TERESSA WILSON,

Grievant,

v.

DOCKET NO. 02-BEP-241

WEST VIRGINIA BUREAU OF EMPLOYMENT

PROGRAMS/LEGAL SERVICES DIVISION,

Respondent.

D E C I S I O N

Grievant, Teressa Wilson, filed this grievance against her employer, the West Virginia Bureau of Employment Programs/Legal Services Division ("BEP"), on June 18, 2002:

> Grievant complains of a series of events culminating in a notice of suspension from work. Grievant received a letter dated June 10, 2002 and delivered on June 11, 2002 providing Grievant that she is suspended from work for a 3-day period; this period begins over a week from the date on the letter and deprives Grievant of holiday pay for a State holiday on June 20, 2002. Based upon the statements contained in the suspension notice, Grievant believes that this action is part of a pattern and practice of harassment and discrimination dating back approximately 2 years.
>
> Grievant's supervisor has previously taken disciplinary action against Grievant; the supervisor says she will reconsider the disciplinary action if Grievant will provide confidential medical information. The disciplinary action by the supervisor, which includes placing Grievant on "restricted leave" status and establishing a procedure for Grievant to follow when calling in sick holds Grievant to a higher standard than her co-workers for the use of leave time. Grievant suffers from a number of medical conditions that necessitate her use of leave. The supervisor's actions have penalized Grievant for leave usage and have placed an additional burden upon Grievant for future leave usage. The supervisor has not only failed to work with Grievant to identifyand implement reasonable accommodation for Grievant to continue to work productively in a job for which Grievant is qualified, the supervisor has also taken punitive action against Grievant due to Grievant's attendance, which is a result of documented health problems. By establishing a higher standard for Grievant to use accrued leave, the supervisor has discriminated against Grievant on the basis of Grievant's known disabilities.

Grievant seeks the following relief:

1)

Immediate cessation of the pattern of harassment of Grievant;

2)

Immediate cessation of the “restricted leave” status for Grievant;

3)

Flexible work hours to accommodate Grievant's documented disability;

4)
A copy of the written policy on restricted leave that applies to all Bureau of Employment Programs (BEP) employees;

5)
A copy of the written policy regarding the procedure by which a BEP employee must call in sick. Specifically, the Grievant seeks the policy, or portion thereof, that states (a) to whom an employee shall report an absence, (b) whether a voice mail or e-mail message from the employee is sufficient, (c) if a voice mail or e-mail message is not sufficient, to whom the employee should direct his/her call if the illness occurs prior to the start of the business day and the employee anticipates seeking treatment or recuperating at home in a manner that makes repeated phone calls difficult or cumbersome;

6)
Training of all BEP supervisors regarding the provisions of the Americans with Disabilities Act and the West Virginia Human Rights Act;

7)
Withdrawal of the suspension from work or, if such suspension has already taken place, reinstatement of all wages and holiday pay lost by Grievant due to the suspension;

8)
Withdrawal from Grievant's personnel file of the June 10, 2002 letter and all other documents alleging misconduct on the part of Grievant;

9)
Attorney fees incurred by the Grievant in protecting her interests in this matter.

Grievant filed the grievance directly to level two, and met with Sally Edge, Benefit Services Director, in June 25, 2002. Ms. Edge denied the grievance on July 2, 2002, and Grievant appealed to level three, where a hearing was conducted on July 18, 2002. A level three decision denying the

grievance was issued on July 25, 2002, by Grievance Evaluator Jennifer N. Taylor, Esq. Grievant appealed to level four on August 1, 2002, and following several continuances for good cause, the parties agreed that the case could be submittedon evidence contained in the level three record. (See footnote 1) This matter became mature for decision on April 3, 2003. Grievant was represented by Carol A. Egnatoff, Esq., and BEP was represented by Patricia J. Shipman, Esq.

SUMMARY OF EVIDENCE

Level Three BEP Exhibits

Ex. 1 -

June 10, 2002 letter from Robert J. Smith to Teressa Wilson.

Ex. 2 -

May 21, 2002 memorandum from Tammy Vickers to Robert Smith.

Ex. 3 -

Summary of Teressa Wilson's Use of Time from January through May 20, 2002.

Ex. 4 -

Statement of Employee Expectations, effective February 14, 2002.

Ex. 5 -

W. Va. Division of Personnel Administrative Rules 14.5 and 14.6.

Ex. 6 -

W. Va. Division of Personnel Administrative Rule, Sick Leave.

Ex. 7 -

BEP Administrative Directive 6200.75, Delayed Payroll Assignment.

Ex. 8 -

W. Va. Division of Personnel Administrative Rule 14.1.

Ex. 9 -

July 9, 2002 memorandum from Teressa Wilson to Sally Edge, with attached

physician's statements.

Ex. 10 -

January 31, 2002 memorandum from Tammy Vickers to Teressa Wilson; February 25, 2002 memorandum from Tammy Vickers to Teressa Wilson.

Ex. 11 -

March 15, 2002 memorandum from Tammy Vickers to Teressa Wilson.

Ex. 12 -

March 26, 2002 memorandum from Tammy Vickers to Teressa Wilson, with attachments.

Ex. 13 -

BEP Administrative Directive 6200.40, Annual Leave.

Ex. 14 -

April 17, 2002 Application for Leave With Pay; April 30, 2002 Application for Leave of Absence Without Pay.

Ex. 15 -

May 1, 2002 memorandum from Tammy Vickers to Teressa Wilson.

Ex. 16 -

March 26, 2002 letter from Bashir Sankari, M.D. to Teressa Wilson; May 8, 2002 letter from David L. Gingrich, P.A.C.; March 27, 2002 letter from William Jeffrey, M.D.

Ex. 17 -

Monthly Time Distribution Sheets for Teressa Wilson, January - June 2002.

Ex. 18 -

W. Va. Division of Personnel 2002 Holiday/Payday Calendar.

Level Three Grievant's Exhibits

None.

Testimony

Grievant testified in her own behalf. BEP presented the testimony of Sally Edge, Tammy Vickers, and Thomas K. Rardin.

Based upon all of the testimony and evidence of record, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed by BEP as an Employment Program Specialist Senior in the Benefit Services Unit. She has been employed in that Unit since January 2002. Prior to that, she was employed in the Internal Management Services Unit.

2. In Benefit Services, Grievant is responsible for reviewing claimants' explanations of benefits (EOBs).

3. Grievant's immediate supervisor in Benefit Services is Tammy Vickers. The Director of the Unit is Sally Edge.

4. The Benefit Services Unit hours of operation are from 8:00 a.m. to 4:30 p.m. for all employees, without exception. The Unit does not have a flex time policy or a work at home policy for its employees.

5. On January 31, 2002, Ms. Vickers informed Grievant she had been taken off the payroll on January 24, 2002, due to insufficient leave time. As of that date, Grievant had 0.2 hours of sick leave, and 0.2 hours of annual leave. She was given fifteen (15) days to improve her attendance or risk being put on restricted leave. LIII BEP Ex. 10.

6. On February 25, 2002, Ms. Vickers extended the fifteen days for another fifteen days because, although Grievant still had a very low leave balance, she had shown some improvement. As of that date, Grievant had 3.8 hours sick leave. LIII BEP Ex. 10. 7. On March 15, 2002, Ms. Vickers informed Grievant she was putting her on restricted leave beginning March 18, 2002. Grievant's sick leave balance had slipped to 1.3 hours since the last warning. LIII BEP Ex. 11.

8. The following restrictions were placed on Grievant's use of leave time in accordance with Division of Personnel rules: For sick leave, she had to have a physician's excuse for all sick leave taken. Any annual leave had to be requested in advance, except for an extreme emergency. Ms. Vickers told Grievant she would review her leave restriction in six months, and if she had accrued 40

hours of sick leave, and 40 hours of annual leave, she would be taken off leave restriction. LIII BEP Ex. 11.

9. On March 18, 2002, Grievant had no leave time, and was absent from work. Because this was the second time she had to go off the payroll, in accordance with BEP's Administrative Directive 6200.75 Delayed Payroll Assignment, she was put on delayed payroll, effective March 26, 2002. LIII BEP Ex. 12.

10. On April 17, 2002, Grievant did not come to work on time, and did not call in. When she did call in, approximately three hours late, she said she had personal business and wanted to take the three hours as annual leave. Because she was on restricted leave, had not requested the time off in advance of taking it, and the situation was not an extreme emergency, Ms. Vickers denied the request. LIII BEP. Ex. 14.

11. On April 30, 2002, Grievant requested 1.5 hours of annual leave because she overslept. Again, because Grievant was on restricted leave, and had not requested the time in advance, Ms. Vickers denied the leave request. LIII BEP Ex. 14.

12. On May 1, 2002, Ms. Vickers informed Grievant by memorandum that she had failed to improve her leave usage since January 2002, asked if Grievant had anydocumentation which would assist her in analyzing her leave usage, and offered Grievant her assistance. Grievant noted on the memorandum that she had requested her medical records. LIII BEP Ex. 15.

13. On March 26, 2002, Rashir Sankari, M.D., provided Grievant with a statement summarizing his care for a condition called “arteriovenous malformation,” or blood in the urine. Dr. Sankari does not indicate in this letter that Grievant is subject to any restrictions or limitations due to this condition. LIII BEP Ex. 16.

14. On May 8, 2002, David L. Gingrich, P.A.C., of HealthScope, provided a statement that Grievant had been seen for “multiple episodes of sinusitis since this past October” and was being referred to a specialist. This statement does not indicate Grievant is subject to any restrictions or limitations due to this condition. LIII BEP Ex. 16.

15. On March 27, 2002, William Jeffrey, M.D., provided Grievant with a statement summarizing her medical conditions, indicating “your most significant conditions are your diabetes, hypertension, and obesity. Obviously, these can lead to cardiovascular complications, kidney complications, or peripheral vascular disease.” This statement does not indicate Grievant is subject to any restrictions

or limitations due to these conditions. LIII BEP Ex. 16.

16. From January through June 2002, Grievant established a pattern of chronic leave usage, coming to work late, hooking absences with holidays and weekends, and failing to call in sick or absent in a timely manner, if at all. LIII BEP Exs. 3, 14, 17, 18.

17. After the imposition of the three-day suspension which is the subject of this grievance, and after Grievant filed the grievance, she presented Director Edge with threeStatements of Medical Necessity from three different physicians, dated June 28, July 1, and July 8, 2002, and a letter from a physician dated June 26, 2002. LIII BEP Ex. 9. Grievant did not provide Ms. Vickers with copies of these documents.

18. None of the Statements of Medical Necessity identify a specific medical condition for which Grievant was treated. In the category requesting identification of limitations the patient may have associated with his or her condition, two documents indicate Grievant has “difficulty in maintaining a rigid schedule,” and the third states she has an “inability to work for extended periods without meals &/or breaks.” LIII BEP Ex. 9.

19. In the category requesting identification of reasonable accommodations which could aid the patient, all three documents have the following checked:

> Flexible scheduling
>
> Supportive work environment
>
> Permission to use paid &/or unpaid leave for absence due to illness or for health care appointments
>
> Counseling of agency personnel regarding support for this individuals' needs in the workplace.

LIII BEP Ex. 9.

20. The June 26, 2002 letter provided by one of Grievant's physicians indicates he treated her for left carpal tunnel syndrome on March 8, 2002, with reference to a compensable injury dated April 19, 1999. He indicates Grievant has contacted him for assistance in getting her some flexibility in her schedule, and states, “at the discretion of the employer, any flexibility that can be accommodated in her schedule would be appreciated.” LIII BEP. Ex. 9. 21. Grievant was issued an ergonomic

keyboard by BEP, but she kept it under her desk and did not use it. Grievant also had wrist pads, but gave them to another employee, Kim Wilson.

22. Ms. Vickers had requested Mike Rhodes of the Safety and Loss Unit to come and help Grievant set up an ergonomic work station to accommodate her carpal tunnel, but Grievant told him to wait until they moved their offices, which apparently will take place sometime in the future.

23. Other than Grievant's carpal tunnel syndrome, Ms. Vickers is unaware of any other medical conditions which Grievant may have which require her to work with restrictions or limitations.

24. Upper level management decided that certain individuals did not need access to certain computer programs, and ordered the programs removed in an effort to alleviate back log problems. These programs were deleted from Grievant's computer, as well as Director Edge's and Associate Director Hope Fallen's computers.

DISCUSSION

The burden of proof in disciplinary matters rests with the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested facts is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-486 (May17, 1993). Where the evidence equally supports both sides, the employer has not met is burden of proof. Hammer, supra.

BEP suspended Grievant for three days without pay for leave abuse in accordance with BEP and W. Va. Division of Personnel ("DOP") rules. DOP Administrative Rule 14.5 provides:

> Suspected Leave Abuse - When an employee appears to have a pattern of leave abuse, including such frequent use of sick leave as to render the employee's services undependable, the appointing authority may request appropriate substantiation of the employee's claim for leave, for example, verification of an illness of less than three days. The appointing authority shall give the employee prior written notice of the requirement for appropriate substantiation.

LIII BEP Ex. 5.

Ms. Vickers issued Grievant two warnings of suspected leave abuse in January and February

2002, and followed those up on March 18, 2002, by placing Grievant on restricted leave, requiring a physician's statement for every health-related absence. The documentation compiled by Ms. Vickers demonstrated excessive use of leave, and a pattern of taking leave on Fridays and Mondays, and immediately before and after holidays. By the time she was placed on restrictive leave in March, 2002, Grievant had accumulated only 1.3 hours of sick leave. On March 26, 2002, Grievant was placed on delayed payroll because she had no sick or annual leave left.

DOP's Delayed Payroll Assignment Policy provides, in pertinent part:

> A. An employee shall be placed on the delayed payroll system when he has been placed off and on a payroll for:
>
> 1. Insufficient accrued leave to cover 2 separate absence incidents during the preceding 6 months, or
> 2. Two occurrences of unauthorized leave resulting in an employee's pay being docked.
>
> . . .
>
> 1. An employee will remain in delayed pay status until (s)he accumulates both 40 hours of sick leave and 40 hours of annual leave.

LIII BEP Ex. 12.

BEP's Administrative Directive 6200.75, Subject: Delayed Payroll Assignment, provides, in pertinent part:

> Supervisors are responsible for monitoring employees' leave balances to prevent delayed payroll status action by assuring sufficient leave time is available before approving leave requests. Supervisors are also responsible for counseling employees regarding attendance problems or abuse of sick leave when such problems arise and for initiating any disciplinary action when necessary.

> Employees are responsible for using their accumulated leave in compliance with established leave policies, requesting prior approval when necessary, and monitoring their accumulated leave balances to ensure an adequate amount to cover absences.

LIII BEP Ex. 7.

In addition, BEP's Administrative Directive 6700.40, Subject: Annual Leave, provides:

> Pay may be docked if the employee does not have adequate time to cover necessary time off, and if the supervisor does not wish to terminate the employee or place the employee on a leave of absence without pay. In either instance, the supervisor must send a memo through normal channels to the Office of Personnel Services, which will then notify the employee in writing of the action being taken and report the action to the Bureau's Payroll Unit.

LIII BEP Ex. 13.

BEP has established by a preponderance of the evidence that it followed all applicable rules and procedures in attempting to correct Grievant's pattern of excessive leave use. She was counseled by her supervisor, given written warnings, placed on restricted leave, placed on delayed payroll status, and finally, suspended for three days without pay, because her leave usage did not improve over time.

Grievant does not contest that her leave usage has been excessive, and in fact, acknowledges that being on delayed payroll is helpful given her circumstances. However, she argues her leave has been justified and supported by medical documentation, and that she has limitations and restrictions which cause her to be late and/or miss work entirely. Grievant contends BEP has failed to accommodate her medical conditions, and insists an “undetermined, flexible schedule” would allow her to correct her leave usage. Furthermore, Grievant argues she has been discriminated against and harassed, because at least one other employee in her Unit has not been disciplined for excessive leave usage. Grievant's arguments constitute affirmative defenses, and she bears the burden of proving those defenses by a preponderance of the evidence. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1995). (See footnote 2)

A physician's statement does not necessarily remove an absence from consideration for determining leave abuse, and the determination of "whether Grievant abused sick leave must be based on all the facts in evidence." Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). While it is true that Grievant provided physician's statements,

both before and after her suspension, theevidence does not indicate that these excuses explained the nature of her illness. These statements taken together indicate she suffers from carpal tunnel syndrome, hypertension, diabetes, depression, and obesity. Other than general statements that Grievant cannot miss meals and needs breaks, there are no specific limitations or restrictions placed upon her ability to work. While Grievant may, indeed, be suffering from all of these problems, she failed to provide her employer with any specific medical substantiation of them, even after being warned that her excessive absences were a problem. Also, it is very clear Grievant had a continuous pattern of "hooking" absences with scheduled days off, which she explained by stating she is allergic to cigarette smoke, and that after spending weekends or holidays with her family, who smoke, she becomes sick.

Grievant also claims she has been harassed and discriminated against by her employer for her leave usage. W. Va. Code § 29-6A-2(l) defines harassment as “repeated or continued disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” Grievant has failed to demonstrate she has been subject to harassment. While Grievant may find being counseled, written up, and suspended, not to mention being taken off the payroll and being under leave restrictions, these actions were taken in the course of business, and in an attempt to get Grievant to rectify her behavior. Additionally, Grievant claimed BEP took computer programs off her computer because of her leave usage. BEP explained that computer programs were taken off not only Grievant's computer, but even the Directors. Corrective and/or disciplinary measures taken by an employer do not constitute harassment. 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). 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).

Grievant works with two other individuals in her Unit, not including her supervisor. Grievant testified one of her coworkers, Kim Wilson, has missed a significant amount of work, comes in late and leaves early, and has a very low leave balance, but has not been disciplined for her leave usage. Ms. Edge testified that Kim Wilson has been counseled about her leave usage, and has received a warning, but that her leave balances are not as low as Grievant's yet. Grievant has failed to identify an employee who is similarlysituated to herself in terms of leave balance who has not been counseled or disciplined, and thus, failed to establish a prima facie case of discrimination.

Employers have the right to expect employees to come to work on time and to follow orders that are do not impinge on their health and safety. Hatfield v. Dept. of Corrections, Docket 98-CORR-020 (Apr. 30, 1998); See Scarberry v. Bureau of Employment Programs, Docket No. 94-BEP-625 (Jan. 31, 1995); Smith v. Dept. of Corrections, Docket No. 93- CORR-538 (May 17, 1994). In this grievance, despite many attempts to get Grievant to correct her excessive absenteeism, she has not, and she even testified that she probably will not. It was not violative of any rules or procedures, and in fact, was mandated by DOP rules, that Ms. Vickers take corrective action against Grievant, and then disciplinary action, culminating in her three-day suspension without pay.

CONCLUSIONS OF LAW

1. The burden of proof in disciplinary maters rests with the employer and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence.

W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. BEP has proven by a preponderance of the evidence that Grievant has abused her sick and annual leave, that it has followed the applicable policies and procedures in counseling her, issuing written warnings, placing her on restrictive leave, placing her on delayed payroll, and ultimately, suspending her for three days without pay.

3. The employee bears the burden on any defense raised to the charges. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1995). 4. A physician's statement does not necessarily remove an absence from consideration for determining leave abuse, and that "whether Grievant abused sick leave must be based on all the facts in evidence." Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997).

5. W. Va. Code § 29-6A-2(l) defines harassment as “repeated or continued disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.”

6. 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:

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

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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

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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). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for theemployment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

7. Grievant has failed to establish by a preponderance of the evidence that the actions taken against her by her employer constitute harassment or discrimination.

Accordingly, this 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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: April 22, 2003

Footnote: 1

Grievant filed a subsequent grievance over a 20-day suspension, which was initially consolidated with the 3-day grievance, and then later severed by Order of Administrative Law Judge Brenda L. Gould, dated March 12, 2003. This grievance was then reassigned to the undersigned Administrative Law Judge for administrative reasons.

Footnote: 2

Grievant withdrew her claims under the W. Va. Human Rights Act at level three.