

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
20 OSP 03751

Sheerlene Artis-Carlton Petitioner, v. NC Division of Motor Vehicles Respondent.	FINAL DECISION
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THIS MATTER came on for hearing on Respondent's Motion for Summary Judgment before the Honorable Stacy Bice Bawtinhimer, Administrative Law Judge presiding, on 5 January 2020 via TEAMS video conference. After considering the materials submitted in support of and in opposition to summary judgment, and the arguments of the parties, the Undersigned **GRANTS** Respondent's Motion for Summary Judgment.

APPEARANCES

For Petitioner: Sheerlene Artis-Carlton, *pro se*
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Zebulon, North Carolina 27597

For Respondent: Kathryne E. (Beth) Hathcock
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ISSUE

Whether DMV Direct Services discriminated and retaliated against Sheerlene Artis-Carlton on the basis of a disability in denying her request to telework during the Covid-19 pandemic?

SUMMARY JUDGMENT MATERIALS

For Petitioner: Affidavits of:

Sheerlene Artis-Carlton
Teiasha Vassell,

Genia Newkirk,
Rodney Coleman
Antoinette Jones-King
Jalaynea Cooper

EEOC Affidavits of:

Robert Quinn
Jennie Bunton
Sandra Utley

Exhibits 1-32 (“Pet. Ex.”)

For Respondent: Affidavits of:

Alicia Simmons
Charlotte Boyd-Malette

Exhibits A-H (“Resp. Ex.”)

STANDARD OF REVIEW

Summary judgment must be granted when the pleadings, responses to discovery, and the record show that “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” N.C. Gen Stat § 1A-1, Rule 56(c). The moving party bears the burden of persuasion on all relevant issues. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has met its burden, the non-moving party must come forward with specific facts demonstrating a genuine issue for trial. *See* N.C. Gen Stat § 1A-1, Rule 56(e); *see also Cray Communications, Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 393–94 (4th Cir.1994) (moving party on summary judgment may simply argue the absence of evidence by which the non-moving party can prove her case). The non-moving party may survive a motion for summary judgment by producing “evidence from which a [fact finder] might return a verdict in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Summary judgment is proper only when there are no genuine issues presented for trial and the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In considering the evidence, all reasonable inferences must be drawn in favor of the non-moving party. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505. However, “the mere existence of a scintilla of evidence in support of the plaintiff’s position [is] insufficient; there must be evidence on which the [fact finder] could reasonably find for the plaintiff.” *Id.* at 252, 106 S.Ct. 2505.

Factual Background

The entry of findings of fact is not necessary when granting a motion for summary judgment, *Hyde Ins. Agency, Inc. v. Dixie Leading Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975), and decisions issued by the OAH granting such motions need not include such findings. N.C. Gen. Stat. § 150B-34(e).

If the findings of fact are actually the trial court's summation of the undisputed facts which support the judgment, findings of fact and conclusions of law do not render a summary judgment void or voidable. *Noel Williams Masonry, Inc. v. Vision Contractors*, 103 N.C. App. 597, 406 S.E.2d 605 (1991)

The Undersigned summarizes the following undisputed facts to provide context for her ruling. *See e.g., Hyde Ins. Agency, Inc.*, 26 N.C. App. at 142, 215 S.E.2d at 165 (“[I]t is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment.”)

UNDISPUTED FINDINGS OF FACT

1. For more than five years and all relevant periods, Petitioner Sheerlene Artis-Carlton (“Petitioner” or “Artis-Carlton”) has been employed as an Administrative Specialist I by the North Carolina Division of Motor Vehicles Driver Services Section (“DMV” or “Respondent”). (Aff. Artic-Carlton, p. 3, ¶ 2) (Aff. Boyd-Malette ¶ 4). Petitioner is assigned to work directly with the Assistant Director of Driver Services and is also titled as the Federal AAMVA State 2 State Commercial Driver License Help Desk Representative for DMV. (Aff. Artic-Carlton, p. 3, ¶ 2a) Among her other clerical and administrative duties, Petitioner prepares the weekly Federal AAMVA Report (a.k.a. “96hr report”) for DMV. (Rodney Coleman Aff. p. 1)

2. DMV’s Driver Services Section is among the largest and busiest at DMV with approximately 650 employees. Charlotte Boyd-Malette is the Director of Driver Services. (Aff. Boyd-Malette ¶¶ 1 & 2) Driver Services includes public-facing employees including Driver’s License Examiners in 116 offices throughout the State, their managers, and approximately 100 third-party Commercial Driver’s License Trainers. Non-public facing employees include the DMV Help Desk, back office staff, and administrative staff upon which the Driver’s License Examiners, Commercial Driver’s License Trainers, and management rely on a daily basis. (Aff. Boyd-Malette ¶ 2)

3. The work/tasks completed by the employees in Driver Services directly impact approximately 7 million NC motorists’ ability to drive and gain access to DMV services provided by the state. Driver Services is also responsible for the integrity of driving records and for reviewing and entering Personally Identifiable Information (“PII”) data to ensure customers are who they say they are, and they only have one credential. Its administrative staff support all of the efforts in the field as well as online. Without them, Driver Services are not able to issue credentials, maintain records, educate the public, or provide guidance to internal and external stakeholders and Legislators that depend on us. (Aff. Boyd-Malette ¶ 3)

4. DMV as well as all State government agencies were impacted by the Covid-19 pandemic beginning March 2020.

State of Emergency Background Due to Covid-19 Pandemic:

5. On 10 March 2020, Governor Cooper declared a State of Emergency in response to the Covid-19 pandemic. This declaration activated the Office of State Human Resources (“OSHR”) Communicable Disease Emergency Policy (“Communicable Disease Policy”). (Aff. Simmons Ex. A, p. 2)

6. The OSHR Communicable Disease Policy, which had last been updated on 7 September 2017, also was updated on 30 March 2020 to address the current pandemic. The Communicable Disease Policy, indicated, “During a public health emergency, certain essential operations of the state must continue, and certain employees may be required to report to a specific worksite ... at the discretion of the agency head to meet the constitutionally and statutorily mandated responsibilities of [S]tate entities.” (Aff. Simmons ¶ 4; Ex. B, p. 2)

7. On 10 March 2020, Director Darryl Bass, the Department of Transportation (“DOT”) Human Resources Director, communicated the new Communicable Disease Policy provisions to all DOT employees including Petitioner and requested that the managers *review their operations to determine who should be designated as essential*. (Aff. Simmons ¶ 4) (emphasis added)

8. Director Bass’ guidance:

- a. advised employees to consult with their supervisor if they were medically fragile or had at-risk family members or other issues that should be considered when evaluating teleworking.
- b. directed managers to review the work responsibilities of each employee and identify who can and should telework, considering age, underlying health conditions, and weakened immune systems.
- c. reminded employees mandatory or essential positions are not conducive to teleworking.
- d. indicated that OSHR encouraged teleworking “to the greatest extent possible” beginning the following day, March 11, 2020.
- e. encouraged all State governmental employees, temporary employees, and contractors working with the State who live and/or work in Wake, Durham and Orange counties to telework to the greatest extent possible starting Wednesday, 11 March 2020.

(Aff. Simmons Ex. A, p. 1)

9. After that email, DMV employees that self-determined that they were in a “high risk” category for the virus, including Petitioner, were allowed to utilize State of Emergency Leave and remain out of the office with no questions asked. (Aff. Boyd-Malette ¶¶ 5-6).

10. The N.C. Department of Health and Human Services indicated those at “high risk” of severe illness from Covid-19 are people:

- over 65 years of age, or
- with underlying health conditions including heart disease, lung disease, or diabetes, or
- with weakened immune systems.

(Aff. Simmons Ex. A, p. 2)

11. A large percentage of the DMV workforce, including Petitioner, utilized the State of Emergency Leave, causing DMV operations to suffer. (Aff. Boyd-Malette ¶¶ 5-6). As a result, only 60 of the 116 Driver’s License offices across the state remained open with minimal staff. The entire administrative support staff assigned to DMV headquarters in Raleigh, including Petitioner were all out. Managers and employees that were at work took on additional tasks to support essential DMV operations. (Aff. Boyd-Malette ¶ 5)

12. Not every position at DMV is suitable for teleworking. According to the OSHR Guidance and Management Discretion: “a job is suited to teleworking if the job or some component of it can be done offsite without disruption to the flow of work and communications.”

13. On 12 March 2020, Director Darryl Bass sent out another communication to employees via Employee News that provided the following updates:

- a. emphasized that teleworking **MAY** be an option for non-essential employees, but that it would be at the discretion of the managers as they balance business needs.
- b. defined a job suitable for teleworking “if the job or some components of it can be done off site without disruption to the flow of work and communication.”
- c. reminded managers that **employees should not assume any specified period of telework, and that employees may be expected to return to regular, in-office work at any time.**

(Aff. Simmons ¶ 5) (emphasis added)

14. On 18 March 2020, another communication went out to all employees from Director Bass. That e-mail provided the following guidance:

- a. defined mandatory employees as those employees who are directed by their supervisor to report to work.
- b. indicated that mandatory high-risk employees **may** be allowed to telework (at the discretion of management).
- c. authorized up to 96 hours of State of Emergency Leave usage from March 16-31.

(Aff. Simmons ¶ 6)(emphasis added)

15. The Emergency Leave was eventually extended into May 2020. (*Id.*)

16. To apply for telework, interested employees were required to submit their request to temporarily telework to their supervisors. The request had to include the specific work to be completed from home. Once submitted, there were five levels of approval, starting with the direct supervisor. A supervisor's approval did not guarantee final approval. Once the direct supervisor approved, the request went to the Director, then to the Deputy Commissioner, the Commissioner and then the Deputy Secretary of Transportation, who had final approval authority. The directive the Directors received was to make sure the work the employee proposed to be completed during telework was in fact work that could be completed at home, did not include personal and confidential information, and is work that would equate to 8 hours a day, 40 hours a week. Less than that would require the employee to take their own leave. Once approved or disapproved, employees would be notified of the decision. (Aff. Boyd-Malette ¶ 11)

17. Of the approximately 650 employees in Driver Services, eleven employees assigned to DMV Headquarters were approved to temporarily telework on account of children in virtual school. Eleven additional employees were approved to temporarily work a rotation of a week in the office followed by a week at home. Three managers were approved for a rotation of two weeks in the office followed by two weeks at home. None of the employees approved for telework were administrative assistants. (Aff. Boyd-Malette ¶ 10)

18. Driver Services management informed the administrative employees that they would not be approved for telework, given the unavailability of meaningful work to be completed from home; the necessity of in-office administrative support for Driver Services management; and the critical importance of providing timely assistance to field offices, the public, and the Legislature. (Aff. Boyd-Malette ¶ 11)

19. The decision to deny telework to all support staff was not arbitrary; management thoughtfully considered several factors:

- a. If administrative support staff were out of the building, it would disrupt the workflow for other in-office administrative staff, causing phones to remain unanswered and leaving managers without readily available support for time-sensitive projects and other routine administrative tasks.

- b. Administrative support staff could not resolve important phone calls remotely, because files and other materials routinely used to answer questions are housed at DMV Headquarters. Additionally, calls could not be transferred to other DMV personnel from an off-site location.
- c. Administrative support staff work with and reference confidential documents that cannot leave the building.
- d. Administrative support staff are responsible for sorting and preparing files and documents located in the Assistant Director's Office in preparation for the December 2020 move of DMV Headquarters to Rocky Mount.

(Aff. Boyd-Malette ¶ 11)

20. For those reasons, no administrative employees in Driver Services were approved for telework. (Aff. Boyd-Malette ¶ 11)

21. On 19 March 2020, Petitioner submitted a telework request listing six tasks she proposed to complete at home, along with a doctor's note dated 17 March 2020 from Vicky Mooring, M.D. at Duke Health Primary Care Knightdale. (Aff. Boyd-Malette ¶ 12, Ex. 1)

22. Dr. Mooring's note stated:

To whom it may concern,

Mrs. Artis Carlton is a patient here at Duke Primary Care in Knightdale. Given her medical history/risk factors and the coronavirus pandemic, she would benefit from working from home (if this is an option). Please contact our office if you have any questions. (Aff. Boyd-Malette Ex. 1).

23. Dr. Mooring did not elaborate as to Petitioner's medical history or risk factors. Nor did she state that Petitioner suffered from any disabling condition or that Petitioner "required" telework as an accommodation for any disabling condition(s). (Aff. Boyd-Malette ¶ 12, Ex. 1)

24. With regard to Petitioner's six proposed tasks, other employees or units handled five of the six tasks, and the other task Petitioner proposed was so infrequent that it has only happened twice in the recent past. (Aff. Boyd-Malette ¶ 12, Ex. F)

25. Although Assistant Director Robbie Quinn signed his first-level approval on the form, after discussions with the Director, it was denied since it proposed tasks to be completed from home that were occasional and not time-intensive; would be best performed in-office; and because Driver Services managers needed Petitioner's assistance in-office. (Aff. Boyd-Malette ¶ 12, Ex. F)

26. Petitioner was advised on 31 March 2020 by email that she had not been approved for telework. (Aff. Artis-Carlton Ex. 26, p. 3) Petitioner's telework request was formally denied on 3 April 2020. (Aff. Boyd-Malette ¶ 12, Ex. F)

27. Prior to the denial of Petitioner's telework request, given the large percentage of the DMV workforce using State of Emergency Leave, the Department of Transportation implemented a formal telework policy on 23 March 2020 in an effort to keep DMV operational and serving the public. (Aff. Boyd-Malette ¶ 6).

28. On March 30, 2020, DMV Commissioner Torre Jessup retroactively changed all DMV employee's employment status as mandatory/essential effective as of 21 March 2020. (Pet. Ex. 23) All DMV employees were sent certified letters requiring them to seek approval to telework or report back to work effective immediately. (Pet. Ex. 23) (Aff. Boyd-Malette ¶ 7)

29. Petitioner did not sign the certified letter but, prior to issuance of the letter, she had already submitted her telework request on 19 March 2020. (Aff. Boyd-Malette ¶ 7) Petitioner denies ever receiving Commissioner Jessup's letter.

30. Prior to the Covid-19 pandemic, Petitioner was in a nonessential position. Petitioner questions the authority of DMV to convert her position from a nonessential to mandatory/essential employee but offered no legal authority to support her challenge. Therefore, the appropriateness of this decision is not before the Undersigned. However, regardless of her designation as a nonessential, mandatory, or essential employee, according to the Communicable Disease Policy, special considerations may also be given to mandatory/essential employees to telework if determined at "high risk". (Aff. Simmons Ex. B) So her redesignation is irrelevant.

31. Even if Petitioner did not receive Commissioner Jessup's letter, she was notified on 31 March 2020 by email from Director Boyd-Malette that she had not been approved to telework and that Petitioner should call her supervisor for further guidance. (Pet. First Set of Ex. p. 26)

32. Petitioner's last day of work was 19 March 2020. (Artis-Carlton Aff, p. 5, ¶ 6)

33. Petitioner asserts because she is disabled with asthma, DMV should have given her special consideration and allowed her to telework.

34. When Director Boyd-Malette reviewed Petitioner's telework request, she was not aware that Petitioner had any disabilities. Petitioner had attached Dr. Mooring's note to her telework request reviewed by Director Boyd-Malette but it did not say that Petitioner was disabled or that she had asthma. (Aff. Artis-Carlton p. 5, ¶ 6)

35. Petitioner asserts that Director Boyd-Malette had knowledge of her disability and high risk factors at that time but provided no documentation as proof. (Aff. Boyd-Malette ¶¶ 12, 17).

36. According to Petitioner, prior to and during the relevant period, she had been diagnosed with two medical conditions: chronic asthma and autoimmune disease. (Aff. Artis-Carlton p. 1, ¶ 1) While Petitioner may have had these diagnoses, Petitioner proffered no evidence that her supervisors were aware of them.

37. But, it is uncontested that prior to March 2020, Petitioner did not require work accommodations for either condition.

38. Petitioner's telework request was formally denied on 3 April 2020 based on the business interests of DMV, not because of her disability. (Aff. Boyd-Malette ¶¶ 11-12).

39. Director Boyd-Malette also denied Petitioner's telework request, in part, because she had "not enough work to justify approving [her] request at this time." (Artis-Carlton Aff. p. 6, ¶ 8(a) citing Resp. Ex. 14)

40. Petitioner disputes the validity of that rationale. Both her past direct supervisors, Robert Quinn (retired May 1, 2020) and Rodney Coleman, allowed her to work from home. (*See* Coleman and Quinn Affidavits). They verified that Petitioner's work duties consisted of more than 8 hours a day, 40 hours a week. (*See also* Bunton and Utley Affidavits).

41. Moreover, Petitioner had been allowed to telework from home during periods of inclement weather and while out on worker's compensation. (Aff. Artis-Carlton p. 3, ¶ 2) She has been assigned a State-issued laptop equipped with Virtual Private Network ("VPN"), Wi-Fi, and a State-issued cell phone capable of receiving direct or transferred calls from her office phone remotely. (*Id.* p. 3 ¶ 6a)

42. According to Petitioner, the Federal AAMVA Report and other clerical duties she performed are predominantly sent by email and can be done remotely from home. (*Id.* p. 3)

43. Even assuming *arguendo* that Petitioner could telework from home and could fulfill all her work responsibilities while doing so, Petitioner's right to telework was subject to both the approvals of her supervisor and the Director. All DMV employees who requested telework during this period, regardless of disabling conditions or telework capability, were denied because they became essential employees due to the pandemic.

44. Petitioner's desire to telework and doctor's note indicating that she would benefit from doing so did not outweigh DMV's interest in continuing its essential State functions. (Aff. Boyd-Malette ¶¶ 8, 11-12, 18)

45. The first documented time Petitioner identified she had a disabling condition was after her request was denied. On 8 April 2020, because of what Petitioner labeled a "respiratory disorder of the lungs" not asthma (Pet. Ex. 16, p. 1), Petitioner filed a Reasonable Accommodation Request ("Accommodation Request") with the Department of Transportation's ADA Office. (Aff. Artis-Carlton p. 7, ¶ 9) Although Petitioner did not label it such on her Accommodation Request nor has she provided medical documentation, Petitioner asserts that she suffers from "chronic asthma". (Aff. Artis-Carlton p. 7, ¶ 10(c)) This Request was not copied to Petitioner's supervisors at Direct Services.

46. Although Petitioner asserts that she also suffers from an "autoimmune disorder", this diagnosis was not listed on her Accommodation Request.

47. Question number 2 of the Accommodation Request, asked Petitioner to “Explain how the impairment(s) listed in question #1 affects your ability to perform the essential function of your job?” (Pet. Ex. 16)

48. Petitioner responded: “My impairment and the current coronavirus pandemic affects my ability to perform my essential job functions **by increasing my risk.**” (Pet. Ex. 16) (emphasis added) Petitioner did not explain how “increasing her risk” affected her ability to perform her work responsibilities.

49. The accommodations Petitioner requested were: 1. “to be allowed to use the NC State of Emergency Paid Leave Code 9548” and 2. “[t]he option to telework from my residence.” (Pet. Ex. 16)

50. The Accommodation Request was granted, and Petitioner was allowed to utilize all available Special Leave until it was exhausted. Once the Special Leave was exhausted, DMV allowed Petitioner to use personal vacation and sick leave until it also was exhausted. (Aff. Boyd-Malette ¶ 13).

51. As another accommodation, Director Boyd-Malette offered Petitioner the opportunity to “rotate in and out the office.” (Aff. Artis-Carlton p. 7, ¶ 10(b)) Petitioner refused this accommodation because this would not “limit [her] risk of exposure.” (Aff. Artis-Carlton p. 7, ¶ 10(c)) (See King affidavit stating that the DMV office was closed twice due to Covid-19 cases)

52. Petitioner also requested concurrent Family Medical Leave Act (“FMLA”). (Aff. Boyd-Malette ¶ 14).

53. Dr. Mooring completed the medical information for the FMLA form and identified Petitioner’s asthma as Petitioner’s only medical condition. (Pet. Ex. 17-A p. 2)

54. Based on the employee’s essential job function or job description, Question 3 of the FLMA form, asked: “Is the employee unable to perform any of his/her job functions due to the condition?” Dr. Mooring checked “No”. (Pet. Ex. 17-A p. 2)

55. Dr. Mooring noted that Petitioner has a history of asthma which exacerbates 1 to 2 times a year but in general is “controlled”. Dr. Mooring recommended Petitioner work from home to limit her risk of exposure because Petitioner “would be at greater risk for complications if she were to contract Covid-19. This is a higher risk condition.” *Id.*

56. Dr. Mooring did not elaborate on how Petitioner’s asthma substantially limits one or more of Petitioner’s major life activities.

57. Also, according to Dr. Mooring, Petitioner did not need any accommodations for her asthma in order to perform her job functions.

58. Prior to her telework request, Petitioner had not requested any work accommodations for either her asthma or autoimmune disorder.

59. The only reference to Petitioner’s autoimmune disorder is in her email to Deputy Commissioner K.A. Brown dated 13 April 2020. (Pet. Ex. 19)

60. Although the Department of Transportation’s FMLA office recommended approval of two days each month of FMLA leave, Driver Services management allowed Petitioner to exhaust her FMLA leave every day. (Aff. Boyd-Malette ¶ 14).

61. On 28 May 2020, Petitioner was notified by Director Boyd-Malette that she had “been approved to remain out of the office” on furlough but that “[t]he decision regarding telework remains the same.” (Pet. Ex. 20)

62. Understandably as this was an evolving and unique situation, Petitioner had many questions about the Families First Coronavirus Response Act (“FFCRA”) and communicated with Alicia Simmons, Assistant Human Resources (“HR”) Director for Policy, Qualification Review & Salary Administration and Performance. (Aff. Simmons ¶¶ 1, 7)

63. Ms. Simmons is responsible for providing policy guidance and interpretation for North Carolina Department of Transportation (“NCDOT”) as well as overseeing the processing of actions not associated with hiring. (Aff. Simmons ¶ 2) Ms. Simmons answered Petitioner’s questions.

64. Since 19 March 2020, Petitioner has not reported to work, despite being designated as a mandatory/essential employee and requested to report back to work by Commissioner Jessup. (Aff. Simmons ¶ 8) (Aff. Boyd-Malette ¶ 13)

65. The Communicable Disease Policy instructs that: “[i]ndividuals designated as mandatory employees may be subject to disciplinary action, up to and including termination of employment, for willful failure to report for or remain at work. Each situation will be reviewed on a case-by-case basis to determine appropriate action.” (Aff. Simmons ¶ 8, Ex. B, p. 32)

66. Petitioner has not been disciplined for her failure to report to work and has been afforded seven months of leave accommodations not available to other mandatory DMV and DOT employees. (Aff. Simmons ¶ 8)

67. DMV recognizes the dangers all its employees, high risk or not, face if they contract the coronavirus. During the pandemic, DMV Headquarters has been taking every precaution to protect the health and safety of all employees working in the building. All employees engage in temperature checks and a health screening before entering the building. Each employee was also provided safety equipment, gloves, masks, safety glasses, and disinfectant spray. Additionally, Petitioner shares a private office with another employee on the 3rd floor of the main building, with a door that can be shut. (Aff. Boyd-Malette ¶ 19).

68. These precautions were unsatisfactory to Petitioner because she is still exposed to a “risk” of contracting the virus. DMV cannot minimize all risks; it can only take reasonable precautions to safeguard its employees. Because of that “risk”, Petitioner has not reported to work at DMV since 19 March 2020. (Affs. Boyd-Malette ¶ 13; Simmons ¶ 8)

69. Petitioner filed a grievance with EEOC on June 17, 2020 for disability discrimination and retaliation. (Pet. Ex. 21) She received a “No Cause Determination” due to lack of evidence. (Aff. Artis-Carlton p. 8, ¶ 12)

70. According to Petitioner, “[she] has been retaliated against by NCDMV Driver Services Director Boyd-Malette by [various] actions”. (Aff. Artis-Carlton p. 9, ¶ 16) Moreover, Petitioner asserts that her “Temporary Telework Agreement was denied based on her [meaning Director Boyd-Malette] way of thinking related to our past and present email correspondences.” (Aff. Artis-Carlton p. 8, ¶ 16)

71. Petitioner refers to Exhibit 26 attached to her affidavit as evidence of the retaliation. Exhibit 26 consists of several email communications from Petitioner to Director Boyd-Malette, Robert Quinn, and NCDOT-ServiceNow (Charles Dean Almond). (Aff. Artis-Carlton Ex. 26, pp. 1- 5)

72. Before the telework decision, Petitioner’s 7 June 2019 email to Director Boyd-Malette asks questions that Petitioner “was curious about” such as about “how to get a pay raise?”; can Petitioner get the Help Desk salary being she is being assigned Help desk duties; clarification about the Program Coordinator II position (posted 5/10/2019); and, when the other CDL Program Coordinator II position be posted. (Aff. Artis-Carlton Ex. 26 p. 1) No reply from Director Boyd-Malette was included with this 2019 email.

73. The second email to Robert Quinn and copied to Director Boyd-Malette is dated 31 March 2020 (10:01 am), after Petitioner has been advised by her supervisor that her telework request was denied. (Aff. Artis-Carlton Ex. 26 p. 1) In this email, Petitioner writes: “Why discriminate?” and she primarily complains about the overall work situation at Driver Services. (Aff. Artis-Carlton Ex. 26, p. 2) Director Boyd-Malette was copied on this email, but she did not respond. No response was included from Robert Quinn either.

74. The other three emails dated 30 March 2020 were directed to or from the NCDOT IT Service Desk and pertain to the Contact us emails to the CDL Unit. (Aff. Artis-Carlton Ex. 26, pp. 4 &5)

75. The only communication from Director Boyd-Malette to Petitioner was an email dated 31 March 2020 (10:05 am) in which Petitioner was again advised that: [y]ou have not been approved to telework. Please call your supervisor for further guidance as directed.” (Aff. Artis-Carlton Ex. 26, p. 3)

76. Petitioner responded “OK” in her last email to Director Boyd-Malette dated 31 March 2020 (10:09 am). *Id.* These email communications do not support Petitioner’s claim that she was retaliated against by Director Boyd-Malette.

77. As alternative evidence of retaliation, Petitioner also states that since 2010 she has been denied Help Desk positions within DMV Drivers Services Department and denied promotional priority as the most qualified for these positions. (Aff. Artis-Carlton p. 9, ¶ 17) These positions were posted on 7 January 2019, 10 May 2019, 27 July 2020, 3 September 2020, and 13 September 2020; all before and after Petitioner’s telework request was denied. (*See* Aff. Artis-Carlton Ex. 27)

78. Petitioner provided no evidence that she has exhausted her administrative remedies for the 2019 positions, and these claims may be untimely. Petitioner has not offered any evidence that she was entitled to promotional priority for the 2020 positions.

79. Based on the email communications, Petitioner has provided no evidence that DMV acted in a retaliatory manner. Even viewing the facts in the light most favorable to Petitioner as required for summary judgment, she has provided only a scintilla of evidence in support of her retaliation claim with respect to the denial of promotional priority. Nor, do the promotional priority claims appear properly before this Tribunal.

80. With respect to her disability discrimination claim, Petitioner exhausted her administrative remedies and timely filed her contested case petition with the Office of Administrative Hearings on 23 September 2020.

ANALYSIS

General

The issue in this case is whether DMV Direct Services discriminated and retaliated against Petitioner on the basis of a disability in denying her request to telework during the Covid-19 pandemic. While there are some disputed facts, these facts are not material facts. Based on the material undisputed facts and the analysis below, Petitioner had not offered sufficient evidence to raise a genuine issue of material fact in support of her claims that DMV discriminated and retaliated against her due to a disability.

The Office of Administrative Hearings (“OAH”) has personal and subject matter jurisdiction over this case. Pursuant to N.C. Gen. Stat. § 126-34.02(b)(4)(2017), a State of North Carolina employee can challenge alleged discrimination and retaliation after completing the agency’s internal grievance process. N.C. Gen. Stat. § 126-34.02(b)(1), (2) (4). Petitioner bears the burden of proof in establishing that DMV engaged in discrimination and retaliation by a preponderance of the evidence. N.C. Gen. Stat. § 150B-25.1(a) (2019); *N.C. Dep’t of Corr. v. Gibson*, 308 N.C. 131, 138, 301 S.E.2d 78, 83 (1983) (quoting *Texas Dep’t of Comty Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 215 (1981)).

I. DISABILITY DISCRIMINATION CLAIM

A. Three Steps Required to Establish Disability Discrimination

Petitioner claims that she was discriminated against because of a disability when DMV denied her telework request. Title I of the ADA provides that “[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to ... discharge of employees ... and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). There are three steps required to establish a discrimination claim.

Where there is no direct evidence of discrimination and the State agency denies any discriminatory reasons for terminating the Petitioner, the three-step method of proof established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)

applies. *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 196 (4th Cir.1997). First, Petitioner “must establish, by a preponderance of the evidence, a *prima facie* case of discrimination.” *Id.* Second, if Petitioner succeeds in establishing a *prima facie* case of discrimination, the burden shifts to the DMV to “rebut the presumption of discrimination by producing evidence that the [petitioner] was [removed] ... for a legitimate, nondiscriminatory reason.” *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). “To accomplish this, DMV must clearly set forth, through the introduction of admissible evidence, the reasons for the [petitioner’s] [removal].” *Id.* Third, if DMV rebuts a presumption of discrimination, Petitioner bears the burden of proving intentional discrimination. *Halperin*, 128 F.3d at 196 (citing *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506–11, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)).

1. First Step: Petitioner Cannot Establish a *Prima Facie* Case for Disability Discrimination.

To establish a *prima facie* case of disability discrimination, Petitioner has the three initial burdens of showing: (1) that she had a disability; (2) that she was able to perform the essential functions of the job, with or without reasonable accommodation; and (3) that she suffered an adverse employment action because of her disability. *Blackburn v. Trustees of Guilford Technical Community College*, 733 F. Supp. 2d 659, 663 (M.D. N.C. 2010) citing *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 686 (4th Cir.1997) (citation omitted) (discussing section 12112(a)).¹

In sum, Petitioner must first show that Respondent took actions against a “qualified individual” with a disability from which discriminatory intent may be inferred and that DMV discriminated against her because of a disability. 42 U.S.C. § 12112(a).

a. Being “High Risk” for Adverse Medical Consequences is Not a Disability

On 19 March 2020, when the Covid-19 pandemic struck, Petitioner requested telework because she is at “high risk” for adverse consequences if she contracts the coronavirus. Being categorized as “high risk” for adverse medical consequences (hereinafter referred to as “high risk”) is not a disabling condition. 29 C.F.R. § 1630.2(j)(i). A “qualified individual” with a disability is defined as an individual that has a physical or mental impairment that substantially limits one or more major life activities of the individual, has a record of such an impairment, or is regarded as having such an impairment. Americans with Disabilities Amendments Act of 2008 (“ADAAA”). 42 U.S.C. §12102(4)(B) (2008).

Not every physical or mental impairment will constitute a disability within the meaning of the ADA. The impairment must “it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.” *J.D. by Doherty v. Colonial Williamsburg Found.*, 925 F.3d 663, 670 (4th Cir. 2019) (quoting 28 C.F.R. § 36.105(d)(1)(v)). In considering whether an impairment substantially limits an individual in a

¹ Section 504 of the Rehabilitation Act prohibits discrimination on the basis of a disability “under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). The same standards applicable to Title I of the ADA also govern complaints of employment discrimination arising under Section 504 of the Rehabilitation Act. 29 U.S.C. § 794(d)

major life activity, courts “construe the statutory text broadly in favor of expansive coverage, keeping in mind that the language is not meant to be a demanding standard.” *J.D. by Doherty*, 925 F.3d at 670 (quoting 28 C.F.R. § 36.105(d)(1)(i)). This interpretation is consistent with the purpose of the ADA Amendments Act of 2008, which was passed to “reinstat[e] a broad scope of protection to be available under the ADA.” *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 329 (4th Cir. 2014).

Petitioner claims that her “high risk” condition substantially limits her ability to work in the office. Work is a major life activity. 29 C.F.R. § 1630.2(i). However, this argument does not avail her because Petitioner’s “high risk” status does not affect her ability to work. She can still work either at home or in the office. She just chooses not to work at the office because of the risk of coronavirus exposure.

Prior to the Covid-19 pandemic, Petitioner had neither requested nor needed any work accommodations for her asthma or autoimmune disorder. Petitioner still does not need telework as an accommodation for either of these medical conditions; she needs telework only because she is “high risk”. Petitioner is unable to establish a *prima facie* case for disability discrimination under ADA because she cannot prove she is requesting telework as an accommodation for a disabling condition.

In light of this pandemic, Congress may further amend the ADA or pass legislation to make “high risk” employees a protected class subject to work accommodations. However, at this time, the Undersigned declines to interpret the ADA so broadly. “High risk” employees are not protected by the ADA or Section 504 of the Rehabilitation Act of 1973. Rehabilitation Act of 1973, 29 U.S.C. Chapter 16, Section 701 *et seq.* Being identified as “high risk” is not a medical diagnosis nor physical impairment. Instead, it is speculation as to how certain groups may respond to the coronavirus. Petitioner offered no proof of how being “high risk” substantially limits one or more major life activities.

DMV has taken every precaution to minimize Petitioner’s risk and to protect the health and safety of its employees working in the building. All employees engage in temperature checks and a health screening before entering the building and are also provided safety equipment, gloves, masks, safety glasses, and disinfectant spray. Petitioner works in a private office on the 3rd floor of the main building, with a door that can be shut. If Petitioner chooses to return to work, additional safety measures could be explored that might alleviate Petitioner’s concerns.

All administrative assistants, whether disabled or not (over 65), were treated the same. Only a limited number of Driver Services personnel were allowed to temporarily telework. Of the 650 employees in Driver Services, eleven were approved for temporary telework because of children in virtual school and fourteen additional employees for temporary telework by rotations of weeks in and out of the office. (Aff. Boyd-Malette ¶ 10). To date, Petitioner has declined any such arrangements except for full-time telework. Other than the doctor’s note submitted on March 19, 2020, Petitioner has not submitted any additional medical documentation to Driver Services in support of her telework request.

b. Petitioner Has Been Treated More Favorably Than Other DMV Employees

Of note, despite the denial of her telework request, Petitioner has been allowed to use all available Special Leave, personal vacation, and sick leave as an accommodation under the Reasonable Accommodation Request and was approved for concurrent FMLA until exhausted. (Aff. Boyd-Malette ¶¶ 10 & 11). Petitioner has been treated more favorably than other employees in that she was granted State of Emergency Leave at full pay as a reasonable accommodation. She has also been allowed to use sick leave without providing a doctor's note and was granted usage of full-time FMLA leave. (Aff. Boyd-Malette ¶ 15).

c. Petitioner Failed to Prove that DMV Knew She had A Disabling Condition on the Day Her Telework Request Was Denied.

Other than claiming to be “high risk”, Petitioner offered no direct evidence that she was denied telework because of a disability. Even if Petitioner needed telework as an accommodation for her asthma, little was and is known about the severity of Petitioner's asthma except that it is well controlled according to her doctor. Asthma does affect breathing, a major life activity. So even though Petitioner's asthma is well-controlled by medication, it would still qualify as a disabling condition, if known. 29 C.F.R. § 1630.2(i).

After the telework denial, Petitioner asserts, without documentation, that she suffers from “auto immune [sic] disease”. This latter diagnosis is discounted because Petitioner offered no medical documentation about: (1) the nature and severity of the impairment, (2) its duration or anticipated duration, and (3) its long-term impact. *Williams v. Channel Master Satellite Sys.*, 101 F.3d 346, 349 (4th Cir.1996); 29 C.F.R. § 1630.2(j)(2)(I)-(iii).

There is no evidence that Director Boyd-Malette or Petitioner's direct supervisor Robert Quinn knew Petitioner was disabled or that they regarded her as disabled as of the date of the denial. *Equal Employment Opportunity Comm'n v. Loflin Fabrication, LLC*, 462 F. Supp. 3d 586, 599–600 (M.D.N.C. 2020); *EEOC v. Mfrs. & Traders Tr. Co.*, 429 F.Supp.3d 89, 104–05 (D. Md. 2019) (citing *EEOC v. Stowe-Pharr Mills, Inc.*, 216 F.3d 373, 379 (4th Cir. 2000)).

All the evidence is that, prior to her telework request on 19 March 2020, Petitioner had done her work in the office without asking for any accommodations. Even her doctor's note failed to state she had a disabling condition. This scintilla of evidence favoring Petitioner is not enough for a rational trier of fact to reasonably find DMV knew Petitioner was disabled when her telework request was denied. *Equal Employment Opportunity Comm'n v. Loflin Fabrication, LLC*, 462 F. Supp. 3d 586, 600–01 (M.D.N.C. 2020) citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Petitioner has failed to offer sufficient evidence to raise a genuine issue of material fact as to whether she had a mental or physical impairment that substantially limits one or more of her major life activities or had a record of an impairment which substantially limits one or more of her major life activities at the time of the telework denial. Accordingly, Petitioner is unable to establish the first prong of the *prima facie* case for disability discrimination.

**d. Petitioner Is Not A “Qualified Individual With a Disability”
Because of Her Refusal to Appear at Work**

Because Petitioner has not established that she was disabled, she is precluded from establishing the second prong of the *prima facie* case for disability discrimination. Even if she were disabled, because Petitioner not a “qualified individual with a disability”, she cannot meet the second prong for disability discrimination. A “qualified individual with a disability” is one “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8).

Petitioner has refused to return to work even after being ordered to do so and with preventative measures in place for her safety. A regular and reliable level of attendance is a necessary element of most jobs. Under these circumstances, Petitioner can hardly be deemed a person who can perform the essential functions of an administrative assistant if she will not return to work. *See Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir.1994); *See also Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir.1987) (stating that prolonged, unexcused absence precluded him from fulfilling the essential functions of his job).

Petitioner has not reported to work since 19 March 2020, despite being designated as a mandatory/essential employee and requested to report back to work by Commissioner Jessup. (Aff. Simmons ¶ 8) The Communicable Disease Policy instructs that:

Individuals designated as mandatory employees may be subject to disciplinary action, up to and including termination of employment, for willful failure to report for or remain at work. Each situation will be reviewed on a case-by-case basis to determine appropriate action. (Aff. Simmons ¶ 8, Ex. B, p. 32)

Although Petitioner could have been disciplined for her truancy, instead she has been afforded seven months of leave accommodations not available to other mandatory DMV and DOT employees. (Aff. Simmons ¶ 8)

Also, because Petitioner was not disabled or regarded as disabled when her telework request was denied, she cannot satisfy the third prong of her *prima facie* case, that is, that the adverse telework decision was because of her disability.

**2. Second Step: DMV Had a Legitimate Nondiscriminatory Reason for Denying
Petitioner’s Telework Request**

Even if Petitioner were disabled, any inference of discrimination raised by the adverse telework decision is rebutted by DMV’s legitimate, non-discriminatory reasons for denying her request. Assuming *arguendo* that Petitioner met her burden of establishing a case of discrimination on its face, the burden shifts to Respondent to produce evidence showing a legitimate, nondiscriminatory reason for its action.

Petitioner's desire to telework and doctor's note indicating that she would "benefit" from doing so did not outweigh DMV's interest in continuing its essential State functions which impact serving approximately 7 million North Carolina motorists' ability to drive and gain access to DMV services. (Aff Boyd-Malette ¶¶ 8, 11-12, 18)

There is no genuine issue of material fact that DMV did not discriminate against Petitioner on the basis of a disability in denying her request to telework. Petitioner did not present "specific facts showing that there is a genuine issue" as to Respondent's intent in denying her request to telework. DMV's affidavits show that DMV complied with guidance from Human Resources and performed the required balancing test in considering Petitioner's request to telework against the operational needs of the DMV Direct Services. DMV's considerations were objective, legitimate and non-discriminatory, and served the business interests of DMV as well as 7 million North Carolinians.

3. Third: Petitioner Has Not Shown That DMV's Reasons Were Pretext

Finally, since DMV has carried its burden to produce a legitimate reason for its action, Petitioner must then satisfy the Undersigned that DMV's stated reasons were merely a pretext for intentional discrimination. *Johnson v. N.C. Dep't of Pub. Safety*, 266 N.C. App. 50, 830 S.E.2d 857 (2019). DMV has stated a legitimate, non-discriminatory reason for its action. Petitioner has not produced any evidence of intentional discrimination or evidence that suggests the DMV's proffered reason is mere pretext. Petitioner's "unsubstantiated allegations and bald assertions" are insufficient to create a genuine issue of material fact of disability discrimination in her adverse telework decision. See *Evans v. Techs. Applications and Serv. Co.*, 80 F.3d 954, 960 (4th Cir.1996).

II. RETALIATION CLAIM

With regard to the retaliation claim, Petitioner bears the burden to show that she engaged in a protected activity, followed by an adverse employment action, and that the protected activity was a substantial or motivating factor in the adverse action. *Brookshire v. N.C. DOT, DMV*, 180 N.C. App. 670, 637 S.E.2d 902 (2006).

Like her discrimination claim, there is also no genuine issue of material fact with regard to Petitioner's claim that Respondent retaliated against her on the basis of a disability in denying her request to telework. Petitioner did not present "specific facts showing that there is a genuine issue" as to whether she engaged in a protected activity. Even though Petitioner's asthma does qualify as a disability, being in a "high risk" category for contracting Covid-19 is not a disabling condition recognized under the ADA. Additionally, Petitioner's requests for an ADA accommodation and FMLA leave were submitted after her telework request had already been denied.

In conclusion, Petitioner has failed to show any genuine issue of material fact as to her claims that DMV discriminated and retaliated against her on account of a disability in denying her request to telework.

FINAL DECISION

BASED UPON THE FOREGOING there is no genuine issue of material fact. Respondent's Motion for Summary Judgment on the grounds that Petitioner failed to prove a genuine issue of material fact in her allegations that Respondent discriminated and retaliated against her in denying her request to telework is **GRANTED** and the decision of the agency is **AFFIRMED**. The Petition is **DISMISSED WITH PREJUDICE**.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of N.C. Gen. Stat. § 126-34.02, an 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 procedure for the appeal shall be as provided by the rules of appellate procedure. **The appeal shall be taken within 30 days after receipt of the written notice of the 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 3rd day of March, 2021.



Stacey Bice Bawtinhimer
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 3rd day of March, 2021.



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