THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

HAMADA E. MAHMOUD,
Grievant,

v. **Docket No. 2014-0303-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR PUBLIC HEALTH,
Respondent.

DECISION

Grievant, Hamada E. Mahmoud, was employed by Respondent, Department of Health and Human Resources in the Bureau for Public Health. On September 4, 2013, Grievant filed this grievance against Respondent attaching a lengthy grievance statement protesting his dismissal from employment. For relief, Grievant sought reinstatement, the continuance of his Family and Medical Leave Act ("FMLA") leave, and reimbursement of attorney fees.

On December 11, 2013, Respondent filed a Notice of Level One Waiver, waiving the matter to level three, despite the December 6, 2013 letter of Grievant's counsel stating that Grievant did not agree to the waiver. By Dismissal and Transfer Order dated December 13, 2013, the Grievance Board dismissed the grievance from the level three docket and transferred it back to the level one docket. Following the June 3, 2014 level one conference, a level one decision was rendered on June 25, 2014, dismissing the grievance. Grievant appealed to level two on July 9, 2014, revising his statement of grievance to clarify that his dimissal followed his approval for FMLA leave and was punishment for seeking leave. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on October 17, 2014.

A level three hearing was scheduled for February 13, 2015. On February 8, 2015, Respondent, by counsel, filed a Motion to Dismiss asserting the grievance should be dismissed as Grievant was an at-will employee and had failed to assert the violation of a substantial public policy. On February 9, 2015, Respondent, by counsel, filed a motion to continue the February 13, 2015 hearing. The hearing was continued and a pre-hearing conference to address the motion to dismiss was held on April 7, 2015. By order dated May 20, 2015, the undersigned denied the motion to dismiss, finding that Grievant had alleged in his grievance statement that he had been dismissed from employment four days after being approved for FMLA leave and that discrimination for use of such leave would be a violation of substantial public policy.

A level three hearing was held on November 3, 2016[1], before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Clinton W. Smith, Esq. Respondent was represented by counsel, Steven R. Compton, Senior Assistant Attorney General. At the request of the parties, the deadline to submit written Proposed Findings of Fact and Conclusions of Law was extended to January 13, 2017. At the written request of Grievant's counsel, due to an issue with the recording of the hearing, the deadline was further extended to February 28, 2017. This matter became mature for decision on March 2, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

[1] The delay in hearing the grievance at level three was due to repeated continuance requests by the parties. Five different level three hearings scheduled by the Grievance Board were continued at the request of the parties.

Synopsis

Grievant was employed by Respondent as a Deputy Medical Examiner in the Office of the Chief Medical Examiner. Respondent dismissed Grievant from employment while he was on Family and Medical Leave Act leave. The FMLA is a substantial public policy and Grievant proved retaliatory intent can be inferred as Respondent dismissed Grievant while he was on FMLA leave. However, Respondent proved it was not motivated to dismiss Grievant from employment to contravene the FMLA, but dismissed him for his long history of poor performance. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as a Deputy Medical Examiner in the Office of the Chief Medical Examiner for approximately eleven years.

2. Until approximately February 2013, Grievant was supervised by Chief Medical Examiner James Kaplan, M.D. Grievant was then supervised by Chief Medical Examiner Allen Mock, M.D. In March 2013, Donald Raynes became the Administrator of the Office of the Chief Medical Examiner. Mr. Raynes did not have supervisory authority over the medical examiners, but assisted Dr. Mock and provided information about the performance of the medical examiners.

3. On May 26, 2011, Grievant was given Employee Performance Improvement Recommendations, which required Grievant to complete twenty backlogged cases from 2010 and prior.

4. On June 3, 2011, Grievant filed a grievance protesting the performance improvement plan of May 26, 2011, and a written warning of the same date.[2]

5. On July 18, 2011, Grievant was suspended for failure to comply with the Employee Performance Improvement Recommendations.

6. On July 21, 2011, Grievant filed a grievance protesting his suspension.

7. On September 25, 2012, Grievant signed an Agreement to Resolve Grievance, which required Grievant to "complete a total number of autopsy reports each month that is equivalent to all the new cases he receives in that month. And if this is fewer than 27 new cases then he will complete an additional number of backlog cases to make up the difference." The Agreement referred to this as a "performance improvement plan" and stated that the plan would remain in place until Grievant's "backlog of incomplete autopsy reports from prior years is no greater than that of other non-administrative Deputy Chief Medical Examiners." The Agreement further stated, "If Dr. Mahmoud meets these productivity requirements in each month from the signing of this agreement until May 1, 2014 OCME is satisfied that the reasons that led to the suspension are resolved. The written warning imposed previously will remain in the employee's file until his backlog is equivalent with that of other Deputy Medical Examiners at which time the warning will be removed."

8. By email dated December 13, 2012, Deputy Commissioner John M. Wilkinson, notified Grievant that "the 27 reports you claimed to have completed in October and November included reports that are pending co-signature. These are not completed

[2] The record does not contain the Employee Performance Improvement Recommendations or the written reprimand. Description of the Employee Performance Improvement Recommendations is taken from the July 18, 2011 suspension letter.

reports. Consequently you have failed to comply with the conditions of the performance improvement plan to reduce your backlog."

9. By email dated March 7, 2013, Deputy Commissioner Wilkinson, notified Grievant he had failed to meet the requirements of the performance improvement plan for January and February.

10. By letter dated April 22, 2013, Andrew C. Garretson, Disability, Attendance, Safety and Loss Control Manager of the DHHR's Office of Human Resources Management, acknowledged receipt of Grievant's request for intermittent leave under the FMLA and confirmed his eligibility to take such leave contingent on Grievant's certification of his medical need by the completion of a DOPL/3 form by Grievant's physician by May 7, 2013.

11. Grievant took intermittent leave two days per week to attend physical therapy.

12. On May 2, 2013, Grievant was issued a new Performance Improvement Plan, extending the prior improvement period, citing Grievant's continued unacceptable performance including outbursts towards fellow employees, case backlog, and failure to respond to phone calls/inquires. The improvement period was extended for six months. To address Grievant's failure to dictate cases, Grievant was relieved of all autopsy duties May 2, 2013 through June 2, 2013 and required to dictate "10 cases per day," and report daily status on the number of cases completed. Grievant refused to sign the Performance Improvement Plan, but did not file a grievance protesting the plan.

13. By email dated May 8, 2013, Mr. Raynes notified Grievant that Grievant had failed to dictate 10 cases on the prior Friday and had failed to provide the number of cases dictated on Monday and Tuesday.

14. On May 15, 2013, Grievant's request for intermittent FMLA leave was approved.

15. On June 10, 2013, Grievant's doctor provided a medical excuse stating Grievant had Adhesive Capsulitis, Shoulder Impingement Syndrome, and Osteoarthritis and "needs to limit work days x8 weeks. Will need to be off work 2 days a week."

16. By email dated July 9, 2013, Administrator Raynes stated,

> Dr. Mahmoud, today is the 9th of July as you and I spoke yesterday, you have not turned in to me the cases you closed for June, as I explained to you my records indicated you completed (1) case and there were (5) cases waiting to be signed by Dr. Mock. In accordance with your improvement plan you were to report to Dr. Mock and I the number of cases you completed each month if you do not provide me with a list of the cases you have completed I will consider you to have completed (6) which as you know is well below the standard set in your improvement plan.

17. By letter dated July 29, 2013, Mr. Garretson acknowledged receipt of Grievant's request for continuous leave under the FMLA and confirmed his eligibility to take such leave contingent on Grievant's certification of his medical need by the completion of a DOPL/3 form by Grievant's physician by August 13, 2013.

18. By letter dated August 20, 2013, Commissioner Marian L. Swinker, M.D., M.P.H., dismissed Grievant from employment.

19. On August 22, 2013, Grievant's request for continuous FMLA leave was approved.[3]

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). However, in cases involving the dismissal of classified-exempt, at will employees, state "agencies do not have to meet this legal standard." *Logan v. W. Va. Regional Jail & Correctional Auth*., Docket No. 94-RJA-225 (Nov. 29, 1994). "[A]s a general rule, West Virginia law provides that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law*." Roach v. Regional Jail Auth*., 198 W. Va. 694, 699, 482 S.E.2d 679, 684 (1996) (citing *Williams v. Precision Coil, Inc*., 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995)). Grievant does not dispute he was an at will employee.

"The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge." Syl. Pt. 3, *Wounaris v. W.*

[3] During the level three hearing Grievant's counsel continually referred to the approval of FMLA leave on August 16, 2013. Grievant's leave was not approved until August 22, 2013. Grievant applied for continuous leave on or about July 29, 2016 and Respondent received Grievant's most recent information on August 16, 2013, presumably the DOPL3 he was told to submit in the July 29, 2016 letter, but the leave was not actually approved until August 22, 2013.

Va. State College, 214 W. Va. 241, 588 S.E.2d 406 (2003) (citing Syllabus, *Harless v. First Nat'l Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978)).

> "'In an action to redress an unlawful retaliatory discharge under the West Virginia Human Rights Act, W.Va. Code, 5-11-1, et seq., as amended, the burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.' Syl. pt. 4, Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986)." Syl. pt. 1, Brammer v. Human Rights Commission, 183 W. Va. 108, 394 S.E.2d 340 (1990).
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> Once the complainant has satisfied that burden, the burden then shifts to the employer to provide a legitimate, intervening reason for the dismissal. As we explained in syllabus point nine of Mace v. Charleston Area Medical Center Foundation, Inc., 188 W. Va. 57, 422 S.E.2d 624 (1992):
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> "In a retaliatory discharge action, where the plaintiff claims that he or she was discharged for exercising his or her constitutional right(s), the burden is initially upon the plaintiff to show that the exercise of his or her constitutional right(s) was a substantial or a motivating factor for the discharge. The plaintiff need not show that the exercise of the constitutional right(s) was the only precipitating factor for the discharge. The employer may defeat the claim by showing that the employee would have been discharged even in the absence of the protected conduct." Syllabus point 3, McClung v. Marion County Commission, 178 W. Va. 444, 360 S.E.2d 221 (1987).

Roach v. Regional Jail Auth., 198 W. Va. 694, 701, 482 S.E.2d 679, 686 (1996).[4]

[4] *Roach* was a case arising from a grievance action, which the West Virginia Supreme Court of Appeals analyzed under the same standard as cases arising under the West Virginia Human Rights Act.

"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." Syl. Pt. 2, *Birthisel v. Tri-Cities Health Services Corp.,* 188 W. Va. 371, 424 S.E.2d 606 (1992). Grievant alleges he was dismissed from employment for his exercise of leave granted under the Family and Medical Leave Act of 1993 ("FMLA"). In enacting the FMLA, Congress found that "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(4). The purpose of the FMLA was "to entitle employees to take reasonable leave for medical reasons. . ." 29 U.S.C. § 2601(b)(2). "It [is] unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]." 29 U.S.C. § 2615(a)(1).

The FMLA's provision that it is unlawful for an employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under the FMLA is a substantial public policy. It is undisputed that Grievant had been granted intermittent FMLA leave had applied for continuous FMLA leave at the time of his dismissal. Commissioner Swinker was not called to testify, but Deputy Commissioner Barbara Taylor admitted that Commissioner Swinker knew about Grievant's FMLA leave, and had discussed with the Division of Personnel whether she would be permitted to dismiss Grievant while he was on FMLA leave. Grievant did not present specific evidence of retaliatory motivation, but retaliatory motivation can be inferred as Grievant was dismissed while on intermittent FMLA leave and within weeks of applying for continuous FMLA leave.

The burden then shifts to Respondent to provide a legitimate, intervening reason for the dismissal. "The FMLA does not prevent an employer from terminating an employee for poor performance, misconduct, or insubordinate behavior." *Vannoy v. FRB of Richmond*, 827 F.3d 296, 304-305 (4th Cir. Va. 2016). "An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment." 29 U.S.C. § 825.216.

Respondent demonstrated a legitimate, intervening reason for the dismissal. Respondent proved Grievant had a lengthy history of poor performance, which predated his FMLA leave by two years. Grievant was placed on a performance improvement plan in May 2011, was suspended in July 2011, entered into an agreement to address his backlog in September 2012, and was notified that he was failing to meet his agreement in December 2012 and March 2013. Grievant did not request intermittent leave until April 2013. In May 2013, Grievant still had a backlog of 285 cases, which he had not cured under the original improvement plan, and was placed on a second performance improvement plan that removed his autopsy duties so he could focus on dictating backlogged cases. Grievant was required to dictate ten cases per day and Grievant's intermittent leave was only for two days per week.[5] Whether intentional or not, this change in duties would also have greatly benefitted Grievant while he was on intermittent

[5] Grievant testified his intermittent leave was to attend physical therapy, but offered no explanation why attending a physical therapy session would require him to take the entire day off from work.

leave as he could focus on clearing his backlog during the three days per week he was at work. The issuance of a second performance improvement plan was reasonable as Grievant had failed to cure his backlog after the first plan and changes were made to actually assist Grievant to meet his plan by taking him off autopsy duty. Yet, within the first week of the new performance plan, Grievant had failed to comply. In June 2013, Grievant only closed six cases.

Grievant asserts his caseload was unfair, because it was almost twice the amount that had been discussed when Grievant was hired. Dr. Mock and Mr. Raynes admitted that the caseloads had increased and that all the doctors had backlogs, but asserted Grievant's backlog was much greater than that of the other doctors, and the other doctors who had been placed on performance improvement plans had complied with their plans. Grievant did not dispute that he had failed to complete his plan or the size of his backlog, he simply asserted it was unfair and that Dr. Mock and Mr. Raynes had harassed him. Grievant did testify that from the date of the second performance improvement plan, May 2, 2013, to his dismissal he was not told his work was unsatisfactory. However, this was clearly untrue as there were two emails sent to Grievant by Mr. Raynes stating Grievant was not in compliance with his plan during this period. Dr. Mock, Mr. Raynes, and Ms. Taylor all explained Grievant was given so long to improve only because recruiting new medical examiners is very difficult. Respondent was not motivated to dismiss Grievant from employment to contravene the FMLA, but dismissed him for his long history of poor performance.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W.VA. CODE ST. R. § 156-1-3 (2008). However, in cases involving the dismissal of classified-exempt, at will employees, state "agencies do not have to meet this legal standard." *Logan v. W. Va. Regional Jail & Correctional Auth*., Docket No. 94-RJA-225 (Nov. 29, 1994).

2. "[A]s a general rule, West Virginia law provides that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law*." Roach v. Regional Jail Auth*., 198 W. Va. 694, 699, 482 S.E.2d 679, 684 (1996) (citing *Williams v. Precision Coil, Inc*., 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995)).

3. "The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge." Syl. Pt. 3, *Wounaris v. W. Va. State College*, 214 W. Va. 241, 588 S.E.2d 406 (2003) (citing Syllabus, *Harless v. First Nat'l Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978)).

4. In analyzing retaliatory discharge arising from the grievance procedure the West Virginia Supreme Court applied the same burden as cases arising from the West Virginia Human Rights Act stating:

> "'In an action to redress an unlawful retaliatory discharge under the West Virginia Human Rights Act, W.Va. Code, 5-

> 11-1, et seq., as amended, the burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.' Syl. pt. 4, Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986)." Syl. pt. 1, Brammer v. Human Rights Commission, 183 W. Va. 108, 394 S.E.2d 340 (1990).
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> Once the complainant has satisfied that burden, the burden then shifts to the employer to provide a legitimate, intervening reason for the dismissal. As we explained in syllabus point nine of Mace v. Charleston Area Medical Center Foundation, Inc., 188 W. Va. 57, 422 S.E.2d 624 (1992):
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> "In a retaliatory discharge action, where the plaintiff claims that he or she was discharged for exercising his or her constitutional right(s), the burden is initially upon the plaintiff to show that the exercise of his or her constitutional right(s) was a substantial or a motivating factor for the discharge. The plaintiff need not show that the exercise of the constitutional right(s) was the only precipitating factor for the discharge. The employer may defeat the claim by showing that the employee would have been discharged even in the absence of the protected conduct." Syllabus point 3, McClung v. Marion County Commission, 178 W. Va. 444, 360 S.E.2d 221 (1987).

Roach v. Regional Jail Auth., 198 W. Va. 694, 701, 482 S.E.2d 679, 686 (1996). (W. Va. 1996).

5. “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." Syl. Pt. 2, *Birthisel v. Tri-Cities Health Services Corp.,* 188 W. Va. 371, 424 S.E.2d 606 (1992).

6. In enacting the FMLA, Congress found that “there is inadequate job security for employees who have serious health conditions that prevent them from working for

temporary periods." 29 U.S.C. § 2601(a)(4). The purpose of the FMLA was "to entitle employees to take reasonable leave for medical reasons. . ." 29 U.S.C. § 2601(b)(2). "It [is] unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]." 29 U.S.C. § 2615(a)(1).

7. The FMLA is a substantial public policy and Grievant proved retaliatory intent can be inferred as Respondent dismissed Grievant while he was on FMLA leave.

8. "The FMLA does not prevent an employer from terminating an employee for poor performance, misconduct, or insubordinate behavior." *Vannoy v. FRB of Richmond*, 827 F.3d 296, 304-305 (4th Cir. Va. 2016). "An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment." 29 U.S.C. § 825.216.

9. Respondent proved it was not motivated to dismiss Grievant from employment to contravene the FMLA, but dismissed him for his long history of poor performance.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: March 20, 2017

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Billie Thacker Catlett
Chief Administrative Law Judge