BAHIYYIH FAREYDOON-NEZHAD, .

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Grievant, .

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v. . Docket No. 94-BOT-088

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WEST VIRGINIA BOARD OF TRUSTEES .

at MARSHALL UNIVERSITY, .

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Employer. .

D E C I S I O N

Bahiyyih Fareydoon-nezhad is employed by Marshall University (hereinafter Marshall) as the Head Librarian in charge of Circulation at its library. Ms. Fareydoon-nezhad (hereinafter Grievant) filed this grievance on December 13, 1993, pursuant to the provisions of West Virginia Code §18-29-1 et seq., alleging that her immediate supervisor, Timothy Balch, Head of Public Services, had engaged in acts of sexual harassment, retaliation and sexual intimidation. Grievant's complaint was denied at the lower levels of the Grievance Procedure for Education Employees and sheappealed to level four by letter dated March 28, 1994. (See footnote 1) Upon receipt of said appeal, a preliminary hearing was conducted so that the procedural history and substantive issues could be clarified. At this hearing, the undersigned informed both Grievant and her representative that this Grievance Board has specifically ruled in previous decisions that it does not have jurisdiction to hear claims alleging sexual discrimination or other causes of action founded completely upon differences in gender. (See footnote 2) It was then agreed upon by all parties that Grievant's complaint could proceed as having raised the charges of retaliation, harassment and discrimination as those terms

are defined in Code §18-29-2. Thereafter, an evidentiary hearing was held at the Grievance Board's office in Charleston, West Virginia on June 6, 1994 and the case became mature on that date.

The following findings of fact have been properly deduced from the evidentiary record developed in the case. These findings mainly relate to the statements made by various individuals inmemoranda sent during work hours. These memoranda are set forth chronologically so that a better understanding may be achieved.

Findings of Fact

March 19, 1993 - Memorandum from Tim Balch (hereinafter Balch) to J. Fidler (hereinafter Fidler), Director of University Libraries, regarding proposed reorganization of the professional staff in the Marrow Library. Proposal that Grievant be moved from position of Head of Circulation to Head of Reference. Statement made as follows: "Bahiyyih can not stay in Circulation; the atmosphere is too poisoned and her management style doesn't seem to be working well there."

July 12 , 1993 - A student assistant signs a form titled Guidelines for Student Assistant Positions signifying that he accepts policies under which student assistants are expected to work in Marrow Library. The following provisions of these guidelines relevant to this case are reproduced as follows:

> Scheduling of make-up time or work during semester breaks, semester interims, and holidays must be approved in advance by immediate supervisor and the administrative office in order to monitor funding.

> A student assistant is to accommodate the schedule of full-time staff and the respective department. If, during employment, this schedule cannot be maintained and the department cannot accommodate another schedule, employment may cease.

> Weekly schedules are not to exceed 19 hours per week or 8 hours a day. Students scheduled for 7 1/2 - 8 hour days are required to take two fifteen minute breaks and at least a 1/2 hour lunch period at the convenience of the department.

October 5, 1993 - Memorandum from Grievant to Fidler. Grievant makes reference to a meeting held by Balch with members ofher (Grievant's) staff discussing Grievant's return to her former position. (See footnote 3) The substance of this memorandum is as follows:

> I fail to understand why such a meeting was necessary and highly resent being discussed by my subordinates in the library. If you or Mr. Balch have any comments regarding my work, it should be communicated to me.
>
> From the tone of the discussion it is apparent that I should expect some retaliation. In order to avoid any unpleasantness I hope this matter will be resolved as soon as possible.
>
> I am capable and competent to do my job and wish only to be allowed to do it.

October 7, 1993 - Memorandum from Fidler to Grievant. Fidler responded to Grievant by asserting that meeting at issue was "informational and neutral" and that there existed no retaliatory motives. Fidler stated that the purpose of the meeting was to "advise the circulation staff of the modification of the Public Services reorganization."

October 29, 1993 - Memorandum from Balch to Grievant. This entire memorandum consisted of the following:

> It is my understanding that our past policy has been that the collection, counting and deposit of photographic monies is the responsibility of a full-time staff member. Has this policy been changed?
>
> If it has not been changed, please provide details on whether a student did, in fact, count and deposit themoney today; and if so, the reasons why you had him/her do so.
>
> Thank you.

This memorandum was sent to Grievant after Balch was told by someone within his department that a student had been in the room with Grievant as she was counting money for a deposit.

November 3, 1993 - Memorandum from Clinton Poston (student assistant) to Grievant. Mr. Poston notified Grievant that he would be unavailable for work from Wednesday through Friday and requested that he be allowed to make up said hours at a later date. Grievant sent this memorandum to Mary Caserta, Business Manager for the Department, requesting approval for student to work on Sunday.

November 3, 1993 - Memorandum from Mary Caserta to Grievant. Ms. Caserta stated that Grievant needed to know how the extra work for the student would be anticipated for Sunday in comparison to the workload of the past few weeks.

November 4, 1993 - Memorandum from Balch to Grievant in which Balch indicated that he had reviewed Grievant's request of Ms. Caserta. Balch referenced the Guidelines for Student Assistant Positions and, specifically to the 19 hour-per-week requirement. He indicated that he believed that the federal wage and hour laws would not permit a student to work more than 19 hours in one week. He stated that there existed a conflict between the student assistant guidelines and "the desired scheduling flexibility" of Grievant, and that it is his belief that "the intent is that the schedule remain fairly constant during the semester." Balchconcluded by stating that he would recommend to Fidler that the Guidelines be revised.

November 4, 1993 - Memorandum from Grievant to Balch. Grievant began by stating,

> With regard to your memo of October 29, 1993 regarding "money handling", please be advised that there has been no "policy" change relative to same. I fail to understand your inquiry! I am full time staff, and as head of circulation responsible for the money collected at the circulation desk.

Grievant went on to state that she had hoped that Balch would refer the person to her who had informed him that a student had been involved in counting money. The following three paragraphs followed:

> It would seem, Mr. Balch that instead of seeking solutions, you are part of the problem. What would prompt anyone, on a single episode, to assume a policy change? Why would that person feel so free to bring it to your attention? Why would you write a memo requiring an explanation from me, when a single phone call could have resolved the issue?
>
> I resent the encouragement evidenced by you in this type of behavior; I resent the fact that you would not afford me the first opportunity to deal with any matter in my department; and I strongly resent your affirmation of the practice of any of my subordinates to by-pass my office to yours.
>
> I certainly hope that we can look to future matter following a chain-of-command that respects all parties, and that I deal reasonably and responsibly with minor incidents in my department that I shall not have the added burden of unnecessary and inappropriate challenges.

November 5, 1993 - Memorandum from Grievant to Balch. Grievant referenced the November 3, 1993, memorandum from Ms. Caserta to her stating that the Guidelines were fine and did not need any change. She stated that "Our higher guideline is toaccommodate students where possible. I hope this purpose is not lost in fog of unnecessary red tape and nit-picking." She explained why the student was going to be absent from work for the three day period and concluded with the following: "I suggest again, that what would normally have been a routine activity has been blown out of proportion. Instead of dealing with a personnel problem, you have complicated and compromised the issue."

November 5, 1993 - Memorandum from Grievant to Balch stating that she did not as yet have approval for the student assistant to work on November 7 and, if such approval was not to be granted, could she be given someone to work.

November 5, 1993 - Memorandum from Balch to Grievant stating that he had no role in approving or disapproving student assistants' make-up work schedules. He indicated that the Guidelines make that issue a matter for the immediate supervisor and the Administrative Office.

November 17, 1993 - Memorandum from Grievant to Circulation Staff. Grievant made the staff members aware of the fact that the employee scheduled to work the weekend of November 20 and 21 might not be able to work due to illness. Therefore, she established an alternative schedule in which each remaining staff person had been assigned to work four hours during that weekend.

November 18, 1993. Three of the members of the circulation staff wrote a handwritten note to Grievant indicating that they were not happy with being required to work on the weekend but that they would work if needed.

November 18, 1993 - Memorandum from Balch to Grievant. Balch wrote the following:

> Although your efforts to schedule around Ms. Jackson's illness and Ms. Holderby's vacation are proper, it appears that you did not consult with any of the staff before making the re-assignments. I consider this to be an egregious supervisory decision on your part.

He recognized that the alternative schedule may cause hardship for some of the circulation staff and, thereafter, concluded by requesting that Grievant meet with the staff and let them work out an

alternative schedule.

November 19, 1993 - Memorandum from Grievant to Balch. Grievant began by stating that she was "extremely upset and thoroughly disappointed" as the result of an incident which occurred on that morning. She wrote the following in response to Balch meeting with the circulation staff:

> 1) You have an office and I have an office, therefore, I, strongly resent being publicly upbraided;
>
> 2) Unless the policy has been changed, I am still responsible for work schedules in circulation, however, your attitude suggests that you are making the schedules, or putting them in staff's hands;
>
> 3) If you had referred the circulation staff back to me, as would have been proper, this matter would not have been blown out of proportion.
>
> I submit to you again Mr. Balch that I hold you responsible for much of the atmosphere of distain [sic], mistrust and lack of respect in the circulation department.

Grievant stated that her policy has been that her staff had the option of changing schedules and shifts but that she has the ultimate responsibility for scheduling. She concluded with the following:

> I have repeatedly requested that you give me the first opportunity to resolve problems arising in my department. Repeatedly, you have intervened into and greatly complicated and enlarged minor day to day activities in the circulation department. Repeatedly, because of your involvement, my staff has challenged procedures which have been standardized by their use, and raised many spurious questions.

Ms. Jackson was able to work during the weekend of November 20 and 21, therefore, the alternative schedule was not implemented.

November 29, 1993 - Memorandum from Balch to Grievant. Balch initially explained that he has primary responsibility for the management and operation of all of the Public Services functions and secondary responsibility for each section within Public Services. He stated that it has been his practice to allow supervisors to handle personnel matters themselves but that he has an "open door"

policy. Balch then continued by writing the following paragraph:

> When I see a supervisor in Public Services making a serious error of judgment I have an obligation - to the librarian, the section, and the Library - to suggest other management strategies which may result in a better outcome for all concerned. Likewise, when I become aware that a supervisor under my authority is not following established policies and procedures it is my responsibility to investigate.

He concluded this memorandum with the following:

> I note that the tone of your recent memos seems to imply that you are the absolute and only authority within your section. This is not the case. As your supervisor I am responsible also for the smooth operation of the section and the proper treatment of the staff. When I see a need for intervention - arising from poor management techniques, staff misconduct, or whatever - I will do so, because that is my responsibility. I believe that you need to re-examine your attitude towards this supervisory relationship.

December 1, 1993 - Memorandum from Grievant to Balch regarding her Memoranda of 11/4/93 and 11/19/93. Grievant thanks Balch for comments made in his memoranda of November 4 and 19, 1993. However, in reference to his November 29, 1993 memorandum, she stated that she "strongly resent your slanderous inferences and request that you state in writing the serious error in judgment, the bad management strategies, and any established policy or procedure I failed to follow." She continued to state that "[t]he tone, style and content of your spurious allegations echo and reiterate the tirades of the Library Faculty Review Committee of the past three (3) years: unstated, untrue, undocumented, and unproven!" Grievant stated that she hoped that her memoranda would have worked to make the Circulation Department work more smoothly; however, she alleged that Balch's intent had been to undermine such progress.

During the period of October through November, 1993, Balch had not sent any memoranda to any of the supervisors of the various sections of the Public Services Division similar to the November 29, 1993 memoranda sent by him to Grievant. Balch believes that this is because the other sections have not experienced similar personnel problems to those experienced by the circulation staff.

None of the memoranda sent to Grievant from Balch were considered forms of disciplinary action.

Discussion

As previously stated, Grievant contends that Balch has discriminated against her, intimidated her, and committed acts ofreprisal. She supports her claims largely upon reference to the various memoranda he had sent to her which have been discussed above. Grievant contends that a review of these memoranda prove that he has been guilty of such wrongdoing. Marshall and namely Balch, completely deny any allegations of improper treatment of Grievant. Grievant's claims will be discussed in connection with the applicable definitions of discrimination and reprisal within Code §18-29-3(m) and (p) respectively. Further, her claim of sexual intimidation will be viewed as a claim of harassment pursuant to that term's definition in Code §18-29-3(n).

The claim of reprisal will be dealt with first as it can easily be discounted. "Reprisal" is defined in W.Va. Code §18-29-3(p) as "the retaliation of an employer or agent toward a grievant or other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In order to find that an administrator committed act[s] of reprisal, a grievant may establish a prima facie case by presenting evidence on the following:

1) He/She engaged in a protected activity.

2) He/She was subsequently treated in an adverse fashion by the employer or agent.

3) The employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity.

4) There was a causal connection (consisting of an inference of retaliatory motive) between the protected activity and the adverse treatment.

5) The protected activity was a significant factor in the employer's decision.

Once the employee establishes a prima facie case of reprisal, the employer may still prevail if it can demonstrate that it would havetaken the same action had the protected conduct not occurred. See, Gerlach v. Federal Trade Commission, 8 MSPB 599 (1981), citing, Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 247 (1977). Further, the grievant may still prevail if the proffered reason for the adverse action is determined to be pretextual. In most cases, reprisal must be proven by circumstantial evidence and inferences drawn therefrom.

In the instant case, Grievant has failed to even establish a prima facie case of reprisal. There is no evidence of record to support a finding that Grievant ever participated in any protected activity which then led to an adverse action being taken against her in retaliation for such activity. Grievant's claim of reprisal must, therefore, be rejected.

"Discrimination" is defined in Code §18-29-3(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." Grievant contends that the "differences in treatment" herein occurred when she started receiving memoranda that were critical of her managerial style or techniques and which advised her of proper actions to take. In essence, Grievant contends that other supervisors under Balch's supervision have not been "supervised by memoranda" as she has been.

It is questionable as to whether Grievant has even proven a prima facie case of discrimination as it is difficult to believe that no other supervisors under Balch's supervision have received communication via memoranda. Because none of the memoranda sent toGrievant were disciplinary in nature, it is virtually impossible to separate them from other typical office memoranda used in the work place. Furthermore, it seems arbitrary for purposes of comparing similar treatment of other employees to limit this type of action, sending memoranda to subordinates, to a period of only two months. However, even if it is assumed that Grievant has established a prima facie case of discrimination as that term is defined in the grievance statute, it is obvious from the record that said treatment was related to the job duties and responsibilities of Grievant as perceived by Balch. Therefore, Grievant's argument that she has been discriminated against is also unpersuasive.

It appears that the very crux of this case is Grievant's contention that Balch has harassed her via sending memoranda to her which evidences his dislike of her or disapproval of her management style and which were also not necessary in order to assure that the Circulation section ran smoothly. Grievant has tried to make much out of the tone of the memoranda and has characterized the

language used as lacking specificity.

"Harassment" is defined by Code §18-29-3(n) as the "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." It is obvious from an objective review of the record in this case, which is largely made up of the memoranda introduced and discussed at length during the hearing, that Balch is not totally to blame for the personnel problems within the Circulation section of the Marrow Library. Both Balch and Grievant engaged inthe practice of memoranda writing which could be classified as hostile, argumentive and overly defensive. Balch cannot be solely to blame for either initiating this practice or for assuring that it continued.

Grievant and Balch are both administrators within the Public Services Department at Marshall and both individuals have responsibility for ensuring that a certain level of efficiency and productivity exist within their respective domains; however, Balch, as Grievant's immediate supervisor, does share in the responsibility for making sure that her unit runs effectively and that the staff are treated fairly. To this end, he attempted to involve himself (or let himself become involved) at various points in time when he believed that corrective action was needed. While his methods could be questioned, the record does not establish that his motives were anything other than proper. Various aspects of Grievant's memoranda to Balch challenged his authority and accused him of wrongdoing. The fact that he chose to respond in writing to these memoranda cannot conclusively be classified as conduct which was "contrary to the demeanor" expected by his profession.

With regard to the November 29, 1993 memorandum, Balch explained that he felt Grievant had exercised poor judgment in the manner in which she created and imposed upon the staff an alternative schedule for the following weekend. This concern, on its face, does not appear unreasonable, especially in light of the fact that the staff approached him with complaints about said schedule. The other statements and references made in thismemorandum were simply clarifications of past statements, acts or philosophies which had previously been placed into question by both parties. In conclusion, while Balch and Grievant may have differing managerial styles and philosophies, the evidence in this case cannot support a finding that Balch harassed Grievant through issuing various memoranda to her. While neither individual may have acted with the greatest of tact or skill in dealing with problems stemming from a strained work environment, neither can either parties' actions be legally classified as improper.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Grievant has the burden to prove her claims by a preponderance of the evidence. Black v. Cabell County Board of Education, Docket No. 06-88-238 (Jan. 31, 1989).

2. Grievant has failed to meet this burden of proving that she has been the victim of discrimination, reprisal or harassment as those terms are defined in W.Va. Code §18-29-3.

Therefore, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

September 19, 1994

Footnote: 1Much confusion ensued as a result of Grievant's letter of appeal to this Grievance Board because she had attached a copy of a decision from President Gilley to the letter; however, this attached decision was issued in response to a complaint she had filed with Marshall's Affirmative Action Office concerning other issues. Upon being made aware of this error, Grievant submitted a follow-up letter to the undersigned dated April 28, 1994, indicating that she wished to appeal the March 2, 1994, level two grievance decision of President Gilley. Thereafter, Marshall specifically waived its right to challenge the timeliness of Grievant's appeal.

Footnote: 2See, Norton, Finnegan v. W.Va. Northern Community College, West Liberty State College, Docket Nos. 89-BOR-503, 539 (Apr. 28, 1993).

Footnote: 3Apparently, Grievant was removed from her position as Head of Circulation for approximately three months based upon some form of evaluation procedure utilized within the Public Services Department. The record in this case is

not sufficient for the undersigned to formulate any findings on this matter; however, it is inferred that Grievant was returned to her position for a set time period by the President of the College. It is believed that this scenario is the subject of other litigation at Marshall.