

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 OSP 01737

BARBARA SMITH-LIDE,
Petitioner,

v.

NC DEPARTMENT OF PUBLIC SAFETY,
Respondent.

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FINAL DECISION

PROCEDURAL HISTORY

This contested case was commenced with the filing of a Petition For Contested Case Hearing on March 13, 2015 and the day by which the final decision was required to be entered, the 180th day from commencement, was September 9, 2015. A Scheduling Order was entered on March 26, 2015, setting this matter for hearing during the week of June 1, 2015. On May 1, 2015, a Notice of hearing was sent, scheduling the hearing for June 1, 2015. On May 6, 2015, Respondent filed a Motion to Dismiss In Lieu Of Prehearing Statement And Motion to Continue/Stay Proceedings Pending Ruling. On May 18, 2015, an Order Denying Respondent's Motion To Dismiss In Part And Granting Respondent's Motion To Dismiss In Part was entered. On May 20, 2015, a Notice Of Hearing And Order Extending Discovery Deadline was issued, scheduling the hearing for June 17, 2015.

On June 16, 2015, Respondent filed a Motion To Continue the Scheduled Hearing Date on the ground that one of Respondent's witnesses was unavailable because of medical leave. Respondent's motion was granted by order on June 18, 2015.

On July 23, 2015, this contested case was reassigned to the Undersigned. The contested case hearing was held on August 6, 2015 and September 16, 2015 in Charlotte and Monroe, respectively. In accordance with an Order entered by the Undersigned, Respondent notified the Undersigned of receipt of the hearing transcript on October 13, 2015 and submitted Respondent's Proposed Final Decision for consideration on November 4, 2015.

Based upon the above stated facts, good and extraordinary cause exists for the issuance of this final decision after the 180th day of commencement in accordance with N.C. Gen. Stat. § 126-34.02(a) and 26 NCAC 03 .0118(b).

APPEARANCES

For Petitioner: Barbara Smith-Lide
Pro Se
30313 Walsingham Court
Matthews, North Carolina 28105

For Respondent: Yvonne B. Ricci
Assistant Attorney General
North Carolina Department of Justice
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PRE-HEARING MOTION

Respondent filed a Motion to Dismiss in Lieu of Pre-Hearing Statement on May 4, 2015, arguing that the Office of Administrative Hearings (“OAH”) lacked personal and subject matter jurisdiction. By Order entered on May 18, 2015, the Motion to Dismiss the Petition in its entirety for insufficient service of process pursuant to Rules 12(b)(2), 12(b)(4) and 12(b)(5) of the North Carolina Rules of Civil Procedure and as to the discrimination/retaliation claims pursuant to N.C. Gen. Stat. § 126-34.02(b)(1) & (2) was denied, and the claim for relief on the ground that Petitioner was discharged without just cause pursuant to N.C. Gen. Stat. § 126-34.02(b)(3) was granted.

WITNESSES

The *Pro Se* Petitioner, Barbara Smith-Lide, who testified during the hearing, presented testimony from the following three witnesses: Lamont Wall, a Correctional Programs Supervisor at Brown Creek Correctional Institution (“Brown Creek”); Cynthia S. Marshall, a Correctional Case Manager at Brown Creek; and Mitchell A. Patton, a Correctional Programs Supervisor at Brown Creek. The Respondent, North Carolina Department of Public Safety (hereinafter “Respondent” or “NCDPS”) did not present any other witnesses.

EXHIBITS

Petitioner’s exhibits (“P. Exs.”) 1 - 9 were admitted into evidence. Respondent’s exhibits (“R. Exs.”) 6, 11, 17 and 18 were admitted into evidence.

ISSUE

Whether Petitioner, Barbara Smith-Lide, met her burden to show by a preponderance of the evidence that she was discriminated against based on her race and/or color and was harassed and retaliated against by the Respondent?

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 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.

BASED UPON the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

FINDINGS OF FACT

1. The Petitioner, Barbara Smith-Lide, an African-American female, began working for the Respondent as a Correctional Case Manager on January 19, 2009. (T. p. 60.)

2. In the Petition and Prehearing Statement, Ms. Smith-Lide alleged that Respondent through the various actions of its employees did unlawfully discriminate against her because of her race and/or color by dismissing and suspending her from her employment, denying her promotions, unfairly disciplining her, and harassing her, creating a hostile work environment. The Prehearing Statement included specific allegations that she believed she was treated differently than her Caucasian co-workers who engaged in similar work activities. Specifically, the Petitioner indicated in her Prehearing Statement that Mr. Driggers, the Programs Director at Brown Creek, referred to a Caucasian co-worker, Brian Lambert, as his “son from another mother” and gave Mr. Lambert preferential treatment such as providing him with a permanent gate key while denying her the opportunity to have a permanent gate key. The Prehearing Statement further alleged that a Caucasian employee (Amy Hooks) was allowed flexibility in her work schedule and that a similar request for a flexible work schedule was denied to an African-American staff member (Mr. Patton) and to Petitioner as well. The Petitioner also alleged in her Prehearing Statement that she received a negative TAP (performance appraisal) entry in September 2014 for failing to timely complete a custody review, but that Mr. Lambert was not disciplined in the same manner for his failure to timely complete the custody review process. The Petitioner alleged that following her filing a claim of discrimination with the Respondent’s Equal Employment Opportunity Office (“EEO”) an internal investigation into her failure to complete case management notes was modified to an investigation into her alleged falsification of case management notes that ultimately resulted in her being terminated from her employment with NCDPS. (Contested Case Petition and Petitioner’s Prehearing Statement)

3. During the hearing, the Petitioner testified that she filed her Petition because she felt as if she was being singled out and harassed as well as disparately treated because she is African-American and that her Caucasian co-workers did not receive the same level of discipline for the same work performance issues. (T. p. 48.)

4. The Petitioner testified concerning the basis for her belief that she was being treated in a discriminatory manner by Respondent.

5. As her first example, Petitioner claimed was that within a few days of an inmate being processed into Brown Creek he is assigned to a case manager by the Programs Director, Mr. Driggers. Once the inmate has been assigned to his case manager that case manager has three business days to make an initial contact visit with his or her assigned inmate. The Petitioner testified that she failed to timely meet with one of her assigned inmates and she was given a below good ("BG") TAP entry for missing that contact by her supervisor Mr. Lamont Wall. However, a Caucasian staff member (Brian Lambert) also failed to meet with one his assigned inmates within this time frame and he did not receive a BG TAP entry nor did he face any disciplinary action as a result until after she filed her claim. Petitioner testified that she was made aware that Mr. Lambert was not disciplined by one of her co-workers Ms. Marshall who got the information from Mr. Wall who also supervised Mr. Lambert. (T. pp. 48 - 49.)

6. The second example according to Petitioner, Mr. Lambert was issued a permanent gate key; however, when she made a request for a permanent gate key to her supervisor Mr. Wall, her request was denied by Mr. Driggers. Petitioner further testified that she was told that she needed to give a justification as to why she needed a permanent gate key while Mr. Lambert told her he did not know why he had been issued a permanent gate key that it was just given to him. (T. pp. 50 - 51.)

7. As her third example, Petitioner stated that Caucasian staff members were consistently reporting to work late on a daily, weekly, and monthly basis and were not disciplined; however, African-American employees who reported late received a "coaching" from their supervisors. (T. p. 52; P. Exs. 4 and 8.)

8. The fourth example is that when Petitioner's supervisor Mr. Wall informed her that she was to receive a BG TAP entry for missing a contact or a custody review, Petitioner asked him if he had disciplined any other staff he supervised for not completing tasks in a timely manner and he told her no. Therefore, Petitioner believes that Mr. Lambert was not disciplined for his assessments and plans being 90 to 120 days past due. (T. pp. 53 - 55; P. Exs. 4 and 6.)

9. Under cross-examination, the Petitioner made several significant admissions.

10. Petitioner admitted that in October 2014 she received a Memorandum of Appreciation acknowledging her dedication and professionalism related to her assistance during a situation that occurred at Lanesboro Correctional Institution on October 17, 2014 that was signed by Brown Creek's Correctional Administrator Herbert Jackson and Brown Creek's Assistant Superintendent of Programs II Mr. Kory Dalrymple. (T. pp. 57 - 59; R. Ex. 11.)

11. Petitioner admitted that she never overheard conversations involving either Mr. Driggers or Mr. Dalrymple in which either made racial jokes or talked about treating their subordinate employees differently because of their color or complexion. (T. pp. 56 - 57.)

12. Petitioner admitted that she may have occasionally been late to report to work but had never received any negative disciplinary action such as a BG TAP entry related to her being tardy; that all the Correctional Programs staff had received e-mails from Mr. Driggers and Mr. Dalrymple advising all staff about the policy related to tardiness; and that to her knowledge no programs staff had ever received any formal discipline related to their reporting late to work. (T. pp. 51 - 52, 55 - 56.)

13. Petitioner admitted that at the time she was given a BG TAP entry related to her failure to timely complete her case management notes she had been employed as a case manager at Brown Creek with about four to five years of job experience, but that at the time she was told by Ms. Marshall that Mr. Lambert had failed to timely complete his case management entries he had only been employed as a case manager at Brown Creek for five to six months. (T. pp. 59 - 60.)

14. Petitioner admitted that at the time she said her request to be given a permanent gate key was denied, Ms. Marshall, an African-American female in a non-supervisory position, also had a permanent gate key in addition to Mr. Lambert (Caucasian male) and Ms. Hooks (Caucasian female). (T. pp. 61 - 62.)

15. Petitioner offered no credible evidence to show that her title, pay grade, and salary were affected by a BG TAP entry related to her failure to timely complete her case management notes. Therefore, Petitioner failed to prove that she was subject to an adverse employment action.

16. On October 23, 2014, Respondent's Equal Employment Office ("EEO") began its investigation into allegations made by Petitioner against Correctional Programs Director Jackie Driggers (Caucasian male) and Assistant Superintendent for Programs Kory J. Dalrymple (Caucasian male) for alleged discrimination based on race, sex, color, and retaliation. (P. Exs. 1 and 9.)

17. The EEO office's Case Determination concluded there was insufficient evidence to substantiate allegations of discrimination based on race, gender, and/or retaliation and, therefore, recommended that management take no corrective action to Petitioner's complaint of discrimination. (P. Exs. 1 and 9.)

18. Lamont Wall (African-American male), employed as a Correctional Programs Supervisor at Brown Creek, was interviewed by the EEO investigator and provided her with a written statement. In his opinion, the Programs Department did not have issues directly involving any racial animus. (P. Ex. 1.)

19. Cynthia Marshall (African-American female), employed as a Correctional Case Manager for Respondent since 2004, was asked by Petitioner if she had ever witnessed any

instances of disparate treatment in the Brown Creek Programs Department. In response, she testified that to her knowledge Petitioner was written up and a TAP entry was placed in her employee file for missing an initial inmate contact, but that other co-workers who missed a similar deadline did not get a TAP entry in their employee files. (T. pp. 9 and 11.)

20. Ms. Marshall was aware of Caucasian (Amy Hooks and Mr. Auman) and African-American (Ms. Baker) co-workers that she witnessed reporting to work late and that she did not have personal knowledge that any of them had been formally disciplined, such as receiving a TAP entry or written warning, regarding their tardiness. (T. pp. 11 - 12, 16, 22, 23, and 26.)

21. While Ms. Marshall testified that Mr. Driggers talked to her in an unprofessional and/or discriminatory manner and that she witnessed Mr. Driggers talk to Petitioner and Ms. Baker (African-American female) in an unprofessional, demeaning, and harsh manner, under cross-examination Ms. Marshall described Mr. Driggers' language as "arrogant", but that he did not use any racial terms, jokes, disparaging comments or references to anyone's skin color when talking with the African-American members of the Programs staff. (T pp. 18 - 19, 25 - 26, and 30.)

22. Mr. Mitchell Patton (African-American male), a Programs Supervisor at Brown Creek since 2006, was asked by Petitioner if he had ever been treated differently from other Caucasian staff in relation to being able adjust his work schedule, but he admitted that in general any requests to work on his scheduled day off had been granted by Mr. Driggers and that it was only one occasion that he remembers his request to adjust his work schedule being denied. (T. pp. 31 - 33, 37, 40 - 43, and 45.)

23. Mr. Patton testified that he was reprimanded for being tardy by Mr. Driggers but he admitted that the "reprimand" consisted of a conversation to be mindful of what time he leaves the work place and that it did not result in a TAP entry being documented in his performance management evaluation. Mr. Patton further testified that all Programs staff, including Caucasian employees, have been verbally warned about being tardy. (T. pp. 34, 39, and 43.)

24. Ms. Patton did not recall either Mr. Driggers or Mr. Dalrymple having a conversation with him that involved his or anyone else's race and/or color nor has he heard either Mr. Driggers or Mr. Dalrymple make a racial joke. (T. pp. 40 - 41.)

BASED UPON the foregoing Findings of Fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of Chapter 126 of the North Carolina General Statutes; the parties properly are before the Office of Administrative Hearings.

Petitioner's Race Discrimination and Harassment (Hostile Work Environment) Claim

2. In the absence of direct evidence of discrimination, under the three-part scheme of proof for discrimination cases developed by the United States Supreme Court, Petitioner has the initial burden of establishing a *prima facie* case of discrimination. Once she presents a *prima facie* case, Respondent has the burden of articulating a legitimate, non-discriminatory reason for the adverse employment action. At that point, Petitioner has the burden of establishing that the reason asserted by Respondent is not the true reason for its decision, but instead a pretext for intentional, unlawful discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Curtis v. N.C. Department of Transportation.*, 140 N.C. App. 475, 479, 537 S.E.2d 498, 501-02 (2000).

3. The “ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Burdine*, 450 U.S. at 253.

4. Petitioner alleges that she was continuously harassed at the workplace on the basis of her race and/or color. To prove a *prima facie* case of hostile work environment based on racial harassment, a plaintiff must show: 1) there was unwelcome harassment; 2) the harassment was based on race; 3) the harassment was so severe or so pervasive that it altered the conditions of employment and created an abusive atmosphere; and 4) there is some basis for imposing liability on the employer. *Causey v. Balog*, 162 F. 3d 795, 801 (4th Cir. 1998). In determining if the third element of the *prima facie* case is met, the Court must consider the frequency and severity of the harassment, whether it was physically threatening or humiliating, whether it reasonably interfered with work performance, and whether it resulted in physical harm. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). A mere utterance ““which engenders offensive feelings in an employee”” does not satisfy the element. *Id.* (quoting *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986)). The severity of the harassment should be judged from “the perspective of a reasonable person in plaintiff’s position, considering ‘all the circumstances.’” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998) (quoting *Harris*, 510 U.S. at 23).

5. Petitioner claims that the Respondent intentionally discriminated against her based on her race, African-American, through the actions of Correctional Programs Director Jackie Driggers (Caucasian male) and Assistant Superintendent for Programs Kory J. Dalrymple (Caucasian male) by unfairly disciplining her and subjecting the African-American Programs staff to disparate treatment.

6. Petitioner failed to amass sufficient evidence to undermine the credibility of Respondent and establish that its true motives were discriminatory. Further, Petitioner has failed to identify any similarly situated Caucasian employee who was disciplined less severely for comparable conduct. Petitioner admits that neither Jackie Driggers nor Kory Dalrymple ever made a discriminatory comment to her referring specifically to her race or referring to the African-American race in general.

7. Petitioner failed to offer any evidence of illegal race discrimination. Petitioner failed to prove that she was intentionally discriminated against by Respondent based on her race.

8. Petitioner has failed to produce reliable evidence from which to conclude that either Mr. Driggers or Mr. Dalrymple treated the African-American Programs staff in a disparate manner from the Caucasian staff. Petitioner's case is based solely upon speculation and innuendo; there is no credible evidence that Petitioner was the victim of discrimination based on race and/or color.

9. Taken in the light most favorable to Petitioner any isolated "arrogant" or "harsh" language used by either Mr. Driggers or Mr. Dalrymple towards the African-American Programs staff do not imply discrimination or harassment. *See Boyd v. State Farm Ins. Co.*, 158 F. 3d 326, 329 (5th Cir. 1998) (stating that a single use of a term generally considered to be a racial slur, during an employee's five-year tenure is properly categorized as a "stray remark from which no reasonable fact-finder could infer race discrimination.")

10. No racial connotation can be derived from the context in which Petitioner alleges that Mr. Driggers talked with the African-American staff using words that were demeaning and harsh. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006). Further, Petitioner has produced no credible evidence indicating that either Mr. Driggers or Mr. Dalrymple's inflection or tone of voice in how they addressed the African-American Programs staff as compared to the Caucasian staff indicated racial animus. *Id.* at 456.

11. Petitioner also fails to amass sufficient evidence of harassment that rises to the level of severity and pervasiveness articulated by the Supreme Court in *Harris* to satisfy a prima facie case of a hostile work environment.

12. Petitioner was not subjected to a hostile work environment because of her race and/or color.

Petitioner's Retaliation Claim

13. For her retaliation claim, Petitioner's prima facie case consists of showing that: (a) she engaged in protected activity; (b) Respondent took an adverse action against her; and (c) there is a causal connection between the protected activity and the adverse action. *Ziskie v. Mineta*, 547 F.3d 220, 229 (4th Cir. 2008).

14. Even though Petitioner has established that Mr. Driggers and Mr. Dalrymple were aware that she had filed a complaint with the EEO in 2014 she failed to show that she was subject to an adverse employment action that affected her title, pay grade, and salary. An adverse employment action is defined as an action that actually adversely affects a term, condition, or benefit of employment. *See generally, Wagstaff v. City of Durham*, 233 F. Supp. 2d 739, 744 (M.D.N.C. 2002) (quoting *Boone v. Goldin*, 176 F. 3d 253, 256 (4th Cir. 1999) ("[A]bsent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does not constitute an adverse employment action even if the new job does cause some modest stress not present in the old position."))

15. There is no credible evidence that any adverse employment action took place against Petitioner.

16. Even if a BG TAP entry under the circumstances and evidence presented could be considered an adverse employment action, such action was not taken in retaliation to any reporting activity undertaken by Petitioner.

17. Petitioner did not satisfy her burden of proving by a preponderance of the evidence her claims of discrimination, harassment, or retaliation.

18. At the close of Petitioner's case in chief, Respondent made an oral Motion for Directed Verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50.

19. The Motion for Directed Verdict was granted in favor of Respondent.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, Petitioner failed to meet her burden of proof by a preponderance of the evidence that Respondent subjected her to racial discrimination, harassment, or retaliation.

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 6th day of November, 2015.

Selina M. Brooks
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 OSP 01737

Barbara Smith-Lide Petitioner, v. Department Of Public Safety, Brown Creek Correctional Institution Respondent.	ORDER AMENDING DECISION WITH NEW NOTICE
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Pursuant to 26 NCAC 3.0129, for the purpose of correcting a clerical error, IT IS HEREBY ORDERED that the above-captioned Decision, issued from this Office on November 6, 2015 is amended to include the OSP appeal rights as follows:

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 3rd day of December, 2015.

Selina M Brooks
Administrative Law Judge