

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-233**

JOHN ODOM

APPELLANT

V.

**FINAL ORDER SUSTAINING
HEARING OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED ORDER
AS ALTERED**

**EDUCATION AND WORKFORCE DEVELOPMENT CABINET
THOMAS O. ZAWACKI, APPOINTING AUTHORITY**

APPELLEE

** ** *

The Board at its regular July 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 14, 2014, having noted Appellant's exceptions, Appellee's response, 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** Background paragraph 8 and substitute the following:

8. Mark White, Director of Human Resources for the Cabinet, and Lisa Cochran, Branch Manager, Support Branch, Division of Unemployment Insurance for the Cabinet, explained that Toby Thompson worked in a section which was just renamed and not abolished. Odom, however, was transferred into a newly created "support branch" in which there were no sections and no need for a section supervisor. Odom's former section, the Appeals Clerical Section, was abolished by the reorganization.

B. **Delete** Finding of Fact paragraph 1 and substitute the following:

1. There are no factual disputes in the testimony of the witnesses, John Odom, Mark White, and Lisa Cochran. Testimony of Dustin Adams is noted, but not relevant to the single issue of age discrimination. It is found by a preponderance of the evidence and by stipulation that John Odom is 42 years old, Toby Thompson is 34 years old, and Bill Morris is 66 years old. Odom and Thompson did not have "status" in the positions to which they were promoted, whereas Morris did. Of course, Morris is in the same age-protected class as Odom. Although Thompson was on promotional probation as a Section Supervisor, he was not similarly situated to Odom because Thompson's section was just renamed and not abolished. Odom was transferred into a newly created "support" branch which had no sections and could not support a section supervisor. Odom's former section, the Appeals Clerical Section, was abolished by the reorganization.

C. **Delete** Conclusion of Law paragraph 3 and substitute the following:

3. If Odom can establish a *prima facie* case, then the Cabinet has the burden to prove a legitimate reason for its decision to revert him. If the Cabinet shows it had a legitimate reason, the burden shifts back to Odom to show the reason was a pretext for the reversion. We need not go that far. Odom, although in a protected class, did not prove another employee under the age of 40 was promoted to the position he sought. Nor did he prove that a person younger than he and "similarly situated" was treated more favorably than he during the Cabinet's reorganization. Odom pointed to Toby Thompson, age 34, as an employee more favorably treated. Although neither Thompson

nor Odom had "status" in their newly promoted positions, the positions were handled differently by the reorganization. Thompson's position was simply renamed and not abolished. Odom's position and his section, the Appeals Clerical Section, was abolished by the reorganization. Odom was transferred to a newly created support branch, which did not contain sections and did need a Section Supervisor. Odom had the burden to prove that he and Thompson were "similarly situated" in all material respects to prove disparate treatment. *Loesel v. City of Frankenmuth*, 692 F.3d. 452, 463 (6th Cir. 2012). He failed to meet the burden.

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

The parties shall take notice that is Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 16th day of July, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Rosemary Holbrook
John Odom

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-233

JOHN W. ODOM

APPELLANT

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

EDUCATION AND WORKFORCE DEVELOPMENT CABINET,
THOMAS O. ZAWACKI, APPOINTING AUTHORITY

APPELLEE

* * * * *

This matter came before Hearing Officer Stephen McMurtry on March 28, 2014, for an evidentiary hearing. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, John W. Odom, was present and appeared *pro se*. The Appellee, Education and Workforce Development Cabinet, was present and represented by the Hon. Rosemary Holbrook.

BACKGROUND

1. The Appellant, **John W. Odom (Odom)**, is employed by the Education and Workforce Development Cabinet as an Unemployment Insurance Appeals Referee II. On May 1, 2013, the Cabinet recommended that Odom be promoted from his referee position to an Administrative Section Supervisor, with a pay increase from \$3,160.46 to \$3,338.50 per month. As provided by 101 KAR 1:325, Section 2, his probationary period for the promotion was six months, beginning May 1, 2013.

2. Almost contemporaneously, **Mark White**, Director of Human Resources for the Cabinet, and its designated Appointing Authority on April 1, 2013, was preparing a reorganization of the Cabinet, as directed by the Cabinet Secretary. On July 22, 2013, Governor Steve Beshear, by Executive Order, approved the reorganization.

3. Mark White testified that as a consequence of the reorganization, the position Odom held during his probationary period was effectively abolished. As he explained, there were no longer employees in positions for an Administrative Section Supervisor to supervise, and the Cabinet could not have a section supervisor in a section which did not exist. White testified that this consequence of the reorganization was unintentional and was not discovered until after its approval by Executive Order.

4. On August 21, 2013, Mark White, by letter, advised Odom that the Cabinet was reverting him to his previous position. He wrote, in part:

Pursuant to KRS 18A.111 and 101 KAR 1:325, Section 2, you will be reverted to your former position of Unemployment Insurance Appeals Ref II effective September 1, 2013. This is NOT because you have failed to satisfactorily complete your promotional probationary period but due to the fact that the recent reorganization of the Office of Employment and Training abolished the Appeals Clerical Section and therefore eliminated the Administrative Section Supervisor position. In accordance with 101 KAR 2:034, Section 3, your salary will be reduced from your current rate of \$3,318.50 per month to your prior salary of \$3,160.46 per month plus any salary advancements that would have been awarded had the promotion not occurred.

5. Odom filed a timely appeal on September 20, 2013, alleging "There are several Section Supervisors still remaining in OET" (Office of Employment Training), "some supervisors are still on probation and have less seniority than me." And "Other supervisor's (sic.) position titles were changed due to the reorganization without any negative impact to their salaries or position grades."

6. In response, the Cabinet filed a Motion to Dismiss the appeal, asserting that a reversion during a probationary period can only be appealed on grounds of discrimination against protected classes, including persons aged 40 and above. KRS 18A.005(35) and KRS 18A.095(12). On January 31, 2014, the Hearing Officer denied the Motion, observing there were sufficient factual allegations in the proceedings to overrule the Motion and permit Odom to proceed on a plea of age discrimination.

7. In his effort to prove that the Cabinet discriminated against him on the basis of age, Odom established that another employee, Toby Thompson, age 34, with less seniority "was allowed to remain in his position as a Section Supervisor, while on promotional probation when he did not begin that position until July 1, 2013." Odom also raised the case of Bill Morris, age 66, an Administrative Section Supervisor, who was moved out of his section as a Human Services Section Supervisor into a branch, which had no sections, without being reverted. Odom regarded the disparate treatment of Toby Thompson and Bill Morris as evidence of age discrimination.

8. Mark White, Director of Human Resources for the Cabinet, and Lisa Cochran, Branch Manager, Support Branch, Division of Unemployment Insurance for the Cabinet, explained that Toby Thompson could not have been reverted, because he had "status" in the position for which he was in probationary employment, and the section in which he worked was just renamed and not abolished. Odom, however, was transferred into a newly created "support branch" in which there were no sections and no need for a section supervisor. Odom's former section, the Appeals Clerical Section, was abolished by the reorganization.

9. KRS 18A.005(34) defines a reversion as either the returning of a status employee to his or her last position held in the classified service, if vacant, or the returning of a status

employee to a vacant position in the same or similar job classification as his or her last position held in the classified service. Reversion occurs after a career employee is terminated other than for cause from the unclassified service or after a status employee fails to successfully complete promotional probation. Reversion after unsuccessful completion of promotional probation, or in the case of a career employee after termination from the unclassified service, may only be appealed to the Personnel Board under KRS 18A.095(12).

FINDINGS OF FACT

1. There are no factual disputes in the testimony of the witnesses, John Odom, Mark White, and Lisa Cochran. Testimony of Dustin Adams is noted, but not relevant to the single issue of age discrimination. It is found by a preponderance of the evidence and by stipulation that John Odom is 42 years old, Toby Thompson is 34 years old, and Bill Morris is 66 years old. Odom did not have a position of "status" as defined by KRS 18A.005(37) in the position to which he was promoted, whereas Thompson and Morris did. Of course, Morris is in the same age-protected class as Odom.

2. Odom presented no "direct evidence" that the Cabinet's decision to revert him was motivated by age discrimination. "Direct evidence" of discrimination is "evidence – standing on its own – [that] would be sufficient to prove discriminatory intent." *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d. 1241, 1249 – 1250 (6th Cir. 1995). No other employee took the position of Administrative Section Supervisor to which Odom was probationally promoted prior to his reversion.

CONCLUSIONS OF LAW

1. KRS 344.040(1) makes it unlawful for an employer to discriminate in the terms and conditions of employment because an employee is 40 years of age or older. If there is an absence of direct evidence of age discrimination, a plaintiff claiming age discrimination must satisfy the burden-shifting test of *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Williams v. Wal-Mart Stores, Inc.*, 184 SW 3d. 492, 495 (Ky. 2005). *Flock v. Brown-Foreman*, 344 SW 3d. 111 (2010).

2. Since there was no direct evidence of age discrimination, Odom must prove: (1) he was a member of a protected class; (2) he was treated disparately in the terms and conditions of his employment than similarly situated employees under 40 years of age; and (3) he was qualified for the position he sought before being reverted. Odom can also prove a prima facie case of age discrimination if he proves a person under 40 years of age was promoted into the position he sought.

3. If Odom can establish a prima facie case, then the Cabinet has the burden to prove a legitimate reason for its decision to revert him. If the Cabinet shows it had a legitimate reason, the burden shifts back to Odom to show the reason was a pretext for the reversion. We need not

go that far. Odom, although in a protected class, did not prove another employee under the age of 40 was promoted to the position he sought. Nor did he prove that a person younger than he and “similarly situated” was treated more favorably than he during the Cabinet’s reorganization. Odom pointed to Toby Thompson, age 34, as an employee more favorably treated. But Thompson was not reverted because he held “status”¹ in the position to which he was promoted. Odom simply did not have the protection of “status.” Because Thompson had “status” in the position to which he was promoted, and Odom did not have status in the position to which he was promoted, they were not “similarly situated.” Odom had the burden to prove that he and Thompson were “similarly situated” in all material respects to prove disparate treatment. *Loesel v. City of Frankenmuth*, 692 F.3d. 452, 463 (Ct. App., 6th – Mich) 2012. He failed to meet the burden.

4. Odom has also failed to prove that the Cabinet discriminated against him for reasons of age in not reverting 66-year-old Bill Morris. To prove age discrimination, Odom must prove as part of the *McDonald Douglas* test that the Cabinet treated more favorably a “similarly situated” employee under 40 years of age.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JOHN W. ODOM V. EDUCATION AND WORKFORCE DEVELOPMENT CABINET (APPEAL NO. 2013-233)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

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

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

¹ KRS 18A.005(37) “Status” means the acquisition of tenure with all rights and privileges granted by the provisions of this Chapter after satisfactory completion of the initial probationary period by an employee in the classified service.

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 Stephen McMurtry** this 14th day of May, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Rosemary Holbrook
Mr. John W. Odom