KIMBERLY D. DAVIS,

Grievant,

v. **Docket No. 04-HE-139**

FAIRMONT STATE COLLEGE,

Respondent.

D E C I S I O N

Kimberly D. Davis ("Grievant"), employed by Fairmont State College ("FSC" or "Respondent") as a Residence Director, filed a grievance directly to level four on April 14, 2004, after her contract was not renewed. For relief, Grievant requested compensation and health benefits through December 31, 2004, a neutral recommendation and payment for pain and suffering, for a total of $88,500.00. A level four hearing was convened on July 9, 2004, at which time Grievant was represented by Stephan C. Davis, and FSC was represented by Elaine Skorich, Assistant Attorney General. The parties were advised that because this was a case of non-renewal rather than dismissal, the matter could be remanded for hearing; however, both stated their desire to proceed at level four. The hearing continued on July 29 and concluded on September 16, 2004. The grievance became mature for decision on October 20, 2004, the due date for submission of proposed findings of fact and conclusions of law.

The following facts are derived from a preponderance of the credible evidence admitted at level four.

Findings of Fact

1. Grievant was first employed by FSC as a Residence Director on January 7, 2002. The letter of appointment advised Grievant that the position was non-classified, andthat she would serve at the will and pleasure of the President. Grievant's employment was renewed by FSC by letters dated October 1, 2002, and July 1, 2003.

2. By letter dated March 26, 2004, FSC President Daniel J. Bradley notified Grievant that her contract would not be renewed beyond June 30, 2004, the end of the fiscal year. Grievant's last day of work was May 16, 2004.

3. Shortly after Grievant assumed her duties as Residence Director, Grievant complained that

she perceived someone to have been in her apartment, or to be listening into her apartment. The area was swept for bugs, but none were found. Dr. Tim Rice, Director of Student Affairs, offered to change the lock on the door, but Grievant elected to do so herself.

4. Grievant continued to experience concerns regarding violation of her apartment. A video tape and address book both came up missing, but were later found in places Grievant would not have placed them, or would have noticed them earlier. In February 2004, she spoke with a member of the Fairmont City police force regarding safety issues.

5. During her tenure at FSU, Grievant advised Dr. Rice that students were showing pornographic tapes in the student lounge. She reported no further incidents of this activity.

6. Grievant was twice subject to sexually oriented statements from male students. She advised them she would not tolerate such comments, and experienced no further problems from either student.

7. Effective the 2004-2005 academic year, FSU no longer employs professional Residence Directors, but staffs the dormitories with student resident assistants.

Discussion

In a grievance challenging non-retention, the grievant has the burden of proving her complaint by a preponderance of the evidence. Turman v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-199 (Nov.8, 1999); Fasce v. Bd. of Directors, Docket No. 94-BOD- 1072 (Sept. 13, 1995). See Baroni v. Bd. of Directors, Docket No. 92-BOD-271 (Feb. 11, 1993). A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

At level four, Grievant revised her statement of grievance to assert that FSU failed to provide adequate safety, security, and protection allowing her to be exposed to an intimidating, hostile and offensive work environment, in violation of Title VII of the Civil Rights Act of 1964. FSU asserts that Grievant's at-will contract of employment was simply not renewed for budgetary reasons. Grievant does not dispute that she was an at-will employee, but argues that she was terminated in retaliation for her “whistle-blowing” regarding campus security. Because Grievant's argument is

tantamount to dismissal, it will be addressed first.

Grievant concedes her at-will employment status at FSU. It is well settled that an at-will employee may be terminated for good cause, bad cause, or no cause, so long as the reason does not contravene some substantial public policy. See Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Dufficy v. Div. of Military Affairs, Docket No.93-DPS-370 (June 16, 1994). See also Wilhelm v. Dep't of Tax and Revenue/Lottery Comm'n, Docket No. 94-L-038 (Sept. 30, 1994) aff'd sub nom. Wilhelm v. W. Va. Lottery, 198 W. Va. 92, 479 S.E.2d 602 (1996); Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775, 781 (1993).

However, even at-will employees are not completely at the mercy of their employer. In this regard, the West Virginia Supreme Court of Appeals has declared:

The rule that an employer has an absolute right to discharge an at-will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.

Syl., Harless, supra. Subsequently, in Birthisel v. Tri-Cities Health Serv., 188 W. Va. 371, 377, 424 S.E.2d 606, (1992), the Court identified sources of public policy as follows:

To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions. Inherent in the term "substantial public policy" is the concept that the policy will provide specific guidance to a reasonable person.

Courts have recognized such actions as submitting a claim for back wages under the Veterans Reemployment Rights Act (Mace v. Charleston Area Medical Ctr. Found., 188 W. Va. 57, 422 S.E.2d 624 (1992)); refusing to conceal alleged environmental violations committed by the employer (Bell v. Ashland Petroleum, Inc., 812 F. Supp. 639 (S.D. W. Va. 1993)); filing a workers' compensation claim (Powell v. Wyoming Cable Co., 184 W. Va. 700, 403 S.E.2d 717 (1991)); Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980)); and attempting to enforce warranty rights granted under the WestVirginia Consumer Protection and Credit Act (Reed v. Sears, Roebuck & Co., 188 W. Va. 747, 426 S.E.2d 539 (1992)), as involving substantial public policy interests. See Roberts v. Adkins, 191 W. Va. 215, 444 S.E.2d 725 (1994). Moreover, this Grievance Board has recognized

that reporting alleged violations of the West Virginia Governmental Ethics Act warrants application of a Harless-type analysis to dismissal of an at-will state employee. Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Accepting for the limited purposes of this grievance, that retaliation for reporting personal safety concerns to law enforcement agencies is contrary to substantial public policy interests, Grievant may establish a prima facie case of retaliation by showing:

(1) that she engaged in protected activity;

(2) that she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT- 088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretaliatory reasonsfor its actions. See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Applying the facts of this grievance to the legal test, Grievant has successfully proven that her employment was not renewed within a matter of weeks after reporting her concerns to the city police department, and that FSU knew of the report because the matter was referred back to campus security. Applying an inference of a retaliatory motive, Grievant has established a prima facie case of retaliation. However, FSU rebutted the presumption by offering a legitimate, nonretaliatory motive i.e., budgetary restraints, for its action. The sum of the evidence does not support a finding that FSU's reason for not rehiring Grievant was pretextual. In summary, Grievant was hired for a certain

period of time. Both parties fulfilled the terms of the contract. Grievant was not dismissed. Her employment was not terminated. FSU administrators acted appropriately within their discretion when deciding not to renew Grievant's contract.

In addition to the foregoing findings of fact and discussion it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. In a grievance challenging non-retention, the grievant has the burden of proving her complaint by a preponderance of the evidence. Turman v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-199 (Nov.8, 1999); Fasce v. Bd. of Directors,Docket No. 94-BOD-1072 (Sept. 13, 1995). See Baroni v. Bd. of Directors, Docket No. 92- BOD-271 (Feb. 11, 1993).

2. It is well settled that an at-will employee may be terminated for good cause, bad cause, or no cause, so long as the reason does not contravene some substantial public policy. See Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994).

3. To demonstrate a prima facie case of retaliation a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen v. Bd. of

Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997). 4. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

5. Grievant established a prima facie case of retaliation; however FSU offered a legitimate, nonretaliatory reason for the decision, and Grievant did not prove the reason was pretextual.

6. Grievant failed to prove that FSU did not re-employ her in retaliation for her expressing security and other concerns.

Accordingly, this grievance is **DENIED** .

Any party 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 theBoard with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: NOVEMBER 16, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE