

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2017-095

RITA RICHARDSON

APPELLANT

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

CABINET FOR HEALTH AND FAMILY SERVICES
AND
KENTUCKY BOARD OF NURSING

APPELLEES

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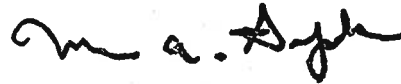
The Board, at its regular December 2018 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated November 1, 2018, (Appellant's Exceptions and Request for Oral Argument – returned as untimely) and being duly advised,

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 21st day of December, 2018.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day sent to:

Hon. Lucas Roberts
Hon. Morgan Ransdell
Ms. Rita Richardson
Mr. Jay Klein

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APPELLEES

This matter came on for an evidentiary hearing on July 30, 2018, at 9:30 a.m., ET, at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Colleen Beach, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Rita Richardson, was present and was not represented by legal counsel. The Appellee Cabinet for Health and Family Services was present and represented by the Hon. Lucas Roberts. The Appellee Kentucky Board of Nursing was present and represented by the Hon. Morgan Ransdell.

BACKGROUND

1. Appellant, Rita Richardson, a classified employee with status, is an Administrative Specialist III with the Cabinet for Health and Family Services (CHFS), Office of Inspector General, Division of Health Care. She filed an appeal on April 27, 2017, alleging "other penalization," namely age and disability discrimination. In support of her appeal, she provided the following statement:

1. Staff at KY Bd of Nursing notified (sic) former staff that now works in Office of Inspector General where I work that I applied for Adm Specialist (sic) position. I had not been notified of interview or not to interview (sic) (Please see attached as the website is not allowing me to type any further than what is shown on each line.

2. By Interim Order dated June 11, 2018, it was established that the issue at the evidentiary hearing would be Appellant's claim of age and disability discrimination, for which Appellant would bear the burden of proof.

3. **Appellant, Rita Richardson**, testified on her own behalf. She is currently employed as an Administrative Specialist III at the Office of Inspector General ("OIG"),

Division of Health Care, Cabinet for Health and Family Services. She began her employment with the OIG in August 2000 when she was first hired as a Secretary III, grade 9.

4. Appellant stated that her tenure at OIG has been “constantly one thing after another.” She testified that early in her career there, she “always did [her] job, but people came after [her].”

5. Appellant stated that a coworker, Dana Malone, who was recently promoted to a supervisory position, made a point to always address Appellant as “Miss Rita,” which Appellant took to be a disparagement of her age. According to Appellant, Malone always emphasized the “Miss,” which Appellant found to be a sign of disrespect. When Appellant asked Malone to call her just “Rita,” Malone told Appellant that “her momma told her to respect her elders.”

6. Appellant asserted that even after she asked Malone to stop, Malone continued to call her “Miss Rita,” and did it in a loud manner, sometimes laughing as she said it.

7. Appellant stated that she is 63 years of age. She suffers from a mobility issue and walks with the assistance of a cane.

8. Sometime around the end of February 2017, Appellant applied for an Administrative Specialist III position at the Kentucky Board of Nursing (“KBN”). Shortly thereafter, Ms. Malone approached Appellant and told her that Malone had been contacted by KBN. Appellant stated that this made her feel very uncomfortable. She felt that KBN’s eliciting information from Malone, whom she felt disrespected her, resulted in her being “unfairly prejudged” by KBN before she even had a chance to interview there.

9. Appellant asked Malone which KBN employee had contacted her. Malone answered, “Meka.” Appellant testified that she asked Malone several times about this encounter and each time Malone replied that “Meka” had contacted her.

10. Appellant then called the Human Resource Administrator at KBN, Joanna Neubert. Appellant explained what Malone had recounted to her and asked that her employment application be withdrawn. Appellant later confirmed this conversation through an email exchange with Neubert, which was introduced into the record as Appellee CHFS’ Exhibit 1.

11. Appellant asserted that Malone’s behavior toward her was the result of age and disability discrimination. “I don’t ask anyone to help me. Because I struggle sometime, and use a cane, [Malone] makes assumptions about me, that I am elderly. After she started picking on me, I started to feel self-conscious.”

12. Appellant contacted Malone by email on March 1, 2017, asking Malone to explain the details regarding the conversation she had with the KBN employee. Malone answered, “She asked me if I knew you, that’s all, we are good friends. I worked for the Nursing Board for twelve years.” Appellant reiterated to Malone that she felt the contact was “highly inappropriate.” (Appellee CHFS’ Exhibit 2).

13. On cross-examination by the Cabinet, Appellant stated that she filed a "Grievance Form" with the Cabinet on March 24, 2017. She complained of a "breach of confidentiality and unauthorized sharing of information" and "assumption of age related remarks." The specific solutions Appellant requested in her grievance was the assurance that Malone would have no access to her personnel records, in addition to an explanation why Malone called Appellant her "elder" and sometimes spoke to her in a "mocking tone." (Appellee CHFS' Exhibit 4).

14. Appellant met with Regional Program Manager Sandra MacDonald on April 7, 2017, to discuss her grievance. According to the documented "response" completed by MacDonald, she discussed with Malone how she addressed Appellant. Malone agreed to "be more aware of how she addresses [Appellant] and how she may be perceived by others." However, because Malone was promoted to a supervisory position, MacDonald noted that Malone could possibly need to access personnel records, including Appellant's, in the performance of her job duties. (Appellee CHFS' Exhibit 4).

15. On April 14, 2017, Appellant wrote on the grievance form: "I am acknowledging RPM Sandra MacDonald met with me to discuss. I am not signing off on the form returning to me on April 7, 2017 under her signature being that neither choice applies to me. In reviewing the grievance process all my recommendations were not addressed/ignored and therefore moving forward in other directions. My grievance was not executed properly after I submitted in accordance with the regulations." [Sic.] (Appellee CHFS' Exhibit 4).

16. On April 27, 2017, Appellant filed an appeal with the Personnel Board.

17. Appellant was asked if she had been notified of any employment action being taken against her, such as a fine, warning, reprimand, suspension, or dismissal. Appellant answered that, prior to the events relating to her job application at KBN, she had been yelled at by RPM MacDonald. In Appellant's opinion, "being yelled at is kind of a verbal warning."

18. When queried why she had withdrawn her application from KBN, Appellant explained that she felt "that there had been a violation. I had already been pre-judged."

19. On cross-examination by the Kentucky Board of Nursing, Appellant stated that her application withdrawal was not done because she no longer wanted to work there, but because she felt uncomfortable. She didn't know if the person who called Malone would be on the interview panel.

20. When asked what relief she was seeking from KBN, Appellant replied: "I don't know. I want to address the breach of confidentiality. I am questioning the legality of it."

21. As for how anyone at KBN would know her age, Appellant answered that her date of birth was on the application form.

22. Upon questioning by the Hearing Officer, Appellant stated that she feels that she was also discriminated against based on her disability, which she identified as a "mobility

issue.” She stated, “I have tripped and it makes me feel self-conscious now. When I have to pass Malone in the office, it bothers me.”

23. At the end of her testimony, Appellant rested her case. Both Appellees made a Motion for a Directed Verdict, which was **OVERRULED** by the Hearing Officer.

24. Appellee Cabinet for Health and Family Services went next in the presentation of evidence. Appellee CHFS called **Dana Malone Scruse** (“Malone”) as its first witness. Malone is currently employed as a Human Services Surveyor Supervisor with the Office of Inspector General. She has worked in the same Louisville office as Appellant since April, 2015. Prior to working there, Appellant was employed at KBN.

25. Malone testified that, sometime in the spring of 2017, she was contacted via text message, by Ann Tino, who had previously been her supervisor when Malone was employed by KBN. Malone recalled that Tino asked her if she knew Appellant and Malone responded, “Yes, why?” According to Malone, Tino didn’t respond and she had no further contact with Tino regarding Appellant.

26. Malone denied that she knew anyone at KBN named “Meka.”

27. Malone was asked if she had ever referred to Appellant as “Miss Rita.” She answered that she had in the past, but when Appellant asked her to stop calling her that, Malone made a “conscious effort” to stop. She denied recalling that Appellant had asked her *repeatedly* to stop calling her “Miss Rita.”

28. Malone denied that she had ever laughed at Appellant in an insulting or mocking way.

29. Malone denied that she had ever remarked on Appellant’s age or disability.

30. Malone stated that she and Appellant had never gotten into an actual argument, but did recall an incident when she was getting on the elevator one day after work. Appellant saw her and remarked to Malone that she had emailed her earlier regarding the volume of her radio at work.

31. **Bob James** is employed by the Office of Inspector General, Cabinet for Health and Family Services, where he has worked for the past four years. His current title is Staff Assistant.

32. James stated that as a result of budget cuts at OIG, the administrative staff was reduced from three to two. Consequently, Appellant was given increased job duties, and her salary was increased to reflect this.

33. At the end of James’ testimony, the Cabinet rested its case.

34. Appellee Kentucky Board of Nursing (KBN) went next in the presentation of evidence. Appellee KBN called **Joanna Neubert** as its first witness.

35. Neubert has been a Human Resources Administrator at KBN since January 2016. Through her testimony, the following exhibits were introduced into the record:

- * Justification for filling the Administrative Specialist III position and transmittal email, dated January 13, 2017. (Appellee KBN's Exhibit 1).
- * Administrative Specialist III posting. (Appellee KBN's Exhibit 2).
- * an email string between Neubert and Tino, the hiring supervisor, in which names of the candidates she wishes to interview have been highlighted. The document shows that Appellant's name has been highlighted. (Appellee KBN's Exhibit 3).
- * Appellant's state application. (Appellee KBN's Exhibit 4).
- * email between Dana Malone and Ann Tino dated February 24, 2017. (Appellee KBN's Exhibit 5).
- * email between Dana Malone and Ann Tino dated February 24-27, 2017, in which Malone informs Tino of her (Malone's) promotion. (Appellee KBN's Exhibit 6).
- * email string between Neubert and the Personnel Cabinet dated February 27, 2017, in which Neubert identifies the candidates chosen for MQ Review. Appellant's name is included in this list. (Appellee KBN's Exhibit 7).
- * email string between Appellant and Neubert, dated February 28, 2017, to March 1, 2017, in which Appellant withdraws her application for the position at KBN and expresses her feeling that it was "highly inappropriate" for someone at KBN to contact a person in Appellant's office who was not a designated reference. (Appellee KBN's Exhibit 8).
- * email string between Neubert and Paula Schenk, KBN Executive Director, dated March 1, 2017, informing Schenk of Appellant's dissatisfaction with the telephone contact that occurred between a KBN employee (inferred by Neubert to be Ann Tino) and Malone. In the email, Neubert expresses her wish to ensure that "we do not have any further incidents along these lines." (Appellee KBN's Exhibit 9).

- * email dated March 4, 2017, between Neubert and the Personnel Cabinet informing Neubert that all the candidates approved to be eligible for interviews are identified in her "req folder." (Appellee KBN's Exhibit 10).
- * Human Resource document "52331 BR" regarding the Administrative Specialist III position listing the status for all chosen candidates. Under Appellant's name, her status is designated as "Interview Declined." (Appellee KBN's Exhibit 11).
- * email string between Neubert and Rosemary Holbrook, Assistant General Counsel, KY Personnel Cabinet, confirming Appellant was designated "MQ approved" and that had Appellant not requested her application be withdrawn from consideration on February 28, 2017, she would have been offered an interview. (Appellee KBN's Exhibit 12).

36. Neubert was asked what she did in response to Appellant's request that her application for the Administrative Specialist III position at KBN be withdrawn. Neubert answered that she acknowledged the request and asked Appellant to confirm this request in writing. Neubert also made a notation of their conversation in a file. When Appellant emailed Neubert confirming her application withdrawal, Neubert notified Ann Tino.

37. Neubert stated that she knew Appellant had passed MQ review because her name appeared on the interview list as documented in the Personnel Cabinet form identified as "52231BR" (Appellee KBN's Exhibit 11). While the notation besides Appellant's name states "Interview Declined," Neubert explained that a candidate's name only appears on this list if the Personnel Cabinet has deemed that they meet the minimum qualifications for the position.

38. Neubert further stated that every candidate that is MQ approved is granted an interview, unless an applicant voluntarily declines to participate.

39. Neubert testified that she personally contacts references for the top candidates and that this is the last step in the interview process.

40. Neubert affirmed that "contact was made to someone not on [Appellant's] reference list, which was inappropriate." While this action was "outside of policy," it was technically not a violation of statute or regulation, in Neubert's opinion. Neubert also denied that she was aware of any discriminatory intent or action against Appellant.

41. On cross-examination, Neubert was asked if she queried Tino about her contact with Dana Malone. Tino told Neubert that she "just hadn't thought about it." She merely thought that Malone may have known [Appellant].

42. **Ann Tino** is the Manager of the Investigation Branch at KBN, where she has worked for the past seventeen years.

43. Her job duties include the investigation and processing of complaints against nurses throughout Kentucky. She was also the hiring manager for the Administrative Specialist III position. She was the designated hiring manager for the Administrative Specialist III position at KBN that Appellant had initially applied for. Her role in the hiring process was to review the list of candidates and their applications, which Neubert sent her. She then compared the candidates' qualifications with the job specifications. After that review, she highlighted the names on the list of the candidates she wished to have sent to the Personnel Cabinet for MQ review. (Appellee KBN's Exhibit 3).

44. Tino stated that Malone had worked previously at KBN, and Tino was her supervisor for a period of four years, until Malone left her employment at KBN to work for the OIG. Tino acknowledged that she and Malone had become friends and the two continued communicating after Malone left KBN.

45. Tino admitted that when she saw that Appellant worked at OIG, she asked Malone, by telephone, if she knew Appellant. Malone had answered "Yes."

46. Tino testified that she did not remember anything more of the conversation. She denied that she had ever discussed Appellant's age or disability with Malone. Tino stated emphatically, "There was no discussion of protected class status. I took years of leadership classes and I know that I would not have inquired into that."

47. Tino stated that she had no idea that Appellant had a disability. She stated that while Appellant's age would have been on her application, she "had not memorized the date."

48. Tino was asked how many of the employees she supervised were over forty. Tino answered that of the eight employees she supervises, five of them were over forty, and that she had recommended all five of them be hired.

49. Tino denied that her call to Malone was a reference check. She admitted that Neubert cautioned her about making similar contact regarding an applicant for a position at KBN in the future, that a candidate may not want their current employer to know that they are looking for employment elsewhere. Tino concluded, "I understand that. I apologize. I was not trying to breach confidentiality."

50. At the end of Tino's testimony, Appellee KBN rested its case.

51. 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.

52. KRS 18A.095(14)(a) states:

Any employee, applicant for employment, or eligible on a register, who believes that he has been discriminated against, may appeal to the board.

53. KRS 18A.140(1) states:

No person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified services because of his political or religious opinions, affiliations, ethnic origin, sex, race or disability. No person over the age of forty (40) shall be discriminated against because of age.

FINDINGS OF FACT

1. Appellant, Rita Richardson, is currently employed as an Administrative Specialist III at the Cabinet for Health and Family Services, Office of Inspector General, Division of Health Care. She has worked in that Division for the past eighteen years.

2. Sometime around the end of February, 2017, Appellant applied for an Administrative Specialist III position at the Kentucky Board of Nursing (KBN). Shortly after she submitted her application, her co-worker, Dana Malone Scuse ("Malone"), told Appellant that she had been contacted by KBN. According to Appellant, Malone recounted that a "Meka" had spoken to her and asked Malone if she knew Appellant. (Testimony of Appellant).

3. At the evidentiary hearing, the woman at KBN that Malone spoke to regarding Appellant's application was identified as Ann Tino, who was Malone's supervisor during Malone's tenure at KBN. (Testimony of Ann Tino and Dana Malone).

4. Appellant stated that this phone call to Malone made Appellant feel very uncomfortable. She felt "unfairly prejudged" by KBN and called their Human Resource Administrator, Joanna Neubert. Appellant instructed Neubert to withdraw her application, which Neubert did. (Testimony of Appellant and Joanna Neubert).

5. Appellant contends that Malone had disparaged Appellant due to her age, 63 years old. According to Appellant, Malone repeatedly called her "Miss Rita," even after Appellant had asked that she just be called "Rita." Appellant also testified that Malone commented to her that she (Malone) had been "taught to respect her elders." Appellant described Malone's behavior toward her as "loud" and "mocking." She stated that Malone's "picking on her" had also made her feel self-conscious about her need to walk with the assistance of a cane. (Testimony of Appellant).

6. The Hearing Officer does not find persuasive Appellant's testimony that Tino's calling Malone regarding Appellant's job application at KBN was an "unfair pre-judgment" of her viability as a candidate. Through the testimony of Joanna Neubert, documents were entered into the record showing that Appellant had been chosen for a minimum qualifications review for the Administrative Specialist III position, which she met, and that she was one of the candidates chosen to be interviewed. (Appellee KBN's Exhibits 3, 7, 10, and 12).

7. The Hearing Officer finds that Appellant did not show that any disciplinary or other adverse employment action was taken against her due to Malone's or Tino's behavior.

8. Appellant's testimony that Malone called her "Miss Rita" repeatedly and in a "loud and mocking tone" was uncorroborated by any other witness or evidence and was firmly denied by Malone, whom the Hearing Officer found to be a credible witness.

9. The Hearing Officer finds that Appellant did not present evidence at the hearing to show that Malone's alleged behavior, or the conversation between Malone and Tino regarding Appellant's job application at KBN, was the result of age or disability discrimination. Likewise, Appellant did not present evidence that any of those actions constituted legally actionable harassment based on protected class status, such as age or disability.

CONCLUSIONS OF LAW

1. State employees may appeal to the Personnel Board if they believe they have been discriminated against based on protected class status, including age over forty (40), or disability. KRS 18A.095(12), KRS 18A.095(14)(a), and KRS 18A.140(1). Based on the Findings of Fact in this case, the Hearing Officer concludes that Appellant has failed to carry her burden of proof to show that any of the actions taken in this case were the result of age or disability discrimination. In order to show a *prima facie* case of age or disability discrimination, Appellant must first show she is a member of a protected class and that she suffered an adverse employee action. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). The Hearing Officer concludes that no adverse employment action was taken against Appellant in her current employment at the OIG, nor did Appellant show any negative impact upon her job application at KBN, which she voluntarily withdrew.

2. Based on the same statutory provisions cited above, a state employee may appeal to the Personnel Board if they feel they have been harassed based on protected class status, including age over forty (40) and disability. Based on the Findings of Fact in this case, the Hearing Officer concludes that Appellant has failed to carry her burden of proof to show that any of the behavior alleged in this case: (1) constitutes harassment based on Appellant's age or disability or (2) constitutes a hostile work environment based on her age or disability. For harassment to be actionable, "it must be sufficiently severe or pervasive to alter the conditions of the [victim's] employment and create an abusive working environment." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). Even accepting Appellant's allegations against Malone as true, the alleged offenses were not "severe" or "pervasive" enough to be construed as creating an abusive working environment.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of RITA RICHARDSON V. CABINET FOR HEALTH AND FAMILY SERVICES AND KENTUCKY BOARD OF NURSING (APPEAL NO. 2017-095) 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 Colleen Beach this 1st day of November, 2018.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Lucas Roberts
Hon. Morgan Ransdell
Ms. Rita Richardson