**PEGGY PRINCE,**

**Grievant,**

**v.** **DOCKET NO. 97-BOT-276**

**BOARD OF TRUSTEES/**
**WEST VIRGINIA UNIVERSITY,**

**Respondent.**

## DECISION

Grievant, Peggy Prince, initiated this proceeding pursuant to the provisions of W.Va. Code §§ 18-29-1, et seq., alleging that she was improperly terminated from her employment with West Virginia University ("WVU"). She seeks reinstatement with back pay and benefits.

This grievance was initially filed with Grievant's immediate supervisor on September 23, 1994, which was denied by letter dated October 13, 1994. Grievant appealed to level two on October 20, 1994. After this matter was held in abeyance by agreement of the parties for an extensive period of time, a level two hearing was conducted on May 21, 1997. The level two evaluator denied the grievance in a written decision dated May 23, 1997. Pursuant to the provisions of W. Va. Code § 18-29-4(c), consideration at level three was waived, and appeal to level four was made on June 6, 1997. A level four hearing was held on August 5, 1997, in the Grievance Board's office in Morgantown, West Virginia. This matter became mature for decision on September 4, 1997, upon receipt of the parties' written proposed findings of fact and conclusions of law.

The following findings of fact are made from a preponderance of the credible evidence of record.

## Findings of Fact

1. Grievant was an employee of WVU from April of 1979 until her termination on September 12, 1994.

2. The position held by Grievant at the time of her termination was Patient Escort at West Virginia University Hospital ("WVUH"), which she performed with no physical or disciplinary difficulties

from 1987 until 1993.

3. The Patient Escort position requires the employee to transport hospital patients, via wheelchairs or gurneys, to and from various areas within the hospital and adjacent offices for testing and other procedures. The position requires constant walking, standing, stair climbing, pushing, pulling, and lifting.

4. Throughout her adult life, Grievant has suffered from the medical conditions of peripheral insufficiency and varicose veins, which cause difficulties with blood flow to her legs. She underwent corrective surgery for her condition in April of 1993, which was performed by Dr. McDowell, a vascular surgeon.

5. Grievant returned to work approximately two weeks after the surgery. However, when she performed her duties as a Patient Escort, her legs would swell, causing bleeding and drainage from the surgical incisions. Because of these continued problems, Grievant intermittently missed work between May and October of 1993. Both Grievant and her employer were concerned that either Grievant or a WVUH patient might obtain an infection due to Grievant's bleeding condition.

6. During the time period between May and October of 1993, Dr. McDowell advised Grievant that she may no longer be able to perform the duties of a Patient Escort because of her medical condition, and he recommended that she look for another position. 7. Grievant began seeing Dr. Ghosal for treatment at some point in late 1993, because her condition did not improve with Dr. McDowell's treatment. When Grievant's condition had not improved, she consulted her supervisor, Sharon Savage, who advised Grievant to obtain a medical verification from a physician regarding her condition and prognosis. Dr. Ghosal completed a medical verification form dated November 29, 1993, stating that Grievant could not stand, sit or walk for long periods of time. He indicated her condition was temporary, but he did not know for what time period. He stated her prognosis was fair and that she should continue observation and evaluation by a vascular surgeon. (See footnote 1)

8. Grievant requested and was granted an extended medical leave of absence from October 16, 1993, through April 30, 1994, during which time she remained on WVU's payroll through usage of sick leave from the catastrophic leave bank. She had exhausted all of her own sick and annual leave time.

9. While Grievant was on catastrophic leave, WVU engaged Thomas Serpento, an occupational specialist, to investigate and determine whether Grievant could ever return to her

position as a Patient Escort, in light of her medical condition. A medical release was obtained from Grievant for this purpose, and she identified her treating physicians as Dr. McDowell and Dr. Jyoti Patel, who took over Dr. Ghosal's practice after his demise. Mr. Serpento designed a questionnaire for these physicians regarding Grievant's functioning abilities, after consultation with Ms. Savage regarding the requirements of Grievant's job.

10. In response to Mr. Serpento's inquiry, Dr. Patel, who only saw Grievant once, onFebruary 1, 1994, indicated that Grievant was moderately impaired in her abilities to walk, stand, crouch and climb stairs. She recommended that Grievant elevate both feet for twenty minutes every two hours, but deferred to a vascular surgeon regarding Grievant's prognosis and ability to work.

11. Dr. McDowell responded to Mr. Serpento's inquiries in a report dated January 3, 1994. He opined that Grievant's vascular condition was chronic and permanent, with incapacitating obesity causing venous hypertension in both legs with continued expected episodes of bleeding from her varicose veins. He believed her to be moderately severely to severely impaired with regard to the functions of walking for sustained periods of time (two hours and over), climbing stairs, standing, pushing, pulling, and in equilibrium-footing capabilities.

12. Based upon the reports provided by Drs. McDowell and Patel, Mr. Serpento determined that Grievant was no longer able to perform the essential duties of her job as a Patient Escort. In his report, dated February 21, 1994, he further noted that, although Dr. Patel's comments were considered, he chiefly relied upon the opinions of Dr. McDowell, due to the relevancy of his medical specialty to Grievant's condition. Grievant was informed of this determination that she could not perform the essential duties of a Patient Escort.

13. Beginning in early 1994, WVU considered Grievant for placement in other positions. In addition, WVUH, although a separate entity and not Grievant's employer, also cooperated in WVU's effort to place Grievant in alternative employment, commensurate with her abilities and physical limitations. Respondent tested Grievant's clerical skills in April of 1994, and she performed poorly on those tests, precluding many sedentary office positions.

14. WVU placed Grievant on “special monitoring” for job placement from May 1, 1994, through August 31, 1994. During this time period, she was on an unpaid medical leave of absence. 15. After numerous attempts to find other positions for which Grievant was qualified and physically able to perform, Respondent could not place Grievant in any other position at WVU or

WVUH.

16. On September 12, 1994, Grievant was terminated from her employment.

17. At no time prior to her termination did Grievant provide any medical or other information to indicate that she could perform her previous job or any other position at WVU.

**Discussion**

In grievances involving discharge actions, the burden of proof is on the employer. W. Va. Code § 18-29-6. Respondent contends that Grievant was physically unable to perform her job duties because of her medical condition, and that it made every possible effort to avoid discharging her from employment. After many months, when no other position could be found in which Grievant could be placed, there was no alternative but to terminate her. Respondent argues that it fully complied with all applicable WVU policies in this case.

One preliminary matter which must be addressed is Respondent's contention at level four that the doctrine of laches prohibits Grievant from obtaining any relief in this grievance. Respondent contends that Grievant prejudicially delayed pursuit of her grievance at level two, resulting in a delay of two and one-half years, during which time evidence was lost and memories faded. However, it was clearly stated several times by Respondent's representative at level two that the grievance was indefinitely continued by agreement of the parties, not because of Grievant's unilateral action. L II T. at 4, 5. Furthermore, when asked by the level two grievance evaluator if timeliness was an issue, Respondent's representative stated there was no question that the grievance was timely. Id. at 5. The level two evaluator found that the grievance was timely at level two and that jurisdiction wasproper. L II Grievance Evaluator's Report at 2. Accordingly, Respondent is prohibited from now asserting that any delay at the lower level was prejudicial or that Grievant should be prevented from now pursuing her claim. Respondent's laches claim is denied.

Grievant contends that her termination violated provisions of both the federal Americans with Disabilities Act ("ADA") and WVU's Affirmative Action Plan for Disabled Employees. With regard to both provisions, Grievant claims that she, as a qualified disabled employee, was entitled to "reasonable accommodation" for her impairments so that she could continue working. Specifically, she believes that Dr. Patel's recommendation that she elevate her legs for twenty minutes after every two hours of activity would have been such an accommodation, which she contends would have

allowed her to continue to perform as a Patient Escort.

Respondent does not dispute that its Affirmative Action Plan provides for reasonable accommodations to be made to disabled employees and contends that an effort was, indeed, made to accommodate Grievant's limitations. The applicable provision merely states that “to the extent possible, [WVU] will eliminate any reasonable physical or other barriers that prevent or impede employment or advancement.” L II, Ex. U-5. Ms. Savage, a nurse and Grievant's immediate supervisor, testified that Dr. Patel's suggestion was simply not feasible, because Patient Escorts are constantly “on the move” and have erratic schedules, precluding any guarantee that Grievant could elevate her legs as needed. Moreover, and much more importantly, WVU justifiably placed much greater importance on the opinions of Dr. McDowell, who had performed Grievant's surgery, treated her for many months following, and was a vascular specialist. Dr. McDowell made it undeniably clear, as Grievant herself testified, that she should obtain some other type of employment. He opined that her condition was chronic and her impairments severe regarding many of the activities requiredof her job. In his response to Mr. Serpento's questionnaire, Dr. McDowell stated that Grievant's ability to engage in walking and/or standing, even for a limited period of two hours, was severely impaired. Accordingly, it was reasonable for Respondent to conclude that accommodations could not be made in the position of Patient Escort, a very physical job, for Grievant's condition.

The ADA, which also requires reasonable accommodation for disabled employees, has been held to have been appropriately followed in numerous instances in which the employee was terminated due to the inability to perform the essential functions of his or her position. If the employee has not positively demonstrated an ability to perform the job, the discharge is proper, even in cases where the employee has been excessively absent because of a medical condition. Kuehl v. Wal-Mart Stores, Inc., 904 F. Supp. 794 (C. Colo. 1995); Cehrs v. North East Ohio Alzheimer Research Center, 9 NDLR 251 (N.D. Ohio 1997); Tyndall v. National Education Centers, 31 F.3d 209 (4th Cir. 1994). Similar to the instant case, the Fourth Circuit has determined that an employer is not required to give an employee an indefinite time to recover from a disability which prevents her from performing her duties. Myers v. Hose, 50 F.3d 278 (4th Cir. 1995).

As Respondent has noted throughout this proceeding, Grievant has not made any attempt to prove that Dr. McDowell's opinions regarding her limitations were incorrect. She was informed in early 1994, several months prior to her termination, that the medical evidence indicated that she

could not perform her duties. She did not contest that determination in any respect until after her termination. Respondent has proven by a preponderance of the evidence that it complied with its affirmative action policy in discharging Grievant. When all indications demonstrated that Grievant could not work as a Patient Escort, Respondent spent numerous months and extensive effort attempting to place Grievant into another position, which also complied with its internal policiesregarding impaired employees.

Grievant has not alleged that any other WVU policy or state statute or regulation has been violated. Her remaining claims are based upon the federal ADA and the West Virginia Human Rights Act. It has been previously held that this Grievance Board does not have jurisdiction to determine whether the ADA or the Human Rights Act have been violated, based upon our Supreme Court's holding in Vest v. Bd. of Educ. of County of Nicholas, 453 S.E.2d 781 (W. Va. 1995). Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept. 25, 1995). In Vest, the Court determined that the Grievance Board's jurisdiction in discrimination-based claims extends only to “discrimination” as it is defined by the Board's authorizing legislation, in W. Va. Code § 18-29-2. Vest, 453 S.E.2d at 784. It was most recently affirmed that the Grievance Board does not have jurisdiction over handicap-based discrimination claims under Vest in Curry v. W. Va. Dept. of Trans., Docket No. 95-DOH-579 (Aug. 6, 1996), which was upheld specifically on that point by the Harrison County Circuit Court on July 22, 1997. Accordingly, Grievant's ADA claim must be denied on jurisdictional grounds.

However, even if this Board did have authority to determine whether the ADA had been violated in this case, Grievant's claims would fail. First, Grievant does not meet the definition of a “disabled” individual under the federal law. The portion of the ADA which defines “disability” provides that it is a “physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 29 C.F.R. 1630.2. Grievant cannot meet this definition, as is obvious from the following portion of the Administrative Law Judge's reasoning in Bowman v. W. Va. Educational Broadcasting Authority, Docket No. 96-EBA-464 (Jul. 3, 1997):

> In order to prove one is substantially limited in the major life activity of working,[grievant] must prove that she is significantly restricted in ability to perform either a class of jobs, or a broad range of jobs in various classes as compared to the average person with comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Bowman at 6 (citations omitted). Furthermore, it is the employee's burden to prove that her medical conditions rise to the level of a disability, not the employer's. Myers v. W. Va. Dept. of Trans., Docket No. 96-DMV-304 (Feb. 10, 1997); Lewis v. Mason County Bd. of Educ., Docket No. 94-26- 175 (Dec. 12, 1994); Howell v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-484 (Sept. 27, 1991). Not only has Grievant not proven that she meets the definition of “disabled,” she argued vehemently that she never was. Finally, as discussed above, even if Grievant were a qualified individual with a disability under the ADA, WVU made every reasonable effort to continue her employment, to no avail, so she has not proven she could perform her duties with reasonable accommodation.

As established in Vest, supra, a Grievant claiming discrimination is limited to alleging that acts have been committed in violation of W. Va. Code § 18-29-2(m), which defines discrimination 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.” In order to establish a prima facie case of discrimination, a grievant must prove :

> (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) 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.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Grievant has madeabsolutely no allegations that she was treated differently than any other employees of WVU, and she has not even attempted to compare herself to other employees. Accordingly, she has not established a prima facie case of discrimination, and no further analysis of her claim is necessary.

In accordance with the foregoing findings and discussion, the following conclusions of law are appropriate in this matter.

## Conclusions of Law

1. In grievances involving discharge actions, the burden of proof is on the employer. W. Va. Code § 18-29-6.

2. Respondent did not violate its internal Affirmative Action Plan with regard to Grievant's termination.

3. The Grievance Board does not have jurisdiction to determine whether employers have violated provisions of the West Virginia Human Rights Act or the federal Americans with Disabilities Act. Vest v. Bd. of Educ. of County of Nicholas, 453 S.E.2d 781 (W. Va. 1995); Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept. 25, 1995); Curry v. W. Va. Dept. of Trans., Docket No. 95-DOH-579 (Aug. 6, 1996).

4. In order to establish a prima facie case of discrimination under W. Va. Code § 18-29- 2(m), a grievant must prove :

(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) 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.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievant did not establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m).

6. Respondent's termination of Grievant's employment was justified, because she could no longer perform the essential duties of her position.

Accordingly, this grievance is **DENIED**.

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**V. DENISE MANNING**

**Administrative Law Judge**

**Dated: November 5, 1997**

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*Footnote: 1*

*The record does not indicate that Dr. Ghosal practiced in any particular area of specialty. He was not a vascular surgeon.*