

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

GRIEVANT,)	
)	
Employee/Grievant,)	<u>DOCKET No. 21-06-806</u>
)	
v.)	DECISION AND ORDER
)	
JUSTICE OF THE PEACE COURT 7,)	[PUBLIC, REDACTED]
)	
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 March 17, 2022, at the Delaware Public Service Commission, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, Delaware 19904. The hearing was closed to the public pursuant to 29 *Del. C.* §10004(b)(8).

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

APPEARANCES

Ilona Kirshon
Department of Justice
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Christopher Isaac, Esq.
Offit Kurman
on behalf of the Employee/Grievant

Zi-Xiang Shen
Deputy Attorney General
on behalf of the Justice of the
Peace Court

BRIEF SUMMARY OF THE EVIDENCE

The Employee/Grievant (“Grievant”) offered eight (8) documents into evidence. Grievant Exhibits 2, 4, 5, 6, 7, and 8 were pre-marked and admitted into evidence; Grievant Exhibits 1 and 3 were pre-marked and admitted into evidence after duplicate pages of the Court’s exhibits were stricken.

The Justice of the Peace Court (“Court”) offered seventeen (17) documents into evidence. Seven (7) documents were pre-marked as Court Exhibits A, D, H, I, J, K and P and admitted into evidence.

The Grievant called the following witnesses: Elizabeth Petrick, Human Resources Director, Justice of the Peace Court; Kirra Britt, Judicial Operations Manager, Court of Common Pleas for Kent County; and Valerie Predeoux, Judicial Operations Manager, Justice of the Peace Court. The Grievant also testified on her own behalf.

At the conclusion of the Grievant’s presentation, the Court moved for involuntary dismissal of the grievance asserting the Grievant failed to make a *prima facie* case to establish a violation of Merit Rule 2.1. The Board granted the Court’s motion.

FINDINGS OF FACT

The Grievant began her employment as a Judicial Court Processor I on June 22, 2020, and was subject to a one-year probationary period. She received on-the-job training which included a training binder titled Basic Clerical Education (“BCE”) Manual.¹

Consistent with the Court’s policy for probationary employees, the Grievant received a three-month and six-month New Hire Performance Review.² Both performance reviews noted that the Grievant was struggling with case processing and daily tasks. Both documents were signed by the Grievant and her supervisor.

¹ Transcript (Tr.) at pp. 5, 103, 139. The Grievant testified she lost her BCE Manual and notes but admitted that she did not ask for a replacement binder and that much of the training information contained in the BCE Manual was available on the Court’s website. Tr. at pp. 133-134

² Grievant Exhibit 7

On February 21, 2021, the Grievant received and signed off on a Performance Improvement Plan (“PIP”) prepared by and discussed with her managing supervisor.³ The PIP identified specific performance concerns and established performance expectations and metrics for assessment. Thereafter the Grievant met regularly with her manager to review her progress in meeting the performance standards. The results of the March 1, 8, April 8 and 21, 2021 PIP review meetings were documented by her manager. The Grievant signed each of the PIP review summaries, each of which documented her continuing struggles.⁴

On March 9, 2021, the Grievant informed her management that she had recently been diagnosed with a disability which she believed was affecting her performance as a Judicial Case Processor I.⁵ Following her disclosure, the Court immediately referred her to its Americans with Disabilities Act (“ADA”) coordinator. The Grievant met with the ADA Coordinator and her manager on April 8, 2021. An ADA Interactive Dialogue Worksheet was prepared during the meeting and signed by the Grievant, her supervisor and the ADA Coordinator.⁶ The meeting was memorialized in an April 20, 2021 letter confirming the Grievant would be accommodated with additional time to take notes, which her supervisors would review to assure their accuracy, as requested.⁷

On or about May 4, 2021, the Grievant made an additional request to use headphones to eliminate workplace distractions. This request was denied after the Court determined that a Judicial Case Processor would not be able to perform her job duties answering phones and interacting with co-workers, the police, and the public while wearing headphones.

By letter dated May 14, 2021, the Grievant was notified that her employment with the Court

³ Grievant Exhibit 3 (JP Ct. p. 000038)

⁴ Grievant Exhibit 3 (JP Ct. p. 000052 – 000095)

⁵ Court Exhibit H

⁶ Court Exhibit K

⁷ Grievant Exhibit 3 (JP Court p. 000096)

had ended.⁸

CONCLUSIONS OF LAW

Merit Rule 9.1 states:

After successful completion of an initial one-year probationary period, the incumbent shall be a Merit employee.

Merit Rule 9.2 states:

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.

Merit Rule 2.1 states:

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.

The Court ended the Grievant's employment during her initial probationary period. Merit 9.2 provides that the sole basis upon which an employee in her initial probationary period may appeal her dismissal is a violation of Merit Rule 2.1 which prohibits discrimination based upon protected status. The enumerated protected classes include "...race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors."

The Grievant testified she had been bullied by a co-worker and that she was required to work in a hostile work environment. No credible evidence was presented to substantiate these claims. The evidence did not establish that there was a pervasive or continuous pattern of harassment that rises to the level of a hostile work environment. *Harris v. DHSS* (MERB Docket No. 19-06-730, March 31, 2020).

The Grievant alleges the Court discriminated against her based on a disability which she disclosed to her managers prior to her separation for failure to successfully complete the initial

⁸ Grievant Exhibit 6

probationary period. The Grievant bears the burden of establishing a *prima facie* case of disability discrimination. To do so, she must establish that: (1) she has a disability; (2) she was otherwise qualified to perform the essential functions of the job, with or without accommodation; and (3) she suffered an adverse employment action because of her disability. *Phillips v. Department of Services for Children, Youth and Their Families*, 2022 WL 811177 (Del.Super. 2022).⁹

It is undisputed that the Grievant made her employer aware that she had a disability and that she suffered an adverse employment action when her probationary employment was terminated. She did not, however, meet her burden to establish that she was qualified to perform the essential functions of the job, with or without accommodation.

The record demonstrates the Court, following notification of her disability, immediately engaged in the required ADA interactive process. The Grievant met with her manager and human resources to discuss her challenges in order to identify reasonable accommodations necessary for her to meet the performance expectations for her position. The Grievant was accommodated by having additional time to take notes and provided the opportunity to review her notes with her supervisor and/or manager. Even with the accommodations she had requested, the Grievant was unable to perform the essential functions of the job. She struggled to perform her assigned duties under the performance improvement plan with substantial support and feedback from supervision.

The Board also concludes as a matter of law that the Grievant's request to wear headphones while working was not a reasonable accommodation because it would have worked an undue hardship on the Court. As the Court's witnesses explained, it is not possible for a Judicial Case Processor to perform the essential functions of her job -- answering the telephone and interacting with co-workers, the police, and the public -- while wearing headphones.

The probationary period provided for under the Merit Rules met its purpose in this case in

⁹ Affirming MERB decision *Grievant v. Delaware Department of Human Resources* (MERB Docket No. 20-05-766)

allowing the employer to evaluate the Grievant's fit for the Judicial Case Processor I position. Upon identifying a perceived mismatch, the Grievant's supervisor began meeting with her weekly in September (before she made any mention of her disability) in order to provide guidance and to discuss missteps and errors. The record establishes that the Grievant was separated during her probationary period because she was not well-suited and was unsuccessful in performing the duties of the position into which she had been hired eleven months earlier.

DECISION AND ORDER

It is this 19th day of **April, 2022**, by a unanimous vote of 4-0, the Decision and Order of the Board to grant the Court's Motion for an Involuntary Dismissal and to deny the grievance. The Board finds the Grievant failed to meet her burden to prove that the Court violated Merit Rule 2.1 when it dismissed her during her probationary period.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER