

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

GRIEVANT,)	
)	
Employee/Grievant,)	
)	
v.)	DOCKET NO. 23-09-900
)	
DEPARTMENT OF SERVICES FOR)	DECISION AND ORDER
CHILDREN, YOUTH AND THEIR FAMILIES,)	(PUBLIC, REDACTED)
DIVISION OF PREVENTION AND BEHAVIORAL)	
HEALTH 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 April 17, 2024, at the Delaware Division of Professional Regulation Hearing Room A, Silver Lake Plaza, Cannon Bldg., 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Sheldon N. Sandler, Esq., Acting Chairperson, Joseph A. Pika, III, Ph.D., and Lester E. Johnson, Jr., Members, a quorum of the Board under 29 *Del. C.* § 5908(a).

APPEARANCES

Victoria R. Sweeney
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Grievant, *pro se*

Monica L. Townsend
Deputy Attorney General
on behalf of the Department of
Services for Children, Youth and
Their Families, Division of
Prevention and Behavioral Health
Services

PROCEDURAL BACKGROUND

The Employee/Grievant (“Grievant”), filed a grievance against the Department of Services for Children, Youth, and Their Families (“DSCYF”), Division of Prevention and Behavioral Health Services (“DPBHS”) (collectively the “Agency”), alleging that the Agency discriminated against her by terminating her based-on race and disability, in violation of Merit Rule (“MR”) 2.1.

BRIEF SUMMARY OF THE EVIDENCE

The Grievant offered ten (10) documents as evidence, marked as Exhibits 1–10. After the prehearing conference, the Board admitted Grievant Exhibit 4 into evidence.¹

The Agency offered thirteen (13) documents into evidence, marked as Exhibits A–M. After the prehearing conference, the Board admitted Agency Exhibits A–M.

The Board heard testimony from five witnesses: Dennisa Evans, the Agency’s former ADA Coordinator; Dr. Aileen Fink, DPBHS Division Director; Ilya Moses, the Agency’s Diversity, Equity, Inclusion (DEI) Administrator; Jeffrey Sisson, Family Services Program Support Supervisor; and the Grievant.

FINDINGS OF FACT

The Grievant is a black female who was employed by the Agency as a Therapist III. In April 2023, the Grievant was teleworking as a temporary ADA accommodation related to respiratory issues. The Agency’s ADA Coordinator informed the Grievant that this temporary accommodation was due to expire soon. The Grievant responded, requesting to extend her

¹ Grievant Exhibits 1, 3, 7, 8, 9, and 10 were summaries of facts or arguments the Grievant intended to present to the Board and were not admitted as evidence. Grievant’s Exhibit 5 is duplicative of Agency Exhibits B and C, which are more complete documents. During the prehearing conference, the parties agreed to enter the Agency Exhibits B and C over Grievant’s Exhibit 5 to avoid repetitive exhibits and confusion during the hearing. Grievant’s Exhibits 2 and 6 contained documents not relevant to the Grievant’s claim and therefore, were not admitted as evidence.

teleworking accommodation. The ADA Coordinator advised the Grievant that new documentation of a continuing substantial impairment from her physician was needed to support her request.

Earlier in 2023, the Grievant was on leave for knee surgery. She had a second ADA accommodation which also allowed her to telework, which had also been approved by the Agency and would expire on July 28, 2023.

On June 22, 2023, the Grievant submitted an ADA Healthcare Questionnaire Form completed by her physician on June 15, 2023, to the ADA Coordinator in support of her request for extending her telework accommodations (the “Initial ADA Form”).² In the Initial ADA Form, the first two questions were answered as follows:

1. Does the employee have a physical or mental impairment? Yes No
2. Does the impairment substantially limit a major life activity, as compared to most people in the general population? Yes No

The Initial ADA Form stated that due to the Grievant’s asthma and allergies, there was a concern about her exposure to community acquired upper respiratory infections. The Initial ADA Form further indicated that the Grievant’s impairment would last for approximately 6 months, and noted the Grievant was requesting to work from home five days per week.

On June 28, 2023, the ADA Coordinator reviewed the Initial ADA Form and informed the Grievant, via email, that her request for accommodation was being denied. The email informed the Grievant the information provided by her physician did not meet the definition of a disability under the ADA.³ The ADA Coordinator also advised the Grievant that she could continue to work from home until July 28, 2023, when her accommodation following her knee surgery would expire.

Later that day, the Grievant replied to the ADA Coordinator by submitting a second ADA

² Agency Exhibit A. The form was dated 6/12/2023 on the first page; her physician signed the form on page 2 on 6/15/23.

³ Agency Exhibit B. The ADA Coordinator was out of the office when the Grievant submitted the request and reviewed the paperwork upon her return to the office.

Healthcare Questionnaire form, stating that she forgot to send an “updated one” (the “Modified ADA Form”).⁴ The Modified ADA Form was identical to the Initial ADA Form but the answer to Question No. 2 was amended to state that the Grievant’s physical or mental impairment *did* substantially limit a major life activity noting “shortness of breath daily, asthma/PE requires oxygen during the day and night”. The answer to Question No. 3 specifically identified breathing, walking, lifting, and performing manual tasks as the major life activities being affected. In the margin next to Question No. 2 there appeared to be “JJ” and “6/15/23” in handwriting. The Modified ADA Form’s answer to Question No. 4 was also amended to state that the anticipated duration of the Grievant’s impairment was approximately “6–12 months”. Similarly, in the margin next to this amendment was another marking presumably meant to be initials and “6/15/23” in handwriting.

On June 30, 2023, the ADA Coordinator emailed the Grievant and asked whether she should disregard the Initial ADA Form and instead replace it with the Modified ADA Form. The Grievant confirmed, and the ADA Coordinator advised that she would review the Modified ADA Form. The ADA Coordinator testified that whenever the Agency receives modifications to submitted medical documentation, the Agency always contacts the physician to determine the validity of the submitted documentation.⁵ The ADA Coordinator contacted the Grievant’s physician and he responded, via facsimile, as follows:

After reviewing the ADA forms I can confirm that they have been altered from the originals sent by me. On page 1 – #2 and #3 have been changed. On page 2 – #4 has been changed.

At the last office visit, on June 12, 2023, it was noted that [*the Grievant*] was on oxygen at night, I am not the physician who prescribed oxygen for her.⁶

⁴ Agency Exhibit B.

⁵ Hearing Tr. at 27:12–17.

⁶ Agency Exhibit C. The ADA Coordinator testified that the facsimile was dated June 29, 2023, but it was initially sent to the Agency’s Leave Department.

After receiving the facsimile, the ADA Coordinator was concerned that the Modified ADA Form had been altered by the Grievant. The ADA Coordinator planned to speak with the Grievant about the Modified ADA Form upon her return to the office after the Grievant's vacation.

On July 17, 2023, the ADA Coordinator and the Agency's Human Resources Director met with the Grievant to discuss the Modified ADA Form. The purpose of the meeting was to share their concerns about the form with the Grievant and provide her with an opportunity to explain what happened. The ADA Coordinator testified that at the meeting, the Grievant stated that she altered the Modified ADA Form to use as an example for her physician and that she sent the document to the ADA Coordinator in error.⁷ At the end of the meeting the ADA Coordinator asked the Grievant to send her any documentation to support her claim. Later that day, the Grievant sent the ADA Coordinator a copy of a purported transaction receipt dated "Jun 13" as well as a facsimile cover letter to her physician from the Grievant dated "6/13/2023" asking the physician to update the ADA paperwork, with a copy of the Modified ADA Form attached.⁸

On July 17, 2023, the Agency placed the Grievant on paid administrative leave pending the results of an investigation.⁹ On August 9, 2023, the ADA Coordinator provided her investigative report to the DPBHS Division Director.¹⁰ In the report, the ADA Coordinator found that the documentation the Grievant provided on July 17, 2023, did not support the explanations she gave during the meeting. The ADA Coordinator determined that the facsimile cover letter was created fictitiously to support the Grievant's claim. Ultimately, the ADA Coordinator substantiated the allegation that the Grievant altered the Modified ADA Form and recommended

⁷ Hearing Tr. at 33:20–34:13. Notably, the Grievant's physician provided the Board with a letter dated April 15, 2024, stating that he was unable to be present for the hearing due to insufficient notice. He attached to his letter a copy of the ADA Form he completed for the Grievant on June 15, 2023.

⁸ Agency Exhibit E.

⁹ Agency Exhibit F.

¹⁰ Agency Exhibit H.

that the Agency terminate the Grievant.

On August 15, 2023, the DPBHS Division Director notified the Grievant that she was being recommended for termination as the investigation concluded that her behavior was unacceptable and violated numerous State and Agency policies, including the State of Delaware Standards of Conduct Policy; the Agency's Policy #305, governing standards of conduct for employees; and DPBHS Policy #4, governing ethics.¹¹ Both the State Standards of Conduct Policy and the Agency Policy #305 require employees to conduct themselves in a manner that upholds public trust and preserves public confidence, and avoids conduct that would violate public trust or would reflect unfavorably upon the State and its government. Agency Policy #305 further requires employees to not falsify State records or make any verbal or written report or misrepresent any material fact with the intent to mislead any person, panel, board, or tribunal. The Director recommended terminating the Grievant because her behavior would create public trust concerns as the Grievant altered her own medical records for her personal benefit. As a Therapist III, the Grievant had direct access to medical records of clients the Agency was serving.¹²

On August 31, 2023, the Agency terminated the Grievant for the reasons set forth in the recommendation to terminate letter.¹³

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, gender identity, genetic information or other non-merit factors is prohibited.

¹¹ Agency Exhibit I. A copy of all relevant policies can be found in Agency Exhibits K, L, and M.

¹² Hearing Tr. at 68:5–15.

¹³ Agency Exhibit J. Although the Agency provided the Grievant with an opportunity to have a pretermination meeting, the Grievant did not request such a meeting before her termination became effective.

Merit Rule 12.1 states:

Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. "Just cause" means that management has sufficient reasons for imposing accountability. Just cause requires: showing that the employee has committed the charged offense; offering specified due process rights specified in this chapter; and imposing a penalty appropriate to the circumstances.

The Board finds that the evidence in this case does not support the Grievant's claim that the Agency discriminated against her due to her race and disability in violation of MR 2.1. For both claims, the Grievant bears the burden of establishing a *prima facie* case of discrimination. To do so, she must establish that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) there is a causal connection between the protected class and the adverse employment action. *Ennis v. Del. Transit. Corp.*, 2015 WL 1542151, at *5 (Del. Super. Mar. 9, 2015) (discussing the *McDonnell Douglas*¹⁴ framework to establish a discrimination claim under Delaware law). If the Grievant establishes her *prima facie* case, the burden shifts to the Agency to present a legitimate, non-discriminatory reason for the adverse employment action. *Id.* If the Agency meets this burden, the burden again shifts to the Grievant to prove the Agency's legitimate, non-discriminatory reason was merely a pretext for discrimination. *Id.*

On her racial discrimination claim, the Grievant has satisfied the first two prongs of the *McDonnell Douglas* test. As a black person, the Grievant is protected by anti-discrimination laws. Termination is an adverse employment action. The Board finds, however, that the record is devoid of any evidence or testimony that the Agency subjected the Grievant to discrimination based on her race. Aside from her own testimony, the Grievant presented two witnesses to support her claim of racial discrimination: the Agency's DEI Coordinator testified that he had limited interaction

¹⁴ *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973).

with the Grievant and did not observe any instances of discrimination against the Grievant.¹⁵ Similarly, an Agency Family Services Support Supervisor testified that while he observed instances in which the Grievant was unfairly treated by another employee, she was not unfairly treated because she was either black or disabled; instead, he believed she was unfairly treated because of a personality conflict.¹⁶ Accordingly, the Grievant has failed to meet her burden in establishing a *prima facie* case of racial discrimination.

The Board concludes as a matter of law that the Grievant did not meet her burden in establishing that the Agency violated MR 2.1 or otherwise discriminated against her in deciding to terminate her. The Board finds the Grievant satisfied the first two prongs of the *McDonnell Douglas* test on her disability discrimination claim. Based on the record, it appears that during the relevant period (June and July 2023), the Grievant was considered disabled which would afford her protection under the ADA. Termination is an adverse employment action. Nonetheless, the Board finds that the Grievant failed to prove that the Agency discriminated against her based on her disability.

At the hearing, the Grievant testified that she modified the Initial ADA Form and intended to send the document to her physician as an example of how to complete the form because he incorrectly completed it.¹⁷ The Grievant maintained that previously, in September 2022, another physician made a similar mistake when filling out the same type of ADA form. That physician, however, later modified the form. The Grievant sought to change the Initial ADA Form in the same way. The Grievant also testified that once she was placed on paid administrative leave, she

¹⁵ Hearing Tr. at 97:1–17.

¹⁶ Hearing Tr. at 110:2–22.

¹⁷ The Grievant testified that she hand-wrote “7 7” and “6/15/23” in the margins of the Modified ADA Form but could not provide an explanation as to why the handwriting appears to look like a “J J” (perhaps to stand for her physician’s initials) or why she wrote “7 7”. Instead, the Grievant testified that she just wrote a “seven” and that she “do[es] that all the time.” See Hearing Tr. at 134:16–17.

raised the issue with her physician but at no point did he state that there was an error with the Initial ADA Form that he completed and submitted to the Agency on the Grievant's behalf.

There is no evidence in the record supporting the Grievant's claim of discrimination. The only evidence the Grievant has presented in support of her claim is her own testimony, and the Board does not find the Grievant's testimony to be credible. Her physician could have corrected the Initial ADA Form when the Grievant first brought this purported issue to his attention in July 2023, but he did not. At the time of the hearing, the Grievant's physician still maintained that the only form he ever filled out was the Initial ADA Form.

The Agency provided substantial evidence demonstrating that it had just cause to terminate the Grievant. The Board finds the ADA Coordinator's testimony to be credible. The steps she took to verify information the Grievant provided, to investigate her suspicion that the Modified ADA Form was improperly submitted, and the conclusions reached following her investigation are well-documented. The Board finds that the Agency afforded the Grievant ample opportunity to truthfully explain why she submitted the Modified ADA Form, and to provide documentation in support of her claim but she did not or could not provide a credible explanation or supportive documents.


The Board concludes the Grievant's termination was the appropriate penalty. By altering her own medical documentation, the Grievant engaged in conduct that would violate public trust or would reflect unfavorably upon the State and its government, especially in light of her position as a Therapist with access to confidential medical records of her patients.

ORDER

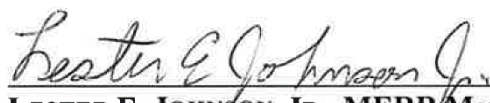
It is this **18th** day of **July, 2024**, by a unanimous vote of 3-0, the Decision and Order of the Board to deny the grievance.



SHELDON N. SANDLER, ESQ., ACTING CHAIR



JOSEPH A. PIKA, III, PH.D., MEMBER



LESTER E. JOHNSON, JR., MERB/Member