

**COMMONWEALTH OF KENTUCKY  
PERSONNEL BOARD  
APPEAL NO. 2018-032**

**PAULA WADE**

**APPELLANT**

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

**EDUCATION AND WORKFORCE DEVELOPMENT CABINET**

**APPELLEE**

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The Board, at its regular June 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 12, 2019, Appellant's Exceptions, Appellee's Exceptions and Request for Oral Argument, Appellee's Response to Appellant's Exceptions, 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** Findings of Fact paragraphs 4 and 5 and substitute the following:

4.     The Appellant alleged that her behavioral problems were caused by Gulf War Syndrome and that mental illness plagued her work performance, but, with accommodations, was improving. The Appellant's claim that mental illness impacted her work performance is buttressed by the fact that the dysfunctional behavior predicted in the January 18, 2017 Employee Accommodation Report has played-out in Wade's work performance as evidenced by the behavior described as justification for the reprimands. The evidence of record establishes that the Cabinet imposed multiple verbal and written reprimands on Wade when it was unaware that

she suffered from Gulf War Syndrome and mental illness. The Appellant argues that the Cabinet's decision to suspend Wade was influenced by her prior reprimands without taking into account her disabilities. However, the Appellant failed to establish that the prior reprimands were issued **as the result of her disabilities**. Further, the Appellant failed to establish the reprimands issued by the Agency were issued without due consideration of the cause of the workplace misbehavior and of the severity of the disciplinary action imposed.

**B. Delete** Conclusions of Law paragraphs 2, 3, 4, and 5 and substitute the following:

2. The Cabinet's Anti-Harassment Policy Statement is "a statement concerning...the internal management" of the Workforce Cabinet. [See KRS 13A.010(1) and (2)(a).] The Policy Statement cannot be used to impose discipline on Wade. Only 101 KAR 1:345, Section 1, can be used to impose such discipline. *Kerr v. Kentucky State Board of Registration for Professional Engineers and Land Surveyors*, 797 S.W.2d 714 (1990). Such an understanding comports with the Board's recent finding in *Charles Phillips v. Tourism, Arts & Heritage Cabinet, Department of Fish and Wildlife Resources*, Appeal No. 2018-161, 2019 WL 2223966 (KY PB). *Phillips* provides that that Board "shall consider the internal policy and its definition of misconduct. The Board may then elect to apply the applicable internal policy to assist the Board in determining what constitutes misconduct in a particular work environment. Internal policy is persuasive authority and is not binding on the Board." Internal policies merely serve to aid the Board in performing their duty to ensure the provisions of KRS Chapter 18A and the 101 KAR series are being followed. Here, the Board finds that the Cabinet's Anti-Harassment policy is useful in making its determination as to what constitutes misconduct at the Workforce Cabinet. Accordingly, the Board adopts

the Cabinet's Anti-Harassment policy and concludes that violation of the Cabinet's policy constitutes misconduct for the purposes of 101 KAR 1:345.

3. Wade's disregard of the Cabinet's Anti-Harassment Policy that bans sexually indecent jokes gave substance to the charge that Wade violated 101 KAR 1:345, Section 1. The Cabinet has the responsibility to investigate even minor complaints of sexual harassment by coworkers to prevent a "workplace permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe and pervasive to alter the conditions of employment and create an abusive working environment..." *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, *Brewer v. Hillard*, 15 S.W.3d 1 (1999). An employer who allows the work environment to become hostile as defined in *Oncale* violates Title VII of the Civil Rights Act of 1964 and KRS 344.

4. Wade's sexual joke that it "looked like someone's going to get 'lei'd' tonight" did not rise to the level of actionable conduct that would "cause tangible psychological injury" and implicate either Title VII of the Civil Rights Act of 1964 or KRS Chapter 344. However, behavior that does not implicate either Title VII of the Civil Rights Act of 1964 or KRS Chapter 344 can still constitute 101 KAR 1:345 misconduct. Such is the case here. The Board concludes the Appellant's actions constitute 101 KAR 1:345 misconduct and, to the extent pertinent, specifically rejects the Hearing Officer's reliance on legal standards applicable to allegations of sexual harassment instead of a general misconduct standard. The Board finds that Wade's behavior does not implicate either Title VII of the Civil Rights Act of 1964 or KRS Chapter 344, but constitutes 101 KAR 1:345 misconduct.

5. Because Wade's behavior constitutes 101 KAR 1:345 misconduct, the Board finds the Cabinet established that the one-day suspension of the Appellant was taken with just cause and is neither excessive nor erroneous in light of all the surrounding circumstances. The Board finds the Appellant committed the misconduct alleged in the Cabinet's February 22, 2018 suspension letter and that a one-day suspension is appropriate in light of all the surrounding circumstances, including the Appellant's record of performance, her mental illness, and her request(s) for accommodation.

C. Delete the Recommended Order and substitute the following:

**IT IS HEREBY ORDERED** that the appeal of **PAULA WADE V. EDUCATION AND WORKFORCE DEVELOPMENT CABINET, (APPEAL NO. 2018-032)** is **DISMISSED**.

**IT IS FURTHER ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered be, and they are approved, adopted, and incorporated herein by reference as a part of this Order, and the Appellant's appeal is **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 19<sup>th</sup> day of June, 2019.

**KENTUCKY PERSONNEL BOARD**

  
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**MARK A. SIPEK**  
**SECRETARY**

A copy hereof this day mailed to:

Hon. Maria "Tess" Russell  
Hon. Joshua R. Hurley  
Hon. Steven Bolton