

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-135

THE ESTATE OF MUNCIE MCNAMARA

APPELLANT

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

**EDUCATION AND LABOR CABINET (formerly EDUCATION AND
WORKFORCE DEVELOPMENT CABINET)**

APPELLEE

* * * * *

The Board, at its regular October 2023 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated August 25, 2023, 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. **Delete** Conclusions of Law 14 and substitute the following:

14. Moreover, even if EWDC determined that McNamara was either disabled or regarded as disabled, his claim still fails because the evidence fails to establish that he was fired because of a disability. *Hallahan v. the Courier-Journal*, 138 S.W.3d 699, 706-707. (Ky. Ct. App. 2004).

B. **Delete** Conclusion of Law 20 and substitute the following:

20. The Hearing Officer concludes that the Appellant failed to show by a preponderance of the evidence that the reports of his objections to the EWDC's use of outside vendors and Meredith's appointment to the KUIC were contributing factors in his dismissal.

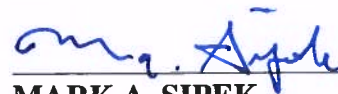
C. **Renumber** Conclusion of Law 22 to 21 and Conclusion of Law 23 to 22.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer, as altered, are approved, adopted, and incorporated herein by reference as a part of this Order and that 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 17th day of October, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Robyn Smith
Hon. Scotty McFarlan
Hon. Rosemary Holbrook (Personnel Cabinet)
Leslie Tindall

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-135**

THE ESTATE OF MUNCIE MCNAMARA

APPELLANT

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

**EDUCATION AND LABOR CABINET (formerly EDUCATION AND
WORKFORCE DEVELOPMENT CABINET)**

APPELLEE

This matter came on for an evidentiary hearing on March 2, 3, and 8, 2022, and April 6, 2022, at approximately 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Mark A. Sipek, Hearing Officer. The proceedings were conducted using Amazon Chime video teleconferencing, recorded by audio/video equipment, and were authorized by virtue of KRS Chapter 18A.

The Appellant, by and through Audrey Haydon as Executrix of the Estate of Muncie McNamara, was present and represented by the Hon. Robyn Smith. The Appellee, Education and Labor Cabinet (formerly Education and Workforce Development Cabinet) was present and represented by the Hon. Scotty McFarlan.

BACKGROUND

1. The Appellant, Muncie McNamara, filed his appeal with the Personnel Board on June 2, 2020. On his Appeal Form and during the initial pre-hearing conference held on August 3, 2020, McNamara, an unclassified employee, indicated he was appealing from his not-for-cause dismissal, alleging his termination was the result of disability discrimination and whistleblower retaliation.

2. On March 26, 2021, the parties informed the Personnel Board that McNamara was deceased.

3. Thereafter, a prehearing conference was held on October 15, 2021, with Audrey Haydon appearing as Executrix of the Estate of Muncie McNamara, being represented by the Hon. Robyn Smith, both appearing by telephone. Counsel for the Appellant informed the Hearing Officer that Haydon had been appointed as Executrix for the Appellant's Estate, and this matter was ready to be rescheduled for an evidentiary

hearing. Counsel for the Appellee agreed, and an evidentiary hearing was rescheduled for March 2 and 3, 2022.

4. There were two (2) issues to be resolved through the evidentiary hearing. First, the Appellant had the burden of proof to establish that McNamara was dismissed as the result of disability discrimination. Second, the Appellant also had the burden of proof to establish that McNamara was dismissed in retaliation for making protected disclosures and complaints. The burden of proof was by a preponderance of the evidence.

5. Following opening statements by the parties' respective counsel, the Appellant's counsel called as its first witness, **Audrey Haydon**. Haydon is Muncie McNamara's widow and was appointed as the Executrix of Muncie McNamara's Estate.

6. Haydon introduced **Appellant's Exhibit 1 (EWDC Exhibit 1, 0001-0002)**, which is the Appeal Form filed by McNamara with the Kentucky Personnel Board. Haydon confirmed the Appeal Form is McNamara's appeal that she is presenting to the Board.

7. Haydon testified that she has known Lieutenant (Lt.) Governor Jacqueline Coleman for many years and considered her to be a close friend. Haydon stated that she and McNamara spent time during the Fall of 2019 helping with the Beshear-Coleman campaign in Bardstown, Kentucky. After the election, McNamara reached out to Coleman about joining the new administration and was directed to send a resume to an individual coordinating the transition team. In December 2019, Coleman offered McNamara the position of Executive Director of the Education and Workforce and Development Cabinet's (EWDC) Office of Unemployment Insurance (OUI). He accepted the offer and began employment in that position in mid-January 2020.

8. Haydon described McNamara as being very direct, to the point, and not one to mince words. She stated that he was very candid and upfront about things, which she acknowledged could be a little difficult to handle.

9. Haydon then introduced the **Appellant's Exhibits 6 and 7 (EWDC Exhibit 16, 0095-0114)**, which are McNamara's medical records from University of Louisville Physicians - Psychiatry and Depression Center discussing three (3) encounters between October 3, 2019, and May 4, 2020, as well as a Continuity of Care note from Baptist Healthcare System listing six (6) encounters between November 11, 2019, and November 5, 2020.

10. Haydon testified that, starting in mid-March 2020, when the Governor issued Executive Orders closing certain businesses due to the COVID-19 pandemic, OUI was flooded with claims and calls and McNamara was very stressed. And, while OUI was being inundated, he himself was overwhelmed by the amount of work and the chaos caused by the confusion surrounding OUI claims.

11. Haydon testified that McNamara left work early on Tuesday, April 28, 2020, and notified then-Deputy Secretary Josh Benton and then-Department of Workforce Investment Commissioner Marty Hammons that he was going to the doctor and, subsequently, ended up at the emergency room. The next day, Wednesday, April 29, 2020, the Appellant went back to work for several hours before leaving for a doctor's appointment in Louisville, Kentucky that afternoon. At that appointment, McNamara's doctor told him he needed to take off work for the next three (3) business days. McNamara provided a doctor's note to Beth Roark (former Executive Director of EWDC's Office of Administrative Services) to keep her apprised of his upcoming three (3) - day absence. McNamara was told by Roark not to work or answer emails while he was off during those three (3) business days.

12. Next, Haydon introduced **Appellant's Exhibit 8 (EWDC Exhibit 11, 0053-0054)**, which is the doctor's note, dated April 29, 2020, stating McNamara was to be off work "for the next three business days. He can RTW [return to work] without restriction after that. Yes to a high stress job." Haydon confirmed that this is the doctor's note obtained by McNamara on April 29, 2020, which was provided to Roark.

13. On cross-examination, Haydon admitted that her knowledge of the reasons for issuance of corrective action to McNamara and his subsequent dismissal is limited to her review of the Notice of Corrective Action (**EWDC Exhibit 9, 0050-0051**) and the dismissal letter (**EWDC Exhibit 12, 0055-0057**). She again acknowledged that McNamara's communication style may have been difficult for some people to handle, and that many people in state government were under profound stress and working significant hours during the early months of the pandemic. Haydon testified that McNamara remained unemployed following his dismissal from OUI on May 5, 2020, and did not receive wages of any kind after that. McNamara did receive a short period of unemployment benefits following his dismissal. Haydon confirmed that McNamara died on March 7, 2021.

14. The Appellant's next witness was **Jacqueline Coleman**, who is the Lieutenant Governor (Lt. Gov.) of Kentucky. Lt. Gov. Coleman testified that she served as Secretary of the Education and Workforce Development Cabinet during the time period relevant to this appeal (*i.e.*, January 2020 – May 2020) in addition to her duties as Lieutenant Governor. As EWDC Secretary, Coleman described her duties as building an

Executive Leadership Team and trusting them to make decisions for their respective departments.

15. Lt. Gov. Coleman stated that she knew that McNamara was Haydon's husband and that she only had a handful of interactions with him prior to his employment with EWDC. She received his application for a position in the administration through the transition portal and forwarded that application to EWDC leadership. The decision to hire McNamara was left, in large part, to the EWDC leadership. Lt. Gov. Coleman testified that, during the relevant time, the EWDC Executive Leadership Team (the "Team") consisted of EWDC Deputy Secretaries Josh Benton and Mary Pat Regan, EWDC General Counsel Joanna Decker, EWDC Chief of Staff Susan Rieber, Office of Administrative Services (OAS) Executive Director Beth Roark, and Department of Workforce Investment (DWI) Commissioner Marty Hammons. Lt. Gov. Coleman testified that she delegated EWDC personnel decisions to her Executive Leadership Team as well as day-to-day management of the respective offices and departments.

16. Lt. Gov. Coleman confirmed that McNamara received the appointment to the position of Executive Director of OUI. McNamara's appointment letter was entered into evidence as **Appellant's Exhibit 4 (EWDC Exhibit 3, pg. 0025)** establishing the effective date of McNamara's appointment as January 16, 2020. At the time of McNamara's appointment, OUI was organized under EWDC's Department of Workforce Investment. Lt. Gov. Coleman explained the relevant leadership hierarchy: the Executive Director of OUI reported to the Commissioner of DWI, who in turn reported to the Deputy Secretary responsible for the Workforce side of the Cabinet (Josh Benton), who then reported to the Secretary of the EWDC. Lt. Gov. Coleman again confirmed that she did not retain for herself any responsibilities over EWDC personnel decisions once the Executive Leadership Team was in place. EWDC personnel decisions and overall oversight over personnel was delegated to the EWDC Executive Leadership Team in conjunction with the Governor's Office. Lt. Gov. Coleman also noted that everyone who works in state government in a non-merit position, including the Team, serves at the pleasure of the Governor.

17. Lt. Gov. Coleman testified that she had a baby on February 8, 2020, and was on maternity leave through March 24, 2020. When she returned to work in late March 2020, she began regularly participating in Executive Leadership Team meetings. She then maintained a modified work schedule from March until approximately May 8, 2020.

18. Around mid-April 2020, Lt. Gov. Coleman recalled receiving several reports of McNamara's unprofessional behavior from members of the Executive Leadership Team. She specifically recalled that at least one (1) member of the Team felt

threatened by McNamara and was very uncomfortable about continuing to work with him. Lt. Gov. Coleman reiterated that her perception at the time was that McNamara's behavior was perceived by others as threatening, that his behavior was at the very least unprofessional, and, in some cases, that his behavior became personal as evidenced by particular text messages with certain members of the Team.

19. Lt. Gov. Coleman testified that, during the early months of the pandemic, every employee in the EWDC was working as hard as they could to help Kentuckians who were struggling to process their claim. An unprecedented amount of unemployment insurance claims was received by the OUI each day. Given the overwhelming stress, she recalled reminding the Executive Leadership Team to be mindful that employees need a break every now and then.

20. On cross-examination, Lt. Gov. Coleman testified that, in her role as Secretary of EWDC, she was not involved in personnel decisions for non-merit employees. She also stated that McNamara did not report directly to her, and that his direct supervisor was the Commissioner of the Department of Workforce Investment, Marty Hammons. She reiterated that she was aware of issues with McNamara's behavior and his performance at work prior to issuance of the Notice of Corrective Action on April 24, 2020. Lt. Gov. Coleman testified that she was not part of any discussions regarding how to address McNamara's behavior or performance prior to April 24, 2020, and she did not make the decision to issue him any corrective action. Susan Rieber, then-EWDC Chief of Staff, informed her of the decision to issue corrective action and that it was done as an attempt to "course correct" McNamara from continuing his unprofessional and confrontational behavior.

21. Shortly after the corrective action was issued, Susan Rieber informed Lt. Gov. Coleman that McNamara had violated the corrective action. Lt. Gov. Coleman testified that she was not part of any subsequent discussions regarding whether to terminate McNamara's employment and that she did not make the decision to terminate his employment. She also stated that Rieber informed her of the decision to dismiss McNamara for his violation of the corrective action plan.

22. The Appellant's next witness was **Joanna Decker**. Decker testified that she has been employed in state government since 2004 in a variety of different capacities and had held the position of EWDC General Counsel from mid-January 2020 through the end of June 2020. As EWDC General Counsel, she was part of the Cabinet's Executive Leadership Team and reported to the EWDC Chief of Staff, the EWDC Deputy Secretaries, and the EWDC Secretary. She also worked with McNamara in his capacity as Executive Director of OUI, and they worked together multiple times a day at the outset of the pandemic. Decker stated that, most of the time, she got along well with McNamara,

until he started bringing up unfounded complaints and speaking differently to her and other staff. Decker reported to leadership that she disagreed with McNamara over certain issues, his complaints were unfounded, he would not let issues go, and he continued to send her repeated texts or emails about them.

23. Decker testified that, on April 22, 2020, McNamara was concerned about outside vendors or contractors having certain access to the unemployment insurance system. Decker stated that she herself shared the same concern about vendors and had already expressed it to the EWDC Executive Leadership Team. The Executive Leadership Team had given her assurance that this type of access had been previously provided to outside vendors. Because Decker and McNamara were both new to the Executive Branch, they were unaware that this use of outside vendors by EWDC was customary at times and that other Cabinets use outside vendors routinely. Decker stated that, once she learned the use of vendors was customary and approved under federal and state law, her concerns were assuaged.

24. When asked about the state of McNamara's health when they worked together, Decker observed someone who was tired, had expressed being stressed out, and had a lot of job duties and weight on his shoulders. When Decker would bring up her concerns with McNamara about taking care of himself, he would always assure her, "No, no, I'm good, I'm good, really I'm OK."

25. Decker testified that, on April 24, 2020, McNamara was upset with the appointment of EWDC Deputy General Counsel Dondra Meredith to the Kentucky Unemployment Insurance Commission ("KUIC"), pursuant to the governing statute. Decker understood that McNamara thought he personally had some sort of attorney-client privilege with Meredith that created a conflict of interest. Decker told McNamara that he was wrong and that she disagreed with him. McNamara had wanted DWI Commissioner Hammons to be appointed to the KUIC, but Decker determined that was a conflict of interest. Also, based on prior appointments, the appointment of Meredith was not out of line.

26. Decker sent a text message to McNamara on April 24, 2020, stating, "Stop texting me" (EWDC Exhibit 17, 0130) because he was badgering her about the KUIC appointment of Meredith, and she did not see a conflict, especially compared to the other option McNamara had offered (i.e., Hammons). Meredith's KUIC appointment had been previously discussed during Executive Leadership Team calls and McNamara never said anything about it until the morning of April 24, 2020.

27. Decker confirmed that she participated in the text message exchange with Susan Rieber contained in **Appellant's Exhibit 42 (EWDC Exhibit 18, 0139-0140)**, dated

April 28, 2020, at 12:19 PM. Decker explained Rieber's message to her on page 2, which states, "We need to talk to Beth because we are also going to let him go per LTB don't know if that's today or tomorrow." Decker testified that the email meant that "LTB," La Tasha Buckner, had made the decision to terminate McNamara's employment.

28. The Cabinet had communicated an expectation that its leadership needed to be professional, and OUI did not feel the loss of McNamara's participation in daily activities of the office immediately after his termination.

29. On cross-examination, Decker introduced certain text messages between herself and McNamara (**EWDC Exhibit 17, 0115-0138**). In a text message dated March 6, 2020 (**pg. 0115**), McNamara wrote, "When I asked if you had practiced or were a government lawyer, I didn't mean that to be rude if it came off that way. ... Sometimes I come off abrasive." Decker confirmed that McNamara's communication style was abrasive at times.

30. In text messages to Decker on March 22, 2020 (**pgs. 0118-0119**), McNamara stated, "I know you think my argument is bullshit on how we do it, but this is what needs to happen and I need you to give the language to do it, whether you like it or not. ... I'm getting frustrated because I need you guys to tell me how to do this. I don't need you to tell me not to do this. If I say this is what we are going to do no matter what and I need a basis. And that's it. Think like a practice lawyer. Find me loopholes. Find a way around. Don't just accept the guidance (which is not law) or even the new law at face value. The new law is largely ambiguous and we talked about that. Tell me how to do it, not if I can do it." Decker confirmed that McNamara commonly handled disagreements with legal staff in the manner shown in these messages, and that he had trouble accepting different points of view.

31. Decker also confirmed that McNamara berated her and other members of the Cabinet's legal staff, as admitted by McNamara in an April 24, 2020 text message to Marty Hammons (**EWDC Exhibit 19, 0150**): "I will admit I probably berated Joanna and Tess [Russell]. I thought I could be a lawyer with them. That's how lawyers are. Dondra [Meredith] also."

32. Decker then introduced an email entitled "RE: Rep Barr Letter of Support" (**EWDC Exhibit 39, 0238-0239**). In this email to Decker, dated April 23, 2020, McNamara wrote, "[U]nbeknownst to me some guy from Barr's office was on a call yesterday where I was bitching about Labor not approving stuff or getting back to us and he offered, unsolicited to intervene. We were already getting shit from them, so it just makes us (me) look like a bigger failure." Decker confirmed that McNamara commonly used this type of language in work emails and the workplace in general and commonly complained

about the U.S. Department of Labor, which is the Cabinet's partner in the unemployment insurance program.

33. Decker confirmed that she received text messages from McNamara on March 22, 2020 (pgs. 0117-0118), wherein he provided Decker with a post from a Facebook law group and made the following statements: "This is from that fucking Robin Smith dumbass who created the whole Nichols mess because she's so fucking stupid and short sighted. ... Please please please let me call and yell at her. ... Please let me tell her to go fuck herself, eat shit, and maybe go back to law school because she clearly learned nothing. ... Someone needs to tell her to shut the fuck up. ... She needs to stop. ... I was ready to yell at her over Nichols if I ever met her in real life and right now I will eviscerate her. ... I hate her." Decker testified that she was shocked to receive these messages, and that it was an inappropriate communication from the Executive Director of OUI to the Cabinet's General Counsel.

34. Decker confirmed that she received text messages from McNamara on April 14, 2020 (pg. 0126), wherein he stated the following:

I came to state government to do good work and I'm getting shut down everywhere. ... Communications. They are killing me ... I actually have a questions. We paid 127,000,000 people buy like 20,000 people couldn't fill the application correctly. It's clear they are just fucking stupid. What am I supposed to do with them. Everyone wants me to handle them but they all agree people are idiots. And they have no idea how to help. ... Comms is is a problem for me now. ... I think people aren't reading it. That's also happening with our staff. They aren't reading the daily emails and they are complaining about not being informed. ... I'm so close to done with this shit. Like really close." (sic).

Decker testified that she did not like when McNamara spoke disparagingly about other people, and that it was not appropriate for the Executive Director of OUI to talk about claimants in that manner.

35. Decker testified that McNamara had trouble delegating tasks to subordinates in OUI, and, during leadership calls, he would instruct colleagues to send individual claimant inquiries to him. She stressed the importance of delegating tasks to McNamara on multiple occasions.

36. Decker was not involved in discussions regarding issuing corrective action to McNamara, nor did she review the Notice of Corrective Action (**EWDC Exhibit 9, 0050-0051**) prior to issuance to McNamara on April 24, 2020. Decker was told to notify the EWDC Executive Leadership Team if she received any inappropriate communications from McNamara. Shortly thereafter, on April 24, 2022, McNamara sent text messages to Decker indicating that he blamed her for him having received corrective action. One of McNamara's text messages to Decker reads in part as follows:

I'm not sure I'm coming to work on Monday. I may resign after you got me reprimanded. But either way I will not contact you anymore and you may not contact me. All correspondence going forward needs to be through the Commissioner."

In a separate email communication on April 24, 2022, to other members of the Legal Staff with a copy to Marty Hammons, McNamara wrote, "I no longer feel comfortable speaking with the Cabinet's legal department outside of the Commissioner's presence. Decker identified an email dated May 4, 2020, entitled "Communication" (**EWDC Exhibit 25, 0199-0204**), which is an email with attachments, (including McNamara's communications quoted above), sent from Decker to Beth Roark. Decker testified that the Executive Director of OUI would be unable to do his job well if he did not work with the Cabinet's legal department.

37. Decker also testified that she understood the communications from McNamara in **EWDC Exhibit 25** violated the Notice of Corrective Action issued to him because he was instructed to be more professional and not refuse to work with people in the Cabinet.

38. Decker testified that McNamara told her he had anxiety issues prior to April 24, 2020, but he was able to manage his anxiety and always assured her that he was okay. McNamara never characterized his anxiety as a disability in conversations with her. Also, he did not inform Decker that he had a heart condition prior to April 24, 2020.

39. Regarding use of outside vendors to assist OUI, Decker again confirmed that she previously raised concerns in Executive Leadership Team calls about this issue and wanted to ensure this course of action was allowable under federal and state law. Decker testified that she was surprised McNamara raised the vendor issue when he did because he had not expressed any concerns when the issue was previously discussed. McNamara put his objection regarding use of outside vendors in writing (**EWDC Exhibit 7, 0040-0043**), and Decker stated that she felt his objection was without merit based on the information she had gathered. The Cabinet responded to McNamara's written objection in writing and addressed his concerns (**EWDC Exhibit 8, 0044-0049**). Decker testified

that she continues to agree with the justifications contained in the Cabinet's response regarding use of outside vendors.

40. Regarding Dondra Meredith's appointment to the KUIC, Decker confirmed that the appointment had been discussed with McNamara present, prior to April 24, 2020, and Decker did not recall McNamara having previously raised any issue with Meredith's appointment until she received his text messages on April 24, 2020 (**EWDC Exhibit 17, 0130**). Decker testified that there was no merit to McNamara's allegation of a conflict of interest arising from Meredith's KUIC appointment.

41. The Appellant next called **Beth Roark**, who has over twenty (20) years of experience working in state government, primarily in human resources. In 2020, she served as the Executive Director for EWDC's Office of Administrative Services (OAS), and oversaw fiscal, human resources, budget, and facilities services for the Cabinet. Roark was part of the Cabinet's Executive Leadership Team and had decision-making authority over hiring and dismissing merit employees of the Cabinet.

42. Roark testified that approval from the Governor's Office, specifically from La Tasha Buckner, was required for decisions involving hiring and dismissing non-merit employees of the Cabinet; these hire and dismissal decisions were made by Buckner in collaboration with EWDC in 2020. Particularly, under the current administration, Roark would typically take whatever concerns or issues the Cabinet experienced with a non-merit employee to EWDC Chief of Staff Susan Rieber. Rieber would then communicate those issues or concerns to the Governor's Office and verbally inform Roark of any decision that was made. Roark was not a party to any of the discussions between Rieber and the Governor's Office.

43. Roark verified the responses provided in EWDC's Responses to the Appellant's Interrogatories, Requests for Production of Documents, and Requests for Admission (**EWDC Exhibit 15, 0080-0094**).

44. Roark testified that the Notice of Corrective Action (**EWDC Exhibit 9, 0050-0051**) issued to McNamara contained the bulk of the behavior issues exhibited by him during his employment with the Cabinet. While the Notice does not reference specific rules or policies violated by McNamara, it does broadly outline the issues and behaviors of concern as well as the expectations for him going forward. Roark did not draft the Notice of Corrective Action but understood that the expectations listed on the second page resulted from McNamara's behavior and identified where improvements needed to be made.

45. Regarding specific instances of unacceptable behavior listed in the Notice of Corrective Action (**EWDC Exhibit 9, pg. 0050**), Roark testified that employees of the Cabinet were working hard to assist OUI, from making UI system adjustments to bringing on additional staff to assist with processing claims, and McNamara, would berate and criticize many of those employees while offering no recommended solutions. Roark witnessed this behavior firsthand many times. For example, EWDC wanted to add individuals to the phone lines to help with the volume of calls coming into OUI. Roark was given a target, and the Human Resources team worked hard to achieve that target, which was difficult to do. McNamara complained and offered no alternate solution, only criticism. Roark stated that he complained all the time, in person and in writing, and that he berated her on the phone during Executive Leadership Team calls as well as in emails.

46. Regarding the reference in the Notice of Corrective Action to “name calling and speaking disrespectfully of clients” (**EWDC Exhibit 9, pg. 0050**), Roark testified that “clients” referred to unemployment insurance claimants, and that McNamara referred to claimants as being stupid numerous times during several EWDC Executive Leadership Team calls.

47. Roark stated that she had firsthand knowledge of instances where McNamara did not handle challenging situations and conflict in a professional manner and with integrity. He sent emails with inappropriate and unprofessional language. During Executive Leadership Team calls, McNamara would often interrupt individuals, was loud and rude, used inappropriate language, and would often speak about claimants in a derogatory and disparaging way. Roark stated, during Team calls, McNamara had to be redirected numerous times to stop his rants. McNamara was also impatient in discussions with the technical team on changes that needed to be made to the unemployment insurance system and lacked understanding when the changes could not be made immediately. Roark testified there were times where McNamara would give conflicting information to staff and further confuse an already tense situation.

48. Roark testified that McNamara violated the Notice of Corrective Action shortly after its issuance.

49. Roark stated that the expectations for merit and non-merit employees are not all that different, but the process by which the Cabinet terminates, disciplines, or provides corrective action are very different.

50. Roark was aware that McNamara had anxiety issues but did not recall when she was made aware of that. McNamara made her aware of a cardiological condition on April 29, 2020, when he mentioned he had been in the hospital the night before and the doctor had told him he was on the verge of having a stroke. Roark told

McNamara that he needed to go to the doctor if his condition was that serious, not to worry about work, and take care of his health. McNamara informed her that he had a doctor's appointment and she responded, "please go and I need something that says you are safe to work before you return because I am concerned about your health."

51. When asked if she considered McNamara unable to work as a result of the conditions he conveyed to her, Roark testified that she could not make that assessment based on the information he provided. Roark is not a medical professional but was concerned about McNamara's health and asked him to follow-up with a medical professional and provide her with something that said whether or not he could work given his claimed condition.

52. Roark testified that the discussions about McNamara's termination had occurred prior to the morning of April 29, 2020.

53. Roark noted that the expectation of all non-merit Governor appointed positions in state government is to do whatever is deemed mission critical at the time, including working nights and weekends if needed. Prior to the pandemic, the compensatory time balance ceiling was 240 hours, but, due to the pandemic, it was raised to 480 hours with expectation that many non-merit employees would be asked to work beyond 37.5 or 40 hours per week. Roark stated that nearly every member of the EWDC Executive Leadership Team was working both day and night at that time and a lot was being asked of them, but the Cabinet still expected employees to act professionally and with courtesy to one another.

54. Regarding McNamara's concern about inappropriate disclosures of information from outside vendors, Roark understood that McNamara was saying the vendor's employees could potentially misuse information they had access to, but he had no specific evidence of that happening. Roark stated that the vendor at issue (Crown Services) confirmed they ran background checks on all employees who would assist OUI, and all those employees went through training with regard to personal information and their responsibility to protect it and not disclose that information. Roark did not agree with McNamara's concern because OUI had been using temporary staffing agencies to hire employees for several years prior to the pandemic. Based on the facts in possession of EWDC leadership, they felt the use of outside vendors under the circumstances was an allowable practice. Roark stated that the decision to proceed with outside vendors was not her decision and she did not make the decision.

55. Roark testified that dissent is not seen as disloyalty in the Cabinet. There are policies in place that protect individuals from retaliation. With McNamara's outside vendor protest, EWDC Deputy Secretary Josh Benton addressed McNamara's concerns,

acknowledged that he heard him, and informed McNamara of his decision to proceed. See (EWDC Exhibit 42, email entitled "RE SSA EIES requirements", 0244-0246) and (EWDC Exhibit 35, email entitled "Crown Services", 0228-0229). With regard to the KUIC appointment of Meredith, Roark's understanding of the statement; "[y]ou are not to engage in conversation related to UI Commission appointments" in the Notice of Corrective Action (EWDC Exhibit 9, pg. 0051), was not Cabinet leadership telling McNamara that they did not want to hear his concerns or were indifferent to them. The statement addressed the manner and to whom McNamara was discussing the issue.

56. On cross-examination, Roark testified that merit employees are hired through a competitive process based on skill and knowledge while non-merit Governor appointed employees are hired to serve at the pleasure of the Governor. Non-merit employees may be dismissed without cause, which is most often the course of action taken. EWDC follows the progressive discipline approach with merit employees with status, but typically not for non-merit employees.

57. Roark stated that corrective action involves types of actions that are not a penalization or punitive. These are attempts to help steer the course and try to get an employee to correct their behavior or performance issues. As appointing authority during her time with EWDC, Roark made the determination regarding corrective or disciplinary action for merit employees of the Cabinet. For non-merit employees, those personnel decisions were made by the Governor's Office.

58. Roark identified EWDC Exhibit 36 (Email entitled "RE: Hayley Presley", 0230-0231) and EWDC Exhibit 28 (Email entitled "GlobalMeet Collaboration Security", 0208-0209) as examples of the unprofessional communications that she received from McNamara. Roark also confirmed that the Kentucky Employee Handbook (EWDC Exhibit 48, 0269-0270) states "[a]ll employees must avoid offensive or inappropriate behavior at work" and McNamara did not avoid offensive or inappropriate behavior at work.

59. Roark identified EWDC Exhibit 27 (Email entitled "FYE Bye Dates are incorrect", 0206-0207) as the email exchange she referenced earlier where McNamara would give a direction to technical staff and that direction would contradict what he previously said. Roark stated this was a common complaint that she heard from staff about McNamara, and there was a lot of uncertainty regarding the information he provided to staff. Roark confirmed that McNamara was unable to consistently provide clear guidance to staff and leadership on unemployment insurance issues, as shown in EWDC Exhibit 38 (Email entitled "Questions on UI programs and Payment of Benefits", 0234-0237). She also confirmed that he had trouble accepting different points of view.

60. Roark testified that discussions began about how to address the McNamara's behavior and performance in early April 2020. By that time, it was apparent his behavior was becoming an issue and the one option predominately discussed was dismissal. Roark did not recall corrective action being discussed since that is not a typical course of action for non-merit individuals in an Executive Director position. Roark testified that the Governor's Office made the decision to issue corrective action to McNamara. She believes she was informed of the decision to issue corrective action a couple of days before McNamara received the Notice of Corrective Action.

61. Roark stated that McNamara never informed EWDC Human Resources that he suffered from a disability. Roark introduced **EWDC Exhibit 5** (EWDC Request for Accommodation Process, **0034-0037**), which states under "Employee Responsibilities" that "[i]f an employee has a disability that impacts his or her ability to perform job duties, the employee should request a reasonable accommodation if that accommodation would allow the employee to perform the essential functions of the job. ... Regardless of how the employee makes his or her initial request, the employee will be responsible for completing the 'Accommodation Request Form', with [or] without assistance from the supervisor within three (3) working days and engaging in the interactive request process" (0036). Roark confirmed that McNamara (1) never completed an Accommodation Request Form, (2) never provided written documentation to the Cabinet concerning a disability, and (3) never requested a Kentucky Employee Assistance Program (KEAP) referral to assist with job-related stress or anxiety. Roark also confirmed that McNamara provided her with the doctor's note, dated April 29, 2020, (**EWDC Exhibit 11, 0053-0054**), which states McNamara can return to work without restriction after three (3) business days and "yes" to high stress job. In Roark's opinion, that note was sufficient for McNamara to return to the office following the three (3) business days.

62. Roark testified that corrective action was not issued to McNamara because of any alleged disability. She also stated that corrective action was not issued to retaliate against him for disagreeing with EWDC leadership's decisions. McNamara received corrective action to work on his behavior.

63. Following issuance of the Notice of Corrective Action on Friday, April 24, 2020, McNamara had texted several individuals over the weekend in an argumentative, defiant manner. Roark recalled speaking with DWI Commissioner Marty Hammons, EWDC Deputy Secretary Josh Benton, and EWDC Chief of Staff Susan Rieber about McNamara's reaction to the corrective action and what to do next. These conversations occurred when they returned to work on Monday, April 27, 2020, if not before. Susan Rieber took the concerns expressed by EWDC Executive Leadership Team and addressed them with the Governor's Office.

64. Roark testified that the Governor's Office made the decision to terminate McNamara's employment. Roark agreed with the dismissal decision because McNamara was not exhibiting behavior expected of someone appointed to an Executive Director position. Roark stated that she had been in state government for twenty (20) years and knew this was a very stressful and busy time, specifically for OUI, but McNamara did not exhibit the behavior that a leader needed to exhibit. To Roark's knowledge, the termination had nothing to do with an alleged disability and had nothing to do with McNamara raising alleged concerns about either outside vendors or KUIC appointments, as conversations regarding his potential dismissal occurred before that happened.

65. The Appellant next called **Honor Barker**, who is the Deputy Commissioner of EWDC's Department of Workforce Investment (DWI). She has held this position since April 1, 2020, and her job duties include oversight of DWI's agencies, which at the time included OUI. Together with DWI Commissioner Marty Hammons, Barker was in McNamara's chain-of-command.

66. Barker testified that she and Hammons relied on McNamara to keep them informed about unemployment insurance matters and provide them with basic high-level information regarding OUI and upcoming changes. Barker described April 2020 as a chaotic and unprecedented time, and DWI needed McNamara to help with the chaos and not exacerbate it. Barker stated that many people were available to assist McNamara with OUI tasks, but he wanted to do it all. She made repeated offers to help him, and he would agree to let her help but ultimately would not.

67. Barker testified that she drafted the Notice of Corrective Action (**EWDC Exhibit 9, 0050-0051**) issued to McNamara. Prior to issuance, Hammons and the EWDC's Human Resources team reviewed the document.

68. Barker went into great detail regarding the specific instances of unacceptable behavior listed in the Notice of Corrective Action:

- a) Regarding the "berating individuals" language, Barker testified that there were instances of outbursts by McNamara where he spoke inappropriately about unemployment insurance claimants. She explained that the OUI office setting is an open cubical area, and McNamara was overheard on a number of occasions saying things like "Oh my God, these stupid people, I can't deal with these people, they are just idiots or imbeciles" and "if they can't figure these things out, they don't deserve to be helped." McNamara would often belittle OUI staff saying, "I don't think any of you all know what you are doing, do you know

what you are doing?" Barker confirmed that she heard McNamara berate "individuals internal and external to the Cabinet for events beyond their control but for which they have attempted to work diligently to correct," and other individuals mentioned that conduct to her as well. When asked if she had documentation of this behavior, Barker explained that they were dealing with a non-merit employee. If dealing with a merit employee, there are specific protocols and processes that have to be followed. But the same protocols and processes are not done or required with non-merit employees.

- b) Regarding the "name calling and speaking disrespectfully of clients" language, Barker confirmed that she heard McNamara speak in this manner and knows that it occurred. During staff conference calls and meetings, Barker observed McNamara being overly aggressive and brash with members of the EWDC's Executive Leadership Team, including yelling loudly, talking over others, slamming his hand on the table and saying "no," and making belittling and disrespectful statements to others. Other staff informed Barker that they witnessed similar behavior by McNamara that fell in line with the behavior that she personally observed. Barker stated that they did talk to McNamara about this behavior and he knew and understood their concerns.
- c) Regarding the "not responding to inquiries from your staff and leadership in a timely manner" language, there were numerous times that staff emailed McNamara to ask questions and he did not get back with them. Barker emailed questions to McNamara and would not hear from him, so she would often have to walk down to his office to try to get the answers she needed. Barker stated she was not the only person having that issue with McNamara. Cabinet leadership tried several things to help McNamara get better control over that and he was not participating.

69. Barker addressed the expectations listed on page 2 of the Notice of Corrective Action (EWDC Exhibit 9, pg. 0051).

- a) Regarding the "exhibit accountability in terms of your actions" language, Barker testified that she and Hammons would talk with McNamara about something problematic and say they did

not want to see it happen again. McNamara would commonly respond to these conversations by saying "it can't fall all on me, it can't be just me, I can't help it if these people don't read the things that I put out there, I can't help it if they are supposed to do this and they do that." Because McNamara was in a leadership position, his supervisors wanted him to be more accountable and not always place blame on his employees. Barker and Hammons informed McNamara that they wanted him to come into these types of conversations with ideas on how to resolve problems instead of just saying "it's not my fault."

- b) Regarding the handling "challenging situations and conflict in a professional manner" language, Barker observed that the more challenging things became, the less professional McNamara reacted. For example, there were times when they tried to talk with him and he would say "yea, yea, yea, yea" but they could tell he was not really listening. McNamara would say things like "OK, I get it, I'm done with this conversation, just send it to me, just send everything you have to me, I'll just do everything." Barker testified these types of statements were not productive or professional, and this is not the type of behavior expected from an Executive Director.
- c) Regarding the "be attentive during leadership calls and respectfully note any concerns" language, Barker again explained how McNamara would talk over others in meetings and slam his hand on table and say "no, stop what you're saying." These outbursts were unacceptable, and they wanted him to be professional and respectful when raising any concerns.
- d) Regarding the "provide notice of needed procedural change to [leadership] in a timely manner" language, McNamara would often receive relevant unemployment insurance information in the evenings (e.g., UIPLs), and first thing in the morning, he would go to EWDC Deputy Secretary Josh Benton or EWDC Chief of Staff Susan Rieber to talk with them about changes before he talked with Barker and Hammons. They talked with McNamara about the chain-of-command and how information generally flows and, as his next line supervisors, it was reasonable to expect that McNamara would discuss these types of OUI issues with them first.

- e) Regarding the “not to engage in conversation related to UI Commission appointments” language, following a conversation with Hammons, Barker understood that McNamara had a disagreement about appointments to the KUIC, but the KUIC was not part of OUI or DWI and McNamara should not be interjecting himself in KUIC appointments.

70. Barker also understood that McNamara violated the Notice of Corrective Action by contacting someone in EWDC Legal to express unwillingness to have anything to do with her.

71. The Appellant next called **Mary Elizabeth Bailey**, who is the Commissioner of the Personnel Cabinet’s Department of Human Resources Administration. She has been employed by the Personnel Cabinet for twenty-one (21) years and held this position during April and May 2020.

72. Commissioner Bailey testified that she was involved in the separation of McNamara from his position with OUI. She was contacted as part of the approval process for terminating a Governor-appointed non-merit employee, and drafted and delivered the notice of termination (**EWDC Exhibit 12, 0055-0057**) to McNamara.

73. Commissioner Bailey reviewed the Notice of Corrective Action (**EWDC Exhibit 9, 0050-0051**) prior to its issuance to McNamara. Bailey testified that corrective action addresses any type of performance issues or other issues to try to improve the situation with an employee. There is no standard for the specificity required for the issues stated; it is acceptable to generally say “do better” because corrective action is not required to be given.

74. On cross-examination, Commissioner Bailey stated that non-merit employees may be dismissed without cause at any time. Before any type of corrective or disciplinary action is issued to a Governor-appointed non-merit employee, Cabinets and agencies must contact her first. Commissioner Bailey then conducts various human resources checks, including reviewing the employee’s career service status, checking to see if the employee recently returned from military leave, or checking to see if the employee had recently been returned to work from sick leave by a physician. Her role does not involve looking into the details underlying the request for termination.

75. Following issuance of the Notice of Corrective Action to McNamara, Commissioner Bailey recalled that Roark contacted her and said they wanted to go ahead and proceed with dismissal. Commissioner Bailey said, “Okay” and completed her

standard human resources checks. During her checks, Commissioner Bailey asked Roark if McNamara had been out on sick leave, and Roark answered in the affirmative. After Commissioner Bailey received and reviewed the doctor's note provided by McNamara to the Cabinet (**EWDC Exhibit 11, 0053-0054**), she had no concerns about medical issues.

76. Commissioner Bailey spoke with La Tasha Buckner regarding McNamara's dismissal and described the conversation as straight forward and typical. Commissioner Bailey informed Buckner that she had performed the necessary checks from a human resources perspective and that they may proceed with termination.

77. Commissioner Bailey testified that dismissals issued to Governor-appointed non-merit employees are generally "without cause."

78. Commissioner Bailey recalled meeting with McNamara on May 5, 2020, to provide him with the dismissal letter (**EWDC Exhibit 12, 0055-0057**). She described McNamara as being loud and abrasive. Commissioner Bailey had to ask him to calm down several times and reiterated that he was an at-will employee and his services were no longer needed.

79. The Appellant next called **Susan Rieber**, who has served as the Lt. Governor's Chief of Staff since December 10, 2019. Rieber also served as Chief of Staff for EWDC while the Lt. Governor was Secretary of the Cabinet.

80. McNamara was employed with OUI during the time Rieber held the position of EWDC Chief of Staff. Rieber recalled participating in meetings with McNamara. She testified the Notice of Corrective Action (**EWDC Exhibit 9, 0050-0051**) was prepared as a result of behavioral issues with him. It was not issued to slander him; rather, the Cabinet wanted to make sure McNamara was doing his job appropriately. The Notice of Corrective Action was drafted on April 20 or 21, 2020, and delivered to McNamara on April 24, 2020, in a meeting attended by him, Rieber, and DWI Commissioner Marty Hammons. Rieber testified that McNamara quickly violated the Notice of Corrective Action, and that violation was reported to the Governor's Office. Rieber believes that she spoke with La Tasha Buckner about McNamara's reaction to corrective action on Saturday, April 25, 2020. The decision was then made that termination was the best option.

81. Rieber stated that McNamara violated the Notice of Corrective Action when he left the meeting and texted staff with inappropriate communications, meaning he accused people of things and had told Joanna Decker that he would not work with her after being told he had to work with the General Counsel's office. McNamara acted defiantly and expressed refusal to collaborate with others in EWDC. McNamara was

asked to be careful about his behavior with staff, to be respectful of staff, and to coordinate with staff. He was asked to self-correct and there was no self-correction. McNamara was not fulfilling his job duties effectively during this critical time for OUI, and that issue had to be addressed.

82. Rieber stated that the Cabinet received reports from pretty much everyone in the EWDC Executive Leadership Team of inappropriate texts, emails, or behavior from McNamara. Rieber characterized this as a pattern of behavior from McNamara, and she became aware of these issues in late March or early April 2020. McNamara's direct supervisors, including DWI Commissioner Marty Hammons and EWDC Deputy Secretary Josh Benton, had conversations with him about correcting his behavior and how he treated staff, but those conversations did not seem to be working. On April 20, 2020, it was then decided that a corrective action plan would be the best next step.

83. Rieber testified that the need for additional staff to assist with unemployment insurance claims, including use of outside vendors, was discussed during the morning Executive Leadership Team meetings. The General Counsel, Human Resources, IT, Commissioner Hammons, and Deputy Secretary Benton all agreed that EWDC needed to hire additional staff and that using outside vendors through the existing Master Agreements to address this staffing need was the best way to do it. There was further discussion about how to screen the vendors for security, and leadership confirmed with the Cabinet's attorneys that it was ok to hire outside vendors because they would receive the same security training and sign the same confidentiality agreements as other EWDC employees.

84. Rieber testified that multiple offers of assistance were made to McNamara during his employment. For example, staff would ask McNamara what his needs were during the morning Executive Leadership Team meetings, and he would say "send stuff to me directly" and "I'll take care of it." EWDC assigned John Lyons to assist McNamara with communicating with and ensuring information from the U.S. Department of Labor was being relayed correctly to staff.

85. Rieber recalled that McNamara thought Dondra Meredith's appointment to the KUIC was a conflict of interest. The issue was reviewed by both the Cabinet's attorneys and attorneys with the Governor's Office and no one else found a conflict.

86. On cross-examination, Rieber testified that La Tasha Buckner made the decision to issue corrective action to McNamara. Buckner serves as Chief of Staff for the Office of the Governor and is regularly looped in for decisions on personnel matters involving non-merit employees. Buckner informed Rieber that corrective action was the

most appropriate next step in dealing with McNamara's behavior. Rieber then communicated that decision to the EWDC leadership team.

87. Rieber confirmed that the behavior and performance issues identified in the Notice of Corrective Action (**EWDC Exhibit 9, 0050-0051**) were accurate. During the meeting when McNamara received the Notice of Corrective Action, he spoke at length about state government and merit employees, and he spoke disparagingly of merit employees.

88. Rieber testified that La Tasha Buckner made the decision to terminate McNamara's employment. The reasoning provided to Rieber for the decision to terminate was that McNamara had violated the Notice of Corrective Action and there was no path forward. Rieber recalled the decision to terminate was made over the weekend, following issuance of corrective action on April 24, 2020. Rieber confirmed the text messages contained in **EWDC Exhibit 18 (0139-0140)** are communications between her and Joanna Decker that occurred on April 28, 2020, at 12:19 PM. Regarding the text message on page 2 (**EWDC Exhibit 18, pg. 0140**), Rieber testified that she was referring to McNamara when she said, "we are also going to let him go per LTB," and that "LTB" is referencing La Tasha Buckner. Rieber stated that she agreed with the decision to terminate McNamara's employment.

89. Rieber testified that McNamara never informed her that he suffered from any sort of medical condition.

90. The Appellant called **La Tasha Buckner**, who is the Chief of Staff and Senior Counsel to the Governor. Buckner participated in the decision to terminate McNamara and provided the following basis for termination: "He was in a position of leadership and he displayed behavior that was unbecoming, including berating fellow employees, being insubordinate and rude, and failing to comply with directives. ... Disruptive, unprofessional, created a stressful situation for his coworkers and supervisors." Buckner did not recall being shown any documents that documented her decision to terminate McNamara.

91. Buckner communicated orally with Susan Rieber and Commissioner Mary Elizabeth Bailey regarding McNamara.

92. Buckner had also made the decision to issue corrective action to McNamara in April 2020, and provided the following basis for that decision: "At that point I had been made aware by Ms. Rieber that he had berated, been disruptive, disrespectful to employees internally and externally, I think they presented a couple of options – termination, corrective action, there might have been another one in there – and, because

of the timing and because I didn't know McNamara, I thought it might benefit from a reset essentially, an opportunity to point out what the problems have been and give him a chance to conform." Assessing McNamara as an Executive Director of a state government office, Buckner described his behavior as unprofessional, rude, hostile, confrontational, and combative. She further testified that all of these things cumulatively suggest someone who should not be in leadership. Buckner stated that, whatever words you want to use to describe McNamara, they all come down to unprofessional behavior. Buckner again confirmed she received oral reports from Susan Rieber regarding McNamara's extremely unprofessional behavior. She recalled one instance in particular where he was rude to an employee of the Finance and Administration Cabinet.

93. Regarding the Notice of Corrective Action issued to the Appellant (**EWDC Exhibit 9, 0050-0051**), Buckner did not participate in the formulation of the notice or see any drafts. She did not communicate with anyone other than Rieber and Commissioner Bailey about issuing the notice to the Appellant. Buckner had no understanding regarding how the EWDC Executive Leadership Team selected the expectations included in the notice. She did not read the notice prior to it being issued. While the notice was being formulated, including an item dealing with McNamara's comments, no one discussed with Buckner about KUIC appointments. Buckner again stated that she had no substantive conversations with anyone about what would go in the notice, nor did she review the notice prior to it being issued.

94. Following issuance of the Notice of Corrective Action on April 24, 2020, Buckner was made aware that McNamara did not receive the notice in a way that indicated he would be able to comply, meaning his reaction was negative. "His negative reaction, at the time that I was informed of it, gave me the impression that he would not be able to comply and that we were probably going to have to move very quickly toward termination." Susan Rieber reached out to Buckner to discuss McNamara's reaction to corrective action. Buckner did not recall when that conversation occurred, but confirmed it was over the phone. Other than Rieber and Commissioner Bailey, Buckner did not receive any feedback from anyone else regarding McNamara's behavior and performance prior to her decision to terminate his employment.

95. Buckner testified that she did not reach out to DWI Commissioner Marty Hammons about McNamara's behavior because she does not independently investigate information related to behavioral misconduct by non-merit employees. "[T]hat's not the nature of my job. During the time period involved, I was Chief of Staff and General Counsel for the Governor, during the height of COVID. My responsibilities and priorities were COVID response, including procuring PPE. Along with that, I do have appointing authority status for non-merits in state government, which totaled to be about 700 to 800. So, no, on any given request for feedback about non-merit performance, I would not

independently reach out, I rely on the people involved to give me accurate information." Because Rieber was Chief of Staff for EWDC, Buckner dealt with her and no other EWDC staff.

96. Prior to McNamara's termination, Buckner did not recall being informed that he had any objections or opinions regarding the use of outside vendors in call centers or appointments that were made to the KUIC. She relied entirely on representations made to her by Rieber and Commissioner Bailey regarding whether McNamara violated provisions of the Notice of Corrective Action. "In this case, McNamara was terminated for conduct unbecoming of someone in leadership; that whatever differences of opinion he might have expressed were not known to me at the time and for which none of that excuses the behavior he was engaged in at the time." Buckner did not recall either Commissioner Bailey or Rieber calling McNamara "insubordinate."

97. Buckner testified that it is appropriate at times to instruct an employee about the kinds of matters they should be discussing. Buckner also clarified that the Notice of Corrective Action did not instruct McNamara to stop raising concerns about ethical or legal issues surrounding a certain topic.

98. Regarding McNamara's Formal Protest of Agency Action, dated April 23, 2020 (**EWDC Exhibit 7, 0040-0043**), Buckner stated that she reviewed this document post-termination and does not recall reading it, seeing it, nor was she copied on it prior to McNamara's termination. She does not believe she participated in any way in the Cabinet's response to this document (**EWDC Exhibit 8, 0044-0049**).

99. Buckner testified that she did not recall communicating during April 2020 with Travis Mayo, then-Chief Deputy General Counsel for the Governor's office, about either McNamara's Formal Protest or the Cabinet's response. She also stated that Mayo did not participate in the decisions to issue corrective action or terminate McNamara.

100. When asked if the Governor's office was aware of issues in 2020 about McNamara that "would, in your view, ruin his reputation," Buckner stated, "I don't know words about, you know, ruining reputation, but I would certainly think that his own statements, and text messages, and emails don't paint him in a positive light and actually reinforce the description I was given at the time, prior to termination, of his behavior ... [h]e admits that he was berating other people."

101. On cross-examination, Buckner testified that corrective action is not something she would normally do in the case of a non-merit employee, "but given the fact that he was heading up UI at the time, if there was any way to salvage it, and allow him to reset, I hoped that could happen. I didn't know him, but I had no reason to dispute

the reports that were coming to me through Susan Rieber, so it was a chance to reset. I learned very quickly his response indicated that it was not going to work for a reset and we'd have to plan something else."

102. Prior to making the decision to issue corrective action to McNamara, Buckner was not aware of any alleged medical issues that he claimed to have or his disagreements with EWDC leadership regarding use of outside vendors to help process unemployment insurance claims. "I had no substantive knowledge of McNamara, nor his job duties, nor anything going on over there other than the behavioral aspects."

103. Regarding the basis for the decision to terminate McNamara's employment, Buckner testified, "It's one thing to do your job or to do it well. It's another thing entirely to be someone in a leadership position that doesn't represent expectations of a leader, which is not to belittle anyone, certainly to do as you are asked to do and work with other people, which, in this case, he was not doing so, and it was internal and external, so those were things that, once this was pointed out with the hopes that he would be able to conform his behavior, his conduct, and he didn't, there's nothing else you can do with that, that's not otherwise correctable. If someone's just not doing their job well, there's the ability to point out job performance aspects, but in state government typically there's two things. It's a lack of good job performance and then it's basically misbehavior. And this fell into the category of misbehavior."

104. Buckner identified **EWDC Exhibit 12 (0055-0057)** as the employment separation letter issued to McNamara on May 5, 2020, and confirmed he was dismissed "without cause." She explained that non-merit employees are employed at-will as opposed to merit employees and, thus, no reason has to be given for the separation as long as the action taken is done for a non-discriminatory, non-illegal reason. McNamara was terminated because he could not conform his behavior to that of someone who should be in leadership and was becoming a disruption more than anything though "... for non-merits, we don't have to give a reason in the letter."

105. Buckner testified that McNamara was not terminated to punish him for reporting alleged concerns involving OUI's use of outside vendors or for raising any alleged conflict of interest involving a KUIC appointment. Buckner also testified that McNamara was not terminated because of any alleged disability.

106. The Appellant next called the **Hon. Travis Mayo**, who currently serves as General Counsel to the Governor in the Office of the Governor. Prior to taking that position, Mayo served as Chief Deputy General Counsel to the Governor from December 10, 2019, through October 15, 2021. As Chief Deputy General Counsel, his job duties included responding to litigation filed against the Governor and Office of the Governor;

working with the various Cabinets to respond to litigation; assisting with drafting administrative regulations related to the Cabinets; assisting with correspondence from constituents or other individuals; litigating cases; reviewing and evaluating legislation; and advising the Governor on various issues. Mayo testified that, as Executive Director of OUI, McNamara was not working as an attorney within the EWDC's Office of Legal Services.

107. None of Mayo's job duties related to responding to protests of agency action that came from agency department heads, and he did not recall ever being involved in such a matter. Prior to McNamara's dismissal, Mayo was not aware of the concern expressed in McNamara's Formal Protest of Agency Action (**EWDC Exhibit 7, 0040-0043**), which was brought to the Governor's Office. He became aware of the Formal Protest of Agency Action and EWDC's subsequent Response (**EWDC Exhibit 8, 0044-0049**) following McNamara's dismissal. Mayo also stated that he became aware that McNamara raised an alleged conflict of interest involving a KUIC appointment following his dismissal. When he learned of the alleged conflict of interest following McNamara's dismissal, Mayo understood that the issue had been addressed and the law was clear there was no conflict.

108. Mayo testified that he became aware of the decision to dismiss McNamara following McNamara's dismissal. His understanding of the reasons for McNamara's dismissal involved disruptive and combative behavior with coworkers, treating coworkers poorly, and speaking poorly of the state's constituents who were seeking guidance from OUI.

109. Following McNamara's dismissal, Mayo reviewed communications showing McNamara had spoken to co-workers disrespectfully, had been combative with co-workers, had spoken poorly about constituents, and had sent harassing communications to coworkers. In terms of communicating with McNamara's attorney following his dismissal, Mayo had been advised that McNamara had sent threatening messages to former coworkers. Mayo testified that he asked the Appellant's legal counsel, the Hon. Robyn Smith, to advise McNamara to cease contacting and communicating with former coworkers in that manner regarding his former employment.

110. When asked his opinion of the communications from McNamara to legal counsel contained in **EWDC Exhibit 25 (0199-0204)**, Mayo testified that these communications show McNamara's uncooperativeness and combativeness with his fellow employees in terms of refusing to speak with EWDC Legal outside of the DWI Commissioner's presence. Mayo stated it was only following McNamara's dismissal, that, in addition to the documents contained in **EWDC Exhibit 25**, he became aware of

additional documents reflecting that McNamara was uncooperative with employees and spoke poorly about constituents.

111. On cross-examination, Mayo testified that he was not involved in discussions regarding either issuing the corrective action to McNamara or McNamara's ultimate dismissal.

112. Mayo confirmed that the following two (2) text messages sent by McNamara to coworkers are examples of the inappropriate communications he became aware of following McNamara's dismissal:

EWDC Exhibit 17, Text Message to Joanna Decker on April 14, 2020 (pg. 0126): "We paid 127,000,000 people buy like 20,000 people couldn't fill the application correctly. It's clear they are just fucking stupid. What am I supposed to do with them. Everyone wants me to handle them but they all agree people are idiots."

EWDC Exhibit 19, Text Message to Marty Hammons on April 14, 2020 (pg. 0145): "I'm sorry but you can't legislate for stupid. I'm open to suggestions. Tell me how we can explain this to dumb people. I know that's not nice to say but we all know it's true. We have dumb people in this state. ... I'm pretty close to being done. I'm don't want to hear from communications. They are getting in the way. And I'm sorry but people are fucking stupid and if they can't get their shit together then fuck them. Sandy has been overwhelmed but she's been amazing and I'm not going to listen to holly shit on her."

113. McNamara called **Greg Higgins**, who is the manager of the KUIC. Higgins met McNamara when he was appointed Executive Director of OUI. Higgins did not have any official interaction with him - other than working with the same subject matter - and unofficially discussing unemployment insurance matters. Higgins is now aware of allegations of disruptive, combative, and harassing behavior exhibited by McNamara while employed with OUI, and he became aware of these allegations through "shop talk" and speculation about why he left, following McNamara's dismissal.

114. Higgins testified that McNamara informed him of his opinion that Dondra Meredith's appointment to the KUIC was a conflict of interest, and he assumed McNamara discussed that with others.

115. Higgins stated that he is not aware of a general directive to employees to stop raising a legal or ethical concern after it has been investigated and a determination has been made. Higgins is also not aware of an informal expectation that employees are not supposed to raise concerns about potential conflicts of interest.

116. Finally, the Appellant called **Marty Hammons**, who currently serves as Executive Advisor to the Secretary of the Education and Labor Cabinet. Hammons testified that he has twenty-eight (28) to twenty-nine (29) years of experience working in state government. He previously served as the Commissioner for the EWDC's Department of Workforce Investment (DWI), and, in that role, he was McNamara's direct supervisor. As McNamara had no prior experience with working in state government, Hammons provided McNamara with guidance and direction in McNamara's role as Executive Director of OUI. Hammons described his supervision approach as eighty percent (80%) listening and twenty percent (20%) talking and stated that some of the best ideas come from merit employees and managers.

117. Hammons testified that he participated in weekly Executive Leadership Team meetings where issues and concerns would be discussed, particularly during the COVID-19 pandemic. He agreed that it was important for staff to bring up issues for discussion so that they could be fully talked about and addressed.

118. Regarding the Notice of Corrective Action issued to McNamara (**EWDC Exhibit 9, 0050-0051**), Hammons testified that Honor Barker drafted the document. Barker prepared the Notice of Corrective Action due to her significant human resources experience. It had been previously discussed among Hammons, Barker, Rieber, and EWDC Deputy Secretary Josh Benton that corrective action needed to be issued to McNamara. These conversations occurred due to behavioral issues that they were experiencing with McNamara.

119. Prior to issuing corrective action, Hammons had discussed with McNamara issues regarding his tone and delivery to staff outside of his chain-of-command. On a number of occasions, McNamara would go directly to a staff member in someone else's division and berate them or say something and give them an order. When they first met, Hammons explained to McNamara that state employees rely on chain-of-command and, if you need to communicate with someone not in your division, you should talk with their supervisor. McNamara would go outside of his own chain-of-command to discuss

workforce issues. He spoke directly with Deputy Secretary Josh Benton as well as the Lt. Governor before addressing issues with Hammons as his direct supervisor.

120. Regarding the expectation in the Notice of Corrective Action that McNamara was “not to engage in conversation related to UI Commission appointments” (0051), Hammons testified that he understood the appointment of Dondra Meredith to the KUIC was under the Cabinet Secretary’s authority. He was informed that McNamara reached out directly to Dondra Meredith, Joanna Decker, and possibly EWDC Staff Attorney Manager Maria “Tess” Russell in a belligerent and unprofessional way to discuss Meredith’s appointment to KUIC, which was the type of behavior Hammons had seen repeatedly from McNamara. Hammons believes that Roark informed him that McNamara communicated with EWDC Legal in a belligerent manner. Hammons also heard McNamara repeatedly say, “Legal f-ing hates me.” Hammons does not know the basis for the McNamara’s opposition to Meredith’s appointment to the KUIC. The “you are not to engage in conversation related to UI Commission appointments” language arose from McNamara’s pattern of behavior of berating people who disagreed with him. From Hammons’ perspective, McNamara had expressed his disagreement about the appointment, and the decision had been made to appoint Meredith. There was nothing left to be discussed with Cabinet staff on that issue.

121. Hammons testified he heard McNamara berate Holly Neal, employed with EWDC’s Communications Office, during a standard weekly phone meeting in the first couple weeks of the COVID-19 pandemic. In response to a comment from Neal, McNamara got very heated and “went at Holly” and Hammons had to intervene. Hammons clarified that “went at Holly” means that McNamara’s tone changed, and he became very aggressive and agitated toward Neal. Hammons stated that, when he became this way, McNamara would not hold back.

122. Prior to issuing corrective action, Hammons also received reports that McNamara was hostile toward Heidi Miller, who was employed with EWDC IT, which Miller reported to her supervisor Sandy Harp. Harp reported McNamara’s behavior to Deputy Secretary Josh Benton, and Hammons believed this is one of the instances that led him to speaking with McNamara regarding his tone and the importance of chain-of-command. There was another instance where McNamara gave a direct order to a Commonwealth Office of Technology (COT) employee and told the employee, “You need to get this done.” Hammons was not present for every instance of McNamara berating other employees, but staff did tell him that there were issues.

123. Hammons testified that he immediately addressed with McNamara the behavioral issues reported to him. Hammons recalled one specific instance where

McNamara came to his office and he addressed these issues with him. McNamara said, "I know, I know, I'll do better." Hammons also received text messages from McNamara where he acknowledged he should not have said something or lost his temper. In conversations with Hammons, McNamara would admit that he should not have done this or said that or should not have berated this individual or lost his cool, but then the occurrence would happen again. "And it seemed to be day to day, it's just when something didn't go right or something happened that aggravated Muncie, you know, it was just hard for him to control his reaction."

124. Hammons recalled thinking if McNamara had an opinion and someone disagreed, he did not like that. Roark and Benton informed Hammons that McNamara was very condescending, very loud, very direct and forceful to them. "[T]hey were uncomfortable with how he presented his argument or whatever it was against whatever they were doing."

125. The Appellant introduced **Appellant's Exhibit 35** (Screen shot of text exchange between Hammons and McNamara dated April 24, 2020; *also identified as EWDC Exhibit 19, 0150*) and asked the witness about the document. In his response to McNamara's text message, Hammons testified he was again explaining that people in state government do not answer outside of their chain-of-command and noted McNamara's tone and delivery. Hammons again offered assistance to McNamara.

126. In this text exchange, Hammons wrote "[t]he protest wasn't brought up to me about today's meeting, not going to lie to you. UI Commission issue." Hammons explained the reference to "UI Commission issue" arose from the issue that he testified about earlier (i.e., McNamara spoke to members of the Cabinet's legal team in an unprofessional manner to express his disagreement to the KUIC appointment and never addressed it with Hammons). "I don't think there is any issue with anyone expressing a protest or disagreement in this office, but going at someone ... the delivery, that was the issue. Again, I still don't know what his protest was." Hammons also stated the decision to appoint Meredith to the KUIC was not his decision or McNamara's decision or DWI's decision; it was the EWDC Secretary's decision.

127. Prior to the text exchange contained in **Appellant's Exhibit 35** (**EWDC Exhibit 19, 0150**) dated April 24, 2020, Hammons testified that McNamara never told him anything about any health issue. From observing him, Hammons stated he seemed very agitated, and in meetings McNamara would slap his hand on the table or lay his head on the table and say "just give it to me, give it to me." Hammons recalled that McNamara once mentioned he dealt with anxiety at times. Hammons stated that he and McNamara did not talk about his anxiety; he just mentioned something like "I'm anxious right now, I deal with anxiety."

128. Hammons identified **Appellant's Exhibit 25 (EWDC Exhibit 10, 0052)** as an email from him to Roark sharing what occurred following issuance of the Notice of Corrective Action to McNamara. He recalled previously sharing this information with Roark face-to-face on Monday, April 27, 2020, but was then asked to memorialize his recollections in writing, which he did. Hammons testified McNamara violated the Notice of Corrective Action the weekend following its issuance by refusing to collaborate with the Cabinet's legal office and going after Decker again with an inappropriate tone in communications.

129. Hammons testified that he was not part of the discussions regarding terminating McNamara's employment.

130. Regarding McNamara's protest to the use of outside vendors in OUI, Hammons testified that McNamara was welcome to provide the protest to him and confirmed to him he had a right to protest. Hammons stated that Cabinet leadership previously discussed the issue and third-party staff were already in-house assisting with unemployment insurance claims, so Hammons did not understand McNamara's concern. Hammons recalled multiple conversations over the course of weeks about the use of outside vendors to assist with claims. He also recalled that EWDC Legal had checked into the outside vendor issue and OUI had met all requirements needed to move forward with using third parties. Hammons confirmed that he signed the Cabinet's Response to McNamara's Formal Protest (**EWDC Exhibit 8, 0044-0049**) and understood the document, but it was prepared by EWDC Legal. Hammons also confirmed that he did not have a concern about the use of outside vendors because the EWDC had done its due diligence prior to proceeding.

131. Hammons testified that it was necessary to discharge McNamara because (1) his behavioral issues were addressed with him many times, (2) McNamara would agree that he needed to change his tone and was out of line, and (3) the behavioral issues continued to occur.

132. On cross-examination, Hammons confirmed that he received text messages from McNamara on February 28, 2020 (**EWDC Exhibit 19, 0141**), wherein he stated the following: "I'm sorry I got so upset today. I was just so overwhelmed with the reorg and then the scanner that was going to shut down the department. That got worked out. But I was honestly like how am I supposed to fix anything on these time frames if I can even buy a scanner that we need. It takes a lot to make me lose my temper but that did it and that's why I walked away and cooled off, because no one needs to get yelled at. So again. Apologies." Hammons testified that McNamara was prone to getting upset when things did not go the way he wanted.

133. Hammons confirmed that he received text messages from McNamara on March 22, 2020 (pg. 0143), wherein he stated the following: "You need to talk to josh. He put me on a project to expand coverage without the feds blessings. And I figured it out and wrote an EO yesterday and today legal got a hold of it and I've been fighting with them. I'm 100% on board with what josh wants to do. Legal is trying to tell is we can't." Hammons testified that if McNamara decided he was right, he typically was not going to agree with others, particularly with the Cabinet's legal team. McNamara seemed to have a lot of issues with the legal team.

134. Hammons confirmed that he received text messages from McNamara on April 14, 2020 (pg. 0146), wherein he stated the following: "My deal is COT and Communications are in the way. And I'm sick of listening To them. Legal was also in the way and I just cut Tess out of our loop. I only deal with Johanna. I'm sorry I got so hot. I'm so frustrated with all of this. Josh told me to take a beat. Does that mean I'm suspended? Because I'm planning on coming in tomorrow otherwise. But I'm not going to mess with you guys." Hammons stated these text messages serve as another example of McNamara's tendency to get very upset with his colleagues when things did not go the way he wanted.

135. Hammons testified that, in a text message, McNamara admitted to berating colleagues. On April 24, 2020, McNamara texted Hammons "[a]nd I will admit I probably berated Joanna and Tess. I thought I could be a lawyer with them. That's how lawyers are. Dondra also." (EWDC Exhibit 19, 0150). Hammons testified that McNamara sent him several text messages admitting that he should not have said or done something.

136. An email entitled "RE: SAR Approval" (EWDC Exhibit 40, 0240-0241) captures a March 5, 2020 email exchange regarding a COT employee named Kane and his difficulties accessing a product. McNamara sent an email to Kane stating the following: "Hi Kane. This is part of the UI process that is a priority of the Governor. Whatever your holdup is get in the phone with Jerome here and get it done today. I don't care what it takes." Cabinet employee Sandy Harp forwarded this email to EWDC Deputy Secretary Benton, who responded, "I passed it along to Marty. He's going to have another conversation with him. If I need to apologize to anyone let me know." Hammons did speak with McNamara and informed him to alert Hammons if he needs something done. Hammons also reiterated that COT employees do not take orders from individuals outside of their supervisors and chain-of-command.

137. Hammons confirmed that he received text messages from McNamara on April 14, 2020 (pg. 0145), wherein he stated the following: "I'm sorry but you can't legislate for stupid. I'm open to suggestions. Tell me how we can explain this to dumb

people. I know that's not nice to say but we all know it's true. We have dumb people in this state. ... I'm pretty close to being done. I'm don't want to hear from communications. They are getting in the way. And I'm sorry but people are fucking stupid and if they can't get their shit together then fuck them. Sandy has been overwhelmed but she's been amazing and I'm not going to listen to holly shit on her." Hammons did not consider these messages to be appropriate communications from the Executive Director of OUI.

138. Hammons identified an email entitled "UI Family First Act 2nd Allotment" (EWDC Exhibit 30, 0213) as an April 23, 2020 email to him from EWDC employee Jacob Fouts, wherein Fouts alerted Hammons that McNamara had not responded to his request for a program report necessary for funding. Hammons testified that he commonly received reports from staff that McNamara was not getting back to them on questions or inquiries, and there were numerous times where OUI staff would stop Hammons in the hallway and say they need answers from McNamara.

139. Hammons confirmed that he received text messages from McNamara on March 6, 2020 (pg. 0142), wherein he stated the following: "So am I getting fired? Because I texted josh a while ago and said I'm sorry I feel like I insulted your integrity. And he said thanks for the feedback. I raised a concern. I talked to JC. I think he's pissed at me for going over his head." Hammons stated this communication is an example of how McNamara would go outside of the chain-of-command.

140. Hammons testified McNamara had trouble delegating tasks to subordinates. During the weekly Executive Leadership Team meetings when unemployment insurance issues were discussed, he would say "just send it to me, just send it to me" time and time again regardless of whether it dealt with an unemployment insurance claim or guidance. McNamara would state, "I'll handle it, I'll take care of it."

141. Hammons discussed conduct and performance issues with McNamara, including the need to set a better example for staff, and McNamara would say he would do better. Hammons heard that numerous times. After these conversations, Hammons stated McNamara would do better for a little bit of time, but as soon as something set him off, he would revert to a belligerent, aggravated attitude.

142. Hammons recalled that Roark alerted him of the decision to issue corrective action to McNamara, and that he agreed with that decision. Even after multiple discussions with him, it seemed to Hammons that McNamara's unprofessional behavior was getting more common and even more hostile at times.

143. Hammons confirmed that he reviewed the Notice of Corrective Action (EWDC Exhibit 9, 0050-0051) prior to its issuance to McNamara. Hammons agreed with

the performance and behavior issues identified in the document. Hammons also confirmed the Notice does not state "you are not to raise concerns."

144. Hammons was present along with Rieber in the meeting where McNamara received the Notice of Corrective Action. Hammons testified that McNamara received corrective action to alert him to behavior and performance issues with the hope that he could change course and do better.

145. Hammons identified an email he sent to Roark entitled "response" (EWDC Exhibit 10, 0052), and stated this email accurately reflects his recollection of the corrective action meeting with McNamara and subsequent events. Hammons testified that McNamara violated the Notice of Corrective Action in his communications to Decker following issuance of the Notice. Hammons again recalled speaking with Roark on Monday, April 27, 2020, regarding McNamara's communications over the weekend following issuance of corrective action.

146. Hammons received a text message from McNamara on April 26, 2020 (pg. 0156), wherein he stated the following: "I spoke with josh. I'm still unsure if I want to come back on Monday. I'll have to go through you for everything legal. I can't have a conversation where Joanna is a participant ever again. I've lost all trust in the legal team." McNamara also sent the following text message to Hammons on that same day (pg. 0158): "I will no longer communicate to the legal team. If I need something from them I'll ask you. If they need something from me they must ask you." Hammons testified that the Executive Director of OUI cannot effectively do their job without communicating directly with the Cabinet's legal staff.

147. Hammons testified that he understood the Governor's Office had made the decision to terminate McNamara's employment.

148. On April 28, 2020, McNamara informed Hammons for the first time that he had a heart condition. Approximately one hour later, McNamara informed Hammons that he was leaving early to go to the doctor. In a text message to Hammons sent on April 28, 2020, at 4:33 PM (pg. 0152), McNamara stated "[m]y cardiologist sent me to ER so I am on the way there currently."

149. Hammons testified that McNamara came to work the following day (April 29, 2020). McNamara informed Hammons that the emergency room doctor said, "you have an important job to do, so you need to get back and do the people's work." McNamara also stated that the doctor informed him that he needed rest. Roark then told McNamara that he needed to go home until he provided Human Resources with a

doctor's note releasing him to return to work. Hammons confirmed that McNamara did provide a doctor's note to Human Resources.

150. Roark informed Hammons of the decision to terminate McNamara's employment. He was unable to recall the specific date of this notification, but testified he received it prior to McNamara being off for three (3) days pursuant to the doctor's recommendation (i.e., prior to April 30, 2020).

151. Hammons was present on the morning of May 5, 2020, along with Personnel Cabinet Department of Human Resources Administration Commissioner Bailey, to deliver the termination notification to McNamara. Roark and Rieber asked Hammons to attend that meeting with Commissioner Bailey. Roark and Rieber felt it was best to have a male present with Commissioner Bailey when she delivered the notification.

152. On re-direct, Hammons was asked how someone is supposed to raise concerns without engaging in conversation, and he responded if McNamara still had concerns after expressing them, he could reach out to him or put his concerns in an email. McNamara had previously raised his concerns in an email or letter.

153. The Appellant rested its case. No further witnesses were called by the Appellee since the Appellee had the opportunity to question witnesses during the Appellant's case. The Appellee's counsel made a closing argument, arguing that the Appellant had failed to provide any evidence that the decisions to issue corrective action or terminate were motivated by an alleged disability or to discourage or punish the Appellant for voicing disagreement with Cabinet decisions.

FINDINGS OF FACT

McNamara's Employment with the EWDC

1. Muncie McNamara, a Governor-appointed non-merit employee, was employed as the Executive Director of the Office of Unemployment Insurance with the Appellee, formerly known as the Education and Workforce Development Cabinet, from January 16, 2020, through May 5, 2020. (EWDC Exhibit 3, 0025; EWDC Exhibit 12, 0055). He was dismissed without cause by letter dated May 5, 2020, signed by Personnel Cabinet Department of Human Resources Administration Commissioner Mary Elizabeth Bailey. (EWDC Exhibit 12, 0055). The letter stated that his services were no longer needed. (*Id.*) As a Governor-appointed non-merit employee, McNamara served at the pleasure of the Governor and could be dismissed without cause at any time. (Testimony of Beth Roark, Commissioner Mary Elizabeth Bailey).

2. There is an expectation that state government employees will act in a professional and courteous manner to one another. (Testimony of Commissioner Mary Elizabeth Bailey, Beth Roark, La Tasha Buckner.) Governor-appointed non-merit employees are also expected to exhibit behavior that is becoming of a leader. (Testimony of Commissioner Mary Elizabeth Bailey, La Tasha Buckner).

3. Beginning in mid-March 2020, when the Governor issued Executive Orders instantaneously closing certain businesses due to the COVID-19 pandemic, OUI was suddenly inundated and required to work through and address an unprecedented number of unemployment insurance claims. (Testimony of Audrey Haydon, Lt. Governor Jacqueline Coleman, Beth Roark, Honor Barker, Marty Hammons).

4. Throughout his employment with EWDC, McNamara consistently exhibited unprofessional and inappropriate behavior. (Testimony of Joanna Decker, Lt. Governor Jacqueline Coleman, Beth Roark, Honor Barker, Susan Rieber, LaTasha Buckner, Marty Hammons). This unprofessional behavior included:

a) Inappropriate and aggressive interactions with colleagues, including admittedly berating coworkers. (Testimony of Susan Rieber, Joanna Decker, Beth Roark, Honor Barker, Marty Hammons, and **EWDC Exhibits 17 and 19**);

b) Speaking disrespectfully of Unemployment Insurance claimants. (Testimony of Beth Roark, Honor Barker, and **EWDC Exhibits 17, 19**);

c) Repeated use of unprofessional and inappropriate language in written communications with coworkers. (**EWDC Exhibits 17, 19, 28, 36, 39**);

d) Not responding to inquiries in a timely and consistent manner. (Testimony of Beth Roark, Honor Barker, Marty Hammons, and **EWDC Exhibits 27, 30**);

e) Repeatedly going outside of the chain-of-command to address issues. (Testimony of Honor Barker, Marty Hammons, and **EWDC Exhibits 19, 20**).

5. The Kentucky Employee Handbook (**EWDC Exhibit 48, 0269-0270**) states “[a]ll employees must avoid offensive or inappropriate behavior at work.” McNamara

did not avoid offensive or inappropriate behavior at work. (Testimony of Joanna Decker, Lt. Governor Jacqueline Coleman, Beth Roark, Honor Barker, Susan Rieber, La Tasha Buckner, Marty Hammons).

6. Marty Hammons, McNamara's direct supervisor, repeatedly addressed these behavioral issues with him. (Testimony of Marty Hammons, Honor Barker). McNamara acknowledged these issues and stated he would do better. However, the unprofessional behavior continued. (Testimony of Marty Hammons).

7. EWDC Chief of Staff Susan Rieber became aware of McNamara's pattern of unprofessional behavior in late March/April 2020 through personal observation during weekly Executive Leadership Team meetings attended by Rieber and McNamara as well as through oral reports from EWDC leadership to Rieber. (Testimony of Susan Rieber, Beth Roark). In early April 2020, discussions began among the EWDC leadership team about how to address McNamara's behavior and performance. (Testimony of Susan Rieber, Beth Roark).

8. Approval from the Governor's Office, specifically from La Tasha Buckner in her role as Chief of Staff for the Office of the Governor, was required for personnel decisions involving Governor-appointed non-merit employees of the Executive Branch. (Testimony of Beth Roark, Susan Rieber, La Tasha Buckner). In 2020, these non-merit personnel decisions were made by Buckner in collaboration with EWDC leadership. (Testimony of Beth Roark, Susan Rieber, La Tasha Buckner).

9. During McNamara's employment with EWDC, Roark expressed concerns and/or issues EWDC experienced with McNamara to Rieber. (Testimony of Beth Roark, Susan Rieber, La Tasha Buckner). Rieber then communicated those issues and/or concerns to Buckner. (Testimony of Beth Roark, Susan Rieber, La Tasha Buckner).

10. On April 20, 2020, following consultation with Rieber and Personnel Cabinet Department of Human Resources Administration Commissioner Bailey, Buckner made the decision to issue corrective action to McNamara. (Testimony of Susan Rieber, La Tasha Buckner, Beth Roark). Corrective action addresses any type of performance issues or other things of concern to try to improve the situation with an employee. (Testimony of Commissioner Mary Elizabeth Bailey, Beth Roark). There is no standard for how specific the behavioral or performance issues must be stated in a notice of corrective action; it is acceptable to generally say "do better" because corrective action is not required to be given to a Governor-appointed non-merit employee. (Testimony of Commissioner Mary Elizabeth Bailey).

11. Buckner credibly testified regarding her reasoning for issuing corrective action to McNamara. "At that point I had been made aware by Ms. Rieber that he had berated, been disruptive, disrespectful to employees internally and externally, I think they presented a couple of options – termination, corrective action, there might have been another one in there – and because of the timing and because I didn't know Mr. McNamara, I thought it might benefit from a reset essentially, an opportunity to point out what the problems have been and give him a chance to conform. ... [G]iven the fact that he was heading up UI at the time, if there was any way to salvage it, and allow him to reset, I hoped that could happen. I didn't know him, but I had no reason to dispute the reports that were coming to me through Susan Rieber, so it was a chance to reset."

12. Buckner did not communicate with anyone other than Rieber and Commissioner Bailey about issuing the Notice of Corrective Action (**EWDC Exhibit 9, 0050-0051**) to McNamara. Buckner does not independently investigate information related to behavioral misconduct from non-merit employees, and she relies on the information provided by agency leadership when making non-merit personnel decisions. (Testimony of La Tasha Buckner). Because Rieber was Chief of Staff for EWDC in April 2020, Buckner dealt with her and no other EWDC staff when deciding how to address McNamara's behavior. (Testimony of La Tasha Buckner).

13. Buckner did not participate in the drafting of the Notice of Corrective Action or see any drafts prior to issuance. (Testimony of La Tasha Buckner). She had no substantive conversations with anyone about what to include in the Notice, nor did she review it prior to issuance. (Testimony of La Tasha Buckner). Further, she "had no substantive knowledge of Mr. McNamara, nor his job duties nor anything going on over there other than the behavioral aspects." (Testimony of La Tasha Buckner).

14. Rieber informed Roark of the decision to issue corrective action to McNamara a couple of days before McNamara received the Notice of Corrective Action. (Testimony of Beth Roark, Susan Rieber). Barker drafted the Notice of Corrective Action issued to McNamara. (Testimony of Honor Barker, Marty Hammons). The Notice of Corrective Action contained the bulk of the behavioral issues exhibited by McNamara during his employment with the Cabinet. (Testimony of Beth Roark, Honor Barker, Marty Hammons). While the Notice does not reference specific rules or policies violated by McNamara, it does broadly and accurately outline the issues and behaviors of concern. (Testimony of Beth Roark, Susan Rieber, Marty Hammons, Honor Barker).

15. The Notice of Corrective Action included the directive that McNamara was "not to engage in conversation related to UI Commission appointments." This language was included after Hammons reviewed Barker's original draft. (Testimony of Honor Barker, **EWDC Exhibit 9**).

16. In the late afternoon of April 24, 2020, McNamara received the Notice of Corrective Action during a meeting with Hammons and Rieber. (Testimony of Susan Rieber, Marty Hammons, **EWDC Exhibit 9**). Corrective action was issued to McNamara to alert him to behavior and performance issues with the hope that his behavior would improve. (Testimony of La Tasha Buckner, Beth Roark, Susan Rieber, Honor Barker, Marty Hammons).

17. McNamara violated the Notice of Corrective Action shortly after its issuance. (Testimony of Beth Roark, Susan Rieber, Marty Hammons, Honor Barker, Joanna Decker, **EWDC Exhibits 9, 10, 17, 19, 25**). Specifically, the Notice of Corrective Action informed McNamara that he was “not to act defiantly or express refusal to collaborate or effectively work with others in the organization.” (**EWDC Exhibit 9**). In communications sent to colleagues dated April 24, 25, and 26, 2020, McNamara stated he would no longer directly communicate with the EWDC’s legal office and blamed then-General Counsel Joanna Decker for his receipt of the corrective action. (Testimony of Marty Hammons, Joanna Decker, **EWDC Exhibits 10, 19, 25**). This conduct was in direct violation of the express expectation to “not act defiantly or express refusal to collaborate or effectively work with others in the organization.” (Testimony of Marty Hammons, Susan Rieber, Joanna Decker, Beth Roark, Honor Barker).

18. Rieber contacted Buckner to discuss McNamara’s reaction to corrective action. Buckner was made aware that McNamara did not receive the Notice of Corrective Action in a way that indicated he would be able to comply, meaning his reaction was negative. “His negative reaction at the time that I was informed of it gave me the impression that he would not be able to comply and that he violated during the meeting and that we were probably going to have to move very quickly toward termination.” (Testimony of La Tasha Buckner).

19. Buckner made the decision to terminate McNamara’s employment. (Testimony of La Tasha Buckner, Susan Rieber). The record shows that this decision was made prior to the afternoon of April 28, 2020. (**EWDC Exhibit 18**). Buckner credibly testified regarding her reasoning for the termination decision: “[McNamara] was in a position of leadership and he displayed behavior that was unbecoming, including berating fellow employees, being insubordinate and rude and failing to comply with directives. ... It’s one thing to do your job or to do it well. It’s another thing entirely to be someone in a leadership position that doesn’t represent expectations of a leader, which is not to belittle anyone, certainly to do as you are asked to do and work with other people, which, in this case, he was not doing so and it was internal and external, so those were things that once this was pointed out with the hopes that he would be able to conform his behavior, his conduct, and he didn’t, there’s nothing else you can do with

that, that's not otherwise correctable. If someone's just not doing their job well, there's the ability to point out job performance aspects, but in state government typically there's two things. It's a lack of good job performance and then it's basically misbehavior. And this fell into the category of misbehavior." (Testimony of La Tasha Buckner). "Mr. McNamara was terminated because he could not conform his behavior to that of someone who should be in leadership and was becoming a disruption more than anything." (Testimony of La Tasha Buckner).

20. Personnel Cabinet Department of Human Resources Administration Commissioner Bailey was contacted as part of the approval process for terminating a Governor-appointed non-merit employee. (Testimony of Commissioner Mary Elizabeth Bailey). Once contacted about terminating a non-merit employee, Commissioner Bailey conducts various human resources checks, including reviewing the employee's career service status, checking to see if the employee recently returned from military leave, or whether the employee was recently returned by a physician from sick leave. (Testimony of Commissioner Mary Elizabeth Bailey). Prior to McNamara's dismissal, Commissioner Bailey performed her standard checks and informed Buckner that the dismissal may proceed from a human resources perspective. (Testimony of Commissioner Mary Elizabeth Bailey).

21. The Hearing Officer finds that Buckner relied entirely on representations made to her by EWDC Chief of Staff Rieber and Commissioner Bailey when making the decision to move forward with terminating McNamara's employment. (Testimony of La Tasha Buckner). Buckner credibly testified that "Mr. McNamara was terminated for conduct unbecoming of someone in leadership; that whatever differences of opinion he might of expressed were not known to me at the time and for which none of that excuses the behavior he was engaged in at the time."

22. Commissioner Bailey drafted and delivered the notice of termination (EWDC Exhibit 12, 0055-0057) to McNamara on May 5, 2020.

McNamara's Health

23. At some point during his employment, McNamara told Joanna Decker, Beth Roark, and Marty Hammons that he dealt with anxiety. (Testimony of Joanna Decker, Beth Roark, Marty Hammons). He did not characterize his anxiety as a disability, and assured Decker that he was okay. (Testimony of Joanna Decker, Beth Roark, Marty Hammons).

24. McNamara (1) never informed EWDC Human Resources that he suffered from a disability, (2) never completed an Accommodation Request Form, (3) never

provided written documentation to EWDC concerning any disability, and (4) never requested a Kentucky Employee Assistance Program (KEAP) referral to assist with job related stress or anxiety. (Testimony of Beth Roark, **EWDC Exhibit 5**).

25. During the afternoon of April 28, 2020, McNamara informed Hammons for the first time that he had a heart condition. Approximately one hour later, McNamara informed Hammons that he was leaving early to go to the doctor. In a text message to Hammons on April 28, 2020, at 4:33 PM (**EWDC Exhibit 19, 0152**), McNamara stated, "My cardiologist sent me to ER so I am on the way there currently." These communications constitute the first time McNamara informed any member of the EWDC leadership team of any alleged heart condition. (**EWDC Exhibit 14, 0070**).

26. Also, on April 28, 2020, McNamara told Roark that the doctor told him he was about to have a stroke. Roark told him to go to the doctor and to obtain a Fitness for Duty Statement from the doctor. (Testimony of Beth Roark).

27. Following his trip to the emergency room on April 28, 2020, McNamara provided a doctor's note to Roark, dated April 29, 2020 (**EWDC Exhibit 11, 0053-0054**), stating he was to be off work "for the next 3 business days. He can RTW [return to work] without restriction after that. Yes to a high stress job." (Testimony of Audrey Haydon, Beth Roark). This doctor's note was sufficient for McNamara to return to the office following the three (3) business days off. (Testimony of Beth Roark, Commissioner Mary Elizabeth Bailey).

28. The Hearing Officer finds that Buckner was not aware of any alleged medical conditions that McNamara claimed to have prior to her decisions to issue corrective action or terminate his employment. (Testimony of La Tasha Buckner). The Hearing Officer further finds McNamara's medical conditions were not the reason for his corrective action or dismissal.

29. McNamara died on March 7, 2021. (Testimony of Audrey Haydon).

Protests to Cabinet Decisions

30. On April 22, 2020, McNamara alerted EWDC leadership via text message and email of his disagreement with the Cabinet's decision to move forward with using outside vendors to assist with processing unemployment insurance claims. (**EWDC Exhibits 17, 35**). In the weeks leading up to April 22, 2020, the use of outside vendors had been repeatedly discussed during conference calls at the weekly EWDC Executive Leadership Team meetings where McNamara was present, and he voiced no objection to the use of outside vendors during those calls. (Testimony of Joanna Decker, Beth Roark,

Susan Rieber, Marty Hammons, EWDC Exhibit 17, 0128, EWDC Exhibit 35, 0228, EWDC Exhibit 42, 0244). EWDC Deputy Secretary Josh Benton addressed McNamara's concerns, acknowledged that he heard him, and again informed McNamara of EWDC's decision to proceed. (Testimony of Beth Roark, EWDC Exhibit 35, 0228, EWDC Exhibit 42, 0244).

31. On April 23, 2020, McNamara tendered a Formal Protest of Agency Action to members of EWDC leadership that memorialized his disagreement regarding use of outside vendors. (EWDC Exhibit 7). EWDC leadership provided McNamara with a written response to his Formal Protest on April 28, 2020, wherein his concerns were addressed and shown to be without merit. (EWDC Exhibit 8).

32. The use of outside vendors to assist OUI in April 2020 had been thoroughly reviewed by EWDC leadership and legal staff and no issues were identified to prohibit EWDC from moving forward. (Testimony of Joanna Decker, Beth Roark, Susan Rieber, Marty Hammons, EWDC Exhibit 8).

33. On April 24, 2020, McNamara also informed EWDC staff of his disagreement with the Cabinet's decision to appoint Deputy General Counsel Dondra Meredith to the Kentucky Unemployment Insurance Commission (KUIC), arguing that it was a conflict of interest. (Testimony of Joanna Decker, Marty Hammons, Greg Higgins, EWDC Exhibit 17, Exhibit 24.) Meredith's appointment had also been discussed during conference calls at the weekly EWDC Executive Leadership Team meetings where McNamara was present prior to April 24, 2020. (Testimony of Joanna Decker, EWDC Exhibit 17, 0130).

34. Meredith's appointment had been thoroughly discussed by EWDC leadership and reviewed by EWDC legal staff and no issues were identified to prohibit EWDC from moving forward. (Testimony of Joanna Decker, Beth Roark, Susan Rieber, Marty Hammons.) The record shows McNamara was the only employee who expressed the opinion that the appointment should not occur.

35. Buckner was not aware that McNamara had objections regarding use of outside vendors to assist OUI or Meredith's appointment to the KUIC prior to her decisions to issue corrective action and then terminate his employment. (Testimony of La Tasha Buckner).

36. During McNamara's employment, there were some performance issues, including McNamara being too concerned with individual claims and not enough with running the Unemployment Insurance Program, which was the primary function for OUI's Executive Director. Nonetheless, the main concerns with McNamara's performance were his behavior issues. As a result of those persistent behavioral issues,

McNamara's overall workplace performance was brought to the attention of La Tasha Buckner, the Governor's Chief of Staff. Buckner decided to give McNamara a chance to "reset" and correct some of these problems through EWDC's issuance of Notice of Corrective Action. McNamara was fired, in large part, because he reacted inappropriately to the Notice of Corrective Action. The Hearing Officer finds that McNamara's text message to Decker blaming her for the issuance of the Notice of Corrective Action and McNamara's refusal to work directly with her or anyone else with the legal staff combined with his other text messages were the reason he was fired.

- a) As counsel for the Appellee stated in his closing argument at the end of the testimony, there is no great mystery in this case. The reasons McNamara was fired were the exact reasons the witnesses stated.
- b) The Hearing Officer finds the testimony of Decker, Roark, Rieber, and Buckner credible about the events that occurred leading up to McNamara's firing.
- c) The Hearing Officer specifically finds that the facts as to whether or not McNamara's medical condition is considered a disability, his medical condition, the Appellee's perception of his condition, and the fact that he requested three (3) days off of work based on a doctor's note, are largely irrelevant as the Appellant has failed to establish that these issues had any nexus with EWDC's decision to terminate McNamara.
- d) McNamara had every right to raise concerns about Meredith's appointment to the Unemployment Commission and potential concerns implicit with allowing third-party vendors access to unemployment claimants' personal information and the Hearing Officer would note that the Appellee's reaction to McNamara raising his concerns was definitely less than ideal. Nonetheless, the Hearing Officer specifically finds that McNamara's protests regarding Meredith's appointment to KUIC and about the use of third-party vendors had nothing to do with Buckner' and EWDC's decision to terminate his employment.
- e) The Hearing Officer also specifically finds that Roark's response to McNamara's statement that he was told he was going to have a stroke by his doctor was a perfectly reasonable response.

CONCLUSIONS OF LAW

1. As an unclassified non-merit employee, McNamara could be fired at any time without cause. KRS 18A.095 and *Martin v. Corrections*, 822 S.W.2d 858 (Ky. 1991).
2. McNamara properly invoked the jurisdiction of the Personnel Board when he filed his appeal and alleged that his dismissal was the result of disability discrimination and whistleblower-type retaliation. KRS 18A.095(14)(a) and *Martin v. Corrections*, 822 S.W.2d 858 (Ky. 1991).
3. McNamara lodged a claim that EWDC discriminated against him on the basis of a disability. McNamara's alleged disabilities seem to be anxiety and an ill-defined heart condition. Any employee who believes he or she has been discriminated against may appeal to the Kentucky Personnel Board. KRS 18A.095(14)(a). McNamara was required to prove this claim by a preponderance of the evidence. KRS 13B.090(7).
4. In Kentucky, an individual is afforded a right of action against his or her employer due to discrimination because the person is a qualified individual with a disability. KRS 344.040(1)(a). The general purposes of Chapter 344 of the Kentucky Revised Statutes include the safeguarding of all individuals within the state from discrimination based on disability and to "protect their interest in personal dignity and freedom from humiliation ..." KRS 344.020(1)(b).
5. Federal law prohibits "a covered entity" from discriminating against "a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a). A "covered entity" includes an employer. 42 U.S.C. §12111(2). In this case, the Appellee, as employer, is a "covered entity."
6. The Appellant bears the initial burden of establishing a *prima facie* case of disability discrimination against the Appellee. *Hedrick v. Western Reserve Care System*, 355 F.3d 444 (6th Cir. 2004); *Snead v. Metropolitan Property & Cas. Ins. Co.*, 237 F.3d 1080 (9th Cir. 2001). To establish a *prima facie* case of discrimination based on a disability, the Appellant must show: (1) that they had a disability as that term is used under the statute, (2) that they were "otherwise qualified" to perform the requirements of the job, with or without reasonable accommodation, and (3) that they suffered an adverse employment decision because of the disability. *Henderson v. Ardco, Inc.*, 247 F.3d 645, 649 (6th Cir. 2001); *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 706-707 (Ky. App. 2004). Here, McNamara has failed to establish either that he had a disability as that term

is used under the relevant statute, or that he suffered an adverse employment decision because of the diagnoses that he contends constituted a disability.

7. A "disability" is defined in KRS 344.010(4) as: (a) a physical or mental impairment that substantially limits one or more of the major life activities of the individual, (b) a record of such an impairment, or (c) being regarded as having such an impairment.

8. McNamara alleges that he was diagnosed with anxiety and a heart condition and that, therefore, he had a disability. A diagnosis, however, is not the same as an impairment. *Hallahan*, 138 S.W.3d at 709 ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual"). Evidence in this matter showed none of McNamara's medical or mental health service providers advised that he had an impairment that substantially limited one or more of his major life activities. He was never placed on any type of restrictions for work. In fact, the only medical documentation that McNamara provided to EWDC related to any alleged disability was a doctor's note, dated April 29, 2020, that stated he could return to work without restriction following three (3) business days off and specifically indicated "Yes to a high stress job." McNamara also (1) never informed EWDC human resources that he suffered from a disability, (2) never completed an Accommodation Request Form, and (3) never requested a KEAP referral to assist with job related stress or anxiety.

9. McNamara has failed to show he meets the definition of disabled under KRS 344.010(4)(a) because the record is devoid of any evidence that he had a physical or mental impairment that substantially limited one or more major life activity.

10. To demonstrate that McNamara was "regarded as" a person with a disability under KRS 344.010(4)(c), he must prove: "(1) A covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) A covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities." *Howard Baer, Inc., et al. v. Shave*, 127 S.W.3d 589, 594 (Ky. 2003). "The Court's focus in a regarded-as-disabled claim, then, is not upon the individual alleging discrimination, but instead is upon the state of mind of the employer." *Laferty v. United Parcel Service, Inc.*, 186 F.Supp.3d 702, 711 (W.D. Ky. 2016). "When working is the affected major life activity, the employee must demonstrate not only that the employer thought that [he] was impaired in [his] ability to do the particular job, but also that the employer regarded [him] as substantially impaired in either a class of jobs or a broad range of jobs in various classes." *Id.*

11. Regarding anxiety, the evidence shows that McNamara informed Joanna Decker, Marty Hammons, and Beth Roark that he dealt with anxiety. McNamara did not characterize his anxiety as a disability and specifically assured Decker that he was okay and able to manage his anxiety. Regarding his alleged heart condition, the record is clear that McNamara did not alert EWDC leadership as to having any such condition until the afternoon of April 28, 2020, which was after the decisions to issue corrective action and terminate his employment were made.

12. The evidence establishes that Buckner, who made the decisions to issue corrective action and to dismiss McNamara, did not perceive or have actual knowledge that McNamara had any physical or mental impairments prior to her decisions to issue corrective action and terminate McNamara's employment. Further, without such actual or perceived knowledge, any alleged act by EWDC against McNamara would lack a nexus to such act being discriminatory based on disability.

13. For these reasons, the Hearing Officer finds that McNamara was not "regarded as having such an impairment" by EWDC and was not discriminated against based on a disability. Consequently, McNamara has failed to carry their burden of proof to establish that McNamara's dismissal was the result of disability discrimination.

14. Moreover, even if EWDC determined that McNamara was either disabled or regarded as disabled, his claim still fails because the evidence fails to establish that he was fired because of his disability. *Hallahan v. the Courier-Journal*, 138 S.W.3d 699, 706-707. (Ky. Ct. App. 2004).

15. McNamara has also made a claim that EWDC retaliated against him for making protected disclosures and raising oppositions to certain decisions by EWDC leadership. On his Appeal Form, McNamara checked the box for "OTHER PENALIZATION" and specified "Retaliation / Whistleblower Retaliation." McNamara also stated "I believe I was fired in retaliation for raising the privacy/data issues and the ethical issue ..."

16. Having read previous Personnel Board cases, the briefs of the parties, and the whistleblower statute itself, the Hearing Officer concludes that the Personnel Board does not have jurisdiction to hear a whistleblower claim brought pursuant to KRS 61.101, *et seq.* The whistleblower statute sets forth a very specific statutory scheme allowing actions to be filed in circuit court within ninety (90) days after the occurrence of the alleged violation. KRS 61.103(2). The whistleblower statute also contains very specific provisions regarding the burden of proof and burden shifting. KRS 61.103(3). None of the provisions of the whistleblower statute convey jurisdiction over such claims.

17. Separately, the Personnel Board has previously exercised jurisdiction over retaliation claims. The Hearing Officer concludes that the basis for jurisdiction of these claims is KRS.095(1), (9), and (14)(a), which is a different font of jurisdiction than the whistleblower statute. The specific provision that applies in this case is KRS 18A.095(14)(a), which reads, "any employee, applicant for employment, or eligible on a register, who believes he has been discriminated against, may appeal to the board." As the Kentucky Supreme Court determined in *Martin v. Corrections Cabinet of Commonwealth*, 822 S.W.2d 858 (Ky. 1991), this subsection is broader than subsection (12) of KRS 18A.095 and permits appeals of all forms of illegal discrimination. The court, in *Martin*, frames the discrimination at issue as "this appeal is in regard to a discharge in retaliation for refusal to violate the prohibitions of KRS 18A.140 against political favoritism." *Martin* at 860. Clearly the court in *Martin* considered KRS 18A.095(14)(a) discrimination to include illegal retaliation.

18. The Personnel Board has adjudicated several retaliation claims without applying the burden shifting or burden of proof established in KRS 61.103(3). *Kenneth Tramontin v. Cabinet for Health and Family Services*, 2005 WL 6154637 (KY PB 2003-372); *Janet Bewley v. Cabinet for Health and Family Services*, 2002 WL 34428687 (KY PB 2001-243 and 2002-069); *Leonard Gardenour v. Justice Cabinet, Department of Corrections*, 2002 WL 34428761 (KY PB 2001-278); *Birchel Calvin Estep v. Transportation Cabinet*, 2010 WL 3940159 (KY PB 2009-136); *William Raisinen v. Education and Workforce Development Cabinet*, 2011 WL 3792887 (KY PB 2009-221); *Sonia Diaz v. Transportation Cabinet*, 2009 WL 1176151, (KY PB 2008-055); *James D. Witt, Jr., and Thomas Boone v. Kentucky Authority for Educational Television and Kentucky Personnel Board*, 2014 WL 2191026 (KY PB 2011-197 and 2012-127); and *Mark Holt, Robert Pickering, Patrick Wise, and Trasimond Soileau v. Kentucky Authority for Educational Television and Kentucky Personnel Cabinet*, (KY PB 2011-198, 2011-200, 2011-201, and 2011-233).

19. The Hearing Officer concludes that it is appropriate to utilize case law regarding the use of the Kentucky whistleblower act to establish a *prima facie* case of retaliation at the Personnel Board. The standard has been quoted as follows:

In order to demonstrate a violation of KRS 61.102, an employee must establish the following four elements: (1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a

disclosure.” *Id.* (quoting *Davidson v. Commonwealth, Department of Military Affairs*, 152 S.W.3d 247, 251 (Ky. App. 2004)). “The employee must show by a preponderance of evidence that ‘the disclosure was a contributing factor in the personnel action.’” *Id.* (quoting KRS 61.103(3)).

20. The Hearing Officer concludes that McNamara made good faith reports to his superiors of both his objections to EWDC’s use of outside vendors and to Meredith’s appointment to the KUIC.

21. The Hearing Officer concludes that the Appellant failed to show by a preponderance of the evidence that the good faith reports of his objections to the EWDC’s use of outside vendors and Meredith’s appointment to the KUIC were contributing factors in his dismissal.

22. The Hearing Officer concludes that the result would be the same if the Board were to apply the burdens of proof and burden shifting analysis set out in KRS 61.103(3).

23. Because all the events underlying this Appeal occurred before the effective date of Senate Bill 153, all references to KRS Chapter 18A are to the sections in effect at the time of the events associated with this Appeal.

RECOMMENDED ORDER

The Appellant, having failed to carry its burden of proof that McNamara was discriminated against based on a disability status or retaliated against for making protected disclosures, the Hearing Officer recommends to the Personnel Board that the appeal of **the ESTATE OF MUNCIE MCNAMARA V. EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2020-135)** 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 fifteen (15) 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.

SO ORDERED at the direction of the Hearing Officer this 25 day of August, 2023.

KENTUCKY PERSONNEL BOARD



**MARK A. SIPEK
EXECUTIVE DIRECTOR**

A copy hereof this day emailed and mailed to:

Hon. Robyn Smith
Hon. Scotty McFarlan
Hon. Rosemary Holbrook (Personnel Cabinet)