CYNTHIA HAIRSTON,

Grievant,

v. Docket No. 05-HHR-247

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/PINECREST HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Cynthia Hairston, is employed by Department of Health and Human Resources ("HHR") as a Ward Clerk at Pinecrest Hospital. On May 16, 2005, she filed this grievance asserting: 1) Her mid-point evaluation was improperly done; and 2) she has been subjected to harassment, discrimination and retaliation. The relief sought is for her first evaluation to be reinstated and all counseling sessions be removed from her record. (See footnote 1)

This grievance was denied at Levels I, II, and III, and Grievant appealed to Level IV on July 19, 2005. A Level IV hearing was held on September 22, 2005. This case became mature for decision on November 14, 2005, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant asserts that nothing should have been added to her mid-point evaluation after she saw it, and to do so was an act of harassment, discrimination, and retaliation fora letter she wrote to the Beckley Post Herald newspaper complaining about the treatment of employees at Pinecrest Hospital. She also asserts she is not guilty of leave abuse and the two counseling sessions she received were unwarranted. Grievant also complained about a racial comment made a year ago.

Respondent asserts Grievant should not have seen the evaluation until after it was checked by her supervisor's supervisor, Grievant has not established she was subjected to harassment, discrimination, and/or retaliation, and pursuant to the Absence Control Policy,

Grievant had exhibited a pattern of leave abuse. Respondent also notes the parties involved in making the racial remark were disciplined back when it happened, and Grievant was informed of this action.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a Ward Clerk at Pinecrest Hospital. She has had some medical problems and missed several days of work.

2. On January 20, 2005, Grievant was given a copy of the Absence Control Policy because HHR believed Grievant might be demonstrating a pattern of leave abuse. Grievant signed indicating she had received and read the policy, but added a statementindicating that due to her medical conditions and numerous doctors' appointments she would "not be able to comply with certain provisions in this policy." (See footnote 3) Grt. No. 3 at Level IV.

3. The Absence Control Policy is designed to ensure there is adequate staff to care for the patients within the Agency's control and protection and to inform employees what is required to avoid leave abuse. Leave abuse may exist when unplanned sick or annual leave averages eight hours a month for a three-month period. Particular attention is paid to the "linking" of unscheduled absences with a scheduled day off. Resp. No. 2 at Level IV.

4. During January, February, March, and April of 2005, Grievant had an unscheduled absence linked to a scheduled day off each month, and she averaged more than eight hours of unscheduled absences a month.

5. On April 4, 2005, Elsie McCray, Director of Nursing, reminded all evaluators that evaluations must be reviewed by the next level supervisor before they were given to the employee. Resp. No. 1 at Level III.

6. CEO Angela Booker, after reviewing the leave records, noted Grievant's leave fell within the parameters for leave abuse. She directed Sylvia Clay, Unit Director, on April 20, 2005, to give Grievant a verbal counseling on this issue. Ms. Clay did not conduct this counseling session in a timely manner due to scheduling problems.

7. On or about April 21, 2005, Grievant wrote a letter to the newspaper expressing her

belief that there was a hostile work environment at Pinecrest Hospital, andGrievant identified an example of inappropriate racial language from a year ago. (See footnote 4) Respondent was aware of this letter.

8. On or about April 29, 2005, Grievant's direct supervisor, Laura Campbell, met with Grievant to review her mid-point evaluation. Contrary to policy, Ms. Campbell did not have this evaluation reviewed by her supervisor, Ms. Clay, before it was seen by Grievant. Ms. Campbell informed Grievant she could not sign the evaluation until it had been reviewed by Ms. Clay.

9. Ms. Campbell was aware that her supervisor should review this evaluation before Grievant saw it, and she was disciplined for her failure to follow this directive.

10. When Ms. Clay saw the evaluation, she saw Grievant's problem about leave abuse was not noted on the evaluation. Ms. Clay directed Ms. Campbell to add a sentence stating Grievant had had seven absences in last three months, and there was a need to monitor her attendance to avoid a violation of the leave abuse policy. (See footnote 5)

11. On May 5, 2005, Ms. Campbell gave Grievant the redone evaluation to review. Grievant was understandably upset by the change and refused to sign the evaluation.

12. On May 10, 2005, Grievant took an unscheduled day of sick leave. On May 11, 2005, Ms. Clay met with Grievant, and told her she should have received a counseling session in April, but since this had not occurred, she was to receive two counselingsessions on this day for leave abuse. Both counseling sessions were conducted at the same time. (See footnote 6)

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. (See footnote 7) Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 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 (May 17, 1993).

I. Evaluation

Grievant has not established any violation of the evaluation process that would require Respondent to give her the first evaluation she was shown by Ms. Campbell contrary to Policy. If Ms. Campbell had followed the process properly, Grievant would never have seen the first evaluation, and the addition would have been made without herknowledge. The purpose of the prior review process with the supervisor is to ensure any issues that need to be shared with the employee are communicated, and the evaluation adequately informs an employee of any potential problems that could affect the final evaluation.

II. Counseling Sessions

Following the guidelines set forth in the Absence Control Policy, Grievant's use of leave demonstrated a pattern leave abuse. Her use of unscheduled leave was greater than eight hours a month, and some of this leave was linked to days off. A counseling session is non-disciplinary and is used to discuss a potential problem before it requires utilizing the progressive discipline process. However, it is clear Ms. Clay should have done the first counseling session in a timely manner, and this failure should not cause Grievant to receive two counseling sessions on the same day. Respondent is directed to change the counseling form to indicate Grievant only received one counseling session.

III. Harassment, discrimination, and retaliation

A. Harassment

Grievant argues HHR's treatment of her constitutes a pattern of harassment. W. Va. Code §29-2(n) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. Sellers v. Wetzel County Bd. of Educ., Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). Similarly, repeated comments of a

sexual nature by a supervisor have been found to constitute harassment. Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997). See Tibbs v. Hancock County Bd. of Educ., Docket No. 98-15-016 (June 16, 1998). A single incident does not constitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998). Johnson v. Dep't of Health and Human Res., Docket No. 98-HHR-302 (Mar. 18, 1999).

Grievant has not demonstrated she has been subjected to harassment. She has not shown a pattern of repeated and continual treatment, or that she has been treated in a manner that is contrary to law. While it is true Grievant received two counseling sessions discussing leave issues; this fact alone does not constitute harassment. Employers are expected to inform employees about their problems in the work area, and employees are entitled to receive fair and honest feedback. This feedback may not always be positive. Just because Grievant did not like the information she received, does not mean it was inappropriate or constitutes harassment. Rider v. Bd. of Trustees/Marshall Univer., Docket No. 99-BOT-348 (Apr. 7, 2000). The counseling Grievant received was proper and warranted.

B. Discrimination

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." Administrative notice is taken that the West Virginia Supreme Court of Appeals has revised the legal test for discrimination claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 8)

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant did not meet her burden of proof and demonstrate she was treated differently than other similarly situated employees. Grievant did not identify any other employees with a similar pattern of leave abuse who were not counseled or identify otheremployees who were allowed to retain an inappropriately processed evaluation. Accordingly, no discrimination was established.

C. Retaliation

Grievant has alleged her mid-point evaluation and two counseling sessions were due to the letter she wrote to the newspaper. Reprisal is defined in W. Va. Code § 29-6A- 2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

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

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). 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.

Ms. Booker directed Ms. Clay to counsel Grievant on April 20, 2005. See Grt. No. 2 at Level IV. Grievant clearly met the guidelines for a pattern of leave abuse. Ms. Clay did not counsel Grievant when she was told to do so. Grievant's letter was published on April 21, 2005. Grievant incorrectly saw the mid-point evaluation on April 29, and received the correct copy of her mid-point evaluation on May 5, 2005. Grievant took unscheduled sick leave on May 10, 2005, and received counseling about a pattern of leave abuse on May 11, 2005. While these events occurred in quick succession, and it is true HHR was aware of Grievant's negative letter, the events that generated the comment on the mid- point evaluation and the counseling sessions occurred in January, February, March, and April before Grievant wrote her letter. Accordingly, no retaliation has been proven.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug.19, 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 (May 17, 1993).

2. W. Va. Code §29-2(n) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

3. What constitutes harassment varies based upon the factual situation in each individual grievance. Sellers v. Wetzel County Bd. of Educ., Docket No. 97-52-183 (Sept. 30, 1997).

4. "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96-BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999).

5. A single incident does not constitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998). Johnson v. Dep't of Health and Human Res., Docket No. 98-HHR-302 (Mar. 18, 1999).

6. Grievant has not demonstrated she has been subjected to harassment. She has not shown a pattern of repeated and continual treatment, or that she has been treated in a manner that is contrary to law.

7. Employers are expected to inform employees about their problems in the work area, and employees are entitled to receive fair and honest feedback. Just becausea grievant did not like the information she received, does not mean it was inappropriate or constitutes harassment. Rider v. Bd. of Trustees/Marshall Univer., Docket No. 99-BOT- 348 (Apr. 7, 2000).

8. The counseling session Grievant received was proper and warranted, but as HHR failed to conduct the first planned session in a timely manner, the counseling Grievant received should be counted only as one.

9. 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."

10. A grievant must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

11. Grievant did not meet her burden of proof and demonstrate she was treated differently than other similarly situated employees.

12. Reprisal is defined in W. Va. Code § 29-6A-2(p) as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." 13. To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

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

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).

14. 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.

15. While the events complained of occurred in quick succession, the events that generated the comment on the mid-point evaluation and the counseling sessions occurredin January, February, March, and April before Grievant wrote her letter. Accordingly, no retaliation has been proven.

Accordingly, this grievance is GRANTED, in part, and DENIED, in part. HHR is ORDERED to correct the "Communication Verification Form" to reflect that Grievant only received one counseling session.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Date: February 17, 2006

Footnote: 1

Grievant also request $3200.00 for "mental anguish and distress." This type of relief is not available through the Grievance Board. See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-007 (June 30, 1997).

Footnote: 2

Grievant represented herself, and HHR was represented by Jennifer Akers, Assistant Attorney General.

Footnote: 3

It is noted the effective date of the most current policy is February 2005, but some form of this policy has been in effect for an extended period. See Fox v. Dep't of Health and Human Res., Docket No. 04-HHR-178 (July 30, 2004).

Footnote: 4

As this incident occurred a year ago, and the two employees were disciplined by Ms. Booker at that time for using inappropriate and racial incorrect language, this issue will not be addressed further.

Footnote: 5

It appears Ms. Clay did not know Grievant had already seen the mid-point evaluation, but this fact is not clearly established in the record.

Footnote: 6

If the first counseling session had been conducted in a timely manner, it is likely Grievant would have received the first step in the progressive discipline process, a verbal warning, on this next unscheduled absence.

Footnote: 7

A review of HHR's progressive discipline policy indicates the first step in the discipline process is a verbal warning. Accordingly, a counseling session is not disciplinary.

Footnote: 8

In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).