

**BEFORE THE ALABAMA  
STATE PERSONNEL BOARD  
IN THE MATTER OF**

<b>SUSAN HAWK,</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
v.	)	<b>CASE NO. 17-19-RCS</b>
	)	
<b>ALABAMA DEPARTMENT OF</b>	)	
<b>REHABILITATION SERVICES,</b>	)	
	)	
<b>Respondent.</b>	)	

**RECOMMENDED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

The undersigned conducted a hearing on May 24, 2017, at the State Personnel Department located in Montgomery, Alabama. Stephen K. Simpson, Esq., appeared on behalf of the Department of Rehabilitation Services (“DRS”). Susan Hawk (“Hawk”) proceeded *pro se*.

Hawk called as witnesses:

- (1) Dana Tidwell, DRS SAIL Nurse;
- (2) Lisa Alford, DRS Director of SAIL Program;
- (3) Jane E. Burdeshaw, DRS Commissioner;
- (4) Jimmie Varnado, DRS District 2 Board Chairperson;
- (5) Milton Moats, DRS Employee assigned to investigate; and
- (6) Stacey Deering, DRS SAIL Counselor.

DRS did not call any additional witnesses.

Hawk introduced eight exhibits into evidence. DRS introduced ten exhibits into evidence.<sup>1</sup>

## **I. PROCEDURAL HISTORY AND CHARGES**

Hawk filed a complaint of discrimination on or about March 10, 2017, pursuant to ALA. ADMIN. CODE r. 670-X-4-.01-.03 (State Personnel Board Rules), which prohibits discrimination against any person with regard to promotion, retention, or any other personnel action because of race, sex, national origin, age, handicap, or other non-merit factor. Under this rule, any applicant or employee who has reason to believe that he or she has been discriminated against because of race, sex, or national origin may file a complaint with the State Personnel Board. That person shall have the right to be heard by the Board or a special hearing agent.

Hawk asserted DRS committed an act of discrimination by assigning her the responsibility to see clients in Randolph County during October 2015. Hawk maintained she was selected to work in Randolph County because she was Caucasian.

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<sup>1</sup> DRS objected to Hawk's Exhibits 1 and 7, alleging: (1) Exhibit 1 was a self-serving letter written by Hawk's brother whose only information is what Hawk has told him; and, (2) Exhibits 1 and 7 were not relevant to the allegations of discrimination by Hawk. Exhibit 1 was admitted into evidence over the objection, allowing it to pass to weight. Hawk testified her brother wrote the letter and his only knowledge was what she told him; therefore, the letter was not given any weight during the deliberation of the evidence. Exhibit 7 was admitted, in part, with certain portions being struck from the record. Specifically, pages 5 and 6 are relevant portions of the record and are admitted into the evidence. Pages 1-4 and 7-15 are either not relevant or were not properly authenticated by the witnesses during the hearing to be credible sources of information. Those pages are not formally admitted into evidence and were not given consideration, but will remain with the exhibits as an offer of proof.

The undersigned scheduled a pre-hearing conference for April 11, 2017, at the State Personnel Department. At the prehearing conference, Stephen K. Simpson represented DRS and Hawk represented herself. The hearing was set for May 24, 2017.

## **II. FACTUAL BACKGROUND**

Having reviewed the documentary evidence and having heard the testimony presented at the hearing and having observed the witnesses' demeanor and assessed their credibility, the undersigned finds the greater weight of the evidence supports the following findings of facts.

DRS employed Hawk as a Rehabilitation Counselor beginning in June 1996. Hawk resigned her position with DRS in January 2001 to pursue an opportunity to work as a school counselor. Hawk returned to DRS as a Rehabilitation Counselor in June 2013 and remains in that job classification. Hawk's personnel file shows she exceeded standards in her job and does not have prior disciplinary issues.

Hawk worked as a Rehabilitation Counselor in the State of Alabama Independent Living ("SAIL") Medicaid Waiver Program for DRS. Hawk's job required her to travel to clients' homes on a regular basis. From June 2013 until October 2015, Hawk's primary areas of travel included Lee County and Tallapoosa County. Sometime around March 2015, one of Hawk's clients, C.W., moved from

Tallapoosa County to Randolph County.<sup>2</sup> Hawk testified C.W. did not move, but rather began living at a shelter in Randolph County. Hawk started traveling to Randolph County in March 2015 to check on this one client. Hawk did not proactively inform her supervisors of the change.

In October 2015, Dana Tidwell (“Tidwell”), a SAIL nurse, volunteered to help DRS’s Anniston Office get caught up with vendor audits. Lisa Alford (“Alford”), SAIL Director, and Tidwell had a meeting where they discussed Tidwell’s new job responsibilities. During the meeting, the two discussed what to do with Tidwell’s clients in Randolph County since Tidwell would not have time to visit them and help the Anniston Office with vendor audits. Tidwell testified she informed Alford that Hawk was already going to Randolph County. Alford testified she assigned Tidwell’s Randolph County clients to Hawk because Hawk was already traveling to that county to see one of her own clients. Tidwell, a Caucasian female, testified it was her understanding that Hawk was given the clients in Randolph County because Hawk was already going there.

Hawk believed she was assigned the clients in Randolph County because she was Caucasian. Hawk believed another DRS employee, Tiffany Davis (“Davis”), an African-American female, could have picked up the clients in Randolph County.

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<sup>2</sup> The undersigned informed the parties during the hearing that the DRS client discussed during the proceedings would be referred to by her initials, C.W.

Hawk believed Davis was not assigned Randolph County because DRS had a client in that county who she described as a white supremacist. Alford, a Caucasian female, testified race played no part in her decision to assign Hawk the Randolph County clients.

When Alford assigned Hawk the Randolph County clients, she simultaneously reassigned Hawk's Lee County clients. Hawk did not enjoy traveling to Randolph County. Hawk complained to Alford that Randolph County was too far for her to drive. Hawk also complained to one of her coworkers, Stacey Deering ("Deering"), that Randolph County was nothing but woods and dirt roads and there were no places to eat. Deering testified that client assignments at DRS frequently change. She recalled one time when her entire caseload was reassigned. Deering explained that changed assignments was a common occurrence.

Alford accompanied Hawk on a home visit to Randolph County in late March 2016. During the trip, Hawk complained to Alford about travel to Randolph County and some back pain she was experiencing. Alford advised Hawk to complete an accommodation worksheet and she would have the issue addressed. On Wednesday, April 13, 2016, Hawk submitted an Employee Job Accommodation Worksheet.<sup>3</sup> Hawk's doctor concluded that Hawk should limit her driving to 1-1.5 hours

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<sup>3</sup> DRS Exhibit 7, p. 1.

maximum, per trip, on paved roads.<sup>4</sup> On April 13, 2016, Alford reassigned Randolph County back to Tidwell for one month and then permanently reassigned Randolph County to Phyllis Taylor.<sup>5</sup> Alford then assigned cases to Hawk that would ensure her driving limitation was properly addressed.<sup>6</sup>

On or about June 20, 2016, Hawk wrote a letter to DRS Commissioner Jane E. Burdeshaw (“Burdeshaw”) complaining of discrimination by Alford. Hawk maintained that her Lee County cases were removed from her by Alford and given to Davis and the reason was race discrimination.<sup>7</sup> Hawk also argued in her letter that she declined a promotion in February 2016 and believed that was the impetus for discriminatory practices against her. Hawk sent a copy of her complaint to DRS District 2 (Montgomery) Board Chairperson Jimmie Varnado (“Varnado”).

Burdeshaw received Hawk’s complaint and appointed an employee from DRS’s Homewood Office, Milton Moats (“Moats”), to investigate Hawk’s allegations.<sup>8</sup> Moats investigated Hawk’s allegations and concluded in an August 22, 2016 memorandum that Hawk’s allegations of discrimination were not supported by

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<sup>4</sup> DRS Exhibit 7, p. 3.

<sup>5</sup> Testimony of Alford and DRS Exhibit 7, p. 4.

<sup>6</sup> Alford testified that initially she did not assign Hawk new cases, she just removed the four Randolph County clients from Hawk’s caseload.

<sup>7</sup> DRS Exhibit 6, pp. 1-4.

<sup>8</sup> DRS Exhibit 6, p. 6.

the evidence. Moats made some recommendations to Burdeshaw that he believed would help address some of the issues Hawk raised in her letter, but concluded Alford did not discriminate against Hawk based upon Hawk's race or disability. On August 23, 2016, Burdeshaw informed Hawk of Moats's findings.<sup>9</sup> Moats testified he did not find evidence of discrimination or retaliation. Moats concluded Alford wanted to place an experienced worker in Randolph County and Hawk was not only experienced, but also already traveling to that county. Furthermore, Moats concluded that Hawk's unwillingness to accept a promotion in February 2016 could not have led to the alleged retaliatory act Hawk complained of (*i.e.*, her assignment to Randolph County) since that act occurred in October 2015.

On September 27, 2016, Hawk submitted a second Employee Job Accommodation Worksheet.<sup>10</sup> Hawk maintained she was still required to drive on unpaved roads and that was causing her to experience lower back and hip pain. Hawk's doctor recommended Hawk should limit her driving to 1-1.5 hours, per trip, on paved roads only. Alford testified she assigned Hawk cases in Elmore County and Autauga County from May 2016 through August 2016, but did not check the road surfaces. In Hawk's September 27, 2016 worksheet, she requested the Autauga County clients be exchanged for Lee County clients. The DRS Americans with

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<sup>9</sup> DRS Exhibit 6, p. 16.

<sup>10</sup> DRS Exhibit 7, p. 6.

Disabilities Act (“ADA”) Review Team met and concluded that due to Hawk’s restrictions she should be assigned cases in Montgomery and Elmore Counties to minimize her driving distances and keep her on paved roads. Hawk lives in Elmore County and she was assigned to work out of DRS’s Montgomery Office. The review team also indicated that she should not be assigned any clients who do not live on paved roads.<sup>11</sup>

Hawk disputed Moats’s report in correspondence to Burdeshaw and Varnado. Varnado testified he received letters from Hawk and spoke to her by telephone a few times about her complaints. Varnado testified he did not have all the facts. Varnado testified he received information from Hawk and he discussed her complaints with Burdeshaw; however, he acknowledged that he does not have the authority to dictate how employees are assigned cases by their supervisors.

Hawk testified she loves Auburn. Hawk attended college at Auburn University and enjoys the community. Hawk also testified she is typically a very happy person. Hawk testified she became unhappy when she was assigned cases in Randolph County and her cases in Lee County were reassigned. Hawk wants to work with clients in Lee County. Interestingly, Hawk did not file a written complaint about her assignment to Randolph County until well after she was reassigned to

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<sup>11</sup> DRS Exhibit 7, p. 11 and 17.



another location. Hawk testified she would be happy if she were reassigned to Lee County.

### **III. ISSUES PRESENTED**

Did DRS discriminate against Hawk by having her work Randolph County from October 2015 through early April 2016?

### **IV. DISCUSSION AND CONCLUSIONS OF LAW**

Hawk claims the treatment she received from DRS was discriminatory based upon her race (Caucasian). For the reasons which follow, Hawk failed to substantiate a *prima facie* case for race discrimination.

The Supreme Court established the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to evaluate claims of indirect evidence of discrimination in employment actions. First, the plaintiff – in this case, Hawk – carries the burden of establishing a *prima facie* case of discrimination. *McDonnell Douglas Corp.*, 411 U.S. at 802. Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on “race, color, religion, sex or national origin.” 42 U.S.C. § 2000(e)-2(a). In order to establish a *prima facie* case of race discrimination, an employee must prove:

- (1) She is a member of a protected class;
- (2) She is qualified for the job;

- (3) She suffered an adverse employment action by the employer; and
- (4) She was either replaced by someone outside her protected group or received less favorable treatment than a similarly situated individual outside the protected group.

See *Maynard v. Bd of Regents of the Div. of Univs. of the Fla. Dept. of Educ.*, 342 F.3d 1281, 1289 (11th Cir. 2003). “In pursuing a discrimination action, a plaintiff cannot rely on attenuated possibilities which might infer a discriminatory motive, but rather, he must come forward with sufficient evidence to establish a *prima facie* case.” *Pace v. Southern Railway System*, 701 F.2d 1383, 1391 (11th Cir. 1983). Personal opinions and conclusory allegations, in the absence of supporting evidence, are insufficient to withstand judgment as a matter of law. *Holifield v. Reno*, 115 F.3d 1555, 1564 n. 6 (11th Cir. 1997). Generally, an employee demonstrates employment discrimination under Title VII using the direct evidence framework set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), or the circumstantial evidence framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under either the direct evidence or circumstantial evidence model, the employee bears the burden of showing that the employer *purposely took adverse action against him because of his race*. *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1230 n. 34 (11th Cir. 2001).

Next, “[i]f a plaintiff establishes a *prima facie* case of discrimination, the defendant employer must articulate a legitimate, nondiscriminatory reason for the challenged employment action.” *Chapman v. AI Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000) (*en banc*). Defendant’s proffered reason must be clear, reasonably specific, and supported by admissible evidence, but defendant need not show it was actually motivated by the proffered reason. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55, 258, 101 S.Ct. 1089, 1094-95 (1981). Instead, defendant “need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.” *Id.* at 257, 101 S.Ct. 1096.

Hawk cannot successfully support a case with general allegations that do not disclose the facts in detail and with precision. The law provides that mere allegations unaccompanied by any evidentiary support will not suffice. See *Engl v. Aetna Life Insurance Co.*, 139 F.2d 469 (2d Cir. 1943); *Croley v. Matson Navigation Co.*, 434 F.2d 73 (5th Cir. 1970). A party is not entitled to the benefit of unreasonable and speculative inferences. *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975).

In the present action, Hawk’s claims for race discrimination fail on their face for several reasons. There is no dispute about the first and second elements of her claim. Hawk is Caucasian and, therefore, a member of a statutorily protected class of individuals covered by Title VII. Moreover, Hawk is a Rehabilitation Counselor

with years of experience and no significant prior disciplinary issues. It is undisputed that she is qualified for her job.

Hawk failed to offer evidence she suffered an adverse employment action. In order to establish an “adverse employment action,” an employee must show that the alleged action “affect[s] a term, condition, or privilege of employment, and is not adverse merely because the employee dislikes it or disagrees with it.” *Crayton v. Alabama Dept. of Agr. and Indust.*, 589 F.Supp.2d 1266, 1284 (M.D. Ala. 2008); *Hooks v. Bank of America*, 183 Fed.Appx. 833 (11th Cir. 2006); *Gaddis v. Russell Corp.*, 242 F.Supp.2d 1123, 1145 (M.D. Ala. 2003). An adverse employment action “must entail a serious and material change in the terms, conditions, or privileges of employment” in order to constitute an actionable event. *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1239 (11th Cir. 2001). An act by an employer “that does not result in ‘lesser pay, responsibilities, or prestige,’” is not an adverse employment action for purposes of Title VII, especially where the employee is reassigned to a position with “the same step, grade, and rate of pay and benefits.” *Crayton*, 589 F.Supp.2d. at 1285 (citing *Doe v. DeKalb County School Dist.*, 145 F.3d 1441, 1448-53 (11th Cir. 1998).

In other words, Hawk has the burden of establishing that DRS’s action had a tangible adverse impact beyond just her perceptions about how she was affected by the action in question. “[T]he asserted impact cannot be speculative at all and must

at least have a tangible adverse effect on [the plaintiff's] employment . . . moreover, the employee's subjective view of the significance and adversity of the employer's action is not controlling." *Davis*, 245 F.3d at 1239. "Not everything that makes an employee unhappy is an actionable adverse action." *Doe*, 145 F.3d at 1449. If this subjective standard were to be applied, "every trivial personnel action that an irritable chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996).

In the present action, Hawk was assigned to visit four clients in Randolph County after her supervisor found out she was already traveling to Randolph County to visit a current client who relocated to the area. Furthermore, Hawk's Lee County cases were reassigned. The evidence in this case fell far short of establishing that Hawk's assignment to Randolph County amounted to an adverse employment action. There was no testimony introduced into evidence to indicate this reassignment affected her prestige, amount of pay, or job classification. Moreover, there was no evidence introduced that suggested this responsibility extended beyond the scope of Hawk's normal duties as a Rehabilitation Counselor with DRS. It is very clear that Hawk was unhappy with the reassignment; however, that is not actionable under the law. Thus, Hawk has failed to establish a *prima facie* case of discrimination.

Hawk failed to state a claim upon which relief can be granted. Transfers from one location to another which do not result in a change in pay, benefits or rank have been held not to constitute an adverse employment action under Title VII. “[A] lateral transfer that results in no loss in pay, benefits or classification does not generally constitute an adverse employment decision.” See *Smith v. Upson Co., Ga.*, 859 F.Supp.1504, 1510 (M.D. Ga. 1994); see also *Smith v. Public Safety*, 64 F.Supp.2d 1215, 1221-1222 (M.D. Ala. 1999). Alford reassigned Hawk for a legitimate business reason. No terms of employment were affected by the reassignment. Alford routinely changed employees’ assignments. Tidwell and Deering both testified it was not uncommon. Once Hawk produced documentation that she suffered from back pain after riding in a car for long periods, Alford reassigned her to Autauga and Elmore counties. Hawk filed another worksheet maintaining she could only drive on paved roads. Alford then reassigned her clients in Elmore and Montgomery counties who lived on paved roads. Hawk has not been subjected to discriminatory treatment. Hawk testified all she wanted was to be reassigned to the Lee County area. Hawk’s sentiment is quite clear through her various complaints, testimony and documentation. However, DRS is not obligated to assign Hawk to Lee County. DRS is free to assign Hawk to any assignment that comports with her ADA worksheet. The DRS ADA Review Team looked extensively at mileage and road surfaces when they concluded Hawk should be

assigned clients living in Elmore and Montgomery counties. DRS has the authority to reassign employees. The State Personnel Board is not required to approve an employee's interdepartmental reassignment and, in fact, does not have the authority to do so.<sup>12</sup> See *Carr v. Dept. of Human Resources*, 952 F.Supp. 1496 (M.D. Ala. 1996).

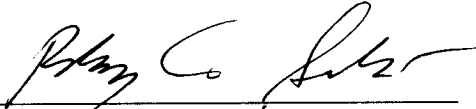
#### IV. CONCLUSION

The undersigned finds that the substantial weight of the evidence failed to demonstrate DRS engaged in race-based discriminatory conduct against Hawk. Moreover, the evidence established that Hawk did not suffer an adverse employment action and the remedy she seeks is unavailable through the State Personnel Board. Thus, Hawk failed to establish a claim of discrimination under ALA. ADMIN. CODE r. 670-X-4-.01-.03. Accordingly, the undersigned recommends that Hawk's complaint be DISMISSED.

Done this 24<sup>th</sup> day of July, 2017.

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<sup>12</sup> After reviewing the evidence, it appears Hawk's complaints were filed in an attempt to be reassigned Lee County. The evidence presented during the hearing showed that Hawk was reassigned to Randolph County for reasons not associated with her race. After she filed an ADA worksheet, Alford immediately reassigned Hawk again, to an area closer to her home and office base. It is unfortunate that Hawk is unhappy with her present assignment; however, her current assignment complies with her September 27, 2016 ADA worksheet. No evidence supported Hawk's contention that Alford engaged in discrimination. Alford, Burdeshaw and Varnado all took Hawk's complaints seriously and had her allegations investigated. Furthermore, she was provided an opportunity in this hearing to present any evidence she had to support her allegations of discrimination. Her allegations are not supported by the preponderant weight of the evidence.

  
RANDY C. SALLE  
Administrative Law Judge  
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