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BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

LAURIE ANN HILFERTY,	)	
	)	
Employee/Grievant,	)	
	)	**DOCKET No. 07-12-406**
v.	)	
	)	
DEPARTMENT OF STATE,	)	**DECISION AND ORDER**
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board ("the Board") at 9:00 a.m. on June 19, 2008 at the Margaret M. O'Neill Building, 410 Federal Street, Suite 213, Dover, DE 19901 and continued on July 17, 2008.

BEFORE Brenda C. Phillips, Chair, John F. Schmutz, and Martha K. Austin, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman, Esquire
Deputy Attorney General
Legal Counsel to the Board

Jean Lee Turner
Administrative Assistant to the Board

Laurie Ann Hilferty
Grievant *pro se*

Kevin R. Slattery, Esquire
Deputy Attorney General
on behalf of the Department of State

BRIEF SUMMARY OF THE EVIDENCE

The grievant, Laurie Ann Hilferty ("Hilferty") testified on her own behalf and called three witnesses: Victoria M. Shahan; Natashia Preston; and Gary Wissler.

The Board admitted into evidence without objection fifteen exhibits offered by Hilferty: Syllabus, Course Interview for State of Delaware training course HR Basics for Supervisors (A-1); e-mail dated July 27, 2007 from Hilferty to Gail Lanouette (A-2); hand-written note by Vicky Shahan dated October 4, 2007 (A-3); Letter dated October 25, 2007 from Dean Reid to Hilferty (A-4); fax cover sheet dated November 6, 2007 with three attachments (A-5); e-mail dated November 6, 2007 from Martina Johnson to Gail Lanouette (A-6); e-mail dated November 7, 2007 from Hilferty to Martina Johnson (A-7); UPS waybill addressed to Hilferty's residence (A-8); copy of envelope addressed to Hilferty's residence (A-9); The Hartford Explanation of Benefits Summary (A-10); The Hartford Coverage Certification Report (A-11); Personnel Action Request - Termination (A-12); letter dated November 8, 2007 from Dr. Lourdes S. Aponte to Martina Johnson (A-13); Hilferty's time cards April - October, 2007 (A-14); and Hilferty's telephone records October 23-November 14, 2007 (A-15).

The Department of State ("DOS") called six witnesses: Troy G. Dennis, Sr., Director of Activities at the Delaware Veterans Home; Guy A. Crawford, Security Supervisor at the Veterans Home; Lois M. Quinlan, Deputy Administrator; Martina S. Johnson, Human Resource Specialist; Dean Reid, Administrator; and Gail Lanouette, DOS Human Resource Manager.

The Board admitted into evidence without objection fifteen exhibits offered by DOS: typewritten notes of telephone calls between Lois Quinlan and Hilferty (S-1); fax cover sheet dated November 21, 2007 with one attachment; October 22, 2007 note written by Troy Dennis (S-3);

e-mail dated October 18, 2007 from Guy Crawford to Martina Johnson (S-4); Martina Johnson notes of September 17, 2007 meeting with Cleveland Whidbee (S-5); Martina Johnson notes of September 17, 2007 meeting with Cleveland Whidbee and Laurie Hilferty (S-6); Martina Johnson notes of September 19, 2007 meeting with Hilferty and Evelyn McIntyre (S-7); Martina Johnson notes of September 19, 2007 meeting with Hilferty and Evelyn McIntyre (S-8); Martina Johnson notes of September 21, 2007 meeting with Cleveland Whidbee (S-9); Martina Johnson notes of September 21, 2007 meeting with Hilferty and Lois Quinlan (S-10); Martina Johnson notes of September 25, 2007 meeting (S-11); Martina Johnson notes of October 12, 2007 meeting (S-12); October 15, 2007 documented conversation between Martina Johnson and Cleveland Whidbee (S-13); notes of October 17, 2007 meeting (S-14); and letter dated November 6, 2007 from Secretary Windsor to Hilferty (S-15).

FINDINGS OF FACT

DOS hired Hilferty on April 15, 2007 as Food Service Director for the Veterans Home in Milford, Delaware on a one-year probationary basis. She was an exempt from the overtime provisions of the Fair Labor Standards Act.

According to Hilferty, not all of the authorized positions in the Food Service section were filled and when one of the employees in the section was sick or on vacation Hilferty had to take their place. According to Hilferty, she often worked weeks at a time without a day off. Lois Quinlan (Hilferty's immediate supervisor) testified that Hilferty worked long hours by her own choice and that Quinlan on several occasions asked Hilferty to cut back on her hours to minimize compensatory time. The real problem, according to Ms. Quinlan (corroborated by Gail Lanouette) was that Hilferty did not promptly fill vacant merit positions with qualified applicants from a certification list. Instead, Hilferty preferred to hire casual/seasonal workers to see if they would "work out" which created a high turnover rate.

On September 10, 2007, Hilferty's doctor diagnosed her with a chronic illness (fibromyalgia). Even after her diagnosis, Hilferty continued to work for long periods of time without any days off.

On October 2, 2007, Hilferty complained verbally to Ms. Quinlan that one of the food services workers Hilferty supervised was sexually harassing her. Hilferty followed up with a written complaint to Martina Johnson, the Human Resource Specialist at the Veterans Home. DOS investigated the complaint.

On October 26, 2007, Hilferty met with Dean Reid, the Administrator of the Veterans Home, and Ms. Lanouette. They went over a letter Mr. Reid signed the day before outlining the

steps DOS had taken to investigate Hilferty's complaint of sexual harassment. DOS concluded that Hilferty's complaint was substantiated and "the individuals involved were counseled and informed that such behavior is not tolerated in the workplace. . . . It is our opinion that your concerns regarding sexual harassment have been appropriately discussed and the individuals involved have been appropriately warned with documentation of such warning."

According to Mr. Reid, Hilferty kept trying to raise job performance issues at the October 26, 2007 meeting. He told Hilferty that the discussion was limited to the sexual harassment complaint and she would be meeting with Ms. Quinlan the next day to discuss an "Investment Plan" to improve Hilferty's job performance. According to Mr. Reid, Hilferty became hostile and walked out of the meeting.

According to Hilferty, she was upset by the result of the investigation because she believed DOS should have transferred the offender out of the Food Service section. [1] According to Hilferty, the October 26, 2007 meeting was so stressful that it caused a "flare up" of her fibromyalgia and she went home in considerable discomfort. According to Hilferty, she called Ms. Quinlan's cell phone that night (Friday) and left a voice-mail that she would not be in for work the next day. Ms. Quinlan testified that she received a garbled message from Hilferty and called her back that same night to ask what the call was all about but that Hilferty never called Quinlan back.

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[1] As Mr. Reid explained, DOS has only the one food service operation at the Veterans Home so transferring the offender to another Food Service Worker position was not an option.

Ms. Quinlan testified that Hilferty called her at home on Sunday evening, October 28, 2007 to say she would be out sick the next day. According to Ms. Quinlan, she told Hilferty that DOS would need a doctor's note for her absence.

Hilferty testified that she went to see her primary care physician on Monday, October 29, 2007 and the physician's assistant who examined her wrote a note: "This is to certify that LAURIE A. HILFERTY has been under my care for the treatment of Shoulder pain and Anxiety and may not return to work until 11/3/07." Hilferty did not fax that note to the Veterans Home until November 6, 2007.

Ms. Quinlan testified that she received a voice message on her work phone from Hilferty the morning of October 29, 2007 saying she would not be in for work until November 5, 2007. Ms. Quinlan testified that she left a message on Hilferty's home phone on October 29, 2007 reminding her that she had to contact the Human Resources office and provide a doctor's note. Ms. Quinlan and Ms. Johnson testified that they did not hear anything from Hilferty for the next week. [2]

On the morning of Monday, November 5, 2007, Dean Reid, Lois Quinlan, and Martina Johnson discussed Hilferty's undocumented absence from work, as well as the job performance

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[2] Hilferty claimed that her AT&T telephone records showed that during the time she was out sick she made several calls to Ms. Quinlan (in addition to those documented by Ms. Quinlan) to advise about her work status. Those records, however, cannot prove whether she actually talked to Ms. Quinlan or what, if any, message Hilferty may have left. The Board finds that the sworn testimony of Ms. Quinlan as corroborated by her contemporaneous notes is the more accurate record of Hilferty's efforts to notify her supervisor about her sick status. The Board notes that Hilferty's phone records show that some of the calls she placed were at odd hours when Ms. Quinlan was not likely to be in the office (for example, 8:01 p.m. on Sunday, November 4, 2007), which suggests that Hilferty was not making best efforts to keep her supervisor informed of Hilferty's sick leave status.

issues Ms. Quinlan had scheduled to discuss with Hilferty on October 27, 2007 before she called in sick. After consulting with Gail Lanouette, the DOS Human Resource Manager, they agreed to recommend Hilferty's termination. Ms. Lanouette drafted a letter for the Secretary's review, which the Secretary signed on November 6, 2007). The letter notified Hilferty:

> It has become evident that your management and supervisory skills are not appropriate for this level position [Food Service Director I]. Additionally, your failure to report to work since October 27, 2007 is unacceptable. . . . Please contact the HR Section at the Delaware Veterans Home to complete various paperwork concerning your benefits and any leave you may be owed.

Ms. Quinlan received a phone message from Hilferty on Monday, November 5, 2007 around 1:00 p.m. saying that she was working with the Office of Management and Budget to file a claim for disability. Based on the evidence in the record, the Board finds that Hilferty made that call after Mr. Reid, Ms. Quinlan, and Ms. Johnson had met earlier that day and decided to recommend Hilferty's termination.

Hilferty's primary care physician had referred her to a specialist, Dr. Lourdes Aponte, who examined Hilferty on November 6, 2007. In a note dated November 6, 2007, Dr. Aponte wrote that Hilferty "has been UNABLE to return to work from 11-06-2007 to 12-18-2007. This patient is allowed to return to work on 12-18-2007."

Hilferty faxed Dr. Aponte' s note and two other notes (one written by Dr. Vincent B. Killeen, dated November 6, 2007, the other by a physician's assistant, Aaron Block, dated October 29, 2007) to the Veterans Home at 1:21 p.m. on Tuesday, November 6, 2007. Hilferty called the Veterans Home later that same day and Ms. Johnson told her she must provide a more

detailed doctor's note explaining why Hilferty could not perform the essential functions of her job. By e-mail dated November 7, 2007 to Ms. Johnson, Hilferty advised that she was "forwarding my doctor a copy of the essential functions of my job duties as printed from the state website and will provide you with my doctor's response as quickly as I receive it." [3]

According to Hilferty, she contacted Dr. Aponte's office to say she would need a more detailed explanation of her medical condition. By letter dated November 8, 2007 to Martina Johnson, Dr. Aponte wrote: "Laurie Ann Hilferty, a patient under my care has recently been diagnosed with a chronic illness, the symptoms of which include: chronic pain and fatigue, difficulty sleeping and/or concentrating, changes in mood or thought, depression and anxiety, bladder and bowel problems, and flare-ups caused by stress and overexertion. As a result, she is temporarily unable to perform the essential functions of her job duties as outlined in the attached document." [4]

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[3] Although Ms. Johnson knew by November 5, 2007 that DOS was going to terminate Hilferty, Ms. Johnson explained at the hearing that she did not believe it would have been appropriate for her to have so notified Hilferty over the phone when she called Johnson on November 5, 2007.

[4] The copy of Dr. Aponte's November 8, 2007 letter introduced into evidence (A-13) did not contain the referenced attachment. The Board heard conflicting testimony as to when DOS received that letter. Hilferty testified that she called Dr. Aponte's office on November 8, 2007 to confirm the letter gone out and was told the letter had been mailed. Ms. Johnson testified that the Veterans Home did not receive the letter until it was faxed on November 21, 2007. The Board does not believe the actual date of receipt is relevant because either way it was after DOS made the decision to terminate Hilferty.

Hilferty suggested that after receiving Dr. Aponte's November 8, 2007 letter DOS should have reconsidered the termination decision. The Board does not agree because the accommodations Dr. Aponte said were necessary for Hilferty to return to work would have eliminated essential functions of Hilferty's job as Food Service Director.

The Hartford initially approved Hilferty' s claim for short-term disability benefits. According to the explanation of benefits summary, the last day worked was October 26, 2007; the benefit start date was November 16, 2007; and the authorized end date was December 7, 2007 (for a total payment of $1,302.39). Subsequently, The Hartford disallowed Hilferty's claim after DOS advised she was no longer an employee with the State of Delaware effective November 6, 2007.

CONCLUSIONS OF LAW

"Under the Merit System, the employing agency may dismiss a probationary employee at any time during the probationary period for reasons of unsatisfactory service or conduct, and that determination is final and conclusive. However, where the employee alleges the termination was not due to unsatisfactory service or conduct but rather to discrimination on the basis of non-merit factors, the termination is appealable through the grievance process and the Merit Rules." *Kopicko v. Department of Services for Children, Youth & Their Families*, 805 A.2d 877, 878 (Del. 2002) (citing 29 *Del. C.* §5922).

Merit Rule 2.1 provides: "Discrimination in any human resource action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors is prohibited."

Hilferty makes two claims under Merit Rule 2.1: (1) DOS terminated her in retaliation for her complaint of sexual harassment; and (2) DOS discriminated against her on the basis of a disability.

A. Retaliation

The term "retaliation" does not appear in Merit Rule 2.1, but the Board believes that for an employer to retaliate against an employee's exercise of a protected activity is discrimination based on a prohibited non-merit factor. *See Shuer v. County of San Diego*, 117 Cal.App.4th 476, 485 (2004) ("A decision to dismiss a probationary employee for revealing unethical or illegal conduct by county employees is to discriminate against her based on a non-job related factor.").

Merit Rule 2.1 mirrors Title VII of the Civil Rights Act. Like the Delaware courts, the Board will rely "on principles of federal law as the interpretative framework and guide for interpreting the counterpart Delaware statute." *Thompson v. Dover Downs, Inc.*, 887 A.2d 458, 461 (Del. 2005).

"To establish a prima facie case of retaliation under Title VII," Hilferty must show that: "(1) [she] engaged in a protected activity," (2) [DOS] took adverse action against [her], and (3) there was a causal connection between the protected activity and [DOS'] action." *Weiler v. R&T Mechanical, Inc.*, 255 Fed.Appx. 665, 2007 WL 3246476, at p.2 (3rd Cir., Nov. 5, 2007).

If Hilferty establishes a prima facie case of retaliation, "the burden of production shifts to [DOS] to articulate a legitimate, nondiscriminatory reason for [Hilferty's] termination. Once [DOS] meets this relatively light burden, the burden of production returns to [Hilferty], who must show by a preponderance of the evidence that [DOS'] proffered reason is pretextual." 2007 WL 3246476, at p.2.

The Board concludes as a matter of law that Hilferty has established the first two elements for a prima facie case of retaliation: (1) she engaged in a protected activity by complaining about sexual harassment in the workplace; and (2) DOS took adverse employment action by terminating

her. Hilferty suggested that the Board could infer the third element (causal connection) because of temporal proximity. She first complained of sexual harassment to her supervisor on October 2, 2007, and DOS terminated her on November 6, 2007, five weeks later.

"Evidence of timing between protected activity and adverse action, alone, ordinarily is insufficient to demonstrate a causal link unless the timing is 'unusually suggestive.'" *McLaughlin v. Fisher*, 2008 WL 1934457, at p.9 (3rd Cir., May 5, 2008) (quoting *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503 (3rd Cir. 1997)). The Third Circuit "has held that two days between a protected activity and an adverse action is 'unusually suggestive' of retaliatory motive" but "three months is not." *McLaughlin*, 2008 WL 1934457, at p.9.

The Board will assume for the sake of argument that Hilferty established a causal connection between her complaint of sexual harassment and her termination for purposes of a prima face case of retaliation. The Board believes, however, that DOS articulated legitimate, non-retaliatory reasons for her termination and that Hilferty did not show by a preponderance of the evidence that those reasons were pretextual.

As explained by Mr. Reid, the situation in the Food Service section at the Veterans Home had deteriorated to the point where the atmosphere was "toxic." Hilferty had shown herself unable to provide the necessary leadership to resolve personality and other conflicts in the workplace. She then failed to show up for work for ten days without a doctor's note explaining why she could not work. According to Mr. Reid, when he made the decision on November 5, 2007 to recommend Hilferty's termination, he did not have any idea when she was coming back or even if she was coming back. Mr. Reid felt that the Food Service Director was a critical position in the Veterans Home – providing three meals a day, seven days a week – and that he had

to take action in the best interests of the residents.

The Board found Mr. Reid a credible witness and does not believe that he had any retaliatory motive in terminating Hilferty. Rather, he did what he felt was necessary to ensure the stability and smooth operation of a critical facility at the Veterans Home. Hilferty did not provide the Board with any evidence that the reasons for her termination were "either a *post hoc* fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext." *Fuentes v. Perskie*, 32 F.3d 759, 764 (3rd Cir. 1994). [5]

The Board concludes as a matter of law that Hilferty failed to prove by a preponderance of the evidence that DOS violated Merit Rule 2.1 by terminating her in retaliation for complaining about sexual harassment in the workplace.

B. <u>Disability Discrimination</u>

"In order to establish a prima facie case of disability discrimination . . . an employee must demonstrate that he or she, (1) has a disability, (2) is otherwise qualified to perform the essential functions of the job, with or without accommodation by the employer, and (3) has suffered an adverse employment action because of his or her disability." *Barclay v. Amtrak*, 240 Fed.Appx. 505, 2007 WL 2004382, at p.2 (3rd Cir., July 12, 2007).

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[5] Hilferty argued that one of the reasons for her termination – job performance – is suspect because she had received a number of commendations at work and DOS only "manufactured" this issue after she complained about sexual harassment. The record, however, shows that Ms. Quinlan had privately counseled Hilferty about job performance when Quinlan perceived "an abrupt decline" towards the end of the summer of 2007, and that Ms. Johnson had discussed workplace issues with Hilferty in a series of meetings in September 2007, all of which occurred prior to the date Hilferty first made her complaint (October 2, 2007).

Federal law defines a "disability" as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. §12102(2). Hilferty claimed that fibromyalgia is a disability because it substantially limits her major life activity of working.

The Board will assume for the sake of argument that Hilferty's fibromyalgia is a disability that substantially impairs the major life activity of working. [6] The Board, however, concludes as a matter of law that Hilferty is not a "qualified" individual with a disability because she is unable to perform the essential functions of Food Service Director with a reasonable accommodation.

Federal law "defines 'a qualified individual with a disability' as a person 'who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.'" *McDonald v. Pennsylvania Department of Public Welfare*, 62 F.3d 92, 96 (3rd Cir. 1995) (quoting 42 U.S.C. §12111(8)). "That definition explicitly gives 'consideration' to an employer's determination of which job functions are essential, especially where an employer has included its expectations in a written job description." *Jackson v. City of Chicago*, 293 F. Supp.2d 836, 841 (N.D. Ill. 2003) (citing 42 U.S.C. §12111(8)).

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[6] "'Some people may have such a severe case of fibromyalgia as to be totally disabled from working.'" *Chamberlain v. McNeil Consumer Products Co.*, 1998 WL 42271, at p.4 (N.D. Ill., Jan. 29, 1998) (quoting *Sarchet v. Chater*, 78 F.3d 305, 307 (7th Cir. 1996)). The Board notes that there is a question whether DOS even knew that Hilferty had a disability so as to trigger the required "interactive process" to determine if a reasonable accommodation could be made. *See Hedberg v. Indiana Bell Telephone Co.*, 47 F.3d 928, 932 (7th Cir. 1995) ("an employer cannot be liable under the [federal disability laws] for firing an employee when it indisputably had no knowledge of the disability"). Hilferty testified that she told Ms. Quinlan about her symptoms (but not the actual diagnosis of fibromyalgia) in September 2007, but Ms. Quinlan denied it, and there is no other evidence in the record to show that Mr. Reid, Ms. Johnson, or Ms. Lanouette was aware Hilferty had a chronic illness when they decided to terminate her on November 5, 2007.

In *Burnett v. Pizza Hut of America, Inc.*, 92 F. Supp.2d 1142 (D. Kan. 2000), the plaintiff (Neala Burnett) was a restaurant manager for Pizza Hut where she had worked since 1977 in a variety of jobs like food preparation, serving tables, and cooking. In 1992 Burnett's doctor diagnosed her with fibromyalgia and certified that she was unable to lift more than twenty pounds and should not be doing repetitive motions of her upper extremities, extended computer or phone work, or working more than forty hours per week. With those work restrictions, Burnett would not be able to perform the essential functions of a restaurant manager.

> Pizza Hut requires its restaurant managers to regularly perform such physical work and that removing this function would fundamentally alter the position. First, Pizza Hut's different written documents plainly describe daily management time as including the physical and repetitive tasks otherwise performed by supervised employees. Second, Pizza Hut considers it essential that a restaurant manager be able to perform all of the functions of supervised employees for purposes of training employees, helping out during busy times, filling in for late or absent employees, and covering positions during scheduled low volume periods.

92 F. Supp.2d at 1156.

Since Burnett could no longer perform the essential functions of a restaurant manager, the issue then became whether Pizza Hut must provide her with a reasonable accommodations. "When a job's essential functions cannot be performed without accommodation, an employer must provide those accommodations that are reasonable." *Burnett*, 92 F. Supp.2d at 1157. "Accommodations are reasonable unless they 'would impose an undue hardship on the operation of the business' by 'requiring significant difficulty or expense.'" *Id.* (quoting 42 U.S.C. §12111(10(A)).

"To perform the physical tasks ordinarily assumed by the restaurant manager, [Burnett] proposes hiring one additional full-time employee and assigning those physical tasks to that employee. An employer is not required under the [federal disability laws] to accommodate an employee's disability by eliminating or modifying an essential function of his job." *Burnett*, 92 F.3d at 1157. "For that matter, an accommodation that would result in other employees having to work harder is not required." *Id.*

The accommodations requested by Hilferty were outlined in Dr. Aponte's letter of November 8, 2007: "a reduction in stress, work load, and reduction in work hours to standard 40 hour work week. Also recommended are discontinuation of intense physical labor, standing for extended periods of time, heavy lifting, and the supervision of employees." The Board believes that reconfiguring Hilferty's position as Food Service Director along those lines would eliminate essential functions of the job. Hilferty acknowledged as much on cross-examination:

> A. Well, I guess the only thing that would prevent me from performing the essential functions of my job would be the heavy lifting, the intense physical labor, standing for extended periods of time, and the supervision of employees. . . .
>
> Q. But you would agree that without these, as your job presently existed, you would not be able to do the essential functions?
>
> A. I guess not as I had been.

Transcript (July 17, 2008) at pp. 263-64.

The Board concludes as a matter of law that Hilferty is not a qualified individual with a disability because she cannot perform the essential functions of Food Service Director at the Veterans Home with a reasonable accommodation. The accommodations outlined in Dr. Aponte's

November 8, 2007 letter were not reasonable accommodations because they would have eliminated many of the essential functions of the job of Food Service Director.

The Board concludes as a matter of law that Hilferty did not establish a prima facie case that DOS discriminated against her on the basis of a disability in violation of Merit Rule 2.1.

ORDER

It is this 27th day of August, 2008, by a unanimous vote of 3-0, the Decision and Order of the Board that the Grievant's appeal is denied.

Brenda C. Phillips
Chair

John F. Schmutz
Member

Martha K. Austin
Member