

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2022-035

JEREMIAH ZIEHR

APPELLANT

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

EDUCATION AND LABOR CABINET (formerly known as
EDUCATION AND WORKFORCE DEVELOPMENT CABINET)

APPELLEE

*** **

The Board, at its regular February 2023 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated January 4, 2023, 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 14th day of February, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

Copies hereof this day sent to:

Jeremiah Ziehr
Hon. Matthew Lynch
Hon. Andrew Bryson
Hon. Rosemary Holbrook (Personnel Cabinet)
Leslie Tindall

**COMMONWEALTH OF KENTUCKY
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JEREMIAH ZIEHR

APPELLANT

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

**EDUCATION AND LABOR CABINET
(formally Education and Workforce Development Cabinet)**

APPELLEE

** ** * * *

This matter came on for a pre-hearing conference on July 26, 2022, at 1:00 p.m. ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Hearing Officer Mark A. Sipek. The proceedings were recorded by audio equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Jeremiah Ziehr, was present and was not represented by legal counsel. The Appellee, Education and Labor Cabinet (formally Education and Workplace Development Cabinet) was present and was represented by the Hon. Adrian Jacob.

FINDINGS OF FACT

1. The Appellant filed his appeal on March 14, 2022, appealing from his probationary dismissal and alleging medical discrimination. The Appellant was serving his initial probationary period as a Voc Rehab Program Specialist I.

2. The Appellant stated that he was having kidney failure. He went in the hospital in December 2021 and was released from the hospital on February 15, 2022. He started work on February 16, 2022, and was dismissed effective March 9, 2022.

3. During the initial pre-hearing conference, the Appellant stated that he was receiving treatment and dialysis while he was working and believed that he needed to be accommodated by his employer. He also stated he did not understand his dismissal. The Appellant stated he was only one (1) month into the job and felt like it had been overwhelming. He did not see any reason he should have been dismissed.

4. Given an opportunity to respond to the Appellant's concerns, counsel for the Appellee explained that the Appellant was dismissed due to multiple absences without notice and for leaving work without notice.

5. The Appellee then filed a Motion for Summary Judgment. The Appellee alleged that the Personnel Board did not have jurisdiction over this appeal because the Appellant did not allege any protected class discrimination. The Appellee further argued, that even if medical discrimination is construed to mean protected class discrimination, the Appellant never requested an accommodation and, thus, there are no underlying allegations that would trigger a question of fact.

6. In its Motion for Summary Judgment, the Appellee framed the factual background of this appeal as follows:

The Appellant, Ziehr, was employed as a Voc Rehab Program Specialist I in the Education and Workforce Development Cabinet, Department of Workforce Investment, Office of Vocational Rehabilitation. Ziehr's employment began on February 16, 2022, and he was dismissed effective March 9, 2022, while serving his initial probationary period. During that time, Ziehr had multiple occasions of unauthorized leave, either not showing up to work or leaving work early, without any notice to his supervisor in advance of, or as soon as possible after, his absences. At no point during his employment did Ziehr make a request for any accommodations in conjunction with his absences from work, nor did he even assert having a disability or seek any form of assistance from his supervisor to request any accommodations. Ziehr filed his appeal to the Personnel Board on March 4, 2022, alleging "medical" discrimination.

7. It is not in dispute that the Appellant never requested an accommodation from the Appellee.

8. Although given an opportunity to respond to the Appellee's Motion for Summary Judgment, the Appellant failed to do so.

9. There are no material facts in dispute and this appeal can be decided as a matter of law based on the appeal form, the statements of the parties at the prehearing conference, the Appellee's Motion for Summary Judgment, and attachments.

CONCLUSIONS OF LAW

1. Because the Appellant was a classified employee serving his initial probationary appeal, he could only appeal to the Personnel Board by alleging some form of illegal discrimination. KRS 18A.111.

2. For the purposes of ruling on the Appellee's Motion for Summary Judgment, the Hearing Officer concludes that the Appellant's claim of medical discrimination is the equivalent of disability discrimination.

3. The Hearing Officer adopts as analysis the argument of the Appellee and its Motion for Summary Judgment as follows:

Even if “medical” discrimination is construed to mean disability discrimination, the Appellant admits he never requested any accommodations. While the Appellee contends that it would be improper to liberally construe “medical” discrimination to mean disability discrimination, this appeal would remain fatally flawed under such an interpretation. The United States Court of Appeals for the Sixth Circuit has described the threshold for triggering accommodations under the ADA:

The applicable EEOC regulations provide that it is “unlawful for a covered entity not to make reasonable accommodation to the *known* physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.” 29 C.F.R. § 1630.9(a) (emphasis added). The Commission’s interpretive guidelines indicate that generally “it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.” 29 C.F.R. pt. 1630 App. § 1630.9. “Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation.” *Id.* There is no question that the EEOC has placed the initial burden of requesting an accommodation on the employee. The employer is not required to speculate as to the extent of the employee’s disability or the employee’s need or desire for an accommodation.

Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1046-47 (6th Cir. 1998) (footnote omitted). The Kentucky Court of Appeals has emphasized this threshold, stating that “it is well settled that the individual with the disability has the responsibility to inform the institution that a reasonable accommodation is needed, as it does not become an issue if the person has never requested one.” *Hash v. Univ. of Kentucky*, 138 S.W.3d 123, 129 n.11 (Ky. Ct. App. 2004). While “a request for medical leave can qualify as a request for a reasonable accommodation under certain circumstances...there are limitations on the bounds of reasonableness.” *Larison v. Home of the Innocents*, 551 S.W.3d 36, 45 (Ky. App. 2018).

Here, Ziehr admitted at the July 26, 2022, pre-hearing conference that he did not request any accommodations in conjunction with the medical problems to which he attributes his unauthorized absences. In fact, Ziehr has never articulated having made a request for such accommodations or even having communicated a basic need for medical leave that would have indicated the existence of a possible disability and accommodation. While *Larison* leaves room to qualify a request for medical leave as a request for reasonable accommodation, Ziehr never made such

a request. Like in *Gantt*, Ziehr “never made a request for an extended leave or any other accommodation.” *Gantt* at 1046. Instead, Ziehr simply did not communicate, either missing days of work entirely or leaving work early without notice. Ziehr now complains that he is “medically” protected from dismissal for his failure to notify absences according to policy. However, without a request for accommodations or medical leave, even an appeal on a proper bases of disability discrimination fails as a matter of law.

4. Even assuming that the Appellant has adequately alleged disability discrimination, the fact that he did not request an accommodation while he was working means that he cannot prevail on his claim and, thus, his appeal is subject to dismissal.

5. Because the Appellant has not stated a case upon which relief could be granted, the Personnel Board may dismiss his case and grant the Appellee’s Motion for Summary Judgment. KRS 18A.095(18)(a) and KRS 13B.090(2).

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JEREMIAH ZIEHR V. EDUCATION AND LABOR CABINET (formally Education and Workforce Development Cabinet) (APPEAL NO. 2022-035)** 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).

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 4 day of January, 2023.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER
EXECUTIVE DIRECTOR

A copy hereof this day is emailed and mailed to:

Hon. Matthew Lynch
Hon. Andrew Bryson
Jeremiah Ziehr
Hon. Rosemary Holbrook (Personnel Cabinet)