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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1117

Filed: 15 August 2017

From the Office of Administrative Hearings, No. 16 OSP 6127

JULIA NICHOLS, Petitioner,

v.

THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, Respondent.

Appeal by Petitioner from final decision entered 25 July 2016 by Judge Fred G. Morrison Jr., in the Office of Administrative Hearings. Heard in the Court of Appeals 20 April 2017.

Alan McSurely for Petitioner-Appellant.

Attorney General, Joshua H. Stein, by Assistant Attorney General, Laura H. McHenry, for Respondent-Appellee.

DILLON, Judge.

Where Petitioner fails to exhaust her administrative remedies pursuant to N.C. Gen. Stat. § 150B-43 *et seq.* prior to filing a petition for a contested case hearing, we affirm the Office of Administrative Hearings' final decision granting the Respondent's motion to dismiss.

I. Background

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Petitioner was employed by the University of North Carolina at Chapel Hill (the “University”) as a counselor in the Academic Advising Program. In May 2015, Petitioner received a written warning for unacceptable conduct from her supervisors. Later that year, in November 2015, she received a second written warning for unacceptable conduct. The second written warning reminded Petitioner that if she did not follow the corrections listed in the warning, she would be subject to dismissal.

In January 2016, two months after receiving the second warning, Petitioner received a notice to attend a pre-disciplinary conference for unacceptable conduct from her supervisors. Following the conference, Petitioner was terminated from her employment with the University.

A few weeks after being terminated, Petitioner filed a State Personnel Act (“SPA”) Grievance Initial Filing Form, in which she alleged that her termination was (1) without just cause, (2) the result of age discrimination, and (3) in retaliation for whistleblowing on alleged improper University activity.

Subsequent to the filing of Petitioner’s grievance form, the University’s Equal Opportunity and Compliance Office completed an informal inquiry of Petitioner’s age discrimination claim, in which it found that no age discrimination had occurred. Petitioner then appealed the informal inquiry to the University’s Office of Human Resources and requested mediation. However, the mediation resulted in an impasse.

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As a result of the unsuccessful mediation, a grievance hearing was scheduled for 15 June 2016. The day before the hearing date, Petitioner notified the University Grievance Officer that she did not intend to participate at the grievance hearing. Despite Petitioner's absence, the University held the grievance hearing. Petitioner did not appear nor participate at the hearing. Pursuant to the University's grievance policy, Petitioner forfeited the right to proceed with the internal grievance process.

The day prior to the scheduled grievance hearing, Petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings ("OAH"). The University moved to dismiss the petition. The administrative law judge ("ALJ") issued a final decision granting the University's motion to dismiss for lack of subject matter jurisdiction based on Petitioner's failure to exhaust administrative remedies. Petitioner appeals.

II. Analysis

Petitioner argues the OAH erred for dismissing her claims for discharge without just cause, whistleblowing, age discrimination and failure of the grievance process. We affirm the ALJ's ruling.

"We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (citations omitted).

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“[W]here the [General Assembly] has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts.” *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). This Court's prior holdings demonstrate that a trial court lacks subject matter jurisdiction to hear an action challenging a final decision by a University unless the plaintiff has exhausted all available administrative remedies, including seeking judicial review pursuant to N.C. Gen. Stat. § 150B-3, or his complaint alleges the administrative remedies available to him are inadequate. *Huang v. N.C. State Univ.*, 107 N.C. App. 710, 715-16, 421 S.E.2d 812, 815-16 (1992).

The requirement that a petitioner exhaust administrative remedies before filing a petition for a contested case “does not require merely the initiation of prescribed administrative procedures, but that they should be pursued to their appropriate conclusion and their final outcome awaited before seeking judicial intervention[.]” *Id.* at 715, 421 S.E.2d at 815 (citation and internal quotation marks omitted). “An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies.” *Shell Island Homeowners Ass’n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999) (citations omitted).

Here, the General Assembly has enacted administrative remedies that apply to Petitioner’s discrimination claim, providing:

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Any State employee having a grievance arising out of or due to the employee's employment shall first discuss the problem or grievance with the employee's supervisor, unless the problem or grievance is with the supervisor. Then the employee shall follow the grievance procedure approved by the State Human Resources Commission. The proposed agency final decision shall not be issued nor become final until reviewed and approved by the Office of State Human Resources. The agency grievance procedure . . . review shall be completed within 90 days from the date the grievance is filed.

N.C. Gen. Stat. § 126-34.01 (2015).

In the present case, Petitioner asserts that the University violated the timeline for completing the internal grievance process by not issuing a final decision within 90 days of her filing her grievance complaint.

Petitioner does not dispute that the University's grievance policy was approved by the State Human Resources Commission in compliance with N.C. Gen. Stat. § 126-34.01. Contrary to Petitioner's assertion that the University was required to issue a final decision within 90 days of her filing her grievance, the North Carolina Administrative Code, the University Grievance Policy, and the North Carolina State Human Resources Manual outline two separate 90-day phases of the grievance process: an informal process and a formal process. *See* 25 N.C.A.C. 01J .1302 (2015).

The University is permitted under the North Carolina Administrative Code 90 days to "complete the entire informal [grievance] process[.]" *See* 25 N.C.A.C. 01J .1302(d)(6). For the formal grievance process, the Administrative Code requires that

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“the process and timeframe for issuance of a Final Agency Decision shall not exceed 90 calendar days of the initial filing of the grievance in the formal grievance process[.]” 25 N.C.A.C. 01J .1302(d)(10). The University Grievance Policy specifically states that “[t]ime spent in the Equal Employment Opportunity Informal Inquiry process is not a part of the formal internal grievance process.” The University’s Grievance Policy goes on to state that if a grievant “disagrees with the conclusions” of the Equal Opportunity Compliance Office (“EOC”), the grievant “may file a formal grievance within 15 calendar days of receiving the conclusions of the investigation which will commence with Step 1 mediation.” Once the formal grievance process is commenced, the 90-day timeframe for issuance of a final decision is triggered. 25 N.C.A.C. 01J .1302(d)(10).

Here, Petitioner filed her initial grievance with the University on 28 January 2016, in which she alleged age discrimination. The University’s EOC conducted an informal inquiry, and within 60 days of the filing of the grievance, issued its determination that no age discrimination had occurred. Petitioner then filed a formal grievance on 7 April 2016, which triggered the 90-day deadline for a final decision under N.C. Gen. Stat. § 126-34.01 and 25 N.C.A.C. 01J .1302(d). On 14 June 2016, only 68 days after Petitioner commenced the formal grievance process, Petitioner filed her petition for a contested case hearing with OAH. Contrary to Petitioner’s assertion that the University was required to issue a final decision within 90 days of

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her filing her initial informal grievance on 28 January 2016, the University Grievance Policy and the North Carolina Administrative Code make it clear that the University was only required to issue a final decision within 90 days of Petitioner filing a formal grievance, which she did on 7 April 2016.

Petitioner abandoned the University's grievance process by failing to attend the grievance hearing scheduled for 15 June 2016. Petitioner makes no argument to explain why continuing with the University's grievance process and attending the scheduled hearing would have been inadequate to necessitate her prematurely filing a petition for a contested case hearing with OAH.

This Court has held that a trial court lacks subject matter jurisdiction to hear an action challenging a final decision by the University unless the petitioner has exhausted all available administrative remedies or her complaint alleges the administrative remedies available to her are inadequate. *Huang*, 107 N.C. App. at 715-16, 421 S.E.2d at 815-16. Petitioner has not alleged that she has exhausted all administrative remedies, nor that such remedies would be inadequate. As such, we hold that the OAH correctly ruled that it lacked subject matter jurisdiction to hear Petitioner's claims.

Based on our determination that the OAH lacked subject matter jurisdiction over Petitioner's claims, we decline to address Petitioner's remaining assignments of error.

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III. Conclusion

For the reasons stated above, we affirm the ALJ's dismissal of Petitioner's claims for lack of subject matter jurisdiction.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

Report per Rule 30(e).