COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-128

JASON PAGAN **APPELLANT**

VS.

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

PUBLIC PROTECTION CABINET **APPELLEE**

*** *** *** *** ***

The Board, at its regular December 2021 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated October 28, 2021, and being duly advised,

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

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

SO ORDERED this 17th day of December, 2021.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Jennifer Wolsing
Hon. Molly Cassady
Jason Pagan
Hon. Rosemary Holbrook (Personnel Cabinet)
Sabrina Sandoval

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2020-128

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

PUBLIC PROTECTION CABINET **APPELLEE**

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This matter came on for an evidentiary hearing on July 1, 2021, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, 40601, before the Hon. Roland Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A. By prior agreement of the parties, the proceedings were conducted via Amazon Chime video teleconferencing in accordance with COVID-19 guidelines. KRS 13B.080(7).

The Appellant, Jason Pagan, was present and was not represented by legal counsel. The Appellee, Public Protection Cabinet (PPC), was present and represented by the Hon. Jennifer Wolsing and the Hon. John Hardesty. Appearing as Agency representative was Brian Raley.

The issue in this case is the Appellant's claim that he had been subjected to sex discrimination with respect to his salary. The burden of proof was on the Appellant to prove his claim by a preponderance of the evidence.

As each party designated a single witness to testify on their respective behalf, it was not necessary to invoke the rule separating witnesses.

The Appellee tendered its written Motion to Dismiss Claims prior to May 15, 2019, and after April 11, 2020, requesting limitation of Appellant's damages, as stated in greater detail in the Motion. The Appellant was given the opportunity to examine the Motion and respond in writing at a later date.[1] The Appellant stated he was not making claims for any damages after the date of his resignation. The evidentiary hearing proceeded as scheduled.

The Appellee next presented a Motion to exclude any witnesses called by the Appellant, except the Appellant himself, and any Exhibits tendered by the Appellant other than the previous Joint Stipulation of Fact (Joint Exhibit 1), as the Appellant failed to file a Witness and Exhibit List. The Appellant responded that he would be the sole witness testifying on his own behalf. The Hearing Officer ruled that, as it is expected that each party would present evidence through one (1) witness on their own behalf, it would not be a surprise or constitute unfair prejudice to the

[1] The Appellant thereafter timely filed his Response to Motion to Dismiss Claims on behalf of Jason Pagan. The Appellee subsequently timely filed its Reply Supporting PPC's Partial Motion to Dismiss.

Appellee to allow the Appellant to testify. As a result, the Appellant was allowed to testify on his own behalf and/or call any witnesses listed on the Appellee's Witness List. Furthermore, the Appellant was allowed to refer to Joint Exhibit 1 as well as any exhibits tendered by the Appellee.

By agreement of the parties, the tendered Joint Stipulations of Fact was marked and admitted as Joint Exhibit 1.

The Appellant waived presentation of an opening statement. The Appellee presented its opening statement.

BACKGROUND

1. The first and sole witness for the Appellant was the Appellant, **Jason Pagan**. The Appellant, at the time of his hire at the Department of Alcoholic Beverage Control (ABC), had been unaware that Lora Estes, previously hired by ABC, was paid a higher salary than him. The Appellant filed a grievance and found out that Lora Estes had been hired at a higher rate. The Appellant's claim is that the Appellee hired females at a higher wage than him, which included the hire of a female at a 20% higher wage rate just prior to his starting date.

2. The Appellant believed a "returning retiree" is someone who "came from KRS Chapter 18." Appellant testified he came from KRS Chapter 16, because he had been a Detective Sergeant with the Kentucky State Police for approximately twenty (20) years before he retired in 2017. In December 2018, he applied for the position with ABC and was hired in January 2019.

3. The Appellant stated his belief that the law required a person to have previously held a position to which he was demoted in order to retain a prior higher salary under the relevant regulation. The Appellant had no disagreement, for instance, with individuals having been demoted from Investigator III to Investigator II being able to retain their higher salary. However, he asserted that a college teacher thereafter taking a position in law enforcement as an officer in a different branch cannot justifiably start at a higher salary. The definition of "demotion" makes clear how the salary arrangement works.

4. A representative of ABC had informed the Appellant that, of the last ten (10) people they hired at a higher salary, nine (9) of ten (10) were women. The Appellant testified that if 90% were women, then he has established a *prima facie* case of sex discrimination. He has requested that he be paid the same rate as the two (2) other women hired into ABC for the time that Appellant served as a PPC employee. The Appellant did not transfer or take a demotion when he entered the job at PPC.

5. Upon examination of Joint Exhibit 1, the Appellant agreed that Ms. Estes' previous employer had been the Justice and Public Safety Cabinet and that she came to PPC via transfer. The Appellant agreed that Sarah Tackett also transferred to PPC and came from the Justice and Public Safety Cabinet, Department of Criminal Justice Training. The Appellant did not transfer into his employment at PPC.

6. The Appellant identified Appellee's Exhibit 1 as the Grievance Form he had filed on February 26, 2020. He was asked to, and read into evidence, the third level review response by Commissioner Allyson Taylor, wherein Ms. Taylor stated: Pursuant to 101 KAR 2:034 (3)(2), Officer Tackett maintained her salary upon transfer to ABC from another State Agency.

7. The Appellant identified Appellee's Exhibit 2 as the Kentucky Administrative Regulation, 101 KAR 2:034, Classified Compensation Administrative Regulations. In reviewing Section 3, Salary Adjustments, (2) Demotion, (a), 1 and 2, the Appellant agreed that anyone who becomes employed with the PPC through the demotion process described in this regulation may retain the salary level of the job of which they immediately left. The Appellant testified the demotion section, however, does not apply to him. He maintained he should have been hired as a new appointee and offered a salary not above the mid-point of approximately $4,272.00 per month. He had not been a Chapter 18A employee before coming to PPC, but had been a Chapter 16 employee and should have been considered a new appointment and not treated as "a returning retiree."

8. The Appellant closed his case-in-chief. The Appellee presented a Motion for Directed Verdict stating that no sex discrimination had been proven in this case. The two (2) women cited by the Appellant were both transferred and demoted into their positions at PPC, and that, by regulation, they retained their previous salaries. The Appellant had admitted he was not similarly situated to these two (2) women and, therefore, his claim should be dismissed.

9. The Appellant responded that nine (9) of ten (10) employees who had been hired at higher salaries than himself were women and that, therefore, he had established a *prima facie* case of sex discrimination.[2]

10. Having heard the arguments of the parties, the Hearing Officer overruled the Appellee's Motion for Directed Verdict.

11. The first witness for the Appellee was **Brian Raley**. Mr. Raley began his employment with the Public Protection Cabinet in 1999. Eight (8) years ago, he assumed the role of Administrative Branch Manager. In March 2019, he was appointed to his current position in the Office of the Secretary as Executive Director of the Office of Administrative Services. He has held this position for about two (2) years and two (2) months, which time encompassed the timeframe pertaining to the Appellant's allegations. Mr. Raley gave a brief description of the duties he performed at each employment position.

12. With regard to Joint Exhibit 1, Mr. Raley agreed to the stipulated facts stated therein. The Appellant had been hired as an Investigator II with a starting salary of $3,385 per month. The Appellant did not transfer in from another state Agency or Department. Prior to his hire, the Appellant was retired.

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[2] The Hearing Officer did not rule on whether Appellant established a *prima facie* case.

13. Mr. Raley identified Appellee's Exhibit 3 as the Appeal Form with attachments filed in this matter by the Appellant, Jason Pagan.

14. The witness testified that: 1) Ms. Tackett was allowed to transfer, demote, and retain her salary per 101 KAR 2:034, Section 3(2), 2) PPC did not discriminate against the Appellant based on his sex, 3) Ms. Tackett had demoted to a lower pay grade, going from pay grade 14 at the Department of Criminal Justice Training to pay grade 12 at PPC, and 4) the regulation authorized retention of Ms. Tackett's prior salary.

15. The witness further testified that: 1) Ms. Estes had been hired at PPC on October 1, 2018, 2) she had previously been employed with the Department of Criminal Justice Training as a Law Enforcement Training Instructor II, 3) she went through a transfer, then demotion, and, pursuant to the regulation, was allowed to retain her previous salary, and 4) she had come to a position at PPC at a lower pay grade.

16. The witness then testified regarding several instances of males having been hired into PPC who were demoted and allowed to retain their prior salary:

A. Mr. Raley identified Appellee's Exhibit 4 as a list of employees who had either transferred within PPC or had come from a Cabinet outside PPC and had undergone a "demote and retain" action. The chart shows such actions having occurred between July 16, 2015, through May 1, 2021.

B. Mr. Raley identified Appellee's Exhibit 5 as a Personnel Action Notification for Kazi Saleem. Mr. Saleem had gone through a transfer, demotion, and salary retention process, where he had been a Revenue Collection Officer at pay grade 13, with a start date of April 16, 2016, and became a Financial Institutions Examiner I with a pay grade of 12. Mr. Saleem was allowed to retain his prior salary.

C. Mr. Raley identified Appellee's Exhibit 6 as a Personnel Action Notification for George Fallis. Mr. Fallis had gone through a demotion with a voluntary retention of salary when he went from an Investigator III, pay grade 14, to an Insurance Fraud Investigator I, pay grade 13, with a start date of November 16, 2016. He was allowed to retain his prior salary.

D. Mr. Raley identified Appellee's Exhibit 7 as a Personnel Action Notification for Charles Carter. Mr. Carter had gone through a demotion with a voluntary retention of salary when he went from an Insurance Fraud Supervisor pay grade 16, to an Insurance Fraud Investigator II, pay grade 14. He was allowed to retain his previous salary.

E. Mr. Raley identified Appellee's Exhibit 8 as a Personnel Action Notification for Mark Jordan. Mr. Jordan had gone through a demotion with voluntary retention of salary when he had gone from an

Administrative Section Supervisor, pay grade 15, to a Boiler Inspector III, pay grade 14, with a start date of September 1, 2017. He was allowed to retain his prior salary.

F. Mr. Raley identified Appellee's Exhibit 9 as a Personnel Action Notification for Charles Stovall. Mr. Stovall went through a demotion and voluntary retention of salary when he went from a HVAC Inspector II, pay grade 14, to HVAC Inspector I, pay grade 13, with start date October 16, 2017. Mr. Stovall was allowed to retain his prior salary.

G. Mr. Raley identified Appellee's Exhibit 10 as a Personnel Action Notification for Don Davis. Mr. Davis went through a demotion and voluntary retention of salary when he went from a HVAC Inspector II, pay grade 14, to HVAC Inspector I, pay grade 13, with a start date of October 16, 2017. Mr. Davis was allowed to retain his prior salary.

H. Mr. Raley identified Appellee's Exhibit 11 as a Personnel Action Notification for Roger Banks. Mr. Banks had gone through a demotion and voluntary retention of salary when he went from an Assistant Director, pay grade 18, to an HVAC Inspection Field Operations Manager, pay grade 16, with a start date of August 1, 2019. Mr. Banks was allowed to retain his prior salary.

I. Mr. Raley identified Appellee's Exhibit 12 as a Personnel Action Notification for Daniel Friedman. Mr. Friedman went through a demotion and retention of salary when he went from Revenue Field Auditor III, pay grade 14, to a Financial Institution Examiner I, pay grade 12, with a start date of August 1, 2016. He was allowed to keep his prior salary. Mr. Raley testified this particular Personnel Action was similar to the Personnel Action PPC took with respect to Ms. Tackett, since both came into PPC from another state agency and were allowed to retain their prior salary rather than experience a 5% salary reduction per pay grade.

17. The Appellant was not allowed to keep his prior salary when he came to PPC because he came from a retired status.

18. Mr. Raley then testified in some detail about a salary spreadsheet that is a part of Joint Exhibit 1:

A. Scott Brown had a starting salary of $3,385 per month. PPC had established this amount as the starting salary for new appointments. Mr. Brown had not come to state employment via a government transfer.

B. Lora Estes had a starting salary of $4,037 per month. PPC could, with Ms. Estes' transfer, either apply a 5% pay reduction per pay grade or

allow her to retain her previous salary. PPC chose to allow her to retain her previous salary since she was eligible under the specified regulation.

C. Timothy Feltner was hired at a starting salary of $3,385 per month. He did not qualify under the demotion regulation, so he was brought in at the standard starting salary for that position at ABC. He had not taken a demotion for the position.

D. Morgan Palmiter was hired at a starting salary of $3,385 per month. He did not qualify under the demotion regulation. He was hired in at the established starting salary since he had not transferred from another state agency.

E. James Selbert was hired at a starting salary of $3,385 per month. He did not qualify under the demotion regulation. He was brought in at the standard starting salary for that position.

F. John Clark was hired at a starting salary of $3,385 per month. He did not qualify under the demotion regulation. He was brought in at the standard starting salary for that position.

G. The Appellant had not been hired at the mid-point salary. The Kentucky Administrative Regulations applicable to the Appellant stated his starting salary could not exceed the mid-point for that position. It had been possible for the Agency, if it had been requested and such request had been approved, to have granted a starting salary up to the mid-point for the Appellant. However, such a request was not made.

H. Ms. Tackett and Ms. Estes were hired below the mid-point for their respective positions.

19. The Appellee's case was closed. The Appellant presented no evidence in rebuttal. A briefing schedule for the parties was set out per the Interim Order entered July 6, 2021.

FINDINGS OF FACT

1. Jason Pagan, the Appellant, who is male, had been hired by the Appellee, Public Protection Cabinet, Department of Alcoholic Beverage Control, as an Investigator II on January 2, 2019. He was a classified employee with status.

2. The Appellant was hired at a starting salary of $3,385 per month. Prior to his hire, he had been retired after twenty (20) years of employment with the Kentucky State Police. He did not transfer to his employment position with PPC from any state agency or department.

3. The parties stipulated that the facts and information contained in the spreadsheet attached to and a part of Joint Exhibit 1 are true and accurate, specifically: "...the employees identified in Joint Exhibit 1 were or are employees of PPC; that their current job titles as stated in Exhibit 1 are true and accurate; that the starting and current salaries for these employees as stated in Exhibit 1 are true and accurate; that the hire date stated in Exhibit 1 for each employee is true and accurate; and that the previous employment information for each employee as stated in Exhibit 1 is true and accurate." The information contained in the Joint Exhibit 1 spreadsheet, which is part of Joint Exhibit 1, is included as **Recommended Order Attachment A**.

4. The parties also stipulated that anyone who became employed by PPC through the demotion process described in 101 KAR 2:034, Classified Compensation Administrative Regulations, Section 3, Salary Adjustments, (2) Demotion, (a) 1 and 2, may qualify to retain the salary level of the job which they immediately left. (Appellee's Exhibit 2)

5. Sarah Tackett, a female, had transferred from a Grade 14 position with the Department of Criminal Justice and demoted to a Grade 12 position at PPC as an Investigator II. She was allowed to retain her prior salary of $4,037.44 per month, per 101 KAR 2:034, Section 3 (2) ["Regulation"]. (Appellee's Exhibits 2 and 4; Joint Exhibit 1). She qualified under the regulation to retain the salary level she had received when she left her position with the Department of Criminal Justice.

6. Lora Estes, a female, had transferred from a position with the Justice Cabinet to a lower grade position at PPC as Investigator II. She qualified under the regulation to retain her prior salary of $4,037.44 per month.

7. PPC had also hired several males who were transferred, demoted, and allowed to retain their prior salaries per the regulation, to wit:

A. Kazi Saleem from pay grade 13 to pay grade 12 with a starting salary of $3,250 per month. (Appellee's Exhibits 4 and 5).

B. George Fallis from pay grade 14 to pay grade 13 with a starting salary of $3,238.28 per month. (Appellee's Exhibits 4 and 6).

C. Charles Carter from pay grade 16 to pay grade 14 with a starting salary of $4,705.16 per month. (Appellee's Exhibits 4 and 7).

D. Mark Jordan from pay grade 15 to pay grade 14 with a starting salary of $4,252.06 per month. (Appellee's Exhibits 4 and 8).

E. Charles Stovall from pay grade 14 to pay grade 13 with a starting salary of $3,215.72 per month. (Appellee's Exhibits 4 and 9).

F. Don Davis from pay grade 14 to pay grade 13 with a starting salary of $3,421 per month. (Appellee's Exhibits 4 and 10).

G. Roger Banks from pay grade 18 to pay grade 16 with a starting salary of $4,867.62 per month. (Appellee's Exhibits 4 and 11).

H. Daniel Friedman from pay grade 14 to pay grade 12 with a starting salary of $3,250 per month. (Appellee's Exhibits 4 and 12).

8. PPC had hired several individuals who had not been demoted or transferred from another state agency who did not qualify under the regulation to retain the salary level from previous positions:

A. Timothy Feltner had not been demoted when hired. His starting salary was $3,385 per month.

B. Morgan Palmiter had not transferred from another state agency. His starting salary was $3,385 per month.

C. James Selbert had a starting salary of $3,385 per month, and

D. John Clark had a starting salary of $3,385 per month.

9. The Appellant admitted the "demotion" provision of the regulation does not apply to him regarding his employment at PPC.

10. The Appellant admitted he had not transferred into his position at PPC from another state agency, since he was retired immediately prior to being hired by the Appellee.

CONCLUSIONS OF LAW

1. Any classified employee may appeal to the Kentucky Personnel Board an action alleged to be based on discrimination due to sex. KRS 18A.095(12).

2. In Kentucky, any person is afforded a right of action against his or her employer due to discrimination based on sex, pursuant to KRS 344.040. That statute, known as the Kentucky Civil Rights Act, prohibits a covered employer to otherwise discriminate against any individual with respect to the conditions or terms of employment because of that individual's gender. Because the Act is similar to Title 7 of the Federal Civil Rights Act of 1964, the Kentucky Civil Rights Act is to be interpreted consistently with Federal law. *Ammerman v. Board of Education*, 30 S.W.3d 793, 797-798 (Ky. 2000). The Appellant alleged he was the victim of reverse discrimination based on his gender, as it related to his starting salary as an Investigator II with the Public Protection Cabinet.

3. The burden of proof is on the Appellant to prove by a preponderance of the evidence that he had been discriminated against through gender or sex discrimination. As stated in KRS 13B.090(7):

> The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record, except when a higher standard of proof is required by law. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

4. In a discrimination case, the Appellant is first required to prove a *prima facie* case of discrimination.

> In proving a *prima facie* case of discrimination, a claimant must prove that he or she: 1) is a member of a protected class, 2) was subjected to adverse employment action, 3) was qualified for his or her position, and 4) was replaced by, or treated less favorably than, a person outside the protected class. *Jones v. Toyotetsu America, Inc.*, No. 2011-CA-001059-MR, Court of Appeals of Kentucky, citing *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992)[3]

5. Title VII prohibits discrimination against all groups, including majority groups, which have been historically favored. However, "the presumptions in Title VII analysis that are valid when a plaintiff belongs to a disfavored group are not necessarily justified when the plaintiff is a member of an historically favored group." *Pierce v Commonwealth Life, Ins. Co.*, 825 F.Supp. 783, 786 (E.D. Kentucky 1993) [quoting *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986)]. In a "reverse discrimination" case, the element of showing to be a member of a protected class is replaced with a requirement that one must demonstrate circumstances that "support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Jones v. Toyotetsu America, Inc.*, citing *Jefferson County v. Zaring*, 91 S.W.3d 583, 591 (Ky. 2002). Further, to make a *prima facie* case, one must demonstrate that "the employer treated differently employees who were similarly situated, but not members of the protected group." *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 62, 67 (6th Cir. 1985). See also *Christopher Thomas v. Energy Environment Cabinet, Division of Forestry*, , 2014 WL 3808989 at 9 (KY PB 2013-291).[4] One may meet such requirement "through a variety of background circumstances" including statistical evidence, employment policies showing a history of unlawful consideration of gender by the employer, evidence that the person responsible for the adverse employment action was a minority, or evidence of on-going tension regarding gender in the workplace. See *Treadwell v. Am. Airlines, Inc.*, 447 Fed.Appx. 676, 678 (6th Cir.).

6. PPC's hiring and determination of salaries for Sarah Tackett and Lora Estes were accomplished under the provisions of 101 KAR 2:034, Section 3(2) Demotion, which states:

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[3] A copy of said opinion is attached hereto as **Recommended Order Attachment B**, pursuant to CR 76.28 (4).
[4] A copy of said opinion is attached hereto as **Recommended Order Attachment C**, pursuant to CR 76.28 (4).

> (a) if an employee is demoted, the appointing authority shall determine the salary in one (1) of the following ways:
>
> 1. The employee's salary shall be reduced by five (5) percent for each grade the employee is reduced; or,
>
> 2. The employee shall retain the salary received prior to demotion. If the employee's salary is not reduced upon demotion, the appointing authority shall explain the reason in writing and place the explanation in the employee's personnel files.

7. Ms. Tackett had demoted to a lower pay grade, going from pay grade 14 at the Department of Criminal Justice Training to pay grade 12 at PPC, and was allowed to retain her previous salary. Ms. Estes had transferred and demoted to a lower pay grade in PPC and was allowed to retain her previous salary.

8. The Appellant was hired by PPC through a different route. He had previously been employed for twenty (20) years with the Kentucky State Police and then retired. While in retirement, he made application for and was hired by PPC as an Investigator II in the Department of Alcoholic Beverage Control on January 2, 2019. His was a new appointment from retired status.

9. The facts demonstrate the Appellant's salary at the time of his appointment was properly set pursuant to 101 KAR 2:034, Section 1(1). The Appellant admitted he had not transferred to his PPC employment from another state agency. The facts clearly show that the two (2) women who were hired by PPC in Investigator II positions did not come to those positions under the same or similar circumstances by which the Appellant had been hired.

10. The Appellant alleged he was subjected to an adverse employment action in that he was hired as an Investigator II at a starting salary that was lower than females hired to the same position. However, as stated above, the background circumstances establish legitimate lawful reasons for that different treatment. While the Appellant was qualified for his position (as he was hired, appointed, and served in that position without disciplinary incident), the facts did not support allegations that he was subjected to an adverse employment action or was treated less favorably than a person outside his protected class. He failed to present a preponderance of evidence demonstrating there were background circumstances to support the suspicion that the Appellee was that unusual employer who discriminated against the majority.

11. The Appellee clearly showed that employees who either 1) transfer into PPC from another state agency or 2) demote within PPC from a higher pay grade to a lower pay grade, may retain the salary received prior to transfer, pursuant to the regulations pertaining to demotion and/or transfer. This is what had occurred in the transfer and demotion of Sarah Tackett and Lora Estes (Appellee's Exhibit 4). Furthermore, the Appellee had processed transfers, demotions, and retention of salary for several males under the same regulations: Kazi Saleem, George Fallis,

Charles Carter, Mark Jordan, Charles Stovall, Don Davis, Roger Banks, and Daniel Friedman. (Appellee's Exhibit 4, and 5 through 12).[5]

12. The Appellant has failed to prove by a preponderance of the evidence a *prima facie* case of either discrimination or reverse discrimination based on sex or gender.

13. Assuming, *arguendo*, that the Appellant had met his burden of proof pertaining to a *prima facie* case, the burden of proof would then shift to the Appellee to articulate a legitimate, nondiscriminatory reason for the employer's actions. *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668 (1973). Even though it was not required, the Hearing Officer finds that the Appellee articulated several legitimate, non-discriminatory reasons for its actions:

A. The Appellant was hired into his position with PPC from retirement status. He did not transfer from another state agency.

B. The Appellant was a new appointment whose salary could not exceed the mid-point of the assigned pay grade. Therefore, the Appellant's salary of $3,385 per month was reasonable.

C. Other employees hired into PPC through transfer and demotion from other state agencies, cited by the Appellee at the hearing, were allowed to retain the salaries of their prior, higher grade positions, whether they were female or male.

D. Neither Sarah Tackett nor Lora Estes were new appointments, as that term is defined, when they were hired as Investigator IIs.

E. The authorization to allow a demoted employee to retain their prior salary, pursuant to the regulation, is not dependent upon that individual's background or experience, nor does it require that the person had previously held the position to which he or she was demoted.

14. Furthermore, the Appellant agreed during his testimony that:

A. Anyone who becomes employed with the PPC through the demotion process described in the regulation may retain the salary of the job from which they immediately left.

B. The "demotion" section of the same regulation does not apply to him.

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[5] Although none of these gentlemen transferred to the same employment position title held by the Appellant, they were all treated consistently under the regulation in retention of their prior salaries and in the same manner as Ms. Estes and Ms. Tackett, who had transferred to positions as Investigator II.

15. The Appellee has, by a preponderance of the evidence, articulated legitimate, non-discriminatory reasons for its actions.

16. Once an employer meets its burden of proving a legitimate, non-discriminatory reason for its actions, the burden of proof shifts back to the employee to show, by a preponderance of evidence that the employer intentionally discriminated against him and the articulated reason(s) is merely a pretext for illegal discrimination. *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668 (1973). There is simply no evidence that the Appellee intentionally discriminated against the Appellant or that any of the articulated reasons were merely a pretext for illegal discrimination. As such, the Appellant has failed to prove this element by a preponderance of the evidence.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JASON PAGAN V. PUBLIC PROTECTION CABINET (APPEAL NO. 2020-128) be DISMISSED.**

As the Hearing Officer recommends the appeal be dismissed, it is also recommended that 1) the Appellee's Motion to Dismiss Claims prior to May 15, 2019, and 2) the Appellee's Motion to Dismiss Claims that may have occurred after April 11, 2020, be **DISMISSED AS MOOT**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

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

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

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

ISSUED at the direction of **Hearing Officer Roland Merkel** this 28 day of October 2021.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:
Hon. Jennifer Wolsing
Hon. John Hardesty
Jason S. Pagan
Hon. Rosemary Holbrook (Personnel Cabinet)

Employee	ABC Current Title	Starting ABC Salary	Current ABC Salary	ABC Hire Date	Previous Employer
Lora Estes	Investigator III	$4,037	$4,037	10/1/18	**KDFWR** - Conservation Officer Rec - January 2006 - February 2007 - Conservation Office I - March 2007-October 2010 **Justice Cabinet** - Law Enforcement Training Instructor - November 2010-May 2015 - Law Enforcement Training Instructor II - June 2015-September 2018 **PPC-Department of Alcoholic Beverage Control** - Investigator II - October 2018-April 2020 *Transfer/Demote/Retain - Investigator III - April 2020-Present *Employee received no salary increase
Sarah Tackett	Investigator II	$4,037	$4,037	2/16/20	**Olathe, KS Police Dept** - Polygraph Examiner/Background Investigator/Recruiter January 2006-July 2013 - Program Coordinator/Testing Services April 2010-May 2013 **KY Law Enforcement Council Branch/Dept of Criminal Justice** - October 2013- Feb 15, 2020 **PPC-Department of Alcoholic Beverage Control** - Feb 16, 2020-Present *Transfer/Demote/Retained
Scott Brown	Investigator III	$3,385	$3,891	8/16/18	**Mayfield Police Dept** - October 1990-November 1998 **McCracken Co Sheriff's Dept** - November 1998-September 2001 **Benton Police Dept** - September 2001 - January 2007 **Alcorn Co Sheriffs Dept** - February 2007-July 2011 **Murray Police Dept** - December 2011 - February 2014 **Benton Police Dept** - February 2015 - August 2015 **Marshall Co Alcoholic Beverage Control** - November 2015 -August 2018
Jason Pagan	N/A	$3,385	$3,555	1/1/19	**KY State Police** - Trooper First Class - 1998-2013 - Sergeant 2013-2017
Morgan Palmiter	Investigator II	$3,385	$3,555	2/1/20	**Floyd County Sheriffs Dept** - 1994-1995 **Daviess Co Sheriffs Dept** - 1995-2019 **US Army Reserves** -Battalion Operation Sergeant 1993-2015
John Clark	Investigator II	$3,385	$3,555	4/16/20	**KY State Police** - Dispatcher 1994-1998 - Trooper 1998-2001 - Detective 2003-2006 - Field Sergeant 2006-2008 - Investigations Commander 2008-2009 - Operations Lieutenant/Asst Post Commander 2009-2013 - Post Commander KSP Post 3 Bowling Green 2013-2018 - KY State Police Major 2018-2019
James Seibert	Investigator II	$3,385	$3,555	2/16/20	**US Army, Field Artillery Operator** - March 2006 - April 2012 **City of Ludlow** - Peace Officer - September 2011 - October 2015 **City of Elsmere Patrolman** - October 2015-November 2016 **City of Park Hills Training Officer** - November 2016 - January 2020
Timothy Feltner	Investigator Supervisor	$3,385	$4,290	1/1/19	**Hazard Police Dept** - July 2011-March 2015 **Perry Co Sheriff's Dept.** - March 2015 - July 2015 **KDFWR Conservation Officer Recruite** - August 2015-December 2018

KEVIN JONES APPELLANT

v.

TOYOTETSU AMERICA, INC. APPELLEE

No. 2011-CA-001059-MR

Court of Appeals of Kentucky

October 26, 2012

NOT TO BE PUBLISHED

APPEAL FROM PULASKI CIRCUIT COURT HONORABLE JEFFREY T. BURDETTE, JUDGE ACTION NO. 09-CI-00572

BRIEF FOR APPELLANT: Marcia A. Smith David O. Smith Corbin, Kentucky ORAL ARGUMENT FOR APPELLANT: Marcia A. Smith

BRIEF FOR APPELLEE: P. Douglas Barr Gwen R. Pinson Lexington, Kentucky ORAL ARGUMENT FOR APPELLEE: P. Douglas Barr.

BEFORE: ACREE, CHIEF JUDGE; MOORE AND STUMBO, JUDGES.

OPINION

STUMBO, JUDGE.

Kevin Jones appeals from an Order of the Pulaski Circuit Court granting summary judgment in favor of Toyotetsu America, Inc. in his action alleging reverse discrimination and improper discharge from employment, hostile work environment (sexual harassment), and the tort of outrage. He argues that the court erred in failing to conclude that he established a *prima facie* case sufficient to overcome Toyotetsu's motion for summary judgment. We conclude that summary judgment was properly rendered, and accordingly affirm the Order on appeal.

In 2008, Jones was an employee of Toyotetsu in Somerset, Kentucky. On December 9, 2008, Anthony Bray was present at the Toyotetsu facility in the capacity of his employment with outside contractor Allied Toyotalift. Jones and Bray were acquainted and considered each other to be friendly. On the date at issue, Bray touched Jones on his chest without Jones's consent, and then grabbed and jiggled Jones's stomach where it overlapped Jones's belt. Jones told Bray to stop touching him, and told Bray that if Bray grabbed Jones again Jones would punch Bray in the mouth. Bray grabbed Jones's stomach again, after which Jones "straight armed" or shoved Bray away with an open hand.

Jones considered the matter ended, and did not report it to Toyotetsu. However, another employee reported the matter to Toyotetsu's management. Jones was suspended pending an investigation of the incident. After the investigation was concluded, Jones's employment with Toyotetsu was terminated based on Toyotetsu management's determination that Jones threatened and struck Bray in violation of Toyotetsu's Serious Misconduct Policy. Toyotetsu was unable to take corrective action as against Bray because he was not a Toyotetsu employee. Toyotetsu did, however, bar Bray from returning to Toyotetsu's facility.

Jones subsequently filed the instant action against Bray and Toyotetsu setting out claims of battery, sexual harassment, wrongful discharge, reverse discrimination and the tort of outrage. Bray and Toyotetsu each moved for summary judgment on all claims and both motions were sustained by way of separate orders. In granting summary judgment as to Toyotetsu, the court determined that even when viewing the record in a light most favorable to Jones, it would be impossible for him to satisfy the elements of the causes of action if the matter proceeded to trial.

Jones now appeals from the Order granting summary judgment in favor of Toyotetsu.[1] He argues that the circuit court erred as a matter of law in dismissing all claims against Toyotetsu. In support of his argument that summary judgment was improperly rendered, his primary contention is that a jury could reasonably conclude that a woman would not have been discharged from employment under the same circumstances as those which led to Jones's termination. Jones contends that Toyotetsu was not prepared to tender any evidence at trial that a female employee had been terminated under circumstances similar to or the same as the one at bar. He also claims that women were treated differently at Toyotetsu because Jones's manager, Jenny Chestnut, required women to be accompanied by someone when Bray was in their work area based on Bray's alleged prior inappropriate conduct.

Jones also alleges that during the last year of his employment with Toyotetsu, Jones had been sexually harassed by Bray when Bray showed Jones sexually explicit images and videos. Jones contends that Bray continued to show Jones these images even after Jones told him to stop, and that Jones complained to Chestnut who did nothing in response.

Jones goes on to argue that when the disputed facts and the record were viewed in a light most favorable to him, the court improperly failed to conclude that he could have met

the four-part test for establishing reverse sexual discrimination resulting in the termination of his employment. Additionally, he contends that he has set out a *prima facie* case of "sexual harassment hostile work environment" which the court improperly disposed of by way of summary judgment. Ultimately, the focus of Jones's argument is "that he was discharged because he was defending himself against sexual harassment by a co-worker, which would not have happened if he had been a woman in the very same circumstances." He seeks an Order reversing the award of summary judgment, and remanding the matter for further proceedings.

Jones's cause of action centers on two primary claims - first, that he was subjected to reverse sexual discrimination, and second, that he was subjected to hostile work environment sexual harassment. On the claim of reverse sexual discrimination, Jones contends Toyotetsu discriminated against him on the basis of his sex when his employment was terminated after he shoved Bray. As the trial court properly notes, under the Kentucky Civil Rights Act, Kentucky Revised Statutes (KRS) 344.040, it is unlawful for a covered employer to discharge any individual or to otherwise discriminate against any individual with respect to the conditions or terms of employment because of the individual's gender. Because the Act is similar to Title VII of the federal Civil Rights Act of 1964, the Kentucky Civil Rights Act should be interpreted consistently with federal law. *Ammerman v. Board of Education*, 30 S.W.3d 793, 797-798 (Ky. 2000).

In proving a *prima facie* case of discrimination, the claimant must prove that he or she 1) is a member of a protected class, 2) was subjected to adverse employment action, 3) was qualified for his or her position, and 4) was replaced by, or treated less favorably than, a person outside the protected class. *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992). "[A] prima facie case of 'reverse discrimination' is established upon a showing that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Jefferson County v. Zaring*, 91 S.W.3d 583, 591 (Ky. 2002)(citing *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985). In granting summary judgment on this issue, the Pulaski Circuit Court rejected Jones's contention that a woman in the same position would not have been fired if she threatened and/or shoved someone who grabbed her chest and stomach in an unwanted manner. In so doing, the court opined that Jones offered nothing more than mere speculation to support this claim. Additionally, the court disagreed with Jones's assertion that Toyotetsu gave female employees more protection from Bray than it did its male employees.

As to the claim of hostile work environment sexual harassment, in order to establish a *prima facie* case, the claimant must show that 1) he is a member of a protected class, 2) he was subjected to unwelcomed sexual harassment, 3) the harassment was based on his sex, 4) the harassment created a hostile work environment, and 5) the employer is vicariously liable. *Clark v. United Parcel Service, Inc.*, 400 F.3d 341, 347 (6th Cir. 2005). In rejecting this claim, the Pulaski Circuit Court determined that Jones, as a male, is not a member of a protected class, and that even if he were, Jones would be unable to present any evidence at trial that the unwelcomed touching was sexual in nature. Additionally, the court relied on *Ammerman, supra*, for the conclusion that isolated incidents are insufficient to meet the elements of the claim unless they are "extremely serious." In sum, the court opined that Jones could not meet the elements of his claims if the matter proceeded to trial.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky.1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to Jones and resolving all doubts in his favor, we must conclude that summary judgment was properly rendered. On the claim of reverse sexual discrimination, the trial court determined that Jones's claim of disparate treatment based on gender was purely speculative and not supported by the record. Jones argued that a woman in the same position as Jones - i.e., one who shoved or struck a third party after being touched in an unwelcomed manner - would not have been fired for violating Toyotetsu's Serious Misconduct Policy. The trial court's finding on this issue is supported by the record. Toyotetsu presented evidence by way of deposition that women had been fired for threatening violence in violation of the Serious Misconduct Policy. Conversely, Jones provided nothing in support of his claim that a female

employee had not been fired or would not have been fired under circumstances the same or similar to those at issue. Some proof of disparate treatment was required to make a *prima facie* case that Toyotetsu was the unusual employer who discriminates against the majority. *Zaring, supra.* Even when the record is viewed in light most favorable to Jones, he made no such showing, and the trial court did not err in so finding. Additionally, even if Jones made a *prima facie* case of reverse discrimination, Toyotetsu demonstrated a legitimate, non-discriminatory reason for terminating Jones's employment, to wit, his uncontroverted violation of the workplace employment policy.

On the claim of hostile work environment sexual harassment, the trial court again found that because Jones is a male, he is not a member of a protected class and must demonstrate that Toyotetsu is the unusual employer who discriminates against the majority. As noted above, Jones failed to demonstrate that Toyotetsu could be characterized as such an employer. Additionally, Jones did not claim that the unwanted touching was sexual in nature until *after* Toyotetsu's motion for summary judgment was entered, and this claim contradicted Jones's initial characterizations of the unwanted touching as something other than sexual in nature. Jones never maintained that the touching was sexual when interviewed by Toyotetsu, nor at any time by way of deposition or affidavit prior to the filing of Toyotetsu's motion for summary judgment. Additionally, a third party who witnessed the incident and reported it to Toyotetsu did not characterize the touching as sexual, but rather as a physical altercation culminating in Jones shoving or punching Bray. A post-deposition affidavit that conflicts with the deposition transcript may not be submitted solely to defeat a motion for summary judgment. *Gilliam v. Pikeville United Methodist Hospital*, 215 S.W.3d 56, 62 (Ky. App. 2006).

Kentucky courts have established a high threshold for conduct creating a hostile work environment. See generally, *Ammerman, supra*, which sets out factors to be considered including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. In the matter at bar, there were two alleged incidents, separated by months, where Bray touched Jones in a manner that Jones considered unwanted or offensive. Jones also recounted three incidents where Bray allegedly showed pictures or video on his phone to Jones. Prior to Toyotetsu's motion for summary judgment, Jones had little recollection of these events and could not exactly remember what he saw. The trial court found as surprising Jones's subsequent affidavit where he was able to remember what he saw in some detail and which contradicted Jones's early deposition testimony. These matters are set out in the record and support the trial court's conclusion that Jones's post-motion affidavit was not credible. Finally, the trial court determined that even if true, these events did not rise to the level of frequency or severity sufficient to constitute a hostile work environment, and certainly did not affect Jones's work. Jones did not even report the second incident of touching which resulted in his shoving or striking Bray, and Toyotetsu would not have known of it but for another employee reporting it.

Again, this analysis must be conducted in the context of Toyotetsu's motion for summary judgment, wherein the record must be viewed in a light most favorable to Jones and resolving all doubts in his favor. Even when viewing the record in such a manner, we cannot conclude that the trial court erred in finding that Jones is unable to present a *prima facie* case of reverse discrimination or hostile work environment sexual harassment. Accordingly, we find no error.

For the foregoing reasons, we affirm the Pulaski Circuit Court's Order Granting Partial Summary Judgment In Favor Of Defendant, Toyotetsu America, Inc.

Notes:

[1] Jones does not appeal from the Order granting summary judgment in favor of Bray.

2014 WL 3808989 (KY PB)

Personnel Board

Commonwealth of Kentucky

CHRISTOPHER THOMAS APPELLANT

v.

ENERGY AND ENVIRONMENT CABINET DIVISION OF FORESTRY
DR. LEN PETERS, APPOINTING AUTHORITY APPELLEE

APPEAL NO. 2013-291
July 16, 2014

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

****

*1 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 19, 2014, having noted Appellant's exceptions, Appellee's response, oral arguments 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** Statement of Factual Evidence Presented paragraph 5, and substitute the following:
5. On one occasion, when Thomas was working with Sarah Shewmaker, she said she had to go to the bathroom. Thomas said while she was gone he tried to figure out where they could go to find a better working place with access to water to mix with the chemicals. The next day he learned he was being accused by the women that he was watching them going to the bathroom. He described the accusations as petty, ridiculous and disgusting, and complained that he was being treated like he was a pervert. He testified that the last thing he would want to do was watch a female go to the bathroom, and that the accusations against him were false, without proof and offensive.

B. **Delete** Statement of Factual Evidence Presented paragraph 10, and substitute the following:
10. Shewmaker testified that a typical work day involves packing the powdered chemical insecticide and jugs of water to a site with trees to be treated, mixing the chemical in the jugs and treating the trees. She described the insecticide chemical as being contained in a small package, which is opened at the site and mixed with water they pull from a stream into a jug. She stated that each of the employees involved in treating the trees is required to have a license that certifies they are trained in handling pesticides.

C. **Delete** Statement of Factual Evidence Presented paragraph 22, and substitute the following:
22. **Alice Mandt** is employed with the Cabinet's Forestry Division as a Hemlock Treatment Coordinator, responsible for hiring crews for a nine-month work period of applying pesticide to treat trees for insects. She stated she obtained Thomas' name as a

Recommended Order Attachment C

potential employee from a Pastor, and that she called Thomas and he expressed that he would be interested in a job. After she hired him, most of their communication was by e-mail.

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.

*2 **SO ORDERED** this 16th day of July, 2014.

Mark A. Sipek
Secretary

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

****

This matter came for an evidentiary hearing on March 27, 2014, at 9:30 a.m., at the offices of the Kentucky Personnel Board, 28 Fountain Place, Frankfort, Kentucky, before Hearing Officer E. Patrick Moores. The proceedings were recorded by audio-video equipment pursuant to the authority found at KRS Chapter 18 A.

The Appellant, Christopher Thomas, was present and was not represented by legal counsel. The Appellee, Energy and Environment Cabinet, Division of Forestry, was present and represented by the Hon. Cannon G. Armstrong, of the Office of Legal Services, Public Protection Cabinet, Frankfort, Kentucky.

I. STATEMENT OF THE CASE

1. Christopher Thomas appeals his employer's decision of December 5, 2013, to terminate his services as an interim employee assigned to the position of a Forest Ranger Technician II with the Division of Forestry. Inasmuch as Mr. Thomas was an interim employee, his termination was without cause. The letter of termination informed Thomas that as an "interim employee" he did not have a right of appeal, except that under KRS18A.095 he may file a claim of discrimination with the Kentucky Personnel Board if he believed that the action was based on unlawful discrimination.

2. Thomas timely filed an appeal with the Kentucky Personnel Board on December 16, 2013, in which he alleged that he was discriminated against due to preferential treatment given to females, and he also alleged that there were ""many issues that needed to be addressed."

3. A Pre-Hearing Conference was held before the Kentucky Personnel Board on January 21, 2014, and the matter was scheduled for an evidentiary hearing to be held before the Board on March 27, 2014. The issue presented was whether the decision to terminate Thomas was taken against him by the Cabinet as a result of illegal discrimination based on his sex (male) and females he worked with received preferential treatment. The Appellant had the burden of proof, which is by a preponderance of the evidence.

4. The Evidentiary Hearing was conducted on March 27, 2014. On April 9, 2014, the Appellant, *pro se*, submitted a "Motion to Amend/Reopen Record & Admit Necessary Evidence," with attachments relating to the handling of insecticides and e-mail exchanges with a personal friend, Matt Wooten.

5. Appellant Thomas' "Motion to Amend/Reopen Hearing & Admit Necessary Evidence," consisted of a six-page, single spaced analysis and argument concerning the evidence produced during the hearing, a three-page description of recommended handling, storage and disposal of the insecticide used on the job, and copies of e-mails between the Appellant Thomas and his supervisor, Alice Mandt, and with a personal friend Matt Wooten concerning his work. Said evidence sought to be introduced post-hearing by Appellant Thomas involved more of the same matters he attempted to introduce during the Hearing, or covered the same issues that were determined by the Hearing Officer to be non-relevant and inadmissible. For the reasons set forth in the Conclusions of Law below, Appellant Thomas' Motion to Reopen the Hearing and admit the additional evidence **is DENIED** by the Hearing Officer.

II. STATEMENT OF FACTUAL EVIDENCE PRESENTED

*3 1. **Christopher Dalton Thomas** was hired by the Division of Forestry as an interim employee, assigned to the position of a Forest Ranger Technician, to serve with a "Hemlock" crew working out of Barbourville. He was hired by Alice Mandt. His job was to work with a crew treating trees in the Natural Bridge Park area with insecticide to prevent destruction of the trees by an insect pest known as "hemlock woolly adelgid."

2. The crew to which Thomas was assigned included three females: Alice Mandt (his supervisor), Brittany Shroll and Sarah Shewmaker. Thomas stated that the work crew difficulties began with problems finding an office and housing for the crew. He further complained that the crew was not given enough training on safety procedures in avoiding exposure to the chemicals from their constant use during application to the trees.

3. Thomas stated that when they started looking at treatment sites, that the supervisor, Alice Mandt, directed him to sit in the back seat of the crew's vehicle as they went to the work site, and that Ms. Shewmaker was instructed to sit up front. He said he started immediately having problems with Ms. Shewmaker, as he was made to carry all the "heavy stuff" and "big jugs" of water and chemicals up steep slopes, which caused him to slide and fall and spill chemicals. He claimed that Shewmaker told him "if you can't handle it, you should get another job."

4. Thomas also stated that Brittany Shroll was more interested in obtaining time off to go get a beer, than she was in doing her job. He also alleged that the women in the crew were routinely late reporting to their job, adding that when they finally arrived to the site in the woods where they were to work, the women would want to sit in the truck as it was "too dark."

5. On one occasion, when Thomas was working with Sarah Shewmaker, she said she had to go to the bathroom. Thomas said while she was gone he sat at the truck trying to figure out where they could go to find a better working place with access to water to mix with the chemicals. The next day he learned he was being accused by the women that he was watching them going to the bathroom. He described the accusations as petty, ridiculous and disgusting, and complained that he was being treated like he was a pervert. He testified that the last thing he would want to do was watch a female go to the bathroom, and that the accusations against him were false, without proof and offensive.

6. Thomas said that he was called to Frankfort that next day to answer to the accusations against him, and that he responded that there was no way that he wanted to watch the women go to the bathroom. He said that when he looked around for access to water he never left the main trail. He claimed that he believed that Brittany Shroll was setting him up to get him fired, saying that there was no evidence that he did anything wrong, and that where they were located in the rough terrain of the forest area, that a person could not see another person even a few feet away. He accused the personnel office of not adequately looking into the matter, and that he always allowed the women to do what they wanted and that there was never a point in time when he wasn't considerate to their feelings.

*4 7. Thomas testified that he had only been on the job less than a month, and that he became aware of a lot of issues that concerned him. He complained that the crew was supposed to take turns with the assignments, but that the women were given preferential treatment and that he was always given the tougher assignment and required to carry heavy loads. He stated that other methods of preferential treatment given the women was Alice Mandt, the supervisor, always requiring him to sit in the

back seat of the vehicle, and that on one occasion she told him that he should seek another job. He also expressed concern that the crew was not given sufficient training on handling and working with the chemical pesticides, and that he was very concerned about the issue of chemical contact with the skin.

8. Thomas testified that Steve Kull, the Assistant Director of the Division of Forestry, told him that he was being dismissed from his position. He stated that the Forestry Division took the women's lies without giving him a chance. On his Appeal Form submitted to the Personnel Board, Mr. Thomas alleged that "I was treated unfairly and falsely accused. Females were given preferential treatment to the point I lost my job." He also made other allegations of ""problems" and "issues" unrelated to the claim of discrimination.

9. Sarah Shewmaker is employed as an interim employee with the Appellee as a Forest Ranger Technician I, with the job duty to apply hemlock treatment to the trees. She described the job only lasting for a term of nine months, following which they have to reapply with the Department. She testified that she submits her applications on-line.

10. Shewmaker testified that a typical work day involves packing the powdered chemical insecticide and jugs of water to a site with trees to be treated, mixing the chemical in the jugs and spray-treating the trees. She described the insecticide chemical as being contained in a small package, which is opened at the site and mixed with water they pull from a stream into a jug. She stated that each of the employees involved in treating the trees is required to have a license that certifies they are trained in handling pesticides.

11. Shewmaker said she met Appellant Thomas on the first day of the interim work period, and that she assumed he had been hired by Alice Mandt. She stated that he had the same duties as the rest of the crew, but that he seemed very unsure of himself in a wilderness setting and reluctant to do the job.

12. Shewmaker testified that Thomas complained about carrying chemicals up sloping terrain, and that he seemed unsure of working with chemicals. She denied having heard him complain about being treated differently because he was a male, or that she ever was aware of any preferential treatment to women. She said the job was predominantly a male job.

13. She described the incident of being instructed to sit in the front of the truck by Alice Mandt was because she (Shewmaker) was familiar with the area. Mandt wanted her there to navigate, and that she drove most of the time at her request. She stated that she never heard any objections or argument from Thomas.

*5 14. Shewmaker stated that she had no prior issues with Thomas, except for his work ethic and unease in the wilderness work environment. She denied that she was involved in any attempt to have another person be given his position with the crew, and stated that there are presently two males on their Hemlock Treatment team.

15. Shewmaker testified that the only issue she had with Thomas was his being unwilling to work in rough terrain and having no initiative to do the job. She testified that on their second day at Natural Bridge, they were working the steepest area of the terrain and that Thomas expressed disbelief that they had to treat all the trees, and that he felt unsafe working with the chemicals. She said that the rest of the week that he seemed reluctant to do his job and that they had to instruct him to treat the next tree. She said that because of his continued complaints about safety concerns, they moved to another area.

16. Shewmaker testified that because they worked ten-hour days, they would have to relieve themselves in the woods. She stated that on the date in issue she and Brittany both needed to relieve themselves and that they told Thomas that they were going back upstream to an area they had already treated. She said she could not see where Brittany was located as there were two large rocks blocking her visibility. She went on with her work and later that day Brittany told her that Thomas had watched her relieve herself.

17. She was asked to give a written statement of the incident, which she discussed the next day with Mr. Kull. She commented that there was no reason for Thomas to be working in the area where they had gone, which had already been treated, but admitted that she did not see him, as she went a separate direction than Brittany.

18. **Brittany Amanda Shroll** is no longer employed with the Forestry Division, and is currently working part-time at a veterinarian clinic since January of 2014. She was previously an interim employee with the Forestry Division working on a nine-month term as a Forest Ranger Technician. She was assigned to a crew with Shewmaker, Thomas and Mandt, to do treatment on hemlock trees. She said they all had the same job assignment.

19. Shroll said she met Thomas on the first day of the crew's assignment. She described him as friendly and that she had no problem with his demeanor, working with him up to his dismissal. She said he asked a lot of questions about the work they did, and expressed concern about the chemicals and exposure to spills and contamination.

20. Shroll said that she never saw any preferential treatment with the women as they all had the same duties and they all were required to carry containers of the water and insecticide. She said the number of containers they had to carry depended on how far they had to go and how many trees they had to treat. She said that it was an easy job to learn.

21. She testified that the incident concerning their bathroom break in the woods occurred while they were setting up their work station at Natural Bridge State Park along a creek area. She said that she and Shewmaker had to relieve themselves and they set off to an area they had already worked. She said Shewmaker went to the area to their right and she went straight ahead. She said she saw Thomas looking towards her direction and became alarmed. She said he got on his phone and turned around and walked away. She said she did not know if Thomas had actually seen her, but said the thought crossed her mind that he may have taken a photo of her with his cellphone. Shroll testified that she did not immediately say anything to anybody, however, that evening she told Alice Mandt what happened.

*6 22. **Alice Mandt** is employed with the Cabinet's Forestry Division as a Hemlock Treatment Coordinator, responsible for hiring crews for a nine-month work period of applying pesticide to treat trees for insects. She stated she obtained Thomas' name as a potential employee from a friend of his wife, and that she called Thomas and he expressed that he would be interested in a job. After she hired him, most of their communication was by e-mail.

23. Mandt testified that when she interviewed Thomas about the job, he was made aware that most of the work would be performed in treacherous terrain and that he would be working with chemicals. She said she covered with him all the equipment and its use, and the types of chemicals he would be working with and how it was to be applied.

24. Mandt testified that Sarah Shewmaker and Brittany Shroll were assigned to the Hemlock crew with Thomas. She said she was in the field almost every day with them, and that she personally trained Thomas, going with him tree by tree applying chemicals "in order to make him feel comfortable with the chemicals." Mandt said she spent a lot of time with Thomas, and felt his complaints were disconcerting to her. She testified that she had showed him a safe method of treating the trees, and that she felt they had adequately covered the process. Mandt testified that she was very concerned with Thomas' lack of comfort working with the chemicals, in spite of the time she spent with him. She said that on one occasion he threw a jug down the hill toward where they were located. Mandt testified that Thomas had enough training and time to learn the job he was hired to perform, but that she became very concerned about the decisions Thomas was making, especially when he knew she was there watching his performance.

25. Mandt testified that she was told that evening about the incident of the women's allegation of Thomas watching them relieve themselves. She said that evening she called her supervisor about Thomas to ask his advice about what should be done, and that the next day she didn't go into the field but met with her supervisor. Mandt said that she didn't know if Thomas actually observed anything, but that it was enough for her that he had been informed by the women that they were going to relieve themselves and that he ended up in the same area. Mandt testified that Thomas' position was filled with a male.

26. **Steven Kull** is Assistant Director of the Division of Forestry. He testified that on the evening of December 3, 2013, he was informed of the Thomas incident by a text message from Diana Olszowy, Branch Manager. He called her and was told of the incident involving the Hemlock crew, and he told her to get the crew into his office the next day. The next day, December 4, he talked to each of the crew members. He said that Brittany Shroll told him that she could clearly see Thomas in her direct line of sight where she was. Sarah Shewmaker told him that she didn't know about the incident until Brittany told her later that day. Kull testified that Thomas told him that he was looking for a source of water to mix the chemicals, and acknowledged that he looked back in the direction where they worked the day before.

*7 27. Kull testified that he instructed Thomas to work in the office until he had an opportunity to discuss the situation with Human Resources. He said that after Thomas left, he contacted the Commissioner and explained the situation. Kull said he suggested that Thomas be terminated, stating that they had a previous discussion of the issue as to whether the Division wanted to keep Thomas as an employee before the incident with Brittany Scholl.

28. Kull testified that information was being compiled about Thomas' work performance, and it was his belief that with Thomas' education and scientific knowledge and the training he received should have been sufficient for him to meet the expectations of the job. Kull testified that he had previously decided that he did not want to keep Thomas, essentially because of his constant questions and complaints about how the division operated and the manner in which the trees were being treated. Kull said that he had previously decided to let Thomas work through the Christmas pay period.

29. Kull said he decided to bring Thomas in and explained to him that he was being dismissed, relying on the statutory authority pertaining to termination of interim employees without cause.

30. **Lynn Keeling Gillis** is Director of Human Resources for the agency which includes the Forestry Division. She stated that the termination of Mr. Thomas set forth in her letter dated December 5, 2013, giving him notice that, effective immediately, his services as a Forest Ranger Technician, are no longer needed, which was based on the authority under 101 KAR 3:050, Section 1(3).

31. Ms. Gillis said that actual hiring of individuals is done at the Division level, and that she made the decision about what they were going to do with the employment of Mr. Thomas. She testified that Mr. Thomas' termination was already being considered when she received the information about the incident with the female ranger technicians.

32. Ms. Gillis further testified that she never received any complaint from Mr. Thomas as to alleged sexual discrimination, nor did she receive any complaints about Ms. Scholl or Ms. Shewmaker receiving preferential treatment.

III. CONCLUSIONS OF LAW

1. It is established by the evidence on the record that the Appellant, Christopher Thomas, was hired by the Kentucky Division of Forestry as an ""Interim Employee" which is defined by KRS 18A.005(20) as an "unclassified employee without status who has been appointed to an interim position that shall be less than nine (9) months duration." The term "interim position" is defined by KRS 18A.005(21) as "a position designed to address a one time or recurring need of less than nine (9) months duration and exempt from the classified service of KRS 18A.115."

2. Inasmuch as Mr. Thomas was an unclassified "interim" employee hired for an ""interim position," the law of this case is controlled by the administrative regulation set forth at 101 KAR 3:050, Section 1(3), which provides that "An employee appointed to a position subject to this administrative regulation shall serve at the will of the appointing authority and shall be subject to termination without prior notice or cause." 101 KAR 3:050, Section 7(2) reiterates that "An employee subject to this administrative regulation may be terminated with or without cause."

*8 3. The letter giving Thomas notice of his termination informed him that the action was being taken without cause, and that he did not have the right of appeal. However, pursuant to KRS 18A.095(14)(a), he was advised that he had the right to appeal if he believed the action was based on unlawful discrimination. Mr. Thomas filed an appeal of his dismissal on the basis of discrimination, alleging "sexual discrimination," due to the females being given preferential treatment.

4. In as much as Thomas is an "unclassified" and "interim" employee, he does not have the statutory protections of a "classified" employee, and according to the state regulation at 101 KAR 3:050, Section 1(3), he may be terminated without notice and without cause. Essentially, Thomas' employment with the Division of Forestry is akin to that of an "at will" employee. Generally, in the absence of a specific statutory or contractual provision to the contrary, employment in Kentucky is terminable at-will, meaning that an employer may ordinarily discharge an employee "for good cause, for no cause, or for a cause that some might view as morally indefensible." *Firestone Textile Co. Div., Firestone Tire and Rubber Co.* v. *Meadows*, 666 S.W.2d 730, 731 (Ky. 1983); *Benningfield* v. *Pettit Environmental, Inc.*, 183 S.W.3d 567 (Ky. App. 2005). The question then becomes if the action taken without cause violates a state policy or is arbitrary under the circumstances.

5. There are exceptions to the at-will doctrine in Kentucky, including situations where the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law, as set forth in *Firestone Textile Co.* v. *Meadows*, 666 S.W.2d 730 (Ky. 1983) [(quoting *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840 (Wis. 1983)]. The state of the law concerning at-will employment in the Commonwealth is well-established. At-will employment permits an employer to fire employees for good cause, for no cause, or for a cause that some might view as morally indefensible. See *Grzyb* v. *Evans*, 700 S.W.2d 399, 400 (Ky. 1985). Kentucky recognizes only two exceptions in which discharging an employee is so contrary to public policy that it becomes actionable. First, an employee's termination can be actionable where it is based upon the employee's refusal to perform an illegal act as a condition of employment. Second, a cause of action may be found for wrongful termination where an employee is fired for exercising a legal right conferred by a statute. *Grzyb*, 700 S.W.2d at 402. The evidence presented by the Appellant failed to establish any reasonable inference that the agency acted improperly in terminating him without cause.

6. The facts establish that Thomas was creating difficulty within the work crew with his continuous complaints about having to carry the water jugs and the chemical mixing agents on hilly terrain. His supervisor had noted that Thomas' constant complaining about the work conditions in a wilderness area and handling chemicals required to treat the trees, had become so disruptive that she had addressed the matter of terminating him with her manager, and it was determined that they would carry him through Christmas. In *Connick* v. *Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), the United States Supreme Court said that "the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." Id. at 151, 103 S.Ct. at 1692 (quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 168, 94 S.Ct. 1633, 1651, 40 L.Ed.2d 15 (1974)). As pointed out in *Commonwealth of Kentucky-Transportation Cabinet* v. *Whitley*, 977 S.W.2d 920, 922 (Ky. 1998), the Court did not "grant blanket protection to all employee criticism." If the particular speech addresses a matter of public concern, a balancing test must be applied weighing "the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees."

*9 7. Appellant Thomas failed to produce any evidence of discrimination or unlawful preferential treatment based upon his being a male. In proving a *prima facie* case of discrimination, the claimant must prove that he or she 1) is a member of a protected class, 2) was subjected to adverse employment action, 3) was qualified for his or her position, and 4) was replaced by, or treated less favorably than, a person outside the protected class. *Mitchell* v. *Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992). A *prima facie* case of 'reverse discrimination' is established upon a showing "that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Jefferson County* v. *Zaring*, 91 S.W.3d 583, 591 (Ky. 2002) (citing *Murray* v. *Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985)).

8. Thomas' allegations on preferential treatment was based principally on the allegation that one of the other women on the crew was always told to sit up front, and he had to ride in the back seat of the vehicle on their way to a work site, and the woman were always late for work. The vehicle arrangement was explained by Ms. Shewmaker's testimony that she was instructed to sit in the front by the supervisor of the work crew, Alice Mandt, because she was familiar with the area, and Mandt wanted her there to navigate, and that she drove most of the time at Mandt's request. She stated that she never heard any objections or argument from Thomas. Shroll testified that she never saw any preferential treatment with the women as they all had the same duties and they all were required to carry containers of the insecticide. None of the witnesses were able to provide any testimony of unwarranted preferential treatment, or favorable work assignments because they were female. Lastly, the record establishes that the employee that was hired to replace Thomas was a male. Thomas' claim of disparate treatment based on gender was purely speculative and not supported by the record.

9. Finally, there is the matter of the Post-Hearing Motion of the Appellant to Amend and Reopen the Record and Admit Necessary Evidence. The Appellant Thomas' motion is based on his attempt to introduce and admit into the record the same information he attempted to introduce at the evidentiary hearing, which was objected to due to its hearsay nature of meaningless documentation pertaining to the chemicals having no bearing or relevance to the issue on appeal, and e-mail communications, including those with a friend outside the employment environment. Further, at the completion of the evidentiary hearing the Appellant made no motion to keep the record open to introduce additional new evidence. These matters had previously been ruled as irrelevant and inadmissible by the Hearing Officer, and Appellant's post-hearing motion provides no factual or legal basis to set aside said ruling and admit the evidence. The Appellant's Motion to Amend/Reopen and Admit Necessary Evidence is **OVERRULED.**

*10 10. It is the conclusion of the Hearing Officer that Appellant Thomas failed to produce any probative evidence that the Division of Forestry's decision to terminate him, without cause, was arbitrary or that he was a victim of any disparate discriminatory conduct. Further, the Hearing Officer finds that there was insufficient evidence that Appellant Thomas was seeking to observe or actually did observe a female co-worker relieving herself. Said allegation was merely an incident that raised consideration of his termination taking effect earlier, as it had already been decided that, as an interim employee, he was to be discharged from his position. The evidence is that this alleged incident was not the basis of his termination, and he was discharged without cause pursuant to 101 KAR 3:050, Section 1(3).

V. RECOMMENDED ORDER

Having considered and weighed all the evidence and the laws of the Commonwealth of Kentucky, and based upon the foregoing findings of fact and conclusions of law, it is the recommendation of the Hearing Officer that the appeal of **CHRISTOPHER THOMAS VS. ENERGY AND ENVIRONMENT CABINET, DIVISION OF FORESTRY (APPEAL NO. 2013-291) be DISMISSED.**

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

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

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

ISSUED at the direction of **Hearing Officer E. Patrick Moores** this 19th day of May, 2014.

Mark A. Sipek
Executive Director

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