

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 OSP 03657

<p>Sandy Bryant Connor Petitioner,</p> <p>v.</p> <p>Johnston County Department of Social Services Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER has come before Stacey Bice Bawtinheimer, Administrative Law Judge, for consideration of Respondent Johnston County Department of Social Services' ("Respondent" or "DSS") Motion for Judgment on the Pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c) ("Motion"), filed November 9, 2022. Petitioner filed her Response to the Motion on November 22, 2022. Pursuant to the Undersigned's November 28, 2022 request, Respondent filed a Reply on December 2, 2022. Having fully reviewed and considered the pleadings and counsels' arguments therein, the Undersigned **GRANTS** the Motion as follows:

APPEARANCES

For Petitioner:	Michael R. Porter The Michael Porter Law Firm 5851 Ramsey Street Fayetteville, NC 28311 Attorney For Petitioner
For Respondent:	David L. Woodard Brett A. Carpenter Poyner Spruill LLP 301 Fayetteville Street, Suite 1900 Raleigh, NC 27602 Attorneys For Respondent

ISSUE

Whether Respondent is entitled to judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c)?

STANDARD OF REVIEW

Regarding a motion for judgment on the pleadings, the North Carolina Rules of Civil Procedure (the “Rules”) provide that, “[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” N.C. Gen. Stat. § 1A-1, Rule 12(c).

When deciding a motion for judgment on the pleadings under Rule 12(c), the court views the facts and permissible inferences in the light most favorable to the nonmoving party. *Samost v. Duke Univ.*, 226 N.C. App. 514, 517, *aff’d per curiam*, 367 N.C. 185 (2013). “‘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.’” *Id.* (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 137 (1974)). The motion should be granted if the movant establishes that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Id.* at 518. “For that reason, the motion’s function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit, with a motion for judgment on the pleadings being the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain.” *Id.* (internal brackets and quotation marks omitted).

FINDINGS OF FACT

1. On September 12, 2022, Sandy Bryant Connor (“Petitioner”) filed an internal grievance with Johnston County Department of Social Services (“DSS” or “Respondent”) alleging she was subjected to political affiliation discrimination and harassment by Johnston County Commissioner Patrick Harris, who also serves on the Johnston County Social Services Board.

2. Petitioner alleges that she began working for DSS in May 2020. Commissioner Harris was appointed to the Johnston County Social Services Board ten months later in February 2021. Commissioner Harris “was not pleased” that Petitioner and other DSS employees were hired from Cumberland County, and Commissioner Harris “could not understand why the positions could not have been filled in house with local staff.” (Internal Grievance, at pp. 1-2, attached as Exhibit A to Motion). Commissioner Harris also purportedly received complaints from his “constituents” who worked at DSS about Petitioner. Based on these allegations, Petitioner contends Commissioner Harris has attempted to convince the Director of DSS, Scott Sabatino, to discipline Petitioner or to terminate Petitioner’s employment.

3. On September 16, 2022, Director Sabatino informed Petitioner that, “[u]pon review of the grievance, allegations on the face of the complaint provide no claim of political affiliation discrimination or harassment; therefore the grievance is denied.” (Final Agency Decision, at p. 1, attached as Exhibit B to Motion.)

4. Subsequently, on September 26, 2022, Petitioner initiated the instant action by filing a Petition alleging workplace harassment, discrimination, and retaliation based on her “Political Affiliation.” (Pet.)

5. In her Prehearing Statement, Petitioner states that “[she] believes that the motivation for said conduct by her employer is her political affiliation in that she is a voter and resident in and of Cumberland County, N.C. as opposed to one of Commissioner Herris’ [sic] ‘constituents.’” (Pet.’s Prehearing Statement, at p. 1, ¶1). Petitioner further states that “she has been discriminated against based on her political affiliations because she is not a ‘constituent’ of Commissioner Harris, and her grievance has been improperly and unjustly denied.” (*Id.* at p. 1, ¶3)

6. After the pleadings closed, Respondent filed this Motion for Judgment on the Pleadings on the grounds that, even if Petitioner’s allegations are true, they do not touch on Petitioner’s affiliation with a political party or belief, and therefore do not amount to discrimination, harassment, or retaliation based on Petitioner’s “political affiliation.” Furthermore, the allegations do not amount to unlawful harassment of any kind, no matter what the motivation for making the alleged comments. (Mem. In Supp. Mot., at p. 3)

7. In response, Petitioner concedes that the only North Carolina case law addressing “political affiliation” in this context requires the employee to show she had an affiliation with a certain political party and was subjected to an adverse employment action or harassment because of that affiliation. (Response, at pp. 6-7). Nevertheless, Petitioner requests this Tribunal expand the meaning of political affiliation beyond her political party to include the county in which she resides. (*Id.* at pp. 6-9). Petitioner provides no federal or state case law from North Carolina or any other jurisdiction to support her position. (*See id.* at pp. 1-10)

8. Respondent replies that under this State’s binding legal precedent, to establish a claim of political affiliation discrimination, harassment, or retaliation, Petitioner must show she has “an affiliation with a **certain political party**” and that her political affiliation with that party was the cause or motivating factor for the adverse employment action or harassment. (Reply at p. 1, *quoting Curtis v. North Carolina Dep’t of Transp.*, 140 N.C. App. 475, 479 (2000) (emphasis added)).

9. Respondent emphasizes that Petitioner’s residence in Cumberland County has no relation to any particular political affiliation or belief, or affiliation with a “certain political party,” and that residents of Cumberland County can be members of any political party or no political party at all. (*Id.* at p. 2). Respondent further points out that Petitioner does not contend that she chose to live in Cumberland County for any particular political purpose or to support a political party or belief. (*Id.*)

10. Rather, Petitioner’s sole basis for claiming political affiliation discrimination, harassment, and retaliation is that she lives in Cumberland County, which is not the county in which she works or the county in which Commissioner Harris serves as a commissioner. (*Id.* at p. 1, *citing* Response, at p. 7). For these reasons, Respondent contends Petitioner’s claims fail as a matter of law. The Undersigned agrees.

CONCLUSIONS OF LAW

1. “After completion of the agency procedure,” a State employee may file a contested case with the Office of Administrative Hearings (1) “alleg[ing] discrimination or harassment based on . . . political affiliation if the employee believes that he or she has been discriminated against in his or her application for employment or in the terms and conditions of the employee’s employment, or in the termination of his or her employment.” N.C. Gen. Stat. § 126-34.02(b)(1). Or, the State employee can “allege retaliation for protesting discrimination based on political affiliation . . . if the employee believes that he or she has been retaliated against in his or her application for employment or in the terms and conditions of the employee’s employment, or in the termination of the employee’s employment.” N.C. Gen. Stat. § 126-34.02(b)(2).

2. To state a *prima facie* case of discrimination based on the employee’s political affiliation, the pleadings must show

(1) the employee works for a public agency in a non-policymaking position (i.e., a position that does not require a particular political affiliation), (2) the employee had an affiliation with a certain political party, and (3) the employee’s political affiliation was the cause behind, or motivating factor for, the demotion or other adverse employment action.

Curtis v. North Carolina Dep’t of Transp., 140 N.C. App. 475, 479 (2000).

3. Regarding the second element, “affiliation” means the political party (e.g., Republican or Democrat) with which the employee is registered or otherwise affiliated. *See id.* at 479-80; *see also North Carolina Dep’t of Public Safety v. Ledford*, 247 N.C. App. 266, 290 n.7 (2016) (stating “[b]ecause the record includes substantial evidence of Ledford’s affiliation with the Democratic party, we conclude that Ledford did satisfy this element.” (Internal citation omitted)).

4. With respect to Petitioner’s claim of harassment based on her “political affiliation,” such claims focus on the impact of alleged behavior on the workplace and require allegations that the political affiliation harassment was “so severe or pervasive as to alter the conditions of the victim’s employment and create an abusive working environment.” *Guthrie v. Conroy*, 152 N.C. App. 15, 20 (2002) (internal brackets and quotation marks omitted). “[I]solated personnel decisions’ cannot form the basis of a hostile work environment claim.” *Jones v. Town of Spring Lake*, No. 5:18-CV-385-D, 2020 WL 4587519, at *9 (E.D.N.C. Aug. 10, 2020) (quoting *Pueschel v. Peters*, 577 F.3d 558, 566 (4th Cir. 2009)).

5. Regarding Petitioner’s retaliation claim, a *prima facie* case of retaliation requires allegations that (1) Petitioner engaged in the protected activity of “protesting discrimination based on . . . political affiliation,” N.C. Gen. Stat. § 126-34.02(b)(2); (2) DSS took adverse employment action against her; and (3) that the protected activity was a substantial or motivating factor in the adverse employment action (i.e., a causal connection existed between the protected activity and the adverse action). *Employment Sec. Com’n of N.C. v. Peace*, 128 N.C. App. 1, 9 (1997).

6. According to Petitioner, all three of her claims are grounded in her alleged “political affiliation.” (Response, at pp. 6-10). However, Petitioner does not identify her political affiliation, as that term is defined in applicable law.

7. In her pleadings or Response to the Motion, she does not allege in any of these documents that anyone at DSS or on DSS’s Board (including Commissioner Harris) has ever made any inappropriate comment or taken any unfavorable or adverse employment action against her because of her political affiliation or political beliefs. Moreover, she does not claim she is a Democrat, Republican, Libertarian, Independent, liberal, conservative, etc.

8. Rather, Petitioner’s Response makes clear that her sole basis for claiming “political affiliation” harassment, discrimination, and retaliation is that DSS and/or Commissioner Harris have treated her differently because she lives in a county (Cumberland) that is different than the county in which she works and in which Commissioner Harris serves as a commissioner (Johnston). Because of her residence, Petitioner cannot be a “constituent” of Commissioner Harris. (*Id.* at p. 8)

9. Petitioner’s residence (Cumberland County) does not constitute political affiliation as recognized by controlling authority in this State. It has no relation to, nor is it a proxy for, any affiliation (or lack thereof) with a political party or political belief.

10. None of Petitioner’s pleadings allege she is affiliated with a political party or that she harbors any particular political belief that Commissioner Harris or anyone at DSS opposes. Petitioner alleges only that she is treated differently because she resides in a county other than the one in which she works and in which Commissioner Harris is a commissioner. Nothing about these allegations touch on a political affiliation or belief. Consequently, Petitioner has failed to state a claim of “discrimination or harassment based on . . . political affiliation,” or of “retaliation for protesting discrimination based on . . . political affiliation,” N.C. Gen. Stat. § 126-34.02(b)(1)-(2). *See, e.g., Curtis*, 140 N.C. App. at 479-80.

11. Recognizing that her residence has no relation to her affiliation with a political party, Petitioner argues that because 25 NCAC 01J .1101 does not define “political affiliation” discrimination as only inter or intra political party discrimination, the Undersigned should construe “political affiliation” broadly to include the county where an employee resides. (Response, at p. 7). To reiterate, Petitioner provides no federal or state case law from North Carolina or anywhere else in the country to support this proposition. (*See id.* at pp. 7-9)

12. Instead, Petitioner cites N.C. Gen. Stat. § 153A-11, which states that “[t]he inhabitants of each county are a body politic” (*Id.* at p. 7, *quoting* N.C. Gen. Stat. § 153A-11). Under this statute, the General Assembly provides for the formation of county governments, giving each county the power to manage its property, to sue and be sued, exercise county powers, rights, and duties, etc. N.C. Gen. Stat. § 153A-11. Nothing in this statute suggests that being an “inhabitant” of the county means the inhabitant is affiliated with or associated with a political party, harbors a particular political belief, or engages in any form of political activity. *See id.*

13. Although the “inhabitants” of a city, county, state, or country may form a “body politic,” Petitioner fails to show how this formation has any relationship to the inhabitants’ political parties, political beliefs, or political activities. In short, Petitioner’s citation to N.C. Gen. Stat. § 153A-11 lends no support for the Undersigned to expand the meaning of political affiliation to include the county in which an employee resides.

14. Petitioner next argues that “[she] has exercised and voiced her political views through her conduct by ‘*voting with her feet*’ by choosing to live in Cumberland County while working in Johnston County,” and analogizes this case to “the movement of millions of Black Americans from the Jim Crow-era South to the North and West, where they benefited from greater opportunity and relatively lower levels of official racial discrimination.” (Response, at pp. 8-9 *quoting* Somin, Ilya, *The Case for Empowering Americans to Vote with Their Feet* December 27, 2021 <https://www.cato.org/commentary/case-empowering-americans-vote-their-feet>).

15. Yet, Petitioner does not contend that she moved to Cumberland County to avoid racial or any other type of discrimination to further a political belief of any kind, or that she lives in Cumberland County so that she can be a member of a particular political party or vote for a particular political regime or purpose. (*See id.* at pp. 8-9). Petitioner cites no statute or common law that creates a protected category of employees, much less a cause of action, for someone who moves to a different location to improve their living conditions. (*Id.*)

16. Petitioner further analogizes her situation to “libertarians moving to New Hampshire as a way to ‘vote with their feet’ to take over a small state” and establish a state of their own. (*Id.* at p. 9). Again, Petitioner does not contend that she is part of any collective political movement of individuals from one location to Cumberland County in an effort to take over Cumberland County or establish a county of their own. (*See id.*)

17. In sum, Petitioner has not alleged that she chose to live in Cumberland County for any political purpose, or that her residence in Cumberland County is a political movement, an expression of a political opinion, or in line with any political party. Petitioner’s analogies to the general statute involving the formation of a county government, to the movement of millions of African Americans to another area of the country to avoid discrimination, and to libertarians moving to New Hampshire to establish a state of their own have no relationship to, or bearing on, this case.

18. As referenced above, North Carolina’s appellate courts first addressed the meaning of “political affiliation” in the context of a discrimination claim in *Curtis*, 140 N.C. App. 475 (2000). There, the North Carolina Court of Appeals recognized that North Carolina courts look to federal decisions for guidance when no North Carolina court has outlined the elements of such a claim. (*Id.* at 479 citing *Dep’t of Correction v. Gibson*, 308 N.C. 131, 136 (1983)).

19. Adopting federal authority, the North Carolina Court of Appeals held that “a prima facie case of political discrimination requires showing . . . the employee had an affiliation with a **certain political party**,” which was “the cause behind, or motivating factor for, the demotion or other adverse employment action.” *Id.*, citing *Robertson v. Fiore*, 62 F.3d 596, 599 (3d Cir. 1995) (*per curiam*) (emphasis added).

20. Regarding the second element, the *Curtis* Court explained:

For purposes of political discrimination claims, an employee's political affiliation need not be strictly defined along party lines; intra-party discrimination may also form the basis for a complaint. *Robertson*, 62 F.3d at 600. This is so because "[t]he danger that employees will abandon the expression or exercise of their political beliefs to appease their supervisors is not diminished because a supervisor supports a different identifiable faction within a party as compared to a different party altogether." *Id.*

Id. at 479-80 (emphasis added).

21. After *Curtis*, the North Carolina Court of Appeals again addressed the elements of a political affiliation discrimination claim in *North Carolina Dep't of Public Safety v. Ledford*, and again held the claim requires "'the employee had an affiliation with a certain political party.'" *Ledford*, 247 N.C. App. 266, 288 (2016) (quoting *Curtis*, 140 N.C. App. at 479)) (emphasis added).

22. Pursuant to *Curtis* and *Ledford*, Petitioner was required to show she was affiliated with a "certain political party" and suffered an adverse employment action or harassment because of her affiliation with that party in order to state an actionable claim for relief.

23. Petitioner's allegations of unfair treatment because she lives in a different county than the one in which she works or in which Commissioner Harris serves as a commissioner does not meet this burden and is fatal to each of her claims of discrimination, harassment, and retaliation based on political affiliation.

24. Even if Petitioner had alleged that she was affiliated with a certain political party, her discrimination and retaliation claims would further fail because she does not allege that she has suffered any adverse employment action such as a demotion, suspension, or termination based on her political affiliation or because she "protest[ed] discrimination based on . . . political affiliation." N.C. Gen. Stat. § 126-34.02(b)(1)-(2).

25. Petitioner alleges she received a written warning on April 1, 2022, which had nothing to do with her political affiliation or any form of retaliation against her for "protesting discrimination based on . . . political affiliation." (Internal Grievance, at p. 3.) Moreover, Petitioner alleges she received the written warning on April 1, 2022, but she did not file this contested case until more than 178 days later on September 26, 2022. (*Id.* at p. 3; Petition, at p. 1.)

26. As such, even if the April 1, 2022 written warning could constitute an adverse employment action, it is time-barred under the 30-day statute of limitations for filing a contested case with the Office of Administrative Hearings. N.C. Gen. Stat. § 126-34.02(a). Petitioner's failure to allege she suffered an "adverse employment action" because of her political affiliation further defeats her discrimination and retaliation claims as a matter of law. *See Curtis*, 140 N.C. App. at 479 (holding "adverse employment action" is required for claim of political affiliation

discrimination); *Peace*, 128 N.C. App. at 9 (holding “adverse employment action” is required for claim of retaliation).

27. With regard to Petitioner’s claim of political affiliation harassment, the pleadings contain no allegations that anyone at DSS or on DSS’s Board has ever made any statement, comment, or gesture toward Petitioner based on her political affiliation, or that she has suffered any form of adverse employment action due to her political affiliation.

28. Additionally, there are no allegations that Commissioner Harris has ever spoken to Petitioner or made any comments to Petitioner about her political affiliation or political beliefs.

29. For these reasons, Petitioner’s claim for hostile work environment harassment based on her political affiliation further fails as a matter of law. *See Norman v. N.C. Dep’t of Admin.*, 257 N.C. App. 673, 679 (2018) (recognizing under federal law, claims of hostile work environment require allegations of conduct that “was sufficiently severe or pervasive to alter the plaintiff’s conditions of employment and to create an abusive work environment”).

30. Even assuming all material allegations of fact in Petitioner’s pleadings are admitted, Respondent is entitled to judgment as a matter of law.

FINAL DECISION

NOW, THEREFORE, based on the foregoing, Respondent’s Motion for Judgment on the Pleadings is **GRANTED. IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that Respondent is entitled to judgment as a matter of law on each of Petitioner’s claims and that 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.

IT IS SO ORDERED.

This the 21st day of December, 2022.



Stacey Bice Bawtinhimer
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.

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This the 21st day of December, 2022.



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