COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-056

DE ANNE PIERSON-ANDREW **APPELLANT**

VS.

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

JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS **APPELLEE**

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

The Board, at its regular June 2017 meeting, having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated May 2, 2017, Appellant's Exceptions and Request for Oral Argument, Appellee's Response to Appellant's Exceptions and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeals are 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 15th day of June, 2017.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Angela Cordery
Ms. De Anne Pierson-Andrew
Mr. Rodney E. Moore

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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This matter came on for an evidentiary hearing on November 30, 2016, at 9:30 a.m., at the offices of the Kentucky Personnel Board, Frankfort, Kentucky, before E. Patrick Moores, Hearing Officer. The proceedings were recorded by audio/video equipment pursuant to the authority found at KRS Chapter 18A.

The Appellant, De Anne Pierson-Andrew, was present and was not represented by legal counsel. The Appellee, the Justice and Public Safety Cabinet, Department of Corrections (hereinafter DOC), was present and was represented by the Hon. Angela Cordery.

I. STATEMENT OF THE CASE

1. De Anne Pierson-Andrew appeals DOC's decision of February 16, 2016, to terminate her from the position of Chaplain with the Kentucky Department of Corrections, Little Sandy Correctional Complex (LSCC), near Sandy Hook, Kentucky. The notice of the termination was issued by letter from Joseph Meko, Warden. Ms. Pierson-Andrew started her employment with LSCC on September 8, 2015, and was still serving her initial probationary period of six months. KRS 18A.111 provides that a probationary employee has no right of appeal for termination while serving in the probationary status. However, KRS 18A.095(14)(a) provides that any employee, applicant for employment, or eligible on a register, who believes that he or she has been discriminated against, may appeal to the Board.

2. The letter from Warden Meko did not inform Ms. Pierson-Andrew of the reason for her termination, as no reason is required for an employee terminated during the probationary period. Ms. Pierson-Andrew filed an appeal pursuant to KRS 18A.095(14)(a), which was received by the Kentucky Personnel Board on March 17, 2016, stating that she was on approved sick leave when she was terminated, and that she was subjected to discriminatory conduct and forced to work in a hostile work environment. She further stated in the appeal that her supervisor made racial comments to her and that her application for government housing as an expert staff on-call 24/7 would not be accepted as the housing was going "to the Warden's boy," who was white. She

further alleged that the Warden displayed a discriminatory attitude towards the inmates concerning approval of requests to attend a funeral.

3. A pre-hearing conference was held before the Kentucky Personnel Board on May 2, 2016. The Appellant was present and not represented by legal counsel. The Cabinet was represented by the Hon. Angela Cordery of the Cabinet's Office of Legal Services. The issue presented was whether the Appellant, who is an African-American female, was terminated from her position as Chaplain as a result of racial discrimination. The Appellant was seeking to be reinstated and awarded her back pay lost as a result of the termination. The Appellant had the burden of proof, which is by a preponderance of the evidence, and the matter was set for an evidentiary hearing on June 15, 2016.

4. The Appellant alleged during the pre-hearing conference that she was never told that the job involved a probationary position, as she had seen an earlier job description for the position of Chaplain that did not indicate this was a position that would include a probationary period. In response to her request for a copy of the job description, the DOC filed a copy of the Job Class Specification on May 26, 2016, which clearly stated in the first statement in the specification, in boldface print, that the job involved a probationary period, further described as a six-month probationary period.

5. On June 14, 2016, the Kentucky Personnel Board conducted a pre-hearing conference on the matter and set it for an evidentiary hearing to be held on June 15, 2016. The Order directed that the issue to be heard was whether the Appellant was terminated because of race discrimination, and that the Appellant had the burden of proof by a preponderance of the evidence. The evidentiary hearing was rescheduled for November 3, 2016. On October 28, 2016, the Board rescheduled the evidentiary hearing to occur on November 30, 2016.

6. The evidentiary hearing was conducted on November 30, 2016. At the conclusion of the presentation of the evidence, the parties determined that they wanted to submit briefs on the facts and their argument on the law. Once the briefs were received, the matter was submitted to the Hearing Officer for a finding of facts, conclusions of law and recommended order.

II. SUMMARY OF FACTUAL EVIDENCE PRESENTED

1. **De Anne Pierson-Andrew** testified that she was hired on September 8, 2015, as a Chaplain at the Little Sandy Correctional Complex (hereinafter referenced as LSCC). She denied that she was told she was being hired as a probationary employee, however, the documents introduced during the hearing unquestionably stated the position was being offered on a six-month probationary basis. She began her service the week of September 14, 2015. She testified that when she began work her direct supervisor, Mr. Holbrook, said to her, "I'm really interested to see how the other people, local church people, treat you," touching his skin, indicating that she was female and African-American.

2. On November 18, 2015, she submitted a NCIC request for allowing some Mennonite workers to be vetted and cleared to come to the prison to work at a "Christmas Behind Bars" program, but that Mr. Holbrook told her not to send the background check requests to NCIC, as he would take care of it and to give the list to him. She said that he apparently did not do the checks, as they had trouble getting the workers into the prison to work on the program. She stated that Holbrook blamed her for not doing the checks, which she stated that as a Chaplain it was not her job.

3. Ms. Pierson-Andrew testified that she applied for government housing on LSCC property, at one of two units she learned had become available, and she said that Holbrook told her she would not receive the housing as they were reserved "for the Warden's boys." She said she learned that a Grade 9, white employee, got the house. She acknowledged that there is a policy for the awarding of housing to people who worked on the property 24/7, and admitted to her knowledge Holbrook had nothing to do with awarding who got the housing, but that he informed her that only the Warden's boys, that he approved of, would get the housing.

4. Ms. Pierson-Andrew testified that Holbrook was very demeaning to her, and that she told him he was verbally abusive. She said she complained to the Human Resource Administrator, Ms. Serena Waddell, about his conduct towards her, and Ms. Waddell told her that Holbrook was verbally abusive to all women, had a problem talking to people, and that she should write him up and submit her written complaint to her. Ms. Pierson-Andrew said she wrote a lengthy document spelling out the conduct of Holbrook towards her, but she never received any response.

5. Ms. Pierson-Andrew testified that she once stated to Holbrook that she felt like she was living in the middle of nowhere. Holbrook responded to her that she should stop saying that because it was like she was accusing him of using the "N" word.

6. Ms. Pierson-Andrew said she was repeatedly offended by Holbrook's comments and yelling at her, and that under the stress he was causing her, her asthma condition was aggravated, causing her to become sick and miss work, and on December 29, 2015, she went on sick leave.

7. Ms. Pierson-Andrew testified she had previously worked as a correctional officer in 2006-2009, in a prison for the Indiana State Department of Corrections, and that she was familiar with the stress associated with the prison environment, in which staff and the guards would often lose their temper. She stated that she still expected people to perform their jobs in a professional manner and that she had never been yelled at like she was confronted by Holbrook.

8. A Job Specification for the position of Chaplain was introduced in the record by the Appellant which described the minimum requirements and education for the position. A Position Description was introduced that set forth the functional duties of the Chaplain position. Lastly, a Job Class Specification was presented which stated that the job has an initial probationary period of six months. Ms. Pierson-Andrew said she read the documents and was familiar with the

information contained on them, but denied she was ever informed the job was being offered on a probationary basis.

9. **Serena Waddell** is the Human Resource Administrator at LSCC, in charge of all personnel matters, including disciplinary issues. She was involved in the interview process for the Chaplain position. She testified that there were 16 applicants for the job, but only four applicants met the minimum qualifications and were interviewed. Two candidates were finally selected to submit to the Warden for consideration. Waddell stated that the key point in Pierson-Andrew's favor was her prior corrections experience and training.

10. Waddell testified that she discussed with Pierson-Andrew the problem she was experiencing with Holbrook, and that she recommended that Pierson-Andrew write a statement describing the issues she had with Holbrook and submit it to her. Waddell said she had a discussion with Pierson-Andrew about the way Holbrook talked with people, which she never considered to be racial in nature. Waddell testified that most of Holbrook's criticisms toward women were directed at the way they dressed for work in that environment. Waddell said that Pierson-Andrew turned in her statement on December 29, 2015, which Waddell said was right before the New Year's holiday, and that she put it on her desk. She admitted that she did nothing with the statement, primarily because Pierson-Andrew had taken off work that day and never came back.

11. Waddell testified that she discussed with Pierson-Andrew the health issues keeping her from working, and was told that she had an asthma condition, and that her conflicts with Holbrook were aggravating that condition and causing her problems. The doctor's written statements directing that she be excused from work gave no explanation of the health condition that was keeping her from showing up for work. Waddell testified that after Pierson-Andrew did not return to work, and as the end of her probationary period was approaching in mid-February, she determined that Pierson-Andrew needed to be replaced with someone more dependable at showing up to work. Warden Joseph Meko agreed and issued a letter to Pierson-Andrew on February 16, 2016, that she was being terminated from the position of Chaplain. The letter informed her that due to the fact she was a probationary employee, pursuant to KRS 18A.111, she had no right of appeal. His letter further informed her that under KRS 18A.095 she could bring an appeal if she believed the action against her was based on unlawful discrimination.

12. **Paul W. Holbrook** is the Deputy Warden of Programs at LSCC, with the responsibility of overseeing all the housing units in the facility and the staff, including the Chaplain. He testified that he first met Appellant Pierson-Andrew during her interview for the position. He said he thought she gave the best interview of all the candidates, and recommended her for the position of Chaplain. He said he would occasionally spend time in the chapel, and that she would stop by his office every now and then. He said he went over the Chaplain's job description and duties with her.

13. Holbrook said that his primary concern with Pierson-Andrew was her failure to think about the factors that go into the situations under her responsibility. He stated, for example, she would approve funeral leave for inmates without doing an adequate review of the relationship of the inmate with the deceased, any association the inmate had with the location of the funeral, the inmate's criminal record and the risk factor of allowing the inmate outside the prison facility.

14. Holbrook also mentioned the issue concerning the Christmas Behind Bars program in which groups would work with the prison and assist in providing the inmates in receiving bags of gift items. He said they had over a thousand bags to distribute, but, unfortunately, the gift items received were not in clear bags, requiring them to search every bag to make sure none contained any contraband. Additionally, one of the members of the group coming to work in the distribution was allowed behind the fence and past the Sally Port without being properly cleared. His name should have been submitted by her in order that he could be vetted and cleared to enter the prison.

15. Holbrook testified that he had no racial bias towards any staff member, and especially not Appellant Pierson-Andrew. He testified that he was involved in her interview and that she had an excellent interview. He said he recommended she be hired because her résumé was excellent and she appeared the most qualified. He said that it was his understanding that the reason she was let go was because of her attendance issue.

16. **Warden Joseph Meko** is the appointing authority at the LSCC. He has spent over 20 years working in correctional administration. He testified that the reason Appellant Pierson-Andrew was terminated was that she was still a probationary employee and was not coming to work. He testified that she was off work from December 29, 2015, until she was terminated on February 16, 2016, and there was insufficient evidence and proof of a medical situation to support her time away from work. He said that she was needed to fulfill the spiritual needs of the inmates, and that a Deputy Warden was having to go to the chapel to do her job. He testified he was never made aware of any discrimination issues directed towards her or that she was forced to work in a hostile work environment.

III. FINDINGS OF FACT

1. The Appellant, De Anne Pierson-Andrew, was hired on September 8, 2015, as the Chaplain at the Little Sandy Correctional Complex, on a six-month probationary basis.

2. She began to experience conflicts with Deputy Warden Paul Holbrook, who she said acted towards her with discriminatory conduct and racially insensitive words. Her earliest indication of this conduct of Holbrook was when he told her that he could not wait to see how the other local church members treated her, and pointed to her skin indicating that because she was black she would experience bias. Holbrook denied the comment and any racial bias.

3. Holbrook testified that he had a problem with Appellant Pierson-Andrew's lack of attention to details, such as her failure to properly analyze whether an inmate could properly be considered to be allowed to leave the prison facility for funeral leave, and to properly have

outsiders come into the prison to participate in a Christmas gift program for the inmates without having them vetted to permit their entry into the prison facility, and have the gifts properly searched for contraband. Lastly, she took off over six weeks from work without providing a medical excuse describing the reason she could not return to work.

4. Appellant Pierson-Andrew took over six weeks away from her job as Chaplain at LSCC, without providing medical documentation for the reason she was missing work, which left LSCC without a Chaplain to perform the services for which she was hired, and with no indication when she intended to return to work.

5. Appellant Pierson-Andrew was working as a probationary employee in an important position of Chaplain. The six weeks she missed from work left LSCC with no one to attend to the inmates' spiritual needs.

6. The allegations of Appellant Pierson-Andrew of discrimination against her, and that she was forced to work in a hostile work environment, were unsubstantiated by direct or indirect evidence.

IV. CONCLUSIONS OF LAW

1. The adverse employment actions Appellant identifies as discriminatory and creating a hostile work environment were: (1) the statement her supervisor made to her,"I can't wait to see how the local church people treat you," pointing to his skin, which she took to mean that the local church people would be adverse to her because of the color of her skin; (2) her being yelled at by her supervisor; and (3) her filing a complaint against him. The Appellant also charges that her supervisor's yelling at her caused her to suffer stressful working conditions that aggravated her health condition, which separately constituted an adverse employment action.

2. Words or conduct that one considers offensive to their sensitivities does not rise to a violation of the Constitution and the discrimination laws of the United States. The most prevalent examples of this are the First Amendment rulings on pornography cases. Without freedom of thought, even that which is considered a mocking phrase, there can be no free society. The question in this case is whether words which the Appellant considers patently offensive and insensitive arise to the level of discriminatory conduct. Not all workplace conduct which may be described as harassment affects a term, condition, or privilege of employment. *Consolidated Edison Company of New York v. Public Service Commission of New York*, 100 S.Ct. 2326, 447 U.S. 530, 65 L.Ed.2d 319 (1980); *Avis Rent-a-Car System, Inc. v. Aguilar*, 120 S.Ct. 2029, 529 U.S. 1138, 146 L.Ed.2d 971 (2000). To prevail on a hostile work environment claim, an employee must show that the harassing conduct was sufficiently severe enough or sufficiently pervasive to alter the conditions of employment and creates a work environment that qualifies as hostile or abusive to employees. *Meritor Savings v. Vinson,* 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

3. The evidence presented by Appellant Pierson-Andrew failed to prove direct or indirect evidence of discriminatory conduct. Direct evidence includes "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 520 (4th Cir. 2006). If believed, direct evidence "would prove the existence of a fact . . . without any inference or presumptions." *O'Connor v. Consol. Coin Caterers Corp.*, 56 F.3d 542, 548 (4th Cir. 1995).

4. To establish direct evidence, the Appellant must produce evidence that clearly indicates a discriminatory attitude at the workplace and must illustrate a nexus between that negative attitude and the employment action. *Desert Palace, Inc. v. Costa,* 123 S.Ct. 2148, 539 U.S. 90, 156 L.Ed.2d 84 (2003). The Appellant argues that a single statement allegedly made by Mr. Holbrook, "I can't wait to see how the local church people treat you," and pointing to his skin, is direct evidence of a discriminatory attitude that bears on Mr. Holbrook's discriminatory conduct toward her. Assuming *arguendo* that this statement was made, it is not evidence of her employer's discriminatory attitude. As a preliminary matter, it is not clear that a single, isolated statement could provide the requisite direct evidence of intent. *Mungro v. Giant Food, Inc.*, 187 F.Supp.2d 518, 521 (D.Md. 2002). According to Ms. Pierson-Andrew, Mr. Holbrook did not say anything that established he did not want her working for him.

5. Moreover, Appellant Pierson-Andrew's assertions that Mr. Holbrook yelled at her and other women working in the prison, thereby creating a hostile work environment, does not put forth direct evidence of discrimination. Appellant Pierson-Andrew's discrimination claims must be examined using the burden-shifting framework established in *McDonnell Douglas Corp. v. Green,* 93 S.Ct. 1817, 411 U.S. 792, 36 L.Ed.2d 668 (1973). The familiar *McDonnell Douglas* framework compensates for the fact that direct evidence of intentional discrimination is hard to come by and gives a party who lacks direct evidence a method for raising an inference of discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Under *McDonnell Douglas*, once the Appellant meets her initial burden of establishing a *prima facie* case for a Title VII violation, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the employer meets this burden of proof, the burden shifts back 'to the Appellant to prove by a preponderance of the evidence that the employer's stated reasons were not its true reasons, but were a pretext for discrimination. *Reeves v. Sanderson Plumbing Products, Inc.,* 120 S.Ct. 2097, 530 U.S. 133, 147 L.Ed.2d 105 (2000). The final pretext inquiry merges with the ultimate burden of persuasion that Appellant Pierson-Andrew has been the victim of intentional discrimination, which at all times remains with the Appellant. See: *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

6. To establish a *prima facie* case on a theory of disparate treatment, a plaintiff must show four elements: (1) that she is a member of a protected class; (2) that her job performance was satisfactory; (3) that she suffered an adverse employment action; and (4) that she was treated differently from similarly situated employees outside the protected class. *Coleman v. Court of Appeals of Md.*, ___ U.S. ___, 132 S.Ct. 1327, 182 L.Ed.2d 296 (2012). The Appellee challenges Appellant's showing on the second, third, and fourth elements. Here, without deciding whether

Appellant has met her burden with regard to the second and fourth elements, the Hearing Officer finds that Appellant has not presented evidence showing an adverse employment action against her. Therefore, she cannot establish a *prima facie* case of discrimination.

7. An adverse employment action is a discriminatory act which adversely affects the terms, conditions, or benefits of the Appellant's employment. *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371 (4th Cir. 2004). In most cases, this type of action inflicts direct economic harm, by way of a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

8. Indirect actions that affect present and future employment such as loss of job title, loss of supervisory responsibility, limited access to training programs, or reduced opportunities for promotion also qualify as adverse employment actions. *Boone v. Goldin*, 178 F.3d 253, 255 (4th Cir. 1999); *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981).

9. The record demonstrates that she was a probationary employee who was terminated from her employment with the Little Sandy Correctional Complex because she stopped reporting for work from December 29, 2015, until the date she was terminated on February 16, 2016. As a probationary employee, without any documentation establishing a reasonable medical basis for her being away from work for up to six weeks, and, further, not providing any reasonable basis that her absence from work was related to her employment, Appellant's behavior essentially constitutes an abandonment of her employment.

10. The allegations of discrimination against Appellant Pierson-Andrew and her claims she was forced to work in a hostile work environment were unsubstantiated. After extensively reviewing the testimony introduced in the hearing, reviewing all the documentation, and considering the briefs submitted by the parties, along with the laws of the Commonwealth of Kentucky and the United States, it is the conclusion of this Hearing Officer that the termination penalty imposed on the Appellant was appropriate and reasonable, and with just cause, and there was no evidence of discriminatory conduct or that Appellant Pierson-Andrew was forced to work in a hostile environment.

V. RECOMMENDED ORDER

Having considered and weighed all the evidence and the laws of the Commonwealth of Kentucky and the United States, and based upon the foregoing findings of fact and conclusions of law, the Hearing Officer recommends to the Personnel Board that the appeal of **DE ANNE PIERSON-ANDREW VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2016-056)** 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, § 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, § 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 2ND day of May, 2017.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

De Anne Pierson-Andrew
Hon. Angela Cordery