

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13OSP09565

<p>KIMBERLY D HINTON, Petitioner,</p> <p>v.</p> <p>NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Respondent.</p>	<p>FINAL DECISION ORDER OF DISMISSAL</p>
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This Cause coming on to be heard and being heard by the undersigned Administrative Law Judge on Respondent's Motion to Dismiss Petitioner's Petition for lack of subject matter jurisdiction and failure to state a claim and for good cause shown, the Undersigned hereby **GRANTS** Respondent's Motion as follows:

FINDINGS OF FACT

1. On February 27, 2013, Petitioner filed a Petition for a contested case hearing with the Office of Administrative Hearings ("OAH").
2. The Petition alleges the appeal is based on: a) a grievance appeal, b) unlawful state employment practice, c) retaliation and harassment in the workplace, and d) violation of Fair Labor Standards Act. She further alleges discrimination based on race, color, sex, and national origin.
3. Previously on June 22, 2011, Petitioner filed a Petition against Respondent, case number 11 OSP 08493, for a contested case based on race discrimination and discrimination due to a handicapping condition. Respondent filed a Motion to Dismiss. Administrative Law Judge Joe Webster granted Respondent's Motion and dismissed the case with prejudice in November 2011.
4. Previously on April 30, 2012, Petitioner filed a Petition against Respondent, case number 12 OSP 02848, for a contested case based on disciplinary action, harassment, and retaliation. She also alleged discrimination based on race, color, sex, and national origin.
5. On or about June 29, 2012, Respondent filed a Motion to Dismiss the April 30, 2012, Petition along with supporting affidavits.

6. On July 31, 2012, the parties had a hearing on Respondent's Motion to Dismiss in case 12 OSP 02848 before Administrative Law Judge Joe Webster.
7. On October 5, 2012, ALJ Webster issued an Order of Dismissal in 12 OSP 02848 granting Respondent's Motion to Dismiss Petitioner's April 30, 2012 Petition-- specifically Petitioner's harassment, retaliation, and discrimination claims--with prejudice. He also ordered dismissal of Petitioner's remaining claim that her request to remove alleged inaccurate and misleading information [December 13, 2011 written warning] was erroneously denied by DOT.
8. Petitioner tried to appeal Judge Webster's Order of Dismissal in 12 OSP 02848, dated October 5, 2012, by filing a Petition for Judicial Review in Wake County Superior Court. Respondent subsequently filed a Motion to Dismiss. After a hearing on the Motion, Wake County Superior Court Judge William R. Pittman granted Respondent's Motion and issued an Order dismissing the petition with prejudice, file number 12 CVS 17451.
9. On October 5, 2012, Petitioner received a written warning for unacceptable personal conduct. She internally appealed the written warning based on inaccurate and misleading information. According to DOT policy and procedures, Petitioner had a hearing before a five member panel, all DOT employees. The panel's findings and recommendation were forwarded to the Secretary for DOT, Anthony Tata. Secretary Tata concurred with the committee that there was no evidence that the October 5, 2012 written warning contained inaccurate or misleading information, and management issued the warning in accordance with pertinent policies and procedures.
10. A final agency decision, dated January 28, 2013, was sent via certified mail to Petitioner and included appeal rights, specifically directions for filing a Petition. Petitioner received the certified letter on January 31, 2013.
11. Petitioner has failed to show that the October 5, 2012 written warning contained inaccurate or misleading information.
12. Petitioner did not receive a November 18, 2012 written warning as alleged in her Petition.
13. On December 18, 2012, Petitioner received a written warning for unacceptable personal conduct. She internally appealed the written warning based on inaccurate and misleading information. According to DOT policy and procedures, Petitioner had a hearing before a five member panel, all DOT employees. The panel's findings and recommendation were forwarded to the Secretary for DOT, Anthony Tata. Secretary Tata concurred with the committee that there was no evidence that the December 18, 2012 written warning contained inaccurate or misleading information, and management issued the warning in accordance with pertinent policies and procedures.
14. A final agency decision, dated April 18, 2013, was sent via certified mail to Petitioner and included appeal rights, specifically directions for filing a petition. Petitioner received the certified letter on or around April 18, 2013.

15. Petitioner did not file a Petition at OAH concerning her December 18, 2012 written warning, and her time for doing so has expired.
16. Petitioner's allegations concerning Respondent's internal grievance process and Respondent's timeliness in responding to her internal complaints do not establish an unlawful state employment practice.
17. In or around late November 2012, a DOT employee in the Project Development and Environmental Analysis ("PDEA") unit filed an Unlawful Workplace Harassment complaint against Petitioner.
18. Petitioner no longer works in the PDEA unit within NCDOT.
19. Effective March 2013, Petitioner was transferred to another division within NCDOT, Transportation Mobility, and now reports to Joel Cranford, Municipal and School Transportation Assistance Engineer.
20. On or about October 25, 2012, Petitioner internally submitted a Workplace Violence Incident Report alleging bullying and retaliation by PDEA management.
21. Her complaint was forwarded to Employee Relations Representative John Eley for investigation. Mr. Eley met with Petitioner on October 30, 2012.
22. The investigation showed that Petitioner failed to present evidence substantiating her allegations. Ultimately, Petitioner failed to establish a violation of the workplace violence policy, and the matter was administratively closed within NCDOT.
23. A letter dated December 17, 2012, reflecting the results of the investigation was sent via certified mail and first class to Petitioner.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings and received proper notice of the hearing in this matter.
2. This contested case is subject to dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and (6) of the Rules of Civil Procedure and 26 NCAC 3.0105 and .0115.
3. Petitioner's allegations fail to state an actionable claim under N.C. Gen. Stat. § 126-34.1 which delineates the actions which may be the basis for filing a contested case by a State employee.
4. By failing to state sufficient facts in her petition, Petitioner failed to state a claim upon which relief can be granted.

5. N.C. Gen. Stat. § 126-38 establishes the time for filing a petition for a contested case hearing and states: “Any employee appealing any decision or action shall file a petition for a contested case with the [OAH] as provided in G.S. 150B-23(a) no later than 30 days after receipt of notice of the decision or action which triggers the right of appeal.”
6. The doctrine of res judicata prevents the current action which is based on the same cause of action between the same parties in 12 OSP 2848.
7. No matter how meritorious the claim, if a petition is not filed within the applicable time limitation, the Office of Administrative Hearings does not have subject matter jurisdiction over the matter.
8. Petitioner fails to allege an unlawful State employment practice as required by N.C. Gen. Stat. 126-34.1 and 126-36.
9. Petitioner’s allegations of harassment and/or retaliation are not based on hostile work environment or quid pro quo pursuant to N.C. Gen. Stat. 126-34.1 and 126-36; and her allegations do not comply with N.C. Gen. Stat. 126-34 as a prerequisite.
10. Petitioner fails to allege a violation of the Fair Labor Standards Act.
11. The burden of production in a discrimination case has been articulated by the North Carolina Supreme Court as follows:
 - (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 action taken by the employer.
 - (3) If a legitimate nondiscriminatory reason [...] has been articulated, the claimant has the opportunity to show that the stated reason for the action taken was, in fact, a pretext for discrimination.

North Carolina Dep’t of Correction v. Gibson, 308 N.C. 131, 137, 301 S.E.2d 78, 82 (1983). The ultimate burden of proving illegal discrimination in the action lies with the Petitioner or complainant. *Id.* at 138, 301 S.E.2d at 83.

12. Petitioner failed to establish a *prima facie* case of discrimination.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby DISMISSES this contested case petition with prejudice.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **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. General Statute 1A-1, Article 2, **this Final 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.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. 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 6th day of October, 2013.

Beecher R. Gray
Administrative Law Judge