

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 OSP 01317

Durham County Department of
Social Services
Respondent.

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FINAL DECISION

On June 4, 2014, Administrative Law Judge Melissa Owens Lassiter conducted a contested case hearing in this case in Raleigh, North Carolina pursuant to Chapters 126 and 150B of the North Carolina General Statutes. At the conclusion of Petitioner's presentation of her evidence, the undersigned Granted Respondent's Motion to Dismiss as Petitioner failed to present sufficient evidence to prove Respondent discriminated against her, and harassed her, based on her age, by forcing her to resign from her employment.

APPEARANCES

For Petitioner: Rose Marie Johnson, Pro Se, 9 Moortown Court, Durham, North Carolina 27713

For Respondent: Kathy R. Everett-Perry, Assistant County Attorney, Office of the Durham County Attorney, P.O. Box 3508, Durham, NC 27702

ISSUE

Whether Respondent discriminated against or harassed Petitioner, based on her age, by forcing her to resign her from employment?

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner:

- 1 Personal Notes by Leah Fullerton (August 28, 2013)
- 2 Email from Rashonda Harris, HR Analyst (May 16, 2013)
- 3 Personal Meeting Notes by Rose Marie Johnson (November 26, 2013)
- 4 Personal Notes by Rose Marie Johnson re: Meeting with Michael Becketts (September 23, 2013)

For Respondent:

- 2 Job Offer Letter Job Description
- 4 Notice of Probationary Termination (August 1, 2012)
- 6 Notice of Probationary Extension
- 7 Notice of Transition Meeting Expectations (March 19, 2013)
- 8 Durham County DSS Critical Incident Reporting Policy
- 9 Durham County Administrative Leave Policy
- 10 Petitioner's 6th Month Self-Rating Evaluation Form
- 11 Notice of Investigatory Suspension with Pay (November 6, 2013)
- 15 Investigatory Suspension Conclusion and Notification of Pre-Disciplinary Conference

Judicial Notice Taken of:

Respondent's Exhibits Nos. 16, 17

WITNESSES

For Petitioner: Cheala Garland-Downey, Leah Fullerton, Jovetta Whitfield, Michael Becketts, Victor Isler, Rose Marie Johnson

For Respondent: None

FINDINGS OF FACT

Based on careful consideration of the testimony presented at the hearing, the documents and exhibits received into evidence, and the entire record in this proceeding, the undersigned finds the following:

1. On November 28, 2011, Petitioner began work at Respondent DSS as a Social Work Program Manager in the Child Protective Services Unit. (Resp. Ex 1, Tr. p 64)

2. During Petitioner's probationary period, on August 1, 2012, Assistant Director Jovetta Whitfield dismissed Petitioner from employment. (Resp. Ex. 4) At that time, Gail Perry was the interim DSS Director.

3. On August 6, 2012, Michael Becketts became the new Director for Respondent. On August 7, 2014, Mr. Becketts rescinded Petitioner's dismissal, and reinstated Petitioner's employment with Respondent because he felt Petitioner had been mistreated. (T. p. 88) Petitioner remained employed in the capacity of Social Work Program Manager until she decided to resign on January 31, 2014. (Tr. pp 141, 142, 156)

4. On August 27, 2012, Director Becketts extended Petitioner's probationary status for three additional months until November 27, 2012 to make sure that the employee [Petitioner] is doing what needs to be done, and functions appropriately in her role. (Resp. Exs. 5, 6; Tr. pp. 118-119, 121)

5. In March 2013, Director Becketts administratively transferred Petitioner from the Child Protective Services Unit to the In Home and Community Initiatives Unit as part of a restructure within Respondent's agency. (Resp. Ex. 7; Tr. pp. 76-77) Specifically, Mr. Becketts made Petitioner and Betty Hughes switch program manager positions with each other. Becketts' restructuring decision was based on his assessment of the organization, discussions with the assistant director, and looking at the types of changes he thought would make DSS functional. Becketts thought that In-Home Services unit was more readily suited to Petitioner's skills, so Petitioner could work with social workers and supervisors, and because program manager Betty Hughes had prior history managing the Child Protective Services unit. (Tr. p. 11)

6. Respondent's restructuring did not affect Petitioner's work title or pay level, and was not punitive in any way. (Tr. p. 77). Petitioner was not the only Social Work Program Manager involved with or affected by the restructure. (Tr. p. 77) No one [employee] had a choice regarding their transfers to other positions, because it was within the DSS director's purview to reorganize and staff the department to its needs. (T. p. 109)

7. Petitioner was not pleased with the decision to transfer her to the In Home and

Community Initiatives unit in March of 2013. (Tr. p. 151). She did not understand why the change occurred or why she had not been included in the decision-making process regarding the transfer. (Tr. p. 150-151)

8. After being transferred to the Community Initiatives unit, Petitioner discovered areas of deficiencies within the In Home and Community Initiatives Unit, and focused on correcting those deficiencies. (Tr. p. 151)

9. On August 26, 2013, Petitioner requested a meeting, via email, with Director Michael Becketts. Mr. Becketts did not respond to the email, but instead, came to Petitioner's office a couple of days later, and asked her, "What do you want to meet with me about?" (Tr. p. 145) By the time Mr. Becketts responded to Petitioner's request for a meeting, Petitioner had changed her mind about addressing her concerns with him, and decided to discuss her concerns first with [Assistant Director] Jovetta Whitfield. (Tr. p. 153-154)

10. On November 6, 2013, Mr. Becketts met with Petitioner to discuss her conduct in association with an incident that occurred at one of the elementary schools over which Petitioner had supervisory authority. At the conclusion of that meeting, Becketts placed Petitioner on investigatory suspension with pay to allow Respondent an opportunity to investigate allegations of unacceptable personal conduct made against Petitioner. Specifically, the allegations were that Petitioner intentionally provided "false or inaccurate information to management regarding her involvement in a CPS investigation, and the instructions you gave a subordinate employee." (Resp. Ex 11)

11. Becketts advised Petitioner, in his November 6, 2013 letter, that her suspension may last up to 30 days, and may be extended for a maximum of 45 days, but that she would be advised in writing if an extension was necessary. (Resp. Ex. 11) Petitioner refused to sign Respondent's written notice of her placement on suspension.

12. Petitioner's suspension was non-disciplinary as the nature of the suspension was to determine what, if anything, may have occurred that would lead to a disciplinary action. (T. p.101)

13. Respondent's policy on investigatory suspensions provided for the removal of an employee from the workplace to allow the department an opportunity to conduct investigations pertaining to alleged misconduct. When this option is exercised, the employee is placed on administrative leave with pay. (Tr. pp. 10-11)

14. On November 6, 2013, Petitioner filed a verbal complaint with Ms. Garland-Downey of Human Resources alleging that Becketts had bullied her, embarrassed her, and humiliated her in a meeting in front of other staff. (Tr. pp. 139-40)

15. On December 4, 2013 letter, Petitioner submitted a letter to Respondent's Human Resources for Respondent's Board of Directors, alleging that she had been subjected to intimidation, bullying, and legal and professional negligence and/or unprofessional conduct by DSS Director Michael Becketts, and Petitioner's supervisor Jovetta Whitfield.

16. On December 17, 2013, Respondent extended Petitioner's investigatory suspension to allow Respondent's Human Resources time to investigate Petitioner's allegations of unprofessional conduct by DSS staff.

17. Respondent's Human Resources Manager, Cheala Garland-Downey, investigated Petitioner's allegations, and discussed such allegations with Petitioner on January 17, 2014. On January 24, 2014, Ms. Garland-Downey informed Petitioner that she had concluded her investigation into Petitioner's allegations of unprofessional conduct, but could not substantiate those allegations. Ms. Garland-Downey advised Petitioner that her suspension was over, and she was to report to work on Monday, January 27, 2014.

18. On January 27, 2014, Petitioner called into work sick, and advised she would report to work on January 28, 2014. On January 28, 2014, Mr. Becketts advised Petitioner by letter to report to his office that day at 11:30 a.m. to attend a pre-disciplinary conference with Becketts and Jovetta Whitfield. (Resp. Ex. 15) The purpose of the pre-disciplinary conference was to discuss allegations regarding Petitioner's involvement in a CPS investigation; specifically, Petitioner's alleged grossly inefficient job performance and unacceptable personal conduct in November 2012. (Resp. Ex. 15) Mr. Becketts informed Petitioner that she was to remain on administrative leave until such conference.

19. On January 28, 2014, Mr. Becketts conducted a pre-disciplinary conference with Petitioner, and allowed Petitioner an opportunity to present information to him.

20. When Mr. Becketts imposed Petitioner's investigatory suspension, he believed that Petitioner had provided false information, not only to him, but also to her coworkers, and to employees Petitioner would be supervising. (T. p. 99, 103, 104) Becketts' perception of Petitioner changed after the investigatory suspension since a lot of the comments that Petitioner alleged had occurred by Becketts and other staff members, were untrue. (T. pp. 88-89)

21. On January 30, 2014, Petitioner submitted her verbal Notice of Resignation by leaving a voice message to Mr. Becketts, Ms. Whitfield, Ms. Downey. On January 31, 2014, Petitioner submitted a written notification of her resignation to Mr. Becketts, explaining that she was resigning, because:

[D]ue to adverse working conditions that I have experienced since my tenure at Durham County Department of Social Services, duress, hostile working environment, retaliation for expressing my opinion, public humiliation of being escorted out of the building in front of staff on not one but three occasions; being referred to as 'new, naive, and stupid and incapable of providing competent delivery of services to children alleged to be the victims of maltreatment. . . .

I began to lose faith and trust in the pre-disciplinary conference of 1/28/2014, and to hear that the charges against me were so egregious that I

could not fathom who [sic] you were talking about. This was further confirmed on 1/30/2014 at 2:42 p.m. As reported in my verbal message, I am returning my parking pass, charges, (I think these are the right ones), and ask that you cease and desist from any further mal alignment [sic] of my professional competence either within the organization or the community.

I would like to have a courier from Federal Express pick up my personal belongings on Monday, February 3, 2014 before 4:00 pm. . . .

It was agonizing for me to be in the period of suspension for such a long period of time. It is my professional and personal opinion that it is wrong to use taxpayer dollars for investigative suspension and to have that time go from 30 to 45 to past the 45-day period of time. However, you chose the time and the conditions.

(Resp. Ex. 16)

22. On January 31, 2014, Mr. Becketts sent Petitioner a letter acknowledging and accepting her resignation from Durham County DSS effective January 31, 2014. (Resp. Ex. 17)

23. At hearing, Petitioner explained that she submitted a claim for being forced to resign based on Mr. Becketts' placing her on investigatory suspension on November 6, 2013 for intentionally and falsely providing information regarding a case in CPS [Child Protective Services]. (Tr. p. 132) Petitioner denied all of the statements made about her, regarding the falsification of information, and asserted that she did not do what others alleged she did. (Tr. pp. 132-33)

24. Petitioner asserted that she was retaliated against, harassed and subject to harsh criticisms by the interim DSS Director Gail Perry, by DSS Director Beckett, and by Jovetta Whitfield while Petitioner was employed at Respondent DSS. Specifically, Petitioner alleged that after Petitioner reported areas of deficiencies she found in the In Home and Community Initiatives Unit to Ms. Garland-Downey with Human Resources, Interim Director Gail Perry targeted Petitioner, subjected Petitioner to harassing statements, and said she [Perry] was going to do whatever she could to get rid of Petitioner. (Tr. pp. 133, 148-49) On cross-examination, Petitioner acknowledged that Gail Perry was the interim director who harshly criticized Petitioner, and that Ms. Perry left the employment of Respondent in August 2012. (Tr. pp. 147-48)

25. Petitioner kept notes, on her computer at work, detailing all the meetings she had with various staff, and kept messages on the cell phone she received from Ms. Fullerton (DSS Social Work Supervisor II) regarding Ms. McGowan. She asserted that Jovetta Whitfield told her there were problems with Ms. McGowan, although Whitfield denied making such statement. Petitioner explained that she had been subject to some very mean types of statements throughout the time she was employed at DSS. (T. p. 145) Petitioner's Exhibits 3 and 4 are Petitioner's notes of meetings she had with other coworkers who Petitioner said were mean to her. Since Petitioner was escorted out of the office after being suspended, and could not return, she was unable to access these notes on her

work computer.

26. Petitioner contended that DSS employees lied in court when they denied making statements Petitioner alleged they made. (T. p. 136) At hearing, DSS Director Michael Becketts denied asking Petitioner did she and another coworker call and tell each other where to meet for lunch, when both Petitioner and her coworker were absent from work. (Tr. p. 86; see also Resp. Exs. 12, 13) Becketts denied asking Petitioner, during an October 23, 2013 meeting, “Where on my body does it hurt?” (Tr. pp. 86-87; see also Resp. Exs. 12, 13)

27. At hearing, Petitioner explained that she was not pleased that her investigatory suspension required her to stay at home, and not report to work for 45 days, that she was walked out of the building in front of staff, and that she had to turn in her work-related equipment to her supervisor before she left the office for that suspension. (Tr. pp. 165-166)

28. Petitioner acknowledged that she would have remained on the job, and not submitted a Notice of Resignation, had there not been allegations of unacceptable personal conduct made against her, and if she had not been subjected to the subsequent investigatory suspension. (Tr. p. 162) She did not want to leave DSS, but felt people there were terrible to her, that it was a terrible place to work, but she loved working with the children. (T. pp. 133-34) She also acknowledged that she worked at the discretion of the DSS director. (T. p. 167) During her investigatory suspension, she continued to receive her \$71,120 annual salary, and accrue her annual leave, and sick leave. (T. pp. 168-169)

29. During the contested case hearing, Petitioner failed to present any evidence supporting or corroborating her claims of age discrimination, and harassment.

CONCLUSIONS OF LAW

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

2. Petitioner is a permanent local government employee subject to Chapter 126 of the General Statutes of North Carolina (the State Human Resources Act) and is a citizen and resident of Durham County, North Carolina.

3. Respondent Durham County Department of Social Services (DSS) is subject to Chapter 126, and was Petitioner’s employer at all times relevant to this case.

4. Pursuant to N.C. Gen Stat. §126-34.02(b), the Office of Administrative Hearings is authorized to hear claims based on discrimination or harassment due to age and/or other protected categories. This is true even when an employee resigns, when the employee can show that she is deemed to have voluntarily resigned, because of her inability or unwillingness to work in conditions that may constitute discrimination. *Corbett v. N. Carolina Div. of Motor Vehicles*, 190 N.C. App.

113, 660 S.E.2d 233 (2008) Where an employee is “deemed to have voluntarily resigned” by the State agency for being unable or unwilling to work in conditions that may constitute discrimination, such resignation can constitute a constructive discharge entitling the employee to file a contested case alleging termination pursuant to N.C.G.S. § 126-34.1(a)(2)b. *Campbell v. N.C. DOT-DMV*, 155 N.C. App. 652, 575 S.E.2d 54 (2003 N.C. App. LEXIS 24 (2003), cert. denied, 357 N.C. 62, 579 S.E.2d 386 (2003)

5. In age discrimination cases, the proper inquiry before the Court is whether a “substantially younger” person is treated more favorably than the Plaintiff. *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996)

6. Petitioner “has the initial burden of proving, by a preponderance of the evidence, a prima facie case of discrimination.” *N.C. Department of Correction v. Hodge*, 99 N.C. App. 602, 611, 394 S.E. 2d 285, 290 (1990)

7. North Carolina courts look to federal employment discrimination law for guidance in establishing evidentiary standards. *North Carolina v. Gibson*, 308 N.C. 130, 301 S.E. 2d 78 (1983)

8. To state a claim for age discrimination based on a hostile work environment or harassment, Petitioner must show that: (1) she was subjected to unwelcomed harassment in the workplace; (2) the harassment was based on her age; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer. See *Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 772(4th Cir.1997); *Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998).

9. In this case, the preponderance of the evidence established that Petitioner voluntarily resigned from her employment with Respondent effective January 31, 2014.

10. Petitioner failed to present sufficient facts to prove by a preponderance of evidence that Respondent discriminated against her and/or harassed her, based on her age, by forcing her to resign from her job with Respondent.

FINAL DECISION

Based upon the above Findings of Fact and Conclusions of Law, the undersigned finds that Petitioner failed to meet her burden of proof in showing that she was forced to resign, or was constructively discharged from employment, based on age discrimination or harassment due to her age.

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 21st day of July, 2014.

Melissa Owens Lassiter
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14OSP01317

ROSE MARIE JOHNSON Petitioner v. CHEALA GARLAND DOWNEY HUMAN RESOURCES DEPARTMENT Respondent	FINAL DECISION ORDER OF DISMISSAL IN PART
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Upon consideration of Respondent's Motion to Dismiss, Petitioner's response thereto, and for good cause shown, the undersigned hereby **GRANTS** Respondent's Motion to Dismiss regarding Petitioner's claims of suspension without just cause and failure to receive priority consideration.

APPEARANCES

For Petitioner: Rose Marie Johnson, *Pro Se*

For Respondent: Kathy R Everett-Perry
Assistant Durham County Attorney
PO Box 3508
Durham, NC 27702

ISSUES

1. Whether Petitioner stated a claim for relief in her petition so that the Office of Administrative Hearings has subject matter jurisdiction over Petitioner's claim of suspension without just cause, failure to receive priority consideration?
2. Whether the Office of Administrative Hearings has personal jurisdiction over Cheala Garland-Downy in her official capacity as HR Manager for Durham County Human Resources Department?

FINDINGS OF FACT

1. On February 24, 2014, Petitioner filed a contested case petition with the Office of Administrative Hearings alleging that the named Respondent, Cheala Garland-Downy, HR Manager for Durham County Human Resources Department, had:
 - a. suspended Petitioner without just cause,

- b. denied her appeal rights timely,
- c. failed to give her priority consideration, and
- d. forced her to resign based on a hostile work environment/adverse working conditions, based on age discrimination, and because Respondent was going to terminate Petitioner from employment.

2. In her petition, Petitioner sufficiently stated facts tending to establish that she was forced to resign from her job with Durham County Social Services, based on a hostile work environment or adverse working conditions, based on age discrimination, and in lieu of Respondent terminating her from employment.

3. In her petition, Petitioner failed to state facts tending to establish that Respondent suspended her for disciplinary reasons, and therefore, without just cause, that Respondent failed to give her priority consideration, and that Respondent denied her appeal rights in a timely manner.

4. The allegations in such petition sufficiently proved that the proper named Respondent in this case is the Durham County Department of Social Services.

CONCLUSIONS OF LAW

1. This contested case is subject to dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) of the Rules of Civil Procedure, and N.C. Gen. Stat. §§ 150B-33(b)(3a) and (10).

2. As an individual is not an “agency” under N.C. G.S. § 150B, and cannot be a proper named Respondent, “Cheala Garland-Downey Human Resource Department” is hereby removed as a named Respondent.

3. As the allegations in such petition sufficiently proved that the proper named Respondent in this case is the Durham County Department of Social Services, the caption is hereby amended to reflect the Durham County Department of Social Services as the proper named Respondent in this case.

4. In *Lewis v. N.C. Dep’t. of Human Resources*, 92 N.C. 737, 739, 375 S.E.2d 712, 714 (1989), the NC Court of Appeals held that “the right to appeal to an administrative agency is granted by statute, and compliance with statutory provisions is necessary to sustain the appeal.”

5. N.C. Gen. Stat. § 150B-23 requires the party filing a petition for a contested case hearing to state facts tending to establish that the agency named as the Respondent has deprived Petitioner of property, has ordered Petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced Petitioner’s rights, and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

6. In this case, Petitioner failed to state a claim for relief that (1) Respondent suspended her for disciplinary reasons, and therefore, without just cause, (2) Respondent failed to give her priority consideration, and (3) Respondent denied her appeal rights in a timely manner. By failing to state those claims for relief, Petitioner failed to comply with the requirements of N.C. Gen. Stat. § 150B-23, and failed to state a claim upon which relief can be granted under Rule 12(b)(6) of the NC Rules of Civil Procedure.

7. The issue whether Respondent forced Petitioner to resign, or “constructively discharged” Petitioner from employment remains ripe for a contested case hearing under N.C.G.S. §§ 150B and -126.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **GRANTS** Respondent’s Motion to Dismiss the above-cited claims.

NOTICE AND ORDER

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 25th day of April, 2014.

Melissa Owens Lassiter
Administrative Law Judge