

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 19639

JOSEPHINE KEKE,)
 Petitioner,)
)
 v.)
)
NORTH CAROLINA)
DEPARTMENT OF)
HEALTH AND HUMAN)
SERVICES,)
 Respondent.)

FINAL DECISION

This case was heard before the undersigned Administrative Law Judge Craig Croom on February 24, 2014 at the North Carolina Office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

Michael C. Byrne
Law Office of Michael C. Byrne
150 Fayetteville Street, Suite 1130
Raleigh, NC 27601
Attorney for Petitioner

Adam Shestak
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602
Attorney for Respondent

WITNESSES FOR RESPONDENT

Malecha Collins
Karen Couch

WITNESSES FOR PETITIONER

Stanley Oyenabo

Christina Okafor
Josephine Keke

ISSUE

Whether Respondent had just cause to separate Petitioner from employment with Respondent on the alleged grounds that Petitioner voluntarily resigned by failing to report to work as scheduled over a period of three days without notifying her employer of her absence?

PROCEDURAL HISTORY

The Court granted Petitioner's request to sequester witnesses barring a representative for each side.

FINDINGS OF FACT

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 Administrative Law Judge (ALJ) makes the following Findings of Fact. In making these findings of fact, the ALJ 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 witnesses, 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.

1. Petitioner Josephine Keke is a career status employee, pursuant to N.C. Gen. Stat. § 126-1.1, of the Respondent North Carolina Department of Health and Human Services in a position subject to the North Carolina Human Resources Act.
2. Petitioner was at all relevant times a Technical Support Specialist at Respondent's Central Regional Hospital.
3. No evidence was presented as to a history of absenteeism on the part of the Petitioner barring the specific time frame of this case.
4. On September 9, 2013, Petitioner followed the Respondent's requirement of calling in to a designated contact, Ms. Malecha Collins, that she was out with a back injury. Per policy, any absences beyond one day shall be addressed by Petitioner's supervisor, Karen Couch.
5. Ms. Couch generally worked a Monday to Friday work schedule. Stanley Oyenabo, a registered nurse on the unit, delivered several pages of paperwork to the unit from Petitioner. In this paperwork, Petitioner requested Family and Medical Leave Act

(hereinafter FMLA) leave from September 9-September 23, 2013 because of her back injury. Petitioner's FMLA leave balance was not exhausted.

6. The FMLA form contained a certification from a medical provider, but the provider failed to fill out the contact section with his or her contact information. Petitioner, at the time the paperwork was submitted, was unaware of this missing information.
7. Mr. Oyenabo delivered the FMLA paperwork to Angie Boss, Ms. Couch's supervisor. He stated that Ms. Boss indicated she would take care of forwarding the paperwork to Ms. Couch.
8. Petitioner temporarily resided with her daughter in Shallotte, North Carolina, where she was being taken care of by her daughter. Ms. Couch had Petitioner's cell phone number. Petitioner received no calls from Ms. Couch. Ms. Couch did try to call Petitioner, but could not recall what number she called. No proof that such calls were made, such as phone records, was submitted in evidence.
9. Ms. Couch sent Petitioner a letter dated September 17th directing Petitioner to contact the hospital. Petitioner learned of this letter some days afterward and sent a colleague, Ms. Christina Okafor, to the hospital on her behalf. Petitioner said she sent colleagues because on a previous experience when she was out sick Ms. Couch had not returned her call.
10. Ms. Okafor spoke with Ms. Boss. Ms. Boss confirmed that she had received Petitioner's FMLA paperwork. She did not indicate to Ms. Okafor that there was any deficiency in the paperwork.
11. Ms. Couch considered Petitioner's FMLA request "invalid" because it was "incomplete," since the provider contact section was blank. Ms. Couch stated she sent the September 17th letter to alert Petitioner of this FMLA issue. However, the September 17th letter makes no reference to defective FMLA paperwork and does not reference FMLA at all.
12. Some days later, Ms. Couch sent another letter to Petitioner saying Petitioner was being separated for failing to report to work. This letter also made no reference to defective FMLA paperwork. Petitioner received this letter while on three weeks of vacation leave, previously approved by Ms. Couch, following her FMLA leave.
13. Petitioner came to the hospital in response to this letter and spoke to Ms. Boss. Ms. Boss directed Petitioner to turn in her badge and other information and report to HR. Ms. Boss did not tell Petitioner her FMLA paperwork was considered "invalid".
14. There was no substantive evidence presented to support the contention that Petitioner voluntarily resigned, nor was there evidence that Petitioner was absent from work without trying to contact her employer over a three day period. Indeed, none of the

paperwork from Respondent indicated what three days Respondent contends Petitioner was absent without making contact.

15. Respondent did not present evidence that Petitioner was “unavailable” for work as defined by personnel policy. To the contrary, the evidence was that Petitioner’s balance of leave had not been exhausted.
16. Respondent did not contest at hearing that Petitioner had an injury that entitled her to FMLA leave for the period at issue.
17. Petitioner filed a Fee Petition along with a fee agreement on March 31, 2014.

Based on these findings of fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The parties received proper notice of the hearing.
2. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 126 and 150B of the North Carolina General Statutes and all parties had notice of the hearing.
3. Petitioner is a career State employee subject to the North Carolina Human Resources Act, N.C. Gen. Stat. § 126-1.1 (2013). Therefore, Petitioner could only “be warned, demoted, suspended or dismissed by” Respondent “for just cause.” N.C. Gen. Stat. 126-35 (a) (2013), 25 NCAC 01J .0604(a).
4. While the relevant regulations do state that a voluntary resignation and a separation from employment can occur when an employee is absent for three consecutive scheduled work days without contacting the employer, the evidence in this contested case is that this did not take place in the case of Petitioner. Rather, Petitioner promptly made a request for FMLA leave and Respondent took no action with respect to that request. Respondent is not entitled to simply ignore a request for FMLA leave merely because of an omission in the paperwork, particularly under circumstances, as here, where it failed to inform Petitioner of the supposedly fatal omissions in repeated correspondence.
5. Accordingly, Petitioner did not voluntarily resign either legally or in fact. Therefore, Respondent’s dismissal of Petitioner was a dismissal without just cause.
6. N.C. Gen. Stat. § 126-34.02 allows the Office of Administrative Hearings to award attorneys’ fees to an employee ordered reinstated. Therefore, Petitioner is hereby awarded attorney’s fees, which he reasonably incurred in pursuing and prosecuting this action. Based upon the Fee Petition of Petitioner’s Attorney, Michael C Byrne, Petitioner is hereby awarded attorney’s fees and costs in the amount of \$ 5,103.75, which shall be paid as provided by law.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's decision to dismiss/separate Petitioner is **REVERSED**. Respondent is hereby **ORDERED** to retroactively reinstate Petitioner to the same or similar position as a Technical Support Specialist with all back pay and benefits which she would have been entitled to receive since her date of dismissal or separation. Furthermore, Petitioner is hereby awarded Attorney's Fees in the amount of \$ 5,103.75, as supported by the fee petition submitted in this case, to Petitioner's attorney, Michael C Byrne, as provided by law.

NOTICE

This Final Decision is issued under the authority of N.C.G.S. § 150B-34. Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. § 7A-29 (a). The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

This the 17th day of April, 2014.

Hon. Craig Croom
Administrative Law Judge