

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-103

PATRICIA MAJOR

APPELLANT

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

LABOR CABINET
LARRY L. ROBERTS, APPOINTING AUTHORITY

APPELLEE

** ** ** ** **

The Board at its regular February 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 8, 2014, having noted Appellant's exceptions and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Add** Findings of Fact number 17:

17. The Board finds that, even assuming *arguendo* that Appellant's complaints were protected activities, the Appellant did not prove a causal connection between such activities and the alleged retaliatory act taken against her (the year-end evaluation received in January 2013).

B. **Delete** Conclusions of Law numbers 4, 5, 6, and 7 and substitute the following:

4. Appellant also claims that her evaluation was done in retaliation for her "persistent remarks, comments and complaints regarding illegal and/or wrongful agency policy." (Appellant's Closing Argument.) To establish a *prima facie* case of retaliation in

the employment context, Appellant must show that (1) she engaged in a protected activity; (2) her employer knew she engaged in the protected activity; (3) thereafter, her employer took some employment action adverse to the employee; (4) there was a causal connection between the protected activity and the adverse employment action. *Smith v. City of Salem, Ohio*, 378 F.3d 566, 570 (6th Cir. 2004). Actionable retaliation claims are limited to those where an employer causes "material adversity" not "trivial harms." *Burlington Northern and Santa Fe Railway Co. v. White*, 548 US 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). The Board concludes as a matter of law that even assuming that the first three prongs of the *prima facie* case of retaliation in the employment context were met, Appellant did not prove any causal connection between Appellant's complaints about Cabinet policy regarding interpretation or enforcement of statutes and the action taken against her. The Board concludes that Appellant failed in her burden of proof to demonstrate a causal connection between any such reports of alleged wrong doing by the Agency and Appellant's 2013 year-end evaluation.

C. **Renumber** Conclusion of Law number 8 to number 5.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer as Altered be, and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order and the Appellant's appeal is **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 20th day of February, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. E. H. "Chip" Smith, IV
Hon. C. Mike Moulton
Lynn K. Gillis
Sherry Butler

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This matter came on for evidentiary hearing on August 13 and 14, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Patricia Major, was present at the evidentiary hearing and was represented by the Hon. C. Mike Moulton. The Appellee, Labor Cabinet, was present and represented by the Hon. E.H. "Chip" Smith.

BACKGROUND

1. Appellant, Patricia Major, appealed to the Personnel Board on April 30, 2013, appealing her 2012 employment evaluation. Appellant stated further in support of her appeal as follows:

Discrimination due to gender and in reprisal to persistent questions and complaints.

2. By Interim Order dated August 5, 2013, it was established that the issues in the evidentiary hearing would be the Appellant's claim of discrimination based on gender, retaliation, and/or illegal reprisal. The burden of proof would be upon the Appellant as to all issues and is by a preponderance of the evidence.

3. Appellant called her first witness. **Jerald Adkins** is a Program Manager in the Department of Workplace Standards, Division of Employment Standards, Apprenticeship and Mediation, in the Kentucky Labor Cabinet. Adkins began his employment with the Cabinet as an Investigator, and was promoted up the ranks to his current position in 2003. He is responsible for the oversight of the Western Branch of his division, and supervises eight Wage and Hour

Investigators, who are charged with ensuring that Kentucky's Wage and Hour laws are enforced correctly, and in a timely fashion.

4. Appellant is an Investigator in Adkins' branch, and he is her first-line supervisor. Currently, there are five males and three female Investigators in the Western Branch.

5. Adkins was queried if he is responsible for assigning cases to individual Investigators. Adkins responded that that used to be one of his job responsibilities, but that duty is now assigned to Jeff Wiley, an Employee Standards Reviewer. That change came about at the direction of Mike Donta, then Acting Commissioner, about a year ago in 2013. Adkins stated that he was not told why the case assignment process was changed. "We had a meeting one day, and Donta said: 'This is what is going to happen.'"

6. Adkins testified that when it was his job duty to assign cases, he looked at each Investigator's workload, and the location of the business which was the subject of the complaint. Adkins denied that he considered the kind of case at issue. Cases are never distinguished by level of difficulty—not in the assignment process, nor when conducting evaluations, Adkins stated.

7. In years past, Investigators had been allowed to initiate their own investigations if they "ran across" a situation at a company they felt merited further inspection to ensure the business was in compliance with wage and hour laws. These Investigator-initiated cases are called "routine" inspections.

8. The pursuit of routine cases was stopped in January 2009 due to a shortfall in the Labor Cabinet's fiscal budget. Currently the only cases that are assigned to investigators are those that are received as "complaints," which must be in writing, but can be received via email, the US. Mail, or posted on the Labor Cabinet website.

9. Adkins stated that there are three types of cases his division investigates: "Wage and Hour," "Child Labor," and "Prevailing Wage." Adkins stated that no one type of case has priority over another, with the exception of "Hazardous Duty Child Labor" cases, which are given the highest priority.

10. Adkins was queried about the socializing that occurred after Branch meetings. He answered that after these annual meetings, a group of employees would informally gather. "Someone would suggest doing something afterwards and I would say 'Invite anyone you want'." Adkins denied orchestrating the meetings or purposefully excluding Appellant.

11. Adkins also denied that he had a continuing conflict in his relationship with Appellant: "There were issues she was argumentative over, specifically pay raises and ACE awards. She also made it clear that she did not like doing Prevailing Wage cases, and felt like she did not have the proper training to do them." Adkins explained that Prevailing Wage cases

involved the enforcement of a prevailing rate of pay (set individually by county) for public works project contractors.

12. As for ACE awards, Adkins stated that the last ACE award granted in his division occurred in 2008. An ACE award results in a 5 to 10 percent raise in the recipient's salary. It is awarded to someone who has shown exemplary job performance. Adkins had nominated employees in his division in the past for the award, but the final decision-maker granting the awards was the Appointing Authority. During his tenure as Program Manager, Adkins made the following nominations:

2006	Denise Brewington Mark Klein
2007	William (Eddie) Hampton Appellant Robert Horine

13. Adkins could not recall specifically if any of the above employees actually received the award, but he thought that Eddie Hampton had. While Appellant did not receive an ACE award, she did get an "E.R.A." award (Employee Recognition Award) which was a one-time lump sum award of over one thousand dollars.

14. Adkins addressed how Investigators were trained. They first receive class room instruction for a period varying from three to six weeks, depending on class size, and how quickly the trainees are grasping the material. After this formal training, the new Investigators typically go out in the field and shadow another Investigator for one to two weeks.

15. Adkins stated that Appellant had not yet trained another employee, but added that—due to budget cuts—the last three employees hired had been terminated during their probationary period.

16. Adkins was asked to address the evaluation process followed in his division. Adkins stated that one of the criteria used to score Investigators' evaluations was the total number of cases an employee closes annually. Adkins noted that the Appellant's number of closed cases in 2012 had "gone down considerably" compared to years past.

17. Appellant received 394 points in her 2012 evaluation, which put her in the "Highly Effective" category. Appellant requested a reconsideration of this evaluation. In response to this request, Adkins sent her a three page memorandum, dated January 31, 2013, in which he explained his scoring for each of her specific tasks. In his memo, Adkins agreed to change Appellant's score in the "Files Reports and other Division Documents in accordance with Division policy" from a 3 to a 4, thus changing her overall score to 404. Her evaluation remained in the "Highly Effective" category.

18. Appellant then requested a second review of her evaluation, which was sent to Mike Donta, Deputy Commissioner. He changed her score in the area of "Communicates with the public and central office effectively" from a 4 to a 5, thus improving her score to 412. Her evaluation remained in the "Highly Effective" category.

19. Adkins was asked if Appellant had ever requested a move to the Eastern Branch, which is supervised by Marjorie Arnold. Adkins responded that Appellant had made that request, but that it had been denied. While two employees, Joe Lagrotto and Joe Ross had been allowed to change Branches, their circumstances were both unique: Lagrotto had never officially transferred to Adkins' Branch in the first place, and Ross's transfer was done pursuant to a Personnel Board Order.

20. On cross-examination, Adkins identified a memorandum he had sent to all the Investigators under his supervision (including Appellant) on January 6, 2009. The memo reads:

Western Folks,

Good morning and happy New Year to all! Due to budgetary shortfalls, until further notice do not open any routine inspections (child labor and prevailing wage). We will be contacting you in the near future to set up your 2008 Employee Evaluation and your 2009 Evaluation Planning session.

21. Adkins denied he was ever instructed to "de-emphasize" child labor cases. He explained that due to staffing shortages (caused by budgetary constraints), his office was directed to focus on investigating complaints only (which are mandated by statute) and to cease initiating routine inspections (which are initiated by Investigators).

22. Adkins was asked how many cases were assigned to Appellant in 2012. He responded that she received approximately 121 new cases that year, and a balance of 39 cases which she had not completed the previous year. That brought her total case load for 2012 to 160. To receive a "greatly exceeds" score in the category of "Completes investigations of complaints, directed and routine inspections," on a job performance evaluation, an Investigator must complete 132 cases. Adkins testified that Appellant had an ample number of cases to complete to reach the "greatly exceeds" benchmark, but in fact she only completed 127 cases, which put her in the "exceeds" category.

23. As for Appellant's request for more child labor cases, Appellant had been assigned five, and no Investigator had received more than five. Adkins added that child labor cases are generally closed in a shorter time-frame than prevailing wage cases.

24. Adkins was asked how he had responded to Appellant's request for more training. Adkins answered that Appellant "had expressed her discomfort" with prevailing wage cases. To assist her with that, he had arranged for her to have one-on-one training with at least seven investigators, including himself.

25. Appellant called her next witness. **Mike Donta** has been employed by the Labor Cabinet since 2008, when he was hired as Director of Employment Standards. He was promoted to Policy Advisor in 2009, and Deputy Commissioner in 2010, which is the position he currently holds. From January 2013 to May 2013, he was temporarily assigned to the role of Acting Commissioner.

26. Donta acted as Gerald Adkins' supervisor during two different time periods: first when he was Director of Employment Standards (2008 to mid-2009); and then when he was Acting Commissioner in 2013. Donta was asked if Adkins had ever "characterized" Appellant in any way. Donta responded that Adkins had told him when he began working for the Cabinet that Appellant was a "trouble-maker."

27. Donta explained why "routine" cases were no longer being assigned. Over the past few years the Cabinet had lost a number of Investigators which they did not have the budget to replace. Concurrently, more complaints had begun to come in. There simply wasn't the manpower to continue "routine" cases, although if an Investigator happened to have extra time in his work load, routine cases could be assigned to that individual.

28. Donta stated that he was aware that Appellant did not like to do "Prevailing Wage" cases, and that she "struggled" with them, more so than other investigators did.

29. Donta was asked to explain how cases were assigned to investigators. He answered that initially assignment of cases were done by the Program Manager, specifically, Jerald Adkins. Donta changed that practice in 2013 when he was Acting Commissioner. He directed another employee, the Employee Standards Reviewer, to assign them instead. Donta explained that there are hard cases and there are easy ones. He wanted to ensure that cases were fairly distributed based on level of difficulty. "Some prevailing wage cases can take months or even years to close. Child Labor cases can take weeks."

30. As for Appellant, while Donta did not find that Adkins had treated her differently, she did bring to his attention occasions when Adkins was not timely responding to her emails and phone calls. Donta agreed with Appellant that Adkins' response time was deficient, and Adkins was "counseled" on this issue. (Donta also determined that Adkins' 24-hour access to his office should be restricted, and that his use of compensatory time needed prior approval from his supervisor.)

31. Appellant and Donta met with Secretary Brown to discuss her concerns about Adkins and her request to transfer. After this meeting, Secretary Brown agreed that the manner in which cases were assigned should be changed, but he denied Appellant's request to transfer to the Western Branch.

32. Donta reviewed Appellant's 2012 evaluation when she requested a reconsideration. Donta stated that after looking at it, he "saw an opportunity to give her a better score." He ended up changing her score from a "4" to a "5" in the category of "Communication" after she showed him documentation that she had corresponded with the public in a timely manner.

33. On cross-examination, Donta stated that the easiest way for an investigator to improve his or her score in the category of "Completes investigations of complaints, directed and routine inspections" is to close some easy cases like child labor cases. In that regard, Donta feels the evaluation system is flawed. Appellant asked Adkins for child labor cases so she could close them by the end of the year, and get that "magic number" of 132, which mandates a rating of "5". Donta added that he didn't feel it was fair for Adkins to have scored Appellant a "4" in the category of communication for being "argumentative" with the Program Manager (Adkins). Donta stated that Adkins is in fact "argumentative" with his own supervisors, and noted that his relationship with Adkins is "severely strained."

34. Donta was asked to state what specific complaints staff has made to him regarding Adkins' supervisory abilities. He answered that he recalled an investigator, Michael Sullivan, relating to him that a couple of his cases were on Adkins' desk, but he couldn't get Adkins to respond to them. Donta denied that only female employees had problems with Adkins.

35. **William Hampton** has been an Investigator for the KY Labor Cabinet since 2001. Jerald Adkins is his first-line supervisor. Hampton stated that he received an ACE award some time in 2003 or 2004. Hampton addressed his 2012 job performance evaluation. In the category of "Completes investigations of complaints, directed and routine inspections," Hampton received a "3," based solely, Hampton stated, on the number of cases he was able to close that year. Hampton admitted he "had a problem" with that score because he was not being assigned new cases due to the number of old cases he was still finishing. When he complained about that to Adkins, Adkins told him to finish his old cases first. Hampton estimated he had 12 or 15 old cases, 8 or 9 of which he completed in 2012. Hampton stated: "My problem with the evaluation system is that we are rated on "production" and not "performance." Hampton explained that different cases require different amounts of time to complete: "One case could take five minutes, and another could take months or more."

36. **Cheri Mallonee** is an Investigator II with the KY Labor Cabinet, where she has worked since 2005. She is based in Wayne County, and is assigned to the 11 counties in the Southern region of the state. She stated that her annual salary is \$33,844.32. She was asked if she was afraid of "retaliation" for testifying. She stated: "Yes."

37. On cross-examination, Mallonee stated that during her entire tenure with the Cabinet, her first-line supervisor has been Jerald Adkins. She described Adkins as "likable but unavailable. It is hard to get communications returned." She stated that it once took him 2 months to return a case to her, but on average, it takes about a week to hear back from him.

38. When asked if Adkins is "fair," Mallonee responded: "There have been times in my employment when we have had conflict."

39. On re-direct, Mallonee was questioned if Adkins treated male employees differently from female employees. She answered: "I'm not sure how he treats men. I only know how he treats me. He has not been fair in the past, and he has not assigned me enough cases to succeed."

40. Mallonee testified that she works from a home-based office. The only time she sees Adkins face to face is during her evaluation sessions. Mallonee has not the opportunity to see how Adkins interacts with other investigators.

41. **Althea Duff** is employed as an Investigator II with the Kentucky Labor Cabinet, where she has been employed since 2007. She is assigned to eight counties in the Eastern Branch. Marjorie Arnold is her first-line supervisor.

42. Duff stated that she had previously filed a grievance because two investigators, Nicole Curtsinger and Debbie Landrum, were earning a higher salary than Duff, even though they had less work experience. The grievance was resolved by the Cabinet's explanation to her that these women were hired at a higher rate of pay pursuant to statute.

43. Duff stated that she felt retaliated against after she filed the grievance. She added: "There was tension in the office with everybody. I felt no one cared. I gave up."

44. **Jeff Wiley** is employed by the Kentucky Labor Cabinet as an Employment Standards Consultant. His duties include reviewing cases before they are closed out, conducting seminars, and —since about January 2013—assigning cases to Investigators.

45. Mike Donta informed Wiley that investigators had complained that they were not getting enough cases, and the ones they were getting were not being equitably divided. Donta instructed Wiley to assign cases as fairly and evenly as possible, "and that is how I do it," he stated.

46. Wiley testified that it can be hard to predict how difficult a case will be when it first comes in. Some cases can be resolved over the phone, others require months of work.

47. **Bill Hurt** was employed by the Kentucky Labor Cabinet from 2000 until 2012, when he retired. He was employed as an Investigator in the Western Branch. Jerald Adkins had been his supervisor, and Appellant was his co-worker.

48. Hurt was asked if Adkins treated Appellant differently than the male investigators. Hurt answered: "Yes, (Appellant) asked a lot of questions at staff meetings, and they would sometimes not be answered. The attitude was "Let's move on." Hurt added that sometimes Adkins would roll his eyes at Appellant.

49. Hurt testified that there was also a "good old boys" gathering that occurred after the semi-annual meetings. "Some of us would go out to eat, then play cards. We would discuss different things, including work issues." Hurt could not recall who organized these get-togethers.

50. On cross-examination, Hurt was asked if he was acquainted with Angela Stephens, an Investigator from Bowling Green. Hurt answered that he knew her, and stated that she was not treated differently than the men at staff meetings: "She got treated the same as men because she didn't ask as many questions. Sometimes Adkins would say to her: 'We'll talk about that later,'" and she seemed to be okay with that."

51. **Sherri Edwards** has worked for the Kentucky Labor Cabinet for over 19 years. She is the female Investigator with the longest tenure. Marjorie Arnold is her first-line supervisor.

52. When asked if she was treated differently than the men in the office, Edwards responded: "Possibly." She explained that she was not provided with internet although all the other investigators were furnished with it. Her understanding was that the internet provider in her area did not have a contract with the state, so she was provided with a smart phone instead.

53. Edwards was asked if she ever observed Appellant being treated differently than men by management. Edwards answered that Appellant was "shunned" for a couple of years, and that the other investigators were told not to speak to her because she "could cause trouble." Edwards testified that Marjorie Arnold and Jerald Adkins told her—sometime in January 2014—that if she was sick of the animosity in the office, she should stop talking to Appellant. Edwards testified that her supervisor, Marjorie Arnold, told her—in the context of being a witness at the present evidentiary hearing—"whoever doesn't cause trouble will be rewarded."

54. **Joseph Lagrotto** has been employed by the Kentucky Labor Cabinet for the past 28 years, and is currently an Investigator III. He is currently assigned to the Eastern Branch, and is under the supervision of Marjorie Arnold. For a brief period of time—from March to September, 2012—Jerald Adkins was his first-line supervisor.

55. Lagrotto's assignment to Adkins' division occurred when he received a call from Commissioner Dixon, who told him he was being moved to Adkins' section in order to "even out the investigators." Lagrotto added that, in his opinion, the real reason for the change was to force him to retire. Lagrotto stated that he felt so harassed by the move that he hired an attorney who wrote a number of letters to Secretary Brown. After the third letter, Lagrotto was moved back to Arnold's supervision in the Eastern Branch.

56. Lagrotto was asked if he ever witnessed Adkins treating Appellant in an inappropriate way. Lagrotto answered: "I can't say anything specific. When I began to talk to other investigators in Adkins' section, no one was happy with Adkins for various reasons."

57. On cross-examination, Lagrotto was asked to expound on how he felt "harassed" by Adkins. He answered that Adkins made him procure case numbers, which he normally did not have to do. As for the specific complaints about Adkins from the Investigators, Lagrotto stated that he had heard Investigators complain that Adkins did not assist them, did not return calls, and had an overall bad attitude. Lagrotto added: "If Adkins disagreed with you, he would retaliate by not assigning you cases, or giving you a whole lot of cases at one time."

58. **Joseph Ross** is an Investigator III with the Kentucky Labor Cabinet. He worked for the Cabinet in the 1980's, left his employment there, and then returned in 1999. He had been assigned to the Western Branch, under the supervision of Jerald Adkins. However, on February 27, 2012, Ross was transferred to the Eastern Branch, under the supervision of Marjorie Arnold.

59. Ross stated that he requested the transfer because he "no longer wanted to be under the supervision of Jerald Adkins."

60. Ross denied that he had ever observed Adkins treat Appellant—or any woman for that matter—differently than men.

61. On cross-examination, Ross clarified that he was re-instated to his previous position by the Personnel Board upon the successful appeal of his dismissal in 2012. At the time of his reinstatement, he was placed in Arnold's division, at his request.

62. **Michael Sullivan** is an Investigator II for the Kentucky Labor Cabinet, a position he has held for the past 11 years. He is assigned to the Western Branch, and is under the supervision of Jerald Adkins.

63. Sullivan denied that Adkins treated female employees differently than male.

64. Sullivan denied that he had seen Adkins retaliate against any one on his staff. However, he did state that he "worried about being retaliated against for his testimony" at the present evidentiary hearing. He added: "I saw what happened to Joe Ross, and that scares me. He got terminated and then came back."

65. **Debbie Henderson** has worked for the Kentucky Labor Cabinet since 1987. She is employed as an Administrative Specialist. Her job duties include secretarial tasks, processing civil penalty letters and open record requests, and sending checks to claimants.

66. Henderson stated that she saw the interactions between Jerald Adkins and Appellant "on a limited basis." As to whether Appellant was treated differently, Henderson responded: "There was probably less interaction" between Appellant and Adkins, but Henderson could not say why. When asked if women were treated differently than men in the office, Henderson answered: "I don't see it."

67. Henderson stated that Adkins did tell her not to speak to Appellant about things that were non-work-related, including this hearing. She added: "He didn't want me to get in the middle of things going on with the two of them." She denied that she had been told what to say, or not say, at the present evidentiary hearing. However, she was "concerned" that Adkins might retaliate against her for her testimony.

68. On cross-examination, Henderson was asked if Appellant's personality was difficult in the office. She responded: "I can see how it could be considered difficult."

69. **Robert Horine** is an Investigator II for the Kentucky Labor Cabinet, where he has been employed for over eleven years. He is assigned to the Western Branch, and is under the supervision of Jerald Adkins.

70. Horine stated that he had never received an ACE award, and could not recall receiving an ERA award either.

71. Horine was given a special assignment to audit all the fire departments throughout the state, a project which took him over four years to complete. During that time-frame he closed a low number of cases but it was his understanding that he was not going to be penalized for this, since he was working on a special assignment instead.

72. Horine was asked to describe his relationship with Jerald Adkins. He responded: "We are friendly. I have socialized with him after meetings on numerous occasions." Horine stated that Adkins sometimes initiated these get-togethers. Other attendees included William (Bill) Hampton and Angela Stephens. Horine added: "My understanding is that we are open to anyone joining us."

73. The Appellant, **Patricia Major**, testified on her own behalf. She has been employed by the Kentucky Labor Cabinet, Division of Employment Standards, since October 2, 2000.

74. She began her employment with the Cabinet as an Investigator I. At that time, Marjorie Arnold supervised all the investigators. In 2003, Jerald Adkins was promoted to Program Manager and he became Appellant's first-line supervisor.

75. Appellant stated that her annual salary is \$33,653.00. Two other women in her division, Cheri Mallonee and Angela Stephens, earn \$33,844 and \$34,395 respectively. Three male investigators, Mike Blevins, William Hampton, and Michael Sullivan, have higher annual salaries than Appellant, even though they have not worked at the Labor Cabinet as long as she has. They earn \$46,534, \$35,558, and \$35,499 respectively.

76. Appellant stated that she believed this inequity in annual salaries was based on gender.

77. Appellant was asked to describe her relationship with Jerald Adkins. "It is strained," she stated. "I don't trust him." Appellant had requested to be transferred out of Adkins' Branch on multiple occasions: first in 2009, again in 2011, and most recently in 2013. Each time her request was denied. Appellant stated that she "absolutely" believed her requests for transfer were denied because she is a woman. When asked if a specific statement was ever made by management regarding this, Appellant answered: "It is an attitude."

78. Appellant added that she had been asked to go to counseling with Adkins, rather than be transferred. "The men in the office—Lagrotto and Ross—weren't asked to go to counseling. I believe that as a female, they want me to suffer rather than be transferred."

79. Appellant addressed her concern regarding office policy, implemented in 2009, in which Investigators were directed to cease initiating "routine" inspections. Appellant stated: "What bothered me was that while we were told we were no longer doing Child Labor or Prevailing Wage routines. What we were really doing was Prevailing Wage routines but re-coding them as 'complaints.'" Appellant concluded: "We're not protecting our children."

80. Appellant was asked if she had specifically been told not to do Child Labor cases. She answered in the affirmative: "I got a written complaint from a minor, saying he had not received his last pay check. I asked Adkins if I should do a child labor inspection, and he told me 'No,' that I should treat it as a 'last pay check complaint.'" If we had treated it as a child labor case, I would have gone to the employer and done an inspection."

81. Appellant filed another complaint with Adkins, sometime in the Spring of 2011. She complained that she had only received one law book, while the Commissioner had received several, and, according to Appellant, gave a few to his family members. Appellant's complaint regarding this matter made Adkins "mad," and "things began to get worse, including my evaluations," Appellant stated.

82. Appellant addressed her job performance evaluation for 2012. She initially received a score of 394, which put her in the "Highly Effective" category. Appellant took particular issue with the score of "4" under the category of "Completes Investigations of complaints, directed and routine inspections." She stated that she needed more cases that she could "close easily," specifically child labor cases, to increase her number of cases closed. She asked for more child labor cases, but Adkins refused to give them to her because she still had 39 cases that were overdue. Appellant stated that her evaluation had been going down for the past few years, which she blamed on Adkins: "He would rather have the males do better," she stated. She also blamed her lower closed-cases number on Adkins' refusal to quickly review her work: "He would hold my cases on his desk."

83. Appellant was asked if Adkins had ever called her a "trouble-maker." Appellant responded: "Well, he's called me a "big baby" and "chicken poop."

84. At the end of Appellant's testimony, Appellant rested her case.

85. Appellee, Kentucky Labor Cabinet, called its first witness. **Jerald Adkins**, Program Manager for the Western Branch, has been Appellant's first-line supervisor since 2003. He was asked to address why Appellant's requests to transfer to the Eastern Branch had all been denied. Adkins responded that these decisions were made by Secretary Mark Brown, Appointing Authority. As for Adkins' input into the decision, Brown had only asked him about his relationship with Appellant, which he described as "fine."

86. Adkins stated that all complaints made to the Division of Workplace Standards—whether they concern prevailing wage or child labor issues—are "looked into." The complaints can be made by anyone, including private citizens or union members. There is no requirement that complaints can only be made by employees of the entity that is the subject of the complaint. Adkins testified that "all complaints are treated equally, but if we have a minor allegedly engaged in a hazardous activity, that case is given priority." Adkins added that just because a minor is working at a certain business where a complaint has been filed does not necessarily mandate the opening of a Child Labor investigation. "If we did that, we would spend all our resources doing only that," Adkins stated.

87. Adkins was asked to address the "gatherings" that were held with some of his Investigators after staff meetings. Adkins stated that Angela Stephens routinely organized them, though he may have occasionally mentioned getting together to some of his employees. Adkins added: "Anyone in our division can come."

88. Adkins denied that he had ever told his Administrative Assistant, Debbie Henderson, not to speak to Appellant.

89. Adkins denied that he had ever retaliated against Appellant, or any woman in his office. "I strive to treat each of my employees equally."

90. **Marjorie Arnold** has been employed by the Kentucky Labor Cabinet since 1989. She is the Program Manager of the Eastern Branch. She supervises seven Investigators and a Labor Management employee.

91. Arnold addressed the transfer of Joe Lagrotto. She stated that when Joe Ross was installed in the Eastern Branch after the resolution of his Personnel Board appeal, Arnold complained to management that adding Ross to the roster of investigators under her supervision was too much. She informed management that if she was going to supervise Ross, then Adkins needed to take one her employees. Lagrotto was suggested.

92. Lagrotto reported to Adkins for a period of time, then began complaining about Adkins. Lagrotto spoke to the Personnel Cabinet about his dissatisfaction with his new supervisor. Looking into the situation, a Personnel Cabinet employee noticed that Lagrotto's paperwork transferring him had never been finalized. Consequently, he was allowed to return to Arnold's division.

93. Arnold denied that she had ever discouraged Sherry Edwards from testifying at the evidentiary hearing. Arnold also denied that she told Edwards there would be a "reward for employees who got along." Arnold added: "I have no reward to give."

94. **Rhonda Clay** is an Administrative Branch Manager over Logistics at the Kentucky Labor Cabinet. Her job duties include the oversight of the Cabinet's budget, purchasing, and fixed assets.

95. Clay was asked what has happened to the budget of the Division of Employee Standards in the past few years. She stated that the budget had decreased by 25%. In 2008, the staff number for that division was capped at 31 employees. In 2014, staffing was capped at 22 employees.

96. **Patricia Dempsey** is Assistant Director of Management Services, a position she has held since 2009. Her job duties include the oversight of the fiscal department, the IT branch, and processing the paperwork for all personnel actions.

97. Through Dempsey's testimony, the following list of Investigators' monthly salaries and total months of service was entered into the record.

<u>Investigator</u>	<u>Monthly Salary</u>	<u>Total Months of Service</u>
Mark Klein	\$4082	392
Joe Lagrotto	4168	321
Tom Yancy	3597	313
Joe Ross	3915	269
Sherri Edwards	3012	220
Angela Stephens	2866	208
Mike Sullivan	2872	162
Appellant	2804	154
Mike Blevins	3877	142
Rob Horine	2756	124
Cheri Mallonee	2820	93
Althea Duff	2427	72
Nicole Curtsinger	2648	36
Sherri Engle	2106	18

98. Dempsey explained why Mike Blevins earned a higher salary than Appellant even though he had fewer total months of service: "Blevins was initially working as a Mediator, at a higher rate of pay. He was laterally transferred, and we had to continue paying him the same amount he had been making."

99. As for why Nicole Curtsinger's salary is so high, relative to her months of service, Dempsey explained that another Investigator, Debbie Landrum (no longer employed by the Cabinet), had been hired at a higher rate of pay, due to her exceptional qualifications. Curtsinger's salary had to be raised commensurate with Landrum's because Curtsinger's position was the same grade as Landrum's, and they were employed in the same county and by the same Cabinet.

100. As for William Hampton, Dempsey testified that he earns more than Appellant because he received an "ACE" award in 2007, which raised his annual salary by 5 percent.

101. 101 KAR 2:180, Section 6, reads:

Performance Incentives. Annual leave shall be awarded as a performance incentive at the following rates:

- (1) Two (2) workdays, not to exceed sixteen (16) hours, for an "Outstanding" rating; or

(2) One (1) workday, not to exceed eight (8) hours, for a "Highly Effective" rating.

102. KRS 18A.140(1), reads as follows:

No person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified services because of his political or religious opinions, affiliations, ethnic origin, sex, race or disability. No person over the age of forty (40) shall be discriminated against because of age.

FINDINGS OF FACT

1. Appellant is employed as an Investigator III with the Kentucky Labor Cabinet, Division of Employment Standards, where she has worked since 2000. She filed this appeal on April 30, 2013, alleging that her employee evaluation was the result of "discrimination due to gender and in reprisal to persistent questions and complaints."

2. By Interim Order dated August 5, 2012, it was established that the issues in the evidentiary hearing would be the Appellant's claim of discrimination based on gender, retaliation, and/or illegal reprisal. The burden of proof was put upon the Appellant as to all issues.

3. Appellant began her employment with the Cabinet as an Investigator I. At that time, Marjorie Arnold supervised all the Investigators. In 2003, Jerald Adkins was promoted to Program Manager, and he became Appellant's first-line supervisor.

4. Appellant's initial score for her 2012 job performance evaluation was 394, which put her in the "Highly Effective" category. Appellant requested a reconsideration of her evaluation to Adkins, who responded with a three page memorandum in which he explained his scoring for each of her specific job tasks. He did change her score in one category ("Files Reports and other Division Documents in accordance with Division policy") from a "3" to a "4." This brought her overall score to "404," which remained in the "Highly Effective" category.

5. Appellant requested a reconsideration of her evaluation to Adkins' supervisor, Mike Donta, who was then Acting Commissioner. He changed her score in one category ("Communicates with the public and central office effectively") from a "4" to a "5." This brought her overall score to a 412, which remained in the "Highly Effective" category.

6. Appellant took particular issue with her score of "4" in the category of "Completes investigations of complaints, directed and routine inspections." The scoring for that category is based solely on the number of cases an Investigator closes. In 2012, Appellant had closed 127 cases. In order to reach the "greatly exceeds expectations" standard, an Investigator needs to close 133 investigations. Jerald Adkins testified that Appellant had been assigned 160 cases in 2012, and had an ample number of cases to complete to score in the "Greatly Exceeds" category.

7. It was Appellant's contention that if she had received more child-labor cases, her year-end number of completed cases would have been higher. Adkins testified that no Investigator received more than five child labor cases. As a general rule, child labor cases are less complicated and faster to close. Both Adkins and Mike Donta stated that Appellant "struggled" with prevailing wage cases. In her first Interim Review, conducted on May 24, 2012, Adkins advised Appellant that she needed to "continue to show focus on completing any prevailing wage cases in a more timely manner." At that time, Appellant had 3 prevailing wage cases that were over a year old.

8. Appellant stated that she believed the decrease in her evaluation scores over the past few years was Adkins' fault. "He would rather have the males do better," she stated.

9. Appellant's witness, William Hampton, testified that he received a "3" on his 2012 job performance evaluation in the category of "Completes investigations of complaints, directed and routine inspections." Hampton stated that he was not assigned as many new cases that evaluation period because he was still finishing old cases. When he complained to Adkins about that, Adkins told him to "finish his old cases first."

10. Appellant also asserts as part of her claim that she was the victim of gender discrimination, that female investigators, and Appellant in particular, were treated differently than males.

11. Appellant contends that three men in the department-- Mike Blevins, William Hampton, and Michael Sullivan--improperly earn higher salaries than Appellant. Patricia Dempsey, Assistant Director of Management Services, explained that Mike Blevins was hired initially as a Mediator, a position with a higher rate of pay, and when he was laterally transferred to an Investigator, his salary remained the same; Michael Sullivan has more months of service than Appellant; and William Hampton received an ACE award in 2007, which increased his salary by 5 percent.

12. Appellant contends that she was not invited to after meeting get-togethers because of her gender. A number of witnesses testified that a group of employees gathered after staff meetings for informal socializing. However, the testimony made clear that another woman, Angela Stephens, was included in these gatherings.

13. Appellant claims that the denial of her requests to transfer to the Eastern Branch—and consequently from the supervision of Jerald Adkins—was due to her gender. As proof of this claim, Appellant cites the fact that two males successfully transferred to the Eastern Branch. Marjorie Arnold, supervisor of that branch, explained the circumstances surrounding these two transfers: Joe Ross was re-instated to her division after the successful appeal of his dismissal to the Personnel Board. Subsequent to Ross being transferred to her branch, Arnold complained to management that adding Ross to her staff would give her too many Investigators to supervise. Joe Lagrotto was then transferred from her branch to Adkins'. Lagrotto lodged numerous complaints regarding this transfer. While investigating the situation, a Personnel Cabinet employee noticed that Lagrotto's paperwork transferring him was never finalized, so he was allowed to resume his old position under the supervision of Marjorie Arnold.

14. Appellant claims that the denial of an ACE award was due to gender. Jerald Adkins testified that no ACE award had been awarded since 2008. Adkins had nominated employees in his division in the past for the award, but the final decision-maker granting the awards was the Appointing Authority. Adkins did, in fact, nominate Appellant for an ACE award in 2007. While Appellant did not receive that award, she did receive an E.R.A award, which is a lump sum award of over a thousand dollars.

15. Appellant also asserts that she received "disparate treatment at the hands of Adkins." (Appellant's Closing Argument). While Appellant and Adkins clearly have a difficult relationship, what was developed at the evidentiary hearing is that many employees—male and female—had a challenging relationship with Adkins. Witnesses of both genders stated that they feared "retaliation" from Adkins for their testimony. Even Mike Donta, who had been Adkins' supervisor on two different occasions, and is currently Deputy Commissioner, stated that Adkins is "argumentative" and noted that his relationship with Adkins is "severely strained."

16. As unpleasant as many witnesses testified it is to work with Jerald Adkins, the Hearing Officer is not persuaded that he treated Appellant, or any other female in his division, differently from males. Joe Lagrotto summed up his brief experience in the Western Branch: "When I began to talk to other investigators in Adkins' section, no one was happy with Adkins for various reasons."

CONCLUSIONS OF LAW

1. The Hearing Officer concludes, as a matter of law, that Appellant failed to prove by a preponderance of the evidence that her 2012 employment evaluation was motivated by gender discrimination or done in retaliation for any comments or complaints she made.

2. In order to establish a claim of gender discrimination, the complaining party must first prove a "*prima facie*" case of discrimination. If she does so, the burden then shifts to the employer to articulate a nondiscriminatory motive for the action. If it does so, the complaining party then has to establish that the employer's explanation for the adverse action is a pretext for

impermissible discrimination. *Newman v. Federal Express Corp.*, 266 F.3d 401, 405 (6th Cir. 2001).

3. The Hearing Officer concludes that Appellant has failed to meet her burden based on the following:

A. Appellant arguably met her burden of establishing a bare bones case of gender discrimination by showing that she is a female, and therefore a member of a protected class, and that she received a lower evaluation by her male supervisor than she had in the past, and that, in her estimation, he treated her differently.

B. However, the Cabinet then successfully rebutted that case by presenting evidence of a “nondiscriminatory intent”, showing that Appellant received her final evaluation score of “Highly Effective” not because she is female, but because of well-documented reasons, including the fact that she had a number of incomplete cases and struggled, particularly, with prevailing wage cases. In addition, evidence was presented that another male investigator, William Hampton, scored lower than Appellant for his overdue cases.

C. Upon the presentation of evidence of a non-discriminatory basis for the Cabinet’s action, the burden fell once again on Appellant, and she failed to meet it by presenting any evidence, other than her own personal opinion, that her supervisor was motivated by gender bias in the completion of her employment evaluation.

4. Appellant also claims that her evaluation was done in retaliation for her “persistent remarks, comments and complaints regarding illegal and/or wrongful agency policy.” (Appellant’s Closing Argument). To establish a *prima facie* case of retaliation in the employment context, Appellant must show that (1) she engaged in a protected activity; (2) her employer knew she engaged in the protected activity; (3) thereafter, her employer took some employment action adverse to the employee; (4) there was a causal connection between the protected activity and the adverse employment action. *Smith v. City of Salem, Ohio*, 378 F.3d 566, 570 (6th Cir. 2004). Actionable retaliation claims are limited to those where an employer causes “material adversity” not “trivial harms.” *Burlington Northern and Santa Fe Railway Co. v. White*, 548 US 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006).

In *Brooks v. Lexington Fayette Urban County Housing Authority*, 132 S.W.3d 790 (Ky. 2004), the Kentucky Supreme Court defined “material adversity” as follows: “a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, or less distinguished title, a material loss of benefits, significantly diminished material responsibilities or other indices that might be unique to a particular situation.” *Id.* At 802.

5. In the present case, without addressing the issue of whether or not Appellant's complaints and comments rise to the level of "protected activity", the Hearing Officer finds that Appellant's retaliation claim must fail because the "adverse employment action" she received did not cause "material harm."

6. Appellant's 2012 employment evaluation was in the "Highly Effective" category. Appellant asserts she should have been scored in the "Outstanding" category. By statute, an employee shall be awarded as a performance incentive two days of annual leave for an "Outstanding" evaluation, and one day of annual leave for a "Highly Effective" evaluation.

7. The material abridgement of an employee's rights cannot include, under any analysis of the *Brooks* case, the loss of an extra day of annual leave offered as a performance incentive. Receiving a "Highly Effective" score did not affect her job in any other discernible way: Her title, job responsibilities, salary and other benefits remained exactly the same. Receiving the second highest score possible on an employee evaluation does not result in a materially adverse change in the terms and conditions of employment, and therefore Appellant's retaliation claim is without merit.

8. Appellant failed to prove by a preponderance of the evidence that she suffered discrimination in violation of KRS 18A. 140. The evidence produced at the evidentiary hearing demonstrated that the Appellant suffered no adverse employment consequence based on her gender.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **PARTICIA MAJOR VS. LABOR CABINET (APPEAL NO. 2013-103)** 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 Colleen Beach** this 8th day of December, 2014.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof mailed this date to:

Hon. E. H. "Chip" Smith
Hon. C. Mike Moulton