

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-037

JAMIE HOWE-THORNTON

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

*** **

The Board, at its regular January 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 14, 2017, Appellant's Exceptions and Request for Oral Argument (**Appellee's Response – not reviewed and considered by Board**), 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 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 18th day of January, 2018.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Mona Womack
Ms. Jamie Howe-Thornton
Mr. Jay Klein

COMMONWEALTH OF KENTUCKY
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APPEAL NO. 2017-037

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

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

** ** * * **

This matter came on for an evidentiary hearing on November 15, 2017, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Jamie Howe-Thornton, was present and appeared *pro se*. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Mona Womack. Appearing as Agency representative was Robert Back.

This matter involves the separation of the Appellant during her initial probationary period from her position as Family Support Specialist I by letter dated February 13, 2017, a copy attached hereto and incorporated herein as **Recommended Order Attachment A**.

The Appellant's appeal alleges disability discrimination as the cause for her termination. Accordingly, the Appellant was assigned the burden of proof by a preponderance of the evidence to prove her allegations of disability discrimination.

BACKGROUND

1. The Appellant, Jamie Howe-Thornton, called herself as her first witness. She testified that she was employed as a Family Support Specialist I as of August 16, 2016, in the Fayette County office. Her six-month probationary period would have ended on or about February 16, 2017. Her claimed disabilities in this case are asthma, anxiety and COPD. She was terminated from her position by letter dated February 13, 2017, effective February 14, 2017.

2. Appellant testified that her immediate supervisor was Robert Back. She stated that she had requested accommodations as of October 16, 2016. Apparently this was a request to be able to correct her own cases, which request was denied. She was told that it would take time away from meeting with her clients and would slow down the processing of her own cases.

3. The Appellant then testified that on August 19, 2016, she suffered an asthma attack after a coworker, Bill Baldrige, unknowingly sprayed some substance in her office which affected her. She related that shortly afterward, she told Mr. Back she had some health issues. The Appellant went through various training sessions during the fall and her cases were read, as was routine, by principal workers. These consisted of Samya Quabili, Tah Holland, and Bailee Mayfield, during her probationary period.

4. The Appellant had some difficulties with these principal readers, claiming they gave her conflicting information and were unwilling to assist her. She also stated that they had refused her request for the accommodation of correcting her own cases. These denials were supported by Supervisor Back. As a result, the Appellant testified that she became worried and anxious because of the difficulty she was having in learning how to process her cases correctly. She claims the refusal of the accommodation (correcting her own cases) caused her great anxiety and stress.

5. The Appellant claimed that during November 2016, both Quabili and Holland refused to help her and, as a result, she requested to be transferred. This was denied by Mr. Back because she was still in her probationary period.

6. Thereafter, on or about January 6, 2017, the Appellant informed Back she was going to file a grievance for the way she was being treated. She believed that at that time, Mr. Back told the Service Region Administrator Associate, Steven Courtney, of her desire to correct her own cases. As a result, Appellant stated that during the remainder of January and February 2017, Courtney had approved her request to correct her own cases, which lasted until the termination notice.

7. On cross-examination, the witness testified that she had first given her written medical records documenting her disabilities to Mr. Back by letter dated January 19, 2017, from Dr. Michele Welling. (This letter lists the Appellant's three disabilities, but makes no mention of any accommodations needed or requested.) The Appellant then confirmed that she had provided no written documentation to Mr. Back explaining her disabilities of anxiety, COPD, or asthma. She did, however, testify that after the spraying incident causing her asthmatic reaction in August, she had told Mr. Back that she would have to go to quarterly medical appointments.

8. Appellant continued to state that during the period from August 2016 through January 2017, Mr. Back and Tah Holland knew of her disabilities but refused her accommodations.

9. The Appellant also stated that because of what she felt was conflicting information from her principal readers, she would sometimes go to other team members, including Robyn Noland, who was not a principal, to ask for assistance. She stated she was directed by Ms. Holland and Mr. Back not to go to other team members, but only principal readers.

10. The witness then identified Appellee's Exhibit 2, an email stream from November 7 through November 28, 2016, in which she corresponded with her Vocational Rehabilitation Specialist, Christa Martin. The essence of these emails were that the Appellant was complaining about her treatment at the hands of her principals, Holland, Mayfield and Quabili, and felt they were attempting to get her fired.

11. The witness next identified Appellee's Exhibit 3, a December 1, 2016 email from her to Martin. In this email, the Appellant feels she is being made a scapegoat and was getting no help from her principal readers.

12. The witness next identified Appellee's Exhibit 4, a January 6, 2017 email from her to Mr. Back. In this email, she threatens to file a grievance against her readers for refusing to let her correct her own errors.

13. Upon re-direct, the Appellant then introduced Appellant's collective Exhibit 2, many documents which were irrelevant to these proceedings, but of those, the Hearing Officer will refer to the documents under consideration.

14. The Appellant's next witness was **Alan Sisk**. He has been the Executive Director of the Cabinet's Office of Human Resource Management for approximately one and one-half years and is the Appointing Authority. He made the decision to issue the separation letter to the Appellant.

15. The witness testified that he had reviewed the EEO Investigative Report dated February 13, 2017, from Cathy Cox of the EEO/Civil Rights Compliance Branch, who conducted the investigation. This investigation found that the Appellant had not been denied reasonable accommodations and that her request to transfer because of anxiety was denied.

16. Asked his understanding of the requirements of disability under law, the witness stated that he felt "if a disability had not been presented in writing, it must be apparent." As to accommodations, the witness felt that it must be apparent or requested in writing as to what was being requested.

17. The witness then answered that in reviewing the supporting documentation for Appellant's separation, which came up through emails from Back, Holland, and Quabili, he did not recall seeing any mention of disabilities listed.

18. The Appellant's next witness was **Robert Back**. He has been a Field Services Supervisor in Fayette County for the past four years. He was the direct supervisor of Team E, on which the Appellant was placed. He testified that during her tenure, she had her cases read by Holland, Quabili, and Mayfield.

19. Her training consisted of how to interview clients and illicit information, and to process cases for issuance of monetary grants. He stated the goal for all probationary Family Support Specialists was to have no more than a 10 percent error rate.

20. The witness stated that after the Appellant began employment in mid-August, a team meeting was held on October 11, 2016. This was the first time any type of accommodation was requested, and that was from the Appellant to be able to correct her own errors. He denied this for various reasons. He testified that again in November, she requested the same accommodation.

21. Back stated that he was never told by the Appellant of any disabilities, nor were any requests for accommodations put in writing.

22. The witness stated that he had become aware in August of Appellant's asthma problems because of the spraying incident by coworker Baldrige. He was not aware of any anxiety that she claimed. The witness stated that after the witness requested to be transferred because of anxiety caused by her coworkers, he refused because he did not think it was so, and because it was not normally allowed during probationary periods.

23. The witness also answered that he did not feel that just because the witness had requested to correct her own cases triggered his need to decide if she had a disability. In fact, he does not think she actually ever disclosed the disability she claimed.

24. The witness also detailed that following the various difficulties between the Appellant and her principal workers during her probationary period, on January 12, 2017, he initiated an email to his superiors requesting that the Appellant be separated before coming off her probation.

25. This chain of emails (Appellee's Exhibit 5) explained that Appellant's error rate for October was 47.6 percent; for November was 39.1 percent; and for December was 37.5 percent. This January 12, 2017 email also contained instances of the Appellant's unprofessional and argumentative behavior with her principal readers.

26. On cross-examination, the witness answered that the first time he became aware of any disability suffered by the Appellant was the January 2017 letter from her physician, Dr. Welling. The witness stated that the actual error rate allowed by the federal government was actually six percent for the state as a whole. However, the Agency had set a standard of ten (10) percent error rate for those attempting to pass probation. The witness then related back to the error rates cited in Appellee's Exhibit 5 for the previous months.

27. The witness also testified that the decision to separate the Appellant had been made before she had filed the grievance in January 2017.

28. The Appellee's first witness, called out of order, was **Bailee Mayfield**. She has been a Field Services Supervisor III (Principal) in Fayette County for the past four and one-half years. Her supervisor is Robert Back.

29. She testified that she authored a January 11, 2017 memo to Mr. Back, citing the reasons for her recommendation for termination of the Appellant. Among these were the high

error rates, and also the Appellant's "attitude" issues, her bullying of fellow principal worker Quabili, and also a breach of confidential information.

30. This witness stated that the only health condition she was aware Appellant had was the asthma because of the spraying incident with Baldrige in August 2016. She was not aware of any COPD issues, and noted that the Appellant did smoke. She concluded by stating that she did not treat the Appellant any different because of any disability she may have suffered.

31. Appellant's next witness was **Steven Courtney**. He has been the Service Region Administrator Associate in Lexington for the past 11 years. He is the supervisor of Robert Back.

32. He testified that he was informed by Back that the Appellant had planned to file a grievance against the Agency in early January 2017. He became aware of her request to correct her own cases and directed Back to allow her to do so beginning in January 2017. However, he stated the decision to separate the Appellant had already been made prior to that directive.

33. The witness stated that he had reviewed the various supporting emails sent by Mayfield, Holland, and Quabili, in deciding to terminate the Appellant. He was, thus, aware of all issues cited by those coworkers. He stated that he had never heard of any accommodation request prior to January 2017, and was not aware of any asthma or anxiety issues.

34. The witness was firm in stating that the reasons for Appellant's dismissal were her high error rate and her attitude. He denied any decision was based on discrimination of any kind.

35. The Appellant's next witness was **Samya Quabili**. She has been the Field Service Supervisor in the Fayette County Office for approximately 11 months. She was the primary principal reader for the Appellant.

36. The witness stated that she was aware the Appellant suffered some anxiety after her mother had passed some months earlier. She stated the Appellant had tried to tie that anxiety to her work performance, but the witness insisted that the Appellant's anxiety could be triggered "by any little thing."

37. On cross-examination, the witness confirmed that she was the principal reader for the Appellant until January 16, 2017. She related that the Appellant's general response to being told of her errors was to argue, sometimes aggressively, and to blame other things.

38. The witness then identified her January 1, 2017 memo (part of Appellee's Exhibit 5) to Supervisor Back justifying the reasons for termination. The witness then testified that she was not aware prior to January 2017 of any disability suffered by the Appellant. This witness also confirmed that her support for Appellant's termination was not based on any type of disability.

39. Following the conclusion of the Appellant's case, the Agency moved for a Directed Verdict, which was **GRANTED**.

FINDINGS OF FACT

1. The Appellant was separated prior to the end of her six-month probationary period. The decision to terminate was made and initiated by Supervisor Back on January 12, 2017, after having information and opinions from some of the Appellant's principal readers of her casework.

2. The Appellant first presented to Back a January 19, 2017 letter from Dr. Michele Welling listing her disabilities of anxiety, asthma, and COPD. The letter made no mention of reasonable accommodations needed or requested.

3. The only definite request for accommodations made by the Appellant was to be allowed to correct her own cases, which was denied by Back for logical reasons.

4. The Appellant's error rates in attempting to process her own cases in October, November, and December 2016 were 47.6 percent, 39.1 percent, and 37.5 percent respectively, well above the ten (10) percent error rates expected of workers on initial probation.

5. No credible evidence was introduced to show the decision to separate the Appellant from employment was based on any disability, either known or unknown.

CONCLUSION OF LAW

The Hearing Officer concludes as a matter of law that the Appellant failed to carry her burden of proof by a preponderance of the evidence and, as a result, the Agency is entitled to a **DIRECTED VERDICT** as a matter of law.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JAMIE HOWE-THORNTON V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2017-037)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not

specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

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

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

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 R. Hanson Williams** this 14th day of December, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Mona Womack
Ms. Jamie Howe-Thornton



Matthew G. Bevin
Governor

CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF HUMAN RESOURCE MANAGEMENT
275 E. Main Street, 5C-D
Frankfort, KY 40621
(502) 564-7770
Fax: (502) 564-3129
www.chfs.kv.gov

Vickie Yates Brown Glisson
Secretary

February 13, 2017

Jamie R. Howe

Re: Request for Accommodation

Dear Ms. Howe:

The Division of Employee Management's EEO/Civil Rights Compliance Branch has completed its review of your January 6, 2017 request for accommodations under the Americans with Disabilities Act as Amended (ADAA) concerning your probationary position as a Family Support Specialist I with the Department for Community Based Services' (DCBS) South Central Service Region's Fayette County Family Support office.

The ADAA protects a qualified individual with a disability from unlawful discrimination because of the individual's disability. To be protected by the Act, the disability must be one which substantially limits one or more major life activities. In addition, qualified individuals must be able to perform their job duties, with or without a reasonable accommodation.

According to medical information dated February 16, 2016, and January 19, 2017, which you provided from Michele M. Welling, M.D., you have been diagnosed with COPD (Chronic Obstructive Pulmonary Disease), asthma, and anxiety. Based on the medical information we received, you are an individual with a disability as defined by the ADAA. However, your healthcare provider did not provide any information regarding accommodations recommended or needed.

This office also reviewed the position description for Family Support Specialist I. The essential functions of your position, which may not be waived under the ADAA, include, among other things, the following:

- Interviews clients for basic public assistance program, gathers, completes, and reviews required documentation to make eligibility determinations.
- Participates in formal and on-the-job training and observing other tenure staff.
- Tracks processing deadlines for timely case activity and case hearings. Learns to identify resources and appropriate referrals.
- Prepares and maintains case records.

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Recommended Order
Attachment A

As an accommodation, you requested "training accommodations in learning proper policy and procedures in order to reduce and/or eliminate issuance errors and addressing the hostile workplace issue." In your request, you stated that you were "having difficulty learning policy and essential functions with current method; coworkers actions and supervisor inaction have created a hostile work environment which exacerbates disability related issues and symptoms." In a grievance document that you forwarded to this office for review on January 17, 2017, you stated that you specifically wanted to be able to correct your own cases in response to "117s" and to transfer to a different team or office location as accommodations. (Note: 117s refer to the Case Review and Summary Sheets used to identify case errors, along with providing detailed explanations of errors.)

When you initially requested that you be allowed to correct your own cases during your October monthly evaluation meeting with your principle workers and your supervisor, you made no indication that this was due to a disability. Your request was denied at that time, as office procedure is that the principle workers make the corrections and send employees screen shots and detailed explanations of the corrections in order to allow more time for staff to see clients. On January 6, 2017, you informed your supervisor that you were going to file a grievance related to not being allowed to correct your own cases. As a result, Service Region Administrator Associate Steve Courtney decided to allow you to begin to do so. You did not inform your supervisor of your disability and that you were requesting this as an accommodation under the ADAA until January 11, 2017.

Regarding your request to transfer to a different team or location due to the "hostile work environment" and associated stress caused by the principle workers, this is not considered a reasonable accommodation under the ADAA. Specifically, in the case of *Gaul v. Lucent Technologies Inc.*, 134 F.3d 576, 581 (3d Cir. 1998), the Court found that a request to be transferred away from coworkers to a less stressful work environment "would impose a wholly impractical obligation" on any employer because the employer "could never achieve more than temporary compliance because compliance would depend entirely on [the employee's] stress level at any given moment. This, in turn, would depend on an infinite number of variables, few of which [the employer] controls. . . The only certainty for [the employer] would be its obligation to transfer [the employee] to another department whenever he becomes 'stressed out' by a coworker or supervisor. It is difficult to imagine a more amorphous 'standard' to impose on an employer." Therefore, your request to transfer to a different office location as an accommodation is denied.

If you have questions concerning this letter, please contact Cathy Cox in the EEO/Civil Rights Compliance Branch at (502) 564-7770, extension 3375.

Sincerely,



J. Alan Sisk
Executive Director

cc: Lesa Dennis, Director, Division of Service Regions
Jeff North, Service Region Administrator, South Central Service Region
April Davis, Acting Service Region Administrator, Southern Bluegrass Service Region
Steve Courtney, Service Region Administrator Associate, South Central Service Region
EEO/Civil Rights Compliance Branch