NORTH CAROLINA

WAKE COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 OSP 08613

AZLEA HUBBARD, Petitioner, v . N. C. DEPARTMENT OF COMMERCE, DIVISION OF WORKFORCE SOLUTIONS Respondent.	)	**FINAL DECISION**

This contested case was heard before Temporary Administrative Law Judge Eugene J. Cella on October 21, 2013 in Goldsboro, NC, on November 29, 2013 in Raleigh, NC and on May 6 and 7, 2014 in Kinston, NC.

APPEARANCES

Petitioner *Pro Se*: Azlea Hubbard
Post Office Box 1225
Goldsboro, NC 27533

For Respondent: Terence D. Friedman
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Phone: (919) 716-5085
Facsimile: (919) 716-6708
E-mail: tfriedman@ncdoj.gov
N.C. Bar No.: 25088

WITNESSES

For Petitioner: Azlea Hubbard

For Respondent: David Applewhite
Diane Thomas
Patsy Jones
Lane Dyer
Lynette Wynn
Tamika Davis

Geneice Hagans
Sheila Williams
Janice Whitley

EXHIBITS

For Petitioner: Two e-mail submissions on May 7, 2014 (to be redacted to eliminate the identifying information of Claimant X)
One e-mail submission of May 8, 2014
Two e-mail submissions of May 12, 2014

For Respondent: Respondent's Exhibits 1 – 17.

ISSUES

1. Whether there was just cause to terminate Petitioner's employment?

2. Whether Respondent terminated Petitioner's employment in violation of the Whistleblower Act?

FINDINGS OF FACT

A. April 4, 2012 Incident

1. The parties acknowledged proper notice of the dates, times and places of the hearing.

2. As of April 2012, Petitioner Azlea Hubbard was a career State employee employed by the Division of Workforce Solutions ("DWS") of the North Carolina Department of Commerce ("Commerce") at the Wilson, NC office of DWS. At the Wilson office in 2012, DWS employees offered employment counseling to their unemployed clients and aided in taking unemployment insurance ("UI") claims from their clients.

3. DWS' witnesses testified that DWS offices were professional work environments without a history of employee disputes where employees were expected to be models of good behavior for the unemployed citizens who sought aid there and who were often in the midst of highly stressful personal circumstances.

4. Petitioner's co-workers Lynette Wynn, David Applewhite, Janice Whitley and Tamika Davis (who at the time used her married name, "Davis-Wilder") testified that Petitioner aggressively questioned, criticized and verbally bullied her co-workers while at the office. Over four days of hearing, and despite regular admonitions not to do so, the Court too observed Petitioner repeatedly attempt to aggressively interrupt witnesses and the Court itself.

5. On April 4, 2012, Davis picked up a telephone call from a UI claimant. She placed the caller on hold and went to see if her supervisor, Claims Manager Sheila Williams was available to help her answer the caller's question. Williams was on the phone with another

caller, so Davis went to her co-worker Wynn's offices to get an answer to the caller's question. Petitioner's co-workers testified that it was typical of employees at the Wilson office to seek the help of co-workers if they did not know the answer to a question that a caller had.

6. Petitioner testified that, some minutes later, she picked up at her own desk the telephone call that Davis had left on hold. Petitioner testified that she decided Davis had left the caller on hold for too long, so she got on the office intercom, reminded Petitioner she had a call pending and told her to return to her desk to pick it up. Petitioner was not Davis' manager. When Davis did not return to her cubicle to pick up the phone, Petitioner got on the intercom again and repeated her demand that she return to pick up the phone.

7. Wilson employees testified that they were discouraged from using the intercom during work hours. Wynn, Davis and Applewhite testified that Petitioner's tone of voice over the intercom the second time she called for Davis to return to her cubicle was noticeably annoyed.

8. Davis walked back to her cubicle after the second time Petitioner called her on the intercom and got back on the line to answer the caller's question. After doing so, she stood up and went to Petitioner's cubicle to tell her she was not Davis' boss and not to order her around again. Davis and Petitioner then began yelling at one another over the office cubicles. DWS clients who were present in the office observed the two women yelling. When they failed to stop arguing after a few minutes, Wynn asked the two women to move into the break room, which they did.

9. The two women continued arguing for a few minutes in the break room. Petitioner started to walk out of the room but turned around to face Davis. Petitioner stood in the doorway. Davis testified that there was only room enough for one person to get through the doorway, so Davis pushed past Petitioner. Petitioner testified that, after Davis had passed by her, Petitioner hit Davis on the back of her arm to "get her attention." The two women continued yelling at one another. Co-worker Applewhite then approached and separated the two women.

10. Wilson Office Manager Geneice Hagans and DWS Regional Manager Patsy Jones learned of the confrontation between Petitioner and Davis on the day it occurred while they were on the road. Jones asked Hagans to investigate the incident and recommend what course of action management should take.

11. When interviewed and later at trial, Petitioner admitted to her core conduct during the April 4 confrontation. She has asserted she was justified in getting on the intercom, in yelling at Davis and in hitting her, and she has disputed whether certain of her co-workers saw certain parts of the dispute, but she has not disputed that these same parts of the dispute occurred.

12. After obtaining the witness statements, Hagans forwarded the investigation results to Jones, along with a recommendation that both Davis and Petitioner be discharged. Jones testified that she reviewed the investigation with DWS Deputy Director of Employment Service Lane Dyer and also recommended that Davis and Petitioner be discharged. Dyer testified that he reviewed the investigation and also recommended that Davis and Petitioner be discharged to then-DWS Director of Employment Services Manfred Emmrich and a representative of the

Human Resources Department. Dyer later learned that Assistant Secretary of Commerce for DWS had approved of the termination.

13. On April 11, 2012, Hagans and Wilson Assistant Office Manager Diane Thomas advised Petitioner that she was being placed on investigatory placement with pay for Unacceptable Personal Conduct, specifically the April 4 confrontation with Davis. *See* Notice of Investigatory Placement, R. Ex. 3. On April 19, 2012, Commerce issued Petitioner her Notice of Predisciplinary Conference, again for Unacceptable Personal Conduct arising from the April 4 confrontation. *See* Notice, R. Ex. 3.

14. The Pre-disciplinary Conference was held on April 27, 2012, and on May 4, 2012, Commerce's terminated Petitioner's employment. *See* Termination Letter, R. Ex. 3. The Termination Letter specified that Petitioner's actions constituted Unacceptable Personal Conduct because Petitioner had engaged in conduct for which no reasonable person should expect to receive a prior warning and which was unbecoming of a State employee and detrimental to State service.

15. Commerce also terminated Davis' employment based on the April 4 confrontation.

B. Prior Incident Between Petitioner and Davis

16. Petitioner claims that her actions toward Davis on April 4, 2012 were either justified or else should not constitute just cause because of her version of a prior incident between her and Davis that occurred in late 2011.

17. One weekday morning, Davis arrived at work late at approximately 11 a.m. Davis entered the office building through the front door where DWS clients entered rather than through the side door which the employees usually used. The front door to the building itself opens into a front area which is separated from the rear area where the employees work by a partition.

18. Petitioner was in the middle of this partition between the front and rear area at the time Davis entered the front door to the building. Petitioner testified that she was standing there for the purpose of locating a DWS client who was waiting in the front area.

19. Petitioner testified that she then asked Davis about why she was entering through the front door and not through the side door that employees usually used. Petitioner admits that, when she asked this of Davis, she was standing squarely in the partition with her arm extended such that it was physically impossible for Davis to go around Petitioner and enter the rear area to get to her cubicle to begin work.

20. Davis testified that she asked Petitioner to move but that she refused to do so. Petitioner denied that Davis asked her to move but also admits she did not offer to move, even though she was blocking the way for Davis to get to her workspace. Davis testified that she then carefully moved Petitioner's hand so that she could enter through the partition. Petitioner, however, claimed that Davis violently moved her hand.

21. Petitioner went to Wilson Office Manager Hagans and reported Davis for allegedly assaulting her in violation of the Violence in the Workplace Policy ("Policy"). Commerce's Policy prohibits workplace violence, which includes but is not limited to "intimidation" and "physical attack." Respondent's Exhibit ("R. Ex.") 8 at 1. "Intimidation includes, but is not limited to, stalking or engaging in actions intended to frighten, coerce, or induce stress." *Id.* A "physical attack shall mean unwanted or hostile physical contact such a [sic] hitting, fighting, pushing, shoving, or throwing objects." *Id.*

22. Hagans interviewed Davis that same day and obtained her version of events. Hagans testified that she determined, in her discretion as manager, that the incident did not violate the Policy or need to be investigated further or reported to higher management because: (a) Petitioner was blocking the entranceway to the rear area and did not move so as to allow Petitioner to enter; and because (b) Hagans did not credit Petitioner's assertion that Davis had violently moved her hand.

23. Hagans' DWS superior Dyer testified that office managers such as Hagans had the discretion to interpret the Policy and determine whether further investigation of an alleged violation and a report to upper management were necessary.

24. From its unique perspective as factfinder at trial, and after observing the demeanor of Petitioner and Davis, the Court does not credit Petitioner's version of the manner in which Davis removed Petitioner's hand from the partition over that of Davis. Further, in light of this factual conclusion, the Court agrees with Hagans' determination that Davis did not violate the language or the obvious intent of the Policy.

C. Claimant X

25. Petitioner also claims that the true reason for her termination was not because of her April 4 confrontation with Davis but rather because Commerce allegedly retaliated against her for supposedly threatening to report her Wilson co-worker, Whitley, for improperly processing a UI claim filed by a woman who, for reasons of statutory confidentiality, the Court will refer to as "Claimant X."

26. Claimant X formerly worked in the Wilson office, although not directly for DWS' predecessor, the former Employment Security Commission. On March 19, 2012, Claimant X went to the Wilson office to file a UI claim after her employment was terminated by her former employer. Whitley testified that she was selected at random to take Claimant X's UI claim information. Petitioner did not witness the process of how Whitley was selected to take Claimant X's UI claim and could not offer more than speculation about this issue.

27. Claimant X informed Whitley that her employment had been terminated because of her "inability to perform" her job. Claimant X filled out paperwork using this phrase as well. R. Ex. 14 at 1. Whitley entered a computer code on the internal DWS UI system that corresponded Claimant X's asserted "inability to perform" her job. If it is ultimately found that a UI claimant was terminated for an "inability to perform" a job, the claimant will be entitled to UI benefits.

28. Petitioner claims that it was contrary to DWS policy for Whitley to enter "inability to perform" a job on behalf of a UI claimant such as Claimant X. Instead, Petitioner claims that the only instance in which a DWS employee could enter "inability to perform" a job as a code in a UI claim was if an employer stated that a UI claimant had been unable to perform a job from which the employer had terminated the claimant. Petitioner, however, offered nothing other than her own testimony in support of this allegation about what DWS policy was.

29. In contrast, Commerce offered its DWS policy, R. Ex. 6 at 2, which explicitly stated that DWS employees were required to enter the code for "inability to perform" a job if a UI claimant gave that reason or facts indicating that reason. Hagans testified, based on R. Ex. 16, that this Policy was still in effect. Additionally, witnesses Wynn, Applewhite, Williams, Hagans, Whitley and Davis testified that, in practice, DWS employees were required to enter the code for "inability to perform" a job if a UI claimant indicated such an inability. The Court therefore finds that Petitioner has not established by a preponderance of the evidence that there was anything impermissible about Whitley having entered the code for "inability to perform" the job on behalf of Claimant X.

30. Petitioner claimed that the result of Whitley entering the code for "inability to perform" the job on behalf of Claimant X was that Claimant X would automatically receive UI benefits. Nonetheless, the facts indicate that Claimant X did not automatically receive such benefits. On March 20, 2012, DWS sent Claimant X's former employer the opportunity to rebut Claimant X's UI claim, including the reason she gave for her termination. R. Ex. 14 at 2. The employer did so on March 28, 2012, stating facts asserting that Claimant X was discharged for a reason that would disqualify her from UI benefits and not for her inability to perform her job.

31. Because the employer disputed Claimant X's allegations, DWS procedure was to forward the paperwork for Claimant X to an Adjudicator located in Raleigh, NC. Wilson Claims Manager Williams did so on March 28, 2012 and, on March 31, 2012, Adjudicator Wanda Alexander determined that Claimant X was terminated but not for her own substantial fault. This determination qualified Claimant X for UI benefits but was a separate qualifying reason than the reason that Claimant X had asserted and that Whitley had entered, namely "inability to perform" her job. Claimant X did not qualify for or receive any UI benefits until **after** Adjudicator Alexander rendered her decision.

32. Petitioner testified that she reported Whitley's allegedly improper entry of the code for Claimant X to Thomas, who allegedly acknowledged to her that what Whitley had done was incorrect. Thomas testified that she does not recall this and that she would have kept notes of any such report by Petitioner if Petitioner had in fact made such a report to her.

33. Petitioner also claimed that she reported Whitley's allegedly improper entry of the code for Claimant X to Williams, who supposedly not only acknowledged that what Whitley had done was incorrect but also stated: "I'm not going down for this!" Williams, on the other hand, testified that Petitioner alleged to her that Whitley had improperly entered the code for Claimant X but that Williams informed Petitioner it was in fact permissible for Whitley to enter the code on Claimant X's behalf. Further, Williams roundly denied having acknowledged there was

anything impermissible about what Whitley had done, including having stated "I'm not going down for this!" or anything similar.

34. From its unique perspective as factfinder at trial, and after observing the demeanor of Petitioner and Williams, the Court does not credit Petitioner's allegation that Williams acknowledged there was anything improper about what Whitley had done or that she said anything similar to not being willing to go "down" for Whitley. This is particularly so given that Petitioner has not established that Whitley's very entry of the code for "inability to perform" the job was in fact contrary to DWS policy.

35. Williams denied speaking with Wilson Office Manager Hagans before Petitioner was terminated about Petitioner's allegations regarding Claimant X and Whitley. Petitioner admits she did not speak with Williams about the matter either. Hagans denied knowing anything about how Whitley had processed Claimant X's UI claim or about Petitioner's allegations regarding Claimant X and Whitley before Petitioner was terminated. Hagans also denied that she had any intent to retaliate against Petitioner for anything when she recommended that Petitioner be discharged for her April 4, 2012 confrontation with Davis.

36. Jones and Dyer testified that they were unaware of who Claimant X was at the time they recommended that Petitioner be discharged for her April 4 confrontation with Davis. They also testified that they were unaware that Petitioner had made any complaints about the processing of any UI claim by one of her co-workers and that they had no intent to retaliate against Petitioner for anything when they decided to terminate her.

37. Petitioner admits that she did not mention her allegations about Whitley and Claimant X to Hagans before being terminated. Petitioner did not contest her termination by filing her own UI claim, in which she could have asserted she was entitled to benefits because the true reason she was terminated was retaliation. Instead, the first time Petitioner raised her allegations regarding Claimant X and Whitley to Commerce in writing was when she filed the grievance of her termination. Hagans, Jones and Dyer all testified that the first time they learned that Petitioner disputed anything with regard to Claimant X was during the grievance process, after Petitioner had already been terminated.

38. Whitley testified she was unaware that Petitioner disputed how she had input the code regarding Claimant X's UI claim until after Petitioner had been terminated. She also denied having any input into the decision to terminate Petitioner. Thomas and Williams further denied having any input into the decision to terminate Petitioner. All three women denied having any intent or reason to retaliate against Petitioner.

39. Petitioner testified and questioned witnesses at enormous length about her theory that she had been terminated in retaliation for complaining about Whitley and how she processed Claimant X's claim. Petitioner asserted that: (a) Whitley, Thomas, Williams, and Hagans were all lying about what the policy on inputting codes for "inability to perform" the job was; (b) DWS had somehow fabricated or changed the written Policy on this issue; (c) the Adjudicator for Claimant X's claim had somehow been convinced to engage in the cover-up of Whitley's error; (d) Hagans, Jones and Dyer were lying about not having learned about Petitioner's assertions regarding Claimant X and Whitley before Petitioner was terminated; and (e) Hagans,

Jones and Dyer were lying when they testified they were not motivated to terminate Petitioner so as to retaliate against her.

40. Ultimately, however, Petitioner offered nothing other than her own speculation in support of any of her theories of retaliation. Moreover, as noted above, Petitioner failed to establish that Whitley's very entry of the code for "inability to perform" the job was in fact contrary to DWS policy. Nor did she establish that Claimant X benefited in any way from Whitley's entry of this code since Claimant X was not paid benefits based on this entry but, rather, the employer received the opportunity to contest Claimant X's determination, and the UI claim was ultimately determined by a third-party other than Whitley, Claimant X or the employer – namely, the Adjudicator – based on an entirely separate reason. It is simply not credible to the Court that the witnesses would go to the lengths Petitioner alleges to cover-up a transgression and retaliate against her when Petitioner was unable to establish that there had actually been any transgression at all.

CONCLUSIONS OF LAW

A. Just Cause Claim

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case per Chapters §§ 126 and 150B of the North Carolina General Statutes.

2. At the time of her discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C.G.S. § 126-1 et seq. Petitioner, therefore, could only "be warned, demoted, suspended or dismissed by" Respondent "for just cause." 25 NCAC 01J .0604(a). Commerce has the burden of proof to establish it had just cause to terminate Petitioner.

3. One of the two bases for "just cause" is "unacceptable personal conduct," 25 NCAC 01J .0604(b)(2), which includes "conduct for which no reasonable person should expect to receive prior warning" and "conduct unbecoming a state employee that is detrimental to state service." 25 NCAC 01J .0614(8)(a),(8)(d), and (8)(e).

4. The Termination Letter specified that Petitioner was being discharged for unacceptable personal conduct, specifically "conduct for which no reasonable person should expect to receive prior warning" and "conduct unbecoming a state employee that is detrimental to state service." 25 NCAC 01J .0614(8)(a),(8)(d), and (8)(e).

5. The Court concludes and affirms Commerce's decision that Petitioner's actions in the April 4, 2012 confrontation with Davis constituted conduct for which no reasonable person should expect to receive prior warning and, therefore, unacceptable personal conduct. Specifically, the Court finds that, as a matter of law, State employees do not need to be warned beforehand that they cannot yell at and hit their co-workers in the workplace. This is particularly so in a workplace such as DWS where the State's clients are vulnerable and the State's employees are expected to be models of stable behavior.

6. Additionally, the Court concludes and affirms Commerce's decision that Petitioner's actions in the April 4, 2012 confrontation with Davis constituted conduct which was unbecoming of a State employee and detrimental to State service and, therefore, unacceptable personal conduct. Again, this conclusion is buttressed by the circumstances of the DWS workplace in particular and the expectations of DWS employees there.

7. Further, as a matter of law, Petitioner's confrontation with Davis in late 2011 in the entranceway to the rear area of the office did not justify Petitioner in her later reaction to Davis on April 4, 2012. Nor did Commerce's application of the Policy to the 2011 confrontation create any legal reason to "raise the bar" or make more exacting the standard for what should constitute just cause in Petitioner's later termination.

B. Whistleblower Act Claim

8. The Whistleblower Act prohibits retaliation against a State employee for reporting the following acts: "(1) a violation of State or federal law, rule or regulation; (2) fraud; (3) misappropriation of State resources; (4) substantial and specific danger to the public health and safety; or (5) gross mismanagement, a gross waste of monies, or gross abuse of authority." N.C. Gen. Stat. § 126-84(a). Petitioner has the burden of proof to establish a violation of the Whistleblower Act.

9. Petitioner's Whistleblower Act claim first fails because she has not established that she in fact reported a violation of State or federal law, rule or regulation, fraud, misappropriation of state resources, or engaged in any of the other protected activities listed under N.C. Gen. Stat. § 126-84(a). As noted above, Petitioner has failed to establish that it was even contrary to DWS rules for Whitley to enter the code for "inability to complete" the job for Claimant X. Thus, Petitioner cannot show that she actually engaged in protected, Whistleblowing activity.

10. Even assuming for the sake of argument that Petitioner had engaged in any such activity, she could not show any causal connection between her protected activity and her termination. In interpreting the Whistleblower Act, North Carolina courts apply federal standards of proof. To show causation, a retaliation claimant must establish, at a minimum, that the relevant decisionmakers had knowledge of the protected activity. *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991); *Gibson v. Old Town Trolley Tours*, 160 F.3d 177, 182 (1998). Here, Petitioner has not established that the actual decisionmakers in her termination – Hagans, Jones and Dyer – even knew of her protected activity (namely her assertion that Whitley had used the wrong code as to Claimant X) at the time she was terminated.

11. Finally, Petitioner's Whistleblower Act claim fails because she has not presented any (let alone a preponderance of) direct evidence of retaliatory intent on the part of the actual decisionmakers or indirect evidence that their explanations for recommending her termination – Petitioner's admitted participation in the events of April 4, 2012 – were a pretext for retaliation.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of N.C. Gen. Stat. § 150B-45, any party wishing to appeal the decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the County where the person aggrieved by the Administrative Decision resides or, in the case of a person residing outside the State, the County where the Contested Case which resulted in the Final Decision was filed. **The appealing party must file the Petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings rule 26 N.C. Admin. Code 03.0102 and the Rules of Civil Procedure, N.C. Gen. Stat. 1A-1, Article 2, **this Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This, the 19th day of May 2014.

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Eugene J. Cella
Temporary Administrative Law Judge