LARRY GREGIS,

Grievant,

v. **Docket No. 98-DOL-079**

DIVISION OF LABOR,

Respondent.

D E C I S I O N

Grievant, Larry Gregis, filed this grievance on March 17, 1998, following the termination of his employment as a Labor Inspector II in the Weights and Measures section of the Division of Labor (Respondent). The grievance was filed directly at level four under the expedited process provided by W. Va. Code §29-6A-4(e), and, following a number of continuances, an evidentiary hearing was conducted on August 12, 1998. This matter became mature for decision on September 15, 1998, with the submission of proposed findings of fact and conclusions of law. (See footnote 1)

The following findings of fact are based upon the entire level four record, including the testimony and exhibits presented at hearing.

Findings of Fact

1. Grievant was employed by the Weights and Measures section of the Division of Labor as a Heavy Scale Test Unit Inspector, effective April 1, 1988. At his request, Grievant was later reassigned to the Fuel Meter Test Unit as a Gasoline Specialist. In this capacity, he was primarily responsible for testing and inspecting commercial fuel meters at retail gasoline pumps, with some inspections in bulk fuel metering plants. 2. Grievant was assigned to cover twenty counties, and worked out of his home in Harrison County.

3. Early in 1997, Grievant began complaining of health problems related to his exposure to gasoline fumes. Grievant reported experiencing frequent headaches, nausea, shortness of breath, dizziness and irregular heartbeats.

4. After Grievant requested protective clothing, he was provided with a respirator, gloves, and disposable suits. These devices did not alleviate Grievant's symptoms.

5. By letter dated April 25, 1997, Dr. James L. Bryant notified Karl Angell, Director of Weights & Measures, that Grievant had been scheduled for chemical sensitivity testing, and while treatment

was sometimes successful, it was possible Grievant would not be able to continue working in his capacity of Gasoline Specialist.

6. Throughout this period of diagnosis, Grievant was assigned to assist other Inspectors for a period of nine to ten weeks, and was not exposed to gasoline fumes. During this period no one was performing Grievant's regular duties.

7. In May 1997, Dr. Bryant reported that Grievant's test results showed a high sensitivity to hydrocarbon. Treatment was not pursued at that time, and further testing was scheduled for phenol, glycerin, and formaldehyde.

8. On June 17, 1997, Dr. Bryant reported that Grievant had shown a sensitivity to both hydrocarbon and phenol, and that immunotherapy had been implemented; however, its effectiveness would not be known until he returned to work.

9. On December 15, 1997, Dr. Bryant advised Mr. Angell that Grievant remained under his care, and requested light duty from chemical exposure from December 15, 1997,through February 15, 1998. Dr. Bryant opined that the chemical sensitivity “will probably be a permanent condition” and the restrictions relating to chemical exposure may need to continue.

10. Division of Labor Commissioner Steven A. Allred notified Grievant by letter dated December 17, 1997, that Grievant could not return to work at less than full duty because he could not perform the essential duties of his job, and the nature of his job was such that it may aggravate his medical condition. Grievant was additionally advised that his sick leave benefits would expire on January 7, 1998, and that he could elect to use his annual leave at that time.

11. In a letter dated December 29, 1997, Dr. Bryant confirmed that Grievant had symptoms characteristic of multiple chemical sensitivity and that he “will be permanently and totally” unable to perform work associated with exposure to hydrocarbon fumes.

12. On February 4, 1998, Commissioner Allred offered Grievant a transfer to the position of Office Assistant II, with an annual salary of $15,288.00. The position was in the Division of Labor's main office, located in Charleston, West Virginia.

13. Grievant declined the offered transfer because the salary was less than the $22,000,00 he had previously earned, would require that he move to Charleston, and he did not possess any experience or qualifications for the position.

14. Grievant exhausted his annual leave on February 11, 1998, and requested a medical leave

of absence, without pay.

15. By letter dated February 23, 1998, Commissioner Allred advised Grievant that he had not received the required documentation for consideration of a medical leave of absence without pay. He further advised Grievant that if the physician's/practitioner'sstatement form was not received by March 2, 1998, it would be concluded that Grievant had abandoned his position, and would be dismissed from employment effective March 10, 1998.

16. Grievant then submitted a physician's statement indicating he could return to work in a light duty capacity, with no exposure to fumes, and that his disability would permanently prevent him from performing his regular duties.

17. Commissioner Allred notified Grievant of his dismissal by letter dated March 4, 1998. The reason given for this action was the physician's statement that Grievant suffered a disability which would permanently prevent him from performing his duties. The Commissioner concluded that under these circumstances, he could not approve a medical leave of absence without pay. This letter was sent by certified mail, and received by Grievant on March 6, 1998.

18. On March 10, 1998, grievant submitted a request for a thirty day medical leave of absence, without pay. The request was denied, and the dismissal affirmed, by Commissioner Allred on March 11, 1998.

19. Grievant filed a number of Workers' Compensation claims relating to the chemical sensitivity, including, but not necessarily limited to one filed on February 5, 1997, alleging an injury on April 25, 1997; (See footnote 2) one filed on March 11, 1997, alleging an injury on June 5, 1995; and one filed on April 4, 1997, alleging an injury on June 27, 1995.

20. All of Grievant's claims filed with Workers' Compensation were denied. Grievant appealed two of those decisions, and prevailed on one claim, by decision datedAugust 10, 1998.

Discussion

Because this is not a disciplinary matter within the meaning of W. Va. Code §29-6A- 6 ¶5, Grievant bears the burden of proving by a preponderance of the evidence that his dismissal was improper. See Goard v. W. Va. Div. of Corrections, Docket No. 95-CORR- 068 (Mar. 20, 1995). On the grievance form, Grievant stated that his dismissal was “in violation of rules, policies, and statute.” He attached a copy of W. Va. Code §23-5A-3, which provides in pertinent part:

(a) It shall be discriminatory practice . . . to terminate an injured employee while the injured employee

is off work due to a compensable injury within the meaning of article four . . . of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

(b) It shall be a discriminatory practice within the meaning of section one of this article for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position. . . .

Presenting a Workers' Compensation decision dated August 10, 1998, which reversed a previous ruling that his disability was not compensable, Grievant argues that it was improper under this statute for Respondent to terminate his employment. Grievant asserts that he could function as an Area Inspector, if he was not required to test fuelpumps. He suggests that he could assume duties from other Inspectors, who could then perform his gasoline-related duties. Grievant also notes that a number of temporary employees were engaged by Respondent to cut grass, paint, etc., and that he could have performed those duties.

Grievant next argues retaliation, and a violation of the W. Va. Code §23-5A-1 provision that “[n]o employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits.” Grievant notes that he had filed a number of Workers' Compensation claims prior to his dismissal.

Grievant claims Respondent has engaged in discrimination, as defined by W. Va. Code §29-6A-2(d), because other employees who had been injured were retained and reassigned. In support of this claim, Grievant presented the testimony of Eugene Woodford and William Nelson. Mr. Woodford, a current employee of Respondent, testified that several years ago when he learned that he was a diabetic, he was given light duty for a period of two to three weeks. Mr. Nelson, a former employee, testified that after he suffered a broken back on the job, he returned to a different assignment.

Grievant also offered testimony from Leo Lanham, an employee of Respondent, and Occupational Safety and Health Act (OSHA) consultant, regarding federal provisions relating to occupational

exposure to benzene. Interestingly, Mr. Lanham stated that the OSHA regulation had never been enforced, and was applied to only the private sector. He recalled that Grievant had not previously approached him with a complaint.

Finally, Grievant asserts that he was denied a medical leave of absence without pay,and was not offered donated leave time. (See footnote 3)

Respondent argues that Grievant failed to prove a violation of Code §23-5A-3 because he was not absent from work due to a compensable injury, and was not receiving, or deemed eligible to receive, temporary total disability benefits at the time his employment was terminated in March 1998. Even when ruled compensable, Respondent notes that the August 1998 decision from Workers' Compensation did not grant Grievant temporary total disability benefits. (See footnote 4) Consequently, Respondent concludes, the cited statute is not applicable to Grievant's situation.

Respondent denies that it engaged in retaliation against Grievant based upon his attempts to receive Workers' Compensation benefits, and notes that almost a year had passed between the filing of the claims and Grievant's separation from employment. Additionally, because Grievant's physician has certified that his condition is permanent, rendering him unable to perform the duties of his position, and his unwillingness to accept the only vacant non-toxic position available, Respondent asserts that it was not prohibited from terminating his employment under the provisions of Code §23-5A-1.

Respondent denies that Grievant is entitled to any relief under the OSHA provisions addressed by Mr. Lanham, because it applies only to “the storage, transportation, distribution, dispensing, sale or use of gasoline, motor fuels, or other fuels, containingbenzene subsequent to its final discharge from bulk wholesale storage facilities, except that operations where gasoline or motor fuels are dispensed for more than 4 hours per day in an indoor location. . . .” Grievant tested fuel meters at outdoor retail gasoline locations, therefore, this regulation was not applicable, Respondent argues.

Citing Skaggs v. Elk Run Coal Co., Inc., 198 W. Va. 51, 479 S.E.2d 561 (1996), Respondent argues that while the West Virginia Human Rights Act imposes a duty to accommodate qualified individuals with disabilities who, with or without reasonable accommodation, can perform the essential functions of the job, it does not require an employer to retain employees who cannot fulfill the essential functions of the job. Because Grievant could not perform the essential functions of the Gasoline Specialist, and no accommodations were available which would have enabled Grievant to

function in that position, termination of his employment was permissible.

Respondent acknowledges that reasonable accommodation can include reassignment to a vacant position. Grievant was offered an office position, consistent with a suggestion by his physician; however, he chose not to accept the transfer. Respondent asserts that it was not required to bump another employee out of a position, and did not discriminate against Grievant based upon his disability when it terminated his employment.

Addressing the issue of Commissioner Allred's denial of Grievant's request for a medical leave of absence without pay, Respondent cites Division of Personnel Rules and Regulations, Section 15.08, which provides that in order to qualify for a medical leave of absence, the employee must submit a physician's statement providing a tentative return to work date, and verification that the disability is not permanent in nature. Because Grievant's physician stated the disability was permanent in nature, and that he would notbe able to resume his duties, Respondent asserts that denial of the requested leave was appropriate.

Finally, Respondent notes that in reference to Grievant's claim that he was not provided with donated leave time, the Division of Personnel Rule which establishes and governs the Leave Donation Program does not require an agency to actively offer a state employee the possibility of receiving donated leave. On the contrary, Respondent has an application form for employees to complete when they wish to seek donations of leave. Respondent argues that it is always incumbent upon the employee seeking the donation, to institute the proper procedures to receive such leave. Respondent notes that Grievant did not inquire as to the possibility of receiving donated leave, and that it did not act improperly by failing to actively offer him an application for said leave.

Grievant has failed to prove that his dismissal was improper under any of the alleged claims. W. Va. Code §23-5A-3 does not apply in this matter because at the time Grievant was dismissed, he was not off work due to a compensable injury. In March 1998, Grievant's Workers' Compensation claims had all been denied. This section does not require that an employer retain non-working, injured, employees through the exhaustion of the appeals process, nor does it provide relief for employees who are dismissed, and their claims subsequently found compensable.

Grievant's argument that his termination was in retaliation for his having filed Workers' Compensation claims in 1997 is not relevant. Reprisal is defined by W. Va. Code §29-6A-2(p) as “the retaliation of an employer or agent toward a grievant, witness, representative or any other participant

in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A Workers' Compensation claim is not agrievance; therefore, it does not fall within the definition of reprisal. Further, the lapse of nearly one full year between Grievant's last claim and his dismissal, and then only after the exhaustion of his leave time, and an offer to transfer, establishes that Respondent's decision to dismiss him was not in violation of Code §23-5A-1.

Discrimination is defined by W. Va. Code §29-6A-2(d) 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." An employee alleging that his dismissal was based upon unlawful discrimination must first establish a prima facie case of discrimination by demonstrating the following:

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

(b)that he has, to his detriment, been treated by his 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.

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

Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). Grievant has established that he is similarly situated to two other employees of Respondent in that they had been injured, or suffered an illness. However, Grievant failed to show that he had been treated differently, to his detriment. Mr. Woodford testified that he had been assigned light duty for two or three weeks. Grievant was assigned light duty for approximately nine weeks. Mr. Nelson returned to work in a different assignment after having broken his back. Grievant was given the opportunity to return to work in a different assignment, but declined the offer. Therefore, Grievant has failed to make a prima facie case of discrimination.

Grievant's own witness, Mr. Lanham, established that Grievant had never filed an OSHA complaint regarding his work with gasoline. Given that Grievant worked in retail, rather than wholesale storage facilities, and did not work indoors more than four hours per day, he has failed to prove that Respondent violated any federal regulation.

Division of Personnel Administrative Rule 15.8 provides in pertinent part:

1. An injured or ill permanent employee upon written application to the appointing authority shall be granted a medical leave of absence without pay not to exceed six (6) months within a twelve month period provided:

* * *

b. The employee's absence is due to an illness or injury which is verified by a physician/practitioner on the prescribed physician's statement form stating that the employee is unable to perform his or her duties and giving a date for the employee's return to work or the date the employee's medical condition will be re-evaluated;

* * * *

d. The disability, as verified by a physician/practitioner on the prescribed physician's statement form, is not of such nature as to render the employee permanently unable to perform his or her duties.

By early 1998, Grievant's physician had determined the disability would permanently render him unable to perform his duties. Under those circumstances, Grievant was not entitled to a medical leave of absence without pay.

Grievant made no assertion that he requested donated leave time, only that he did not receive it. Grievant has failed to prove that Respondent has a duty to suggest, promote, or otherwise provide donated leave time for an employee who has not requested said time.

Grievant opines that he could complete the duties of an Area Inspector II or III, absent any gasoline-related work. He suggests that he could substitute alternative work with other inspectors, such as testing store scales, concrete batch plant scales, pharmacy scales, and elevators. Mr. Angell testified that all Area Inspectors are assigned the full spectrum of scales, including gasoline pumps, and that he could not tailor an assignment for Grievant within the framework of the Section. Because all Inspectors are assigned some gasoline pumps, Mr. Angell noted that when Grievant was on light or alternative duty, no one was available to perform his duties of Gasoline Inspector, and that such a

situation was not feasible on a permanent basis.

Grievant's claim regarding the temporary employees hired by Respondent is somewhat unclear. Mr. Angell testified that the Division has employed temporary (160 day) employees to assist Inspectors, mow grass, paint, etc. Of course, Grievant is unable to assist the Inspectors, and it appears that the maintenance work is located in Charleston. As previously noted, Grievant rejected the Office Assistant position in part because it was in Charleston. Grievant did not indicate that he would accept temporary employment, and has failed to prove that he was entitled to any of these assignments. In accordance with the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. Dismissal for a disability which permanently precludes an employee from performing his duties is not a disciplinary matter within the meaning of W. Va. Code §29- 6A-6 ¶5. Grievant bears the burden of proving by a preponderance of the evidence that his dismissal from employment was improper. See Goard v. W. Va. Div. of Corrections, Docket No. 95-CORR-068 (March 20, 1995).

2. Grievant failed to prove a violation of W. Va. Code §23-5A-3, because at the time of his dismissal his injury had not been ruled compensable.

3. Grievant failed to prove that the dismissal was the result of reprisal, as defined by W. Va. Code §29-6A-2(p).

4. Grievant failed to prove that the dismissal was the result of his attempt to receive benefits, in violation of W. Va. Code §23-5A-1.

5. Grievant failed to prove that Respondent had engaged in discrimination by treating similarly situated employees in an inconsistent manner, in violation of W. Va. Code §29-6A-2(d).

6. Grievant failed to prove that Respondent violated any OSHA regulations relating to his work with gasoline.

7. Grievant failed to prove that he was entitled to a medical leave without pay when he was permanently unable to return to work.

8. Grievant failed to prove that he requested, or was improperly denied donated sick leave. 9. Grievant failed to prove that Respondent was required to tailor a position to suit his particular needs.

10. Grievant failed to prove that he was entitled to any work performed by temporary

employees.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). 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.

Date: November 12, 1998 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Grievant was represented by Freddie Maynard, United Mine Workers/West Virginia State Employees Union Representative, and Respondent was represented by Kelli D. Talbott, Senior Assistant Attorney General.

Footnote: 2

Obviously an error was made regarding these dates. The physician dated the form May 6, 1997.

Footnote: 3

At hearing, Grievant claimed protection under the Americans with Disabilities Act (ADA). Grievant did not prove that he was a qualified individual under the ADA, and he did not address this issue in his post hearing proposals. It is determined that Grievant has abandoned this issue in the grievance process, and noted that it has been filed with the United States Equal Employment Opportunity Commission. (Grievant Exhibit 3)

Footnote: 4

The decision merely overruled a previous ruling and granted no specific benefits.