

ALAN HAINES,

Appellant
v.

BALTIMORE COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 13-49

OPINION

INTRODUCTION

Appellant challenges his termination from employment as a building service worker for Baltimore County Public Schools (BCPS). The Baltimore County Board of Education (local board) filed a Motion for Summary Affirmance maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant filed an opposition to the motion and the local board replied.

FACTUAL BACKGROUND

Appellant served as a building service worker for Baltimore County Public Schools from 2007 until his termination in 2011. (Record 9 at 1). During this time, he worked at Dulaney High School, Padonia Elementary School, Towson High School, and Ridgely Middle School, repeatedly being transferred for inappropriate behavior. (Record 6, Superintendent's Exh.12 at 1).

In November 2010, Appellant used obscene and abusive language towards another employee at Towson High School.¹ (Record 6, Superintendent's Exhs.9, 11). The senior operations supervisor at the time recommended him for termination for "gross misconduct." (Record 6, Superintendent's Exhs.7, 8). Instead of terminating Appellant's employment, Michael Sines, Executive Director of Physical Facilities and Superintendent's designee, suspended Appellant without pay for five days. (Record 6, Superintendent's Exh.4 at 2). He also transferred Appellant to Ridgely Middle School, placed him on a 180 day performance review, and required him to successfully complete anger management training.² *Id.* Mr. Sines also warned that "if this type of behavior occurs again, [Appellant] will be subject to immediate separation from employment with Baltimore County Public Schools." *Id.*

On July 29, 2011, Appellant was involved in an incident at Ridgely Middle School which ultimately led to his termination. (Record 6, Superintendent's Exh.4 at 1). On that date, Appellant had been in his van in the parking lot of the school smoking a "smokeless cigarette."³ (Appeal at 7). Afterwards, he entered the break room where Michael Tilghman, Building Operations Supervisor at Ridgely Middle School; William Broaddus, Building Service Worker; and Ethan Looney, Building Service Worker, were already talking. *Id.*; Tr. at 87. Mr. Tilghman reminded Appellant that if he takes a smoke break, he must swipe out and leave the school

¹ The local board's Memorandum and Reply mistakenly refer to Towson High School as Loch Raven High School.

² Appellant successfully completed the performance review and training. (Record 6, Superintendent Exh.4 at 2).

³ Appellant identifies a smokeless cigarette as a device that helps individuals quit smoking. (Appeal at 7).

grounds. (Record 6, Superintendent's Exh.4 at 1). Appellant became angry and asked why he was always being accused. Tr. at 97. He then swiped out and left the premises. (Record 6, Superintendent's Exh.4 at 1).

Mr. Broaddus and Mr. Looney provided written accounts of the incident. *Id.* Mr. Looney stated that Appellant "worked himself into an angry rage" and Mr. Broaddus stated that Appellant "seemed to lose total control of himself." *Id.* Mr. Broaddus also reported feeling threatened.⁴ *Id.*

Once in his car, Appellant spoke on the phone with Paul Wingerd, Area Supervisor, and explained that he felt he was being bullied and harassed. (Appeal at 8). Appellant also said that he was shaking and was unable to think clearly. (Tr. 97-98; Record 6, Superintendent's Exh.4 at 2). Mr. Wingerd said that Appellant should have called him before leaving the school premises. (Appeal at 8). He then placed Appellant on administrative leave and reported the incident to Sean Lee, Senior Operations Supervisor. *Id.*

After hearing about the incident from Mr. Lee, William Wingerd, Administrator of the Office of Operations, recommended that Appellant be terminated from employment.⁵ (Record 6, Superintendent's Exh.1 at 1). Michael Sines, acting as the Superintendent's designee, affirmed the recommendation to terminate Appellant. *Id.* at 2. He based his decision on the July 29, 2011 incident at Ridgely Middle School as well as the November 2010 incident at Towson High School. *Id.*

Appellant appealed his termination from employment to the local board. A hearing took place and the hearing examiner recommended that the local board affirm the Superintendent's decision.⁶ The local board affirmed. This appeal followed.

STANDARD OF REVIEW

In *Livers v. Charles County Bd. of Educ.*, 6 Op. MSBE 407 (1992), *aff'd* 101 Md. App. 160, *cert. denied*, 336 Md. 594 (1993), the State Board held that a non-certificated support employee is entitled to administrative review of a termination pursuant to §4-205(c)(4) of the Education Article. The standard of review that the State Board applies to such a termination is that the local board's decision is *prima facie* correct and the State Board will not substitute its judgment for that of the local board unless its decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A.

ANALYSIS

Appellant claims that the local board's decision violated the Americans with Disabilities Act (ADA), and his due process rights based on the "Missing Witness Rule." (Appeal at 27-33). Appellant further claims that he was not an "at will" employee and was terminable only for "just

⁴ During the hearing, Appellant testified that he is diagnosed with Bipolar II disorder which can interfere with his social interactions. Tr. 45; 56-57.

⁵ William Wingerd is also Paul Wingerd's father.

⁶ The hearing took place over two days: March 1, 2012 and May 16, 2012.

cause.” (Response at 5-6). Lastly, Appellant claims that there was a conflict of interest because William Wingerd, who recommended Appellant’s termination to the Superintendent’s designee, is the father of Paul Wingerd, who made the earlier decision to place Appellant on administrative leave. (Appeal at 33-35).

Was the ADA Violated?

Appellant argues that his termination was a result of illegal discrimination based on his disability of Bipolar II disorder, and that the hearing examiner failed to identify him as disabled under the ADA. (Appeal at 26). The ADA states that no employer shall discriminate against an individual on the basis of disability in regard to the discharge of employees. 42 USCS § 12112, *Jones v. American Postal Workers Union*, 192 F.3d. 417, 423 (4th Cir. 1999). However, the ADA does not protect those individuals who are discharged based upon the employee’s misconduct, even if the misconduct relates to the individual’s disability. *Id.* at 429. In *Gasper v. Perry*, a disabled individual was terminated based on his history of disciplinary issues, his failure to follow instructions, and inappropriate and offensive behavior towards his coworkers. *Gasper v. Perry*, 1998 U.S. App. LEXIS 14933 1, 19-21 (4th Cir. Va. 1998). Though he claimed that this behavior was a result of his mental disability, the court upheld his termination finding that any employer may terminate an employee for misconduct, even if it is allegedly related to the employee’s disability. *Id.* at 22.

In this case, the hearing examiner found that although Appellant claimed he was diagnosed with Bipolar II disorder, he did not provide supporting medical documentation or medical testimony. (Record 11 at 45). There is not any evidence that Appellant ever requested accommodations for his Bipolar II disorder from his employer or that the employer knew about the condition. *Id.* Moreover, even if Appellant’s inappropriate conduct was related to his Bipolar II disorder, the ADA does not provide protection from termination for his offensive behavior and violation of employee standards of conduct. There is no evidence that Appellant was discharged for any reason other than his misconduct. Thus, the hearing examiner did not err in his analysis regarding the ADA claims.

Due Process/Missing Witness Rule

Appellant claims that his due process rights were violated based on the theory of the Missing Witness rule. The Missing Witness rule is the doctrine that, when a party fails at trial to present a witness who is under the control of that party and whose testimony would have been admissible, the fact finder is entitled to infer that the witness’s testimony would have been unfavorable to that party. *Bereano v. State Ethics Comm’n*, 403 Md. 716 (Md. 2008). Appellant asserts that the Missing Witness Rule applies here because Mr. Tilghman, Mr. William Wingerd, Mr. Broadus, and Mr. Looney were present on the first day of the hearing before the local hearing examiner, but not on the second day and did not testify.⁷ (Appeal at 20, 29-30). Even if the Missing Witness rule were applicable here, it does not require the fact finder to make the inference. *Bereano*, 403 Md. at 739. Rather, it merely allows it. *Id.* Moreover, in this case

⁷ Although Appellant maintains that the local board “purposely hid” the witnesses, there is no evidence to support this claim. (Appeal at 35).

there are written statements and emails from the named individuals that set forth their accounts of how the events transpired. Those accounts support the termination decision.

Was There "Just Cause" for Appellant's Termination?

Although the local board maintains that Appellant was an at-will employee, the collective bargaining agreement between the union and the local board contains a "just cause" provision. (Record 6, Exh.A6 at 26). That provision states that an employer shall not terminate any employee without "just cause." *Id.* Thus, Appellant could only be terminated for "just cause."

Appellant contends that there was not "just cause" for his termination. (Response at 3). Article XIII of the collective bargaining agreement states that gross misconduct on the part of an employee is "just cause" for termination. (Record 6, Exh.A6 at 26). Creating a disturbance is one of the cited examples of gross misconduct. *Id.* Appellant has a history of creating disturbances, including those in November 2010 and July 2011, which resulted in multiple suspensions, transfers, and anger management counseling throughout his employment with BCPS. Accordingly, we find that there was "just cause" for his termination.

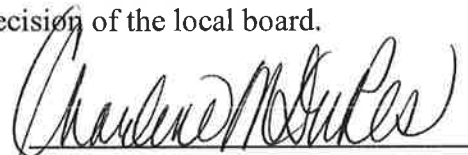
Conflict of Interest

Appellant claims that there was a conflict of interest because William Wingerd, the Administrator of the Office of Operations who recommended Appellant's termination, is Paul Wingerd's father. (Appeal at 35). Paul Wingerd is the Area Supervisor who placed Appellant on administrative leave and reported the incident to the Senior Operations Supervisor. Tr. 258-259. Appellant believes that William Wingerd's termination recommendation was biased because of his son's involvement in the case. (Appeal at 35).

Although both William Wingerd and Paul Wingerd were involved in this case, it was established during the hearing that William Wingerd does not directly supervise his son.⁸ *Id.* at 258-259. Although Appellant believes bias influenced William Wingerd's termination recommendation based on the mere fact that the two are related, there is no evidence to support the claim. The termination is supported by evidence of Appellant's misconduct. Thus, we do not find that Paul Wingerd's relation to William Wingerd caused a conflict of interest in this case.

CONCLUSION

For the foregoing reasons, we affirm the decision of the local board.


Charlene M. Dukes
President

⁸ Baltimore County Public School's Code of Ethics 8363 states that "an employee may not be in a position that directly supervises, evaluates, or disciplines an immediate family member." Tr. At 254-255.

Mary Kay Finan

Mary Kay Finan
Vice President

James H. DeGraffenreid, Jr.

James H. DeGraffenreid, Jr.

Linda Eberhart

Linda Eberhart

Absent

S. James Gates, Jr.

Absent JM

Luisa Montero-Diaz

Sayed M. Naved

Sayed M. Naved

Madhu Sidhu

Madhu Sidhu

Donna Hill Staton

Donna Hill Staton

Guffie M. Smith, Jr.

Guffie M. Smith, Jr.

September 24, 2013