THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CARA LINDA CHAPMAN,
Grievant,

v. **DOCKET 2009-0769-DHHR**

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

DECISION

Grievant Cara Linda Chapman filed her Grievance on November 13, 2008, as follows: "False report to workers compensation by management and refusal to accommodate request for light duty." As relief, she seeks "to be made whole including discipline against person or persons making false report and refusing accommodation."

A level three hearing was held in the Grievance Board's office on November 4, 2009 before Administrative Law Judge Mark A. Barney. Following Mr. Barney's resignation, the matter was reassigned to the undersigned Administrative Law Judge for decision based on the record developed below and at the level three hearing. Grievant was represented by Gordon Simmons and Respondent was represented by counsel, Jennifer Akers. The matter became mature for decision on December 4, 2009, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was injured at work and placed on workers' compensation disability. After her doctor released her to return to work on light duty, she was not returned to work because no light-duty assignment was available. Other employees were given light duty

assignments, but Grievant did not establish she was similarly situated to them. Also while on disability, her employer reported her participation in a Union rally to the workers' compensation insurer, but no adverse action was taken against her as a result. As Grievant failed to prove a grievable claim, the grievance is denied.

Findings of Fact

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

1. Grievant is employed by Respondent as a Health Service Worker.
2. On August 15, 2008, Grievant was injured at work, and her doctor ordered that she only work at "light duty" with restrictions against direct patient care, lifting over ten pounds, bending, stooping or overhead work.
3. Grievant informed Respondent of the restrictions, and was told there was no light duty work available for her.
4. Grievant's regular duties are assisting professional staff in nursing acute psychiatric patients.
5. Grievant spoke to Vickie Crager, Benefits Coordinator, and requested a light-duty assignment. Ms. Crager found no available assignments that fit Grievant's restrictions.
6. Grievant was further restricted by her doctor from all work from September 8, 2008 to October 6, 2008, when he released her to light duty work with a restriction on lifting over 20 pounds, and no work involved in direct patient care or that caused excessive neck flexion.

7. Grievant again requested light duty that accommodated these restrictions, but Ms. Crager could find no available work that Grievant could perform in any department of the hospital.

8. Grievant received workers' compensation benefits for the period she was off work.

9. On October 20, 2008, Grievant was observed and photographed picketing the hospital at a Union rally, carrying a sign. Ms. Crager felt this activity might be at odds with Grievant's claimed limitations.

10. Ms. Crager forwarded the news photo of Grievant holding the sign over her head to the DHHR Workers' Compensation liaison, who apparently notified Brickstreet Insurance Company, the Workers' Compensation insurer, who took no action. Respondent took no action in response to the report, either.

11. Other employees who were restricted to light duty due to injury were given light duty assignments, which assignments fit their particular restrictions.

12. Grievant returned to work without restrictions on November 11, 2009.

Discussion

Although not expressly stated in her grievance, Grievant claims retaliation and discrimination. As the grievance does not involve disciplinary action, Grievant must prove her claims by a preponderance of the evidence. 156 C.S.R. 1 § 3.

The discrimination claim flows from the fact that Grievant was not given a light-duty assignment, but other employees were so accommodated. In order to establish a claim

of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:[1]

> (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.

Grievant did not meet her burden on this issue, because she did not establish that she was similarly situated to any other employee. She did not identify any other employee in her classification or position who was accommodated, nor that any employee who was accommodated had the same restrictions. In addition, she did not identify any light-duty position she could have filled during the time she was restricted. Respondent, on the other hand, provided evidence that it looked for available work not only in Grievant's section, but also in other units in the hospital. Because of the unique nature of Grievant's limitations, she was not similarly situated to another employee.

Grievant's retaliation claim is based on the fact that her Union protest activity was reported to Brickstreet Mutual, her workers' compensation provider, who was paying her disability benefits at the time of the protest. A grievant claiming retaliation may establish a *prima facie* case of reprisal by establishing:[2]

---

[1]*The Board of Education of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

[2]*Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See Frank's Shoe Store v. W. Va. Human Rights Comm'n,* 179 W. Va. 53, 365 S.E.2d 251 (1986); *Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ.*, Docket No. 94-BOT- 088 (Sept. 19, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No.

(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.

Certainly Grievant's involvement in a union picket line was a protected activity, but no adverse action was taken against Grievant because of that. Although Grievant alleges that Respondent told Brickstreet her disability was fraudulent because she was protesting, the evidence clearly supports Respondent's version that Brickstreet was simply informed, truthfully, of the public activity. Neither Brickstreet nor Respondent took any action adverse to Grievant. Grievant did not establish she was retaliated against or subjected to any sort of reprisal.

The following conclusions of law support this discussion:

Conclusions of Law

1. Grievant must prove her claims by a preponderance of the evidence.156 C.S.R. 1 § 3; *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

89-26-56 (Sept. 29, 1989).

2. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (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.

The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

3. A grievant claiming retaliation may establish a *prima facie* case of reprisal by proving:

> (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.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See Frank's Shoe Store v. W. Va. Human Rights Comm'n,* 179 W. Va. 53, 365 S.E.2d 251 (1986); *Fareydoon-Nezhad v. W. Va. Bd. of*

Trustees/Marshall Univ., Docket No. 94-BOT- 088 (Sept. 19, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (Sept. 29, 1989).

4. Grievant failed to meet her burden of proving either discrimination or reprisal.

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 Decision. *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).

July 9, 2010

M. Paul Marteney
Administrative Law Judge