KAREN P. ADDAIR,

Grievant,

v. DOCKET NO. 03-HHR-147

DEPARTMENT OF HEALTH AND HUMAN

RESOURCES/WELCH COMMUNITY HOSPITAL,

Respondent.

DECISION

Grievant filed this grievance against her employer, Welch Community Hospital, (Respondent) on May 29, 2003, stating:

> I am under several physicians care [due to] work-related injuries. I was terminated from my nursing supervisor's position I had been at for approx. 17 years. I feel that I have been discriminated against [due to] physical impairments, I received on the job. I also feel that my dismissal was retaliation for meeting with DHHR (Vicky Partner) this past fall on behalf of the staff on problems @ WCH. I did not and could not report to full active duties as demanded by Walt Garrett. I had not been released from my physician's care. My attorney had written Mr. Garrett several letters advising him that he was my appointed representation. I also emailed Mr. Garrett & informed him that I had not been released. I am awaiting rehab. and been in physical therapy for >15 weeks and under the care of chiropractic >20 weeks. I am making every effort to [be] rehabilitated. I have been discriminated against for my physical disability and dismissal was made also because “your TTD benefits were closed.” My benefits are pending and according to WV Code Chpt. 23, Art. 4 employee rights have been violated [due to] my compensable injury in which I am eligible for TTD benefits. Thanks.

Grievant did not include a statement of relief sought on her original grievance form, but according to a separate form filed by her attorney on July 10, 2003, she requests “Thatshe be reinstated to her position as soon as the doctors who are treating her for work- related injuries have released her to return to work.”

A level four hearing was held in the Grievance Board's Beckley office on September 8 and November 18, 2003. Grievant was represented by counsel, Randal W. Roahrig, and Respondent was represented by counsel, Robert Miller, Assistant Attorney General. This matter became mature for decision on January 21, 2004, the deadline for filing of the parties' proposed findings of fact and

conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant was employed by Respondent as a Licensed Practical Nurse (LPN) in 1985, became a Registered Nurse (RN) in 1992, and was promoted to Nurse Supervisor (See footnote 1) in 1995. She always had good evaluations and her value as an employee is undisputed.

2. On February 26, 2002, Grievant injured herself on the job and filed claims with the Workers' Compensation Commission (WCC), for which she began receiving temporary total disability (TTD) benefits for injuries to her knee and back. Beginning July 16, 2002, Grievant was placed on a medical leave of absence without pay.

3. On March 26, 2003, the WCC sent both Grievant and Respondent a notice captioned, "PLEASE READ CAREFULLY - SUSPENSION DECISION." This notice stated, in part, "By letter dated 02/10/03, you were given 30 days to provide medical informationto continue payment of your temporary total disability benefits. After again reviewing your claim, it appears there is insufficient information to pay additional temporary total disability benefits and your claim is now closed." The notice further stated, "Any party to this claim may protest this decision within 30 days from the date you receive this letter."

4. Upon receipt of the suspension decision, WCH Human Resources Director Kathy Addair (See footnote 2) drafted a letter for the signature of WCH Chief Executive Officer Walter J. Garrett, dated April 8, 2003, which letter stated in part:

> The purpose of this letter is to learn of your intentions regarding your continued employment with the WV Department of Health and Human Resources at Welch Community Hospital. You were approved to be absent from work while on a leave of absence without pay for a work related injury from July 16, 2002 to the present date. Welch Community Hospital has been notified via letter from Workers' Compensation that your claim for temporary total disability benefits has been suspended because you failed to cooperate with you participation in a rehabilitation program. It is, therefore, our expectation that you will return to work on May 1, 2003 with a physician's statement releasing you to return to full duty employment without restrictions.

. . .

> If you fail to return to work on May 1, 2003, I will conclude that you have abandoned your position. In such case this letter will serve as a fifteen (15) day notification of your dismissal from the Department of Health and Human Resources, effective April 25, 2003.

Respondent's Exhibit No. 3.

5. Grievant's attorney responded on her behalf by letter dated April 11, 2003. He stated unequivocally that Grievant had not failed to cooperate with her rehabilitation, (See footnote 3) was still pursuing her TTD claim, and that she "has not and will not abandon her position." He also informed Respondent that Grievant "is still being treated by an orthopedic specialist and is still under Workers' Compensation care." Respondent's Exhibit No. 4.

6. On May 22, 2003, Respondent informed Grievant by letter that she had been terminated effective May 1, 2003, because she had failed to report for duty on May 1. Respondent's Exhibit No. 5.

DISCUSSION

As termination is a disciplinary action, Respondent bears the burden of proof, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. Respondent's position is that it received a notice from the Workers' Compensation Commission (WCC) indicating that Grievant's TTD claim was closed and she did not return to work, thereby effectively abandoning her job. Grievant claims Respondent illegally discriminated against her because of her TTD claim by firing her while she was eligible to receive Workers' Compensation benefits.

Normally, discrimination claims in grievances are analyzed under the definition of "discrimination" contained in W. Va. Code § 29-6A-2(d), which states, "'Discrimination' means any differences in the

treatment of employees unless such differences are relatedto the actual job responsibilities of the employees or agreed to in writing by the employees." However, two other sections of the W. Va. Code more accurately define an employer's obligations to an employee in matters such as these. First, discrimination is prohibited under § 23-5A-1: "No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter." Second, "discrimination" in that context is defined by § 23-5A-3, which states in part:

> (a) It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

Although Grievant presented voluminous evidence of her condition and the dealings with WCC that led up to the issuance of her claim-closure letter, the resolution of this grievance turns on one simple question - whether Grievant was eligible to receive TTD benefits at the time she was dismissed. Respondent asserts that, as far as it knew, Grievant was not eligible to receive TTD benefits at the time of her termination, because it had received official communication from the WCC indicating Grievant's claim was closed. Grievant counters this assertion through her argument that the closure of her claim was appealable, and by presenting evidence that suggests she may win that appeal. Grievant argues that, as long as the WCC decision to close her claim is appealable, she is "eligible to receive" benefits and may not be fired. That phrase, "or is eligible to receive" benefits contained in W. Va. Code § 23-5A-3, is somewhat open to interpretation, but unfortunately has not been clarified to a great extent by the W. Va. Supreme Court of Appeals. That court has found on at least one occasion that an employee need not have even filed a claim in order to be protected by the prohibition of termination:

> We recognize, as have other courts, that a compensation claim need not actually be filed so long as the employee suffered a work-related injury and was attempting to file a claim. Thus, an employer can still violate the statute by firing the employee before his claim is filed. *See* Cerracchio v. Alden Leeds, Inc., 223 N.J.Super. 435, 538 A.2d 1292 (1988); Thompson v. Kinro, Inc., 37 Ohio App.3d 175, 525 N.E.2d 528 (1987); Buckner v. General Motors Corp., [760 P.2d 803 (Okla. 1988)].

St. Peter v. Ampak-Division of Gatewood Prods., Inc., 199 W. Va. 365, 484 S.E.2d 481 (1997).

The court has, however, found that:

> A workers' compensation claimant who is protesting the closure of her claim for temporary total disability benefits and/or the denial of additional temporary total disability benefits does not come within the meaning of the terms "is claiming" found in West Virginia Code [§] 23-5A-2 (1994). Accordingly, an employer who ceases to pay the health insurance premiums for a claimant who is protesting or appealing the closure or denial of temporary total disability benefits does not commit an act of discrimination within the legislative intent of West Virginia Code [§] 23-5A-2.

Syl. Pt. 6, Rollins v. Mason County Bd. of Educ., 200 W. Va. 386, 489 S.E.2d 768 (1997). (See footnote 4) The Grievance Board has previously determined that this decision provides elucidation of the quandary in which the legislature has left employers by failing to clearly define eligibility to receive TTD benefits. Specifically, it has been held that

> The same logic applies here. Although Grievant appealed the decision to discontinue his temporary benefits, all legal determinations so far have found him to not be entitled, or "eligible" for such benefits. As with insurance coverage, it is logical that the legislature did not intend the "is eligible" for temporary benefits language to require employers to retain employees who have been declared no longer entitled to such temporary benefits. At the time of his discharge, Grievant had been declared not to be entitled to further benefits, which determination has not yet been overturned. Accordingly, no violation of the statute occurred.

Baire v. Div. of Corrections, Docket No. 97-CORR-129 (March 11, 1998).

As a general rule, this Grievance Board adheres to the doctrine of *stare decisis* *(See footnote 5)* in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. Shaffer v. Kanawha County Bd. of Educ., Docket No. 00-20-085 (June 12, 2000); Belcher v. W. Va. Dep't of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).

Grievant points out that the Court, in Rollins, reasoned that it was "significant that the Legislature failed to include in West Virginia Code § 23-5A-2, any language referencing the objection, protest, or appellate stage of a TTD claim. Had the Legislature intended to extend the protection of health insurance coverage through this procedural stage of a claim, logic suggests that such language would have followed the 'is receiving benefits' phrase of West Virginia Code § 23-5A-2." Rollins, *supra* at 773. West Virginia Code § 23- 5A-3 does have language following that same phrase: "or is eligible to receive." However, the effect of extending protection during the appeal phase of the process is identical in both cases. In Rollins, the court fond it unreasonable to extend insurance benefits for an undetermined amount of time, given that the appeal process could drag on for unreasonably long periods. (See footnote 6) The same could happen to an employer holding a job position open for an absent employee, with more pronounced consequences. Grievant's argument is insufficient to establish that the holding in Baire was clearly in error.

Even if Grievant has failed to establish that termination while appealing closure of a TTD claim is *per se* discrimination, she may still establish that she was discriminated against because of her Worker's Compensation Claim. “In order to make a prima facie case of discrimination under W. Va. Code, 23-5A-1, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W. Va. Code, 23-1-1, et seq.; and (3) the filing of a workers'compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.” Syl. Pt. 1, Powell v. Wyoming Cablevision, Inc., 184 W. Va. 700, 403 S.E.2d 717 (1991). While Grievant did sustain an on-the-job injury and institute Workers' Compensation proceedings, she did not establish a nexus between her termination and the filing of benefits. To the contrary, the closure of her claim and her subsequent failure to return to work were proven to be the triggering factors in Respondent's decision to dismiss Grievant from employment.

In order to establish a claim of discrimination under W. Va. Code § 29-6A-2(d), an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, employees must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that they have, to their detriment, been treated by their 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 Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

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

Grievant presented evidence of other employees of WCH who had been off on extended medical leaves of absence without being terminated. However, neither employee was similarly situated. Karen Wingo had not sustained a work-related injury and was not a Workers' Compensation claimant. In addition, she had been released by her doctor to return to work without restrictions. Valerie Blankenship did have a Workers' Compensation claim, but was released to return to work with restrictions. Grievant was never released to return to work. Having failed to compare herself to any similarly-situated employees,Grievant failed to establish a *prima facie* discrimination claim under W. Va. Code § 29-6A- 2(d).

Grievant contends Respondent's response to the suspension letter was not only illegal under the Workers' Compensation statutes, but also evidenced reprisal for her actions in complaining about the facility. To demonstrate a prima facie case of reprisal as defined by W. Va. Code § 29-6A-2(p), a grievant must establish by a preponderance of the evidence the following elements:

a) that she engaged in a protected activity, e.g., filing or participating in a grievance;

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

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

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

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

Jordan v. Dep't of Trans./Div. of Highways, Docket No. 03-DOH-057 (Sep. 15, 2003).

Grievant presented very little evidence to support this allegation, other than her testimony that she had sent a letter to the governor complaining of conditions at the hospital, and that she had met with DHHR officials in Charleston. Nevertheless, she did establish that she engaged in a protected activity and was subsequently treated in an adverse manner. Other than her belief the two events were connected, though, she failed to establish any causal connection between the two and did not provide enough information to support an inference they were related. In fact, her argument that her firingwas discrimination based on her Workers' Compensation claim directly contradicts the notion that it was retaliation for a prior complaint she made.

Grievant also argued her termination violated the West Virginia Human Rights Act, W. Va. Code § 5-11-1 *et seq.* This argument will not be addressed, because, "The Grievance Board does not have subject matter jurisdiction to determine liability for claims that arise under the Human Rights Act. [Citations omitted.]" Simmons v. Bureau of Employment Programs, Docket No. 97-BEP-531 (Nov. 23. 1998).

The following conclusions of law support the decision reached herein:

CONCLUSIONS OF LAW

1. Respondent bears the burden of proving it properly terminated Grievant, and must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H- 88-005 (Dec. 6, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. Discrimination against Workers' Compensation claimants is prohibited under W. Va. Code § 23-5A-1: "No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits

under this chapter." Second, "discrimination" in that context is defined by W. Va. Code § 23-5A-3, which states in part:

> (a) It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

3. This Grievance Board adheres to the doctrine of *stare decisis* in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. Shaffer v. Kanawha County Bd. of Educ., Docket No. 00-20- 085 (June 12, 2000); Belcher v. W. Va. Dep't of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).

4. "The Grievance Board does not have subject matter jurisdiction to determine liability for claims that arise under the Human Rights Act. Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); See Bowman v. W. Va. Educational Broadcasting Authority, Docket No. 96-EBA-464 (July 3, 1997); Prince v. Bd. of Trustees, Docket No. 97-BOT-276(Nov. 5, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1997); Currey v. Dept. of Transp., Docket No. 95-DOH-579 (Aug. 6, 1996)." Simmons v. Bureau of Employment Programs, Docket No. 97-BEP-531 (Nov. 23. 1998).

5. “In order to make a prima facie case of discrimination under W. Va. Code, 23-5A-1, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W. Va. Code, 23-1-1, et seq.; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise

discriminate against the employee." Syl. Pt. 1, Powell v. Wyoming Cablevision, Inc., 184 W. Va. 700, 403 S.E.2d 717 (1991).

6. In order to establish a claim of discrimination under W. Va. Code § 29-6A- 2(d), an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, employees must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their 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 Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

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

7. To demonstrate a prima facie case of reprisal as defined by W. Va. Code § 29-6A-2(p), a grievant must establish by a preponderance of the evidence the following elements:

> a) that she engaged in a protected activity, e.g., filing or participating in a grievance;
>
> b) that she was subsequently treated in an adverse manner by the employer or an agent;
>
> c) that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;
>
> d) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and
>
> e) that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Jordan v. Dep't of Trans./Div. of Highways, Docket No. 03-DOH-057 (Sep. 15, 2003). *See* W. Va. Dept. of Natural Resources v. Myers, 443 S.E.2d 229 (W. Va. 1994); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). *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).

8. Grievant did not establish a *prima facie* discrimination or reprisal claim.

For the foregoing reasons, this grievance is hereby **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, and 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 appealingparty 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.

Date: February 2, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant was classified as a Nurse 3.

Footnote: 2

Ms. Addair is not related to Grievant. For purposes of clarity, Kathy Addair will be referred to herein as Ms. Addair, and Karen Addair will be referred to as Grievant.

Footnote: 3

Ms. Addair admitted at the level four hearing that this allegation had been included in the April 8, 2003, letter due to

an error on her part.

Footnote: 4

W. Va. Code § 23-5A-2 states, in part: "Any employer who has provided any type of medical insurance for an employee or his dependents by paying premiums, in whole or in part, on an individual or group policy shall not cancel, decrease his participation on behalf of the employee or his dependents, or cause coverage provided to be decreased during the entire period for which that employee during the continuance of the employer-employee relationship is claiming or is receiving benefits under this chapter for a temporary disability. If the medical insurance policy requires a contribution by the employee, that employee must continue to make the contribution required, to the extent the insurance contract does not provide for a waiver of the premium." (Emphasis supplied.)

Footnote: 5

"Stare decisis" literally translates as "to stand by decided matters". The phrase "stare decisis" is itself an abbreviation of the Latin phrase "stare decisis et non quieta movere" which translates as "to stand by decisions and not to disturb settled matters".

Footnote: 6

In Grievant's case, as of the date of the second hearing, she had not been receiving TTD benefits since February, 2003.