

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2016-255

CANDACE SMITH

APPELLANT

VS. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER

CABINET FOR HEALTH AND FAMILY SERVICES

APPELLEE

* * * * *

This matter came on for an evidentiary hearing on February 6, 2017, at 9:30 a.m., ET, at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Candace Smith, was present in person and was not represented by legal counsel. The Appellee, Cabinet for Health and Family Services, was present and represented by the Hon. Brent Irvin. Also present as Agency representative was Ms. Dana Fryman.

The first issue on appeal is the Appellee's decision to place Appellant on Directed Sick Leave. The burden is on the Appellee to prove by a preponderance of the evidence that the action was taken with just cause and was neither excessive nor erroneous. The second issue is Appellant's claim of disability discrimination. The burden is on the Appellant to prove by a preponderance of the evidence that she was subject to disability discrimination. The rule separating witnesses was invoked and employed throughout the course of the proceedings. Appellant waived presentation of an opening statement. The Appellee gave an opening statement.

BACKGROUND

1. The first witness for the Appellee was **Howard J. Klein**. Mr. Klein is employed by the Cabinet for Health and Family Services, Office of Human Resource Management, where he oversees disciplinary matters, directed sick leave and ADA issues. He testified a form has been signed that allows him to testify for the Appointing Authority.

2. Mr. Klein developed a Temporary Modified Duty (TMD) policy for the Cabinet. He explained the genesis for the policy's development. The policy benefits the employer by continuing to receive work output from an employee on restricted work, while the employee is not required to use up sick leave time during such modified duty. Most states employ an initial 90-day period. This Cabinet instituted an initial 90-day period and, if necessary, an employee

may apply for an additional 30-day extension, subject to approval. A total of 120 days may be allowed an employee to work outside their classification and still be paid.

3. He identified Appellee's Exhibit 1 as the Temporary Modified Duty Plan he had developed in 2008, and which has been in full force and effect since that time. He read the purpose of the policy into the record, which includes assisting an employee's recovery process, minimizing the loss of productivity, and maintaining employee relations and morale. Once an employee provides satisfactory medical proof to justify being placed on modified duty, the employee is given up to 90 days. At the end of the 90 days, if the employee is still unable to complete the full duties of the position, they may request an additional single extension of 30 days. Mr. Klein's office then reviews the request and documentation to either approve or deny the request.

4. After 120 days has expired, the employee is either released by their doctor to full duties, or the employee will go into directed sick leave if unable to perform the essential functions of their job. The Cabinet conducts an ADA analysis if a doctor completes a questionnaire. The Cabinet could then determine what ADA accommodations could be provided, including a demotion to a lower level job and the pay rate that accompanies that position. Appellant was provided ADA materials and Family Medical Leave documents to complete and return. The Cabinet never received a return of any documents from Appellant.

5. Appellant had suffered a fall. She was limited to light desk duty by her physicians. Social Workers are required to conduct investigations, walk through people's homes, interview clients, be on their feet, be able to drive, walk around and lift a small child. She was assigned temporary modified duty for the maximum period of 120 days.

6. The next witness was **Saprina "Crissy" Grubbs**. Since 2005, Ms. Grubbs has been employed by the Cabinet for Health and Family Services as a Service Region Administrator Associate (SRAA).

7. She identified Appellee's Exhibit 2 as the Temporary Modified Duty Plan approved for Candace Smith, which the Appellant and Grubbs had signed. Attached to the plan is the statement from Appellant's doctor. The parties agreed to the modified job tasks (page 1), which would extend from April 12, 2016, to June 12, 2016.

8. She identified Appellee's Exhibit 3 as the Temporary Modified Duty Plan approved for the Appellant, which had been signed by Ms. Smith and Dana Fryman. This plan was in effect for the period of June 14, 2016, to July 14, 2016.

9. She identified Appellee's Exhibit 4 as the Temporary Modified Duty Plan approved for the Appellant. This document granted the single 30-day extension of modified job tasks for the period of July 14, 2016, to August 14, 2016. It was signed by the Appellant and

Dana Fryman, and approved by Mr. Klein.¹ To her knowledge, Appellant's doctors have not released Ms. Smith to return to the full duties of her position.

10. Ms. Smith's workstation is in Garrard County. Placing an employee on modified duties has no effect on that employee's pay rate. All through her modified duty period, Appellant received the same pay she always had as a Social Service Clinician I.

11. **April Davis**, who has been employed by the Cabinet for Health and Family Services, Protection and Permanency Division, as Acting Service Region Administrator (SRA) for the Southern Bluegrass Region, a 10-county area, since April 2016, offered her testimony. She described her duties. She is one of nine SRAs in Kentucky. An SRA is the top employee for the region. She has about 280 employees under her supervision in the Southern Bluegrass Region. The region headquarters is located in Lexington, Kentucky, and includes Garrard County.

12. She identified Appellee's Exhibit 5 as the Job Class Specification and Position Description for a Social Service Clinician I, the position to which Appellant is employed. The essential job duties of the position which were beyond Appellant's medical restrictions, included having to respond to child abuse allegations by driving to the home and/or school; when a court orders removal, to physically remove and transport a child to a foster home; to go out into the field to interview parties; attend court on behalf of the Cabinet. She acknowledged Garrard County is a rural county.

13. When an employee is placed on Family Medical Leave (FML), such leave protects one's employment should the employee run out of other leave time. When the employee qualifies for FML, there is a certain amount of Family Leave time the employee is able to take. Medical certification from the employee's physician is required for approval.

14. On June 9, 2016, Ms. Davis telephoned Ms. Smith to tell her Ms. Franklin, of Human Resources, had been trying to contact her. Appellant responded that she had an attorney who cautioned her about having contact with Frankfort because of her pending Worker's Compensation matter. Davis told Smith she needed to contact Ms. Franklin, and she could explain that to her.

15. Appellant began temporary modified duties on April 12, 2016.

16. The next witness was **Dana Fryman**. Since May 16, 2016, Ms. Fryman has been employed by the Cabinet for Health and Family Services as a Family Services Office Supervisor (FSOS) in Garrard County. She was the one who received the various doctor notes submitted by Appellant. To-date, no doctor has released Appellant to perform the full duties of her position.

17. She identified Appellee's Exhibit 6 as the Annual Employee Performance Evaluation document for Appellant's position, which sets out the duties of her employment for

¹ Appellee's Exhibits 2, 3 and 4 are sealed in the record.

the period of January 1 through December 31, 2016. The physical requirements of a Social Worker include making contact with victims, conducting interviews, interviewing collateral individuals who could contribute information, going to court and filing a petition, physically removing a child from a home and transporting them, making monthly home visits, completing mandatory trainings at different locations, attending regular meetings and making family court appearances.

18. She identified Appellee's Exhibit 7 (sealed in the record) as the various doctor notes submitted by Appellant. These notes took Appellant off work medically from February 16, 2016, to June 11, 2016. On May 11, 2016, her physician allowed Appellant to perform light duty and identified certain restrictions, which would be in effect through July 7, 2016. On October 24, 2016, the physician indicated Appellant would be able to return to work as soon as she was released to full duty. On December 29, 2016, the physician indicated Appellant would continue to be off work until February 9, 2017. To date, Appellant has not yet been released to perform the full duties of her position.

19. While she was on light modified duty, Appellant worked on the backload of filings, answered the telephone, typed past-due ADTs, typed field work reports, gathered documents for presentations, substituted for the OSA from time-to-time, and attended some meetings for Ms. Davis. Appellant also retrieved medical documents and had been approved to be "on call" on the phone, in order to dispatch workers for emergencies.

20. The next witness was the **Appellant, Candace Smith**. For the past five years, she has been employed by the Cabinet for Health and Family Services as a Social Service Clinician I with a work station in Garrard County. Her physician has never released her to return to the full duties of her position. She has a pending Workers' Compensation claim and identified Appellee's Exhibit 8 (sealed in the record) as the Workers' Compensation filing she submitted to the Kentucky Department of Workers' Claims. That document reflects she slipped on snow and ice on February 15, 2016, and injured her back and left leg.

21. She identified Appellee's Exhibit 9 (sealed in the record) as a document signed by her treating physician on February 18, 2016. Dr. Rodney Bates listed in detail the limitation of her activities, which Appellant read into the record.

22. It was on August 12, 2016, that Appellant sent an email to Dana Fryman (Appellee's Exhibit 10) with a then-current doctor's note, requesting another extension of her Temporary Modified Duty Plan. She had never turned in any completed ADA documents to the Cabinet.

23. She identified Appellee's Exhibit 11 as the August 16, 2016 letter which had been provided to her on the day she was told she was not to report to work any longer until she was able to return to full duty. She read into evidence the three questions in that letter that were posed to her physician. She gave the letter to Dr. Bates, who responded by his letter of September 12, 2016, identified as Appellee's Exhibit 12 (sealed in the record). Appellant read the doctor's responses into evidence.

24. She identified Appellant's Exhibit 1 as the December 14, 2016 letter she received notifying her that she had been placed on sick leave without pay beginning December 15, 2016. She testified she received no pay after October 11, 2016, and her health insurance had been dropped. She identified Appellant's Exhibit 2 (sealed in the record) as notification she received regarding her COBRA continuation coverage. She testified that such coverage would cost her \$1,500 per month.

25. She identified Appellant's Exhibit 3 (sealed in the record) as the July 11, 2016 Progress Note from Dr. Bates. As of that time, she was still unable to return to full duties.

26. She identified Appellant's Exhibit 4 (sealed in the record) as the April 14, 2016 Progress Note from Dr. Bates which allowed her to perform light duty at work. When she performed light duty work, she was still performing Social Service Clinician duties, with the exception of field work. She also helped other workers in the office and helped alleviate a heavy case load.

27. She identified Appellant's Exhibit 5 as the August 16, 2016 letter which notified her of placement on Direct Sick Leave. She was advised she could either use up her leave or file for Family Medical Leave. If she did neither, she would be placed on leave without pay.

28. Appellant did not fill out or return the Request for Accommodations form. She did make a request on two occasions to extend the 120-day Temporary Modified Duty period. Her requests were denied.

29. In this appeal to the Personnel Board, Appellant has challenged placement on directed sick leave because she was still performing her regular duties, except field work, while helping others alleviate the case backlogs. She has no knowledge of any other employee who has been treated differently than her regarding use of the Temporary Modified Duty plan or placement on directed sick leave.

30. **Saprina Grubbs** was recalled to the stand. She testified about Appellee's Exhibit 10, which she recognized as an email chain. Appellant sent an August 12, 2016 email to Dana Fryman with a doctor's note advising nothing had changed. Ms. Fryman forwarded the email to Ms. Grubbs. Ms. Grubbs sent it to her supervisor, April Davis.

31. Ms. Davis sent the email to Jay Klein at OHRM and asked if he is approving a continuation of TMD. Mr. Klein asked that Appellant be given ADA paperwork and stated he would start working on directed sick leave letters.

32. Ms. Grubbs affirmed that Appellant's Exhibit 5 is the Directed Sick Leave letter she delivered to the Appellant. She is not aware of anyone who, once having exhausted their leave time, was allowed Temporary Modified Duty beyond 120 days instead of having been placed on directed sick leave.

33. **April Davis** was recalled to the stand. Regarding Appellee's Exhibit 10, she testified she had sent a question to Human Resources because the Appellant was on TMD and the time period for Temporary Modified Duty had already been 120 days. She inquired about the next step. Mr. Klein responded as shown in the email. Mr. Klein's office then issued Appellant's placement on directed sick leave beginning August 16, 2016.

34. Ms. Davis is not aware of any other employee who was allowed to continue on light duty work beyond the Temporary Modified Duty Plan period that had been provided to Appellant.

35. The Cabinet rested its case. The Appellant proceeded in the presentation of her claims.

36. The first witness for the Appellant was **Patricia "Ellise" Bengé**. For the past two years, Ms. Bengé has been employed by the Cabinet for Health and Family Services as an Investigative Worker in Garrard County. When Appellant returned to work in April 2016 after her injury, she assisted writing up ADTs, covering the front desk for the secretary, filing, entering contacts into the system, answering the telephone, conducting paperwork, and being "on-call." An OSA was not qualified to do all those duties. Appellant had still been doing the duties of a Social Worker, as well as having assisted others. The office struggled with the caseload as it lost two workers.

37. When Appellant was no longer allowed to work at the office, it definitely made tasks more difficult. Social Service Worker I duties include activities outside the office in the field. Once Appellant no longer worked in the office, her absence impacted the amount of overtime assigned to Ms. Bengé.

38. The next witness was **April Davis**. She offered testimony about her telephone call to the Appellant after Davis had received a phone call from Cynthia Franklin. She advised Appellant the certification piece required for FML was missing and delayed approval. She encouraged Appellant to call Franklin regarding Family Medical Leave.

39. The **Appellant, Candace Smith**, offered her testimony. She stated Ms. Davis did telephone her to advise Ms. Franklin had been trying to contact her. Smith explained she had been working in the office but received no emails or phone calls from Franklin. She testified Davis replied, "I do not have to save your job for you. You need to call her back." Smith told Davis she would not call her back because she had been so advised by her Workers' Compensation attorney.

40. Appellant closed her case. The Appellee presented a motion for directed verdict. Appellant responded to the motion. The Hearing Officer told the parties he would take the motion under advisement and consider same in formulating his recommendation.

FINDINGS OF FACT

1. Candace Smith, the Appellant, is a classified employee with status. She is employed by the Cabinet for Health and Family Services in Garrard County, Kentucky, as a Social Service Clinician I. The essential job duties for her position are set out in the Job Class Specification (Appellee's Exhibit 5). Her job expectations are contained in her Annual Employee Performance Evaluation (Appellee's Exhibit 6).

2. On February 15, 2016, Appellant slipped on snow and ice and injured her back and left leg. Her treating physician, Dr. Rodney Bates, examined Appellant on February 16, 2016, and provided a detailed list of her physical limitations. He took her off work for one week (Appellee's Exhibit 9).

3. Dr. Bates continued to see Appellant regularly, and kept her off work to April 11, 2016 (Appellee's Exhibit 7). On April 14, 2016, Dr. Bates approved Appellant for light duty with no lifting of more than 10 pounds. He was not certain when Appellant could return to fulltime, regular duty work. (Appellant's Exhibit 4.)

4. On April 12, 2016, Appellee placed Ms. Smith on a Temporary Modified Duty Plan, modifying her job tasks expectations. The term of such plan expired June 12, 2016. (Appellee's Exhibit 2.)

5. A Temporary Modified Duty policy had been developed by the Cabinet. (Appellee's Exhibit 1.) It allows certain employees with medical restrictions to continue to work, performing modified duties. While on Temporary Modified Duty (TMD), an employee does not use up any sick leave time.

6. The Cabinet employs an initial TMD period of up to 90 days. If necessary, and subject to Cabinet approval, an employee may be granted an additional 30 days, but all TMD time is limited to 120 days and may not be extended further.

7. Once the 120 day TMD period has expired, an employee released by their doctor may return to the full duties of their position. If the employee is not released by their doctor and, therefore, is unable to perform the essential functions of their job, they are placed on directed sick leave.

The Cabinet requests the employee have their doctor complete and return an American with Disabilities Act (ADA) questionnaire. The completed questionnaire is reviewed and provides the Cabinet information to assess what ADA accommodations may be provided to the employee. The Cabinet provided this questionnaire, as well as a Family Medical Leave document to the Appellant. Those documents were never completed or returned by the Appellant. Therefore, the Cabinet had no information upon which to base a decision pertaining to Family Medical Leave or ADA accommodations.

8. On June 14, 2016, the Cabinet approved a 30-day extension of Ms. Smith's TMD period. (Appellee's Exhibit 3.) This brought her total TMD period to 90 days.

9. Dr. Bates examined Ms. Smith again on July 11, 2016. In his report, he planned to follow Ms. Smith another month and stated she would continue with limited activity at work. (Appellant's Exhibit 3.)

10. On July 14, 2016, the TMD period was extended a final 30 days. (Appellee's Exhibit 4.) This brought Ms. Smith's total TMD time to 120 days.

11. No employees of the Cabinet who had ever been placed on TMD have engaged in modified duty for more than 120 days.

12. On August 16, 2016, the Cabinet notified the Appellant that, pursuant to 101 KAR 2:102, Section 2, she was being placed on sick leave, effective August 16, 2016. She was to continue on sick leave until she was fit to return to work and perform her assigned job duties. (Appellant's Exhibit 5.)

13. A letter was dispatched that same day by the Cabinet to Ms. Smith's healthcare provider, notifying the provider that Appellant had been directed off on sick leave due to concerns about her condition. The letter posed three questions that required responses in order to return Ms. Smith to fulltime work. (Appellee's Exhibit 11.)

14. Dr. Bates responded to the Cabinet's inquiry by letter of September 12, 2016. (Appellee's Exhibit 12.) He indicated Ms. Smith would improve "...very slowly." Her return to work was "...very indefinite at this point in time" and it could take months or years to completely resolve her condition.

15. On October 24, 2016, Dr. Bates indicated that Ms. Smith would be able to return to work "as soon as released to full duty." (Appellee's Exhibit 7.)

16. By letter of December 14, 2016, the Cabinet advised Ms. Smith that, pursuant to 101 KAR 2:102, Section 2, she was placed on sick leave without pay, effective December 15, 2016. It advised her that she had exhausted her paid leave on October 11, 2016; that she had also exhausted her FML entitlement; that she had been absent from work on sick leave without pay for 30 continuous calendar days, including holidays. (Appellant's Exhibit 1.) On December 29, 2016, Dr. Bates indicated, "Candace Smith is to continue to be off work until her next office visit on 2/9/17, with no change in activity." (Appellee's Exhibit 7.) To the date of the evidentiary hearing, neither Dr. Bates nor any other medical service provider of the Appellant's had released her to return to the full duties of her position as a Social Service Clinician I.

17. Appellant timely filed her appeal with the Kentucky Personnel Board.

CONCLUSIONS OF LAW

1. A classified employee with status shall not be dismissed, demoted, suspended or otherwise penalized except for cause. KRS 18A.095(1). At the time Appellant was placed on Directed Sick Leave she was a classified employee with status.

2. As defined by the Kentucky Revised Statutes, a “penalization” includes “...any action that diminishes the level, rank, discretion, or responsibility of an employee without proper cause...” KRS 18A.005(24).

3. Prior to having placed Ms. Smith on Directed Sick Leave, the Cabinet requested she complete and return an ADA questionnaire and a Family Medical Leave document. Appellant did not complete or return either document to her employer. The Cabinet had no information upon which to base a decision whether to provide ADA accommodations or grant Family Medical Leave.

4. Without such options available to it, the Cabinet could do nothing other than place Ms. Smith on Directed Sick Leave when her 120 days of Temporary Modified Duty had expired. Her doctor had not released her to the full duties of her position by August 16, 2016. In fact, as of the date of the evidentiary hearing, she still had not been released to those duties.

5. At that time, the Cabinet had also sent a letter to Ms. Smith’s physician, Dr. Bates, asking him to respond to three questions. (Appellee’s Exhibit 1.) In his September 12, 2016 response, Dr. Bates did not release Smith from light duty restrictions. (Appellee’s Exhibit 12.)

6. Appellee has shown by a preponderance of the evidence that placing Appellant on Directed Sick Leave was done with just cause and was neither excessive nor erroneous.

7. At the close of evidence, the Appellee presented a Motion for Directed Verdict on the issue of Appellant’s claim that she was subject to disability discrimination. Appellant failed to produce any evidence to support that claim. Therefore, Appellant has failed to prove by a preponderance of the evidence that she was subject to disability discrimination. The Appellee’s Motion for Directed Verdict on this issue is and shall be **SUSTAINED**.

RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **CANDACE SMITH V. CABINET FOR HEALTH AND FAMILY SERVICES, (APPEAL NO. 2016-255)** 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 Roland P. Merkel** this 21st day of April, 2017.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Brent D. Irvin
Ms. Candace Smith