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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1082

Filed: 18 July 2017

Office of Administrative Hearings, No. 16 OSP 06725

MARCIA HUTCHISON, Petitioner-Appellant,

v.

NORTH CAROLINA DEPARTMENT OF JUSTICE, Respondent-Appellee.

Appeal by Petitioner from an order entered 30 August 2016 by Administrative Law Judge J. Randolph Ward in the Office of Administrative Hearings, Guilford County. Heard in the Court of Appeals 21 March 2017.

Smith, James, Rowlett & Cohen, L.L.P., by Seth R. Cohen, for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason R. Rosser, for Respondent-Appellee.

INMAN, Judge.

When a state employee's medical condition or prognosis results in absences beyond her permitted leave time, so that she is unable to return to all of her position's essential duties or designated work schedule, and the employee and agency cannot agree on an accommodation that meets both the needs of the agency and the

employee's condition, the agency is permitted to terminate the employment.

Marcia Hutchison ("Petitioner") appeals a final decision from the Office of Administrative Hearings ("OAH") dismissing her claim against the North Carolina Department of Justice ("Respondent" or "DOJ") and the denial of her motion to reconsider the dismissal. Petitioner contends that the administrative law judge ("ALJ") erred by failing to take into consideration, or by not considering in a light most favorable to Petitioner, DOJ's own time records, which Petitioner argues demonstrate that she was on approved leave on the date she was terminated from employment for being unavailable to work. After careful review, we affirm.

Factual and Procedural History

The evidence presented in the OAH tended to show the following:

In 2004, Petitioner was employed by Respondent as a Paralegal II in the Environmental Division of the DOJ in Raleigh, North Carolina. Employees holding this position are required to work five days and a total of 40 hours each week.

Petitioner took several leaves of absence from 2013 to 2015 including: a leave of absence in March 2013, disability leave in May 2013, and illness leave in May 2015. Petitioner returned to work on 5 August 2015. When she returned, Petitioner had 40 hours of bonus leave available and a negative balance of eight hours vacation leave. On 8 January 2016, Petitioner exhausted the remainder of her leave credits (0.65 hours) due to a medical appointment. Petitioner was then absent from work for

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various reasons from 11 January to 12 February 2016, a total of 25 days, before she was given notice that her employment was being terminated.

On 3 February 2016, Petitioner submitted several documents to Respondent's Human Resources Office, including: (1) doctors' notes concerning her absences on 14-15 January 2016, which stated that Petitioner needed to be absent from work on those dates; (2) documents from a medical center concerning her condition; and (3) a Family and Medical Leave Act ("FMLA") form from her chiropractor indicating that Petitioner was seen on 21 January 2016 and would be incapacitated from 21 January through 10 February 2016. The FMLA form also stated that Petitioner would require "leave for medical treatment once a day for ten days followed by leave three times a week for four weeks." Petitioner did not submit documents regarding her absences on 11, 12, or 19 January 2016.

On 8 February 2016, Petitioner's supervisor sent her a pre-termination notice via FedEx, informing Petitioner that Respondent was considering terminating her employment because of absences accrued after she had exhausted her leave credits. The letter noted that because Petitioner had exhausted all leave credits, her absences would be coded 9400, "Leave without Pay." During a telephone conference on 11 February 2016, Petitioner informed her supervisor that her chiropractor released her to return to work on 15 February 2016.

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On 12 February 2016, Respondent issued a letter pursuant to the North Carolina Administrative Code, 25 N.C. Admin. Code 1C.1007(a), involuntarily terminating Petitioner's employment due to her unavailability after the exhaustion of her leave credits.

Petitioner filed a *pro se* petition for a contested case hearing on 17 June 2016, alleging, in part, that her employment was wrongfully terminated. Petitioner filed a prehearing statement on 6 July 2016. Respondent filed a prehearing statement on 5 August 2016. On 18 August 2016, Respondent filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. In addition to the petition and prehearing statements, the ALJ considered 113 exhibits included with Respondent's motion.

On 30 August 2016, the ALJ granted Respondent's motion for judgment on the pleadings and issued a final decision order of dismissal, concluding that, as of 12 February 2016, Petitioner had not been cleared by her medical provider to return to work, was therefore "unavailable," and as a result was terminated from her position.

On 31 August 2016, Petitioner filed a motion to reconsider the final decision order of dismissal, arguing that the ALJ failed to consider internal time records that were included in Respondent's prehearing statement. On 14 September 2016, the ALJ denied Petitioner's motion to reconsider. Petitioner timely appealed.

Analysis

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Petitioner argues that Respondent must prove that she was unavailable to work on Monday, 15 February 2016, the next work day following the termination of her employment. She further contends that, given the chance, she would have been able to work on that date and therefore her employment should not have been terminated due to unavailability. We disagree.

A. *Standard of Review*

“A trial court’s ruling on a motion for judgment on the pleadings is subject to *de novo* review on appeal.” *Samost v. Duke Univ.*, 226 N.C. App. 514, 517, 742 S.E.2d 257, 259 (2013). When conducting *de novo* review, the reviewing court “considers the matter anew and freely substitutes its own judgment for that of the lower [court].” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted).

When ruling on a motion for judgment on the pleadings, “[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party.” *Samost*, 226 N.C. App. at 517, 742 S.E.2d at 259 (citation omitted). A trial court should refuse to grant a party’s motion for judgment on the pleadings unless “the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.” *Am. Bank & Trust Co. v. Elzey*, 26 N.C. App. 29, 32, 214 S.E.2d 800, 802 (1975) (citation omitted).

B. Separation Due to Unavailability

Petitioner contends that the ALJ committed error by granting Respondent's Rule 12(c) motion for judgment on the pleadings and by denying Petitioner's motion for reconsideration because the question of whether she was available for work the Monday following termination of her employment, 15 February 2016, is a genuine issue of material fact that must be decided at trial.

Title 25, subchapter 1C, section .1007 of the North Carolina Administrative Code, previously 25 N.C. Admin. Code 1D.0519, "covers circumstances wherein an employee is presently absent from work, has no leave time to cover the absence, and is therefore subject to separation." *Beauchesne v. Univ. of N.C.*, 125 N.C. App. 457, 464, 481 S.E.2d 685, 690 (1997) (holding that the State Personnel Commission's termination of an employee was supported by substantial evidence because the petitioner presented no evidence of when, if ever, she would return to work). Section 1C.1007 provides that a state employee may be separated when "the employee remains unavailable for work *after all applicable leave credits and leave benefits have been exhausted* and agency management does not grant leave without pay." 25 N.C. Admin. Code 1C.1007(a)(1) (emphasis added). "Applicable leave credits" include sick, vacation, bonus, incentive, and compensatory leave. 25 N.C. Admin. Code 1C.1007(d). Section 1C.1007 does not apply to leave due to either short-term or long-term disability. *See id.*

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If an employee has been involuntarily separated for a non-disciplinary reason and appeals the termination, the separating agency has the burden of proving only that the employee was unavailable to work. See N.C. Gen. Stat. § 126-34.02(b)(3) (2015) (“[I]n contested cases conducted pursuant to this section, an employee may appeal an involuntary nondisciplinary separation due to an employee’s unavailability . . . but the agency shall only have the burden to prove that the employee was unavailable.”). To prove that the employee was unavailable, the agency has the burden of establishing that the employee, in addition to having exhausted all leave credits,

is unable to return to all of the position’s essential duties as set forth in the employee’s job description or designated work schedule due to a medical condition or the vagueness of a medical prognosis, and the employee and agency are unable to reach agreement on a return to work arrangement that meets both the needs of the agency and the employee’s condition.

25 N.C. Admin. Code 1C.1007(a)(1).

In *Beauchesne*, this Court held that the agency was justified in terminating an employee who was unavailable after all of her leave credits had been exhausted. 125 N.C. App. at 466, 481 S.E.2d at 691. There, the employee was deemed unavailable for work when she fell ill and accrued absences, without sick or vacation leave, and failed to provide any legitimate time frame for when she would be able to return to work. *Id.* at 446, 481 S.E.2d at 691. In addition, the employee failed to cooperate

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with her employer or propose a plan to accommodate her needs with the agency's interest in ensuring that her position was covered. *Id.* Before terminating the employee due to her unavailability, the employer "attempted to accommodate her absence by hiring temporary help[,] but "[the] solution did not meet the needs of the [employer]." *Id.* at 467, 481 S.E.2d at 692. This Court ultimately held that the employee was unavailable for work based on her failure to comply with the requirements of 25 N.C. Admin. Code 1C.1007(a)(1). *Id.*

Here, Petitioner argues that she would have been permitted to return to work on Monday, 15 February 2016, because her chiropractor released Petitioner from her "period of incapacity" effective 12 February 2016, the date that she was terminated from her employment. This argument is unavailing, because even if we assume Petitioner was available for work on 15 February 2016, her numerous absences after the exhaustion of her leave credits amounted to unavailability on 12 February 2016 under 25 N.C. Admin. Code 1C.1007, as asserted by Respondent in its letter to Petitioner on 8 February 2016. The letter reviewed Petitioner's history of absences and explained that Respondent was unable to accommodate future absences.

Before the date her employment was terminated, Petitioner had exhausted all leave available to her. In a conference call on 11 February 2016, Petitioner stated that she would be available to return to work on 15 February 2016, but also stated

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that she would have to periodically miss work on later, undetermined dates for medical appointments.

The day after the conference call, 12 February 2016, Respondent sent Petitioner the letter terminating her employment due to unavailability. Respondent did not challenge the legitimacy of Petitioner's medical appointment needs, but explained that Petitioner's absences resulted in "considerable disruption" of Respondent's operation of its business without a settled course of action between the parties. *Beauchesne*, 125 N.C. App. at 466, 481 S.E.2d at 691. Respondent was permitted by 25 N.C. Admin. Code 1C.1007 to terminate Petitioner's employment because, since exhausting her leave credits five weeks earlier, Petitioner had been absent for 25 days and Respondent could no longer accommodate the absences that Petitioner's medical treatment would require going forward.

Petitioner also contends that she was on agency approved leave while she was absent in January and February 2016 and therefore was not unavailable on those dates. While Petitioner's absences during this period were coded "9400" or "Leave without Pay" in the agency's recording system, Petitioner failed to introduce any evidence that the absences were approved by Respondent. The 12 February 2016 letter explains the code in the context of informing Petitioner that her employment will be terminated.

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Accordingly, Petitioner failed to raise a genuine issue of material fact regarding whether she was unavailable for work on the date her employment was terminated. We therefore hold that the ALJ did not err in issuing its final decision order of dismissal.

C. Motion for Reconsideration

Petitioner also contends that the ALJ should have allowed her motion for reconsideration¹ because in deciding Respondent's motion for judgment on the pleadings, the ALJ had inappropriately considered the evidence in a light most favorable to the moving party. We disagree.

We review the denial of a motion for reconsideration for an abuse of discretion, unless the motion involves a question of law or legal inference subject to *de novo* review. See *N.C. All. for Transp. Reform, Inc. v. N.C. Dep't. of Transp.*, 183 N.C. App. 466, 469, 645 S.E.2d 105, 107 (2007) (reviewing the denial of a motion to reconsider *de novo*, because it involved a question of law as to the sufficiency of the basis for the petitioners' Rule 59 motion). We "reverse [the ALJ's denial of a motion for reconsideration] only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *James River Equip., Inc. v. Tharpe's*

¹ Title 26, chapter 3, section .0129 of the North Carolina Administrative Code, which dealt with "Reconsideration or Rehearing" procedures, expired 1 August 2016. Title 26, chapter 3, section .0101 of the North Carolina Administrative Code states that "[t]he Rules of Civil Procedure . . . shall [now] apply in contested cases in the Office of Administrative Hearings (OAH)[.]" 26 N.C. Admin. Code 3.0101. Therefore, Petitioner's motion filed 31 August 2016 is likely treated as a motion to reconsider under Rule 59 of the North Carolina Rules of Civil Procedure.

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Excavating, Inc., 179 N.C. App. 336, 344, 634 S.E.2d 548, 555 (2006) (internal citations and quotations omitted).

Petitioner argues that the ALJ, in inferring that Respondent had not granted her leave without pay, necessarily failed to review the facts and permissible inferences in the light most favorable to the non-moving party. Petitioner contends that, because her absences were coded “Leave without Pay,” the ALJ should have inferred that she was on a State-approved leave of absence on those dates, and that, based on the note provided by her chiropractor, the ALJ should have inferred that she was available to work on 15 February 2016. But Respondent’s evidence showed the contrary, and Petitioner failed to submit any evidence to support the contention that coding the time “Leave without Pay” meant that the absences were approved by management.

In denying Petitioner’s motion for reconsideration, the ALJ acknowledged that Respondent’s discharge letter did not specifically recite the language that “agency management does not grant leave without pay,” but inferred that Petitioner’s absences had not been approved from its statement that “the agency has made the decision to separate [Petitioner] effective today, [12 February 2016] after all leave credits have been exhausted.”

Viewing the facts in the light most favorable to Petitioner, the ALJ did not err in concluding that Petitioner was unavailable for work on the date her employment

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was terminated. Without any reference in Respondent's termination letter to the absences being approved, and without any other evidence that Respondent approved Petitioner's absences, it would have been unreasonable for the ALJ to infer that the 9400 "Leave without Pay" code meant that Petitioner was on agency-approved leave. Therefore, the ALJ reasonably inferred that had the DOJ approved Petitioner's absences, it would not have terminated her employment for unavailability. Accordingly, we hold that Petitioner failed to demonstrate that the ALJ abused its discretion by denying Petitioner's motion for reconsideration.

Conclusion

For the foregoing reasons, we affirm the OAH's final orders: (1) dismissing the Petitioner's claim for wrongful termination due to unavailability; and (2) denying Petitioner's motion to reconsider the final order of dismissal.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

Report per Rule 30(e).