THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ELIZABETH M. LOY,
Grievant,

v. **Docket No. 2018-1206-CONS**

BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

Grievant, Elizabeth M. Loy, was employed by Respondent, Board of Education, as Director of the West Virginia Birth to Three Program at the Regional Education Service Agencies Eight. On May 2, 2018, Grievant, by counsel, filed a grievance against Respondent protesting her suspension from employment. On May 15, 2018, Grievant, by counsel, filed a second grievance protesting her termination from employment. Grievant made her statement of grievance in both grievances through a separate two-page attachment consisting of detailed numbered allegations. The statements of grievance make the same allegations, except that the second grievance adds allegations relating to the termination of employment. For relief, Grievant seeks reinstatement and back pay.

By order entered May 23, 2018, the grievances were consolidated into the above-styled grievance. On May 18, 2018, Respondent, by counsel, filed *Respondent's Motion to Dismiss* asserting the grievance must be dismissed as Grievant was an at-will employee and had failed to allege the violation of a substantial public policy.[1] On June 5, 2018, Grievant, by counsel, filed *Grievant's Opposition to Respondent's Motion to*

[1] Respondent alleged alternate grounds for dismissal that are not necessary to address.

Dismiss arguing Grievant has a constitutionally protected property interest in her employment and raising for the first time the allegation that she was terminated due to her age. On June 13, 2018, Respondent filed *Respondent's Reply to Grievant's Opposition to Motion to Dismiss*. Grievant is represented by counsel, Garry G. Geffert Respondent is represented by counsel, Sherri Goodman Reveal and Mary Catherine Tuckwiller.

Synopsis

Grievant was employed by Respondent, Board of Education, as Director of the West Virginia Birth to Three Program at the Regional Education Service Agencies Eight. Grievant's employment was at-will. Grievant was suspended with pay due to allegations that she had harassed employees and created a hostile work environment. Respondent later dismissed Grievant from employment without stating any cause for terminating her at-will employment. Grievant failed to state a claim on which relief can be granted because she did not allege that her discharge contravened some substantial public policy. Accordingly, the grievance is dismissed.

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, Board of Education, as Director of the West Virginia Birth to Three Program at the Regional Education Service Agencies Eight.

2. Grievant's employment was at-will.

3. By letter dated April 9, 2018, Grievant was suspended with pay due to allegations that she had harassed employees and created a hostile work environment.

4. On May 9, 2018, Respondent terminated Grievant's at-will employment. The letter did not state any cause for the termination.

5. Grievant filed a grievance protesting her suspension on May 2, 2018, and a grievance protesting her termination on May 15, 2018. Neither statement of grievance contained any facts or allegations that would relate to a claim of age discrimination.

Discussion

"Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. § 156-1-6.19. "Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue." W. VA. CODE ST. R. § 156-1-6.19.2. "Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits." W. VA. CODE ST. R. § 156-1-6.19.3. "A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." W. VA. CODE ST. R. § 156-1-6.11 (2008). "An administrative law judge may, in the judge's discretion, hold a hearing on a motion if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made. . . ." W. VA. CODE ST. R. § 159-1-6.6.1. "[T]here is no requirement

for the holding of a hearing on a motion to dismiss for failure to state a claim upon which relief may be granted." *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 544, 729 S.E.2d 860, 866 (2012) (*per curiam*). A hearing is not necessary in this matter as the determination must be made based on the legal arguments of the parties, which have been fully developed by the written submissions of the parties, and the factual allegations raised by Grievant in her statements of grievance.

Respondent argues that the grievance must be dismissed for failure to state a claim upon which relief may be granted because Grievant, an at-will employee, did not allege in her grievance that her dismissal from employment contravened some substantial public policy principle. Grievant argues she had a property interest in her continued employment, she did not receive due process, and she was terminated due to age discrimination.

Grievant essentially argues that she was not an at-will employee because she had a reasonable expectation of continued employment, which would entitle her to due process protections. "A 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." Syl. Pt. 3, *Waite v. Civil Serv. Comm'n,*, 161 W.Va. 154, 241 S.E.2d 164 (1977), *overruled in part on other grounds by W. Va. Dep't of Educ. v. McGraw,* 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). "'A "property" interest protected by due process must derive from private contract or state law, and must be more than the unilateral expectation of continued employment.' *Major v. DeFrench*, 169 W.Va. 241, 286 S.E.2d 688, 695 (1982)." *Orteza v. Monongalia Cty. Gen. Hosp*., 173 W. Va. 461, 463, 318 S.E.2d 40, 42 (1984).

Grievant clearly was an at-will employee. Grievant was employed within a regional education service agency by Respondent. Respondent was charged by the Legislature with establishing regional education service agencies by rule. W.VA. CODE § 18-2-26(c) (2016). By Respondent's legislative rule, "All RESA regular full-time and regular part time personnel are non-contractual will and pleasure employees of the WVBE. . . ." W.VA. CODE St. R. § 126-72-3.13.b (2015). Grievant cites *W. Va. Univ. v. Sauvageot*, 185 W. Va. 534, 408 S.E.2d 286 (1991) in support of her argument that her long term employment with Respondent gave her a reasonable expectation of continued employment. *Sauvageot* is not applicable. Ms. Sauvageot was a contract employee, not an at-will employee. Instead, as Respondent asserts, it is *W. Va. Bd. of Educ. v. Marple*, 236 W. Va. 654, 783 S.E.2d 75 (2015) and its reliance on *Orteza* that is applicable to this situation. *Marple* specifically addressed Grievant's same assertions of good evaluations and pay raised as insufficient to establish an expectation of continued employment. Grievant had no employment contract and no entitlement under state law; on the contrary, Grievant's employment was specifically designated as at will by legislative rule. Grievant had no reasonable expectation of continued employment.

An at-will employee serves at the will and pleasure of his or her employer and can be discharged at any time, with or without cause. *Wright v. Standard Ultramarine and Color Co.*, 141 W. Va. 368, 382, 90 S.E.2d 459, 468 (1955). However, "'[t]he 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., *Harless v. First Nat'l Bank of Fairmont*, 162

W. Va. 116, 246 S.E.2d 270 (1978)." Syl. Pt. 4, *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012) (*per curiam*).

The Supreme Court of Appeals of West Virginia has specifically found that an at-will employee's grievance challenging his/her termination of employment may be dismissed without hearing when the employee fails to allege a contravention of substantial public policy. *Wilhelm v. W. Va. Lottery*, 198 W.Va. 92, 479 S.E.2d 602 (1996); *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012) (*per curiam*).

"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 Servs. Corp*., 188 W. Va. 371, 424 S.E.2d 606 (1992). Where no specific public policy source is cited, the Supreme Court has "refused to impose a duty on the State of good faith and fair dealing with its at-will employees" because to grant that right would be contrary to the principle that the appointing authority has an unfettered right to terminate an at-will employee barring a violation of substantial public policy. *Wilhelm v. West Virginia Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996)(citing *Williams v. Brown*, 190 W. Va. 2012 at 208, 437 S.E.2d 775 at 780-81 (1993)).

The Supreme Court has found that the termination of an at-will employee contravenes substantial public policy when it violates an important right of the employee. *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984) (employee's right to privacy violated when discharged for refusing to take a polygraph test); *McClung v. Marion County Commission*, 178 W. Va. 444, 360 S.E.2d 221 (1987)

(employee's right to seek redress of grievances and seek access to the courts violated when discharged for making a claim for overtime wages not paid); *Feliciano v. 7*-Eleven, Inc., 210 W. Va. 740, 559 S.E.2d 713 (2001) (employee's right to self-defense violated when discharged for defending self against robber in violation of employer's policy).

The Supreme Court has also found that the termination of an at-will employee contravenes substantial public policy when it is in retaliation for an employee's actions regarding a matter of substantial public interest. *Kanagy v. Fiesta Salons, Inc.* 208 W. Va. 526, 541 S.E.2d 616 (2000). (Employee terminated in retaliation for cooperating with the investigation of an employer by state regulatory agency); *Tudor v. Charleston Area Medical Center, Inc*., 203 W. Va. 111, 506 S.E.2d 554 (1997) (employee terminated in retaliation for expressing concern that employer was violating a state regulation); *Page v. Columbia Natural Resources, Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996); (Employee terminated in retaliation for truthfully testifying in a legal action against employer).

Neither of Grievant's statements of grievance allege in any way that Respondent's motivation for her discharge was to contravene some substantial public policy principle. Grievant's allegations all relate to Respondent's alleged lack of cause to discharge Grievant, which is not applicable in the discharge of an at-will employee, and to her assertion that her due process rights, which she does not possess, were violated. The statements of grievance in this matter were detailed and made many specific allegations, none of which related to Grievant's responsive claim that she was terminated due to age discrimination. "It is not enough to make conclusory statements about the [alleged public policy] violations." *Armstrong*, 229 W. Va. at 545, 729 S.E.2d at 867. This allegation has

clearly been raised simply in an attempt to survive the motion to dismiss and not as a true claim.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. "Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. § 156-1-6.19. "Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue." W. VA. CODE ST. R. § 156-1-6.19.2. "Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits." W. VA. CODE ST. R. § 156-1-6.19.3.

2. "A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." W. VA. CODE ST. R. § 156-1-6.11 (2008).

3. "An administrative law judge may, in the judge's discretion, hold a hearing on a motion if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made. . . ." W. Va. Code St. R. § 159-1-6.6.1. "[T]here is no requirement for the holding of a hearing on a motion to dismiss for failure to state a claim upon which relief may be granted." *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 544, 729 S.E.2d 860, 866 (2012) (*per curiam*).

4. “A 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings.” Syl. Pt. 3, *Waite v. Civil Serv. Comm'n,*, 161 W.Va. 154, 241 S.E.2d 164 (1977), *overruled in part on other grounds by W. Va. Dep't of Educ. v. McGraw,* 239 W. Va. 192, 201, 800 S.E.2d 230, 239 (2017). “‘A “property” interest protected by due process must derive from private contract or state law, and must be more than the unilateral expectation of continued employment.’ *Major v. DeFrench*, 169 W.Va. 241, 286 S.E.2d 688, 695 (1982).” *Orteza v. Monongalia Cty. Gen. Hosp*., 173 W. Va. 461, 463, 318 S.E.2d 40, 42 (1984).

5. “All RESA regular full-time and regular part time personnel are non-contractual will and pleasure employees of the WVBE. . . .” W.VA. CODE St. R. § 126-72-3.13.b (2015).

6. Grievant was an at-will employee pursuant to legislative rule.

7. An at-will employee serves at the will and pleasure of his or her employer and can be discharged at any time, with or without cause. *Wright v. Standard Ultramarine and Color Co.*, 141 W. Va. 368, 382, 90 S.E.2d 459, 468 (1955). However, “‘[t]he 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., *Harless v. First Nat'l Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978).” Syl. Pt. 4, *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).

8. The Supreme Court of Appeals of West Virginia has specifically found that an at-will employee's grievance challenging his/her termination of employment may be dismissed without hearing when the employee fails to allege a contravention of substantial public policy. *Wilhelm v. W. Va. Lottery*, 198 W.Va. 92, 479 S.E.2d 602 (1996); *Armstrong v. W. Va. Div. of Culture & History*, 229 W. Va. 538, 729 S.E.2d 860 (2012).

9. "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 Servs. Corp*., 188 W. Va. 371, 424 S.E.2d 606 (1992). Where no specific public policy source is cited, the Supreme Court has "refused to impose a duty on the State of good faith and fair dealing with its at-will employees" because to grant that right would be contrary to the principle that the appointing authority has an unfettered right to terminate an at will employee barring a violation of substantial public policy. *Wilhelm v. West Virginia Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996) (citing *Williams v. Brown*, 190 W. Va. 2012 at 208, 437 S.E.2d 775 at 780-81 (1993)).

10. Grievant, an at-will employee, failed to allege that her discharge contravened some substantial public policy.

11. As Grievant failed to state a claim on which relief can be granted the grievance must be dismissed.

Accordingly, the grievance is **DISMISSED.**

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. *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 19, 2018

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Billie Thacker Catlett
Chief Administrative Law Judge