DARLENE MYERS,

Grievant,

v. DOCKET NO. 96-DMV-304

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF MOTOR VEHICLES,

Respondent.

D E C I S I O N

Grievant, Darlene Myers, filed this grievance on July 18, 1996, challenging her termination from employment with Respondent Division of Motor Vehicles. Grievant was dismissed from employment by letter dated July 11, 1996, effective July 26, 1996, for excessive leave abuse and absenteeism. This action was expedited to level four of these proceedings pursuant to W. Va. Code § 29-6A-4(e), and a level four hearing was held on October 17, 1996. This matter became mature for decision on November 18, 1996, the deadline for the submission of proposed findings of fact and conclusions of law.

Based upon a review of the testimony and exhibits presented, it is appropriate to make the following findings of fact.

Findings of Fact

1. Grievant was a 19-year employee of Respondent Division of Motor Vehicles, and at the time of her termination, she was employed as an Office Assistant II in the Records Unit of the Information Services Section of the Division of Motor Vehicles.

2. At the time of her termination, her first line supervisor was Ms. Lynda Osborne, and her Unit Manager was Mr. Lacy Morgan, Manager of Information Services.

3. Grievant had been in the chain of command of Mr. Morgan since December 1986. R. Ex. 15.

4. Grievant had an extensive history of improperly taking leave; taking leave before it was accrued; and being placed upon leave without pay status on innumerable occasions, which caused a level of uncertainty regarding her attendance to employment duties, and an inability to include Grievant in any long-range planning activities within the unit. LIV Test., Osborne.

5. On December 15, 1992, Grievant received a written warning from Commissioner Jane Cline regarding her failure to produce doctor's statements for sick leave which was taken, noting that she did not have enough sick or annual leave to cover the absences. This letter advised Grievant that her leave usage would be closely monitored, imposed restrictions on her leave usage, and warned her that failure to adhere to the requirements “will result in further disciplinary action such as suspension from work without pay.” R. Ex. 14.

6. On July 30, 1993, Grievant received a written warning from Mr. Morgan which documented that for the months January-June, 1993, she had used 55.5 hours of sick leave, 83.75 hours of annual leave, and 123.25 hours of unauthorized leave (leave withoutpay). This letter placed Grievant on a restrictive policy of leave use which included bringing doctor's excuses for each absence due to sickness, as well as requiring 48 hours advance notice of her intent to take annual leave. These restrictions were to be in place for at least sixty (60) days during which her leave usage would be closely monitored. The written warning also explicitly advised Grievant that if the absences were the result of a medical condition, she was to immediately contact a physician or counseling service of her choice. R. Ex. 12.

7. On October 4, 1993, Mr. Morgan extended the leave restrictions above for another sixty (60) days, and Grievant was warned that failure to observe these restrictions “will result in disciplinary action.” R. Ex. 13.

8. In late May 1993, Grievant was transferred to the Records Section and placed under the direct supervision of Lynda Osborne.

9. Ms. Osborne found a noticeable improvement in Grievant's leave use from approximately June 1993 through January 1994. On that basis, Ms. Osborne asked Mr. Morgan to lift the restrictions placed upon Grievant, and he did so via memorandum dated January 3, 1994. R. Ex. 9.

10. Almost immediately after the restrictions had been lifted, Ms. Osborne observed that Grievant fell back into a pattern of leave abuse. LIV, Osborne.

11. Grievant's performance evaluation for 1993, conducted in March 1994, reflects she

received a “Needs Improvement” in the area of Attendance, specifically, Ms. Osborne noted that Grievant “[h]as a tendency to use leave time before she accrues it.” The evaluation shows Grievant was counseled about doing personal business on State time, reporting to work on a daily basis, and using leave before it was accrued. R Ex. 10. 12. Grievant was evaluated for 1994 in March 1995 by Ms. Osborne. On that evaluation, Grievant noted that improving her attendance would help her improve her job performance. Again, she received a “Needs Improvement” in the attendance area, and again, her plan of improvement indicates that Ms. Osborne counseled Grievant that she needed to report to work on a regular basis, and she needed to cease using more time than she accumulated monthly. R. Ex. 7.

13. On September 8, 1995, Grievant was issued a 3-day suspension for absence without leave, abuse of leave, and unauthorized leave for an absence on September 7, 1995. Grievant responded to Mr. Morgan that she accepted the suspension, but denied misusing or abusing leave, characterizing it as “excessive”, but not abusive. R Ex. 8.

14. Grievant received her 1995 evaluation in January 1996. She again received a “Needs Improvement” in attendance for using leave before it was accumulated, and her plan of improvement mirrors those from previous years. R. Ex. 4.

15. Thereafter, on March 4, 1996, Grievant received a 10-day suspension without pay for her continuing leave abuse. For the period September 21, 1995 through March 1, 1996, Grievant had used 77 hours of annual, 54 hours of sick leave and 172 hours of leave without pay. R. Ex. 5.

16. Finally, with no improvement in the situation, Grievant was terminated by letter dated July 11, 1996, to become effective July 26, 1996, for “abuse of leave, absence without leave and unauthorized leave.” The letter indicated that from the time of her 10- day suspension in March through the date of dismissal, Grievant had used 49 hours of annual leave, 39.75 hours of sick leave, and 28.50 hours of leave without pay. R. Ex. 6. 17. At the time of her dismissal, Grievant had been off the payroll so many times that she had lost approximately 2 years of service with the State, from her total of 19 years' service.

18. Despite being counseled numerous times by her supervisor regarding her leave usage, including being asked if there was anything seriously physically wrong with her, being encouraged to take a medical leave of absence if necessary, and despite receiving a 3-day and a 10-day suspension without pay, Grievant never informed her supervisor or Mr. Morgan of any serious

physical or mental impairment which would prohibit her from coming to work or from performing her job duties. LIV, Osborne; Morgan; Myers.

19. At all times relevant herein, Respondent had failed to post the required information on the Federal Family Medical and Leave Act ("FMLA") in a conspicuous work place as required by law.

Discussion

In disciplinary matters, the burden of proof lies with the employer to prove the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6. Grievant does not deny that she took the amount of leave reported by Respondent.

The evidence of record shows that Respondent inquired directly of Grievant whether she had any serious physical or mental condition of which it should be aware; encouraged her to seek assistance through an employee assistance program, or a counselor of her own choosing; encouraged her to take a medical leave of absence, and provided her with numerous opportunities through counseling and evaluations to make her medical condition known. LIV, Osborne; Morgan; Myers. Grievant did not avail herself of these opportunitiesand under this Grievance Board's case law, the employer is not required to do anything more. "When an employer has established by a preponderance of the evidence that an employee has continuously abused sick-leave time; has not provided doctor's excuses, although reasonably required to do so per Personnel Rules . . .; has not explained, after repeated invitation why she should not comply with that directive; and that it comported with applicable progressive discipline regulations, its decision to terminate the employee will be upheld." Morrison v. W. Va. Div. of Health, Docket No. 90-H-013 (Apr. 30, 1990); Duncan v. Lincoln County Bd. of Educ., Docket No. 89-22-147 (May 1, 1989). Furthermore, even assuming Grievant had advised her employer of her physical problems, Respondent had no obligation to tolerate major problems with her performance ad infinitum. Lewis v. Mason County Bd. of Educ., Docket No. 94-26-175 (Dec. 12, 1994).

Grievant contends, however, that dismissal was too severe a penalty; that she suffers from innumerable medical conditions of which Respondent should have known; and that Respondent violated the FMLA, which requires that her dismissal be reversed. "Where a defense is raised by a grievant in a discipline-based claim[,] it is his burden to establish the validity of that defense." Young v. W. Va. Dept. of Health and Human Resources, Docket No. 90-HHR-541, at 12 (Mar. 29, 1991).

Regarding Grievant's first defense, that her employer “should have known” that she suffered from serious medical conditions, including diabetes and migraine headaches, which prevented her from coming to work, this Grievance Board has held that if an employee has an affliction which might entitle accommodation, the employee has an obligation to advise the employer of such a situation unless she is prevented from meaningfully doing so by either the employer, the condition or circumstances beyond hercontrol. Lewis v. Mason County Bd. of Educ., Docket No. 94-26-175 (Dec. 12, 1994); Howell v. W. Va. Dept. of Health and Human Res., Docket No. 90-H-484 (Sept. 27, 1991); Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991). Grievant testified that she did not inform her supervisor of her physical and mental conditions because she “didn't consider it any of their business.” LIV, Myers. She conceded that her supervisor solicited information about her condition, but she did not tell her because she didn't trust her, and felt it would be used against her. LIV, Myers. Grievant believes that Respondent “should have known” about her serious medical condition because of the excessive amount of leave she was taking. While Grievant's fears might be understandable, there is a point when conduct “understandable from a personal viewpoint” is “unacceptable from a professional one.” Howell, supra. If Grievant was unwilling to inform Respondent of her condition after repeated direct inquiry, it is too much to assume that Respondent “should have known” simply based upon Grievant's excessive leave usage.

Grievant also alleges Respondent violated the Federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. (“FMLA”), by failing to inquire whether she wished to take FMLA leave, failing to designate her leave as FMLA leave, and by failing to post the required FMLA notice. These violations arguably entitle her to reinstatement. The pertinent Sections of the FMLA advanced by Grievant are set forth as follows.

29 C.F.R. § 825.100 provides:

> (a) The [FMLA] allows “eligible” employees of a covered employer (See footnote 1) to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job (see § 825.306(b)(4)). In certain cases, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

29 C.F.R. § 825.208 provides:

> (a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

29 C.F.R. § 825.300(C) provides:

> (a) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, whether or not it has any "eligible" employees, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. Employers may duplicate the text of the notice contained in Appendix C of this part, or copies of the required notice may be obtained from local offices of the Wage and HourDivision. The poster and the text must be large enough to be easily read and contain fully legible text.
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> (b) An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $100 for each separate offense. Furthermore, an employer that fails to post the required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave.

In summary, the FMLA provides eligible employees twelve weeks of unpaid leave each year for "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). "An employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet their [sic] obligation to provide notice, though they would need to state a qualifying reason for the needed leave." See Manuel v. Westlake Polymers Corp., 66 F.3d 758, 762 (5th Cir. 1995). Further, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, based on information provided by the employee. If the employer does not have sufficient information about the employee's reason for taking leave, "the employer should inquire further to ascertain whether the paid leave is potentially FMLA-qualifying." 29 C.F.R. § 825.208(a)(2); Manuel, supra, at 762.

Grievant relies on Hendry v. GTE North, Inc., 896 F. Supp. 816 (N.D.Ind. 1995), to support her

position that Respondent violated the Act by not making further inquiry whether her leave was FMLA-qualifying. As in the instant case, the plaintiff in Hendry was terminated for excessive absenteeism over a number of years. Following a course of progressive discipline and counseling regarding the importance of her attendance, the plaintiff was terminated. She sued her employer, alleging it had violated, among otherthings, the FMLA, because it never told her of its existence, and there was no posted notice within her work area.

Hendry is an appeal of an order of summary judgment in favor of the employer. The Court's discussion of the FMLA centered on whether there was an issue of fact which remained to be determined regarding whether plaintiff suffered from a “serious health condition”, and whether she was improperly denied FMLA leave. Important in the court's discussion of this issue is the mention that the plaintiff's doctor had offered an opinion that the plaintiff was unable to work or perform the functions of her job due to her serious medical condition, and that plaintiff had, at least on one occasion, asked for reasonable accommodation from her employer. The court found there were issues of fact to be decided on these issues, and reversed the summary judgment order, remanding the case for a determination on these issues.

With respect to an employee, the term “serious health condition” is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery. Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028, 1035 (M.D.Tenn. 1995). The Department of Labor has developed a “brightline” test for what illnesses qualify as serious health conditions. If an employee is (1) incapacitated for more than three consecutive days, (2) seen once by a doctor, and (3) prescribed a course of medication, such as an antibiotic, she has a “serious health condition” worthy of FMLA protection. Brannon, supra, at 1036. “Incapacity” is defined 'as “inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.” 29 C.F.R. 825.114(a)(2)(I). In Brannon, the court found that the plaintiff had not proven she was “incapacitated” even though she missed more than three consecutive days of work. The court found that the plaintiff had not proven that she was unable to work, or that her absence was “due to” her illness. The court noted that her doctor had never advised her to remain off work, and that his subsequent speculation that it was reasonable for her to miss three or four days of work for her illness was insufficient to prove that the absence was necessary. Further, the court

found that plaintiff's own testimony that she was “too sick to work” was also insufficient to prove her absence was necessary. Finally, the court found that the plaintiff's doctor was unable to testify that the plaintiff was unable to perform the functions of her job in light of her illness. Brannon, supra, at 1037.

Applying the above case law to the instant grievance, Grievant simply has not proven by a preponderance of the evidence that she suffers from a serious health condition which would qualify her for FMLA leave. Grievant presented a letter dated October 16, 1996, from a psychiatrist stating that she suffered from depression. Of course, this letter was authored well after Grievant was terminated by Respondent. The doctor carefully points out in his letter that the first time he saw Grievant was on August 19, 1996, again after her dismissal, and that he could not conclude that her depression would have prevented her from performing the functions of the her job in the past. G. Ex. 6. The doctor did not testify on Grievant's behalf at level four. Grievant presented two letters from Dr. Susan Cavender, her physician over the course of the relevant period, dated August 5, 1996 and August 15, 1996, again after her termination. These letters indicate that Grievant had been under Dr. Cavender's care for a variety of physical and medical conditions over the years. However, these letters also do not state in any terms thatGrievant's medical condition would have prevented her from performing the functions of her job in the past. G. Exs. 2, 3. Dr. Cavender also did not testify on Grievant's behalf at level four. Grievant presented no additional evidence from any health care provider indicating that she was too sick to work, or that her medical condition prevented her from performing the essential functions of her job during the period in question. These letters, obviously solicited by Grievant after her termination, are therefore accorded very little weight regarding whether Grievant was incapacitated during the relevant period. As in Brannon, Grievant's own testimony that she was too sick to work simply is insufficient to prove her many absences from work were necessary. Finally, Grievant failed to identify which of her many absences would possibly qualify as FMLA leave, so it is impossible for the undersigned to determine whether Respondent should have inquired in any given instance whether Grievant's absence was due to a serious medical condition.

In any event, there is ample evidence that Respondent did make inquiry into the seriousness of Grievant's condition, offered her employee assistance or counseling, and encouraged her to take a medical leave of absence, all of which Grievant refused. Grievant's own testimony at level four, that she did not consider her condition to be any of Respondent's business, serves to indicate that, even

if Respondent had asked her whether she needed to take FMLA leave, she would have still refused to inform it of her condition. It is merely self-serving testimony for Grievant to now allege that had Respondent asked her whether her condition was serious enough to possibly qualify for FMLA leave, she would have told it.

Finally, Mr. Morgan, as well as Steve Edens, Respondent's Administrative Services Manager, conceded that Respondent, during the relevant period, had not posted therequired FMLA notice. However, both gentlemen testified that Respondent adheres to the mandate of the FMLA and, in fact, has several employees currently utilizing its benefits. LIV, Morgan; Edens. Grievant maintains that Respondent's failure to post the required notice constitutes a violation of the FMLA which entitles her to reinstatement to her position. (See footnote 2) The court in Hendry, supra, held that failure to post the required FMLA notice in the workplace could result in a civil money penalty, which cause of action belongs to the Secretary of Labor. 29 C.F.R. § 825.404; Hendry, supra, at 828. The failure to post the FMLA notice did not result in the plaintiff being reinstated in Hendry, nor does it result in Grievant's reinstatement here.

Conclusions of Law

1. In disciplinary matters, 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. "When an employer has established by a preponderance of the evidence that an employee has continuously abused sick-leave time; has not provided doctor's excuses, although reasonably required to do so per Personnel Rules . . .; has not explained, after repeated invitation why she should not comply with that directive; and that it comported with applicable progressive discipline regulations, its decision to terminate the employeewill be upheld." Morrison v. W. Va. Div. of Health, Docket No. 90-H-013 (Apr. 30, 1990); Duncan v. Lincoln County Bd. of Educ., Docket No. 89-22-147 (May 1, 1989).

3. Respondent has proven by a preponderance of the evidence that its dismissal of Grievant for excessive leave abuse and absenteeism was warranted under the circumstances. It repeatedly sought information from Grievant regarding her condition, counseled her regarding her attendance and leave usage, and finally applied all of the steps of progressive discipline before her termination.

4. Where a defense is raised by a grievant in a discipline-based claim, it is his burden to

establish the validity of that defense. Young v. W. Va. Dept. of Health and Human Res., Docket No. 90-HHR-541 (Mar. 29, 1991).

5. If an employee has an affliction which might entitle accommodation, the employee has an obligation to advise the employer of such a situation unless she is prevented from meaningfully doing so by either the employer, the condition or circumstances beyond her control. Lewis v. Mason County Bd. of Educ., Docket No. 94- 26-175 (Dec. 12, 1994); Howell v. W. Va. Dept. of Health and Human Res., Docket No. 90- H-484 (Sept. 27, 1991); Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991).

6. An employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though would need to state a qualifying reason for the needed leave. Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995).

7. An employee claiming rights under the FMLA has the burden of proving by a preponderance of the evidence that she suffers from a “serious health condition” whichwould necessitate FMLA leave. Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028 (M.D.Tenn. 1995).

8. Grievant has failed to prove by a preponderance of the evidence that she suffers from a “serious health condition” under the FMLA.

9. Grievant has failed to prove by a preponderance of the evidence that Respondent failed to make inquiry whether she had a “serious health condition”, whether she needed accommodation, or whether she needed to take a medical leave of absence.

10. Grievant failed to inform Respondent at any time that she had a “serious health condition” for which she needed accommodation.

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 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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MARY JO SWARTZ

Administrative Law Judge

Dated: February 10, 1997

Footnote: 1 *There is no dispute that Respondent, as an agency of the State of West Virginia, is covered by the FMLA. 29 C.F.R. § 825.108.*

Footnote: 2 *Grievant also alleges Respondent violated the FMLA by not posting notice of its provisions in its handbook. However, the handbook relied upon by Grievant, identified at hearing as the "Arch Moore Handbook" (G. Ex. 1), would have been issued long before the FMLA was even in effect. The FMLA was passed and became effective in 1993, which would have been during the term of Governor Gaston Caperton. Grievant and Respondent agreed at hearing that no handbook was issued during the Caperton Administration. Thus, Grievant's allegation in this regard must fail.*