THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

LINDA ADKINS,

Grievant,

v. **Docket No. 07-HHR-016**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES /
BUREAU OF BEHAVIORAL HEALTH
AND HEALTH FACILITIES, OFFICE OF
BEHAVIORAL HEALTH SERVICES,

Respondent .

D E C I S I O N

Grievant is employed by the Department of Health and Human Resources ("DHHR," “Respondent,” or “Employer”) and is assigned to the Bureau of Behavioral Health and Health Facilities ("BHHF"), Office of Behavioral Health Services. On September 7, 2006, she filed a Level I grievance, having earlier identified herself as suffering from Bipolar Disorder. She sought several forms of accommodation, as contemplated under the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12101 - 12213 and the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1 to 5-11-21.

Grievant received partial relief at Levels I and II. Level III hearings were

conducted on December 15, 2006, and January 5, 2007. The original Statement of Grievance was:

> Employer is failing to comply with ADA (Americans with Disabilities Act) to pursue reasonable and expedient resolution to my Formal Written Accommodation Request dated May 15, 2006, to accommodate my ADA disability. Multiple informal requests for accommodations have been made prior to this date by me and my doctor. Acts of discrimination, defamation of character, and retaliation have also been endured. EEOC Guidelines for Accommodations have been distributed at least twice. Employer is failing read [sic] and/or consider these Federal Guidelines.

Grievant sought the following relief:

Original Grievance (9/7/06) (See footnote 1)

1. Permission to accumulate “flex time” and use it the following week, or carry it and use it within the next month if at all possible, would be very helpful.

2. I request that my attendance report (time sheet) be monitored specifically by the clerical staff of BHHF's Division of Personnel, or the clerical staff in the Division of Adult Mental Health; not other clerical staff “as assigned” to this duty.

3. I request the ability to work at home partial or full days if necessary. This would be discussed with and approved by my immediate supervisor.

4. I request the ability to find private work space at the office in which to work undisturbed.

5. I may need assistance from my immediate supervisor structuring and prioritizing tasks.

6.
I request permission to take more frequent breaks if necessary. If I exceed the 30 minutes a day recommended in the State's Personnel Policy, I would lengthen my work hours accordingly.

Addendum (See footnote 2)

I.
Since my original written request, the Bureau has circulated guidelines stating no one is to work past 6:00 p.m.; and I have received personal admonitions not to do so. I have requested in writing an adjustment to my Accommodation Request #1 above, to be able to accrue additional hours after 6 p.m., as is my standard work practice.

II.
Have my leave reinstated to what it was at the end of March, 2006, before I got sick and this whole agonizing process started: AL 57.78 hours; SL 45 hours.

III.
Reimbursement for my out of pocket expenses for psychiatric and counseling sessions I have had to schedule to respond to Bureau demands for information, and to help me cope with the additional stressors brought on by my work situation and lack of accommodations. (Estimate as of this date: $250.00.)

IV.
Reimbursement for all wages or benefits lost due to being off payroll due to a lack of leave.

V.
Reimbursement for travel or expenses incurred by any witnesses or legal representatives.

VI.

Make me “whole,” however that is possible; and regain six months of my life.

Addendum II (1/3/07) (See footnote 3)

1.

Add to initial relief, #1 above: Use “Adjusted Off” time prior to its accrual. If the additional time is not accrued during the designated time period, personal leave would be used instead.

2.

Receive prior approval to request “adjusted off” time in advance as much as possible, although it may not be feasible prior to every single use. My immediate supervisor would be informed at the time it is used, or immediately thereafter.

3.

Add to Addendum #I above: Request the ability to lengthen my work day to allow for frequent breaks if necessary, after 6:00 p.m.

4.

Add to Addendum #I above: I request the ability to work past 6:00 p.m. for any reasonable work assignments, not just “Special Projects” as Sheila Kelly has stated in her decision letter dated October 6, 2006, regarding the Level II Hearing.

5.

I request the flexibility to work the hours my doctor recommends without needing prior approval to work more than the number of hours I must choose for my Approved Schedule. For example, if my doctorstates I can work 6 to 8 hours a day, and my current schedule it six hours per day; prior approval, justification, and the additional forms currently required to be signed by me and my immediate supervisor will not be necessary.

The January 11, 2007, Level III decision denied the grievance, and on January 22, 2007, she appealed to this Board at Level IV. (See footnote 4)

The Grievant was represented at the lower levels. She appears *pro se* before this Board; the Employer is represented by Assistant Attorney General Jennifer K. Akers. On April 12, 2007, Ms. Akers notified the Board that the parties had agreed to submit the case on the record developed below. On April 13, 2007, former A. L. J. Wendy A. Campbell entered an order granting the parties until May 13, 2007 (a Sunday), to submit proposed findings of fact and conclusions of law. The parties apparently stipulated to a one-day extension of this deadline, and the Employer's proposed findings and conclusions were mailed on Tuesday, May 15, 2007, at which time the case became mature for decision. The Grievant did not submit a proposed decision. On September 7, 2007, the case was transferred to the undersigned for administrative reasons.

Synopsis

____The Grievant essentially maintains that DHHR has failed reasonably to accommodate her mental disability (Bipolar Disorder), as required by the ADA and theWest Virginia Human Rights Act. (See footnote 5) The Respondent does not dispute that it has not made all the accommodations Grievant seeks and recognizes that she is disabled, but maintains that it has reasonably accommodated her disability, and that it has not discriminated or retaliated against her.

The Grievant filed and presented her case as one of discrimination and retaliation under the grievance statutes. In order to prevail, therefore, she must prove either discrimination or retaliation before this Board may even consider the question of reasonable accommodation. Because the Grievant

has not met her burden of proof on either discrimination or retaliation, her grievance must be denied.

After thorough review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact:

Findings of Fact

1 1. Grievant is employed by the Department of Health and Human Resources and is assigned to the Bureau of Behavioral Health and Health Facilities, Office of Behavioral Health Services.

2 2. Beginning April 18, 2006, Grievant's psychiatrist began providing statements to DHHR restricting the number of hours Grievant could work. Grievant's Ex. 1, Level III.

3 3. In a memorandum to her Employer dated May 15, 2006, Grievant identified herself as suffering from a "medical/psychiatric illness" and requested accommodations, ascontemplated under the ADA (the Americans with Disabilities Act). Grievant's Ex. 2, Level III.

4 4. In a letter dated July 18, 2006, Grievant's physician described her diagnosis as Bipolar Disorder, Type II. Grievant's Ex. 4, Level III.

5 5. Several months of discussions between the parties regarding her requested accommodations took place, during which the Employer granted some of them.

6 6. The Grievant is a person with a disability within the meaning of the ADA and the West Virginia Human Rights Act.

7 7. On September 7, 2006, Grievant filed a Level I grievance seeking accommodations. The specifics of her requests are set forth above.

8 8. At the time of the Level III hearing, Grievant's original accommodation requests had been granted, except for her request that she be

permitted to work from home. *See* Items 1 through 6 of the "Original Grievance (9/7/06)" list, above, and Level III Hearing Transcript, at pp. 14-16. The request to work from home was Item No. 3 on the list.

9 9. At the time of the Level III hearing, Grievant's time sheet was being monitored by the clerical staff in BHHF's personnel office, as she requested.

10 10. At the time of the Level III hearing, Respondent had afforded Grievant the opportunity to select any available empty cubicle and offered to pay for Grievant to become a client of the Division of Rehabilitation Services, at Respondent's cost, to obtain that Division's advice on arranging Grievant's work station to provide more privacy. Grievant declined that offer. 11 11. At the time of the Level III hearing, Respondent had also offered to contact Capitol Designs, a private firm, regarding a possible redesign of Grievant's work space.

12 12. At the time of the Level III hearing, Grievant's immediate supervisor was assisting her with structuring and prioritizing her tasks.

13 13. At the time of the Level III hearing, Respondent had allowed Grievant to work any hours between 7:00 a.m. and 6:00 p.m. so that she could accrue flex time, in order to “adjust off” on a weekly basis. The Bureau has a policy which forbids any employee to work past 6:00 p.m.

14 14. The Respondent's denial of some of the Grievant's accommodation requests occurred after the filing of the grievance.

Discussion

Burden of Proof

Because this grievance does not involve a disciplinary matter, the Grievant

has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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).

Statutory Prohibitions Against Discrimination

Although the Grievant alleges discrimination and retaliation (and testified at the Level III hearing that she was the victim of harassment), this grievance is essentially an ADA-type (Americans with Disabilities Act) claim. In it, the Grievant seeks accommodations which include changes in the physical arrangement of her workspace; changes in her working hours; time off and schedule shifts; and other changes to the Employer's normal work arrangements. By agreeing to some of Grievant's accommodation requests (and in its Proposed Findings and Conclusions), the Employer has recognized both the genuineness of Grievant's disability, and her entitlement to some level of accommodation. The Employer apparently maintains, however, that it has fulfilled its responsibility to make “reasonable accommodation” as defined in West Virginia and federal law and regulations. (See footnote 6) The Respondent contends, at the least, that it has not engaged in any activity prohibited by the grievance statutes.

Under a long line of decisions by the West Virginia Supreme Court of Appeals and this Board, *see Vest v. Board of Education of County of Nicholas*,

193 W. Va. 222, 455 S.E.2d 781 (1995), the Grievance Board's jurisdiction is not defeated because the facts alleged in a grievance may also state a claim under the West Virginia Human Rights Act. For this Board to possess jurisdiction, however, the grievance must state a claim under the grievance statutes, in this case W. Va. Code §§ 29-6A-1 to 29-6A-12 (2006). It is beyond this Board's power to determine an employer's liability under the Human Rights Act, Syllabus Point 1, *Vest, supra*, even when the grievance alleges discrimination of the sort the Human Rights Act prohibits, such as disability-based discrimination. Provisions of the grievance statutes other than those prohibiting discrimination and retaliation have also been interpreted in the past to support a disability-based grievance. *See, e.g.*, *Belcher v. Department of Transportation*, Docket No. 94-DOH-341 (April 27, 1995) (although it deals with the Fair Labor Standards Act) and *Rodak v. Department of Tax and Revenue*, Docket No. 96-T&R-536 (June 23, 1997); *but see, e.g., Ruckle v. Department of Health and Human Resources*, Docket No. 04-HHR-367 (June 23, 1997) (interpreting *Vest* to permit consideration of Human Rights Act-based grievances only on discrimination grounds). Because the Grievant in this case based her case exclusively on claims of discrimination and retaliation, legal theories not presented by the record will not be considered.

Discrimination and Favoritism

"'Discrimination' means 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." W. Va. Code § 29-6A-2(d). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other

employees." W. Va. Code § 29-6A-2(h). The West Virginia Supreme Court of Appeals has recently clarified that the elements of claims of discrimination and favoritism under the grievance statutes are essentially identical, as this Board has long held. To establish either type of claim, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Educ. Policy Comm., Nos. 32163 and 33296 (W. Va., Oct. 12, 2007) (per curiam); *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004). *See Chaddock v. Div. of Corr*., Docket No. 04-CORR-278 (2005). *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004); *Kincaid v. Div. of Corr*., Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ*., Docket No. 90-50-281 (Jan. 28, 1990).

During her testimony at the Level III hearing, the Grievant identified other employees whom she suggested the Employer had treated more favorably than the Grievant in response to their accommodation requests. However, the Grievant presented no direct evidence to support her contention. The testimony established that she had no first-hand knowledge of the other cases, and she presented no other first-hand evidence about them. And in each case, the Employer's witnesses testified to significant differences between the Grievant's situation and those of the other employees whom she identified. The other employees with whom the Grievant attempted to compare herself were not similarly situated to the Grievant. For example, Grievant attempted to prove that another employee was permitted to transfer

to a different division as an accommodation, but the employer's evidence established that the employee in question had never requested an accommodation, and that the transfer took place for other reasons.

The facts established in the record of the Level III proceedings do not make the showing on discrimination required under *White, supra*, and the other cases cited above, by a preponderance of the evidence. The Grievant has therefore failed to prevail on her claim of discrimination.

Retaliation

W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an Employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In *W. Va. Department of Natural Resources v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229 (1994) (per curiam), the Supreme Court of Appeals applied the Human Rights Act reprisal test announced in *Frank's Shoe Store v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986), to a grievance by a state employee. Under that authority, the elements of a reprisal claim under the grievance statutes, which a grievant must establish by a preponderance of the evidence, are:

(1) that the grievant engaged in protected activity, e.g. filing or participating in a grievance;

(2) that the grievant was subsequently treated in an adverse manner by the employer;

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

> (4) that the employer had a retaliatory motive for the adverse treatment (which may be inferred from the period of time between the protected activity and the adverse action, or from other satisfactory evidence).

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Gruen v. Bd. of Directors/Concord College*, Docket No. 95-BOD-281 (Mar. 6, 1997).

For purposes of this Decision, the undersigned Administrative Law Judge assumes, without deciding, that Respondent's failure to grant all of Grievant's requested accommodations constitutes "adverse action" within the meaning of the authority citedabove. Because there is no evidence of a retaliatory motive in this record, the question whether Respondent's action was adverse is immaterial. (See footnote 7)

The record establishes that the Grievant engaged in protected activity by making the accommodation requests, and by filing her grievance. The element of subsequent adverse treatment is assumed for purposes of the Decision. The Employer obviously had actual knowledge of the Grievant's protected activity. However, the Grievant failed to meet her burden to establish a retaliatory motive. In fact evidence of such a motive is entirely absent from the record. Because Grievant failed to establish all the elements of retaliation by a preponderance of the evidence, she failed to prove that aspect of her grievance.

Conclusions of Law

1 1. In a non-disciplinary matter, the Grievant has the burden of

proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact ismore likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2 2. "'Discrimination' means 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." W. Va. Code § 29-6A-2(d). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h). The West Virginia Supreme Court of Appeals has recently clarified that the elements of claims of discrimination and favoritism under the grievance statutes are essentially identical, as this Board has long held. To establish either type of claim, an employee must prove:

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3 3. The record contains no credible or persuasive evidence of employees similarly situated by disability to the Grievant, nor of disparate treatment by Respondent with respect to disability accommodations. 4 4. The facts established in the record of the Level III proceedings do not make the showing on discrimination and favoritism required under *Board of Education v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004), by a preponderance of the evidence.

5 5. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In *W. Va. Department of Natural Resources v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229 (1994) (per curiam), the Supreme Court of Appeals applied the Human Rights Act reprisal test announced in *Frank's Shoe Store v. W. Va. Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986), to a grievance by a state employee. Under that authority, the elements of a reprisal claim under the grievance statutes, which a grievant must establish by a preponderance of the evidence, are:

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See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Gruen v. Bd. of Directors/Concord College*, Docket No. 95-BOD-281 (Mar. 6, 1997). 6 6. The Grievant engaged in protected activity by filing this grievance, and the Respondent had actual knowledge of Grievant's pursuit of the grievance.

7 7. Because Grievant failed to establish all the elements of retaliation by a preponderance of the evidence, she failed to prove that aspect of her grievance.

Accordingly, this grievance is **DENIED**.

Any party 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. *See* W. Va. Code § 29-6A-7 (2006). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they 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 on the 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.

_____

Thomas J. Gillooly

Administrative Law Judge

Date: October 31, 2007

Footnote: 1

The grievance described Items 1 through 6 as the original accommodation requests made before the grievance was filed.

Footnote: 2

Items 1 - 6 and the first Addendum were attached to the original September 7, 2006, grievance form. Items I through VI were apparently presented for the first time in the grievance.

Footnote: 3

The Grievant submitted "Addendum II" between the first and second days of the two-day Level III hearing,

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Footnote: 4

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

Footnote: 5

The grievance also alleged defamation of character, a type of civil claim one may bring in court, which is not recognized by the grievance statutes. It will therefore not be considered.

Footnote: 6

W. Va. Code §§ 5-11-1 to 5-11-21 77; C. S. R. §§ 77-1-4.4 to 77-1- 4.6 (1994); 42 U.S.C. § 12101

- 12213; 29 C.F.R. § 1630.2(o).

Footnote: 7

At the Level III hearing, the Grievant also appeared to interpret as "retaliation" (See footnote 8) such things as delays in responding to her requests, being questioned by the Employer to gather information relevant to her requests, and the Employer's sign-out sheet requirement. The undersigned concludes that, under all the facts and circumstances of this case, these events were not sufficiently "adverse" to be considered in the retaliation analysis. Grievant also referred in her Level III testimony to "harassment." Since she did not base her grievance on a claim of harassment, that issue is not addressed.

Footnote: 8

Grievant also referred in her Level III testimony to "harassment." Since she did not base her grievance on a claim of harassment, that issue is not addressed.