



**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2018-200**

**KENYA MOSLEY**

**APPELLANT**

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

**DEPARTMENT OF VETERANS AFFAIRS**

**APPELLEE**

\*\* \*\* \* \* \* \*\* \*\*

This matter came on for an evidentiary hearing on June 11, 2019, at 9:30 a.m., E.T. at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky before the Hon. Darren L. Embry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Kenya Mosley, was present at the evidentiary hearing and was not represented by counsel. The Agency/Appellee, the Kentucky Department of Veterans Affairs, was present at the evidentiary hearing and represented by the Hon. Dennis Shepherd. Present with Mr. Shepherd was John Ostroske, Human Resources Manager for the Department of Veterans Affairs and Agency representative.

The Hearing Officer notes this appeal was filed with the Kentucky Personnel Board on October 1, 2018. At issue in this appeal is whether Appellant's termination from the Department of Veterans Affairs was based on race discrimination, age discrimination, or disability discrimination.<sup>1</sup>

Following a pre-hearing conference held on April 16, 2019, at 10:30 a.m., an Interim Order, dated April 24, 2019, scheduled an evidentiary hearing for June 11, 2019, at 9:30 a.m., E.T. The issue set forth in the Interim Order was whether the Appellant was terminated on the basis of her race, her age, or a disability. The Appellant was assigned the burden of proof, which is by a preponderance of the evidence, on all issues.

The Interim Order provided that Appellee resubmit its discovery requests, and for the Appellant to file responses to such discovery requests on or before May 15, 2019. Appellant, filing *pro se*, was informed of the procedure for making discovery requests of her own. Counsel

---

<sup>1</sup> At the evidentiary hearing on June 11, Appellant declined to present evidence of her original claims of race discrimination and age discrimination. Appellant did, however, maintain her claim that she was terminated because of a disability and offered three exhibits and witness testimony purported to support her disability discrimination claim.

for Appellee was ordered to provide Appellant with information regarding certain witnesses to be called at the evidentiary hearing and to state each witness' employment status. The Parties were ordered to submit response briefs, along with any evidence and exhibits they intended to enter at the evidentiary hearing, on or before May 28, 2019. Both Parties were ordered to appear at the evidentiary hearing in person. The Parties personally appeared at the evidentiary hearing on June 11, 2019.

### BACKGROUND

1. The Appellant was employed by the Appellee during two different periods at one of Appellee's nursing facilities designated the Thomson-Hood Veterans Center ("Thomson-Hood") in Wilmore, Kentucky. Appellant's first period of employment at Thomson-Hood spanned approximately two months during the summer of 2017 and ended when Appellant voluntarily resigned from her position for personal reasons.
2. Appellant's second period of employment at Thomson-Hood spanned approximately two months during the summer of 2018 and ended when Appellant was terminated from her position during the probationary period in August of 2018.
3. On August 27, 2018, Appellant signed this appeal to challenge Appellee's termination decision. The appeal was received by the Kentucky Personnel Board on October 1, 2018.
4. After the Parties declined opening statements, Appellant called her first witness, **Cheryl Hoover**, an Administrative Specialist III at Thomson-Hood. Ms. Hoover was sworn in to testify.<sup>2</sup> Hoover recalled an "incident" in which Appellant left work and Appellant telling her that Appellant needed to leave because she could not "be out with the smokers." Hoover then told Appellant that she should let her manager or house charge nurse know about her breathing issues. Hoover could not recall any conversation between Appellant and Tara Richards. Appellee declined to cross-examine Hoover and she was dismissed.
5. Appellant called **Dani Turner**, Nurse Aide State Registered (NASR) I at Thomson-Hood, as her second witness. Turner was sworn in to testify.<sup>3</sup> Turner recalled Appellant's request to Tara Richards that Appellant be assigned to work on a floor other than "Washington."<sup>4</sup> Turner did not remember Appellant mentioning her smoke allergy. Turner remembered having a conversation with Appellant concerning the possibility of switching floors so that Appellant would not have to work on the Washington floor. Turner recalled an "incident" in August 22, 2018, in which Appellant left work and then returned, but Turner could not recall which floor Appellant worked upon return. Appellee declined to cross-examine Turner and she was dismissed.

---

<sup>2</sup> The Hoover testimony began at 09:38:24 a.m.

<sup>3</sup> The Turner testimony started at 09:42:10 a.m.

<sup>4</sup> "Washington" refers to a specific floor in Thomson-Hood Veterans Center that caters to veterans of the Washington neighborhood.

6. Appellant called **Tara Richards**, a Charge Nurse at Thomson-Hood during Appellant's employment, as her third witness. Richards was sworn in to testify.<sup>5</sup> Richards did not recall asking Appellant to work Washington. Richards did not recall any conversation with Appellant in which Appellant communicated her desire to work on another floor to accommodate Appellant's breathing condition exacerbated by exposure to smoke. Richards did not remember making a call to Appellant on August 27, 2018, in which Appellant was asked why she had abandoned her post at Thomson-Hood, in which Richards asked Appellant to return to work, and in which Richards assured Appellant that accommodations would be made for her breathing condition. Richards also could not recall another conversation with Appellant the following day (August 28, 2018) in which Appellant communicated her breathing problems but was told to work Washington to see how Appellant could handle it. Richards also did not remember discussing a change to Appellant's floor assignment. Appellee declined to question Ms. Richards and she was dismissed.

7. Appellant, **Kenya Mosley**, then took the witness stand and was sworn in.<sup>6</sup> Appellant was not represented by counsel, so this Hearing Officer asked her to simply recite her understanding of the facts. Appellant's first period of employment began with a Certified Nurse Assistant (CNA) course she took which was held at Thomson-Hood. Upon completion of the course, Appellant started working the floor as a CNA at Thomson-Hood. Appellant was first assigned to Washington, which had a "smoking cage" that Appellant had not been previously aware. After fourteen minutes in this environment, Appellant became ill and could not breathe. Appellant stepped outside but then returned, working until her chest hurt and she experienced breathing difficulties. Hoover told Appellant to speak to a Charge Nurse about the situation. Appellant found a Charge Nurse, the identity of whom Appellant could not remember, who told Appellant to go home if she needed. Appellant went home. When Appellant returned, she was assigned to a floor other than Washington. Concerning this absence, Appellant stated that she was not required to show a doctor's note or medical documentation, but that she was told "it was okay" and that "it's fine." Appellant communicated to others her willingness to work any other floor but Washington and that she would switch floor assignments with other nurses. Appellant then stated that she would make this switch with other nurses to make the accommodation, including with Cheryl Hoover.

8. Appellant also testified regarding another incident in July 2018 in which she was scratched by a resident who was HIV positive. The resident in question accidentally scratched Appellant on the arm, drawing some blood, as Appellant helped him change and clean himself. After sharing this information with fellow nurses, Appellant was hastily informed that the patient was HIV positive and that Appellant should get a blood test immediately. Appellant left to get blood tests done. While waiting for the results, Appellant received a call from someone at the hospital where the tests were conducted. This unknown person told Appellant that she was a "positive reactor." This person suggested that Appellant avoid the environment she normally

---

<sup>5</sup> The Richards testimony started at 09:45:50 a.m.

<sup>6</sup> The Mosley testimony started at 09:48:58 a.m.

worked in until the results came back. That night Appellant called a Charge Nurse at Thomson-Hood to relay the information from the hospital. The Charge Nurse warned Appellant that Appellant was in her probationary period, Appellant was urged to come to work, and Appellant was told that her absence would count as points against her. Appellant decided not to come to work for her shift. Appellant suggested that she missed work because of the uncertainty of the blood test results, yet Appellant's testimony suggests that she decided to return to work without knowing the blood test results and that she learned of the need for a second blood test *while* she was at work at Thomson-Hood. When Appellant did return to work, she called the hospital and learned that the original blood work had been lost and that she needed to return for a second round of tests. Appellant informed the Charge Nurse of this, to which the nurse asked Appellant why she had not gone to get the blood tests when Appellant completed a previous shift at Thomson-Hood. Appellant explained that she had a second job of which Thomson-Hood was aware and that Appellant thus needed to return home to sleep instead of getting the tests redone. When Appellant returned to work and explained to Richards her breathing problems, Richards stated that Appellant could not be assigned to a floor other than Washington because everyone on the shift was a volunteer and could not be "pulled." Appellant did not believe that all of the nurses working were volunteers. Appellant then left work, at which point Richards asked Appellant to return to work. Appellant returned to work under assignment to a different floor. Appellant expresses that she was discriminated against on the basis of a disability because she could not work on Washington.

9. Counsel for Appellee then questioned Appellant. Appellant worked at Thomson-Hood for two months in the Summer of 2017 and another two-month period in Summer 2018. Appellant underwent orientation at the beginning of both periods. Appellant could not recall the rules of employment or accommodation for disabilities explained to her during either orientation. Appellant resigned from the first period of employment when her car's engine failed. Appellant stated that, during her second period of employment, she had attendance problems, mostly total absences. Appellant never provided reasons or documentation for these absences except for the incident during her second period of employment when she was scratched by a resident. Appellant never determined whether she was HIV-positive. Appellant never went up a chain of command at Thomson-Hood to file a formal request for accommodation to the Administrator. Instead, Appellant discussed her breathing problem with Cheryl Hoover and, at some other point, talked to Julie Harmon, Thomson-Hood's CNA class instructor, who then directed Appellant to talk to Appellant's Charge Nurse about her breathing problems. Appellant did not state at the hearing whether she ever talked to her Charge Nurse. During Appellant's second period of employment, Appellant never contacted her supervisor, Kelly Canada, about Appellant's health concerns. Appellant stated that other nurses would switch floors with Appellant whenever she expressed her problem working Washington. During neither period of employment did Appellant formally request a medical accommodation for her asthma.

10. Appellant brought and identified Exhibits 1, 2, and 3, which were admitted in the same order. Exhibit 1 was identified by Appellant as a letter from her employer of five years at Garden Springs Therapeutic Massage, in which the author attests to Appellant's allergy to smoke. Exhibit 2 was identified as a Medical Report with a service date of July 26, 2018, which documents potential exposure to "hazardous bodily fluids." Exhibit 3 was identified as a similar Medical Report with a later service date of July 30, 2018.

11. Appellee called **Kelly Canada** as a witness. Canada was sworn in to testify.<sup>7</sup> Canada knew Appellant as an employee at Thomson-Hood, whose position was a night-shift CNA. Canada was Appellant's supervisor during Appellant's second period of employment. Thomson-Hood is one of the four nursing facilities that exclusively services veterans in Kentucky. Canada never received a request from Appellant for medical accommodation. Canada never processed any such request or related information through the chain of command. Canada was not aware of Appellant's asthma.

12. Appellant then cross-examined Canada. Canada testified she had never met or seen Appellant. Canada was not aware that Appellant had been switching floor assignments with other workers. Canada stated that as supervisor she would ask for medical documentation of a medical condition, if the condition prevented someone from working on a particular floor, and assuming the condition was brought to Canada's attention. Canada stated that Charge Nurses do not necessarily have to require medical documentation to authorize reassignments.

13. Appellee then questioned Canada again. Canada was the initial recommender of Appellant's probationary termination. Canada's reasons for the recommendation were based on Appellant's attendance, specifically unexcused absences. These absences amounted to eleven (11) absences during Appellant's eight-week period of employment. Four of those absences were no-call-no-shows and Canada received a doctor's note for only one of these absences. Canada supervises employees for performance and considers attendance as part of performance. Canada's recommendation for termination was sent to Human Resources up the chain of command to the appointing authority at the Kentucky Department of Veterans Affairs. Canada provided a log of Appellant's attendance to support the recommendation.

14. Appellant then questioned Canada again. Appellant's recorded absences during her second period of employment were on the following dates:

- June 23, 2018
- June 29, 2018
- July 7, 2018
- July 23, 2018
- July 24, 2018

---

<sup>7</sup> The Canada testimony starts at 10:07:23 a.m.

- July 26, 2018
- July 27, 2018
- August 7, 2018
- August 11, 2018
- August 14, 2018
- August 15, 2018

There was one recorded excuse for the August 14<sup>th</sup> and 15<sup>th</sup> absences, which was not received until August 21<sup>st</sup>. Canada was aware of the incident in which Appellant was scratched but was not aware that Appellant's reasons for her absences on August 14<sup>th</sup> and 15<sup>th</sup> were pursuant to a doctor's recommendation. The documentation provided to Canada from the emergency room and urgent treatment centers suggested that Appellant could return to work the next day. Canada was not aware of any call to Thomson-Hood in which Appellant relayed instructions from the hospital employee that Appellant not return to work. Appellant then concluded her questioning.

15. Appellee questioned Canada further. Thomson-Hood had a two-hour call-in policy under which nursing staff were required to call in two hours before the start of their shift if the employee was going to be late or absent. This allows supervisors at Thomson-Hood to arrange for a replacement of the absent employee to ensure the continued care of the Thomson-Hood residents.

16. Appellant then questioned Canada again. According to Canada, Appellant's situation regarding the blood work and doctor's recommendation would have been an extenuating circumstance under Thomson-Hood's two-hour call-in policy had the circumstances been communicated to Canada. Canada expressed skepticism regarding the authority of whoever may have told Appellant to stay home.

17. Representative for Appellee, **John Ostroske**, was present to give his testimony and was first questioned by counsel for Appellee.<sup>8</sup> John Ostroske is the Human Resources Branch Manager for the Kentucky Department of Veterans Affairs ("KDVA"), which encompasses the Thomson-Hood Veterans Center. Ostroske was formerly the HR Administrator at Thomson-Hood, a position he held for sixteen years. Ostroske stated that the KDVA does not need a reason to terminate an employee in Appellant's former position when working during the employee's initial probationary period of employment. This probationary period lasts for the employee's first six (6) months of employment. After an employee's probationary period has expired, the KDVA must show cause before the employee can be terminated. Appellant's termination was a probationary termination because she was only two months into her employment. Ostroske is familiar with Appellant's employee record. The beginning of the employment at Thomson-Hood begins with an orientation, which lasts approximately three to

---

<sup>8</sup> The Ostroske testimony started at 10:21:55 a.m.

four days. During this orientation, new hires are instructed as to the policies and customs at Thomson-Hood, which is the purpose of the orientation. Appellant, having been employed during two different periods, underwent two orientation courses at Thomson-Hood. Ostroske agreed with Kelly Canada's assessment of Appellant's performance at Thomson-Hood. The purpose of the two-hour call-in and absentee policies is to ensure that senior veterans are met with an adequate number of staff at the nursing facilities, that replacements for late or absent employees can be arranged. Ostroske defined a "no-call-no-show" as failing to show up to work without calling to notify of the absence. The probationary termination process for a KDVA nurse starts with the nurse's supervisor and extends up through the Nursing Director, the Thomson-Hood Administrator, Human Resources (including a legal review), and is ultimately decided by the relevant appointing authority. In this case, the procedure for probationary termination was followed and all employee documentation was reviewed in the process. There was no record in the documentation about an accommodation for her asthma.

18. Appellant then questioned Ostroske. Thomson-Hood has a mandatory overtime policy implemented for any extended eight-hour shift that consecutively follows another eight-hour shift. Thomson-Hood nurse employees were told about this policy at orientation and again when they go to their nursing units. Ostroske was not aware of the fact that some of Appellant's recorded no-call-no-shows were for shifts that were extended eight-hour shifts. Ostroske was unaware that these absences were due to Appellant's work obligations at her other job. Thomson-Hood does have an employment policy that full-time employees at Thomson-Hood must regard Thomson-Hood as their "primary employment" and that separate work obligations are not an excuse for tardiness or absenteeism.

19. In Appellant's closing statement she explained that she was never told about the "primary employment" policy for full-time employees at Thomson-Hood.

20. Appellee made no closing statement.

### **FINDINGS OF FACT**

1. Appellant, Kenya Mosley, was employed as a CNA nurse during two different time periods by the Appellee, the Department of Veterans Affairs, at Thomson-Hood Veterans Center. The first period spanned roughly from June 2017 to August 2017 and ended with Appellant's voluntary resignation.

2. The second period of employment spanned roughly from June 2018 to August 2018 and ended with Appellant's probationary termination.

3. Appellant submitted a timely appeal which was received on October 1, 2018.

4. Appellant never submitted a formal written request for an accommodation for asthma or allergy-related breathing problems. Additionally, Appellant never pursued an informal request for accommodation with her supervisors. The evidence is overwhelming that Appellant failed to



avail herself of any procedure for making such requests despite Appellant having undergone two different orientations at Thomson-Hood and being instructed by at least two different people to discuss the issue with her supervisor.

5. Appellee terminated Appellant for a consistent pattern of largely unexplained absences, not on the basis of Appellant's race, age, or disability. Appellant offered absolutely no evidence or testimony to show her termination was motivated by her race or age.

6. Appellant was not terminated on the basis of any disability. Appellant did not prove the existence of a protectable disability at any point in this appeal process. If she had presented medical documentation of her asthma or smoke allergy in this appeal, such documentation was never presented to anyone at Thomson-Hood or the KDVA, including Appellant's supervisor. Further, if Appellant had proven a concrete disability, it was not shown that Appellee in any way terminated Appellant on the basis of this disability. Appellee was not on notice of Appellant's disability because Appellant never followed any sort of established procedure to make an accommodation request.

#### **CONCLUSIONS OF LAW**

1. The appointing authority of the Department of Veterans Affairs,<sup>9</sup> Benjamin R. Sweger, took the recommendation to terminate Appellant for deficient job performance. This was proper under Kentucky law and regulations regarding state employee termination procedures under KRS 18A.095 and 101 KAR 1:345.

2. Appellant was terminated during her six (6) month probationary period of employment under KRS 18A.111 and 101 KAR 1:325, which is to last six (6) months. Though Appellee demonstrated ample reason to terminate Appellant, Appellee was not required to show such cause for termination since the probationary period began with Appellant's reemployment to Appellee in June 2018. Appellant was terminated before her probationary period expired and no cause need be shown for her termination under such circumstances.

3. Appellant failed to prove by a preponderance of the evidence that she was terminated based on race, age, or disability discrimination. Appellant has failed to provide either direct or circumstantial evidence of race discrimination, age discrimination, or disability discrimination as the basis or cause of her termination from the Kentucky Department of Veterans Affairs. Appellant failed to prove by a preponderance of the evidence, the only claim she maintained at the evidentiary hearing, her disability discrimination claim. To the contrary, Appellant was terminated for poor work performance as determined by Appellant's superiors at Thomson-Hood.

---

<sup>9</sup> KRS 18A.005(1) "Appointing authority: means the agency head or any person whom he has authorized by law to designate to act on behalf of the agency with respect to employee appointments, position establishments, payroll documents, register requests, waiver requests, requests for certification, or other position actions. Such designation shall be in writing and signed by both the agency head and his designee. Prior to the exercise of appointing authority, such designation shall be filed with the secretary;"

While it was entirely within Appellee's discretion to terminate Appellant without cause during her probationary period, Appellee still demonstrated Appellant's performance to be deficient for eleven (11) recorded absences in the first eight (8) weeks of Appellant's employment. In any case, Appellant did not demonstrate this reason to be pretextual. This appeal fails on the merits and the facts presented by Appellant.

**RECOMMENDED ORDER**

The Hearing Officer recommends to the Personnel Board that the appeal of **KENYA MOSLEY V. KENTUCKY DEPARTMENT OF VETERANS AFFAIRS (APPEAL NO. 2018-200)** be **DISMISSED** pursuant to KRS 18A.095(22)(d).

**NOTICE OF EXCEPTION AND APPEAL RIGHTS**

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


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

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

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

**ISSUED** at the direction of **Hearing Officer Darren L. Embry** this 12<sup>th</sup> day of August, 2019.

**KENTUCKY PERSONNEL BOARD**

  
\_\_\_\_\_  
**MARK A. SIPEK**  
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Dennis Shepherd  
Kenya Mosley