**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JOANN F. HEDRICK,**
**Grievant,**

**v.** **DOCKET NO. 2009-0496-CONS**

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL BATEMAN HOSPITAL,**
**Respondent.**

## DECISION

This is a consolidation of three grievances filed by JoAnn Hedrick, an employee at Mildred Mitchell Bateman Hospital. The first, filed August 11, 2008, concerned whether she should have been placed on an improvement plan. The second, filed October 14, 2008, challenged a reprimand, and the third, filed October 31, 2008, challenged Grievant's suspension, and as later amended, her constructive discharge. Grievant seeks to have her improvement plan voided, and all disciplinary actions to be reversed and expunged, and she seeks to be restored to her job, with all back pay and interest and restored benefits to which she is entitled.

A level three hearing was held in the Grievance Board's Charleston office on May 28, 2009. Grievant was represented by Gordon Simmons, and Respondent was represented by counsel, Jennifer Akers, Assistant Attorney General. The matter became mature for decision on June 29, 2009, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

### Synopsis

Grievant was employed by Respondent at Mildred Mitchell Bateman Hospital, and during the course of her employment she was subject to a performance improvement plan

and subsequent performance-related disciplinary actions, until she resigned. Grievant contends her resignation was forced by the continued unjustified disciplinary actions, and was therefore a constructive discharge. She failed to prove her claim, and Respondent met its burden of proving the discipline was justified, therefore the Grievances are denied.

**Findings of Fact**

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

1. Grievant was employed by Mildred Mitchell-Bateman Hospital as a Health Service Assistant, and worked there eight years until she resigned on October 27, 2008.

2. On March 6, 2008, Grievant was issued a Performance Improvement Plan ("PIP") [Respondent's Exhibit No. 8] by her supervisor, Kristen L. Thompson, RN, Nurse Manager. The Plan cited Grievant's failure to willingly accept legitimate direction, her frequent negative comments about management, her use of profanity while on duty, and her frequent discussions with her coworkers about her disputes with management.

3. Grievant requested a meeting with the Hospital Chief Executive Officer(CEO) to discuss the issues she was having with her supervisor, including those cited in her performance improvement plan as performance deficiencies.

4. Grievant did not show up to meet with the CEO, and again failed to show up later when the meeting was rescheduled.

5. Grievant was given a reprimand for her unprofessionalism in failing to keep her meeting with the CEO, and for failing to abide by the hospital's policy requiring an employee to call in and report an absence by a certain time prior to her shift.

6. Grievant's reprimand was in part based on the fact that, on the date of the second meeting, she did not call in to report that she would be absent, and then failed to call in to report her reason for not showing up at all that day.

7. Grievant gave Ms. Thompson a note on October 27, 2008, stating "Please consider this my two-week notice."

8. On October 28 and 29, 2008, Grievant did not report for work, and again failed to call in prior to her absences or later to explain her absences.

9. Grievant was then suspended for a seven-day period on November 3, 2008, because at a meeting held with her to discuss her absences and to determine what, if any, disciplinary measure should be taken, she did not provide a legitimate excuse and seemed not to care what would happen.

10. At the time she submitted her resignation, Grievant was not rational, due to stress brought on by "family problems, medical problems and work-related problems."

11. Grievant's physician had prescribed her several medications to treat her disorders of depression, anxiety, irritability and other mood and cognitive problems, but at the time she resigned, she was not compliant with her physician's treatment medication regime.

## Discussion

As there are several issues raised in these combined grievances, normally each issue would be addressed in turn. However, given Grievant's resignation, most of the issues are moot, except as evidence of Grievant's supervisors creating an unreasonably unbearable work environment. If management's actions were unreasonable, on the whole,

and Grievant had no other alternative than to resign, then constructive discharge is a viable claim.

Improvement Plan

A performance improvement plan is not a disciplinary measure, but is instead a management tool to increase employee productivity through direct and clear guidance on specific topics. As such, Grievant suffered no compensable loss that would survive her resignation. Given the conclusion below that her resignation was not a constructive discharge, this issue is now moot. "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]."[1] "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]."[2]

Written Reprimand

Grievant received a written reprimand on October 10, 2008 due to her "continued unwillingness to treat all employees, including Hospital leaders with respect and decorum." The reprimand cited an incident on August 1, 2008, on which date Grievant failed to show up for a meeting with the Hospital CEO, which the Grievant had requested. Grievant again failed to appear or call in for a rescheduled meeting on September 26. In fact, on that date Grievant did not appear for work, and did not call in to report or explain her absence. Although Grievant later claimed she had been in an automobile accident and later had to

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[1] *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993).

[2] *Bragg v. Dep't of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003).

go to the courthouse for a juvenile matter involving her sons, she never explained why she failed to call in later that morning or at any time throughout the day, instead stating that she knew she would be disciplined for it.

A written reprimand is exactly the type of low-level, attention-getting discipline that should be used to attempt to correct behavior such as Grievant's. It is significant that Grievant was given a second chance at meeting with the hospital CEO after she failed to show up for the first one, before she was reprimanded for her unprofessional conduct. It is equally significant that Grievant stated she knew she was violating hospital policy for being a "no call-no show" the second time she did it, missing both her meeting with the leader of the hospital but also her full day of work without ever informing anyone where she was or why she was not there.

Even though this issue is moot given Grievant's resignation, it is relevant as a background to the reason for her later suspension for the behavior.

Suspension

Grievant was suspended for seven days on November 3, 2008, which she alleges in her third grievance to have been done without cause. On October 28 and 29, 2008, Grievant did not report for work and did not call in to report her absence. On October 31, 2008, a predetermination meeting was held with Grievant and her representative, at which time she explained that she was so stressed she just thought "why bother."

Respondent has shown good cause for suspending grievant. She had just received a valid reprimand for a "no-call, no-show" day, was reminded of the policy and procedure for calling off, and then shortly thereafter quite willfully violated the policy, knowing full well what the possible disciplinary consequences were.

Constructive Discharge

Grievant's string of disciplinary actions related to her performance and professionalism culminated with her resignation, which she now characterizes as a constructive discharge. "To determine whether an employee's act of resignation was forced by others, rather than voluntary, the circumstances surrounding the resignation must be examined in order to measure the ability of the employee to exercise free choice."[3] In order to prove a constructive discharge, a grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary that a grievant prove that the employer's actions were taken with a specific intent to cause her to quit.[4]

Essentially, constructive discharge claims are an extreme version of hostile workplace claims. However, monitoring the workplace performance and behavior of an employee is normal and reasonable. Efforts to promote better work habits and workplace conduct are acceptable, and an improvement plan is among the least severe forms of correction, even if it creates stress for the employee.[5] Grievant claims the string of disciplinary actions were uncalled for.

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[3]*Falquero v. Dep't of Enviro. Protection*, Docket No. 2008-1596-DEP (Dec. 16, 2008); *McClung v. W. Va. Dep't of Public Safety*, Docket No. 89-DPS-240 (Aug. 14, 1989); *See Adkins v. Civil Serv. Comm'n*, 171 W. Va. 132, 298 S.E.2d 105 (1982).

[4]*Slack v. Kanawha Co. Housing & Redevelopment Auth.*, 188 W. Va. 144, 423 S.E.2d 547 (1992); *Preece v. Public Serv. Comm'n*, Docket No. 94-PSC-246 (Apr. 25, 1997); *Coster v. W. Va. Div. of Corr.*, Docket No. 94-CORR-600 (Aug. 12, 1996); *Kennen v. Dep't of Transp./Div. of Highways*, Docket No. 08-DOH-001 (Apr. 27, 2009); *Jenkins v. Dep't of Health & Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002).

[5]*See, Webb v. Dep't of Health and Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 06-HHR-139 (Dec. 11, 2006); *Rider v. BOT/Marshall Univ.*, Docket No. 99-BOT-348 ( Apr. 7, 2000).

However, Grievant also admits that, at the time she submitted her resignation, she was not being rational. The only exhibit Grievant introduced at the Level III hearing was a statement from her physician, dated March 10, 2009, stating, "[A]t the time [of her resignation] she was irrational and therefor incompetent to make a decision regarding her job . . . in my opinion, Ms. Hedrick should be reinstated."[6] Grievant testified that she had been under a lot of stress in the two months leading up to her resignation, part of which was her perception of the way she was being treated by management, and partly because she was ill and had some medication changes. She testified that, at the time of her resignation, she was not taking the medications that were prescribed to her in order to help her cope with this stress. This amounts to an admission by Grievant that her resignation was not a constructive discharge. In fact, she testified, "I realized I had made a mistake" as soon as she was back on her medication.

The undersigned recognizes that an unreasonable person can still take a reasonable action, but in this case Grievant's actions did not meet that standard. Had she resigned at a time when she was able to consider her actions clearly, she would nevertheless have simply resigned. Grievant's employer's actions were reasonable attempts to control her workplace behavior, and Grievant had a proper form of redress if she felt those attempts were improper. In fact, she had already initiated her challenges through the grievance procedure, and should have awaited the outcome of those grievances, or at least taken the matters to mediation to help work out a solution both she and her employer could live with.

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[6]Whether or not Grievant should be permitted to withdraw her resignation is not the subject of these grievances. Grievant does have pending a separate grievance on that issue.

Under these facts, Grievant cannot meet her burden of proving a constructive discharge, because she admits a reasonable person would not have made the mistake of resigning, and because a reasonable person would not have quit under the same circumstances.

The following conclusions of law support this discussion:

**Conclusions of Law**

1. 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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. In order to prove a constructive discharge, a grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary that a grievant prove that the employer's actions were taken with a specific intent to cause her to quit. *Slack v. Kanawha Co. Housing & Redevelopment Auth.*, 188 W. Va. 144, 423 S.E.2d 547 (1992); *Preece v. Public Serv. Comm'n*, Docket No. 94-PSC-246 (Apr. 25, 1997); *Coster v. W. Va. Div. of Corr.*, Docket No. 94-CORR-600 (Aug. 12, 1996); *Kennen v. Dep't of Transp./Div. of Highways*, Docket No. 08-DOH-001 (Apr. 27, 2009); *Jenkins v. Dep't of Health & Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002).

3. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dep't of Health & Human Res.*, Docket No. 03-HHR-348 (May

28, 2004); *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003).

4. The questions of whether Grievant was properly placed on a Performance Improvement Plan and whether she was properly reprimanded are moot.

5. Respondent met its burden of proving Grievant was properly suspended for failing to call in and report her absences of October 27 and 28, 2008.

6. Grievant did not meet her burden of proving that her resignation was a constructive discharge.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also 156 C.S.R. 1 § 6.20 (2008).

**August 18, 2009**

**M. Paul Marteney**
**Administrative Law Judge**