

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

KERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**KANWHA COUNTY BOARD
OF EDUCATION,**
Appellant,

v.

Appeal No. 32783
Civil Action No. 03-AA-54

JOHNNY SLOAN,
Appellee.

**BRIEF FILED ON BEHALF OF APPELLEE
IN REPLY TO BRIEF OF APPELLANT**

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I. Procedural History

On August 27, 2002, Appellee was interviewed concerning allegations that he had sexually harassed a fellow employee. By letter dated August 27, 2002, Appellee was suspended with pay. On September 26, 2002, an agent of Appellant conducted a pre-disciplinary evidentiary hearing for Appellee concerning his suspension. By letter dated November 13, 2002 and received November 18, 2002, Appellant notified Appellee that it had voted to terminate his employment. Appellee filed an appeal to level IV on November 20, 2002. An evidentiary hearing was conducted on February 5, 2003. By decision issued March 24, 2003, the administrative law judge ordered that Appellee be reinstated with back pay and all benefits less a three-day suspension without pay. Appellant initiated an appeal to circuit court on or about April 25, 2003. By order entered December 13, 2004, the circuit court affirmed the decision of the administrative law judge.

II. Statement of the Facts

Johnny Sloan, Appellee, was employed by the Appellant as a custodian at Bridgeview Elementary Center. The Kanawha County Board of Education, Appellant, is a quasi-public corporation created by statute for the management and control of the public schools of Kanawha County.

Appellee worked for the Appellant for about twenty-seven years as a regular employee. Appellee had very good evaluations of his past service with the Appellant. Brenda Akers worked for Appellant as an aide during the 2000-2001 and 2001-2002 school years. Brenda Akers was responsible for caring for the needs of a special needs student. As a result she came to the cafeteria to assist the student while the student ate lunch.

Appellee's duties required him to be in the cafeteria to assist the students to put their refuse from lunch in the trash receptacle. Ms. Akers began to come over to where Appellee was stationed and talk to him during her time in the cafeteria. Ms. Akers initiated the conversations. She "deserted" her "station" in order to engage Appellee in conversation. Witnesses who were regularly in the cafeteria indicated that Ms. Akers stood close to Appellee and frequently touched his arm and shoulder. Regina Flinner, the school counselor, described Ms. Akers' behavior toward Appellee as flirtatious.

The testimony of various witnesses indicated concerning Ms. Akers' conduct toward Appellee and other male staff members was such as to indicate a potential willingness to an illicit affair. The following testimony was given at level IV:

- i. Cindy Williams, Head Cook, described Ms. Akers' conduct as "so forward" and indicated that Ms. Akers had patted the stomach of another male employee.
- ii. John LeFevre, a substitute teacher and husband of a teacher at the school, testified that Ms. Akers had put his arm on his shoulder

and told him something to the effect that she would have to come over to his home sometime when his wife wasn't at home.

iii. Ms. Flinner testified that Ms. Akers "batted her eyes" at Appellee and frequently joked with him.

The conversations between Appellee and Ms. Akers grew more personal as time passed. Ultimately, toward the end of the school year (2001-2002) Appellee broached the topic of a sexual relationship between the two of them. Ms. Akers did not reject this suggestion nor did she indicate to Appellee that she was upset or offended by the suggestion. Later Appellee again broached the topic with about the same result. At some point Appellee also mentioned the possibility of payment to Ms. Akers for a sexual relationship.

The last time Appellee raised the subject occurred when he observed Ms. Akers deviating from her normal routine by walking along a stretch of sidewalk by the school. Appellee believed that this was intended as sign to him that she wished to discuss the matter. Appellee approached her and suggested a sexual relationship with her. Again, she did not verbally refuse, but simply walked away from him. Appellee interpreted this as a "no" and did not broach the subject again. Appellee and Ms. Akers continued to have a friendly relationship continued up to the end of school, a period of several weeks. However, on or about the last day of school Ms. Akers told Appellee that she believed she had earned the \$100. Appellee disagreed.

Though mortified by the whole situation, Appellee cooperated with the Appellant's investigation. He frankly admitted to making proposals of a sexual relationship. It is difficult to imagine the allegations being proven absent his frank admissions. He could have turned the matter into a archetype "she said/he said" situation. Appellee has expressed deep remorse and regret at the circumstances giving rise to this disciplinary action.

At about the same time the allegations against Appellee were being investigated Appellant took action regarding another employee charged with sexual harassment and several other charges. The other employee, Mr. Cooper, had been terminated for theft and sexual harassment. The grievance board had affirmed this termination. However, at the August 23, 2002 meeting, Appellant reduced the penalty enforced against Kenneth Cooper from termination to a six month suspension with the requirement that Mr. Cooper not be assigned to the school where his misconduct occurred and a further possibility of counseling if necessary.

III. Issues Raised

- a. Did Appellee violate the sexual harassment policy of Appellant?
- b. Were there sufficient grounds for the termination of Appellant?

IV. Citation of Authority

A. Martin v. Randolph County Board of Education, 465 S.E.2d 399 (W.Va. 1995)

B. West Virginia Code §18A-2-8

C. Rovello v. Lewis County Board of Education, 381 S.E.2d 237 (W.Va. 1989)

V. Argument

Before addressing the two specific issues raised by this appeal, Appellee would like to briefly address the appropriate standard of review to be applied to this case. First, we note that the court must utilize the clearly wrong standard to review the determination of the administrative law judge and circuit court on factual issues. Accordingly, this court must "...uphold any of the ALJ's factual findings that are supported by substantial evidence..." and must give, "... substantial deference to inferences drawn from these facts. Further, the ALJ's credibility determinations are binding unless patently without basis in the record." Martin v. Randolph County Board of Education, 465 S.E.2d 399 (W.Va. 1995). This is the standard, which must be applied to the decision of the administrative law judge on the issue of whether Appellee violated Appellant's sexual harassment policy.

In Martin the West Virginia Supreme Court of Appeals also held that although a court may set aside a decision of an administrative law judge if it is arbitrary,

capricious, an abuse of discretion, or contrary to law; the scope of review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the hearing examiner. Application of this principle would be appropriate when reviewing the decision of the administrative law judge and the circuit court on the issue of whether Appellee was entitled to mitigation of the punishment levied on him by Appellant, i.e. termination.

A. Appellee did not violate the sexual harassment policy of Appellant.

Appellant's policy defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature ... when: ... such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or education or creating an intimidating, hostile or offensive working or educational environment; ..."

Appellee contends that the conduct of Ms. Akers was such that he believed that his advances were welcome. He sincerely believed that she was interested in a sexual relationship. Ms. Akers never directly declined Appellee's overtures or indicated to him that they upset her. However, when she walked away from him without answering at all, Appellee took that as a refusal. From that point forward he continued to be friendly and never brought up the topic again.¹

¹ According to the record she brought up the topic again on the last day of the school year.

The administrative law judge held that Appellant had not proven that Appellee's advances were unwelcome nor that they interfered with Ms. Akers work performance or created a intimidating, hostile, or offensive working environment.² She noted that the failure of Appellant to present Ms. Aker's testimony at the level IV hearing and observed that while such was unnecessary to prove what happened, it would certainly be helpful in a determination as to whether the advances were truly unwelcome or created a hostile working environment. The administrative law judge found Appellee to be a credible witness noting that he could have simply denied the whole matter. Further, she found the letter from Ms. Akers that was introduced into evidence not to be truthful.³ Simply put, Appellant did not present evidence sufficient to support a charge of violation of the sexual harassment policy.

² See Conclusion of Law #4, p. 15 of the level IV decision in this case.

³ The administrative law judge stated, that Appellee, "... presented no reason for its failure to call Ms. Akers as a witness so that she could explain under oath how upset she was by Appellee's behavior, and so she could be cross-examined. While her testimony was unnecessary to establish what Appellee had said to her, as Appellee admitted to the statements, her testimony was crucial to the determination of whether Appellee's statements truly were unwelcome, and whether they created a hostile work environment.

Appellee's version of what occurred was markedly different from that of Ms. Akers with regard to the circumstances under which the statements were made by Appellee, and Ms. Akers' actions after the statements were made, which is one reason a witness should be presented for cross-examination. Ms. Akers' letter states that Appellee approached her while she was performing lunch room duty and offered her money for oral sex. Ms. Akers told the investigator that she was "standing by the door to the outside of the building when she was approached by Mr. Sloan." Appellee testified that he first made the proposition to Ms. Akers after she had approached him one day at his work area in the lunch room. All the witnesses were quite clear in their testimony that Ms. Akers never performed her assigned lunch room duty, rather she approached Appellee everyday while he was manning his work station. None of the witnesses ever saw Appellee approach Ms. Akers. Nowhere in the investigative report does it indicate that Ms. Akers ever mentioned the fact that she approached Appellee everyday at his work area and talked to him for up to 30 minutes; rather, the report states, "[s]he indicates that she would frequently be

Although the administrative law judge did not hold that Appellee's actions violated the sexual harassment policy, she did hold that the actions were immoral.

Immorality is one of the grounds upon which disciplinary action may be based pursuant to West Virginia Code §18A-2-8. This leads us directly to our next issue,

whether Appellant was justified in terminating Appellee for this immoral action.

Before addressing that issue, Appellee would like to address one further point under the topic of sexual harassment.

in the cafeteria to help out with the lunch duty and that the school custodian, Johnny Sloan, was usually present as well."

Ms. Akers stated in her complaint that Appellee had cornered her at the storeroom and shown her money, while Appellee stated he had followed Ms. Akers outside and shown her money. The complaint form states that she, "[w]alked away each time -- continued to steer away and avoid the individual for the remaining school year." She likewise told the investigator that in response to the offers she had avoided contact with Appellee. Appellee testified that Ms. Akers continued to be quite friendly with him after the offers, and continued to leave her duties each day at lunchtime to stand beside him and talk to him for up to 30 minutes, right up until the end of the school year. Sharon Gainer, cafeteria manager, and Regina Flinner, school counselor, both testified that Ms. Akers continued to approach Appellee at his work area in the cafeteria and talk to him nearly everyday through the end of the school year, including the very last day of school." Level IV decision, pp. 8-10.

Although Appellee could not recall every detail of what occurred, he admitted that he had in fact made the offers as alleged by Ms. Akers, apologized for his actions, and stated he would not make such a mistake again. Appellee could have simply denied it all, but he was candid enough to admit the truth, and his mistake. It will also be noted that Ms. Akers told the investigator that she had been under psychiatric care for the last two years, and requested that she be rehired by KBOE in a family support position, and that KBOE pay for her therapy and psychiatric visits, among other things. The undersigned finds Appellee to be a credible witness, and Ms. Akers' complaint and her statement to the investigator to be untruthful. Ms. Akers' statements that she resigned due to the sexual harassment, and she delayed reporting due to the emotional stress she suffered during the past several months due to the harassment are not credible given that she was untruthful about avoiding Appellee, and in fact, continued to talk to him everyday at lunchtime. This is not the type of response one would expect from someone who was intimidated or offended by Appellee's offers. Accordingly, Ms. Akers' statements will be given no weight. KBOE has not demonstrated that Appellee violated its sexual harassment policy.

Appellant accuses the administrative law judge of adopting a "blame the victim" attitude in this case. This is truly unjustified. Appellee agrees that no amount suggestive language or other "cues" or "signals" justifies an individual in physically forcing himself or herself on another individual in a sexual manner. However, we are not dealing with rape in this case. In fact, we are not dealing with actual intercourse at all. Appellee contends that the actions of Ms. Akers led him to believe she was interested in a sexual relationship and that such belief was reasonable. When he came to understand that she was not interested in a sexual relationship, he dropped the subject. Although such action may well be immoral, it does not constitute sexual harassment.

B. There were not sufficient grounds to terminate Appellee.

Appellee argues that the administrative law judge was correct in determining that termination was not appropriate in this case. Appellee noted that he had a long (27 years) career with the board of education and that his record up to the point of the incident with Ms. Akers was exemplary. Such factors should be given great weight in considering possible mitigation of punishment. Rovello v. Lewis County Board of Education, 381 S.E.2d 237 (W.Va. 1989). The administrative law judge further pointed out that the penalty dealt to him, i.e. termination, was disproportionate to punishment

imposed on another employee (Mr. Cooper) whose case was similar to his and which was processed at about the same time period.

The administrative law judge ruled in favor of Appellee on these issues. She did a fine job of explaining the standard she used and the basis upon which she decided that termination was too harsh a penalty. Accordingly, let us simply follow her reasoning as explained in the level IV decision. She held:

"Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted). "[T]he appropriateness of a penalty, while depending upon resolution of questions of fact, is by no means a mere factual determination. Douglas v. Veterans Administration, 5 M.S.P.B. 280 (1981). Such a decision 'involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgement and discretion.' Id. citing Kulkin v. Bergland, 626 F.2d 181, 185 (1st Cir. 1980); Beall Const. Co. v. OSHRC, 507 F.2d 1041, 1046 (8th Cir. 1974). Because the imposition of a penalty results from an employer's administrative exercise of its discretion, said action may be the result of arbitrary and capricious decision-making or an abuse of discretion. See, Thompson v. U.S. Postal Service, 596 F. Supp. 628 (D.C. Va. 1984)." Feicht v. W. Va. Bureau of Employment Programs, Docket No. 93-BEP-253 (Dec. 9, 1993). "[M]itigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for

rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

Level IV decision, p. 11-12

With regard to the standard applied to a claim by an employee that he/she had been the victim of disparate treatment, she held:

For an employee to prevail on a claim of disparate treatment [in discipline], he must establish that there is no rational basis for distinguishing specific penalties for the same or substantially similar misconduct. The misconduct brought into question must be similar or more serious than that with which the grievant is charged. Clark v. Dept. of Navy, 6 MSPB 24 (1981). The grievant must also show that the other employee's disciplinary record is similar to his own. Clancy v. Dept. of Navy, 6 MSPB 173 (1981). Finally, the grievant must establish that his position is similar to that of the other employee to whom he is compared with respect to the trust and responsibility expected of his position. Rohn v. Dept. of Army, 30 MSPR 157 (1986).

McVicker v. Kanawha County Bd. of Educ., Docket No. 95-20-339 (Feb. 9, 1996).

[T]he burden is on the employer to come forward with a reason why a difference in treatment exists once the grievant identifies a disparity in the result for the same offense.

Drummer v. General Services Administration, 22 MSPR 432 (1984). Only when the established misconduct is sufficiently egregious is the disparate treatment doctrine immaterial. In other words, if an employee's punishment is appropriate to the seriousness of the offense, an allegation of disparate treatment presents no basis for reversal. Quander v. Dept. of Justice, SF07528311002 (1984). An agency may impose valid sanctions that are different if its decision is based upon management's full consideration of all relevant factors. Gilmore v. Dept. of Army, 7 MSPB 155 (1981).

Level IV decision, p. 12

The administrative law judge then explained the factors on which she relied in applying these standards. She held:

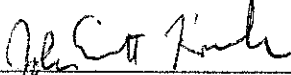
Grievant was an outstanding 27 year service employee, with no prior discipline, who propositioned a female co-worker who left her work station everyday and stood close to him, telling him about her personal problems, joking, touching him, and asking him to loan her money, for 30 minutes at a time; and then Grievant admitted to his actions, and apologized. Grievant's co-workers testified as to what a supportive, good co-worker he was. Mr. Cooper was a satisfactory service employee, who stalked a female co-worker, stole items from her purse, and lied about what had happened while under oath. Mr. Cooper and Grievant are similarly situated in terms of their employment responsibilities. When one considers all the circumstances, which is what a board of education is supposed to do when deciding on an employee's livelihood, it is difficult to understand how Grievant's employment could be terminated. It is even more difficult to understand how KBOE could terminate Grievant's employment, yet reinstate Mr. Cooper. Certainly Mr. Cooper would seem to be more of a threat to his co-workers in the future than Grievant. The undersigned finds that while some punishment is appropriate, the penalty imposed was clearly disproportionate to the offense under the circumstances, and that Grievant has been subjected to disparate treatment.

Level IV decision, pp. 12-13

Appellee urges this court to follow the administrative law judge and circuit court in taking note of the many factors that favor mitigation of the punishment imposed on Appellee. First, he was honest and cooperated with the Appellant's investigation. Had he simply denied the allegations, it is doubtful that Appellant could have carried its burden of proof. Second, Appellee is painfully aware of his error and has shown

considerable remorse. Third, Appellee has been employed by Appellant for approximately twenty-seven years and has a spotless record. Finally, Appellee treated another employee guilty of much worse conduct with considerably more leniency. In view of these and other factors, the decision of the administrative law judge to reduce Appellee's punishment from termination to a suspension.

JOHNNY SLOAN, Appellant
By counsel,

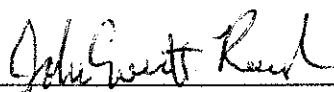


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CERTIFICATE OF SERVICE

I, John Everett Roush, Esq., hereby certify that I have served the foregoing "Brief Filed on Behalf of Appellee in Reply to the Brief of Appellant" on this the 12th day of September 2005 by depositing the same in a properly addressed envelope, First Class Postage Prepaid, in the U.S. Mails, to:

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