THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

WILLIAM WILEY,

Grievant,

v. DOCKET NO. 06-RJA-267

REGIONAL JAIL AUTHORITY,

Respondent.

DECISION

Grievant William Wiley filed this grievance on August 3, 2006, challenging his suspension and subsequent termination. He seeks reinstatement, back pay, and attorney's fees.

A level four hearing was held in the Grievance Board's Charleston office on October 11, 2006. Grievant was represented by Amy Crossan, Esq. and Respondent was represented by Chad Cardinal, Esq. The matter became mature for decision on November 17, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant, an at-will employee, claimed he was terminated in retaliation for filing for unemployment compensation benefits while he was suspended without pay. Respondent successfully rebutted a prima facie showing of reprisal, by proving the decision to terminate was made without knowledge that Grievant had filed an unemployment compensation 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 Regional Jail Authority (RJA) at the Southwestern Regional Jail (SWRJ), as a Correctional Officer 2. He is an at-will employee. 2. On June 6, 2006, Grievant was notified that he was being suspended pending an investigation into an allegation

that he had brought contraband into SWRJ.

3. Grievant had no contact with Respondent until July 25, 2006, when he was notified that a pretermination hearing would be held the following day. Grievant had applied for unemployment compensation benefits on July 24.

4. Following the July 26 hearing, which was conducted by telephone, Grievant's employment was terminated.

5. SWRJ Chief of Operations John L. King, II made the decisions to suspend and to terminate Grievant. He was never informed of the unemployment compensation claim.

6. Melissa Hayes is an administrative assistant to the director of personnel for RJA. When an unemployment compensation claim is filed, it is sent to her and she processes it. Mr. King is not in her chain of command, and she did not communicate to him that the claim had been filed. The claim was allowed by the Unemployment Insurance Compensation Commission (UICC), so she never sent any information to the SWRJ. The only time she ever sends information relating to a claim is when the claim is contested, the UICC denies the claim, and the employee appeals the denial. Since the claim was granted, the information was simply put into Grievant's personnel file.

Discussion

Grievant does not dispute that he was a classified-exempt employee, thereby serving in an at-will employment status. (See footnote 1) As an at-will employee, Grievant can be terminated for good reason, no reason, or bad reason, provided that he is not terminated for a reason that violates a substantial publicpolicy. (See footnote 2) Classified-exempt state employees may be dismissed from employment for any reason not violative of the Constitution or a substantial public policy. A classified-exempt employee bears the burden of proving his dismissal was unlawful. (See footnote 3)

> 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.

> West Virginia courts have recognized such conduct as submitting a claim for back wages under the Veterans Reemployment Rights Act [*Mace v. Charleston Area Medical Ctr. Found.*, 188 W. Va. 57, 422 S.E.2d 624 (1992)], refusing to operate a motor vehicle with unsafe brakes contrary to various safety statutes and regulations [*Lilly v. Overnight Transp. Co.*, 188 W. Va. 538, 425 S.E.2d 214 (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)], [or] filing a workers' compensation claim [*Shanholtz v. Monongahela Power Co.*, 165 W. Va. 305, 270 S.E.2d 178 (1980)]. *(See footnote 4)*

Filing a claim for unemployment compensation benefits while on unpaid suspension would fall into the category of an activity protected by public policy from forming the basis for the termination of an at-will employee.

West Virginia Code section 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.” Firing an at-will employee for filing an unemployment compensation claim would constitute reprisal, and would be a violation of public policy. 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. (See footnote 5)

In this case, there is a strong inference that Grievant's unemployment claim was the catalyst for his termination, given that the investigation into Grievant's alleged misconduct began months before his suspension occurred, was completed very shortly thereafter, and then Grievant had no contact with RJA until the day after he filed his unemployment claim. The stated reason for the dismissal, Grievant's admission that he passed commissary items between inmates, was known to Respondent on June 6, 2006, prior to his suspension. This is enough to make a *prima facie* showing of reprisal.

“If a grievant establishes a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual.” (See footnote 6) Respondent rebuts this presumption

by claiming the timing was coincidental, and that the person making the termination decision had no knowledge of the unemployment claim. Accordingly, the undersigned must make a credibility determination. In assessing the credibility of witnesses, some factors to be considered . . . are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. (See footnote 7) Additionally, the ALJ 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 8)

Both Mr. King and Ms. Hayes were credible. Grievant provided no evidence that Mr. King actually knew about his unemployment claim, other than the suspicious timing. The inference drawn from this timing is weak; there is no reason to disbelieve Respondent's witnesses, and Grievant offered nothing to rebut them. Much weight is given to Ms. Hayes' testimony, as she has no motive to fabricate, no apparent influence in her chain of command, and the procedure she uses when processing unemployment claims is standardized. The fact that she does the same thing in every case goes a long way to dispelling the assumption she did something different in this case. Correlation may imply causation, but it does not prove it.

Respondent has successfully rebutted the inference that the termination of Grievant was reprisal for his filing an unemployment compensation claim. As such, he has no defense to the termination of his at-will employment.

The following conclusions of law support this discussion:

Conclusions of Law

1. Classified-exempt state employees may be dismissed from employment for any reason not violative of the Constitution or a substantial public policy. A classified-exempt employee bears the burden of proving his dismissal was unlawful. *Parker v. W. Va. Health Care Cost Review Auth.*, Docket No. 91-HHR-400 (June 30, 1992).

2. As an at-will employee, Grievant can be terminated for good reason, no reason, or bad reason, provided that he is not terminated for a reason that violates a substantial public policy. *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993). *See Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995); *Harless v. First Nat'l Bank,* 162 W. Va. 116, 246 S.E.2d 270

(1978).

3. Firing an at-will employee for filing an unemployment compensation claim would constitute reprisal, and would be a violation of public policy.

4. Grievant made a prima facie showing that his termination was a result of reprisal.

5. "If a grievant establishes a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Webb*, supra." *Rainey v. Dep't of Admin./Pub. Employees Ins. Agency*, Docket No. 04-ADMN-174 (Sep. 3, 2004).

6. Respondent successfully rebutted the presumption that it terminated Grievant as reprisal for his filing an unemployment compensation claim. Grievant did not show the reasons for his termination were pretextual.

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 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.

January 26, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

See Roach v. Regional Jail Auth., 198 W. Va. 694, 482 S.E.2d 679 (1996); Ramos v. Regional Jail & Correctional Facility Auth., Docket No. 98-RJA-363 (Jan. 29, 1999); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91-

HHR-400 (June 30, 1992).

Footnote: 2

Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993).

Footnote: 3

Parker, supra.

Footnote: 4

Birthisel v. Tri-Cities Health Services, 188 W. Va. 371, 424 S.E.2d 606 (1992).

Footnote: 5

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Footnote: 6

Rainey v. Dep't of Admin./Pub. Employees Ins. Agency, Docket No. 04-ADMN-174 (Sep. 3, 2004).

Footnote: 7

Harold J. Asher and William C. Jackson. Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984).

Footnote: 8

Id., Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).