

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NOS. 2014-180 AND 2014-181

KHADIJA SHALLOW

APPELLANT

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

JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS
J. MICHAEL BROWN, APPOINTING AUTHORITY

APPELLEE

** ** *

The Board at its regular March 2015 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated February 2, 2015, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby 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 March, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Angela Cordery
Khadija Shallow
Bobbie Underwood

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
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**FINDINGS OF FACT, CONCLUSION OF LAW
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DEPARTMENT OF CORRECTIONS
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APPELLEE

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This matter came on for evidentiary hearing on December 15, 2014, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Stephen T. McMurtry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Khadija Shallow, was present and was not represented by legal counsel. The Appellee, Department of Corrections, was also present and represented by the Hon. Angela Cordery.

BACKGROUND

1. On July 18, 2014, Roberto Rodriguez, Director of the Division of Probation and Parole, notified Khadija Shallow that she would be discharged from her employment as a Probation and Parole Officer I, District 18, for failure to satisfactorily complete the required probationary period. The discharge came at the close of business that same day. Rodriguez advised Shallow that she had no right to appeal the decision unless she believed the discharge was based on unlawful discrimination.

2. Shallow, on August 18, 2014, filed two appeals with the Kentucky Personnel Board alleging discrimination; one signed July 18, 2014, and the other July 22, 2014. In the appeal (2014-180) dated July 18, 2014, Khadija Shallow alleged:

The manager of district 18 was discriminatory to me in the following matters. 1. I made the manager aware of my nursing times to make sure I would not get engorged or overwhelmed. Sandy Taylor stated to me on May 5, 2014, May 22, 2014, and June 30, 2014, that I was not allowed to pump the times I made her aware of. Sandy Taylor stated to me that I would have to let her know every time I needed to pump. 2. She was also rude in telling me that I could not wear my hair a certain way, in a ponytail on the top of my head. She did not state these things to other employees, only me.

In the appeal (2014-181) dated July 22, 2014, Khadija Shallow alleged:

1. Nursing my child – having to pump 2-3 times a day being told I could not on some days and then having to let Sandy know every time it took place. 2. The way my hair was worn. 3. Layoff – stating they had to speak to me on more than one occasion.

The two appeals were consolidated for purposes of the hearing.

3. Shallow called **Ravi Buckner**, a coworker and the Equal Employment Officer for probation and parole officers. Buckner said Shallow told him that Sandy Taylor, District 18 supervisor, “Spoke to her in a way [she] didn’t like.” Buckner said he was unsure what her complaint was, but advised her how to file a discrimination complaint.

4. Shallow called **Lee Ann Wiseheart**, a fellow Probation and Parole Officer, also serving a probationary period of employment, who testified that Shallow told her Sandy Taylor said she could not “pump” at work even though she was breastfeeding her baby and that she could not wear her hair in a bun. She admitted Sandy Taylor was not there when Shallow told her of these work conditions.

5. (a) **Khadija Shallow** testified that she had to pump 3-4 times a day during an eight-hour workday and supplied a doctor’s explanation to Sandy Taylor. Two or three weeks into her probation, she testified, Sandy Taylor came into a room where she was pumping and said, “What are you doing?” When she, Taylor, realized that she was pumping, Taylor said, “Oh, okay, let me know when you have to do it.” On another occasion, according to Shallow, Sandy Taylor told her, “You can’t wear your hair like that.” Shallow offered into evidence a photograph of the style she was wearing her hair that day, plaited hair worn on top of her head. Shallow said another woman was allowed to wear her hair that way.

(b) On cross-examination, Shallow testified that on several occasions she was not allowed to “pump” because she was in training, training given in one hour to one half hour sessions. On one occasion when she had to pump, she informed Taylor who said, “I’m on the phone right now, let Kristen know.” Shallow said she had completed two months of her probationary period before she was discharged.

6. The Department called **Ashlee Skillern**, Human Resources Administrator, Institutional, for the Division of Probation and Parole. She introduced the documentation associated with the hiring and firing of Shallow: (1) Request for Personnel Action (Hiring), (2) Personnel Action Notification (Appointment), (3) Request for Personnel Action (Firing), (4) Rodriguez’s July 18, 2014 letter of discharge, (5) Personnel Action Notification (Separation) and (6) notes documenting Shallow’s work performance from 5/8/14 to 7/14/14 kept by Cassandra (Sandy) Taylor, Kristin Harrod, and Sabrina Farris.

7. **Cassandra (Sandy) Taylor**, District 18 supervisor, testified that the Department hired Shallow because she stood out in her interviews and application as personable and one likely to persevere. She said the Division of Probation and Parole evaluates probationary employees in one-on-one meetings, performance at conferences, and daily notes kept. She said Shallow had to be repeatedly trained, was defensive when criticized and failed to take responsibility, blaming others for her work problems. Taylor said Shallow was not denied an opportunity to “pump,” and there were no issues in that regard. She related one incident when she knocked on Shallow’s door, saw her “pumping,” and told her “let me know when you are doing this,” as she did not want to “walk-in on her.” She said, “Many have breastfed and pumped.” Taylor said Shallow’s hairstyle was never an issue and she never had a conversation with Shallow about her hair.

8. **Kristin Harrod and Sabrina Farris**, both Probation and Parole Officers, and assistant supervisors of Shallow, testified they helped train Shallow during the two months, approximately, of her probationary period. They were in agreement that the training was “not taking,” “not sticking in.” They testified that there were no prohibitions on “pumping” or hairstyles imposed on Shallow. Farris said women officers wear their hair as they want and the only conversation she had with Shallow regarding “pumping” was that she did not have to notify her each time she did it. She could just “put a note on the door” so no one would walk in on her.

FINDINGS OF FACT

1. Although it is not entirely clear from the evidence, it appears that Shallow, a black female, intended to prove that Taylor’s alleged work restrictions on “pumping” and hairstyle proved race and gender *animus* on her part that, in turn, proved Taylor’s recommendation of discharge was similarly motivated. Shallow’s credibility is, however, undermined by the inconsistency in her testimony, her statements of appeal July 18, 2014, and July 22, 2014, and the testimony of Wiseheart and Buckner. Wiseheart said Shallow told her she was prohibited from wearing her hair in a bun. Shallow’s July 18, 2014 statement of appeal alleged she could not wear her hair in a “ponytail on the top of her head.” Shallow’s testimony bolstered by a photograph depicted her hairstyle as plaited hair strands on top of her head. Buckner said Shallow complained to him about the manner Taylor spoke to her and did not mention “pumping” and hairstyle restrictions.

2. Taylor’s account of walking in on Shallow when she was “pumping” is more credible than Shallow’s. Taylor said she knocked on the door, saw Shallow “pumping” and wanting to protect her privacy advised her to put a note on the door. Shallow said Taylor, three to four weeks into her probationary period, expressed surprise when seeing her “pumping” and said, “What are you doing?” and “Oh, okay. Let me know when you have to do it.” Shallow’s interpretation of this event as a directive that she had to get permission to pump appears disingenuous.

3. The testimony of Taylor, Harrod and Farris is credible; Shallow's testimony is not.

CONCLUSION OF LAW

Shallow presented no credible direct or circumstantial evidence that the Cabinet terminated her employment for reasons of gender or race discrimination. Shallow had the burden to show at least an inference of a causal connection between her complaints of discrimination and of her firing to shift the burden to the Cabinet to prove a justifiable and valid reason for her termination. She failed to raise such an inference. *Herrera v. Churchill McGee, LLC*, 545 Fed Appx 499 (6th Cir., 2013); *Johnson v. Kroger*, 319 F.3d. 858, 866 (6th Cir., 2003).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **KHADIJA SHALLOW VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NOS. 2014-180 AND 2014-181)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

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

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).

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

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

ISSUED at the direction of **Hearing Officer Stephen T. McMurtry** this 2ND day of February, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Angela Cordery
Khadija Shallow