

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

KANAWHA COUNTY BOARD  
OF EDUCATION,

Appellant,

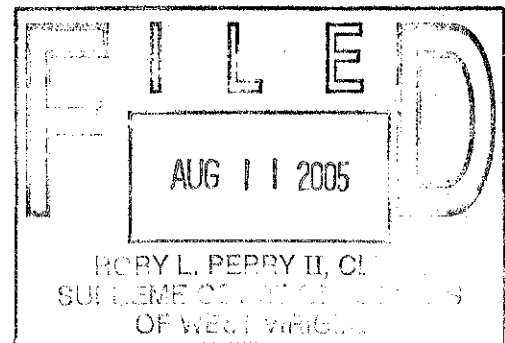
v.

Appeal No. 32783  
Circuit Court of Kanawha County  
Civil Action No. 03-AA-54

JOHNNY SLOAN,

Appellee.

BRIEF OF APPELLANT



James W. Withrow  
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### Cases

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- Harry v. Marion County Board of Education, 203 W. Va. 64, 506 S.E. 2d 319 (1998)
- King v. Chrysler Corp., 812 F.Supp. 151 (E.D.Mo.E.D.1993)
- Maikotter v. Univ. of W.Va. Bd. of Trustees, 206 W. Va. 691, 527 S.E.2d 802 (1999)
- Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)
- Quinn v. West Virginia Northern Community College, 197 W. Va. 313, 475 S.E.2d 405 (1996)
- University of West Virginia Board of Trustees v. Fox, 197 W. Va. 91, 475 S.E.2d 91 (1996)
- Westmoreland Coal Co. v. West Virginia Human Rights Commission, 181 W.Va. 368, 382 S.E.2d 562 (1989)

### Statutes

- West Virginia Code §5-11-9(1)
- West Virginia Code §18-29-7
- West Virginia Code §18A-2-8
- West Virginia Code §29-6A-1

## Regulations

6 W.Va.C.S.R. §7-4-2 (1992)

6 W.Va.C.S.R. §77-4-3.2 (1992)

29 C.F.R. §1604.11 (1980)

## Statement of the Case

This is an appeal from a decision of the Circuit Court of Kanawha County, West Virginia, affirming, a decision of an administrative law judge for the West Virginia Education and State Employees Grievance Board pursuant to the provisions of West Virginia Code §18-29-7. The decision of the administrative law judge overturned a decision of the Kanawha County Board of Education, which terminated appellee's employment as a result of three separate acts of immorality and sexual harassment against a fellow employee. The ALJ found that the petitioner did not violate the appellee's sexual harassment policy (which is essentially the same standard as propounded by the West Virginia Supreme Court of Appeals in cases involving sexual harassment), and substituted her judgment concerning the appropriate punishment for what she deemed to be an act of immorality. In both instances the ALJ was clearly wrong based on the following discussion. The Circuit Court of Kanawha County, by the Honorable Paul Zakaib, Jr., upheld the Grievance Board decision by Order entered December 13, 2004.

## Procedural Background

By letter dated August 27, 2002, the appellee was advised that Superintendent Ronald E. Duerring had received certain allegations that he had engaged in conduct which, if determined to be true, would constitute a violation of Kanawha County Schools' sexual harassment policy. The appellee was suspended with pay pending a hearing relating to those allegations. The investigator for Kanawha County Schools, Jeane Ann Herscher, conducted an investigation into

the allegations and made a report to the Superintendent of Schools. When the appellee was interviewed as a part of the investigation, he generally admitted the charges against him. By letter dated September 20, 2002, the employee was advised that a hearing on the allegations would be held on September 26, 2002.

A hearing on the allegations was held as scheduled before a person designated by the Superintendent to hear evidence on the charges. At the hearing Kanawha County Schools offered testimony from its investigator, Jeane Ann Herscher and introduced four exhibits, including Ms. Herscher's investigative report. The appellee testified on his own behalf. The evidence in the case is largely undisputed, and the appellee admitted to the misconduct in the hearing.

By decision dated October 14, 2002, the hearing examiner found that the employee was guilty of the sexual harassment and recommended the appellee be terminated. On November 12, 2002, the Superintendent of Kanawha County Schools recommended that appellee be terminated, and the Kanawha County Board of Education voted to accept the Superintendent's recommendation. The appellee appealed his termination directly to Level IV of the West Virginia Education and State Employees Grievance Board in accordance with West Virginia Code §18A-2-8.

A Level IV hearing was held on February 5, 2003, at the Grievance Board Offices in Charleston. On March 24, 2003, an Administrative Law Judge for the Grievance Board issued a decision granting determining that the appellee's conduct did not warrant termination and ordered the appellee reinstated with a three day suspension for immorality.

The appellant appealed the Grievance Board decision to the Circuit Court of Kanawha County, which issued an order on December 13, 2004, affirming the decision of the Grievance Board.

#### Facts

The Administrative Law Judge found the following facts to be true, and they are generally undisputed by the parties:

1. At the time of his dismissal, Appellee had been employed by KBOE for 27 years as a custodian. During the 2001-2002 school year, Appellee worked at Bridgeview Elementary School. He was in his ninth year at that school.

2. During the 2001-2002 school year, Brenda Akers was employed as a classroom aide at Bridgeview Elementary School. It was her second or third year at Bridgeview Elementary.

3. Each day Appellee was assigned to stand beside the trash cans while the students ate, and empty the students' trays into the trash cans after they had finished eating.

4. Ms. Akers was assigned to assist a special education student in the lunch room each day.

5. Ms. Akers did not assist the student during lunch. Everyday, over an extended period of time, she went to where Appellee was stationed while the student ate, and talked to Appellee for as much as 30 minutes.

6. During these daily conversations, Ms. Akers discussed personal matters with Appellee, such as her financial situation and what car her son should buy. She told Appellee she was having difficulty paying her bills, and needed a job which paid more money. She asked Appellee if he would loan her \$200.00 one time, and \$300.00 another time. Appellee did not loan her any money. She asked Appellee for advice, and they joked.

7. One time Ms. Akers' hand accidentally bumped Appellee in the groin area, and she made a joke of it. She would touch Appellee on the arm and shoulder from time to time, and rub his belly. At times Ms. Akers' body was touching Appellee's as they talked. Appellee had commented to Ms. Akers that she looked good in low cut tops, and she laughed.

8. Appellee felt comfortable with Ms. Akers, and thought she was interested in having a sexual relationship.

9. On August 13, 2002, Ms. Akers filed a complaint with KBOE, alleging that Grievant had made inappropriate comments to her on two occasions at school. Ms. Akers had already resigned her employment with KBOE at this time. Ms. Akers alleged Appellee had offered her a hundred dollars if she would engage in oral sex with him, with Appellee providing sexual gratification to Ms. Akers.<sup>1</sup> She alleged that on a second occasion Appellee had made the same offer. She also alleged that on another occasion, Appellee had shown her a hundred dollar bill and said, "Here it is."

10. Appellee admitted he had made these statements and shown Ms. Akers some money, acknowledged during the Level IV hearing that he should not have made these statements to Ms. Akers, apologized, and stated he would never do anything like this again, as he had learned his lesson. At the time Appellee made the statements to Ms. Akers he did not think he was doing anything wrong, because he thought she was interested in a relationship, and that they were friends.

11. When Appellee first made the offer to Ms. Akers they were standing at Appellee's work area in the cafeteria. She moved away from him, and did not respond. This occurred in approximately April 2002. The second time he made the offer they were again at Appellee's work area in the cafeteria. She responded, "you wouldn't do your wife like that." They continued to talk after she made this response, although Appellee could not recall what else was said.

12. The third offer was made by Appellee outside the school building. Appellee saw Ms. Akers outside the building in the front, near where he was stationed in the cafeteria. Ms. Akers had told him she always walked in the rear of the building, and he thought it was odd that she

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<sup>1</sup> The appellee's statement to Ms. Akers was that he would "give her \$100 if she would let him lick her pussy." This statement is so vile that the appellee would not repeat the statement during the hearing, nor would the ALJ quote the statement in her decision.

had changed her long established pattern, and thought she wanted to talk to him. He went out to talk to her. He showed her he had the money, and told her there were places in the school building they could go. They walked to the end of the building, and Ms. Akers walked away from Appellee without responding. He took this as a no.

13. Appellee offered Ms. Akers the \$100.00 because he knew she needed money, and he thought she was interested in having a sexual relationship with him.

14. After Appellee made these comments to Ms. Akers, she continued to stand with Appellee everyday at lunch time and talk and joke, as though nothing improper had happened.

15. Near the end of the school year, as Appellee was exiting the cafeteria, Ms. Akers was in the hallway, and she said she thought she had earned that \$100.00. Appellee asked her how she had earned \$100.00, and that was the end of that conversation.

16. Appellee had received sexual harassment training annually while an employee of KBOE.

17. Appellee received the highest rating possible on his performance evaluations over the preceding three years. For the preceding two years, he received the highest rating possible on all 22 categories in which his performance was rated.

18. Appellee was dismissed from his employment with KBOE on November 12, 2002, after an investigation by KBOE into the charges. Appellee had never been disciplined by KBOE before for any infraction.

Based on the foregoing, the ALJ found that the appellee had not violated the county's sexual harassment policy, but had engaged in immoral conduct by offering to pay money for sexual activity.

Notwithstanding the above findings and the multiple violations committed by the appellee, the ALJ concluded that the appellee's employment should not be terminated, but rather he should receive a three day suspension.

#### Assignments of Error

The ALJ's decision is in error in the following particulars:

1. The ALJ wrongly concluded that the acts of the appellee, in offering a fellow employee money in return for sexual favors, did not constitute sexual harassment.
2. The ALJ wrongly concluded that based upon the proven actions committed by the appellee there was insufficient evidence to terminate his employment.

#### Standard of Review

“A final order of the hearing examiner for the West Virginia Education and State Employees Grievance Board, made pursuant to W.Va.Code, 29-6A-1, et seq. [1988], and based upon findings of fact, should not be reversed unless clearly wrong.” Quinn v. West Virginia Northern Community College, 197 W. Va. 313, 475 S.E.2d 405 (1996) With regard to issues of statutory application or issues of law, however, a *de novo* standard of review applies. Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, a *de novo* standard of review is applied. Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995) See also Ewing v. Board of Educ. of County of Summers, 202 W. Va. 228, 503 S.E.2d 541 (1998); University of West Virginia Board of Trustees ex rel. West Virginia University v. Fox, 197 W. Va. 91, 475 S.E.2d 91 (1996). Although great deference is accorded to the findings of fact of the West Virginia Educational Employees Grievance Board, questions of law are reviewed *de novo*. Maikotter v. Univ. of W.Va. Bd. of Trustees, 206 W. Va. 691, 527 S.E.2d 802 (1999).

Grievance 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*. Cahill v. Mercer County Board of Education, 208 W. Va. 177, 539 S.E.2d 437 (2000).

The current case generally involves a review of the application of law to a generally agreed to factual situation.

#### Discussion

It is inconceivable that in the early part of the 21<sup>st</sup> century anyone, including any school employee, Administrative Law Judge or Circuit Court Judge, would consider the actions of the appellee, in offering money to a fellow worker in exchange for the opportunity to engage in oral sex to be any thing other than vile, reprehensible and immoral. It appears that the ALJ let her sympathy for the appellee and her apparent dislike of the victim affect her judgment in this case.<sup>2</sup> However, personal feelings concerning a party or the victim have no place in making disciplinary decisions.

This case represents an extreme example of an Administrative Law Judge for the West Virginia Education and State Employees Grievance Board substituting her judgment for that of the board of education concerning what an appropriate disciplinary measure is related to one of the board's employees. This case also presents an example of a "blame the victim" reasoning, which one would think in this day and age would be entirely discredited. The fact that he victim may have worn provocative clothing, "flirted" with the appellee or even gave the appellee the impression that she was interested in some sort of relationship with him, is not any justification or excuse for the outrageous conduct on the part of the appellee.<sup>3</sup>

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<sup>2</sup> Although the victim did not testify at the hearing, several of her co-workers testified on behalf of the appellee. It was obvious that these witnesses disliked the victim and were very fond of the appellee.

<sup>3</sup> The ALJ criticized the appellant for not calling Ms. Akers as a witness at the hearing. Since Ms. Akers had made her complaint and the appellee had already admitted his misconduct, it was not necessary for Ms. Akers to testify.

The ALJ recognized that the employee had committed at least three serious instances of immorality and engaged in inappropriate conduct, however, in the end, the ALJ arbitrarily overturned the decision of the Superintendent of Schools and the elected board of education and determined that the employee should not be terminated, but rather, that he should be suspended for three days. This Court has held, in a long line of cases, that a county board of education has the authority to dismiss a school employee based upon the causes listed in statute governing dismissal (West Virginia Code §18A-2-8), which authority must be exercised reasonably, not arbitrarily or capriciously. The ALJ did not conclude that the board's action was arbitrary or capricious. It was, instead, the decision of the ALJ which was arbitrary and capricious, and such decision should be reversed.

The ALJ wrongly concluded that the appellee did not violate the county's sexual harassment policy.

While not explicitly saying so, the ALJ found that the appellee asking a fellow female employee if he could lick her pussy for \$100.00 on two occasions and showing her \$100 on a third occasion did not violate the county's sexual harassment policy by creating a hostile working environment. In the particular regard, the ALJ is clearly wrong. The ALJ apparently reasoned since the employee continued to converse with the appellee after he made the offers showed that a hostile environment did not exist. This reasoning defies present day analysis and thinking concerning the effects of sexual harassment on the victim. Oftentimes victims are reluctant to come forward and will continue to associate with the perpetrator because they do not wish to be singled out or they think if they ignore the comments the harassment will stop.

In West Virginia case law, Westmoreland Coal Co. v. West Virginia Human Rights Commission, 181 W.Va. 368, 382 S.E.2d 562 (1989); the Human Rights Commission (HRC) regulations, 6 W.Va.C.S.R. § 77-4-3 (1992); the federal authorities, Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed. 2d 295 (1993); Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986); and the Equal Employment Opportunity Commission (EEOC) regulations, 29 C.F.R. § 1604.11 (1980), recognize two types of sexual harassment. First, in quid pro quo harassment, an employer or its agent conditions an employee's job, employment benefits, or continued employment on his or her consent to participate in sex. Second, in hostile environment harassment, which is what occurred in this instance, an employer "discriminate[s] against ... [a female employee] with respect to ... conditions or privileges of employment[.]" when the workplace is infected, for example, by sexual barbs or innuendos, offensive touching, or dirty tricks aimed at the employee because of her gender. W.Va.Code, 5-11-9(1) (1992). In these cases, women are denied an equal opportunity in the workplace because, unlike their male counterparts, they must work in an atmosphere they find emotionally oppressive.<sup>4</sup> The conclusion that the working environment that Ms. Akers was subjected to at Bridgeview Elementary School was not hostile is clearly wrong and should not be sustained. No reasonable person could be expected to continue working in an environment in which offers to engage in sexual activity were being made on a regular basis. This is especially true if the offers of sexual activity are coupled with the offer to pay money.

Section 2.2 of 6 W.Va.C.S.R. §77-4-2 (1992) defines the parameters of sexual harassment:

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<sup>4</sup> The pioneer work by Catherine MacKinnon entitled *Sexual Harassment of Working Women* (1979) demonstrated and emphasized the role of male power and domination in sexual harassment. Ms. MacKinnon's subsequent works have elaborated, in a variety of contexts, on the interrelationship between male domination and both physical and civil rights abuses of women. See, e.g., Catherine MacKinnon, *Feminism Unmodified* (1987); Catherine MacKinnon, *Only Words* (1993).

"2.2 Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

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"2.2.3 Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

Additionally, Section 2.1 of 6 W.Va.C.S.R. § 77-4-2 (1992) interprets the Human Rights Act as affording "employees the right to work in an environment free from discriminatory intimidation, ridicule, or insult." These rules and the Human Rights Act are generally for the express purpose of protecting the rights of all individuals in the employment context.

This is precisely what occurred in the instant case. While the victim attempted to ignore and deflect the comments of the appellee by walking away or by referring to the appellee's spouse, she ultimately found the environment so intimidating, hostile and offensive she believed it necessary to quit her employment. The fact that the misconduct came from a co-worker, as opposed to a superior does not lessen the nature and extent of the hostile environment.

When sexual harassment occurs, the identity of the perpetrator is irrelevant to the victimized employee. A hostile environment can be just as oppressive when it is created by co-workers, subordinates, or customers as when it is caused by a superior. Hanlon v. Chambers, 195 W. Va. 99, 464 S.E. 2d 741 (1994). Case law under Title VII, EEOC regulations, and HRC regulations concur that co-workers and customers can cause a hostile environment. E.g., Davis v. Tri-State Mack Distribs., Inc., 981 F.2d 340 (8th Cir.1992) (co-workers); Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir.1991) (co-workers); EEOC v. Sage Realty Corp., 507 F.Supp. 599 (S.D.N.Y.1981) (customers); King v. Chrysler Corp., 812 F.Supp. 151

(E.D.Mo.E.D.1993) (patrons); 29 C.F.R. § 1604.11(d) (1980) (fellow employees); 29 C.F.R. § 1604.11(e) (1980) (non-employees); 6 W.Va.C.S.R. § 77-4-3.2 (1992) (co-workers).<sup>5</sup>

In this case, the appellee co-worker created a hostile working environment by offering to perform oral sex on a fellow employee for money. These offers, which occurred on three separate occasions, created a situation no reasonable person could find to not be intimidating or oppressive. The appellee's conduct in this matter cannot be viewed as anything other than offensive *per se*, and constitutes sexual harassment. Violating sexual harassment policy has been determined to be grounds for terminating a school employee. Harry v. Marion County Board of Education, 203 W. Va. 64, 506 S.E. 2d 319 (1998). Therefore, the ALJ's decision in this case was clearly wrong.

The ALJ wrongly concluded that based upon the numerous proven offenses committed by the appellee there was insufficient evidence to terminate his employment.

Based on the foregoing discussion, the appellee created a hostile working environment, and thereby was insubordinate for violating the sexual harassment policy. The appellee also engaged in three separate acts of immorality. Any one of these offenses is sufficient under West Virginia Code 18A-2-8 to terminate the employment of school personnel. It is submitted that the ALJ was arbitrary and capricious when she substituted her judgment for that of the school board in determining the appropriate punishment for an employee who admitted that his conduct was improper. It may be that irrelevant factors, such as sympathy,<sup>6</sup> played a role in the ALJ's

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<sup>5</sup> 6 W.Va.C.S.R. § 77-4-3.2 (1992) provides:

"With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knew or reasonably should have known of such conduct, or expressly or impliedly authorized or ratified such conduct. As a defense an employer may show that it took timely and appropriate corrective action regarding such conduct."

<sup>6</sup> Although not set forth in the ALJ's findings of fact, the appellee does not have much education, is functionally illiterate and may not be otherwise employable. Even if these facts are true, it does not excuse the appellee's behavior in this case.

decision. It is most certainly true that the appellee presents a sympathetic picture, while the victim has been portrayed in a very unfavorable light. Nevertheless, these emotions have no place in making these types of decisions. It is also true that the appellee has recognized his conduct was not appropriate and has apologized to the ALJ. Despite the appellee's apparent sincere expressions of remorse, this does not, in and of itself, obviate his misbehavior or take away from the seriousness of his offenses.

The ALJ improperly substituted her judgment for the judgment of the Superintendent of Schools and the elected board of education concerning the proper punishment for admitted acts of misconduct. The ALJ allowed her limited view of these circumstances outweigh the Board of Education's view of these actions and their effect on the school system as a whole. The Board of Education is by law and policy required to take a strong stance against permitting sexual harassment in the workplace and educational environment. The Board and the Superintendent have enacted strict policies and regulations aimed at preventing or minimizing sexual harassment. One of the key elements of these policies is effective disciplinary action against those who violate these standards.<sup>7</sup>

#### Conclusion

For all of the foregoing reasons, the decision of the Administrative Law Judge for the West Virginia Education and State Employees Grievance Board is contrary to law, arbitrary and capricious and is clearly wrong in view of the evidence on the record. The order of the Circuit Court of Kanawha County affirming this decision is also in error. The appellant, Kanawha County Board of Education, respectfully requests this Honorable Court reverse the decision of

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<sup>7</sup> In addition to effective disciplinary action, the Board and the Superintendent have developed appropriate educational programs for students and employees and countywide reporting and investigating system. All of these measures, while not eliminating sexual harassment in Kanawha County Schools, have reduced in incidences and harmful effects of sexual harassment on students and employees.

the Circuit Court of Kanawha County issued December 13, 2004, and determine the termination of the employment of the appellee was justified under the circumstances, and grant such other relief as the Court deems appropriate.

Respectfully Submitted  
KANAWHA COUNTY BOARD OF  
EDUCATION  
By Counsel



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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

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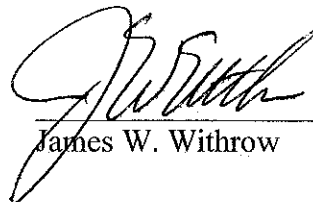
JOHNNY SLOAN,

Appellee.

CERTIFICATE OF SERVICE

The undersigned, James W. Withrow, Counsel for the Board of Education of the County of Kanawha, hereby certifies that on the 10<sup>th</sup> day of August, 2005, I served the foregoing BRIEF OF APPELLANT by mailing a true and correct copy thereof, postage prepaid to the following individual:

John Roush  
West Virginia School Service Personnel  
Association  
1591 Washington Street, East  
Charleston, WV 25311



James W. Withrow