

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Salena Williams-Grant,
Petitioner Below, Petitioner

vs.) No. 21-0117 (Kanawha County 19-AA-95)

Jefferson County Board of Education,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Salena Williams-Grant,¹ by counsel Christian J. Riddell, appeals from the Circuit Court of Kanawha County’s January 15, 2021, order, that denied petitioner’s appeal of the West Virginia Public Employees Grievance Board’s (“Grievance Board”) August 2, 2019, decision. Respondent Jefferson County Board of Education, by counsel Tracy B. Eberling, filed a response in support of the circuit court’s order. Petitioner filed a reply.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner is a teacher at Jefferson High School and worked for respondent for approximately thirty-seven years. She is also African American and over the age of forty. Throughout her employment, petitioner filed multiple complaints of harassment, hostile work environment, and discrimination. This appeal arises out of two grievances filed by petitioner regarding four incidents that occurred during the 2017-2018 school year when petitioner was supervised by Assistant Principal Mary Beth Group.² Respondent gave petitioner two letters of reprimand and a corrective action plan (“CAP”) stemming from these incidents.

¹ Although petitioner’s brief notes that her name is “Selena,” the appendix record and the order on appeal notes that her first name is actually “Salena”.

² Petitioner was supervised by Assistant Principal Group after she filed a grievance against the school’s principal, Sherry Fitzgerald.

During the first incident, shortly after the beginning of the school year, petitioner was accused of inappropriately confronting a student in the hallway. Petitioner was verbally counseled about her interaction with that student.

Later, on November 30, 2017, the head technologist for Jefferson County Schools went to petitioner's classroom to check on the status of a technology assistance request previously submitted by petitioner. When the technologist entered the room, petitioner required that he announce his appearance with "good morning class," in the manner that she required of individuals who entered the classroom. Petitioner deemed the technologist's first attempt unacceptable and directed him to say it louder. He complied. Later that day the technologist went to speak to petitioner about the incident. Petitioner was on her duty hour at the time and she responded loudly that he was unprofessional for approaching her during her duty time, and that he should come to speak with her during class time.

That same day, petitioner confronted a parent volunteer after he attempted to enter an activity area restricted to staff. In response, the volunteer obtained a pass to access the area. Later, petitioner reported that bubble-wrap popping and the fragrance worn by the parent volunteer and/or the volunteer's child (who was also present) adversely affected her.

Later that day, petitioner e-mailed Assistant Principal Group to voice her displeasure with the technologist and the parent volunteer. Assistant Principal Group investigated the incidents and determined that petitioner was at fault. On December 12, 2017, Assistant Principal Group met with petitioner to discuss concerns regarding petitioner's conduct and petitioner denied any unprofessional conduct.

On December 13, 2017, Principal Sherry Fitzgerald e-mailed the Jefferson County Superintendent about petitioner's conduct toward the parent volunteer and requested assistance in addressing petitioner's conduct. The following day, Assistant Principal Group e-mailed petitioner to recap their December 12, meeting. Assistant Principal Group directed petitioner to be mindful of her actions toward others, noting that reports had been made that petitioner had behaved unprofessionally. This was not a letter of reprimand and was not placed in petitioner's personnel file. Later that day, petitioner contacted Assistant Principal Group by internal telephone and reportedly addressed Assistant Principal Group in a loud and confrontational tone, such that Assistant Principal Group spoke with Principal Fitzgerald about the call. Assistant Principal Group was counseled to document the call and avoid interaction with petitioner until further notice. Petitioner then sent a lengthy e-mail critical of both Assistant Principal Group and Principal Fitzgerald to Assistant Principal Group with a copy to Principal Fitzgerald, as well as the Chief Human Resources Officer for the county, Assistant Superintendent Patrick Blane, Superintendent Bondy Shay Gibson, and a representative of AFT-WV.

On December 15, 2017, Principal Fitzgerald sought guidance from respondent about petitioner's conduct and the superintendent requested that Lee Ebersole, a central office employee with substantial experience in professional employee performance matters, meet with the principal and assistant principal concerning appropriate next steps. Respondent maintains that the school

system often includes Mr. Ebersole in personnel issues to support school administrators and to determine the appropriate steps to support improvement.

On December 22, 2017, Mr. Ebersole met with Principal Fitzgerald and Assistant Principal Group, as well as Bryan Cooley, a representative of the county's human resources department. They concluded that petitioner's conduct should be documented and a CAP be considered to address petitioner's unprofessional conduct. Mr. Ebersole subsequently e-mailed Assistant Principal Group recommending that they explore designing and implementing a CAP, given the nature of petitioner's insubordinate behavior. By letter dated January 10, 2018, Principal Fitzgerald recommended that Superintendent Gibson terminate petitioner or, in the alternative, that petitioner be placed on a CAP to remedy her behavior. Superintendent Gibson chose the issuance of a letter of reprimand based on the Employee Code of Conduct and the implementation of a CAP.

On January 17, 2018, respondent issued petitioner a letter of reprimand and placed her on a CAP, citing areas of concern under Standard 2³ and Standard 7⁴ of Policy 5310. The CAP included the directive that petitioner submit a report on a book entitled "Social and Emotional Learning." Petitioner claims that she was not aware of that letter of reprimand and the CAP until a later e-mail dated February 2, 2018, when she learned that the administration would be conducting classroom observations in her class. In response to the e-mail, petitioner wrote, "this email is very inappropriate to me as well as disrespectful to me, especially, when I am an 'Advanced Teacher'. How could you send me something like this at the start of Black History Month? A written apology is requested." Assistant Principal Group and Mr. Ebersole conducted a classroom observation and noted concerns about petitioner's teaching under Standard 2. As a result of the observation, petitioner was rated as unsatisfactory in the area of respect. The summative evaluation noted that petitioner "has demonstrated a consistent pattern of insubordination. Her demeanor has been progressively disrespectful toward her principal and supervisor. She has not responded well to suggestions for improvement" On February 21, 2018, petitioner filed her first grievance in which she grieved the letter of reprimand.

On April 13, 2018, Principal Fitzgerald, Assistant Principal Group, and Mr. Ebersole met with petitioner and her representative to discuss the CAP. Petitioner filed a second grievance on April 20, 2018. The CAP was ultimately revised to focus only on Standard 7, professionalism, following a grievance hearing. The CAP established a goal for petitioner to "communicate with parents/guardians and colleagues in a consistently professional manner." It targeted examples of petitioner's conduct and suggested changes. Even after the revision, petitioner refused to sign it. Although petitioner did comply with some of the CAP's substantive requirements, the administration issued a second letter of reprimand after determining that petitioner's submissions under the revised CAP were disrespectful towards Assistant Principal Group and Principal Fitzgerald.

³ Policy 5310's Standard 2, regarding "the learner and learning environment," states "[t]he teacher understands and responds to the unique characteristics of learners."

⁴ Policy 5310's Standard 7, regarding "professional conduct," states "[t]he teacher demonstrates professional conduct as defined in law, policy, and procedure at the state, district, and school level."

Petitioner's two grievances were ultimately consolidated by the Grievance Board. Petitioner claimed that she is the victim of retaliatory actions and disparate treatment because of her reports of wrongdoing and her race. She also argued that other employees have been placed on focused support plans, rather than corrective action plans.

The Grievance Board denied petitioner's grievance on August 2, 2019, finding that she had been insubordinate in refusing to comply with certain provisions of the CAP. It found that

[t]he events surrounding Respondent's discipline of Grievant are mired in confusion as to cause and effect. The end result, however, is that Grievant was disrespectful towards her supervisors, thus justifying the second letter of reprimand. While the efficacy of those assignments may have been suspect, Grievant does not have leeway to be insubordinate just because she disagrees with directives.

Petitioner appealed the Grievance Board's decision to the circuit court, claiming that her CAP was initiated in violation of state policy and further arguing that the CAP amounted to harassment, discrimination, and reprisal based on petitioner's age and race.

On January 15, 2021, the circuit court affirmed the Grievance Board's decision. As to the issue of insubordination, the circuit court noted that

[t]he [administrative law judge ("ALJ")] found that the Respondent had met its burden of proof in demonstrating that its decision to discipline Petitioner was justified and that it was not arbitrary and capricious, or unreasonable. Petitioner contends that while her actions may constitute violations of school rules, they cannot amount to insubordination under the standard set forth in *Butts [v. Higher Educ. Interim Governing Bd./Shepherd Coll.]*, 212 W. Va. 209, 569 S.E.2d 456 (2002)]. However, this Court fails to see how the conduct, which Petitioner admits may constitute a violation of school rules and regulations, could constitute anything other than a willful and contumacious act.

The Decision by the ALJ was based upon the record of this case and the testimony provided at the hearing, which established the following: Petitioner had not been subject to prior disciplinary action; Petitioner was insubordinate to her supervisors; Petitioner's conduct warranted the issuance of two letters of reprimand; Placing the Petitioner on a Corrective Action Plan was appropriate based on her conduct; and the Corrective Action Plan was amended after petitioner filed her second grievance.

To arrive at its decision, the ALJ properly discounted testimony which constituted hearsay, and was left with contradicting testimony as to material facts. The ALJ properly evaluated the character of relevant witnesses and made detailed factual findings regarding the same. Finding that no witness's integrity had been bolstered or impugned by a reputation for honesty, attitude, untruthfulness or prior inconsistent statements, the ALJ properly moved to plausibility as the most insightful factor to consider. In determining the plausibility of testimony from the

three material witnesses, the ALJ found Assistant Principal Group's testimony to be most plausible and therefore most credible.

The ALJ's determination that Petitioner's conduct was insubordinate under the applicable legal definitions was not clearly wrong in light of the underlying facts as presented and the governing case law, nor was its determination that the Respondent properly issued the letters of reprimand. Further, the ALJ found that the Respondent had acted neither arbitrarily or capriciously in its issuance of the subject CAP as the Respondent had complied with applicable state law and policy.

In finding that the ALJ's determination was appropriate, the Court further FINDS that pursuant to the West Virginia Board of Education Policy and West Virginia Code, the Board of Education's CAP and letters of reprimand regarding Petitioner were authorized actions under West Virginia law.

The circuit court also thoroughly addressed petitioner's claim that she was retaliated against as a result of her prior grievance activity and properly found that an "employee claiming retaliation must establish a prima facie case." (*Citing Freeman v. Fayette Cnty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004)). As to a prima facie case of reprisal, the circuit court noted that

[t]he ALJ found that Petitioner had failed to establish a prima facie case of reprisal based on the gap in time between Petitioner's protected conduct and the issuance of the letters of reprimand and CAP. Petitioner presents no argument as to why the ALJ's finding regarding the lack of a temporal connection between the Petitioner's protected activity and the Respondent's adverse action was clearly erroneous based on the facts presented, or alternatively was an arbitrary and capricious application of its discretion. Because the Petitioner has failed to establish as much, this Court declines to substitute its own judgment for that of the ALJ.

The circuit court also addressed the ALJ's findings that petitioner had failed to establish a prima facie case of discrimination. After addressing West Virginia Code § 6C-2-2(d),⁵ the circuit court found that although petitioner recited multiple examples of how she felt she was discriminated against as compared to other employees that were either younger, of a different race, or both, petitioner failed to carry her burden in identifying "specific, similarly situated employees who were treated differently" either through testimony or affidavit at the grievance hearing. Additionally, the circuit court found that the ALJ "heard evidence from the Respondent that presented a legitimate basis for the issuance of written reprimands." Accordingly, the circuit court denied petitioner's appeal of the ALJ's finding on the subject of discrimination.

As to petitioner's claim that the ALJ erred where he failed to find that respondent harassed her by pursuing accelerated disciplinary action against her, the circuit court agreed with the ALJ

⁵ Pursuant to § 6C-2-2(d), "[d]iscrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees."

that the conduct complained of by petitioner does not rise to the level of harassment.⁶ Additionally, the circuit court found that “based on this [c]ourt’s prior finding that the Respondent had sufficient reason to issue the written reprimands, Petitioner’s argument fails.”

Petitioner now appeals.

“[T]his Court reviews decisions of the circuit court under the same standard as that by which the circuit court reviews the decision of the ALJ.” West Virginia Code § 6C-2-5(b) sets that standard and explains the elevated burden an appellant must meet:

A party may appeal the decision of the administrative law judge on the grounds that the decision:

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the administrative law judge’s statutory authority;
- (3) Is the result of fraud or deceit;
- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

As we held in Syllabus Point 1 of *Cahill v. Mercer County Board of Education*, [208 W. Va. 177, 539 S.E.2d 437 (2000)] our review is part plenary and part deferential:

[g]rievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo.

⁶ The circuit court noted that

[j]udging the conduct from the perspective of a reasonable person in Petitioner’s position, the Court agrees with the ALJ that the conduct alleged does not rise to the level of harassment. In addition, based on this Court’s prior finding that the Respondent had sufficient reason to issue the written reprimands, Petitioner’s argument fails.

Finally, we have held that “[a] final order of the hearing examiner for the West Virginia [Public] Employees Grievance Board, made pursuant to W. Va. Code, [6C-2-1], et seq. [], and based upon findings of fact, should not be reversed unless clearly wrong.” [Syl. Pt. 3, *Armstrong v. West Virginia Division of Culture and History*, 229 W. Va. 538, 729 S.E.2d 860 (2012) (citing Syl. Pt. 1, *Randolph Cnty. Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989)].

Wilfong v. Randolph Cnty. Bd. of Educ., 243 W. Va. 25, 28-29, 842 S.E.2d 229, 232-33 (2020) (footnotes omitted).

Initially, petitioner argues that the circuit court erred in upholding the decision of the Grievance Board. Specifically, she contends that the circuit court erred in finding that petitioner’s actions amounted to insubordination under the law. Respondent maintains that the grievance board was correct in its decision and that the letters of reprimand issued by respondent were in conformance with state law. We agree with respondent. Here, the Grievance Board and the circuit court reviewed the law related to insubordination, found that there was a sufficient basis to issue the letters of reprimand, and further found that the letters of reprimand were properly issued. We refuse to substitute the judgment of this Court with regard to factual determinations and we give deference to the factual findings rendered by an ALJ.

Further, petitioner claims that respondent’s decision to issue a CAP without first implementing a “Focused Support Plan,” was an illegal disciplinary action. Respondent maintains that it exercised its discretion in not first implementing a focused support plan as a measure to correct petitioner’s performance. Moreover, per respondent, the ALJ properly found that the corrective action plan was warranted by petitioner’s conduct and was not a disciplinary action. As to this issue, petitioner’s argument runs afoul of Policy 5310 which provides that “[c]ertain instances of misconduct as specified in W. Va. § 18A-2-8 may require immediate disciplinary action and/or a CAP.” W. Va. CSR § 126-142-9.4.a. Inasmuch as insubordination is one of the specified grounds delineated in West Virginia Code § 18A-2-8,⁷ we decline to find that the circuit court erred upholding the decision of the Grievance Board.

Petitioner also argues that the circuit court erred in upholding the ALJ’s determination that petitioner had failed to set out a prima facie case for retaliation. The Grievance Board found that petitioner failed to meet her burden of proof on her retaliation claim, as defined by West Virginia Code § 6C-2-3(h), where it determined that the timing of the issuance of the letters of reprimand

⁷ West Virginia Code § 18A-2-8(a) specifically provides:

Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a finding of abuse by the Department of Health and Human Resources in accordance with § 49-1-1 *et seq.* of this code, the conviction of a misdemeanor or a guilty plea or a plea of nolo contendere to a misdemeanor charge that has a rational nexus between the conduct and performance of the employee’s job, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge.

was too removed from petitioner's earlier grievance to be causally related as a matter of law.⁸ Further, petitioner failed to present any argument as to why the ALJ's finding regarding a lack of a temporal connection and petitioner's protected activity were either erroneous or were an arbitrary application of discretion. Thus, we decline to disturb the court's ruling as to reprisal/retaliation on appeal.

Petitioner also claims that she was subject to harassment and that the circuit court erred in upholding the administrative law judge's determination that she had failed to prove harassment.⁹ Per West Virginia Code, "[h]arassment" means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." *Id.* § 6C-2-2(l). Petitioner argues that "the CAP placed upon Petitioner was unusual, extreme, and intensive – far beyond that which is typical." Although petitioner claims that her CAP required reflection reports and that this was a unique component of her CAP, we find this requirement does not rise to the level of actionable harassment. Accordingly, we decline to disturb the circuit court's ruling on harassment on appeal.

Next, we address petitioner's claim that the court erred where it failed to find discrimination. As defined in West Virginia Code § 6C-2-2(d), "discrimination" is "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." As to this claim, the Grievance Board and the circuit court analyzed the law and evidence to conclude that petitioner did not meet her burden of proof to sustain her claim of discrimination.¹⁰ Specifically, the court found that petitioner failed to provide any evidence that she was treated differently from similarly situated employees, or that she was treated disparately than younger employees or employees of different races. Inasmuch as we find that the circuit court properly found that petitioner failed to sustain her burden to prove discrimination, we refuse to disturb this finding on appeal.

⁸ The ALJ also properly rejected petitioner's attempts to substitute her various complaints about work matters, including those complaints raised in her e-mail, as the basis for the alleged reprisal, as the e-mail does not constitute protected activity under the statute, because it was not a grievance within the meaning of West Virginia Code § 6C-2-2(i)

⁹ We note that petitioner's arguments to this Court are nearly verbatim to the arguments that she presented to the circuit court. Now, however, she also argues that the circuit court refused to "meaningfully address or respond to her arguments." Respondent argues that the Grievance Board and circuit court provided a thorough analysis and properly found that petitioner was not subject to reprisal, retaliation, harassment, or discrimination. As addressed more thoroughly herein, we agree with respondent.

¹⁰ Although petitioner asks this Court to reverse this decision based upon journal articles which suggest that she was disciplined based on her cultural differences or ethnicity, we note that those articles were not part of the record below, and our review is limited to a consideration of the appendix record on appeal.

Finally, respondent maintains that petitioner's case is moot because she has now retired. Petitioner maintains that the issue is not moot because any disciplinary issues will remain on her record should she seek further employment. Inasmuch as we have affirmed this matter on substantive grounds, we need not address this issue on appeal.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton

DISQUALIFIED:

Justice C. Haley Bunn