

3. She knew an Internal Affairs investigation had begun due to her having been late conducting an 8:45 p.m. inmate count in Dorm 5. Just prior to the count, she had been outside the dorm, talking to Johnson and another officer. She did not realize the count start time had passed until she observed Sergeant Charles Carter and then looked at the clock. Johnson did not say anything to her about conducting her count. She had rushed through the count and did it improperly.

4. Thereafter, she received an Intent to Dismiss letter. She made the decision to resign her position, with prejudice.

5. She testified about a matter in Dorm 2 at BCC. On that particular day, she had been involved in another Internal Affairs investigation. She did not want to be in trouble any more. She did not miss work and wanted to do her job. Appellant had been on the job a few months and was also constantly in investigations. Gross just wanted to keep by herself and not talk to anyone.

6. Appellant came into the office where Gross was sitting. He asked her how she was doing. She said she felt like she was in trouble a lot and, if she talked to someone, she would just get into trouble.

7. At no time did she ever feel Appellant used his position as a supervisor to prevent her from leaving a room. Never once did she feel threatened by him or forced to do anything. She felt no discomfort or upset with the physical contact. In fact, she had been hugged by several other officers prior to that.

8. **Joseph Johnson, the Appellant**, offered his testimony. He had been employed as a CO at the Northpoint Training Center for about three years. On October 1, 2018, he was promoted to Sergeant and began work at BCC. He was reverted back to his CO position on December 4, 2018. He had been on probationary status from October 1, 2018, through the date of reversion. The normal probationary period for a Sergeant is six months.

9. He believed the harassment complaint against him, and the actions that resulted from same, had been based on incomplete information. The complaint had been lodged by Correctional Officer (CO) Bailey Winner. This was not the first time CO Winner manipulated the system to avoid her own disciplinary action.

10. On November 2, 2018, Winner had refused to work mandatory overtime. Johnson required her to bring in a medical slip to justify her refusal. He then notified his superiors and others of the incident by email (Appellant's Exhibit 1).

11. He identified Appellant's Exhibit 2 as a November 19, 2018 memorandum from Captain Kevin Carter to CO Bailey Winner. This memo brought to Winner's attention certain concerns and expectations regarding time and attendance and her violation of CPP 3.14.

12. On November 3, 2018, Winner tagged the Appellant on her Facebook posts (Appellant's Exhibit 3). Appellant testified he is identified therein under the pseudonym "Albert Wesker." He stated these text messages show that he and Winner were still perfectly fine about talking "crap" to each other. The day Winner returned to work was the day she filed the complaint that he had been harassing her.

13. Appellant's Exhibit 4 shows a series of messages between Winner and the Appellant. Prior to October 25, 2018, Appellant entered Dorm 4 and observed Winner had apparently been crying. He asked her what was going on. She told him she was a single mother, had no support at home from her family, and provided other personal information. He allowed her to continue "venting" for about 30 minutes until he felt she was okay to return to shift.

14. He believed this was an incident observed or reported by others as the inordinate amount of time he had spent with Winner. He testified that if Winner had been male, his behavior would not have seemed abnormal to anyone, as such time is regularly spent with male employees for similar situations.

15. He identified Appellant's Exhibit 5 as the BCC Shift Roster for the 4 p.m. to 12 a.m. shift, November 24, 2018. He offered this as an example of the workload with which a supervisor dealt at that time.

16. He believed that Winner had a habit of avoiding discipline against herself by complaining against others, including Appellant. He stated Winner's complaint was sexually discriminatory against him, as she had done this to avoid her own discipline.

17. He identified Appellant's Exhibit 7 as notes he took contemporaneous with an October 26, 2018 mandatory meeting of supervisors. The supervisors discussed and reviewed matters pertinent to the institution, including how to deal with time and attendance issues and placement of people in the correct positions.¹

18. CO Winner was ex-military, the same as Appellant. Appellant's interaction with her was the same as with any other officer. He stated they were consenting adults who spoke on Facebook. He did not speak to her in that forum in his capacity as her supervisor.

¹ Appellant had offered the introduction of Appellant's Exhibit 6. Due to an objection, that exhibit was not admitted because the document was not relevant to the issues in this appeal.

19. An inmate count is vitally important to the security of the institution. It is the CO's job to conduct such count in a timely manner. At no time did CO Gross advise Appellant she had to leave their conversation to conduct the count.

20. **Captain Jason Lotter** offered his testimony. He is employed at the BCC as an Internal Affairs Officer, where he has held that post for almost two years. At the direction of Warden Ratliff, he conducted and was the lead investigator for two investigations pertaining to the acts and behavior of the Appellant. With reference to CO Winner, Appellant told Lotter his relationship with her was strictly professional; he dealt with her job and duties.

21. Captain Lotter observed Winner to be an outgoing, straightforward, and direct person. On a few occasions, he saw that she joked with staff back and forth. At times, she used profanity.

22. The second investigation involved allegations of harassment against the Appellant. This investigation had been initiated by an Occurrence Report (OR) filed by CO Winner. She had received quite a few Facebook messages from Appellant, had told him to stop, but the messages kept coming. He identified Appellee's Exhibit 1 as his Internal Affairs Report of Investigation, dated November 13, 2018.

23. Once he received Winner's complaint, he took it to the Warden. She directed he start an investigation. He interviewed CO Winner. She became very emotional. She was afraid because of a prior incident she had endured when she was in the military. In this case, she said Johnson constantly messaged her on Facebook. He asked her to do overtime on his shift, and discussed other matters that made her feel very uncomfortable when Johnson was around her. He spent "extraordinary" amounts of time with her on her post. She was afraid he would use his rank to "get something more from her." All his behavior affected her job performance.

24. Captain Lotter also spoke with Lt. Hester and Sgt. Carter. They were present when Winner came in to retrieve documents from Hester. Carter had noticed Appellant spent an extraordinary, inappropriate amount of time with Winner. Hester remembered Winner told Appellant to "stop" something; he took it as mutual "playground flirting."

25. All interviews were recorded (Appellee's Exhibit 2). Following the interviews, Captain Lotter made the following findings:

It appears that both Sgt. JOHNSON and CO WINNER made inappropriate comments in messages on Facebook Messenger when it comes to a supervisor and an officer. It appears that Sgt. JOHNSON has spent inappropriate amounts of time in the dorm that CO WINNER was working

according to witnessing supervisors. Communication between Sgt. JOHNSON and CO WINNER has stopped since the last message was sent through Facebook Messenger on Sunday November 4, 2018. (sic)

26. Once the investigation was closed, the report was referred to Warden Ratliff.

27. Subsequently, Captain Lotter received an email complaint from Procedures Assistant Penix on November 27, 2018. Inmates in Dorm 5 had complained they had not been counted during an 8:45 p.m. inmate count on November 22, 2018. Inmate counts are the most important activity at the facility, as it accounts for the whereabouts of all the inmates. Counts occur throughout the day. Lotter sent the email to Warden Ratliff. She directed him to begin an investigation.

28. Captain Lotter first examined video footage for that evening. On the video log, which is a part of his report (Appellee's Exhibit 3), he recorded what he observed. He saw CO Gross walk out of Dorm 5 to the location of a blue truck. About 30 minutes later, she walked back into Dorm 5 at about 9 p.m., approximately 15 minutes after the 8:45 p.m. inmate count had started. This raised a serious security issue since 8:45 p.m. is the last inmate count for the night until midnight. This gives inmates who might go missing three hours' head start.

29. He interviewed Captain Carter, who confirmed his own observations of the video timeline. He also interviewed Sgt. Carter, who had been in the truck that pulled up to the dorm about 9 p.m. when CO Gross re-entered the building.

30. In Captain Lotter's interview of Sgt. Johnson, Appellant said he had talked to CO Gross about dorm matters and officer expectations. He did not remember the count being called. Officer Smith, in his interview, remembered the count having been called. Captain Lotter also interviewed David Penix.

31. Captain Lotter authored the report of the investigation, dated December 7, 2018, (Appellee's Exhibit 3) and referred the matter to the Warden. He made the following findings:

It appears that CO GROSS did not start the 8:45pm standing ID count in Dorm 5 until 9:00pm due to being outside the dorm talking to Sgt. JOHNSON and CO SMITH. CO GROSS can be seen on camera running through A-Bay and D-Bay without count sheets and not conducting proper counts. CO GROSS can also be see (sic) observed on camera not counting the single man R-Bay rooms nor going upstairs to count B-Bay and R-Bay rooms. After reviewing the Dorm 5 logbook for 11/22/18 on the 4-12 shift, it also appears that CO GROSS falsified documents by noting in her

logbook that she made security rounds in Dorm 5 at 8:30pm and at 8:45pm when she was still outside the dorm talking to Sgt. JOHNSON and CO SMITH.

It appears that Sgt. JOHNSON kept CO GROSS from starting count on time by keeping her outside the dorm talking to her. Being a supervisor, Sgt. JOHNSON should be aware of count times and ensuring that officers are in their dorms accounting for the inmates in their assigned dorms.

It appears that there is no evidence of CO SMITH being responsible for CO GROSS not counting her dorm on time due to both CO SMITH and CO GROSS stating that most of the conversations were between CO GROSS and Sgt. JOHNSON.

It appears that David PENIX did go outside of his job duties by obtaining information that was outside of his job duties and was not told to do so. David PENIX admitted to gathering information from Control Center.

32. **Tiffany Ratliff** was the next witness. She had been employed as the Warden of BCC from July 1, 2016, through her retirement on April 1, 2019. As Warden, she was the appointing authority who made disciplinary decisions regarding employees. In her assessment of the matters brought to her attention, she surmised there was enough inappropriate activity between a supervisor and a subordinate to warrant the level of discipline that was issued.

33. When she received notification from Captain Lotter of allegations of improper conduct, she reported the matter to Personnel in Frankfort. Frankfort directed her to handle the matter at the institution. Thereafter, she directed Captain Lotter to begin an investigation.

34. She reviewed the first investigative report provided by Captain Lotter (Appellee's Exhibit 1). Based on the information gathered, she concluded there was enough inappropriate activity to issue a lower level of discipline. This type of behavior usually warranted discipline. She examined the type of allegation, the proof on hand, Appellant's disciplinary history, and considered the progressive disciplinary scheme to reach a fair level of discipline.

35. She decided to issue a written reprimand to Appellant. She identified Appellee's Exhibit 4 as the December 4, 2018 letter issued to the Appellant for staff misconduct and violations of CPP 3.1, Code of Ethics/Social Media Use, Section II(F) Social Media; and CPP 3.5, Sexual Harassment and Anti-Harassment, Section 2. Policy and Procedures. The written reprimand was issued by Abby McIntire, as Acting Warden. On December 4, 2018, Warden Ratliff had been away from the institution and directed McIntire to issue the document. Warden

Ratliff issued the written reprimand based on inappropriate Facebook messages, the inappropriate amount of time Appellant had spent with Winner, and inappropriate physical contact. Neither his sex nor gender in any way played a part in consideration of the discipline, nor did it affect her decision.

36. She identified Appellee's Exhibit 5 as Kentucky Corrections Policies and Procedures, Policy 3.1, Code of Ethics/Social Media Use. She testified that the facts showed Appellant had violated Section II, Policy and Procedures, F., Sections 1-3.

37. She identified Appellee's Exhibit 6 as Kentucky Corrections Policies and Procedures, Policy 3.5, Sexual Harassment and Anti-Harassment. She testified Appellant had violated Section II, Policy and Procedures, A. Prohibited Behavior, Sections 1-3.

38. Appellant was on probation as a Sergeant. Based on all the previous information she had received, Ratliff concluded Appellant had failed to meet the probationary requirements as a Sergeant. The Internal Affairs investigations factored into her decision. She, therefore, directed Rodney Moore, Director of the Division of Personnel Services, to issue the December 11, 2018 Notice to Appellant that, effective December 12, 2018, reverted Appellant to his former position of Correctional Officer due to the failure to satisfactorily complete his promotional probationary period (Appellee's Exhibit 7). Ratliff stated she did not make this decision based on either Appellant's sex or gender. Her decision would not have differed had the employee been female.

39. No further witnesses were called by the Appellant. The Appellee declined to present any witnesses or other evidence in the case. Each party presented their own respective closing arguments. The matter was submitted to the Hearing Officer for his recommendation.

FINDINGS OF FACT

1. At the time the Appellant, Joseph Johnson, was reverted from the position of Sergeant to Correctional Officer (CO), and when he received a written reprimand, he was on probationary status. His probationary status began October 1, 2018, through his reversion date of December 4, 2018.

2. Appellant was issued a written reprimand on December 4, 2018, for "staff misconduct," more specifically for having made ". . . inappropriate comments and messages on Facebook Messenger to Officer Bailey Winner...also been witnessed by other staff and on security camera engaging in prolonged, inappropriate physical contact with Officer Taylor Gross during work hours in the security training/breakroom on November 15, 2018." It was alleged his actions violated CPP 3.1, Code of Ethics/Social Media Use, Section II, F. Social Media; and CPP

3.5, Sexual Harassment and Anti-Harassment, Section II, Policy and Procedures, A. Prohibited Behavior.

3. On December 11, 2018, Rodney Moore, Director of the Division of Personnel Services, issued a letter to Appellant notifying him he had been reverted to his former position of CO, effective December 12, 2018. The reason cited for such action was Appellant "failed to satisfactorily complete your promotional probationary period." The letter advised Appellant that, as he was on promotional probation pursuant to KRS 18A.111, he did not have a right to appeal the reversion to the Kentucky Personnel Board, but pursuant to KRS 18A.095, he could file a claim of discrimination with the Board if he believed the action was based on unlawful discrimination (Appellee's Exhibit 7).

4. Appellant had been employed as a CO at the Northpoint Training Center for about three years. On October 1, 2018, he was promoted to Sergeant and began a promotional probationary period, working at the Blackburn Correctional Complex (BCC).

5. Bailey Winner, a female, had been a CO at BCC under Appellant's supervision. She and Appellant were both military veterans. She had refused to work mandatory overtime on November 2, 2018, and Appellant reported same to his superiors (Appellant's Exhibit 1). On November 19, 2018, Captain Kevin Carter issued a memorandum to Winner, citing concerns of her behavior with respect to issues of time and attendance (Appellant's Exhibit 2).

6. On November 3, 2018, Appellant and Winner engaged in text messages between them. The same day, Winner and Appellant, under the pseudonym "Albert Wesker," exchanged messages through Facebook (Appellant's Exhibits 3 and 4).

7. When Winner returned to work, she filed a harassment complaint against Appellant through an Occurrence Report (OR).

8. Captain Jason Lotter, Internal Affairs Officer at BCC, received Winner's OR complaint. He took the complaint to Warden Tiffany Ratliff. Warden Ratliff directed Lotter to conduct an investigation.

9. Captain Lotter conducted the investigation and interviewed Winner, Lt. Hester, Sgt. Charles Carter, and Sgt. Joseph Johnson. In his Internal Affairs' Report of Investigation issued November 13, 2018, he issued the following Findings:

It appears that both Sgt. JOHNSON and CO WINNER made inappropriate comments in messages on Facebook Messenger when it comes to a supervisor and an officer. It appears that Sgt. JOHNSON has spent

inappropriate amounts of time in the dorm that CO WINNER was working according to witnessing supervisors. Communication between Sgt. JOHNSON and CO WINNER has stopped since the last message was sent through Facebook Messenger on Sunday November 4, 2018. (sic) (Appellee's Exhibit 1).

10. The investigation was closed and the Report of Investigation was referred to Warden Ratliff.

11. On November 27, 2018, Captain Lotter received an email complaint from Procedures Assistant Penix. It was alleged that on November 22, 2018, some inmates in Dorm 5, waiting to be counted at the 8:45 p.m. inmate count, never saw the CO. After notifying the Warden, Lotter was directed to begin an investigation.

12. Captain Lotter began his investigation by viewing video footage. He recorded what he observed. He also interviewed Captain Kevin Carter, Sgt. Charles Carter, CO Edward Smith, CO Taylor Gross, Sgt. Joseph Johnson, and David Penix. In his Internal Affairs Report of Investigation, issued December 7, 2018, he issued the following Findings:

It appears that CO GROSS did not start the 8:45pm standing ID count in Dorm 5 until 9:00pm due to being outside the dorm talking to Sgt. JOHNSON and CO SMITH. CO GROSS can be seen on camera running through A-Bay and D-Bay without count sheets and not conducting proper counts. CO GROSS can also be see (sic) observed on camera not counting the single man R-Bay rooms nor going upstairs to count B-Bay and R-Bay rooms. After reviewing the Dorm 5 logbook for 11/22/18 on the 4-12 shift, it also appears that CO GROSS falsified documents by noting in her logbook that she made security rounds in Dorm 5 at 8:30pm and at 8:45pm when she was still outside the dorm talking to Sgt. JOHNSON and CO SMITH.

It appears that Sgt. JOHNSON kept CO GROSS from starting count on time by keeping her outside the dorm talking to her. Being a supervisor, Sgt. JOHNSON should be aware of count times and ensuring that officers are in their dorms accounting for the inmates in their assigned dorms.

It appears that there is no evidence of CO SMITH being responsible for CO GROSS not counting her dorm on time due to both CO SMITH and CO GROSS stating that most of the conversations were between CO GROSS and Sgt. JOHNSON.

It appears that David PENIX did go outside of his job duties by obtaining information that was outside of his job duties and was not told to do so. David PENIX admitted to gathering information from Control Center. (sic) (Appellee's Exhibit 3).

13. The investigation was closed and the Internal Affairs Report of Investigation was referred to Warden Ratliff.

14. After having examined the November 13, 2018 report, Warden Ratliff concluded there was sufficient evidence to support issuance of lower level disciplinary action. She examined the type of allegation, the proof on hand, and Appellant's disciplinary history. She considered the progressive disciplinary scheme and decided to issue the December 4, 2018 written reprimand to Appellant for staff misconduct and violation of CPP 3.1, Code of Ethics/Social Media Use; CPP 3.5, Sexual Harassment and Anti-Harassment, Section II, Policy and Procedures. The written reprimand was issued by Acting Warden Abby McIntire. Ratliff testified that neither Appellant's sex nor gender played any part in consideration of such discipline nor did it affect her decision.

15. After examining the Internal Affairs' Report of Investigation dated December 7, 2018, Warden Ratliff considered this new information, as well as the information that preceded issuance of the previous written reprimand, and concluded Appellant had failed to meet the probationary requirements as a Sergeant. She directed Rodney Moore, Director of the Division of Personnel Services, to issue the December 11, 2018 Notice of Reversion to the Appellant. (Appellee's Exhibit 7). She testified she did not make this decision based on either Appellant's sex or gender; that her decision would not have differed had Appellant been female.

16. The following policies and procedures were in full force and effect at all times relevant to the occurrences in this case:

- Kentucky Corrections Policies and Procedures, Policy 3.1, Code of Ethics/Social Media Use (Appellee's Exhibit 5); and
- Kentucky Corrections Policies and Procedures, Policy 3.5, Sexual Harassment and Anti-Harassment (Appellee's Exhibit 6).

17. Appellant timely filed his appeal with the Kentucky Personnel Board and alleged the actions taken against him were the result of sexual discrimination.

CONCLUSIONS OF LAW

1. An employee with status who has been promoted, shall serve a promotional probationary period of six (6) months. KRS 18A.111(4). Notification to an employee on promotional probation of the reason the probationary employment has been terminated by the Appointing Authority shall not confer a right to appeal to the Kentucky Personnel Board. KRS 18A.111(8).

2. However, at the time of his reversion to the position of Correctional Officer, effective December 12, 2018, Joseph Johnson was a classified Executive Branch employee. As such, he was entitled to appeal to the Kentucky Personnel Board his allegations based on sexual discrimination. KRS 18A.095(12).

3. When Appellant was reverted to Correctional Officer, such action occurred prior to the end of the six (6) month probationary period.

4. Any employee who believes he has been discriminated against may appeal to the Kentucky Personnel Board. KRS 18A.095(14)(a). Appellant, a probationary employee, appealed to the Kentucky Personnel Board his claim that he had been reverted due to sex discrimination. This matter, therefore, is properly before the Personnel Board.

5. In Kentucky, it is an unlawful practice for an employer to discharge any individual or other to discriminate against any such individual because of that individual's race, color, religion, national origin, sex, and/or age 40 and over. KRS 344.040(1).

6. In order to establish a violation of the Kentucky Civil Rights Act, a party must prove the same elements as required for a *prima facie* case of discrimination under Title XII of federal law. Talley v. Bravo Pitino Restaurant, LTD, 61 F.3d 1241 (6th Cir. 1995).

7. Because the Kentucky Act is similar to Title XII of the Federal Civil Rights Act of 1964, the Kentucky Civil Rights Act should be interpreted consistently with federal law. Ammerman v. Board of Education, 30 S.W.3d 793, 797-798 (Ky. 2000).

8. In proving a *prima facie* case of discrimination, the claimant must prove that he: (1) is a member of a protected class, (2) was subjected to an adverse employment action, (3) was qualified for his position, and (4) was replaced by, or treated less favorably than, a person outside the protected class. Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir. 1992). However, in this case, Appellant has alleged sex discrimination resulted from the employer treating him, a male, differently than it would have treated a female employee, thus claimant is presenting a claim for "reverse discrimination."

9. Reverse discrimination is established upon a showing that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority. Jefferson County v. Zaring, 91 S.W.3d 583, 591 (Ky. 2002) [citing Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985)]. Therefore, some proof of disparate treatment, and not merely a bare allegation or pure speculation of such, is required to make a *prima facie* case.

10. Here, Appellant not only failed to present proof of disparate treatment based on his sex, but he also failed to make the proper allegation. In this case, he alleged sex discrimination was based on his having spent an inordinate amount of time on the job with a female co-employee and interacting with her on social media, whereas, had the co-employee been male, the employer would not have resorted to his reversion.

11. Appellee presented evidence that the reversion was based on Appellant's failure to meet probationary requirements as a sergeant. On December 4, 2018, he was issued a written reprimand for staff misconduct resulting from inappropriate, offensive, or sexually harassing behavior while at work; and use of social media such that it adversely affected security operations and impaired discipline and relationship among coworkers. (Appellee's Exhibit 4). Such acts were found by the employer to have been in violation of CPP 3.5, Sexual Harassment and Anti-Harassment, Section II, Policy and Procedures, as well as CPP 3.1, Code of Ethics/Social Media Use, Section II, F. Social Media.

12. The reversion was also based on consideration of events surrounding that written reprimand, as well as the matters described in the second investigative report (December 7, 2018) (Appellee's Exhibit 3). The Appellee, therefore, demonstrated a legitimate, non-discriminatory reason for reverting Appellant to his prior position of Correctional Officer, due to violation of workplace employment policies.

13. Appellant has failed to prove by a preponderance of the evidence that his reversion from Sergeant to Correctional Officer, and the written reprimand he received, were the result of sex discrimination.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JOSEPH JOHNSON V. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2018-257)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

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

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

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

ISSUED at the direction of **Hearing Officer Roland P. Merkel** this 9th day of July, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Oran S. McFarlan
Mr. Joseph Johnson