

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 OSP 02351

<p>Helen J Kirby Petitioner,</p> <p>v.</p> <p>NC Department of Transportation Respondent.</p>	<p>FINAL DECISION ORDER OF DISMISSAL</p>
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Respondent NC Department of Transportation (“Respondent”) filed a Motion for Summary Judgment (“Motion”) on July 21, 2022. Petitioner Helen J Kirby (“Petitioner”) was ordered to respond to the Motion within ten (10) days as provided by OAH rules. 26 N.C.A.C 3.0115(a). Petitioner filed a Response on August 2, 2021. The Motion is ripe for disposition.

SUMMARY OF UNCONTESTED MATERIAL FACTS

1. Findings of fact are neither necessary nor desirable when ruling on a motion for summary judgment, Hyde Ins. Agency, Inc. v. Dixie Leading Corp., 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975), and OAH decisions granting such motions need not include such findings. N.C.G.S. 150B-34(e). The Tribunal does not make findings of fact on motions for summary judgment; rather, the Tribunal summarizes material facts it considers to be uncontested. See, e.g., Vizant Techs., LLC v. YRC Worldwide, Inc., 373 N.C. 549, 551, 838 S.E.2d 616, 617 (2020). The Tribunal summarizes the following undisputed facts to provide context for its ruling. Hyde Ins. Agency, Inc., 26 N.C. App. at 142, 215 S.E.2d at 165.
2. Petitioner filed a Petition for a Contested Case (“Petition”) in the Office of Administrative Hearings (“OAH”) on June 21, 2022. In the Petition, Petitioner alleges various kinds of discrimination and retaliation, culminating in her termination from employment, “because I made a complaint about my seat being wet.” Petition.

3. Even under “our liberal rules of construction for allegations raised in a party’s pleading,” Winbush v. Winston-Salem State Univ., 165 N.C. App. 520, 523, 598 S.E.2d 619, 622 (2004), the Petition does not allege that Respondent separated Petitioner from employment, for disciplinary reasons or otherwise, without just cause in violation of N.C.G.S. 126-35. The Petition does not check the “box” for discipline without just cause, nor does it allege that Respondent allegedly separated Petitioner for unavailability. A petition is required to at least “state facts tending to show” that an agency has taken a given action. N.C.G.S. 150B-23.
4. Respondent’s filings, supported by affidavit, demonstrate that Petitioner was separated from employment on the grounds of “unavailability,” in that (a) Petitioner was repeatedly found unfit for duty in Fitness for Duty evaluations and (b) failed to report for work after all her applicable leave was exhausted. See 25 N.C.A.C. 1C.1007(b).
5. Petitioner’s response, unsupported by affidavit or documentation, was an email filed August 2, 2022. This email states: “I am unsure if I am following the proper process or protocol when responding to the letter that I received regarding the desire for objections to be considered before a ruling is made, but I Helen Kirby desire for objections to be made before a ruling is made.” The Petitioner’s response does not state any specific objections or disputes to Respondent’s filings.
6. The actual evidence of Petitioner’s workplace behavior leading to the Petitioner’s Fitness for Duty evaluations is relatively scant. Petitioner apparently claimed that some substance was left on her chair, causing her to become wet and experience some sort of irritation. Petitioner was also, Respondent claims, disruptive in a workplace meeting. Respondent also cites a “documented counseling” issued to Petitioner; a documented counseling is not disciplinary action under the North Carolina Human Resources Act.
7. Despite this, the uncontested evidence before the Tribunal is that multiple professional evaluations determined that Petitioner was unfit to perform her duties with Respondent due

to one or more mental health conditions, and that Petitioner failed to report for work after all applicable leave was exhausted.

8. Respondent's evidence does not show, on a summary judgment standard or otherwise, that it made any attempts to find other work for Petitioner or obtain additional leave for Petitioner through any source. In a case where a Petitioner contested unavailability separation on just cause grounds, this omission would be fatal to any summary judgment motion. However, Petitioner does not allege that she was separated without just cause.
9. Respondent's evidence does show, uncontradicted by Petitioner, that Petitioner refused to apply for short term disability.
10. Petitioner's filings contain no actual evidence of discrimination or retaliation, other than the bare allegation in her Petition that she suffered adverse employment action following her complaints about her seat being wet. Petitioner makes no evidentiary or argumentative showing that these complaints were in some sense protected activity, nor does Petitioner tie these complaints, and Respondent's reaction to them, to some category such as racial discrimination – other than, again, to simply allege it.

CONCLUSIONS OF LAW

1. On a motion for summary judgment, the question before the Tribunal is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact, and that a party is entitled to judgment as a matter of law. Meadows v. Cigar Supply Co., Inc., 91 N.C. App. 404, 371 S.E.2d 765 (1988). Only a fact, resolution of which would prevent the party against whom it is resolved from prevailing, is material. Bone International, Inc. v. Brooks, 304 N.C. 371, 374, 283 S.E.2d 518, 520 (1981).
2. To the extent that the Findings of Fact contain Conclusions of Law, and vice versa, they should be so considered without regard to their given labels. Charlotte v. Heath, 226 N.C. 750, 755, 440 S.E.2d 600, 604 (1946).
3. A court, or in this case an administrative Tribunal,

need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

3. The burden of establishing a lack of any triable issue resides with the movant. Pembee Mfg. Corp. v. Cape Fear Constr. Co., Inc., 313 N.C. 488, 329 S.E.2d 350 (1985). Here, the burden rests with Respondent.
4. The facts of this case, for evidentiary purposes, are uncontested. Assuming the Petition makes a prima facie case for discrimination or retaliation, as the Tribunal does for the purposes of this motion, Respondent has shown a legitimate, non-discriminatory reason for separating Petitioner from employment: multiple Fitness for Duty evaluations resulting in a finding that Petitioner was unable to perform her job, following her failure to report for work after all applicable leave was exhausted. N. Carolina Dep't of Correction v. Gibson, 308 N.C. 131, 301 S.E.2d 78 (1983). Under North Carolina law, under appropriate circumstances, a properly supported showing of "unavailability" is a legitimate and non-discriminatory reason to separate a State employee from the State government workforce. See 25 N.C.A.C. 1C.1007.
5. The Fitness for Duty evaluation process in State government has, at times, been employed as a method of retaliation or abuse. Archie Andrew Copeland v. N.C. Department of Juvenile Justice and Delinquency Prevention, 2012 WL 928122, 11 OSP 04591. Though the underlying conduct causing the evaluations, as noted, strikes the Tribunal as scant, the record is simply devoid of evidence, other than the mere allegations of Petitioner, that these evaluations were employed for any improper purpose or were done inaccurately or unprofessionally.
6. While the burden is on Respondent to show an entitlement to summary judgment, once Respondent has put forward a showing of entitlement to summary judgment the Petitioner may not simply rest on her pleadings or on mere denials, but must come forward with some evidence of her own of disputed facts or other matters creating an issue for trial. Petitioner has not done so here.

7. Petitioner's lack of evidentiary response is no doubt related to her pro se status. However, North Carolina law is clear – there is not one legal standard for unrepresented parties and another for those otherwise.
8. Respondent has met its burden to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

FINAL DECISION

The Motion is **ALLOWED**. This case is **DISMISSED** with prejudice.

NOTICE OF APPEAL

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.

SO ORDERED.

This the 3rd day of August, 2022.

A handwritten signature in blue ink that reads "Michael C. Byrne". The signature is written in a cursive style and is positioned above a solid blue horizontal line.

Michael C. Byrne
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

Helen J Kirby
6800 Bristle Bark Ct
Wendell NC 27591
Petitioner

Kathryne Elizabeth Hathcock
NC Department of Justice
khathcock@ncdoj.gov (served electronically on August 3, 2022)
Attorney For Respondent

This the 4th day of August, 2022.



Lisa J Garner
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