COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-115

MELODY GREENUP **APPELLANT**

VS.

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

CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

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

The Board, at its regular December 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated October 28, 2021, and being duly advised,

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

DELETE Conclusion of Law #6 and substitute the following:

> The Appellant failed to introduce any evidence that she suffered an adverse employment action under circumstances that would give rise to an inference that it was the result of age discrimination. The Appellant's testimony that she did not fit in with her younger coworkers and that she felt excluded from the clique of coworkers is not sufficient to establish that her reversion was a result of age discrimination. Likewise, she failed to present any evidence that she possessed superior qualifications to those who were not discharged. The Appellant may have presented proof of the first three requirements for a *prima facie* case, however, she failed to establish the fourth requirement. In addition, the evidence she presented did not in any way demonstrate that she was discriminated against based on her age.

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

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

SO ORDERED this 17th day of December, 2021.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Olivia Peterson
Melody Greenup
Hon. Rosemary Holbrook (Personnel Cabinet)
Jay Klein

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-115

MELODY GREENUP **APPELLANT**

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

CABINET FOR HEALTH AND FAMILY SERVICES **APPELLEE**

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This matter came on for an evidentiary hearing on January 12, 2021, at 9:30 a.m. EDT, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A. The hearing was conducted by video teleconference using Amazon Chime.

The Appellant, Melody Greenup, was present and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Olivia Peterson. Also present for the Appellee was the Appointing Authority Howard J. Klein.

BACKGROUND

1. The Hearing Officer notes this appeal was filed with the Personnel Board on April 13, 2020. On the appeal form and during the pre-hearing conference, the Appellant, a classified employee with status, indicated she was challenging her probationary reversion in addition to advancing claims of age and disability discrimination. The Appellant further explained her claims in an attachment to the narrative portion of the appeal form wherein she stated, in pertinent part:

> I, Melody Greenup, feel as if I was wrongly reverted from my position as SSA back to my former position of Administrative Specialist I. I was extremely dependable, willing to help anywhere I was needed, never refused a trip, always completed any assignment even going through hoops to find out how to do it, and was willing to admit what I might have done wrong as to seek guidance on what to do the next time on situations that didn't allow me to find out beforehand. I feel as if I was discriminated against because of my height and my age. My height made it difficult for me to reach the top of one of the workers file cabinets as well as drive one of the vans. I also feel they had a problem with me being over 40. I was not treated like other staff.(sic)

2. Following discussion, the Appellant made clear that she was asserting that her probationary reversion was the result of age and/or disability (height) discrimination.

3. At the evidentiary hearing, the issue was whether the Appellant was reverted from her position as a Social Service Aide I as a result of disability discrimination or age discrimination. The Appellant also alleged she was subjected to a hostile work environment.

4. The burden of proof was assigned to the Appellant on all issues. The standard of proof was by a preponderance of the evidence.

5. In her opening statement, the Appellant stated she was a twenty (20) -year state employee. She stated that, for the first time in her state employment, she was subjected to a hostile work environment. She stated she was treated as if she was not wanted at the Cabinet for Health and Family Services. She stated she performed above and beyond. She also stated that the write-up she received was not factual and it was opinion-based.

6. The opening statement from Appellee's counsel stated that the evidence will show there were issues with the Appellant performing her duties as a Social Service Aide I. Counsel also stated there was no discrimination and the Appellant could not prove the elements for a hostile work environment claim.

7. The Appellant, **Melody Greenup**, testified she is currently employed as a Youth Worker I with the Department of Juvenile Justice. She stated she filed this appeal after she was reverted from a Social Service Aide I to her previous position as an Administrative Specialist I.

8. Throughout her testimony, the Appellant made reference to a memorandum regarding her probationary three (3) - month review as a Social Service Aide I. This document was introduced into evidence and can be found on pages 52 through 54 of the Appellee's Exhibits. In this document, dated March 3, 2020, Family Services Office Supervisor (FSOS) Erica Stevens wrote to Service Region Administrator Associate (SRAA) Marjorie Shular regarding issues with the Appellant's performance as a Social Service Aide I.

9. The Appellant admitted that she questioned different things, including filing methods. She stated this was the first job she had where she was required to file. She stated that another employee showed her how to file but was very hostile towards her. The Appellant thought this method of filing did not make any sense. She stated that she cleaned the playroom hoping that the other employee could calm down and then asked her again about filing. She stated the other employee again responded in a hostile manner. She stated that FSOS Kristin Doty overheard this and did nothing about it.

10. The Appellant also responded to allegations that she wanted to change things in a way that went against policy and procedure. She stated that she did not receive any instruction on how to obtain Medicaid cards or Social Security cards. She stated that she

changed the system to the way they did it in Oldham County. She did not believe this violated policy and procedure.

11. The Appellant testified that, contrary to the allegations in FSOS Stevens' memorandum, she never attempted to get something that she should not have. She stated she asked for help to figure out how to obtain out-of-state birth certificates. She stated that she had text messages that showed this occurred on two (2) occasions and she had correctly performed these duties. She made specific reference to pages 12 through 26 of her exhibits.

12. One of the Appellant's primary duties was to drive a van and transport children under the care of the Appellee. She responded to criticism of the way she handled an incident on February 4, 2020, when she was in charge of a 4-year-old and two (2) 18-month-old babies. While she was transporting the children, the 4-year-old had to use the bathroom. The Appellant chose to stop the van at a nearby White Castle and allow the 4-year-old to enter the restaurant unattended while she stood outside at a spot where she could see both the child entering the bathroom and the two (2) 18-month-old babies, who were sleeping in the van. The Appellant stated it was impossible for her to both hold the 4-year-old's hand as he entered the building and carry the two (2) 18-month-old babies. After she discussed this matter with her supervisor, she was later given a two (2) child stroller, which is what she needed in order to properly perform this work. The Appellant believed that she did the best that she could under the circumstances. The Appellant argued that any failure from this incident was due to lack of training and lack of proper equipment for her use.

13. The Appellant also responded to criticism in the way she handled transportation of children to visit prison moms. She stated that this was entirely due to a lack of training. The Appellant believed it was important to understand what was allowed and not allowed according to prison regulations. She believed if she broke any of these regulations, she would not be allowed to transport the children for any future visits. She specifically referred to the fact that she was told to not wait more than fifteen (15) minutes for prison moms. She stated that the general rule was that if the mother was more than fifteen (15) minutes late, the visit did not take place.

14. The Appellant stated that she was accused of only wanting to drive one (1) of the two (2) vans because of a personal reference. The Appellant stated that the reason she could only drive one (1) van effectively was because of her height. She stated she could not drive the other van safely because of the way the seat and steering wheel adjusted on that van. She stated that she told this to FSOS Doty and explained the reason why she only wanted to drive the one van.

15. The Appellant testified that she wished to have a trash can in the van in case the children who were being transported got sick. She said that, in response to an incident where a child alleged he was sick and was told to throw-up out the window, when the window was lowered, the child reached to the outside of the car and opened the door from the outside and attempted to escape from the car. She stated she was trying to follow the way Ms. Long, the previous Social Service Aide I, had done things. She stated that FSOS Stevens referred to

this as "answer shopping." The Appellant responded that she had only done what she had been told to do, which was to find out how the previous Social Service Aide I did things. She also stated that, when she discussed these issues with FSOS Stevens and FSOS Doty, they would laugh and belittle her.

16. The Appellant stated that, when she told SRAA Shular about these issues after she had been reverted, SRAA Shular responded, "why didn't you tell me these things earlier?" The Appellant responded that she did not like causing waves. The Appellant praised SRAA Shular for assisting her in finding her new job with the Department of Juvenile Justice. The Appellant responded to the allegations of "answer shopping" by pointing to certain text messages, which were entered into evidence on pages 35 and 36.

17. The Appellant stated she was "caught in the middle" regarding the cleaning of the vans. She stated that she was told by FSOS Doty that they do not clean the vans. She was then instructed otherwise by Stacey Price, the Social Service Aide from Oldham County.

18. As a part of her case, the Appellant introduced into evidence pages 1 through 44, which consisted of texts and emails regarding her work performance. She also introduced a memorandum from FSOS Stevens to SRAA Shular at pages 52 through 54.

19. When asked about her claims of age discrimination, the Appellant stated that most of the staff were younger, and she felt that she did not fit in with them. She said this included another Social Service Aide who was hired at the same time as her. The Appellant stated she was referring to her coworkers and not her supervisors. She did not know the ages of her supervisors. The Appellant stated that she was forty (40) years old when she started working as a Social Service Aide I and turned forty-one (41) while serving in this position. She stated that she felt that she did not fit into their clique.

20. The Appellant stated she was subjected to a hostile work environment and made to feel uncomfortable. She stated an example was when she asked about the files and her coworker got hostile. At that time, a coworker raised her voice with her. She felt that the people she worked with did not like her and wanted to get rid of her. She believed they were hostile towards her because she could not drive both vans.

21. The Appellant testified that she did not tell anyone, during her interview for this position, that she would need to be accommodated for her height because she did not know there was going to be a problem. She also stated she did not tell anyone in Human Resources that she needed an accommodation due to her height.

22. At the end of her testimony, the Appellant closed her case. The Appellee made a motion for a directed decision arguing that the Appellant had not carried her burden of proof on any of her claims. The Hearing Officer granted the Appellee's motion.

FINDINGS OF FACT

1. The Appellant, Melody Greenup, was promoted to a position as a Social Service Aide I with the Appellee. As a result, she was serving a six (6) - month promotional probationary period.

2. On March 31, 2020, during the course of her promotional probation, the Appellant was reverted from her position as a Social Service Aide I (grade 10) to a position as an Administrative Specialist I (grade 9) with a loss of pay.

3. The Appellant filed a timely appeal on April 13, 2020, alleging that her reversion was the result of age and disability discrimination. She also alleged she was subjected to a hostile work environment.

4. An evidentiary hearing was held, and the Appellant was assigned the burden of proof on all issues.

5. The Appellant testified as her only witness. She introduced forty-four (44) pages of texts and emails as well as a three (3) - page memorandum from FSOS Erica Stevens to SRAA Marjorie Shular, dated March 3, 2020, as her exhibits.

6. The Appellant's disability discrimination claim was solely based on her height, which is 4'11". The Appellant did not present any evidence that her height was caused by a physiological condition.

7. Importantly, the Appellant did not formally request an accommodation from the Agency for her height at any time during her employment. At most, the Appellant testified about two incidences where she mentioned issues her height was causing. First, she informally told her supervisor about her inability to physically handle three (3) children on February 3, 2020. Thereafter, she was provided a two (2) - child stroller, which solved this problem. Then, she also showed her supervisor the problem she had driving one of the vans because of her height. However, this was not a problem thereafter, because very few child transports were being conducted due to the COVID-19 pandemic.

8. The Appellant was forty (40) years old when promoted to Social Service Aide I and turned forty-one (41) during her six (6) - month promotional probationary period. The Hearing Officer finds the Appellant credible when she asserts that the coworkers she worked with were younger and did not include her in their clique.

9. Similarly, the Hearing Officer finds the Appellant credible when she says that one coworker was hostile to the Appellant when she did not understand the filing system. A supervisor heard this and did nothing about it.

10. One of the Appellant's supervisors would laugh at her when she asked questions.

11. The Appellee made a Motion for Directed Verdict at the close of the Appellant's case.

12. Because this case was decided on a Motion for Directed Verdict, the Hearing Officer accepts as true and accurate the entirety of the Appellant's testimony, including the testimony specifically highlighted above. The Appellant spent much of her testimony refuting issues raised in the three (3) - month review memorandum introduced into evidence. The Hearing Officer finds (for purposes of ruling on this motion) that the Appellant was not properly trained, or provided proper equipment, and was treated unfairly.

13. Nonetheless, based on the Appellant's evidence, the Hearing Officer finds that she was not improperly reverted due to age or disability discrimination. Further, the Appellant was not subjected to a hostile work environment based on her age or alleged disability.

CONCLUSIONS OF LAW

1. As an employee promoted to a position as a Social Service Aide I, the Appellant, Melody Greenup, was serving a six (6) - month promotional probationary period. KRS 18A.111(4). During her six (6) - month promotional probationary period, she could be reverted to her former position or a position of like pay and status with a limited right of appeal. KRS 18A.005(35).

2. After being reverted to Administrative Specialist I, with a loss of pay, the Appellant properly invoked the jurisdiction of the Personnel Board by filing an appeal based on age and disability discrimination. KRS 18A.095(12).

3. The Appellant was assigned the burden of proof by a preponderance of the evidence to prove her claims of discrimination as well as her claim of a hostile work environment. KRS 13B.090(7).

4. The Appellant failed to carry her burden of proof on her claim of disability discrimination. The Appellant's disability discrimination claim was based on her height, however, no evidence was introduced that her height is based on a physiological condition. In *Colton v. Fehrer Automotive, North America, LLC*, 2021 WL 3073780, U.S. Ct. of App. 11th Circuit (July 2021) the Court held that the Americans with Disabilities Act (ADA) should not be read to elevate a physical condition, like height, to the status of disability, unless it is based on a physiological condition. The ADA defines a disability as "a physical or mental impairment that substantially limits one or more…major life activities." Title 42 U.S.C. § 12102(a). The ADA does not define the word "impairment." The Equal Employment Opportunity Commission (EEOC) has issued regulations defining impairment as "any physiological disorder or condition." The EEOC has offered further interpretation that physical characteristics, such as height, do not constitute

impairments. Case law supports this distinction between physical characteristics and a disorder or condition. *EEOC v. Watkins Motor Lines, Inc.* 463 F.3d 436, 443 (6th Cir. 2006); *Sutton v. United Air Lines, Inc.* 527 U.S. 471, 119 S.Ct. 2139, June 22, 1999. Although Congress amended the ADA after the *Sutton* case by broadening the scope of the phrase "that substantially limits one or more major life activities," it did not amend the "physical or mental impairment" phrase. As a result, the Hearing Officer concludes that the Appellant's disability claim based on height must fail.

5. The Appellant also made an age discrimination claim in this case. She may prove her age discrimination claim by either direct or indirect evidence. If by indirect evidence, Kentucky courts follow the *McDonald-Douglas Corporation v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973) burden shifting framework. The Plaintiff must establish a *prima facie* case by showing that the Plaintiff: (1) was a member of a protected class, (2) was discharged; (3) was qualified for the position from which they were discharged; and (4) was replaced by a significantly younger person. Once a *prima facie* case is established, the employer may rebut it by providing a legitimate, non-discriminatory reason for the termination. If a legitimate, non-discriminatory reason is given, the burden shifts back to the Plaintiff to establish that the reason is pretext for masking the discriminatory motive. The burden of persuasion remains with the Plaintiff at all times to demonstrate that age was the but-for cause of the dismissal. *Williams v. Wal-mart Stores, Inc.,* 184 S.W.3d 492 (Ky. 2005); *Yeschick v. Mineta,* 675 F.3d 622, 632 (6th Cir. 2012). An employee who was fired and not replaced can establish he is the victim of age discrimination. The question is always "whether, under the particular facts and context of the case at hand, the Plaintiff has presented sufficient evidence that he or she suffered an adverse employment action under circumstance which gives rise to an inference of unlawful discrimination." *Macy v. Hopkins County School Board of Education,* 484, F.3d 357, 365 (6th Cir. 2007). One way of establishing the fourth element is by establishing that the Plaintiff possesses superior qualifications to those who were not discharged. *Rachells v. Cingular Wireless Employee Services, LLC,* 732 F.3d 652, 653 (6th Cir. 2013).

6. The Appellant failed to introduce any evidence that she suffered an adverse employment action under circumstances that would give rise to an inference that it was the result of age discrimination. The Appellant's testimony that she did not fit in with her younger coworkers and that she felt excluded from the clique of coworkers is not sufficient to establish that her dismissal was a result of age discrimination. Likewise, she failed to present any evidence that she possessed superior qualifications to those who were not discharged. The Appellant may have presented proof of the first three requirements for a *prima facie* case, however, she failed to establish the fourth requirement. In addition, the evidence she presented did not in any way demonstrate that she was discriminated against based on her age.

7. The Appellant's claim that she was subjected to a hostile work environment must also fail. The Appellant presented no evidence that any harassment she may have suffered from was the result of unwelcome age or disability harassment. *Hafford v. Seidner,* 183 F.3d 506 512 (6th Cir.1999). Further, the evidence presented by the Appellant amounted to nothing more than isolated incidents that did not amount to discriminatory changes in terms and conditions of employment. *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998).

8. Because the Appellant had the burden of proof on all issues and, at the close of her case, failed to meet her burden of proof on any issue, the Appellee was entitled to a Recommended Order granting the motion for a directed decision. KRS 13B.090(7).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **MELODY GREENUP V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2020-115) 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 28 day of October, 2021.

KENTUCKY PERSONNEL BOARD

MARK A. SIPER
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Olivia Peterson
Melody Greenup
Hon. Rosemary Holbrook (Personnel Cabinet)