THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Linda Sun,	)	OEA Matter No. 1601-0037-17
Employee	)	
	)	Date of Issuance: October 13, 2017
v.	)	
	)	Joseph E. Lim, Esq.
Office of the Tenant Advocate,	)	Senior Administrative Judge
Agency	)	

Andrea Comentale, Esq., Agency Representative
Linda Sun, Employee *pro se*

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On April 7, 2017, Linda Sun ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") contesting the Office of the Tenant Advocate's ("OTA" or "Agency") final decision to remove her from her position as a Program Support Specialist effective on February 21, 2012.

I was assigned this matter on June 5, 2017, after Agency submitted its Answer to Employee's Appeal on May 12, 2017, with a motion arguing that OEA lacked jurisdiction over this matter. On June 6, 2017, I issued an order directing Employee to submit a brief addressing whether her appeal should be dismissed for lack of jurisdiction. Employee submitted her response, not just to the jurisdiction issue, but also to the substantive issues of her appeal. After reviewing the record, I determined that there were no material issues of fact that would require an evidentiary hearing. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether this Office has jurisdiction over Employee's untimely appeal.

2. Whether this appeal should be dismissed.

FINDINGS OF FACT[1]

1. Employee started in the real estate business in 1985.

2. The OTA was formerly a division of the DC Department of Consumer and Regulatory Affairs (DCRA). OTA became independent of that agency on October 1, 2007. It is classified as a subordinate agency in the District government under the administrative control of the Mayor. The OTA works with other entities to promote better tenant protection laws and policies in the District.

3. Employee was hired as a Program Support Specialist with the Agency effective September 17, 2007, in position DS-301-11/4, pursuant to a Career Service appointment.

4. From September 2008 until the date Employee was summarily removed, Employee's immediate supervisor was Dennis Taylor (Taylor), Agency's General Counsel.

5. Employee was never hired by Agency as a lawyer.

6. Between August 2009 and May 2011, Taylor conducted repeated trainings regarding the unauthorized practice of law that included instructions on actions that constituted unauthorized practice of law, advice on how to avoid the unauthorized practice of law, and instructions on specific actions to avoid.

7. Later, Taylor asked Employee to delete the designation "JD" from her Agency email signature block after observing that it caused confusion among Agency's clients.

8. On March 31, 2010, Agency issued OTA Bulletin No. 2010-001 that restricted all staff in Employee's position from mediation activity and attendance at Office of Administrative Hearings (OAH) and court hearings.

9. In 2010, Agency internally designated Program Support Specialists as "Case Management Specialists," but their status as a Career Service employee remained unchanged.

10. In December 2010, Employee unilaterally resumed the use of the designation "JD" in her Agency email signature block.

11. Employee is a law school graduate but is not a member of the District of Columbia Bar and is not admitted to practice law in any jurisdiction.

12. On December 14, 2010, Employee sent several emails to a tenant client of Agency regarding an upcoming OAH mediation in the tenant's case stating, "I will send you an email with a proposal for the amount you want to ask from the landlord. You can then send it directly to [the landlord's attorney], with a cc to me. He will respond to you as to

[1] Based on the parties' joint statement of facts, unrefuted representations, and documents of record.

what the LL will offer. You can then forward this email to me with your comments. I will then give you my response. This may go back and forth a few times until both parties agree on the amount to settle. . . . I have worked like this on a couple of mediation cases . . .."

13. In emails dated January 20, 2011, and January 25, 2011, Employee again offered her assistance to the Agency client in negotiations. She further counseled the tenant client extensively on how to handle the mediation and stated, "I will be on standby tomorrow morning, either by phone or by email."

14. On January 26, 2011, Employee emailed a letter that she had drafted for the tenant client for filing in Superior Court, offering to file the letter upon approval by the tenant client.

15. On February 3, 2011, Employee advised the tenant client via email to violate a provision of a settlement agreement that had been reached in the tenant's case, stating, "[d]on't dismiss the tenant petition."

16. On February 8, 2011, Employee continued to advise the tenant client via email by stating "On second thought I think you need not cancel the motion to dismiss" but later stating " ...if you like, you can cancel the motion to dismiss."

17. On February 8, 2011, Employee called Taylor "stupid" when discussing the tenant client's case.

18. On February 10, 2011, Employee informed the tenant client via email that she had called Taylor "stupid" in connection with the tenant's case.

19. Employee continued to advise this tenant client via email on February 10, 2011, by providing legal language to include in a motion to withdraw the motion to dismiss, and also advising the tenant to fire the Agency attorney assigned to the case.

20. In late 2011 or early 2012, Employee's request for annual leave for February 24, 27, 28 and 29, 2012, for the purpose of taking the Bar exam was approved.

21. On February 11, 2012, Employee sent an email to Taylor, copying the Agency Director, Johanna Shreve, stating, among other things, "I will be taking off the week of 20 to 24."

22. In emails dated February 14, 2012, Agency's Director notified Employee that 5 hours of sick leave was approved for February 21, 2012 but that any additional leave was denied based on the needs of the Agency.

23. On February 17, 2012, Employee sent several emails concerning her request for additional leave to Taylor, copying the Agency Director and the Mayor, that contained the following language: ". . . -- oh, stupid me – you suggested that I should most respectfully submit my petition to our esteemed chief tenant advocate, who has graciously granted my petition for 5 hours. . . . --- oh, there I go again, how stupid of me

– I entreated the Honorable Chief Tenant Advocate to grant my Motion for 8 Hours Leave of Absence for Thursday, February 23, 2012. Whew! That was close. I almost got my head cut off."

24. On February 21, 2012, Agency issued a Summary Removal Directive (Notification) informing Employee that she was being summarily removed from her position of Program Support Specialist, Grade 11, Step 6 effective February 21, 2012.

25. Employee's Notice of Summary Removal Directive did not provide Employee with a copy of the OEA Rules, the OEA appeal form, and notice of the right to be represented by a lawyer or other representative, or any information regarding her appeal rights.

26. On February 24, 2012, Agency issued a Summary Removal Notice in accordance with section 1616 of Chapter 16 of the District of Columbia Personnel Regulations, listing the following causes for removal:

    - Count One – Misfeasance and Insubordination: Copying the Executive Office of the Mayor with Your Disrespect of Supervisors
    - Count Two – Malfeasance by Unauthorized Practice of Law: Preparation of Legal Documents
    - Count Three – Malfeasance by Unauthorized Practice of Law: Unauthorized Drafting of Legal Documents
    - Count Four – Malfeasance by Unauthorized Practice of Law and Insubordination by Violation of OTA Bulletin No. 2010-001: Participation in Mediation Conducted by the Office of Administrative Hearings
    - Count Five - Malfeasance by Unauthorized Practice of Law: Provision of Legal Advice and Preparation of Legal Documents
    - Count Six - Malfeasance by Unauthorized Practice of Law: Advising a Tenant to Fire an OTA Attorney
    - Count Seven – Insubordination: Disobeying a Direct Order from Your Supervisor
    - Count Eight – Malfeasance: Boasting to a Member of the Public of Your Disrespect of a Superior
    - Count Nine – Unauthorized Practice of Law and Insubordination: Use of Degree Designation "JD" in Email Signature Block
    - Count Ten – Insubordination: Disobeying Repeated Direct Orders to Avoid Practice of Law.

27. On March 21, 2012, Employee filed a Charge of Discrimination against Agency with the Equal Employment Opportunity Commission (EEOC) alleging she was terminated as a result of discrimination based on race, sex, national origin, age and retaliation.

28. On July 17, 2012, at Employee's request, the EEOC issued a Notice informing Employee of the right to institute a civil action under Title VII of the Civil Rights Act of 1964.

29. On or about October 22, 2012, Employee filed a Complaint in the United States District Court for the District of Columbia against the District of Columbia, Agency's Director and Taylor in both their official and individual capacities.

30. On or about November 28, 2012, Employee filed a Second Amended Complaint with seven causes of action:

    - Count I – Wrongful Termination in Violation of Public Policy
    - Count II – Retaliation in Violation of the District of Columbia Whistleblower Protection Act
    - Count III – Discrimination in Violation of the District of Columbia Human Rights Act
    - Count IV – Wrongful Termination in Violation of Title VII of the Civil Rights Act of 1964
    - Count V – Breach of Contract
    - Count VI – Intentional Infliction of Emotional Distress
    - Count VII – Assault

31. On September 30, 2015, the United States District Court denied Employee's Motion for Summary Judgment and granted Defendants' Motion for Summary Judgment on Counts I through VI of the Second Amended Complaint.[2]

32. On March 15, 2016, following a jury trial, the U.S. District Court entered a Judgment on the Verdict for Defendant on Count VII – Assault of the Second Amended Complaint.[3]

33. Employee appealed the verdict on March 18, 2016.

34. On February 14, 2017, the U.S. Court of Appeals for the District of Columbia Circuit issued a Judgment affirming the US District Court's orders filed September 20, 2015, and March 15, 2016, stating that summary judgment was proper on Employee's Title VII, 42 U.S.C. §1981, D.C. Human Rights Act, District of Columbia Whistleblower Protection Act, and intentional infliction of emotional distress claims. The Court further noted that because Employee was not at-will, the common law claim of wrongful termination in violation of public policy is unavailable and the District of Columbia Comprehensive Merit Personnel Act provides Employee's sole remedy.

35. On April 7, 2017, Employee filed the instant appeal to the Office of Employee Appeals asserting that "[t]he termination of [her] employment was retaliatory and in violation of the public policy of the DC Government."

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[2] *Sun v. D.C. Government, et al*., Civ. Action No. 12-1919, 133 F.Supp.3d 155 (2015).

[3] *Sun v. Shreve*, Civ. Action No. 12-1919, 2016 WL 2840476 (D.D.C.)(March 15, 2016).

36. Agency's Omnibus Response: Motions to Dismiss for Lack of Jurisdiction, and on the Grounds of *Res Judicata* and Collateral Estoppel, and, in the Alternative, for Summary Disposition, and, in the Alternative, Answer was filed on May 12, 2017.

ANALYSIS, AND CONCLUSIONS OF LAW

1. Whether this Office has jurisdiction over Employee's untimely appeal.

This Office's jurisdiction is established pursuant to the District of Columbia's Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Official Code § 1-601-01, *et seq*. (2001). OEA Rule 628.2 states that "*[t]he employee shall have the burden of proof as to issues of jurisdiction..."*[4] Pursuant to OEA Rule 628.1, the burden of proof is defined under a "preponderance of the evidence" standard. Preponderance of the evidence means "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue."

OEA Rule 604.2 provides that an appeal with this Office must be filed *within thirty (30) calendar days of the effective date of the appealed agency decision*.[5] This Office has no authority to review issues beyond its jurisdiction. The time limits for filing appeals with administrative adjudicative agencies are mandatory and jurisdictional matters. *See Zollicoffer v. District of Columbia Pub. Sch.*, 735 A.2d 944 (D.C. 1999) (quoting *District of Columbia Pub. Emp. Relations Bd. v. District of Columbia Metro. Police Dep't*, 593 A.2d 641, 643 (D.C. 1991)). A failure to file a notice of appeal within the required time period divests this Office of jurisdiction to consider the appeal. *See Id*.

However, OEA Rule 605.1 provides that:

When an agency issues a final decision to an employee on a matter appealable to the Office, the agency shall at the same time provide the employee with a written copy of all of the following:

(a) The employee's right to appeal to the Office;

(b) The rules of the Office;

(c) The appeal form of the Office;

(d) Notice of applicable rights to appeal under a negotiated review procedure; and

(e) Notice of the right to representation by a lawyer or other representative authorized by the rules.

[4] 59 DCR 2129 (March 16, 2012).

[5] *Id*.

Employee was removed from her position on February 21, 2012, and filed her appeal with OEA more than five years later on April 7, 2017. However, Employee alleges, and Agency concedes, that the February 21, 2012, Notice of Summary Removal Directive failed to provide Employee with a copy of OEA Rules, the OEA appeal form, and notice of the right to be represented by a lawyer or other representative, or any information regarding her appeal rights. The Superior Court of the District of Columbia has also held that even if an employee received a copy of his or her appeal rights, such notice fails if the notice is ambiguous.[6] Consequently, Agency cannot benefit from Employee's seemingly untimely filed Petition for Appeal because it failed to adhere to OEA Rule 605.1.[7] Accordingly, I find that Employee has established the jurisdiction of this Office over her appeal.

2. Whether this appeal should be dismissed.

Agency argues that this appeal should be dismissed on the grounds of *Res Judicata* and Collateral Estoppel. *Res Judicata*, Latin for "a thing adjudicated," is defined by Black's Law Dictionary[8] as, "an issue that has been definitively settled by judicial decision," and as "an affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit." "Collateral Estoppel" is defined by the same Black's Law Dictionary as "the binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based;" and "a doctrine barring a party from re-litigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one."

Agency points out that there are no material and genuine issues of fact for OEA to decide, as all of the same claims against all of the same parties that Employee raises in this appeal were already adjudicated on their merits in Federal Court. In *Sun v. & District of Columbia,* 133 F. Supp. 3d 155 (D.D.C. 2015) (Agency Exhibit #15), *aff'd,* No. 16-7032 (D.C. Cir. Feb. 14, 2017) (per curiam), Employee instituted a civil action pursuing the same allegations that she is attempting to raise in this matter against the District, and any District employee, supervisor, or official having personal involvement in the prohibited personnel action. Employee brought seven causes of action:

(1) Wrongful Termination in Violation of Public Policy;

(2) Retaliation in Violation of the District of Columbia Whistleblower Protection Act;

(3) Discrimination in Violation of the District of Columbia Human Rights Act;

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[6] See *Curry-Mills v. D.C. Dept. of Youth & Rehabilitation Services*, Case No. 2016 CA 003190 P(MPA) (D.C. Super. Ct. December 22, 2016).

[7] See *Margaret Rebello v. DCPS*, OEA Matter No. 2401-0202-04, *Opinion and Order on Petition for Review* (June 27, 2008).

[8] 8th Edition 1999.

(4) Wrongful Termination in Violation of Title VII of the Civil Rights Act of 1964, as Amended;

(5) Breach of Contract;

(6) Intentional Infliction of Emotional Distress; and

(7) Assault.

The action was adjudicated in Federal Court, which has supplemental jurisdiction under 28 U.S.C. § 1367. As noted in the Findings of Facts above, the U.S. District Court for the District of Columbia, on September 30, 2015, denied Employee's Motion for Summary Judgment and granted the defendants' (Agency, et. al.) Motion for Summary Judgment in part and denied in part.[9]

In *Sun v. D.C. Government, et al*., the U.S. District Court for the District of Columbia ruled that Employee failed to prove discriminatory bias in the determination to terminate her, holding that her argument is illogical and unsupported by the evidence in the record. Thus, the Court granted summary judgment to defendants on the Title VII claim and the D.C. Human Rights Act claim, Intentional infliction of emotional distress, and the whistleblower claim. The Court also ruled that there was no breach of contract because Employee was terminated for cause. With regard to the wrongful termination claim, however, the Court wrongly held she was "at will." (The parties subsequently agreed that Employee was Career Service and therefore not an at-will employee.) Lastly, with regard to the assault claim, the Court ruled that it was for the jury to decide, not the Court. Subsequently, the jury in *Sun v. Shreve* threw out Employee's assault claim.[10]

On April 7, 2017, Employee filed a Petition for Appeal with OEA contesting Agency's final decision to remove her from her position as a Program Support Specialist, effective on February 21, 2012. Her stated grounds for appeal are 1) summary removal; 2) conflicts of interest of her superiors, Ms. Shreve and Dennis Taylor; 3) discrimination; 4) insufficient evidence; 5) EEOC complaint; 6) due process; 7) retaliation; and 8) preclusion from filing earlier.

Employee argues that *res judicata* and collateral estoppel do not apply in her case since the Federal Court had wrongly held that she was an at-will employee. She claims that she did not get a full and fair opportunity to litigate her claims, thus depriving her of due process. However, the record belies that assertion. I note that this argument is moot as the Federal Court had adjudicated all her claims on their merits and thus afforded her all the same procedural rights as any Career Service employee would have, even holding a jury trial for her assault claim. The parties in Employee's claims, Agency and Employee, are also the parties here. Thus, the doctrines of *res judicata* and collateral estoppel preclude her appeal.

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[9] *See Sun v. District of Columbia,* 133 F. Supp. 3d 155, l72 (D.D.C. 2015) (Agency Exhibit #15), *aff'd,* No. 16-7032 (D.C. Cir. Feb 14, 2017) (per curiam) (Agency Exhibit #12).

[10] Civ. Action No. 12-1919, 2016 WL 2840476 (D.D.C.)(March 15, 2016)

In addition, D.C. Code § 1-615.56(a) clearly and unequivocally precludes her appeal to this Office. D.C. Code § 1-615.56(a) states:

> The institution of a civil action pursuant to [D.C. Code] § 1-615.54 shall *preclude* an employee from pursuing any administrative remedy for the same cause of action from the Office of Employee Appeals ... (emphasis added).

In the instant matter, Employee has had all her claims adjudicated on their merits. Thus, her appeal must be dismissed.

ORDER

It is hereby ORDERED that Employee's Petition for Appeal is DISMISSED.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge