ELROSE T. SMITH,

Grievant,

v. **DOCKET NO. 96-BOT-242**

BOARD OF TRUSTEES\POTOMAC STATE COLLEGE,

Respondent.

DECISION

Elrose T. Smith, Grievant, filed this grievance against Respondent, Board of Trustees\Potomac State College, alleging, in pertinent part, that she:

> has been retaliated against as a result of her revealing improper activities at Potomac State College Library. Grievant has been discriminated against because of her age. Grievant has been forced to resign from her position as a result of the harassment by the employees at the library at Potomac State College.

As relief, Grievant seeks:

1. Salary and benefits during the time off, 12/31/95 to retirement age.

2. Attorney fees and all other costs paid.

3. Internal discipline for parties of wrongdoings according to University policy.

4. Monetary damages for emotional distress and humili- ation due to constructive termination. (See footnote 1) Grievant was denied relief at the lower levels of the grievance procedure. A Level IV hearing was held on December 5, 1996. The case matured for decision on February 12, 1997, with receipt of Respondent's post-hearing submission. The following Findings of Fact were derived from the record.

FINDINGS OF FACT

1. Grievant worked at the Potomac State College Library (library) from 1989 until she resigned effective December 31, 1995. She also taught part-time at the college. On August 16, 1993, she was

employed full-time as a Library Technical Assistant III.

2. In April, 1993, approximately four months before Grievant became employed full-time, Ms. Jill Gardner became Interim Director at the Potomac State Library.

3. In October, 1993, Respondent advertised for a librarian position. Ms. Dawn Downey was one of the applicants. Grievant believes that Ms. Gardner and Ms. Linda Bane, Assistant University Librarian and Assistant Adjunct Professor, improperly added computer experience to Ms. Downey's application. Ms. Downey had computer experience at the time she made application for the position. Grievant repeatedly, in speaking with other college employees, referred to the above event as a falsification of Ms. Downey's application. 4. In December, 1993, Grievant became concerned over a cash shortage of fifty-four dollars in the "Library's Kitty." (See footnote 2) Grievant also questioned the appropriateness of having a "kitty," the origin of the funds originated, and how the "kitty" was operated.

The shortage was investigated by Mr. William R. Quigley, Director, Internal Audit. He provided Ms. Gardner with correct operating and bookkeeping procedures. Mr. Quigley stated that missing funds from the "kitty" were insignificant. (See footnote 3)

5. On January 21, 1994, Ms. Gardner performed Grievant's three month probationary evaluation. Some of the comments of the evaluation are reproduced below:

> A. [Grievant] schedules work study students well but is concerned about time to complete own duties. She needs to realize that all tasks can not be completed immediately but are continual. Therefore, time management must be worked into a weekly calendar allowing her time to complete all duties in her job description without job delegation.
>
> B. There have been complaints by co-workers about her over interest in their jobs or job performance.
>
> C. Being a part-time teacher, she is used to working in a supervisory capacity and sometimes this "spills over" into the library workplace among staff which makes them uncomfortable. Goals for the future are morale building with staff and becoming more library literate.

Level II, Ex. 8. The evaluation also notes Grievant is very interested in the college and its programs, is always punctual and meets deadlines, participates in the library's annual World War II Remembered program, serves on Student Life Council, and has an excellent rapport with students.

The evaluation also noted:

> A. Quality of work acceptable but several areas need improvement or more working knowledge (kardex and understanding all circulation computer processes). Quantity of work depends on items received and processed (microfiche).
>
> B. Goals for the future are morale building with staff and becoming more library literate. This is essential for all new employees. This can be accomplished by reading the various library magazines which the library subscribes. Libraries with more technology (libraries of the future) are also a main thrust for all librarians, especially at PSC with the results of North Central and the fact that in the future we need to be fully automated to compete with other schools. (See footnote 4)

6. On March 22, 1994, Ms. Gardner performed Grievant's six month probationary evaluation, which is similar to the three month evaluation, and is not negative of Grievant. Also similar to the three month evaluation, Ms. Gardner stresses the use of computers, and states:

> [s]ince attending the Computers in Libraries convention in Washington, I see even more the need of increased usage of technology here in the library. With the thoughts of automation arising, more interest must be taken in computers and all of their functions. The entire staff must be involved in the planning and implementation of automation in the library area. 7. Grievant received a “letter of counseling” dated August 17, 1994, which outlined “three areas of performance deficiency” - Mathematical proficiency, computer competency, and attention to detail. A plan of improvement and development was included in the letter. (See footnote 5) Level II, Ex. 10.

8. Grievant filed a grievance in September 1994, against Respondent alleging “that the computer course she was being required to take was a grievable event and there were other inequities presented in the workplace.” Level IV, G. Ex. 1. (See footnote 6) After the grievance was denied at Level I, by Ms. Gardner (Grievant's immediate supervisor), Grievant and Respondent entered into a settlement agreement.

9. On October 10, 1995, Grievant had a conversation with Ms. Bane alleging she did not receive notice of a regularly scheduled Monday meeting. Grievant also expressed concern over some missing periodicals. During this encounter, Ms. Bane made reference to the possibility of Grievant having Alzheimer's disease. Grievant's mother had suffered from Alzheimer's disease. On November 21, 1995, Grievant filed an incident report form pertaining to Ms. Bane's remark, and commented that “Linda Bane's reference to [her] possibly having Alzheimer's is offensive, and shows age discrimination.” Level II, Ex. 6-B. 10. Grievant filed a complaint with the West Virginia Human Rights Commission, which was docketed on January 29, 1996. Grievant alleged:

> that during the term of her employment she was harassed by co-workers due to her age, and that as a result, she was forced to resign her position on or about December 31, 1995. She alleges this harassment, and her forced resignation, to be the result of age discrimination, in violation of the West Virginia Human Rights Act as amended.

Level IV, R. Ex. 1.

After a full investigation, the West Virginia Human Rights Commission issued a determination of "no probable cause". The following two primary reasons were given for the no probable cause determination:

> A. The Complainant resigned her position due to conflict with co-workers. This conflict was the result of her report of alleged wrongdoing to the Respondent's administration.
>
> B. Allegations of harassment based on the Complainant's age were based on the Supervisor's insinuation of the Complainant having Alzheimer's disease. These comments do not rise to the level of harassment, which would be considered severe or pervasive, and which is the standard for determining this type of harassment.

Id.

11. Grievant did not like the way Ms. Gardner ran the library, and was attentive to things that were not her concern: student's dress, Ms. Bane's dress, Ms. Bane's application to a library in the state of Maryland, Ms. Gardner's handling of Ms. Bane's "confidential" problem, Ms. Gardner's integrity, computer use in the library, the termination of Ms. Hazel Riggleman (a library employee), and the release of students' grades. 12. Grievant had trouble performing her work without help. She also had trouble in computer applications.

DISCUSSION

First, Grievant alleged that Respondent discriminated against her because of her age. W. Va. Code §18-29-3(m) defines discrimination as:

> "Discrimination" means 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.

A prima facie showing of discrimination, under W. Va. Code §18-29-3(m), consists of a grievant establishing:

> (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 grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

If a grievant successfully proves a prima facie case, a presumption of discrimination exists, then respondent may rebut it by articulating a legitimate reason for its action. However, a grievant may still prevail if she can demonstrate the reason proffered by a respondent was pretextual. See W. Va. Inst. of Technology v. WVHRC & Zavareei, 383 S.E.2d 490 (W. Va. 1989); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). The first element in proving a claim of discrimination is often a major hurdle. See Sagace v. W. Va. Div. of Corrections, Docket No. 96-CORR-469 (June 26, 1997). However, in the instant case, Grievant did not even allege that she was similarly situated to anyone. Grievant failed to prove any of the elements of discrimination by a preponderance of the evidence.

Second, Grievant alleged she was harassed. “Harassment” is defined by W. Va. 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.” Clearly, more than a single deviation from accepted demeanor, a single reference to Grievant having Alzheimer's disease, is required to violate this provision. See Thompson v. Bd. of Trustees/Marshall Univ., Docket No. 96-BOT-097 (Dec. 31, 1996); Eagel v. Marion County Bd. of Educ., Docket No. 94-24-226 (Nov. 23, 1994); Jackson v. Fayette County Bd. of Educ., Docket No. 94-10-029 (May 18, 1994).

Grievant failed to prove by a preponderance of the evidence that she was harassed. For example, Grievant pointed to an instance where she produced a periodical listing for 1995-1996. Ms. Gardner and Ms. Bane examined the listing. Each found different errors in the listing. Later, Grievant was asked to place the listing in a spread sheet format. Although Grievant believes otherwise, she failed to prove by a preponderance of the evidence that Respondent's desire to arrange the information in a computer usable format was harassment. While it is evident Grievant had trouble completing her work by herself, and learning new computer applications (See footnote 7) simultaneously, merely

receiving instructions from a superior to put information in a different format is not harassment. Few of her instances of alleged harassment were corroborated, and the ones that were, like the above example, do not support a finding that Respondent or its employees acted “contrary to the demeanor expected by law, policy, and profession.”

Third, Grievant alleges that she has been retaliated against because she allegedly revealed improper activities at Potomac State College Library. W. Va. Code §18-29-2(p) defines reprisal as “the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.”

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989), explained that the definition of reprisal actually refers to two types of injury. The first is an “injury” to the employer caused by some action of the employee, and the second is an “injury” to the employee caused by the employer for which the employee is attempting to get redress, e.g., through the grievance procedure.

The only “injury” Grievant proved, by a preponderance of the evidence, is that she received a “letter of counseling” dated August 17, 1994, for deficiencies in Mathematical proficiency, computercompetency, and attention to detail. However, she is not trying to redress this action of Respondent in the instant grievance. She has voluntarily elevated her “cause” from a letter of counseling to one of termination, and her reprisal claim must fail.

More recently, Conner v. Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994), explained that the general rule is that an employee must prove by a preponderance of the evidence that her protected activity was a "significant," "substantial" or "motivating" factor in the adverse personnel action. Warren v. Dept. of Army, 804 F.2d 654 (Fed. Cir. 1986); Harvey, supra; See P. Broida, A Guide to Merit Systems Protection Board Law & Practice, Chapter 13 (5th ed. 1988). See generally Conner v. Barbour County Bd of Educ., Docket No. 93-01-246 (Apr. 28, 1994). A grievant may make a prima facie showing of reprisal under W. Va. Code §18-29-2(p) by establishing by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer was aware of the protected activity; (3) the employer subsequently took an adverse action against the employee; and (4) retaliatory motivation or that the adverse action followed the employee's protected activity within such period of time that retaliatory motivation can be inferred.

The employer can rebut a prima facie showing of reprisal by offering evidence of a legitimate, non-retaliatory reason for the adverse action. Should the employer succeed in rebutting the prima

facie showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely apretext for a retaliatory motive. Conner v. Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

Assuming arguendo that Grievant proved a prima facie case, Respondent rebutted it by establishing legitimate, non-retaliatory reasons. Those reasons were partially addressed in the “letter of counselling”. Again, simply put, Grievant had trouble completing her work by herself, and learning new computer applications. Grievant's claim of reprisal fails.

Last, Grievant alleges that she was constructively discharged. In order to prove constructive discharge in West Virginia, the employee must "establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit." Slack v. Kanawha County Housing & Redevelopment Auth., 188 W. Va. 144, 423 S.E.2d 547 (1992). It is not necessary for the employee to show that the employer's actions were taken with a specific intent to cause the employee to quit. Slack, supra. To "determine whether an employee's act of resignation was the result of coercion, rather than a voluntary act, the circumstances surrounding the resignation must be examined in order to measure the ability of the employee to exercise free choice." McClung v. W. Va. Dept. of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989). See Adkins v. Civil Service Comm'n, 171 W. Va. 132, 298 S.E.2d 105 (1982). See also Schultz v. Dept. of the Navy, 810 F.2d 1133 (Fed. Cir. 1987); Dumas v. Merit SystemsProtection Bd., 789 F.2d 892 (Fed. Cir. 1986). Moreover, whether working conditions are intolerable must be assessed by the objective standard of whether a "reasonable person" in the employee's position would have felt compelled to resign. Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985). See J.P. Stevens & Co. v. NLRB, 461 F.2d 490 (4th Cir. 1972); McKinney v. K-Mart Corp., 649 F. Supp. 1217 (S.D.W. Va. 1986). A grievant alleging a constructive discharge or demotion has the burden of proving his or her allegations by a preponderance of the evidence. McClung, supra. See Coster v. W. Va. Div. of Corrections, Docket No. 94-CORR-600 (Aug. 12, 1996).

As discussed above, Grievant failed to prove by a preponderance of the evidence that she was harassed, discriminated against, or retaliated against by Respondent. In this case, since Grievant has failed to prove harassment, discrimination, or retaliation, which supposedly made Grievant's working conditions so intolerable that she was coerced to quit, her claim of constructive discharge must

likewise fail because it is predicated upon her other allegations. The record will not support a finding that Grievant's working conditions were “so intolerable” that a "reasonable person" in her position would have felt compelled to resign.

Moreover, this is simply not a case of constructive termination. In this case, Grievant has caused morale problems in the library. She insinuated that there were illegal and improper activities occurring in the library. Grievant simply could notkeep up with her work-load, could not get along with her co-workers, and disagreed with how Ms. Gardner ran the library. Grievant's problems at the library were of her own making. See Coster, supra.

In addition to the foregoing narrative and findings of fact, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). 2. Grievant failed to prove by a preponderance of the evidence her allegations of discrimination, harassment, reprisal, or constructive discharge.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Mineral 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.

Dated:_October 7, 1997_____ _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

The type of relief Grievant seeks is generally not granted by the Grievance Board. Even if Grievant proved constructive discharge, she would not be entitled to compensation until retirement age. She has a legal duty to mitigate her damages.

The Grievance Board is without statutory authority to award legal fees, or to compensate grievants for emotional distress or humiliation. Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-002-007 (June 30, 1997); Chafin v. Boone County Health Dept., Docket No. 95-BCHD-362 (June 21, 1996); Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986). Summarily, theGrievance Board is without statutory authority to order an employer to discipline an employee. See Daughery v. BOD/West Liberty State College, Docket No. 93-BOD-295 (Apr. 27, 1994).

Footnote: 2

The "kitty" fund was established prior to Ms. Gardner becoming Director. At times these funds were used to purchase books, and other miscellaneous library materials at local stores.

Footnote: 3

The record does not reveal that anyone was ever disciplined for "kitty" related shortages. Poor bookkeeping and lack of evidence prevented successful prosecution.

Footnote: 4

The above comments are not vicious attacks on Grievant, and the record will not support a finding that the evaluation was a poor one.

Footnote: 5

According to Grievant this was the first time she says her work was questioned.

Footnote: 6

At Level II, Grievant testified she filed grievances on September 30, 1994, (Tr. 7), and on October 10, 1994 (Tr. 69).

Footnote: 7

It appears that Grievant had little contact with a computer, or at least the computer applications used at the library, before she accepted her latest position at the library.