DR. RENDA JAMES,

Grievant,

v. **Docket No. 05-31-463**

MONROE COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant, Dr. Renda James, is employed as a guidance counselor at James Monroe High School. Grievant filed two grievances that were consolidated at Level II. In the first grievance filed on October 25, 2005, Grievant claims harassment, retaliation, and discrimination for having her work hours changed from seven and a half hours to eight hours. The second grievance, filed on November 7, 2005, claims a violation of *W. Va. Code* § 18A-2-7, which deals with transfers. Grievant seeks payment for extra time worked and any other benefits due. The grievance was denied at Level I, and a hearing was held at Level II. The grievance was denied at Level II on December 8, 2005. Grievant chose to bypass Level III, and submitted this case on the record at Level IV. (See footnote 1) Grievant is represented by Ben Barkey of West Virginia Education Association, and Respondent isrepresented by Gregory Bailey of Bowles Rice McDavid Graff and Love. This case became mature for decision on March 15, 2006. (See footnote 2)

Issues and Arguments

Grievant argues that her work hours should be seven and a half hours beginning at 8:30 a.m. and concluding at 3:40 p.m. These are the required hours for teachers. Grievant argues the seven and a half hours is appropriate because she is employed by virtue of a teacher's contract. She argues that those have been her hours since the 2004- 2005 school year, and she believes she should continue to work seven and a half hours a work day, as opposed to eight hours.

Respondent argues that Grievant is not under a teacher's contract, but instead is considered professional support staff. As a result, she is required her to work an eight hour day. Also, every other

guidance counselor in the county works an eight hour day, and because Grievant was only working seven and a half hours, the principal at the high school felt there was an inequity in the work load. After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following findings of fact.

Findings of Fact

1. Grievant is employed as a guidance counselor at James Monroe High School. She has held that position since January 24, 2005, as a result of a transfer per her request.

2. For the 2004-2005 school year, Grievant worked seven and half hours, from 8:30 a.m. to 3:40 p.m., the same hours as teachers. 3. Christy Parker, the Principal, did not address the Grievant's schedule during the 2004-2005 school year because a previous grievance had been filed on a separate issue, and Ms. Parker was concerned that addressing Grievant's schedule at that time could be misinterpreted by Grievant as retaliation.

3. In August 2005, Principal Parker was informed the senior guidance counselor would be retiring during the school year, and since Grievant would be the only guidance counselor at the school, it was important Grievant work the required eight hour day.

4. Principal Parker consulted with Dr. Lyn Guy, Superintendent, and since all other guidance counselors throughout the county were working an eight hour day, it was decided that Grievant would be required to work from 8:00 a.m. to 4:00 p.m.

5. On September 27, 2005, Ms. Parker discussed with Grievant her work schedule and explained the need for Grievant to work an eight hour day. Ms. Parker believed this conversation put Grievant on notice that she should begin working from 8:00 a.m. to 4:00 p.m. immediately.

6. Grievant continued to work from 8:30 a.m. to 3:40 p.m.

7. On October 20, 2005, Grievant received a letter from Ms. Parker directing her to begin working an 8 hour day on October 24, 2005.

8. Grievant began working from 8:00 a.m. to 4:00 p.m. on October 24, 2005.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, *W. Va. Code* § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderancestandard 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 and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant claims that requiring her to work an eight hour day is harassment, retaliation, and discrimination. She also alleges a violation of *W. Va. Code* § 18A-2-7 which deals with various assignment and transfer issues. (See footnote 3)

W. Va. Code § 18-29-2(n) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96- BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Id.*; *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

Requiring Grievant to work an eight hour day is not harassment. Principal Parker testified that she was satisfied with Grievant's work, but needed her to be at the school longer, especially with the retirement of the senior guidance counselor. Grievant was approached about this issue once through a discussion with Principal Parker, and onlyafter Grievant did not adjust her work hours, was she approached again and given a date certain to start working eight hours. Grievant has failed to meet her burden on the issue of harassment.

Grievant also alleges that the schedule modification was retaliation. *W. Va. Code* § 18-29-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a *prima facie* case of reprisal by establishing:

(1) that he engaged in protected activity, e.g., filing a grievance;

(2) that he was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See Frank's Shoe Store v. W. Va. Human Rights Comm'n,* 179 W. Va. 53, 365 S.E.2d 251 (1986); *Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ.*, Docket No. 94-BOT- 088 (Sept. 19, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989).

Principal Parker was aware Grievant had filed a previous grievance against Respondent. As a result, Principal Parker was reluctant to discuss the scheduling issue during the 2004-2005 school year even though she had valid concerns about the work loadbecause she did not want it to be misinterpreted as retaliation. Therefore, Principal Parker did not say anything to Grievant about her hours until it became clear the senior guidance counselor was going to retire, and Grievant would be the only counselor at the school. At that point, the issue had to be addressed, and it was addressed in the least adverse manner possible, with not causal connection to the prior grievance filed.

Lastly, Grievant alleges discrimination. "*W. Va. Code* § 18-29-2(m) 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.'" *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001). "[T]o prevail in a claim for discrimination under *W. Va. Code* § 18-29-2(m), an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the actual job responsibilities of the employees and not agreed to in writing by the employee. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the discriminatory treatment." *The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242 , 605 S.E.2d 814 (2004).

Clearly, Grievant is not being treated differently from other employees. Guidance counselors throughout the county work an eight hour day, and while that is different from teachers' schedules, that difference is necessitated by the different job responsibilities. Therefore, Grievant has failed to meet her burden. This grievance must be denied. The following conclusions of law support this Decision.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, *W. Va. Code* § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. *W. Va. Code* § 18-29-2(n) defines harassment as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” “Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96- BOT-462 (Aug. 29, 1997).” *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Id.*; *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

3. Grievant failed to prove that requiring her to work an eight hour day is harassment.

4. *W. Va. Code* § 18-29-2(p) defines “reprisal” as “the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either foran alleged injury itself or any lawful attempt to redress it.” A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1) that he engaged in protected activity, e.g., filing a grievance;

(2) that he was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

5. Grievant has failed to meet the established test for retaliation.

6. "*W. Va. Code* § 18-29-2(m) 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.'" *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001). "[T]o prevail in a claim for discrimination under *W. Va. Code* § 18-29-2(m), an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the actual job responsibilities of the employees and not agreed to in writing by the employee. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the discriminatory treatment." *The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242 , 605 S.E.2d 814 (2004).

7. Grievant has failed to prove discrimination.

Accordingly, the grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monroe County. Any such appeal must be filed within thirty days of receipt of this decision. *W. Va. Code* § 18-29-7. 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.

DATE: March 31, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

This case was originally assigned to ALJ Marteney, but due to administrative reasons, it was reassigned to the undersigned who has reviewed the complete record in this matter.

Footnote: 2

Neither party submitted proposed findings of fact and conclusions of law.

Footnote: 3

There was no evidence presented on this issue. Therefore, this alleged violation is deemed to have been abandoned.