

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-066

ROBIN BROWN

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

*** **

The Board, at its regular January 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 14, 2020, and being duly advised,

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

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 13th day of January, 2021.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Carmen Ross
Mr. Robin Brown
Mr. Jay Klein

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-066

ROBIN BROWN

APPELLANT

VS. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

* * * * *

This matter came on for an evidentiary hearing on August 24, 2020, at 9:30 a.m., EST, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were conducted by video teleconference using Amazon Chime. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Robin Brown, was present, and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Carmen Ross.

BACKGROUND

1. The Appellant, Robin Brown, filed his appeal with the Personnel Board on February 26, 2020. He appealed his dismissal while serving his initial probationary period as a Family Support Specialist I with the Cabinet for Health and Family Services. The Appellant alleged discrimination based on age, sex, and disability.

2. The issue for the evidentiary hearing was identified as whether the Appellant was dismissed from his position as a Family Support Specialist I due to discrimination based on age, sex, and disability. The Appellant was assigned the burden of proof, which was to be by a preponderance of the evidence.

3. At the evidentiary hearing, the **Appellant, Robin Brown**, in his opening statement, stated that he was discriminated against by the Appellee. He stated that his supervisors knew that he needed help and admitted so in his evaluations and training records. He stated that the little help he received was not enough; he stated his supervisor was too busy and no one else would help him.

4. The Cabinet, in its opening statement, stated that the evidence would show there was no record of the Appellant having a disability and he made no request for accommodation. As a Family Support Specialist, it was necessary for the Appellant to master work on the

computer. Based on his previous employment as a postal worker, the Appellant struggled with this work. He was provided training and help, but was not progressing in his job and was dismissed after three months. The Appellee's position was that there was no discrimination in the decision to dismiss him.

5. As the party with the burden of proof, the Appellant presented his case first. He stated he wished to call **Jennifer Drake** as a witness. The Appellant did not file a Witness and Exhibit List and made no arrangements for Ms. Drake to be present. There was an agreement at the last pre-hearing conference that the Appellant could call witnesses on the Appellee's witness list, however, no one made arrangements for Ms. Drake to be present or available for the hearing and she did not testify.

6. The Appellant called **Amandeep Burns** as his next witness. Ms. Burns is employed as a Family Support Principal with the Department for Community Based Services' office in Versailles, Kentucky. She stated that she was on vacation from the end of December 2019 and returned to the office on January 20, 2020. She stated that, when she was in the office, she did everything she could to assist the Appellant to learn his job. In her absence, she said he could be assisted by Jennifer Drake, Penny Jewell, Lynn Johnson, or Michelle. She was not aware of Penny Jewell or Lynn Johnson being sick. She testified that, although some of the individuals who were there to help Robin Brown were in Lawrenceburg and he worked in Versailles, they were available to him using Skype or telephone calls. Burns testified that, even if others were with clients or working on other matters, they would respond to Skype.

7. Burns testified that the Appellant had trouble mastering the job. When asked if it was known that he needed help, why more help was not provided, Burns responded that Brown was provided a lot of help. Burns testified that she was aware that Lynn Johnson had sent him case notes and Brown had copied and pasted these notes, including her initials. She stated that these were supposed to be used as examples and not to do the work for him. She testified that his training records reflected that he needed help; they were aware of the situation and were providing him with help. Burns testified that they provided him with the same assistance as all new employees, and, in some instances, even more.

8. When asked why it took so long to return casework to him with corrections, Burns testified it did not take a long period of time. She stated they reviewed these things within a day or so. She stated that, in some instances, although the information was available in the system, Brown could not figure out how to access it and they had to email it to him later.

9. Burns testified that she had no knowledge that Brown had left his previous job with the post office because of a disability. She stated that she knew he had back issues, but did not consider him to be disabled.

10. When she came back from vacation, Burns thought she had assisted Brown for thirty days, however, the record shows he was dismissed eight days after she returned from vacation.

11. Burns testified that the lock was broken on the mens restroom. She stated that the women would use the restroom if the other restroom was occupied. A request had been made to the building manager to repair the lock on the mens restroom.

12. The Appellant called **Penny Jewell** as his next witness. Jewell is a Family Support Supervisor in Anderson County. She testified she was not aware that the Appellant had left his other job due to medical issues. She was aware he had retired from the post office. When asked if she was sick when Brown came back from training, she stated she was not sure, although she did have the flu in November or December of last year (2019). She was not sure if Lynn Johnson was also sick.

13. Jewell testified that she was there to assist Brown by telephone or email. She stated that Jennifer Drake reviewed most of his cases. She stated that several people were there to help him.

14. Based on Appellee's Exhibit 11, which was introduced during Jewell's testimony, the Appellant received 112.75 training hours. Jewell testified that everyone in the office helped Brown try to learn the job. She specifically identified Michelle, Lynn Johnson, and herself. When asked if the Versailles office was short staffed, Jewell replied that it was fully staffed.

15. Jewell testified that she thought Brown was a "great guy," however, he had problems with the technology. She stated that she tried to have Brown sit with the office assistant so he could learn scanning procedures. She stated that Brown did not know how to look up policy or to apply it to his casework. She stated that another problem was that they would show Brown something and by the next day he would have forgotten it again and would have to be shown again.

16. When asked how she would know if he was getting help, since she was not in the same office as he was, Jewell stated she was there on some occasions. In addition, she stated that case reviews showed the work he was doing. She knows that other individuals helped him because of the case records and emails.

17. When asked why Brown was let go after only three months when there was a six-month probationary period, Jewell stated that he was not getting the job. She stated that there were some things he did not get that employees would be expected to learn the first week.

18. The **Appellant, Robin Brown**, testified on his own behalf. He is not currently employed. He was last employed with the Appellee on January 28, 2020, as a Family Support Specialist I. He started on November 1, 2019. He testified he was serving an initial probationary period of six months.

19. Brown testified that, during his interview process, he made them aware that he was disabled and that he had left his previous work for medical reasons. He testified that Penny Jewell was aware of his back problems and that he had to move around a lot.

20. In addition to back problems, Brown testified he had a mood disorder and depression. His problems were exacerbated by having problems learning his new job.

21. About two weeks before he was dismissed, Brown became aware he could ask for a desk where he could work standing up. He stated he learned of this during a discussion with a coworker. He stated they did not have the forms he needed in the office and he never made the request. He testified he never told anyone at work about depression or mood disorders.

22. Brown testified he was not comfortable using the men's restroom, knowing that women used it also. He was afraid he might walk in on a woman using the restroom. He believed this was a form of sex discrimination.

23. With respect to age discrimination, the Appellant testified that he is forty-six years old and did not grow up using computers all the time. He stated that his supervisors knew he needed help with the computer work and did not provide it to him. He testified that Penny Jewell was sick part of the time while he was on probation. In addition, he only saw her three or four times. She was usually working out of her own office. He testified that he did not receive much help from Burns either, as she was only back from her vacation for eight days before he was dismissed. He testified that no one was available to help him because they were busy doing their own work. He testified that Jennifer Drake was only assigned to their office so that she could work on Medicaid, not to help him. She did provide some help, but not enough so that he could learn this job.

24. At the close of his testimony, the Appellant rested his case. Before calling any witnesses, counsel for the Appellee made a motion for a directed decision. She stated the Appellant had not presented a *prima facie* case of disability discrimination. She stated that the record did not even show that the Appellant qualified as an individual with a disability, only that he testified he had back problems. She stated that claims because he was forty-six years old and was not good with computers constituted age discrimination did not meet the legal standard. Lastly, she stated that there was no testimony that the bathroom issue in any way affected his work.

25. The Appellant responded that he believed the issues he identified showed that he was discriminated against, and he did not have a fair chance to complete his probationary period.

26. The Hearing Officer **GRANTED** the Appellee's motion for directed decision.

FINDINGS OF FACT

1. The Appellant, Robin Brown, was hired as Family Support Specialist I on November 1, 2019. He was dismissed while serving his initial probationary period on January 28, 2020.

2. The Appellant testified that he suffered from back problems. He was previously employed as a postal worker and left that job due to these problems. No evidence was presented that the Appellant's back problems impacted his performing any major life activities.

3. Brown testified that occasionally he needed to stand while he was working. He was not prevented from doing this by his supervisors. He did not request any accommodation from his supervisors.

4. The Appellant also suffered from a mood disorder and depression. He did not tell any supervisors about these issues.

5. The Appellant testified that he is forty-six years old. He stated that, because of his age, he did not learn computers. The evidence establishes that the Appellant had a great deal of problems performing the computer work necessary to complete probation as a Family Support Specialist I. Although the Appellant argued that he did not receive the help he needed, the evidence showed that the Appellee attempted to provide the Appellant with assistance so he could perform his job. Multiple employees were available to provide him with help and answer his questions. He also attended over one hundred twelve hours of training.

6. The Appellant did not provide any evidence establishing that inability to perform computer work constituted illegal age discrimination.

7. The lock on the door of the men's restroom in the office where Brown worked was broken. Women also used the men's restroom. As a result, Brown did not use the restroom at the office. The Appellee requested the building manager to repair the lock on the door. No evidence was introduced into the record that this issue impacted Brown's work.

8. Brown failed to carry his burden of proof that he was discriminated against while he was employed based on disability, age, or gender.

9. Although the Appellee had no burden of proof, the evidence established that Brown had considerable difficulty performing the duties of a Family Support Specialist I, despite being provided a great deal of assistance by supervisors and coworkers.

CONCLUSIONS OF LAW

1. KRS 18A.095(12) provides:

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.

2. To prove age discrimination, the Appellant must either show direct evidence of a discriminatory animus or, absent that, must satisfy the burden-shifting test of *McDonnell-Douglas Corp v. Green*, 422 U.S. 792 (1973). The Kentucky Supreme Court in *Williams v. Walmart*, 184 S.W.3d 492, (Ky. 2005), reflects that the purpose of the *McDonnell-Douglas prima facie* case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. This burden-shifting approach allows the victim of discrimination to establish through inferential and circumstantial proof.

3. With respect to age discrimination, the McDonnell-Douglas framework requires that an aggrieved party show: (1) that he was a member of a protected class; (2) that he suffered an adverse employment action; and (3) that another substantially younger employee received those benefits of employment. The employer must articulate some legitimate, non-discriminatory reason for its actions, and then the employee must then be afforded a fair opportunity to demonstrate that the employer's stated reason for its action was pretext.

4. In this case, the Hearing Officer concludes that the Appellant failed to make a *prima facie* case of age discrimination. While the Appellant established that he was forty-six years old and that he was dismissed, he did not establish that any younger individuals were treated any differently. In fact, the evidence established that the Appellant was provided the same assistance in performing his work, and perhaps more assistance, than any other similarly situated individuals. Because the Appellant failed to present a *prima facie* case, there was no need for the Appellee to present any evidence.

5. With respect to his claim of disability discrimination, the Appellant failed to establish that he suffered from a disability when he only provided testimony that he suffered from back problems. No detailed evidence of the specific problem was presented into evidence. More importantly, he did not show that his back problems in any way affected any major life activities.

6. In addition, the Appellant failed to establish that he requested any accommodation from his employer. For these reasons, the Appellant failed to present a valid claim of disability discrimination, and there was no need for the Appellee to present any evidence.

7. Likewise, the Appellant's claim of sex discrimination must fail. There was no evidence that the issue with the lock on the men's restroom door or the fact that women used the men's restroom in any way impacted his work or led to his dismissal.

8. As an employee alleging discrimination, the Appellant had the burden of proof on all issues. Pursuant to KRS 13B.090(7), "failure to meet the burden of proof is grounds for a recommended order from the hearing officer." In this instance, the Appellant failed to meet his burden of proof that he was discriminated against based on age, disability, or sex, and a recommended order in favor of the Appellee is appropriate.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ROBIN BROWN V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2020-066)** 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 the Hearing Officer this 14th day of December, 2020.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Carmen Ross
Mr. Robin Brown