An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-446

Filed: 15 January 2019

Office of Administrative Hearings, No. 17 OSP 04389

JASON SCOTT GRAY, Petitioner-Appellee,

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Respondent-Appellant.

Appeal by Respondent from an amended final decision entered 15 February 2018 by Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 27 November 2018.

Jason Scott Gray, pro se.

Attorney General Joshua H. Stein, by Assistant Attorney General Tamika L. Henderson, for Respondent-Appellant.

DILLON, Judge.

Respondent appeals from an amended final decision from the Office of Administrative Hearings. After careful review, we affirm in part and remand in part.

I. Background

Petitioner Jason Scott Gray was an employee of Respondent North Carolina Department of Public Safety ("NCDPS"), working as a registered nurse at Johnston County Correctional Institution, from January 2012 to December 2016.

While working at the Institution, Mr. Gray received disciplinary warnings, warning letters, and poor performance reviews for his failure to follow NCDPS's policies, excessive personal telephone usage, and tardiness.

In December 2016, Mr. Gray was dismissed from NCDPS.

Mr. Gray challenged his dismissal through NCDPS's internal grievance process. NCDPS's Employee Advisory Committee heard Mr. Gray's challenge. On 31 May 2017, the Committee issued a written affirmation of his dismissal.

Separately, Mr. Gray filed a grievance against his female supervisor with NCDPS's Equal Employment Opportunity Office (the "EEOO"), in which he alleged that he was subjected to a hostile work environment and sex discrimination. In February 2017, the EEOO determined, in writing, that Mr. Gray had not provided sufficient evidence of the alleged discrimination and workplace harassment.

In June 2017, Mr. Gray filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings, alleging workplace harassment which led to his dismissal. NCDPS moved to dismiss the case on grounds that NCDPS's internal process and review of Mr. Gray's claims were still ongoing.

In September 2017, an administrative hearing was held, during which an Administrative Law Judge ("ALJ") orally denied NCDPS's motion.

In February 2018, the ALJ issued an Amended Final Decision, finding that NCDPS had just cause to discipline Mr. Gray but not to dismiss him and concluding that Mr. Gray's dismissal was "ultimately driven by [Gray's] supervisor's discrimination/harassment against [him] based on his gender."

NCDPS was ordered to suspend Mr. Gray for thirty (30) days without pay for his misconduct and to reinstate Mr. Gray with all back pay. NCDPS timely appealed.

II. Analysis

NCDPS makes two arguments on appeal. We address each argument in turn.

A. Alleged ALJ Errors

NCDPS argues that the ALJ erred in three ways. More specifically, NCDPS contends that the ALJ erroneously (1) denied its motion to dismiss, (2) found that Mr. Gray had been subjected to sex discrimination and a hostile work environment, and (3) concluded that NCDPS failed to establish "just cause" to dismiss Mr. Gray.

1. Motion to Dismiss

NCDPS filed a motion to dismiss for failure to exhaust administrative remedies pursuant to Rule 12(b)(1). *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 220-21, 517 S.E.2d 406, 410 (1999) ("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."). The ALJ denied this motion and proceeded to hear Mr. Gray's sex discrimination claim.

N.C. Gen. Stat. § 126-34.02(b)(1) provides that "a State employee . . . [who] believes that he or she has been discriminated against in . . . the terms and conditions of the employee's employment, or in the termination of his or her employment" may file a contested case "after completion of the agency grievance procedure and the Office of State Human Resources review[.]" N.C. Gen. Stat. § 126-34.02(b)(1) (2016).

The State Human Resources Manual provides that an employee must "first file a complaint with the agency Equal Employment Opportunity (EEO) Officer . . . within 15 calendar days of the alleged discriminatory or retaliatory act[.]" Mr. Gray filed a complaint on 16 December 2016, fourteen (14) calendar days after his dismissal. In February 2017, Mr. Gray received a response, in which the EEOO determined that "there was insufficient evidence to substantiate allegations of discrimination and workplace harassment based on sex and disability" and suggested Mr. Gray file a Grievance Form HR 555, which he had filed two months earlier, if he disagreed. Thus, it appears as though the internal grievance procedure was not complied with due to the EEOO, not through any fault of Mr. Gray. Moreover, Mr. Gray did, in fact, file an appeal and receive a final agency decision regarding his dismissal. This final agency decision permits Mr. Gray to further appeal the present action to the Office of Administrative Hearings.

Therefore, we find that the ALJ did not err in denying NCDPS's motion to dismiss for lack of subject matter jurisdiction.

2. Sex Discrimination and Hostile Work Environment

NCDPS also argues that the ALJ erred in concluding that Mr. Gray was subjected to a hostile work environment and sex discrimination.

North Carolina looks to federal decisions for guidance in discrimination cases. *N.C. Dept. of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983).

To allege a hostile work environment, an employee must show "that the offending conduct was (1) unwelcome, (2) was based on [his] sex, (3) was sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive work environment, and (4) was imputable to [his] employer." *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 331 (4th Cir. 2003). To prove a prima facie case of sex discrimination, an employee must show that "(1) [he] is a member of a protected class; (2) [he] suffered adverse employment action; (3) [he] was performing [his] job duties at a level that met [his] employer's legitimate expectations at the time of the adverse employment action; and (4) the position remained open or was filled by similarly qualified applicants outside the protected class." *Hill v. Lockheed Logistics Mgmt.*, 354 F.3d 277, 285 (4th Cir. 2004).

Here, Mr. Gray, in his initial Petition for a Contested Hearing, alleged that NCDPS had "workplace harassment and agencies neglect to act on claims of

workplace harassment which lead to termination of employment." Mr. Gray also presented evidence, in the form of testimony and exhibits, that his supervisor treated him differently than his female coworkers. For example, the evidence tended to show that Mr. Gray was frequently blamed for things at work, received harassing comments, was the subject of harassing comments to others, was criticized for his work, was gossiped about, received written warnings, and was assigned work that his supervisor knew, in fact, he could not accomplish. The ALJ made findings consistent with this evidence in concluding that Mr. Gray had been subjected to a hostile work environment.

Mr. Gray also put on evidence of sex discrimination – he is male, he was discharged, and there was a reasonable inference of sex discrimination. NCDPS argues that the third element of sex discrimination is not satisfied, contending that Mr. Gray was dismissed not because of his gender, but because of his failure to adequately perform his work duties. However, looking at the evidence and record as a whole, the ALJ concluded that NCDPS's hostile work environment contributed, if not caused, Mr. Gray's non-compliance at work. Moreover, even if Mr. Gray failed to perform his duties as required, there was evidence before the ALJ which tended to show that NCDPS's main reason for dismissing Mr. Gray was discriminatory.

Thus, the ALJ did not err in determining that Mr. Gray had experienced both a hostile work environment and sexual discrimination while working at NCDPS.

3. "Just Cause"

NCDPS next argues that the ALJ also erred in finding that it lacked just cause to dismiss Mr. Gray.

"Just cause" is required to discharge, suspend, or demote a career State employee for disciplinary reasons. N.C. Gen. Stat. § 126-35(a) (2016). "Just cause" has not been defined by Section 126-35(a) of our General Statutes. *Id.* Indeed, our Supreme Court has advised that "[j]ust cause . . . is not susceptible of precise definition," but "can only be determined upon an examination of the facts and circumstances of each individual case." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900-01 (2004).

Our Court has refined *Carroll* and provided a framework to analyze whether an employer had "just cause" to dismiss an employee. *Warren v. N.C. Dep't of Crime Control & Pub. Safety*, 221 N.C. App. 376, 383, 726 S.E.2d 920, 925 (2012). More specifically, it must first be determined whether the employee in fact engaged in the conduct the employer alleges. *Id.* Next, it must be determined whether the employee's conduct falls within the scope of unacceptable personal conduct or grossly inefficient job performance. *Id.* Lastly, it must be determined whether that misconduct amounted to just cause for the employee's dismissal. *Id.*

Here, evidence was presented that Mr. Gray did consistently use his personal telephone during work hours and received written warnings for such conduct.

Evidence was also presented that Mr. Gray failed to properly assess and document an inmate. However, there is evidence to support the ALJ's determination that NCDPS did not prove the failure to assess and document inmates by a preponderance of the evidence.

Nevertheless, the incidents of Mr. Gray's shortcomings at work *may* be grounds for dismissal pursuant to the North Carolina Administrative Code, the North Carolina Nurse Practices Act, and Johnston Correctional's Standard Operating Procedures. However, viewing this conduct in light of the circumstances surrounding Mr. Gray's employment at NCDPS, namely the sex discrimination and hostile work environment he experienced, as described above, the ALJ did not commit error by determining that Mr. Gray's actions did not rise to the level of "just cause" for his dismissal. *Warren*, 221 N.C. App. at 382, 726 S.E.2d at 925 (concluding that "the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis").

B. Evidence

Lastly, NCDPS argues that a number of findings of fact are not supported by the evidence and that certain conclusions of law are not supported by the findings of fact nor the evidence or are affected by an error of law.

In reviewing an ALJ's findings and conclusions, we apply the "whole record" test. *N.C. Dep't of Corr. v. Hodge*, 99 N.C. App. 602, 610, 394 S.E.2d 285, 289 (1990). More specifically, we look at all the evidence and "determine whether an administrative decision has a rational basis in the evidence. *Id.* (quoting *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979).

1. Findings of Fact

NCDPS challenges a litany of findings of fact on the ground that they are not supported by the evidence.[1] However, viewing the record as a whole, we determine that evidence was presented on these facts and the ALJ properly weighed them in making its findings. As we do not re-weigh evidence, but rather limit our review to determining if the ALJ's findings have "a rational basis in the evidence," we find no error. *Id.*

NCDPS also challenges finding of fact number 41 alleging that it is not supported by the evidence and is affected by error of law. Similar to the other challenged findings of fact, there is evidence in the record that provides a rational basis for the ALJ's finding of fact number 41. The alleged error of law concerns the ALJ taking judicial notice of a witness's race and denying NCDPS's requested hearing on the noticed fact. However, the amended final decision at issue here was, in fact, amended to remove the witness's race. Moreover, NCDPS's right to be heard

[1] NCDPS has challenged findings of fact numbers 36, 37, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 59, 61, 62, 65, 66, 67, 68, 69, 70, 73, 74, 76, 77, 78, 81, and 82.

regarding the noticed fact is not based in N.C. Gen. Stat. § 8C-1, Rule 201(e), as cited in its brief. *See* N.C. Gen. Stat. § 8C-1, Rule 201(e) (2017) ("In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken."). Rather, NCDPS's rights regarding judicially noticed facts stem from Section 150B-30 of our General Statutes, which affords a party "an opportunity to dispute the noticed fact through submission of evidence and argument." N.C. Gen. Stat. § 150B-30 (2017). Indeed, NCDPS was afforded this right in filing its motion and supporting evidence to be heard. In its discretion, the ALJ considered this evidence and denied the motion. Thus, there is no error of law in the ALJ's finding of fact number 41.

2. Conclusions of Law

NCDPS further challenges numerous conclusions of law.[2] In so doing, NCDPS argues that the challenged conclusions of law are unsupported by the evidence and are affected by errors of law.

A review of the whole record reveals evidence on which the ALJ could, and did, base its conclusions on. *Hodge*, 99 N.C. App. at 610, 394 S.E.2d at 289. This evidence amounts to a rational basis for the conclusions of law. *Id.* The record, as well as

[2] NCDPS challenges conclusions of law numbers 1, 3, 12, 22, 23, 24, 27, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 41, and 42.

relevant case law, also reveals that the ALJ's conclusions of law, with the exception of conclusion of law number 42, are not affected by errors of law.

Regarding conclusion of law number 42, the ALJ did err in ordering NCDPS to suspend Mr. Gray "without pay for one month." Specifically, the Administrative Code permits a maximum of two weeks unpaid suspension. *See Harris v. N.C. Dep't of Pub. Safety*, ___ N.C. App. ___, ___,798 S.E.2d 127, 138 (2017) ("Under the ALJ's *de novo* review, the authority to 'direct other suitable action' includes the authority to impose [an alternative sanction within the range of allowed dispositions or] a less severe sanction as 'relief.' "); *see also* N.C. Gen. Stat. § 126-34.02(a)(3) (2017).

III. Conclusion

The ALJ did not err in denying NCDPS's motion to dismiss, finding that Mr. Gray had been subjected to sex discrimination and a hostile work environment, or in concluding that NCDPS failed to establish "just cause" to dismiss Mr. Gray. Moreover, the ALJ's findings of fact and conclusions of law are supported by the "whole record."

However, the ALJ did err as a matter of law in ordering NCDPS to suspend Mr. Gray for one month without pay. As such, we remand the amended final decision for entry of a two-week unpaid suspension for Mr. Gray. The remaining amended final decision is affirmed.

REMANDED IN PART, AFFIRMED IN PART.

Judges BRYANT and ZACHARY concur.

Report per Rule 30(e).