BETTY J. DOOLEY,

Grievant,

v.

DOCKET NO. 98-DOH-312D

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Betty J. Dooley, filed the following grievance against her employer, West Virginia Department of Transportation/Division of Highways ("Highways"), alleging:

> A continuous pattern of harassment - the latest occurring on July 21, 1998, by John Lancaster and Tim Martin, and others, but harassment to me is not limited to these two people. These two people are now interfering with a police investigation regarding the "bomb scare."
>
> Relief sought: Transfer with a promotion outside the Planning Division. All other relief to make me whole in this matter.

Grievant's immediate supervisor was on vacation, so she filed this grievance at level two on July 28, 1998. She received a decision on August 3, 1998, from Paul F. Wilkinson, Director, Planning and Research, informing her that he was unable to effect the relief she requested. Grievant appealed to level three on August 3, 1998. No hearing or decision was rendered at level three, and Grievant advanced her appeal to level four, also alleging that Highways was in default. A Notice of Default Hearing was issued on September 2, 1998, and Highways conceded its default by letter dated February 23, 1999. Thereafter,Highways requested a hearing on the remedy, as provided by W. Va. Code § 29-6A- 3(a)(2)(1998).

Thereafter, Grievant resigned her employment with Highways, effective August 31, 1998, and

Highways made a Motion to Dismiss the grievance. A telephonic conference was held on March 12, 1999, and Grievant amended her grievance to allege constructive discharge. A level four hearing was held on March 16, 1999. Following the conclusion of that hearing, the undersigned informed the parties that she was reopening the matter to allow Grievant to present additional evidence on her constructive discharge claim. A hearing was set for May 11, 1999, however, Grievant failed to appear. A Show Cause Order was issued on May 11, 1999, and no response was received from Grievant. Therefore, this grievance became mature for decision on July 1, 1999, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant appeared pro se, and Highways was represented by Krista L. Duncan, Esq., Assistant Attorney General.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. A -

Request for medical leave of absence from Betty Dooley, dated July 28, 1998; Certificate to return to work from Thomas S. Lanava, M.D., dated July 27, 1998.

Ex. B -

Request for transfer of Grievant from Thomas S. Lanava, M.D., dated August 5, 1998.

Ex. C -

HealthPlus doctor's statement, dated August 29, 1998.

Ex. D -

Sleep Study Report, dated April 9, 1998.

Ex. E -

HealthPlus statement dates June 26, 1998.

Ex. F -

Grievance statement of Betty Dooley, dated May 27, 1998, requesting transfer.Ex. G - August 5, 1997 reference letter from Jerry L. Legg, Chief, To Whom It May Concern, regarding Betty Dooley.

Ex. H -

West Virginia Division of Personnel Notice of Written Score for Betty Dooley, dated December 7, 1998.

Ex. I -

October 29, 1997 letter from Betty Dooley to Doreen Baria, Head Secretary.

Ex. J -

March 13, 1998 letter from Betty Dooley to Commissioner Sam Beverage through Paul Wilkinson, Director.

Ex. K -

West Virginia Division of Highways transaction forms for Tammie Means, dated November 1, 1996 and April 6, 1998.

Highways' Exhibits

Ex. 1 -

August 31, 1998 letter from Betty Dooley to the Honorable Governor Underwood, Commissioner Beverage, and Jeff Black, Personnel Director.

Ex. 2 -

West Virginia Division of Highways transaction form for Betty Dooley, dated August 31, 1998.

Testimony

Highways presented the testimony of Jeff Black and Jerry Legg. Grievant testified in her own behalf.

ISSUES

The issues to be decided are (1) whether the relief sought by Grievant is contrary to law or clearly wrong; and (2) whether Grievant has proven she was constructively discharged by a preponderance of the evidence.

FINDINGS OF FACT

I find, by a preponderance of the evidence the following facts:

1. Grievant filed a grievance alleging harassment by Division Director John Lancaster, Tim Martin, and others on July 27, 1998, and seeking a transfer and promotion as relief.

2. On August 3, 1998, the grievance was denied at level two by Paul Wilkinson, Director of Planning and Research. 3. No timely hearing or decision was rendered at level three.

4. Grievant filed her notice claiming she prevailed by default at level four on August 18, 1998.

5. On August 31, 1998, Grievant resigned from her employment with Highways.

6. A Notice of Default Hearing was issued from this Grievance Board on September 2, 1998.

7. On February 8, 1999, Highways requested a hearing on the default claim, in accordance with W. Va. Code § 29-6A-3(a)(2)(1998).

8. On February 23, 1999, Highways conceded that a default occurred at level three of the grievance procedure, and again requested a hearing to establish that the relief sought by Grievant was contrary to law or clearly wrong.

9. Grievant is qualified and skilled in the secretarial field of employment, as evidenced by her civil service scores. G. Ex. H.

10. As early as October 1997, Grievant had requested that she be transferred out of her division. Nothing was done to accommodate Grievant at that time, however, her immediate supervisor, Jerry Legg, wrote Grievant a letter of recommendation. G Ex. G.

11. Sometime in 1998, former Secretary of Transportation Richard Jemiola resigned, and a position was created in the Legal Division to accommodate his foromer secretary.

12. Grievant filed a grievance over the placement of Ms. Akers into the Legal Division position. G. Ex. F. 13. In April 1998, Tammy Means, a secretary, resigned from her position at Highways. She had worked in a different division than Grievant. No attempt was made to transfer Grievant into this position.

DISCUSSION

Effective July 1, 1998, the West Virginia Legislature amended the grievance procedure for state employees to add a default provision. (See footnote 1) This default provision is contained in W. Va.

Code §29-6A-3(a)(2), which provides, in pertinent part:

> The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

Although Highways concedes that a default occurred, it contends that Grievant's requested remedy is clearly wrong and contrary to law, because she voluntarily resigned from her employment, rendering her grievance moot. In a default matter, the Respondent has the burden of establishing its defense by a preponderance of the evidence. See Hoffv. Bd. of Trustees, Docket No. 93-BOT-104 (June 30, 1994); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993).

There is no dispute that Grievant resigned her employment with Highways, effective August 31, 1998, and that this grievance had not been resolved at that time. Grievant contends she was forced to resign because of the continued harassment alleged in her grievance, and therefore, her resignation should be considered a “constructive discharge.” In order to prove a constructive discharge, a grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary that a grievant prove that the employer's actions were taken with a specific intent to cause her to quit. Slack v. Kanawha County Housing, 188 W. Va. 144, 423 S.E.2d 547 (1992); Preece v. Public Service Comm'n, Docket No. 94-PSC-246 (Apr. 25, 1997); Coster v. W. Va. Div. of Corrections, Docket No. 94-CORR-600 (Aug. 12, 1996).

However, 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). 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).

This grievance presents an unusual series of events. The default in this grievance occurred at level three, and Grievant alleged default on August 18, 1998. Because Highways has conceded that a default occurred, the undersigned is required, by statute, to presume Grievant prevailed on the merits of her claim at the time of her default. Her claim is one of harassment by her Division Director, as well as others. Her alleged reason for resigning was because of continued harassment by her Division Director and others. Thus, Grievant is required to prove that the harassment by her Division Director and others rendered her working conditions so intolerable that a reasonable person would have been compelled to quit.

Grievant was diagnosed with sleep apnea on or about March 30, 1998 after going through a series of tests at Columbia Saint Francis Hospital. G. Ex. D. She was seen at HealthPlus on June 26, 1998 for problems relating to sleep apnea, as well as shoulder and chest pains. G. Ex. E. Grievant presented evidence that she requested a medical leave of absence from July 22 through July 28, 1998, or contemporaneous with the time she filed her grievance alleging harassment. The request was approved. G. Ex. A. Grievant presented a doctor's slip from her physician, Dr. Thomas Lanava, dated August 5, 1998, requesting that she be transferred due to stress and anxiety reasons. G. Ex. B. Grievant was again seen by a physician on August 29, 1998 (G. Ex. C). Grievant testified her stress and anxiety condition worsened and she took off work the week of August 24 throughAugust 29, 1998. After going to the doctor on August 29, 1998, Grievant decided to resign her employment.

Grievant alleges that her medical condition was caused by or exacerbated by the harassment she received at the hands of Mr. Lancaster. Grievant attempted to show that other employees had left the department because of Mr. Lancaster, but called no witnesses to support her allegations. Mr. Jeff Black, Human Resource Director, testified that no other employees besides Ms. Dooley had ever complained to him about Mr. Lancaster. That does not mean, of course, that Mr. Lancaster was not singling out Ms. Dooley for harassment, it only serves to discredit her testimony that other employees in her division were adversely treated by Mr. Lancaster.

It is clear Grievant suffers from a medical condition, including stress and anxiety, which certainly could be worsened if working conditions were not satisfactory. However, that does not mean that the working conditions were intolerable such that a reasonable person would be compelled to quit. It is truly unfortunate that Grievant did quit when she did, as she would have prevailed in her grievance otherwise. However, because she did quit her employment, that renders any relief to which she would be entitled because of the default moot and speculative.

CONCLUSIONS OF LAW

1. A grievant who was prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a level four hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or hergrievance, awarding such a remedy would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2)(1998).

2. When the employer asserts that the remedy received is contrary to law or clearly wrong, the employer must establish such a defense by a preponderance of the evidence. See Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994).

3. 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).

4. In order to prove a constructive discharge, a grievant must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary that a grievant prove that the employer's actions were taken with a specific intent to cause her to quit. Slack v. Kanawha County Housing, 188 W. Va. 144, 423 S.E.2d 547 (1992); Preece v. Public Service Comm'n, Docket No. 94-PSC-246 (Apr. 25, 1997); Coster v. W. Va. Div. of Corrections, Docket No. 94-CORR-600 (Aug. 12, 1996).

5. However, 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).

6. Moreover, whether working conditions are intolerable must be assessed by the objective standard of whether a "reasonable person" in the employee's position wouldhave 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).

7. Grievant has failed to prove by a preponderance of the evidence that her working conditions were so intolerable that a reasonable person would have felt compelled to resign.

8. Grievant has failed to prove by a preponderance of the evidence that she was constructively discharged from employment.

9. Consequently, Respondent has proven by a preponderance of the evidence that the relief sought by Grievant is clearly wrong, in that she voluntarily resigned her position, and the relief sought is moot.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: August 3, 1999

Footnote: 1

This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998).