

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-058**

ASHLEY D. LEWIS

APPELLANT

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

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

APPELLEE

** ** *

This matter came on for an evidentiary hearing on July 23, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Ashley D. Lewis, was present at the evidentiary hearing and was represented by the Hon. Michael Boylan. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Jennifer Wolsing. Appearing as the agency representative for the Appellee was Tina Ashley.

The issues in this matter involve the placement of the Appellant on Directed Sick Leave, and the Appellant's claim of discrimination based on disability. The Appellee was assigned the burden of proof by a preponderance of the evidence to show that the Appellant was correctly placed on Directed Sick Leave. The Appellant was assigned the burden of proof, by a preponderance of the evidence, to show any claims of discrimination based upon disability. The Appellant has also alleged retaliation by virtue of the fact that she prevailed on a previous Personnel Board appeal, which restored her to employment.

BACKGROUND

1. The Appellee's first witness was **Jay Klein**. He is employed with the Office of Human Resource Management, and has been the Appointing Authority at the agency for the past 13 years. Part of his duties includes handling disciplinary actions and issues of Directed Sick Leave. The witness introduced Appellee's Exhibit 1, a copy of a January 2014 Personnel Board Final Order restoring Appellant to work at the agency.

2. The Appellant was working at Bingham Gardens, a facility under the auspices of the agency, at the time of her previous termination. Upon restoration to her position as Patient Aide II, she began working at the Hazelwood facility in Louisville, Kentucky.

3. Klein then introduced Appellee's Exhibit 2, an e-mail thread containing, most importantly, a February 10, 2014 note from Appellant's physician, Dr. Valerie Waters. This note listed the following restrictions for the Appellant as to her job as a Patient Aide II:

- (1) No lifting over 15 pounds.
- (2) No pushing/pulling over 20 pounds.
- (3) Alternate sitting/standing as needed.
- (4) No physical restraint of residents.

4. The witness then noted that this exhibit contained information from Hazelwood addressing those restraints, and informing him the Appellant could not perform the essential functions of her position. Klein stated that at the time of her placement upon sick leave, there were no desk jobs available to accommodate the Appellant.

5. As a result, the Appellant was placed on Directed Sick Leave by letter dated February 12, 2014, also accompanied by a letter back to the Appellant's health care provider asking when she could return to work. This placement upon sick leave was pursuant to 101 KAR 2:102, Section 2(a)(4).

6. Klein testified that the dates of February 12, 2014, through May 28, 2014, constituted the actual dates of Directed Sick Leave. Apparently, the Appellant had surgery on May 28, 2014, which would have allowed her to return to work. The witness then introduced Appellee's Exhibit 5, the pertinent parts being a March 6, 2014 letter from Dr. Michael Park detailing the Appellant's symptoms and, although not explicitly saying so, the symptoms described make it clear the Appellant could not perform her position as a Patient Aide II with the restrictions previously disclosed by Dr. Waters. Also contained in Exhibit 5 was an April 2, 2014 letter from the agency to Appellant declaring that she was then currently an individual with a disability as defined by the Americans With Disability Act (ADA). This letter further informed the Appellant that a search of positions within Jefferson and Bullitt Counties revealed there were no positions available in those counties, nor at the Hazelwood Center, in which the Appellant could perform all the essential functions of her position. She was also informed there were no positions available in her current or lower pay grades.

7. Finally, this witness introduced Appellee's Exhibit 6, a June 18, 2014 letter to Appellant from the Cabinet, stating she was still considered an individual with a disability. In addition, a continued attempt to identify a Grade 7 or lower position available in Jefferson or Bullitt Counties had indicated no available positions for the Appellant with desk duties only.

8. Klein concluded by denying that the placement of the Appellant on Directed Sick Leave was in any way retaliation for the prior Personnel Board appeal in which she prevailed.

9. On cross-examination, Klein admitted he was the Appointing Authority who had initially dismissed the Appellant, and then stated he was not aware she had been reinstated as of February 14, 2014, a short time before he took the action of placing the Appellant on Directed Sick Leave.

10. Directed to Dr. Parks' report, the witness admitted there was no specific statement saying the Appellant could not perform the duties of her job. However, he cited the detailed description of her pain and symptoms described therein. Klein also again referred to the job restrictions, which had been listed by Dr. Waters in her February 10, 2014 report.

11. The witness was then questioned as to the section of 101 KAR 2:102, Section 2 quoted in the Directed Sick Leave letter. Klein testified he felt that the provisions of 101 KAR 2:102, Section 2(2)(a)(2) or (4) would support the decision to place Appellant on Directed Sick Leave.

12. 101 KAR 2:102, Section 2(2)(a)(2) and (4) reads as follows:

(2) Use and retention of sick leave.

(a) An appointing authority shall grant or may require the use of sick leave with or without pay if an employee:

2. Is disabled by illness or injury. If requested by the appointing authority, the employee shall provide a statement from an appropriate medical health professional certifying the employee's inability to perform his duties for the days or hours sick leave is requested. If requested by the appointing authority, the employee shall provide a certificate from an appropriate medical health professional certifying the employee's fitness to return to duty before the employee is permitted to return to work;

4. Would jeopardize the health of himself or others at his work station because of a contagious disease or demonstration of behavior that might endanger himself or others.

13. Regarding the issue of discrimination, the witness revealed that an employee named Bill Daniels did an investigation in April 2014 regarding whether the Appellant suffered from a disability. Klein also revealed that Cathy Cox did an investigation in June 2014 regarding the same issue. These employees were the ones who directed the letters of April 2, 2014, and June 18, 2014, respectively. The witness then added that he saw no reason why either of these two individuals would have reason to discriminate against the Appellant because of her prior Personnel Board appeal. He also added that as far as finding another position for the Appellant, there were not very many Grade 7 or lower positions available in which to place the Appellant.

14. The Appellee's next witness was **Tina Ashley**. She has been the Human Resources Director at the Hazelwood facility for the previous three years. Her duties also

include overseeing disciplinary actions, payroll, worker's compensation and placement of employees upon sick leave. The witness detailed as of April 2014, the Bingham Gardens facility was under the auspices of the agency. Sometime in April, the facility was placed with a private contractor, and as a result, staff there was moved to the Hazelwood facility.

15. Ms. Ashley stated that during this timeframe, Hazelwood was filling all available positions which were needed; however, during this timeframe, there were no positions available which would have accommodated the Appellant's restrictions. She stated that with those restrictions, the Appellant could not have functioned as a Patient Aide II.

16. On cross-examination, the witness testified that an inquiry was made by Bill Daniels asking if Hazelwood had any positions which would accommodate the restrictions. She informed him there were no light-duty jobs there. The witness continued by stating that Hazelwood does have a policy which allows for one light-duty job position per shift. However, she reiterated, there were no such positions in April or May 2014.

17. Ms. Ashley concluded by stating that in her three-year tenure, there have probably been three to five people placed on light duty out of approximately fifteen requests. She stated the agency must be able to accommodate the restrictions in order to place an employee in a light-duty position. The Appellee then closed.

18. The Appellant, **Ashley D. Lewis**, called herself as her first and only witness. She began by stating she is now on Directed Sick Leave. However, through her counsel, the Appellant stated the relief being sought here is for the period from February 12 through May 27, 2014. She explained she seeks relief for this period because she feels no reasonable accommodation was attempted, and she seeks to be retroactively placed upon some other kind of leave which would have afforded her with pay.

19. The witness stated she was first employed August 1, 2010, at the Bingham Gardens facility located at Central State Hospital. She described staff duties there as taking care of intellectually disabled residents, including some with behavioral issues.

20. The Appellant explained that the facility was divided into six houses, each containing four clients. She was assigned to the same resident every day, because that resident needed more medical assistance.

21. The witness stated that after the Personnel Board ruled in her favor in January 2014, she received an e-mail from the Cabinet some two days before she was to return to work, this e-mail being either on or around February 3, 2014. She then testified that when she returned to Hazelwood, no one would help her with reinstating her insurance or answering any questions, and generally avoided her.

22. As further evidence of retaliation, the witness explained she was sent to the House Manager, David Goldman, to be given a tour of Hazelwood. She was then informed that Turquoise Malone would be her supervisor. Goldman told her at that time she was being assigned to House 4, not House 6, where she had previously worked. The witness explained she

could not understand why she was not returned to work with the same resident she had assisted previously. However, she also admitted this same resident was the one who had initially injured her.

23. The Appellant testified that when she tried to turn in the required information at Bingham Gardens after reinstatement, no one was available from Human Resources to assist her. She further stated she was not allowed on the property at Bingham Gardens.

24. The witness declared her primary complaint regarding retaliation was that she was not allowed to returned to work at House 6.

25. The Appellant explained that her disability had consisted of a bulging disk, for which she had surgery on May 28, 2014. She stated that as of the date of this hearing, she could not lift a resident by herself, and cannot do certain pulling actions. She declared that when she was reinstated to work in early February 2014, she could have answered the telephone or made copies while being on light duty. She declared she could have done her job with reasonable accommodations, which should have included help with the lifting of patients. She also added that there were five other employees on light duty during the period between February to May 2014, but she was not one of them.

26. The witness explained that after she moved to Hazelwood, she had applied for a supervisory position, but was told she did not qualify because of her disability.

27. On cross-examination, the Appellant admitted she had first injured her back in May 2012. This was while assisting a resident in one of the houses at Bingham Gardens. She declared again that the retaliation existed because she was not allowed to return to work in House 6. She also admitted she did not know if there was a limit on the number of light-duty positions which could be made available.

28. Asked to address her restrictions which included no lifting over 15 pounds, the witness stated that most patients weigh between 125 and 130 pounds, and her job required her to be able to lift those patients. The witness also admitted she did not know if any light duty positions were available during the period April through May 2014 at Bingham Gardens. The Appellant then closed.

FINDINGS OF FACT

1. A disabled employee establishes a *prima facie* case of ADA discrimination when she shows (1) she is a "qualified individual" under the ADA (42 USC § 12111), (2) her employer took adverse employment action against her, and (3) her disability motivated the adverse employment action.

2. The letter and details given by Drs. Waters and Park establish the Appellant was a qualified individual. The agency took an adverse employment action against the Appellant by placing her on directed sick leave.

3. Appellant's disability motivated the adverse employment action.

4. Thus, the Appellant established a prima facie case of discrimination. However, the agency provided a legitimate, non-discriminatory reason for the adverse employment action. *Rsolma v. J. H. Properties, Inc.*, 149 F 3d 517, 520-21 (6th Circuit 1998). This reason was based on the fact the Appellant could not perform the essential functions of her position as a Patient Aide II, as her restrictions included: (1) no lifting over 15 pounds, (2) no pushing/pulling over 20 pounds, and (3) no physical restraint of residents.

5. The reason offered by the agency for placing the Appellant on directed sick leave was not a pre-text, as the agency had searched for "light duty" position in Jefferson and Bullitt counties, and found none available which could accommodate the Appellant's restrictions.

6. No credible evidence was offered to show the agency's actions were in any way retaliation for the Appellant having prevailed in a previous Personnel Board appeal.

CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that the agency carried its burden of proof by a preponderance of the evidence to show the Appellant was properly placed on directed sick leave.

2. The Hearing Officer concludes as a matter of law that the Appellant failed to carry her burden of proof to show the agency's action was based upon retaliation for her prevailing in the prior Personnel Board appeal.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **ASHLEY D. LEWIS V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2014-058)** 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 R. Hanson Williams** this 16th day of September, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Jennifer Wolsing
Hon. Michael Boylan