

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
18 OSP 02258

<p>Jodette Dorene Hall Petitioner,</p> <p>v.</p> <p>North Carolina Department of Public Safety Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER was heard before the Honorable Stacey Bice Bawtinheimer, Administrative Law Judge, on September 30, 2019 at the Office of Administrative Hearings (“OAH”), 1711 New Hope Church Road, Raleigh, North Carolina.

After considering a hearing on the merits held on the above-mentioned date, arguments from counsel for both parties, all documents in support of or in opposition to the parties’ motions, all documents in the record, including the Proposed Decisions, as well as all stipulations, admissions, and exhibits, the Undersigned concludes that the North Carolina Department of Public Safety (“Respondent” or “DPS”) did not wrongfully separate Petitioner Jodette Dorene Hall (“Petitioner” or “Hall”) and did not unlawfully discriminate against her due to her disability.

APPEARANCES

For Petitioner: Charles E. Monteith, Jr.
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For Respondent: Orlando L. Rodriguez
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
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WITNESSES

For Petitioner: Jodette Dorene Hall, Petitioner

For Respondent: Jodette Dorene Hall
Jamie Terrell Meadows, Human Resources
Consultant for Department of Public Safety

EXHIBITS

Exhibits admitted as evidence at the hearing:

For Petitioner: Exhibits 1-5, 7, 8, and 10-19 (“Pet’r Ex.”)

For Respondent: Exhibits A, C-H, and J (“Resp’t Ex.”)

The Parties stipulated to the authenticity and admissibility of the admitted exhibits.

ISSUES

1. Whether Respondent wrongfully separated Petitioner from her career State employment due to her unavailability in violation of 25 NCAC 01C .1007?
2. Whether Respondent unlawfully discriminated against Petitioner due to her disability by failing to give her reasonable accommodations?

RELEVANT STATUTES (including but not limited to)

N.C. Gen. Stat. §§ 126-1 *et seq.*; N.C. Gen. Stat. §§ 150B-1 *et seq.*; 25 NCAC 01J .6001-6017; 25 NCAC 01C .1007; 26 NCAC Chapter 1 and 26 NACA Chapter 3; and the Americans with Disabilities Act (“ADA”), 42 U.S.C §§ 12101 *et seq.*

EXTRAORDINARY CAUSE AND PROCEDURAL HISTORY

Petitioner filed her contested case petition on April 13, 2018 alleging that Respondent had wrongfully separated her from career State employment due to alleged unavailability in violation of 25 NCAC 01C .1007 and discriminated against her due to a disability by failing to give her reasonable accommodations for her disabling condition.

Prior to filing her petition, Petitioner filed three charges of disability discrimination, case file numbers 17 CRD 0598, 17 CRD 0015, and 18 CRD 0022, with the Equal Employment Opportunity Commission (“EEOC”) which were referred for investigation to the Civil Rights Division (“CRD”) of the Office of Administrative Hearings.

Subsequently, on May 11, 2018, Petitioner moved to stay the contested case to allow completion of the investigation of Petitioner's case charge number 18 CRD 0022 which was filed on February 14, 2018. This request was pursuant to 26 NCAC 04 .0108 which requires a stay be entered in a contested case where there is a companion discrimination charge under investigation by the CRD.

On May 14, 2018, prior to the issuance of the Order of Stay, Respondent moved to partially dismiss some of Petitioner's claims. In response to Respondent's partial dispositive motion, on May 21 and 22, 2018 Petitioner voluntarily dismissed without prejudice her January and February discrimination claims, charge numbers 17 CRD 0598 and 17 CRD 0015, as well as her retaliation claim. Petitioner did not dismiss her claims for wrongful separation and disability discrimination.

The case was stayed on May 23, 2018 and the Undersigned deferred ruling on the remainder of Respondent's Partial Motion to Dismiss until after completion of the CRD's investigation of charge 18 CRD 0022. The Petitioner filed monthly Status Reports on the status of the CRD's investigation. None of the results of the three CRD investigations were disclosed to the Undersigned.

Upon completion of the investigation, the stay was lifted on August 19, 2019 and the case was calendared for hearing on September 30, 2019. The pending Partial Motion to Dismiss was denied on that day. (T p. 15:2-7)

Because both Parties desired a transcript of the hearing, Proposed Final Decisions were due on November 21, 2019 and the Final Decision was due on December 21, 2019. The hearing transcript, however, was not completed and delivered until December 2, 2019. During a conference call on December 5, 2019, the Undersigned ordered that Proposed Final Decisions be filed on the morning of December 30, 2019. The Final Decision deadline was January 6, 2020.

Except for the period stayed to allow for the Civil Rights Division's investigations, once the stay was lifted on August 19, 2019, this case was decided within the 180-day period.

STIPULATIONS OF FACT

Petitioner stipulated that she received each correspondence contained in Respondent's exhibits. (T p. 8:22-9:1)

Respondent stipulated that it received all documents from both the Petitioner and her physicians which are in the Petitioner's exhibits. (T p. 9:2-6)

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the September 30, 2019 hearing, the stipulations, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact and Conclusions of Law. In making the Findings of Fact, the

Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From the evidence presented, the Undersigned makes the following findings of fact:

Parties and Issues

1. Jodette Dorene Hall (“Petitioner” or “Hall”) alleged that the North Carolina Department of Public Safety (“Respondent” or “DPS”) wrongfully separated her from employment due to unavailability and raised claims of unlawful discrimination due to her disability.

2. DPS contends that Hall was unavailable and her separation was consistent with the requirements of 25 N.C. Admin. Code 01C. 1007. DPS also denied any unlawful discrimination due to disability.

3. Concurrent with the events related to her separation and request for accommodations, Hall filed three charges of disability discrimination, charge file numbers 17 CRD 0598, 17 CRD 0015, and 18 CRD 0022, with the Equal Employment Opportunity Commission (“EEOC”) which were referred for investigation to the Civil Rights Division (“CRD”) of the Office of Administrative Hearings. This contested case was stayed pending completion of the investigations.

4. Hall voluntarily dismissed some of her discrimination claims and the only discrimination claim currently at issue is her disability discrimination claim for DPS’ failure to accommodate her Post-Traumatic Stress Disorder (“PTSD”) and Major Depressive Disorder (“MDD”). According to Hall, DPS’ failure to accommodate her disability resulted in her unlawful termination.

3. The two issues in this contested case are: 1. whether DPS wrongfully separated Hall from her career State employment due to her unavailability in violation of 25 NCAC 01C .1007; and 2. whether DPS unlawfully discriminated against Hall due to her disability specifically by refusing her request for the accommodations of intermittent leave and transfer to another position.

Witnesses

Two witnesses testified at the hearing: Petitioner Jodette Dorene Hall and Jamie Terrell Meadows, Human Resources Consultant for Department of Public Safety.

5. Hall was initially called in Respondent’s case in chief for direct examination. Rather than cross examine her at that time, Hall’s legal counsel opted to recall Hall in Petitioner’s case in chief where she was subject to cross examination by DPS’ counsel.

6. Hall presented confident and knowledgeable about the facts underlying her case. She was somewhat argumentative on cross examination but that was understandable as cross examination is typically stressful for most witnesses. Hall's testimony about the meetings between her and her supervisor, Joy Jones, differed significantly from the written accounts of those meetings. However, Director Jones did not testify and Hall's perceptions of those meetings during and after may have been clouded by her frustration and anxiety evident through her written account of the meetings. Except as noted below, overall Hall was a credible witness.

7. Jamie Terrell Meadows, Human Resources Consultant for Department of Public Safety, testified for DPS. She was not involved in all the events in this case but was personally knowledgeable about some and very knowledgeable about DPS' employment policies and disability related requirements. Ms. Meadows was a credible witness.

Hall's Employment History With DPS

8. Jodette Dorene Hall ("Petitioner") began employment with the North Carolina Department of Public Safety ("Respondent") on September 8, 2014 as a Correctional Behavioral Specialist 1 at the North Carolina Correctional Institute for Women ("NCCIW"). (T pp. 18:3-11, 91:11-20; Resp't Ex. A) Due to a change in the law which reduced the time of a probationary appointment to twelve months, Hall became a career State employee on October 30, 2015. (T pp. 18:25, 19:1-4; Resp't Ex. A)

9. Prior to her employment with DPS, Hall was an employee of the Federal Bureau of Prisons for sixteen years and was placed at Butner for her last duty station from July 29, 2012 to April 3, 2013. (T pp. 16:20-17:12) One month after her transfer, Hall was brutally attacked from behind by a staff member in the parking lot who broke her nose and jaw while he was attempting to drag her behind the bushes and rape her. (T p. 17:13-20) This attack led to her Post-Traumatic Stress Disorder ("PTSD") and Major Depressive Disorder ("MDD") diagnoses which were central to this case. (T p. 17:13-20)

10. Hall's PTSD and MDD symptoms includes panic attacks, poor focus, fatigue, social withdrawal, sleep disturbances, and high anxiety. (Pet'r Ex. 12, p.7) Based on her diagnoses of PTSD and MDD, Hall had mental impairments which substantially limited her major life activities including concentration, thinking, communicating, and working.

11. Hall resigned from the Federal Bureau of Prisons because of this incident and there was a confidential settlement. (T p. 91:1-10) It is not in evidence what Petitioner did between the interim period of April 3, 2013 to September 8, 2014 before she accepted the position of Correctional Behavioral Specialist 1.

12. The OSHR job specification for the Correctional Behavioral Specialist 1 position included direct inmate contact during psychological testing of inmates, counseling of inmates to develop rapport and attitudes to facilitate valid test results and gathering relevant background information for psychological reports. This position typically included assigned supportive counseling to aid inmates' adjustment to the prison environment and their psychological functioning. The duties included data entry and collection regarding clinical impressions of

inmates during assessment or in daily activities while they were on an inpatient mental health or infirmary unit. Monitoring and teaching basic living skills to inmates were also required duties. In this position, the employee's supportive counseling role included the use of crisis intervention techniques and referral to other treatment staff as required. The duties of the Correctional Behavioral Specialist 1 position involved daily and direct inmate contact. (Resp't Ex. A)

13. From September 9 through August 2015 Hall worked, without any accommodations or apparent issues, as a Correctional Behavioral Specialist 1 at NCCIW during which time she had direct daily contact with staff and inmates within the correctional facility.

14. In late August 2015, Hall applied for and was allowed leave under the Family and Medical Leave Act ("FML") to assist her family in caring for her terminally ill mother. (T pp. 91:21-25, 92:1-11) Her leave request was purportedly approved by someone at NCCIW, but Hall provided no written evidence of this approval. (T pp. 92:9-11)

15. Around September 2015, Hall requested additional leave without pay. (T p. 92:12-22) It was not clear in the record what this leave category was. Her request for leave without pay was approved even though, again, Hall received no formal written notification of such approval from her supervisor at NCCIW. (T pp. 92:23-25, 93:1-10)

16. The day after Hall became a career employee, on November 1, 2015, she went out on short-term disability. (T p. 19:6-9; Resp't Ex. A) Hall returned to work in early December 2015 and then went out on short-term disability again on December 31, 2015. (T p. 19:10-19; Resp't Ex. A) Hall remained on short-term disability leave until sometime early May 2016.

17. In early May 2016, Hall and her psychiatrist, Dr. An'Drea Taylor, decided that Hall could attempt to return to the Correctional Behavioral Specialist 1 position. (T pp. 94:16-25, 95:1-3, 104:21-23) Hall returned to work on May 9, 2016. (T pp. 19:22-25, 20:1-3; Resp't Ex. A)

18. Prior to her return to work in May 2016, Hall had applied for short-term disability again and was notified by letter dated April 8, 2016 that she had been approved for short-term disability retroactively effective January 1, 2016 to December 30, 2016. DPS paid her short-term disability benefits during this time. (T p. 195:20-23) Hall's short-term disability benefits were later extended from December 31, 2016 to September 28, 2017. (Resp't Ex. A, p. 2) The Retirement System paid for Hall's extended short-term disability benefits. (T p. 195:10-17)

19. Hall initially elected to return to work rather than remain on short-term disability. However, Hall only worked for about three weeks until an incident occurred on May 26, 2016. (T p. 95:4-8) Upon arriving to work that day, Hall witnessed a "chaotic scene" where an inmate was dying in the area located on the way to Hall's office and there were a number of correctional officers and doctors present. (T p. 95:11-25) Hall passed out during this incident and woke up in the nurses' area. (T p. 96:1-22)

20. Hall did not return to work at the NCCIW for the remainder of the year following the May 26, 2016 incident. (T p. 98:7-11)

21. Instead, in June 2016 Hall requested Americans With Disabilities Act accommodations (“ADA accommodations”) for her disabilities of PTSD and MDD. As an accommodation she asked to be transferred to a position with no direct contact with inmates. (T p. 97:1-9)

22. In July 2016, Hall provided Elaine Mazingo, an ADA coordinator at NCCIW, and Kenneth Thomas, another ADA coordinator, with a statement from Dr. Taylor which described Hall as having the following symptoms: hypervigilance, increased startle response, excessive worries, feeling tense and having difficulty relaxing. (T pp. 97:20-25, 98:1-3; Pet’r Ex. 1)

23. On September 16, 2016, DPS’ Equal Employment Opportunity Office denied Hall’s request that she be accommodated by transferring her to a position that did not require direct contact with inmates. (Resp’t Ex. A, p. 2) On September 21, 2016, Hall filed a timely grievance of this denial. (Resp’t Ex. A, p. 2)

24. Hall’s accommodation request eliminated one of the essential job functions, working directly with inmates, for the Correctional Behavioral Specialist position. Hall was unable to perform six on the nine essential job functions of the Correctional Behavioral Specialist position mainly because she could not have direct contact with inmates because of her disabling conditions. (Resp’t Ex. A)

25. At that time, Hall was no longer qualified for the Correctional Behavioral Specialist 1 position because she could not work, with or without accommodations, directly with inmates which was an essential job function. As of June 2016, Hall was not a qualified individual with a disability and not entitled to the protections of the ADA.

26. On December 2, 2016, W. David Guice, issued a Final Agency Decision with respect to Hall’s September 21, 2016 grievance. (Resp’t Ex. A) In that decision, Guice denied Hall’s requested accommodation for the Correctional Behavioral Specialist 1 position but, in his discretion, granted Hall’s request that DPS conduct a job search for positions that did not require direct inmate contact. (Resp’t Ex. A, pp. 2-3)

27. Later in December, Hall was offered a Processing Assistant IV position with a lower pay grade than her former position. (Resp’t Ex. C, p. 1) Hall declined this position and filed her first charge of discrimination with the EEOC on January 5, 2017, charge number 17 CRD 0598. (Petition p. 2) Investigation of this charge was ongoing until August 2019.

28. Also in December 2016, Hall was offered three different Office Processing Assistant positions. However, while the essential job functions worksheets were being completed, all three position were reclassified and became no longer available. (T p. 100:4-25)

29. Later on February 1, 2017, DPS offered Hall the position of Processing Assistant-IV (pay grade 59) at the Triangle Maintenance Complex in Wake County which only required duties with indirect/passing contact with inmates. (Resp’t Ex. C)

30. Hall declined the Processing Assistant IV position because she understood that her acceptance of this position would release DPS from liability for her existing discrimination grievances and her ability to file future grievances. (T p. 101:18-25) Hall was not represented by counsel when she made this decision. But for that misunderstanding, Hall said she would have accepted this position. Instead, Hall elected to remain on short-term disability leave. (Resp't Ex. C)

31. On February 14, 2017, Hall filed her second discrimination charge, 17-CDR-0015, for retaliation. (Petition p. 3) Investigation of this charge was also ongoing until August 2019.

32. On September 7, 2017, Twyla Philyaw, an Employee Relations Analyst for DPS, mailed Petitioner a letter offering her another Office Assistant IV position at the Central Prison Healthcare Complex. Ms. Philyaw advised Hall that the position involved only indirect or minimal inmate contact and that she wanted her to report on Monday, September 18, 2019. (Resp't Ex. C, p. 2)

33. DPS was anxious to fill this vacant position. (T p. 103:2-10) Ms. Philyaw advised Hall that the agency could not continue to hold this position for her because it needed to be filled and that if she "remain[ed] unable or unwilling to report for this position that she would be recommended for separation from employment due to her unavailability." (Resp't Ex. C, p. 2)

34. Hall accepted the Office Assistant IV position and, due to prior appointments, with Ms. Philyaw's consent she started on September 27th instead of September 18th. (T pp. 102:21-25, 103:1-10)

35. The Office Assistant IV position is critical to the Director of Nursing's ability to ensure that adequate patient care by nursing staff is provided to patients and is critical to the operation of the Central Prison Healthcare Complex. (Resp't Ex. E, p. 3)

36. At the time Hall accepted the Office Assistant IV position, she believed that she was able to perform the essential duties of the position. (T p. 103:17-20) She understood the duties involved performing basic secretarial duties for Joy Jones, the Director of Nursing ("Director Jones") at the Central Prison Healthcare Complex. (T pp. 103:21-25, 104:1-11)

37. Two of the essential duties included "[w]ork under stressful conditions caused by direct contact with incarcerated offenders who can become physically violent and verbally abusive" and "[c]omprehend and abide by policies, standard operating procedures, emergency plans, memorandum, legal documents and other directives, both written and verbal, governing daily activities." (Pet'r Ex. 12, p. 4)

38. On September 14, 2017, Hall's physician, Dr. Taylor indicated on the "Office Assistant IV Essential Job Function" form that Hall could perform all the duties except she needed the accommodation of indirect/passing contact with inmates. (Pet'r Ex. 12, pp. 3 & 4)

39. With respect to working with inmates Dr. Taylor commented that “[a]t this time, patient is able to have indirect/passing contact as long as she’s not alone with inmates or in direct patient/inmate case where she is the primary provider for their care.” (Pet’r Ex. 12, p. 4)

40. As of September 14, 2017, Hall could, with the accommodation of indirect inmate contact, perform all her essential job functions.

41. Addendums were added to the Dr. Taylor’s comments in October and November 2017 with respect to the essential job duty of following policies/rules and Hall’s need for scheduling accommodations. (Pet’r Ex. 12, p. 7)

42. Hall discussed her job responsibilities with her supervisor Director Jones who informed her that in this position Hall would be Jones’ “right-hand man” and that Director Jones “needed someone pretty much that could be there all the time.” (T pp. 117:16-118:3) According to Hall after her conversations with Director Jones, she understood that she would be “pretty much running things when the Director and the Assistant Director were out.” (T pp. 111:25-112:3)

43. The job responsibilities of the Office Assistant IV position included, but were not limited to; keeping track of the whole Department of Nursing staff’s call-outs, and call-ins for the nursing staff, handling dispatches for the Central Prison Healthcare Complex, filings and clerical staff duties, taking minutes for meetings, traveling with Director Jones as needed, and reporting written warnings. (T pp. 103:21-104:11)

44. Unfortunately, Hall’s transition back into the workplace did not go well.

45. Hall’s first day of work in the Office Assistant IV position was September 27, 2017. (T pp. 104:24-25, 105:1) Because Director Jones was on vacation until September 28, 2017, Hall had been instructed by Business Officer Bruce McKinney to report at 8:00 a.m. for her first day of work. (Resp’t Ex. E; T p. 105:21-25)

46. Hall was forty (40) minutes late for work on her first day. (T p. 29:14-16; Resp’t Ex. E)

47. Hall was late for work on her first day because she had several severe panic attacks that morning. (T p. 106:1-7)

48. Hall said she called Mr. McKinney and informed him she would be late that morning (T pp. 68:22-25, 106:22-25), however, this is inconsistent with Mr. McKinney’s statement in his October 20, 2017 letter that she did not call anyone to notify them she would be late that day or the following days. (Resp’t. Ex. E, p. 1)

49. After she arrived that morning, Hall sought clarification about her work schedule. (Resp’t Ex. E) Since Hall’s direct supervisor was not present, Mr. McKinney advised her to speak with her supervisor the next day, September 28, 2017, about the matter. (Resp’t Ex. E) He also advised her that it would be “OK” for her to come in at 8:30 a.m. on September 28, 2017. (Resp’t Ex. E, p. 1; T pp. 108:24-25, 109:1-3)

50. Hall worked until the end of her shift on September 27, 2017 and felt that it had been a “pretty good day.” (T p. 108:10-19)

51. On her second day of work, September 28, 2017, Hall was 15-20 minutes late for work because she again experienced panic attacks that morning. (T p. 109:13-25) Hall contacted Assistant Director of Nursing Karen Marlowe (“Assistant Director Marlowe”) and told her that she would be late. (T p. 110:5-15)

52. Later that morning, on September 28, 2017, Director Jones and Assistant Director Marlowe, met with Hall to discuss her work schedule and provided the time and attendance directive to Hall. (Resp’t Ex. E) Director Jones and Assistant Director Marlowe advised Hall that she had two schedule options, 7:30 a.m. – 4:00 p.m. or 8:00 a.m. – 4:30 p.m. (Resp’t Ex. E) Hall elected to work 7:30 a.m. – 4:00 p.m. (Resp’t Ex. E)

53. Before and during the September 28, 2017 meeting, Director Jones did not know about Hall’s disability or need for accommodations. (Resp’t Ex. D)

54. Hall arrived at work at approximately 9:00 a.m. on her third day of work, Friday, September 29, 2017. (T p. 112:9-17). She once again had panic attacks on her way to work as well as a nosebleed. (T pp. 112:18-113:21). Petitioner called Assistant Director Marlowe and left a message that she would be late. (T p. 113:7-17)

55. Hall met with Assistant Director Marlowe after she arrived at work on the morning of Friday, September 29, 2017. (T p. 114:1-25) Director Jones was not at work that Friday. (T p. 114:17-20) During that meeting, Hall told Assistant Director Marlowe about her disability and the panic attacks that she had suffered on the last three days. (T p. 114:2-13) Assistant Director Marlowe was sympathetic and approved Hall’s request to leave work early on that day. Hall left work around 10:15 a.m. (T p. 114:14-24)

56. On her fourth day of work, Monday October 2, 2017, Hall was again late and reported to work at approximately 8:34 a.m. instead of 7:30 a.m. as she had previously agreed. (T pp. 115:19-25, 116:1-2)

57. That same day, Hall met with Director Jones and Assistant Director Marlowe around 1:00 p.m. (T p. 116:15-22)

58. Hall’s and Director Jones’ written accounts of what transpired during the October 2nd meeting varied significantly. (*Compare* Pet. Ex. 3 dated October 2, 2017 to Resp’t Ex. E dated October 3, 2017)

59. According to Director Jones’ account, during this meeting, Hall became defensive after being confronted about her series of late arrivals and stated that she would need to be late on some days as part of her accommodation. (Resp’t Ex. E) Director Jones informed Hall that she was not aware of any accommodation related to Petitioner’s work schedule and that, like all other employees, she would need to be on a regular and consistent schedule. (Resp’t Exs. D & E) Also during the meeting, Hall became loud, stood up, pointed at people, cursed, and abruptly left the

meeting. (Resp't Ex. E) Because of Hall's "loud and demanding" actions, the Chief Executive Officer "CEO" Judith Knechtges had to be called into the office. (Resp't Ex. E) Hall continued to be rude and argumentative to other staff on her way out of the facility. (Resp't Ex. E)

60. However, according to Hall's account, Director Jones and the other staff were rude and aggressive to her. During the meeting on October 2nd when Hall tried to explain why she needed to take "intermittent leave" due to her PTSD and MDD, Director Jones' behavior became unacceptable, rude and aggressive. (Pet'r Ex. 3, p. 1) When she told Director Jones that she had PTSD and MDD. (T p. 117:3-15) Director Jones responded that she was frustrated because she was not given sufficient notice of Petitioner's arrival and need for accommodations. (T p. 117:16-25)

61. Approximately 15-20 minutes into the October 2, 2017 meeting, Hall experienced a panic attack. (T p. 119:1-6) Hall testified at the hearing that during the meeting she began sweating and her nose started to bleed profusely. (T p. 120:8-20) Neither Hall nor Director Jones mentioned in their written accounts of the meeting that Hall's nose started bleeding profusely, something which would have been noticeable and an extraordinary response to a staff meeting.

62. Regardless of the credibility of these written accounts, it was clear that in the meeting both participants were frustrated and became confrontational based on misunderstandings and miscommunications.

63. Hall eventually left the meeting and the facility. (T p. 120:20-25) She then called Ms. Philyaw and reported what had happened during her meeting with Director Jones and that Director Jones, Assistant Director Marlowe and CEO Knechtges were aggressive and extremely rude to her. (T p. 121:7-18) Petitioner also emailed Ms. Philyaw at 11:19 p.m. that evening and described her rendition of the October 2nd meeting.

64. Despite the adversarial nature of the October 2, 2017 meeting, Hall reported to work at her scheduled time on October 3, 2017. (T p. 123:7-11)

65. During a meeting that day with Director Jones, Director Jones handed Hall a copy of her memorandum responding to the email Hall had forwarded to Mrs. Philyaw. Director Jones also stated her concerns about Hall's request to take intermittent leave considering the work schedule expectations for her current position. (Resp't Ex. D) Even though Hall had requested accommodations for previous positions, Director Jones advised Hall that if she wished to obtain a reasonable accommodation for her current position as an Office Assistant IV that Hall would have to comply with the ADA policy which she had attached to her memorandum. (Resp't Ex. D, p. 1) As a concession, Director Jones did agree to push back Hall's work schedule to 8:00 a.m. to 4:30 p.m. (Resp't Ex. E, p. 2¹)

66. Hall left work following the October 3, 2017 meeting in order to go to a previously scheduled and approved appointment with her primary care physician, Dr. Pha-Soby. (T pp. 128:10-25, 129:1)

¹ Respondent's exhibit E has a typographical error on page 2 in the third paragraph which starts with "On Monday, October 3, 2017...". The correct date is October 2, 2017.

67. After Hall left the facility on October 3, 2017, she never returned to work. (Resp't Ex. E; T p. 30:7-16) She had worked only 5 partial days at the Central Healthcare Prison Complex.

68. From November 2016 to October 3, 2017, Hall had only worked a total seventeen (17) days as an employee of DPS. (T p. 54:8-12)

69. As of October 4, 2017, Hall had 0.39 special leave bonus hours, 0 hours of vacation, and 0 hours of sick leave. (T pp. 30:17-25, 31:1, 32:6-10; Resp't Ex. E, p. 3)

70. Because Hall had not worked 1,040² hours during the past 12-month period she was not eligible for Family Medical Leave. (T p. 32:11-13; Resp't Ex. E)

71. Moreover, Hall was not entitled to leave without pay because she did not apply for it in writing and have it approved. The leave without pay policy provides that leave without pay is granted at the discretion of the agency head. (Resp't Ex. E, p. 3) Although Director Jones had told Hall to bring a doctor's note when she returned to work, Hall proffered no evidence that Director Jones had actually approved her absence from work without pay. (T pp. 32:21-25, 33:1-6; Resp't Ex. E. p. 3)

72. The Office Assistant IV position at the Central Prison Healthcare Complex is a critical position for the agency and Hall's absences caused hardships for the other employees, requiring them to work additional hours, creating the necessity for management to pay overtime, and her absence also hampered the ability of other employees to take their own leave. (Resp't Ex. E, p. 3)

73. On October 10, 2017, DPS received notes from Hall's medical providers. (Resp't Ex. E) The first note was from Duke Health/Triangle Family Practice. The note indicated that Hall had been treated, for an unspecified condition, on October 3, 2017 and that she would be out of work from October 2 through October 9, 2017. (Resp't Ex. E) The second note was from Carolina Partners in Mental HealthCare, PLLC and it indicated that Hall was treated on October 10, 2017, for an unspecified condition, and that she would be out of work from October 10, 2017 until October 27, 2017. (Resp't Ex. E)

74. On October 12, 2017, Hall submitted a second request for an accommodation under the ADA. (Resp't Ex. F) In her second ADA request, she sought a schedule change to 8:30 a.m. – 5:00 p.m. (T p. 36:2-8; Resp't Ex. F) On November 6, 2017, DPS approved her request to change her designated work time to 8:30 a.m. – 5:00 p.m. (T p.36:9-10; Resp't Ex. F) This was the second time Hall's work schedule was changed. Even after her schedule was changed again, Hall did not report to work.

75. On October 20, 2017, DPS advised Hall that if she did not return to work by October 25, 2017, a recommendation for her dismissal for unavailability would be forwarded through the chain of command. (T p. 35:12-16; Resp't Ex. E) Petitioner did not return to work on October 25, 2017. (T p. 35:17-18; Resp't Ex. E)

² Currently the ADA requires 1,250 hours.

76. On November 16, 2017, DPS sent Hall a Pre-Separation Letter. (Resp't Ex. G) DPS informed Hall that she had been in unapproved leave of absence without pay status since October 5, 2017. (T p. 37:21-24; Resp't Ex. G) DPS further advised Hall that her position was critical to the operation of the Central Prison Healthcare Complex and that she could not stay in leave of absence status indefinitely. (Resp't Ex. G)

77. The Pre-Separation letter further stated that:

This letter is to notify you that you must report to work immediately. If you remain unavailable on December 1, 2017, I will recommend that you be separated due to unavailability. You may propose to me in writing any action that I can take as an accommodation which would allow you to come to work from 8:30 p.m. until 5:00 p.m. every day and avoid your separation for unavailability.

(Resp't Ex. G, p. 1)

78. Hall was instructed to either return to work by December 1, 2017 or propose a reasonable accommodation which would enable her to return to work (8:30 am – 5:00 pm, Monday through Friday) by that date. (Resp't Ex. G; T pp. 38:23-25, 39:1-17) DPS advised Hall that if she did not return to work by December 1, 2017, or propose a reasonable accommodation to return to work, 8:30 am – 5:00 pm, Monday through Friday, DPS would recommend her separation due to her unavailability. (Resp't Ex. G)

79. On November 20, 2017, Dr. Taylor faxed another accommodation request to Ms. Meadows. (Pet'r Ex. 14, p. 3; T pp. 140:21-24, 141:1-10) In her letter, Dr. Taylor stated that:

[Hall].... would do best and have better transition back into work environment by:
1) having job accommodations set up outside the correctional facility environment;
2) allowed to start her work day [sic] at 8:30 am to account for time for stabilization of any symptoms that may flare-up in the mornings; 3) allowed time from work to attend follow-up appointments; and, 4) allowed time out of work when and if she encountered severe exacerbations in her condition.

(Pet'r Ex. 14, p. 3)

80. Dr. Taylor attached to her letter the list of “Office Assistant IV Essential Job Functions” and noted that Hall could perform all the essential job functions with the accommodation of indirect/passing contact with inmates and scheduling accommodations.

81. Ms. Meadows received the November 20, 2017 fax from Dr. Taylor. (T p. 70:13-18) Hall did not receive a response from Ms. Meadows or any other employee of DPS concerning the accommodation requests set forth in the November 20, 2017 fax. (T p. 144:3-9) Based upon Hall's requests, she could not return to work in the Office Assistant IV position at the Central Prison Healthcare Complex because of her medical conditions.

82. On November 26, 2017, Hall emailed Mr. McKinney, Ms. Meadows, Ms. Philyaw and Brian Murray. (Pet'r Ex. 15; T p. 144:10-19) None of those four individuals responded to Petitioner's email. (T pp. 144:20-24, 145:16-25)

83. On November 28, 2017, Hall emailed Mr. McKinney again. (Pet'r Ex. 16) In that email, Hall referenced Dr. Taylor's November 13, 2017 fax and asked if it was acceptable for her to return to work on December 5, 2017. (Pet'r Exs. 13 & 16) Mr. McKinney did not send an email in response to Petitioner's November 28, 2017 email. (T p. 146:4-12) He did, however, call Petitioner on the afternoon of November 28, 2017 and told her that he had received her accommodation requests and would contact her again to let her know if any of those requests could be granted. (T pp. 146:13-17; 147:5-11)

84. Mr. McKinney did not call or email Hall after his conversation with her on November 28, 2017. (T p. 147:12-15)

85. Dr. Taylor sent another fax to Mr. McKinney on November 28, 2017. (Pet'r Ex. 17) Included in that fax were the accommodation requests that Dr. Taylor had previously submitted earlier in November 2017. (Pet'r Ex. 17, pp. 3-4; T pp. 148:5-25, 149:1-4)

86. On December 1, 2017, Hall emailed Ms. Meadows and renewed her request that she be transferred to a non-critical position outside of the prison system which would permit her to take intermittent leave. (Pet'r Ex. 19) Hall did not receive a response to this email. (T p. 129:1-14)

87. By December 1, 2017, Hall had not reported to work. (T p. 39:18-20)

88. Moreover, by December 1, 2017, Hall had not proposed an accommodation that would allow her to return to her job full time, 8:30 a.m. – 5:00 p.m., as an Office Assistant IV at the Central Prison Healthcare Complex. (Resp't Ex. H)

89. On November 28, 2017, Hall notified Bruce McKinney that she would be released from her doctor on December 5, 2017. (Pet'r Ex. 16)

90. Hall did not return to work on December 5, 2017.

91. Hall and DPS were unable to reach an agreement on a return to work arrangement which would meet both their needs.

92. The next communication Hall received from DPS was a Separation Letter dated December 13, 2017 from Bruce McKinney informing her of her separation due to unavailability. (Resp't Ex. H) The Separation Letter stated that Hall had been given the opportunity "to meet or propose in writing alternative methods of accommodation to avoid this separation." (Resp't Ex. H)

93. The Separation Letter acknowledged the prior approval of Hall's request that she be allowed to work from 8:30 a.m. to 5:00 p.m. (Resp't Ex. H, p. 2) It also acknowledged Hall's request to be transferred to a position, other than an Office Assistant IV position, that would permit her to work intermittently. (Resp't Ex. H, p. 2) Hall's request to work intermittently at another position was denied because she was not eligible for Family Medical Leave and it was not a reasonable accommodation. (Resp't Ex. H, p. 2)

94. The Separation Letter did not address all of requested accommodations that Dr. Taylor faxed to Jamie Meadows on November 20, 2017. (Resp't Ex. H; Pet'r Ex. 14, p. 3) Significantly, the Separation Letter did not address Hall's request for a position outside of a correctional facility environment.

95. According to Ms. Meadows, Mr. McKinney never asked her if DPS had an available position that would not require Petitioner to work in a correctional environment. (T pp. 47:12-19, 73:19-25, 74:1) Ms. Meadows provides consultation to DPS's employees and management regarding ADA issues. Ms. Meadows testified that DPS has more than 26,000 employees and not all of those employees work in a correctional setting. (T pp. 63:1-7, 73:23-25, 74:1) Ms. Meadows further testified that there are Office Assistant IV positions that do not require working in a correctional environment. (T p. 77:1-4) She was not asked if any of these positions were vacant at that time.

96. Hall testified that she would have returned to work on a full-time basis on December 5, 2017 had she been allowed to do so. (T pp. 148:1-3, 151:24-152:4; Pet'r Ex. 16) No one had prohibited her from returning to work. On the contrary, DPS wanted her to return and as of that date had not issued the Separation Letter. Notably, Hall did not say that she would have returned to work on a full-time basis as an Office Assistant IV at Central Prison Healthcare Care.

97. Although Hall insisted that she needed the accommodation of a position outside the correctional environment, on December 12, 2017 the day before her separation notification, she interviewed for an office processing assistant position at the North Carolina Correctional Institute for Women. (T p. 152:5-14)

98. Effective December 13, 2017, DPS separated Hall due to her continued unavailability because: 1. Hall had exhausted all leave credits as of October 4, 2017 (T pp. 40:4-7, 53:10-13, 57:21-24; Resp't Ex. H); 2. Hall had been in unapproved leave of absence without pay status since October 5, 2017 (T p. 58:2-4; Resp't Ex. G); and 3. Hall did not return to work on December 1, 2017 or propose an accommodation that would allow her to return to work 8:30 to 5:00 every day at her current position. (T. pp. 58:5 – 60:20; Resp't Ex. H) Because of these factors, Hall remained unavailable to work and was subject to separation due to her unavailability. (Resp't Ex. H)

99. Hall filed a grievance after being informed of her separation from employment with DPS. (T p. 151:9-11) Around this time, she also filed her third discrimination charge, 18-CRD-0022 alleging that DPS' refusal to agree to her request for ADA accommodations was discriminatory.

100. The Final Agency Decision approving Hall's separation was issued on March 14, 2018. (T p. 151:12-19, Resp't Ex. J)

101. Hall timely appealed this Final Agency Decision to OAH on April 13, 2018.

CONCLUSIONS OF LAW

BASED UPON the foregoing Findings of Fact, stipulations, sworn testimony, relevant laws, legal precedent and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following Conclusions of Law:

1. The Parties are properly before the Office of Administrative Hearings and received proper notice of the hearing in this matter. The Office of Administrative Hearings has personal and subject matter jurisdiction to hear and decide this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.

2. To the extent that the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels. *Bonnie Ann. F. v. Calallen Indep. Sch. Bd.*, 835 F. Supp. 340 (1993).

3. At the time of her dismissal, Hall was a career State employee and thus was entitled to the protections of the North Carolina Human Resources Act and the administrative regulations promulgated pursuant to said Act. Hall had been continuously employed by DPS in a position subject to the North Carolina Human Resources Act for more than twelve months prior to her separation from employment.

ISSUE 1: Whether DPS wrongfully separated Hall from her career State employment due to her unavailability in violation of 25 NCAC 01C .1007?

4. A State agency can separate an employee for non-disciplinary reasons in three particular instances one of which is for unavailability. *See* 25 NCAC 01C. 1007(a). In this case, Hall was separated for unavailability, not due to a disciplinary action. 25 NCAC 01C .1107(a)(1).

5. In a contested case for an involuntary, non-disciplinary separation due to an employee's unavailability, an employee may appeal in the same fashion as if it were a disciplinary action. N.C. Gen. Stat. § 126-34.02(b)(3); *Beauchesne v. University of North Carolina at Chapel Hill*, 125 N.C.App. 457 , 463 (1997). However, in that instance the agency does not have to prove "just cause" only that the employee was unavailable. *Id.*

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6. DPS bears the burden of proving that Hall was unavailable. 25 NCAC 01C .1007(c). To meet its burden of proof, DPS must prove the following four prongs:

- a. that Hall had exhausted all applicable leave credits and leave benefits;
- b. that DPS did not grant the employee leave without pay;
- c. that Hall was unable to return to all of the position's essential duties as set forth in the employee's job description or designated work schedule due to a medical condition or the vagueness of a medical prognosis; and
- d. DPS and Hall were unable to reach agreement on a return to work arrangement that meets both the needs of the agency and the employee's condition.

25 NCAC 01C .1007(a)(1)

First Prong

7. With respect to the first prong, it is undisputed that at the time of her separation, Hall had exhausted all applicable leave credits and leave benefits.

Second Prong

8. Regarding the second prong, Hall was required to apply in writing to her agency head to obtain leave without pay. 25 NCAC 01E .1103. The approval of leave without pay is at the discretion of the agency head. 25 NCAC 01E .1101. Even though Hall had been granted leave without pay without doing a written request in the past, that does not relieve her of this requirement for future requests especially since she was in a new position with a different supervisor. Hall assumed that Director Jones had acquiesced to her leave without pay because she told Hall to bring her doctor's note to work but that does not automatically mean Director Jones approved her leave without pay status. *See Hutchison v. N.C. Dep't of Justice*, 802 S.E.2d 918 *4 (N.C. Ct. App. 2017)(unpublished).

9. The preponderance of the evidence established that DPS had not approved Hall to be in a leave without pay status. Instead, DPS had informed Hall, in writing several times, that it had not approved her leave without status and that she could not remain out in such a status indefinitely.

10. At the time of her separation, Hall had been on unapproved leave of absence without pay status since October 5, 2017.

Third Prong

11. As to the third prong, the evidence demonstrated that Hall was unable to perform the position's essential duties as set forth in the employee's job description or designated work schedule due to her medical conditions of PTSD and MDD. In fact, the evidence proved that Hall was unable to return to her position due to her medical condition for almost 2 months.

12. Before starting work at the Central Prison Healthcare Complex, Hall had provided no indication that she would be unable to work a normal and consistent schedule. It was only after Director Jones and Assistant Director Marlow confronted Hall about her tardiness, that she first indicated that her condition would require her be late and miss work from time to time.

13. After only five days of work, Hall's physicians wrote "excuse from work" notes indicating that she was unable to return to work from October 5 to December 5, 2017 because of exacerbations of both her PTSD and MDD symptoms. (Pet'r Exs. 7, 11 &13)

14. On November 6, 2017, after being away from work for over one month, Dr. Taylor updated Hall's Essential Job Function form to reference Family Medical Leave paperwork in which the Dr. Taylor certified that Petitioner might require time away from work depending on the severity of some symptoms of her medical conditions. (Pet'r Ex. 12)

15. If Hall had been entitled to Family Medical Leave, DPS would have been required to allow her leave without pay. All agencies in North Carolina are required to follow the Family Medical Leave Act of 1993 ("FML"). 25 NCAC 01E .1401. Sick leave without pay is mandatory for an employee who qualifies for FML. 25 NCAC 01E .0314.

16. At that time, to be eligible for FML, an employee must work 1,040 hours in the prior 12-month period. Currently, to be an eligible employee under the Family and Medical Leave Act, the employee must have at least 1,250 hours of service with an employer during the previous 12-month period. 29 U.S.C. § 2611 (2)(A).

17. The undisputed evidence established that Hall did not qualify for FML because she had not worked 1,040 hours in the prior 12-month period and that she had been on short-term disability leave for most of the previous year.

18. DPS informed Hall that her position was critical to the operation of the agency and that she was expected to work a consistent 8:30 a.m. to 5:00 p.m., five-day a week schedule. (Resp't Exs. E, G) And, after repeatedly being advised that she needed to either (1) return to work or (2) propose some other 5-day work schedule, Hall did neither.

19. Instead of either returning to work, Hall requested a transfer to an entirely different position, where she could take unplanned time away from work to either attend doctor appointments or deal with exacerbations of her conditions. (T pp. 170:1-173:7; Resp't Ex. D; Pet'r Ex. 17)

20. Hall indicated that she could report to work on December 5, 2017, but she did not report to work any day before her on December 13, 2017.

21. DPS has proven by a preponderance of the evidence that, at the time of her separation, Hall could not or would not return to perform the essential duties of her position and could not adhere to the designated work schedule because of her medical condition.

Fourth Prong

22. Lastly, with regard to the fourth prong, DPS has proven that, after a series of communications aimed at avoiding Hall's separation, the parties were unable to agree to a "return to work" arrangement that suited *both* their needs. 25 NCAC 01C .1007(c) (emphasis added).

23. Hall argues that DPS could have reassigned or transferred her to a position outside of the correctional environment. While this may have suited Hall's *needs*, it did not suit DPS *needs*. The work arrangement has to meet both parties' needs. Clearly there was no mutually agreeable return to work arrangement.

24. DPS was justified in terminating Hall because she failed to propose an arrangement to accommodate her future intermittent absences which was consistent with DPS' critical interest in ensuring that her position was covered. *Beauchesne v. Univ. of N.C.*, 125 N.C. App. 457, 446 (1997).

25. Moreover, Hall's request to transfer to a position outside the correctional facility was not responsive to the question posed of what work arrangement would enable Hall to return to her current position, not a completely different position.

26. The work arrangement had to be by mutual agreement about how Hall would perform the essential duties as set forth in her job description and designated work schedule for the current position. 25 NCAC 01C .1007(a)(1). A transfer to another non-correctional position was not an arrangement which would enable Hall to return to her current job duties.

27. Hall next argues that DPS failed to undertake steps to avoid separation as required by 25 NCAC 01C .1007(c)(1) because DPS had other non-correctional positions and failed to even consider relocating her to one of those positions.

28. Again, 25 NCAC 01C .1007(a)(1) does not require the DPS to locate an alternative position, its focus is for the parties to make a mutually agreeable arrangement to avoid separation from the employee's current position.

29. Plus, Hall's insistence that she had to have a position at a non-correctional facility is disingenuous in light of the fact that, on the day *before* she was separated, she interviewed for a position at the women's correctional institute.

30. Hall's request for transfer to another position did not constitute an alternative proposal to termination that DPS had to consider.

31. In light of the foregoing findings of fact and conclusions, the Undersigned concludes that DPS has met its burden by a preponderance of evidence that DPS properly separated Hall from employment on December 13, 2017, and that DPS did not substantially prejudice Petitioner's rights; act erroneously; fail to act as required by law; or act arbitrarily and capriciously when DPS chose to separate Hall from employment.

Issue 2: Whether Respondent unlawfully discriminated against Petitioner due to her disability by failing to give her reasonable accommodations?

32. The Office of Administrative Hearings may hear a claim of discrimination or harassment based on disability as a contested case. N.C. Gen. Stat. § 126-34.02(b)(1). Hall bears the burden of proving her claim that DPS discriminated against her based on a disability in violation of the Americans with Disabilities Act (“ADA”).

33. All State agencies in North Carolina must give equal opportunity for employment without regard to disability. N.C. Gen. Stat. § 126-16.

34. The Americans with Disabilities Act prohibits discrimination against individuals with disabilities. 42 U.S.C. § 12101 *et seq.*

35. To prevail on an ADA discrimination claim, Hall must prove that: (1) she has a disability as defined by the ADA; (2) she is qualified for the job with or without accommodations; and (3) she was unlawfully discriminated against by an employer because of her disability. *Rittelmeyer v. Univ. of N.C. at Chapel Hill*, 252 N.C. App. 340, 359, 799 S.E.2d 378, 389 (2017).

36. The ADA defines “disability” as a physical or mental impairment that substantially limits an individual’s ability to perform one or more of an individual’s major life activities. 42 U.S.C. § 12102(1). Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. § 12102(2).

37. Hall’s PTSD and MDD are medical conditions that substantially limited her ability to engage in major life activities such as concentrating and focusing. Because of such, Hall had a disability within the meaning of the ADA.

38. However, simply being disabled is not enough. The employee must be a “qualified individual” to be protected by the ADA. No employer shall discriminate against a “qualified individual” on the basis of disability in regard to the terms and conditions of employment. 42 U.S.C. § 12112(a).

39. A “qualified individual” is an individual who, with or without reasonable accommodation, can perform the essential functions of the job that such individual holds or desires. 42 U.S.C. § 12111(8).

40. Hall was not a qualified individual. Hall has not offered any evidence to prove that, with the accommodation of intermittent leave, she could perform the essential functions of the job. Hall’s excessive absences alone proves that she has been unable to perform her essential job functions.

41. Assuming that Hall was a qualified individual, she could bring a discrimination claim against DPS for “failure to accommodate.”

42. Hall claims she was terminated because DPS failed to provide reasonable accommodations and failed to engage in the interactive process when DPS did not even address her request for a position outside the correctional facility environment which would allow her to work intermittently.

43. Disability discrimination includes not making accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability unless the employer can demonstrate that the requested accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5).

44. To establish a *prima facie* case for a “failure to accommodate claim,” Hall must prove: “(1) that [she] was [a qualified] individual who had a disability within the meaning of the statute; (2) that the employer had notice of [her] disability; (3) that with reasonable accommodation [she] could perform the essential functions of the position; and (4) that the employer refused to make such accommodations.” *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 579 (4th Cir. 2015) *citing* *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 (4th Cir. 2013) (brackets and ellipsis omitted).

Request for Intermittent Leave Accommodation

45. Hall’s accommodation requests included: no direct inmate contact, a 8:30 a.m. to 5:00 p.m. work schedule, intermittent leave at her current position, intermittent leave at a different Office Assistant IV position, and finally a transfer to any vacant position with no direct inmate contact, intermittent leave, and outside a correctional facility environment. DPS granted her first two requests but denied the latter requests. The intermittent leave request will be addressed first.

46. Hall must prove that her request for intermittent leave was a reasonable accommodation for her disability also prove that this accommodation would enable her to perform the essential job functions of her position.

47. A reasonable accommodation is one that “enables [a qualified] individual with a disability ... to perform the essential functions of [a] position.” 29 C.F.R. § 630.2(o)(1)(ii). The statute expressly contemplates that a reasonable accommodation may require job restructuring, part-time or modified work schedules, and reassignment to a vacant position. 42 U.S.C. § 12111(9)(B).

48. A job function is “essential” when the reason the position exists is to perform that function. 29 C.F.R. § 1630.2(n)(2). Neither party proffered a written job description of this particular position. However, based on Hall’s testimony it was evident that her job responsibilities were much more than just clerical/secretarial duties.

49. Hall's job responsibilities involved handling dispatches for the healthcare complex, assisting and traveling with the Director for meetings, as well as keeping track of daily nurse call-ins and call-outs for the whole Department of Nursing staff. Hall's primary responsibility was to assist the Director of Nursing and "pretty much run things when the Director and Assistant Director were out."

50. Hall's position was critical to the Director of Nursing's ability to ensure that adequate patient care by nursing staff was provided to patients and the operation of the Central Prison Healthcare Complex. (Resp't Ex. E, p. 3)

51. Because of the nature of her disability, Hall herself could not know when and if she was going to have an exacerbation in her condition which would cause her to be late to work or to leave work. What is known is that she had exacerbations every day she worked in her new position which interfered with her ability to function her essential job functions.

52. Moreover, if intermittent leave were to be approved as an accommodation, it would require other employees to work additional hours, create the necessity for management to pay overtime, and hamper the ability of other employees to take leave. Hall's accommodation request was not reasonable when its implementation burdened the other employees to do her job in her absence. *Jacobs*, 780 F.3d at 580–81 *comparing Crabill v. Charlotte Mecklenburg Bd. of Educ.*, 423 Fed. Appx. 314, 323 (4th Cir.2011) (noting that "an accommodation that would require other employees to work harder is unreasonable").

53. Even if intermittent leave was a reasonable accommodation, Hall's has failed to show how it would enable her to perform all the essential functions of her position in light of her unforeseen tardiness and absences. An employer is not required to grant even a reasonable accommodation unless it would enable the employee to perform *all* of the essential functions of her position. *Jacobs*, 780 F.3d at 581 Hall has failed to meet her burden of proof that her intermittent leave accommodation request was reasonable or would allow her to perform all her essential job duties.

54. Hall has failed to make a *prima facie* case of discrimination for DPS' refusal of her intermittent leave accommodation request.

Request to be Transferred to a Position Outside a Correctional Facility Environment

55. As an alternative accommodation, Hall requested a transfer to another position.

56. This request for an accommodation to another position changed over time. First, she requested to be transferred to a different Office Assistant IV position which would allow intermittent leave. Then, she asked for an Office Assistant IV position which would allow intermittent leave outside a correctional environment.

57. Finally, Hall “request[ed] to be transferred to a position within the Department of Public Safety (DPS), outside of the Prison system, that was non-critical and will permit [her] to take intermittent leave to manage [her] disabilities of Post-Traumatic Stress Disorder (PTSD), and Major Depressive Disorder (MDD).” (Pet’r Ex. 19)

58. Hall’s last accommodation request, to be transferred to another position with indirect inmate contact outside of the correctional facility setting, is an admission that Hall could not perform the duties of her current position at the Central Prison Healthcare Complex. Also, this request is disingenuous in light of the fact that at the same time Hall was requesting this accommodation, she interviewed for a position in another correctional facility.

59. When DPS was nonresponsive to this request, Hall complained that DPS’ actions were discriminatory because DPS failed to even acknowledge this request before termination and failed to consider this accommodation request before her termination.

60. The ADA does impose upon employers a good-faith duty “to engage [with their employees] in an interactive process to identify a reasonable accommodation.” *Jacobs*, 780 F.3d at 581 citing *Wilson*, 717 F.3d at 346.

61. The Fourth Circuit Court of Appeals has held that “an employer will not be liable for failure to engage in the interactive process if the employee ultimately fails to demonstrate the existence of a reasonable accommodation that would allow her to perform the essential functions of the position.” *Jacobs*, 780 F.3d at 581 citing *Wilson*, 717 F.3d at 347.

62. Transferring Hall to a different position would not help her perform her essential duties in her current position and was not a reasonable accommodation request. Because Hall failed to demonstrate the existence of a reasonable accommodation that would allow her to perform the essential functions of her current position, DPS is not liable for failing to respond to her transfer accommodation request or to consider reassignment.

63. Hall failed to make a *prima facie* case of discrimination for DPS’ refusal and failure to consider her transfer accommodation request.

64. Assuming *arguendo* that Hall did make a *prima facie* case of discrimination on either of these accommodation requests, then the burden would shift to DPS to produce evidence of a legitimate, nondiscriminatory reason for terminating Hall. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

65. Even if Hall made a *prima facie* case and the burden shifted to DPS, Hall still cannot prevail because DPS did not unlawfully discriminate against Hall based her disability. Instead, DPS separated Hall because of her unavailability pursuant to 25 NCAC 01C .1007(a)(1). Such a separation cannot support the unlawful discrimination element of Hall’s ADA claim.

66. Since DPS provided a nondiscriminatory reason for Hall's termination, under the *McDonnell Douglas* burden-shifting framework, the burden shifts back to her to prove that this justification is pretextual. *Reeves v. Sanderson Plumbing Prods., Inc.* 530 U.S. 133, 143 (2000). This she cannot do as DPS has already proved by a preponderance of the evidence that it properly terminated her for unavailability.

67. The Undersigned concludes that DPS did not discriminate against Hall when DPS refused to consider the possibility of a reassigning her to a position outside of a correctional facility environment/prison system. DPS also did not discriminate against Hall when it refused her intermittent leave request because it would not have enabled Hall to perform all the essential job functions of her position and it was unreasonable. DPS' refusals to Hall's accommodation requests did not cause Hall's separation from employment. Hall's failure to report to work and her unavailability led to her separation.

68. DPS did not discriminate against Hall due a disability and did not substantially prejudice Hall's rights; act erroneously; fail to act as required by law; and act arbitrarily and capriciously when DPS refused to provide the accommodations requested by Hall and instead chose to separate her from employment.

FINAL DECISION

BASED ON THE FOREGOING, the Undersigned hereby finds proper authoritative support of the Conclusions of Law noted above and it is hereby ordered, adjudged, and decreed that: Respondent's decision to separate Petitioner from her employment with Respondent due to her unavailability is **AFFIRMED**. Moreover, Respondent did not discriminate against Hall due a disability. Petitioner's contested case petition is **DISMISSED WITH PREJUDICE**.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Pursuant to N.C. Gen. Stat. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C. Gen. Stat. § 7A-29(a). **The appeal shall be taken within 30 days of receipt of the written notice of final decision.** A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

IT IS SO ORDERED. This the 6th day of January, 2020.



Stacey Bice Bawtinheimer
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 6th day of January, 2020.



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