M. TODD JENKINS, et al.,

Grievants,

v.

DOCKET NO. 00-HHR-334

WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/MILDRED MITCHELL-
BATEMAN HOSPITAL,

Respondent.

D E C I S I O N

Grievants, Todd Jenkins, Kim Smith, Teresa Laginess Jenkins, Kara Anderson, Jeff Watson, Wally Summers, Barb Mannon, and Sara Cook, are all employed by the West Virginia Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital ("Hospital") in the Nursing Department. They hold a variety of positions including Health Service Worker, Licensed Practical Nurse, and Registered Nurse. On August 29, 2000, Grievants filed a grievance alleging that policy MMBHC33, *Dress Standards Policy*, is "discriminatory to all nursing staff due to the exclusion of jeans as proper attire. . . Jeans may only be worn by employees routinely engaged in physically intensive positions." Grievants also allege this policy infringes upon their "Constitutional Rights, based on the culture of our community setting."

Grievants Christie Reynolds, Leigh Hale, Larry Lanham, Donna Bowman, and Lida Butcher, are all employed by the Hospital in the Admissions Department. On August 31, 2000, they filed a similar grievance alleging that MMBHC33, *Dress Standards Policy*, discriminates against them by prohibiting them from wearing jeans to work. These Grievants allege they should be allowed to wear jeans because they participate in"spontaneous NVCPI [sic] intervention, direct patient care, and cleaning and decorating the office. . . .".

These grievances were consolidated at Level III of the grievance process, a hearing was held on October 12, 2000, and a decision denying the grievance was issued October 19, 2000. The grievance was timely appealed to Level IV and a hearing held in Huntington, West Virginia on January 29, 2001. This matter became mature for decision on March 23, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievants appeared pro se, and the Hospital was represented by B. Allen Campbell, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Level III Grievants' Exhibits

Ex. 1 -

Admissions Direct Contact With Public.

Ex. 2 -

W. Va. Division of Personnel Agency Dress Codes.

Level III Hospital Exhibits

Ex. 1 -

May 26, 1995 letter from Robert L. Stephens, Jr. to Kieth Anne Dressler; May 17, 1995 memorandum from Kieth Anne Dressler to Robert L. Stephens, Jr.; Draft Employee Dress Standards Policy.

Ex. 2 -

July 24, 2000 letter from Joe E. Smith to Kieth Anne Dressler; Draft Employee Dress Standards.Ex. 3 -

Level III Grievance Decision dated May 1, 2000 in Darby, et al. v. W. Va. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital.

Level IV Grievants' Exhibits

Ex. 1 -

Hilltopper Newsletter.

Ex. 2 -

Monthly Meetings of Department Heads, December 1999-December 2000.

Ex. 3 -

Section 2.02.08 - Staff Responsibilities; Section 2.02.09-Medical and Nursing Services.

Ex. 4 -

Graph representing Hospital-OAS (Overt Aggression Scale) from January through December 2000.

Ex. 5 -

Note from Joe Smith, Division of Personnel: Positive Change for the Millennium.

Ex. 6 -

Hospital Mission Statement.

Ex. 7 -

W. Va. Division of Personnel Agency Dress Codes.

Ex. 8 -

Staff Assignment Form.

Ex. 9 -

Graph: Quality Advancement Employee Incidents/Accidents Monthly Totals for 2000.

Ex. 10 -

Overt Aggression Scale (OAS).

Ex. 11 -

December 14, 2000 memorandum from Carol Wellman, Administrator, to Todd Jenkins, Health Service Worker.

Level IV Hospital Exhibits

Ex. 1 -

Policy Number MMBHC033 - Employee Dress Standards.

Testimony

Grievants presented the testimony of Todd Jenkins, Teresa Laginess Jenkins, Larry Lanham, Barbara Mannon, Donna Bowman, Leigh Hale, Todd Deal, Rebecca Dunn, Steven Bias, Michael Neal, Mark Bowman, Michael Manchester, Jeff Watson, and Walter Summers. The Hospital presented the testimony of Kieth Anne Worden, Rebecca Dunn, and Carol Wellman.

FINDINGS OF FACT

After a review of the record in its entirety, the undersigned finds the following facts have been proven by a preponderance of the evidence. 1. Grievants, Todd Jenkins, Kim Smith, Teresa Laginess Jenkins, Kara Anderson, Jeff Watson, Wally Summers, Barb Mannon, and Sara Cook, are all employed by the Hospital in the Nursing Department and hold a variety of positions including Health Service Worker, Licensed Practical Nurse, and Registered Nurse.

2. Grievants Christie Reynolds, Leigh Hale, Larry Lanham, Donna Bowman, and Lida Butcher, are all employed by the Hospital in the Admissions Department.

3. Grievants employed in the Nursing Department are exposed to assaults by combative patients which may result in scuffles with the patient. During these scuffles patients sometimes damage Grievants' clothing. Grievants are also exposed to blood, urine, feces, and many diseases. These Grievants also routinely engage in lifting and moving patients and equipment.

4. Grievants employed in the Admissions Department occasionally are required to help subdue violent patients.

5. During a staff meeting for department heads held in December 1999, the Hospital decided that all supervisors and professional staff would be prohibited from wearing blue jeans. This policy was not reduced to writing.

6. In April 2000, employees from the Hospital's Fiscal Services department filed a grievance alleging the ban on blue jeans was applied in a discriminatory manner.

7. The Level III grievance evaluator granted the grievance holding that the policy was being applied in a discriminatory manner due to the varied interpretations given the word “professional.”

The grievance evaluator directed the Hospital to either 1) restrict all employees from wearing blue jeans to work, 2) permit all employees to wear blue jeans,or 3) specifically and indiscriminately outline the circumstances in which employees may wear blue jeans to work, which were to be related to an employee's actual job responsibilities. The decision further required that the policy be approved by the Division of Personnel ("Personnel").

8. Consequently, the Hospital formulated its revised Employee Dress Standards Policy, MMBHC33. This policy was submitted to Personnel for review and became effective October 5, 2000. Additionally, the policy was discussed with department heads and other management in management team meetings.

9. The policy only allows employees "routinely involved in physically intensive positions" to wear jeans. The policy goes on to define classifications that are involved in "routinely physical positions." These classifications are for the most part manual labor positions, such as maintenance and electrical workers.

10. Grievants employed in the Nursing Department are involved in "routinely intensive physical positions."

11. Grievants in the Admissions Department are not involved in "routinely intensive physical positions."

DISCUSSION

In non-disciplinary matters the Grievants must prove all the allegations constituting their grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievants challenge policy MMBHC33, *Dress Standards Policy*, on three grounds: 1) prohibiting Grievants from wearing jeans does not effectuate the purpose of the policy; 2) prohibiting Grievants from wearing jeans isdiscriminatory under the policy; and 3) prohibiting Grievants from wearing jeans violates their constitutional rights. The Hospital denies its policy discriminates against Grievants in any way.

Policy MMBHC33, *Employee Dress Standards*, provides in pertinent part as follows:

POLICY:

> It is the policy of Mildred Mitchell-Bateman Hospital that all employees appear for work utilizing appropriate personal hygiene and dressed appropriately for the duties they

are to perform. These standards are based on legitimate business necessity and obligation to maintain a safe and professional working environment. This policy addresses three areas of concern: safety, image, and role modeling for the patients and image of the organization to the public that it strives to serve.

PROCEDURE:

SAFETY - All employees are responsible for being acutely aware of their work area and physical hazards located therein. Safety gear required for employees in individual departments are specified within that department's Safety Program and/or Infection Control Manual.

ROLE MODELING FOR PATIENTS - As a part of the treatment of all patients, employees are required to set an example and observe proper standards of hygiene and dress for patients. In essence, employees who appear for work utilizing appropriate personal hygiene and dressed appropriately for the duties they are to perform are teaching patients the standards expected of them by the community upon their discharge.

PUBLIC IMAGE - The image of Mildred Mitchell-Bateman Hospital, the Department of Health and Human Resources, and State employees in general is reflected by the appearance or impression employees make through their daily contacts with the public. Mildred Mitchell-Bateman Hospital employees are expected to maintain a professional appearance.

. . .

EMPLOYEE DRESS STANDARDS

APPENDIX A

. . .

JEANS:

> **Jeans shall only be worn by employees routinely involved in physically intensive positions, i.e., cleaning position: housekeepers, laundry staff, Dietary & Café staff-cooks, food service workers; maintenance positions: electricians, plumbers, steam boiler operators, carpenters, maintenance workers, painters, groundskeepers, Tool Room staff; Storeroom staff - storekeepers, storeroom clerk, mail runner, Clinical staff: greenhouse staff. Recreation therapists and direct patient care staff responsible for recreational activities shall dress appropriately for the recreation activity in which they are involved.**

> **Jeans may also be worn during infrequent and physically intensive tasks such as cleaning area, moving offices, decorating area, etc. after receiving prior approval from their immediate supervisor.**

LIII Hosp. Ex. 1; LIV Hosp. Ex. 1.

Grievants' first argument is that the purpose of Policy MMBHC33 ("the policy") is not effectuated by prohibiting Grievants from wearing jeans. The policy addresses three areas of concern: safety, image, and role modeling for patients.

Grievants in the Nursing Department argue it is safer for them to wear jeans than any other clothing allowed under the policy. They credibly testified that they are routinely exposed to assault by combative patients, expectorants, urine, emesis, defecation, open wounds, infectious drainage, herpes, HIV, hepatitis, and blood. Grievants contend that jeans are made of a more durable fabric and are less likely to tear in a confrontation with patients. While denim is generally heavier than cotton poplin, it is still a porous material and as such, will not insulate or protect Grievants any more than any other fabric. Additionally, while denim is generally stronger than cotton poplin, Grievants presented noevidence to demonstrate that khaki pants were more likely to be torn during an altercation than jeans.

Grievants next argue that jeans provide an acceptable public image for Hospital staff. There is no dispute that the Hospital, through its Administrator, Carol Wellman, has the discretion to decide what image it wants to portray to the public. While Grievants may disagree with management's decision in this regard, absent any constitutional infringements, or unlawful discriminatory application, employees must appear for work in attire deemed appropriate by the employer.

Finally, Grievants argue that wearing jeans allows them to be more appropriate role models for their patient population. Grievants presented testimony that "normalization" of the

patients' environment has shown benefits such as fewer patient assaults and more open communication. Grievants also testified that the patient population at the hospital would more likely come from a home environment in which jeans are the norm, rather than the exception, thus meeting the "standards expected of them by the community upon their discharge." LIII Hosp. Ex. 1; LIV Hosp. Ex. 1.

The concept of "normalization" does not require that hospital staff wear jeans. Under this theory of treatment the hospital setting is merely de-institutionalized and made less clinical. In a "normalized" setting, staff wear more casual clothing, but not necessarily jeans. In other words, nurse "whites" and caps are not worn in the hospital setting. The theory of "normalization" is just that, and Grievants' own witness on this subject admitted there are contradictory studies about this topic. Nonetheless, it is the Administration of thehospital that has the discretion to determine the specifics of a "normalized" setting, not the Grievants.

Grievants' second argument is that the policy has been applied in a discriminatory manner in that other staff at the hospital are allowed to wear jeans while they are not. 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." In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, Grievants must show:

(a)

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

(b)

that they have, to their detriment, been treated by their 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 Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once Grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Thereafter, Grievants may show that the offered reasons are pretextual. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievants have failed to make a prima facie case of discrimination. Grievants are not similarly situated to other Hospital employees who are allowed to wear jeans. Thepolicy states that jeans "shall only be worn by employees routinely involved in physically intensive positions." When examining the classifications listed in the policy which the Hospital defines as "physically intensive positions", it is clear that neither the nursing staff nor the admission staff are involved in the type of physical labor contemplated by the policy. Staff allowed to wear jeans are staff involved in manual labor. Grievants are not manual labor employees, but professional staff. No professional staff employees are permitted to wear jeans. Thus, Grievants are not similarly situated to staff who are allowed to wear jeans, and, therefore, have failed to make a prima facie case of discrimination. (See footnote 1)

Grievants' final argument is that the policy impinges upon their Constitutional right of freedom of expression by limiting what they can wear to work. Grievants rely on the Kanawha County Circuit Court decision in Webb v. Mason County Board of Education, Civil Action No. 89-AA-107 (Oct. 24, 1989) to support their claim. Grievants' reliance on this case is misplaced.

The plaintiff in Webb was a Mason County school teacher who wore jeans and a cotton shirt in his classroom for seventeen years. In 1988, the County School Superintendent decided to institute a dress code that would prohibit employees from wearing jeans. Webb refused and was ultimately dismissed. He filed a grievance with the Grievance Board, which upheld the termination. The Circuit Court of Kanawha County reversed the termination for several reasons. It found that the Mason County Board failedto follow its own progressive disciplinary procedure in terminating Webb, it lacked the authority to issue a dress code in the first place, the dress code was unconstitutional because it impeded the achievement of a thorough and efficient system of free schools under the W. Va. Const., Art. XII, § 1, the dress

code violated Webb's guarantee of academic freedom embodied in the W. Va. Const., Art. III, § 7, and violated Webb's rights to due process of law, equal protection of the law and freedom of expression.

The Circuit Court ruled that the due process clause of the Fourteenth Amendment to the Constitution of the United States protects the rights of individuals to determine their personal appearance in the absence of disruptive effects. *Citing*, Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975). To reach this conclusion, the Circuit Court relied on Conrad v. Goolsby, 350 F. Supp. 713 (N.D. Miss. 1972) for its analysis. In this case, a school board discharged three high school teachers for failing to conform their beards, mustaches and sideburns to a dress code. In Conrad the Court held that "a state sanction regulation which prescribes generally the grooming habits of adults as a condition of public employment unrelated to one's ability to perform his work can only be viewed with close judicial scrutiny." The Court found that "such regulations, which are of general import, create an arbitrary and capricious classification, devoid of logic and rationality, and plainly offend both substantive due process and equal protection guaranteed by the Fourteenth Amendment." *Id.* at 718.

Four years later, the United States Supreme Court disagreed with this analysis in Kelly v. Johnson, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed. 2d 708 (1976). In this case, county policemen sought the protection of the Fourteenth Amendment, not as ordinarycitizens, but as law enforcement employees of the county. The Court found this to be a significant distinction because the state has wider latitude and notably different interests in imposing restrictive regulations on its employees than it does on regulating the citizenry at large. The Court went on to hold that the proper analysis is whether the plaintiffs "can demonstrate that there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, and the promotion of safety of person and property." *Id.* 425 U.S. at 1446.

The Grievance Board has adopted the Supreme Court's ruling and recognized that dress codes are to be judged by a rational basis analysis. *See*, Burdette v. W. Va. Public Serv. Comm., Docket No. 93-PSC-132 (Nov. 16, 1993). In Burdette, the grievant, a Utility Financial Analyst, was required to dress "professionally" by wearing dress pants, a dress shirt and a tie. He was not permitted to wear jeans to work. He filed a grievance alleging the dress code

was unconstitutional relying on Webb, *supra*. Citing Kelly, the Grievance Board recognized that:

> **citizens have a "liberty" interest in matters relating to their personal appearance. However, one's right to dress as they deem fit and to determine their own appearance implicates only a general substantive liberty interest which does not rise to the level of a fundamental right. Because the right to dress as one sees fit is not a fundamental right, any restrictions placed upon one's choice of dress are to be judged under a "rational basis" test to determine if the regulation can be branded as arbitrary. The Employer may defeat the challenge to its dress code by showing that it has a reasonable and rational basis for restricting Grievant's manner of dress in order to meet a legitimate end.**

Burdette at 5. The Grievance Board went on to hold that the Public Service Commission established a rational basis for its dress code policy in that it has an interest in promotingprofessionalism within its offices and exhibiting professionalism to the public. The Grievance Board distinguished Webb because that case was decided in the context of academic freedom. While educational-constitutional values involve a "compelling state interest", economic interests are assessed under a "rational basis" analysis.

The instant case is similar to Burdette. The Hospital instituted its dress standards policy to promote "safety, image, and role modeling for the patients and image of the organization to the public that it strives to serve". The evidence shows that while Grievants may disagree with the Hospital's decision, the dress standards policy has a rational basis in legitimate interests of the Hospital. As such, it passes constitutional muster and does not run afoul of the Fourteenth Amendment.

CONCLUSIONS OF LAW

1. In non-disciplinary matters the grievant must prove all the allegations constituting the grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, 95-DOH-287 (Jan. 22, 1996).

2. W. Va. Code § 29-6A-2(d) 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 claim of

discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

3. 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 employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 91-DOH-246 (Apr. 30, 1992).

4. Grievants have failed to establish a prima facie case of discrimination in that they are not similarly situated to other Hospital employees who are allowed to wear jeans.

5. To withstand Constitutional scrutiny, an employer must show a rational basis between a legitimate business decision and the implementation of a dress code. Professional image in the community is a legitimate business decision that survives the rational basis analysis. Burdette v. W. Va. Public Serv. Comm., Docket No. 93-PSC-132 (Nov. 16, 1993). Consequently, the Hospital's dress code does not violate the Fourteenth Amendment to the Constitution.

6. Grievants have failed to prove the allegations of their complaint by a preponderance of the evidence. Accordingly, this grievance is DENIED.

Footnote: 1

This holding is in no way meant to demean or diminish the physically intensive work that is required of the nursing staff. Clearly, nurses are routinely required to perform physically intensive tasks; however, the policy clearly sets forth the intention of the Hospital to distinguish between professional nursing staff and those involved in manual labor activities, such as maintenance, electrical work, and housekeeping, etc.