley's first-line supervisor.

141. Conover was familiar with the Appellant as a worker in the Russell County office. She recalled that Appellant called her one day at home. She could not remember the exact date, but knew it happened sometime after Dudley had told Appellant she need to come to work on time, and not to put in for so much overtime. Appellant told Conover that she was "worried about not being able to work overtime" and wanted Conover to speak to Dudley on her behalf. "She was also worried about getting behind in her CQAs because she said she had gotten behind in the past."

142. Conover denied that Appellant told her she could not wake up because of medications she was taking or that any physical complaints were preventing her from finishing CQAs.

143. Conover stated that she was involved in the decision to request a Major Disciplinary Action against Appellant. "She had a chronic time and attendance problem," Conover stated. Conover denied that Melissa Dudley had any time and attendance issues.

144. When asked if Dudley had singled Appellant out, Conover responded: "No, Melissa was very knowledgeable in regard to policy and applied it fairly across the board to her staff."

145. As for Appellant's failure to complete CQAs in a timely fashion, Conover stated: "The harder we tried to assist her, the more it became clear she was not going to comply." Conover testified that while other employees in the Russell County office also had past due CQAs, no other worker had past due CQAs to the same extent as Appellant.

146. **Anna Noyola** appeared telephonically. She is employed in the Protection and Permanency office of DCBS in Russell County. She and Appellant began working in the Russell County office at the same time, in September, 1999. Noyola testified that she and Appellant did their initial training together. They carpooled at first, but Appellant "was always running late," and Noyola started traveling on her own.

147. Noyola testified that she and Appellant "were like best friends" when they first started working for the Cabinet. She admitted having called the county attorney's office before, looking for Appellant, but that was to make sure she had her keys so she would not get locked out, which had happened in the past.

148. Noyola denied that office staff treated Appellant differently, but stated that over the course of their employment Noyola grew "afraid" of Appellant. "I never wanted her to get mad at me, so I would help her with her work." Noyola testified that she would purposefully arrive to court late so that Appellant would not be the only tardy one.

149. Sometime in 2005, Appellant and Noyola had a disagreement during which Appellant shoved and covered Noyola's mouth. Noyola was pregnant at the time and had already suffered a miscarriage previously. After that their relationship changed. "We were never as close again, but I still spoke to her on a work level," Noyola stated.

150. Noyola stated that Appellant works a second job as a server at the Jamestown Marina restaurant. When asked the timeframe of Appellant's employment there, Noyola answered: "She has always worked there as far as I know." Noyola testified that Appellant would sometimes rush out of the DCBS office to get to the restaurant by 5:00 pm. Appellant also spoke of "working a double shift" on some occasions.

151. **Melissa Dudley** was re-called by the Cabinet on rebuttal. Dudley was asked if she had suggested to Appellant to request a voice-activated typing program. She responded: "No, it was Appellant's doctor who suggested it."

152. Dudley was asked to recall the incident of the leak in Appellant's office. Dudley testified that she had bagged up Appellant's things because her personal belongings, as well as stacks of CQAs, court orders and other work papers were getting wet. Dudley denied that she threw anything away. In fact, she added there were still some of Appellant's personal belongings secured in the DCBS office. To date, Appellant had not picked them up.

153. The Appellant, **Vicki Brockman**, was recalled. She was asked what the Cabinet could have done differently to address her allegation that her health issues prevented her from getting to work on time. She answered: "I don't know. I didn't know what my options were."

154. KRS 18A.095(1) states:

> A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

155. 101 KAR 1:345, Section 1, states:

> Appointing authorities may discipline employees for lack of good behavior or the unsatisfactory performance of duties.

156. KRS 18A.095 (12) and (14)(a) read:

> (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.
>
> . . .
>
> (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.

157. KRS 344.010(4) states:

> (4) "Disability" means, with respect to an individual:
>
> (a) A physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual;
>
> (b) A record of such an impairment; or
>
> (c) Being regarded as having such an impairment.

158. KSR 344.025 states:

> No provision in KRS Chapter 18A shall be construed to preclude any classified or unclassified state employee from appealing to the personnel board any action alleged to be in violation of laws prohibiting discrimination based on a person's status as a qualified individual with a disability, sex, age, religion, or race or national origin, in accordance with this chapter.

159. KRS 344.040(1)(a) states:

> (1) It is an unlawful practice for an employer:
>
> (a) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking;

FINDINGS OF FACT

1. Appellant, Vickie Brockman, was a classified employee with status employed by the Cabinet for Health and Family Services.

2. Appellant was hired in the Russell County DCBS office in 1999 as a Social Service Clinician I. She was dismissed from that position by letter dated June 14, 2012, under the signature of Howard J. Klein, Appointing Authority. The grounds for dismissal stated in the letter were Lack of Good Behavior (poor time and attendance, falsifying timesheets, incorrectly filling out timesheets, and failure to complete timesheets), and Unsatisfactory Performance of Job Duties [failure to timely file Continuous Quality Assessments (CQAs)].

3. According to the testimony of Melissa Dudley, Appellant failed to note her tardy arrival to work as "unauthorized leave without pay" on her timesheet on approximately 41 occasions between 5/10/11 to 12/9/11. On these days Appellant noted on her timesheet that she had worked a regular 7.5 hour work day. Her tardiness on these occasions varied from 8 minutes to 27 minutes. (See **Addendum to Recommended Order Attachment A.**)

4. According to the testimony of Melissa Dudley, Appellant called in sick or late and made additional errors on her timesheet on approximately 23 occasions for the time period of 5/16/11 to 12/22/11. These errors were primarily Appellant's failure to accurately designate the type of leave on her timesheet.

5. Appellant failed to fill out a timesheet for the following pay periods: 4/15-4/30/11; 7/1-7/15/11; 7/15-7/31/11; 12/15/11-12/31/11. During that time, Appellant arrived to work late approximately 20 times.

6. While Appellant did admit that she "sometimes" came to work late, she testified that Dudley's corrections to her timesheets were not always accurate. She denied that Dudley always knew exactly when she began work as Dudley was not always at the front desk upon her arrival. Appellant acknowledged that she often did not note her arrival time on the office sign-in sheet, but alleged that she often came in with "arms full" and went straight to her office instead of signing in. She stated that she kept her own record of her work hours on a personal calendar.

7. Appellant asserts that Dudley improperly altered her timesheets and submitted them unsigned by Appellant. Dudley testified that she corrected them to reflect the time Appellant actually worked and that she offered them to Appellant to review and sign, but Appellant refused. On this issue, after weighing the credibility of the witnesses and the totality of the evidence presented at the evidentiary hearing, the Hearing Officer finds the testimony of Melissa Dudley to be more persuasive. Appellant had chronic and long-standing time and attendance issues dating back to 2002. She received a ten-day suspension on April 5, 2011, for poor time and attendance (and failure to timely complete CQAs). Her annual performance evaluations from 2009, 2010, and 2011 all clearly note that she had a problem with tardiness. Additionally, Appellant could not recall which days specifically were incorrect on her timesheet, nor did she produce any documentation rebutting the timesheets Dudley corrected and submitted. When asked if the dates listed on the dismissal letter as times she had arrived late were accurate, Appellant's response was: "I can't say they're all accurate." The Hearing Officer also notes that since Appellant was quite aware that her time and attendance was being closely monitored, it was her responsibility (and also would have been to her benefit if, in fact, she had arrived on time) to accurately and regularly sign in, even if other employees did not.

8. Much was made at the evidentiary hearing about the three different sets of timesheets submitted to Jenny Young by Melissa Dudley. Young testified that these three sets were comprised of the ones originally sent to her by Dudley; a second batch of corrected documents that were not completely right; and a third set in which all the requested corrections had been made. It was this third and final set of documents Young considered to be "fully executed," and those were the ones she used to draft the Intent to Dismiss letter. The corrections made to the time-keeping documents were to the CHFS2s only and not the timesheets. Young testified that Dudley had failed, on certain occasions, to initial the CHFS2s, and that those were the corrections she sought from Dudley. Finding Ms. Young to be a credible witness, the Hearing Officer accepts her testimony as true on this matter, and rejects Appellant's claim that the Cabinet's decision to dismiss Appellant was made on "records which had no indicia of reliability or accuracy." (Appellant's Reply brief, 1/6/14).

9. In Kentucky, any person is afforded a right of action against his or her employer due to discrimination based on disability pursuant to KRS 344.040. Any state employee who believes she has been discriminated against may appeal to the Personnel Board. KRS 18A.095 (12) and (14). The prohibition in Kentucky law against disability discrimination found in KRS 344 tracks the federal Americans with Disabilities Act. To prove disability discrimination under the ADA, as well as Kentucky law, Appellant must prove that she is a "qualified individual" with a "disability," and was dismissed by her employer because of the disability.

10. A "qualified individual" is a person with a disability who, with or without reasonable accommodation, can perform the essential functions of the job the person holds. A "disability" is an impairment that substantially limits a major life activity, e.g. walking, seeing, hearing, speaking, breathing, learning or working [45 C.F.R., Section 84.3 (j)(z)(ii)(2001)].

11. The Appellant has the initial burden of proof to show that she had a disability that would qualify for the provision of reasonable accommodations from the Appellee under either the ADA or the Kentucky Civil Rights Act. In the event Appellant meets her burden of proof, then the burden will shift to the Appellee to show that the Appellee attempted to make reasonable accommodations for the Appellant, and that Appellant's termination was justified.

12. Appellant asserted that her tardiness and absences from work were "unavoidable and due to the side effects from medication prescribed to her by a physician." (Appellant's Closing Argument, page 1.) Appellant testified that she provided Dudley with documentation of this condition in March 2011, but Dudley testified she first learned of it when Appellant gave her a doctor's "speed" note (Appellee's Ex. 64) in November, 2011. This note stated: "(Appellant) was put on an anti-anxiety medication and this med (sic) may make her sleepy or be in a deeper sleep and be unable to arouse like she should from sleep." By Appellant's own admission, she never sought a specific accommodation from her employer for this condition.

13. Appellant failed to satisfy her burden of proof in showing that she is a "qualified individual" with a disability regarding the side effects of her medication which she alleged caused tardiness. The only evidence of this disability submitted at the hearing was Appellant's own testimony and a 'speed note" from her doctor stating that her prescribed medications "may make her unable to arouse like she should." The uncontroverted testimony at the evidentiary hearing was that Appellant worked a second job in the evening as a waitress, and sometimes even "pulled a double shift." It is also noteworthy that after Appellant became aware that a major disciplinary action had been requested against her, her tardiness (which she blamed on her medication) improved dramatically.

14. From the entirety of the evidence presented, the Hearing Officer finds that Appellant did not satisfy her burden of proof to show that her physical condition regarding the inability to awaken in the morning prevented or substantially limited any of her major life activities.

15. Appellant asserted that her inability to timely finish CQA's was "a direct result of her medical condition for which the Cabinet had to provide accommodation." (Appellant's Closing Argument, page 1.) Appellant submitted a "CHFS Accommodation Request Form" on May 11, 2011, in which she requested voice-activated software. She stated that this accommodation would assist in making the performance of her job possible because she "would not have to sit in a strain (sic) or fixed position for extended periods of time." (Appellee's Ex. 63.) In the "Interactive Process Questionnaire" filled out by her physician, Dr. Phillip Aaron stated that Appellant's impairment is an inability "to sit in position to type at computer." When asked what specific assistance would allow Appellant to be able to perform her job functions, Dr. Aaron responded: "voice activated device/machine." (Appellee's Ex. 63.)

16. The Cabinet provided Appellant with voice activated typing software in early June, 2011. After this software proved unsuccessful, a second system was sent to her a few weeks later. The Hearing Officer finds that the Cabinet reasonably responded to Appellant's request for voice activated software by supplying her with two different systems. The Cabinet provided proper accommodation for this medical condition, pursuant to the specific requests of both Appellant and her physician.

17. Appellant was put on a Performance Improvement Plan for failure to timely complete CQAs on the following dates: 4/28/09; 4/26/10; 8/2/10; 9/12/11.

18. On September 12, 2011, Appellant was put on "protective time," meaning that Appellant was not given additional cases or tasks at this time, but was directed to work in the office to finish the necessary paperwork to complete her past due cases. Dudley's expectation was that Appellant would finish 3 cases per day while she was on protected time, which would have brought Appellant into compliance by October, 2011. She began protected time with approximately 82 past due cases. At the end of her protected time, on December 27, 2011, she still had 10 unfinished cases. She completed, then, about 72 cases in roughly three and a half months, averaging approximately one case per workday.

19. Appellant contends that being placed on protective time was "disparate treatment' and as such constitutes a "penalization." The Hearing officer rejects this claim. A "penalization" is defined in KRS 18A.005(24) as any action that reduces the "level, rank, discretion or responsibility of an employee without proper cause or authority....and the abridgement or denial of other rights granted to state employees." The placement of a worker in protective time is a means of assisting her to finish past-due paperwork, and consequently is a tool to help her be more successful in her job duties.

20. The Hearing Officer finds that Appellant failed to meet her burden of proof to show that by being placed in protective time she suffered a "penalization."

21. Appellant claims that she was the victim of a hostile and abusive work environment, and as such suffered a "penalization." However, the only evidence offered to support that claim were vague assertions that her co-workers stared at her, made her feel left out, called to check on her whereabouts, and once yelled at her. As for the behavior of her supervisor, Appellant stated that Dudley had told Appellant she "wore her out," and would sometimes not speak to her. Appellant also alleged that when she said to Dudley: "I think you'd like to get rid of me," Dudley made no response. The Hearing Officer finds such assertions, even if true, do not rise to the level of severity and pervasiveness to show that a term, condition or privilege of Appellant's work was affected. The Hearing Officer also notes that Appellant offered no evidence corroborating her contention that she was singled out for mistreatment. In fact, what was developed at the evidentiary hearing was that Appellant herself acted inappropriately: Anna Noyola testified that Appellant had "shoved her and covered her mouth" when Noyola was pregnant, and Bernice Wilson testified that Appellant spoke to her in a "degrading way," and was often in a bad temper.

22. As for the allegation that Dudley put various items belonging to Appellant in a dumpster, Dudley's testimony, corroborated by Bernice Wilson, was that there had been a serious water leak in Appellant's office, and consequently, Wilson and Dudley had boxed up some of Appellant's papers and personal items. Both women denied throwing anything away. In fact, Dudley testified that a box of Appellant's things is still in the Russell County office waiting to be picked up.

23. The Hearing Officer finds that Appellant failed to meet her burden of proof to show that she suffered a "penalization" as a consequence of a hostile work environment.

24. The Hearing Officer finds that Appellant was dismissed for cause related to misconduct. Therefore, the Cabinet's denial of payment of Appellant's accumulated annual leave was done pursuant to administrative regulation, 101 KAR 2:102, Section 1 (3)(d), which states: "Annual leave on separation: an employee who has been dismissed for cause related to misconduct or who has failed, without proper excuse, to give proper notice of resignation or retirement shall not be paid for accumulated leave."

CONCLUSIONS OF LAW

1. The decision of the Appellee to dismiss Appellant for Lack of Good Behavior and Unsatisfactory Performance of Duties has been proven by a preponderance of the evidence.

2. The decision of the Appellee to dismiss Appellant was neither excessive nor erroneous and was taken for just cause.

3. The decision of the Appellee to deny payment to Appellant of accumulated annual leave was done with just cause, and in accordance with 101 KAR 2:102, Section 1(3)(d).

4. Appellant failed to satisfy her burden of proof to show that her supervisor, Melissa Dudley, changed her timesheets improperly resulting in unpaid leave. While it is uncontroverted that Dudley did change Appellant's timesheets, it was done for just cause and to accurately reflect the time Appellant actually worked.

5. Appellant failed to meet her burden of proof to show that she was subject to a hostile work environment that constituted an illegal penalization as the term is defined in KRS 18A.005(24) or illegal discrimination as set forth in KRS 18A.095(12) and (14).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **VICKIE BROCKMAN VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NOS. 2012-078, 2012-080, 2012-177 AND 2012-182)** 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 6th day of March, 2014.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. Mary S. Tansey
Hon. Robert Bertram
Hon. Anna Whites

ADDENDUM TO RECOMMENDED ORDER
ATTACHMENT A

1) Melissa Dudley testified that for the following dates in 2011, Appellant filled out a timesheet stating she had worked a regular 7.5 hour day, even though she had reported to work late for the amount of time as noted below. Dudley corrected Appellant's timesheet to reflect .25 hours of unauthorized leave without pay on these occasions.

5/10	12 minutes	9/30	14 minutes
5/20	8 minutes	10/5	18 minutes
5/24	10 minutes	10/11	20 minutes
5/25	10 minutes	10/12	23 minutes
6/2	10 minutes	10/19	15 minutes
6/3	8 minutes	10/25	14 minutes
6/13	14 minutes	10/26	12 minutes
6/17	15 minutes	10/31	10 minutes
6/20	15 minutes	11/1	12 minutes
6/23	11 minutes late	11/2	14 minutes
8/2	11 minutes late	11/9	16 minutes
9/1	14 minutes	11/15	16 minutes
9/6	12 minutes	11/18	15 minutes
9/7	15 minutes (from lunch)	11/23	17 minutes
9/14	9 minutes	11/30	23 minutes
9/15	12 minutes	12/2	27 minutes
9/16	17 minutes	12/6	10 minutes
9/19	15 minutes	12/7, 12/8, 12/9	12 minutes
9/21	15 minutes		
9/26	17 minutes		
9/29	15 minutes		

2) Melissa Dudley testified that on the following dates Appellant reported to work late for the amount of time as noted below. Appellant did not complete a timesheet for these dates. On the timesheet Dudley created for Appellant, she reported this tardiness as unauthorized leave without pay.

4/22 15 minutes

4/28 45 minutes

7/7 32 minutes

7/11 13 minutes

7/12 16 minutes

7/14 12 minutes

7/26 16 minutes

7/27 10 minutes

7/29 8 minutes

12/16 15 minutes

12/19 15 minutes

12/21 15 minutes

12/27 15 minutes

12/28 15 minutes