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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-1002

Filed: 5 May 2020

North Carolina Utilities Commission, No. E-7, Sub 1159

IN THE MATTER OF: ELLEN S. WHITAKER, 713 Arnette Avenue, Durham, North Carolina, 27701, Complainant,

DUKE ENERGY CAROLINAS, LLC, Respondent.

Appeal by complainant from order entered 24 June 2019 by the North Carolina Utilities Commission. Heard in the Court of Appeals 15 April 2020.

Ellen S. Whitaker, complainant-appellant pro se.

The Allen Law Offices, by Dwight W. Allen, Britton H. Allen and Brady W. Allen, Duke Energy Corporation Associate General Counsel Kendrick Fentress, and Robert W. Kaylor for Duke Energy Carolinas, LLC, appellee.

TYSON, Judge.

Ellen S. Whitaker (“Complainant”) appeals from an order from the North Carolina Utilities Commission (“the Commission”). We affirm.

I. Background

Complainant allegedly suffers from electromagnetic hypersensitivity and seeks to avoid exposure to electromagnetic fields produced by wireless electric meters.

Complainant requested Duke Energy Carolinas, LLC to install an analog meter at her residence in 2013. In response, Duke Energy provided Complainant with information about North Carolina's Remote Metering Reading and Usage Data Service ("RMRUDS") tariff. This alternative provides an option for customers to have their meter read by connection to a telephone line, as opposed to having the meter communicate via wireless radio frequency. The customer is required to pay the incremental charge for this service. On 26 November 2013, Complainant signed an agreement accepting the terms of the RMRUDS tariff, including a \$45.00 monthly charge for this service.

Complainant asserted claims before the Commission, which served the complaint on Duke Energy on 20 December 2017. Complainant sought three specific remedies under the federal Americans with Disabilities Act ("ADA"): (1) no additional payments for a phone-read meter; (2) a refund for previous payments for the phone read meter; and, (3) the installation of an analog meter.

Duke Energy filed an answer and motion to dismiss on 4 January 2018. In its answer, Duke Energy responded Complainant had accepted the agreement with Duke Energy to be enrolled in RMRUDS, and that it had not received any request from Complainant to terminate. Duke Energy planned no action on Complainant's pending smart meter opt-out tariff request, pending the Commission's final

resolution of the complaint, unless her complaint was to be construed as a request for termination.

Complainant responded she wanted to remain on the RMRUDS tariff pending a resolution of her complaint before the Commission. Duke Energy renewed its request to dismiss the complaint for failure to state a claim upon which relief can be granted. It argued Complainant is not entitled to a reduction in the rate due to disability and the Commission had no jurisdiction over her claims.

Complainant filed testimony and exhibits on 8 March 2018. On 22 March 2018 Duke Energy filed its testimony. Complainant filed rebuttal testimony on 2 April 2018. On 6 July 2018, the Hearing Examiner entered the recommended order dismissing the complaint for failure to meet her burden of proof required in the statute to show the action of a utility regarding its service is unjust or unreasonable. N.C. Gen. Stat. § 62-75 (2019).

Complainant filed exceptions to the recommended order dismissing complaint on 23 July 2018. The Commission issued an order on 24 June 2019 overruling exceptions and affirming the recommended order to dismiss the complaint. Complainant timely appealed.

II. Jurisdiction

Jurisdiction lies in this Court from an appeal of an opinion and order of the Commission pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 62-90(d) (2019).

III. Standard of Review

“The decision of the Commission will be upheld on appeal unless it is assailable on one of the statutory grounds enumerated in [N.C. Gen. Stat. §] 62-94(b).” *State ex rel. Util. Comm’n v. Carolina Util. Customers Ass’n*, 348 N.C. 452, 459, 500 S.E.2d 693, 699 (1998) (citation omitted).

N.C. Gen. Stat. § 62-94(b) provides:

So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission’s findings, inferences, or conclusions or decisions are:

- (1) In violation of constitutional provisions, or
- (2) In excess of statutory authority or jurisdiction of the Commission, or
- (3) Made upon unlawful proceedings, or
- (4) Affected by other errors of law, or
- (5) Unsupported by competent, material and substantial evidence in the view of the entire record as submitted, or
- (6) Arbitrary or capricious

N.C. Gen. Stat. § 62-94(b) (2019).

“Under [N.C. Gen. Stat. § 62-94(b)], the essential test to be applied is whether the Commission’s order is affected by errors of law or is unsupported by competent, material, and substantial evidence in the view of the entire record as submitted.” *State ex rel. Utilities Comm. v. Village of Pinehurst*, 99 N.C. App. 224, 226, 393 S.E.2d 111, 113 (1990) (citations omitted), *aff’d per curiam*, 331 N.C. 278, 415 S.E.2d 199 (1992). “[A]ny . . . finding, determination, or order made by the Commission . . . shall be prima facie just and reasonable.” N.C. Gen. Stat. § 62-94(e) (2019).

IV. Issues

Complainant argues the Commission erred in making its findings of fact numbers 3, 4, and 5. Complainant also argues the Commission erred by improperly dismissing her complaint without applying the ADA, and the North Carolina Persons with Disabilities Protection Act, N.C. Gen. Stat. § 168A (2019).

V. Challenged Findings of Fact

Plaintiff challenges findings of fact 3, 4, and 5 in the Commission’s order. This Court reviewed the competent evidence in the entire record and the Commission’s findings thereon. The Commission’s findings on the challenged material issues of fact are “supported by competent, material, and substantial evidence.” *Cube Yadkin Generation, LLC v. Duke Energy Progress, LLC*, __ N.C. App. __, __, 837 S.E.2d 144, 151 (2019) (citation omitted). We are bound by supported evidentiary findings of the Commission. *Id.*

Complainant further argues these findings of fact violated the ABA Model Code of Judicial Conduct. The Commission is an agency created by the General Assembly and is not part of the Judicial Branch. N.C. Gen. Stat. § 62-1, *et seq.* (2019). The ABA Model Code of Judicial Conduct is not statutory law in our state. None of the alleged conduct in Complainant’s brief is subject to or violates the North Carolina Code of Judicial Conduct. *See* N.C. Gen. Stat. § 7A-10.1 (2019). Complainant’s challenges to the Commission’s findings of fact are overruled.

VI. Application of State and Federal Statutes to Commission

A. Americans with Disabilities Act of 1990

Complainant argues the Commission erred by improperly dismissing her complaint by not applying the ADA. The Commission upheld the “availability of the new opt-out tariff, it is unnecessary to resolve the issues raised about the applicability of the ADA.” The Commission never addressed the applicability of the ADA. The Commission determined Complainant had been provided the relief she sought by Duke Energy allowing customers to request manually-read meter service at no charge.

Our General Statutes do not confer jurisdiction for an action arising under the ADA with the Commission. The Commission only may act when delegated and conferred with power from the General Assembly. *State ex rel. Utilities. Comm. v.*

N.C. Textile Mfrs. Assoc., 59 N.C. App. 240, 244, 296 S.E.2d 487, 490 (1982), *rev'd on other grounds*, 309 N.C. 238, 306 S.E.2d 113 (1983).

Complainant cites *Metallo v. Orlando Utilities Comm'n*, No. 6:14-CV-1975-ORL, 2015 WL 5124866, at *3-4 (M.D. Fla. Sept. 1, 2015) and argues the Commission's negative treatment was "unsupported by the evidence in view of the entire record, and is unwarranted, arbitrary and capricious and prejudicial." In *Metallo*, the plaintiff had sued asserting his utilities company wrongly charged him for the use of an analog electric meter. The court in *Metallo* concluded that plaintiff with asserted electromagnetic hypersensitivity had stated a claim under the ADA to survive a Federal Rule of Civil Procedure 12(b)(6) motion. *Id.* *Metallo* is a federal district court opinion interpreting a federal statute and provides no analysis or basis regarding the jurisdiction of a state public utility regulatory commission over the ADA. *Id.* This federal trial court decision from the middle district of Florida is not binding precedent upon this Court. This argument is without merit and dismissed.

B. North Carolina Persons with Disabilities Protection Act

Complainant also argues the Commission's order violated the North Carolina Persons with Disabilities Protection Act. N.C. Gen. Stat. § 168A. The Commission is the improper forum to assert an action under this statute. *See* N.C. Gen. Stat. § 168A-11 ("The action shall be commenced in superior court in the county where the alleged

discriminatory practice or prohibited conduct occurred or where the plaintiff or defendant resides.”). Complainant’s argument is dismissed.

VII. Conclusion

Competent evidence in the whole record supports the Commission’s findings of fact numbers 3, 4, and 5. Complainant was provided with the remedy she sought by Duke Energy. The Commission was not the proper forum for Complainant’s causes of action.

The Commission did not err by dismissing Complainant’s complaint. The Commission’s order overruling exceptions and affirming the recommended order dismissing complaint is affirmed. *It is so ordered.*

AFFIRMED.

Judges BERGER and COLLINS concur.

Report per Rule 30(e).