

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ABDEL-FATAH MASSOUD,

Grievant,

v.

Docket No. 2018-1348-CONS

WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Grievant, Abdel-Fatah Massoud, was employed by Respondent, West Virginia University (WVU). On January 5, 2018, Grievant filed his first grievance against Respondent stating, "Discriminatory and retaliatory removal/demotion from assignment to William R Sharpe Hospital. Violation of public policy." For relief, Grievant sought, "To be made whole in every way including reinstatement to assignment." On April 6, 2018, Grievant filed his second grievance stating, "Nonrenewal of contract without cause and while Grievant on sick leave." For relief, Grievant sought, "To be made whole in every way including reinstatement to assignment and renewal of contract."

Grievant filed directly to level three of the grievance process.¹ A level three hearing was held on March 10, 2019, before the undersigned at the Grievance Board's Westover office. Grievant appeared in person and by representative Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by Dr. Marc Haut and by counsel, Samuel Spatafore, Assistant Attorney General. This matter became

¹ West Virginia Code § 6C-2-4(a)(4) permits a grievant to proceed directly to level three of the grievance process when the grievance deals with the discharge of the grievant.

mature for decision on June 17, 2019, after receipt of each party's written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed through an annual contract as an Assistant Professor with WVU. Grievant's employment with WVU included an additional role as Medical Director of Sharpe Hospital. WVU did not renew Grievant's contract. Grievant contends that he is entitled to be reinstated because his non-renewal was motivated by discrimination and retaliation, and because he was functionally demoted for the remainder of his term. Grievant further contends that Respondent violated the FMLA in the manner it implemented his non-renewal. Grievant claims WVU was obligated to provide cause for his non-renewal. Grievant did not prove that he had a property interest in continued employment. Therefore, any consideration of Grievant's lack of cause and functional demotion arguments are moot. Grievant also did not prove his claims of discrimination, retaliation, and FMLA violations. Accordingly, this 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 initially hired by Respondent, West Virginia University (WVU), in August 2011, as a full-time faculty at the rank of Assistant Professor in the Clinician Track in the Department of Behavioral Medicine and Psychiatry at the William R. Sharpe, Jr. Hospital (Sharpe) in Weston, West Virginia through a Notice of Appointment (NOA).
2. Sharpe operates under the direction of the West Virginia Department of Health and Human Resources (DHHR).

3. The NOA explained that Grievant's performance would be reviewed on an annual basis and that he would need to achieve significant contributions in service, education, and reasonable contributions in scholarship. (Respondent's Exhibits 1)

4. Grievant's appointment was renewed annually for the academic years 2012-13; 2013-14; 2014-15; 2015-16; 2016-17; and 2017-18.

5. All NOAs stated they were subject to the provisions of WVU Faculty Handbook and West Virginia University Board of Governors Policy 2.

6. West Virginia University Board of Governors Policy 2 states in relevant part as follows:

Section 3.6: Clinical-track, librarian-track, and term faculty hold appointments that are not subject to consideration for tenure, regardless of the number, nature, or time accumulated in such appointments. Clinical-track, librarian-track, and term faculty appointments are only for the periods and for the purposes specified, with no other interest or right obtained by the person appointed by virtue of such appointment.

(Respondent's Exhibit 2)

7. Grievant was not entitled to future NOAs nor guaranteed any right to continued employment past the June 30, 2018, end date of his most recent NOA.

(Respondent's Exhibit 3)

8. By letter dated February 12, 2016, Grievant received an additional role with WVU as Medical Director of Sharpe Hospital for an annual term beginning March 1, 2016, and ending February 28, 2017. Grievant was notified that this position would be reviewed annually in accordance with Respondent's policies and was "offered in accordance with the provisions of WVU Board of Governor's Policy 2 and the West Virginia University Faculty Handbook ... ". (Grievant's Exhibit 1)

9. The letter informed Grievant “there is an expectation that you will devote 70% to clinical effort, 20% to administrative/education, and 10% to scholarship/department service. ... As a faculty member in the non-tenure Clinician Track you will be expected to demonstrate significant contributions in service (including clinical service) and education and reasonable contributions in scholarship.” (Grievant’s Exhibit 1)

10. Dr. Marc Haut was Chair of WVU’s Department of Behavioral Medicine and Psychiatry and was Grievant’s supervisor.

11. By letter dated February 17, 2016, Dr. Haut informed Grievant that the recruitment oversight committee had selected him to serve as Medical Director of Sharpe Hospital and that “[y]ou have certainly demonstrated good leadership in your interim appointment ...”. (Grievant’s Exhibit 2)

12. Grievant received two salaries, one for his position as Assistant Professor in the Clinical Track and one for his role as Medical Director.

13. In August 2016, Dr. Haut’s secretary forwarded by email to Grievant an anti-Islamic article that had been circulated by Dr. King, a member of Grievant’s staff, and informed Grievant that Dr. Haut wanted Grievant’s comments. Dr. Haut never informed Grievant the purpose of his feedback. (Grievant’s testimony)

14. Grievant complained to Dr. Haut about the circulation of the article, then agonized over Haut’s tolerance of Dr. King’s behavior when he failed to reprimand Dr. King. (Grievant’s testimony)

15. On March 1, 2017, the Behavioral Medicine and Psychiatry’s Promotion and Tenure Committee sent a letter to Dr. Haut evaluating Grievant’s contributions in the

areas of service, teaching, and research/scholarship as part of his annual review for 2016. It stated that his service was good, his teaching was satisfactory, and his research/scholarship was unsatisfactory. (Grievant's Exhibit 4)

16. The Committee stated that “[p]romotion to Associate Professor in the clinical track requires the candidate to demonstrate significant contributions in two areas (such as teaching and service) and reasonable contributions in the third (such as research/scholarship). Specifically, at least 3 peer-reviewed publications since appointment are needed. For Dr. Massoud to be considered for promotion in the future he will need to continue his significant contributions in both teaching and service, and to pursue research and scholarship activities that can lead to peer-reviewed publications. The Committee is aware that barriers to research exist at Sharpe Hospital. The Committee suggests participation in scholarly achievement or professional development such as a member of a journal editorial board, participation in Ad hoc Journal Review, or other scholarly participation such as book chapters or review articles.” (Grievant's Exhibit 4)

17. The Committee unanimously recommended Grievant be retained at the level of Assistance Professor (clinical). (Grievant's Exhibit 4)

18. Dr. Clay Marsh was the Vice President and Executive Dean for Health Sciences at WVU.

19. On March 1, 2017, Dr. Haut sent a letter to Dr. Marsh concurring with the recommendation of the Committee that Grievant be retained at his current rank of Assistant Professor (clinical). (Grievant's Exhibit 4)

20. Grievant was also renewed for a second year as Medical Director of Sharpe Hospital.

21. As Medical Director, Grievant supervised medical staff who approached him with complaints about Pat Ryan, CEO of Sharpe Hospital. Grievant relayed these complaints to Dr. Haut and Vickie Jones, Commissioner for the Bureau for Behavioral Health and Health Facilities. (Grievant's testimony)

22. Ms. Jones summoned Mr. Ryan to Charleston to discuss the matter. On his return, Mr. Ryan called Grievant to his office, telling Grievant he was irate for having to defend his decisions for three hours. Grievant told Mr. Ryan that staff were upset because he was not working with them. Mr. Ryan promised to work with medical staff and to meet with Grievant on a weekly basis, but never followed through. Mr. Ryan continued to make decisions unilaterally, such as discontinuing the position of treatment team coordinator. (Grievant's testimony)

23. On September 28, 2017, the federal Centers for Medicare and Medicaid Services (CMS) terminated Sharpe Hospital's participation in the Medicare program due to noncompliance with requirements for a psychiatric hospital. (Grievant's Exhibit 3)

24. Between October 30, 2017, and November 1, 2017, DHHR retained Greeley (a consulting company) to prepare Sharpe Hospital for CMS recertification. (Grievant's Exhibit 9)

25. CEO Ryan informed DHHR that removing Grievant as Medical Director might hasten the pace of recertification. (CEO Ryan's testimony)

26. By letter dated January 2, 2018, Dr. Haut informed Grievant that he acquiesced to DHHR's request to remove Grievant as Medical Director and would provide

Grievant the opportunity to be reassigned to another position within WVU. He stated that this decision was based on recommendations from Greeley, DHHR personnel, and DHHR Cabinet Secretary Bill Crouch, and was made after consulting with Dr. Marsh. (Grievant's Exhibit 5 and Dr. Haut's testimony)

27. On January 2, 2018, Grievant met with Dr. Haut and Cabinet Secretary Crouch. Secretary Crouch informed Grievant that there would be a change in leadership and raised concerns to Grievant that Grievant had been disruptive in a meeting with a social worker, based on an uncorroborated claim. (Grievant's testimony)

28. On January 2, 2018, WVU removed Grievant as Medical Director of Sharpe Hospital and reassigned him for the remainder of his contract terms. The letter noted that Grievant would be unable to meet on January 4, 2018, since he had taken that week off, and offered Grievant the opportunity to meet with Dr. Haut on January 9, 2018, to discuss options for reassignment. (Grievant's Exhibit 5)

29. By letter dated February 2, 2018, Grievant was approved for leave under the federal Family Medical Leave Act (FMLA) from January 26, 2018, to April 1, 2018. (Grievant's Exhibit 7)

30. On March 21, 2018, the Promotion and Tenure Committee sent a letter to Dr. Haut unanimously recommending Grievant's retention as Assistant Professor (clinical) and evaluating Grievant's contributions in the areas of service, teaching, and research/scholarship as part of his annual review for 2017. It evaluated his contributions in each area as follows: service was excellent, teaching was good, and research/scholarship was unsatisfactory. It assessed his goal for the upcoming year as

decreasing aggression at Sharpe Hospital and working to correct CMS deficiencies. (Grievant's Exhibit 8)

31. On March 21, 2018, Dr. Haut sent a letter to Dr. Marsh expressing disagreement with the recommended retention of Grievant as Assistant Professor by the Promotion and Tenure Committee and recommending that he not be retained. Dr. Haut determined that Grievant's service performance was unsatisfactory, focusing on the following factors: Sharpe's loss of CMS accreditation, the Greeley report's identification of significant problems in Grievant's role as Medical Director, and Secretary Crouch's request that Grievant be removed as Medical Director. (Grievant's Exhibit 9)

32. On April 2, 2018, Dr. Marsh sent Grievant a letter informing him that his one-year appointment as Assistant Professor (non-tenure) would not be renewed for the 2018-2019 academic year beginning on July 1, 2018. (Grievant's Exhibit 11)

33. Respondent informed Grievant by letter dated April 3, 2018, that he was approved for further medical leave under the FMLA for the period between April 2, 2018, and May 25, 2018. (Grievant's Exhibit 10)

34. Grievant was properly compensated under the terms of his employment contract.

Discussion

Normally in a non-disciplinary matter such as the current action, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993),

aff'd, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant contends that the non-renewal of his employment contract was motivated by discrimination and retaliation and is therefore a violation of public policy. Grievant asserts that the non-renewal was without cause and resulted from Respondent improperly shifting blame for its CMS decertification onto Grievant. Grievant asserts that Respondent also violated public policy in deciding not to renew his contract while he was on FMLA leave. Grievant claims that, in removing him as Medical Director of Sharpe Hospital prior to the expiration of his contract, Respondent functionally demoted him. Grievant implies that because Respondent failed to respond to discovery requests, and because the undersigned squashed some requested subpoenas, Grievant was unable to properly present his case that his non-renewal was arbitrary and capricious and was the result of discrimination and retaliation. Grievant contends that the proper remedy is reinstatement.

Respondent counters that Grievant does not have any right to employment beyond the term of his annual contract and cannot receive relief beyond contractual entitlements. Respondent suggests that Grievant's claim of functional demotion should fail because he received the full compensation he was entitled to under his contract and is not entitled to reinstatement after the expiration of his contract. It further argues that Grievant must prove he has a property right to continued employment by clear and convincing evidence.

In requesting that the undersigned reinstate him to the same position, Grievant suggests that he had a property right in continued employment. Accordingly, the question of whether Grievant had a property right is at issue in this grievance. Therefore, Grievant

must first prove he had a property interest in continued employment. Only then does Respondent have an obligation to provide cause and to not act in an arbitrary and capricious manner in not renewing his contract.

The employee's "property right in employment end[s] when his contract with the College end[s]" *State ex rel. Tuck v. Cole*, 182 W.Va. 178, 181, 386 S.E.2d 835, 838 (1989). For a property right to exist, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*, 182 W.Va. at 179, 386 S.E.2d at 836 (citation omitted). Without a property right, "the employer may refuse to renew." *Id.*

[U]nilateral, subjective expectations on the part of an employee developed apart from any action, undertaking, or position of the employer are not sufficient to give rise to a protected property interest. There must be some undertaking by the employer which gives rise to an objective expectation on the part of the employee. *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983); see also *Logan County Education Association v. Logan County Board of Education*, __ W. Va. __, 376 S.E.2d 340 (1988).

W. Va. Univ. v. Sauvageot, 185 W. Va. 534, 408 S.E.2d 286 (1991)

To prove a property right in continued employment, Grievant has a heightened burden of proof. "Where an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer or by implication from the employer's personnel manual, policies or custom and practices, such claim must be established by clear and convincing evidence." *Whitaker v. Bd. of Directors/ West Liberty State College*, Docket No. 99-BOD-231 (Jan. 11, 2000), citing *Adkins v. Inco Alloys Int'l Inc.*, 187 W.Va. 219, 417 S.E.2d 910 (1992). See also *Jerrell v. New River Community and Technical College*, Docket No. 2008-1826-NRCTC (Oct. 7, 2009), *aff'd*, West Virginia Supreme Court of Appeals No. 101403 (Sept. 23, 2011)

(memorandum decision). “Clear and convincing proof” is “proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt.” BLACK’S LAW DICTIONARY, 251 (6th ed. 1990).

The evidence indicates that Grievant did not have a property right to continued employment. The yearly appointment letters clearly set forth that Grievant was being employed for one-year terms. Also, Section 3.6 of West Virginia University Board of Governors Policy 2 states, in relevant part, that “[c]linical-track, librarian-track, and term faculty appointments are only for the periods and for the purposes specified, **with no other interest or right obtained by the person appointed by virtue of such appointment.**” (emphasis added). Grievant has not demonstrated by clear and convincing evidence that he had acquired a property interest in his employment or that he acquired any rights in employment beyond the term of his contract. Although the parties presented arguments regarding whether Respondent’s actions were arbitrary and capricious, only employees with a property interest in their employment are entitled to nonarbitrary and non-capricious treatment. See *Sauvageot, supra*. Therefore, as Grievant has failed to prove he had a property interest in his employment, the issue of whether Respondent’s actions were arbitrary and capricious is not relevant.

Grievant suggests that WVU’s refusal to renew his contract was motivated by discrimination and retaliation, and that WVU improperly informed him of the non-renewal during his FMLA leave, and that this entitles him to continued employment for public policy reasons. “[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. Reg’l 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)). “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 Coll.*, 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)). The Grievance Board has previously applied the same standard to an employee whose contract is not renewed. *Loundmon-Clay v. Higher Educ. Policy Comm’n/Bluefield State College*, Docket No. 02-HEPC-013 (Aug. 29, 2002), *aff’d*, Kanawha Cnty. Cir. Ct. Docket No. 02-AA-117 (Jan. 12, 2005) (citing *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993); *Harless v. First Nat’l Bank*, 169 W. Va. 673, 246 S.E.2d 270 (1978); *Higginbotham v. W. Va. Dep’t of Public Safety, W. Va. State Police*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Myer v. W. Va. Racing Comm’n*, Docket No. 95-RC-290 (May 3, 1996); *Samples v. Glenville State College*, Docket No. 94-BOD-564 (July 28, 1995); *Dufficy v. Div. of Military Affairs*, Docket No. 93-DPS-370 (June 16, 1994)).

Grievant bases his claim of retaliation and discrimination on the fact that his supervisor, Dr. Haut, forwarded to him for comment an Islamophobic article that had been dispersed by coworker Dr. King; that Grievant complained to Dr. Haut that Dr. King’s dissemination of Islamophobic articles made him uncomfortable; and that Grievant helped subordinates make complaints against Sharpe CEO Ryan. Grievant asserts that these actions resulted in a push by Sharpe and DHHR for his removal as Medical Director and

resulted in the non-renewal of his contract by WVU. If Grievant's protected conduct did in fact result in his dismissal, it would be a violation of substantial public policy. "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." Syllabus Point 2, *Birthisel v. Tri-Cities Health Services Corp.*, 188 W. Va. 371, 424 S.E.2d 606 (1992).

The West Virginia Supreme Court has held that "it is the public policy of this State and otherwise unlawful to discriminate or retaliate against an employee for reporting acts of discrimination and/or harassment which are occurring in the workplace." *Burke v. Wetzel Cty. Comm'n*, 240 W. Va. 709, 728, 815 S.E.2d 520, 539 (2018). Grievant alleges that he reported acts of discrimination and harassment to his supervisor, Dr. Haut, and that WVU retaliated by not renewing his contract. These activities are protected under State code and case law. "West Virginia Code § 6C-1-3(a) provides that 'no employer may discharge . . . an employee . . . because the employee, acting on his own volition, . . . makes a good faith report or is about to report . . . to the employer or appropriate authority an instance of wrongdoing or waste.'" *Id.* at 729. "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." W.VA. CODE § 6C-2-3(h). Reprisal is defined 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." W.VA. CODE § 6C-2-2(o).

The West Virginia Supreme Court has set forth a three-phased assessment for determining whether a discharged employee has been retaliated against for engaging in a protected activity. “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)).

Under the first phase, the undersigned must determine whether Grievant made a *prima facie* case for retaliation, which includes four elements. First, Grievant must establish by a preponderance of the evidence that he engaged in a protected activity. Grievant showed that in August 2016, he complained to Dr. Haut that Dr. King had made him uncomfortable by disseminating Islamophobic articles. Sometime in mid-2017,

Grievant helped subordinates make complaints against Sharpe CEO Ryan, which Grievant then relayed to his supervisor Dr. Haut and CEO Ryan's chain of command, Vickie Jones, Commissioner for the Bureau for Behavioral Health and Health Facilities. This was a protected activity. This Board has held that a "grievance proceeding" is not limited to grievance actions before this Board or other tribunals. See *Riddle v. DHHR/BCF*, Docket No. 2018-2029-DHHR (Oct. 24, 2018), *aff'd* on other grounds, Civil Action No. 18-AA-256 (Kanawha County Circuit Court Nov. 20, 2018). In the context of retaliation, this Board has interpreted "grievance proceeding" to mean a range of "protected activities" beyond a "grievance proceeding", including cooperating with an investigation. See *Williamson v. Division of Highways*, Docket No. 2016-0608-CONS (September 22, 2016).

Grievant also proved the remaining elements required to make a *prima facie* case. Grievant showed that he complained to his WVU supervisor, Dr. Haut. Thus, WVU would have been aware of Grievant's protected activity. DHHR began advocating for the non-renewal of Grievant's contract in late 2017. Even though a year passed between the time Grievant complained to Dr. Haut about King's Islamophobic behavior and DHHR's advocacy for his non-renewal, DHHR's advocacy for Grievant's removal began shortly after Grievant complained about CEO Ryan. Although the non-renewal decision was made many months after Grievant complained about CEO Ryan, Grievant established a causal connection between WVU's eventual non-renewal of Grievant's contract and DHHR's lobbying efforts.

Consequently, the second and third phases of assessing retaliatory discharge come into play. Under these phases, the undersigned must determine whether WVU

rebutted Grievant's *prima facie* case of retaliatory discharge and, if so, whether Grievant proved that the reasons given by WVU were pretext for unlawful discrimination or retaliatory discharge. "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).

Under the second phase of retaliatory discharge, the undersigned must assess WVU's non-discriminatory and non-retaliatory reasons for not renewing Grievant's contract. These reasons include Dr. Haut's statement that the non-renewal resulted from Greely's report regarding Sharpe's loss of CMS accreditation which identified significant problems with Dr. Massoud in his role as Medical Director. He also cited DHHR Secretary Crouch's advocacy of Grievant's removal. Dr. Haut further justified WVU's decision in his March 21, 2018, letter to Dr. Marsh (who subsequently issued the non-renewal letter), writing, "[t]he failure of WVU to remedy these problems and remove Dr. Massoud as Medical Director exposed the university to loss of the agreement with Sharpe Hospital. We have given Dr. Massoud the opportunity to be placed in one of our other clinical operations, but thus far he has not responded to that request." The letter went on to state

that Dr. Massoud's performance in two out of three categories was unsatisfactory and therefore recommended his non-renewal.

Moving to the third phase of a retaliatory discharge assessment, Grievant failed to prove that the reasons provided by WVU were pretext for unlawful discrimination or retaliatory discharge. Sharpe lost its CMS accreditation under Grievant's watch. Grievant contends that his actions had nothing to do with the loss of accreditation and that CEO Ryan's actions directly correlated to that loss. Greeley, an independent and unbiased consultant, attributed the loss at least in part to Grievant. While Grievant contends that Greeley was inept in its assessment, it did not prove that Greeley was biased. Therefore, the undersigned will not second guess Greeley's recommendation.

Grievant contends that WVU violated the FMLA by contacting him to schedule appointments during his FMLA leave, and implies that the April 2, 2018, termination letter violated the FMLA. 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). "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." *Mahmoud v. Dep't of Health & Human Res.*, Docket No. 2014-0303-DHHR (Mar. 20, 2017), *aff'd*, Kan Cnty. Cir. Ct. Docket No. 17-AA-32 (Mar. 5, 2018).

Grievant was on FMLA leave from January 26, 2018, to May 25, 2018. By letter dated April 2, 2018, WVU notified Grievant that his non-renewal as Assistant Professor would be effective July 1, 2018. Grievant contends that Dr. Haut's attempts to schedule meetings with Grievant for January 4th and January 9th were violations of the FMLA. Yet Grievant does not indicate how these attempted meetings violated the FMLA. Grievant's FMLA leave officially began on January 26, 2018, after these attempts. Further, Grievant does not cite any authority for the proposition that an employer cannot communicate with an employee while that employee is on FMLA leave, specifically to inform him that his non-renewal would be effective after his FMLA leave expires. Also, "[t]he 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. The evidence clearly shows that WVU's decision to not renew Grievant was in the works long before Grievant qualified for FMLA leave.

Lastly, because Grievant did not prove by clear and convincing evidence that he had a property interest in his continued employment, Grievant's claims of functional demotion are moot.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. The employee’s “property right in employment end[s] when his contract with the College end[s]” *State ex rel. Tuck v. Cole*, 182 W.Va. 178, 181, 386 S.E.2d 835, 838 (1989). For a property right to exist, “a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Id.*, 182 W.Va. at 179, 386 S.E.2d at 836 (citation omitted). Without a property right, “the employer may refuse to renew.” *Id.*

[U]nilateral, subjective expectations on the part of an employee developed apart from any action, undertaking, or position of the employer are not sufficient to give rise to a protected property interest. There must be some undertaking by the employer which gives rise to an objective expectation on the part of the employee. *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983); see also *Logan County Education Association v. Logan County Board of Education*, ___ W. Va. ___, 376 S.E.2d 340 (1988).

W. Va. Univ. v. Sauvageot, 185 W. Va. 534, 408 S.E.2d 286 (1991).

3. “Where an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer

or by implication from the employer's personnel manual, policies or custom and practices, such claim must be established by clear and convincing evidence. " *Whitaker v. Bd. of Directors/West Liberty State College*, Docket No. 99-BOD-231 (Jan. 11, 2000), *citing Adkins v. Inco Alloys Int'l Inc.*, 187 W.Va. 219, 417 S.E.2d 910 (1992). *See also Jerrell v. New River Community and Technical College*, Docket No. 2008-1826-NRCTC (Oct. 7, 2009), *aff'd*, West Virginia Supreme Court of Appeals No. 101403 (Sept. 23, 2011) (memorandum decision).

4. Grievant did not prove by clear and convincing evidence that he had acquired a property right in his continued employment beyond the expiration of his employment contract on June 30, 2018.

5. "[I]t is the public policy of this State and otherwise unlawful to discriminate or retaliate against an employee for reporting acts of discrimination and/or harassment which are occurring in the workplace." *Burke v. Wetzel Cty. Comm'n*, 240 W. Va. 709, 728, 815 S.E.2d 520, 539 (2018).

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,

[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).

7. Grievant did not prove retaliatory discharge by a preponderance of the evidence.

8. “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.” *Mahmoud v. Dep't of Health & Human Res.*, Docket

No. 2014-0303-DHHR (Mar. 20, 2017), *aff'd*, Kan Cnty. Cir. Ct. Docket No. 17-AA-32 (Mar. 5, 2018).

9. Grievant did not prove by a preponderance of the evidence that WVU violated the FMLA.

10. As Grievant did not prove that he had a property interest in continued employment and lost no pay, the issue of functional demotion is moot.

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 (2018).

DATE: July 30, 2019

Joshua S. Fraenkel
Administrative Law Judge