MARY ALBRIGHT,

Grievant,

v. **DOCKET NO. 00-HHR-130**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/

MILDRED MITCHELL BATEMAN HOSPITAL,

Respondent .

D E C I S I O N

This grievance was filed by Grievant, Mary Albright, against her former employer, Respondent, Department of Health and Human Resources ("HHR"), on November 5, 1999, when HHR refused to allow her to rescind her resignation. The statement of grievance reads, “discrimination - harassment.” She sought as relief, “to be allowed to rescind my resignation and to be made whole in every way.” (See footnote 1)

The following Findings of Fact are made based upon the record developed at Level III.

Findings of Fact

1. Grievant was employed by HHR at Mildred Mitchell Bateman Hospital as a Word Processor. She had been employed by HHR since November 10, 1998. She transcribed dictated admission histories and physical examination results.

2. Grievant's normal working hours are 7:00 a.m. to 3:00 p.m. On October 22, 1999 (See footnote 2), Grievant came to work early, at 4:30 a.m., so that she could leave early, at 12:30 p.m., to visit her cousin who was having surgery. As the surgery arose suddenly, Grievant could not obtain prior approval to vary her shift, unless she called her supervisor before 4:30 a.m. She did not call her supervisor to obtain approval to work different hours. She knew she was supposed to obtain prior approval. Employees were allowed to vary their work hours with their supervisor's approval.

3. Two other transcriptionists were working on October 22, 1999. One of them had a previously

scheduled doctor's appointment in the afternoon, and the other had leave approved for the afternoon to visit her grandson in foster care, during previously scheduled visitation hours.

4. When Grievant's supervisor, Michelle Runkle, became aware that Grievant had come to work early, she asked Grievant why she had done this. Grievant told her what she wanted to do. Ms. Runkle told Grievant she needed prior approval in order to vary her shift, and Ms. Runkle needed someone to work that afternoon. Ms. Runkle then talked to her supervisor, Pat Franz. Ms. Franz met with Grievant and Ms. Runkle. Ms. Franz asked Grievant why she had come in early without consulting with Ms. Runkle. Grievant told her her cousin was ill, and she wanted to leave early. Ms. Franz told Grievant she was not to vary her schedule without approval. Grievant responded thateveryone else did it, to which Ms. Franz replied that other employees obtained their supervisor's approval first, and she had concerns about coverage for admissions histories and physical examinations. Ms. Runkle then told Grievant she could not leave early, but she could leave for a few hours and return at 1:00 p.m., to complete her shift, so there would be coverage from 1:00 p.m. to 3:00 p.m. It was a Friday, which typically sees a high admission rate, and if Grievant left, there would be no transcription coverage on Friday afternoon.

5. Grievant did not believe it was reasonable to ask her to leave and come back later, and refused to leave and come back to complete her shift. Grievant stated, “if I leave, I'm not coming back, that's the stupidest thing I ever heard.” Ms. Franz told her if she did not accept this option, it would be considered insubordination. Grievant then stated she would “just quit.” Grievant then asked Ms. Franz, what she thought of that. Ms. Franz asked her to repeat her statement, and Grievant stated she would rather quit than do as Ms. Runkle suggested. Ms. Franz responded that if she wanted to quit, she would accept her verbal resignation, and would remain in the area to accept her written resignation; to which Grievant responded that she would go type it.

6. Grievant went to her work area and sat down at her computer to compose her one sentence resignation letter. Ms. Franz came into the area shortly thereafter and sat down. Ms. Franz watched Grievant while she typed her resignation. Grievant signed her resignation letter and handed it to Ms. Franz.

7. Ms. Franz was in a supervisory position over Grievant, and was authorized to accept her resignation.

8. On October 25, 1999, Grievant asked to rescind her resignation. HHR declined to allow

Grievant to rescind her resignation, because Ms. Runkle had found Grievant to abuse time and telephone privileges, and Grievant had acted in an insubordinate manner toward her on more than one occasion, including the day Grievantresigned. Ms. Runkle had memorialized her concerns with Grievant's inappropriate behavior in a letter to Grievant dated March 1, 1999. That letter states that Grievant is to make requests to Ms. Runkle to change her schedule.

9. Gwen Cruck was rehired at Mildred Mitchell Bateman Hospital shortly after resigning her employment. Ms. Cruck did not ask that her resignation be rescinded.

Discussion

In nondisciplinary matters, the grievant has the burden of proving her case by a preponderance of the evidence. Tucci v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995). It appears that Grievant is claiming harassment and discrimination based upon Ms. Runkle requiring her to obtain prior approval in order to work a schedule different from her usual schedule, and denying her request to leave at 12:30 p.m., and upon HHR's refusal to allow her to rescind her resignation. Inasmuch as Grievant is no longer an employee, whether she was discriminated against or harassed are at issue only in terms of whether the treatment she received was so severe that it amounted to 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 Serv. 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).

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. Dep't of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989); SeeAdkins v. Civil Serv. 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)." Dooley v. Dep't of Transp., Docket No. 98-DOH-312D (Aug. 3, 1999).

Grievant has failed to demonstrate facts sufficient to convince the undersigned that a reasonable person would have been compelled to resign under these circumstances. HHR needed Grievant's services on Friday afternoon, October 22, 1999. According to HHR's witnesses, HHR is required by law to have admissions histories and physical examinations transcribed within 24 hours, and Grievant knew this. The other two transcriptionists had already been approved for leave before Grievant took it upon herself to change her work hours without notice. Grievant gave no reason why she could not take time off work and return at 1:00 p.m.; she just thought it was stupid. She did not indicate that she absolutely had to be at her cousin's side from 1:00 to 3:00 p.m., and no one else was available. Ms. Runkle tried to accommodate Grievant as best she could given the circumstances. Grievant simply did not like what she heard. She did not want to work, even though she was needed by her employer, and she made a choice to act in a rebellious manner by quitting if she could not get her own way. Those who make such choices must live with the results.

Grievant suggested that Ms. Franz forced her to write out her resignation by sitting close by staring at her while she typed her resignation, and by telling her to "write it out and give it to her now." Ms. Franz denied having said this. Even were this statement true, it still does not amount to coercion under the facts here, although it could amount to baiting. It is clear from Grievant's own account of her meeting with Ms. Runkle and Ms. Franz that she was not intimidated by Ms. Franz; it is more likely that she would haveresponded to such a comment by Ms. Franz with an "I'll show you" attitude by "defiantly" typing the letter.

Even if the written resignation were found to have been coerced, by Grievant's own admission, the verbal resignation was not coerced. Grievant stated at the Level III hearing, "I do feel like I was forced into giving a written [resignation.] I did myself give the verbal [resignation], that was with no coercion at all. I do feel like I was forced or encouraged, pressured into giving a written resignation."

"A resignation is, by definition, a voluntary act on the part of an employee seeking to end the employer-employee relationship. Smith v. W. Va. Dept. of Corrections, Docket No. 94-CORR-1092 (Sept. 11, 1995). See Welch v. W. Va. Dept. of Corrections, Docket No. 95-CORR-261 (Jan. 31, 1996). As a general rule, an employee may be bound by her verbal representations that she is resigning when they are made to a person or persons with the authority to address such personnel

matters. See, Welch, supra; Copley v. Logan County Health Dept., Docket No. 90-LCHD-531 (May 22, 1991). The representations must be such that a reasonable person would believe that the employee intended to sever his relationship with the employer. " Hale-Smith v. Mingo County Bd. of Educ., Docket No. 98-29-075 (Sept. 30, 1998).

In this case, Grievant gave a clear, verbal resignation to a person with authority to accept it, and that is sufficient.

As to Grievant's claim that she was discriminated against because she was not allowed to rescind her resignation, Grievant has not demonstrated that any other similarly situated employee was allowed to rescind his or her resignation. W. Va. Code § 29-6A- 2(d) defines discrimination, for purposes of the grievance procedure, 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.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his 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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant demonstrated that one employee was rehired by HHR after resigning. The evidence does not reflect when this occurred, in what capacity that person was employed, or the circumstances under which this person was rehired. Thus, there is no evidence that this person was similarly situated to Grievant. Even if this person were similarly situated to Grievant, however, HHR is not

required to allow an employee to rescind her resignation, and has demonstrated a legitimate, non-discriminatory reason for not allowing Grievant to do so. Grievant had been insubordinate on more than one occasion, and on October 22, 1999, she clearly demonstrated her insubordination, and that she was not willing to work when the agency needed her.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In nondisciplinary matters, the grievant has the burden of proving her case by a preponderance of the evidence. Tucci v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995). 2. 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 Serv. 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).

3. 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. Dep't of Public Safety, Docket No. 89-DPS-240 (Aug. 14, 1989); See Adkins v. Civil Serv. 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).” Dooley v. Dep't of Transp., Docket No. 98-DOH-312D (Aug. 3, 1999).

4. “A resignation is, by definition, a voluntary act on the part of an employee seeking to end the employer-employee relationship. Smith v. W. Va. Dept. of Corrections, Docket No. 94-CORR-1092 (Sept. 11, 1995). See Welch v. W. Va. Dept. of Corrections, Docket No. 95-CORR-261 (Jan. 31, 1996). As a general rule, an employee may be bound by her verbal representations that she is resigning when they are made to a person or persons with the authority to address such personnel

matters. See, Welch, supra; Copley v. Logan County Health Dept., Docket No. 90-LCHD-531 (May 22, 1991). The representations must be such that a reasonable person would believe that the employeeintended to sever his relationship with the employer. " Hale-Smith v. Mingo County Bd. of Educ., Docket No. 98-29-075 (Sept. 30, 1998).

5. Grievant verbally, voluntarily resigned her position to the proper authority, and followed this verbal resignation with a written confirmation. Her resignation was not coerced.

6. A grievant alleging discrimination must establish a prima facie case by demonstrating:

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

(b) that he has, to his detriment, been treated by his 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.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

7. Grievant failed to demonstrate she was similarly situated to any other employee who was allowed to rescind his or her resignation.

Accordingly, this grievance is **DENIED**.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: December 27, 2000

Footnote: 1

The parties waived Level I of the grievance procedure, proceeding to Level II on November 5, 1999. Grievant's second level supervisor responded on November 18, 1999, denying the grievance. Grievant appealed to Level III, where a hearing was held on March 22, 2000. The grievance was denied at Level III on March 29, 2000. Grievant appealed to Level IV on April 5, 2000. A Level IV hearing was scheduled for October 24, 2000. Grievant appeared by her representative, Ron Grogg, and HHR was represented by Anthony D. Eates, II, Esquire. Grievant did not appear for the hearing. Mr. Grogg and Mr. Eates agreed to submit this grievance for decision based upon the record developed at Level III, if Grievant did not object. As Mr. Grogg had not been able to make contact with Grievant in the days immediately preceding the hearing, and he was unable to reach her by telephone on the day of the hearing, a letter was sent to Grievant allowing her time to object to submitting the grievance for decision on the record. No objection was received, and this matter became mature for decision upon receipt of Respondent's written argument on December 5, 2000. Grievant declined to submit written argument.

Footnote: 2

Grievant testified that she came in early on October 21, 1999, and the discussion which led to her resignation occurred the next day, a day when she had arrived at work at the usual time. This recitation of events does not correspond with her later testimony that all the events occurred on the same day, and is not logical.