

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2012-218**

CHARLES WILKINS

APPELLANT

VS.

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

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

APPELLEE

** ** ** ** **

This matter came on for an evidentiary hearing on February 13, 2013, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before Mark A. Sipek, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Charles Wilkins, was present and was not represented by legal counsel. The Appellee, Justice and Public Safety Cabinet, Department of Corrections, was present and represented by the Hon. Amber Arnett. Also present for the Appellee was Warden Martin Granado, the Appointing Authority.

BACKGROUND

1. The Appellant, Charles Wilkins, filed his appeal with the Personnel Board on September 28, 2012. The Appellant was appealing his reversion while serving his promotional probationary period from his position as a Classification and Treatment Officer (CTO) at the Roederer Correctional Complex (RCC) to a position as Corrections Recreational Leader I at the Kentucky State Reformatory, effective September 22, 2012.

2. The Appellant alleged that his reversion was the result of disability discrimination and was in retaliation for filing a sexual harassment complaint.

3. At a pre-hearing conference held on November 8, 2012, it was also established that when the Appellant was notified of his reversion, he submitted his resignation. In the pre-hearing order the Appellant was put on notice that in order to be reinstated the Appellant would have to prevail on a claim of constructive discharge. The burden of proof on this claim was assigned to the Appellant and he was informed he would have to demonstrate that the conditions of employment were so intolerable that his resignation was coerced. At the pre-hearing conference the Appellant made clear that the relief he was seeking was to be reinstated to his position as a CTO I with any back pay he would be due.

4. The pre-hearing order also made clear that the Appellant would have the burden of proof on the issue that his reversion was due to disability discrimination or retaliation.

5. In his opening statement the Appellant stated that he reported to his supervisor that a coworker had sexually harassed him. Two days later, he was informed that he was fifty cases behind. Later, he was attending a training session, which would have provided him valuable information to perform his duties as a CTO, when he was called out of the training session by the Warden. During his meeting with the Warden, he informed the Warden that he was dyslexic and that he would require accommodation in order to be able to successfully perform his job. The Appellant stated that the Warden responded there was no accommodation that could be offered to the Appellant.

6. On September 21, 2012, he was reverted to his position as a Corrections Recreational Leader. He believed that he had not been properly trained and was never given a performance improvement plan or counseled. He believed his reversion was the result of discrimination based on his disability by failing to accommodate his dyslexia. He also felt that his reversion was the result of retaliation for having reported sexual harassment.

7. In a brief opening statement, the Appellee stated this matter was a straight forward reversion case and that the Appellant was reverted because he could not keep up with the workload for a CTO in the Assessment Center at RCC. The Appellee stated there was no disability discrimination and that the Appellant was not retaliated against. The Appellant's concerns were investigated and handled properly. As further proof of the lack of discrimination or retaliation, the Appellee stated that the proof would show that following his resignation the Appellant was offered his old position as a Corrections Recreational Leader, which he turned down.

8. The Appellant called **Jessica Tedder** as his first witness. The Appellee objected to the Appellant offering any testimony from Ms. Tedder as the Appellant had failed to file a witness and exhibit list putting the Appellee on notice that Ms. Tedder would be called as a witness. The parties were ordered to file their witness and exhibit lists by February 4, 2013. The Hearing Officer **OVERRULED** the objection; however, a break was taken during the hearing and the Appellee was allowed to interview Ms. Tedder before she offered any testimony. The Hearing Officer determined that this is what the Appellee would have done had they received a witness list. Counsel for the Appellee was also informed that if any additional accommodation was necessary as a result of the Appellant's failure to file a witness list, she should ask for further relief.

9. Following a short break, Ms. Tedder testified on behalf of the Appellant. She testified that she started as a CTO the same day as the Appellant, April 2, 2012. She stated they received training from Sheila Trotter, both together and individually. She testified that Ms. Trotter provided them with a manual, as well as "cheat sheets" to show them how to perform the duties of a CTO, specifically in the Assessment Center at RCC. She stated that they received

step-by-step instructions on how to perform this work. Ms. Tedder testified they also received good feedback from Ms. Trotter, as well as other supervisors. One very important aspect of classification was to review inmates for potential conflicts with other inmates. She stated that Scott Grimes provided instruction on how to do this.

10. Ms. Tedder testified that the Assessment Center is busy and hectic. She stated that there was stress, although the staff morale was good. She stated that there was some joking around among the staff.

11. The Appellant, **Charles Wilkins**, testified that he started as a CTO at the beginning of April 2012. He stated that he was hired at RCC as a Correctional Officer on January 4, 2010. He testified he became Corrections Recreational Leader on January 1, 2011. He received his promotion to CTO on April 2, 2012.

12. The Appellant stated he was sexually harassed by the caseworker next to his office, CTO Mary Oerther. Around the middle of July she started making comments about the way he dressed. He stated it started out as a joke. He stated that there were rumors going around with the security staff. On August 22, 2012, the Appellant reported this to Amanda Dees, the Warden's secretary who was also a friend of the Appellant's.

13. The Appellant stated as a result of his e-mail he had a meeting with his supervisors Becky Barker, Scott Grimes and Abby McIntire. He stated they told him he should have reported the sexual harassment sooner.

14. Two days later on August 24, 2012, the Appellant states there was a list of how many cases the CTOs were behind. He stated that on this list it was stated that he had fifty cases which were considered late.

15. The following week, the Appellant was attending LCMI training, which he stated was very important training in order to continue as a CTO. He stated that he was pulled out of an important session on Wednesday and informed that he was to meet the Warden. During his meeting with the Warden, Wilkins told the Warden that he was dyslexic. He stated that he had an Individual Education Plan (IEP) from Indiana University Southeast which he gave to the Warden. The Appellant stated that the Warden informed him that there was nothing he could do to provide the proper accommodation. Appellant stated that pursuant to CPP 3.19 he felt he was entitled to a modification of his job and the ability to work more overtime. He stated that when he brought this up the Warden discussed the possibility of moving him to a position in Unit 4, although the Warden stated this would be setting him up for failure.

16. The Appellant stated he was receiving feedback from his supervisors Becky Barker and Scott Grimes that he was very thorough, his work was good and that going to Unit 4 would not be a good idea. When he returned back from training many of his cases had been assigned to other caseworkers and his caseload was thinned out. He also stated he received pointers from his supervisors.

17. The Appellant stated that he never signed a performance improvement plan and never signed any type of counseling session.

18. The Appellant testified that he was informed of his reversion on September 21, 2012, and that he submitted a resignation on the same day [Appellee's Exhibit 1]. The Appellant was allowed to use his accumulated leave time making the official date of his resignation October 6, 2012 [Appellee's Exhibit 2].

19. On cross-examination, the Appellant stated that he met with Captain Joy Kiefer-Waford who took a statement from him following his claim of sexual harassment. He stated that no one got back in touch with him to let him know what happened.

20. The Appellant also discussed the individual education plan he received from the Indiana University Southeast. He did not point to any specific accommodation he requested that he had been denied. He testified that he felt his reversion was based on discrimination based on the timing of when he was notified his employment was in trouble.

21. With respect to refusing the reversion to a Corrections Recreational Leader position with the Kentucky State Reformatory, Appellant stated that he thought it was too dangerous. He stated he did not ask any particular employee questions to verify this. During the Appellant's testimony, the Hearing Officer introduced a copy of the Appellant's e-mail to the Warden's secretary as Hearing Officer's Exhibit 1 over the objection of counsel for the Appellee. From the e-mail exchange it was clear that the Appellant was complaining that his fellow CTO, Mary Oerther, was joking about "gay stuff" and saying that Wilkins needed to "come out of the closet." The Appellant alleged that his fellow CTO discussed these matters in front of inmates and other staff members. The day of the e-mail, he stated that she was talking with another coworker who also thought that the Appellant was gay. The Appellant stated this was "the straw that broke the camel's back" and led to his complaint (Hearing Officer's Exhibit 1).

22. At the conclusion of his testimony, the Appellant rested his case. The Appellee made a motion for directed verdict arguing that the Appellee was entitled to judgment on the issue of constructive discharge. Counsel for Appellee argued that the Appellant had not introduced evidence sufficient to show that a reasonable person would feel compelled to resign. Counsel cited case law establishing that an objective standard is used and that the Appellant cannot resign regarding prospective changes which he has not been exposed to. This was in reference to the Appellant resigning because he felt the reversion to KSR would be too dangerous.

23. Upon hearing argument from both sides, the Hearing Officer **GRANTED** the motion for directed verdict on the issue of constructive discharge.

24. Counsel for Appellee also made a motion for directed verdict on the issues of retaliation and disability discrimination. The Hearing Officer **DENIED** those motions and informed both parties that those were the only issues remaining.

25. The Appellee recalled **Jessica Tedder** as their first witness. Ms. Tedder testified that the training she received while on probation helped out a lot. She pointed to Abby McIntire and Jessica Durrett as being especially helpful. She stated that there was a lot of talk about caseload numbers and that the Appellant was stressed out about these numbers because he was always behind. Ms. Tedder thought that she caught on quickly to what was being taught because she had previously worked in the Records Department. She tried to encourage the Appellant to calm down and just focus on the work. She stated that he was always worried that he was behind and was afraid he was not going to make it off probation.

26. She recalled this issue came up especially starting in the third month which was June. She stated that when inmates came from jail they needed to be classified to custody as quickly as possible. She stated that the workload was tough, but in order to keep up she came in early. Her goal was to keep as many inmates as she could off the two-week list. Ms. Tedder stated that she was able to make it off probation.

27. Since that time, Ms. Tedder testified that she transferred to the Correctional Psychiatric Treatment Unit at KSR. She was asked whether she thought that unit was more dangerous than the Assessment Center. She stated that she felt working in the Assessment Center was more dangerous because you were working with the unknown.

28. With respect to extra time she needed to work while on probation to keep up, she stated that her comp time was approved.

29. The Appellee next called **Scott Grimes**, who was a Correctional Unit Administrator I over the Assessment Center. He stated that he had six years experience with Corrections. He started out as a Correctional Officer at RCC and then worked as a CTO at the Assessment Center.

30. Grimes testified that the Assessment Center houses approximately 700 inmates and that there are nine caseworkers. The goal is to classify the inmates as quickly as possible so they can move to their permanent location where they can receive programs, rehabilitation, etc.

31. With respect to Mr. Wilkins, Grimes testified that in 2012 this was Wilkins' initial contact with the program staff. The goal was to teach the fundamentals of case management so that inmates could be properly classified. He stated that as a Unit Administrator he had to review the Appellant's work and sign off on it. One reason that it might take longer to classify inmates was if they needed a psychological evaluation.

32. Grimes testified that each Tuesday, Wednesday and Thursday, the new CTOs received training from Sheila Trotter so that they could understand classification. On Mondays and Fridays, they would sit in with more seasoned CTOs to see how they did the work. Grimes testified that Sheila Trotter knew the Classification Manual more thoroughly than anyone.

33. Appellee's Exhibit 5 was introduced during Mr. Grimes' testimony. It is a copy of Corrections Policy and Procedure 17.2, which states that unless certain exceptions apply CTOs in the Assessment Center have two weeks to classify an inmate. Pursuant to Appellee's Exhibit 10, CPP 17.2 has been incorporated by reference as an Administrative Regulation at 501 KAR 6:020.

34. Scott Grimes testified that he was the Appellant's evaluating supervisor. He noted that "his work was okay, nothing spectacular. His ability to classify inmates did not stand out as being exceptionally good or exceptionally bad." He did state, however, the Appellant did a poor job of meeting the two-week deadline. He stated that the Appellant was always falling behind. He stated that the Appellant was concerned about making it off probation.

35. The Appellee next called **Abby McIntire**. Ms. McIntire was the Unit Administrator II over the Assessment Center and became a Corrections Program Administrator effective April 1, 2012. She had worked fourteen years at RCC.

36. McIntire testified that based on her experience the two-week deadline was reasonable and was expected for CTOs. She stated that Sheila Trotter was the "best of the best" when it came to training.

37. McIntire testified that the Appellant made some common mistakes during Classification Committee. She stated that this often happens because new employees are nervous. She stated, however, the big problem with the Appellant's work was he could not keep up with the caseload; his numbers were bad. She stated that reasonable overtime was available to CTOs to keep up with the work.

38. McIntire testified that reversions happen for CTOs who cannot keep up. She stated that she had at least four others who have been reverted for the same reason. Typically she stated these reversions occur at the end of the probationary period.

39. With respect to Mr. Wilkins' sexual harassment complaint, Ms. McIntire testified that this matter was turned over to be investigated and Ms. Oerther receiving a written reprimand. She stated that Ms. Oerther also apologized. When this matter was initially reported they offered to move Mr. Wilkins to another office.

40. During Ms. McIntire's testimony, the Appellee introduced Appellee's Exhibit 11, comments from Jessica Durrett regarding Charles Wilkins' work. On July 5, 2012, the Appellant scored several disciplinary write-ups wrong on the Reclassification Form. On July 9, 2012, an inmate was not classified due to a "conflict" not being checked into. The Appellant was counseled and told to work on completing the Conflict Questionnaire Form. On July 12, 2012, the Appellant had to be told not to discuss conflicts with inmates because they might be confidential.

41. Appellee's Exhibit 12 was also introduced by Ms. McIntire. This demonstrated that on August 24, 2012, the Appellant had approximately 50 inmates on his caseload that had not been classified. The Appellant was instructed that some of his files would be distributed to other CTOs in order to get them completed. In addition, the Appellant was told that when he completed LSCMI training on Monday, September 3, 2012, they would be sitting down with him and discussing issues concerning time management and workload.

42. Appellee's Exhibit 13 was a memo to the file from Rebecca Barker regarding the Appellant's job performance and discussion of the possibility of moving to Unit 4. Wilkins stated it took him forty minutes to work up a file. They told him he should be faster than that and he should set a goal of completing eight to ten files per day. It was also discussed that he should prioritize tasks and he was also given strategies to help him prioritize. In the memo it was made clear that the Appellant needed to improve his performance in order to stay in the Assessment Center.

43. Appellee's Exhibit 14 was a list of Inmates Not Classified as of Tuesday, September 4, 2012. The Appellant had by far the most compared to the other CTOs.

44. The Appellee next called **Broderick Wright**, the Recreation Supervisor at RCC. Wright stated that he spoke with the Appellant and was aware that he had resigned from his CTO position. In November of 2012, Wright needed help in the Recreation Department and talked to the Warden. He stated that he would like to offer Mr. Wilkins his job back as a Recreation Leader at RCC. The Warden agreed to let him. Wright contacted the Appellant and made the offer. The Appellant was not interested and stated that he thought there would be a conflict of interest and did not want to go back to work in that situation.

45. The Appellee next called **Joy Kiefer-Waford**, the Captain assigned to Internal Affairs at RCC. She testified that she investigated the Appellant's complaint of sexual harassment and made a report to the Warden. Her report was introduced as Appellee's Exhibit 16. Her report shows that she began her investigation on August 31, 2012 and completed her report to the Warden on September 5, 2012.

46. The Appellee called **Warden Martin Granado** as its last witness. Warden Granado stated that he has twenty years experience in Corrections and has worked at three different institutions. He was appointed Warden at RCC on June 1, 2012. He stated that in this capacity he is responsible for the daily operation of the institution including 240 staff and 1100 inmates.

47. Granado acknowledged that he signed the reversion letter reverting the Appellant from his position as a CTO because he was not keeping up with the workload.

48. When the Warden testified that when he became aware there was a problem with Appellant's performance, he scheduled a meeting with him. When the Appellant was informed that he was not keeping up with the work, he told the Warden that he had dyslexia. He specifically mentioned an Individual Education Plan (IEP) he had from Indiana University Southeast. The Warden specifically asked the Appellant, when he learned he was dyslexic, "What can we do to help you?" The only thing that the Appellant mentioned was the IEP.

49. The Warden testified that he is familiar with IEPs. He stated that what he needed in order to accommodate the Appellant was a statement with a medical diagnosis. While the IEP had information from professionals in vocational rehabilitation, no one involved with the process was a medical professional capable of giving a diagnosis.

50. Warden Granado testified that he wanted the Appellant to succeed in his position. He stated that the Appellant's mother is his Personnel Administrator who serves almost as his right arm. He stated that he did not want to see the Appellant have to be reverted from this position; however, there was nothing he could do to help him and his work performance was not up to par such that they could grant him status in the CTO position.

51. With respect to the Appellant's complaints of sexual harassment, the Warden testified that these matters were fully investigated by Captain Kiefer-Waford. As a result of her report, the Warden issued a written reprimand to Mary Oerther, which was introduced into the record as Appellee's Exhibit 21.

52. The Warden testified that he did not discriminate against the Appellant because of his condition. Once he was aware of the Appellant's condition, he requested the appropriate information. He is not aware of anything else that could have been done to help the Appellant. In addition, he testified that he did not retaliate against the Appellant for filing a complaint of sexual harassment. The Warden testified that he investigated it and took appropriate action as a result of the Appellant's complaint.

53. KRS 18A.111(4) states:

An employee with status, who has been promoted, shall serve a promotional probationary period of six (6) months, except for those employees granted leave in excess of twenty (20) consecutive work days during this period. Such probationary periods shall be extended as prescribed in KRS 18A.005. During this period, he shall retain the rights and privileges granted by the provisions of this chapter to status employees.

54. 101 KAR 1:325 establishes that there is a six-month probationary period for a Classification and Treatment Officer. This applies to both initial probation and promotional probation.

55. KRS 18A.095(12) states:

Any classified employee may appeal to the board an action alleged to be based on discrimination due to race, color, religion, national origin, sex, disability, or age forty (40) and above. Nothing in this section shall be construed to preclude any classified or unclassified employee from filing with the Kentucky Commission on Human Rights a complaint alleging discrimination on the basis of race, color, religion, national origin, sex, disability, or age in accordance with KRS Chapter 344.

56. KRS 18A.005(27) states:

'Promotional probation' means the period of service, consistent with the length of the initial probationary period, following the promotion of an employee with status which must be successfully completed in order for the employee to retain the position to which he has been promoted. If the employee is granted leave in excess of twenty (20) consecutive work days during this period, his promotional probation shall be extended for the same length of time as the granted leave to cover such absence

57. KRS 18A.005(35) states:

'Reversion' means either the returning of a status employee to his or her last position held in the classified service, if vacant, or the returning of a status employee to a vacant position in the same or similar job classification as his or her last position held in the classified service. Reversion occurs after a career employee is terminated other than for cause from the unclassified service or after a status employee fails to successfully complete promotional probation. Reversion after unsuccessful completion of promotional probation, or in the case of a career employee after termination from the unclassified service, may only be appealed to the Personnel Board under KRS 18A.095(12)

FINDINGS OF FACT

1. The Appellant, Charles Wilkins, was hired at the Roederer Correctional Complex (RCC) as a Correctional Officer on January 4, 2010. The following year he was promoted to a Corrections Recreational Leader. On April 1, 2012, he was promoted to a position as a Classification and Treatment Officer (CTO) at RCC. He was assigned to work in the Assessment Center. [Testimony of the Appellant.]

2. The Assessment Center is the receiving place for all male inmates in the Correctional system. The goal for the CTOs is to quickly classify the inmates so that they can be sent to the appropriate institution. There they are assigned specific programs, medical treatment or other things to meet their specific needs. [Testimony of Jessica Tedder and Scott Grimes.]

3. A new CTO assigned to the Assessment Center must learn how to classify inmates just like all other CTOs. In addition, however, it is necessary that they learn to classify new inmates quickly so that the process can proceed as quickly as possible. Pursuant to Corrections Policy and Procedure 17.2, inmates should be classified within two weeks except for certain specific circumstances. [Testimony of Scott Grimes, Abby McIntire and Appellee's Exhibit 5.]

4. After the Appellant was promoted to CTO, he learned how to classify inmates although he made some mistakes. His mistakes were not glaring, the problem that his supervisors noticed was that he could not meet the time deadlines and could not classify inmates fast enough. As a result, he had a large number of inmates on his caseload who were beyond two weeks. [Testimony of Scott Grimes, Abby McIntire and Appellee's Exhibits 12, 13 and 14.]

5. The probationary period for a CTO is six months. The Appellant knew that he was having difficulty keeping up with his caseload and was worried that he would not make it off probation. He shared these concerns with coworkers. In addition, as supervisors pointed out the fact that he was not keeping up and letting him know that he would have to improve in order to make it off probation. [Testimony of Jessica Tedder, Abby McIntire and Appellee's Exhibits 12, 13 and 19.]

6. On August 22, 2012, it was noted that the Appellant had 78 inmates in his caseload that had not been classified. CTO Mary Oerther voluntarily assisted Wilkins in working up 13 files. Unit Administrator Scott Grimes worked with Wilkins to classify another 13 inmates. On August 24, 2012, the Appellant still had 52 inmates that had not been classified. This number was still in excess of the average CTO caseload. Because Wilkins was going to be attending training the week of August 27, of the remaining 52 files, 26 were divided among the remaining caseworkers. [Testimony of Scott Grimes and Appellee's Exhibits 9 and 12.]

7. On August 27, 2012, the Appellant began an important week of training. During the Tuesday session he was called out to a meeting with the Warden. At that time, Warden Granado discussed with the Appellant the fact that he was not keeping up with his workload. During the meeting, the Appellant stated that he was dyslexic and was having difficulty keeping up. Warden Granado told the Appellant that he would need to see paperwork with a medical diagnosis in order to determine the appropriate accommodation for the Appellant's condition. During this discussion there was some discussion of moving to another unit; however, no specific offer was made nor did the Appellant request a move to another unit. [Testimony of Warden Martin Granado and Appellant.]

8. As of September 4, 2012, the Appellant still had more inmates on his caseload than any other caseworker. He continued to have difficulty keeping up. [Testimony of Abby McIntire, Warden Granado and Appellee's Exhibit 14.]

9. Because the Appellant was unable to keep up with the workload expected of him as a Classification and Treatment Officer in the Assessment Center, Warden Granado decided to revert him from promotional probation. The Warden notified the Appellant of this action on September 21, 2012, when he met with him. The official notice that he was being reverted from his position as a CTO to a position of Corrections Recreation Leader I assigned to the Kentucky State Reformatory (KSR). [Testimony of Appellant, Warden Granado and Appellee's Exhibit 1.]

10. The Appellant did not want to accept the reversion and transfer to KSR so he submitted a notice of resignation on September 21, 2012. He decided to use leave time through October 5, 2012, which was approved by the Warden. The official date of his resignation was October 6, 2012. [Testimony of Appellant, Warden Granado and Appellee's Exhibit 2.]

11. Despite the Appellant's fears of working at KSR, the Hearing Officer finds that the working environment at KSR is no more dangerous than the work environment at RCC. Numerous witnesses testified that the Assessment Center is more dangerous than other institutions because you are dealing with inmates who are unknown at that point. Certainly there was no evidence to support a finding that the conditions at KSR were so onerous that the Appellant had no choice but to resign. The Hearing Officer notes that the Appellant did not accept the transfer and so did not know exactly what the work conditions were. [Testimony of the Appellant, Jessica Tedder, Abby McIntire and Captain Joy Kiefer-Waford.]

12. On August 22, 2012, the Appellant sent an e-mail to the Warden's secretary complaining that he was being sexually harassed by a coworker, Mary Oerther. As a result of the Appellant's complaint, the Warden assigned this matter to Captain Joy Kiefer-Waford of Internal Affairs for an investigation. She started her investigation on August 31, 2012, and concluded it on September 5, 2012, with a report to the Warden. As a result of the investigation, the Warden determined that Ms. Oerther had made inappropriate statements to the Appellant and that these were overheard by coworkers. The Warden issued a written reprimand to Ms. Oerther

on September 13, 2012, and she apologized to the Appellant. [Testimony of Appellant, Captain Kiefer-Waford, Warden Granado and Appellee's Exhibits 16 and 21.]

13. The Hearing Officer finds that the Appellant's complaint of sexual harassment did not in any way influence the decision to revert him from his position. The Hearing Officer finds that there was no retaliation. To the contrary, the evidence shows that the Appellant's allegations were taken seriously, were investigated and appropriate action was taken to see that the inappropriate comments stopped.

14. The evidence demonstrates that the Appellant first brought up having dyslexia in a meeting with the Warden on August 28, 2012. The Warden asked him to present paperwork with a medical diagnosis which the Appellant did not do. The only written information the Appellant offered was a IEP from Indiana University Southeast from 1999 discussing his need for accommodation in an educational setting. In addition to not demonstrating a medical diagnosis regarding a need for any accommodation, the Appellant never specifically identified an accommodation which would allow him to perform the essential functions of his job as a CTO in the Assessment Center at RCC. In addition, the Appellant never introduced any evidence such that the Appellee would have been in a position to consider transferring the Appellant to another unit.

CONCLUSIONS OF LAW

1. The Appellant failed to introduce evidence that his reversion was the result of retaliation for having reported sexual harassment. Although the Appellant introduced evidence that he had engaged in protected conduct by filing a complaint and suffered an adverse employment action by being reverted, he failed to introduce any evidence of a causal connection between the two. As a result, he failed to prove a *prima facie* case of retaliation. *Kentucky Department of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003).

2. The Appellant failed to establish that he suffered from a disability such that he could prove that his reversion was the result of disability discrimination. The Appellant offered his own testimony that he was dyslexic; however, he was not able to introduce any medical evidence demonstrating that this was a disabling condition such that the Appellee would have been required to provide an accommodation or if he could perform the essential functions with such an accommodation. In addition, the Appellant failed to offer any proof of any accommodation which would have helped him perform his job duties as a CTO in the Assessment Center.

3. The Appellee introduced evidence of a legitimate non-discriminatory or non-retaliatory reason for reverting the Appellant that is his inability to keep up with the workload as a new CTO in the Assessment Center. Even if the Appellant did present a *prima facie* case of either retaliation or discrimination, the Appellee offered sufficient proof to establish that neither of these were the reason for his reversion.

4. The Appellant offered no credible evidence that the stated reason for the Appellant's reversion was his inability to keep up with the workload was pretext.

5. The evidence does not establish that the conditions at KSR where the Appellant was offered a transfer upon his reversion were so intolerable that his resignation was coerced. The Appellant offered no proof on this issue other than his subjective fear of transferring to KSR. For this reason, the Hearing Officer granted a directed verdict on the issue of constructive discharge. *Comm., Tourism Cabinet v. Stosberg*, 948 S.W.2d 425 (Ky. App. 1997).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **CHARLES WILKINS VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2012-218)** 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.

SO ORDERED at the direction of **Hearing Officer Mark A. Sipek** this 19th day of April, 2013.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Amber Arnett
Charles Wilkins