JIMMY L. LITTLE,

Grievant,

v. **DOCKET NO. 05-DEP-248**

DEPARTMENT OF ENVIRONMENTAL

PROTECTION,

Respondent.

DECISION

Grievant Jimmy L. Little filed this grievance on July 18, 2005, challenging his termination from employment, and alleging harassment, discrimination and retaliation. He seeks reinstatement to his position and an end to the harassment, discrimination and retaliation.

A level four hearing was held in the Grievance Board's Charleston office on February 10, 2006. Grievant was represented by Fred Tucker of the UMWA-WVSEU and Hattie Little, and Respondent was represented by counsel, Doren Burrell, Senior Assistant Attorney General. The matter became mature for decision on March 31, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant was dismissed for job abandonment and insubordination after he failed to request a medical leave of absence following the closure of his workers' compensationclaim and his subsequent failure to return to work. Grievant takes the position that Respondent is prohibited from terminating him in connection with his workers' compensation claim, and that his employer's actions are inextricably entwined with the claim.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant was employed by Respondent as an Environmental Technician 1.
2. In September 2004 Grievant was injured on the job.
3. As a result of his injury, Grievant filed a Workers' Compensation claim and was awarded

temporary total disability (TTD) benefits, because he was unable to work. Grievant elected to receive these benefits rather than using leave earned on the job while he was unable to work due to his injury.

4. After unsuccessfully attempting to obtain information about Grievant's condition from him, Respondent requested, through the Workers' Compensation Commission, that an independent medical examination (IME) be performed to determine Grievant's extent of recovery.

5. The IME was conducted May 11, 2005, by Dr. Prasadarao B. Mukkamala, M.D., who reported that Grievant had reached his maximum degree of medical improvement and that he could return to work immediately.

6. As a result of the report, Grievant's TTD benefits were suspended on May 18, 2005. 7. Sherry Arthur, Respondent's benefits and return-to-work coordinator, contacted Grievant in an attempt to obtain a functional capacity assessment, and offered to assist Grievant in returning to work in a light-duty assignment at full pay. Ms. Arthur also explained that Respondent would provide rehabilitation services until Grievant could return to his full-duty assignment.

8. Grievant refused to return to work under any conditions, claiming his personal physician had not released him.

9. Dr. John C. Sharp, D.O. opined in a January 12, 2006, letter to Brickstreet Insurance Company (See footnote 2) that Grievant was “temporarily totally disabled and is unable at this time to return to work in any type of job capacity.” He also stated he had planned a course of treatment to include physical therapy, work conditioning/hardening and counseling, and that his goal was to have Grievant back to work by May 1, 2006.

10. Respondent stipulates that Grievant is still under Dr. Sharp's care and is pursuing a rehabilitative program, and is conducting litigation to dispute the suspension of his TTD benefits.

11. Because Grievant refused to return to work, Ms. Arthur instructed Grievant that he must request a medical leave of absence, and fill out the proper paperwork to do so, pursuant to Responent's and the Division of Personnel's policies on medical leaves of absence.

12. Ms. Arthur provided Grievant the necessary forms and instructed Grievant exactly what information was needed and when it must be submitted by. 13. Grievant responded by refusing to apply for a medical leave of absence, claiming he did not need to because he was protesting the suspension of his TTD benefits and because Dr. Sharp had not cleared him to return to work.

14. Ms. Arthur advised Grievant of the consequences of his failure to apply for the leave of absence with the required documentation, and further advised Grievant leave would be granted if he would just apply. She explained that he was on unauthorized leave.

15. Ms. Arthur referred Grievant to her supervisor, Melinda Campbell, who attempted to explain the process and requirements to Grievant again, but he was steadfast in his refusal to apply for a leave of absence.

16. Respondent finally, on July 5, 2005, issued a letter to Grievant advising him of his dismissal for job abandonment, and for his insubordination in refusing to comply with policies and rules regarding application and documentation for a medical leave of absence.

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. (See footnote 3) Respondent charged Grievant with job abandonment and insubordination. Grievant claims his TTD claim prohibits adverse personnel actions even on these bases while that claim is pending. Although Grievant presented evidence of his condition and the dealings with Workers' Compensation, the resolution of this grievance turns on one simple question - whether Grievant was eligible to receive TTD benefits at the time he was dismissed. Respondent asserts that, as far as it knew, Grievant was noteligible to receive TTD benefits at the time, because it had received official communication from the Workers' Compensation Commission indicating Grievant's claim was suspended due to his reaching maximum medical improvement and the IME finding that he could return to work. Grievant counters this assertion through his argument that the closure of his claim was appealable, and by presenting evidence that he is appealing the determination based on conflicting medical evidence. Grievant argues that, as long as the decision to suspend his claim is appealable, he is "eligible to receive" benefits and may not be fired.

Discrimination against Workers' Compensation claimants is prohibited under W. Va. Code § 23-5A-1: "No 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 under this chapter." Second, "discrimination" in that context is defined by W. Va. Code § 23-5A-3, which states in part:

> (a) It shall be a discriminatory practice within the meaning of section one of this article 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.

(Emphasis added.)

That phrase, "or is eligible to receive . . . benefits" is somewhat open to interpretation, but several prior decisions have determined that the legislature did notintend appeals to extend protection after the TTD benefits had been discontinued. (See footnote 4) Grievant is unable, therefore, to establish that he was *per se* discriminated against in violation of W. Va. Code § 23-5A-1.

Even if Grievant has failed to establish that termination while appealing closure of a TTD claim is *per se* discrimination, he may still establish that he was discriminated against because of his Worker's Compensation Claim. "In order to make a prima facie case of discrimination under W. Va. Code, 23-5A-1, the employee must prove that:

> (1) an on-the-job injury was sustained;
>
> (2) proceedings were instituted under the Workers' Compensation Act, W. Va. Code, 23-1-1, *et seq*.; and
>
> (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee."

Syl. Pt. 1, Powell v. Wyoming Cablevision, Inc., 184 W. Va. 700, 403 S.E.2d 717 (1991) (formatting supplied for clarity). While Grievant did sustain an on-the-job injury and institute Workers' Compensation proceedings, he did not establish a nexus between his termination and the filing of benefits. To the contrary, the closure of his claim, the IME finding he was able to return to work, and his subsequent failure to return to work after clear instruction, were proven to be the triggering factors in Respondent's decision to dismiss Grievant from employment. Grievant was given every

opportunity and assistance in filling out the necessary paperwork to comply with the leave of absence policy, but willfully refused to comply even after he was clearly informed that he would likely be dismissed if he remainedon unauthorized leave. Respondent's forbearance in overlooking Grievant's stubbornness for a month and half while attempting to return him to work at light duty with full pay or in the alternative place him on approved leave dispels any notion of retaliation or discrimination on the basis of his TTD leave.

The following conclusions of law support this discussion:

Conclusions of Law

1. In dismissal cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for dismissing an employee. W. Va. Code § 29-6A-6. *Davis v. W. Va. Dept. of Motor Vehicles*, Docket No. 89-DMV-569 (Jan.22, 1990); *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 fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. Discrimination against Workers' Compensation claimants is prohibited under W. Va. Code § 23-5A-1: "No 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 under this chapter."

3. "Discrimination" in the context of Workers' Compensation claims is defined by W. Va. Code § 23-5A-3, which states in part:

> (a) It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is offwork due to a compensable injury within the meaning of article four of this chapter <u>and is receiving or is eligible to receive temporary total disability benefits</u>, 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.

(Emphasis added.)

4. An employee is not “eligible to receive . . . benefits” during the appeals period after TTD benefits have been discontinued*. See Addair v. Dep't of Health and Human Res.*, Docket No. 03-HHR-147 (Feb. 2, 2004). *See also Syl. Pt. 6, Rollins v. Mason County Bd. of Educ.*, 200 W. Va. 386, 489 S.E.2d 768 (1997); *Baire v. Div. of Corrections*, Docket No. 97-CORR-129 (March 11, 1998).

5. Grievant did not establish that he was discriminated against on the basis of his Workers' Compensation claim.

6. Respondent met its burden of proving Grievant abandoned his position by failing to return to work or apply for an approved leave of absence following the termination of his TTD benefits.

For the foregoing reasons, this grievance is hereby **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, and such appeal must be filed within thirty 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 andshould 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.

May 2, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Respondent submitted a reply brief outside the agreed time frame, to which Grievant objected. Respondent's reply was disregarded.

Footnote: 2

Successor in interest to the Workers' Compensation Commission.

Footnote: 3

W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

Footnote: 4

See Addair v. Dep't of Health and Human Res., Docket No. 03-HHR-147 (Feb. 2, 2004). See also Syl. Pt. 6, Rollins v. Mason County Bd. of Educ., 200 W. Va. 386, 489 S.E.2d 768 (1997); Baire v. Div. of Corrections, Docket No. 97-CORR-129 (March 11, 1998).