

**STATE OF NORTH CAROLINA**  
**GUILFORD COUNTY**

**OFFICE OF ADMINISTRATIVE  
HEARINGS**  
**NOS. 08 OSP 1724; 09 OSP 3187**

**PATRICE BERNARD,** )  
 )  
 **Petitioner,** )  
 )  
 **v.** )  
 )  
 )  
 **N.C. A&T STATE UNIVERSITY,** )  
 )  
 **Respondent.** )  
 \_\_\_\_\_ )

**PROPOSED DECISION**

The above-captioned case was heard before the Honorable Selina M. Brooks, Administrative Law Judge, on 21 October 2013 and 22 October 2013 in Greensboro, North Carolina.

**APPEARANCES**

**FOR RESPONDENT:** Matthew Tulchin  
Assistant Attorney General  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, N.C. 27602

**FOR PETITIONER:** David W. McDonald, Esq.  
Hicks McDonald Noecker LLP  
100 South Elm St., Suite 510  
Greensboro, N.C. 27401

**EXHIBITS**

**Admitted for Petitioner:**

<u>Exhibit No.</u>	<u>Date</u>	<u>Document</u>
1	9/5/06	Vacancy Announcement
2	10/10/06	NC A&T Recommendation for Employment for Non-Academic Personnel

3	7/25/07	Letter from Vanessa Lawson, Interim Director of Human Resources, to Patrice Bernard
4	8/6/08	E-mail chain between Pamela Basheer and Patrice Bernard re: Interim Evaluation
5	4/21/08	E-mail from Joyce Edwards to Loleta Chavis re: Please Review
6	4/22/08	E-mail from Loleta Chavis to Joyce Edwards re: FW: Please Review
7	4/22/08	E-mail from Joyce Edwards to Laurie Charest re: Please review and respond
8	4/22/08	Letter from Joyce Edwards to Patrice Bernard
9	5/20/08	E-mail from Patrice Bernard to Pamela Basheer re: Offer Letter
10	5/19/08	E-mail from Drake Maynard to Patrice Bernard re: Position Posted Incorrectly
11	6/4/08	NC A&T State University SPA Employee Grievance Form
12	6/6/08	E-mail from Sheila Benton to Sullivan Welborn, Linda McAbee, Joyce Edwards, and Pamela Basheer re: Letter received on June 6, 2008
13	6/11/08	E-mail from Erskine Bowles to Patrice Bernard, Laura Luger, Harold Martin, and Stanley Battle re: Position Posting Error
14	7/11/08	Department of Human Resources Termination Record
15	6/23/08	E-mail from Patrice Bernard to Linda McAbee re: Questions – RIF
16	7/9/08	E-mail from Linda McAbee to Patrice Bernard re: Urgent Status – Dr. Welbourne, Please Reply
17	7/25/08	E-mail from Elizabeth Leak to Patrice Bernard re: Location of Career Banding Dispute Form
18	8/20/08	Memorandum From Linda McAbee to Patrice Bernard regarding Career-Banded Position Crosswalk and Legislative Increase
19	6/20/08	E-mail from Ann Lemmon to Patrice Bernard re: A&T/Personnel Issue
20	2/24/09	E-mail from Anne Lemmon to Patrice Bernard re: response to our emails

21	3/9/09	E-mail from Patrice Bernard to Erskine Bowles
22	3/10/09	Letter from Linc Butler, Assistant Vice Chancellor for Human Resources at NC A&T State University, to Patrice Bernard
24	5/7/09	Grievance Committee Recommendation Report
25	5/11/09	Letter from Stanley F. Battle, Chancellor of NC A&T State University, to Patrice Bernard
26	5/20/09	E-mail from Patrice Bernard to Kitty McCollum, Vice President for Human Resources, UNC General Administration, re: E-mail Response
27	2/11/09	E-mail from Patrice Bernard to Linc Butler
29	8/1/95	State Personnel Manual, Types of Appointments
30	7/1/98	State Personnel Manual, Severance Salary Continuation
31	9/19/07	Letter from Nanita Cole, Benefits Manager for NC A&T State University, to Patrice Bernard
32	6/11/08	Letter from Joyce Edwards, Executive Director for Career Services and Experiential Learning for NC A&T State University, to Patrice Bernard Re: Reduction-in-Force

**Admitted for Respondent:**

<u>Exhibit No.</u>	<u>Date</u>	<u>Document</u>
15	4/22/08	Letter from Joyce Edwards, Executive Director for Career Services and Experiential Learning for NC A&T State University, to Patrice Bernard
22	6/6/08	Letter from Sheila Benton, Special Assistant to the Vice Chancellor for Human Resources, to Patrice Bernard
34	7/13/06	Application for State Employment
35	9/5/06	Application for State Employment
36	6/12/08	Application for Employment
37	9/9/13	Petitioner's Responses to Respondent's First Set of Interrogatories and Requests for Production of Documents

## **WITNESSES**

### **Called by Petitioner:**

Patrice Bernard

### **Called by Respondent:**

None

## **ISSUE**

Whether the selection of Petitioner's position for elimination pursuant to a reduction in force ("RIF") was due to discrimination based on race or sex and/or retaliation.

**ON THE BASIS** of 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 undersigned makes the following findings of fact. In making these findings, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

## **FINDINGS OF FACT**

1. Petitioner Patrice Bernard was a permanent State employee subject to Chapter 126 of the North Carolina General Statutes.
2. Respondent North Carolina Agricultural and Technical State University ("NC A&T" or "the University") is subject to Chapter 126 and was Petitioner's employer.
3. Petitioner is an African American woman.
4. Petitioner began her employment at North Carolina A&T State University on a temporary basis in 2003 as a computing consultant. **T pp. 37, 157**
5. From 2004 to 2006, Petitioner worked as an Administrative Assistant at the University's College of Arts and Science before joining the Human Resources department as Benefits Receptionist. **T p. 159** Petitioner was dismissed from the Human Resources position during the probationary period, but did not disclose the fact that she was dismissed on subsequent job applications. **T pp. 160-64, 167-68; Resp. Exs. 34, 35, 36**
7. In September 2006, the University posted a vacancy announcement for position #9017 of Technology Support Analyst in the Office of Career Services. **Pet. Ex. 1** The position was a time-limited position. **T pp. 83, 175-79; Pet. Exs. 2, 3, 8, 14, 32; Resp. Ex. 15** The posting did not indicate that the position was time-limited. **T p. 38; Pet. Ex. 1**

8. Petitioner testified that she would never have applied for the position if she had known that it was a time-limited position because she “was already in a position with the university” and “was happy where [she] was.” **T p. 41** Petitioner later admitted, however, that she had been dismissed from her previous position and was currently unemployed when she applied for the Technology Support Analyst position. **T pp. 172**
9. Petitioner applied for the Technology Support Analyst position and was hired in November 2006. **T pp. 37-38, 162-63; 174-75; Pet. Ex. 2** Petitioner’s offer letter and the Recommendation for Employment both indicated that the position was time-limited. **T pp. 174-75; Pet. Ex. 2**
10. As Technology Support Analyst for the Office of Career Services, Petitioner was responsible for managing the office’s website, providing training to students on the use of Career Services software, and maintaining office technology. **T pp. 38-39**
11. Petitioner received generally favorable performance evaluations from her supervisors regarding her performance of her job duties. **T pp. 45-46; 199-206**
12. Petitioner’s immediate supervisor in the Office of Career Services was Ms. Pamela Basheer. **T pp. 40, 199, 201; Pet. Exs. 2, 8.** Ms. Basheer reported to Ms. Joyce Edwards, the Director of Career Services. **T pp. 40, 199, 201; Pet. Exs. 2, 8**
13. On July 25, 2007, Ms. Vanessa Lawson, Interim Director of Human Resources provided Petitioner with an update regarding her appointment as a time-limited employee and informed Petitioner that funds had been approved to continue to support her position for the period of July 1, 2007 through June 30, 2008. **T pp. 42-43, 176-80; Pet. Ex. 3**
14. Petitioner stated that Ms. Lawson’s letter regarding Petitioner’s position being continued represented the first time she became aware that her position was time-limited. **T pp. 42, 177**
15. Petitioner was displeased to learn that her position was not permanent and asked her supervisor for an explanation. **T pp. 43, 179** When Petitioner did not receive a satisfactory answer, she contacted the Director of Career Services, Joyce Edwards. **T p. 43** Petitioner testified that she did not receive a satisfactory explanation from Ms. Edwards so she contacted Human Resources and the Vice Chancellor of Student Affairs. **T pp. 42-43** Petitioner said she never received a response to her inquiries. **T p. 43**
16. In September 2007, Petitioner was approved for Family Medical Leave because of the serious health condition of her father. **T pp. 43-44, 180-81; Pet. Ex. 31** Petitioner had requested intermittent leave for an indefinite period of time. **Pet. Ex. 31** Petitioner also applied for Shared Leave, because she was concerned that she would not have enough leave time to cover her time out of work. **Pet. Ex. 31** Petitioner was required to exhaust all of her leave before using shared leave. **Pet. Ex. 31**
17. Petitioner testified that the Director of Career Services “exploded and cursed at [Petitioner]”

during a staff meeting when the Director learned that Petitioner had requested Family Medical Leave. **T pp. 44, 216** Petitioner believed that she was treated differently after she took Family Medical Leave. **T pp. 44-45, 68, 181-83, 216-19**

18. Petitioner also claimed that she was discriminated against by Ms. Edwards because she took Family Medical Leave. **T pp. 183-85, 216-20** Petitioner testified that she did not file a grievance regarding Ms. Edwards' behavior, nor could she recall telling anyone else at the University about Ms. Edwards' discriminating against her. **T pp. 184-85, 228-29**
19. In April 2008, Ms. Edwards was forced to reassess the function of the Office of Career Services because of budget constraints. **T. 51-54, Pet. Exs. 5-8** After consulting with Human Resources and her supervisor, Vice Chancellor Dr. Sullivan Welborne, Ms. Edwards decided to eliminate Petitioner's time-limited, receipt funded position. **Pet. Exs. 5-7**
20. On April 22, 2008, Ms. Edwards informed Petitioner in a letter and in person that her time-limited position was being eliminated. **T pp. 48, 52-54, 195-98; Pet. Ex. 8** The letter did not contain any information regarding Petitioner's appeal rights or her RIF rights. **Pet. Ex. 8**
21. Petitioner believes that Ms. Edwards' decision to eliminate Petitioner's position was based on racial discrimination, gender discrimination, and/or retaliation. **T pp. 216-20, 222** In support of this belief, Petitioner claimed that Ms. Edwards started to treat her differently after Petitioner took Family Medical Leave. **T pp. 216, 218** Petitioner stated that Ms. Edwards "was less than friendly" and "made it very difficult" for Petitioner to take Family Medical Leave. **Id.**
22. Petitioner also stated that Ms. Edwards eliminated her position "without consideration that there were temporary employees" working in the office. **T pp. 216-17, 222** Petitioner believes that these employees, which she describes as "younger females, one African-American, once Caucasian," should have been dismissed before her. **T pp. 216-17, 222-24** However, these employees held different positions than Petitioner, one was a receptionist and the other was a temporary employee who performed odd jobs in the office. **T pp. 222-23**
23. Petitioner stated that Ms. Edwards discriminated against her by ignoring Petitioner's requests for information regarding the status of her position and the RIF. **T pp. 217-18**
24. Petitioner filed a grievance after being told that her job was being eliminated. **T pp. 54, 69-72; Pet. Ex. 11** She also contacted the Office of State Personnel complaining about the University's decision to eliminate her position. **T pp. 58-59; Pet. Ex. 10** Petitioner did not mention anything about discrimination in her grievance or in her communication with the Office of State Personnel. **Pet. Exs. 10-11**
25. On June 6, 2008, the University rescinded the letter dated April 22, 2008 that Petitioner received from Ms. Edwards. **T pp. 206-07; Pet. Ex. 12; Resp. Ex. 22.**

26. The University determined that because the position was advertised as a permanent full-time position, the University would treat the position as such and award Petitioner all the rights of a permanent full-time employee. **T pp. 73-76; Pet. Ex. 12**
27. In a letter dated June 11, 2008, the University informed Petitioner that due to budget reasons, specifically the elimination of funding, her position as Technology Support Analyst was being eliminated through a Reduction-in-Force Personnel Action effective July 11, 2008. **T pp. 86, Pet. Ex. 32**
28. The University explained to Petitioner that it was treating her position “as a permanent classification,” and therefore she was entitled to full RIF rights. **Pet. Ex. 32** These RIF rights included the right “to receive leave, total service credit, retirement, and health benefits, and severance pay as well as primary re-employment consideration.” **Pet. Ex. 32**
29. Petitioner was provided with a copy of the University’s RIF policy along with a copy of the University’s Mediation and Grievance Policy and Procedures. **Pet. Ex. 15, 32**
30. Petitioner contacted administrators at the University of North Carolina – General Administration, including Chancellor of the University of North Carolina, Erskine Bowles, to complain about the University’s action. **T pp. 77-83, 103-14; Pet. Exs. 13, 19-21** Petitioner alleged that the University did not follow proper guidelines when it conducted the RIF and violated her rights as a State employee. **T pp. 77-83, 103-14; Pet. Exs. 13, 19-21** Petitioner did not mention anything about discrimination in her complaints to General Administration. **T pp. 241-42; Pet. Exs. 13, 19-21**
31. Petitioner also requested more information from the University administrators about the decision to eliminate her position. **T pp. 85-90, 103; Pet. Exs. 15-16**
32. Petitioner’s position of Technology Support Analyst was eliminated on July 11, 2008. **Pet. Ex. 14** Petitioner’s former supervisors both recommended Petitioner for rehire. **T. pp. 83-84, Pet. Ex. 14**
33. In accordance with her RIF rights, Petitioner received, among other things, severance, extension of health benefits, and primary re-employment consideration. **T pp. 143, 212-13**
34. As part of her right to priority reemployment, Petitioner was able to get another job with the State. **T pp. 213-14** She was hired by the University of North Carolina at Greensboro as a Technology Support Analyst and received a salary that was higher than the one she was paid at NC A&T. **T pp. 213-14**
35. Following receipt of the June 11, 2008 RIF letter, Petitioner filed a grievance challenging the RIF. **T pp. 210-11** Petitioner also continued to seek a response from the University to her inquiries regarding the process used to RIF her position. **Pet. Exs. 19-21** Petitioner had a conversation with Ms. Linda McAbee, Vice Chancellor for Human Resources for the University, but was not satisfied with the responses provided by Ms. McAbee. **T pp. 238-40**

36. In a letter dated March 10, 2009, Mr. Linc Butler, Assistant Vice Chancellor for Human Resources for NC A&T, attempted to address Petitioner's outstanding concerns and questions regarding the University's decision to RIF her position. **T pp. 119-20, 245-46; Pet. Ex. 22** Mr. Butler also provided Petitioner with an update regarding the next steps in her grievance. **T pp. 119-20, Pet. Ex. 22**
37. Petitioner's grievance of her RIF was heard by the University on April 27, 2009. **T pp. 129, 134; Pet. Ex. 24**
38. In a letter dated May 11, 2009 the Chancellor of NC A&T, Stanley F. Battle, issued a Final Agency Decision regarding Petitioner's grievance. **T pp. 138-39; Pet. Ex. 25** The Chancellor upheld the recommendation of the Grievance Committee that Petitioner was not "treated improperly through the RIF policy" at NC A&T and was "afforded all of the rights and privileges under the RIF policy." **Pet. Ex. 25** The Chancellor also upheld the recommendation of the Committee that Petitioner was "not retaliated against by the Office of Career Services (OCS) or the Division of Human Resources." **Pet. Ex. 25**
39. Petitioner filed a Petition for a Contested Case Hearing with the Office of Administrative Hearing immediately following the University's issuance of the Final Agency Decision. **T p. 139** In her Petition, Petitioner alleged she was discriminated against on the basis of race.
40. In Petitioner's verified Responses to Respondent's First Set of Interrogatories and Requests for Production of Documents that were provided during discovery in this case, Petitioner stated that she "does not wish to proceed with a claim of racial discrimination at this time." **Resp. Ex. 37; T pp. 224-26**

### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has subject matter jurisdiction over the issue of whether Respondent discriminated against Petitioner in this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.
2. Petitioner challenges her RIF on the basis that the University failed to follow proper State and University guidelines. Failure to follow proper substantive and procedural requirements with regard to a RIF is not a basis for a contested hearing under N.C. Gen. Stat. § 126-34.1. See N.C. Gen. Stat § 126-34.1 The Office of Administrative Hearings does not have subject matter jurisdiction over the issue of whether a RIF complied with substantive and procedural requirements and, therefore, that claim must be dismissed. N.C. Gen. Stat. § 126-34.1; University of N.C. v. Feinstein, 161 N.C. App. 700, 590 S.E.2d 401 (2003).
3. Petitioner also challenges her RIF on the grounds that the University discriminated against her on the basis of her race, gender, and/or retaliation.
4. The Office of Administrative Hearings has jurisdiction over the issue of whether a RIF constitutes unlawful discrimination on the basis of gender, race, and/or retaliation. N.C.



Gen. Stat. § 126-34.1(a)(2); Feinstein, 161 N.C. App. at 703, 590 S.E.2d at 403.

5. Petitioner has the burden of proving that Respondent unlawfully discriminated against her because of her race and her gender and/or retaliated against her.
6. With regard to Petitioner's discrimination claim, the North Carolina Supreme Court has adopted the burden-shifting scheme used by federal courts, which was articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See North Carolina Dep't of Corr. v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983).
7. Under the McDonnell Douglas burden-shifting scheme, a petitioner must first establish a prima facie case of discrimination. If a petitioner establishes her prima facie case, the burden then shifts to the respondent to articulate a legitimate, non-discriminatory reason for its decision. If the respondent articulates a legitimate, non-discriminatory reason for the decision, then the burden shifts back to the petitioner to prove that the reason given by the respondent was a pretext for discrimination. Hoyle v. Freightliner, LLC, 650 F.3d 321, 337 (4<sup>th</sup> Cir. 2011).
8. Petitioner failed to prove her claim that Respondent discriminated against her on the basis of gender when it eliminated her position pursuant to a RIF.
9. Petitioner did not meet her burden of proof that Respondent's reasons for the RIF were a pretext for discrimination. In particular, she presented no evidence of a discriminatory animus on the part of the decision makers involved.
10. As to Petitioner's claim for retaliation for her engaging in protected activity, "[t]o establish a *prima facie* case of retaliation, it must be shown that (1) the plaintiff engaged in a protected activity, (2) the employer took adverse action, and (3) there existed a causal connection between the protected activity and the adverse action." Salter v. E & J Healthcare Inc., 155 N.C. App. 685, 693, 575 S.E.2d 46, 51 (2003) (quoting Brewer v. Cabarrus Plastics, Inc., 130 N.C. App. 681, 690, 504 S.E.2d 580, 586 (1998), disc. rev. denied, 350 N.C. 91, 527 S.E.2d 662 (1999)). Federal courts use the same burden-shifting schemes for retaliation claims. See, e.g., Hoyle v. Freightliner, LLC, 650 F.3d 321, 337 (4<sup>th</sup> Cir. 2011).
11. Petitioner failed to establish a prima facie case of retaliation, because she failed to establish that she engaged in any protected activity. Moreover, even if she had demonstrated she engaged in any protected activity, she failed to establish a causal connection between the protected activity and the adverse action. Petitioner presented no evidence of any animus by the University about her grievance. Petitioner presented no evidence that Petitioner's complaints in any way caused the University to eliminate her position in a reduction in force.
12. Petitioner's evidence shows a legitimate non-retaliatory reason for Respondent's action and Petitioner failed to establish any evidence of retaliatory intent by any supervisor. Petitioner failed to present any evidence that Respondent's legitimate non-retaliatory reason for the

RIF was pretextual, or that retaliation was the real reason for the action.

13. At the close of Petitioner's case in chief, Respondent made oral Motions to Dismiss and for Directed Verdict pursuant to N.C. Gen. Stat. §1A-1, Rules 12 and 50.
14. Petitioner's allegation that Respondent violated RIF policies and procedures was dismissed for lack of subject matter jurisdiction. **T. pp. 266-70**
15. Petitioner's allegation of retaliation on the basis of race discrimination was deemed abandoned and dismissed. **T. pp. 270-79**
16. The Motion for Directed Verdict was granted in favor of Respondent on the issue of retaliation based on age discrimination. **T pp. 2779-84**

On the basis of the above Conclusions of Law, the Undersigned issues the following:

### **DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Petitioner's RIF was not the result of discrimination on the basis of gender, race and/or retaliation. Respondent's action is therefore **AFFIRMED**.

### **ORDER**

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Services Center, Raleigh, N.C. 27699-6714, in accordance with N.C.G.S. § 150B-36(b).

### **NOTICE**

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to Decision and to present written arguments to those in the agency who will consider this Decision. N.C.G.S. § 150B-36(a).

The agency is required by N.C.G.S. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings. The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

This, the 28th day of February, 2014.

---

Selina M. Brooks  
Administrative Law Judge

A copy of the foregoing was sent to:

David W. McDonald, Esq.  
Hicks McDonald Noecker LLP  
100 South Elm St. Ste. 510  
Greensboro, NC 27401  
ATTORNEY FOR PETITIONER

Matthew Tulchin  
Assistant Attorney General  
NC Dept. of Justice  
PO Box 629  
Raleigh, NC 27602-0629  
ATTORNEY FOR RESPONDENT

This the \_\_\_\_\_ day of March, 2013.

---

Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
(919) 431-3000  
Fax: (919) 431-3100