COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2015-111, 2015-165 and 2015-191

TERESA G. HALL **APPELLANT**

VS.

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

FINANCE AND ADMINISTRATION CABINET **APPELLEE**

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

The Board, at its regular May 2016 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 24, 2016, and having considered Appellee's exceptions, oral arguments, and being duly advised,

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

A. **Delete** Finding of Fact number 14 and substitute the following:

> 14. The purpose of having placed Appellant on directed sick leave, according to Ms. Barker, was to ensure Appellant's safe return to work, after receiving information from Appellant's treating physician on steps the Cabinet should take "beyond measures already in place." The conflicting written statements provided by Dr. Roach, the second having been based on direct instructions from Appellant (Appellee's Exhibits 25 and 26), coupled with Appellant's refusal to have allowed direct communication between her employer and her treating physician, substantiated the grounds for Appellee having placed Appellant on directed sick leave. The Appellee, therefore, has demonstrated, by a preponderance of the evidence, that placing Appellant on directed sick leave at that time was done with just cause and was neither excessive nor erroneous.

B. **Delete** Conclusion of Law number 5, and substitute the following:

5. After examination of the deposition testimony of Dr. Roach, it is clear that the Cabinet has taken steps prior to this hearing, to provide the type of reasonable accommodations recommended by the doctor.

C. **Delete** the Recommended Order, and substitute the following:

IT IS HEREBY ORDERED that the appeals of **TERESA G. HALL V. FINANCE AND ADMINISTRATION CABINET (APPEAL NOs. 2015-111, 2015-165 and 2015-191)** are **DISMISSED.**

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, be, and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order and the Appellant's appeals are **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 19th day of May, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Cary B. Bishop
Ms. Teresa Hall
Ms. Honor Barker

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOs. 2015-111, 2015-165 and 2015-191

TERESA G. HALL **APPELLANT**

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

FINANCE AND ADMINISTRATION CABINET **APPELLEE**

** ** ** ** **

These matters came on for an evidentiary hearing on October 13, 14, 15, and 16, 2015, at 9:15 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Teresa G. Hall, was present and was not represented by legal counsel. The Appellee, Finance and Administration Cabinet, was present and represented by the Hon. Cary Bishop. Also present as agency representative was Ms. Honor Barker.

The issues in this case and respective burdens of proof were:

1. The matter of the disciplinary action taken against the Appellant in the nature of suspension from duty and pay for a period of 30 business days, from June 1, 2015, through July 13, 2015, from her position as Revenue Program Officer within the Department of Revenue, for unsatisfactory performance of duty and lack of good behavior. The burden of proof was on Appellee to demonstrate, by a preponderance of the evidence, that the disciplinary action taken was with just cause and was neither excessive nor erroneous.

2. The matter of the Appellee having placed Appellant on directed sick leave by separate letter of May 29, 2015. The burden of proof was on Appellee to demonstrate, by a preponderance of the evidence that such action was taken with just cause and was neither excessive nor erroneous.

3. The matter of Appellee's failure to allow Appellant to return to work after receipt of a doctor's statement, and keeping Appellant on directed sick leave. The burden of proof was on Appellee to demonstrate by a preponderance of the evidence that the disciplinary action taken was with just cause.

4. Appellant's claims of discrimination based on race, color, religion, sex, disability, political affiliation, and age over 40. The burden of proof was on Appellant to prove her claims by a preponderance of the evidence.

5. Appellant's claims of having been denied access to public records, discrimination, retaliation and harassment. The burden of proof was on Appellant to prove her claims by a preponderance of the evidence.

This hearing pertains to consolidation of Appeal Nos. 2015-111, 2015-165, and 2015-191. The rule separating witnesses was invoked and employed throughout the course of the proceeding. This case proceeds pursuant to the directive set out in the October 9, 2015 Interim Order in Limine. Pending motions and preliminary matters were dealt with and decided at the beginning of the evidentiary hearing, with a separate Interim Order having been issued on October 13, 2015.

At the hearing, the Appellant claimed she did not file a witness or exhibit list in the current proceeding as she had been to the Personnel Board many times prior and did not always have to submit such a list; that she always brought the exhibits to the hearings. The Hearing Officer directed her attention to the August 4, 2015 Interim Order issued following conclusion of the pre-hearing conference. Paragraph 7 of that Order set out clearly and unequivocally the requirement of an exchange of witness and exhibit lists by the parties no later than October 6, 2015, and that such recitation followed the statutory language of KRS Chapter 13B.

Each of the parties presented their respective opening statements.

BACKGROUND

1. The first witness for the Appellee, Finance and Administration Cabinet, was **Honor Barker**. Since May 2013, Ms. Barker has served as the Human Resources Director, Division of Human Resources, for the Finance and Administration Cabinet. She identified Appellee's Exhibit 1 as the May 29, 2015 letter she had authored and signed as Appointing Authority, notifying Appellant of issuance of a 30-day suspension. Some of the matters identified in the letter reflected on-going issues pertaining to Appellant that pre-dated Ms. Barker's employment in her current position. The disciplinary action occurred for Appellant's continued violations of her Memorandum of Expectations (MOE), and specifically for insubordination, harassment, making discriminatory comments, engaging in dangerous and threatening behaviors that caused great concern for leadership, others outside the Cabinet, and co-workers expressing fear in the workplace. Appellant displayed continuing behaviors that have not ceased following previous disciplinary actions.

2. The immediately previous disciplinary action had been a 15-day suspension. The next step in progressive discipline is issuance of a 30-day suspension which, in this case, she testified was warranted. Ms. Barker identified the previous disciplinary actions as well as the

following exhibits: Appellee's Exhibit 2: A Performance Improvement Plan issued August 14, 2008; Appellee's Exhibit 3: A Performance Improvement Plan issued January 13, 2009; Appellee's Exhibit 4: A Performance Improvement Plan issued March 9, 2009; Appellee's Exhibit 5: A July 28, 2009 Official Reprimand; Appellee's Exhibit 6: A May 20, 2010 Notice of a 3-day Suspension; Appellee's Exhibit 7: A January 30, 2013 Notice of a 5-day Suspension; Appellee's Exhibit 8: A September 29, 2014 Notice of a 15-day Suspension; Appellee's Exhibit 9: A Memorandum of Expectations issued to Appellant September 24, 2013; Appellee's Exhibit 10: A Revised Memorandum of Expectations issued October 27, 2014, the date of Appellant's return from her 15-day suspension. Nearly all these prior disciplinary actions were issued due to similar issues and behavior for which she received the current 30-day suspension.

3. A Memorandum of Expectations (MOE) is not equal to disciplinary action. It is a measure by the Cabinet as an internal tool for corrective action for an employee, with a goal to avoid disciplinary action. In Appellant's situation, it was issued to establish rules, clarify in writing items previously addressed to her verbally, and set out expectations. It dealt with behavioral issues. A PIP (Performance Improvement Plan) deals with performance issues.

4. The witness identified Appellee's Exhibit 11 as an Executive Order issued by the Governor on June 2, 2008, "Relating To Equal Employment Opportunities And Non-Discrimination In Employment In Kentucky State Government." She identified Appellee's Exhibit 12 as Finance and Administration Cabinet Standard Procedure, Procedure #3.3, Sexual Harassment. She referred to the Executive Order and the Sexual Harassment Policy in the current disciplinary letter. These were cited due to the discriminatory behavior, comments, and harassing behavior displayed by Appellant. The purpose of such orders and policies is to promote a positive work environment, free of sexual harassment or hostility. Such actions shall not be tolerated. Ms. Barker offered specific testimony, citing portions of the Sexual Harassment Policy that had been violated by the Appellant.

5. In the disciplinary letter, Barker had also raised allegations of bullying. She identified the resources she relied on, including such statements in the letter, specifically Appellee's Exhibits 13, 14, 15, and 16. Appellant had engaged in having falsely made accusations against a fellow employee, and also engaged in hostile staring and intimidation. She harshly and consistently criticized other people, yelled in the workplace, screamed in front of others to humiliate someone, engaged in verbal abuse, and offensive behaviors that were threatening or intimidating.

6. Much of Appellant's behaviors involved targeting individuals with whom she works. Such behaviors appear to have been intended to intimidate and caused a hostile work environment; an environment in which others felt unsafe being around her. Appellant invades others' individual space. She is known to have stood behind people without moving. She intentionally set herself up in an open area so others are aware they are being watched or stalked. This all constituted bullying.

7. Appellant's behaviors are definitely more serious than a mere personality conflict with others. She exhibits persistent behaviors intended to be harmful, and which are harmful in the workplace. She makes discriminatory comments. Ms. Barker has spoken with many individuals over a long period of time who have worked with Appellant, and all appear to express varying degrees of severe discomfort and fear for their own safety. She testified bullying is the same as harassment.

8. The disciplinary letter (Appellee's Exhibit 1) identifies 22 events that warranted discipline. These were not all the events that occurred during that time period.

9. Page 3, paragraph 4, of the disciplinary letter describes an allegation pertaining to movement of boxes. Appellant had previously been disciplined for this same type of behavior. She was also warned per her Revised MOE. In this instance, she was in a neighboring branch with no reason to be there and moved boxes belonging to that branch. She violated her MOE. Thereafter, she contacted someone in the Personnel Cabinet to report an alleged safety hazard. If she had such a concern, she should have utilized her chain-of-command.

10. On page 7, paragraph 2, there is described an incident pertaining to Cherlyn Hall. Appellant had previously been directed to utilize her chain-of-command whenever she has issues or complaints, and that she is to stay in a certain work area. Cherlyn Hall ("C. Hall") was a former employee. On this occasion C. Hall had come to the fourth floor and assisted the individual who took over her former position. When Appellant complained to her supervisors about the presence of C. Hall, she was told C. Hall is able to be on the floor and there is no reason to prohibit her presence. Appellant was then instructed to return to her work area. Appellant failed to follow these instructions, and called many individuals to complain, including the Personnel Cabinet. She also caused a scene downstairs at the front desk. Her supervisor, Lori Detwiler, had instructed Appellant to return to her work cubicle until C. Hall left the building. Appellant failed to abide by these instructions, and in so doing, was insubordinate.

11. Page 8, paragraph 2, of the letter identifies an incident when Lori Detwiler and Carla Briscoe had been notified of a smell in the ladies' bathroom on the fourth floor. They investigated and determined it may have been Windex sprayed on the mirror. They notified Appellant of the odor and instructed her not to go into that bathroom, but to use the ladies' bathrooms on the third or fifth floors. Instead of abiding by such instructions, Appellant immediately went into the fourth floor ladies' restroom and thereafter called around to make complaints about the matter. She had been given reasonable instructions and failed to follow those instructions.

12. With reference to the incidents described on page 11, paragraph 1, the Cabinet had been notified by the EEO Investigator of an incident reported by Ana Gomez. The EEO advised the Cabinet to look into it. Ms. Gomez reported an attempt by the Appellant to run her over with her car at 6:30 a.m. one morning in the office parking lot. Ms. Barker spoke to the Appellant, Appellant's supervisors, and Ana Gomez. Appellant admitted she was in the parking

lot at that time. She stated, however, she was on her way out of the parking lot to meet a friend for breakfast.

13. On that day, Appellant had just returned from her 15-day suspension. The parking lot is a part of the workplace. Appellant was not permitted to report to work before 8:00 a.m. Her work hours were changed so that they would coincide with the physical presence of her supervisors at the workplace. This behavior was very concerning, particularly the fear she instilled in a coworker.

14. Appellant has also exhibited behavior and comments in an unprofessional tone, and harassed coworkers. She often directs comments to Ms. Barker, and often her own supervisors, stating that such person is "incompetent, has low cognitive skills…is ignorant." She has also made allegations that the workplace is sexually focused.

15. The witness identified Appellee's Exhibit 18 as the May 16, 2013 Memorandum issued to all employees on the fourth floor, notifying them of the prohibition of use of chemicals and fragrances in that area. [1] She identified Appellee's Exhibit 19 as the May 20, 2013 email from David Gordon admonishing employees on the fourth floor that he had received two complaints about violation of the previous policy, and that staff needed to follow those guidelines. She identified Appellee's Exhibit 20 as a February 27, 2015 letter from Yvette M. Smith, Executive Director, Office of EEO and Contract Compliance, to Teresa G. Hall. The letter was a written follow-up of telephone conversations Appellant had with Ms. Sherita Miller pertaining to use of a filtration mask. The Cabinet had purchased and provided four separate masks for the Appellant; Appellant advised such masks did not work and she required a pediatric mask. Ms. Smith notified Appellant the Cabinet required the following information before any additional masks were to be purchased:

> To ensure the proper accommodation, please provide a recommendation from your healthcare provider/rehabilitation professional for a mask that will enable you to perform the essential functions of your job. The recommendation should be specific as to all details such as brand, model, size, or any other options that are available. …the information requested is a vital part of our efforts to facilitate the accommodation process and to determine whether an employee is eligible for accommodation under the ADA. Therefore, please send the required documentation to my attention no later than Friday, March 13, 2015.

The parties stipulated Appellant had made prior requests for ADA accommodations. The only ADA accommodations on appeal currently are allegations pertaining to Appellant's fragrance and chemical odor sensitivities. Ms. Barker testified that signage had been placed in common areas of the fourth floor notifying employees it is a "fragrance-free zone." They had coordinated with maintenance for the entire building that chemicals were not to be used on the fourth floor;

[1] Appellee's Exhibit 17 was not admitted into evidence.

the crews, if they cleaned carpet or sprayed for insects, were to coordinate such in advance to determine what may be used and when operations should be conducted. They were to thereafter air out the area before Appellant returned to the workplace. Employees on the fourth floor were given notices that they are not permitted to use fragrances, spray aerosols, scented cleaning wipes, colognes, perfumes, candles, potpourri, or other fragrant items. The Appellant has advised the Cabinet she is not satisfied with this. However, she will not advise what more it is that she wants the Cabinet to provide. Ms. Barker was not aware of anyone, who, since October 2014, had violated or intended to violate this ADA accommodation.

16. Each incident Appellant reported of having detected certain chemical or fragrant smells was investigated by several different people. Typically, they detect no odor at all. Ms. Barker believed Appellant is highly sensitive and detects odors that others cannot. However, the Cabinet cannot discipline anyone when they either cannot identify the presence of a smell or the source of same.

17. Shortly after Ms. Barker undertook her current employment position, she met with Norb Ryan, then-ADA Coordinator. At that time Appellant had given Ryan permission to speak with her doctor. Ryan updated supervisors on that conversation with the doctor. He had asked the doctor what the Cabinet could do. In that discussion, Ryan and the doctor agreed the only true way to protect Appellant was to provide her a filtering mask. The doctor identified three specific masks. These masks were offered to Appellant and she chose one. The mask was purchased and provided to her. She tried it and later advised the mask did not work. The Cabinet ordered another mask. The Cabinet has ordered and provided five different masks, all chosen by the Appellant. The Cabinet has never told Appellant that she has to wear a mask.

18. Jennifer Hicks then became the ADA Coordinator. Appellee's Exhibit 21 is an email with an attached letter of September 19, 2014, authored by Ms. Hicks. This was issued following a group meeting with most of Appellant's leadership team to review the matter.

19. When Appellant reports a fragrance event, she has reported the physical effects on her, including throat closure, trouble breathing, heart palpitations, and that she is too ill to walk or drive anywhere.

20. The Cabinet has done everything it knows to do and what the professionals have instructed it to do. The Cabinet is asking that a medical professional tell them if there are other things to be done to provide the Appellant with reasonable accommodations. They have been unable to proceed any further without Appellant's cooperation. The Cabinet has not been given notice of having to provide any accommodation other than what has already been provided.

21. The Cabinet had been instructed about the mask. Also, if there is an incident, Appellant should be allowed to remove herself from that area. The Cabinet has instructed Appellant she can certainly go into and use the conference room.

22. Ms. Barker recently asked Appellant for permission to speak with her doctor. Appellant refused. The Cabinet issued a requirement that Appellant provide a healthcare certification prior to returning to work. The initial form from the doctor indicated permission was given to speak with the doctor and that the Cabinet should continue its efforts and Appellant would continue to explore masks that would work. However, a second, amended form was subsequently received from the doctor indicating the Cabinet no longer had permission to speak with the doctor and that the mask was not the issue; that the Cabinet needed to live up to its responsibilities to provide a safe work environment.

23. She identified Appellee's Exhibit 22 as an email reminder notice pertaining to the restrictions on the fourth floor. This had been distributed to all fourth floor employees.

24. She identified Appellee's Exhibit 23 as a May 29, 2015 letter she had authored as Appointing Authority making a request to Appellant for provision of information before her return to work. If Appellant did not provide such requested information, she would be placed on directed sick leave pursuant to 101 KAR 2:102, Section 2(2)(a)(4). The Cabinet required updated information from her physician in order to determine the workplace was safe for her return, and under what conditions. This letter was issued because Appellant did not voluntarily cooperate in providing information from or communicating with her doctor. The letter was issued after consultation with the ADA Office.

25. Ms. Barker had made a determination that if such information was not provided, Appellant would be placed on directed sick leave from the date her suspension ended. Appellant has failed to provide sufficient information that would enable the Cabinet to take her off directed sick leave.

26. She identified Appellee's Exhibit 25 as a June 29, 2015 Certificate of Medical Care Provider, received by the Cabinet from Dr. James Roach. She identified Appellee's Exhibit 26 as a Certificate of Medical Care Provider, received June 30, 2015, from Dr. James Roach. Appellee's Exhibit 25, standing alone, would have been an appropriate release for the Appellant to return to work. However, prior to Ms. Barker contacting Dr. Roach for more information, she received Appellee's Exhibit 26 revoking permission to talk to the doctor and providing a different statement. She telephoned the doctor's office to verify with the nurse practioner the authenticity of both documents. They verified the documents and confirmed the doctor could not speak to Ms. Barker. When she asked about the drastic change between the two documents, the nurse practioner explained that was what Appellant required them to say and would not permit them to say anything different.

27. Ms. Barker determined the second letter was not sufficient to remove Appellant from directed sick leave status. She had explained to Appellant why she made that decision, what the Cabinet needed and why. Appellant told her she would not permit her doctor to tell the Cabinet anything else. In this event, it did not help the Cabinet to ensure Appellant's safety at work. Appellant has stated in the past that the Cabinet has not been able to protect her. This second letter from the doctor did not tell the Cabinet there was anything the Cabinet needed to

do, in addition to what has already been done, to meet Appellant's concerns. Appellant has not uniformly worn a filtration mask in the workplace. In her most recent communication on the subject Appellant advised she was no longer willing to wear it.

28. She identified Appellee's Exhibit 27 as an August 6, 2015 letter she authored and sent to the Appellant regarding a Directed Sick Leave follow-up. That letter reiterated previous telephone conversations Ms. Barker had with Appellant and cleared up any confusion Ms. Hall might have had about Directed Sick Leave. It also described why the Cabinet required the additional information.

29. The Cabinet has not been provided with any further information from Appellant's doctor since the issuance of that letter. Appellant remains on Directed Sick Leave.

30. Appellant has since advised Ms. Barker that she would not be able to return to work for quite some time as her condition had worsened. Appellant had just been provided with a portable oxygen concentrator and that, if she were to return to work, she would have to bring it with her. The Cabinet might be required to provide the Appellant with an air purifier. Ms. Barker responded to her that that would be a great idea, and asked that Appellant's doctor advise of such in writing, then they would be "good to go."

31. Ms. Barker had no knowledge of the specific locations on the fourth floor where Appellant performs her job duties.

32. Page 3, paragraph 3, of the suspension letter (Appellee's Exhibit 1) describes an incident pertaining to a discussion of Bill Cosby. Ms. Barker determined that the other people present during that event did not corroborate Appellant's allegations. It appears the event did not happen the way Appellant reported.

33. The Cabinet has asked Appellant to place her complaints in writing. She reports her complaints usually by email. Barker has emails from Appellant's supervisors in Appellant's chain-of-command describing their involvement, what they did, and with whom they spoke. She has written communications from other employees who may have been involved in incidents. Barker speaks directly to those people. She tries to figure out what happened. The number and volume of complaints themselves have become detrimental to the organization. There rarely is any basis for Appellant's complaints, and it involves so much time to follow through and investigate. Her filing of complaints without basis is just a small part of the basis for the discipline.

34. Ms. Barker does not recall that cigarette smoke had been listed by Appellant's physician as one of the irritants that trigger an asthma event. She did not recall Lori Detwiler ever disclosing to her that Appellant was "very uncomfortable with trying to pass large-framed individuals in the hallway; that she didn't want to brush up against them." Nor was she aware that Appellant had told Detwiler that she would stop and wait for such individuals to move. Appellant continued her questioning, asking Ms. Barker if she had ever seen Susan Penny,

Eileen Thompson or Lindsay Brown, and whether she would consider Susan Penny to be a large-boned individual. In her question, Appellant stated, "The two individuals put together would take up four feet."

35. No one insisted Appellant wear a mask. However, Norb Ryan, in conjunction with Appellant's doctor, agreed a mask would be helpful. That is why Appellant had been given options in the selection of masks.

36. Ms. Barker acknowledged she had been advised, particularly through the letter of Jennifer Hicks (Appellee's Exhibit 21), that Appellant is highly sensitive to odors to which others are not; that she detects what most other employees do not. In such an instance, the Cabinet does not know what more they can do for her. It happens "all the time" and Appellant is not willing to help us. She tells us we have to fix it.

37. In the suspension letter, Barker explained Appellant was advised that it was reasonable for Appellant to cooperate so the Cabinet can help her. The Cabinet merely sought the provision of required medical information. Each time a mask was provided to Appellant, she reported either the mask did not fit right, it chafed her face, it did not work, or she got hot while wearing it.

38. The Hearing Officer inquired what would result if it is learned that it is impossible for the agency to be able to provide reasonable accommodations under the ADA? Ms. Barker answered that if an undue burden exists under the law or if there are measures which are beyond reasonable accommodations, then such individual is unable to work in that workplace. The Cabinet would either have to find another position for Appellant or, if one is not available, Appellant might have to go on disability. The Cabinet has not reached that point yet, however. It is willing to provide more accommodations if it is given information that same is to be provided. No one has questioned Appellant's health condition.

39. Since October 2014, there have been no disciplinary actions instituted against individuals based on Appellant's reports of chemical events. The Cabinet could not identify any individuals as a source, or in some instances could not identify the presence of an odor.

40. Cherlyn Hall, a former employee, committed no wrongdoing when she was present on the fourth floor. There was no reason to prohibit her from coming into the building or onto the floor. Appellant's supervisors gave reasonable and appropriate directions to the Appellant. Cherlyn Hall's presence did not violate any procedures or policies, and no one filed a complaint that her presence had violated any policy.

41. The reports by Lindsay Brown about Appellant's acts were expressed concerns about the Appellant and did not constitute bullying behavior. Barker was not aware of any complaints Appellant had filed against Ms. Brown for bullying, nor had she observed any other behaviors from her to lead her to believe that she had bullied anyone. She found no evidence of

anyone having bullied the Appellant. She reiterated that if an employee felt another has engaged in bullying, it is incumbent on that individual to come forward and report it.

42. All of Appellant's complaints were considered. Ms. Barker was aware that one of Appellant's asthma triggers is cigarette smoke. She had spoken with Appellant many times regarding each and every complaint. The Cabinet is unable to discipline anyone for matters that cannot be detected. There are no complaints from Appellant that have ever been ignored. These are fully documented, looked into, and responded to accordingly, either by Ms. Barker, her supervisor or Appellant's second-line supervisor. The supervisors have confirmed to Ms. Barker in the past their many discussions with the Appellant. Ms. Barker and the Appellant have spoken many times.

43. The EEO investigation was initiated after a complaint from Susan Penny that Appellant had been harassing her and treating her in a discriminatory manner. The Cabinet EEO conducted an investigation and released its final report.

44. Upon Appellant's return to work following her 15-day suspension, the location of her cubicle had been changed to another area of the fourth floor.

45. With reference to the incident in the parking lot, Ms. Barker is aware there are videos which keep track of that area, but such records are kept for a limited period of time. There was some discussion in this instance whether videos were available. The incident, however, was not made known to Barker until the EEO reported it to her. Furthermore, Ana Gomez did not immediately report the incident. Video of the incident then may not have been available by that time. Barker also learned of the allegations by Susan Penny that Appellant moved her car in the parking lot closer to hers, and the allegation of Don Pollock, explaining why he brought a gun to work, from reports by the EEO office.

46. The Hearing Officer directed that Appellant's statement made during questioning, regarding the alleged mental health of a co-employee be stricken from the record.

47. As several questions next pertained to the EEO report, that report, at the request of the Hearing Officer, was admitted as Appellee's Exhibit 29. At the request of the Appellant the document was ordered sealed in the record. A recess was granted to allow Appellant time to review the document. Upon return from the recess, Appellant stated that instead of looking over the document, she went to her car; she had not looked at it.

48. Appellant's use of the term "bi-sexual" in the manner she used it to label someone as she perceived them to be, was in violation of the regulations and laws and is improper in the workplace. There was no need to refer to the individual by anything other than her name.

49. Barker and the Appellant had two conversations regarding directed sick leave. In the first conversation, Barker explained to her what directed sick leave was and she made certain Appellant understood what was needed and why. She also explained she would send Appellant a

follow-up letter. In the second conversation, they discussed the medical documentation needed, and Barker inquired whether Appellant had any questions. Thereafter, Hall telephoned Barker to verify receipt of information from Appellant's doctor.

50. Appellant was instructed many times that should any type of event occur, she could go to the conference room until the matter was investigated. Appellant was also allowed to wear her mask, go outside, or go home, if she felt that was necessary.

51. The next witness was **Carla Briscoe**. Since 2014, Ms. Briscoe has been employed by the Department of Revenue as the Mineral Tax Assistant Director. She had previously been a Branch Manager. She has worked with the Appellant for three years and is her second-line supervisor. Lori Detwiler, Branch Manager, is Appellant's first-line supervisor, and Greg Jennings, Director, is the third-line supervisor.

52. Briscoe had consulted with Detwiler in the preparation of the September 29, 2014 Memorandum of Expectations. Once completed, the document was delivered by Ms. Detwiler to the Appellant.

53. With reference to Appellee's Exhibit 1, page 6, paragraph 3, the Cabinet had received Appellant's new mask and Briscoe took it to her. Appellant had an incident that morning, reporting she had smelled something. It was determined that it might be cinnamon from oatmeal that had been eaten by Lindsay Brown. No chemicals were detected.

54. Appellant inquired about the smell. Briscoe confirmed it had been cinnamon oatmeal and suggested Appellant put on the mask if the odor bothered her. Hall said she was going to call Personnel. She stated her throat had been closing earlier that morning and her heart fluttered. She told them they did not have the cognitive skills to know the difference between allergies and an asthma event. Hall became loud enough that other people around the area could hear her. She finally yelled, "Please leave" to get them out of her office. Her yelling and conduct was not in compliance with the MOE.

55. Cherlyn Hall had been a Branch Manager in the Oil and Gas Division. She left employment voluntarily and on good terms. There was no prohibition against her being on the fourth floor.

56. Appellant came in to Briscoe's office on the morning of February 26, 2015, and stated, "There's that bi-sexual that's been stalking me for two years on my floor." This was not a professional communication in compliance with her MOE. Briscoe did not know to whom Appellant had referred. Appellant told her it was Cherlyn Hall. Briscoe told her that C. Hall is allowed to visit. Appellant disagreed and stated, "I see where I stand. I'll make a note of that." She then left.

57. Briscoe went to her boss, Greg Jennings, to report the matter. When she arrived at his office, she found Jennings talking to Lori Detwiler. Briscoe told him what had happened.

Suddenly Ms. Hall appeared, was upset with Jennings, and wanted to know who let C. Hall on the floor. Jennings agreed that they certainly could have visitors. He directed that if Appellant was bothered by her presence, she should go to her cubicle and others would tell her when C. Hall left the building.

58. Appellant did not follow that instruction. She went downstairs to the front desk and spoke with Dominique Redd, demanding to know who let C. Hall into the building. Ms. Redd told her they could not give her that information.

59. The MOE required Appellant to speak in acceptable tones and not use abusive language. In the absence of a MOE, employees are expected to follow a supervisor's reasonable instructions.

60. Ms. Hall had reported a smell in the fourth floor ladies restroom. Lori Detwiler asked Briscoe to investigate the matter with her. They both smelled around in the restroom, looked in the stalls and did not detect anything. They got very close to the mirrors and were able to detect a faint odor of something used to clean the mirror. Cleaning staff had previously been directed not to use chemicals.

61. Upon contact with facility management, such individuals responded by email that they used no scented products in cleaning.

62. The Cabinet was unable to determine the source of that slight scent. Briscoe and Detwiler examined the third floor ladies restroom, as well as the fifth floor ladies restroom. The fifth floor restroom would be okay for Appellant's use, however, the third floor restroom had some scented lotions on the counter. Appellant was advised to use the restroom on the fifth floor. Later in the day, Lori Detwiler reported to Briscoe that Appellant had gone back into the fourth floor restroom.

63. With reference to the incident of April 22, 2015, Lori Detwiler was the supervisor who received Appellant's report. Detwiler informed Briscoe soon thereafter. They both looked into the matter and detected cigarette smoke after having walked by the subject area. They had come across Aileen Thompson and detected the smell coming from her. There is a smoking ban on state property, but such ban does not extend to employees smoking on private property, either before or after work, or at home.

64. On April 27, 2015, Appellant reported to Lori Detwiler that she detected a chemical fragrance. Briscoe learned about it after the 9:30 break time. She observed Appellant in the lobby trying to talk to Dominique Redd. After Hall left, Briscoe spoke to Ms. Redd and learned Appellant wanted to know if they were going to send out an email regarding the elevators. Briscoe did not find any scent that day. She observed Appellant had not been wearing her mask.

65. Employee morale is low. The alleged behaviors reported by Appellant have led to employees being upset and angry. When Appellant files complaints, others fear they will get in trouble; but nothing is being done about her continuing complaint behavior. She has also targeted Ana Gomez, Cherlyn Hall, and since October 2014, Susan Penny and Lindsay Brown.

66. There are so many complaints lodged by the Appellant. They are required to document each complaint and investigate. This takes up a great deal of time. It has also disrupted the operations of MOTAX. Appellant's cubicle is not in the midst of the MOTAX area. There is no reason for her to linger in the MOTAX area or be involved in their matters. Briscoe is typically involved in investigating Appellant's complaints, which generally are not substantiated.

67. Other employees have expressed concerns about being targeted through Appellant's complaints or being bullied by her. Since issuance of the last MOE, Appellant's behaviors have not changed and, in fact, she has stated she would not change her behaviors.

68. Briscoe is familiar with Appellant's ADA accommodations. Appellee's Exhibits 18, 19, 20, 21, and 22 accurately reflect those accommodations in place, particularly since October 2014. She knows of no one who has intentionally disregarded these accommodations, sprayed cologne, perfume or cleaners.

69. If one were to go to the file area from Appellant's cubicle, one would walk past two MOTAX cubicles. If one walks to Lori Detwiler's office, one would walk past five MOTAX cubicles. Appellant had the option to go out the side door to come in another direction to get files.

70. With regard to the reported incident of December 31, 2014, Appellant had many times been advised to just walk around people in the hallway. They have received many reports that Appellant just stands behind employees, staring at them and not saying "Excuse me." She told Briscoe she should not have to say "Excuse me."

71. No one from the Cabinet has pressured Appellant to wear a mask. It was believed Appellant had initiated the concept of wearing a mask. The Cabinet thereafter ordered several masks. Neither the Cabinet nor the Appellant could know ahead of time whether each mask would work until they were physically tried.

72. Appellant reported Jay Wallen had been wearing a strong fragrance. Briscoe approached Wallen and did not detect it. She has never detected any cologne on Wallen when he has visited Briscoe in her office.

73. Since October 2014, after investigating complaints by the Appellant, Briscoe has been unable to substantiate those claims. Therefore, no disciplinary actions could be handed out to employees as a result.

74. The next witness was **Lori Detwiler**. Since February 2014, Ms. Detwiler has been employed by the Department of Revenue as Branch Manager in the Minerals Branch. She is Appellant's first-line supervisor.

75. Detwiler and Honor Barker participated in the preparation of the Memorandum of Expectations issued to Appellant on October 27, 2014. The only revision made to the previous MOE was a change in Appellant's work schedule. When one is suspended, their flex schedule is revoked. The terms of the revised, as well as the prior MOE, limited Appellant's activity; to protect her from chemical exposures, it would keep her in areas of her own work needs; she was to use acceptable tones in speaking to coworkers and supervisors; she was not to touch or disturb objects belonging to other divisions or areas.

76. On December 2, 2014, Appellant registered a concern about a box being in an aisleway as a fire hazard. This was brought to Detwiler's attention about 4:30 the previous afternoon. Detwiler examined where the box was located. It was against the wall and not in the aisleway. There was at least three to four feet of open aisleway space and, therefore, there was no hazard.

77. Subsequently, Appellant told Detwiler she had moved the box. Detwiler later received an email from MOTAX advising Appellant had kicked the box around the corner and in front of someone's doorway. One MOTAX employee asked Detwiler if they were in trouble. She told them no.

78. The following morning, MOTAX had received additional boxes and stacked them up in that area. Nothing was in the aisleway. Appellant told Detwiler that because she had not dealt with the matter, Appellant had called Dana Harvey at Safety, who would take care of it. Detwiler told her there was no legitimate reason to contact Harvey.

79. Harvey met with Carla Briscoe and Ms. Detwiler after having gotten several calls from the Appellant. Harvey advised there was no issue, and the location of the boxes had been previously approved by the Fire Marshal.

80. The MOE requires Appellant to resolve issues within the chain-of-command. She failed to do so on this occasion and interfered with the operation of another division.

81. On December 31, 2014, Appellant reported she smelled a citrus smell. Detwiler looked into this and did not smell anything. She questioned everyone in the area. As it was New Year's Eve, she asked everyone whether they had been eating oranges. Susan Penny had oranges on her desk, but had not eaten them. The ADA accommodations do not mention any sensitivity to fruit or fruit odors. People have told her that oranges were being eaten all through the week.

82. Detwiler confirmed that she was the supervisor named in the matter identified on January 13, 2015. She did not smell anything coming from Ms. Brown's office. She had also asked Carla Briscoe and Melissa Klink to sniff the area. No one detected any smell.

83. They reported to Appellant that nothing could be detected. Appellant did not believe them. Appellant went downstairs and got a security guard to come up to smell the area. Appellant left the workplace at noon, which is part of her accommodation. About January 20, 2015, Appellant made a complaint about an odor. Briscoe and Detwiler walked over to Appellant's cubicle to bring her a newly arrived mask. Briscoe told her that nothing was found with regard to the complaint; that Ms. Brown had been eating cinnamon oatmeal. Appellant told them just to put the mask on her desk; she was leaving at noon. During that interaction, Appellant got more and more upset, called people incompetent, and accused them of not taking care of her health issues. She said they had "low cognitive skills." She also called Detwiler incompetent. Appellant raised her voice to a level that others around could hear it. She told them to get out of her office. Briscoe and Detwiler left. Appellant failed to act professionally or in accordance with her MOE.

84. On February 25, 2015, Appellant reported that Lindsay or someone sprayed something. Detwiler could not detect anything. She asked Appellant if she had worn her mask or whether she would wear it. She had observed Appellant walk several times through that area without wearing a mask. Appellant advised that her mask was hot, pulled on her hair, and did not fit.

85. Since October 27, 2014, Detwiler has seen Appellant wear her mask less than 10 times and then for only very short periods of time.

86. Cherlyn Hall was a former branch manager at Oil and Gas Property Tax. There was no reason to prohibit her from being on the fourth floor. On that day, Carla Briscoe came to Detwiler's office and together they walked over to Fred Brasseale's office to say hello to C. Hall. On the way, Briscoe told her Appellant had come to her office to say she was very upset Cherlyn was there. Later, Greg Jennings took Briscoe and Detwiler to his office to discuss Teresa Hall having been in Briscoe's office and the language she had used. Appellant came in at that moment and was extremely irrational, angry and complained someone had let C. Hall on the floor. She was told Cherlyn was allowed to be there to visit and that she was not present over anything concerning Appellant; that Cherlyn took no actions to harm the Appellant.

87. Appellant stated "we needed to make Cherlyn leave the floor." Appellant was told it could not be done. Mr. Jennings directed Appellant to work in her own cubicle, and Detwiler would let her know when C. Hall had left. These were very reasonable instructions. C. Hall was present to assist the person who had taken over the position vacated by her. C. Hall's presence had been required. It was not reasonable to ask her to leave. There was no reason for Appellant to be in that area or for there to be chaos.

88. Instead, Appellant went downstairs to the front desk and caused a lot of concern and chaos. One girl ended up in tears. Appellant was asked to step away from the desk. She had been asking who it was that let C. Hall in the building.

89. In a later voicemail received by Detwiler, Appellant stated, "I know she misses me bad. Thank you for all your support." Her tone was very angry.

90. C. Hall left employment of the Cabinet on December 1, 2014. Since that date, she had only been on the premises one time. Detwiler was not aware of any other alleged contact C. Hall had or any interest she has shown at all toward the Appellant. Appellant insisted they had let a sexual predator who stalked her for two years onto the floor. It was explained to her those charges had not been substantiated and there was no reason for C. Hall to leave.

91. On March 26, 2015, Appellant sent Detwiler an email reporting a very strong odor in the fourth floor women's restroom. Carla Briscoe and Detwiler went to that restroom and checked everything out. They could not detect an odor. Over by the sink, they smelled the mirror, and there was a faint odor of dirty rags. The odor was hard to detect.

92. They made an email inquiry to the facility management employees. They responded no aerosols had been sprayed and they had followed all previous instructions. Maintenance reported they would now lock the door for one-half hour after cleaning.

93. Detwiler emailed Appellant and told her what they had found, that Briscoe and she had examined the third floor and fifth floor restrooms, discovered the third floor restroom had scented lotions on the counter, and suggested Appellant could either wait a while to use the fourth floor restroom, wear her mask, or use the fifth floor restroom.

94. Upon her examination of Appellee's Exhibit 1 pertaining to the incident of April 9, 2015, Ms. Detwiler stated the quote listed therein is accurate. She and Briscoe had walked to the subject area multiple times. No odors were detected. Appellant had not been wearing a mask during that time.

95. Detwiler was the supervisor identified in the April 22, 2015 incident. Appellant made an allegation that Aileen Thompson had a very strong floral smell. Detwiler investigated with Carla Briscoe and could only detect cigarette smoke. Again, Appellant had not been wearing her mask.

96. On April 27, 2015, Appellant reported the presence of a strong floral or chemical odor, and described her symptoms. Detwiler asked her if she would consider wearing her mask. Appellant said no. No smell was detected by Ms. Detwiler.

97. A lot of time is spent investigating these items, cutting down on the efficiency of the office. Matters have to be processed regularly, on a monthly basis by Teresa Hall, Lori Detwiler, and one other employee. Some days it takes up 75% of Detwiler's time to investigate

Appellant's complaints or intercede in matters pertaining to Appellant's behavioral issues. When issues affect MOTAX, she is often called in to investigate or handle the matter.

98. Since issuance of a revised MOE, there has been no real change in Appellant's behavior. There has been no intentional or other disregard by other employees of Appellant's ADA accommodations nor any harassment directed against her.

99. Appellant, if she begins to dislike someone, starts to file a number of complaints against that individual. People have had to leave work due to such behavior. Their anxiety levels are high. Employees do not like seeing Detwiler coming towards them, because they fear being questioned. They are all walking on eggshells. Even simple conversations among employees are reported.

100. Detwiler is stressed too. She has worked for state government almost 13 years, and this is the most stressful time of her life. It is stressful for her to come in to work. She experiences nightmares and headaches.

101. Appellant's job duties include the filing of returns, organizing files, keeping information current in the files with online research, and keeping track of items on data spreadsheets.

102. With reference to the November 17, 2014 matter, Appellant submitted a concern over certain conversations. She had accused Susan Penny of being sexually depraved in talking about a news item about Bill Cosby, and that she had used her position in management to be sexually abusive. The matter was investigated. The facts did not match Appellant's allegations.

103. There was nothing about the situation that occurred on December 2, 2014, that was a threat to the safety of any employee. This was verified by others.

104. Since October 27, 2014, Appellant has made no complaints of being sexually harassed. In December 2014 she submitted a complaint that Randy Moore walked past her cubicle and had been stalking. The witness met with Randy Moore and asked that he not speak to the Appellant. He said that on occasion he told Appellant that the coffee was ready. Appellant, in her statement to the witness, called Mr. Moore "psychotic and toxic." Mr. Moore agreed he would not contact the Appellant. He has not shown any untoward behavior toward anyone in the workplace. She concluded there was no improper behavior on his part.

105. Appellant advised she needed a pediatric mask. There are pediatric masks available online. She helped Appellant navigate online to view them. Appellant did not like the colors or designs as they were for children.

106. The witness was aware Susan Penny had filed a report with the EEO. The witness was questioned during the investigation.

107. Appellant has been counseled by the witness that if there are people standing in the walkway, to say "Excuse me" to get past them. Appellant has stated she would not talk to these people and has advised them multiple times that she would not say "Excuse me."

108. She does not recall Appellant ever having told her that cigarette smoke is a trigger for her asthma attacks.

109. The next witness was **Donna Durr-Richards**. For the past seven years, Ms. Durr-Richards has been employed by the Department of Revenue in the Property Valuation Section as a Policy Analyst. Her workstation is near that of the Appellant.

110. There is a vacant space on the fourth floor in the Tangible Branch area. On December 4, 2014, she observed Appellant having made several trips through that area. It is not where Appellant would be required to pass. Ms. Durr-Richards and employees in that section have been told by Carla Briscoe that if they see Appellant in their area, it needed to be reported. Another employee had told Durr-Richards that Appellant stated that the empty workspace could be used differently. She reported Appellant's presence in the area to Briscoe. There was no reason work-wise for Appellant to have been in that corner of the building.

111. A memo had been sent out by David Gordon telling everyone not to use fragrances, candles, etc. on the fourth floor. She is not aware of anyone having violated these restrictions, or in any way having discriminated against the Appellant.

112. Durr-Richards, as well as others she has observed on the floor, are concerned with their own personal safety in regards to the Appellant. Susan Penny told the witness that Appellant had been in the office parking lot just this morning (the morning of this hearing).

113. **Yvette Smith** was the next witness. Since November 2004, she has held the position of Executive Director in the Finance and Administration Cabinet. She identified Appellee's Exhibit 29 as a copy of the Investigative Report issued after an EEO investigation. Sherita Miller was the lead investigator and Ms. Smith, also an investigator in that matter, rounded out the two-person team. She took notes during the witness interviews. Ms. Smith supervises Ms. Miller. It was Ms. Miller who wrote the report.

114. Susan Penny had lodged allegations of a hostile work environment based on sex, and discrimination based on race, color and gender. Ms. Smith described the investigatory process, and that interviews had been conducted. A report was then written. The report found that sexual harassment had occurred, a hostile work environment existed, and harassment was perpetrated based on race, color and gender. Smith concurred with the findings and conclusions of the allegations against the Appellant. She confirmed that Susan Penny is an African-American woman.

115. She read the EEO report recommendations into the record. She believed discipline against the Appellant was warranted, as the allegations by Ms. Penny had been substantiated by other witnesses.

116. She identified Appellee's Exhibit 20 as the February 27, 2015 letter she had signed and delivered to the Appellant.

117. She identified Appellee's Exhibit 28 as an email string. The Appellant had been doing research on masks and discussed this with Ms. Miller. Smith believed this occurred because Appellant reported the previous masks did not work properly. At that time, Jennifer Hicks was the State ADA Coordinator. Ms. Hicks mentions the masks therein, because it was a device recommended by Appellant's physician. The links had been emailed to Appellant's doctor for approval.

118. To the best of her knowledge, prior to the purchase of each mask, such mask was first approved by Appellant's physician. No other accommodation or any other equipment was recommended by the doctor.

119. The Cabinet cannot prevent any and all fragrance exposure. The fourth floor is frequented and the building likewise on all levels, by visitors. The building also contains a large public auditorium. Sometimes an accommodated employee has to make adjustments as well, in the work area, with regard to provided accommodations.

120. When allegations had been received from Appellant, like the one brought in December 2014, Sherita Miller would conduct the investigation and talk to individuals involved. Ms. Smith does not believe any recommendations have been made by her office to discipline any employees as a result of Appellant's allegations.

121. The provision of ADA accommodations is a team effort, where an employee brings sufficient information to the employer for such accommodation and the employer provides a reasonable accommodation.

122. During the EEO interview of the Appellant, Ms. Hall consistently wanted to bring up allegations of bigotry that she alleged to have suffered. Ms. Smith advised her she would have to file a separate EEO complaint. The Appellant has not filed her own complaint with the EEO office after October 27, 2014, even when Ms. Smith followed up with Appellant.

123. The next witness was **Greg A. Jennings.** Mr. Jennings is employed by the Department of Revenue, and has been employed in state government for 28 years. Since April 2014, he has held the position of Director II of the Division of Mineral GIS and Minerals Taxation. He is Appellant's third-line supervisor. Appellant works in the Severance Tax Area, dealing mainly with coal.

124. He identified Appellee's Exhibit 10 as the Revised MOE issued to Appellant. This document was the result of a multi-task effort of Mr. Jennings, Carla Briscoe, Lori Detwiler, the Deputy Commissioner, and Honor Barker. It was a revision of a previous MOE, and set out very reasonable expectations of the Appellant.

125. Cherlyn Hall had been a former Branch Manager of Oil and Gas. She left employment on good terms and had been a very good Branch Manager. She was a well-liked employee with whom everyone got along except one person. There was no prohibition against C. Hall coming back to the building or the fourth floor to visit. The presence of visitors was not an unusual occurrence.

126. On February 26, 2015, Mr. Jennings received notice of a phone call from the Appellant. Instead of answering the call, he contacted Lori Detwiler and Carla Briscoe to find out why he was getting this call from the Appellant. Briscoe and Detwiler came to his office. Soon thereafter Appellant showed up and was very irate. She stated exactly what is cited in the suspension letter (Appellee's Exhibit 1). "There is a bi-sexual who stalked me that's on the floor." Appellant was very determined to find out why C. Hall was there and who had allowed her in the building. She was very demanding, to the point that for the first time in his seven years of having employees come to his office, Mr. Jennings had to stand up from his chair.

127. Appellant's face was red. In the presence of three lines of supervision, Appellant was very rude and very demanding. Jennings explained that C. Hall had every right to be there, and there was no problem with her presence. Appellant went on and on about C. Hall's presence, and about her sexuality. "You don't go around in the workplace and call someone bi-sexual. That has been explained to the Appellant many, many times."

128. Mr. Jennings directed Appellant return to her cubicle. Appellant responded, "Well, I have important work in the filing area. So you're going to tell me that instead of doing my work, I have to go to my cubicle?" Jennings said he told her "Yes. If you have a problem, I am directing you back to your cubicle. I'll have Ms. Detwiler come get you when Cherlyn has left the floor." Jennings stated, "I did this to prevent any confrontation on the premises. I had no idea what Appellant was going to do next."

129. Instead of going to her cubicle as the witness had directed, Appellant went down to the Security Guard's office and confronted them to find out who let C. Hall in. That caused a commotion downstairs. Appellant was basically insubordinate.

130. Appellant's behaviors have a negative impact overall in the division, which spreads over to the MOTAX Branch. We spend a lot of time investigating. We have yet to find one complaint that she has filed which has any kind of merit. Mr. Jennings is not against people filing complaints. However, such complaints can cross the line when a person against whom the complaint is made feels targeted and they cannot come to work without being fearful that something is going to happen. He has seen employees will not come out of their cubicles because they have said to him they are afraid they will run into the Appellant. They fear that she

will file a complaint against them. Most of the employees she targets are females. Mr. Jennings stated they cannot spend as many hours as they spend investigating baseless claims.

131. Appellant has always said she is not going to change. She has told Jennings that if a person is bi-sexual, she is going to call them a bi-sexual.

132. When Appellant was first moved to a new cubicle, she told Jennings and Carla Briscoe she was happy with the move. She had originally wanted relocation to a cubicle that was right next to the door and the bathroom. We wanted to limit her exposure to asthmatic triggers. We felt that location near the door was noisy, closer to more traffic, and would have a higher incidence of possible exposure to odors.

133. The next witness was **Sherita Miller**. For the past two years, Ms. Miller has been employed by the Finance and Administration Cabinet, Office of EEO and Contract Compliance, as a Program Investigative Officer II. In January 2015, she received a complaint filed by Susan Penny. Ms. Penny alleged Appellant made comments to her "having the hots" for a male co-worker. She also alleged Teresa Hall accused her of using her management position in order to exploit sexual content, engaged in abusive behavior regarding an incident involving an article about Bill Cosby. She also alleged that Hall attacks women and women of color.

134. Ms. Miller investigated the matter. She interviewed the complainant, Ms. Hall, and a number of witnesses who were identified on pages four and five of her final report. She identified Appellee's Exhibit 29 as the Final Report that resulted from that investigation. Ms. Miller was the lead investigator. Her supervisor, Ms. Smith, took interview notes, reviewed the report, and acted in assistance. Ms. Miller incorporated the entirety of the report as a part of her testimony.

135. During the interview, Appellant denied the allegations. Hall said Ms. Penny showed this type of behavior indirectly through her actions, squirming too much, standing too close and speaking in flirtatious tones with Mr. Wallace. Hall said she observed Ms. Penny to be "sexually charged" with two other male coworkers, and that the Department of Revenue management staff is "sex charged as a whole."

136. Ms. Miller found that the witness statements overall supported Ms. Penny's allegations. She found evidence that Teresa Hall sexually harassed Susan Penny and discriminated against her based on race, sex and color. She recommended disciplinary action be taken against Ms. Hall, and that Appellant undergo anti-harassment and diversity training. Hall violated the Finance Cabinet's Executive Order, the Cabinet's EEO Policy and the Sexual Harassment Policy.

137. With reference to Appellant's ADA accommodations, Ms. Hall contacted Miller to state she had suffered a chemical fragrance assault in the workplace, and her mask did not work; the mask was too hot, too big, and did not fit; a pediatric mask would be a better fit.

138. Miller addressed each of Appellant's concerns regarding ADA matters, and assisted in the provision of filtration masks to her. Ms. Hall has issues with both the option to wear a mask, as well as the effectiveness of same.

139. She identified Appellee's Exhibit 28 as an email pertaining to a certain mask Ms. Hall wanted. Miller asked that she select a mask and inform her of that choice. When Hall responded, she did so in a rude and unprofessional manner, and attacked Miller's skills and abilities. Miller sent that email to Jennifer Hicks, ADA Coordinator. Hicks thereafter sent back a list of web links to allow a search for masks from which Appellant could choose. Use of a mask was a recommendation made by Hall's physician, Dr. Gross.

140. Based on those instructions from Ms. Hicks, the Cabinet should allow Appellant to choose her masks, however, it would be unreasonable to go beyond providing a certain number of masks. Hall herself chose each mask. Four different masks had been purchased. Hall fully cooperated in selecting the masks. She never stated that she would not use it, or that the Cabinet should not make such purchase.

141. The building itself and the cubicles are in an open environment. The public has access to these areas. It is not possible for an employer to safeguard against all exposures to odors or fragrances. Depending on the nature of the accommodation, an employee, as well as the employer, may have to make adjustments. An employer may not force an employee to wear a mask. The selection of a specific mask is up to either Ms. Hall or her physician.

142. The EEO office did not "push" Appellant to wear a mask. If all options have been explored for accommodations, there may come a time when the Cabinet decides there are no reasonable accommodations available to provide.

143. Since October 2014, Appellant has not filed any complaints with the EEO office.

144. The next witness was **Anayansi ("Ana") Gomez.** For the past 11 years, Ms. Gomez has been employed by the Department of Revenue. She is a Geoprocessing Specialist III. Since October 2014, she has worked in the same area with the Appellant, but they do not work together.

145. She offered testimony based on the allegations contained in Appellee's Exhibit 1, page 11, paragraph 1. On October 27, 2014, she arrived at work about 6:30 a.m. As she walked toward the building, Ms. Hall, in her car, pushed on the gas and, Gomez says, she was lucky she saw her. Hall was close to running her over. Hall had been waiting in her car, pushed on the gas, turned around and parked.

146. Ms. Gomez told a supervisor, Lori Detwiler, about the incident. Detwiler said Hall reports to work at 8:00 a.m. Gomez observed that Ms. Hall parked in the same parking spot every day. On this occasion, it was unusual to see her in another spot, backed into the spot.

147. She has seen Appellant bully others. At times when she herself worked on the scanner, a place where there is not too much room, Appellant has stood behind her without saying anything, as if she was daring her to respond. Hall has targeted Gomez, and also in the past, Cherlyn Hall. In the office, the employees "have to walk on eggshells, pretty much. It's like a prison."

148. The next witness was **Melissa Klink.** For the past year, Ms. Klink has been employed by the Department of Revenue as Assistant Director for the Division of Local Support. For the four years prior, she was a Program Coordinator.

149. She gave testimony with reference to the incident of January 13, 2015, which is listed in Appellee's Exhibit 1, page 5, the last paragraph. Ms. Klink had been asked by Lori Detwiler to help her investigate a complaint of a strong smell near the office occupied by Lindsay Brown. Kim Holt was also present at the time. They walked by that office twice. Neither she nor anyone else smelled any scents whatsoever. Ms. Klink works on the other side of the building from Appellant and has no interaction with her.

150. The Appellee rested its case.

151. The first witness for the Appellant was the **Appellant, Teresa Hall.** For the past 10 years, Ms. Hall has been employed by the Department of Revenue, Mineral Taxation, as Revenue Program Officer.

152. She testified that at no time had she ever tried to run over anyone in the parking lot, nor harass or intimidate them. Ms. Gomez and she have had a toxic past. Hall felt this allegation was just more of Gomez's retaliation. Hall regularly walks in the parking lot for exercise in the mornings, during breaks, and at lunch.

153. She has spoken with Sherita Miller on numerous occasions, as well as Ms. Smith and Ms. Barker, about her three ADA accommodations. Despite requests, she has never been provided any written documents from her doctor showing that the doctor recommended she wear a mask. Dr. Gross has never told her she should wear a mask.

154. Carla Briscoe has been very demeaning, bullying and harassing toward Hall regarding her ADA accommodations. Appellant did try different masks because she did not know what else to do. She wanted to remain in the workplace.

155. Her doctor has prescribed nitroglycerin and the use of a nebulizer. She also uses a Xopenex Rescue Inhaler, oxygen therapy at night, a portable oxygen concentrator for use during the day, Restasis (for dry eye), and takes supplements for her heart and for sleep. She testified she has cognitive impairment to a small degree, and that is why she takes notes extensively.

156. Many in the office, including Susan Penny, James Wallen, Aileen Thompson, Ana Gomez, and Lindsay Brown, thought it was funny when she has a respiratory event. They openly talk and laugh about it. That constitutes a hostile work environment.

157. She continued in her testimony that Department of Revenue management has demonstrated a lack of cognitive skills to have the ability to deal with the situation. She has made full disclosure to Lori Detwiler and Carla Briscoe. "I never know when I go to the office if I'm going to be assaulted that day." She stated she was "goaded" into selecting a mask. She selected masks because that is what she was told to do by her chain-of-command. She does not believe a mask is a reasonable accommodation for her. Upon questioning from the Hearing Officer whether any other device was required to provide her reasonable accommodation, Appellant responded in the negative. She just wants enforcement of the ban on the use of sprays and chemicals.

158. She has no sensitivity to the use of rubbing alcohol. She had recorded that she had the following number of incidents of chemical exposure: December 2014: 5; January 2015: 6; February 2015: 6; and March 2015: 3.

159. She wants management to employ a more rapid response when she reports a chemical or fragrant event. She requests disciplinary action against management for their fraudulent reporting of matters.

160. She testified that when she goes into the bathroom, she is very careful because she does not want people to touch her or do inappropriate things to her.

161. With reference to the box incident, boxes were on each side of the aisleway, piled up shoulder-high. Another box was located on the floor by itself. She kicked the lone box out of the way on her way to the Coal Severance area.

162. She testified Carla Briscoe has chosen to cover for employees who violate the accommodations, such as James Wallen, who wears too much cologne. "They just don't have the cognitive skills for the positions they are given." She stated they do not exhibit the ability to comprehend this serious issue. "We have the best government money can buy." She has seen management employees conduct themselves above the law. They do whatever they want and there has been no recourse. She includes Susan Penny among those individuals.

163. On February 26, she did use the term "bi-sexual" to refer to the kind of relationship Cherlyn Hall tried to have with her. She did make that statement. The Hearing Officer inquired why she did not just identify the individual by name? Her answer, "Because that indicates the type of activity that she engages in...if you want to be gay...lesbian, if you want to marry your dog or goat, that's your business. Just don't try to engage me. Don't try to recruit me." She stated she was very fearful and distressed by Cherlyn Hall's presence. "Like I said, we have the best government money can buy." When she made that statement, others

would know exactly who she was talking about. "When you use the term bi-sexual, people get the big picture."

164. She felt threatened physically and sexually by Cherlyn Hall's presence. She did tell Lori Detwiler "Thank you for all your support" because she had detailed conversations with her about her concerns and fears.

165. Cigarette smoke is one of Appellant's asthma triggers. She does not know why it does not appear on the list pertaining to accommodations. She has alleged select employees from the Division of Collections are allowed to smoke in the parking lot, even though smoking on the premises is prohibited. She reported that incident. She noticed the presence of cigarette butts. When asked by the Hearing Officer, she stated she did have a cell phone at the time, but did not take photographs or video of people smoking. She continued by saying, "Seeing is believing when dealing with this group."

166. With reference to Appellee's Exhibits 25 and 26, Appellant testified she is not making any claims for ADA accommodation based on mental disability.

167. She stated Susan Penny has chosen her as a scapegoat to hide her own defects in the work she is paid to do. The Department of Revenue management continuously participates in derogatory jokes, gestures, comments and slurs, from which there have been no consequences.

168. Appellant's doctor thinks she is able, physically and mentally, to return to work, and she will certainly make that effort. She had disclosed to Honor Barker that she has filed for disability with the Social Security Administration. She is not represented by an attorney in that matter.

169. The Hearing Officer noted to the parties that there is a return-to-work issue with regard to Directed Sick Leave. He found that the Cabinet is entitled to discovery, at the very least, of a copy of Appellant's Social Security Administration application, and that a copy of same is to be turned over by Appellant to the Appellee at the time of the deadline for submission of Exhibit Lists for Dr. Roach's deposition.[2]

170. The Appellee took the deposition of Dr. James Roach on November 13, 2015. The deposition was filed in the record on December 9, 2015, and is considered part of the evidence in this case. Appellee's Exhibits 30 through 45 are also filed in the record and are considered part of the evidence in this case. Dr. Roach's testimony will be discussed in the Findings of Fact.

[2] A separate Interim Order was issued accordingly.

171. The next witness called by the Appellee, via deposition, was James Parrish Roach, M.D. Dr. Roach has been Teresa Hall's treating physician since June 8, 2015. He is her treating physician with regard to fragrance sensitivity issues. By agreement of the parties, and due to discussions pertaining to Appellant's personal medical information, it was ordered that Dr. Roach's deposition transcript, and the background descriptions of same, be sealed in the record.

FINDINGS OF FACT

1. Teresa G. Hall, the Appellant, is a classified employee with status. She is employed by the Finance and Administration Cabinet as a Revenue Program Officer with the Department of Revenue.

2. The parties stipulated to the following facts: (a) Appellant had made prior requests for Americans with Disabilities Act (ADA) accommodations; (b) the only ADA accommodation currently at issue in this appeal pertains to Appellant's fragrance and chemical odor sensitivities.

The 30-Day Suspension

3. On May 29, 2015, Appellant was notified of being placed on suspension from duty and pay for 30 days. (Appellee's Exhibit 1.) The Appellee identified 22 specific incidents in the letter pertaining to its allegations. Many of these incidents were repetitive of prior behavior exhibited by Appellant for which Ms. Hall had received corrective or disciplinary action.

4. Appellant had the following disciplinary history and corrective measures:

   (a) August 14, 2008, Performance Improvement Plan (Appellee's Exhibit 2);

   (b) January 13, 2009, Performance Improvement Plan (Appellee's Exhibit 3);

   (c) March 9, 2009, Performance Improvement Plan (Appellee's Exhibit 4);

   (d) July 28, 2009, Official Reprimand (Appellee's Exhibit 5);

   (e) May 20, 2010, Notice of a 3-Day Suspension (Appellee's Exhibit 6);

(f) January 31, 2013, Notice of a 5-Day Suspension (Appellee's Exhibit 7);

(g) September 29, 2014, Notice of a 15-Day Suspension (Appellee's Exhibit 8);

(h) September 24, 2013, Memorandum of Expectations (MOE) (Appellee's Exhibit 9);

(i) October 27, 2014, Revised Memorandum of Expectations (Appellee's Exhibit 10).

5. The evidence and testimony showed, by a preponderance of the evidence:

(a) October 27, 2014: When Anayansi (Ana) Gomez arrived for work at 6:30 a.m., Appellant, who did not start work until 8:00 a.m., was present in her own car in the building parking lot. She accelerated her car toward Gomez and came close to running her over.

(b) November 17, 2014: Appellant accused Susan Penny, the Manager of a neighboring branch, of being sexually depraved for having discussed a news item about Bill Cosby. Other witnesses to the event described the discussion as normal office conversation. Pursuant to investigation, the facts did not support Appellant's false allegations.

(c) December 2, 2014: Appellant told Ms. Detwiler the MOTAX Branch had placed a box in a walkway which posed a hazard and should be moved. Ms. Detwiler examined the location and determined there was no hazard; there was a 3-4' open space in which one could walk. Later, Ms. Detwiler received an email from MOTAX, advising Appellant had kicked that box around the corner and in front of someone else's doorway. Such acts were a violation of Appellant's Revised MOE, in that she failed to follow the chain-of-command, and it interfered with the operation of another branch.

(d) January 20, 2015: When supervisors, Carla Briscoe and Lori Detwiler, delivered a filtration mask to Appellant in her cubicle, Appellant told them both they did not have the cognitive skills to know the difference between allergies and an asthma event. In a voice loud enough to be heard by other people near the area, Appellant yelled, "Please leave" to get Briscoe and Detwiler out of her office. These acts constituted insubordination and were a violation of her Revised MOE.

(e) February 26, 2015: Appellant came to Ms. Briscoe's office and stated, "There's that bi-sexual that's been stalking me for two years on my floor," referring to Cherlyn Hall, a former employee. Cherlyn Hall was not in any way prohibited from entering the building or being on the fourth floor. Appellant later went to the office of Greg Jennings, and in the presence of Jennings, Detwiler and Briscoe, demanded to know who let Cherlyn Hall on the floor. Jennings told Appellant that if she was bothered by Cherlyn Hall's presence, she should return to her cubicle and stay there until someone let her know Cherlyn Hall had left. Appellant failed to follow such instruction. Instead, she went downstairs to the front desk demanding information from Dominique Redd. Such acts constituted insubordination and a violation of her Revised MOE.

(f) March 26, 2015: After investigating a complaint from Appellant about an odor in the fourth floor women's restroom, Ms. Briscoe and Ms. Detwiler reported their findings and directed Appellant to avoid use of that facility until the odor dissipated. They requested she use her mask or use the women's restroom on the fifth floor. Appellant disregarded such instructions from her supervisors, and went into the fourth floor restroom. She thereafter filed a complaint. Such behavior constituted insubordination and a violation of the Revised MOE.

(g) December 2015: Susan Penny filed a complaint of a hostile work environment based on sex, and discrimination based on race, color, and gender. The matter was investigated by the EEO. A written report was issued at the conclusion of the investigation and interview of numerous individuals, including Appellant. (Appellee's Exhibit 29, Sealed in the Record.) Ms. Penny's allegations were substantiated, and disciplinary action was recommended against the Appellant, "...as her behavior resulted in sexual harassment and a hostile work environment." It was also recommended Appellant undergo Anti-Harassment and Diversity Training; that Appellant had violated the Finance Cabinet's Executive Order, the Cabinet's EEO Policy and the Sexual Harassment Policy (Appellee's Exhibit 12).

6. The acts described in paragraph 5(a) through (g) above support allegations of unsatisfactory performance of duty and lack of good behavior, and that Appellant violated Executive Order 2008-473 Relating to Equal Employment Opportunities and Non-Discrimination in Employment in Kentucky State Government (Appellee's Exhibit 11), and Finance and Administration Cabinet Standard Procedure #3.3, Sexual Harassment (Appellee's

Exhibit 12). The Appellee has demonstrated, by a preponderance of the evidence, that the 30-day suspension issued to Appellant was taken with just cause and was neither excessive nor erroneous.

Directed Sick Leave

7. On May 29, 2015, Honor Barker, Appointing Authority, issued a letter to the Appellant giving her notice that she may not return to work on July 10, 2015, following her 30-day suspension unless she provided a certification completed by her treating physician. If Appellant failed to supply the requested information or if such information was not approved by Barker to return to work, Appellant would be placed on directed sick leave (Appellee's Exhibit 23).

8. In her letter, Barker cited 101 KAR 2:102, Section 2(2)(a)(4), which states:

> Section 2. Sick leave.
>
> (2) Use and retention of sick leave.
>
> (a) An appointing authority shall grant or may require the use of sick leave with or without pay if an employee:
>
> 4. Would jeopardize the health of the employee or others at the employee's work station because of a contagious disease or demonstration of behavior that might endanger the employee or others.

The grounds cited in the notice letter were "...increasing reports of events alleged to have impacted your health and safety in the workplace in concert with your increasingly defiant behavior and unwillingness to assist by identifying and wearing a suitable filtration mask to aid our efforts to provide protection and maintain a safe environment for you and for others."

9. Ms. Hall had her treating physician, James Roach, M.D., complete a Certificate of Medical Care Provider, which Dr. Roach then faxed to Appellee on June 29, 2015 (Appellee's Exhibit 25). Dr. Roach certified Ms. Hall was mentally and physically capable of performing the essential functions of her position in a safe and effective manner. He also indicated certain accommodations he recommended, including continued exploration of optimal filtration masks. Dr. Roach also indicated that Ms. Hall had authorized him to discuss the matter with Honor Barker.

10. Subsequently, Ms. Hall withdrew permission for Dr. Roach to discuss matters with Honor Barker. On June 30, 2015, Dr. Roach completed a revised Certificate of Medical Care Provider and indicated "the three ADA accommodations in place are to be honored – the mask is not an issue. It is the responsibility of an employer to provide a safe and healthy work

environment." The information provided on this form was entered by the doctor following Appellant's direction to do so, word-for-word. (Appellee's Exhibit 26.) The document was faxed to the Appellee. Along with that document, the Cabinet was provided a June 30, 2015 letter from Terri J. Powell, LCSW, stating Appellant's mental health assessment revealed no concerns for her return to work, provided her three ADA accommodations were followed.

11. Dr. Roach opined in his testimony that Ms. Hall's sensitivities to light, noise and smell are triggered not only by toxins in the workplace, but may also result from a possible chronic infection. He suggested that when a triggering event occurred at work:

(a) Ms. Hall leave the room or vicinity where an odor is detected;

(b) Efforts be made to identify the source of the odor and either remove or cover the source;

(c) There be a minimization of clutter, posters, and wall hangings in and about Appellant's workspace to minimize accumulation of dust;

(d) Certain protections against electromagnetic fields be utilized, such as the use of an "earthing pad" under Appellant's computer keyboard;

(e) Filtration masks could be used to diminish Ms. Hall's symptomatology and improve her ability to continue work;

(f) The use of a dehumidifier in the workplace would be advantageous.

12. Dr. Roach further opined "...with comprehensive evaluation and comprehensive intervention, it is my opinion, largely resolvable. And I think the potential is there for 90% of her symptomatology to resolve."

13. It is up to the person seeking ADA accommodations to provide sufficient information to assist the employer in meeting a reasonable accommodation. It is not up to the employer to search continuously to find suitable accommodations, including suitable filtration masks, on its own. Furthermore, it is evident Dr. Roach's suggested actions [paragraph 11(A) through (F)] not only suggest provision of certain accommodations by Appellee, but require cooperation and reasonable actions by Appellant, in order for such suggestions to be effective.

14. The purpose of having placed Appellant on directed sick leave, according to Ms. Barker, was to ensure Appellant's safe return to work, after receiving information from Appellant's treating physician on steps the Cabinet should take "beyond measures already in place." The conflicting written statements provided by Dr. Roach, the second having been based

on direct instructions from Appellant (Appellee's Exhibits 25 and 26), coupled with Appellant's refusal to have allowed direct communication between her employer and her treating physician, substantiated the grounds for Appellee having placed Appellant on directed sick leave. The Appellee, therefore, has demonstrated, by a preponderance of the evidence, that placing Appellant on directed sick leave at that time was done with just cause and was neither excessive nor erroneous.

However, the recent deposition testimony provided by Dr. Roach, including his description of steps that may be taken beyond current measures of accommodation already in place, and his belief Appellant can, with continued medical attention, improve her condition by 80% within a year, substantiates that Appellant should be allowed to return to work immediately and her directed sick leave terminated. Although Appellant has filed her application for Social Security Disability, and has alleged in that application she is disabled and unable to work, until such time as a final decision is rendered in that matter, statements in the application remain allegations and were given little weight in the instant proceeding. The Appellant has demonstrated, by a preponderance of the evidence, that the directed sick leave should now be terminated, and she be allowed to return to work under the facts of this appeal. Furthermore, she should be allowed to bring her portable oxygen concentrator to work so long as she uses it in a manner that does not impede, hinder, or interfere with the work performed by other employees.

Appellant's Claims of Discrimination Based on Race, Color, Religion, Sex, Disability, Political Affiliation and Age Over 40

15. Appellant presented her own testimony as well as cross-examination of Appellee's witnesses, to attempt to support her allegations. Despite allegations, there was no evidence Carla Briscoe engaged in unprofessional behavior toward the Appellant. She neither demeaned, bullied, nor harassed Ms. Hall. Although Appellant alleged a hostile work environment existed because other employees laughed when she had a respiratory event, there was no corroborating evidence of that allegation. Furthermore, it was clear that each time Appellant reported a sensitivity reaction, the Cabinet investigated the event in a timely and efficient manner.

16. There was no untoward behavior by the mere presence of Cherlyn Hall in the building. Cherlyn Hall's presence was lawful, and there was no evidence that she interacted with the Appellant on that occasion in any manner, let alone act in any manner to physically threaten the Appellant.

17. There was no evidence presented that dealt in any manner with Appellant's allegations of discrimination based on political affiliation or age. Such claims are, therefore, deemed not supported by any evidence and border on the frivolous. Appellant failed to meet her burden of proof by a preponderance of the evidence.

18. There were scant facts presented with regard to Appellant's claims of discrimination based on race, color, religion, or sex. Appellant failed to meet her burden of proof by a preponderance of the evidence.

19. While there was a great deal of evidence pertaining to Appellant's disabilities and the ongoing ADA accommodations accorded to her, such evidence was insufficient to support Appellant's allegations of discrimination based disability, and she, therefore, failed to meet her burden of proof by a preponderance of the evidence.

Appellant's Claims of Being Denied Access to Public Records, Discrimination, Retaliation and Harassment

20. There was no evidence Appellant was denied access to any public records. Appellant failed to meet her burden of proof by a preponderance of the evidence.

21. Appellant's claims of discrimination have been fully addressed above.

22. While the evidence shows Appellant engaged in a protected activity, that is, gainful employment, there was no evidence to show she was "disadvantaged" by an act of her employer. The evidence did not support Appellant's allegations of retaliation or any harassment directed toward her. Appellant failed to meet her burden of proof by a preponderance of the evidence.

CONCLUSIONS OF LAW

1. The issues in this case were:

   a. Whether Appellee has demonstrated by a preponderance of the evidence that the disciplinary action taken against the Appellant in the nature of suspension from duty and pay for a period of 30 business days, from June 1, 2015, through July 13, 2015, was taken with just cause and was neither excessive nor erroneous.

   b. Whether Appellee has demonstrated by a preponderance of the evidence that its having placed Appellant on Directed Sick Leave by a separate letter of May 29, 2015, was action taken with just cause that was neither excessive nor erroneous.

   c. Whether Appellee has demonstrated by a preponderance of the evidence that its failure to allow Appellant to return to work after receipt of a doctor's statement, and keeping Appellant on Directed Sick Leave was action taken with just cause.

d. Whether Appellant has shown by a preponderance of the evidence that she suffered discrimination based on race, color, religion, sex, disability, political affiliation, and/or age over 40.

e. Whether Appellant has shown by a preponderance of the evidence that she was denied access to public records, had been discriminated against, or been subject to retaliation and harassment.

2. "Preponderance of evidence" means: "...evidence which, as a whole, shows that the facts sought to be proved is more probable than not. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more creditable and convincing to the mind." Black's Law Dictionary, 5th Ed., page 1064. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of the evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer. KRS 13B.090(7).

The 30-day suspension:

3. In the foregoing Findings of Fact, paragraph 5 (incorporated by reference herein), Appellee has demonstrated by a preponderance of the evidence that Appellant had engaged in certain acts that violated Executive Order 2008-473, Relating to Equal Employment Opportunities and Non-Discrimination in Employment in Kentucky State Government (Appellee's Exhibit 11), and Finance and Administration Cabinet's Standard Policy #3.3, Sexual Harassment (Appellee's Exhibit 12). All of such cited behavior supported allegations of unsatisfactory performance of duty and lack of good behavior. Therefore, Appellee has demonstrated by a preponderance of the evidence that the 30-day suspension issued to Appellant was taken with just cause and was neither excessive nor erroneous.

Directed Sick Leave:

4. Appellant was placed on Directed Sick Leave to ensure that her return to work would not endanger her health. Appellant's reticence and non-cooperation in providing requested updated medical information, coupled with two conflicting written statements provided by her physician, Dr. Roach, substantiated the grounds for Appellee having placed her on directed sick leave. Appellee has demonstrated by a preponderance of the evidence that placing Appellant on Directed Sick Leave at that time was done with just cause and was neither excessive nor erroneous.

5. After examination of the deposition testimony of Dr. Roach, it is clear that the Cabinet has taken steps prior to this hearing, to provide the type of reasonable accommodations recommended by the doctor. Other than a provision of a clutter-free workspace, allowing Appellant to bring her portable oxygen concentrator to work, and possibly providing a grounding pad, there is little more required of the Cabinet in providing reasonable accommodations. Based

on the doctor's testimony, the directed sick leave should now be terminated and Appellant be allowed to return to work under the facts of this appeal.

Appellant's claims of discrimination based on race, color, religion, sex, disability, political affiliation and age over 40:

6. In Kentucky, any person is afforded a right of action against her employer due to sex discrimination, pursuant to KRS 344.040. Any state employee who believes she has been discriminated against may appeal to the Personnel Board. KRS 18A.095(15)(a). The Appellant, Teresa Hall, has lodged such claim, alleging she was the victim of a hostile work environment and sexual harassment.

7. It is an unlawful practice for an employer to discriminate against an individual with respect to terms, conditions, or privileges of employment because of that individual's sex. KRS 344.040(1). The general purpose of Chapter 344 of the Kentucky Revised Statutes include the safeguarding of all individuals within the Commonwealth from discrimination because of sex and to "...protect their interests and personal dignity and freedom from humiliation..." KRS 344.020(1)(b).

8. The Kentucky Civil Rights Act incorporates the anti-discrimination policies embodied in the Federal Civil Rights Act of 1964 (PL 88-352, Title VII, Equal Employment Opportunity) as amended. Due to the substantial similarity between KRS Chapter 344 and Title VII of the Civil Rights Act of 1964, U.S. Supreme Court decisions may be used to interpret the Kentucky Civil Rights laws. *White v. Rainbo Baking Co.*, 765 S.W.2d 26, 28 (Ky. App. 1988). It is Title VII of the Federal Civil Rights Act which addresses employment discrimination based on "race, color, religion, sex, or national origin." The Kentucky Civil Rights Act provides the additional protection of one's personal dignity and freedom from humiliation. *Myers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992).

9. Appellant failed to meet her burden of proof by a preponderance of the evidence pertaining to her claims of discrimination based on political affiliation or age. There was simply no evidence presented that dealt with these allegations in any manner.

10. Appellant failed to meet her burden of proof by a preponderance of the evidence pertaining to her allegations of discrimination based on race, color, religion or sex. There were scant facts presented with regard to these claims.

11. Furthermore, Appellant failed to meet her burden of proof by a preponderance of the evidence to support her claims that she was subject to disability discrimination.

Appellant's claims of being denied access to public records, discrimination, retaliation and harassment:

12. Appellant failed to meet her burden of proof by a preponderance of the evidence to show that she was denied access to any public records. There was no evidence or testimony on this issue.

13. Appellant's claims of discrimination have been fully addressed heretofore, and she failed to prove her claims by a preponderance of the evidence.

14. Furthermore, the evidence did not support Appellant's allegations of retaliation or any harassment directed toward her. She failed to meet her burden of proving same by a preponderance of the evidence.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **TERESA G. HALL V. FINANCE AND ADMINISTRATION CABINET, (APPEAL NOS. 2015-111, 2015-165 AND 2015-191)** be **SUSTAINED to the following extent:**

1. That directed sick leave be terminated immediately, and Appellant be allowed to return to work; and

2. All other issues raised by Appellant in these appeals be **DISMISSED.**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

Any document filed with the Personnel Board shall be served on the opposing party.

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Roland P. Merkel** this 24th day of March, 2016.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Cary Bishop
Ms. Teresa G. Hall