WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MELANIE COBB,
Grievant,

v. **Docket No. 2013-0866-CONS**

DIVISION OF HIGHWAYS
Respondent.

DECISION

Grievant, Melanie Cobb, is employed by Respondent, Division of Highways ("DOH"), as a Transportation Worker 2 Equipment Operator. Ms. Cobb filed two level one grievance forms dated August 15, 2012. On one form Grievant alleged that Respondent improperly put "a class 3 operator on a class 2 machine. The class 3 operator is a grader and backhoe [operator]. He was put on an end-loader which is a class 2 machine, and I was put to flagging and labor work." As relief Grievant seeks "that when this grievance is final a memo be sent to all organizations with this ruling, so this problem can be settled once and for all, and to be made whole." On the second form Grievant stated:

> I feel that I am being retaliated against for going over supervisors head for several wrong doings and instances that has happened at the Elkview organization, for being taken off of equipment and being replaced with class 3 and summer help employees."

On this form Grievant seeks as relief, "If this is found to be true that all supervision involved be reprimanded, and to be made whole." Both grievances arose out of work assignments Grievant received on one day.

The two grievances were consolidated at level one and a level one conference was held on November 15, 2012. A decision was entered December 10, 2012,

dismissing the consolidated grievance. Grievant appealed to level two on December 13, 2012, and the parties participated in mediation on April 17, 2013. Grievant filed an appeal to level three on April 29, 2013.

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on August 27, 2013. Grievant appeared at the hearing with her Representative Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Krista Black, Esquire, Department of Transportation, Legal Division. The parties submitted Proposed Findings of Fact and Conclusions of Law, the last of which was received by the West Virginia Public Employees Grievance Board on September 30, 2013. The consolidated grievance became mature for decision on that date.

Synopsis

Grievant argues that she was given the least desirable assignments on a road paving and repair job in reprisal for making a sex discrimination complaint and filing a grievance. Grievant failed to prove that her assignment to the least desirable duty on the job resulted from retaliatory motives.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Melanie Cobb, is employed by Respondent, Division of Highways, ("DOH") as a Transportation Worker 2 Equipment Operator. Grievant is one of two women who are employed as Transportation Workers at her work facility, and she is the only female there who is an Equipment Operator.

2. Grievant holds a Class-A Commercial Driver License ("CDL"), which enables her to operate the large trucks utilized by Respondent. She has also been trained and is certified to operate endloaders, mowing tractors, and paving rollers. Grievant most often drives a tandem axel dump-truck for her crew, and is very accomplished at operating a paving roller.

3. Grievant works in the DOH Elkview Area facility which has twenty-three full-time employees who are generally divided into two crews. On a typical workday the Transportation Crew Supervisor 2 assigns the areas to be worked on to the two Transportation Crew Supervisor 1s. ("Foremen").[1] Each foreman supervises a crew. Each of the two foremen assigns specific tasks to be performed on each job to the members of his crew.

4. Prior to the events giving rise to this grievance, Grievant had made complaints to the State office of the DOH that she had been discriminated against based upon her gender by her supervisors. Grievant had also previously filed a grievance pursuant to the process set out in W. VA. CODE § 6C-2-1 *et seq.*

5. On August 15, 2012, Grievant's crew was assigned to perform a tar and chip repair job on roads in their region. This assignment was expected to take a few days. The job did not require the use of a tandem axel dump-truck which Grievant usually operates. Instead, an endloader and a paving roller were going to be needed. The equipment operator who primarily operated the endloader for the crew had

[1] The terms "crew supervisor" and "foreman" were both used to refer to the transportation crew supervisor 1s for each crew during the hearing. The term "foreman" will be consistently used herein for clarity even though it may not be the technically correct title.

transferred, so there was no operator on that crew with the primary responsibility to operate the endloader on the crew at that time.

6. Foreman Terry Goodwin assigned Mr. Lambert, a Transportation Worker 3 Equipment Operator, to operate the endloader on the job. Endloaders are typically operated by level 2 equipment operators, but level 3 operators may operate any of the heavy machinery. Mr. Lambert had not specifically been certified by the DOH to operate an endloader but he had previously operated that piece of equipment, and Foreman Goodwin had seen him successfully do so at the area facility.

7. A roller was going to be needed to complete most of the work on the tar and chip job but none was available on August 15, 2012, the first day of the job. Foreman Goodwin was planning to assign Grievant to operate the roller since she was adept on that machine. He assigned her to flagging on the first day of the job since the roller was not available on that day. Grievant operated the roller on the second day of the tar and chip job, and for the rest of the week until that job was completed.

8. There was a summer worker[2] assigned to the crew. On the first day of the tar and chip job, he was assigned to drive a guide truck behind the boom mowing machine. He was also assigned some flagging work. The summer worker did not report to work again after that day.

9. It was undisputed that flagging is generally considered to be the least desirable duty on road repair jobs.

10. No party produced a policy, rule or procedure that a transportation worker is required to be certified on a particular piece of heavy equipment before being allowed

[2] The summer worker was a college student who was working temporarily for the DOH during his summer vacation from school. The supervisor testified that his attendance was very unreliable.

to operate it on the job. The testimony indicated that an operator is required to be certified on a grader before operating it on the road, and that it is often preferable for a person to be certified on other equipment, but not required.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 3 (2008); *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).

Grievant argues that she was given the least desirable assignment of flagging on a tar and chip job as reprisal for her making a complaint of sexual discrimination to DOH state officials and for filing a grievance. She noted that an Equipment Operator 3 was assigned to operate an endloader, which is typically operated by an Equipment Operator 2, instead of that job being assigned to her.[3] She also points out that a summer worker was assigned to drive a pilot truck behind a mowing machine while she was assigned to the less desirable flagging duties.

WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the

[3] Grievant alleged that Respondent was prohibited by policy from allowing the Equipment Operator 3 from operating the endloader because he was not specifically certified as trained to operate that piece of equipment. However, Grievant did not produce any policy, rule or procedure which contained that prohibition and the testimony did not support this assertion.

grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That she engaged in protected activity;
> (2) That she 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.

Carper v. Clay County Health Dep't, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural* Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W.

Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

There is no doubt that Grievant was engaged in activities protected by W. VA. CODE § 6C-2-3(h) which states:

> (h) *Reprisal.* -- No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination.

Grievant had previously filed a grievance against the Respondent which is protected activity under the foregoing statute. Grievant is also protected from retaliation for seeking redress for perceived gender-based discrimination. *See* W. VA. CODE § 5-11-9. Respondent conceded that it was aware that Grievant had participated in these activities.

Grievant argues that she was given the least desirable assignment (flagging) on the tar and chip job in retaliation of her participation in these protected activities. An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the protected activity. *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Warner v. Dep't of Health & Human Res*., Docket No. 2012-0986-DHHR (Oct.

21, 2013). Viewing the facts in the most favorable light for the Grievant, one might be able to conclude that Grievant made a *prima facie* case for reprisal

If the Grievant establishes a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *See Mace, supra.* Respondent offered simple non-retaliatory reasons for the assignment Grievant received on August 15, 2012. The equipment Grievant was primarily assigned to (tandem axel dump truck) was not needed on the tar and chip job, but a roller was going to be needed. The foreman placed Grievant on flagging the first day of the job to keep her available to operate the roller for the duration of the job when it arrived the next day since Grievant had previously demonstrated proficiency in operating that piece of equipment. The usual endloader operator was not available on the crew and it was reasonable to assign that duty to Mr. Lambert instead of Grievant because he held a higher classification and was more senior than Grievant. The assignment given to the summer worker was similar to the one given to Grievant and he was also assigned flagging duties on the day in question. Clearly, Respondent demonstrated legitimate, non-retaliatory reasons for the assignments given to Grievant, and Grievant did not offer any evidence that these reasons were pretexts. Accordingly, the grievance is DENIED.[4]

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 3 (2008); *Holly v.*

[4] It is worth noting that the remedies Grievant sought amounted to disciplinary action against a fellow employee and an advisory opinion, both of which have repeatedly been held to be unavailable through the grievance procedure. Even if she had prevailed the remedies she sought could not be granted.

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).

2. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer 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." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That she engaged in protected activity;
> (2) That she 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.

Carper v. Clay County Health Dep't, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural* Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

3. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *See Mace v. Pizza Hut, Inc., supra.*

4. Respondent proved, by a preponderance of the evidence, legitimate, non-retaliatory reasons for the assignment given to Grievant on August 15, 2012.

5. "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, supra.

6. Grievant did not present any evidence to prove that the reasons offered by Respondent for the assignment Grievant received on August 15, 2012, were pretexts for retaliatory motives.

Accordingly, the grievance is 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).

DATE: NOVEMBER 7, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE