

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2021-142

ANNA HARDIN

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

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

The Board, at its regular November 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated September 14, 2023, Appellant's emailed exceptions, Cabinet's Response to Appellant's Exceptions, and being duly advised,

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

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

SO ORDERED this 6th day of November, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Anna Hardin
Hon. Lucas Roberts
Hon. Rosemary Holbrook (Personnel Cabinet)
Jay Klein

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2021-142

ANNA HARDIN

APPELLANT

V.

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

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

This matter came on for an evidentiary hearing on July 31, 2023, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were conducted using Amazon Chime video teleconferencing software and were authorized by virtue of KRS Chapter 18A.

The Appellant, Anna Hardin, was present by Amazon Chime video teleconferencing software and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and was represented by the Hon. Lucas Roberts, appearing in-person. Also present as Agency representative was Gae Vanlandingham, who appeared by Amazon Chime video teleconferencing software.

BACKGROUND

1. The Hearing Officer notes the Appellant filed her appeal with the Personnel Board on November 18, 2021, challenging her probationary dismissal in addition to advancing claims of discrimination based on disability and age. The Appellant further explains her claims on her Appeal Form wherein she states, in pertinent part:

I was terminated today. The orientation process there is very unorganized. On a survey I went on, Jamie Manns (sic) was training me, when the other surveyors started asking her a lot of questions because they hadn't been trained in many things. They got thrown to the wolves, like so many I had heard of. After this, I shadowed a Wildhealth Survey, and then did (3) three on my own. Despite having little guidance, I was still on track in my orientation. I had 3 different administration people telling me 3 different tasks to do for orientation purposes.

I asked Gae Vanlandingham and the personnel HR lady from Frankfort there in person for a reason. Neither would give one, just stated I could request there (sic) records. According to the lady from Frankfort, I was still in the probationary period. A time frame of (6) six months, in which they

Anna Hardin
**Findings of Fact, Conclusions of Law,
and Recommended Order**
Page 2

did not have to have a reason. I was not given an email, physical address, phone number or contact person to request the open records. (sic)

2. At issue during the evidentiary hearing: Whether the Appellant, who was serving her initial probationary period as a Nurse/Consultant Inspector, was dismissed as a result of disability or age discrimination.

3. Burden of Proof: On all issues was with the Appellant and was by a preponderance of the evidence.

4. Witnesses:

A. For the Appellant:

Anna Hardin

B. For the Appellee:

(1) Jamie Mann

(2) Gae Vanlandingham

(3) Howard J. Klein

5. Exhibits:

A. Appellant's:

(1) November 15, 2021 letter from Gae Vanlandingham to Belinda Beard regarding Anna Hardin's conduct during her probation.

(2) November 16, 2021 letter from Jamie Mann addressed, "To whom it may concern" regarding Anna Hardin's probation.

(3) November 16, 2021 memorandum from Belinda Beard to Jay Klein. Subject: Request for Separation.

(4) Redacted Emails from Gae Vanlandingham Re: Eastern Branch OIG November 1, 2021, November 8, 2021, and November 15, 2021.

(5) CHFS Personnel Procedures Handbook, 3.2, Anti-Harassment/Discrimination Statement.

(6) CHFS Personnel Procedures Handbook, 3.1, Americans with Disabilities (ADA) and Kentucky Civil Rights Act Accommodation Request.

B. Appellee's:

(1) November 18, 2021 Separation Letter to Anna Hardin from Howard J. Klein, Designated Appointing Authority.

6. At the conclusion of the evidentiary hearing, the parties were given the opportunity to submit Proposed Findings of Fact, Conclusions of Law, and Recommended Order, as well as Post Hearing Briefs, on or before September 1, 2023. The Appellant filed her brief on August 31, 2023. She also included information that was not placed in the record during the evidentiary hearing on July 31, 2023. The Appellant's brief was considered in preparing this Order, however, new materials that were not introduced into the evidentiary record during the hearing were not considered. The Appellee filed Proposed Findings of Fact, Conclusions of Law, and Recommended Order on September 1, 2023, which were considered in preparing this order.

FINDINGS OF FACT

1. The Appellant is a Registered Nurse with twenty-five (25) years' experience in nursing. She previously worked at Saint Joseph Hospital in Lexington, Kentucky, until sometime during 2020, when she suffered a work-related back injury. In May 2021, she underwent a second spinal fusion surgery. (Testimony of the Appellant)

2. The Appellant interviewed for a job as a Nurse Consultant/Inspector (NCI) for the Cabinet for Health and Family Services (CHFS) in the Office of Inspector General (OIG) in September 2021. Gae Vanlandingham was the lead interviewer on the Interview Panel. The Appellant revealed to the Interview Panel that she had back issues. Vanlandingham described the job duties and physical requirements for the NCI position. The Appellant stated she could perform the duties without limitation. (Testimony of Vanlandingham and the Appellant)

3. The Appellant was hired as an NCI and began her employment with the OIG on October 18, 2021. For the remainder of October 2021, the Appellant was learning her new job duties through video training sessions and reading procedure manuals. (Testimony of Mann, Vanlandingham, and the Appellant)

4. On November 1, 2021, the Appellant received specific training from her primary trainer Jamie Mann, Nurse Regulator. In **Appellant's Exhibit 2**, a November 16, 2021 letter from Jamie Mann regarding Anna Hardin's probation, Mann described the November 1 training day as follows:

Anna Hardin
Findings of Fact, Conclusions of Law,
and Recommended Order
Page 4

- a) On 11/01/2021 I reported to the Lexington office to meet Anna Hardin RN and discuss her first assignment, as a team member for a re-certification at a Skilled Nursing Facility (SNF). Before I came to the office I had previously emailed Ms. Hardin and her supervisor Mrs. Vanlandingham to ensure scheduling and to inform them of my intent. The planned training session with Ms. Hardin was to review the new employee on-boarding guidelines and walk Ms. Hardin through the pre-survey steps for the re-certification and broadly review the Long Term Care Survey Process (LTCSP) with her. When I arrived to the office I had a brief discussion with Mrs. Vanlandingham; she then introduced me to Ms. Hardin. (sic)
- b) Ms. Hardin's desk was scattered with multiple Post It notes, in stacks and stuck to everything; the post it notes were written on. When I sat down with Ms. Hardin I explained to her, per our previous email I would be going over the New Employee On-Boarding Guide, the LTCSP, and then would assist her with the pre-survey process for the re-certification survey. Ms. Hardin immediately interrupt me and said she had several questions she needed me to answer. I agreed and asked her what kind of questions she had. Ms. Hardin had a stack of long Post It notes she pulled from a notebook and begin asking random questions; if a resident is sent to a psychiatric hospital and takes narcotics but when they get to the psychiatric unit and they drug test the resident and no narcotics show up who is responsible to investigate the nurse who was stealing the narcotics?; if a resident refuses their immunizations, isn't it their right to refuse even if they have a power of attorney? Shouldn't the facility get in trouble if they forced the resident to take an immunization against their will? After several random questions, I told Ms. Hardin her question were not relevant to what I had planned to train her on and asked her to hold further questions of that nature until after our training session. At that time Ms. Hardin noted the time, date and my name on her post it notes and said ok you don't know. I then explained to her I was going to review the new employee onboarding guide. When reviewing the document with Ms. Hardin I had to redirect her several time to focus and pay attention what I was telling her; she kept diverting back to her stack of Post It note questions and asking questions about the upcoming survey. (sic)
- c) After review of the on-boarding guide I began discussion with Ms. Hardin related to the LTCSP. She stated she had read the document multiple times that morning and felt like she had a good understanding of it. I directed her several times to turn to certain

Anna Hardin
Findings of Fact, Conclusions of Law,
and Recommended Order
Page 5

pages as we discussed the process so she could make notes or highlight pertinent areas. At that time, I explained to Ms. Hardin the process of receiving and uploading zip files from email into the ASE-Q program. She was unfamiliar with how to save files from emails and where to find them once saved. She made several notes as we, together completed the task. Once we had the shell uploaded into the program I continued with explaining and walking her through the steps necessary to get familiar with the program and information about the facility and residents we would be working with the remainder of the week. We also discussed the LTCSP and references we could utilize while on survey. Ms. Hardin had to be redirected continuously to stay focused on what we were reviewing. She was focused on how she could print out the information and I explained to her we didn't need to print it several times. I also discussed with her the importance of documenting in the ASE-Q and limitedly documented on CMS form 807. After we had completed our review I told her she would need to make sure the Team Coordinator (TC) got her business card before we went into the facility the next morning. She frantically searched her desk and several bags for the cards and found it and wrote on a post it note to "give to the TC" and laid it on her desk. I also informed her she would need to get a rolling table to take with her to have at the facility. She stated she could not lift or carry it because she had a bad back and after several comments about having a bad back and not being able to lift things, I told her I would carry the table. (sic)

(Testimony of Mann and Appellant's Exhibit 2)

5. From November 2, 2021, through November 4, 2021, the Appellant was a team member for a recertification at a skilled nursing facility. Mann served as the trainer for the Appellant and another uncertified NCI. Although the Appellant was present primarily to observe and learn, she struggled with her first assignment.

- a) The Appellant could not focus on the survey and was distracted by the facility requirement for eye protection. In Resident Care areas, the Appellant complained about her face shield and that she did not have goggles. She distracted facility staff while discussing this issue in the hallway.
- b) The Appellant was passive aggressive towards Mann and others. The Appellant also demanded Mann's attention when she was trying to assist the other uncertified NCI.

c) The Appellant could not utilize the tablet she was provided and instead wrote resident data on Post-it notes. She also did not use the appropriate form(s). In **Appellant's Exhibit 2**, Mann described this issue as follows:

From 11/2/2021 through 11/4/2021, Ms. Hardin struggled with navigating her work station even with one on one direction from me. It would take here up to ten minute at times to highlight, copy and paste text. Ms. Hardin had difficulty with sharing and receiving data with the team; saving attachments; toggling between the electronic health record and ASE-Q. Ms. Hardin also had a difficult time scrolling in windows in ASE-Q. I would tell Ms. Hardin 4-5 times how to use the mouse on the key board, how to right click, how to use to task bar to toggle between screen and she would continue with her approach for 5-10 minutes unable to complete the task. Each time throughout the survey when I reminded her and directed her on how to navigate it was as if she had never been told. Additionally, she constantly wrote resident data on Post It note and I had to redirect her to not do so and to use 807 or type it into the ASE-Q program. Ms. Hardin became frustrated with my constant redirection and told me, I guess you are always right. She also stated she had her way of doing things and I had mine and continued to document on Post It notes. While working in the conference room others, survey team member would ask one another and myself for guidance and Ms. Hardin would interject her personal interpretation of the regulation and state I know I am right. (sic)

d) The Appellant entered residents' rooms without knocking.

e) The Appellant had a resident raise her arm to check her bracelet (wander guard). Mann had to redirect the Appellant on proper interactions with residents.

(Testimony of Mann and **Appellant's Exhibit 2**)

6. The Appellant testified that she needed assistance carrying her rolling table and that Mann carried her table for her. The Appellant further testified that she had difficulty with extended standing and walking during the facility visit and that these difficulties were consistent with the Appellant's previous back issues, which resulted in two (2) spinal fusion surgeries. The Hearing

Officer finds the Appellant's testimony credible that her back problems limited her ability to walk, stand, and lift. The Hearing Officer also finds credible the Appellant's testimony that she was on a nine (9) - month trial work period with Social Security Disability. The Appellant was determined to be disabled by the Social Security Administration and was not required to work. (Testimony of the Appellant)

7. Mann reported to Vanlandingham the problems the Appellant was having during the facility visit through phone calls and e-mails on a daily basis. At Vanlandingham's request, Mann prepared a written summary of the Appellant's training on November 16, 2021. (Testimony of Mann, Vanlandingham, and the **Appellant's Exhibit 2**)

8. Also on November 16, 2021, Vanlandingham wrote a memorandum to her supervisor, Belinda Beard, outlining concerns about the Appellant's work and requesting the Appellant be dismissed during her probationary period. In her memorandum, Vanlandingham also pointed out that the Appellant was reported sleeping during a Teams Meeting on November 12, 2021. On November 16, 2021, Beard sent a request to Appointing Authority Howard J. Klein requesting the Appellant's probationary dismissal. (Testimony of Vanlandingham, Klein, and the **Appellant's Exhibits 1 and 3**)

9. Klein agreed with the recommendation and signed a letter dismissing the Appellant effective November 18, 2021. (Testimony of Klein and the **Appellee's Exhibit 1**)

10. The Appellant alleges she was dismissed as a result of disability discrimination. The evidence reflects the Appellant mentioned her back problems on three (3) occasions:

- a) During her interview, the Appellant stated she had back problems but could perform the job duties of an NCI without limitations.
- b) On November 1, 2021, the Appellant told Mann she could not lift the rolling table, and Mann lifted it for her during the facility visit.
- c) The Appellant sat during the final report to the facility staff. When Mann asked her to stand, the Appellant stated her back hurt.

The Appellant alleges Vanlandingham was aware she needed an accommodation. She cites CHFS Personnel Procedures Handbook, 3.1, Americans with Disabilities (ADA) and Kentucky Civil Rights Act Accommodation Request (**Appellant's Exhibit 6**) as support. The Hearing Officer finds that the Appellant had not put either Vanlandingham or Mann on notice that she needed an accommodation. The Appellant did not state, at any time including during her interview, that she needed any type of an ongoing accommodation or modification in order to complete her job duties. The two (2) times that she asked for temporary modifications (lifting the table and sitting instead of standing), she was granted the temporary modification. The Hearing Officer finds the Appellee never failed to accommodate any request from the Appellant due to her back issues. (Testimony of the Appellant, Mann, Vanlandingham, and the **Appellant's Exhibits 1 and 2**)

11. During the July 21, 2023 evidentiary hearing, the Appellant alleged she was not accommodated by being provided a laptop instead of the tablet that she was having trouble with during the facility visit. The Hearing Officer finds the Appellant never requested a laptop. In addition, the Hearing Officer finds that the Appellant's inability to use the tablet had nothing to do with her back issues or any disability the Appellant testified about having. (Testimony of the Appellant, Mann, and the **Appellant's Exhibit 2**)

12. As outlined in the testimony and exhibits, the Hearing Officer finds the Appellant was dismissed because she was having problems performing her job duties as an NCI. Although the Appellant had only worked one (1) month of her six (6) - month probationary period, Vanlandingham was not in favor of keeping the Appellant because the Appellant did not exhibit the professionalism that was expected of a representative of the OIG. (Testimony of Mann, Vanlandingham, Klein, and the **Appellant's Exhibits 1, 2, and 3**)

13. The Appellant alleges she was dismissed after she told Vanlandingham that she was on a nine (9) - month trial work period with Social Security Disability (SSD). She speculated Vanlandingham misunderstood and recommended her dismissal. The Appellant alleges she told Vanlandingham about her disability trial work period on November 15, 2021, and the recommendation to dismiss her came the next day. Vanlandingham denies she was ever told the Appellant was on an SSD trial work period or that the Appellant had been found disabled by the Social Security Administration. Mann and Klein also testified they had never heard of this. The Hearing Officer finds Vanlandingham had no knowledge the Appellant was on a SSD trial work period or had been found disabled by the Social Security Administration. The Hearing Officer makes this finding because;

- a) The Appellant described commenting about her SSD trial work period while passing Vanlandingham in the hallway.
- b) The Appellant thought Vanlandingham misunderstood her and thought she only planned to work for nine (9) months.
- c) The Appellant told Vanlandingham at the same time she was discussing problems at Eastern State Hospital.
- d) Vanlandingham did not include any reference to disability or a trial work period in her memorandum dated November 16, 2021.
- e) The Appellant was allowed to work up to the last day, including visiting a health clinic.

The Hearing Officer finds that none of Vanlandingham's actions were consistent with knowledge of the Appellant's disability. (Testimony of Vanlandingham, Mann, Klein, the Appellant, and the **Appellant's Exhibit 1**)

14. The Hearing Officer specifically finds that Vanlandingham's recommendation to dismiss the Appellant was not based on her Social Security Disability or her nine (9) - month trial work period. (Testimony of Vanlandingham)

15. The Hearing Officer finds the testimony of Vanlandingham, Mann, and Klein credible regarding the circumstances of the Appellant's dismissal. (Testimony of Vanlandingham, Mann, and Klein)

16. The Appellant also offered testimony that she thought her dismissal was in retaliation for discussing problems at Eastern State Hospital. As a procedural matter, the Hearing Officer would note that the Appellant did not formally allege illegal retaliation prior to the evidentiary hearing and raised this issue for the first time during her testimony at the evidentiary hearing. Nonetheless, given the evidence of record, the Hearing Officer finds illegal retaliation was not the reason the Appellant was dismissed. (Testimony of the Appellant)

17. The Appellant's dismissal was not the result of age discrimination.

CONCLUSIONS OF LAW

1. As an employee serving her initial probationary period, the Appellant could be dismissed at any time pursuant to KRS 18A.111. Her only right of appeal would be an allegation of illegal discrimination pursuant to KRS 18A.095(12) or (14)(a).

2. The Appellant properly invoked the jurisdiction of the Personnel Board when she filed a timely appeal alleging disability discrimination, pursuant to KRS 18A.095(12) and (14)(a).

3. In Kentucky, an individual is afforded a right of action against his or her employer due to discrimination because the person is a qualified individual with a disability. KRS 344.040(l)(a). The general purposes of the Kentucky Revised Statute Chapter 344 include the safeguarding of all individuals within the state from discrimination based on disability and to "protect their interest in personal dignity and freedom from humiliation ..." KRS 344.020(l)(b).

4. Federal law prohibits "a covered entity" from discriminating against "a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a). A "covered entity" includes an employer. 42 U.S.C. §12111(2). In this case, the Appellee, as employer, is a "covered entity."

5. The Appellant bears the initial burden of establishing a *prima facie* case of disability or age discrimination against the Appellee. *Hedrick v. Western Reserve Care System*, 355 F.3d 444 (6th Cir. 2004); *Snead v. Metropolitan Property & Cas. Ins. Co.*, 237 F.3d 1080 (9th Cir. 2001). To establish a *prima facie* case of discrimination based on a disability, the

Appellant must show: (1) That she had a disability as that term is used under the statute; (2) That she was "otherwise qualified" to perform the requirements of the job, with or without reasonable accommodation; and (3) That she suffered an adverse employment decision because of the disability. *Henderson v. Ardco, Inc.*, 247 F.3d 645, 649 (6th Cir. 2001); *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 706-707 (Ky. App. 2004). A similar standard applies to age discrimination.

6. The Appellant has been able to establish that she had a disability and that she was over the age of forty (40). Her testimony about her age, that she had two (2) back surgeries (the last one (1) occurring only five (5) months before she started working for the Appellee), the fact that she had difficulty lifting, walking, and standing, and the fact that she was found disabled by the Social Security Administration are sufficient to establish that she suffered from a disability and that she was over the age of forty (40).

7. However, the Appellant has failed to establish that she was otherwise qualified to perform the work of an NCI. Based on the Findings of Fact, the Appellant was not meeting the reasonable expectations of her employer.

8. The Appellant has been unable to establish any causal connection between her disability, her age, and the decision to dismiss her from employment. Based on the Findings of Fact, neither the Appellant's disability, nor her age, were the reason she was dismissed.

9. The Appellant failed to carry her burden of proof that her dismissal was the result of disability or age discrimination. KRS 13B.090(7).

10. Because all the events underlying this appeal occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A are to the sections in effect at the time of the events associated with this Appeal.

RECOMMENDED ORDER

The Appellant, having failed to carry her burden of proof that she was discriminated against based on a disability status, the Hearing Officer recommends to the Personnel Board that the appeal of **ANNA HARDIN V. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2021-142)** 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 fifteen (15) 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

Anna Hardin
**Findings of Fact, Conclusions of Law,
and Recommended Order**
Page 11

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).

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.

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

SO ORDERED at the direction of the Hearing Officer this 14 day of September, 2023.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK

EXECUTIVE DIRECTOR

A copy hereof this day emailed and mailed to:

Anna Hardin
Hon. Lucas Roberts
Hon. Rosemary Holbrook (Personnel Cabinet)