THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LINDA SUN,	)	OEA Matter No. 1601-0037-17R20
Employee	)	
	)	Date of Issuance: August 12, 2020
v.	)	
	)	JOSEPH E. LIM, ESQ.
OFFICE OF THE TENANT ADVOCATE,	)	Senior Administrative Judge
Agency	)	

Ryan Martini, Esq., Agency Representative
Linda Sun, Employee *pro se*

INITIAL DECISION ON REMAND[1]

PROCEDURAL HISTORY

On October 22, 2012, Employee filed a lawsuit against the Office of the Tenant Advocate ("OTA" or "Agency") and other parties in the United States District Court of the District of Columbia, alleging numerous claims ranging from Wrongful Termination in Violation of Public Policy to Assault.[2] On September 30, 2015, the United States District Court granted Defendants' Motion for Summary Judgment on all counts except the assault claim.[3] On March 15, 2016, following a jury trial, the U.S. District Court entered a Judgment on the Verdict for Defendant on the remaining assault claim.[4] Employee appealed the verdict on March 18, 2016.

On February 14, 2017, the U.S. Court of Appeals for the District of Columbia Circuit issued a Judgment affirming the U.S. 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.

On April 7, 2017, Linda Sun ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") contesting the OTA's 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. On June 6, 2017, I issued an order directing Employee to submit a brief addressing

[1] This decision was issued during the District of Columbia's Covid-19 State of Emergency.
[2] *Sun v. D.C. Government, et al*., Civ. Action No. 12-1919.
[3] *Sun v. D.C. Government, et al*., Civ. Action No. 12-1919, 133 F.Supp.3d 155 (2015).
[4] *Sun v. Shreve*, Civ. Action No. 12-1919, 2016 WL 2840476 (D.D.C.)(March 15, 2016).

whether her appeal should be dismissed for lack of jurisdiction due to her untimely appeal. Employee submitted her response, not just to the jurisdiction issue, but also to the substantive issues of her appeal. Upon consideration of the briefs, I held that OEA had jurisdiction over this appeal as Agency had failed to inform Employee about her appeal rights to OEA.

On October 13, 2017, I issued an Initial Decision ("ID") dismissing Employee's appeal on the basis of *res judicata*, collateral estoppel and D.C. Official Code § 1-615.56(a).[5] Employee appealed the ID, and on October 9, 2019, the Superior Court of the District of Columbia ("Superior Court") issued an Order granting in part the Petition for Review and remanding to OEA for further consideration of whether Agency violated 16 DCMR 1616.3(a). The Order made it clear that OEA should only address that issue. On January 27, 2020, in response to the parties' motions, the Superior Court denied the respondents' motion for reconsideration and petitioner's motion for sanctions and granted the request for clarification by stating that the regulation to be reviewed on remand is 16 DPM 1616.2 (2012) rather than 16 DCMR 1616.3(a).

After holding status conferences on February 10, 2020, and June 4, 2020, I determined that an Evidentiary Hearing was needed. I held an Evidentiary Hearing virtually on June 18, 2020 via Webex due to the Covid-19 operational status. During the hearing, Employee walked away during a short break and never responded to repeated calls to return to the hearing. I then continued the hearing, and Agency gave its closing argument. Immediately after the hearing, Employee emailed a copy of the opening argument that she read at the hearing and asked for another hearing, stating that she did not like the testimonies that the witnesses gave and that her hearing was poor. On June 29, 2020, eleven days after the hearing, she emailed her closing argument. The record is closed.

JURISDICTION

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

ISSUES

1. Whether Agency complied with 16B DCMR 1616.2 (2012) in its summary removal action against Employee.[6]

2. If so, whether Agency's penalty of removal should be upheld or overturned.

UNDISPUTED FACTS[7]

[5] D.C. Official Code § 1-615.56(a) states: "[t]he institution of a civil action pursuant to [D.C. Official 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)."

[6] The D.C. Superior Court acknowledged that 16 DCMR 1616.2 is more accurately cited as 16B DCMR 1616.2 as it specifically deals with summary actions. *Sun v. Office of the Tenant Advocate,* Civil Case No. 2071 CA 007451 (D.C. Super. Ct. January 27, 2020).

[7] Based on the parties' joint statement of facts, unrefuted representations, documents of record, and findings of fact from *Sun v. Office of the Tenant Advocate,* OEA Matter 1601-0037-17 (Oct. 13, 2017).

1. OTA is 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. OTA also provides legal representation for tenants in landlord-tenant dispute cases, conducts educational outreach on tenant rights and obligations, and provides emergency housing in the city.

2. Employee's job duties as a Program Support Specialist or Case Management Specialist involved meeting with tenants during Agency's intake process and determining if they needed legal assistance with one of Agency's attorney advisers. Although Employee was a law school graduate, she was not licensed as an attorney anywhere and was specifically told by Agency not to render any legal advice or services to tenants.

3. 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.

4. Employee's immediate supervisor was Dennis Taylor ("Taylor"), Agency's General Counsel, who 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.

5. Despite repeated instructions and warnings, Employee gave legal advice to one of Agency's clients to directly contravene a court approved settlement agreement. Employee also instructed this client to fire her Agency appointed attorney. Despite being told by Taylor not to do so, Employee used the designation of "JD" in her Agency email signature block, which confused Agency's tenant clients.

6. In January and February of 2011, Employee interfered in an Agency client's mediation at the D.C. Superior Court.

7. In February 2011, Employee called her supervisor Taylor "stupid" and informed the tenant client via email that she had called Taylor "stupid" in connection with the tenant's case.

8. Sometime in February 2012, Employee's leave was approved on the condition that any additional leave was denied due to Agency needs. In response, Employee sent several sarcastic emails concerning her request for additional leave to her supervisor and sent copies to the Agency Director and the Mayor.

9. 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.

10. 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.

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

12. On 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.

13. On November 28, 2012, Employee amended her Complaint to allege Wrongful Termination in Violation of Public Policy, Retaliation in Violation of the District of Columbia Whistleblower Protection Act, Discrimination in Violation of the District of Columbia Human Rights Act, Violation of Title VII of the Civil Rights Act of 1964, Breach of Contract, Intentional Infliction of Emotional Distress, and Assault.

14. On September 30, 2015, the United States District Court denied Employee's Motion for Summary Judgment and granted Defendants' Motion for Summary Judgment on all counts apart from the assault charge.[8]

15. On March 15, 2016, following a jury trial, the U.S. District Court entered a Judgment on the Verdict for Defendant on the Assault Complaint.[9]

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[8] *Sun v. D.C. Government, et al*., Civ. Action No. 12-1919, 133 F.Supp.3d 155 (2015).
[9] *Sun v. Shreve*, Civ. Action No. 12-1919, 2016 WL 2840476 (D.D.C.) (March 15, 2016).

16. After Employee appealed, 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.

17. 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."

18. 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.

19. I held that OEA had jurisdiction over this appeal as Agency had failed to inform Employee about her appeal rights to OEA. On October 13, 2017, I issued an Initial Decision ("ID") dismissing Employee's appeal on the basis of *res judicata*, collateral estoppel and D.C. Official Code § 1-615.56(a).

SUMMARY OF EVIDENCE[10]

1. Johanna Shreve ("Shreve") (Transcript pgs. 25-75)

Shreve, Chief Tenant Advocate at OTA, testified that as Agency head, she determined Employee had to be summarily removed. Shreve explained that when she learned about Employee's repeated defiance of her supervisor's orders regarding the unauthorized practice of law and publicized disrespectful language toward her supervisor, she issued the February 21, 2012, Summary Removal Directive to Employee.[11] She explained that summary removal was necessary as she believed Employee's consistent insubordination jeopardized the integrity of Agency's mission and harmed the tenant community that Agency served.

Shreve testified that in 2007, she had admonished Employee for sending emails to then D.C. Mayor Adrian Fenty regarding Employee's complaints about Agency. She informed Employee about the proper channels to use and instructed her to follow the D.C. Employee's Manual. When Employee repeated this offense in 2008, Shreve again brought her to her office and warned her that such continued insubordination would lead to termination. Employee told her that Mayor Fenty is her personal friend since she receives Christmas postcards from him. Thus, when Employee sent emails to the Mayor in 2012 regarding her leave, Shreve determined that Employee's repeated transgressions was inimical to Agency's mission.

[10] Obtained from the witnesses' testimony, exhibits, and supplemented by the parties' joint stipulation of facts and other undisputed written submissions.
[11] Agency Exhibit 1.

Shreve testified that Employee's actions were detrimental to public health, safety, and welfare because Employee's unauthorized interference with tenants and giving them harmful legal advice exposed them to legal penalties. She explained that the tenant population that they serve are often very vulnerable due to their low income and lack of English proficiency. In her February 24, 2012, Summary Removal Notice to Employee, Shreve listed the charges of malfeasance, insubordination, misfeasance, and any on-duty or employment related act or omission that an employee knew or should reasonably have known is a violation of law and their specifications.[12] The notice also informed Employee of her right to present a written defense to the hearing officer who will review the matter.

Shreve also explained why she denied part of Employee's leave application by stating that Employee did not have enough leave balance and that Employee's emails regarding her leave application were disrespectful and insulting towards her supervisor, Dennis Taylor.[13] She also cited the fact that Employee sent these emails to her and the Mayor. Shreve elaborated on each of the charges and specifications against Employee and explained why Employee's persistent unprofessional conduct constituted a threat to the integrity of Agency's operations and was detrimental to the public welfare.

2. Dennis Taylor ("Taylor") (Transcript pgs. 76-98)

Supervisory Attorney-Advisor Taylor was Employee's supervisor during the relevant time period. He testified that he drafted the February 24, 2012, Summary Removal Notice that Shreve signed.[14] Taylor stated that the charges and specifications in the notice stemmed from his direct dealings and observations of Employee. He elaborated on Employee's demanding tone in asking for leave and Employee's continued defiance of Agency's orders for Employee to stop giving erroneous legal advice to a tenant client. Employee had succeeded in agitating the tenant to violate a judicial order, thereby exposing the tenant to a contempt of court order.

Taylor testified that after conferring with him regarding Employee's actions, it was Shreve who determined that a summary removal of Employee was warranted. In drafting the summary removal notices, he consulted the D.C. Department of Human Resources. The notice advised Employee of the charges and specifications against her in detail and listed the procedures she had to defend herself.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Whether Agency complied with 16B DCMR 1616.2 (2012) in its summary removal action against Employee.

This Office's Rules and Regulations provide that an agency's action must be supported by a preponderance of the evidence, which is defined as "that degree of relevant evidence which a

[12] Agency Exhibit 2.
[13] Agency Exhibit 3.
[14] Agency Exhibit 2.

reasonable mind, considering the matter as a whole, would accept as sufficient to find a contested fact more probably true than untrue."[15] Unlike a regular adverse action which involves a proposed adverse action before such action is effectuated in a final decision, a summary removal is a more immediate and drastic form of adverse action. It is not to be used lightly and is reserved only for instances when certain conditions are met.

16B DCMR 1616.2 states that: "An employee may be suspended or removed summarily when his or her conduct:

(a) Threatens the integrity of District government operations;

(b) Constitutes an immediate hazard to the agency, to other District employees, or to the employee; or

(c) Is detrimental to the public health, safety, or welfare.

Based on the testimonies and documents presented at the hearing, I find that Employee's continued and defiant flouting of her superiors' orders led to harming the interests of Agency's tenant clients. I also find that Employee's insolent and disrespectful behavior towards her supervisors disrupted interpersonal relations at OTA and hindered Agency's mission. Employee's actions threaten the integrity of Agency operations and is detrimental to public welfare. I therefore conclude that Agency complied with 16B DCMR 1616.2 (2012) when it summarily removed Employee.

<u>If so, whether Agency's penalty of removal should be upheld or overturned.</u>

The evidence shows that before taking the summary removal action against Employee, Agency head Chief Tenant Advocate Johanna Shreve made a good faith effort to determine that at least one of the conditions described in 16B DCMR 1616.1 was met, and that Agency had good causes for Employee's summary removal. I find that Agency met its burden of proving Employee's insubordination, misfeasance, and malfeasance as defined by 16B DCMR 1603 (2012) and therefore, Agency had good cause for summary removal. I also find that, based on the evidence presented at the hearing and the undisputed facts on the record, Agency followed the requirements of 16B DCMR 1616.1. I therefore conclude that Agency's summary removal of Employee should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

Agency's action of summarily removing Employee is UPHELD.

FOR THE OFFICE: Joseph E. Lim, Esq.
Senior Administrative Judge