FREDA SMITH,

Grievant,

v.

DOCKET NO. 94-BEP-099

WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS/WORKERS' COMPENSATION DIVISION,

Respondent.

D E C I S I O N

Grievant, Freda Smith, submitted this grievance directly to level four on March 23, 1994, in accordance with W. Va. Code § 29-6A-4(e). Grievant challenges her dismissal from Respondent West Virginia Bureau of Employment Programs, effective March 23, 1994. Following a lengthy procedural history, a level four hearing was held on October 9, 1996, and this case became mature for decision on November 8, 1996, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Consistent with W. Va. Code § 29-6A-4(e) and the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision. (See footnote 1)

The material facts in this case are not in dispute and are set forth in the following findings of fact.

Findings of Fact

1. Grievant was hired as a "service worker" by Respondent on August 16, 1981, and had been so employed for 13 years prior to her dismissal effective March 23, 1994. Prior to the statewide reclassification project, "Service Workers" were individuals hired from the Department of Rehabilitation Services register. "Service Workers" were reclassified to Office Assistant Is following the statewide reclassification project. Grievant's position was within the classified service.

2. Grievant was employed by Respondent as a camera operator in the Microfiche Department of the Workers' Compensation Division.

3. Respondent perceived Grievant to be a person with a handicap under the Americans With Disabilities Act.

4. On March 23, 1994, Grievant was terminated from her employment following a physical altercation on February 15, 1995, between herself and a co-worker, Terry Graley.

5. From approximately December 1993, until the day of the altercation, Grievant and Mr. Graley engaged in a continuing exchange of verbally abusive and derogatory remarks to each other, culminating in the physical fight between them on February 15, 1994.

6. On the morning of February 15, 1994, Grievant had a verbal confrontation with her immediate supervisor, Alma Downey, during which Ms. Downey was struck in the glasses by Grievant with a whisk broom. Grievant told Ms. Downey at the time that she would not take orders "from the devil." 7. On the afternoon of February 15, 1994, Grievant approached Mr. Graley while he was kneeling at a printer, jumped on his back, grabbed his hand and neck, and kicked him. Mr. Graley shoved Grievant to get her off of him, and yelled and cursed at her.

8. Grievant was initially suspended, and then dismissed by letter dated March 8, 1994, citing the physical attack on Mr. Graley, and the verbal attack on Ms. Downey, as well as her continued absence from work, and continued insubordination. R. Ex. 3.

9. Grievant does not deny the charges against her.

10. Mr. Graley was also dismissed from his employment with Respondent over this incident.

Discussion

In a disciplinary matter, the burden of proof lies with the employer to prove the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6. Dismissal of a civil service employee must be for "good cause," which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention. W. Va. Code § 29-6-15; Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980). Respondent has met its burden in proving that on February 15, 1994, Grievant engaged in a physical altercation at work with a co-worker, as well as verbally assaulting her immediate supervisor. Grievant asserts that dismissal is too

severe a penalty because she was provoked into taking physical action against Mr.Graley, and because she is a person with a handicap under the Americans With Disabilities Act, § 42 U.S.C. 12111, et seq. (See footnote 2)

It is undisputed that Grievant and Terry Graley had an on-going, hostile working relationship, which often entailed yelling, cursing and making derogatory remarks to one another. It is undisputed that Terry Graley often did things deliberately to anger Grievant. For instance, Grievant was a particularly fastidious person, and Graley would deliberately knock a box of paper clips off her microfiche machine onto the floor. Grievant, on the other hand, would deliberately post religious pamphlets and tracts on Graley's machine, called him the "spawn of Satan", and told him he was going to go to hell because of his lifestyle. Grievant and Graley's workstations were located next to each other; however, Grievant had received permission to turn her machine around so that she would not have to look at Graley. Both Grievant and Graley requested their supervisor to move the other to the back of the room. There was an available machine there, but neither one of them wanted to be the one to move; they wanted their supervisor to make the other one move. This childish behavior occurred continuously over a lengthy period of time, and caused much disruption and anxiety in the workplace.

Both Grievant and Graley were counseled more than once to leave their personal business at the workplace door. Grievant was cautioned not to preach her religious beliefs in the workplace and not to place pamphlets on others' workstations. Grievant persisted in this behavior despite being told not to do so by her supervisor. Graley also persisted in his childish behavior towards Grievant.

Respondent's Policy and Procedure Manual, Section 6400.01, entitled "Employee Responsibilities: Conduct, provides in pertinent part:

> The Bureau of Employment Programs is judged to a large extent by the conduct of its employees. The attitudes expressed toward the public and the way we treat each person who has occasion to contact the Bureau are the basis of our image. The public has the right to expect prompt, efficient service and courteous treatment.
>
> Each person must be treated with dignity and respect. Employees are expected to be courteous to their fellow workers, as well as to the publics we serve.
>
> . . .

In the best interest of the Bureau, its employees and the public, the following behaviors are prohibited:

A) Using foul or abusive language.

B) Engaging in sexual or racial harassment.

C) Making disrespectful and degrading comments to or about others.

. . .

I) Being loud and boisterous or otherwise disruptive.

. . .

The above list is not meant to be all inclusive. Other behaviors are prohibited under individual policies or regulations.

. . .

Employees will be counseled individually and in private on any behavior or grooming problems and given suggestions for improvement.

Should deviant and unacceptable behavior continue, proper disciplinary procedures will be initiated, in accordance with Policy 6400.20/DISCIPLINARY ACTIONS.

Respondent's Policy and Procedures Manual, Section 6400.20, Disciplinary Actions, provides, in pertinent part:

Employees of the Bureau are expected to abide by established work rules and conduct themselves in such a manner that their actions do not adversely reflect on the image of the Bureau, or disrupt normal office routine. In the event discipline does become necessary because of a violation of expected behavior, employees should expect and will receive penalties whose severity is related to the offense committed.

> . . . Except in cases of flagrant violations of acceptable behavior, an attempt will be made to apply discipline in progressive stages in order that an opportunity for corrective action is available to the employee.
>
> . . .
>
> C) Suspension - . . . A suspension may also be considered as the first disciplinary step if the employee is guilty of serious offenses, such as: failure to report to work without notification for 3 or more days, use of four or abusive language, failure to comply with regulations, falsification of records, or illegal political activity.
>
> D) Demotion or Dismissal - . . . Flagrant misconduct which may result in demotion or dismissal without previous disciplinary action includes: gross misconduct, theft, conviction of a felony related to the job, use of political influence to gain employment advantage, intoxication or use of unauthorized drugs on the job, insubordination, or willful destruction of State property.

Grievant does not deny using foul or abusive language towards her supervisor and Mr. Graley on February 15, 1994, nor does she deny physically attacking Terry Graley the same day. Grievant's behavior constitutes a flagrant violation of the rules and regulations of the Bureau, and the attack on Terry Graley certainly can by characterized as "gross misconduct". Thus, suspension, and subsequent dismissal from employment, cannot be found to be too severe or arbitrary and capricious. See Guine v. Civil Service Com'n, 149 W.Va. 364, 141 S.E.2d 364 (1965).

Grievant also asserts that Respondent failed to train its managers and supervisors adequately with regard to supervising persons with disabilities under the Americans With Disabilities Act. Although somewhat inartfully worded, Grievant appears to be making aclaim that Respondent discriminated against her on the basis of her handicap. (See footnote 3) An employee asserting an affirmative defense must establish such defense by a preponderance of the evidence. McFadden v. W. Va. Dept. of Health and Human Res., Docket No. 94-HHR-428 (Feb. 17, 1995); Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, 453 S.E.2d 374 (W. Va. 1994); Morris v. W. Va. Dept. of Health, Docket No. 91-DHS-112 (June 25, 1991).

This Grievance Board does not have authority to determine liability for claims that arise under the

West Virginia Human Rights Act, W. Va. Code § 5-11-1, et seq, which would include a claim of handicap discrimination. Nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination", "favoritism", and "harassment", as those terms are defined in W. Va. Code § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over handicap-based discrimination claims. See Vest v. Bd. of Educ. of Cty. of Nicholas, 193 W. Va. 222, 455 S.E.2d 781 (W. Va. 1995); Keatley v. Mingo County Bd. of Educ., Docket No. 95-29-257 (Sept. 25, 1995).

W. Va. Code § 29-6A-2(d) defines "discrimination" 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 by the employees.

In order to establish a claim of discrimination under W. Va. Code § 29-6A-2(d), an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievance and/or the other employee(s) and were not agreed to by the grievant in writing.

Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); see Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Hendricks, supra; see Tex. Dept. of

Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant has failed to make a prima facie case under the standard set forth above for establishing a claim of discrimination under W. Va. Code § 29-6A-2(d). Grievant has failed to show that she was treated any differently than any other employee in similar circumstances. The only other employee who was involved in a physical altercation at work was Terry Graley, and Terry Graley was also dismissed from his employment with Respondent. Grievant presented no evidence of any other employees who had engaged in physical confrontations at work who were not disciplined or were disciplined in a lesssevere manner than Grievant. Thus, Grievant has failed to establish a claim of discrimination under W. Va. Code § 29-6A-2(d).

Furthermore, a review of the applicable law under the Americans With Disabilities Act, 42 U.S.C. § 12111, et seq. ("ADA"), reveals that Grievant's claims in that regard also fail. The ADA provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112.

A person making a claim of discrimination under the ADA bears the burden of proving a prima facie case of discrimination by a preponderance of the evidence. In a typical ADA case, the claimant must prove that:

(1)

she was in the protected class;

(2)

she was discharged;

(3)

at the time of her discharge she was performing her job at a level that met her employer's legitimate expectations; and

(4)

her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.

Ennis v. Nat'l Assoc. of Bus. & Educ. Radio, Inc., 53 F.3d 55 (4th Cir. 1995).

Once a claimant has made a prima facie case of discrimination, the burden shifts to the employer to articulate some legitimate, nondiscriminatory explanation, which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. If the employer meets this burden, the presumption created by the prima facie case "drops out of the picture", and the claimant bears theultimate burden of proving that she has been the victim of intentional discrimination. Id. at 58., citing St. Mary's Honor Ctr. v. Hicks, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). (See footnote 4) Based upon the facts in this case and the following discussion, the undersigned finds Grievant has not established a prima facie claim of discrimination under the ADA, because she was not in the protected class.

Only persons who are "qualified" for a job may state a claim of discrimination under the ADA. The ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Tyndall v. Nat'l Educ. Centers, 31 F.3d 209 (4th Cir. 1994). In order to determine whether an individual is "qualified", it must be decided (1) whether she could "perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue; and (2) if not, whether "any reasonable accommodation by the employer would enable [her] to perform those functions." Id. at 213.

In Palmer v. Circuit Court of Cook Cty. Soc. Serv. Dept., 905 F. Supp. 499 (D.C.N.D. Ill. 1995), the Court held that the plaintiff's (a person with a disability) inability to get along with her supervisor and co-worker did not substantially limit her ability to work in general; it just limited her ability to work with those particular individuals, and that her personalityconflict with those individuals did not constitute a handicap. Id. at 508. The Court went on to state that the first step in determining whether an employee is "qualified" required it to determine whether she could perform the essential functions of the job. In Palmer, the plaintiff could perform the substantive work required of her, she just could

not perform her job in the company of her supervisor and co-worker. Id. at 508. Likewise, in the instant case, Grievant was capable of performing the substantive work required of her by Respondent; she just could not adequately perform in the presence of Terry Graley.

It is undisputed that Grievant used abusive and threatening language in the workplace, and ultimately resorted to physical contact with a co-worker. The courts have consistently held that one who displays abusive and threatening conduct towards co- workers is not an otherwise "qualified individual." Id. at 508. In addition, an employer is not required to eliminate any of the disabled employee's essential employment functions in order to accommodate such a disability. Id. at 508. "The essential functions of any job include avoidance of violent behavior that threatens the safety of other employees." Id. at 509; see also Hurst v. St. Mary's Hosp. of Huntington, Inc., 867 F. Supp 435 (S.D.W. Va. 1994), wherein the court found that an example of a legitimate, nondiscriminatory reason for discharge of a handicapped individual occurred when a person with a handicap created a reasonable probability of a materially enhanced risk of substantial harm to the handicapped person or others. Id. at 439.

In the instant case, Grievant and Terry Graley had a personality conflict, which escalated from abusive name-calling to a physical altercation. The cause for Grievant's dismissal was not discrimination due to her perceived handicap, but her own failure to recognize the acceptable limits of behavior in a clearly difficult situation for both her andher co-workers. Respondent offered to move Grievant away from Terry Graley, but she refused; she wanted Respondent to move Terry Graley. Respondent cannot be expected to do more to accommodate Grievant in this scenario. An employer cannot be required to insulate its employees from co-workers; to do so would be to impose an undue hardship on the employer. Adams v. Alderson, 723 F. Supp 1531 (Col. D. Ct. 1989).

Grievant was fired for misconduct in the workplace. Her termination was not related to her disability. An employer must be permitted to terminate its employees for egregious misconduct, irrespective of whether the employee is disabled. Id. In the instant case, Respondent's actions in terminating Grievant for physically attacking Terry Graley were well within its authority under its own personnel policies, and within the ambit of the Americans With Disabilities Act.

Conclusions of Law

1. In a disciplinary matter, the burden of proof lies with the employer to prove the charges by a

preponderance of the evidence. W. Va. Code § 29-6A-6.

2. Dismissal of a civil service employee must be for "good cause," which means misconduct of a substantial nature directly affecting the rights and interest of the public, rather than trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention. W. Va. Code § 29-6-15; Oakes v. W. Va. Dept. of Finance and Admin., 164 W. Va. 384, 264 S.E.2d 151 (1980).

3. Respondent has proven by a preponderance of the evidence that Grievant used verbally abusive and threatening language in the workplace, and physically attacked a co-worker in the workplace. These actions constitute gross misconduct under Respondent's Policy and Procedures Manual, Sections 6400.01 and 6400.20. 4. An employee asserting an affirmative defense must establish such defense by a preponderance of the evidence. McFadden v. W. Va. Dept. of Health and Human Res., Docket No. 94-HHR-428 (Feb. 17, 1995); Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991), aff'd, 453 S.E.2d 374 (W. Va. 1994); Morris v. W. Va. Dept. of Health, Docket No. 91-DHS-112 (June 25, 1991).

5. "Discrimination" is defined by W. Va. Code § 29-6A-2(d) 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 by the employees."

6. In order to establish a claim of discrimination under W. Va. Code § 29-6A- 2(d), an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievance and/or the other employee(s) and were not agreed to by the grievant in writing.

Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); see Parsons v. W. Va. Div. of Highways, Docket No. 91-DOH-246 (Apr. 30, 1992).

7. Grievant has failed to prove she is similarly situated to another employee who has been treated differently than she in similar circumstances, i.e., fighting in the workplace.

8. Grievant has failed to prove by a preponderance of the evidence that she was discriminated against by Respondent under the provisions of W. Va. Code § 29-6A-2(d). 9. Grievant's termination was not related to her handicap; she was fired for gross misconduct. Grievant displayed abusive and threatening conduct towards her co- workers and supervisor, and thus, was not an "otherwise qualified" individual under the ADA.

10. Grievant has failed to prove she was discriminated against by Respondent under W. Va. Code § 29-6A-2(d), or the Americans With Disabilities Act, 42 U.S.C. § 12111, et seq.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the “circuit Court of the county in which the grievance occurred,” and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-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 to 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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MARY JO SWARTZ

Administrative Law Judge

Dated: December 18, 1996

Footnote: 1

This case was reassigned to the undersigned Administrative Law Judge due to administrative reasons.

Footnote: 2

As discussed below, because the physical attack is justification enough for Grievant's dismissal, the other charges against Grievant will not be discussed.

Footnote: 3

Although Respondent's witnesses testified they perceived Grievant to be a person with a handicap, the nature and extent of Grievant's handicap was never defined by Grievant.

Footnote: 4

The applicable standard for establishing handicap discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-1, et seq., is similar to the standard set forth in Ennis, supra. Under the Human Rights Act, a claimant must establish that (1) she meets the definition of "handicapped"; (2) she is a "qualified handicapped person"; and (3) she was discharged from her job. The burden then shifts to the employer to rebut the prima facie case by presenting a legitimate, nondiscriminatory reason for the discharge. Morris Nursing Home v. Human Rights Com'n, 431 S.E.2d 353 (W. Va. 1993).