

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2021-095**

BRAD N. ROGERS

APPELLANT

VS.

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

KENTUCKY DEPARTMENT OF EDUCATION

APPELLEE

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

The Board, at its regular May 2025 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated April 11, 2025, 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 15th day of May, 2025.

KENTUCKY PERSONNEL BOARD

Gordon A. Rowe, Jr.

Copies hereof this day emailed and mailed to:

Brad N. Rogers
Hon. Sara Bentley
Hon. Rosemary Holbrook (Personnel Cabinet)

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2021-095

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

KENTUCKY DEPARTMENT OF EDUCATION

APPELLEE

* * * * *

This matter is before the Hearing Officer on the Renewed Motion to Dismiss filed by the Appellee herein, Commonwealth of Kentucky, Department of Education. The Appellant, Brad N. Rogers, has not filed a response to the Renewed Motion to Dismiss. In addition to the Renewed Motion to Dismiss, the Hearing Officer has considered relevant parts of the administrative record in this case, including responses to discovery submitted by each party.

This appeal last came on for a pre-hearing conference on June 6, 2024, at 10:00 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Gordon A. Rowe, Jr., Executive Director/Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A. The appellant herein, Brad N. Rogers (the “Appellant”), was present by telephone and was not represented by legal counsel. The appellee herein, Commonwealth of Kentucky, Department of Education (the “Appellee” or “KDE”), was present by telephone and was represented by the Hon. Sara Bentley.

The principal purposes of the pre-hearing conference were to discuss the status of discovery, and to address the Appellee’s Renewed Motion to Dismiss the appeal.

After due consideration and review of the Motion to Dismiss, along with related documents in the record, the Hearing Officer has concluded that the Appellant failed to meet his burden of establishing a genuine issue of material fact on the issue of racial discrimination and that the appeal should be dismissed as a matter of law. In order to survive a motion to dismiss, the Appellant was required to produce some evidence showing that the Appellee was the unusual employer who discriminates against the majority, which he has failed to do. *See Jefferson Co. v. Zaring*, 91 S.W.3d 583, 591 (Ky. 2002). He also failed to show that he was treated less favorably than similarly situated employees of a different race. The Findings of Fact and Conclusions of Law below support the Hearing Officer’s recommendation that the Personnel Board dismiss this appeal.

FINDINGS OF FACT and PROCEDURAL BACKGROUND

1. The Appellant was employed briefly by the Appellee as a Systems Engineer IT until he was terminated on July 20, 2021. [See July 20, 2021, letter from Kentucky Department of Education to the Appellant (the “Termination Letter”).]

2. The Appellant was a probationary employee when his employment was terminated by the Appellee on July 20, 2021, and he has never disputed his status as a probationary employee. [See July 20, 2021, Termination Letter.]

3. The Appellant filed an appeal with the Personnel Board on August 23, 2021, alleging that he was wrongfully dismissed from his employment due to racial discrimination. In his statement of facts on the Appeal Form, the Appellant alleged he was “terminated because of racial discrimination” and “fired for being white.” [See Appeal Form date-stamped August 23, 2021 (the “Appeal Form”)]. The Appellant also alleged that a software developer of Indian descent used by KDE “openly lied” about or “sabotaged” his work. [See Appeal Form at p. 2.]

4. In October 2022, during the discovery phase of this case, the Appellee timely served the Appellant discovery requests, which consisted entirely of two (2) interrogatories and one (1) request for production of documents. By Interim Order, the Hearing Officer ordered the Appellant to respond to the discovery requests by December 16, 2022. Between December 16, 2022, and April 26, 2024, the Appellant’s time to respond to the requests was extended several times by the Hearing Officer. During this period, the Appellee also filed motions to dismiss the appeal based on the Appellant’s failure to timely respond to discovery requests. The Appellee’s motions to dismiss were denied by the Hearing Officer. The final extension was granted by Interim Order after a May 8, 2024 pre-hearing conference and gave the Appellant until May 24, 2024, to answer the discovery requests. The Appellant finally submitted his responses to the Appellee’s discovery requests in late May 2024 (the responses were dated May 24, 2024, but not received by Personnel Board until May 28, 2024, according to the date-stamp in the appeal file).

5. The Appellant also served the Appellee with discovery requests and the Appellee timely answered the Appellant’s discovery requests on December 16, 2022. The Appellee supplemented its discovery responses on March 29, 2023.

6. In response to the Appellee’s Interrogatory No. 1 and Interrogatory No. 2, which asked the Appellant to describe “each and every instance or occurrence during your employment with KDE where you believe you were discriminated against based on your race and to state the basis for that belief,” the Appellant described two (2) situations where he believed his work was unduly criticized by a non-managerial coworker, who he identified as “Akash” and who he believed was of Indian descent.

7. The Appellant’s description of these incidents does not set forth any facts to show that his conflict with Akash was anything more than a common workplace dispute about the manner of work.

8. In response to Interrogatory No. 1, the Appellant generally accused Akash of being an “angry man” who was regarded by experienced team members as someone who was not good with software problems. He recounted one specific incident in which Akash allegedly became angry and yelled at him regarding software coding issues. He also alleged that Akash took credit for a coding issue the Appellant corrected. [See Appellant’s Responses to Appellee’s Interrogatories and Request for Production of Documents (“Appellant’s Discovery Responses”) at pp. 2-3, which was filed and date-stamped at the Personnel Board on May 28, 2024.]

9. The Appellee’s Interrogatory No. 2 asked the Appellant to state “each and every instance or occurrence” in which his work product was “sabotaged” or he was “openly lied about.” In similar fashion to his response to Interrogatory Number 1, the Appellant recounted an incident in which he and Akash had a disagreement regarding a coding fix for a web page that was not in alignment. In the midst of a discussion about changes to the computer coding, the Appellant alleges that Akash called him “stupid” and later became “furious” when he fixed the problem. [See Appellant’s Discovery Responses at p. 4.] After the Appellant made changes to the code, another coworker was unable to login to the software program and, according to the Appellant, Akash blamed the Appellant and said his changes “ruined the entire software program.” [See Appellant’s Discovery Responses at p. 4.] The Appellant acknowledged that Akash then made some configuration changes, which he characterized as minor, and apparently the problem was solved. The Appellant believed Akash undeservedly took credit for the solution and stopped talking to him in a subsequent meeting when the Appellant questioned what Akash did to fix the problem. [See Appellant’s Discovery Responses at p. 4.]

10. After the incident described in response to Interrogatory No. 2, the Appellant asserts that Akash tried to “ruin work I did” and “tell management my work was bad.” [See Appellant’s Discovery Responses at p. 4.] However, he does not describe any specific instance in which Akash allegedly tried to “ruin” his work or told management bad things about his work. In fact, the Appellant actually undermines his own assertions in this regard in his response to Interrogatory Number 1, by stating that other coworkers recognized Akash’s shortcomings. For example, the Appellant stated that another coworker named Rashi stated that Akash “did not know how to solve software problems and did not know SQL very well.” [See Appellant’s Discovery Responses at p. 2.] Regarding the incident described in response to Interrogatory Number 2, the Appellant stated that coworkers Rich and Rashi questioned Akash’s explanation of his coding solution. [See Appellant’s Discovery Responses at p. 2.] So, by the Appellant’s own admission, other employees did not blindly accept Akash’s rendition of the facts regarding this incident, or blame the Appellant for the problems.

11. The Appellant produced **no documents** in response to the single request for production of documents, which asked him to produce all documents “which might support the allegations in his appeal” regarding discriminatory treatment.

12. The Appellant has failed to produce or even point to any facts to show that: a) Akash, the non-managerial coworker of Indian descent who he complained about, had any effect whatsoever on his dismissal, b) the Appellee KDE was the unusual employer who discriminates against employees who are members of a majority group, i.e., that he was discriminated against

for being white; or c) the Appellant was treated differently than similarly-situated, non-majority employees.

13. The Appellant has not pointed to a single fact or incident that might show race was a factor in his dismissal or in regard to how Akash treated him. The Appellant has not shown that Akash (or anyone else at KDE) committed any acts toward him that affected his employment or treated him less favorably than employees from a non-majority group.

14. The Appellant has not shown how any similarly situated, non-majority employees were treated more favorably than he was. The only non-majority employee who the Appellant compared himself to was Akash. Akash is not similarly situated because he was a contract employee.¹

15. The Appellant claimed that white employees were in the numerical minority on his team. He claimed that, except for him, his software team was “made up exclusively of persons who may be from India or similar regions.” [See Appellant’s Discovery Responses at p. 1]. His basis for this claim is solely through his own, unsupported observation that during team meetings, “I believe there was no one else American besides myself and Scott.” [See Appellant’s Discovery Responses at p. 1.] However, he provided no evidence to show how this numerical difference resulted in him being treated less favorably than non-white (non-majority) employees, other than his own speculation in that regard.

16. Although the Appellant has alleged, without support, that the majority of the persons on his team were of Indian descent, the Appellee has provided countervailing evidence to show that the majority of full-time employees in KDE and on the IT team were white (majority) employees; the Indian employees referred to by the Appellant were contract employees. [See Appellee’s Renewed Motion to Dismiss at p. 4.]

17. On July 11, 2024, the Appellant filed a Renewed Motion to Dismiss the appeal on the grounds that the Appellant has not stated a cognizable claim of race discrimination, which would be the only exception to the Appellee having the right to dismiss him for any reason during his probationary period of employment. *See* KRS 18A.111.

18. The Appellant never filed a response to the Renewed Motion to Dismiss.

CONCLUSIONS OF LAW

1. Dismissal of this appeal is warranted because the Hearing Officer has determined “there are no genuine issues of material fact and judgment is appropriate as a matter of law” in regard to the Appellant’s discrimination claims. See KRS 13B.090(2).

2. A motion to dismiss should be granted where it appears that the complaining party would not be entitled to relief under any set of acts which could prove his claim. *Par-*

¹ *See* Appellee’s Renewed Motion to Dismiss at p. 4. The Appellant has not disputed this fact.

Mutuel Clerk's Union, Local 541 v. Kentucky Jockey Club, 551 S.W.2d 801 (Ky. 1977). In examining whether it is proper to grant a motion to dismiss, the facts alleged must be liberally construed in favor of the complaining party and taken as true. *Pike v. George*, 434 S.W.2d 626 (Ky. 1968).

3. Even taking the Appellant's claims as true, he has not produced any facts to show that he could prove his racial discrimination claim in an evidentiary hearing.

4. As a probationary employee, the Appellant could be dismissed at any time for a good reason, a bad reason, or no reason at all, as long as the dismissal is not based on a discriminatory reason. *Martin v. Commonwealth*, 822 S.W.2d 858, 860 (Ky. 1991).

5. The Personnel Board does not have jurisdiction to hear an appeal of a probationary employee, unless the employee makes a claim of protected class discrimination. KRS 18A.111 provides that “[A]n employee may be separated from his position...during his initial probationary period and shall not have a right to appeal, except as provided by KRS 18A.095.

6. Pursuant to KRS 18A.095, state employees are protected from discrimination as set forth in various state and federal anti-discrimination statutes. Specifically, any state employee “may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, age forty (40) and above, or any other category protected under state or federal civil rights laws.” KRS 18A.095.

7. In order to make out a *prima facie* case of race discrimination, the party alleging discrimination must prove that:

- a) he is a member of a protected class;
- b) he was subject to an adverse employment action;
- c) he was qualified for the job; and
- d) he was replaced by a person outside the protected class or he was treated differently than similarly situated individuals outside the protected class.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The Appellant has failed to provide sufficient evidence of element a) or element b) of the *McDonnell Douglas* test.

8. In this appeal, the Appellant's race discrimination claim is actually a reverse race discrimination claim, which is analyzed somewhat differently than other discrimination claims. In a reverse race discrimination claim, instead of the initial *McDonnell Douglas* requirement that a claimant shows that he is a member of a protected (minority) class, the claimant must show that his employer was the unusual employer who discriminates against the majority. *Jefferson Co. v. Zaring*, 91 S.W.3d 583, 591 (Ky. 2002). A complainant who is part of a majority group can meet the first prong of the *McDonnell Douglas* test in a reverse discrimination case where there is evidence of “background circumstances” to support the complainant's allegation that the defendant employer is the “unusual employer who discriminates against the majority.” *Murray v.*

Thistledown Racing Club, 770 F.2d 63, 67 (6th Cir. 1985). To satisfy the “remaining elements” of the McDonnell Douglas *prima facie* test [and to survive summary judgment], the claimant must also show that “he was treated differently than other similarly situated employees who were not members of the protected group.” *Id.* at 67.

9. This Board has consistently held that to establish a *prima facie* case of reverse discrimination requires “some proof” that the complaining employee was treated differently (i.e., disparate treatment of member of majority group) than members of the minority group; a “bare allegation or pure speculation” about discriminatory conduct will not survive a motion to dismiss. *Joseph Johnson v. Justice and Public Safety Cabinet, Department of Corrections*, 2019 WL 4202680. At *9 (KYPB 2019).

10. The Appellant has failed to meet the burden of showing any background circumstances to support the claim that the Appellee was the unusual employer who discriminates against the majority or that the Appellant was treated differently than similarly situated employees in the minority group. The facts cited by the Appellant in support of his reverse race discrimination claim amount to nothing more than bare allegations and unfounded speculation.

11. The Appellant seems to base much of his discrimination claim on the fact that the majority of the people he worked with were of Indian descent. However, the fact that the Appellant was a minority in his work group does not mean that he was racially discriminated against. Simply being outnumbered in a work group does not allow one to infer that he is being treated differently for that reason. The Appellant has not cited to any facts in the record to show that employees who were not of the majority race were treated more favorably than he was.

12. The Appellant’s claims focus on one coworker who he believes to be of Indian descent, Akash. The evidence in the record shows that Akash was not similarly situated because he was a contract employee.

13. However, even assuming, arguendo, that the Appellant meets the first prong of the test and that he may be similarly situated to Akash, nothing in the record shows that Akash was treated any differently than the Appellant was. The evidence of record shows that the Appellant and Akash had at least two workplace disputes, which involved the way software was being coded and who should receive credit. The Appellant has not cited any facts or pointed to any evidence in the record to show that Akash was treated more favorably in these circumstances. In fact, he points to specific incidents which lead to the opposite conclusion, showing that Akash was questioned about his work during these incidents. The Appellant stated in his responses to the Appellee’s interrogatories that other coworkers recognized Akash’s shortcomings. For example, the Appellant stated that another coworker named Rashi stated that Akash “did not know how to solve software problems and did not know SQL very well.” [See Appellant’s Discovery Responses at p. 2.] In regard to the incident described in response to Interrogatory Number 2, the Appellant stated that coworkers Rich and Rashi questioned Akash’s explanation of his coding solution. [See Appellant’s Discovery Responses at p. 4.] So, by the Appellant’s own admission, Akash’s conduct was questioned by others at KDE and his alleged

attempts at sabotage or taking credit for the Appellant's work did not affect how KDE viewed the Appellant's work nor did it have any effect on the Appellant's eventual dismissal.

14. The Appellant cannot carry the ultimate burden of showing discrimination under the *McDonald Douglas* standard. His inferences about how he was viewed negatively because of Akash are not supported at all in the record but are merely based on his own unfounded speculation. The Appellant has not pointed to any facts showing that a decisionmaker who terminated his employment, or even a peer who may have commented on his work, made any statements or engaged in any conduct showing that race was a factor in his dismissal or any other treatment at work.

15. The Appellant's claims that he was "fired for being white" are based on no more than bare, unsupported allegations and pure speculation. The Appellant has not pointed to anything in the record to create a genuine issue of fact on his claim of racial discrimination. Thus, his discrimination claim should be dismissed as matter of law.

RECOMMENDED ORDER

WHEREFORE, the Hearing Officer, after careful review and consideration of the record in this appeal and the applicable provisions of KRS 18A.095 and KRS Chapter 344, recommends to the Kentucky Personnel Board that the appeal of **BRAD N. ROGERS V. KENTUCKY DEPARTMENT OF EDUCATION (APPEAL NO. 2021-095)**, be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

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

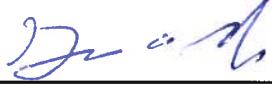
The parties are strongly encouraged to send any exceptions and/or requests for oral argument by email to: PersonnelBoard@ky.gov

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.

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

SO ORDERED at the direction of the Hearing Officer this 11th day of April, 2025.

KENTUCKY PERSONNEL BOARD


GORDON A. ROWE, JR.
EXECUTIVE DIRECTOR

A copy hereof was emailed and mailed by first class, U.S. mail to the following persons at their respective addresses as provided to the Personnel Board on this 11th day of April, 2025:

Brad N. Rogers, Appellant
Hon. Sara Bentley, Counsel for Appellee
Hon. Rosemary Holbrook, Personnel Cabinet