

STATE OF NORTH CAROLINA  
COUNTY OF ROBESON

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 OSP 06204

<p>Laketha Latoya Southern Petitioner,</p> <p>v.</p> <p>Robeson County Department of Social Services Respondent.</p>	<p><b>FINAL DECISION ORDER OF DISMISSAL WITHOUT PREJUDICE</b></p>
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THIS MATTER came on for hearing before Hon. J. Randolph Ward, Administrative Law Judge, on November 18, 2015 in Fayetteville, North Carolina. Following receipt of the parties' post-hearing submissions, this Decision was prepared.

**APPEARANCES**

For Petitioner: Anitra K. Brown, Esq.  
Anitra K. Brown Legal and Consulting Services  
Raleigh, N.C.

For Respondent: Brooke Clark  
Tiffany Powers  
Robeson County DSS Lumberton, N.C.

**ISSUES**

Whether Respondent acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by rule or law, within the meaning of N.C. Gen. Stat. § 150B-23(a), in denying Petitioner's most recent requests for reasonable accommodations.

**STATUTES AT ISSUE**

42 U.S.C. § 2000e-5; 42 U.S.C. §§ 12101 - 12213; 42 U.S.C. § 12117. N.C. Gen. Stat. §§ 7A-759; Chapter 126; Chapter 150B, Art. 3; 168A-3(1b); 168A-4; 168A-5(a)(5) and (b)(4); 168A-10.1; and, 168A-11.

## ORDER

Petitioner seeks Orders compelling Respondent to grant her “reasonable accommodations” in the conditions of her employment pursuant to the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101 to 12213 (hereinafter, “ADA”). Because these issues have not yet been presented to an authorized agency for the requisite formulation of a charge, informal dispute resolution, investigation, and a finding of reasonable cause, the Office of Administrative Hearings does not have jurisdiction to resolve the controversy by a contested case hearing.

Petitioner Laketha L. Southern has career employee status, having been employed by Respondent Robeson County Department of Social Services since 2008. She testified that she has been diagnosed and treated for many years for hemiplegic migraine headaches, which can be triggered by light, noise, and smells commonly encountered in her work as a Child Protective Services caseworker. The evidence shows that Respondent has made several efforts to accommodate Petitioner over the years. Petitioner testified that since suffering a blow to her head in a fall at work, she has been significantly more susceptible to the environmental irritants, and was on Family Medical Leave Act (“FMLA”) leave from work for nearly two months last year.

Shortly after returning from FMLA leave, Petitioner sought additional accommodations. In a letter dated August 14, 2015, which its authors characterized as Respondent’s “formal response” to Petitioner’s request for “reasonable accommodations” pursuant to the ADA, the attorneys for the Department of Social Services and Robeson County declined Petitioner’s “requests for a permanent office, allowing you to work from home, or additional leave.” The letter contained no notice of rights, or opportunity to pursue the matter, other than a willingness to discuss “any other suggestions” for accommodations. Ms. Southern filed a Petition for a contested case hearing on August 20, 2015.

A State employee has two means of enforcing a right to reasonable accommodation. North Carolina’s Persons With Disabilities Protection Act, Chapter 168A, makes it a “discriminatory practice” for a government agency to fail to provide "reasonable accommodations" to a "person with a disability," if the accommodations can be accomplished without "undue hardship." If, after cooperative discussions, the matter is not resolved, an employee can file a civil action in superior court within 180 days, and obtain a bench trial on the issues. N.C. Gen. Stat. §§ 168A-3(1b); 168A-4; 168A-5(a)(5) and (b)(4); 168A-11.

Alternatively, an employee covered under Chapter 126 of the General Statutes may choose to address their complaint to the United States Equal Employment Opportunity Commission (“EEOC”), or its deferral agency in North Carolina, the Civil Rights Division of the Office of Administrative Hearings (“CRD”). N.C. Gen. Stat. §§ 7A-759; 168A-10.1. CRD is typically capable of more promptly preparing a charge. In scenarios such as the present one, CRD will refer the charge to EEOC, which is empowered to investigate ADA complaints against governmental units brought within 300 days of the accrual of the dispute. In cases retained by CRD for investigation and conciliation, a disappointed employee is given the option of pursuing the claim in a contested case hearing, if CRD finds probable cause. The Administrative Law Judge’s “order entered ... after a contested case hearing on the merits ... is a final agency decision and is binding

on the parties.” N.C. Gen. Stat. § 7A-759(a), (d) and (e). More commonly, a dissatisfied employee obtains a “right to sue,” and proceeds in federal court.

In the exercise of “all of the powers and authority necessary to function as a deferral agency,” CRD uses the “powers, remedies, and procedures” set out in 42 U.S.C. § 2000e-5 for processing an ADA claim. N.C. Gen. Stat. § 7A-759(a); 42 U.S.C.A. § 12117(a). These include obtaining a charge under oath from the aggrieved party, and pertinent information from both the parties; determining if there is reasonable cause to believe the charge is true, and notifying parties of the findings; and, if reasonable cause is found, endeavoring “to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” At every stage, CRD seeks to mediate an agreement between the parties. Only after a charge is “not resolved by informal methods of conference, conciliation or persuasion” may the “matter be heard as a contested case as provided in Article 3 of Chapter 150B of the General Statutes.” N.C. Gen. Stat. § 7A-759(d).

As this matter clearly presents a jurisdictional question, there is “an obligation to address the issue *sua sponte* regardless whether it is raised by the parties.” *Heritage Pointe Builders, Inc. v. N.C. Licensing Bd. of Gen. Contractors*, 120 N.C.App. 502, 504, 462 S.E.2d 696, 698 (1995), *disc. review denied*, 342 N.C. 655, 467 S.E.2d 712 (1996).

### **DECISION**

Consequently, the Petition must be, and hereby is, **DISMISSED, WITHOUT PREJUDICE** to the Petitioner’s right to raise these issues in any forum with jurisdiction to resolve them.

### **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.

**IT IS SO ORDERED.**

This the 14th day of March, 2016.

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J Randolph Ward  
Administrative Law Judge

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<p>Laketha Latoya Southern Petitioner,</p> <p>v.</p> <p>Robeson County Department of Social Services Respondent.</p>	<p><b>ORDER AMENDING FINAL DECISION ORDER OF DISMISSAL WITHOUT PREJUDICE</b></p>
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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 March 14, 2016 is amended as follows:

**DECISION**

Consequently, the Petition must be, and hereby is, **DISMISSED, WITHOUT PREJUDICE** to the Petitioner's right to raise these issues in any forum with jurisdiction to resolve them.

"Due to extraordinary technical difficulties with the recording of the hearing, resulting in slow production of the transcript, and delay exceeding the usual time for delivery of the transcript, the time for filing this decision was extended to and including Monday, March 14, 2016. 26 NCAC 03 .0118(b)."

**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.

Except as otherwise amended, the Final Decision entered on March 14, 2016 remains in effect.

This the 16th day of March, 2016.

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J Randolph Ward  
Administrative Law Judge