ROBIN E. BELLINGER, .

.

Grievant, .

.

v. . DOCKET NO. 95-DPS-119

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WEST VIRGINIA DEPARTMENT OF .

PUBLIC SAFETY, MOUNTAINEER .

CHALLENGE ACADEMY, .

.

Respondent. .

D E C I S I O N

This is a grievance by Robin E. Bellinger (Grievant), submitted directly to Level IV in accordance with W. Va. Code § 29-6A-4(e), challenging her dismissal from employment with the Mountaineer Challenge Academy (MCA) on March 8, 1995. Evidentiary hearings in this matter were conducted at this Board's office in Elkins, West Virginia, and at MCA near Kingwood, West Virginia, on April 5, 1995, and May 11, 1995, respectively. This case became mature for decision on July 10, 1995, upon timely receipt of post-hearing arguments from both parties.

Grievant was employed at MCA as an Assistant Squad Leader (Youth Service Worker I). By letter dated February 22, 1995, MCA's Director, Hugh P. Dopson, notified Grievant of his decision to dismiss her from employment, effective March 8, 1995. The lettersets forth the primary basis for this dismissal as repeated instances where Grievant was found sleeping on duty, particularly January 9, 13, 20, and 24, 1995. See J Ex 1.

MCA noted in the dismissal notice that Grievant was "serving at the will and pleasure of the Director as an at-will employee." J Ex 1. Although W. Va. Code § 29-6A-6 places the burden of proof on the employer in disciplinary matters (Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992)), an at-will employee is subject to dismissal for any reason which does not

contravene some substantial public policy principle. Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994). In her post-hearing submission, Grievant acknowledges that she was a "classified-exempt" employee. (Grievant's Closing Argument at 10.) (See footnote 1) Classified-exempt employees are not covered under the civil service system, thereby serving in an at-will employment status. See W. Va. Code § 29-6-2(g); Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992).

Even at-will employees, such as Grievant, are not completely at the mercy of their employer. In this regard, the West Virginia Supreme Court of Appeals has declared:

> The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.

Syllabus, Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978). Subsequently, in Birthisel v. Tri-Cities Health Services, 188 W. Va. 371, 424 S.E.2d 606 (1992), the Court identified sources of public policy as follows:

> To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions. Inherent in the term "substantial public policy" is the concept that the policy will provide specific guidance to a reasonable person.

Birthisel at 377, (footnotes omitted).

Courts have recognized such conduct as submitting a claim for back wages under the Veterans Reemployment Rights Act (Mace v. Charleston Area Medical Ctr. Found., 188 W. Va. 57, 422 S.E.2d 624 (1992)), refusing to conceal alleged environmental violations committed by the employer (Bell v. Ashland Petroleum, Inc., 812 F. Supp. 639 (S.D. W. Va. 1993)), filing a workers' compensation claim (Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980)), and attempting to enforce warranty rights granted under the West Virginia Consumer Protection and Credit Act (Reed v. Sears, Roebuck & Co., 188 W. Va. 747, 426 S.E.2d 539 (1992)), as involving substantial public

policy interests. Moreover, this Grievance Board has recognized that reporting alleged violations of the West Virginia Governmental Ethics Act warrants application ofa Harless-type analysis to dismissal of an at-will state employee. Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Here, Grievant is alleging that her termination resulted from unlawful discrimination on the basis of her sex in that male employees at MCA who committed substantially identical offenses were treated more leniently. State employees are specifically protected from "discrimination," defined as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d) (1988). Moreover, employers are prohibited from discriminating in terms and conditions of employment because of sex under the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1, et seq. In addition, sex-based employment discrimination is prohibited under Title VII of the federal Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e. Accordingly, the undersigned finds that Grievant's specific allegations of sex-based discrimination raise an issue of substantial public policy which, if true, would prohibit her termination, notwithstanding her at-will employment status. See Lilly v. Overnight Transp. Co., 188 W. Va. 538, 425 S.E.2d 214 (1992); Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). Guevera v. K-Mart Corporation, 629 F. Supp. 1189 (S.D.W. Va. 1986), which found no Harless-type cause of action for national origin discrimination, is distinguished in that Grievant's claim of discrimination underW. Va. Code § 29-6A-2(d) is directed to the same forum in which she is seeking a remedy. See generally, Vest v. Bd. of Educ., 455 S.E.2d 781 (W. Va. 1995); Price v. Boone County Ambulance Auth., 175 W. Va. 676, 337 S.E.2d 913 (1985). Likewise, Wilhelm v. Department of Tax & Revenue, Docket No. 94-L-038 (Sept. 30, 1994), is distinguished in that Grievant here specifically identified at least one similarly-employed male who committed the same offense without being terminated.

An at-will employee seeking to establish that her termination was motivated by unlawful discrimination must first establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), by demonstrating the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the

other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

See Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992). See also Graley, supra. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the termination. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Graley, supra.

MCA is operated by the National Guard Bureau under a federal "pilot" program established to motivate high school dropouts, ages16 to 18, to complete a vocational or academic education. While MCA has a capacity of up to 120 "at-risk" youth, all of whom are volunteers, there are usually from 50 to 80 participants in each 22-week class. Graduates of the program receive a $2,200 stipend to further their educational goals. MCA employs two types of personnel: administrative support and "cadre." The latter serve in a quasi-military environment and deal directly with the students (or "cadets" as they are called at MCA). The employer contends it is important that cadre personnel serve as appropriate "role models" for these young people.

MCA established through the credible testimony of Platoon Commander Daniel Duggan that, on December 30, 1994, he verbally advised Grievant concerning the duties she would be performing upon moving to the 10:00 p.m. to 6:00 a.m. "midnight shift." In particular, Mr. Duggan advised Grievant that a female Squad Leader was required to deal with female cadets in the barracks at MCA, because male employees were wary of entering the barracks during sleeping hours due to privacy concerns. He advised Grievant of a female cadet's suicide threat, a suspected homosexual relationship involving female cadets, and episodes where female cadets would climb out the barracks windows and leave the area to smoke cigarettes, illustrating typical problems requiring adult supervision by a female staff member. (See footnote 2) Mr. Duggan emphasized to Grievantthe importance of staying awake while on duty during the midnight shift, noting that all staff members were aware that another employee, Jeffrey Tranum, had recently been fired by MCA for sleeping on duty. He made similar comments to Richard Bond and Michael Barlow, the other MCA staff members assigned to the midnight shift.

Mr. Duggan also testified that Grievant had been experiencing conflicts with her prior supervisor, Daniel Hauger, and having problems reporting to work on time, factors which influenced his decision to reassign her to the midnight shift. He recalled that Grievant indicated agreement with moving to the midnight shift.

Allen Moran, a Senior Squad Leader at MCA, testified that he observed Grievant lying on the couch in the barracks lounge at approximately 5:30 a.m. on two occasions during the week of January 9 through 13, 1995. On each occasion, he walked up to her and looked directly into her face, noting that she was asleep. Mr. Moran recalled that the first occasion was on January 9, 1995, but he was not sure of the date of the second incident. On January 9, after observing Grievant, he went upstairs and reported to Mr. Bond and Mr. Barlow that Grievant was asleep. The three of them came back downstairs and Mr. Bond woke Grievant.

Richard Bond, an Assistant Squad Leader at MCA, testified that he observed Grievant sleeping on duty on 5 to 10 occasions, up toand including, January 24, 1995. On January 24, 1995, Mr. Bond made his first written report regarding Grievant's sleeping on duty. On cross-examination, Mr. Bond denied under oath that he had slept on duty or that he had been observed sleeping on duty by anyone during the same general time frame. At the time Mr. Bond made these denials, the undersigned observed his demeanor to indicate visible discomfort with these questions. MCA's Director, Hugh Dopson, testified that, during a recess, Mr. Bond reported to him that he had not told the truth on the witness stand, but had been sleeping on duty on one occasion.

Michael Barlow, another Assistant Squad Leader at MCA, testified that he was working on the midnight shift with Grievant and Mr. Bond in January 1995. He testified that he personally observed Grievant sleeping on duty "more than a few" times. Mr. Barlow further explained that Mr. Bond had told Grievant at one time that they would "cover" for her if she would let them know when she needed to sleep. However, Grievant never complied with this request.

Mr. Barlow recalled being questioned by the Platoon Commanders regarding a blanket found in the lounge. He told them he had not seen anyone sleeping. However, Mr. Barlow had seen Grievant sleeping under the same blanket on the couch in the lounge. Grievant likewise did not admit to the Platoon Commanders that she had been sleeping. It was at this time that Mr. Duggan made it clear in Grievant's presence that there would be no sleeping on the midnight shift.

Mr. Barlow recalled a subsequent occasion when a security guard from Camp Dawson came into

the building and found Grievant sleeping before he could get downstairs to respond to the Security Guard's knock. At that time, Mr. Barlow told Grievant that she could be fired if the guard reported the incident to his superiors. He recalled Grievant's response as: "Oh, well, they'll just have to fire me." Mr. Barlow testified that there were several occasions after Mr. Duggan's admonishment when Grievant was sleeping on duty. According to Michael Racco, a Platoon Commander at MCA, he spoke with the entire night shift crew, including Grievant, during the week of January 18, 1995, emphasizing that there was to be no sleeping on duty. This occurred following Mr. Moran's report of one incident where Grievant had been sleeping on duty, and Mr. Dopson having showed him a blanket found on a couch in the barracks lounge.

Ruben Pena, MCA's Commandant of Cadets, testified that the Standard Operating Procedure (SOP) for cadre members at MCA contains a specific provision prohibiting sleeping on duty. Indeed, the SOP notes that violation of the rule may result in termination of employment. Mr. Pena noted that this particular provision was added to the SOP immediately after Mr. Tranum was terminated for sleeping on duty, sometime around October 1994. Mr. Moran also stated that he was familiar with MCA's written policy prohibiting staff members from sleeping on duty and that all cadre members were instructed to read MCA's written policies.

Mr. Pena conducted an investigation of the allegations that Grievant had been sleeping on duty. After he advised Grievant that he was conducting an inquiry into charges of sleeping on duty and the potential consequences, Grievant admitted that she had slept on duty on one occasion. Grievant blamed anxiety over various medical problems, including tests for possible cancer, for her inability to sleep during her off-duty hours.

Mr. Moran also testified that two staff members, Mr. Hauger and Mr. Serdich, were caught sleeping on duty on one prior occasion and each received suspensions for their offenses. These events occurred approximately one year to eighteen months prior to Grievant's offenses. Mr. Hauger testified that approximately one year after he was caught and punished for sleeping on duty, he was promoted to Senior Squad Leader.

MCA Director Hugh Dopson testified that Mr. Tranum's termination for sleeping on duty in the November 1994 time frame was intended to send a clear message to cadre personnel that sleeping on duty would not be tolerated. He indicated that Mr. Hauger and Mr. Serdich were suspended for sleeping on duty at an earlier point in time, rather than terminated, because the rules had not been

clearly established by management and communicated to employees at that time. Mr. Dopson testified that he was not aware that Mr. Bond had been sleeping on duty prior to his admission on April 5, 1995. Similarly, although Mr. Barlow testified that he observed Mr. Bond sleeping on duty on one occasion, there was no evidencethat he ever reported this incident to Mr. Dopson or any other supervisor above Mr. Bond.

Mr. Dopson further testified that two female personnel were hired as Assistant Squad Leaders at MCA at about the same time as Grievant. Both of those individuals are still employed at MCA.

Consistent with her right under W. Va. Code § 29-6A-6, Grievant did not testify at the Level IV hearing. Grievant objected to consideration of a written statement she had given to Mr. Dopson (R Ex 4) on the basis that it was obtained by "coercion" in violation of her W. Va. Code § 29-6A-6 right not to testify against herself. (See footnote 3) This issue need not be addressed as this statement related only to the allegation that Grievant was asleep on duty on January 24, 1995. Even without this written admission, there is ample credible evidence that Grievant was sleeping on that date, as alleged in the termination notice (J Ex 1).

In evaluating the remaining evidence of record, the undersigned finds that the testimony of MCA's witnesses and their prior written statements were substantially consistent. Moreover, their demeanor and responses under cross-examination revealed no particular animosity toward Grievant, so as to cause them to fabricate or embellish their statements. Accordingly, the undersigned finds that the Employer proved that Grievant was sleeping on duty on January 9, 13 and 24, 1995. There was nowitness who specifically recalled finding Grievant asleep on January 20, 1995.

Consistent with the legal analysis set forth earlier in this decision, the undersigned administrative law judge concludes that Grievant has established a prima facie case of discrimination under W. Va. Code § 29-6A-2(d) in that she was treated differently than certain male personnel at MCA who were similarly situated by being employed as Assistant Squad Leaders and found sleeping on duty. See Parsons, supra. There was evidence that the two male employees received one-week suspensions for similar misconduct. Accordingly, the burden shifts to MCA to prove that there were legitimate, job-related reasons for the differences in treatment. See Graley, supra.

The consistent testimony of Mr. Dopson, Mr. Pena and Mr. Duggan indicated that the two male employees who were suspended were given the benefit of the doubt because, at the time of their offenses, MCA had not yet established a clear policy regarding sleeping on duty, nor had cadre

personnel been clearly advised of their employer's expectations in regard to sleeping on duty. Moreover, the fact that another male employee, Mr. Tranum, was terminated for a single offense of sleeping on duty, provides a sufficient basis to overcome Grievant's prima facie case.

On August 11, 1995, Grievant submitted a "Request to Reopen Hearing," alleging the following:

> Subsequent to the submission of closing arguments in the above referenced matter, information was developed that another individual, male gender, was admittedly sleeping on duty. This fact was made known to Mr. HughDobson (sic), Director, Mountaineer Challenge Academy, and an investigation was allegedly conducted and the individual was given only a reprimand. Additional information was developed concerning the possibility of supervisory personnel coaching witnesses on their testimony after being admonished not to discuss their testimony with anyone. Based on the above facts and circumstances, request that this matter be re-opened so that sworn testimony from the individuals concerned may be obtained.

In regard to the allegation that another male individual was sleeping on duty and given a reprimand, the Grievant does not claim that such individual slept on duty on multiple occasions, despite specific warnings of the consequences of such conduct. Thus, the incident described in the Grievant's Request to Reopen Hearing is readily distinguishable from the facts and circumstances surrounding Grievant's termination. Inasmuch as the record in this matter consists of the uncontradicted testimony of Respondent's witnesses, and no significant credibility determinations were required in arriving at the essential facts necessary for resolution of this grievance, an inquiry into Grievant's claim that certain witnesses may have been "coached" after their initial appearance on the witness stand does not appear warranted. Accordingly, Grievant's Request to Reopen Hearing is hereby **DENIED**.

The Respondent established that Grievant was sleeping on duty on at least three occasions, despite repeated warnings from both her supervisors and her peers regarding the consequences of such conduct. Thus, MCA demonstrated sufficient cause to terminate Grievant's at-will employment.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are made in this matter.

FINDINGS OF FACT

1. Grievant had been employed by the Mountaineer Challenge Academy (MCA) since August 1993.

2. Positions such as that held by Grievant in the uniformed "cadre" of MCA personnel are classified-exempt as defined by W. Va. Code § 29-6-2(g).

3. In October or November 1994, MCA included a strict rule against cadre personnel sleeping on duty in its written Standard Operating Procedures.

4. Sometime around October 1994, Jeffrey Tranum, a male employed as part of MCA's cadre, was terminated after being found sleeping on duty on one occasion.

5. Two male cadre members found sleeping on duty approximately one year earlier than Mr. Tranum, Mr. Hauger and Mr. Serdich, were suspended without pay for one week.

6. Grievant was sleeping while on duty at MCA on January 9, 13, and 24, 1995.

CONCLUSIONS OF LAW

1. Classified-exempt employees are not covered under the civil service system, thereby serving in an at-will employment status. See W. Va. Code § 29-6-2(g); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992).

2. An at-will employee is subject to dismissal for any reason which does not contravene some substantial public policy principle. Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June16, 1994); Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

3. The prohibition against "discrimination" set forth in W. Va. Code § 29-6A-2(d) does not necessarily limit or restrict the right of a public employer to decide which at-will employee it wishes to dismiss. In other words, a discharged state employee cannot challenge her dismissal on the basis of discrimination under the grievance procedure, unless that discrimination rises to the level of a "substantial contravention of public policy." Wilhelm v. Dept. of Tax & Revenue, Docket No. 94-L-038 (Sept. 30, 1994).

4. Where a Grievant sets forth a specific allegation of sex-based discrimination which, if true, would violate the state Human Rights Act, W. Va. Code §§ 5-11-1, et seq., and Title VII of the federal Civil Rights Act, 42 U.S.C. § 2000e, as well as the discrimination provision of the grievance procedure, W. Va. Code § 29-6A-2(d), such Grievant has articulated a substantial public policy interest, and is entitled to a hearing on the question of the employer's actual motivation in terminating his or her employment. See Birthisel v. Tri-Cities Health Serv., 188 W. Va. 371, 424 S.E.2d 606 (1992); Graley v. W. Va. Parkways Economic Development & Tourism Auth., Docket No. 91-PEDTA-

225 (Dec. 23, 1991).

5. A terminated at-will employee must establish by a preponderance of the evidence that the employer's controlling motivation in his or her termination was a factor protected by a substantial public policy. See Graley, supra.

6. A grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), must demonstrate the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992).

7. An employer may rebut a grievant's prima facie case by demonstrating that a legitimate, non-discriminatory reason was the controlling motivation in the termination decision. See Frank's Shoe Store v. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Graley, supra.

8. Although Grievant made a prima facie case of sex-based discrimination in regard to her termination from employment by MCA, the Respondent established legitimate non-discriminatory reasons for her termination by demonstrating that a policy against sleeping on duty was being strictly enforced at the time of her termination and was similarly applied in the termination of a male employee who slept on duty on one occasion in late 1994. See Frank's Shoe Store, supra.

9. In demonstrating that Grievant was sleeping on duty in violation of MCA's established policy on January 9, 13 and 24,1995, MCA established a sufficient basis for terminating her at-will employment. See Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the "circuit court of the county in which the grievance

occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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LEWIS G. BREWER

Administrative Law Judge

Dated: August 15, 1995

Footnote: 1A Personnel Action form (WV-11), dated August 13, 1993, in Grievant's personnel file (G Ex 6) also indicates that Grievant was employed in a classified-exempt capacity.

Footnote: 2This testimony essentially established that being female was a bona fide occupational qualification (BFOQ) for at least one staff member on the midnight shift. See 42 U.S.C. § 2000e-2(e); Dothard v. Rawlinson, 433 U.S. 321 (1977); Gibson v. W. Va. Dept.of Health & Human Resources, 452 S.E.2d 463 (W. Va. 1994); Higginbotham v. Putnam County Bd. of Educ., Docket No. 40-88-069 (Feb. 27, 1989).

Footnote: 3"No employee shall be compelled to testify against himself or herself in a grievance involving disciplinary action." W. Va. Code § 29-6A-6.