THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JUDITH KENNEN,

Grievant,

v. **DOCKET NO. 08-DOH-001**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Judith Kennen ("Grievant") grieves the decision of Respondent Division of Highways ("DOH") dismissing her grievance(s) at Level Three. DOH's dismissal decision concerned two separate grievances that were joined at the lower level. Grievant filed her first grievance on February 16, 2006.[1] This grievance was denied at Level One and Level Two. A second grievance was filed on or about January 9, 2007. This grievance was waived at Level One and granted at Level Two. Both grievances were consolidated and considered together at Level Three, and both were dismissed due to mootness.[2]

A Level Four hearing was held before the undersigned Administrative Law Judge ("ALJ") in Charleston, West Virginia, on February 9, 2009. Grievant appeared by and

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[1] 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 CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA.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, which continue to control the proceedings in this case.

[2] At Level Four, the only issue raised by Grievant was constructive discharge. Insofar as claims raised in these two grievances were not raised, they are considered abandoned.

through her counsel, Andrew J. Katz, Esquire. Respondent appeared by and through its counsel, Robert Miller, Esquire. This matter became mature for decision on March 13, 2009, the deadline for submitting proposed findings of fact and conclusions of law. Both parties have submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant filed two separate grievances complaining of her supervisor's conduct. Ultimately, her supervisor was removed from his position and transferred. After Grievant's supervisor was removed from the workplace, Grievant transferred to a higher paying position at another location. At Level Four, Grievant argues that she was constructively discharged and entitled to damages. Grievant has not established constructive discharge by a preponderance of the evidence. Accordingly, this grievance is **DENIED**.

Based upon a detailed review of the record, the undersigned makes the following findings of fact:

Findings of Fact

1. From 2000 to May, 2007, Grievant was a Right of Way Agent 1 in DOH District Seven. She worked out of the District Seven headquarters in Weston, West Virginia.

2. Bill Ramsey was Grievant's supervisor.

3. During the relevant time periods, the District Seven Manager was Ron Hooten.

4. Grievant filed a grievance against Mr. Ramsey on or about February 16, 2006. The statement of grievance provided: "[h]ostile work environment (encouraged by supervisor), sexual discrimination, unequal treatment, residual problems caused by unfair hiring practices. Harassment concerning Worker's Comp. Dr. Appointments." The relief

requested was "[p]ay scale corrected. Hostile environment corrected. Equal treatment, opportunity for advancement. Level II with raise. No more harassment over Worker's comp. app.s." [*sic*]. This Grievance was denied by Mr. Ramsey at Level One. It was similarly denied at Level Two by Mr. Hooton.

5. In December of 2006, Grievant bid on a Right of Way Agent 3 position in Parkersburg, West Virginia.

6. Grievant's mother lived in the Parkersburg, West Virginia area and accepting a position in Parkersburg afforded Grievant the opportunity to be with her mother during the week.

7. After bidding on the position, Grievant filed a second grievance on or about January 9, 2007. The statement of grievance provided:

> I [Grievant] feel that I am constantly subjected to behavior that can only be classified as harassment by my immediate supervisor, Bill Ramsey. This is an ongoing situation during which there have been numerous examples of action that can be described as berating, lecturing, ranting, sermonizing, scolding, etc. These situations have sometimes occurred in the presence of co-workers and other managers. These outbursts have included verbal assaults regarding, amongst a variety of issues, my personal life, previous WVDOH situations with which Mr. Ramsey is both ignorant and misinformed, and day-to-day challenges of my every activity at work that represents a scrutiny that appears to be of a persecutory nature. As a result of this on going situation, I believe that my every day at work places me in an environment that is antagonistic, intimidating and impairs my opportunity to work in a harmonious work environment conducive to performing my function to the best of my ability.

This grievance sought the following relief:

> I [Grievant] want the situation corrected and restitution made for the damage to my career. I want a workplace free of discrimination, unequal treatment, hostility and animosity. I desire to work in a professional environment where employees and members of the public are treated in a professional manner. Additionally, I request a written assurance that I will not be subject to

reprisals as a result of this grievance, and in any other way made whole.

8. This grievance was waived at Level One and granted at Level Two. By letter dated February 2, 2007, Mr. Hooten stated "I am going to grant relief to insure [*sic*] that we provide a hostile free working environment by temporarily removing Bill Ramsey from his position as District Seven Right of Way Manager." Mr. Ramsey was removed from his position.

9. On March 6, 2007, Grievant interviewed for the position of Right of Way Agent 3 in Parkersburg. Grievant was offered the job in late March, 2007. Grievant accepted the position in Parkersburg as a Right of Way Agent 3 on or about March 29, 2007, and began working in Parkersburg on May 16, 2007.[3] She received a salary increase from $2,853.00 to $3,139.00. At the time of the Level Four hearing, Grievant was still employed in Parkersburg.

10. Ultimately, on April 18, 2007, Mr. Ramsey was demoted[4] and transferred to Charleston, effective May 7, 2007. Throughout the early Spring of 2007, Mr. Ramsey sometimes came to District Seven headquarters to finish up certain projects, though he had very little, if any, contact with the Grievant.

Discussion

In a grievance which does not involve a disciplinary matter, the grievant has the

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[3] Somewhere around this time period, Grievant was going through (or just completing) a divorce from Stanley Wilt, an employee in the DOH District Seven construction office. *See* Level Four, Testimony of Stanley Wilt (testifying he was married to Grievant for three and one-half years beginning in August, 2004).

[4] This demotion was from a Transportation Realty Manager to a Transportation Realty Agent. It was accompanied by a reduction in salary.

burden of proving her grievance by a preponderance of the evidence. *Payne v. W. Va. Dep't of Energy*, Docket No. ENGY-88-015 (Nov. 2, 1988); *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). Where the evidence equally supports both sides, a grievant has not met her burden. *Finley v. Dep't of Health & Human Res./Huntington Hosp.*, Docket No. 99-HHR-277 (Oct. 5, 1999).

The Grievant's sole argument is that she was constructively discharged and is entitled to damages. 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. *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). 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); *Jenkins v. Dep't of Health & Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002). The trier of fact must be satisfied that the

working conditions would have been so difficult or unpleasant that a reasonable person[5] in the employee's shoes would have felt compelled to resign. *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977); *Slack, supra.*

Grievant accepted a promotion in Parkersburg, West Virginia, well after her supervisor was removed from the workplace. In light of the lack of coercion in the workplace, Grievant had the opportunity to exercise free choice when accepting the promotion in Parkersburg. Grievant received assurances from Mr. Hooton that she would not be subject to a hostile work environment. At the time Grievant *interviewed* for the position in Parkersburg, she was not subject to a hostile work environment, or any negative conduct by Mr. Ramsey. Similarly, when Grievant *accepted* the position in Parkersburg, she was not subject to a hostile work environment, or any negative conduct by Mr. Ramsey. Mr. Ramsey was removed from his position and had very little, if any, contact with Grievant after this grievance was granted at Level Two.

Moreover, it cannot be ignored that Grievant had incentive to accept the position in Parkersburg. The new position was a promotion. The new position had a higher salary. The new position also afforded Grievant the opportunity to be closer to her mother, who lived in the Parkersburg area. In recognition of the circumstances presented in this matter, Grievant was not constructively discharged; she freely chose to transfer to another position

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[5] In discussing the "reasonable person" standard, the West Virginia Supreme Court of Appeals has described a reasonable person as, "neither an automaton nor an exceptional man, but an ordinary member of the community. Being an ordinary person, the law makes allowance for mere errors in his judgment and does not visualize him as exercising extraordinary care. Normality is the quintessence of this characterization." Syl. Pt. 6, *Patton v. City of Grafton*, 116 W.Va. 311, 180 S.E. 267 (1935); *Honaker v. Mahon,* 210 W.Va. 53, 552 S.E.2d 788 (2001).

within the DOH.

Accordingly, Grievant has not proven that it is "more likely than not" that she was constructively discharged. *Jackson*, *supra*. The record indicates that she transferred to a higher-paying position within DOH and was not subject to discrimination when she interviewed for the position. This grievance must be denied.

Conclusions of Law

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving his grievance by a preponderance of the evidence. *Payne v. W. Va. Dep't of Energy*, Docket No. ENGY-88-015 (Nov. 2, 1988); *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004). Where the evidence equally supports both sides, a grievant has not met her burden. *Finley v. Dep't of Health & Human Res./Huntington Hosp.*, Docket No. 99-HHR-277 (Oct. 5, 1999).

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, supra*; *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); *Jenkins v. Dep't of Health & Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002). To determine whether an employee's act of resignation was forced by others, rather than

voluntary, the circumstances surrounding the transfer must be examined in order to measure the ability of the employee to exercise free choice. *See McClung v. W. Va. Dep't of Public Safety*, Docket No. 89-DPS-240 (Aug. 14, 1989).

3. Grievant has not established, by a preponderance of the evidence, that she was constructively discharged.

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. W.VA. CODE § 29-6A-7 (see Footnote 1). 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 WEST VIRGINIA 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: April 27, 2009

Mark Barney
Administrative Law Judge