DARNELL BRYANT,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
PRINCE GEORGE'S COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 99-50

OPINION

This is an appeal of the dismissal of a non-certificated employee for poor performance, failure to comply with work requirements, and other deficiencies. The local board has filed a Motion to Dismiss, or alternatively, Motion for Summary Affirmance, maintaining that Appellant has failed to present facts that show that the local board's decision is arbitrary, unreasonable or illegal. Appellant has filed an opposition to the motion.

BACKGROUND

Appellant was employed as a custodian with the Prince George's County Public School System for approximately 2 years.[1] On January 29, 1999, the local superintendent terminated Appellant from his position based on his failure to report timely; failure to notify the school in case of absences; failure to remain on duty during assigned hours and failure to complete assigned duties.

The record reveals that there were problems with Appellant's work performance beginning in early 1997. On May 8, 1997, Appellant's supervisor requested that Appellant be terminated from his position. Although Appellant was not terminated at that time, he was issued a warning letter for his unsatisfactory work performance; his failure to complete assigned duties; his failure to properly secure the building prior to leaving; his failure to report to work at his designated time; and his failure to follow instructions.

The subsequent year, Appellant received an interim evaluation indicating "unsatisfactory" in all categories - possessing and applying knowledge and skills necessary to the job, cooperating and working with others, regular attendance and punctuality, and demonstrating initiative and interest in work. The comments noted that Appellant's performance was deficient in cleaning the cafeteria, kitchen, classrooms and hallways, and that dead mice and mouse droppings were found in the kitchen after Appellant supposedly cleaned the area. The comments further noted that the

[1]Appellant was originally assigned to University Park Elementary School and was later transferred to Laurel High School.

Chief Building Supervisor had met several times with Appellant to discuss his poor cleaning skills and ways in which he could improve his performance. As of the date of the evaluation, however, Appellant's performance had not improved. Moreover, Appellant had indicated that he could not perform any better. *See* January 12, 1998 Interim Evaluation.

Thereafter, on January 14, 1998, Patrick J. Logan, Director of Plant Operations, issued a warning letter to Appellant regarding his unsatisfactory work performance and his failure to complete assigned duties. He advised Appellant that any further unsatisfactory performance could result in his termination from employment. The letter also provided Appellant with information on the Employee Assistance Office in the event that he was having any personal problems which might affect his job.

Later that month, Jan Mills, Principal of Laurel High School, observed that Appellant's performance had not improved. In a memo to the Director of Plant Operations, the Principal stated,

> As a result of the conference between Mr. Bryant, Mr. Chapman and myself, Mr. Bryant's job performance has not improved. In fact, it may have deteriorated. I have received three written statements from teachers expressing their dissatisfaction with the condition of their classrooms. The floors had not been swept and the trash had not been emptied for several days. One teacher tried to make special arrangements with Mr. Bryant so that he could enter her room during class. Even this did not encourage him to do his assigned work. After receiving the third letter, I looked for Mr. Bryant in his assigned hallway on January 20. He was not present but his broom was leaning against the wall in the cafeteria. I asked Mr. Richardson, the night lead man, where he thought I could find Mr. Bryant. Mr. Richardson stated that Mr. Bryant was probably outside smoking a cigarette. He also said that he has a very difficult time getting Mr. Bryant to work. I found Mr. Bryant smoking on school property. I stated that I had thought he was interested in improving his job performance in order to keep his job. He told me that he thought he had done so. I explained that I had received several complaints and also that he was breaking state law by smoking. Once again, he told me that he was doing his best. His station continues to remain dirty. This employee is not interested in performing his job in the manner we require. He needs to be terminated as soon as possible.

Rather than terminate Appellant, he was suspended for a period of ten days for his unsatisfactory work performance and his failure to complete assigned duties. Again, Appellant was advised that he could be terminated from his employment if he did not immediately improve his work

performance.

Additional problems regarding Appellant's work performance surfaced during September, 1998. The Principal noted the following incidents:

- September 8 - Mr. Bryant did not report to work until 2:00 p.m., nor did he notify anyone that he would be late.

- September 11 - A teacher reported to the Chief Building Supervisor that Mr. Bryant was sitting in the teacher's lounge at 10:50 a.m. reading the newspaper and talking on the phone.

- September 16 - At 11:55 a.m. Mr. Bryant was not accomplishing his assigned duties because he was again sitting down when it was not his break or lunch time.

- September 24 - At 11:55 a.m. Mr. Bryant was standing in the custodian's closet reading the newspaper while his assigned duties went unperformed.

By letter dated October 6, 1998, Thomas D. Kirby, Director of Personnel, advised Appellant of his termination effective that same date based on his failure to report to work at his designated time; failure to notify administration in case of absences; failure to remain on duty during assigned hours; and failure to complete assigned duties.

Appellant appealed the termination decision. A full evidentiary hearing was held before a local hearing officer during which Appellant testified on his own behalf.[2] The hearing officer recommended that the termination of Appellant from his position be upheld, citing testimony and written documentation of Appellant's poor performance and poor work history. The hearing officer stated that Appellant "was given sufficient opportunity to improve his job performance and was counseled and warned of the need to improve his work behavior prior to his termination." *See* Hearing Officer Report at 9. The local superintendent concurred with the hearing officer's recommendation and upheld Appellant's termination.

Appellant appealed the local superintendent's decision to the local board. Oral arguments were heard on May 20, 1999.[3] During oral argument, Appellant asserted for the first time that his discharge violated the Americans With Disabilities Act. The local board affirmed the superintendent's decision upholding Appellant's termination.

ANALYSIS

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[2]Appellant was not represented by counsel during the hearing.

[3]Appellant retained counsel prior to oral argument.

In *Livers v. Charles County Board of Education*, 6 Op. MSBE 407 (1992), *aff'd* 101 Md. App. 160, *cert. denied*, 336 Md. 594 (1994), the State Board held that a non-certificated employee is entitled to administrative review of a termination pursuant to § 4-205(c)(4)[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. *See* COMAR 13A.01.01.03E(1).

Appellant claims that the local board's decision upholding his termination is unlawful because his termination is in violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. 12101 *et seq*. This argument was raised for the first time during oral argument before the local board. Appellant now contends that the school system failed to provide him with reasonable accommodations so that he could perform the essential functions of his position. Although Appellant testified at the hearing before the local hearing officer that he had kidney disease and that he underwent dialysis, (Tr. 44-47), he also stated:

> I mean, I bust my – here I am, I've got kidney disease, and I still would rather work. I could had say, (sic) well, when I found out I had kidney disease, I could had say, well, I don't want to work no more, give me my check, I want to file for disability. I was coming to work. I asked Mr. Chapman – say Mr. Chapman – when I got out the hospital, I say Mr. Chapman, the doctor said that I would have to come in for dialysis two times a week, and I told Mr. Chapman, I say, if it's possible, can I come in early and get my work done so I can go get my blood cleaned in the evening. He said he didn't mind doing that. (Tr. 46-47).

We believe the mere mention of these facts during the hearing is insufficient to raise an ADA claim and preserve the issue for review on appeal. *See Earl Hart v. Board of Education of St. Mary's County*, MSBE Opinion No. 97-30 (September 25, 1996)(failure to raise issue of age discrimination below constituted waiver of issue on appeal); *Theresa Fentress v. Board of Education of Howard County*, MSBE Opinion No. 96-37 (September 26, 1996)(failure to challenge suspension before local board constituted waiver of matter on appeal to State Board). Accordingly, we find that Appellant's ADA claim has been waived by his failure to raise this claim below.

However, even if the State Board were to consider the merits of Appellant's ADA claim, we would find that the decision of the local board is not arbitrary, unreasonable or illegal. In order to prevail on an ADA claim, Appellant must demonstrate that (1) he has a disability within the meaning of the ADA; (2) that he is qualified for the employment in question; and (3) that he

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[4]This provision has been recodified verbatim as § 4-205(c)(3) of the Education Article (1997 Repl. Vol. & 1998 Supp.).

was terminated due to discrimination based on his disability. *See Shafer v. Preston Mem'l Hosp., Corp.*, 107 F.3d 274, 276 (4th Cir. 1997); *Williams v. Channel Master Satellite Sys., Inc.*, 101 F. 3d 346, 348 (4th Cir. 1996). A qualified individual is one who can perform the essential

functions of the position with or without reasonable accommodation. *See Tyndall v. Nat'l Educ. Ctrs., Inc. of California*, 31 F. 3d 209, 212-213 (4th Cir. 1994).

The ADA's interpretive guidance explains that an employer is not expected to accommodate disabilities of which it is unaware. *See* 29 C.F.R. app. 1630.9 (1994). Thus, federal courts have ruled that employers are not liable under the ADA if, at the time of discharge, the employer has not been informed of the employee's disability and the employer has no reason to know of the disability. *See Miller v. National Cas. Co.*, 61 F.3d 627, 629-30 (8th Cir. 1995); *Larson v. Koch Ref. Co.*, 920 F. Supp. 1000, 1005 (D. Minn. 1996). Additionally, it is the employee's responsibility to inform the employer of any disability and the need for accommodation. *See* 29 C.F.R. app. 1630.9 (1994). *See also Jackson v. Boise Cascade Corp.*, 941 F. Supp. 1122,1127 (S.D. Ala. 1996); *Lippman v. Sholom House, Inc.*, 945 F. Supp. 188 (D. Minn. 1996).

Appellant has not presented any evidence in this case demonstrating that he advised his employer that he had a disability that impacted his ability to perform his job functions and that he needed accommodation. Throughout the time Appellant was receiving negative feedback concerning his work performance he never indicated to school officials that his failure to perform adequately was a result of his health problems, or his kidney disease once diagnosed. If as Appellant asserts, he was unaware that he had a disability prior to spring, 1998, neither can his employer be expected to have known. Moreover, once diagnosed, Appellant did not advise his employer that this condition was the basis for his prior performance deficiencies.

We find that Appellant's mere mention to his employer that he was undergoing dialysis, (Tr. 44-47), is insufficient to put the school system on notice that he had a disability, and that the disability impacted the performance of the essential functions of his job to the extent that he needed accommodation. There is no evidence in the record that Appellant advised the school that his kidney disease prevented him from doing his job satisfactorily, or that he needed accommodations. Moreover, Appellant's own testimony suggests that he did not believe that he had any performance problems. (Tr. 45, 49, 56-57).

The record in this case consists of sufficient unrefuted evidence of Appellant's continued deficiencies in his job performance. His inadequacies span the two years of his employment up to the time of his termination. Appellant was apprised of his poor performance over the two years that he was employed by the school system and was given numerous opportunities to improve, as well as opportunities in which he could have indicated that he had a disability that was the root of the problem and that he needed certain accommodations. It is not the employer's responsibility to determine why an employee fails to perform satisfactorily. *See Larson v. Koch Refinery Co.*, 920 F. Supp. 1000, 1005 (D. Minn. 1996); *Lippman v. Sholom Home, Inc.*, 945 F. Supp. 191. Furthermore, Appellant failed to present evidence to show that he could have performed the essential functions of his position if he had been provided with a particular accommodation.

CONCLUSION

For all of these reasons, we find that Appellant has not met his burden of proving that the local board acted arbitrarily, unreasonably, or illegally in this matter. We therefore affirm the decision of the Board of Education of Prince George's County.

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December 8, 1999