

11-0629

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

Appellant,

v.

CIVIL ACTION NO. 09-AA-7

MICHELLE L. FALQUERO,

Appellee.

FINAL ORDER

This case is before the Court for consideration upon the Petition for Appeal filed by the Appellant, West Virginia Department of Environmental Protection, ("WVDEP"), from the Decision of Administrative Law Judge William B. McGinley ("ALJ") of the West Virginia Public Employees Grievance Board ("Grievance Board") dated December 16, 2008. That decision held the Appellee, Michelle L. Falquero, rescinded her resignation from her employment as a secretary with the WVDEP prior to it being accepted by her employer; and therefore, she remains an employee of the WVDEP as her resignation is void.

After giving due and mature consideration to the written briefs filed by the parties herein, and after reviewing the official Court file, this Court is of the opinion that the Decision of the Grievance Board is not contrary to law or lawfully adopted rule or written policy of the employer; does not exceed statutory authority; is not the result of fraud or deceit; is not clearly wrong in view of the reliable, probative and substantial evidence on the whole record; nor is it arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of

discretion. *See, W.Va. Code*, § 6C-2-5. Therefore, the Court does hereby **ORDER** that the Decision of the Grievance Board entered on December 16, 2008, is **AFFIRMED**.

In so finding, the Court further adopts the Findings of Fact and Conclusions of Law as stated by the Grievance Board in their entirety. The more pertinent findings and conclusions are set forth, in part, below:

Findings of Fact

1. Grievant (Michelle Falquero) has been employed by WVDEP for approximately five years and was most recently classified as a Secretary 2. Grievant has never received an evaluation or any other indication that her performance was less than satisfactory.

2. At all times relevant to this matter, Grievant was assigned as the secretary for the WVDEP Public Information Office.

3. Since 2004, Grievant has been working in the Executive Office Suite of the WVDEP offices in Kanawha City. Two other secretaries also work in that suite of offices and provide support services to the WVDEP Cabinet Secretary, General Counsel, and at least one other manager. The other secretaries have been in the Executive Office Suite since 2004 as well.

4. Grievant complains that the other secretaries are abusive in their behavior toward her and that their actions have created a hostile work environment. Examples of the behavior include the following:

- . When Grievant entered a room where the other secretaries were chatting, they would giggle/snigger as Grievant was leaving.
- . When walking by Grievant's office, the secretaries would make loud comments, aimed at Grievant, related to matters such as leave abuse or that they were being required to do Grievant's work.
- . The other secretaries would always eat lunch together while Grievant covered the phones, however, if Grievant needed to switch her lunch time, neither of the other secretaries would agree to cover the phones in her absence.

- Twice, the other secretaries took annual leave at the same time without putting it on the leave calendar. Grievant showed up to work and found she was the only secretary on duty.
- One of the secretaries would bring the Public Information Office mail to Grievant and toss it on her desk in a way that it usually ended up falling on the floor.
- The secretaries would not share information with Grievant and would generally respond to her questions by stating "I don't know".
- On one occasion, the other secretaries organized a Christmas gift exchange without telling Grievant and then made comments about Grievant's failure to purchase a gift for her supervisor.
- The other secretaries would set the thermostats in common rooms at the highest settings. When Grievant would reset the thermostats at the medium settings the co-workers would change them back to the hottest setting.¹

5. In late 2007, on two separate occasions, Grievant discussed with Debbie Hughes the problems she was having with the other two secretaries and how the situation was affecting her. Debbie Hughes works in the WVDEP Office of Human Resources and at that time, was the EEO and Grievance Coordinator.

6. During these two occasions, Grievant also spoke with Ms. Hughes about her desire to be reclassified as an Administrative Secretary because she had assumed the duties of an Administrative Secretary who had left the office and not been replaced.

7. Ms. Hughes advised Grievant of her right to file a grievance. Ms. Hughes also offered to speak with Grievant's supervisor about the situation.

8. Grievant declined to file a grievance out of concern that she would be subjected to reprisal. She also declined Ms. Hughes' offer to speak to Grievant's manager because her manager was already aware of the situation. Grievant felt her manager could do nothing about the problem

¹ See Grievance Board Joint Exhibit 3. These examples were uncontested by the WVDEP.

since she did not supervise the other secretaries.

9. On February 22, 2008, Grievant met with Randy Huffman to discuss the perceived hostile work environment and her desire to be reclassified. At that time, Mr. Huffman was the Assistant Cabinet Secretary for WVDEP.² Mr. Huffman indicated to Grievant that he would discuss the work situation with Grievant's new supervisor, Kathy Cosco, and with the Human Relations Office.

10. Grievant met with her supervisor, Kathy Cosco on February 27, 2008, to discuss the same issues she had raised with Ms. Hughes and Mr. Huffman. Grievant asked Ms. Cosco if Mr. Huffman had spoken to her about her work environment and Ms. Cosco responded that he had not.

11. In response to Grievant's concerns about the hostile work environment, Ms. Cosco informed Grievant that she and Cabinet Secretary Timmermeyer had held a conversation about two weeks earlier about changing some of the offices. At the end of the legislative session in early March, Secretary Timmermeyer intended to move her assistant into Grievant's office in the Executive Suite on the third floor and move Grievant to an office on the first floor, where she would be closer to the Public Information Office. In response to questions from Grievant, Ms. Cosco assured her that the office Grievant would move to would be a private office and comparable to the office Grievant presently occupied.

12. On February 28, 2008, Grievant Falquero gave Ms. Cosco a copy of her letter of resignation that stated: "This letter serves as notice that I am resigning from my position at the West Virginia Department of Environmental Protection. My last day of work will be June 15, 2008." Grievant told Ms. Cosco that things would never change at WVDEP and that Grievant had set that date of her departure more than three months in the future so that she could look for another job. Ms. Cosco's only response was to say "okay".

13. No other action was taken regarding Grievant's resignation for a month.

14. After spending time in her new office, Grievant realized that she was no longer subject to the perceived hostile environment in the Executive Suite. Grievant spoke with Ms. Cosco on March 26, 2008, regarding whether she could rescind her resignation. Ms. Cosco indicated that she did

² On May 1, 2008, Randy Huffman replaced Stephanie Timmermeyer as the Cabinet Secretary for WVDEP.

not know. On March 27, 2008, Grievant submitted a memorandum to Kathy Cosco and Sandy Kee³ which stated: "As of today I am rescinding my resignation. Thank you."

15. On April 1, 2008, Ms. Cosco gave Grievant a letter stating:

"The West Virginia Department of Environmental Protection (DEP) accepted your February 28, 2008, letter resigning your position as a Secretary II with the DEP's Public Information Office. On March 27, 2008, you notified me in writing that you were rescinding your resignation. I regret to inform you that the DEP has decided to deny your request and that your last day of employment will be June 15, 2008, as you initially indicated in your letter of resignation."

This was the first communication the WVDEP had with Grievant regarding the acceptance of her resignation.

16. Over the next month, Grievant and Ms. Cosco exchanged correspondence related to Grievant's request to know who, in WVDEP, denied her request to rescind her resignation and why it was denied. During this period, Randy Huffman was appointed as the new Cabinet Secretary for WVDEP. See Footnote 2, *supra*.

17. Ms. Cosco met with Randy Huffman, and he suggested that she develop a staffing plan for the Public Information Office that reflected her view about how the employees could best be utilized. In that meeting, Ms. Cosco asked Mr. Huffman if he wanted to reconsider Ms. Timmermeyer's decision to reject Grievant's effort to rescind her resignation. Mr. Huffman indicated that he would allow Grievant to rescind her resignation based upon certain conditions.

18. Ms. Cosco scheduled and held a meeting with Grievant on May 8, 2008, for the purpose of discussing Grievant's resignation. Debbie Hughes was also at that meeting.

19. At the May 8th meeting, Ms. Cosco gave Grievant an Employee Performance Appraisal-1 Form ("EPA")⁴ that contained the duties and

³ Sandy Kee is the Manager of the WVDEP Office of Human Relations.

⁴ It was understood by all of the parties that the EPA given to Grievant was not intended to be an evaluation of her performance. The EPA was used solely as a vehicle for setting out Grievant's responsibilities under the new staffing plan.

responsibilities that Ms. Cosco envisioned Grievant would be performing in the new staffing plan. Ms. Cosco told Grievant that the WVDEP would allow her to rescind her resignation if she agreed to the following two conditions:

- Grievant would sign the EPA, indicating her acceptance of the new duties envisioned for her position in the new staffing plan.
- Grievant would draft a respectful letter acknowledging that she was no longer in a hostile work environment.

20. Grievant indicated to Ms. Cosco that she didn't believe that she would be able to perform the duties as listed in the EPA and expressed dissatisfaction that most of the administrative duties that she had been performing were being taken away. Ms. Cosco stated that they should leave the duties as written and if problems arose, adjustments could be made. Grievant left the meeting without signing the EPA.

21. On May 15, 2008, Debbie Hughes sent an e-mail to Grievant to confirm a conversation between the two of them and to communicate information to Grievant from Randy Huffman. The gist of the message was that in order to continue her employment with the WVDEP, Grievant had to meet the conditions set out in the May 8th meeting. If Grievant failed to submit the required documents to Ms. Cosco, "the resignation [she] submitted to the agency dated February 28, 2008, [would] be processed as requested by [her]." *See* Grievant's Grievance Board Exhibit 1

22. Ms. Falquero filed this grievance on May 15, 2008.

23. On May 20, 2008, Cabinet Secretary Huffman e-mailed a letter to Grievant stating that Grievant had until May 30, 2008, to sign the EPA and return it to Ms. Cosco. The condition that Grievant would need to write a letter regarding the hostile work environment was specifically withdrawn. Mr. Huffman also stated that signing the EPA would not prejudice Grievant's rights to contest the duties listed therein through the grievance process. Finally, it was noted that failure on the part of Grievant to submit the signed EPA as written, by the specified date, would "foreclose any possibility that the Department [would] reconsider its decision to deny [Grievant's] rescission request." *See* Grievant's Grievance Board Exhibit 2

24. For the reasons set out in her grievance statement, Grievant did not sign the EPA prepared by Ms. Cosco, and she was no longer considered employed by the WVDEP as of June 15, 2008.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. *Procedural Rules of the W.Va. Public Employees Grievance Bd.* 156 C.S.R. 1 § 3 (2008); *Howell v. W.Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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. "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); *Jenkins v. Dep't of Health & Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002).

3. To determine whether an employee's resignation was forced by others, rather than voluntary, 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).

4. 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); *Jenkins v. Dep't of Health & Human Resources/Mildred Mitchell-Bateman Hosp.*, Docket No. 02-HHR-214 (Oct. 22, 2002).

5. The "reasonable person" standard contemplates a reasonable person to be, "neither an automaton nor an exceptional man, but an ordinary member of the community. Being an ordinary person, the law makes allowance for mere errors in his judgment and does not visualize him as exercising extraordinary care. Normality is the quintessence of this characterization." *Syl. Pt. 6, Patton v. City of Grafton*, 116 W.Va. 311, 180 S.E. 267 (1935); *Honaker v. Mahon*, 210 W.Va. 53, 552 S.E.2d 788 (2001).

6. Grievant did not prove, by a preponderance of the evidence, that her working conditions were so intolerable that a reasonable person, in the same situation, would be compelled to quit.

7. An offer to resign by a classified, state employee may be withdrawn at any time before it is accepted by the employer. The tender of a resignation by such employee is a mere offer to mutually rescind the contract of employment and is not binding on either party to the contract until its acceptance by the employer. *Le Masters v. Board of Education Of Grant District*, 105 W.Va. 81, 141 S.E. 515 (1928); *Bailey v. The Fred W. Eberle Technical Center*, Docket No. 98-49-189 (Sept. 30, 1998); *Nealis v. Berkeley County Bd. Of Educ.*, Docket No. 02-87-231-2 (Dec. 22, 1987); *Quigley v. Kanawha County Board of Education*, Docket No. 01-20-105 (Aug. 30, 2001).

8. Grievant rescinded her resignation before it was accepted by her employer. Therefore, her resignation was void and she remains an employee of the WVDEP.

Accordingly, the grievance is GRANTED to the limited extent that she remains an employee of the WVDEP. The Department of Environmental Protection is Ordered to immediately reinstate Grievant Falquero to her position as secretary for the Public Information Office at the Classification of Secretary 2 and to pay to Grievant all pay she would have received from June 15, 2008, until the date of her reinstatement plus statutory interest.

Attorney Fees and Court Costs

The Appellee, Michelle Falquero, further requests court costs and reasonable attorney fees in the prosecution of her case. Having substantially prevailed in this appeal, this Court finds Ms. Falquero is entitled to court costs and reasonable attorney fees in the prosecution of this appeal. Accordingly, it is hereby **FURTHER ORDERED** that Ms. Falquero shall recover from the WVDEP her court costs and reasonable attorney fees for this appeal.

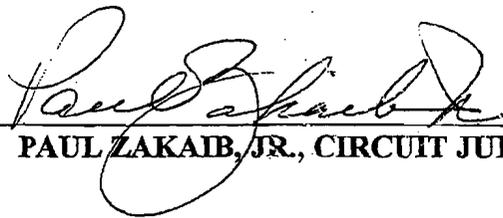
Counsel for Ms. Falquero is directed to submit an affidavit regarding Ms. Falquero's attorney fees within thirty (30) days of the date of entry of this Order. Counsel for the WVDEP

shall then have thirty (30) days from the date of filing of said affidavit to submit a response to the same. It will then be incumbent upon counsel for Ms. Falquero to schedule a hearing/oral argument before the Court upon the issue of attorney fees and court costs

Ms. Falquero also requests that the WVDEP reimburse her for monies lost to taxes and penalties from early IRA withdrawals due to this appeal. This Court is aware of no statutory or other authority which would authorize the Court to award such funds. Therefore, Ms. Falquero's request for the same is **DENIED**.

The Court hereby notes the objection and exception of all parties aggrieved by this ruling, and **FURTHER ORDERS** that the Clerk forward a certified copy of this Final Order to all parties or counsel of record, and to the West Virginia Public Employees Grievance Board.

Enter this 26th day of October, 2010.


PAUL ZAKAIB, JR., CIRCUIT JUDGE

STATE OF WEST VIRGINIA
COUNTY OF MORGAN
RECORDED
FILED IN THE OFFICE OF THE CLERK OF SAID COUNTY
ON THIS 16th DAY OF FEBRUARY 2011
Cathy S. Hester
CLERK OF COURT

11/5/10
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