

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 OSP 0929**

DECISION
by SUMMARY JUDGMENT

Mr. Byrne did file a Notice of Appearance and notice of review was sent to the Attorney General's Office. Ms. Thomas was no longer representing Respondent and the matter was forwarded to Assistant Attorney General Joseph E. Elder who was unaware of the matter and sought continuance of the review. Mr. Elder was also hindered when attempting to retrieve a copy of the official file to find that the Office of Administrative Hearings had archived the file.

The record proper in 2010 had been reviewed in 2010 including the Respondent's Motion and Petitioner's Response, and all other items submitted by the Respondent and the Petitioner, including all Affidavits; and upon considering the Memorandums of Law; and hearing argument from the Respondent's counsel and the Petitioner's counsel at the time; the Undersigned found that Summary Judgment was warranted in this matter. The present record assembled does not include any prior exhibits or affidavits or the like, however the findings of fact have been established and adopted.

Hearing on this present matter was held on November 1, 2013 with Petitioner represented by attorney Michael Byrne and Respondent represented by Assistant Attorney General Joseph E. Elder. As previously stated, the State Personnel Commission adopted the entirety of the Findings of Fact of the Administrative Law Judge and further adopted the entirety of the Conclusions of Law with the exception of Conclusion of Law 9. The parties presented argument with focus on Conclusion 9 given the prior adoption of all findings of fact and all other conclusions of law.

On November 1, 2013, Petitioner testified and as did Dr. Margaret Dorfman with Triangle Psychiatric Services, PA. Petitioner further presented four exhibits including his resume, a January 11, 2010 letter signed by Dr. Dorfman and Stephen Chandler, a DVD of Dr. Dorfman's deposition, and a transcript of the video deposition of Dr. Dorfman. Respondent presented one exhibit which included the 2010 Petition for a Contested Case Hearing as well as documents constituting the agency's action in the matter. The Petitioner is presently working in a non-governmental position and seeks monetary damages as the remedy in this case.

The Parties submitted a law brief and/or Memorandum of Law, the latter which was filed by Respondent on December 4, 2013 and received by the Undersigned on December 9, 2013, which have been considered along with all other matters received.

FINDINGS OF FACT

1. Petitioner was employed with North Carolina State government beginning in June 1999. The Petitioner's last day at work was February 15, 2008. At that time he was a Staff Development Coordinator in the Division of Mental Health, Developmental Disabilities and Substance Abuse Services.

2. On February 20, 2008, Petitioner provided a physician's note to HR Manager Terry Penny along with a Short-Term Disability claim request. After a sixty day waiting period, Petitioner began his Short-Term Disability on April 15, 2008. Several errors in Petitioner's medical leave status, processing Petitioner's FMLA, and processing Petitioner's Short Term Disability claim and approved benefits left Petitioner without income for approximately eight months in 2008.

Petitioner's Short-Term Disability was extended to April 15, 2010.

3. By letter dated January 12, 2010, Petitioner stated that he and his providers believed it was in his best interest that he return to an alternative position and as such was "requesting accommodation for a position that would not regenerate the same stressors which have already proven damaging to my physical and mental health." Included with his request were three letters of support from Petitioner's treating physicians.

4. By letter dated January 29, 2010 Respondent replied to Petitioner stating that Respondent was "unable to grant your request for placement in another position." Respondent's letter went on to say that Petitioner's position of Staff Development Coordinator was still available to him should he "become able to return to work before or at the end of the extended short-term disability period." The Respondent included an application for Long-Term Disability with their response.

5. On February 10, 2010, Petitioner wrote a letter to Michelle Edelen, his supervisor, stating that he was "not seeking another job in another Department or State Agency," but that he was (as stated later in the letter) requesting that he "no longer be supervised by you and Steve Hairston because it adversely affected my mental and physical health."

6. On February 18, 2010, Michelle Edelen responded by letter stating that Respondent was "unable to grant your request for placement in another position or under other supervision." He was directed to report to work on April 16, 2010 and told that "a return-to-work notice from your treating health care provider will be required." The letter states that the notice "should specifically address your ability to perform the essential functions of the job." A job description that was enclosed in the February 18, 2010 correspondence was approximately four years old and had been signed by Petitioner's former supervisor.

7. On March 8, 2010, Petitioner filed a Petition for a Contested Case Hearing alleging discrimination based upon disability.

8. Petitioner filed a claim for Long-Term Disability benefits under the Disability Income Plan of North Carolina with the Department of State Treasurer, Retirement Systems Division. On April 20, 2010, the Plan's Medical Board approved Petitioner's application with an effective date of April 6, 2010. On April 30, 2010, Petitioner submitted his resignation effective April 16, 2010.

9. In the Medical Report for Petitioner's disability review submitted to the Retirement Systems Division, Petitioner's doctor stated that he was totally disabled and unable to work. Based upon that report and Petitioner's own statements, he was approved for Long-Term Disability benefits. The Undersigned finds it unnecessary to repeat the specific medical diagnosis but such led Petitioner's treating physician to state Petitioner showed no improvement and was unable to work at his professional level.

BASED ON the foregoing findings of fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. A party moving for summary judgment satisfies its burden of proof (1) by showing an essential element of the opposing party's claim is nonexistent or cannot be proven, or (2) by showing that the opposing party cannot (or did not) produce evidence to support an essential element of his or her claim or (3) the opposing party cannot surmount an affirmative defense which would bar the claim. See *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982). When ruling on summary judgment, the evidence is viewed in the light most favorable to the non-moving party, according that party the benefit of all reasonable inferences. See *Bailey v. Blue Cross & Blue Shield of Virginia*, 67 F.3d 53 (4th Cir. 1995) *cert. denied*, 516 U.S. 1159, 116 S.Ct. 1043, 134 L.Ed.2d 190 (1996).

2. In applying North Carolina discrimination law, the Undersigned is guided not only by North Carolina law and cases but also by federal employment discrimination decisions which are applicable and authoritative.

3. North Carolina law and the federal Americans with Disabilities Act (ADA) prohibit discrimination against a “qualified individual with a disability ... in regard to the hiring, advancement, or discharge of employees ...and other terms, conditions, and privileges of employment.” 42 U.S.C. Sec. 12112(a). In order to prove a prima facie case of discrimination, a Petitioner must establish: (1) he has a disability; (2) he is a qualified individual, and; (3) the employer discriminated against him because of his disability. See *Martinson v. Kenney Shoe Corp.*, 104 F.3d 683 (4th Cir. 1997); *Doe V. University of Maryland Med. Sys. Corp.*, 50 F3d. 1261 (4th Cir. 1995)

4. The facts presented by Petitioner show that he has a disability, that is, he has a physical and/or mental impairment that substantially limits one or more major activities. The analysis now turns to whether Petitioner is a qualified individual with a disability “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. Sec. 12111(8).

5. To determine whether a disabled individual is qualified, courts consider whether the individual can perform the essential functions of the job at issue and if not, whether any reasonable accommodation by the employer would enable the individual to perform these functions. *Tyndall v. National Educ. Ctrs.*, 31 F3d 209 (4th Cir. 1994)

6. Essential functions are defined as the “fundamental job duties of the employment position

the individual with a disability holds or desires.” 29 C.F.R. Sec. 1630.2(n) Evidence of whether a particular function is essential includes the employer’s judgment as to which functions are essential, written job descriptions, amount of time spent on the job performing the function, and the consequences of not requiring the incumbent to perform the function(s). 29 C.F.R. Sec. 1630.2(n).

7. Among the materials in Petitioner’s application for Long-Term Disability is his physician’s statement that he is totally disabled and unable to return to his position with the State. Further, Petitioner himself in his application, has certified that he is unable to perform the essential functions of his job. (To avoid confusion that Petitioner’s receipt of disability benefits was at all determinative, which it was not, the phrase “and by his receiving Long-Term Disability” has now been stricken from this Conclusion of Law).

8. Even if Petitioner cannot perform the essential functions of the job without accommodation, he could still be a qualified individual with a disability if he could perform the essential functions of the job with a reasonable accommodation. Reasonable accommodation is defined as “modifications or adjustments to the work environment, or to the manner or circumstances under which the position is held or desired, is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position.” 29 C.F.R. Sec. 1630.2(o) The reasonableness of an accommodation is assessed objectively, and is not viewed subjectively from the concerns of either party. See *Williams v. Channel Master Satellite Sys. Inc.*, 101 F.3d 346 (4th Cir. 1996)

9. Petitioner sought the same job with the same responsibilities which by repeated declarations, he is unable to perform, but desired different supervisors as a reasonable accommodation. The preponderance or greater weight of the evidence leaves the Undersigned to conclude that even an accommodation of a change of supervisors would not change Petitioner’s status to a qualified individual as Petitioner is unable to perform the essential functions of the job regardless of who his supervisors may be. (This Conclusion has been rewritten)

BASED ON the above Findings of Fact and Conclusions of Law, the Undersigned issues the following:

DECISION

Based on the forgoing Findings of Fact and Conclusions of Law and for the reasons set forth above, summary judgment is **ALLOWED**. The Undersigned hereby finds that Petitioner did not meet his burden of proof on his prima facie case of discrimination.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the final decision. In this matter the agency has previously adopted each and all findings of fact contained in the Administrative Law Judge's decision. The agency that will make the final decision in this matter is the North Carolina State Personnel Commission now titled the North Carolina State Human Resources Commission.

IT IS SO ORDERED.

This the 30th day of January, 2014.

Augustus B. Elkins II
Administrative Law Judge