

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-121**

ANTOINETTE HILLS

APPELLANT

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

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

APPELLEE

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This matter came on for an evidentiary hearing on December 17, 2012, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Kim Hunt Price, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Antoinette Hills, was present at the evidentiary hearing and was represented by the Hon. Scott C. Wilhoit. Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Carrie Cotton.

BACKGROUND

1. Appellant, **Antoinette Hills**, was hired as a Patient Aide I in the Department of Behavioral Health, Development and Intellectual Disabilities, Hazelwood Center on January 1, 2012.

2. By letter dated May 29, 2012, Appellant was separated from her position, effective May 30, 2012. The separation was during her initial probationary period.

3. Appellant filed a timely appeal with the Personnel Board on May 31, 2012, appealing her dismissal and stating,

I was not given any explanation for termination. I was only told that I did not meet the satisfactory requirements within my probationary period. I have not had any bad report or write-ups, and have not been given an evaluation to date. I don't know of any reason why I have been terminated.

It was later clarified at a pre-hearing conference that the Appellant was alleging discrimination based on age and race. Accordingly, the burden of proof was upon Appellant to prove the allegation of discrimination.

4. Appellant testified she is 47 years old, female and African-American.
5. Appellant applied for this position in September, 2011. At the time, she lived in Cincinnati and had been out of work. She initially applied for 2 positions; that of a patient aide and a transport driver. She had been a medical assistant since 2003. She received an interview for both positions for which she applied. She rented a hotel room and came to Louisville for the interviews.
6. Appellant began work on January 2, 2012, at the Hazelwood facility. After her orientation, she was assigned to the West second floor, but due to a shortage of patient aides, she was regularly transferred to other areas in the facility where work was needed.
7. Appellant's supervisor, Kevin Magee, was a Caucasian male.
8. The group that Appellant was assigned to helps feed and change patients who are mentally disabled and unable to care for themselves. She worked the second shift at times, and bathing and putting the patients to bed was part of her duty. She earned \$11.17 per hour, with a 37.5 hour work week and occasional overtime. She also received a shift differential in addition to her hourly wage for the work period after 7:00 p.m., but she could not recall that exact amount.
9. After March, Appellant was made the primary aide in her group for her shift, which means she had a little more responsibility. This was done by her supervisor, Kevin Magee, after some other aides left employment.
10. Appellant was injured at work and worked on the switchboard for about a month due to that work injury and her restrictions. She then went back to the patient aide position.
11. On the night of May 12, 2012, two other aides were arguing out loud and almost came to blows in front of the clients. They were dismissed and the next day a memo was sent out that if such a thing happened to anyone in the future, that person or persons would be fired.
12. Barbara King, an aide who had been there for a long time, came in on Wednesday to get the weights of clients. It was her responsibility to do that. At that time, Appellant had a client in the dining room who sits in a rocking chair in order to

remain calm. She had left his wheelchair located near him because she knew she had to weigh him that day and it would be more convenient. King moved the wheelchair and told her that she moved it. Appellant told her, "I wish you hadn't done that, because I need it." King got into a huff and went back and moved it again.

13. Appellant testified when she approached King, King was initially nice, but then left in a huff to move the chair, came back and said that Appellant had been disrespecting her by asking her to move the chair. The discussion became heated and later, the supervisor, Mr. Magee, was brought into the situation and talked to both of them. This occurred before her injury.

14. When Appellant came back from her injury, everything the first week was fine. Although King did make some remarks to her, Appellant retained a nice demeanor. However, during the second week, in a very hectic time in the unit, Appellant had cleaned a patient up and put her to bed and there was another one waiting to be prepared for bed in the television unit. A third client had urinated on himself and needed a bath. Appellant came to get the third client and King said for her to wait, that she wanted to give 2 other patients their baths first. Appellant went ahead and took the third client and tried to hurry back so that King could get her patients their baths. When she got back, King was gone, and another aide was there. Appellant put her patient to bed and started working on her daily log when King came back in, leaned over Appellant and said, "Thanks a lot for coming back in 5 minutes" in a sarcastic tone. Appellant told her that she had said she would be back in about 10 minutes from bathing the other patient, but told King she had still been able to get her work done. King then replied that just when she thought that Appellant was half human, this happened.

15. Supervisor Magee again talked with both of them, and King apologized to Magee.

16. Appellant asked that the matter be heard by higher ups, but that did not occur, although Magee said it would be documented in King's file, and if anything else occurred, something would be done to her.

17. On April 25, 2012, Appellant asked for permission to be off on April 30, 2012, for a family issue. The request was denied on April 27, 2012. However, Appellant did not report to work on April 30, 2012, as scheduled. Schedules come out on a monthly basis, and the schedule had been made for the period of time she was requesting off prior to her asking off.

18. Appellant also requested a personal day on May 22, 2012. She was approved for a special double shift on May 28, 2012. She acknowledged that holidays

are hard times to fill, because people often call in to be off on those days. A new schedule had already been set to begin Memorial Day week. She could not start her second job without completing a DOT physical, and therefore she did not come in to work. She went in to work at Hazelwood the next day, Tuesday, and was told she was terminated for unsatisfactory completion of her probation.

19. Appellant felt that she was treated differently than others because of her race and age.

20. She is now working for TARC, the transportation system in Louisville, and began there on October 21, 2012. One week after she left State employment, she began working in motor vehicle transportation earning \$7.30 per hour. She worked there until September 30, 2012, when she started the job with TARC. She does not have the health, dental and deferred compensation benefits on this job that she had with the State.

21. On cross-examination, Appellant acknowledged that in her initial orientation she had received training in time and attendance and in employee misconduct. Appellee's Exhibit 6, Hazelwood Policies 7.6.1, was introduced concerning time and attendance. It states,

Reporting for work as scheduled, and on time is the responsibility of each employee. All leave must be requested and approved in advance, in accordance with facility policy, employee handbook and administrative regulations.

22. Appellant signed Appellee's Exhibit 7, showing that she had received the training on the time and attendance.

23. Appellee's Exhibit 11, Appellee's Policies 7.13.2, concerning misconduct that is non-threatening was introduced into evidence. By definition misconduct includes a breach of personnel rules, departmental rules, regulations and policies or facility rules and policies, and specifically includes subsection 1(G) poor attendance record; 1(H) tardiness; and 1(I) job abandonment.

24. Appellant acknowledged it is very important to follow all the policies and regulations with regard to the type of population that is at Hazelwood, and that attendance is important to being able to do that. She also acknowledged that not following a plan with a client can be detrimental to the patient.

25. Appellant alleged that no one else on her floor was over 40, African-American and female. She stated there were a large number of younger patient aides, but there were no patient aides at her age over 40 who were African-American.

26. Appellant did not believe she was familiar with Appellee's Exhibit 13, a March 13, 2012 verbal coaching for poor job performance, but did acknowledge it was her signature on the form. This came from Christa Snawder and Mike Lewis and concerned Appellant's use on March 4, 2012, of "Tena Wipes" on a client. The client's risk management plan contained notes that "Tena Wipes" could not be used on her, and Appellant had reviewed her risk management plan, but failed to follow it. The memorandum specifically stated that failure to follow risk management plans would result in disciplinary action, including possible termination. Appellant did remember the incident after reviewing the document, and stated that she had reported it herself. She agreed that she failed to follow the plan for that patient.

27. **Theodore Chappell**, an investigator in Risk Management at Hazelwood, testified that he did an investigation as reflected in Appellee's Exhibit 12, concerning Appellant's use of the "Tena Wipes" on a patient who was not to have "Tena Wipes" used to clean her. This patient was allergic to the "Tena Wipes," and that is why it was listed in her risk management plan not to use them on her. He stated Appellant did report this situation herself, and remembered it occurring when he interviewed her.

28. Chappell testified that one of the witnesses, Odebowale, who was interviewed in this matter on March 8, 2012, is an LPN and is an African-American female. In fact, she is actually from Africa, he believes. Further, Lanesha Rankin, the supervisor who was interviewed in his investigation, is also an African-American female.

29. Chappell is a 26 year old Caucasian, has been at Hazelwood since September 2011, and has done investigations since that time. This was his first job as an investigator, and prior to that, he had worked at Our Lady of Peace Psychiatric Unit with primarily adolescents. He investigates unknown injuries and has expanded investigations which can be referred to the directors, who determine if it is an incident that needs to be reported to an outside agency. He could not recall that Adult Protective Services was called in regarding this matter with the use of the "Tena Wipes."

30. **Jay Klein**, the Appointing Authority, testified that it is his responsibility to do terminations and that all EEO investigations are handled through his office. In this case, requesting termination was not a disciplinary action, because Appellant was within her probationary period. Therefore, it was worded as a separation from employment. Appellant was separated for 2 reasons; her refusal to come in after she

requested a day off which was denied, and her prior corrective action concerning the use of the "Tena Wipes" on a client who could not have those used on her.

31. **Kevin Magee**, a Caucasian, the supervisor for Appellant, testified he had worked at Hazelwood for 1 1/2 years as a Floor Supervisor. He testified that 90% of the employees there are female and over the age of 30. The majority are African-American.

32. Magee testified that it is not his responsibility to deny or to grant time off, but he passes those requests on to his supervisor. Appellee's Exhibit 8, Appellant's request for the time off in this matter, was introduced through him. The request for time off stated that it was for a family issue. She made the request on April 25, 2012, and requested to be off on April 30, 2012. The request was denied by the supervisor, Christa Snawder.

33. Magee verified that schedules are made out on the 20th of each month for the entire next month. He testified that typically employees ask for time off prior to the 15th of the month because it is hard to get time off approved after the schedule is made out. When he received this request, he took it to his supervisor, Christa Snawder, and she sent it back unapproved. He testified that if the Appellant had made the request to him verbally, he would have given her this sheet to fill out.

34. Snawder did not point blank deny the request, but got back with him in a day or so after checking, and denied it because of low staffing at the time and apparently a failure to be able to have someone else come in. At that time, there were 10 groups who needed supervising and only an average of 5 staff. It is preferable to have 10 staff. It is preferred because the preferred ratio of workers to clients is 4 to 1. But at that time, it was 5 or 6 to 1.

35. Magee testified that the denial would not have been based upon Appellant's age, sex or race, but because of low staff coverage and inability to obtain coverage for her time slot. After he gave her the denial of the request for time off, Appellant told him she would not be in on Monday because she had other business to attend to. He did ask her, on the next day when she came in for work, why she did not call in on Monday morning, and she thought that telling him the Friday before had been sufficient. Appellant never provided any statement for why she did not come in to work on that Monday. The policy states that a statement is due on the first working day back. Magee testified there was no write up for this denied leave because he had the conversation with her ahead of time.

36. **Tina Ashley**, the Human Resources Director who has worked at Hazelwood for nearly 2 years, testified that her department compiles all personnel files. She verified that the patients at Hazelwood have mental health and retardation issues,

and are a very fragile population. Patient aides must assist residents with their daily needs, such as bathing, brushing their hair, shaving, feeding, and toileting.

37. Ashley introduced Appellee's Exhibit 5, which tracks the employee's days off. It reflected the March 13, 2012 verbal coaching for poor job performance with regards to the "Tena Wipes." It also reflected that the leave for April 30, 2012, which was requested on April 25, 2012, was denied on April 27, 2012; and Appellant still did not report to work. It also reflected a denial of a request for personal leave on May 22, 2012. Finally, it reflected that on May 28, 2012, Appellant was approved for a special schedule of Friday, a single shift, and on Saturday and Sunday, double shifts.

38. Ashley testified there is a huge turnover in patient aides, and 30 to 40% of them do not complete their nine month probationary period. The majority of patient aides are women the age of 30 to 35, and 80 to 90 percent of them are African-American.

39. Ashley testified to Appellee's Exhibits 9 and 10, which reflected that Appellant was off appropriately for a work-related injury and that she had brought in the required documentation for that. Also she had requested sick leave on February 1, 2012, and brought in the appropriate doctor's excuse for same. Ashley felt that Appellant understood the requirements for taking off for leave.

40. Ashley testified concerning the investigation into the "Tena Wipes," they thought a written reprimand should occur, but they do not make that final decision at the facility. When it was sent to Frankfort, there was a telephone conference, and it was determined that it would be a verbal counseling, and no termination at the time because Appellant was new to the facility, and they wanted to give her time to learn.

41. Ashley verified the request for separation was based on Appellant not coming in on the day she was denied leave off, and for not producing a statement as required from a doctor. In addition, she admits another missed day of work, too.

42. Ashley further testified that at the time of employment of Appellant, there was definitely an error in the computer system and Appellant was listed as a Caucasian female. She also verified that one employee is over 70 years old and the action taken to separate Appellant dealt with her work performance and not because she was African-American, over 40 or female.

43. On cross-examination, when asked whether Family Medical Leave could have been used by Appellant on the days she had requested off, Ashley stated that in order to receive Family Medical Leave, it has to go through Kelly Schrader in Human Resources, and just because someone writes "family issue" on their leave request, it does not automatically qualify you for Family Medical Leave. Further, because

Appellant was new to the system, she did not qualify for Family Medical Leave yet, because she had not been employed for the required 1 year period.

FINDINGS OF FACT

1. Appellant was denied leave that she requested for April 30, 2012, and failed to report for work on April 30, 2012. She further failed to provide a doctor's excuse for said absence.

2. Appellant was denied requested leave on May 22, 2012, and failed to report to work on said date. She further failed to provide a doctor's excuse for said absence.

3. Hazelwood Policies 7.6.1 requires that leave be approved in advance or there be a doctor's statement on the day someone returns to work.

4. KRS 18A.095(12) states, as follows:

Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age forty (40) and above. Nothing in this section shall be construed to preclude any classified or unclassified employee from filing with the Kentucky Commission on Human Rights a complaint alleging discrimination on the basis of race, color, religion, national origin, sex, disability, or age in accordance with KRS Chapter 344.

5. Appellant was serving a probationary period at the time she was separated from employment.

6. Appellant used "Tena Wipes" on a patient whose risk management plan clearly stated the patient was allergic to them and the "Tena Wipes" could not be used on her.

7. Appellant is an African-American female over age 40.

8. There was no evidence introduced that any action taken in this matter was a result of Appellant's race, age or gender.

CONCLUSIONS OF LAW

1. It is not necessary that cause be proved in the separation of an employee during a probationary period.
2. Appellant did not prove discrimination in this matter. Her separation was for a combination of attendance problems and failing to follow a patient care plan.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ANTOINETTE HILLS V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2012-121)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

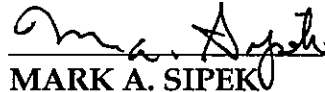
Any document filed with the Personnel Board shall be served on the opposing party.

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

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

ISSUED at the direction of Hearing Officer Kim Hunt Price this 17th day of March, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day sent to:

Hon. Carrie Cotton
Hon. Scott C. Wilhoit