

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-266

ERASTO MORAN

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 June 2017 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 10, 2017, 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 15th day of June, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Mona Womack
Mr. Erasto Moran
Mr. Jay Klein

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**FINDINGS OF FACT, CONCLUSIONS OF LAW,
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CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

This matter was brought for an evidentiary hearing on March 6, 2017, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before E. Patrick Moores, Hearing Officer. The proceedings were recorded by audio/video equipment pursuant to the authority found at KRS Chapter 18A.

The Appellant, Erasto Moran, was present and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Mona S. Womack, Deputy General Counsel for the Cabinet's Office of Legal Services.

I. STATEMENT OF THE CASE

1. The Appellant, Erasto Moran, filed this appeal on October 20, 2016, alleging that he was discriminated against by being given a verbal reprimand for what he described was in retaliation for his act as a whistleblower about the Cabinet's timesheet verification procedure, which he claims is fraudulent. The Cabinet moved to dismiss the appeal on the grounds that, pursuant to KRS 18A.095(1), the Personnel Board lacks jurisdiction to hear an appeal on a verbal reprimand which, under KRS 18A.005(24), is not considered a penalty that can be appealed.

2. Appellant Moran is employed at the Appellee's Glasgow State Nursing Facility. He claims that he has raised several issues throughout the Cabinet and the Governor's Office that the method of computing time worked is fraudulent. He states that he normally works from 11:00 p.m. until 7:00 a.m. the following morning, but all his time worked is documented as having been worked the next day. He has made several written complaints to the Cabinet and to the Governor's office, alleging that work time is not properly recorded. Moran received a verbal reprimand for missing time at work without a signed health care provider's statement of an illness authorizing his missing work. Moran alleges that he was charged with the reprimand because he is a Hispanic and a male over 40, and that it was also in retaliation for his complaints made concerning the calculation of time worked.

3. A pre-hearing conference was conducted before the Personnel Board on December 15, 2016. The Hearing Officer noted that the Appellant had submitted a response to the Cabinet's Motion to Dismiss by alleging discrimination, which brought the matter within the jurisdiction of the Board. The Hearing Officer addressed the issues on appeal and discussed the process of obtaining discovery and subpoenaing witnesses for an evidentiary hearing set to take place on March 6, 2017. The hearing was conducted at the offices of the Kentucky Personnel Board on March 6, 2017. The issue on appeal was whether Appellant Moran was discriminated against based on his national origin, or age, or was retaliated against when he received the verbal reprimand. Appellant Moran had the burden of proof by a preponderance of the evidence, and proceeded first in the presentation of proof.

4. Appellant Moran was the only witness to testify in support of his cause of action. At the conclusion of the presentation of the evidence by Appellant Moran, the Cabinet moved for a directed verdict on the basis that the Appellant failed to establish any evidence of discrimination or retaliation, and that the matter should be dismissed. The Hearing Officer heard the arguments of the parties and reviewed the record and his notes from the evidence presented at the hearing, and determined that the Appellant Moran did fail to present probative evidence of discrimination or retaliation and ruled that, for the following reasons, the Motion for Directed Verdict dismissing the appeal was to be **SUSTAINED**.

II. SUMMARY OF EVIDENCE PRESENTED

1. As previously noted, Appellant, **Erasto Moran**, was the sole witness. He is employed at the Glasgow State Nursing Facility (hereinafter GSNF), a state-owned facility that accepts Medicare and Medicaid patients, including those with mental and intellectual challenges. Moran was employed at the facility as a Nurse Aide State Registered II, with the responsibility to assist in the care of the residents in the facility.

2. Moran acknowledged that the staffing at the nursing home was an essential issue, in meeting the needs of providing for the care for the patients, and that he had been working there since 2003 taking care of the residents. He admitted that he had a history of attendance issues that had resulted in his being suspended on two prior occasions, with a three-day suspension and a five-day suspension, and a prior verbal warning. Due to the previous time and attendance issues, Moran was on a "verification" requirement, meaning that he was to provide medical or other appropriate documentation for his reason for missing any work, when he received the verbal reprimand that is at the heart of the current appeal.

3. Moran alleged that he believed that he received the current verbal reprimand because it was the intent of the GSNF to terminate him in retaliation for all grievances he filed complaining about the legality of the method used to calculate time worked. Moran had been complaining about the GSNF policy for staffing protocol and designation of time worked of third shift employees since he filed a grievance on January 24, 2012. Moran was given notice of a verbal reprimand on September 30, 2016, for violation of GSNF Policy Number ER-103, Time and Attendance, in that he had failed to report to work on three occasions: August 31,

September 14 and 27, 2016, or produce a doctor's statement providing a basis for his being off his scheduled work. Due to the three undocumented absences, the verbal reprimand informed Moran that not only would he be subject to further disciplinary action for any similar violations, up to and including dismissal, but that the verification requirement would be extended an additional six months to April 3, 2017.

4. Moran wrote on the written notice of the verbal reprimand that he had doctor's notes requesting he be excused from work on August 31 through September 4, for September 14, and for September 27 and 28. He produced timesheet records for August and September that allegedly recorded a pattern of violations of his work schedule. However, Moran argued that the doctor's notes established that his alleged violations were erroneous.

5. Moran produced a Time Statement for the month of August 2016, which he claimed shows he was off when he was working, and a timesheet for the last two weeks of August which showed him working on the second shift when he was working on the third shift. He also produced a timesheet for September 1-15, 2016, and a Time Statement for the month of September 2016, on which he also wrote they were fraudulent. He claimed the Time Statements and timesheet were fraudulent in that they showed him being off on days he actually worked and working on days he was actually off, including the days he had a doctor's statement for being off work. He said that if he signed the erroneous timesheets, it would constitute fraud which would give his employer grounds to terminate him for making a fraudulent statement of his time worked.

6. Moran produced a timesheet for March 2016 and a written Notice of Verbal Reprimand dated April 2, 2016, which covered his attendance violations for failure to be at work as scheduled, in which he was placed on a verification requirement for a period of six months. Moran alleged that the time records showed a pattern of alleged violations of his requirement to show up for work, which he claimed were erroneous, as he had produced to his employer the doctor statements excusing him from work on the dates he was declared to be in violation of his work schedule.

7. Moran testified that he reached out to the Attorney General and the Governor concerning the unlawful manner in which the GSNF was enforcing its time records, and that the GSNF was using improper and fraudulent calculation of his time worked in its effort to make a case against him to terminate him. He said that the way he understood the statute he was making a fraudulent wage claim, and that he has contacted the commissioner, the attorney and the Governor to obtain clarification of the time policy. He stated that he would not be fired for making a fraudulent wage statement.

8. Moran testified that he has been paid for all his time worked, except that there is a possible error on whether he was paid for August 31, 2016. He also testified that the added verification imposed upon him was in retaliation for the complaints he has made about the calculation of his time worked and the dates he was cited for not showing up for work, when he had produced doctor notes excusing his not showing up for work.

9. Moran testified that he believed that he received the verbal warning and the extended verification as retaliation because of his efforts to obtain a statement from the Cabinet as to the reason his signing the timesheets will not be considered as fraudulent and used against him. The record established that he filed a grievance in January 2012, concerning the GSNF's policy for calculating his time worked and the violations of its staffing protocol. On March 12, 2012, the Cabinet's Appointing Authority, Howard J. Klein, wrote Moran a letter explaining the process utilized by the Cabinet to calculate wages, in which he explained:

On April 4, 2011, the Kentucky Human Resource Information System (KHRIS) was implemented. KHRIS is a statewide system designed to manage human resource processes for the Commonwealth. This new software system modernized and streamlined key business processes including the functions of personnel administration, payroll, benefits, and time administration. In KHRIS, an employee who works a shift that starts on one day and ends on the next day determines their work day based upon which day a majority of the hours are worked. Your normal schedule has you starting work at 11:00 p.m. and ending at 7:00 a.m. Prior to KHRIS, your work day on the timesheet would be listed as the day you started work. After KHRIS, your work day on the timesheet is determined as the day you ended your shift as this is the day with the majority of your work hours. For example, when you are scheduled to work from 11:00 p.m. Thursday until 7:00 a.m. Friday, for payroll and scheduling purposes in KHRIS, you are working on Friday (1.00 hours worked on Thursday and 6.5 hours worked on Friday). All hours would be recorded on Friday. Under the old system, the hours would have been recorded on Thursday.

10. Moran admitted that the doctor's excuses were recorded on his time records, and that he was paid for the days he was off as paid leave time, but the day he was away from work was counted as a day off from his scheduled work time. Because of the extent of time missed from work in the months of August and September, the verification requirement he was under was extended another six months. Moran stated that there was no valid reason to extend his requirement to provide verification for his days missed, but that under this process the Cabinet was using against him, he would never be able to get off verification.

11. Moran alleged that he was being treated differently, but he produced no evidence to support this claim. He said he is Hispanic and over 40, but no evidence was presented how he was treated differently because of his race or age. He testified that when he was injured and placed on light duty, he was placed on a different shift than a woman who was on light duty. However, he acknowledged that he did not know the circumstances of her injury or work restrictions, and that the employer had the right to assign an employee on light duty to duties where there was a need to fit the employee's abilities to perform the work.

III. FINDINGS OF FACT

1. Moran has been employed since 2003 at the Glasgow State Nursing Facility as a Nurse Aide State Registered II, with the responsibility to provide care for the facility's resident patients.

2. Moran had a history of attendance issues resulting in a three-day suspension and a five-day suspension, a prior verbal warning, in addition to the verbal warning underlying this appeal, and a verification requirement that he produce documentation establishing appropriate reasons for his basis for missing his scheduled work.

3. During a thirty-day period from August 30 through September 30, 2016, Moran missed five days of scheduled work: August 30, September 4, September 14, September 27 and September 28.

4. Moran produced extensive documentation of his time records and doctor notes, none of which established any relevant proof that he was being discriminated or retaliated against.

5. Moran has had an on-going dispute with the Cabinet since 2012 concerning the manner in which his time worked is calculated by the state. He never explained the basis of his dispute except to say the Cabinet was reporting all his hours worked on the date that most of the hours were worked, when he actually worked one hour in the evening of one day and the balance of six and one-half hours on the next day. His argument that forcing him to sign a timesheet that has all his hours worked on one day is a fraud which the Cabinet could use as a basis to terminate him. However, he failed to produce any evidence establishing that he was at risk for being terminated for signing his timesheet that calculated his time worked in this manner.

6. Howard J. Klein, the Cabinet's Appointing Authority, wrote Moran a letter on March 12, 2012, explaining the method of calculating time worked and paid under the state's new personnel payroll system known as the Kentucky Human Resource Information System (KHRIS), pertinent part:

In KHRIS, an employee who works a shift that starts on one day and ends on the next day determines their work day based upon which day a majority of the of the hours are worked. Your normal schedule has you starting work at 11:00 p.m. and ending at 7:00 a.m. Prior to KHRIS, your work day on the timesheet would be listed as the day you started work. After KHRIS, your work day on the timesheet is determined as the day you end your shift as this is the day with the majority of your work hours.

7. Said statement adequately explained the method of calculating and paying Moran for his labors, but, for some unexplained reason, Moran is not happy with this explanation and insists he be provided a written law or letter that he will not be terminated for signing the timesheet which he repeatedly argued was fraudulent.

8. Moran's explanation and documentation of his problems concerning the timesheets and the verbal warning he received were not relevant to this hearing, as the Personnel Board does not have jurisdiction to hear an appeal of a verbal warning except to the extent that any evidence was included as to retribution or discriminatory conduct against him.

9. All Moran's evidence and arguments were based on his sole belief that he was treated differently, which was discriminatory based on his Hispanic race or his age, or was in retaliation to his grievances concerning the work time records which he repeatedly stated was fraudulent, with no evidence to establish the basis of his claim.

10. Moran failed to produce any evidence that the Cabinet acted against him in any discriminatory manner. No evidence was presented by any witness to establish how the Cabinet's method of calculating time work and payroll was discriminatory. Further, Moran was unable to provide any evidence of loss of pay or opportunities, or that the duties assigned to him were outside his job description, or in retaliation against him.

IV. CONCLUSIONS OF LAW

1. The leading authority for establishing a case of discrimination because of race is the decision of the United States Supreme Court in the matter of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). The Court established the following analysis: First the Plaintiff must establish a *prima facie* case of discrimination. Second, if the Claimant carries his initial burden of proof, the burden shifts to the employer to "articulate some legitimate nondiscriminatory reason" for the challenged workplace decision. Third, if the employer carries this burden, the Claimant has an opportunity to prove that the legitimate reasons the employer offered were merely a pretext for discrimination. Although intermediate evidentiary burdens shift back and forth under this framework, the ultimate burden of proof that the employer intentionally discriminated against the Appellant remains at all times with the Appellant. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The employer's burden is one of production, not persuasion. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

2. Kentucky law mirrors the Federal standard adopted by the United States Supreme Court in *McDonnell Douglas*, *supra*. [See *The Lexington-Fayette Urban County Housing Authority v. Brooks*, 2001 Ky. App. LEXIS 699 (Ky. App. 2001); *Jefferson County, Kentucky v. Zaring*, 91 S.W.3d 583 (Ky. 2002)].

3. Because we are dealing with the role of the Personnel Board as an administrative body as part of this appeal, we must consult the relevant statutes to determine the authority the General Assembly gave to that particular administrative body. KRS 18A.095 permits the Board to only review matters of penalization. A verbal reprimand is not a disciplinary action rising to the level of penalization as set forth in KRS 18A.005(24). However, the Board has jurisdiction to review any claim of discrimination. KRS 18A.095(12).

4. The primary argument presented by Moran was that the Cabinet retaliated against him because of his on-going grievances alleging fraud in his time records and payroll system. To establish a *prima facie* case for retaliation, Appellant must show that: (1) he engaged in protected activity; (2) his employer took a materially adverse action against him; and (3) a causal connection existed between the protected activity and the adverse action. See *Burlington N. & Santa Fe Railway. Co. v. White*, 548 U.S. 53, 61-67 (2006). He must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Burlington N.*, 548 U.S. at 68. The standard focuses on materiality because it is important to separate significant from trivial harms and is an objective standard for purposes of judicial administration. *Id.* at 68-69. If the worker establishes a *prima facie* case of retaliation, the burden shifts to the employer to offer evidence of a legitimate, non-retaliatory reason for the adverse action, after which the burden shifts back to the worker to produce evidence that the employer's proffered reason was a pretext for retaliation. *Anderson v. G.D.C., Inc.* 281 F.3d 452, 458 (4th Cir. 2002).

5. No evidence was presented that Moran was ever caused to lose any pay or opportunities for advancement, or that he was ever asked or compelled to do any job tasks or work outside of his job description. He also failed to present any evidence that he was treated differently from any other. The evidence produced at the hearing by the Appellant also failed to demonstrate any conduct constituting intimidation that caused him to fear for his employment, or threatened his employment. He testified that he had another hearing within a week, however, that hearing was being conducted on his disciplinary actions imposed on him, which is outside the scope of this hearing.

6. To establish a *prima facie* case on a theory of disparate treatment, the Appellant must show four elements: (1) that he is a member of a protected class; (2) that his job performance was satisfactory; (3) that he suffered an adverse employment action; and (4) that he was treated differently from similarly situated employees outside the protected class. *Coleman v. Court of Appeals of Md.*, ___ U.S. ___, 132 S.Ct. 1327, 182 L.Ed.2d 296 (2012).

7. An adverse employment action is a discriminatory act which adversely affects the terms, conditions, or benefits of the Appellant's employment. *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371 (4th Cir. 2004). In most cases, this type of action inflicts direct economic harm, by way of a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

8. To establish discrimination by direct evidence, the Appellant must produce evidence that clearly indicates a discriminatory attitude at the workplace and must illustrate a nexus between that negative attitude and the employment action. *Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148, 539 U.S. 90, 156 L.Ed.2d 84 (2003). Evidence of indirect actions must show an effect against present and future employment such as loss of job title, loss of job responsibility, limited access to training programs, or reduced opportunities for promotion, which also qualify as adverse employment actions. *Boone v. Goldin*, 178 F.3d 253, 255 (4th Cir. 1999); *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981).

9. The Motion to Dismiss by the Appellee was well-taken. In the hearing of this matter, the Appellant failed to set forth evidence of discrimination or retaliation, either through direct presentation of his testimony as the sole witness for his case, or through the written timesheets and other documents he presented. He completely failed to present any evidence that the actions of GSNF was a pretext or that the reasons for the employer's actions were baseless or insufficient, or was designed for an improper motive. The inquiry in this hearing was not to examine the Cabinet's personnel policies, or GSNF's business decisions, or the disciplinary action it took against Moran. Rather, the inquiry is limited to whether the employer engaged in discriminatory or retaliatory conduct against Moran.

10. Having weighed all the evidence, including the documents introduced into the record by Appellant Moran and the credibility of his testimony, this Hearing Officer concludes that the Appellant failed to meet his burden of providing a preponderance of affirmative evidence to show the existence of a genuine issue of material fact that the Cabinet's conduct was discriminatory towards the Appellant or involved any improper motive of retaliation. Appellant Moran's entire presentation of evidence centered on the method of the Cabinet's calculation of time worked and having the employee sign the timesheets, which he repeatedly claimed is fraudulent. However, the written letter to him from Mr. Klein clearly established the process utilized by the KHRIS accounting and payroll method, and the reasonableness of this system. Moran produced no evidence that the system was discriminatory in its practice or that it cost him any loss of money.

11. At the conclusion of the Appellant's proof, the Hearing Officer finds that Appellant has not presented evidence showing an adverse employment action against him. Therefore, he cannot establish a *prima facie* case of discrimination or retaliation.

12. For the forgoing reasons, this Hearing Officer must conclude that Appellant Moran's appeal should be dismissed and sustained the Cabinet's Motion to Dismiss.

V. RECOMMENDED ORDER

Having considered and weighed all the evidence and the laws of the Commonwealth of Kentucky, and based upon the foregoing Findings of Fact and Conclusions of Law, it is the recommendation of the Hearing Officer that the appeal of **ERASTO MORAN VS. CABINET FOR HEALTH AND FAMILY SERVICES (APPEAL NO. 2016-266)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.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).

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 the **Hearing Officer E. Patrick Moores** this 10th day of May, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Mona Womack
Erasto Moran