



**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2013-248**

**KIMBERLY A. CURTIS**

**APPELLANT**

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

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

**APPELLEE**

\* \* \* \* \*

This matter came on for an evidentiary hearing on February 14 and 28, 2014, at 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky, before the Hon. Stephen T. McMurtry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Kimberly A. Curtis, was present at the evidentiary hearing and represented by the Hon. Paul Fauri. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Carrie Cotton.

**BACKGROUND**

1. The Appellee, Cabinet for Health and Family Services (CHFS), employed the Appellant, Kimberly A. Curtis, on December 16, 2010, as a Cook I at the Hazelwood Center. She worked in that position until October 12, 2013. On October 11, 2013, the previous day, Howard Jay Klein, Division Director of Employee Management in the Office of Human Resources Management and Appointing Authority for the Cabinet, notified the Appellant that she was to be dismissed from her employment effective October 12, 2013.

2. The dismissal letter described a rather extensive history of her time and attendance problems, her reporting responsibilities upon being late or absent from work, her previous disciplinary suspensions and reprimands, and two of her most recent time and attendance infractions which precipitated the Cabinet's decision to terminate her employment. These last two infractions were:

On August 3, 2013, you were scheduled to work from 5:00 a.m. to 1:00 p.m. On this date, you arrived at 5:10 a.m., ten minutes after the [sic] beginning your regularly scheduled shift. As you could not provide a justifiable reason for your tardiness, your supervisor did not approve use of leave time for this tardiness. Your actions resulted in you being issued 0.25 hours of unauthorized leave without pay.

On September 17, 2013, you were scheduled to work from 5:00 a.m. to 1:00 p.m. You telephoned the facility at 5:26 a.m. and left a voicemail advising your supervisor that you would not be at work on this date. You telephoned your supervisor again at 5:45 a.m. and spoke to your supervisor advising her that you would not be at work. Your failure to follow call-in procedures resulted in you being issued 7.50 hours of unauthorized leave without pay.

(A copy of the entire dismissal letter is attached to this Recommended Order as **Recommended Order Attachment A.**)

3. The Cabinet called three employees at the Hazelwood Center who worked closely with the Appellant: **Tina Ashley**, Human Resources Director at the Center; **Linda "Carol" Boatman**, Dietician and Director of Food Services; and **Denise Vincent**, First Shift Supervisor. Their testimony was sequential, substantially cumulative and undisputed.

4. At early employment orientations, the Cabinet provides each employee with written time and attendance rules and regulations, including procedures for reporting tardiness and absences. It reinforces employee understanding of these rules, regulations and procedures at periodic in-service training. Essentially, if an employee is going to be tardy or absent, she must call in one hour before the start of the shift to advise a supervisor that she will be absent/tardy, and the reasons why. If there is no answer, she must leave a message, then call back and talk only to a supervisor. "Call-ins for tardiness may be approved by the supervisor/designee for emergencies and is subject to the approval or denial of the supervisor." The "one hour" rule for employees such as the Appellant, whose start time was 5:00 a.m., was not enforced because there was no one within the hour prior to 5:00 a.m. to take a call. Employees whose start time was 5:00 a.m. had to call in at 5:00 a.m.

5. Alongside this rule and the associated procedures, the Family and Medical Leave Act (FMLA), restated in CHFS' Personnel Procedures Section 5.8 IV(b) provided, "If the need for FML is unforeseeable, employees must provide notice to their supervisors as soon as possible" (i.e. within the department's call-in time policy, unless there are unusual circumstances).

6. The Appellant does not deny that she was late 10 minutes on August 3, 2013, and did not call in by 5:00 a.m. to leave a message or talk to a supervisor. Nor does she deny not calling in on September 17, 2013, until 5:26 a.m. to advise she was going to be absent that day.

On September 17, 2013, Linda Boatman took the telephone message left by the Appellant which said, "I am not feeling well. I have been up and down all night, and will not be in today." She told Boatman the same excuse during a later 5:45 a.m. call-back.

7. Tina Ashley testified that a full complement of cooks is necessary to timely serve carefully selected and prepared meals to meet the dietary needs of the patients, the effective administration of medication and behavioral control. Federal law regulates the timely and proper preparation of meals and snacks, and provides sanctions against the state agencies for non-compliance. Linda Boatman testified there are 23 kitchen positions that are historically difficult to fill with willing workers. Vacant positions and late or absent cooks impose hardships on those employees at work who are required to meet the federal regulations. Denise Vincent testified that 5-7:00 a.m. is the busiest time of day.

8. The Cabinet presented the testimony of Linda Boatman and Howard Jay Klein to prove the time and attendance history of the Appellant. They authenticated certain documents to substantiate their testimony and prove the Appellant's problems leading to the decision to terminate her.

9. On April 2, 2013, Boatman placed the Appellant on "Notification of Point System for Tardiness" because she was tardy on six occasions during a two-month period. On January 4, 2013, Denise Vincent placed the Appellant on "Verification of Personal or Family Illness" for a six-month period. On October 29, 2012, Boatman issued the Appellant a written reprimand for "Excessive Tardiness" occurring on 9/1/12, 9/5/12, 9/6/12, 9/24/12, 9/26/12 and 10/28/12. She previously had been put on "Notification of Point System for Tardiness" from 9/6/12 to 12/6/12.

10. On October 12, 2012, Boatman gave the Appellant a verbal reprimand for not providing a physician's statement to verify illness when absent from work on 3/20/12, 3/22/12 and 6/20/12. On September 7, 2012, Boatman notified the Appellant she was to be placed on "Notification of Points System for Tardiness" for tardiness on 9/1/12, 9/5/12, and 9/6/12. This led to a verbal reprimand.

11. On July 2, 2012, Boatman placed the Appellant on "Verification of Personal or Family Illness" for six months, a status which required her to provide a doctor's statement to verify an illness or cause for an absence.

12. On April 17, 2012, Boatman placed the Appellant on "Verification of Points System for Tardiness" for being tardy five times during a 12-month period. On May 17, 2011, Boatman gave the Appellant a verbal reprimand for tardiness on four occasions from 4/11/11 through 4/27/11.

13. On February 6, 2012, Howard Jay Klein suspended the Appellant for one day for Lack of Good Behavior for exceeding her break time on January 9, 2013, after being directed by her supervisor to return to work. The suspension was not appealed to the Personnel Board.

14. On July 10, 2013, Howard Jay Klein suspended the Appellant for five days for Lack of Good Behavior for continuing "to exhibit poor time and attendance and [failure] to adhere to time and attendance procedures." The alleged behavior occurred at times different from the behavior described above. This suspension has been appealed to the Personnel Board and awaits a hearing.

15. **Tina McQueen**, Security Administrator at the Hazelwood Center, testified that on October 4, 2013, during a 10-10:30 a.m. smoking break, the Appellant told McQueen she wanted to leave early that day. According to McQueen, Appellant said, "I have FMLA, and I can use that to leave early." McQueen said the Appellant was "jovial, and in no distress."

16. **Howard Jay Klein**, who wrote the Appellant's dismissal letter in his capacity as the Appointing Authority, testified he based his authority to dismiss her on (1) 101 KAR 1:345, which authorizes disciplinary action for Lack of Good Behavior and Unsatisfactory Performance of Duties, (2) 101 KAR 2:095, Section 2(5) which requires employees to give reasonable advance notice of work absence, (3) CHFS Policy and Procedure 2.1, Employee Conduct, Section 20, "Employees must report for duty...as scheduled, (4) the Family and Medical Leave Act (FMLA), and (5) CHFS Policy and Procedure 5.13, Sick Leave, "Employees may be disciplined for failing to follow" a supervisor's procedure for requesting sick leave and emergency sick leave, including call-in times for unscheduled sick leave, acceptable methods of contact (phone, mail, e-mail), and staff who may be contacted." Klein acknowledged that Curtis was retroactively approved for intermittent FML when she called in on September 17, 2013.

17. Klein explained why he had withdrawn a prior August 26, 2013 letter to dismiss the Appellant. He determined that some of the allegations in the dismissal letter were unsustainable, as they required cooks to call in one hour before 5:00 a.m. to report absences or tardiness when there was no supervisor or employee at work to receive the call. On September 18, 2013, Klein advised the Appellant of his decision. However, the day before, on September 17, 2013, he learned that the Appellant had called-in 26 minutes late to report she would be absent that day. Klein then decided to combine the August 3, 2013 allegation of tardiness with the September 17, 2013 infraction, and issue the Appellant a second dismissal letter.

18. Klein confirmed the Hazelwood Center had adopted a progressive disciplinary policy which applied to failures to arrive at work on time, and unexcused absences from work. The progression had five steps, beginning with a verbal warning, then a written reprimand, followed by three requests for major disciplinary actions. Two levels of progressive discipline may be omitted if the employee fails to report or notify his/her supervisor of reasons for the absence. Klein testified that he omitted the written reprimand stage of progressive discipline as

permitted by the Hazelwood Center Policy (see Cabinet's Exhibit 4, pages 14 and 29), which states, "Disciplinary action taken against an employee may be progressive unless the infraction warrants a more severe discipline."

19. When questioned about FMLA pre-empting the call-in procedures of the Hazelwood Center, Klein was of the opinion that the Cabinet's "Policy and Procedures Manual," Section 5.8(IV)(c)(page 7 of Cabinet's Exhibit 26) stated that "Employees on approved intermittent FML will be required to...follow office policy for calling in when leave is needed due to this condition." Klein reasoned that the FMLA did not excuse the Appellant from calling in at 5:00 a.m. on September 17, 2013.

20. Klein testified that the Appellant's dismissal was in accordance with past disciplinary action imposed on similarly-situated, dismissed employees. As examples, he introduced the dismissals of S.B. on February 4, 2013, Y.R. on April 3, 2013, and C.C. on March 22, 2013.

21. S.B. had a disciplinary history of a five-day suspension on 12/3/12, and a two-day suspension on 7/3/12. In addition, she had two instances of being placed on "Verification of Personal or Family Illness" on 11/27/12 and 5/24/12, and being placed on the "Points System for Tardiness" on 8/28/12. Her immediate dismissal charges were: "On December 23, 2012, and January 8, 2013, S.B. failed to provide verification to justify her absences."

22. Y.R. had two verbal reprimands, 10/14/11 and 9/2/11, a 5/17/11 written reprimand, a 7/3/12 two-day suspension and a 10/12/12 five-day suspension. The Cabinet had placed her on "Verification of Personal or Family Illness" on July 9, 2012, August 4, 2011, and April 1, 2011, and on the "Points System for Tardiness" on April 18, 2011. Her immediate dismissal charges were: "Failure to provide verification of illness for absences on January 20, 2013, and March 5, 2013."

23. C.C. had three verbal reprimands on 1/25/12, 7/13/10 and 7/18/12, one written reprimand on 2/24/12, a two-day suspension on 9/25/12 and a five-day suspension on 11/2/12. The Cabinet placed him on "Verification of Personal or Family Illness" on September 24, 2012, March 14, 2012, and July 25, 2011. The initiating charges for the dismissal were: "An unapproved absence on February 9, 2013, and a failure to provide verification of illness on February 10, 2013."

24. The **Appellant, Kimberly Curtis**, testified that she began her employment on December 16, 2010, as a Cook I at the Hazelwood Center. The job required her to prepare snacks, deliver them on trays to the clients, and between 10:00 a.m. to 1:00 p.m., serve meals. She had worked every position in the kitchen, and trained new employees to do their work. She said she was an excellent employee. (Her supervisors, Boatman and Vincent, agreed she was an excellent worker, except for her time and attendance problems.)

25. The Appellant testified she was diagnosed with Irritable Bowel Syndrome (IBS) in high school, but the disease had become “more prominent” during the last two and a half years. She takes medication to control anxiety, pain and acidity, and regulates her diet. She said her IBS is under control, but “flares up” from time to time. The record is somewhat contradictory as to when the Appellant applied for intermittent FML benefits for her IBS, but the Cabinet does not contest that on September 17, 2013, when she called in at 5:26 a.m., and later that hour talked to Carol Boatman, she was entitled to the protections of the FMLA. Whether they applied, or were effectively invoked by the Appellant when she called in, is at issue.

26. The Appellant testified that on the night of September 16 and 17, 2013, she was awake experiencing cramping and stomach pain, and making many trips to the bathroom. About 3:00 a.m., she was lying on the couch when she passed out and slept until about 5:26 a.m. She awoke and called in to work, leaving a message that she would not be in to work that day because of her IBS. She called back at 5:45 a.m. and spoke to Boatman, explaining she had been sick all night. Boatman did not excuse the tardiness because the Appellant had failed to follow Hazelwood’s call-in procedures.

27. The Appellant recalled the conversation she had with Tina McQueen on October 4, 2013. She said she went outside to smoke a cigarette during her lunch break, where she met McQueen. While conversing with her, the Appellant said, “I told her I was going to try to leave early, and I would use FMLA. I didn’t say I was sick or not sick.”

28. The Appellant explained her tardiness of August 3, 2013, as caused by a series of misfortunes. During the drive to work that morning, she “hit” every red light and dropped her cell phone on the car floor where she was unable to retrieve it. She did work 30 minutes overtime that day.

### **FINDINGS OF FACT**

1. The Cabinet has proved, by a preponderance of the evidence, most of which is uncontested, the factual allegations of the Appellant’s October 11, 2013 dismissal letter, including prior discipline, prior corrective actions, the Appellant’s 10-minute tardiness on August 3, 2013, and her failure to timely call-in to excuse an absence on September 17, 2013.

2. The Cabinet has proved, by a preponderance of the evidence, that the Appellant was disciplined no more harshly than other Hazelwood employees who had similar time and attendance problems and past disciplinary actions. They were C.C., S.B. and Y.R. The evidence does not prove that these employees were similarly situated in all relevant respects. In fact, S.B. was a Nurse’s Aide and C.C. and Y.R. were Patient Aides.

3. The Appellant has proved, by a preponderance of the evidence, that she was an excellent employee when she worked and was not absent. She also proved that on September 17, 2013, when she called-in 26 minutes late, she was under the protection of the Family and Medical Leave Act for Irritable Bowel Syndrome. In this regard, she proved that during the night of September 16 and 17, 2013, she experienced stomach cramping, stomach pain and diarrhea, and eventually passed out, causing her to sleep past her 5:00 a.m. call-in time to report her absence. She was able to call in and leave a message at 5:26 a.m., explaining her condition and that she would not be in to work that day. She called again at 5:45 a.m. when she talked to Carol Boatman, to advise she would be absent that day because of her IBS. Boatman refused to excuse the absence because the Appellant had not followed Hazelwood's call-in procedure by reporting her absence by 5:00 a.m.

4. The Hearing Officer finds that the conversation between Tina McQueen and the Appellant on October 4, 2013, is not relevant to prove the allegations of the dismissal letter. The Cabinet has not charged the Appellant with an October 4, 2013 unexcused absence. Furthermore, there is insufficient evidence coming out of the conversation to prove a fraudulent use of FMLA benefits or to diminish her credibility when she claimed IBS sickness on September 17, 2013.

### **CONCLUSIONS OF LAW**

1. This case is complicated. There are several legal issues to be decided based upon the above Findings of Fact. First, did the Family and Medical Leave Act exempt the Appellant from having to call-in by 5:00 a.m. on September 17, 2013, as required by the time and attendance procedures of the Hazelwood Center? (The Cabinet had approved the Appellant for intermittent FML benefits to accommodate the erratic sickness and attacks common to IBS.) Second, if the FMLA protected and exempted the Appellant from Hazelwood's call-in policies, was there, otherwise, sufficient evidence of non-compliance with the time and attendance policies to justify dismissal? Disregarding the September 17, 2013 infraction, was the August 3, 2013 infraction, combined with the Appellant's past record of reprimands, suspensions and failed efforts to correct time and attendance problems, sufficient to terminate her employment under KRS 18A.095 and 101 KAR 1:345?

2. Finally, would such termination violate KRS 18A.095(22)(c), making the disciplinary action excessive and erroneous in view of all the surrounding circumstances.

3. The controlling FMLA regulation is 29 CFR 825.303(c), which states:



**Complying with employer policy.**

When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requiring leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized, and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstance has justified the failure to comply, FMLA-protected leave may be delayed or denied.

4. The issue, then, is whether stomach pain, cramping, diarrhea, being up all night and passing out during the 5:00 a.m. call-in deadline constitute unusual circumstances. 29 CFR 825.303(c) is a recent January 2009 revision of the FMLA, and there are few cases which illustrate unusual circumstances. In *Howard v. V. T. Halter Marine Inc.*, 2011 WL 2414672 (S.D. Miss), the Federal District Judge determined that a jury could reasonably find "sleeping all afternoon," "going in and out of consciousness" with a high fever and "being in a semi-delirious state" constitute "unusual circumstances" under 29 CFR 825.303(c). See also *Watson v. Afco Steel LLC*, 210 WL 4269235 (E. D. Ark., Oct. 28, 2010). In that case, the Federal Judge left it to the jury to determine if "sleepiness" was an unusual circumstance under 29 CFR 825.303(c). Given this background of jurisprudence, it is reasonable to conclude that Irritable Bowel Syndrome symptoms of cramping, stomach pain and diarrhea throughout the night which led to the Appellant's passing out and sleeping past the 5:00 a.m. deadline constitute "unusual circumstances" under the FMLA regulation and excuse her failure to comply with Hazelwood's call-in regulations.

5. It is further concluded as a matter of law that given the Appellant's history of tardiness and absences which has prompted many efforts by the Cabinet to correct her problem, including placing her on a tardiness point system, requiring written doctor's excuses and a series of disciplinary actions, the last being a five-day suspension, the ten-minute tardiness episode of August 3, 2013, was sufficient to justify terminating her employment. The 10-minute tardiness was the tip of the iceberg which sank the ship.

6. Finally, it is further concluded as a matter of law, that her dismissal is not excessive or erroneous in view of all the circumstances or in violation of KRS 18A.095(22)(c). The Hearing Officer agrees with the Cabinet's statement in comparing the Appellant's punishment to three other Hazelwood employees that "Curtis was given a bit more leeway in the

form of additional opportunity to use the point system in one comparison.” (Cabinet’s Brief, page 3.)

**RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **KIMBERLY A. CURTIS V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2013-248)** 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 Stephen T. McMurtry** this 10<sup>th</sup> day of June, 2014.

**KENTUCKY PERSONNEL BOARD**

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

A copy hereof this day mailed to:  
Hon. Carrie Cotton  
Hon. Paul Fauri