THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PEARL BOGGESS,

Grievant,

v. **Docket No. 2022-0464-DOT**

PARKWAYS AUTHORITY,

Respondent.

DECISION

Grievant, Pearl Boggess, filed this expedited level three grievance against her employer, the West Virginia Parkways Authority ("Parkways") on December 16, 2021, stating: "I worked for Parkways for 9 yrs and 4 years ago I requested special accommodations. They were granted[.] 3 days a week 8 hr days[.] A couple months ago they told me they wouldn't accommodate this any more and fired me December 1, 2021." As relief sought, Grievant states, "I would like to be returned to my position at the same position, and the same pay rate."

A level three hearing was held via Zoom video conferencing on March 11, 2022, before the undersigned ALJ, who appeared from the Grievance Board's Charleston, West Virginia office. Grievant appeared by Zoom and with her counsel, Michael T. Clifford, Esquire. Respondent appeared by Zoom and by its representative, Steve Maynard, and by counsel, A. David Abrams, Esquire, Abrams & Byron. This matter became mature for decision on May 2, 2022, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a permanent, part-time toll collector. Grievant was an at will employee. Respondent terminated Grievant's employment asserting that Grievant could not meet the essential functions of her position. Grievant challenged her dismissal, arguing that Respondent "waived the right to require [her] to comply with the job description requirements." Grievant did not assert that Respondent's motivation in discharging her contravened any substantial public policy. Therefore, 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

Grievant, an at-will employee, was employed by Respondent as a permanent, part-time toll collector at Toll Barrier C. Grievant had been so employed since in or about 2012.

On or about August 3, 2017, Grievant was in an accident that resulted in her being seriously injured, suffering multiple fractures and other injuries. This accident was not work-related. As a result of her injuries, Grievant was unable to return to work until April 2018.

Grievant's physician determined that, based upon Grievant's physical impairments, Grievant could only work three, eight-hour workdays each week when she returned to work. Grievant and her physician completed the necessary paperwork to make this request and submitted the same to Respondent.

Respondent granted Grievant's request for accommodations. Thereafter, Grievant was scheduled to work only three, eight-hour workdays each week beginning in 2018. Respondent continued to allow Grievant to work this schedule until sometime in late 2021.

In August or September 2021, Steve Maynard, Director of Tolls, determined that Respondent could no longer continue to allow Grievant to work only three, eight-hour days per week because it was causing Respondent to have to pay other employees overtime to cover the toll booths at Barrier C. Further, Mr. Maynard concluded Grievant was not meeting the essential functions of her job because of her limited availability.

Respondent offered Grievant the following alternatives to her three, eight-hour shifts per week schedule: (1) that in addition to her three, eight-hour shifts per week, Grievant would have to work callouts, but that Respondent would place Grievant at the bottom of the list of employees to be called in when Parkways had no one else available, "short of someone that would have to be paid overtime;" and, (2) that Grievant would work three days on, one day off, one day on and one day off, which would allow Grievant "to work five days when needed with at least one day of rest after three days." Grievant rejected these two alternative accommodations citing her physician's directions that she was to only work three, eight-hour shifts per week.

By letter dated December 1, 2021, Executive Director Miller informed Grievant that she was being dismissed from employment because she could not meet the essential functions of her job.

Discussion

Ordinarily in grievance cases, 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 (2018). However, in cases involving the dismissal of classified-exempt, at-will employees, state "agencies do not have to meet this legal standard." *Logan v. Reg'l Jail & Corr. Auth*., Docket No. 94-RJA-225 (Nov. 29, 1994) *aff'd*, Berkeley Cnty. Cir. Ct., Civil Action No. 94-C-691 (Sept. 11, 1996). It is undisputed that Grievant was an at-will employee.

"[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)). "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).

Therefore, a grievant employed at-will alleging she was wrongfully terminated has the burden of proving by a preponderance of the evidence that the termination of her employment was motivated to contravene some substantial public policy. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant has alleged no violation of public policy in her statement of grievance or in her proposed Findings of Fact and Conclusions of Law. Instead, Grievant argues that Respondent's decision to dismiss her from employment violates contract law. Specifically, Grievant asserts that Respondent "waived the right to require [her] to comply with the job description requirements" because it allowed Grievant to continue to work only three, eight-hour shifts per week from 2018 until the fall of 2021, even though her 2018 request for accommodation stated that her impairment would likely last one year.[1]

However, contract law is not applicable in this grievance. Grievant had no contract with Respondent. She was an at-will employee. Further, Respondent did not in any way waive its "right" to require Grievant to meet the requirements of her job. Grievant has the burden of proof in this grievance and she has failed to meet that burden. Lastly, given Grievant's failure to assert that Respondent's motivation for her discharge contravened some substantial public policy, the exhibits Respondent

[1] *See*, Grievant's Proposed Findings of Fact and Conclusions of Law, pg. 2, paragraph 9.

presented at level three in its defense of its actions are irrelevant and were not considered in rendering this decision. Accordingly, this grievance is denied.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. Ordinarily in grievance cases, 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 (2018). However, in cases involving the dismissal of classified-exempt, at-will employees, state "agencies do not have to meet this legal standard." *Logan v. Reg'l Jail & Corr. Auth*., Docket No. 94-RJA-225 (Nov. 29, 1994) *aff'd*, Berkeley Cnty. Cir. Ct., Civil Action No. 94-C-691 (Sept. 11, 1996).

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. 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)).

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 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)).

4. "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).

5. Therefore, a grievant employed at-will alleging she was wrongfully terminated has the burden to prove by a preponderance of the evidence that the termination of her employment was motivated to contravene some substantial public policy. "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).

6. Grievant failed to prove by a preponderance of the evidence that the termination of her employment was motivated to contravene some substantial public policy.

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: June 15, 2022

Carrie H. LeFevre
Administrative Law Judge