

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 OSP 03350

<p>Marcia Denise Kirkpatrick Petitioner,</p> <p>v.</p> <p>Department of Transportation Respondent.</p>	<p>FINAL DECISION ORDER OF DISMISSAL</p>
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Respondent North Carolina Department of Transportation (“Respondent”) filed a “Motion for Partial Judgment on the Pleadings and Motion for Remand and Stay” (“Motion”) on September 22, 2022. Petitioner Marcia Denise Kirkpatrick (“Petitioner”) was provided the time permitted by rule to respond. Petitioner responded on September 30, 2022. The Motion is ripe for disposition.

SUMMARY OF UNCONTESTED FACTS

1. Petitioner filed a Petition for a Contested Case (“Petition”) in the Office of Administrative Hearings (“OAH”) on September 2, 2022. See Petition.
2. The Petition states that Petitioner appeals (a) her discharge from employment without just cause, (b) that she experienced discrimination and/or retaliation for opposition to alleged discrimination in the form of “training” and “termination,” (c) that she was “wrongful terminated after filed a complain on coworkers unethical behaviors, and (d) that “coworkers sexually harassed /assault nothing was done [and] human resources manager fired me after making a report.” Id.
3. The Petition also alleges that Petitioner was “was fired once [I] reported a complaint about behaviors of sexual harassment, stalking, and hostile workplace result terminated my job performance unsatisfactory with no prior write-ups during 90 day probation.” Id.
4. The Petition does not reference Article 14 of Chapter 126, nor does it allege that Respondent violated the Whistleblower Act.
5. The Petition is dated August 26, 2022. The Petition states that Petitioner had four months of continuous State employment as of the time of the agency actions complained of.

6. Attached to the Petition is another document, signed by Petitioner, which largely reiterates the same allegations as above, adding that Petitioner made “five reported incidents” and was terminated from employment on August 17, 2022.
7. The Motion states that Petitioner was hired by Respondent on April 16, 2022. There is no reference to this date in the Petition and the Motion is not supported by an affidavit. However, the Petition does state that at the time of her termination, Petitioner had four months of continuous State service.
8. The Motion acknowledges that Petitioner filed a complaint regarding various issues and attaches what is claimed to be a copy of that complaint, a contention Petitioner does not dispute, to the Motion as “Exhibit A.”
9. The Motion alleges, again without affidavit or other appropriate indicia of proof, that Petitioner failed to complete either the informal EEO complaint process or Respondent’s internal grievance process prior to filing her appeal with OAH.
10. The Motion also contends that the Tribunal should “Remand and Stay” certain claims made by Petitioner, and, in the alternative, that the Tribunal dismiss the case without prejudice due to alleged defects in Petitioner’s pleadings.
11. Petitioner’s response contains no written argument, but rather consists of two pages from the State Human Resources Manual’s “Disciplinary Action Policy.” Petitioner Response does not dispute that she failed to complete either the informal EEO complaint process or Respondent’s internal grievance process prior to filing her appeal with OAH. Respondent’s claims on this point are thus uncontested.

STANDARD OF REVIEW

1. Regarding a motion for judgment on the pleadings, our Rules of Civil Procedure state:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”

N.C.G.S. 1A-1, Rule 12(c).

2. The Administrative Procedure Act (N.C.G.S. Chapter 150B) permits resolution of an action by judgment on the pleadings. When considering such a motion:

An administrative law judge may grant judgment on the pleadings, pursuant to a motion made in accordance with G.S. 1A-1, Rule 12(c), ...that disposes of all issues

in the contested case. Notwithstanding subsection (a) of this section, a decision granting a motion for judgment on the pleadings...need not include findings of fact or conclusions of law, except as determined by the administrative law judge to be required or allowed by G.S. 1A-1, Rule 12(c)....”

N.C.G.S. 150B-34(e).

3. “A motion for judgment on the pleadings ‘is not favored by the courts; pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader.’ RGK, Inc. v. U.S. Fid. & Guar. Co., 292 N.C. 668, 674, 235 S.E.2d 234, 238 (1977).
4. Judgment on the pleadings is a summary procedure and the judgment is final. Elizama Landaros-Gamboa v. Johnston Cnty. Department of Social Services, 2022 WL 2389883, 22 OSP 00145. Therefore, each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits. The movant is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment. Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 479 F.2d 478 (6th Cir. 1973).
5. The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974).

CONCLUSIONS OF LAW

1. This contested case does not strike the Tribunal as a proper one for disposition by judgment on the pleadings, most particularly because it does not dispose of all issues in the case as contemplated by N.C.G.S. 150B-34.
2. Respondent’s contention that the Petition should be dismissed without prejudice for failure to state the type of discrimination at issue is without merit. Pleadings in OAH are not controlled by N.C.G.S. 1A-1, Rule 8, but rather by N.C.G.S. 150B-23. There is no “magic language” requirement of the OAH litigant.
3. Further, the “Motion for Remand and Stay” by Respondent does not cite a rule under which the Tribunal may grant that relief. While N.C. Super. Ct. & Dist. Ct. R. 6 has been amended to remove the requirement that a movant state the rule on which a motion is based, failing to cite a source for requested dispositive relief is an issue of greater concern in OAH, a tribunal of limited jurisdiction, than in the General Court of Justice.
4. However, motions to dismiss for lack of subject matter jurisdiction may be raised at any time during pendency of the action. In motions to dismiss for lack of subject matter jurisdiction, matters outside the pleadings may be considered and weighed by the Tribunal

in determining the existence of jurisdiction over the subject matter. Tart v. Walker, 38 N.C. App. 500, 248 S.E.2d 736 (1978).

5. Indeed, dismissal for lack of subject matter jurisdiction may be raised by the Tribunal itself. Dale v. Lattimore, 12 N.C. App. 348, 183 S.Ed.2d 417, cert. denied, 279 N.C. 619, 184 S.E. 2d 113 (1971); Jonathan Randall Kuhn v. Beaufort Community College, 2020 WL 11273228. That is appropriate in this case with respect to Petitioner’s claims, though with differing resolutions depending on the complaints at issue.
6. Rule 12(b)(1) requires the dismissal of a petition when there is a “[I]ack of jurisdiction over the subject matter.” N.C.G.S. 1A-1, Rule 12(b)(1).
7. Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law.” Clements v. Clements ex rel. Craige, 219 N.C. App. 581, 586, 725 S.E.2d 373, 377 (2012) (citing McKoy v. McKoy, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010)). It further “cannot be conferred by consent or waiver and a court cannot create it where it does not already exist.” *Id.*
8. OAH has jurisdiction over “contested cases.” Under the Administrative Procedure Act, N.C.G.S. Chapter 150B, “Contested case” means “an administrative proceeding ... to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty.” N.C.G.S. 150B-2(2).
9. However, OAH has no jurisdiction other than that granted through North Carolina's General Statutes or rules properly promulgated pursuant to those statutes. State ex rel. Utilities Comm'n v. Carolina Utility Customers Ass'n. Inc., 336 N.C. 657, 446 S.E.2d 332 (1994); Meads v. N.C. Dep't of Agriculture, 349 N.C. 656, 509 S.E.2d 165(1998).
10. While Petitioner is clearly a State employee aggrieved by agency action, the Petition states that at the time of her termination, Petitioner had been employed with Respondent for four months.
11. A “career State employee” is, in pertinent part:
 - a State employee or an employee of a local entity who is covered by this Chapter pursuant to G.S. 126-5(a)(2) who:
 - (1) Is in a permanent position appointment; and,
 - (2) Has been continuously employed by the State of North Carolina or a local entity as provided in G.S. 126-5(a)(2) in a position subject to the State Personnel Act **for the immediate 12 preceding months.**

N.C.G.S. 126-1.1; Wetherington v. N. Carolina Dep't of Pub. Safety, 368 N.C. 583, 590-91, 780 S.E.2d 543, 547 (2015) (emphasis supplied).

12. “A **career** State employee may allege that he or she was dismissed, demoted, or suspended for disciplinary reasons without just cause.” N.C.G.S. 126-34.02(b)(3) (emphasis supplied).
13. Petitioner was dismissed from employment with Respondent after four months of service. Career status employment requires 12 months of consecutive State service in a permanent position subject to the North Carolina Human Resources Act.
14. Accordingly, Petitioner has no property interest in continued employment with the State and may not appeal a dismissal as being without just cause under N.C.G.S. 126-34.02. The Petitioner’s claim for dismissal without just cause must be dismissed with prejudice. Vickie Bass v. NC Department of Public Safety Emergency Management, 2022 WL 2290315.
15. The language of N.C.G.S. 126-34.02 is notably different for appeals alleging discrimination or retaliation, in that any “State employee” may appeal such an action. N.C.G.S. 126-34.02(b)(1) and (b)(2). Career status is not a jurisdictional prerequisite for such appeals. However, such appeals may only “be heard as contested cases after completion of the agency grievance procedure and the Office of State Human Resources review. Id.”
16. Prior to 2014, under the former N.C.G.S. 126-36 and N.C.G.S. 126-34.1, a State employee could file claims of illegal discrimination or retaliation appeal directly with OAH. Those statutes are now repealed. Since 2014, a petitioner may not file a discrimination or retaliation claim in OAH without either (a) completion of the agency informal EEO complaint process and internal grievance process, or (b) on appropriate election on a cause finding by the OAH Division of Civil Rights.
17. Petitioner indicates neither event in her filings. Petitioner’s discrimination claims must be dismissed **without prejudice** so that Petitioner can complete the internal grievance process.

FINAL DECISION

Petitioner’s claim for dismissal without just cause is **DISMISSED WITH** prejudice. Petitioner’s claims for discrimination and retaliation are **DISMISSED WITHOUT** prejudice.

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.

IT IS SO ORDERED.

This the 30th day of September, 2022.



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:

Marcia Denise Kirkpatrick
mkirkpatric@gmail.com
Petitioner

Kathryne Elizabeth Hathcock
NC Department of Justice
khathcock@ncdoj.gov
Attorney For Respondent

This the 30th day of September, 2022.



Daniel L. Chunko
Law Clerk
N. C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 919-431-3000