

STATE OF NORTH CAROLINA
COUNTY OF MOORE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13OSP15267

LINDA G GRIFFIN PETITIONER, V. NC DPS HOKE CORR RESPONDENT.	FINAL DECISION
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This contested case was heard before the Honorable J. Randall May, Administrative Law Judge, on December 13, 2013, at the High Point Courthouse, High Point, North Carolina.

APPEARANCES

For Petitioner: Evelyn M. Savage, Esq.
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For Respondent: Yvonne B. Ricci
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ISSUE

1. Whether Respondent violated Petitioner's rights in the terms and conditions of Petitioner's employment by its response to Petitioner's request for a reasonable accommodation?

WITNESSES

Petitioner, Linda G. Griffin, (hereinafter "Petitioner" or "Ms. Griffin"), presented testimony from the following four witnesses: Ms. Griffin; Lynn Summers, Superintendent at Hoke Correctional Institution (hereinafter "Hoke"); Brian Murray, a North Carolina Department of Public Safety ADA Compliance Officer; and Tammy Lockamy, Nurse Supervisor at Hoke.

Respondent, North Carolina Department of Public Safety (hereinafter "Respondent" or "NCDPS"), presented testimony from Gary Crutchfield, Assistant Superintendent for Programs at Hoke.

EXHIBITS

Petitioner's exhibits ("P. Exs.") 1 - 20, 25, and 26 were admitted into evidence.

Respondent's exhibits ("R. Exs.") 1 - 10 were admitted into evidence.

RULING AT CLOSE OF PETITIONER'S CASE

At the close of Petitioner's case, the undersigned denied Respondent's argument for a directed verdict.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following Findings of Fact. In making the Findings of Fact, the undersigned has weighed all the evidence, or lack thereof, 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 interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. The parties are properly before the Office of Administrative Hearings on a Petition pursuant to Chapter 126 of the General Statutes, and the Office of Administrative Hearings has jurisdiction over both the parties and the subject matter as such.

2. The petitioner, Linda G. Griffin, is a registered nurse employed at Hoke, a prison facility in the NCDPS. Petitioner testified that Hoke has a central nursing station located on the second floor in the central unit of the facility and a north unit located in a separate building from the main facility on the first floor where unstable, chronic-disease, inmates are housed. (Transcript ("T.") T. p. 21)

3. Petitioner filed this contested case at the Office of Administrative Hearings on July 12, 2013. In her contested case petition, Petitioner alleged that Respondent, through the various actions of its employees, did suspend her without just cause; failed to follow its American with Disabilities Act ("ADA"), Family Medical Leave Act ("FMLA"), and Voluntary Shared Leave ("VSL") policies; and unlawfully discriminated against her because of her handicapping condition. (Petition (4) and (5))

4. Hoke's Correctional Administrator Lynn Summers testified that Hoke is a minimum custody, 622-bed facility with a primary mission to provide medical health services and administrative personnel actions. (T. p. 65)

5. Petitioner testified that she had surgery on her knee in November 2010 and returned to work in March 2011 with restrictions to avoid stair-climbing and to wear a knee brace for one month. Petitioner further testified that she had no problems performing her job

duties, including responding to emergencies, from March 2011 until October 2012 as she would use the elevator when she was assigned to the central unit on the second floor of the facility. (T. pp. 23-24)

6. Sometime in October 2012 the elevator at the facility was not working and Petitioner would at times be assigned to work the north unit located in a separate building from the main facility on the first floor. (T. pp. 24-25)

7. On November 7, 2013, Tammy Lockamy, the nurse supervisor at Hoke, talked with Petitioner who told Ms. Lockamy that the elevator was not working and that she could not walk up the steps in the facility. Ms. Lockamy told Petitioner to report to the north unit, and then Ms. Lockamy contacted the facility Administrator Lynn Summers to inquire what should be done in response to Petitioner saying she was unable to climb the stairs. (T. pp. 109-111)

8. Petitioner admitted that she recalled telling Lead Nurse McLauren on November 7, 2012, that the elevator was not working, that she would be unable to climb the stairs, and inquired what should she do. (T. p. 48)

9. Mr. Summers notified Petitioner by letter dated November 7, 2012, that since she had indicated to Hoke nursing staff that she was unable to climb stairs to the central unit medical area and requested assignment to the north unit medical area, she was instructed to obtain a completed set of essential job functions from her physician prior to returning to work at Hoke. Mr. Summers' direction to Petitioner to provide a completed essential job function form from her physician was because she had to be able to respond to emergencies as a Hoke staff nurse anywhere within the building and her job responsibilities require at least sporadic visits to the upstairs area. (P. Ex. 1)

10. On November 8, 2012, Petitioner provided Hoke staff with a nurse's essential job functions form completed by her then treating physician, Dr. Brenner. (T. pp. 48-49; P. Ex. 2)

11. While Dr. Brenner checked the box on the last page of the nurse's essential job functions form that Petitioner was able to perform all the essential job functions as listed, he did add the comment "avoid stair climbing" for essential function number 8 and "avoid climbing stairs" for essential function number 17. Additionally, while Dr. Brenner indicated that Petitioner could perform all the essential job functions, he still checked the boxes on the last page of the form that Petitioner had both permanent and temporary restrictions under the section indicating that the employee is unable to perform an indicated essential function. (P. Ex. 2)

12. While Mr. Summers acknowledged that Hoke experienced trouble with its elevator in October 2012, he would contact the maintenance section so arrangements could be made to have a contractor complete the repairs in a timely manner. Mr. Summers further testified that given the makeup of Hoke's nursing staff, a nurse cannot be permanently assigned to the north unit on the first floor and that there would be times that the elevator could not be used, even if operational, such as if electrical power is lost or in the case of a fire. (T. pp. 65, 71, and 81)

13. Brian Murray, Personnel Analyst III serving as an ADA Compliance Officer, testified that his duties and responsibilities include reviewing, approving, and consulting in relation to Respondent's employees' requests for reasonable accommodation. Mr. Murray advised Hoke staff by e-mail transmission on January 30, 2013, that since there are days that Petitioner would be the only nurse on duty at Hoke, that Petitioner would be required to respond to an emergency with no guarantee of the elevator being operational. Petitioner had to be able to respond to an emergency at Hoke in an emergency with or without the use of an elevator. (T. pp. 88, 100-101)

14. Mr. Murray indicated that if an employee is directed by its physician to avoid stairs, and the employee requests to be assigned to a first floor location on days when the elevator is not work working, assuming the employee is a qualified individual with a disability, this would be a reasonable accommodation. However, he clarified his testimony to explain that if Petitioner was to have been determined to be a qualified individual with a disability that she could not have been allowed to permanently indicate that she could never climb stairs. (T. pp. 104-105)

15. Mr. Summers testified that Petitioner has not been separated from her employment with NCDPS, and denied that his letter dated January 7, 2013 to Petitioner was intended to be a "threat" to Petitioner's employment with NCDPS. Mr. Summers indicated that his January 7, 2013, letter was a standard letter that is sent to an employee to clarify employment status. Mr. Summers further testified that Petitioner remains out of work since December 20, 2012, due to a medical condition related to stress that has prevented her from being able to perform all of her essential job functions. (T. pp. 72-73, and 118; R. Ex. 1; P. Ex. 7.) Mr. Summers further testified that he sent a letter dated December 17, 2012, to Petitioner in an attempt to explain her current employment status, her request for a reasonable accommodation, and address her inability to perform her essential job functions in relation to the ADA. (T. p. 74; P. Ex. 6)

16. Mr. Summers explained that his letter to Petitioner dated December 17, 2012, was sent as an attempt to explain that since she could not perform all the essential job functions of a nurse that she needed to either request an accommodation or take leave until such time that she could perform all the essential job functions. Mr. Summers further testified that he determined that Petitioner could not perform her essential job functions based on Petitioner telling him and Ms. Lockamy that she could not climb stairs in November 2012. (T. p. 74, P. Ex. 6)

17. Mr. Gary Crutchfield, Hoke's Assistant Superintendent for Programs, testified he did not intend for his December 14, 2012, e-mail to Petitioner to be a threat to end her employment with NCDPS. Mr. Crutchfield indicated that this e-mail was related to Petitioner's request to take vacation leave on December 24 - 25, 2012. (T. pp. 114-115; P. Ex. 5)

18. Petitioner admitted that she was on the schedule and worked at various times at Hoke from November 7 through December 16, 2012. (T. p. 47)

19. Petitioner testified that she went to be examined by Dr. Kathleen Letizia on December 20, 2012, and had Dr. Letizia complete a certification form for the Family and Medical Leave Act ("FMLA") that indicated that she was unable to perform all her essential job

functions with the condition commencing on December 20, 2012; and the period of incapacity continuing until the middle or end of February 2013. Petitioner submitted this form to Respondent. (T. pp. 51-53; R. Ex. 1)

20. Petitioner acknowledged that she provided Respondent with a note from Dr. Letizia that indicated she was under Dr. Letizia's care and unable to return to work from February 13, 2013 until the present with the noted dated April 2, 2013. (T. p. 54; R. Ex. 2)

21. Petitioner acknowledged that she provided Respondent with a note from Dr. Letizia that indicated she was under Dr. Letizia's care and unable to return to work from May 29, 2013 until July 17, 2013. (T. p. 55; R. Ex. 3)

22. Mr. Summers testified that his staff has received from Petitioner a series of doctor's notes indicating that Petitioner was unable to report to work from December 20, 2012 until July 17, 2013. He instructed his administrative staff to contact Petitioner instructing her to provide further medical documentation, and that at the time of this hearing, Hoke has never received any further medical notes or documentation from Petitioner. (T. p. 73; R. Exs. 1-4)

23. Mr. Summers testified that he believed that Petitioner could return to work related to her knee injury, because on April 17, 2013, Petitioner agreed that she could and would respond to an emergency by climbing stairs if no other options existed. Mr. Summers instructed her to provide a completed essential job functions form from the physician treating her for stress. (T. pp. 76-77; R. Ex. 5)

24. Petitioner acknowledged that she received an e-mail from Cindy Walkup at Hoke, dated August 23, 2013, that indicated Ms. Walkup still had not received a doctor's note taking Petitioner out of work after July 17, 2013, and requesting that Petitioner provide this documentation to the facility. (T. p. 56; R. Ex. 4) While Petitioner testified that she provided the requested documentation in response to this e-mail, she admitted that as of the date of that e-mail, she still was not capable of returning to work. (T. p. 57)

25. Petitioner testified that she recently went to her physician to obtain certification that she could return to work. Petitioner further testified that at this point she is ready and willing to return to work. Petitioner obtained a note from Dr. Letizia dated December 10, 2013, indicating that Petitioner is now ready to return to work with an attached nurse's essential job functions form certifying that Petitioner is able to perform all the essential functions as listed, that is dated December 11, 2013. (T. pp. 45-46; P. Ex. 20) Mr. Summers testified that had he been provided this note from Dr. Letizia indicating that Petitioner was able to perform all her essential job functions earlier than December 2013, then she would have been placed back on the work schedule at Hoke. (T. p. 118)

26. Petitioner admitted that Dr. Letizia's note indicates that she was not capable of performing all her essential job functions until December 10, 2013. (T. p. 61; P. Ex. 20)

27. While Petitioner's request for a reasonable accommodation that was reviewed and processed by Mr. Murray was dated January 22, 2013, Mr. Murray testified that his office did not receive this request for a reasonable accommodation from Petitioner until June 10, 2013.

Petitioner requested that she be assigned to the first floor duty station on days when the elevator was not functioning properly. Mr. Murray testified that Petitioner's request was closed because at the time his office received the request, Petitioner was out of work through July 17, 2013 because of her physician's note. (T. p. 89, 94; R. Ex. 7)

28. Mr. Murray testified that Petitioner's request was not specifically addressed by his office because when an employee is out of work and unable to return, his office waits until new restrictions are presented or new medical document is presented, because the need for the accommodation could be irrelevant after she was released from her doctor's care on July 17, 2013. There is no need to make a determination on the request of an employee that is unable to report to work. Further, he could not process Petitioner's request for an accommodation since she presented unable to perform all the essential job functions of a nurse with or without a reasonable accommodation because of depression that was being treated by Dr. Letizia. (T. p. 90-92; R. Ex. 1; R. Ex. 8)

29. Mr. Murray indicated that his decision not to further process Petitioner's request for a reasonable accommodation reflected in his June 11, 2013 letter, written and sent by certified mail to Petitioner, was based on the medical note from Dr. Letizia indicating that Petitioner was unable to return to work with or without a reasonable accommodation. (T. pp. 92-93; P. Ex. 26)

30. While Mr. Murray's response to Petitioner dated June 11, 2013 was from a request dated January 22, 2013, he testified that he responded to Petitioner's request for a reasonable accommodation within thirty days of when he received Petitioner's request and medical documentation, consistent with NCDPS's Human Resources ADA Act policy. (T. p. 93; R. Ex. 8)

31. Mr. Murray indicated that even if he had received Petitioner's request for a reasonable accommodation on January 23, 2013, based on the evidence available at that time and the then available medical documentation and notes, his response to Petitioner's request would not have been different because she still would not have met the definition of a qualified person with a disability since she had submitted a note indicating she was unable to return to work and could not perform all her essential job functions with or without a reasonable accommodation. (T. pp. 94-95; R. Ex. 8; P. Ex. 12)

32. Mr. Murray indicated that the essential job functions provided to NCDPS by Petitioner created confusion as to whether or not Petitioner could perform all her essential job functions, because Dr. Brenner checked boxes on the form that Petitioner had both permanent and temporary restrictions until surgery. This documentation as presented would not have been clear enough for him to properly review and assess Petitioner's request for a reasonable accommodation. Based on the medical documentation that Mr. Murray had at the time he made his decision, he could not further process or temporarily accommodate Petitioner's request based on the note indicating she could not return to work with or without a reasonable accommodation. (T. p. 92, 96, and 99; R. Ex. 1; P. Ex. 2; P. Ex. 26)

33. Limited to a consideration of the essential job functions form completed by Dr. Brenner on November 8, 2012, Mr. Murray did not have sufficient medical documentation that would have allowed him to determine whether or not Petitioner was a qualified individual with a disability in accordance with NCDPS's ADA policy, based on Dr. Brenner's comments that Petitioner should avoid steps. (T. pp. 94-97; 102; P. Ex. 2)

34. Mr. Summers testified that a letter, dated April 16, 2013 and addressed to Dr. Brenner, shows his attempt to seek clarification from Dr. Brenner regarding the comments he made on the essential job functions that he completed for Petitioner on November 8, 2012. Mr. Summers did not receive a response to this letter. (T. pp. 116-117; R. Ex. 9)

35. Mr. Summers testified that as of the hearing of this matter, Petitioner has been properly credited with all appropriate FMLA leave in Respondent's Beacon electronic timekeeping system and that any administrative oversight did not affect Petitioner's pay. (T. pp. 78-79; R. Ex. 6) Mr. Summers further testified that Petitioner was allowed participation in, and was awarded, voluntary shared leave credit. (T. p. 117; R. Ex. 10; P. Ex. 19)

36. Petitioner admitted that she has not received a letter from Respondent indicating that she has been separated from her employment with Respondent. (T. p. 63)

37. Upon receipt of Mr. Murray's letter dated June 11, 2013, notifying Petitioner that since her medical provider indicated she was unable to return to work at that time and that his office would not further process her request for a reasonable accommodation, Petitioner filed this appeal with the Office of Administrative Hearings.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case per Chapter § 126 and § 150B of the North Carolina General Statutes. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. Petitioner is a career State employee subject to the provisions of the State Personnel Act, N.C. Gen. Stat. § 126-1 *et. seq.*

3. Chapter 126 of the North Carolina General Statutes provides the rights and remedies available to Petitioner for contested case petitions. Specifically, for petitions filed prior to August 21, 2013, a State employee has a remedy under state law and therefore a right to file a petition for a contested case hearing before the Office of Administrative Hearings where s/he could allege the following claims:

An alleged unlawful State employment practice constituting discrimination . . . including: [d]emotion, reduction in force, or termination of an employee in retaliation for the employee's opposition to alleged discrimination on account of the employee's age, sex, race, color, national origin, religion, creed, political

affiliation, or handicapping condition as defined by Chapter 168A of the General Statutes.

Violation of . . . the following federal statutes as applied to the employee:

...

- d. The Americans with Disabilities Act, 29 U.S.C. § 2601, *et. seq.*

N.C. Gen. Stat. §§ 126-34.1(a)(2)b and 126-34.1(a)(11) (2012). (Now repealed)

Request for an Accommodation Claim - The Americans with Disabilities Act

State Law

4. Under the North Carolina Persons with Disabilities Protection Act, a “person with a disability” means any person who:

- (i) has a physical or mental impairment which substantially limits one or more major life activities;
- (ii) has a record of such an impairment; or
- (iii) is regarded as having such an impairment.

N.C. Gen. Stat. § 168A-3(7a) (2013). The term “physical or mental impairment” in this subdivision excludes: “(A) sexual preferences; (B) active alcoholism or drug addiction or abuse; and (C) any disorder, condition or disfigurement which is temporary in nature, lasting six months or fewer, and leaving no residual impairment.” N.C. Gen. Stat. § 168A-3(7a)(a.) (2013). The term “major life activities” is defined as, functions such as “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, eating, sleeping, lifting, bending, standing, breathing, learning, reading, concentrating, thinking, communicating, and working. N.C. Gen. Stat. § 168A-3(7a)(b.) (2013) The term “qualified person with a disability” is defined as “a person with a disability who can satisfactorily perform the duties of the job in question, with or without reasonable accommodation, (i) provided that the person with a disability shall not be held to standards of performance different from other employees similarly employed, and (ii) further provided that the disabling condition does not create an unreasonable risk to the safety or health of the person with a disability, other employees, the employer's customers, or the public; . . .”

5. The Supreme Court of North Carolina narrowly defined disability in the context of Chapter 168A as a “present, non-correctible loss of function which substantially impairs a person’s ability to function normally.” *Burgess v. Joseph Schlitz Brewing Co.*, 298 NC. 520, 528, 259 S.E. 2d 248, 253 (1979).

6. In this case, Petitioner failed to prove by a preponderance of the evidence that she had a present, non-correctible loss of function, and thus, failed to show that she is a handicapped person under Chapter 168A of the North Carolina General Statutes. Petitioner did not present any competent medical evidence or testimony to support her assertion that she was diagnosed and treated for a knee injury and/or depression and anxiety. Further, Petitioner failed to show

that at the time the Respondent evaluated and provided a response to her request for a reasonable accommodation that she was a “qualified person with a disability” as defined by NC law.

Federal Law

7. The American with Disabilities Act Amendments Act of 2008 (“the new Act”) makes changes to the definition of the term “disability.” The new Act emphasizes the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA. The new Act became effective as of January 1, 2009.

8. The ADA requires that in order to be disabled, a person must have:

- A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- B) a record of such impairment; or
- C) being regarded as having such an impairment (as described in paragraph (3)).

42 U.S.C.S. § 12102(1).

9. Major life activities for the purpose of ADA include:

- A) caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- B) the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

42 U.S.C.S. § 12102(2).

10. In *Bryant v. Better Business Bureau of Maryland*, the Court established that a plaintiff bears the burden of proof on the issue of reasonable accommodation under the ADA and a *prima facie* case, consists of the following elements: “(1) that the plaintiff is disabled under the ADA, (2) that the plaintiff is qualified to perform the essential functions of the job in question with a reasonable accommodation, (3) that such a reasonable accommodation exists, (4) that the defendant was aware of the plaintiff’s need and desire for the accommodation, and (5) the defendant refused to provide any reasonable accommodation.” *Bryant v. Better Business Bureau of Maryland*, 923 F. Supp. 720, 733, 737-38 (D. Md. 1996).

11. Petitioner is required to demonstrate, as part of his *prima facie* case, that an accommodation of his disability exists and that such accommodation is reasonable. *Riel v. Electronic Data Sys. Corp.*, 99 F.3d 678, 683 (5th Cir. 1996). Further, the Petitioner must be

able to perform the essential functions of the job, with or without reasonable accommodation. *Giles v. General Elec. Co.*, 245 F.3d 474, 11 AD Cases 1242 (5th Cir. 2001).

12. In this case, Petitioner failed to prove by a preponderance of the evidence that she was a “qualified individual with a disability,” as she did not present evidence to the Respondent at the time her request for accommodation was made that she was capable of returning to work with a reasonable accommodation and thus, failed to present a claim under the ADA. As a result, Petitioner is not within the ADA’s protected class.

13. Based on the foregoing, Petitioner has failed to prove by a preponderance of the evidence that Respondent discriminated against her based on a handicapping condition.

14. On the basis of the above-noted Findings of Fact and Conclusions of Law, the undersigned makes the following:

FINAL DECISION

Respondent articulated by the greater weight of the evidence, legitimate, non-discriminatory reasons for its decision not to further process Petitioner’s request for a reasonable accommodation since Petitioner, at the time of Respondent’s decision, was unable to return to work. Additionally, Petitioner has not met her burden of proof showing that Respondent discriminated against her based on a disability or being regarded as having a disability. Accordingly, Petitioner failed to prove racial discrimination or harassment based on a disability or being regarded as having a disability; and, therefore, Respondent’s decision is **AFFIRMED**.

NOTICE

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

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 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. 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 30th day of January, 2014.

J. Randall May
Administrative Law Judge