JOYCE WALDRON,

Grievant,

v. **Docket No. 05-EBA-422**

EDUCATIONAL BROADCASTING AUTHORITY

Respondent.

DECISION

Grievant Joyce Waldron, an at-will employee, was employed as a receptionist by the Educational Broadcasting Authority ("EBA"). She was terminated for repeated tardiness and failure to call-in and report her absences. The relief sought is, "I want my job back. I feel I was fired unfairly and would still be an asset to the agency."

As this grievance was a termination, it was filed directly to Level IV on November 16, 2005, and a Level IV hearing on Respondent's Motion to Dismiss was held on February 6, 2006. This grievance became mature for decision on that date, as the parties' did not elect to submit proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Respondent asserted Grievant was an at-will employee, and as such could be terminated for any reason that did not violate a substantial public policy. Respondent reported Grievant was terminated for tardiness and failure to call-in when she was late. Respondent also noted there was no substantial public policy identified on Grievant's Statement of Grievance, and that is why the Motion to Dismiss was filed.

Grievant asserted EBA violated a substantial public policy when it was aware of her health problems and those of her mother, and did not personally tell Grievant she couldapply for a medical leave of absence under the Family Medical Leave Act ("FMLA"or "Act"). In essence, Grievant argues EBA should have told her of this opportunity for leave so she could take it, and then she would not have been terminated for tardiness. Since Grievant was an at-will employee, she has the burden of proof to demonstrate a violation of a substantial public

policy.

In rebuttal, Respondent asserts the FMLA was posted as required, the Parental Leave Act ("PLA") is discussed in detail in the Handbook, and that is all that is required. Accordingly, no violation of the FMLA or the PLA has been proven.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed as an at-will employee by EBA as a receptionist at the time of her termination. Resp. No. 1. Grievant manned the "very busy" front desk, and if she was not there, other employees had to be pulled from their positions to cover for her.

2. Grievant has been an at-will employee since the time of her hire in 1992. In January of 2001, EBA redid its Personnel Handbook. On January 10, 2001, Grievant signed a Statement of Acceptance which stated in pertinent part, "I understand my employment is 'at-will' . . . [and] my employment may be terminated at any time with or without notice, cause or compensation."

3. This Statement of Acceptance's final sentence read, "I have received my personal copy of the EBA's Employee Handbook, and I have been given an opportunity to read it and ask questions regarding its contents." Grievant signed her name directly after this statement.

4. EBA's Handbook discussed W. Va. Code § 21-5D-5, the Parental Leave Act, and notified EBA employees they were entitled to twelve weeks of unpaid leave after the exhaustion of all other leave if they met certain conditions identified in this Act. Resp. No. 1 at 19 - 21. The required FMLA posting was also on the bulletin board in the employee break room. Testimony Ray.

5. EBA's Handbook also discussed an employee's sick leave and the right to ask for a leave of absence without pay. Resp. No. 1 at 17 - 18 & 22.

6. EBA's Handbook also identifies tardiness as a problem to be dealt with through progressive discipline. Resp. No. 1 at 30 - 31.

7. Grievant has a long history of tardiness, and in January 2005, Grievant's supervisor, Diane Lunsford, gave her a verbal warning and discussed the problem with her.

8. On February 7, 2005, Ms. Lunsford gave Grievant a written warning about her continued tardiness.

9. On July 19, 2005, Grievant received a three-day suspension for her continued tardiness and failure to call-in.

10. On November 8, 2005, Grievant was called to help with her ill mother, and ended up taking her to the emergency room to receive pain medication. Grievant was tired after this long evening, went to sleep at her mother's house, and did not wake up until 9:30 a.m. She then called work to try to explain the situation. Grievant was told not to come in and was called later that day and informed she was terminated.

11. Grievant has problems with anxiety, depression, and panic attacks and takes a variety of medications for these problems. These drugs cause her to be drowsy andoversleep. (See footnote 2) Grievant's mother has osteoporosis and Alzheimer's, and Grievant frequently assists in her care.

12. Grievant did not establish her sick and annual leave was depleted, a requirement for receiving FMLA leave.

13. Grievant never asked her supervisor about the FMLA or PLA, and whether they would apply to her situation.

Discussion

In termination 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 suspending an employee. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). However, in cases involving the dismissal of classified-exempt, at-will employees, state "agencies do not have to meet this legal standard." Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994). Indeed, an at-will employee is subject to disciplinary action for any reason which does not contravene some substantial public policy. See Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994). See also Wilhelm v. Dep't of Tax and Revenue/Lottery Comm'n, Docket No. 94-L-038 (Sept. 30, 1994), aff'd sub. nom. Wilhelm v. W. Va. Lottery, 198 W. Va. 92,

479 S.E.2d 602 (1996). Grievant was a classified-exempt employee and as such served at the will and pleasure of EBA. See Wilhelm, supra; Dye v. Dep't of Educ., Docket No. 99-DOE-217 (Sept. 16, 1999), Bellinger v. W. Va. Dep't of Pub. Safety, Docket No. 95-DPS-119 (Aug. 15, 1995); Logan, supra; Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-HHR-400 (June 30, 1992). Grievant's at-will status denotes she could be fired for good reasons, bad reasons, or no reasons, provided she was not terminated for a reason that violated a substantial public policy. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). See Wilhelm, supra; Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995); Harless, supra.

The burden of proof is on an at-will employee to establish a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue, and the termination stands. Wilhelm, supra. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he 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). See Loundman-Clay v. Higher Educ. Policy Comm'n/Bluefield State College, Docket No. 02-HEPC-013 (Aug. 26, 2002).

Even at-will employees are not completely at the mercy of their employer. In this regard, the West Virginia Supreme Court of Appeals has declared:

> **The rule that an employer has an absolute right to discharge an at-will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy, then the employer may be liable to the employee for damages occasioned by this discharge.**

Syl.,Harless, supra. Subsequently, in Birthisel v. Tri-Cities Health Serv., 188 W. Va. 371, 377, 424 S.E.2d 606, (1992), the Court discussed sources of public policy and stated:

> **To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions. Inherent in the term "substantial public policy" is the concept**

that the policy will provide specific guidance to a reasonable person.

Courts have recognized that substantial public policy interests are implicated in such actions as submitting a claim for back wages under the Veterans Reemployment Rights Act (Mace v. Charleston Area Med. Ctr. Found., 188 W. Va. 57, 422 S.E.2d 624 (1992)); refusing to conceal alleged environmental violations committed by the employer (Bell v. Ashland Petroleum, Inc., 812 F. Supp. 639 (S.D. W. Va. 1993)); filing a workers' compensation claim (Powell v. Wyoming Cable Co., 184 W. Va. 700, 403 S.E.2d 717 (1991)); Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980)); and attempting to enforce warranty rights granted under the West Virginia Consumer Protection and Credit Act (Reed v. Sears, Roebuck & Co., 188 W. Va. 747, 426 S.E.2d 539 (1992)). See Roberts v. Adkins, 191 W. Va. 215, 444 S.E.2d 725 (1994).

I. Credibility

An issue to address is credibility, as Grievant testified she was not told of the opportunity for leave under the FMLA and PLA, and FMLA information was not posted asrequired. This testimony of Grievant is not in agreement with other witnesses, nor is it in agreement with her own signed Statement of Acceptance. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). See Nalle v. Workers' Compensation Comm'n, 04-WCC-113 (July 30, 2004).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or

motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. **(See footnote 3)** **See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999); Perdue, supra. See also Loundman-Clay v. Higher Educ. Policy Comm'n, Docket No. 02-HEPC-013 (Aug. 29, 2002).**

The undersigned Administrative Law Judge had an opportunity to observe the witnesses and to assess their credibility during their testimony. Grievant's testimony that EBA had not posted the required FMLA posting is not believed. The undersigned Administrative Law Judge also finds Grievant's testimony that she did not have a Handbook and did not read it, is contradicted by her signed statement discussed in Findings of Fact 3 and 4. Accordingly, the undersigned Administrative Law Judge finds Grievant either knew or should have known about her rights regarding family leave. Additionally, Grievant knew or should have known about her rights regarding her own sick leave as this information was detailed in the Handbook as well.

II. Family Medical Leave Act/Parental Leave Act

Grievant asserts EBA failed to notify her of her rights to leave under the FMLA/PLA, and this failure should nullify the termination. This assertion is an affirmative defense, and the burden of proof on this issue is with Grievant. It should be noted this argument is a rather flawed. As stated previously, Grievant argues EBA must personally inform her of her rights, and because Respondent did not, she cannot be fired. This argument requires the assumption Grievant would have agreed to apply for unpaid leave, met the requirements for receiving it, and then she would not have to come to work on time as her tardiness would be excused. This is not a case where Grievant asked for FMLA/PLA leave and Respondent denied the request or did not provide Grievant with the required paperwork or rules. Grievant has not met her burden of proof and demonstrated Respondent had a duty to do more than what it did. While Grievant's supervisor could have personally discussed the FMLA/PLA with Grievant and suggest she apply for this leave, EBA had no duty to do so, and the requirements of these Acts have not been violated. **(See footnote 4)** **Further, it should be noted Grievant was also informed of the rules regarding her own health problems, and the right to apply for a leave of absence without pay for extended illness. There is no contention by Grievant that she asked**

for any type of family or medical leave, and this request was denied.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. A classified-exempt employee is not covered under the civil service system and is an at-will employee. Bellinger v. W. Va. Dep't of Pub. Safety, Docket No. 95-DPS- 119 (Aug. 15, 1995); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91- HHR-400 (June 30, 1992).

2. In cases involving the dismissal of classified-exempt, at-will employees, state agencies do not have the burden of proof to establish reasons for the termination and do not have to establish good cause for discharging an employee. Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

3. Because Grievant was an at-will employee at the time of her termination, this dismissal could occur for "no reason" or a "bad reason," unless a substantial public policyis violated. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). See Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Higginbotham v. W. Va. Dep't of Pub. Safety/W. Va. State Police, Docket No. 97-DPS-018 (Mar. 31, 1997); Myer v. W. Va. Racing Comm'n, Docket No. 95-RC-290 (May 3, 1996); Samples v. Glenville State College, Docket No. 94-BOD-564 (July 28, 1995); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994).

4. The burden of proof is on an at-will employee to establish a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue, and the termination stands. Wilhelm, supra. See Young v. W. Va. Dep't of Health and Human Res., Docket No. 90-HHR-541 (Mar. 29. 1991).

5. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993); Black's Law Dictionary, 5th ed. at 1064.

6. Where the evidence equally supports both sides, the employee has not met her burden. Id. See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of

Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997). See Loundman- Clay v. Higher Educ, Policy Comm'n/Bluefield State College, Docket No. 02-HEPC-013 (Aug. 26, 2002).

7. If Grievant can prove Respondent failed to notify her properly of her leave rights under the FMLA/PLA Acts, she would establish a substantial public policy violation. 8. The actions of EBA met the requirements of the FMLA/PLA Act. Grievant did not demonstrate EBA violated either of these Acts, or that the Agency had a duty to ask Grievant if she wished to apply for leave under the FMLA/PLA.

Accordingly, this grievance is DISMISSED.

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 (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 are 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Date: February 17, 2006

Footnote: 1

Grievant was represented by her son, and Respondent was represented by Katherine Campbell, Assistant Attorney General.

Footnote: 2

It would appear Grievant's tardiness is not caused by a medical problem, but poor regulation of medication. Grievant did not assert her tardiness was caused by her anxiety or depression.

Footnote: 3

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 4

It is also noted that while not the main focus of the Level IV hearing, it would appear Grievant would have trouble meeting the requirements to apply for leave under this Act. This conclusions need not be reached in this case because Grievant never requested FMLA leave or any other type of leave.