IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

WILLIAM W. PHILLIPS,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	C.A. No. N21A-01-002 CLS
DELAWARE DEPARTMENT OF SERVICES FOR CHILDREN YOUTH AND THEIR FAMILIES,	)	
	)	
Appellee.	)	
	)	

Date Submitted: February 8, 2022
Date Decided: March 15, 2022

Upon Appellant's Appeal from a Decision of the Merit Employee Relations Board.
AFFIRMED.

ORDER

William Phillips, Wilmington, DE, 19808, *Pro Se*, Appellant.

Andrew R. Fletcher, Esquire, Delaware Department of Justice, Wilmington, Delaware, 19801, Attorney for Appellee, Delaware Department of Services for Children, Youth, and Their Families.

SCOTT, J.

Upon consideration of Appellant William Phillips' ("Mr. Phillips") appeal from the decision of the Merit Employee Relations Board (the "Board") dismissing Mr. Phillips's grievance, and the record of the case, it appears:

1. Mr. Phillips is a former employee for the Appellee, the Department of Services for Children, Youth and Their Families ("the Department"). During Mr. Phillips employment probationary period, he was dismissed from employment on January 6, 2020, for unsatisfactory performance.

2. Prior to his dismissal, Mr. Phillips started employment for the Department for in June 2019. He was assigned to manage the Labor Relations section of the Department and reported directly to Ms. Milewski, the Human Resources Director. Ms. Milewski regularly communicated with Mr. Phillips regarding his performances and changes needed to be made. Beginning in September 2019, Ms. Milewski started meeting with Mr. Phillips weekly and followed up after each meeting with notes summarizing the conversations. In October 2019, Mr. Phillips notified the Department he believed he might be suffering from Central Auditory Processing Disorder ("CAPD") which affected his ability to process instructions on how to master a computer program that was required for his position. Mr. Phillips was sent Americans with Disabilities Act ("ADA") forms to be completed.

3. In early November, Mr. Phillips informed an employee working in Employee Relations that he had an appointment scheduled for January to test for CAPD. Mr. Phillips subsequently met with Ms. Milewski and an ADA coordinator to talk about his issues and a plan was created to help Mr. Phillips. His struggles with work continued following the meeting and shortly thereafter, he was terminated.

4. After Mr. Phillips' dismissal, he underwent medical testing, and the results did not show he had CAPD. Upon receiving his dismissal notice, which stated the reason for dismissal was unsatisfactory performance, Mr. Phillips requested a grievance hearing, and his request was denied. Subsequently, he appealed the denial of the requested grievance period to the Board on the basis his dismissal was a result of discrimination due to his age and disability.

5. On November 17, 2020, the Board heard Mr. Phillips' appeal and he made an additional claim contending DSCYF violated his due process rights.

6. On December 10, 2020, the Board issued a written decision and order concluding Mr. Phillips did not establish DSCYF discriminated against him and DSCYF did not violate his due process rights.

7. On January 4, 2021, Mr. Phillips filed this Appeal and submitted his opening brief on November 29, 2021. Mr. Phillips argues the Board's decision

was administratively flawed because he did allege a prima facie case of discrimination and his premature termination violated his due process rights. Additionally, he argues Merit Rule 13 applies to his case mandating assistance/re-evaluation for performance issues and discussion with higher authority for performance issues, and he did not received notice warning of poor performance during his employment in accordance with 29 Del. C. 1953 § 5922.

9. On December 17, 2021, the Department answered Mr. Phillips opening brief. The Department argued under Merit Rule 9.2 an employee may be dismissed at any time for unsatisfactory performance during their probationary period, there is substantial evidence in the record to support the Board's finding that Mr. Phillips' dismissal was unrelated to discrimination, Mr. Phillips' was not entitled to performance reviews under Merit Rule 13, he was not entitled to notice of poor performance, and Mr. Phillips' due process rights were not violated.

10. On February 4, 2022, Mr. Phillips replied and reiterated his arguments found in his opening brief.

11. On appeal from an administrative board, the Superior Court must determine if the Board's factual findings are supported by substantial evidence

in the record and free from legal error.[1] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] The Court must review the record to determine if the evidence is legally adequate to support the Board's factual findings.[3] The Court does not "weigh evidence, determine questions of credibility or make its own factual evidence findings."[4]

12. In administrative appeals cases, this Court has recognized that it may "exhibit some degree of leniency toward a *pro se* litigant to see his case is fully and fairly heard."[5] However, *pro se* litigants are still expected to adhere to the rules and requirements of this Court.[6] "There is no different set of rules for *pro se* plaintiffs, and the trial court should not sacrifice the orderly and efficient administration of justice to accommodate an unrepresented plaintiff."[7]

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[1] *Unemployment Ins. Appeal Bd. v. Duncan*, 621 A.2d 340, 342 (Del.1993).
[2] *Histed v. E.I. duPont de Nemours & Co.*, 621 A.2d 340, 342 (*citing Olney v. Cooch*, 425 A.2d 610, 614 (1981)).
[3] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del.1965).
[4] *Id.* at 67.
[5] *Jackson v. Unemployment Ins. Appeal Bd.*, 1986 WL 11546, at *2 (Del.Super.Sept. 24, 1986).
[6] See *Von Fegyverneky v. CFT Ambulance Serv.*, 2012 WL 2700464, at *3, n.17 (Del.Super. June 28, 2012) citing *Draper v. Medical Center of Delaware*, 767 A.2d 796, 799 (Del.2001).
[7] *Draper v. Medical Center of Delaware*, 767 A.2d 796, 799 (Del.2001).

13. The issue before the Court is whether the Board erred when it dismissed Mr. Phillips grievance and found Mr. Phillips failed to provide sufficient evidence that the Department violated Merit Rule 2.1 when he was terminated during his probationary period. This Court finds the decision and order is supported by substantial evidence.

14. It is undisputed Mr. Phillips was terminated during his one-year probationary period. Merit Rule 9.2 provides any employee may be dismissed at any time during the probationary period and employees dismissed during their probationary period may not appeal the decision unless a violation of Merit Rule 2 is alleged. Under Merit Rule 2.1, the Department may not discriminate against an employee based on race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors. Mr. Phillips had the ability to seek an appeal because he alleged age and disability discrimination.

15. Before rending its decision, the Board reviewed the following evidence: Mr. Phillips' admitted exhibits marked Exhibits 1, 2, 5, 10, and 11, the Department's admitted exhibits marked Exhibits A, C through FF, and Mr. Phillips' testimony.

16. The Board found Mr. Phillips assertion that the Department violated his due process rights because he was not provided formal performance evaluation during his employment, the same argument brought in this Appeal, was unfounded. The Board correctly identified Mr. Phillips relied on Rule 13, however Rule 13 does not apply to Mr. Phillips because the text of the rule states he must have completed his probationary period for the rule to apply. There is substantial evidence to support this conclusion and there is no error in application of the law.

17. Additionally, the Board found Mr. Phillips failed to meet his burden of proof to establish a prima facie case of age discrimination[8] or disability discrimination. It concluded, on the age discriminate allegation, Mr. Phillips did not establish there was a causal connection between his age and the adverse employment action. The record reflects the only connection Mr. Phillips asserts is the job was filled by a 29-year-old, this itself and according to previous Board decisions, is not sufficient to satisfy a causal connection between his age and the adverse employment action.

[8] For a discrimination claim, an individual must establish: (1) he was a member of a protected class; (2) that he suffered an adverse employment action; and (3) that there is a casual connection between the protected class and the adverse employment action. Ennis v. Del. Transit. Corp., 2015 WL 1542151, at *5 (Del. Super., Mar. 9, 2015).

18. The Board concluded, on the disability discrimination[9] allegation, Mr. Phillips was unable to establish he had a disability, because he was never diagnosed with having a learning disability, nor that he was otherwise qualified to perform the essential functions of the job with or without accommodation, based on Mr. Phillips continued difficulty with accommodations and weekly meetings with Ms. Milewski. The record reflects Mr. Phillips did not have a disability, as he was not diagnosed after termination and Mr. Phillips, according to his own testimony, struggled to perform his assign duties even with a performance plan, substantial intervention from Ms. Milewski, and weekly meetings.

19. There is substantial evidence to support Mr. Phillips did not establish a prime facie case for age or disability discrimination.

[9] To prevail on a disability discrimination claim, an individual must establish: (1) he has a disability; (2) he is otherwise qualified to perform the essential functions of the job, with or without accommodation; and (3) he suffered an adverse employment action because of his disability. A disability is defined as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(2).

Therefore, for the foregoing reasons, the decision of the Board is **AFFIRMED.**

IT IS SO ORDERED.

/s/ Calvin L. Scott
Judge Calvin L. Scott, Jr.