

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-286

TERESA HALL

APPELLANT

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

**FINANCE AND ADMINISTRATION CABINET
DEPARTMENT OF REVENUE
LORI H. FLANERY, APPOINTING AUTHORITY**

APPELLEE

** **

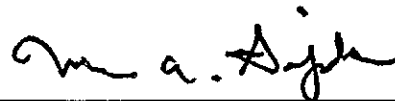
The Board at its regular November 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated October 7, 2014, and being duly advised,

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

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

SO ORDERED this 19th day of November, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Cary B. Bishop
Teresa Hall
Honor Barker

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This matter came on for evidentiary hearing on June 17 and 18, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and authorized by virtue of KRS Chapter 18A.

Appellant, Teresa Hall, was present and was not represented by legal counsel. Appellee, Finance and Administration Cabinet, Department of Revenue, was present and represented by the Hon. Cary Bishop. Also present as Agency representative was Ms. Carla Briscoe.

The issue in this matter pertains to the Appellant's claims that she had been subjected to sexual harassment and a hostile work environment while an employee of the Department of Revenue. During the evidentiary hearing she also raised allegations of retaliation and disability discrimination. The burden of proof was on the Appellant to prove her case by a preponderance of evidence.

The rule separating witnesses was invoked and employed throughout the course of the hearing. Each party presented an opening statement.

BACKGROUND

1. The first witness for the Appellant was **Teresa Hall** (hereafter "T. Hall" or "Appellant"). On June 4, 2012, Ms. Hall had been transferred to the Division of Mines and Minerals. At that time, her first-line supervisor was Carla Briscoe, although Randy Murray was her supervisor "on paper." She gave a brief description of her duties. When Carla Briscoe was injured in an accident, it was Ron Johnson who became the "go-to" person after Randy Murray. Ms. Hall claimed Ron Johnson undermined her ability to do her work.

2. Ana Gomez, a coworker, alleged that she had seen up the dress of T. Hall. Cherlyn Hall (hereafter "C. Hall"), also a coworker, is alleged by Appellant to have looked up T. Hall's dress. The only incident of which T. Hall was certain was a single time when Carla Briscoe saw her sitting on a stool in the file room, came up to her and said she was sitting in a position where one could see up her dress.

3. Appellant believed C. Hall expressed interest in her "in a more intimate sense and I'm not open to that." She also described an incident when Ms. Gomez became very distraught and had an "emotional meltdown over the way I made coffee." Ms. Gomez also constantly interrupted her when she was working with Randy Moore.

4. Appellant stated that Randy Moore had sent her "a very inflammatory e-mail" in July of 2012 about her inappropriate dress. Moore never said anything to her prior to the e-mail. Appellant got very upset over this and felt it was hostile.

5. Appellant testified that Jason Mills has emotional outbursts and that he "vented" on her.

6. Sometime in 2012 to 2013, Mr. Mills regularly sat in the cubicle of Jay Wallen, located across from the filing area, to watch Appellant "two to three hours a day." She became very uncomfortable because of his body language, looks, and attitudes. She discussed the matter with Ron Johnson, to no avail.

7. C. Hall "started creating more interest in me." She had been monitoring Appellant's phone calls and asked Randy Murray if Appellant was doing a project because she was on the telephone.

8. Appellant testified that sometime in July 2012 she had gone to the cubicle of Lori Detwiler to speak to her. C. Hall, standing behind Appellant, started waving her arms above her head "and got behind me and squeezed my derriere." Appellant was shocked and told C. Hall to stop it. She reported the incident to Ron Johnson. She did not fill out an incident report.

9. Appellant believed "Ana Gomez was relentless." She and C. Hall had "partnered up" on a variety of things.

10. When Carla Briscoe returned from her accident, Appellant had fifteen meetings with her to discuss C. Hall's "inappropriate attention" towards her. Appellant told Briscoe that C. Hall followed her on her break, at lunch, and that she could not go to the bathroom without her being there; that C. Hall had been hovering in front of her cubicle.

11. Appellant testified, "Carla conspired with Cherlyn; Carla tried to give me a gift that is quite expensive." The gift contained some Arbonne products. Subsequently, Briscoe disclosed that she had lied to Appellant and that C. Hall wanted her to have that gift. Appellant told Briscoe numerous times that she did not want anything from C. Hall.

12. One month later, C. Hall put a gift down in Appellant's cube, stood right over her with "her boob was here on my shoulder and I said I don't want anything from you. You need to leave." She insisted Appellant take the Christmas gift.

13. Appellant testified, "I had enough. I don't want any sexual contact." "...Revenue is a very, very sexual agency. I've been there eight years. It is ridiculous the amount of sexual interaction management chooses to have with their employees. I don't want to be involved in that."

14. Appellant related that there are two workers who periodically have "outburst of song" and who sit less than three feet from her. It is very startling to her "... and I've had some serious health problems because of this." She told Ms. Briscoe many times about these two individuals.

15. In early 2014, Ana Gomez was in the cubicle of Randy Moore. That cubicle is located about three feet from Appellant's cubicle. Appellant heard Gomez say that while she was at yoga the night before, she could see women's body parts through their pants. Appellant did not want to hear that. "I really thought she was going to orgasm because she was laughing and had such a great experience telling him what all she saw."

16. Appellant stated she has chronic asthma and there should not be the continued use of aerosol products at the office. Susan Perry, supervisor of Motor Vehicle Tax, as well as her staff, had received an e-mail from David Gordon on this subject. People continued to intentionally use products that caused her to have respiratory problems.

17. Appellant contacted Norb Ryan, the Kentucky ADA Coordinator. As a result, she was granted certain accommodations including an ergonomic chair for her back, corrective lighting for her sight/vision (she has problems working with fluorescent lighting), paper curtains to direct the lighting onto her desk, a cube shield placed over her cubicle, as well as a glare screen for her computer.

18. Susan Penny and her staff use Clorox wipes, citrus scented. In June of 2013, because of such use, Appellant had thirteen separate asthma attacks. She stated Susan Penny encouraged her employees to use these products to cause her asthma attacks.

19. She suspected Ana Gomez had sprayed something in her cubicle. Appellant had a security officer come up to verify that.

20. She identified Appellant's Exhibit 1 as a May 16, 2013 memorandum from David Gordon, Executive Director of the Division of Property. This memo went out to all OPV employees on the 4th floor of the State Office Building reminding them not to use chemicals or fragrant products on that floor.

21. She identified Appellant's Exhibit 2 as the May 20, 2013 e-mail from David Gordon to employees on the 4th floor. This e-mail explained he had received two complaints of individuals failing to comply with the memo he had sent out the previous week.

22. The Cabinet stipulated at this point that it did provide ADA accommodations to the Appellant and tendered for its admission Appellee's Exhibit 1. Appellee's Exhibit 1 was admitted. This undated exhibit from the Kentucky Office of the Americans with Disabilities Act shows that five steps had been taken to provide accommodations for Teresa Hall. The Appellant admitted that items 1, 3, 4 and 5 on the accommodation list had been accomplished. With reference to item 2, although higher cubicle walls had not been installed, cube shields had been installed. In addition to securing an ergonomic chair, she also has a foot-stool, and an anti-glare screen on her computer monitor. She testified that while strong noxious odors do result in her asthma attacks, the lavender based lotion made from natural lavender oil which she uses on occasion, causes her no problems.

23. Appellant has a mask she uses at work that had been purchased with Agency funds. She wears it "as-needed."

24. T. Hall identified Appellant's Exhibit 4 as a July 29, 2013 memo she had sent to Randy Murray, Carla Briscoe, Yvette Smith and Norb Ryan. In this memo she described a July 29 incident regarding use of aerosols. She heard Ana Gomez laughing from within Randy Moore's cubicle and heard something spraying. She then detected a strong fragrant odor. She asked Gomez if she sprayed anything to which Gomez replied, "Did you see me spraying anything?"

25. She identified Appellant's Exhibit 5 as a June 10, 2013 memo she had sent to Randy Murray, Carla Briscoe, Susan Bailey, David Gordon, and others. In the memo, Appellant described a number of incidents pertaining to several individuals and alleged the existence of a hostile work environment.

26. She identified Appellant's Exhibit 6 as an e-mail of October 25, 2012, and a separate e-mail of October 29, 2012, that she had sent to David Gordon. She sent the e-mails to request assistance pertaining to her allegations of a hostile work environment.

27. She identified Appellant's Exhibit 7 as a chronology she had authored setting out her allegations of harassment, unwarranted sexually inappropriate, unprofessional and obsessive behavior she alleged to have experienced from C. Hall from July 9, 2012, to November 19, 2013.

28. She identified Appellant's Exhibit 8 as a chronology she had authored pertaining to her allegations of harassment from C. Hall for the period of November 4, 2013, though December 19, 2013.

29. No supervisor ever told her that she needed to keep her legs closed while sitting. Carla Briscoe, however, did tell her to do so within the first two weeks of Appellant's employment.

30. When Appellant, during cross-examination, was asked if she spoke to anyone about any employee's sexual orientation, Ms. Hall first answered, "No." Then she stated that she did ask Randy Moore if he thought Ana Gomez was bi-sexual, because of all the interest she showed in Appellant. "I do believe both C. Hall and Ana Gomez are bi-sexual because of their actions, their words, their body language, and their facial expressions toward me." Appellant stated she had also mentioned this to Lori Detwiler. "Other than those two, I don't think there are any other people who are confused about their gender." She testified she had told Lori Detwiler, "There are a lot of lesbians and bi-sexual people at the Department of Revenue." She then told Ms. Detwiler, "You don't act like a bi-sexual." "I'm very comfortable talking with you about the different situations in this office."

31. She identified Appellee's Exhibit 2 as the September 24, 2013 Memorandum of Expectations issued to her by Carla Briscoe. The topics discussed and set out therein include Attendance; Conduct; Americans with Disabilities Act (ADA); and Kentucky Employee Assistant Program (KEAP).

32. The next witness for the Appellant was **Fred Brasseale**. For more than twenty years Mr. Brasseale has been a Mineral Assessor with the Department of Revenue, Mineral Valuation.

33. A mail cart was normally kept in Mr. Brasseale's cubicle. Other people made jokes on a regular basis about stealing "his cart." Everything in the office that is moved, is moved by use of that cart. The cart does not belong to Mr. Brasseale, it merely sits in his office because it happens to fit.

34. **Randy Murray**, who since February 1, 2014, has been an Internal Policy Analyst III with the Department of Revenue and Unmined Minerals, was the next witness. His prior position since 2008 was that of Section Supervisor of the Minerals Severance Tax Section.

35. Mr. Murray had been Appellant's supervisor from July 2012 until February 2014. He believes Tom Crawford, Stacey Ewalt, and Susan Bailey got together and that through their office Murray was directed to send the Appellant an e-mail about her habits of dress. Mr. Murray himself had never observed Appellant to have dressed inappropriately or sit inappropriately at work. Neither Crawford, Ewalt, nor Bailey work in Murray's or Appellant's section or side of the building.

36. When he was directed to write the e-mail, he then questioned the people who made complaints about Appellant's mode of dress.

37. Prior to sending out the e-mail, he spoke to Lori Detwiler and C. Hall about the inappropriate dress allegations. They were direct witnesses who had observed the matter.

38. He identified Appellee's Exhibit 3 as the June 9, 2014 e-mail he composed and sent to Teresa Hall. He testified that Randy Moore was one of the "three coworkers" mentioned in the e-mail. The "supervisors" mentioned therein include C. Hall and Carla Briscoe.

39. Mr. Murray never asked anyone to monitor Appellant's telephone calls, nor did anyone ask him to do so.

40. Randy Moore and Jim Justice each had complained to Mr. Murray about Appellant having come to their office and picking up and examining documents without their permission. He sent an e-mail to the Appellant to correct her on these different points. Thereafter, Appellant and Mr. Murray had a thirty-minute discussion on those topics.

41. Murray participated in a meeting with Norb Ryan to discuss the ADA accommodations for Appellant. Upon his examination of Appellee's Exhibit 1, he testified this list correctly reflected the discussion and the results of that meeting. He believes all the ADA accommodations have been established. He has seen the Appellant wear her mask once or twice.

42. He described the atmosphere in the office. There is a lot of apprehension among employees. People talk and wonder what the next episode will be pertaining allegations of using aerosol sprays or perfumes.

43. By agreement of the parties, the next two witnesses for the Appellee were called out of order. The first witness was **Sherita Miller**. For the past nine months, Ms. Miller has been employed by the Finance and Administration Cabinet, Office of EEO and Contract Compliance, as a Program Investigative Officer II. Prior to that, she worked four and a half years in the Office of Procurement Services. Her prior three and a half years were spent as Program Coordinator in the Office of EEO and Contract Compliance.

44. It was Ms. Miller who was directed to investigate the Appellant's complaints of sexual harassment, workplace violence, and hostile work environment. During testimony, she described the Appellant's allegations against C. Hall, Ana Gomez, and Jason Mills. She conducted interviews, took and transcribed her notes, and drafted a final report, which she identified as the April 9, 2014 document shown in Appellee's Exhibit 5. This was the first report she had ever drafted regarding allegations of sexual harassment.

45. In her conclusions, she found that no individuals gave information to support the Appellant's claims of sexual harassment, bullying, or workplace violence. Violation of ADA accommodations was not a part of this investigation.

46. It was not unreasonable under the circumstances that coworkers were directed not to speak to the Appellant or fraternize with her. A consistent theme from among other employees was they were constantly thinking Appellant would accuse them of doing something. One employee had asked for a transfer out of the division. Another employee advised he might leave his current position if the work environment did not change. One witness she interviewed became very upset and cried. Some were concerned that if they said anything in this investigation, Appellant would find out, file a complaint, and management might discipline them. Ms. Miller found no evidence of any threats made by C. Hall or Ana Gomez or that they engaged in acts which constituted sexual harassment against the Appellant.

47. She identified Appellee's Exhibit 6 as the June 2, 2008 Executive Order of the Governor Relating to Equal Employment Opportunities and Non-Discrimination in Employment in Kentucky State Government. This order prohibited discrimination against any state employee who was in one of the many protected classes.

48. She identified Appellee's Exhibit 7 as Procedure No. 2.5, Sexual Harassment, issued by the Office of Equal Employment Opportunity and Contract Compliance, Finance and Administration Cabinet.

49. Upon cross-examination, it was Ms. Miller's opinion that when the Appellant herself called individuals bi-sexual or lesbians, this violated the Sexual Harassment policy, in particular II., 4. and 2. (Appellee's Exhibit 7). The training recommendations she had made in her report were a result of some of the employees having asked her what "sexual harassment" and "inappropriate behavior" were. This training was not recommended based on any evidence that Appellant was the victim of sexual harassment.

50. **Donna Durr-Richards**, who since February of 2014, has been employed by the Department of Revenue, Compliance Section of State Valuation, was the next witness. Her prior position had been in the Motor Vehicle Tax Section for a period of about five years.

51. Ms. Durr-Richards had worked with the Appellant for about two years on the same floor of the building, although not in the same section. In February of 2014, she moved to another section.

52. Prior to her relocation, her cubicle was about 25 feet away and two cubicles down from that of Appellant. On two occasions, Durr-Richards saw the Appellant sitting inappropriately while wearing a dress. Appellant sat on a stool in the common area in the hallway, with her legs spread apart. Ms. Durr-Richards did not feel comfortable enough to approach Appellant at that time to tell her.

53. Approximately one year ago, Ms. Durr-Richards had used a Lysol wipe in her cubicle for general cleaning. The wipes had been ordered by Laura Steele as part of the normal office supplies. They were told wipes could be used instead of aerosols. Thereafter she had been asked by Susan Penny, her supervisor, not to use Clorox wipes. A memo on the subject was subsequently distributed among the employees. She acknowledged that at one time she had seen a sign in the bathroom indicating that the spraying of aerosols was prohibited.

54. She testified, "Safely, I would say 75 percent of that floor are afraid of her [the Appellant]." Employees believe Appellant is dangerous and that she would actually hurt someone.

55. Approximately one year ago when Ms. Durr-Richards came to work, she approached her cubicle and saw that four to five archive boxes she had stacked on the outside of her cubicle wall had been moved. There is a 12 to 18 inch opening between the outside cube wall and a structural pillar. On the other side of the pillar there are filing cabinets. These archived boxes contained records from "MOTAX" and are normally set there. She learned that Teresa Hall had moved them. Ms. Durr-Richards moved the boxes back. She later discovered Hall had moved them a second time.

56. She spoke to Carla Briscoe and told her Teresa Hall had moved her boxes out of her area. Ms. Briscoe asked the witness to put up a sign that read, "Please do not move the boxes." Ms. Durr-Richards moved the boxes back to the pillar and put up the sign. Within minutes, Teresa Hall came back and moved the boxes again.

57. When Appellant moved the boxes again, Ms. Briscoe had been in Durr-Richards' cubicle. Appellant approached the witness and was very rude, telling her that she was not a "team player." Durr-Richards was in shock. Later in the day, Ms. Briscoe apologized to her. The witness characterized that last encounter as the Appellant having been "in your face" making her point that I should not move my own boxes.

58. The stack of boxes did not obstruct anyone's way to walk. The boxes did not block a walkway.

59. She continued her testimony stating, "I feel a whole lot better, now that I have moved to the other side of the building." She realized there were common areas including the elevator or ladies' restroom where she might encounter the Appellant. The elevator was not of much concern to her because usually there were other people present. She never goes to the restroom where she has not thought, "I hope she's not in there."

60. The fourth floor has had a totally different atmosphere since the Appellant came to work there. People are uncomfortable, frustrated, and, like the witness, afraid.

61. With the previous two witnesses of the Appellee having offered their testimony out of turn, the testimony returned to that of the Appellant's witnesses.

62. For the past ten years, the next witness, **Randy Moore**, has been employed by the Department of Revenue as a Mineral Assessor II. Appellant had assisted him on some projects.

63. Approximately three to four weeks ago, Appellant came "tearing" into Mr. Moore's office while he was sitting at his desk. He stood up and Appellant pushed behind him to grab something off his desk. He testified: "You slapped me with your breast and I did not like that."

64. Upon further questioning, Moore testified, "I feel you're dangerous, yes." When Appellant first came to work, Mr. Moore made efforts to try to "enfold" her into the group. He had several conversations with Appellant and spoke to her about where she was living. He thought it was a rough area, so he told her, "I hope you have protection." Appellant responded, "Oh yes, I have a handgun." Appellant then stepped up close to Mr. Moore, looked him straight in the eye, and said, "And I know how to use it." That frightened Moore because Appellant displayed an ability to change moods in an instant.

65. There was an incident when Appellant had questioned Mr. Moore's ability to walk. He had asked Appellant to drop off a copy of the Coal News so he could review it and keep up with information. Appellant refused and said, "No, you have legs."

66. Upset, Mr. Moore went to Carla Briscoe's office where he found Ms. Briscoe and the Appellant. Appellant at that time stated, "You're trying to make me do more work. You can walk. There's nothing wrong with you. You are nothing but a needy person." Mr. Moore admitted that he did stick his finger in Appellant's face and declared that he was not needy; that he has a real issue with walking and that it was not his fault. He was hurt by what Appellant had

said. "I didn't know that you were capable of that." Mr. Moore testified he has degenerative disc disease in all lumbar aspects of his back and is in constant pain.¹

67. There was another incident when Moore had observed Appellant reuse old coffee grounds to make coffee. "It was weak as water."

68. Moore admitted he occasionally sings in the workplace. Neither the Appellant nor anyone else asked him to stop or to sing at a lower volume.

69. It was plain to everyone in the office that at times one could see up the Appellant's dress. She sat at a 45 degree angle to her desk, looking back over her shoulder at the computer monitor, with her legs spread. One could see that as they walked by her cubicle. On such occasion he was embarrassed.

70. Moore believes other people are intimidated by the Appellant. On two separate occasions he had observed T. Hall and a Security Guard walk around the floor trying to smell the cologne of employees. Things like that put you on edge. She had also at one time come to the witness' cubicle and asked if he thought Ana Gomez was a lesbian; that she herself thought Ms. Gomez was.

71. He described the environment as a rough place to work and the employees have to watch what they do.

72. The next witness was **Jason Mills**. For six years he had been employed in the Department of Revenue, as an Information Systems Supervisor. For the past few months, he had served as the Revenue Branch Manager for Property Valuation. There are times that he goes to Jay Wallace's cubicle to help him with his work or to visit. He never sat there to watch the Appellant.

73. He did have discussions with Ana Gomez about the Appellant having brought a Guard onto the floor to sniff Ms. Gomez for perfume. He had also discussed with her the incident of Appellant calling Ms. Gomez a lesbian. He has observed quite a bit of animosity between the Appellant and C. Hall and had discussed that with C. Hall. He did advise Ana Gomez to avoid the Appellant as much as possible to avoid any conflict.

74. Mr. Mills had observed a few times when Appellant first came to work, that she sat at her desk at a 45 degree angle in a short skirt with her legs apart. He mentioned this to his supervisor, Carla Briscoe. Walking by the cubicle he felt "kinda uncomfortable." The Appellant's desk has now been moved and that problem no longer presents itself.

¹ The Hearing Officer observed Mr. Moore to enter the hearing room, and walk with difficulty, with the aid of a cane.

75. Two ADA accommodations had been accorded to the Appellant: 1) the adjustment of the light above her cubicle; and 2) a memo had been distributed directing employees not to spray anything. He had heard that a year and a half ago, C. Hall had sprayed an odor neutralizing spray in the office.

76. He has observed Appellant wear her mask approximately four to five times.

77. He has not seen anyone bully the Appellant, but believes the reverse is true: that she bullies others. He was aware of the box-moving incident outside Donna Durr-Richards' office, as well as the words Appellant had with Randy Moore. Appellant had at one time sent the witness an e-mail accusing him of not having the skill set to do his job.

78. The first witness on the second day of hearing was **David Gordon**. Since January of 2008 Mr. Gordon has been employed by the Department of Revenue, Finance and Administration Cabinet, as the Executive Director of the Office of Property Valuation. At the time of the alleged incidents, Mr. Gordon was the Appellant's fourth-line supervisor.

79. Mr. Gordon has never observed Appellant wear offensive or inappropriate attire at work or to have exposed herself in an inappropriate way.

80. After receiving two complaints, he sent out the May 16, 2013 memo, which he identified as Appellant's Exhibit 1. He knew Appellant had breathing problems around fragrances. Gordon asked others for advice and was told to send out this memo. A few days later, after additional complaints, he sent out the e-mail dated May 20, 2013 (Appellant's Exhibit 2).

81. **Susan Bailey**, who since April of 2014, has been the Director of State Valuation in the Office of Property Valuation, Department of Revenue, was the next witness. Her previous five years were spent as the Deputy Executive Director of the Office of Property Valuation.

82. Appellant had discussed with the witness, "a couple of times" during June 4 through October 29, 2012, her allegations of a hostile work environment. Ms. Bailey spoke to the Executive Director David Gordon about these matters to keep him in the loop.

83. Ms. Bailey had been copied on the July 23, 2012 e-mail (Appellee's Exhibit 3). She did not participate in the creation of the document, nor did she recall directing Randy Murray to send out the e-mail.

84. She never observed the Appellant to have worn improper or offensive attire in the workplace or to have exposed her undergarments.

85. **Susan Penny** was the next witness. Since March 2014, she has been employed by the Department of Revenue, Property Valuation, as the Motor Tax Branch Manager. Previously she had been employed for a period of two years as the supervisor of Motor Vehicle Property Tax Branch, and four years as supervisor of Sales and Use Tax, Tax Payer Assistance.

86. Employees in Ms. Penny's section did use Clorox citrus-scent wipes. The wipes had been provided by Laura Steele who made the general supply purchase. Employees were told they could use these wipes according to a list of items upon which such wipes had been included. The wipes were to be used instead of desk spray. Most times employees clean their offices on Fridays because the Appellant is on a flex schedule and does not work that day. She was aware of the memo that had been distributed pertaining to the aerosol ban. She did not believe the use of the Clorox wipes violated that directive. Such wipes are currently being used.

87. **Troy Robinson**, who for the past year has been employed by the Finance and Administration Cabinet as Executive Director of the Office of Administrative Services, was the next witness. His previous eight years were spent employed as Division Director for Human Resources where he was also the Appointing Authority.

88. Appellant first contacted Mr. Robinson about 2010 while Appellant worked in Collections. She lodged complaints of a hostile work environment and the use of aerosol sprays. He and Appellant worked together toward a resolution. As part of the resolution, Appellant was moved to Mineral Severance. Several matters played into the eventual transfer of the Appellant. Robinson believed a reprimand and two suspensions had been pending or issued. With regard to the five-day suspension, the settlement agreement provided the employer would withdraw the suspension and transfer Appellant to an area it felt best for her, based on Appellant's educational degrees. Appellant also indicated she had friends and an interest in that new area. The transfer was not based on any aerosol spray problems.

89. After the move, Appellant expressed concerns about her work situation. She sent Mr. Robinson e-mails about Ana Gomez and alleged outbursts. Robinson and another individual visited employees in Appellant's section to discuss the matter. Things calmed down after that and no disciplinary action was issued.

90. Robinson recalls having had a meeting with the state ADA Coordinator. After the meeting, employees were asked not to spray aerosols. After Appellant's transfer, that ban was elevated to the entire fourth floor.

91. Appellant's work relations with coworkers in Collections got pretty heated. She had made multiple complaints prior to her transfer about bullying and a hostile work environment.

92. **Anayansi "Ana" Gomez** was the next witness. Since August 1, 2005, Ms. Gomez has been employed by the Department of Revenue, Division of Property Valuation and GI Services, as a Geoprocessing Specialist III.

93. After review of Appellant's Exhibit 6, Ms. Gomez testified she had observed Appellant make coffee by using old coffee grounds. Gomez explained to her that they did not drink coffee that way. Appellant did not listen. Gomez observed Appellant reusing a filter and coffee grounds and attempting to place fresh grounds into that same filter. Gomez then walked away.

94. Gomez has not spoken to the Appellant in over a year. The only time she spoke with her was when her supervisor, Randy Murray, told her to give Appellant some letters.

95. Gomez denied spraying anything into Appellant's cubicle. She did observe C. Hall spray something in the area because of a smell coming from Appellant's cubicle. It was to get rid of that smell.

96. On April 20, 2013, when Appellant asked her if she had sprayed anything, Gomez replied, "Have you seen me doing it?" She replied in that manner because she did not like the way Appellant approached her and asked the question. Gomez testified she did not have to answer to T. Hall. She has never seen Randy Moore spray anything. She denied ever having any conversations with C. Hall about the Appellant.

97. Gomez testified she had been using perfume a long time. She was aware of the memo from David Gordon and testified it said nothing about using lotion or perfume. She had previously asked her supervisor if it was alright to use perfume and was advised it would be fine. She also received approval from Carla Briscoe.

98. Gomez stated she never attempted to look up the Appellant's dress. There was an incident one and a half years ago where it was obvious Appellant had her legs spread open and everyone could see it. Appellant sat in her cubicle, at an angle to her desk, facing the cubicle opening. It was impossible not to see how she was sitting. Her supervisor, Jason Mills, was not at work that day. Gomez talked to her other supervisor, C. Hall, and asked her to say something to Appellant because there were a lot of people, including taxpayers, who come to the office. "I don't want to see that and I don't think all the people want to see that."

99. On two occasions Ms. Gomez saw Appellant bring a Security Officer to the fourth floor work area. Early one morning she was sitting in her cubicle and saw Appellant walk a guard around the cubicle. They were sniffing to make sure Gomez was not wearing perfume. The second incident also occurred in the early morning. Gomez was making coffee. Appellant

located Gomez and directed the Security Guard towards her. They were right beside Gomez, very close, sniffing her. Gomez told Jason Mills and Carla Briscoe about the incident. This incident made her feel like she had been harassed.

100. During Christmas time C. Hall gave everyone in the office a gift. Gomez never said anything to Teresa Hall to indicate any romantic interest in her. "She just likes to intimidate people and harass people in the workplace." Randy Moore told Gomez that on two occasions Teresa Hall told him she thought Gomez might be a lesbian. "I did not do anything about it because I know how she is."

101. At the end of her testimony, Ms. Gomez stated: "There are a lot of people in the office that try to do it the right way. Try to come to work and do the job right. But then we have Ms. Hall, here, who has made a career of trying to harass people, intimidate people, and she is trying to play the system and she's getting away with it. I mean, we've been dealing with this for two years . . . two long years and . . . we are hostage in the office. We cannot do anything, say anything, because if she overhears us talking about something, she reports it or, misconstrues what we say . . . I hope something is done because I don't believe we can work like this forever."

102. **Carla Briscoe**, who for the past five years has been employed by the Department of Revenue, Property Valuation, as the Revenue Branch Manager, offered her testimony. When the Appellant was transferred to the Division in June of 2012, Ms. Briscoe was her Branch Manager. Briscoe was injured in a motor vehicle accident. Ron Johnson and Randy Murray then became Appellant's supervisors from July 6 through December 3, 2012. Upon Briscoe's return, she became Appellant's second-line supervisor.

103. In her interview during the EEO Investigation, Briscoe explained how Appellant's cubicle had first been set up and how the Appellant sat. On December 3, 2012, when Briscoe returned to work, Appellant's cubicle had been rearranged making it impossible to see up her dress. She herself has never seen Appellant wear offensive or inappropriate attire at work.

104. Appellant had complained to Ms. Briscoe a couple of times about C. Hall. Briscoe discussed the allegations once or twice with C. Hall and requested she adjust her behavior after the "cart" incident; to stay away from Teresa Hall and leave her alone.

105. One morning when Briscoe came to work, Appellant came to her office carrying a package of Arbonne products. Appellant said it had been left on her desk anonymously and she was going to call around and ask who had left it. Briscoe told her not to do that but to just take it as a gift. At that time Briscoe did not know who left the gift for the Appellant.

106. She learned a day later that C. Hall had delivered the gift. C. Hall said she cleaned out her closet, found this travel set, knew how Appellant liked these products and brought them to leave on Appellant's desk. Subsequently, Appellant told Briscoe she did not want anything from C. Hall and that she was "disappointed" at Briscoe because she did not tell Appellant who the gift was from.

107. As Christmas approached, Briscoe saw a little package of gifts in Cherlyn Hall's tray and asked whose they were. C. Hall stated they had been returned to her by the Appellant. C. Hall had given gifts to several people including the Appellant, as it was Christmas.

108. Lori Detwiler reported an incident between C. Hall and Teresa Hall. Detwiler and C. Hall were engaged in a discussion. Appellant had a question for Detwiler, rushed into the cubicle between C. Hall and Detwiler, and in the process bumped C. Hall. Briscoe had Detwiler write a statement. She then spoke to C. Hall and asked her to also write a statement. C. Hall's statement was consistent with that provided by Detwiler. Briscoe then considered the matter closed.

109. When Teresa Hall had first transferred, Briscoe had heard by word of mouth that she had issues with the use of aerosols. Briscoe made a "no aerosol" sign and hung it up in the bathroom. She did not know at the time how broad Appellant's allergies were.

110. A day or so later, Facilities Management removed the lights from over Appellant's cubicle.

111. Subsequently, they met with the ADA representative. As a result of that meeting they received an e-mail with the list of ADA accommodations (Appellee's Exhibit 1). All the steps listed therein are currently in place.

112. Another "no aerosol" sign was placed in the common area near the copy machine. This aerosol ban was communicated to all employees on the floor. Briscoe herself had told a new employee not to wear "lots of perfume" and not to spray any sprays; that in order to clean a desk they had a spray bottle with vinegar and water. She acknowledged that men in the office continued to wear cologne.

113. Appellant had approached Briscoe on one occasion to report someone had sprayed something near her cubicle. Briscoe looked into the matter and could not smell anything.

114. She identified Appellee's Exhibit 2 as the September 24, 2013 Memorandum of Expectations she had prepared and delivered to Teresa Hall as part of Appellant's evaluation. This was after the meeting with the individuals from ADA.

115. The ADA recommendations included a particular mask be provided to Appellant. This mask was paid for by the state. Briscoe had seen Appellant wear it two times in the last year.

116. The only reason Briscoe directed Appellant modify where she worked on the fourth floor, was to help her avoid areas of the floor where she need not be and come into possible contact with annoying or noxious odors. Briscoe also recommended to other employees that they avoid interactions with the Appellant. This was the result of Appellant's argument with Randy Moore and that such interactions usually ended up in a complaint.

117. On May 8, when the Appellant reported a chemical smell, Briscoe looked into the matter. She saw there had been a bucket in the janitor's closet with an ammonia smell. She shut the door and e-mailed Jennifer Faye.

118. She related an incident pertaining to Appellant moving boxes that had been stacked by Donna Durr-Richards. Briscoe believes she probably told Appellant the boxes belong to another group and were not hers to move. Briscoe met with and spoke to David Gordon and Susan Penny. She then spoke to the Appellant and told her to move the boxes back where they had originally been. There is six feet of space on the other side of the pole which was clear for purposes of a walkway.

119. The next witness was **Lori Detwiler**. Since February 1, 2014, Ms. Detwiler has been the Branch Manager in the Department of Revenue for the Mineral Severance Taxation Branch. Previously she had been Program Manager in that same section.

120. She has worked with the Appellant for about two years and became her first-line supervisor in February 2014.

121. She has never seen the Appellant wear offensive or improper attire. She did receive complaints from employees, however, that Appellant had worn very short skirts. On several occasions she herself had seen Appellant sitting inappropriately at her desk. She reported to Randy Murray that this was not appropriate. She did not feel at the time that it was her position to address the Appellant. She brought the matter to her supervisor so he could discuss it discreetly with T. Hall.

122. Some male coworkers had also come to Detwiler to advise they were uncomfortable and had to use another door into the area so they did not walk past Appellant's cubicle. Two other women reported they had observed the same thing and were uncomfortable.

123. Taxpayers come into the office, as well as visitors from the federal government. She did not want this to be an ongoing issue. After the Appellant's cubicle was rearranged, the matter seemed to have been resolved.

124. On July 16, Detwiler and Cherlyn Hall were engaged in a conversation in Detwiler's office. Teresa Hall approached, pushed past C. Hall and asked Detwiler a question. Detwiler answered the question and the Appellant left. Soon thereafter, Appellant returned with another question, which Detwiler answered. At no time did she observe the Appellant to express any emotion, or change her expression or demeanor. She did not see C. Hall waive her arms around or touch the Appellant in any way.

125. Upon her review of Appellee's Exhibit 5, Detwiler recalled Appellant made a statement to her that Ana Gomez and or C. Hall might be lesbians. Appellant stated certain actions had made her uncomfortable, such as the matter involving the coffee pot. Detwiler was never aware of any complaints of a sexual nature made by the Appellant.

126. Appellant mentioned to Detwiler several times that she felt she was being mistreated and that the Department of Revenue was not meeting her ADA requirements. Appellant felt employees in the area were intentionally trying to start things with her. Detwiler investigated and either dealt directly with or did not find anything each time Appellant brought a complaint. She did not ignore Appellant's complaints. She went through her chain of command or directly to the appropriate person.

127. Appellant told Detwiler on more than one occasion that due to Appellant's observation of what she perceived to be the behavior of others, she questioned whether or not one or more individuals were lesbians. After Detwiler became Branch Manager, Appellant requested a meeting. At the meeting, she told her of some of her concerns and issues and that she did not like real friendly behavior; no back patting. Appellant said she did not think Detwiler was a lesbian, but she would keep her eye on her. At the end of the meeting, Appellant asked if Detwiler wanted to give her a hug, in a kind of laughing manner. Detwiler did not hug her.

128. Ms. Detwiler has been working on the fourth floor for about eleven and a half years. She described it as a good functioning office where people generally work well together. However, since Appellant started working there, there have been a lot more interpersonal issues that need to be addressed, which takes away from work time. She also testified: "The office climate is not good. It's chaotic. It's destructive. There is something every day that we have to deal with. It's interpersonal – unable to get along. It's very difficult to get work done many days." Appellant made so very many complaints and they tried to keep everyone compliant with her requests. "It's just not enough." The issues become "all consuming" . . . "so disruptive" . . . "keeps everybody on pins and needles." No one knows what to expect that day. People modify

their behavior in the workplace because they are afraid Appellant will file a grievance. They make sure they are very careful around her.

129. **Cherlyn Hall** was the next witness. Since February 2014 she has been employed by the Finance and Administration Cabinet as Branch Manager of Mineral Valuation. For the previous three years she was a supervisor in Mineral Valuation.

130. C. Hall usually takes her lunch break from 12 noon to 12:30 p.m. Sometimes she takes a later lunch due to the volume of telephone calls. When she takes a later lunch or longer lunch, she first advises her supervisors. Occasionally she will take a one-hour lunch.

131. She has never been asked by any supervisor to monitor the Appellant's telephone calls. She did not report repeatedly to Randy Murray about the Appellant. On one occasion, however, she observed Appellant on the phone for hours and thereafter asked Randy Murray if Appellant had any work to do.

132. On a separate occasion, she did ask Appellant who she had just spoken to on the telephone as she heard her own name mentioned. Appellant replied that Cherlyn would find out soon enough.

133. The witness had used "OdoBan" in the office when the Appellant was not present. It is not an aerosol and is used to get rid of odors. This product came from the Assistant Director's office. She had observed a "really, strong floral smell that was permeating" the area which made her nauseous. As Appellant was not around, the witness sprayed it in the hallway.

134. C. Hall remembers having been in Lori Detwiler's cubicle engaged in a conversation. Appellant suddenly came barreling into the cubicle, walked in between the individuals, and her arm bumped into the witness. C. Hall denies ever touching the Appellant.

135. On one occasion, the witness had left a gift in the Appellant's chair. Appellant had not told her previously that she never wanted anything from the witness or anything to do with her. C. Hall is an Arbonne distributor and gets many free items. She knew Appellant liked Arbonne products so she brought this particular set in and left it on her chair. She never saw or heard anything about the matter after that.

136. In December she prepared and distributed Christmas presents to everyone, including the Appellant. She had placed a present in Appellant's cubicle. Appellant told her she did not want it. C. Hall responded, "Do whatever you want to do with it." The gifts she gave to Appellant, and all the women, were identical.

137. She testified that early on in Appellant's employment, she had given the Appellant a ride home on a number of occasions when she required one.

138. C. Hall denied ever attempting to look up the Appellant's dress. She once did talk to the Appellant as a courtesy as she had observed her bent over in the filing area, exposing six inches of her slip.

139. She has never said or done anything that expressed any romantic interest at all in the Appellant. Furthermore, she uses restrooms on other floors to avoid being alone with the Appellant.

140. The Appellant's case was closed. The Appellee presented the following additional witnesses.

141. For the past five years, **James "Jay" Wallen** has been employed by the Department of Revenue, as a Mineral Assessor with the title Geoprocessor II. He has worked with the Appellant for about two years, but in a different section.

142. Jason Mills had visited Wallen's cubicle on a number of occasions, in the course of work-related matters and also as a friend for social matters. Mr. Wallen called on Mills many times for his expertise. He never observed Mills linger in his cubicle in order to gaze or stare at the Appellant. He did not observe Mr. Mills ever expressing any romantic interests in the Appellant.

143. On one occasion, at a time when Appellant was not working on that same floor, Wallen approached his own cubicle and saw Appellant in it. Appellant asked him about a map he had on the wall. She then sat on Wallen's desk, and faced him, with her legs open. It was awkward and inappropriate. He did not feel comfortable bringing it up. He looked away and would just have preferred that the incident did not happen.

144. There was another incident when a new scanner had been installed. He and others were around the scanner and Wallen stood extremely close to the device going over its features. Appellant, who had been present in the room working in files behind the scanner, suddenly "barged in between me and the scanner . . ." Wallen felt this was very rude.

145. The next witness was **Scott Parritt**. For the past two and a half years Mr. Parritt has been employed by the Finance Cabinet as an Human Resource Administrator. He discussed his duties which include the investigation of complaints. His Director, Honor Barker, had assigned to him the matter of the complaints filed by Teresa Hall.

146. He identified Appellee's Exhibit 5 as the April 9, 2014 determination and report prepared by Sherita Miller. Ms. Miller and Parritt discussed her findings before the report was issued. Mr. Parritt agrees with the report's contents.

147. During the course of his investigation Parritt and Miller interviewed employees from the Appellant's office, including coworkers, supervisors, and individuals from other departments. They also interviewed and met with the Appellant.

148. They did not find any evidence that Appellant had been sexually harassed by her coworkers or bullied, intimidated or otherwise harassed. They did not find any evidence to support any of the allegations against Ana Gomez or C. Hall.

149. They did find that coworkers had been directed not to talk to or fraternize with the Appellant. They found that most of the harassment came from Teresa Hall, some harassment came from supervisors. However, it was not unreasonable to not fraternize with the Appellant as her coworkers expressed a direct fear of her: "They were scared to death." A couple of individuals broke down and cried during the interview. It rose to the level that employees were afraid of or intimidated by the Appellant. They had a fear of retaliation from her; that if they "walk across the floor the wrong way" they would be accused of doing something wrong. Although Appellant is treated like an outcast, Mr. Parritt himself has told her that she brings it on herself. There were legitimate work reasons for leaving her out of participation or not interacting with her.

150. As a result, the report recommended a reprimand for Teresa Hall as she had used inappropriate comments in the workplace, i.e. sexual orientation; bullied and/or harassed coworkers. (Appellee's Exhibit 5, p. 7.) The report also recommended that all employees participate in trainings particularly since some of the employees had allowed their training to lapse. Mr. Parritt concluded that when Teresa Hall accused coworkers of being lesbians or bisexual, this constituted a violation of the sexual harassment policy.

151. The Appellee's case was closed. Appellant offered no rebuttal testimony. A subsequent briefing order was issued. Upon receipt of the briefs, the matter stood submitted to the Hearing Officer for his recommendation.

FINDINGS OF FACT

1. During all events described herein, Teresa Hall was a classified employee with status. She is employed by the Finance and Administration Cabinet, Department of Revenue, Division of Mines and Minerals.

2. Ms. Hall timely filed her appeal with the Kentucky Personnel Board on December 12, 2013. She alleged she has been subjected to sexual harassment and a hostile work environment. During the evidentiary hearing, Appellant testified she was also subject to retaliation, and that violations of her ADA accommodations constituted discrimination based on disability. The burden of proof is on the Appellant to prove her allegations by a preponderance of the evidence. KRS 13B.090(7).

3. During her employment, Appellant was accorded certain accommodations by the Appellee, pursuant to 42 U.S.C. § 12101, *et. seq.*, (Americans with Disabilities Act or ADA). Those accommodations included: (a) a paper skirt installed around the light assembly over Appellant's cubicle; (b) shields placed atop Appellant's cubicle walls to shield out light; (c) provision of an ergonomic chair; (d) anti-glare screen for her computer; (e) prohibition of the use of aerosols by the cleaning crew; (f) signage installed directing employees to honor the fourth floor area as a fragrance free zone. (Appellee's Exhibit 1.) Among the materials prohibited from use on the fourth floor, were aerosol sprays, room deodorizers, deodorizing plug-ins, fragrant candles, and potpourri. These items were prohibited in cubicles, bathrooms, and common areas. Employees were not to use or spray chemicals or other fragrant products. (Appellant's Exhibit 1.) An additional accommodation was the purchase by Appellee of a filtration mask for Appellant's use.

4. In 2010, Appellant had been employed in the Collection Division. At that time, she made known to Troy Robinson, Division Director for Human Resources, her complaints of a hostile work environment and the use by others of aerosol sprays. She had certain disciplinary actions pending against her at that time. She and her employer entered a settlement agreement that included her transfer to the Division of Mines and Minerals.

5. Following Appellant's transfer several individuals on that floor made complaints that Appellant sat at her desk in her cubicle facing the cubicle opening, with her legs spread apart. Individuals who complained included Jason Mills and Anayansi (Ana) Gomez. James Wallen testified that once when he approached his own cubicle, Appellant was there, sitting on his desk, and inappropriately had her legs open.

6. Taxpayers and employees of the federal government frequent the fourth floor. It was decided Appellant's desk would be repositioned within her cubicle in such a manner to prevent her from being observed outside the cubicle.

7. Appellant made a number of inquiries or statements about the sexual orientation of some of her coworkers. She asked Randy Moore if he thought Ana Gomez was bi-sexual. She told Lori Detwiler "there are a lot of lesbians and bi-sexual people at the Department of Revenue" and that Detwiler did not "... act like a bi-sexual." She testified she believed both C. Hall and Ana Gomez are bi-sexual.

8. The evidence did not support Appellant's allegation that Ana Gomez and/or C. Hall had ever made any sexual advances toward Appellant, or behaved in any manner that would constitute sexual harassment. The testimony regarding Arbonne and Christmas gifts show there was neither a romantic or sexual intent expressed or implied by C. Hall or Ana Gomez.

9. Teresa Hall had exhibited inappropriate sexual behavior while in the Division of Mines and Minerals. Such incidents included: (a) sitting in her cubicle with her legs spread apart, in view of passers-by; (b) sitting inappropriately in the area where she conducted the filing of documents; (c) having told Lisa Detwiler she did not think she was a lesbian, but would keep her eye on her; she then asked Detwiler if she wanted a hug; (d) sat on the desk of James Wallen waiting for him to enter, and then opening her legs; and (e) questioning the sexual orientation of Cherlyn Hall and Ana Gomez.

10. The May 8, 2013 "chemical smell" incident was the result of inadvertence by the cleaning personnel. When Appellant reported this smell it was immediately investigated and found to have originated from a cleaning bucket where the door to the janitor's closet had been left open. The matter was resolved by closing the door.

11. While singing in the workplace may occasionally be distracting or disruptive, there is no evidence in this case to support the allegation that it contributed to a hostile work environment. Appellant's allegations that she has had "serious health problems" due to what she termed "outbursts of song" was not supported by the evidence.

12. There were times when aerosol or other sprays, or cleaning agents such as scented Clorox wipes, were used on the fourth floor. There appears to be a lack of understanding about what products, including perfume and cologne, may or may not be used, and if used, when and to what degree.

13. On September 24, 2013, Carla Briscoe issued to Appellant, as part of an evaluation, a Memorandum of Expectations (Appellee's Exhibit 2). Appellant's conduct in the workplace was specifically addressed. The memorandum also explained the actions taken by the Cabinet with reference to Appellant's ADA accommodations.

14. Sherita Miller, Program Investigator Officer II, had been assigned by the Office of EEO and Contract Compliance to investigate Appellant's allegations of sexual harassment, workplace violence, and hostile work environment. Violation of ADA accommodations was not part of her investigation.

15. Upon completion of the investigation, she drafted a final report on April 9, 2014 (Appellee's Exhibit 5). She concluded that no individuals gave information to support Appellant's claims of sexual harassment, bullying, or workplace violence. She did conclude, and there was some confusing testimony given by Scott Parritt, HR Administrator, that bullying did exist in the Division of Minerals Taxation and GIS Severance Branch, demonstrated by the behavior not only of Teresa Hall, but supervisors, and that this created a hostile work environment for all employees. However, Mr. Parritt clarified his testimony by stating it was not unreasonable to direct employees not to have contact with Teresa Hall, based on Hall's past behavior, and to only have contact with her for business purposes, so as to avoid instigation of problems or confrontations.

CONCLUSIONS OF LAW

1. Appellant has raised claims that she had been subjected to sexual harassment, hostile work environment, retaliation, and disability discrimination. Each of those claims is dealt with separately, below.

2. KRS 13B.090(7) states in part:

The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

Sexual Harassment and Hostile Work Environment:

3. 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 a claim alleging she was the victim of a hostile work environment and sexual harassment.

4. 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 interest and personal dignity and freedom from humiliation..." KRS 344.020(1)(b).

5. The burden of proof was on the Appellant, Teresa Hall, to prove by a preponderance of the evidence that she had been sexually discriminated against by being subjected to a hostile work environment.

6. The Kentucky Civil Rights Act incorporates the anti-discrimination policies embodied in the Federal Civil Rights Act of 1964 (P.L. 88-352, Title VII, Equal Employment Opportunity) as amended. Due to the substantial similarity between KRS 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).

7. The applicable standard to determine whether Title VII is violated, is "when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment. This standard requires an objectively hostile or abusive environment; one that a reasonable person would find hostile or abusive, . . . as well as the victim's subjective perception that the environment is abusive." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17; *Meritor Savings Bank v. Vinson*, 477 U.S. 57. The determination whether an environment is "hostile, may be made only by looking at all the circumstances, which may include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Furthermore, the effect on the employee's psychological wellbeing is relevant in determining whether Plaintiff actually found the environment abusive." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17.

8. With regard to sexual harassment, Appellant has alleged four types of interactions: (1) That she received unwanted gifts from Cherlyn Hall; (2) that Cherlyn Hall and Anna Gomez attempted to look up her dress at the workplace; (3) that Cherlyn Hall rubbed and cupped her derrière; and (4) that Jason Mills observed Appellant from the cubicle of Jay Wallen and did so in such a manner that she felt harassed.

A. Unwanted gifts from Cherlyn Hall

There is no factual dispute that on one occasion Cherlyn Hall anonymously attempted to give a gift to Teresa Hall containing certain Arbonne products, and that these products were returned by the Appellant. It is also undisputed that at Christmas time, C. Hall distributed gifts to employees on the fourth floor at her place of work, including Appellant.

There was a failure of proof to show there was any untoward, sexual, or hostile intent by C. Hall in presenting these gifts. The first gift was given anonymously. While Appellant may have, in the intervening time between the two gifts, expressed to a supervisor that she did not desire to receive gifts from C. Hall, the subsequent Christmas gifts given out in general by C. Hall do not indicate anything of a harassing or sexually motivated intent. For future reference, C. Hall is now aware of Appellant's desire not to receive any gifts from her.

B. Allegation that Cherlyn Hall and Ana Gomez attempted to look up Appellant's dress.

Appellant in her testimony has alleged that Cherlyn Hall and Ana Gomez both attempted to look up her dress. Both C. Hall and Ana Gomez denied such acts. Other witnesses gave testimony that the Appellant, particularly in the beginning of her employment at the Division of Mines and Minerals, sat in an inappropriate manner while filing documents at her own desk. Complaints from employees were directed discreetly to supervisors. As a result, Appellant's desk was repositioned in her cubicle to eliminate outside view of her sitting posture. This had also been brought to Appellant's attention by the July 23, 2012 e-mail of Randy Murray, Appellant's supervisor at that time (Appellee's Exhibit 3). James Wallen, who was quite visibly uncomfortable during his testimony, told of an occasion when he entered his own office and Appellant, sitting on his desk, asked about a map and opened her legs.

If anyone had looked up the Appellant's dress, the evidence and testimony indicate such events were the result of the inappropriate occasional public postures of the Appellant. There was a failure of proof that there was any untoward, sexual, or hostile intent by Cherlyn Hall, Ana Gomez or others during such occasions.

C. Allegations that C. Hall rubbed and cupped Appellant's derriere

By Appellant's testimony, it was July 2012 when she had gone to the cubicle of Lori Detwiler. Appellant testified C. Hall stood behind her, started waving her arms and then squeezed Appellant's derriere.

Cherlyn Hall, in her testimony, denied the allegations. Lori Detwiler testified Appellant came to her office to ask a question and left soon after. Appellant returned with another question and after receiving the answer left again. At no time did Detwiler observe Appellant to have expressed any emotion, change in her expression or demeanor, nor did she observe C. Hall to wave her arms around or touch the Appellant in any way.

Weighing the credibility of the witnesses, the preponderance of the evidence did not support Appellant's allegations.

D. **Allegations pertaining to observations by Jason Mills.**

Appellant alleged Jason Mills harassed her by having observed her for hours from the cubicle of Jay Wallen, across from Appellant's cubicle.

Mr. Mills testified he is a colleague and friend of Jay Wallen and often goes to Wallen's cubicle to help him with his work or at times to socialize. He denied going to that cubicle to linger and observe the Appellant.

Mr. Wallen testified that in the course of work-related matters he has called on Mr. Mills many times to assist and lend his expertise. He had never observed Mills to linger in his cubicle to gaze or stare at the Appellant nor had he observed Mills ever express any type of romantic interest in Ms. Hall.

There was a failure of a preponderance of the evidence to support the allegations made by Appellant against Jason Mills.

Retaliation

9. In retaliation claims, the burden shifting scheme of *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) as applied in *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697 (Ky. App. 1991) is applicable. The Appellant must first make out a *prima facie* case showing: (1) she engaged in a protected activity; (2) she was disadvantaged by an act of her employer; and (3) there was a causal connection between the activity engaged in and the Cabinet's adverse actions.

10. If a *prima facie* case is made out, then the Cabinet must articulate a legitimate non-retaliatory reason for the adverse action. Should the Cabinet do so, the Appellant then must show that such stated reason is merely pretext to cover such retaliation. *Kentucky Center for the Arts, Id.*, at 699. If an employee fails to offer any direct evidence of retaliation, she must prove her case by circumstantial evidence of "cold hard facts" from which the inference can be drawn that the supervisor's actions were motivated by vindictive retaliation. *Harker v. Land Bank of Louisville*, 679 S.W.2d 226 (Ky., 1984).

11. Furthermore, a classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause. KRS 18A.095(1). As defined by the Kentucky Revised Statutes, a “penalization” includes: “. . . any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause . . .” KRS 18A.005(24). This would include retaliatory acts.

12. Appellant was required to demonstrate by a preponderance of the evidence that she was penalized by the actions of the Appellee. “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 credible and convincing to the mind.” Black’s Law Dictionary, 5th Ed., p. 1064. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of 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).

13. Our Declaration of Independence sets out the following:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among those are Life, Liberty, and the pursuit of Happiness.

Life, Liberty, and the pursuit of Happiness are included among the fundamental rights of citizens of the United States. The pursuit of Happiness, no doubt, includes the pursuit of one’s labors or profession, and in so doing, one has a reasonable expectation to be able to work in a safe environment, free of hostility or retaliatory acts. Employment in a safe environment is, therefore, a protected activity.

14. Appellant has alleged a number of acts by her employer or its agents by which she claims she suffered retaliation.

A. Alleged harassment by Cherlyn Hall.

Appellant alleged Cherlyn Hall lurked at or near Appellant’s cubicle or followed her during lunch breaks. C. Hall testified she has a flexible lunch schedule and may often walk around the employment area at lunch. There has been no testimony that there was any contact between the individuals during this activity or objectively that C. Hall’s behavior on such walks constituted any kind of hostile or retaliatory act. Furthermore, C. Hall had viable employment duties on the fourth floor of the work area and there was a lack of evidence to show any such “lurking” by her.

Appellant also testified about an encounter in the cubicle of Lori Detwiler, where C. Hall is alleged to have waved her arms about and grabbed Appellant's derriere. Ms. Detwiler testified, however, that during that event, she did not see any such motions or touching. Upon direct examination by the Hearing Officer, Ms. Detwiler testified she did not see a change in the facial expression of Appellant; that Appellant did not react or say anything at all to indicate an offensive touching had taken place, or that she was uncomfortable or offended by any activity during that time.

B. Appellant has alleged that Ana Gomez "went off" on her one time when Appellant was making coffee for the office.

It is undisputed that during that single incident, Appellant utilized old coffee grounds and a used coffee filter to make a new pot of coffee. Ana Gomez advised Appellant that was not the way coffee was made in the office. Even if Gomez had raised her voice during this incident, it falls short of an act of bullying or retaliation against Appellant.

C. Randy Murray and the alleged hostile e-mail.

Appellant alleged that her supervisor, Randy Murray, at the behest of a number of other supervisors, sent her an e-mail dated July 23, 2012, and that such e-mail was hostile in nature (Appellee's Exhibit 3).

Randy Murray, as a supervisor, had among his duties, the responsibility to communicate with his employees in a corrective manner when the situation was appropriate. He testified a number of supervisors and other employees had brought to him a number of concerns about the Appellant and her behaviors. It is not unusual for a supervisor to thereafter act on such complaints, particularly when they came from a number of different sources. In the e-mail, Mr. Murray also stated that some of the matters had previously been brought to Appellant's attention by the Branch Manager or another supervisor.

The matters addressed in that e-mail included: (1) Directing Appellant to discontinue communications outside the Department pertaining to matters surrounding Carla Briscoe's motor vehicle accident, and Appellant allegedly acting in the capacity as health and wellness coach for the Department of Revenue; (2) cautioning Appellant to be careful in the attire that she wears and her posture as several employees complained that on occasion when Appellant sat or bent over she exposed her undergarments; (3) that at least three male coworkers complained that Appellant had touched or rubbed their back or shoulders even after being asked not to do so; that such could result in a complaint of sexual harassment against her by these coworkers; and (4) that more than one coworker

complained that Appellant entered his cubicle and picked up documents lying on the desk, examined same without permission; that this constituted a violation of her coworkers' privacy.

The evidence shows that all of these areas of concern are legitimate, originated from more than one source, and were appropriately addressed by Mr. Murray.

D. Allegations that supervisors instructed coworkers to minimize contact with the Appellant.

Carla Briscoe, Revenue Branch Manager, who had been Teresa Hall's supervisor, issued Appellant a Memorandum of Expectations on September 24, 2013 (Appellee's Exhibit 2). While not a form of discipline, the Memorandum was given to advise Appellant her behavior in the workplace was unsatisfactory and certain past behaviors would no longer be tolerated. Among the behavior addressed were Appellant's contact with coworkers in a derogatory and harassing manner; attendance, and other conduct. The memorandum instructed Appellant "... not to approach anyone without a business-related need and, if needing to do so, you are to speak in an acceptable tone to express in brevity the information needing to be relayed . . . You are to remain in your work cubicle performing your assigned duties unless needing to visit a common area such as the restroom or copy room."

The testimony showed Appellant's coworkers were also instructed to limit their interactions with the Appellant to business related activities. In view of the testimony of some of the witnesses that they feared interaction with the Appellant as such interaction might result in her filing an unwarranted complaint or grievance against them and result in possible disciplinary action by management, the Cabinet had a legitimate purpose to limit such contact for business purposes only. Interaction, on a business-only basis, when necessary, was viewed as a way to limit opportunities for uncomfortable contact, while still accomplishing the business needs of the Cabinet.

Such limitation of interaction between the Appellant and coworkers was particularly justified by two incidents that were brought to light:

(1) Without prior communication with Donna Durr-Richards, Appellant, without valid reason, relocated boxes outside Ms. Durr-Richards cubicle. Ms. Durr-Richards did not work in the same section as the Appellant. When the boxes were returned to their previous location, Appellant thereafter moved the boxes yet again. When the boxes were returned to their original position a second time by Durr-Richards, they were moved yet again by the Appellant. Appellant's bizarre behavior during this

incident, and her testimony attempting to justify same, show that Appellee was justified in limiting T. Hall's contact with others on the floor.

(2) Randy Moore and Jim Justice had each complained to Randy Murray of incidents when Appellant came to each of their offices, picked up and examined documents from their desks without permission.

15. Sherita Miller, Program Investigative Officer II, investigated Appellant's complaints of sexual harassment and workplace violence. She thereafter issued an April 9, 2014 report (Appellee's Exhibit 5). Part of her conclusions pertaining to allegations of bullying and a hostile work environment, were contradictory. On p. 6 of her report she stated:

It is also reasonable to conclude that bullying does exist in the Division of Minerals, Taxation and GIS Severance Branch, and this behavior is demonstrated not only by Teresa Hall but as well as Supervisors. This type of behavior creates a hostile work environment for all employees.

It is reasonable to conclude that Teresa Hall is being treated unfairly because employees have been instructed not to talk or be around her. This can be viewed as a form of retaliation, i.e. isolation.

...

Based on the totality of findings from the investigation, there is no evidence that Ana Gomez, C. Hall and Jason Mills sexually harassed Teresa Hall. Further, there is no evidence that Teresa Hall is being bullied by her co-workers but there is unfair treatment towards Teresa Hall. . . .

16. The recommendations made by Ms. Miller included that Teresa Hall be reprimanded for the use of inappropriate comments of sexual orientation in the workplace; bullying and/or harassment of coworkers; and that she retake the Anti-Harassment Training course. Recommendations pertaining to other employees in the office included additional and updated training.

17. In her testimony, Ms. Miller stated it was not unreasonable under all the circumstances for employees to be directed not to fraternize with Appellant. She found it was constantly on the minds of those employees that such interaction might result in Appellant accusing them of having done something wrong. Some employees were concerned that if they said anything during the investigation, Appellant would find out and file a complaint against them; that management would thereafter discipline them. One employee told Miller they had asked to transfer out of the Division; another indicated he might leave his current position if the

work environment did not change. One witness became so upset during the interview, that person cried.

18. There was a failure of a preponderance of the evidence to demonstrate that supervisors telling employees to limit their contact with Appellant, and likewise instructing the Appellant to minimize non-business contact with fellow employees, rose to the level of retaliation. Such directive did not disadvantage Appellant in any manner. The Cabinet had a legitimate business purpose in attempting to minimize conflict between the Appellant and others, particularly when the bulk of the evidence showed that the current tumult in the work environment was substantially the result of Appellant's own actions. The preponderance of the evidence bore out the observations of Sherita Miller that Appellant's coworkers feared Appellant's potential actions in response to anything they did or said.

19. Scott Parritt testified that it was not unreasonable for the Cabinet to have employees not fraternize with the Appellant nor was it unreasonable for the supervisors to direct this in light of all the circumstances. His opinion at the time of the hearing was that such act did not constitute retaliation, but just common sense to reduce the hostilities. He believed such directive constituted a legitimate work reason.

Disability Discrimination

20. There is no dispute that Appellant was granted certain ADA accommodations by the Cabinet. This is particularly evidenced by the ADA memo (Appellee's Exhibit 1). The Cabinet provided certain accommodations pertaining to Appellant's light sensitivity and asthma. According to the evidence she has been appropriately accommodated for such disabilities.

21. Appellant alleged the Cabinet, and/or its agents or employees, have violated those accommodations and therefore discriminated against her. Those allegations do not pertain to her light sensitivity. She has made such allegations of acts that resulted in aggravation of her asthmatic condition.

22. In Kentucky, any person is afforded a right of action against her employer due to discrimination based on disability, pursuant to KRS 344.040. Any state employee who believes she has been discriminated against in such manner may appeal to the Personnel Board. KRS 18A.095(14)(a).

23. The Cabinet has conceded that Appellant has medical conditions that require reasonable accommodations (see p. 15 of Written Closing Argument of Finance and Administration Cabinet).

24. In addition to having taken certain measures pertaining to Appellant's light sensitivity, the Cabinet sent out a memorandum dated May 16, 2013, directing employees on the fourth floor that the "... use of aerosol sprays, room deodorizers, deodorizing plug-ins, fragrant candles and potpourri is prohibited in cubicles, bathrooms and common areas which are located on the 4th floor of the State Office Building. . . .All employees are expected to maintain a safe working environment by not using or spraying chemicals and other fragrant products that may create a recognized hazard to themselves or others." (Appellant's Exhibit 1.)

25. Following complaints by the Appellant that such directive was violated, David L. Gordon sent out an e-mail on May 20, 2013, reminding supervisory staff to make certain that employees were following the previous guidelines. (Appellant's Exhibit 2.)

26. The May 8, 2013 "chemical smell" incident was quickly investigated and resolved by the Cabinet.

27. The evidence did not clearly set out whether employees could or could not use citrus scented wipes to clean their work spaces. Furthermore, there was conflicting testimony about whether employees could or could not wear perfume or cologne, and if they could, in what amounts. It appears then there is confusion on these matters, which requires further clarification by the ADA Coordinator. However, for purposes of this appeal, those incidents do not rise to the level of a violation by the Cabinet of the ADA accommodations provided to Appellant. It was clear that visitors frequent the 4th floor, making it very difficult to control whether such non-employees wear cologne or perfume while on the premises. The Hearing Officer believes a clarification of the fragrance and aerosol issues, once made, will place all 4th floor employees on notice that such actions will not be tolerated, there will no longer be any confusion as to the interpretation of that ADA accommodation, and that future violations would necessarily result in disciplinary action. The testimony also indicated that although the Commonwealth had purchased for the Appellant a filter mask to wear on such occasions when aerosols or aromas disturbed her, she has only been seen wearing such mask sporadically. It is apparent that mask was provided to provide Appellant some protection from occasional errant aerosols or odors.

28. There was a failure of a preponderance of the evidence to show that the Cabinet by its agents or employees violated the ADA accommodations provided to T. Hall. The Cabinet provided Appellant with accommodations. It thereafter timely responded to her allegations of ADA violations, directing employees to abide by certain restrictions and investigating incidents brought to its attention by Appellant. Further clarification of the aerosol restrictions on the 4th floor, by the ADA Coordinator, is required.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **TERESA HALL VS. FINANCE AND ADMINISTRATION CABINET, DEPARTMENT OF REVENUE (APPEAL NO. 2013-286)** 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 also 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 7th day of October, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Cary Bishop
Teresa Hall