BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

GENE DANNEMAN, Employee/Grievant, v. DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Employer/Respondent.	))))))))))	**DOCKET No. 08-10-429** **DECISION AND ORDER**

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board ("the Board") at 9:00 a.m. on April 16, 2009 at the Margaret M. O'Neill Building, Suite 213, 410 Federal Street, Dover, DE 19901.

BEFORE John F. Schmutz, Acting Chair, and Joseph D. Dillon, Paul R. Houck, and Martha K. Austin, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Administrative Assistant to the Board

Gene Danneman
Employee/Grievant *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Division of Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

The Board did not hear any witness testimony or admit any documents into evidence. The Board heard legal argument from the parties on the motion by the Department of Health and Social Services ("DHSS") to dismiss the appeal for failure to state a claim under the Merit Rules and statutes.

FINDINGS OF FACT

The jurisdictional facts are not in dispute. The employee/grievant, Gene Danneman ("Danneman"), works at the Emily P. Bissell Hospital ("the Hospital") as the Volunteer Resource Coordinator. The Hospital has a dress code which prohibits the wearing, among other things, of flip-flops, open-toed shoes, and sneakers, but employees may wear special clothing or shoes for medical reasons upon providing supporting medical documentation from a physician.

The dress code provides for progressive discipline. For a first violation, the "supervisor will verbally counsel the employee discussing the dress code violation and the employee will be sent home to change into appropriate clothing. The employee will have to use annual leave or compensatory time to go home, change clothes and return to work."

For a second violation, the "supervisor will verbally counsel the employee discussing the dress code violation and will maintain a summary of the counseling in the supervisor's employee file. Additionally, the employee will be sent home to change into appropriate clothing. The employee will have to use annual leave or compensatory time to go home, change clothes and return to work."

Danneman provided the Hospital with a note dated February 28, 2007 from Dr. Alan J. Fink stating that she "should wear sneakers to work to prevent low back pain from occurring."

Danneman began wearing multi-colored sneakers to work. Her supervisor, Hospital Director Susan Mitchell, told Danneman that multi-colored sneakers did not comply with the professional image standards set forth in the dress code and directed Danneman to wear only black or brown sneakers. [1]

On April 23, 2008, Mitchell verbally counseled Danneman for wearing closed-toe sandals in violation of the dress code. Mitchell sent Danneman home to change and she returned wearing black sneakers.

Danneman provided the Hospital with a note from Dr. Damian M. Andrisani stating that because of a broken middle toe it was medically necessary for her "to wear a stiff soled shoe to work" with "a back to it (a closed shoe) so as to allow support of her entire foot."

On May 5, 2008, Danneman wore open-toed sandals to work. Mitchell directed her to return home to obtain appropriate footwear. Mitchell advised Danneman that if she refused to change her shoes she could use sick leave for two days until her next doctor's appointment.

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[1] Danneman suggest that the color restrictions on her sneakers was arbitrary and capricious. The Board will not second-guess management's prerogative to interpret and apply its own dress code. *See* Merit Rule 1.4: "The State has the exclusive right to manage its operations and direct employees except as specifically modified by these Rules."

CONCLUSIONS OF LAW

Danneman claims the Hospital violated: Merit Rule 12 for reprimanding her without just cause; Merit Rule 5.3 for allegedly coercing her into taking sick leave; and Merit Rule 2.1 for allegedly discriminating against her on the basis of a disability.

Danneman's supervisor verbally counseled her on April 23 and May 5, 2008 for wearing inappropriate footwear to work in violation of the Hospital's dress code. The Board has previously determined "as a matter of law that it does not have jurisdiction to decide a grievance over a verbal reprimand. The Board does not believe that a verbal reprimand amounts to a disciplinary measure under Merit Rule 12.1 which an employee can grieve by alleging that the employer did not have just cause." *Trader v. DHSS*, Docket No. 07-01-379 (May 15, 2008).

The Board concludes as a matter of law that Danneman has failed to state a claim for a violation of Merit Rule 12 because the verbal counseling she received from her supervisor was not a disciplinary measure which is grievable under the Merit Rules.

The Board concludes as a matter of law that Danneman has failed to state a claim for violation of Merit Rule 5.3. The Board does not believe that Danneman's supervisor coerced her into taking two days of sick leave until her next doctor's appointment. Ms. Mitchell gave Danneman a choice: go home and change shoes, or take sick leave. Danneman may not have liked her choices, but she chose to take sick leave. She was not coerced.

The Board concludes as a matter of law that Danneman has failed to state claim for a violation of Merit Rule 2.1 for disability discrimination. The Board will assume, for the sake of argument, that she has a physical impairment (bad back). Danneman, however, has not alleged any facts to show that her disability substantially limits a major life activity like walking or working.

In *Whitfield v. Pathmark Stores, Inc.*, 971 F. Supp. 851 (D. Del. 1997), the plaintiff's doctor prescribed that she be restricted at work from standing for long periods of time because of a bad back. The court held that the plaintiff was not disabled for purposes of the Americans with Disabilities Act ("ADA") because her back injury did not substantially limit her ability to work. "While the record contains evidence of Whitfield's medical limitations, there exists nothing connecting those limitations to ability to perform other jobs in the community." 971 F. Supp. at 859.

In *Agnew v. Heat Treating Services of America*, 2005 WL 3440432 (6th Cir., Dec. 14, 2005), the court held that the plaintiff's bad back did not substantially limit his ability to work.

> Plaintiff's evidence shows that he likely does have a physical impairment, namely a bad back. However, Plaintiff's bad back alone does not qualify him for ADA disability status. Plaintiff has established that his back problems at times prevent him from lifting heavy objects, bending at the waist, twisting, standing for long periods of time or walking long distances. But Plaintiff has failed to establish that his back injury precludes him from performing these activities altogether or that he's significantly restricted in performing these activities.

2005 WL 3440432, at p.5.

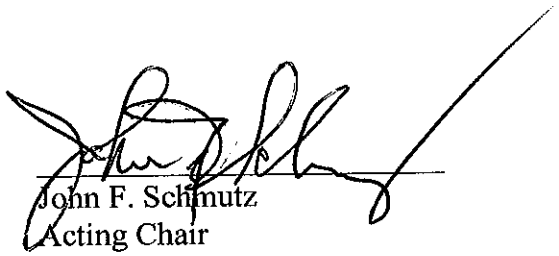
Danneman has not alleged any facts to state a claim that her back condition substantially limits her ability to walk or work. Indeed, her own doctor authorized her to work full-time so long as she wore support shoes like sneakers. Danneman has not alleged any facts to show that her back condition prevented her from doing her work as the Hospital's Volunteer Resource Coordinator, much less that her condition substantially limited her ability to perform other jobs.

The Board concludes as a matter of law that Danneman has failed to state claim under Merit Rule 2.1 for disability discrimination because her physical impairment does not substantially limit

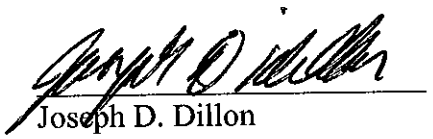
her ability to work or other major life activity.

ORDER

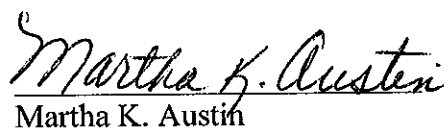
It is this 22nd day of April, 2009, by a unanimous vote of 4-0, the Decision and Order of the Board to grant the motion by DHSS to dismiss Danneman's appeal.



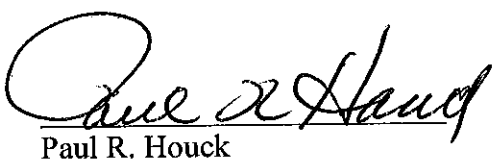
John F. Schmutz
Acting Chair



Joseph D. Dillon
Member



Martha K. Austin
Member



Paul R. Houck
Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

> (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
>
> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
>
> (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
>
> (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: May 1, 2009

Distribution:
Original: File
Copies: Grievant
Agency's Representative
Board Counsel

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