JEANNETTE L. KITCHEN,

Grievant,

v. DOCKET NO. 05-HHR-175

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU FOR

HEALTH AND HEALTH FACILITIES,

Respondent.

DECISION

Grievant filed this grievance on May 23, 2005, challenging her dismissal for job abandonment after she failed to return to work after a medical leave of absence. Grievant contends that dismissal is retaliation for a disagreement her husband had with Respondent, and is a continuation of harassment she has endured since then, which created a “semi-hostile” work environment. She seeks to be reinstated to her position “or severance pay depending on grievance decision.”

A level four hearing was held in the Grievance Board's office on September 1, 2005. Grievant was represented by her husband, Daniel J. Kitchen, and Respondent was represented by counsel, Landon R. Brown, Senior Assistant Attorney General. The matter became mature for decision on September 30, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant contends that she did not abandon her job, but instead was obstructed by Respondent in her attempts to report her medical condition and extend her leave of absence, and that her dismissal was in actuality retaliation for the conduct of her husband, who is not employed by Respondent. She also maintains she was subject to a hostile work environment, although it is unclear how she views that contention as justification for her alleged conduct. Conversely, Respondent's position is that Grievant did not return to work after the expiration of an approved medical leave of absence, was dilatory in filing proper paperwork although she was provided the instruction and means to do so, knew the consequences of her failure to act, and that it had no duty to grant additional unpaid leave.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant was employed by Respondent as a Programmer in its Bureau for Behavioral Health and Health Facilities, Data Integration and Security Division. She had been employed with Respondent since 1996, and had been a Programmer since 2003.

2. On May 16, 2005, Grievant was notified by Acting Commissioner Kristi Pritt that she was dismissed from her position, effective June 8, 2005, “as a result of your abandonment of your position.”

3. On or about February 24, 2005, Grievant suffered a non-work-related injury to her knee, and called the office to let them know she would be off that day. She calledoff the next day as well, and on February 28, she called to say she would be off at least three more days.

4. At the time she first called off work, Grievant had a total leave balance of 4.08 hours. Although she did not request it, after the 4.08 hours was used, she was placed on an approved medical leave of absence.

5. On March 2, 2005, Grievant had a doctor's appointment, and then called in to say she would be off work at least a week. On March 9, March 16, and March 23, she returned to the doctor and each time called in to say she would be off for another week. After an appointment on April 6, 2005, she emailed her supervisor, Faith Stuart, to say she would be off at least to the end of April or first of May.

6. Francis Bishop, Respondent's Human Resources Coordinator, is responsible for processing personnel transactions, but has no authority to grant or deny leave. During the time Grievant was off, she communicated with Grievant on the phone and by email, explained to her the required paperwork. On March 3 and March 15, 2005, Ms. Bishop sent Grievant an Application for Leave Without Pay form and a Physician's Statement form by email, at Grievant's request. Ms. Bishop also sent Grievant the forms by postal mail.

7. On or about March 21, 2005, Grievant submitted an Application for Leave Without Pay, but it only covered the period February 25 to February 28, 2005. Included on this Application was the typed statement, above Grievant's signature, stating “I understand that if I do not return at the expiration of an approved leave of absence, my employment may be terminated, unless an extension

has been approved in advance." Grievant also submitted the required Physician's Statement. Ms. Stuart approved the leave for that time period. 8. On April 19, 2005, Grievant was placed on unauthorized leave status by Ms. Stuart, and was sent a letter to that effect. The letter specified and included the forms Grievant needed to complete and return in order to have her approved leave extended.

9. In addition to the leave forms, the April 19 letter included a draft Improvement Plan that was to be implemented when Grievant returned, addressing her leave usage. The plan detailed Grievant's past leave use, noting that during January, February and March, Grievant had gone off-payroll three times for a total of 223.47 hours, due to overuse of paid leave.

10. Grievant had previously been granted a medical leave of absence, in 2003. At that time, she completed and submitted all required forms, and Employee Information Director Jeanne Roberts sent her a letter explaining and quoting the rules for leaves of absence, including rule requiring an employee to return at the end of approved leave, or be subject to dismissal. The letter included a copy of Division of Personnel Rule 14.8.

11. Grievant never submitted a leave request form or physician's statement covering the period of her unauthorized absence.

12. In April and May, 2005, Grievant claimed her post office box was closed and she was unable to receive mail because she had not paid the mailbox fee, and neither she nor her husband could get to the post office before it closed to pay the fee. During this time she received no written correspondence from Respondent, although she was in contact by telephone and email.

13. Grievant's 2003 leave of absence was surrounded by an almost identical set of facts, with an absence, extension, trouble getting forms and even a closed post office box. 14. On May 16, 2005, Grievant called to say she had just received the April 19 letter regarding unauthorized leave status. That same day, Acting Commissioner Kristi Pritt mailed Grievant a letter advising her that she was being dismissed "as a result of your abandonment of your position." The letter noted Grievant had requested leave through April 6, 2005, and did not return to work thereafter and did not request an extension of her leave. Grievant faxed in a leave extension request and physician's statement that same day.

15. On May 20, 2005, Ms. Pritt sent Grievant a follow-up letter with a clarified explanation of the reasons for the dismissal decision. The second letter noted that after the first letter had been

sent, Grievant did submit a request for an extension and physician's statement, but that request for an extension was denied because Division of Personnel Administrative Rule section 14.8(d)(3) requires a request for an extension to be made in advance.

16. All of these events took place during a time when Grievant's husband was entangled in an imbroglio with Respondent involving a job for which he was not selected. Mr. Kitchen's dispute began with an accusation that in 2002 Grievant had given him potential access to confidential computer records, so that he could help her with a programming assignment.

17. Almost the entire administration of DHHR and Grievant's office has changed since the incident in 2002, and none of the people involved in that incident are involved with Grievant's employment. In 2003, Ms. Stuart did fire Mr. Kitchen from a contract position working on special project, ostensibly because he wore an old state employee identification badge to a meeting with other contractors, even though he was not, at thetime, a state employee. Mr. Kitchen contends another reason for the action is because he told Ms. Stuart she was running the program badly.

18. Grievant cites as examples of her having to work in an hostile work environment such things as Ms. Stuart repeatedly asking her for the same data report, instructing her not to work at home while she was off on unpaid leave, being inconsistent in setting work priorities, being unappreciative of jobs Grievant had done, and not communicating with Grievant about Mr. Kitchen's attempts at getting employment with one of Ms. Stuart's special projects.

Discussion

The burden of proof in disciplinary matters rests with the employer, 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). Here, Respondent must prove its charge that Grievant abandoned her job by failing to return after the expiration of her approved leave of absence. However, Grievant's defenses of retaliation and hostile work environment will be addressed first, even though Grievant made no argument that either situation excuses her admitted failure to obtain an approved leave of absence for most of the period she was off work, and never filed a grievance during her employment term complaining of either situation.

Grievant claims her dismissal was retaliation for a disagreement between her employer and her

husband. “Retaliation” is prohibited by W. Va. Code § 29-6A-2(p), which incorporates it in the definition of prohibited “reprisal” thusly: “the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievanceprocedure either for an alleged injury itself or any lawful attempt to redress it.” According to Grievance Board rulings, (See footnote 1) in order to demonstrate a *prima facie* case of reprisal, a grievant must establish by a preponderance of the evidence

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

that he was subsequently treated in an adverse manner by the employer or an agent;

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

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

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

Grievant makes no argument that she engaged in a protected activity, and there is no evidence from which to infer that Grievant's dismissal was a result of any other circumstance than her failure to comply with the requirements for an approved leave of absence. Even if Grievant's argument were to be taken as a complaint that her alleged “semi-hostile work environment” is the adverse action, there is no evidence to connect that situation with any protected activity.

As for the hostile work environment claim, it is wholly unsupported by the evidence. Grievant was subjected to no more rigorous demands in her work than may be expected in any job. “To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment.” (See footnote 2) Asrelated to her absence situation, Respondent showed remarkable patience and restraint, only taking action against Grievant's unauthorized absence after a considerable amount of fruitless effort has been expended trying to get Grievant in compliance with the rules.

Respondent, on the other hand, has more than met its burden of proof that Grievant did abandon

her position by failing to return to work after an approved leave of absence, and by failing to obtain an approved extension of that leave in advance of its expiration. The Division of Personnel's Administrative Rule addresses this situation. Section 14.8(d) allows an injured (or otherwise disabled) employee to be placed on an unpaid medical leave of absence, so long as a physician's statement justifying continued leave is submitted every thirty days and the estimated period of disability is defined. Failure of an employee to report to work at the end of such a leave of absence or to provide, in advance, justification for continued leave is grounds for dismissal. (See footnote 3) In addition, section 14.8(a), which discusses leaves of absence, specifies that the employer may grant an extension to a leave of absence “at his or her discretion based on the agency's personnel needs.” It is significant that the Rule is written so that the discretion depends on the needs of the agency and not of the employee. This section of the Rule even repeats that “Approval of personal leave is discretionary with the appointing authority.” (See footnote 4)

Grievant's contentions that she did not have access to proper forms, did not understand the rules, and had trouble getting her mail are viewed by the undersigned with great skepticism. Not only had Grievant been through this process before, she had beentold in person by mail, email and by phone, what forms were needed and when they must be submitted. As Respondent points out, an almost identical set of facts, down to the closed post office box, surrounded her previous leave of absence situation. Although, in this instance, Grievant's testimony that she could not get her postal mail was unrebutted by contrary evidence and was confirmed by the testimony of her husband, the prior analog makes it suspicious. However, even if taken at full face value, that circumstance would not change the outcome in this matter, because none of Grievant's obligations were dependent on her receipt of postal mail.

The following conclusions of law support this discussion:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, 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 (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 & Human Res.*,

Docket No. 92-HHR-486 (1993).

2. "[D]ismissal for failure to return to work after a medical leave of absence is a disciplinary dismissal. W. Va. Code § 29-6A-6. *See Clark v. W. Va. Dep't of Military Affairs & Public Safety*, Docket No. 99-DJS-428 (Nov. 30, 1999)." *Hayden v. Dep't of Health and Human Res.*, Docket No. 98-HHR-133 (1999). 3. 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:

> that he engaged in a protected activity, e.g., filing or participating in a grievance;
>
> that he was subsequently treated in an adverse manner by the employer or an agent;
>
> that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;
>
> that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and
>
> 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 (2003). *See W. Va. Dep't of Natural Res. v. Myers*, 191 W. Va. 72, 443 S.E.2d 229 (1994); *Conner v. Barbour County Bd. of Educ.,* Docket Nos. 93-01-543/544 (1995); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (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 (1997).

4. "To create a hostile work environment, inappropriate conduct must be sufficiently severe or pervasive to alter the conditions of an employee's employment. *See Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)." *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998).

5. Grievant did not prove her dismissal was retaliatory, nor that she was subject to a hostile work environment. Even if she had proven the allegations of retaliation andhostile work environment,

those would have been grounds for a grievance, but would not have excused her failure to return to work.

6. Section 14.8(d)(3) of the Administrative Rule for the Division of Personnel allows an injured employee to be placed on an unpaid medical leave of absence, so long as a physician's statement justifying continued leave is submitted every thirty days, and the estimated period of disability is defined. Failure of an employee to report to work at the end of such a leave of absence or to provide proper justification for continued leave is grounds for dismissal. *Hayden, supra*. (See footnote 5)

7. "Personal leave is granted at the discretion of the employer, and extensions of leave given for a specific amount of time may be given, at the discretion of the employer based on the needs of the agency. DOP Administrative Rule § 14.8(a)." *Harbert v. Dep't of Revenue*, Docket No. 05-TD-027 (May 24, 2005).

8. Respondent met its burden of proving it justifiably dismissed Grievant when she failed to return to work after a leave of absence and failed to obtain an approved extension of her leave.

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 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 andshould 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.

October 18, 2005

_____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

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

Footnote: 2

Napier v. Stratton, 204 W. Va. 415, 513 S.E.2d 463, 467 (1998).

Footnote: 3

Hayden v. Dep't of Health and Human Res., Docket No. 98-HHR-133 (1999).

Footnote: 4

Harbert v. Dep't of Revenue, Docket No. 05-TD-027 (May 24, 2005).

Footnote: 5

The Hayden decision references section 15.08 of the administrative rule; that section has since been replaced by section 14.8(d)(3), which is essentially identical.