

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

LA WANA ROBERTS,)	
)	
Employee/Grievant,)	DOCKET No. 19-06-734
)	
v.)	
)	DECISION AND ORDER
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,)	OF DISMISSAL
DIVISION OF CHILD SUPPORT SERVICES,)	
)	
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 December 5, 2019 at the Delaware Commission of Veterans Affairs, 802 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, Paul R. Houck, Jacqueline Jenkins, Ed.D, Victoria Cairns, and Sheldon Sandler, Esq., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

LaWana Roberts
Employee/Grievant, *pro se*

Allison McCowan
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

The Department of Health and Social Services (“DHSS”) offered and the Board admitted into evidence without objection 17 exhibits (A-Q). DHSS called two witnesses: Lara Apostolos, Child Support Supervisor, DHSS/DCSS; and Louis Pettigrew, Social Service Administrator, DHSS/DCSS.

The employee/grievant, LaWana Roberts (“Roberts”), offered two exhibits and the board admitted neither documents as they were Roberts’ written objections to being terminated. Roberts called Tamekia Kendall-Williams, Child Support Specialist, DHSS/DCSS. Roberts testified on her own behalf.

FINDINGS OF FACT

Roberts joined the Division of Child Support Services on October 15, 2018 as a Child Support Specialist I. Roberts worked an 8 a.m. to 4:30 p.m. shift with a one-hour lunch break. Roberts’ duties included seeing walk-ins/clients, filing petitions and motions with the Family Court, attending mediation two to three times per month and answering questions through customer service. Roberts received a performance plan outlining her duties and expectations. *Exhibit B*. The plan states an employee must obtain supervisory approval in advance for any change in scheduled working hours. *Exhibit B*.

DCSS put Roberts on a training schedule in mid-October for Department orientation, Division orientation, accounting and DELJIS. DCSS created a three-month training schedule for Roberts where she would shadow other specialists, staff the front desk, build cases and go to Court. *Exhibit A*. DCSS increases the caseloads of new Child Support Specialists (“CSS”) each month. A new CSS starts with 150 to 250 cases, which increases to 400 to 500 cases in a month, increases to 1000 cases by six months and the CSS has a full caseload of 1500 to 1800 cases by the end of her one year probationary period. DCSS gave Roberts a caseload starting in December. Roberts

began having attendance issues in approximately February/March 2019. Roberts was regularly tardy. She was late every day in February, based on the office's sign-in log. Roberts exhibited the same tardy behavior for March 2019. Lara Apostolos, Roberts' supervisor, noted other issues as well, such as a lack of retention of information, a failure to take notes and difficulty conducting mediations. In addition, Roberts failed to update paternity in the computer database, and she failed to use the vital statistics interface.

Apostolos met with Roberts on March 14, 2019 for their quarterly one-on-one meeting. *Exhibit C.* Apostolos discussed with Roberts expectations for performance and time/attendance. Apostolos kept notes from the meetings with Roberts. *Exhibit E.* At the March 14, 2019 meeting, Apostolos counseled Roberts on her attendance. Roberts told Apostolos she was fatigued and having trouble getting up due to medication she was prescribed. Apostolos met with Roberts again on April 25, 2019 and May 16, 2019. Roberts continued to have issues with tardiness and completing tasks/duties in April and May.

In May 2019, Roberts requested her start time be changed to 8:30 a.m. DCSS typically gives varied work hours to those who have seniority or a severe need. Requestors must fill out a formal request form for a flexible schedule and Roberts failed to complete one. Roberts failed to mention any disability at that time. Probationary employees may not work a flexible schedule. On June 6, 2019, Julie Shahan informed Apostolos by email that she believed there were grounds to terminate Roberts during her probationary period. *Exhibit H.* On June 6, 2019, Shahan informed Carla Mitchell-Penny of the intent to terminate. *Exhibit H.* On June 7, 2019, Apostolos sent an email to Roberts documenting her tardiness. *Exhibit K.* Roberts typically arrived for work between 8:10 a.m. and 8:30 a.m.

Roberts provided to Joanne Pugh, another supervisor, a letter from a physician dated June 11, 2019. The letter requested Roberts be permitted to start work at 8:30 a.m. due to medication

withdrawal. *Exhibit M.* DCSS notified Roberts that the letter could not be accepted because it was not on letterhead. On June 20, 2019, Roberts presented a new request from her physician for a change in arrival time for six weeks, this time on a prescription pad, as DCSS had requested. *Exhibit P.* The physician's note does not identify a medical issue or disability which supports the requested schedule change.

On June 14, 2019, Shahan submitted to Mitchell-Penny the termination letter for Roberts. *Exhibit N.* On June 18, 2019, the termination was submitted for the DHSS Secretary's signature. *Exhibit O.* On June 21, 2019, the Secretary informed Roberts by hand-delivered letter she was being terminated during her probationary period citing ongoing unsatisfactory job performance and time/attendance issues. *Exhibit O.*

CONCLUSIONS OF LAW

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.

Merit Rule 9.2 provides:

Employees may be dismissed at any time during the initial probationary period. Except, where a violation of Chapter 2 is alleged, probationary employees may not appeal the decision.

In order to establish discrimination based on a disability, Roberts must establish she: (1) has a disability, (2) is otherwise qualified to perform the essential functions of her job with or without accommodation, and (3) that she suffered an adverse employment action because of her disability. *Hilferty v. Dept. of State*, MERB Docket No. 07-12-406 (2008). 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).

The Board finds Roberts failed to establish a *prima facie* case that she suffers from a qualified disability. The note Roberts submitted from her physician does not establish that she has a qualifying disability.

The Board finds as a matter of law that Roberts failed to meet her burden to establish that she suffered discrimination based on a disability, the only basis on which a probationary employee may grieve her termination.

Consequently, her grievance is denied.

ORDER

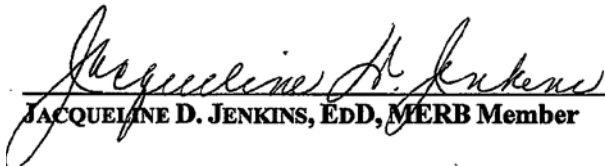
It is this **11th** day of **March, 2020**, by a vote of 5-0, the Decision and Order of the Board to deny the Grievant's appeal as she failed to meet her burden to establish she had a disability and that DCSS discriminated against her when they terminated her prior to the conclusion of the probationary period of her employment.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER