FILED
OFFICE OF ADMINISTRATIVE HEARINGS
10/21/2022 3:03 PM

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 OSP 03471, 21 OSP 03959

Kavitha N Krishnan OTD Petitioner, v. North Carolina Department of Health and Human Services Respondent.	**FINAL DECISION**

This matter came before Administrative Law Judge J. Randolph Ward for a hearing on the merits on March 21, 2022, through March 22, 2022, via Cisco Webex meeting and on May 23, 2022, through May 24, 2022, at the Office of Administrative Hearings ("OAH") in Raleigh, North Carolina. Former ALJ Ward retired from OAH effective July 28, 2022, prior to his issuance of a Final Decision. This matter was reassigned to Michael C. Byrne, Administrative Law Judge ("the Tribunal") to issue a Final Decision based upon consideration of all appropriate evidence in the record.

APPEARANCES

For Petitioner: M. Anthony Burts, II
Burts Law, PLLC
24 N. Brady Ave
Newton, North Carolina 28658

For Respondent: William D. Walton
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

Joseph E. Elder
Special Deputy Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

ISSUES

The issues in this contested case are:

Whether Petitioner was placed on "Investigatory leave without just cause, subjected to harassment and discrimination by DHHS employees during the course of the investigation," and forced to resign from State employment (2019 Petition).

Whether Respondent (a) dismissed Petitioner without just cause, (b) created a "hostile work environment" for Petitioner, and (c) retaliated against Petitioner, resulting in her termination (2021 Petition).

EXHIBITS

Respondent's Exhibits 1-46 and 48-51 were admitted into the record. Petitioner's Exhibits 1, 3, 4, 12-18, 25, 41, 47, and 68-71 were offered by Petitioner but were not received into evidence.

WITNESSES

For Petitioner:	Dr. Kavitha Krishnan Julie Pace
For Respondent:	Dr. Ruth Hurst Donnie Smith Pamela Khuno Dr. Chinyu Wu Doug Irvin Rebecca Gross

BASED UPON careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the Tribunal makes the following findings of fact and sets out relevant procedural history.

RELEVANT PROCEDURAL HISTORY

1. On June 17, 2019, Dr. Kavitha Krishnan ("Petitioner") filed a petition for a contested case, case number 19 OSP 03471 ("2019 Petition"), in the Office of Administrative Hearings ("OAH").[1]

2. The 2019 Petition alleged that Petitioner's appeal was based on "Investigatory leave without just cause, subjected to harassment and discrimination by DHHS employees during the course of the investigation."

3. Though the 2019 Petition does not "check the box" for dismissal without just cause or discrimination based on race or gender, the 2019 Petition states, summarily, that Petitioner was retaliated against by unidentified persons at Murdoch Developmental Center ("MDC"), leading to an investigation "at the conclusion of which I was forced to resign." The 2019 Petition also states that "this discrimination, I believe, was based on the fact that I am a minority female who questioned the policies of those at Murdoch."

[1] As discussed below, Petitioner testified under oath, per the transcript, that her name is "Rita Ann Krishnan."

4. On August 6, 2019, the 2019 Petition was reassigned to Administrative Law Judge J. Randolph Ward ("former ALJ Ward").

5. On September 3, 2019, Respondent North Carolina Department of Health and Human Services ("DHHS" or "Respondent"), the state agency which operates MDC, filed a motion to dismiss alleging that Petitioner had failed to exhaust her internal administrative remedies prior to filing in OAH. Specifically, Respondent alleged that Petitioner had failed to submit an informal EEO complaint and additionally had failed to complete the agency's internal grievance process and obtain a final internal grievance decision as approved by the Office of State Human Resources.

6. On September 16, 2019, Petitioner filed a response in opposition to the Motion to Dismiss. Petitioner responded that former ALJ Ward "should deny Respondent's motion to dismiss and allow Petitioner the opportunity to have her case heard. In the alternative, Petitioner requests that the Court stay the instant proceedings and allow Petitioner to complete the grievance process as previously attempted."

7. The record of the 2019 Petition fails to show any ruling in 2019 by former ALJ Ward on Respondent's September 3, 2019, Motion to Dismiss – at least, on Respondent's allegations that Petitioner failed to complete the informal EEO complaint and agency internal grievance process.

8. However, on December 12, 2019, former ALJ Ward issued a "Final Decision Order of Dismissal" regarding the 2019 Petition ("Dismissal Order"). The Dismissal Order stated that "it has become apparent that the Petitioner failed to timely file her Petition for a contested case hearing in this matter," thus depriving OAH of jurisdiction and requiring dismissal of the 2019 Petition.

9. N.C.G.S. 126-34.02 required then, and requires now, that, "Except for cases of extraordinary cause shown, the Office of Administrative Hearings shall hear and issue a final decision in accordance with G.S. 150B-34 within 180 days from the commencement of the case."

10. The 2019 Petition was filed June 17, 2019. Former ALJ Ward issued the Dismissal Order on December 12, 2019, 178 days after the 2019 Petition was filed.

11. Both Petitioner and Respondent alleged error on appeal with respect to the Dismissal Order. On November 3, 2020, the Court of Appeals reversed former ALJ Ward's Dismissal Order:

> In this state employee grievance proceeding, the administrative law judge, on the judge's own initiative without notice to the parties, dismissed the case on the ground that it was not timely initiated. The ALJ reasoned that, under the general timing rules for contested cases in N.C. Gen. Stat. § 150B-23(f), the time to commence the case began to run when the agency placed its final decision in the mail.

> Both parties argue on appeal that the ALJ's ruling is erroneous. We agree. This contested case is governed by a more specific provision in the North Carolina Human Resources Act, N.C. Gen. Stat. § 126-34.02, which states that the time to commence a contested case runs from the employee's "receipt of" the final agency decision. Applying the ordinary meaning of the word "receipt," the time to commence this contested case began to run when the decision was delivered, not when the agency placed it in the mail. We therefore reverse the ALJ's order and remand this case for further proceedings.

Krishnan v. N. Carolina Dep't of Health & Hum. Servs., 274 N.C. App. 170, 171, 851 S.E.2d 431, 432 (2020).

12. OAH received the Court of Appeals judgment on December 2, 2020. The 2019 Petition was reopened that same day.

13. On March 25, 2021, former ALJ Ward issued an order denying Respondent's original September 2019 Motion to Dismiss related to the 2019 Petition. Though the Tribunal is unable to discern any Motion to Stay filed by either party in the record, former ALJ Ward, in the same filing, ordered that "the litigation of this contested case is STAYED, pursuant to N.C. Gen. Stat. § 150B-33(b)(4), pending the conclusion of the EEO Informal Inquiry for Unlawful Discrimination, Harassment or Retaliation, and the formal grievance procedure authorized by N.C. Gen. Stat. § 126-34.01."

14. The Tribunal discerns no subsequent order in the record formally dissolving former ALJ Ward's sua sponte stay of the 2019 Petition in the record of 19 OSP 03471.

15. On September 15, 2021, Petitioner filed a second petition for a contested case, docketed as 21 OSP 03959 (the "2021 Petition"). The 2021 Petition alleged that DHHS had (a) dismissed Petitioner without just cause, (b) created a "hostile work environment" for Petitioner, and (c) retaliated against Petitioner, resulting in her termination.

16. The 2021 Petition also alleged that "Respondent created a hostile work environment for the Petitioner by and through creation of unnecessary and unreasonable roadblocks and/or obstacles, which forced the Petitioner to resign and seek mental health treatment. The Petitioner was subjected to said hostile work environment after inquiring about a pay increase that her employer was obligated to give her and was later subjected to adverse action after filing an EEO Complaint."

17. The then-presiding ALJ noticed the 2021 Petition for hearing on January 12 and 13, 2022.

18. On December 13, 2021, the 2021 Petition was reassigned to former ALJ Ward.

19. On December 14, 2021, an order was entered consolidating the 2019 Petition and 2021 Petition into a consolidated contested case.

20. On January 13, 2022, citing "the parties' informal joint motion to continue" the hearing, former ALJ Ward, through a "Continuance and Order of Rescheduled Hearing," ordered the hearing of the consolidated cases continued and noticed the rescheduled hearing for February 17-18, 2022.

21. The following day, January 14, 2022, former ALJ Ward issued a "Notice of Hearing" setting the hearing of the consolidated cases for March 21-22, 2022.

22. On April 19, 2022, former ALJ Ward issued another Notice of Hearing, setting the hearing of the consolidated cases for May 23-24, 2022.

23. Former ALJ Ward completed the hearing on the merits of the consolidated cases on May 24, 2022.

24. Former ALJ Ward retired from the Office of Administrative Hearings effective July 28, 2022. Prior to his retirement, former ALJ Ward did not issue a Final Decision on the consolidated cases.

25. The consolidated cases were re-assigned to the Tribunal on July 11, 2022.

FINDINGS OF FACT

Parties and Witnesses

1. Petitioner Kavitha Krishnan ("Petitioner") is a former employee of the North Carolina Department of Health and Human Services ("DHHS"). At the hearing, per the transcript, Petitioner testified under oath that her name was "Rita Ann Krishnan." (T. p 525). It is thus unknown whether or not "Kavitha" is an assumed name. The Tribunal will employ "Kavitha Krishnan," as needed, for the sake of clarity, as that is how both petitions in this case are captioned.

2. While Petitioner's testimony was generally credible as to factual statements, her descriptions of her employment at Murdoch Developmental Center as a "complete hell" and "horrors" are generally not credible. In making this determination, the Tribunal concludes not that Petitioner stated intentional falsehoods, but rather Petitioner's evidence does not establish that her workplace was permeated with severe and pervasive harassment.

3. Respondent North Carolina Department of Health and Human Services, Murdoch Developmental Center ("MDC"), is a facility operated by the North Carolina Department of Health and Human Services ("DHHS" or "Respondent"), an agency of the State of North Carolina.

4. MDC supports persons with significant medical and behavioral needs that cannot be supported in their home communities. (T. p 224).

5. MDC serves a population of adults with intellectual disabilities and children with dual diagnoses of intellectual disabilities and other mental health problems. The majority of these individuals are diagnosed with severe and profound intellectual disability. MDC is an intermediate care facility (T. pp 30, 224, 317, 449-450).

6. MDC employed Petitioner in the position of occupational therapy supervisor on February 15, 2016. (T. pp 118-19, 123, 527). In her time at MDC, Petitioner consistently received performance evaluations in the high range of meets expectations. (Res. Ex. 41; T. p 163-65)

7. Donnie Smith, ("Smith") Director of Physical and Occupational Therapy Services, was Petitioner's direct supervisor while she was employed at MDC. (T. pp 116-18). Smith was generally credible unless otherwise stated.

8. Dr. Ruth Hurst ("Hurst"), retired, served as the Director of Psychology and Chair of the research committee for MDC for four years including the relevant times in this matter. (T. pp 29-30, 32). Hurst was generally credible unless otherwise stated.

9. Pamela Khuno ("Khuno") was the facility Director of MDC during the time Petitioner was employed there. Khuno was generally credible unless otherwise stated.

10. Dr. Chinyu ("Wu") is an associate professor in the Department of Occupational Therapy at Winston-Salem State University ("WSSU") (T. p 289). Wu was generally credible unless otherwise stated.

11. Doug Irvin ("Irvin") was Programming Director at MDC during the time Petitioner was employed there. Irvin was generally credible unless otherwise stated.

12. Rebecca Gross ("Gross") was Health Services Director at MDC during the time Petitioner was employed there. Gross was generally credible unless otherwise stated.

Petitioner's Experience at MDC

13. Petitioner's experiences at MDC and her relationships with MDC management do not appear to have been happy ones; there were "several people, in particular people in higher management, that made my life a complete hell while I was in Murdoch." (T. p 527). Petitioner also claimed she was "constantly bombarded, unfairly, unfair treatment, and then I was put on an investigation . . . that was at the tail end of my horrors with working at Murdoch." (T. p 527).

14. From the perspective of a reasonable person, Petitioner's treatment by MDC management, based on the evidence, does not rise to the level of a "horror," or a "hell," as Petitioner alleges:

> a. Petitioner described meeting the head of the MDC Psychology Department, Dr. Tom Thompson ("Thompson"), who asked Petitioner what she was doing at MDC. When Petitioner stated she was an occupational therapist, Thompson allegedly replied that he didn't know what occupational therapy was. (T. p 529).[2] Petitioner "found that [comment] a complete insult," for reasons she did not explain further and which are not apparent to the Tribunal from the testimony.

[2] Thompson did not testify at the contested case hearing.

b. Petitioner felt she was not referred to as "Dr. Krishnan" often enough by MDC staff, compared to other persons holding doctoral degrees. (T. pp 587-88).

c. Petitioner felt "terrible" when Smith instructed her not to ask about a pay increase further. (T. p 532).

d. Petitioner felt that Irvin did not treat her with the professional courtesy he provided to others and treated her differently than other staff. (T. pp 572-73, 575, 577). However, Petitioner only ever had intermittent contact with Irvin. Petitioner recalled approximately five face to face interactions with Irvin over her three years working at MDC. A representative sampling of what Petitioner considered to be harassing or discriminatory treatment from Irvin occurs at T. p 573:

But during my time with Mr. Irvin, what has stood out is he never looks at me. He either looks past me, he looks on the side. He's very condescending when he speaks with me. And there's a clear difference when he speaks with me compared to other – other professionals I've been around.

By contrast, Petitioner testified that with other staff members Irvin "was friendly with everybody." (T. p 575).

e. In another example of purported maltreatment by Irvin, Petitioner testified that Irvin, "when I was speaking about a particular patient that they talked about, he was not giving me any due respect. He talked over me. He did not really listen. He didn't actually care to expand on what I was talking about. But that was really different about somebody else bringing up about patient care. He would expand and talk a lot more. So I felt dismissed in front of others." (T. p 590).

f. Petitioner testified that she suffered harassment by Smith because Smith denied Petitioner permission to provide "workshops" in New York and Chicago that Smith had originally approved: "I thought that was another harassment because it was really the tail end of it when he said that to me."[3]

g. Petitioner testified that Gross "sat right in front of me and she said to me, looked me directly in the eye, and she said, 'There is a Murdoch way, and those who don't follow the Murdoch way have left, no matter how smart they are.'" T. p 585. In response to her counsel's question regarding other interactions or dealings with Gross that made Petitioner feel uncomfortable, harassed, treated unfairly (T. p 586), Petitioner responded that Gross "did not support" Petitioner with respect to retaining a student's funding and, in another meeting, that Petitioner "felt completely harassed" because Gross did not "support" Petitioner and "didn't understand what I was doing . . . as part of the project with the universities." (T. p. 587).

[3] Presumably, "tail end" references the end of Petitioner's employment at MDC.

h. "Cumulative testimony of a similar nature was given at trial, but we find it repetitive and set out this testimony as illustrative of the whole." Hardy v. N. Carolina Cent. Univ., 260 N.C. App. 704, 817 S.E.2d 495 (2018).

Petitioner's Pay Raise

15. The pay raise issue with Smith, per the 2021 Petition, caused Petitioner to experience a "hostile work environment" at MDC. The evidence on this issue was:

a. Petitioner received a doctoral degree in occupational therapy in December of 2016. (T. p 529). Smith mentioned that obtaining such a degree would cause a raise in her pay.

b. Petitioner requested an in-range salary adjustment upon completion of her doctoral degree. Petitioner was in her probationary period (i.e., Petitioner was not a career-status State employee subject to the North Carolina Human Resources Act) at the time of her request. (T. pp 167-68). Smith completed a justification memo in support of Petitioner's in-range request. (Res. Ex. 38; T. p 124).

c. At the time of Petitioner's salary request, DHHS was in the midst of changes to the classification and compensation plan. Because of the changes being made to the plan no salary adjustments or increases were approved during that time. (T. pp 125-26). There was also evidence that Smith, contrary to his representations to Petitioner, failed to send all the required paperwork to Raleigh despite telling Petitioner he had done so (below).

d. In the time frame between Petitioner's request for the in-range salary adjustment and its eventual approval, Petitioner made multiple inquiries to Smith about the salary increase. Following one of the inquiries, Smith told Petitioner he had submitted the paperwork to HR and requested she stop asking him about it. (T. pp 170-71, 530).

e. From the evidence, then, the specific "hostile environment" Petitioner experienced regarding the salary increase was Smith (eventually) telling Petitioner to stop asking him about it or ask others about it. (T. p 530-531). This was after Petitioner had inquired of Smith about the raise "three or four times." (T. p 538). While Petitioner testified that her experience at MDC became more unpleasant generally after the pay raise issue arose, she provided few if any specifics specifically tied to that request other than her interaction with Smith.

f. Petitioner eventually went to MDC Employee Relations regarding her salary increase and Smith's reaction to her inquiries. (T. p 535-536). Approximately a week later, the paperwork for the increase was signed. (Id.)

g. Eventually, Petitioner's in-range salary adjustment was approved. (Res. Ex. 38; T. pp 128-29). Petitioner received her salary adjustment before other employees whose paperwork was submitted prior to hers. (T. pp 536-37).

h. Smith revised Petitioner's job duties to justify the in-range adjustment. (Res. Ex. 40; T. pp 126-27, 182).

Petitioner's Outside Employment Issues

16. Petitioner and MDC management had repeated disagreements or disputes regarding Petitioner's attempts to do work in addition to her employment at MDC.

17. Secondary employment is employment of an employee outside of his or her state government primary employment as a secondary form of employment. (T. pp 129, 247). Secondary employment is common at MDC and Petitioner received approval on numerous occasions for secondary employment. (Res. Ex. 32; 130-32, 247).

18. Dual employment occurs when an employee who has primary employment with a state agency requests to work for another state agency at the same time. (T. pp 130, 247).

19. Dual employment is rare at MDC. Dual employment requires permission from the primary agency. Authorization for dual employment requires prior approval by the employee's supervisor, the director of MDC, and an agreement between MDC and the other state agency regarding compensation. (T. pp 130, 133-34, 247-48).

20. In April of 2017, Petitioner agreed to teach a summer course for Winston Salem State University ("WSSU"). This created a dual employment situation where Petitioner failed to get prior approval. (Res. Ex. 36; T. pp 133-35, 542-43).

21. Petitioner received coaching from Smith about the proper procedure to seek dual employment. (Res. Ex. 33; T. p 135).

22. Smith expressed concerns about Petitioner engaging in dual employment and encouraged her to seek opportunities to teach that would not create dual employment scenarios. (Res. Ex. 33; T. p 136).

23. MDC allowed Petitioner to teach the summer course at WSSU. (Res. Ex. 34-35; T. pp 137-38).

24. MDC received a subsequent request from WSSU for Petitioner to teach in the fall of 2017. Smith spoke to Petitioner informing her that MDC could not approve future dual employment arrangements based on her duties at MDC. (T. pp 139-40, 545-46).

25. Despite this, on August 22, 2018, Respondent received dual employment paperwork and a check for Petitioner. MDC then conducted an investigation regarding potential insubordination by Petitioner for accepting dual employment after being directed that future dual

employment would not be approved. (Res. Ex. 36, 51, p 25-29; T. pp 140-41, 144, 249, 260-61, 461-65).

26. At the conclusion of the investigation, Smith informed Petitioner not to sign any paperwork involving projects at MDC, reviewed her job description on how she must consult with him first prior to starting any project, and that she should focus on research that does not involve dual employment. (Res. Ex. 36; T. p 145).

27. Petitioner received no disciplinary action as a result of the investigation into dual employment or other outside employment issues. (T. pp 682-684).

28. Petitioner was allowed to teach the course for the 2018-2019 academic year. (T. p 146).

29. During her employment with MDC, Hurst was an adjunct professor for Duke and UNC-W. She was not formally employed, did not receive payment, and did not teach classes. Hurst was given the title "adjunct professor" as an honorific for supervising and arranging memorandums of agreement in the clinical context. (T. pp 68-69, 102-03, 467-68).

MDC Investigation of Volunteer Computer Usage

30. On March 7, 2019, Smith observed a volunteer using a computer. He was not aware a volunteer was in the building and was concerned whether the volunteer was using the proper protocols for private health information. (Res. Ex. 37; T. pp 147-48).

31. A management investigation determined that Petitioner had allowed the volunteer to use the computer under her credentials and proper protocols were not followed. (Res. Ex. 37; T. p 150). Smith discussed the improper computer use by a volunteer with Petitioner emphasizing the MDC policies involved in the security and privacy of information. (Res. Ex. 37; T. p 151).

32. Petitioner did not receive disciplinary action regarding the volunteer's computer use. (T. p 151).

Disputes Regarding Petitioner's Research Activities

33. MDC is not a research-oriented facility. Research is not a major component of MDC's purpose. (T. pp 30-31, 262, 321).

34. Petitioner's job duties at the time she began working at MDC did not involve conducting research. (T. p 119-120).

35. To the extent research is conducted at MDC, the MDC research policy governs the development, review, and approval of such activity. (Res. Ex. 24; T. p 227).

36. While the research policy states that research is encouraged at MDC, in practice research projects are rare at MDC. In the last ten years there have been seven or eight proposals

brought to MDC's research committee. The population served at MDC has additional safeguards in terms of federal and state regulations that must be followed. For research to be approved, there must be a demonstrated benefit for the residents at MDC. (Res. Ex. 24; T. pp 30-31, 33, 225, 229, 321). During Hurst's four years as the research committee chair only two research proposals were considered. (T. p 31).

37. Memorandums of understanding and/or clinical affiliation agreements are common at MDC as they explain the responsibilities of the university and MDC in relation to university students being on campus at MDC. (T. p 48).

38. At MDC, clinical affiliation agreements or memorandums of understanding relate to clinical practice and providing students the opportunity to train, learn, and be coached by MDC on how to conduct clinical practice. (T. pp 48, 120-21). MDC regularly has interns and visiting students mentored by MDC staff for clinical and/or fieldwork experiences. (T. pp 249-51, 365). Conducting research is fundamentally different than a clinical or fieldwork assignment at MDC. (T. p 70-71).

39. Clinical experiences or rotations at MDC do not involve research. (T. pp 251, 283, 459-60). They do not require MDC staff to teach at the universities the students attend. (T. p 122).

40. While there was a clinical affiliation agreement between MDC and Winston-Salem State University, this agreement did not reference or relate to research. (Pet. Ex. 17; T. pp 371-72).

41. A clinical affiliation agreement does not in itself give permission for students to engage in research. All research at MDC must be conducted according to the research policy. (Res. Ex. 24; T. pp 473-74). The reference to patient caseloads in such agreements is in regard to the number of residents at MDC that a clinician is responsible for and has nothing to do with research. (T. p 268). When students come to MDC under a clinical affiliation, they fill out HIPAA authorizations and confidentiality agreements during their first day. (T. pp 711, 724).

42. Research may be conducted at MDC if it has been approved by a university's institutional review board (IRB) and approved by the research committee and the director of MDC. (Res. Ex. 24; T. pp 31, 32).

43. All MDC employees review the research policy when they begin employment. (T. p 39). Petitioner was aware of the research policy. She reviewed the policy at the start of her employment, and the policy was discussed with Hurst during the research committee review process. (Res. Ex. 25; T. p 39).

44. The process for research to be approved at MDC includes the employee contacting the chair of the research committee to discuss their proposal. The employee then appears before the research committee to discuss their ideas for a research proposal. The employee would next go to an institutional review board for the board's approval. The employee would return to the research committee with their written proposal for the research committee to review. The committee reviews the proposal, makes recommendations, and suggests revisions (if deemed

necessary), until it recommends approval of the proposal. Finally, the research proposal is referred to the facility director for the director's determination of whether to approve or deny the research. (Res. Ex. 24; T. pp 36-37, 227-28, 320-21).

45. In May of 2018, Petitioner presented a research proposal to the research committee for initial review. (T. pp 38, 547-48). The research committee approved Petitioner to submit her proposal to an IRB. (T. pp 38, 548).

46. Petitioner sought and received approval for the research from Winston-Salem State University's IRB. (Res. Ex. 48; T. pp 39, 49).

47. Petitioner ultimately did not obtain consent under the MDC research policy requirements related to her research project or its resulting poster (discussed below). (T. pp 42, 236).

48. After receiving approval from WSSU's IRB, Petitioner submitted the proposal for review by the research review committee. (Res. Ex. 7; T. p 49).

49. The research committee had questions and concerns regarding hypothesis 1, 4, and 5. (Res. Ex. 48, p 7; T. pp 325-27, 357-59).

50. The research committee recommended Petitioner remove hypothesis 1, 4, and 5. Petitioner made the recommended changes and the committee voted to approve the proposal with revisions. (T. pp 53-54, 104, 327-28).

51. On January 7, 2019, the research committee approved the proposal and forwarded it to the facility director, Khuno, for her determination on the research proposal. (T. p 51). Per the MDC research policy, Khuno has final approval before research can be conducted. (T. pp 55, 222-23).

52. In reviewing research proposals, Khuno considers whether the research to be conducted will provide a direct benefit that improves the lives of the population of MDC. (T. p 228). Khuno reviewed and denied Petitioner's research proposal because she did not see how it would benefit MDC's population. (T. pp 54, 231, 328).

53. Hurst informed Petitioner that Khuno had denied the research proposal. (Res. Ex. 12; T. p 55-56).

54. Hurst did not issue the denial to Petitioner in writing as set forth in the research policy, because her understanding was that Petitioner would revise the proposal and resubmit it for consideration. (Res. Ex. 49 p 9; T. pp 56-59, 232, 259-60, 520-22). However, the proposal was not resubmitted for approval. (T. p 61).

55. Ultimately, however, Petitioner's proposal was not denied in writing as the MDC research policy required.

56. On March 8, 2019, Petitioner presented Hurst a poster to review in relation to a class project Petitioner's students worked on. (T. pp 61-62, 404). Such posters are commonly used at conferences to present research (T. p 62).

57. According to the MDC research policy, for a poster to be presented outside of MDC, it must have approval from the chair of the research committee and the head of the quality management department. (Res. Ex. 24; T. pp 7; 64-65).

58. Petitioner's poster contained demographic information, data, and results. (T. pp 62, 407). The poster and related data analysis fell under the provisions of the research policy. (Res. Ex. 11; T. pp 405-06, 519).

59. Hurst was concerned when she reviewed the poster because it appeared that research was conducted without prior approval. (T. pp 62, 364, 404).

60. After revisions to the poster, MDC approved the poster for presentation. (Res. Ex. 8, 23; T. pp 235, 332, 368, 406-07, 408, 484-85).

61. Hurst notified her supervisor, Irvin, of her concerns regarding the poster. (T. pp 65, 317, 330, 404). Irvin was not in Petitioner's management chain. (T. p 402).

62. After speaking with Hurst, Irvin informed Gross regarding the poster and Hurst's concerns about it. Shortly thereafter, Irvin and Gross informed Khuno about the poster. (T. pp 233, 330-31, 404).

63. Khuno shared Hurst's concern that the poster gave the appearance that research was being conducted at MDC for a research proposal that had not been approved. Khuno supported initiating an investigation into whether Petitioner conducted unapproved research. (Res. Ex. 2, 14; T. pp 233-35, 404, 470, 489-90).

64. The potential harm if unauthorized research was conducted was serious, because of the federal regulations related to the operation of the facility. If MDC was not in compliance with the federal regulations, it could lose ninety-eight percent of its operating budget received from Medicaid funding. However, there is no evidence in this case that this event either occurred or was reasonably likely to occur. See Joe T Locklear v. North Carolina Department of Public Safety, 2022 WL 2389874 ("While it is easy in any just cause case to imagine quantum amounts of inchoate harm flowing from an act of unacceptable personal conduct, the question here is: what actual, quantifiable harm resulted from Petitioner's actions?").

65. In addition to the potential harm, the individual residents had their right to privacy violated by the release of the confidential health information. (T. pp 237, 242).

66. Management investigations can arise if there is an issue of employee conduct. For instance, if an employee is not following a policy the department manager can initiate an investigation. (T. p 236).

67. There is a duty to be forthright and honest in the MDC code of conduct. (Res. Ex. 27). MDC management determined that Petitioner was not truthful and forthright during the investigation into the poster and unauthorized research. (T. pp 428-29, 474, 491-92).

68. On March 11, 2019, Smith, Irvin, and Gross met with Petitioner to discuss the poster. (Res. Ex. 17; T. pp 157, 333). At this meeting, Irvin and Gross discovered that the poster was at least in part the same project that was disapproved by Khuno. (Res. Ex. 17; T pp 334, 409-12, 492-93).

69. Irvin and Gross had concerns that unauthorized research had been done at MDC, and that if real client data was used for that research confidentiality rules over client information and/or state or federal regulations could have been broken. Such data includes past data from people that are served by MDC as well as demographic information sufficient for identifying the identity of a person. (T. pp 335, 342, 367, 369, 371, 382, 427-29, 474, 479, 723-24).

70. MDC has "[v]ery strict rules surrounding the maintenance of confidentiality over client information, which would be inclusive of past data from people that we serve, as well as demographic information sufficient for identifying the identity of a person." (T. p 335) (Irvin testimony).

71. The unapproved research was conducted by Petitioner and persons under her supervision through comparative analysis of sensory related issues between MDC children in one program versus another. (T. pp 369-70, 382, 492-93, 519).

72. At MDC, protected health care information includes a person's race or origin, testing information, and age, among other categories. (T. pp 335, 373-77). On March 14, 2019, Gross went to Petitioner's office to request a copy of the data set used for the poster project and paper. Petitioner replied that the data was on her personal Google Drive. They were unable to access the Google Drive from the MDC computer and Petitioner stated she would bring Gross a copy of the data the next morning. (T. pp 419-21).

73. On March 15, 2019, Petitioner delivered the requested data set to Gross. (Res. Ex. 19; 421).

74. Wu worked with Petitioner on her research project at MDC during the academic year of 2018-2019. (T. p 290).

75. Wu was contacted by Gross regarding the data that was being used in the research course. Gross requested a copy of the data. (T. pp 291, 293, 421-22). Wu provided the requested data to the general counsel at WSSU, who forwarded the data to Gross. (Res. Ex. 18; T. p 293, 421-22).

76. The data Petitioner provided to Gross during the investigation were different than the data used by the students from WSSU. (T. pp 240, 343-44,421, 423, 622). The identifiers for some categories for some children had been changed by one. These categories included gender, race, residence, and age. (T. p 277). The data had been altered. (T. p 423).

77. When Gross received the data set from WSSU, MDC used the key included with the data set to match the data points to MDC residents confirming that the data was real. They then discovered that Petitioner had altered the data set she provided to them by 1 in some of the categories. (Res. Ex. 18, 19, 20, 21, 22; T. pp 338-342, 423-27, 429-30, 492-93). Petitioner released data from children who live at MDC without their guardians' consent. (Res. Ex. 8, 9; T. pp 273, 516-18, 618, 628-29, 660, 701).

Petitioner's Placement on Investigatory Leave

78. On March 20, 2019, MDC placed Petitioner on investigatory leave with pay. (Res. Ex. 1; T. pp 342-43, 418, 431-32). The investigatory leave with pay notice informs employees that they must make themselves available during their typical hours of work to participate in any investigations. (Res. Ex. 1; T. pp 281, 345, 432-33).

79. Following the investigatory leave meeting, Smith spoke with Petitioner as she went to gather her belongings. Petitioner acknowledged she made a mistake and stated "[n]obody wants to do research or present research with made-up data. How else can they (the students) really learn?" (Res. Ex. 16; T. p 161).

80. At approximately 2:00 p.m. on April 3, 2019, Gross and Irvin interviewed Petitioner a second time. They asked Petitioner why there were differences between the data set Petitioner provided and the data set provided by WSSU. Petitioner stated she did not feel comfortable answering their questions. (T. pp 343-44, 431, 433-35).

81. Gross and Irvin then provided Petitioner a private office and asked her to provide a written statement by close of business that day. (T. pp 344, 384, 435).

82. At the end of the day on April 3, 2019, Gross and Irvin reviewed the statement draft with Petitioner and informed her of the Disciplinary Action Policy provision on the top of the witness statement that provides, an "employee's refusal to cooperate in a reasonable, administrative investigation will be considered a personal conduct issue and may result in disciplinary action, including dismissal." They also told Petitioner there would be a meeting the next day to discuss potential disciplinary actions and if Petitioner wanted to provide additional information, she had an opportunity to do so prior to the meeting at 3:30 p.m. the next day. (Res. Ex. 30, Attachment F; T. pp 346-47, 385-386, 436-37, 721-22).

MDC Recommendation of Petitioner's Dismissal and Petitioner's Resignation

83. On April 4, 2019, there was an MDC administrative review meeting to discuss the findings of the investigation and potential discipline for Petitioner. No additional information was received prior to the meeting and the recommendation for dismissal was made. (Res. Ex. 2; T. pp 347-48, 437-39).

84. Pre-disciplinary conferences are required when management is recommending the disciplinary action of dismissal. Advance written notice of the pre-dismissal conference must be

given to the employee, which includes the time and location of the conference and the issue for which dismissal is recommended. (25 N.C.A.C. 01J.0613(4); T. pp 238, 442).

85. The notice must inform the employee of the type of disciplinary action being considered, that it is not a final decision, that a lesser disciplinary action is possible, and the specific acts or omissions that are the reasons for the recommendation. (State Human Resources Manual, Section 7, p 8; T. p 242-43, 348-49, 440-41).

86. The recommended discipline in a pre-disciplinary notice is not a final determination. (State Human Resources Manual, Section 7, p 8; T. p 242-43; Res. Ex. 2). The recommended discipline can change depending on information presented by the employee that management was not aware of.

87. MDC management considered similar situations with other employees. Although there were no directly similar situations to Petitioner's, MDC considered instances where supervisory employees who have to be able to maintain a level of trust, deceived MDC in an investigation. (T. pp 241,440).

88. MDC considered the policies and procedures that had been violated, that Petitioner had (in MDC management's view) demonstrated a pattern of not following policy and procedure, and the seriousness of the issue. (T. pp 440,447).

89. The recommended discipline of dismissal for Petitioner was not a final determination. (T. pp 245-46, 440-44, 727).

90. On April 16, 2019, Petitioner received a Notice of Pre-Disciplinary Conference. The notice stated that dismissal was being recommended, instructed the date and time of the meeting, and notified Petitioner of her opportunity to respond to the proposal and offer additional information before a final decision is made. (Res. Ex. 2; T. p 440-42).

91. Petitioner reviewed the letter when she received it. (T pp 648, 685-686).

92. Petitioner did not offer additional or clarifying information to MDC management (T. pp 502, 506-07, 687, 725-27).

93. Petitioner resigned her employment from MDC in writing, via email, prior to the pre-disciplinary conference taking place. In the email, Petitioner denied any allegations made against her in the pre-disciplinary letter. (Res. Ex. 3, 4; T. p 350, 445-46, 666).

94. No one at MDC mentioned resignation to Petitioner prior to her submitting her resignation. (T. pp 681, 721).

95. There was no final determination or discipline issued by Respondent against Petitioner due to Petitioner resigning prior to that action taking place. However, it is reasonable for Petitioner to have inferred that dismissal was a likely – though not inevitable – outcome after receiving the pre-disciplinary conference letter from MDC management.

96. Petitioner had no prior formal discipline from Respondent during her tenure at MDC. (T. pp 682-684).

97. Irvin submitted a complaint to the North Carolina occupational therapy board after Petitioner resigned. (T. pp 351-52, 386-87). Whether this action was justified or not, it happened after the termination of Petitioner's employment and there is no evidence that any threat of such a complaint was made to induce Petitioner to resign.

98. Petitioner subsequently filed two petitions in OAH alleging various claims as discussed in the "Relevant Procedural History" section, above.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 126 and 150B of the North Carolina General Statutes.

2. To the extent that the Findings of Fact contain Conclusions of Law and vice versa, they should be so considered without regard to their given labels. Charlotte v. Health, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946).

3. An administrative tribunal need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).

4. All parties have been correctly designated and there is no question of misjoinder or nonjoinder. Petitioner alleges that she was constructively discharged and subjected to a hostile work environment.

5. Review of Petitioner's claims is complicated due to the multiple petitions filed and multiple claims, or non-claims, raised therein. The Tribunal attempts to review those claims in turn.

2019 Petition Claims

Investigatory Leave Without Just Cause

6. The 2019 Petition alleged that Petitioner was placed on "[i]nvestigatory leave without just cause, subjected to harassment and discrimination by DHHS employees during the course of the investigation."

7. A State employee may be placed "on investigatory leave with pay . . . [t]o investigate allegations of performance or conduct deficiencies that would constitute just cause for disciplinary action . . . [and] [t]o avoid disruption of the workplace and/or to protect the safety of persons or property." Tisha Hardy v. North Carolina Central University, 2021 WL 5049200.

8. Prior to her resignation, Petitioner was a career-status State employee subject to the North Carolina Human Resources Act. N.C.G.S. 126-1.1. As such, she could not be subjected to formal disciplinary action without just cause. N.C.G.S. 126-35.

9. However, it is well established that placing an employee on investigatory leave with pay is not a disciplinary action. "Placement on investigatory leave with pay shall not constitute a disciplinary action as defined in this Section, G.S. 126-34.02, or in G.S. 126-35." 25 N.C.A.C. 01J.0615(a).

10. Petitioner has no appeal rights related to being placed on investigatory leave with just cause, and her claim related to that action in the 2019 Petition must be dismissed with prejudice.

2019 Claims of Discrimination/Retaliation

11. The 2019 Petition alleged that Petitioner was "subjected to harassment and discrimination by DHHS employees during the course of the investigation."

12. Though the 2019 Petition does not "check the box" for dismissal without just cause or discrimination based on race or gender, the 2019 Petition states, summarily, that Petitioner was retaliated against by unidentified persons at Murdoch Developmental Center, leading to an investigation "at the conclusion of which I was forced to resign." The 2019 Petition also states that "this discrimination, I believe, was based on the fact that I am a minority female who questioned the policies of those at Murdoch." (T. p 573).

13. At the outset, the Tribunal discerns essentially no evidence, other than Petitioner's apparent opinion to this effect, that any action was taken against her because she was "a minority female who questioned the policies of those at Murdoch."

14. The only action that Petitioner, in her testimony, attributed to her race or ethnicity was her allegedly different treatment by Irvin, which she contrasted Irvin's treatment of Hurst: I mean, there's several differences. Well, the commonalities, we both have a doctorate. I have a clinical doctorate. She's had a doctorate in Ph.D. She's a white female. I'm of Indian ethnicity." (T. p 573).

15. Other than her claims regarding Irvin, Petitioner, in her testimony, discussed race, ethnicity, and national origin issues regarding only the MDC residents used for her research. (See, e.g., T. p 705). Other than the comment above, Petitioner, in her testimony, only used the word "female" to identify another staff member. (T. p 646).

16. By her admission, Petitioner interacted with Irvin approximately five times during the entire course of her employment with MDC. (T. p 573). There is no evidence that Irvin was even aware of Petitioner's ethnicity. Petitioner's testimony regarding Irvin proves nothing at all related to gender-based discrimination, as the very example Petitioner used described treatment of a colleague who was, herself, a female.

17. Petitioner's subjective belief that MDC's actions stemmed from discriminatory (or retaliatory) intent is insufficient, standing alone, to prove discrimination and/or retaliation. Tinsley v. First Union Nat'l Bank, 155 F.3d 435, 444 (4th Cir. Va. 1998); Schultz v. General Electric Capital Corp., 37 F.3d 329, 334 (7th Cir. Ill. 1994); Andrea Y Murphy v. NC DHHS Office of Rural Health, 2020 WL 8182261.

18. Pursuant to N.C.G.S. 126-34.02, a State employee may challenge an employment action she believes was motivated by illegal discrimination on the part of the employing State agency. "[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." N.C. Dep't of Corr. v. Gibson, 308 N.C. 131, 138, 301 S.E.2d 78, 83 (1983) (quoting Texas Dep't of Comty. Affairs v. Burdine, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 215 (1981)).

19. The Supreme Court of North Carolina has adopted the standard used by the United States Supreme Court in proving discrimination: 1) the claimant carries the initial burden of establishing a prima facie case of discrimination; 2) the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the applicant's rejection; and 3) if a legitimate nondiscriminatory reason for rejection has been articulated, the claimant has the opportunity to show that the stated reason for rejection was, in fact, a pretext for discrimination. Gordon v. NC DOC, 173 N.C. App. 22, 618 S.E.2d 280 (2005); Willie Joyce Partin v. Department of Transportation, Division of Motor Vehicles, Traffic Records, Crash Report Unit, 2014 WL 7653622.

20. While it is well established that a petitioner's burden of showing a prima facie case is not an onerous one, the Tribunal concludes that more is required than (a) Petitioner's subjective belief of discriminatory activity, and (b) Irvin being, in Petitioner's view, friendlier to a white female colleague.

21. The case for retaliation is similar. A prima facie showing of retaliatory discharge requires a plaintiff to show: (1) she engaged in **some protected activity**, such as filing an EEO complaint; (2) the employer took adverse employment action against the plaintiff; and (3) that the protected conduct was a substantial or motivating factor in the adverse action (a causal connection existed between the protected activity and the adverse action). Forbes v. City of Durham, 255 N.C. App. 255, 261, 805 S.E.2d 159, 163 (2017) (emphasis supplied). Petitioner must prove "but for" causation instead of "motivating factor" in her prima facie case of retaliatory acts in violation of Title VII. Id.

22. Under North Carolina State personnel rules, which have the force of law in these cases pursuant to N.C.G.S. 126-4, "retaliation" means adverse action taken against an individual for filing a discrimination charge; testifying; or participating in any way in an investigation, proceeding, or lawsuit related to **discriminatory employment practices based on race, religion, color, national origin, sex, age, disability, political affiliation or genetic information**; or because of opposition to employment practices in violation of the **unlawful workplace harassment** policy." 25 N.C.A.C. 01J.1101 (emphasis supplied).

23. The 2019 Petition states, "I was retaliated against for raising concerns about the lack of clearly stated policies regarding research, confidentiality, and interactions with students in clinical settings." This is not protected activity under Title VII or State personnel rules. Nor, by plain reading of the governing statute, does this give rise to an appeal right under N.C.G.S. 126-34.02:

> (2) Retaliation.—An applicant for State employment, a State employee, or former State employee **may allege retaliation for protesting discrimination** based on **race, religion, color, national origin, sex, age, disability, political affiliation, or genetic information** if the employee believes that he or she has been retaliated against in his or her application for employment or in the terms and conditions of the employee's employment, or in the termination of the employee's employment.

N.C.G.S. 126-34.02(b)(2) (emphasis supplied). The same statute also states, "Any issue for which an appeal has not been specifically authorized by this section shall not be grounds for a contested case hearing." Richard Hilton Nowack v. NC Department of Public Safety, 2020 WL 11273208.

24. Petitioner's claims for discrimination and retaliation must be dismissed with prejudice.

2019 Forced Resignation Claims

25. "[A]n employee may terminate his services with the state by submitting a resignation to the appointing authority." 25 N.C.A.C. 01C.1002 (2016); Hunt v. N.C. Dep't of Pub. Safety, 260 N.C. App. 40, 47, 817 S.E.2d 257, 262 (2018). The phrase "appointing authority" in 25 N.C.A.C. 01C.1002 refers to the person or persons who have the power to make personnel decisions at MDC. Hunt at 260 N.C. App. at 51, 817 S.E.2d at 264. "Such a definition is consistent with the usage of this term in Title 25 of the Administrative Code as referring to persons who initiate personnel actions against State employees." See, e.g., 25 N.C.A.C. 01J.0604 ("Any employee, regardless of occupation, position or profession may be warned, demoted, suspended or dismissed by the appointing authority.").

26. In this case, the parties do not dispute that Petitioner resigned (Res. Ex. 3) or that Gross, MDC's Director of Health Services, had authority to accept Petitioner's resignation (Res. Ex. 4). Rather, the parties dispute the nature of Petitioner's resignation. Petitioner contends her resignation was involuntary and a constructive termination. Respondent contends that Petitioner made a voluntary choice to resign not only before formal disciplinary action was taken against Petitioner, but also before the nature of that discipline had been decided upon.

27. A career status State employee's property interest in continued employment (and its consequent appeal rights) is both conferred and created by North Carolina law and is protected by the Constitution of North Carolina. Peace v. Emp. Sec. Comm'n of N. Carolina, 349 N.C. 315, 507 S.E.2d 272 (1998). Ordinarily, a state employee cannot pursue a claim for dismissal in the Office of Administrative Hearings unless the employee actually is dismissed. N.C.G.S. 126-34.02.

28. However, the State employer who tells the career status State employee that he or she has a "choice" between resignation and termination has, under most circumstances, engaged in a termination. "In other words, the argument goes, petitioner did not get fired, he quit. To this argument, we respond: to take disability retirement after you are told you will be terminated on a specific date is hardly a voluntary career change." Nix v. Dep't of Admin., 106 N.C. App. 664, 668, 417 S.E.2d 823, 827 (1992). As the OAH has stated flatly: "An involuntary resignation amounts to constructive discharge." Wanda Renfrow v. North Carolina Department of Revenue, 2015 WL 1120630.

29. It follows that a State employee who voluntarily resigns generally cannot pursue a dismissal claim—a dismissal, by its nature, is an "**involuntary separation** for cause." 25 N.C.A.C. 01J.0608 (emphasis added). However, as Renfrow explains:

> But courts have held that where "the employer actually lacked good cause to believe that grounds for termination existed," a resignation under threat of dismissal is effectively the same as an involuntary dismissal. Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 174 (4th Cir. 1988). The law does not require the employer to show that there actually were grounds to terminate the employee. Rather, the employer need only show that, at the time the decision was made, with the facts available to it, the employer had good cause to believe termination was appropriate. So long as this good cause exists, a resignation under threat of dismissal is not a dismissal because the resignation was voluntary.

Renfrow v. N. Carolina Dep't of Revenue, 245 N.C. App. 443, 447-48, 782 S.E.2d 379, 382 (2016).

30. North Carolina courts have also found, albeit under the former N.C.G.S. 126-34.1, a right to appeal to the Office of Administrative Hearings when a resignation is a "choice" between resigning and the State employee continuing to work under conditions that violate State law. Campbell v. N.C. Dep't of Transp., 155 N.C. App. 652, 661, 575 S.E.2d 54, 60 (2003); Corbett v. N. Carolina Div. of Motor Vehicles, 190 N.C. App. 113, 117, 660 S.E.2d 233, 237 (2008); review denied, 363 N.C. 124, 675 S.E.2d 41 (2009). In this case, no evidence of that situation exists.

31. OAH decisions, while not binding on the Tribunal, have adopted the Renfrow "good cause" exception to resignation cases, well prior to Renfrow itself: "This is so even where the only alternative to resignation is facing termination for cause, **unless the employer actually lacked good cause to believe that grounds for termination even existed**." Sharon B. Matthews v. North Carolina Department of Transportation, Division of Motor Vehicles, 2006 WL 3890371 (citing Christie v. United States, 518 F.2d 584, 588 (Ct. Cl. 1975) (emphasis supplied) ("[T]his 'good cause' requirement is met as long as plaintiff fails to show that the agency knew or believed that the proposed termination could not be substantiated.")). OAH has also recognized that "an employee's seemingly voluntary resignation may be considered involuntary, however, if the employer extracted the resignation through misrepresentation or coercion." Kevin Gerity v. North Carolina Department of Health and Human Services, 2015 WL 3813979 (citing Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 174 (4th Cir. 1988)).

32. The OAH Renfrow ruling, and its subsequent appellate affirmance turned on the finding that the respondent agency could not demonstrate it had good cause to believe grounds for Renfrow's termination existed because the conduct in question was not "current": "nineteen months passed before the Department of Revenue chose to pursue any disciplinary action." Renfrow v. N. Carolina Dep't of Revenue, 245 N.C. App. 443, 448, 782 S.E.2d 379, 382 (2016). In this case, most of the conduct Respondent cites in its Notice of Pre-Disciplinary Conference (Res. Ex. 2) occurred within a month or two of the Notice.

33. Further, the employee in Renfrow actually participated in the pre-disciplinary conference. While this would not have altered the outcome in Renfrow legally, it marks a different fact pattern from this case, where Petitioner resigned prior to participating in the pre-disciplinary conference. Petitioner was not, therefore, offered the faux choice of "resign or be fired" at a pre-disciplinary conference, as she tendered a written resignation before that conference took place. OAH has previously held that, standing alone, "notice of the pre-disciplinary conference did not amount to an unlawful 'threat' to discharge Petitioner." Gerity, 2015 WL 3813979. Indeed, the fact pattern of Petitioner's actions in this case resembles that of Gerity:

> Here, the Petitioner drafted his own resignation letter prior to the pre-disciplinary conference. No one at OCME or DHHS suggested that he consider retirement or resignation rather than contest the recommendation for dismissal. Moreover, Petitioner presented his resignation letter at the outset of the pre-disciplinary conference before any substantive conversation could begin. These facts further support the conclusion that Petitioner voluntarily resigned his position.
>
> Id.

34. The remaining question is whether Respondent justifiably believed it had good cause to dismiss the Petitioner, as its letter to Petitioner indicates. That the letter indicates that no final decision had been made (Res. Ex. 2, p 9), a letter to an employee indicating that dismissal was "recommended" is sufficient to make a reasonable person in Petitioner's shoes believe that dismissal was the likely outcome.

35. In deciding the "good cause" issue, it is emphasized that "good cause" and "just cause" are not the same thing. Had Petitioner stood her ground and Respondent terminated her, OAH might have reversed that decision even if Respondent proved that Petitioner engaged in the conduct of which Respondent complained as Petitioner had no prior disciplinary history. Petitioner had good to very good performance reviews. While Respondent complained of potential consequences or harm stemming from Petitioner's actions, little or no actual harm appears in the record except to the progress of Respondent's internal investigation. See Whitehurst v. E. Carolina Univ., 257 N.C. App. 938, 947-48, 811 S.E.2d 626, 634 (2018); Wetherington v. NC Dep't of Pub. Safety, 270 N.C. App. 161, 840 S.E.2d 812, review denied, stay dissolved, 374 N.C. 746, 842, S.E.2d 585 (2020).

36. It is not, however, the Tribunal's function in this Final Decision to engage in an advisory analysis on whether Petitioner's theoretical dismissal was for just cause under N.C.G.S. 126-35 and its related case law. Rather, the Tribunal must decide whether something – such as the

lack of current unacceptable personal conduct in Renfrow – made Respondent's belief that it could dismiss Petitioner illegal or otherwise unwarranted/unbelievable.

37. No such issue exists in this case. The comparatively minor secondary employment issues aside, for which Respondent took no disciplinary action against Petitioner in any event, Respondent found that Petitioner violated multiple MDC policies with respect to her research activities, at least one of which (Res. Ex. 28, 29) "may result in disciplinary action up to and including dismissal." (Res. Ex. 28, "Privacy and Security," p 1). Respondent also found that Petitioner altered data submitted to MDC as part of an internal investigation and acted evasively and/or dishonestly during that internal investigation (Res. Ex. 2, p 9).

38. OAH has upheld disciplinary action up to and including dismissal for conduct similar to Petitioner's, as alleged by Respondent. See Edward Little v. NC Department of Public Safety, 2015 WL 6125390 (demotion for potential compromise of internal investigation); Tammy Cagle v. Swain County Consolidated Human Services Board, 2013 WL 8116178 (termination of employee with good service history for interfering with internal investigation and violating no-contact order); Barbara Hinton v. Surry County Health and Nutrition Center, 2014 WL 1207864 (dismissal for violation of HIPAA policies). Thus, it cannot be said that Respondent lacked a reasonable belief that it had good cause to terminate Petitioner, even if the outcome on appeal of such a termination may well have been different.

39. Petitioner was not asked to resign nor was resignation discussed with her. She was given a pre-disciplinary conference notice during which she was to have the opportunity to present her response to the matters and recommended action set out in the notice. Instead of going through with the disciplinary process, Petitioner chose to tender her resignation prior to the pre-disciplinary conference taking place.

40. The State personnel appeals system provides every career status State employee the opportunity to appeal his or her dismissal up to and including our State's Court of Appeals. Petitioner could have taken this course. Instead, she chose to resign prior to Respondent's final determination of what disciplinary action it was imposing against Petitioner.

41. The Tribunal concludes as a matter of law that Petitioner voluntarily resigned from employment with Respondent and that under the circumstances Respondent had a reasonable belief it had good cause to terminate Petitioner. Having voluntarily resigned under circumstances not amounting to a constructive dismissal, Petitioner had no right under N.C.G.S. 126-34.02 to appeal on the basis that she was dismissed without just cause or that her resignation was coerced or otherwise invalid. This claim must be dismissed with prejudice.

2021 Petition Claims

42. On September 15, 2021, Petitioner filed a second petition for a contested case in OAH, docketed as 21 OSP 03959 (the "2021 Petition"). The 2021 Petition alleged that DHHS had (a) dismissed Petitioner without just cause, (b) created a "hostile work environment" for Petitioner, and (c) retaliated against Petitioner, resulting in her termination.

43. The 2021 Petition also alleged that "Respondent created a hostile work environment for the Petitioner by and through creation of unnecessary and unreasonable roadblocks and/or obstacles, which forced the Petitioner to resign and seek mental health treatment. The Petitioner was subjected to said hostile work environment after inquiring about a pay increase that her employer was obligated to give her and was later subjected to adverse action after filing an EEO Complaint." The 2021 Petition's claims originate in the same employment and separation issues as the 2019 Petition.

Dismissal Without Just Cause

44. Petitioner's 2021 claim for dismissal without just cause fails for the same reasons as her involuntary resignation claims in the 2019 Petition, as analyzed above: Petitioner was not dismissed from employment by Respondent, but rather resigned from that employment while facing a likely, but not inevitable, dismissal. Summarized, Petitioner's evidence fails to show that Respondent knew or believed that the proposed termination could not be substantiated. Christie v. United States, 518 F.2d 584, 588 (Ct. Cl. 1975) ("The underlying rationale is that a Government-initiated removal (adverse action) is analogous to a 'taking' of a property interest; an employee-initiated separation is not.").

45. Petitioner did not establish an involuntary separation creating a right of appeal under N.C.G.S. 126-34.02, and her claim for dismissal without just cause must be dismissed with prejudice.

2021 Retaliation Claims

46. To the extent the 2021 Petition alleges retaliation, those claims fail for the same reasons as set forth in the Tribunal's analysis of the 2019 Petition and must be dismissed with prejudice.

Hostile Work Environment

47. At the outset, it is questionable whether the 2021 Petition satisfies the pleading requirements of N.C.G.S. 150B-23 with respect to a hostile work environment claim. "Jurisdiction rests on the allegations of the petitioner." Phyllis Dowdy Wall v. Sand Hills Community College, 2021 WL 8014939 (citing Campbell v. N. Carolina Dep't of Transp., Div. of Motor Vehicles, 155 N.C. App. 652, 660, 575 S.E.2d 54, 60 (2003)).

48. The 2021 Petition's allegation that "Petitioner was subjected to said hostile work environment after inquiring about a pay increase that her employer was obligated to give her" does not, on its face, state any colorable claim for a hostile work environment, for several reasons.

49. First, as previously discussed, N.C.G.S. 126-34.02 provides no right of action regarding alleged harassment of discrimination regarding a failure to raise an employee's pay, standing alone:

> (1) Discrimination or harassment --An applicant for State employment, a State employee, or former State employee may allege discrimination or **harassment based on race, religion, color, national origin, sex, age, disability, genetic information, or political affiliation** if the employee believes that he or she has been discriminated against in his or her application for employment or in the terms and conditions of the employee's employment, or in the termination of his or her employment.

50. N.C.G.S. 126-34.02(b)(1) (emphasis supplied). Further, the same statute also states, "Any issue for which an appeal has not been specifically authorized by this section shall not be grounds for a contested case hearing."

51. Second, again under State personnel rules, "Unlawful workplace harassment" is defined as "unsolicited and unwelcome speech or conduct based upon **race, color, national origin, sex, age, disability, genetic information, or political affiliation** that creates a hostile work environment or under circumstances involving quid pro quo." 25 NCAC 01J .1101(b) (emphasis supplied). A pay raise is not one of these items, again, standing alone.

52. Third, "[t]o allege a hostile work environment, an employee must show 'that the offending conduct was (1) unwelcome, (2) **was based on [a protected trait of the employee]**, (3) was sufficiently severe or pervasive to alter the conditions of [the employee's] employment and create an abusive work environment, and (4) was imputable to [the employee's] employer.'" Gray v. N. Carolina Dep't of Pub. Safety, 263 N.C. App. 593, 822 S.E.2d 331 (2019) (unpublished) (adopting the evidentiary standard of a Title VII claim of harassment for allegations of a harassment under Chapter 126) (quoting Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 331 (4th Cir. 2003)).

53. In summary, the hostile environment must also be based on an employee's race, gender, national origin, or other Title VII protected traits. A pay raise, at risk of repetition, is not a Title VII matter standing alone. Thus, any "hostile environment" claim based on Petitioner's complaints about her pay is subject to summary dismissal.

54. However, the 2021 Petition also alleges that Petitioner "was later subjected to adverse action after filing an EEO Complaint." This allegation is sufficient to invoke OAH's jurisdiction for a hostile environment claim. N.C.G.S. 150B-23; Winbush v. Winston-Salem State Univ., 165 N.C. App. 520, 522, 598 S.E.2d 619, 622 (2004).

55. Starting with the third element to prove the "severe and pervasive" element of the hostile work environment theory, Petitioner must show not only that she perceived the conduct as hostile and abusive, but also that a reasonable person in her position would have found the environment objectively hostile or abusive. Kathleen Hardiman v. N. C. Aquarium At Pine Knoll Shores, Jay Barnes, Director, James Lewis and Lonnie Burke, 2009 WL 4912684.

56. Rude or coarse speech with subordinates does not in and of itself, without more, create a hostile work environment. Isham Spann v. Marva G. Scott and Edgecombe County Department of Social Services, 2010 WL 4356878. A mere utterance "which engenders offensive

feelings in an employee" does not satisfy this element. Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 67, 91 L. Wd. 2d 49, 106 S. Ct. 2399 (1986). To prevail on this claim, Petitioner must demonstrate that the workplace is **permeated** with protected-trait-based intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Hardiman, 2009 WL 4912684.

57. The conduct of MDC management of which Petitioner complains does not rise to the "severe and pervasive" level required to prevail on a hostile work environment claim. Summarized, Petitioner's evidence establishes that (a) on multiple occasions, MDC managers did not treat Petitioner as courteously as Petitioner believed they should, and (b) on multiple occasions MDC management prohibited Petitioner from doing things she wanted to do (engaging in work for other entities and conducting research) or failed to act quickly enough to grant Petitioner things she wanted to have (a salary increase).

58. Without minimizing Petitioner's distress over them, comparing Petitioner's evidence of harassment with the conduct in Meritor Savings Bank, a lodestar United States Supreme Court case on hostile work environment, is instructive:[4]

> Respondent testified that during her probationary period as a teller-trainee, Taylor treated her in a fatherly way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated, when she started going with a steady boyfriend. Respondent also testified that Taylor touched and fondled other women employees of the bank.

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 60, 106 S. Ct. 2399, 2402, 91 L. Ed. 2d 49 (1986).

59. While it is not required that all litigants "match" the facts of Meritor Savings Bank, see Gray (the "main reason" for petitioner's dismissal was discriminatory) that the respective allegations in Meritor and this case do not compare in severity, from the perspective of a reasonable person, is self-evident. A reasonable person in Petitioner's position, considering all of the circumstances, could not find that Respondent's "harassing" treatment of Petitioner during her employment was severe or pervasive.

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[4] North Carolina courts "look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." N. Carolina Dep't of Correction v. Gibson, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983).

60. Even if it was, the record essentially no evidence that MDC management undertook these actions because of Petitioner's gender, race, national origin, or other prohibited Title VII-type criteria as opposed to either legitimate (one perspective) or bureaucratic and didactic (another) interpretations of MDC policies and practices. Demonstrating a severe and pervasive workplace harassment situation standing alone is, as discussed, simply not enough.

61. Based on the foregoing, analysis of the remaining elements to establish a hostile work environment are not warranted and the Tribunal declines to do so.

62. The Tribunal concludes as a matter of law that Petitioner failed to make a prima facie case for discrimination based on hostile work environment.

63. Petitioner's claims based on hostile work environment must be dismissed with prejudice.

CONCLUSION

This contested case should have been (a) dismissed without prejudice in September 2019 for Petitioner to exhaust her internal remedies, or (b) if not, set for hearing and decided on the merits by November 2019. "Except for cases of extraordinary cause shown, the Office of Administrative Hearings shall hear and issue a final decision in accordance with G.S. 150B-34 within 180 days from the commencement of the case." It was not. The result was a series of errors and delays by which the parties were poorly served. It is the Tribunal's hope that this Final Decision, finally issued, will bring closure to all parties involved.

FINAL DECISION

Petitioner is not entitled to any relief from Respondent. This contested case is **DISMISSED** with prejudice.

NOTICE OF APPEAL

This Final Decision is issued under the authority of N.C.G.S. § 150B-34. Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. § 7A-29(a). The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

SO ORDERED, this the 21st day of October, 2022.

Michael C. Byrne
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

Mark A Burts
Burts Law PLLC
Anthony@burtslaw.com
Attorney For Petitioner

Joseph Edward Elder
NC Dept. of Justice, Office of the Attorney General
jelder@ncdoj.gov
Attorney For Respondent

William Walton
N.C. Department of Justice
wwalton@ncdoj.gov
Attorney For Respondent

This the 21st day of October, 2022.

Jerrod Godwin
Law Clerk
N.C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850