THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CRYSTAL J. FLEMINGS,
Grievant,

v. **Docket No. 2018-0981-MU**

MARSHALL UNIVERSITY,
Respondent.

DECISION

Grievant, Crystal J. Flemings, was employed by Respondent, Marshall University. On February 19, 2018 direct, Grievant filed this grievance against Respondent alleging she was wrongfully terminated. For relief, Grievant seeks reinstatement.

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on April 18, 2018, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared *pro se*.[1] Respondent was represented by counsel, Kristi A. McWhirter, Assistant Attorney General. This matter became mature for decision on May 21, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Campus Service Worker and protests her dismissal from employment. Respondent asserts it had good cause to terminate Grievant's employment due to her long history of unacceptable attendance, which was not corrected despite progressive discipline and an additional performance plan, and which caused Respondent to hire an additional part-time temporary employee to

[1] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

compensate for Grievant's absences. Grievant asserts that her absences should be excused due to her circumstances and that Respondent interfered with her use of FMLA leave and retaliated against her for requesting FMLA leave. Respondent proved it had good cause to terminate Grievant for her absenteeism when Grievant's absenteeism worsened after progressive discipline and an additional performance improvement plan. Grievant established a *prima facie* case of retaliatory discharge, however, Respondent provided credible evidence of legitimate nondiscriminatory reasons for its actions and Grievant did not demonstrate those reasons were merely pretextual. 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 Campus Service Worker.

2. During the relevant period, Grievant was employed in the Housing and Residence Life Housekeeping Unit. Grievant was assigned to Holderby Hall, a dormitory for students. During the weekday, Grievant was responsible for cleaning two floors and, during the weekends, Grievant was responsible for light cleaning and trash removal for the whole building.

3. On March 9, 2016[2], Grievant received an oral warning for excessive use of annual and sick leave. Grievant used 97.75 hours of leave between November 18, 2015 and March 4, 2016.

[2] Respondent entered into evidence performance evaluations and disciplinary action prior to this date. However, as the termination letter listed the disciplinary history

4. On May 17, 2016, Grievant received a written warning for excessive use of annual and sick leave. In the two months since the oral warning, Grievant used 93.5 hours of leave.

5. On October 5, 2016, Grievant received a recommendation for suspension for excessive use of annual and sick leave. Between July and September, Grievant missed over seventeen days of work, using 97.25 hours of leave and overdrafting her available leave by another 32.76 hours. The consequence of failure to improve would be a recommendation for termination.

6. On October 19, 2016, although Grievant's overall performance was rated "good," Grievant's performance for attendance was rated "unsatisfactory" and that Grievant's performance needed to improve.

7. Although termination was the next step in discipline and Grievant's attendance had not improved, because her quality of work when present was good, Human Resource Services Director Bruce Felder determined Grievant should be given one last opportunity to improve her attendance through a performance improvement plan.

8. On June 19, 2017, Grievant was placed on a performance improvement plan for excessive use of sick and annual leave and tardiness. From January 2017 through June 19, 2017 Grievant used 202.25 hours of leave. The plan required "[i]mprovement in excessive use of sick and annual leave" and "[i]t is expected of you to be at work when scheduled." The consequence of failure to improve was "[c]ontinued disciplinary action that may result in termination."

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from this date forward, earlier disciplinary action and performance will not be considered in this decision.

9. Grievant's performance was reviewed on July 19, 2017. In the first month of the improvement plan, Grievant had used an additional twelve hours of leave. Immediate improvement of attendance was again required with the continued consequence of disciplinary action of termination for failure to improve.

10. Although another performance review was scheduled for August 19, 2017, no further review occurred.

11. On November 1, 2017, although Grievant's overall performance was rated "fair," Grievant's performance for attendance was rated "unsatisfactory" and that Grievant's performance needed to improve. It was noted that because of her absences, "the quality of her assigned area falls behind, then effects the overall living environment of the residents" and hardship is placed on her co-workers who are forced to pick up her assigned area.

12. From the beginning of the performance improvement plan in July 2017 through January 2018, Grievant was absent for 370.5 hours, or almost fifty days.

13. Between May 2016 and her termination, Grievant experienced many personal difficulties. Grievant's daughter became suicidal and was hospitalized. Grievant's son was removed from her home and Grievant was required to attend monthly court dates from March 2017 through December 2017. During the month of January 2018, both Grievant and her daughter experienced illnesses requiring medical treatment. Grievant provided medical excuses for January 2, 2018 to January 5, 2018, January 5, 2018 to January 8, 2018, and January 10, 2018 to January 11, 2018.

14. Grievant requested thirteen days of sick leave between January 2, 2018 through January 20, 2018, but only provided excuses for seven of those days. Grievant worked only two days total in the month of January 2018.

15. Due to the nature of her work, when Grievant was absent, other employees would be required to cover Grievant's duties. Eventually, Respondent was forced to hire part-time temporary staff to cover Grievant's frequent absences.

16. Grievant's father was hospitalized on January 23, 2018.

17. On January 29, 2018, Hospitalist, Dr. Randy Kinnard, completed the Family and Medical Leave Act ("FMLA") Certification of Health Care Provider for Family Member's Serious Health Condition. Dr. Kinnard stated Grievant's father would be incapacitated from January 23, 2018 to February 22, 2018 and would need "[a]ssistance with ADL's." Dr. Kinnard stated, "Daughter has been assisting her mother with father care while in hospital and will continue to do so when discharged home." Dr. Kinnard further stated, "Family has been staying with pt 24/7 for safety and to lessen confusion."

18. On the same day, Grievant turned in the certification form to the human resources office, but failed to complete the actual application for FMLA leave.

19. On February 2, 2018, Grievant also turned into the human resources office a Catastrophic Leave Recipient Application, which is an application to receive donated leave.

20. By memo dated February 5, 2018, Director Bruce Felder suspended Grievant without pay as her position had been recommended for termination and scheduled a pre-termination hearing on February 8, 2018. Attached to the memo was a Performance Counseling Statement also dated February 5, 2018. Grievant signed the

Performance Counseling Statement on February 7, 2018. The following were the stated grounds for the Performance Counseling Statement:

> You received an oral warning for excessive absenteeism on 3/3/2016. The behavior continued and a written warning was issued on 5/17/2016. On 10/5/2016 you were suspended for excessive absenteeism for missing 17 days in a 3 month period. This behavior continued through June 2017 and [in] lieu of termination you were given a performance improvement plan. Your absences from work continued to be excessive during periods of the improvement plan and thereafter. Since July 2017 – September 2017, you used approximately 154 hours of leave. From October 2017 – January 2018 you have been absent 216.5 hours of annual, sick, and leave without pay.

21. By letter dated February 14, 2018, Director Felder terminated Grievant's employment.

22. The Marshall University Classified Staff Handbook governs classified staff discipline and follows four steps of progressive discipline: oral counseling, written counseling, suspension, and discharge/dismissal. Classified staff may be dismissed from employment, in relevant part, for "[n]on-improvement in work performance after proper training and/or discipline by use of oral or written counseling."

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). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980); *Guine v. Civil Serv. Comm'n*, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

Respondent asserts it had good cause to terminate Grievant's employment due to her long history of unacceptable attendance, which was not corrected despite progressive discipline and an additional performance plan, and which caused Respondent to hire an additional part-time employee to compensate for Grievant's absences. Grievant asserts that her absences should be excused due to her circumstances and that Respondent interfered with her use of FMLA leave and retaliated against her for requesting FMLA leave.

As a preliminary matter, "If an employee does not grieve specific disciplinary incidents, he cannot place the merits of such discipline in issue in a subsequent grievance proceeding. *Jones v. W. Va. Dept. of Health & Human Resources,* Docket No. 96-HHR-371 (Oct. 30, 1996); *See Stamper v. W. Va. Dept. of Health & Human Resources*, Docket No. 95-HHR-144 (Mar. 20, 1996); *Womack v. Dept. of Admin.*, Docket No. 93-ADMN-430 (Mar. 30, 1994). In such cases, the information contained in prior disciplinary documentation must be accepted as true. *See Perdue v. Dept. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994)." *Aglinsky v. Bd. of Trustees*, Docket No. 97-BOT-256 (Oct. 27, 1997), ***aff'd***, Mon. Co. Cir. Ct. Docket No. 97-C-AP-96 (Dec. 7,

1999), *appeal refused*, W.Va. Sup Ct. App. Docket No. 001096 (July 6, 2000). Grievant did not grieve any of her prior discipline, so all prior disciplinary documentation is accepted as true.

Grievant's absenteeism was of a substantial nature directly affecting the rights and interest of the public. Grievant was so frequently and unpredictably absent that Respondent was unable to adequately cover Grievant's duties, which was affecting the quality of life for the resident students. As a result, Respondent was forced to hire a temporary part-time employee. "It is axiomatic that an employer may expect its employees to arrive at work, and be ready to work, on time at the beginning of their shifts." *Holland v. Dep't of Health &Human Res./Mildred Mitchell-Bateman Hosp*, Docket No. 06-HHR-126 (May 31, 2006). Continual, repeated and unrepentant absenteeism rises to the level of a substantial issue, for which termination is a reasonable outcome. *Id.* Grievant has had a long-standing attendance problem for which she received progressive discipline from March 2016 through October 2016 and had an additional opportunity through the performance improvement plan in the summer of 2017 to improve her attendance. Grievant's attendance never significantly improved during this period and, following the performance improvement plan, continued to deteriorate to the point that she was only present for work for two days in January 2018.

Grievant asserts her absences should be excused because of her personal difficulties. While the undersigned is not unsympathetic to Grievant's difficulties, Respondent has a right to expect its employees to actually appear for work and Respondent worked with Grievant for almost two years to allow her to improve. Further, although Grievant asserts her absences in the last month were due to medical conditions,

Grievant only provided medical excuses for seven of the thirteen days she missed through January 20, 2018. An employee may be dismissed when his/her absences due to health conditions render him/her unable to fulfill the duties of the position. *Hayward v. Dep't of Health & Human Res*., Docket No. 07-HHR-086 (July 23, 2007) (citing *Gregis v. Div. of Labor*, Docket No. 98-DOL-079 (Nov. 12, 1998); *Fullen v. Bd. of Trustees/W. Va. Univ.*, Docket No. 97-BOT-460 (June 18, 1998)).

Grievant asserts Respondent interfered with her ability to take FMLA leave and retaliated against her for applying for FMLA leave. Grievant never completed the FMLA leave application process. Although Grievant provided the medical practitioner's certification to the human resources department, Grievant provided no evidence that she had completed or submitted the actual FMLA application. Therefore, Respondent could not interfere with Grievant's FMLA leave when she had never properly applied for the leave.

"In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

> [T]he 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

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

"An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

In enacting the Family and Medical Leave Act of 1993 ("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). Grievant engaged in a protected activity when she started the FMLA process by submitting the medical practitioner's certification. Respondent was

aware of the protected activities, as Respondent acknowledged the receipt of the certification. Grievant was terminated from employment several weeks after submitting the certification, which is sufficient to infer retaliatory motivation. However, Respondent easily rebuts the presumption of retaliation with its evidence of Grievant's long-standing, extreme attendance issues and the extra effort Respondent made to allow Grievant time to correct these issues. Further, the termination was clearly based on Grievant's absenteeism through January 20, 2018, before Grievant submitted the certification on January 29, 2018. Grievant offered no evidence that Respondent's justification for her termination was merely a pretext.

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). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. Permanent state employees who are in the classified service can only be dismissed for "good cause," meaning "misconduct of a substantial nature directly affecting the rights and interest of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention." Syl. Pt. 1, *Oakes v. W. Va. Dep't of Finance and Admin*., 164 W. Va. 384, 264 S.E.2d 151 (1980);

Guine v. Civil Serv. Comm'n, 149 W. Va. 461, 141 S.E.2d 364 (1965); *See also* W. VA. CODE ST. R. § 143-1-12.02 and 12.03 (2012).

3. "It is axiomatic that an employer may expect its employees to arrive at work, and be ready to work, on time at the beginning of their shifts." *Holland v. Dep't of Health &Human Res./Mildred Mitchell-Bateman Hosp*, Docket No. 06-HHR-126 (May 31, 2006). Continual, repeated and unrepentant absenteeism rises to the level of a substantial issue, for which termination is a reasonable outcome. *Id.*

4. An employee may be dismissed when his/her absences due to health conditions render him/her unable to fulfill the duties of the position. *Hayward v. Dep't of Health & Human Res*., Docket No. 07-HHR-086 (July 23, 2007) (citing *Gregis v. Div. of Labor*, Docket No. 98-DOL-079 (Nov. 12, 1998); *Fullen v. Bd. of Trustees/W. Va. Univ.*, Docket No. 97-BOT-460 (June 18, 1998)).

5. Respondent proved it had good cause to terminate Grievant for her absenteeism when Grievant's absenteeism worsened after progressive discipline and an additional performance improvement plan.

6. "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004). In syllabus point six of *Freeman*, the West Virginia Supreme Court of Appeals specifically applied the same elements required to prove a *prima facie* case under the West Virginia Human Rights Act to a claim arising from a public employee grievance stating,

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> 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

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)).

7. "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

8. Grievant established a *prima facie* case of retaliatory discharge, however, Respondent provided credible evidence of legitimate nondiscriminatory reasons for its actions and Grievant did not demonstrate those reasons were merely pretextual.

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: July 5, 2018

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Billie Thacker Catlett
Chief Administrative Law Judge