Issue: Group I Written Notice (violation of policies that lead to hostile work environment for subordinate employee); Hearing Date: 03/20/18; Decision Issued: 06/29/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq; Case No. 11147; Outcome: Full Relief; **Administrative Review: Ruling Requested received 07/13/18; EEDR Ruling No. 2019-4762 issued 08/21/18; Outcome: Remanded to AHO; Remand Decision issued 09/05/18; Outcome: Original decision affirmed; Administrative Review: Ruling Request on 09/05/18 Remand Decision received 09/21/18; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11147

Hearing Date: March 20, 2018
Decision Issued: June 29, 2018

PROCEDURAL HISTORY

On October 17, 2017, Grievant was issued a Group I Written Notice of disciplinary action for:

> A violation of DOP 150.3, Reasonable Accommodations; DOP 145.3, Equal Employment Opportunity, DHRM Policy 2.05, Equal Employment Opportunity, DHRM Policy 2.30, Workplace Harassment, and the Americans with Disabilities Act (ADA) for retaliation and interference as defined by EEOC and DOP 145.3 resulting in a hostile work environment for a subordinate employee due to her placement at [the Facility] as an accommodation under the ADA.

On November 6, 2017, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 10, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On March 20, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employs Grievant as a Superintendent at one of its correctional institutions. She has been employed by the Agency for approximately 25 years. The Institution had several buildings including the Admin Building and the Annex Building. Grievant's office was in the Annex. No evidence of prior active disciplinary action was introduced during the hearing.

The Institution received some human resource services from employees working at Facility V.

Grievant's practice was to have her department heads or other supervisors issue Notices of Improvement Needed/Substandard Performance to the employees they supervised even if the supervisors were not the ones actually witnessing an employee's behavior. Grievant had discretion to adopt this practice and it was not contrary to Department policy or training.

Grievant implemented a dress code for employees, volunteers and official visitors to the Facility. On March 29, 2017, Grievant distributed a memorandum stating, in part:

The correctional workplace setting is unique. Employee dress must be appropriate and a security conscious approach is needed to ensure a safe and secure environment for employees and offenders, as well as to ensure effectiveness and efficiency of operations. Therefore, it is critical that we have guidelines of acceptable and appropriate dress to ensure that we promote a positive image to the public and offenders, to ensure that we promote positive modeling for offenders without distractions from inappropriate dress, and most importantly to ensure safety of our employees while they perform their job duties. It is expected that employees will be attired in business casual clothing. The style of dress allows not only for traditional business attire of dresses, suits, ties and dress shoes, but also allows casual alternative that is still appropriate for the workplace. Employees are also expected to maintain good hygiene and grooming standards. The following provisions have been established:
***

- No leggings or spandex attire.

Accountability for staff:

If any employee is found to be in non-compliance with the dress code or bringing unauthorized items inside the facility, an immediate effort will be made to correct the issue. If you are found to be non-compliant, progressive discipline could be imposed and the time involved spent to allow you to become compliant will not be approved as leave.[1]

For simplicity, the Hearing Officer will refer to leggings, non-legging lower body clothing, and pants as trousers.

Ms. T, a Superintendent who replaced Grievant at the Facility, testified that leggings are like stockings, but thicker. She testified leggings have a “close fit” from the waist to the ankles. She testified that leggings are made of spandex although other pants also can be made of spandex. Ms. T sent Ms. F home when Ms. T observed Ms. F wearing stockings in the Facility. Ms. T allowed Ms. F to use her lunch break to account for her time missing from the Facility to change clothing.

The Agency hired Ms. M on January 5, 2017 as a Correction Officer and assigned her to work at Facility D. She was a probationary employee. Due to her pregnancy, Ms. M was a unable to complete the Basic Correctional Officer training at the Academy for Staff Development within the required 12 months established by the Department of Criminal Justice Services. Ms. M contacted the Agency’s human resource department to request assistance. The Agency elected to apply its Americans with Disabilities Act accommodation guidelines to Ms. M and concluded she was minimally qualified for a vacant Office Service Specialist position at the Facility.[2] Ms. M did not have any prior human resource training.

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[1] Grievant Exhibit 28.

[2] It appears that the Agency regarded Ms. M as being disabled.

Grievant was in the process of selecting among candidates to fill a vacant Office Service Specialist position at the Facility. She had interviewed candidates for the position. Grievant wanted to fill the position with a candidate who had extensive human resource experience and not someone minimally qualified. A former employee performed poorly in the OSS position and created managerial problems for Grievant. Grievant desired to avoid similar problems by hiring a talented employee with human resource experience.

The vacant Office Service Specialist position encompassed dual responsibilities - providing clerical support to Major M and operating as the Human Resource representative under the direction of the Human Resource Officer, Ms. L. Ms. L worked at Facility V.

On April 17, 2017, the Benefits Manager sent Ms. M a letter stating, in part:

> The Department's Americans with Disabilities Act (ADA) committee has received your request for accommodation under the ADA. Per [name] who is your treating Health Care Professional (HCP), the agency was advised that you "are unable to do exercises that were checked off on the mandatory physical training requirements for Corrections Officers (CO-25A)." The work unit was notified of this restriction on March 8, 2017 and temporarily accommodated you until a decision could be made by the ADA committee. Any accommodation that is expected to go over 90 days must be reviewed by the Department's American with Disability Act (ADA) committee. Due to your restriction, you will not be able to meet all of the necessary requirements to obtain Department of Criminal Justice Services (DCJS) certification as a Corrections Officer within 12 months of your hire date.
>
> A letter was mailed to you on March 24, 2017, indicating that the ADA committee could not approve your request to accommodate. Later, the Benefits Manager received your application for a review of a placement into another DOC position in which you were minimally qualified for. After reviewing available vacancies, [Facility] has agreed to meet with you regarding a non-security position that you are minimally qualified to fill with or without reasonable accommodations.
>
> I am pleased to inform you that effective 04/25/2017, you are being placed in the position of Office Services Specialist … in Major's Office of [Facility]. This is a Non-VALORS position and since this position is in a lower pay band, your semi-monthly salary will be reduced to [$number] which equates to an annual salary of [$number]. ***

The Benefits Manager sent Grievant a copy of her letter to Ms. M.

On April 18, 2017, Grievant sent the Benefits Manager an email stating:

Do you really think this is a good decision based on the person in the [Facility] OSS position has access to the confidential employee information? Is there a mail room position anywhere or some other clerical position where the duties are non-critical and not considered a confidential position? The employees here are really going to be upset.

The Benefits Manager replied:

I think it will be fine. She is also from a different facility, so I don't know why anyone would have a problem with it. It would be no different than if she applied and was selected.

Grievant responded:

Yes, there is a difference. I would have considered her suitability and evaluated her KSA's. No one consulted with me on this placement.[3]

Grievant scheduled an Executive Team Meeting for April 24, 2017 with one of the topics being to welcome Ms. M to the Facility. Grievant introduced Ms. M and asked Ms. M about herself. It was a short "Hi and Bye", according to Ms. M. Ms. M worked in the Admin Building in an office with a door she could close for privacy.

Ms. M performed duties at the Facility including employee health insurance, FMLA, short-term disability, and general human resource duties. Ms. M had a part-time employee (a P14) who prepared the duty roster and perform time keeping responsibilities.

Ms. M reported to Ms. L, the Human Resource Officer at Facility V. Ms. M also served as the secretary to Major M. Ms. M would "punch" documents for Major M and put them in order. Ms. M would type memoranda for Major M. Ms. M had a "direct line" reporting relationship to Major M and a "dotted line" reporting relationship with Ms. L. Major M reported to Grievant.

Ms. M received a copy of the dress code when she began working at Grievant's Facility. She received a copy of the policy from Ms. H.

On May 17, 2017, Ms. M reported to work wearing what Grievant considered to be leggings. The leggings were tightfitting women's gray stretch pants. Grievant told Ms. M she could not wear leggings to work. Ms. M did not believe she was wearing leggings. The trousers were made from a mixture of cotton and rayon with approximately two percent spandex. The leggings were tight at the top and loose at the ankles. Grievant did not require Ms. M to go home to change her clothing. Ms. M did not wear those pants to work again. Ms. M went to maternity shops to find pants she thought would be acceptable. She had difficulty finding satisfactory clothing.

[3] Grievant Exhibit 26.

Grievant scheduled a management team meeting on May 22, 2017 which included Ms. H, Ms. F, and the Fiscal Tech. Ms. M reported to work wearing tight fitting trousers that Ms. M believed were not leggings. The trousers were black and made of cotton and rayon with some spandex material. Ms. M walked towards a conference room where she was observed by Grievant who was outside of the conference room. Grievant stopped Ms. M and said she had told Ms. M about wearing leggings and that Ms. M could go home and change. Ms. M said she was not wearing leggings. Ms. M said she had checked the tag before she bought them and the tag did not say leggings. Grievant and Ms. M moved inside the conference room. Grievant told Ms. M she needed to go home and change. Ms. M "just stood there" and looked at Grievant in disbelief. According to Ms. M, Grievant asked the other women in the room if Grievant was wearing leggings. The other woman evaded eye contact and said nothing, according to Ms. M. The Fiscal Tech testified that Ms. M was wearing leggings on May 22, 2017. She said after Grievant told Ms. M to go home and change, Ms. M continued to discuss the matter with Grievant and asked if Major M was there. Grievant asked the group if Ms. M was wearing leggings. The Fiscal Tech did not remember responding but remembered thinking she wished Ms. H would "shut up and go home" in respect for an instruction from the Superintendent. Ms. H was at the meeting on May 22, 2017 and observed Ms. M. Ms. H had given Ms. M the dress code policy on Ms. M's first day of work. Ms. H believed Ms. M was wearing leggings. She testified that the women in the meeting just looked at each other because they knew Ms. M had been given the dress code policy but was violating it by wearing leggings. Ms. H testified Grievant did not ask the other women if Ms. M was wearing leggings. Ms. F testified she was in the room on May 22, 2017 and noticed Ms. M wearing leggings.

The Lieutenant testified that employees at the Institution complained that they were not being paid overtime and cycle sheets not being handled appropriately. These were duties of Ms. M. The Lieutenant testified that Ms. M sent the Lieutenant an email stating Ms. M had sent the Lieutenant some cycle sheets and if the cycle sheets were not returned, employees would not receive overtime pay. The Lieutenant called Ms. M and said Ms. M had not given the Lieutenant "anything." Ms. M responded that she thought she had given the Lieutenant the cycle sheets. The Lieutenant testified when she went to Ms. M's office, she noticed Ms. M was inside the office with her light off.

On May 25, 2017, Grievant sent Major M an email stating:

> Please issue [Ms. M] a NOI due to wearing Leggings despite being told it is against the Dress Policy. I told her on 5/17 that Leggings were not allowed. She showed up on 5/22 wearing Leggings and was sent home to change. Make sure she turns in leave for the time she was sent home. Next time, she could be Xed.[4]

Ms. M worked in Office 1. Across the hall from her was Office 2. No one was assigned to work in Office 2. Office 2 was sometimes used to hold interviews of prospective employees. Ms. M had a key to Office 2. Some other employees also had keys to Office 2. When Ms. M began working in Office 1, approximately 10 boxes of

[4] Agency Exhibit 11.

records were in the office. In order to make more room for herself, Ms. M had an offender move several boxes of employee records from Office 1 to Office 2. Ms. M did not open the boxes to look inside to see what items she was moving to Office 2. Ms. M did not ask anyone's permission to move the boxes. Grievant was instructed to return the boxes.

Ms. M moved the boxes back to Office 1 on the following day. She looked inside the boxes and saw some of the document including timesheets, cycle sheets, employee names and numbers. The boxes also contained confidential employee medical records and doctor's notes. Ms. M did not consider any of the papers she viewed to contain confidential information.

On June 7, 2017, Major M issued Ms. M a Notice of Improvement Needed/Substandard Performance because, "it has been reported that [Ms. M] reported to work wearing "Leggings" and was sent home to change."[5]

Grievant and Major M met on June 7, 2017. During the meeting, Grievant said Ms. M was not working out and Grievant wanted to get rid of her. After Major M defended Ms. M's attendance, etc., Grievant decided not remove Ms. M.

Once Grievant learned that Ms. M had moved the boxes to Office 2 without first determining the contents of the boxes, Grievant became concerned regarding Ms. M's judgment. Grievant became concerned that Ms. M did not understand the importance of keeping employee records confidential. It was a "red flag" for Grievant. Grievant wanted to "secure her office" and knew that Ms. F could accomplish this objective. Grievant knew that Ms. F had more experience in human resources than did Ms. M. Grievant decided to cross-train Ms. F and Ms. M to ensure that the Institution would have adequate and competent human resource services. Grievant knew that Major M would be leaving the Institution soon and that the Institution would need someone to perform HR duties while Ms. M was on maternity leave.

Grievant met with Ms. M on June 9, 2017. Grievant asked Ms. M how her training was going. Ms. M later recounted the event in an email stating:

> [Grievant] nodded negatively and said, well since you don't have any experience and HR is such a confidential and serious department, and [Ms. F] has a lot of HR experience, she will be replacing you and you will replace her in records and she will train you with Records duties. She asked me when I expected to be out on leave. I answered in October to which she seemed surprise. To me it seemed like she expected it to be sooner. She then told me that I'd be moving into the Records office in the inside of the prison and [Ms. F] would move here to the Admin Building. And once I have come back from leave I'll be doing Records, helping the

[5] Agency Exhibit 11. Major M reluctantly issued the Notice of Improvement Needed/Substandard Performance because Major M was not present on May 22, 2017 to observe Ms. M wearing leggings.

major with clerical work, (since I currently am … Rep and the Major's Secretary), in addition to supporting [Ms. F] in her HR duties. ***[6]

On June 10, 2017, Grievant sent an email to Ms. L with copies to Ms. M and Ms. F stating:

> [Ms. F] and [Ms. M] will be cross training effective June 25th. This opportunity will afford each employee additional training in records and human resources. Effective June 25, [Ms. F] will assist [Facility V] with Human Resources and [Ms. M] will assist [Ms. F] with Records Management. Both employees may participate in any training related to each field. Thank you.[7]

Grievant sent an email to all staff:

> Effective June 25, 2017, [Ms. F] will be the facility contact to assist employees with Human Resources and if she is unable to assist you, you may contact [Ms. L] HRO at [Facility V]. [Ms. M] will assist [Ms. F] with the Records Management and will begin cross training in this department. Thank you.[8]

On June 12, 2017, Grievant sent to Ms. M a letter stating:

> Effective Monday, June 12, your immediate supervisor will be [Ms. K] Fiscal Tech Sr. until the position of Major has been filled. Please make this adjustment for any official business, sick leave, [and] work hours, etc.[9]

Ms. F understood that Grievant wanted to help Ms. M by giving her opportunities but Ms. F knew Grievant was concerned about Ms. M's lack of human resource experience.

Grievant entered Ms. M's office one day and surprised Ms. M. Ms. M stood up and quickly shut down her computer. As the computer was shutting down, Grievant could see a Facebook logo on the computer screen. This raised concern for Grievant that Ms. M may be misusing her internet access.

On June 20, 2017, Grievant sent an email to the Information Security Officer stating:

> I may have someone abusing the computer and want to review her Outlook account and Internet usage. Her name is [Ms. M].[10]

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[6] Agency Exhibit 12.

[7] Agency Exhibit 12.

[8] Agency Exhibit 12.

[9] Agency Exhibit 12.

On June 21, 2017, Grievant sent an email to the Fiscal Tech instructing the Fiscal Tech to issue Ms. M a Notice of Improvement Needed/Substandard Performance for the following:

> On June 6, 2017, confidential employee records were found in a vacant office and you were questioned and admitted to placing the boxes in the office and stated to [Grievant] that you did not know the contents of the boxes. This presented a possible situation where a possible breach of employee confidentiality records could have occurred. You were instructed to have these records removed and return to your office so that you could monitor them until [Ms. L] could review and have them transferred to a secure storage unit or filed in a lock secured filing cabinet. In an effort to improve your knowledge of employee confidential records, this Notice of Needs Improving is being issued to you. In addition, you will be provided with additional supervision and cross training to assist you with your training in the field of Human Resources.[11]

On June 8, 2017, Ms. M filed a complaint with the Agency alleging harassment and hostile work environment by Grievant. On July 5, 2017, the EEO Manager issued a report regarding her findings. The EEO Manager wrote, in part:

> In her complaint, [Ms. M] wondered if [Grievant] disliked her because she is pregnant and/or Hispanic. [Ms. M] stated "it just seems that everything I do for her is not enough, something is always missing and she just makes me feel as if I was incompetent and unable to do my job."

On August 17, 2017, the EEO Manager sent Grievant a letter describing her findings in response to Ms. M's June 8, 2017 complaint of harassment and hostile work environment. The EEO Manager wrote, in part:

> The investigation revealed that shortly after being placed at [Institution] (less than two months) due to an ADA accommodation (protected activity), you:
>
> 1) Reprimanded [Ms. M] by issuing a NOI and instructed her temporary supervisor to issue a 2nd NOI:
> 2) Transferred [Ms. M] to another position, including changing her office, for what was described as "cross training";
> 3) Stated to two members of your Executive Team that you wanted to fire [Ms. M].
> 4) Increased your scrutiny over [Ms. M] by initiating a review of her computer usage based upon the allegation that [Ms. M] was accessing Facebook and the [denied] report by [Fiscal Tech] that [Ms. M] "spends a lot of time on her computer"; and

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[10] Agency Exhibit 13.

[11] Agency Exhibit 14.

5) Plan to increase [Ms. M's] workload by adding training in the Records function before she had a reasonable opportunity to fully acclimate to her HR duties. ***

Conclusion
Based on the evidence obtained through the investigation, this complaint is concluded as founded for retaliation and interference as defined by the EEOC and VA DOC Operating Procedure 145.3 resulting in a hostile work environment for [Ms. M] due to her placement as the OSS at [Facility] as an accommodation under the Americans with disabilities act (ADA).[12]

The EEO Manager's five allegations of fact are restated in the Group I Written Notice issued to Grievant.

Ms. M gave birth on October 6, 2017. The Agency presented a photograph of Ms. M wearing the clothing Grievant called leggings. Ms. M was not pregnant when the picture was taken. The picture only showed the front of Ms. M.

When Ms. M was asked during the hearing why she thought Grievant was being hostile to her, Ms. M testified:

> I don't know why she was being hostile to me. I questioned the Major and she did not say anything. [Grievant] just didn't like me. [Grievant] did not want me there is what the Major said.

The Agency's Investigator testified, "I don't know why [Grievant] did not want [Ms. M] there" referring to the Institution.

The Regional Administrator testified "I don't think pregnancy had anything to do with it" referring to Grievant's behavior. He believed that because Grievant was denied the opportunity to make her employment decision, Grievant took her frustration out on Ms. M.

CONCLUSIONS OF POLICY

When a supervisor perceives an employee as performing poorly, it is not unusual for the supervisor to provide heightened scrutiny and counseling for that employee. If the employee does not agree with the supervisor's opinion about the employee's performance, it is not unusual for the employee to perceive the supervisor's unwanted attention and criticism as creating a hostile work environment (in general)[13] for the employee.

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[12] Grievant Exhibit 1.

[13] Sometimes employees refer to their workplace as hostile even though they know their supervisor is not acting against them because of a protected status.

A supervisor is not subject to disciplinary action simply because an employee feels like the supervisor has created a hostile work environment for the employee. It depends on why the supervisor took actions that caused the employee to perceive he or she was in a hostile work environment. If the employee is performing poorly and the supervisor is correcting that employee's behavior, there is no basis for disciplinary action. If the supervisor's actions, however, are merely a pretext to discriminate against a pregnant and/or Hispanic employee, then the supervisor's actions are improper.

In this case, Ms. M did not agree with Grievant's criticism of her and "wondered" whether Grievant's motivation related to Ms. M's ethnicity. The Agency investigated the matter. The Agency did not agree with Grievant's decisions affecting Ms. M and presumed Grievant was acting in part because of Ms. M's ethnicity and pregnancy despite Grievant's explanations that Grievant's actions related to Ms. M's work performance.

The Agency disciplined Grievant for:

> A violation of DOP 150.3, Reasonable Accommodations; DOP 145.3, Equal Employment Opportunity, DHRM Policy 2.05, Equal Employment Opportunity, DHRM Policy 2.30, Workplace Harassment, and the Americans with Disabilities Act (ADA) for retaliation and interference as defined by EEOC and DOP 145.3 resulting in a hostile work environment for a subordinate employee due to her placement at [the Facility] as an accommodation under the ADA.

The Agency further alleged that Grievant "humiliated, attack, and embarrassed [Ms. M] due to her pregnancy and/or ethnicity."

As the Superintendent of a DOC institution, Grievant was entitled to exercise appropriate managerial judgment regarding how to operate that institution. Grievant had discretion to determine the quality of an employee's work performance and how to address correcting and improving that performance. Indeed, to properly perform her duties Grievant was obligated to monitor the performance of her subordinates to ensure they performed their duties.

There is no merit to the Agency's allegation that Grievant's actions towards Ms. M were based in part on Ms. M's pregnancy or ethnicity. Grievant's treatment of Ms. M was based on Grievant's perception of Ms. M's poor work performance. Each of Grievant's actions against Ms. M were preceded by poor performance by Ms. M. Grievant's objective was to correct and improve Ms. M's work performance which is part of Grievant's supervisory obligation.

The Agency did not cite the specific policy language that Grievant violated.

DOC Operating Procedure 150.1 governs Reasonable Accommodations. During the hearing, the Agency did not cite the specific language of this policy that Grievant supposedly violated. The Agency's allegation appears to be that Grievant violated this policy by interfering with its attempt to accommodate Ms. M by placing her at the

Institution. Grievant did not interfere with the Agency's placement of Ms. M at the Institution. Ms. M was a probationary employee. Grievant could have removed her from employment at any time.[14] Instead, Grievant attempted to identify her poor work performance and correct that poor work performance. Moreover, Grievant justifies her actions by relying upon section N of the policy which provides:

> Employee Work Performance and Evaluations – Supervisors may not give employees with disabilities "special treatment." Disabled employee should not be evaluated on a lower standard or a higher standard, nor disciplined less severely or more severely than other employees. Special treatment is not equal employment opportunity.
>
> 1. Supervisors should hold employees with disabilities to the same standards of performance as other similarly situated employees without disabilities, for performing the essential job functions (with or without accommodation). If accommodation is required to perform the essential functions, the employee should not be evaluated on their performance without the accommodation.[15]

DHRM Policy 2.30 defines Workplace Harassment as:

> Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person <u>on the basis of</u> race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

A hostile work environment is not simply one where an employee feels closely scrutinized by a supervisor. Grievant did not act contrary to DHRM Policy 2.30 because she did not act on the basis of race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability.

DOC Operating Procedure 145.3 governs Equal Employment Opportunity. Section III defines Discrimination as:

> Any policy or action taken that results in an unfair advantage to either an individual or group of individuals who are considered part of a protected

[14] Grievant told Major M, Grievant wanted to fire Ms. M and asked for Major M's opinion. After Major M defended Ms. M, Grievant concluded she would not terminate Ms. M. If Grievant wished to discriminate against Ms. M, Grievant could have disregarded Major M's opinion.

[15] Agency Exhibit 4.

> group related to race, sex (including sexual harassment, pregnancy, and marital status), color, national origin, religion, sexual orientation, gender identity, age, political affiliation, veteran status, or against otherwise qualified persons with disabilities.

Workplace Harassment is defined as:

> Any unwelcome verbal, written or physical conduct that denigrates or shows hostility or aversion towards a person that:
>
> - Has the purpose or effect of creating an intimidating, hostile or offensive work environment.
> - Has the purpose or effect of unreasonably interfering with an employee's work performance.
> - Affects an employee's employment or opportunities or compensation. Workplace harassment on the basis of race, sex (including sexual harassment, pregnancy, and marital status), color, national origin, religion, sexual orientation, gender identity, age, political affiliation, veteran status, or against otherwise qualified persons with disabilities is illegal. Workplace harassment not involving protected areas is a violation of DOC operating procedures.

The Agency's policy prohibits discrimination and workplace harassment but it specifies:

> This operating procedure does not permit or require the lowering of bona fide job requirements, performance standards, or qualifications in order to give preference to any state employee or applicant for state employment.

Grievant did not violate DOC operating procedure 145.3 because she was correcting Ms. M's poor work performance. Grievant did not act contrary to the Americans with Disabilities Act or EEOC guidelines because she applied performance standards to Ms. M regardless of Ms. M's pregnancy.[16] Grievant was not authorized to lower performance expectations for Ms. M simply because Ms. M was pregnant and Hispanic.

DHRM Policy 2.05 prohibits employment discrimination on the basis of race, sex, color, national origin, religion, age, veteran status, political affiliation, genetics, or against otherwise qualified persons with disabilities. However, it does not permit the lowering of bona fide job requirements, performance criteria, or qualifications in order to give preference to any state employee or applicant for state employment on the basis of the above prohibitions. Grievant did not violate DHRM Policy 2.05 because she did not discriminate against Ms. M on the basis of race, sex, color, national origin, religion, age,

[16] Pregnancy is not (itself) a disability under the ADA. The Pregnancy Discrimination Act, which is incorporated into Title VII of the Civil Rights Act of 1964, makes discrimination based on pregnancy a form of sex discrimination. Nevertheless, the Hearing Officer will analyze the evidence in this case using the same ADA standard applied by the Agency.

veteran status, political affiliation, genetics, or against otherwise qualified persons with disabilities.

The Agency's allegation that Grievant "humiliated, attacked, and embarrassed [Ms. M] due to her pregnancy and/or ethnicity" is untrue. Grievant's treatment of Ms. M was based on Grievant's perception of Ms. M's work performance and not in any way on Ms. M's ethnicity or pregnancy.

The Regional Administrator testified that Grievant's actions were not motivated by Ms. M's pregnancy but rather by Grievant's dislike of being forced to accept placement of an employee she had not selected. If the Regional Administrator's opinion is correct, it shows that Grievant was motivated by factors other than Ms. M's pregnancy or ethnicity. It would confirm that the Agency's allegations of discrimination are untrue. The Agency, however, did not revise the Written Notice to reflect the Regional Administrator's assessment.

Leggings. The Agency's discipline is based on the assertion that Grievant falsely accused Ms. M of wearing leggings on May 22, 2017 when Ms. M was not actually wearing leggings and, thus, should not have sought the issuance of a Notice of Improvement Needed/Substandard Performance.

A key consideration of whether Ms. M's trousers were leggings or simply pants is the tightness of the clothing. Whether the trousers were too tight or not too tight is a matter of opinion – not a matter of fact.

The Agency presented witnesses stating their opinions that Ms. M's trousers were not leggings. The Agency presented a picture of Ms. M wearing the trousers she wore on May 22, 2017. The picture does not reflect how tight the trousers were on May 22, 2017 because Ms. M's body on May 22, 2017 was larger than at the time of the picture when Ms. M was no longer pregnant. Although the Agency's picture does not show the precise level of tightness, it shows that Ms. M's clothing closely fit her body. Grievant presented evidence from witnesses stating their opinions that Ms. M's trousers were leggings. One could argue that Ms. M was wearing leggings because the trousers were made with spandex.[17] One could argue the trousers were not leggings because they were loose around the ankles instead of fitting snugly.[18]

Grievant has presented sufficient evidence to show that her conclusion that Ms. M was wearing leggings was not arbitrary or capricious. As the Superintendent, Grievant had the discretion to determine whether Ms. M's trousers were too tight. She did not base her opinion on Ms. M's pregnancy or ethnicity. Grievant's opinion

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[17] No evidence was presented regarding the definition of "spandex attire" in the Institution's dress code. One could argue that regardless of whether the trousers were leggings they were "spandex attire" contrary to the dress code.

[18] As one witness pointed out, the trousers may have been loose around the ankles because the leggings were longer than necessary. If the clothing was not so long, it would have been clear that the trousers were leggings.

regarding Ms. M's trousers was within the range of reasonable opinions that the trousers were prohibited leggings.

Grievant's treatment of Ms. M after observing Ms. M wearing leggings was appropriate. Grievant instructed Ms. M to go home to change clothing. Grievant warned Ms. M on May 17, 2017 about not wearing leggings to work. When Ms. M repeated that behavior, it was appropriate for Grievant to issue a Notice of Improvement Needed/Substandard Performance.

The Agency alleged Grievant should have pulled Ms. M aside to speak with her about her leggings instead of doing so in front of the management team. The Agency did not present a policy or any training taken by Grievant showing she knew or should have known not to confront Ms. M about wearing leggings in the event other employees could hear Grievant. Although it may have been a preferred practice to speak with Ms. M away from other employees, Grievant had discretion to make that decision. Moreover, it is not clear whether Grievant or Ms. M initiated the discussion with other employees about whether Ms. M was wearing leggings.

Grievant's behavior does not rise to the level of disciplinary action. Grievant's actions were not based on or served as a pretext for discrimination against Ms. M.

Cross-training. The Agency alleged that Grievant should not have removed Ms. M's HR duties to cross train her because Ms. M was beginning to learn the position.

Grievant had discretion regarding whether to cross-train employees at the Institution. Ms. M demonstrated she did not appreciate the importance of properly maintaining confidential employee records. This was a "red flag" to Grievant. Grievant knew Ms. F had experience with human resource duties and could perform those duties while Ms. M was out of work on maternity leave. Grievant's decision was appropriate under the circumstances and consistent with the authority of her position. Grievant did not attempt to cross-train Ms. M as a pretext to discriminate against Ms. M due to her pregnancy or ethnicity.

Internet Usage. The Agency alleged Grievant falsely accused Ms. M of accessing Facebook using Agency computers and having Ms. M's computer usage reviewed by the Information Technology Officer. Grievant presented a print out of Ms. M's computer usage. Ms. M had a unique login identification and password. The Agency was able to determine what websites she accessed using her Agency computer. According to the Agency's Information Security Officer, Ms. M did not access Facebook using the Agency's computer because the Agency's "firewall" prohibited employees from accessing Facebook. Although Ms. M may not have actually accessed Facebook, the printout of Ms. M's internet activity clearly shows she repeatedly tried to access Facebook. On May 12, 2017, Ms. M's access to Facebook was denied. On May 23, 2017, Grievant's access to Facebook was initially blocked by the URL filter but a minute later she had "success" and the "Web request allowed" but then there was a "failure" with the "Web request allowed. On May 23, 2017, Ms. M's access to Facebook was blocked by the URL filter. On June 8, 2017, Ms. M's access to Facebook was blocked by the URL filter. On June 15, 2017, Ms. M's access to Facebook was blocked

by the URL filter. On June 16, 2017, Ms. M's access to Facebook was blocked by the URL filter. On June 19, 2017, Ms. M's access to Facebook initially was blocked by the URL filter. At 11:28 a.m., Grievant's access was a "success" with "Web Request Allowed." Ms. M's internet usage shows she attempted to access Facebook and this is consistent with Grievant's claim that she noticed the Facebook logo on Ms. M's computer screen. Grievant knew that accessing Facebook was using the Agency's computer was improper and justified her inquiry of the Information Security Officer regarding Ms. M's computer usage. Grievant did not inquire regarding Ms. M's internet usage because Ms. M was pregnant or Hispanic.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction

in which the grievance arose within **30 days** of the date when the decision becomes final.[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.

COMMONWEALTH of VIRGINIA

Office of Equal Employment and Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 11147-R

Reconsideration Decision Issued: September 5, 2018

RECONSIDERATION DECISION

EEDR issued Ruling 2019-4762 remanding this matter to the Hearing Officer and providing, in part:

> EEDR has thoroughly reviewed the hearing record and is unable to determine whether there is a factual basis for the hearing officer's conclusion that the disciplinary action was not warranted under the circumstances in this case. The hearing officer appears to have assessed the alleged misconduct for which the grievant was disciplined primarily as a question of whether she engaged in discrimination against Ms. M based on her pregnancy and/or ethnicity. The hearing officer only explicitly addresses the allegations of retaliation and interference once in the decision, stating the "Grievant did not interfere with the Agency's placement of Ms. M at the Institution." The Written Notice, however, charged the grievant with retaliation and interference because Ms. M was assigned to the Institution as a reasonable accommodation under the Americans with Disabilities Act ("ADA"), not discrimination based on Ms. M's pregnancy and/or ethnicity. As such, the hearing officer has not adequately addressed the conduct charged in the Written Notice and, as described below, there is no indication that he has utilized the correct standard.
>
> DHRM Policy 2.05, Equal Employment Opportunity, and the ADA both prohibit discrimination and retaliation against a qualified individual with a disability on the basis of the individual's disability. An individual is "disabled" if he/she "(A) [has] a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment . . . ." Although pregnancy is not, by itself, a disability under the ADA, "a pregnancy-related impairment that

substantially limits a major life activity is a disability under the first prong of the definition." In the hearing decision, the hearing officer noted that the agency appears to have "regarded Ms. M as being disabled."

Although an employee who meets the definition of disability solely under the "regarded as" prong is not entitled to reasonable accommodation, such an employee is nonetheless protected from discrimination and retaliation based on his or her perceived disability or protected activity relating to the perceived disability. A request for reasonable accommodation constitutes protected activity under the ADA. It is, therefore, unlawful and a violation of state policy to retaliate against employee who has requested reasonable accommodation.

Furthermore, regulatory guidance provides that "[i]t is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by" the ADA. The Equal Employment Opportunity Commission ("EEOC") has also published guidance stating that "[t]he scope of the [ADA's] interference provision is broader than the anti-retaliation provision" and "protects any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights." When interpreting and applying the statutory language prohibiting ADA interference, some courts have adopted tests that require a discriminatory motive. At least one other court seems to have determined that an impermissible motive is not necessary for an actionable claim of ADA interference. There appear to be no cases from the Court of Appeals for the Fourth Circuit addressing the elements of a claim of ADA interference. Here, the agency has essentially adopted the EEOC's guidance that "conduct that is reasonably likely to interfere with the exercise or enjoyment of ADA rights" is prohibited. EEDR finds that this is the standard to be applied by the hearing officer in evaluating whether the grievant engaged in ADA interference with regard to Ms. M.

In this case, the agency investigated the grievant's conduct and determined that she had retaliated against Ms. M due to her request for reasonable accommodation and interfered with Ms. M's exercise or enjoyment of ADA rights. Based on the discussion above, the hearing officer does not appear to have considered whether the evidence supports a conclusion that the grievant's conduct constituted retaliation and/or interference because of Ms. M's request for reasonable accommodation and subsequent placement at the Institution. Accordingly, the decision must be remanded to the hearing officer for further consideration of the evidence in the record on this issue under the standard provided above.

<u>Written Notice</u>

On October 17, 2017, Grievant was issued a Group I Written Notice of disciplinary action. The Agency alleged Grievant should receive a Group I Written Notice for:

> A violation of
> DOP 150.3, *Reasonable Accommodations*;
> DOP 145.3, *Equal Employment Opportunity*;
> DHRM Policy 2.05, Equal Employment Opportunity;
> DHRM Policy 2.30, Workplace Harassment;
> and
> the Americans with Disabilities Act (ADA) for retaliation and interference as defined by EEOC and DOP 145.3, resulting in a hostile work environment for a subordinate employee due to her placement at [the Facility] as an accommodation under the ADA.

Under the section IV "Circumstances Considered" of the Written Notice, the Agency writes, "the disciplinary action has been mitigated to a Group I written notice for failure to follow policy, unsatisfactory performance, and disruptive behavior due to a founded employee complaint."

The Agency did not cite the specific policy language that Grievant violated.

In the Agency's opening statement, Counsel stated:

> The written notice was brought for unprofessional, unsatisfactory performance failure to follow instructions and policy, violation of two DHRM policies -- [equal] employment opportunity, workplace harassment and disruptive behavior. Could have resulted in a group III. They gave her a Group I with no other discipline.

In the Agency's closing statement, Counsel stated Grievant was being issued a Group I for unprofessional conduct.[19]

<u>ADA Status Does Not Grant Immunity from Disciplinary Action</u>

Managers have the authority to manage and that authority includes the authority to take corrective action including counseling an employee who performs poorly. The fact that an employee was placed in a position through an ADA accommodation does not grant that employee immunity from corrective action if that employee performs poorly. This conclusion is confirmed by DOP Operating Procedure 150.3, Reasonable Accommodations, providing:

> Employee Work Performance and Evaluations – Supervisors may not give employees with disabilities "special treatment." Disabled employees

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[19] Although oddly punctuated, the Written Notice lists several violations of policy separated by semi-colons with reference to "retaliation and interference" following a semi-colon and an "and". "Retaliation and interference" is one of several allegations made by the Agency.

should not be evaluated on a lower standard or a higher standard, nor disciplined less severely or more severely than other employees. Special treatment is not equal employment opportunity.

> 2. Supervisors should hold employees with disabilities to the same standards of performance as other similarly situated employees without disabilities, for performing the essential job functions (with or without accommodation). If accommodation is required to perform the essential functions, the employee should not be evaluated on their performance without the accommodation.[20]

Agency managers may have regarded Ms. M as disabled. Grievant, however, treated Ms. M as any other employee obligated to meet her performance expectations. Grievant took action against Ms. M because Grievant perceived Ms. M's work performance as unsatisfactory. Grievant did not take action against Ms. M for any improper reason or simply because Ms. M was placed at the Facility where Grievant was the Superintendent.

Cross-Training

The Agency alleged that Grievant should not have removed Ms. M's HR duties to cross train her because Ms. M was beginning to learn the position. The Agency asserts Grievant improperly transferred Ms. M to another position.

On June 10, 2017, Grievant sent Ms. M, the HRO, Ms. F, and another employee an email stating:

> [Ms. F] and [Ms. M] will be cross training effective June 25th. This opportunity will afford each employee additional training in records and human resources. Effective June 25, [Ms. F] will assist [Facility V] with Human Resources and [Ms. M] will assist [Ms. F] with Records Management. Both employees participate in any training related to each field. Thank you.[21]

Grievant had genuine concerns about the confidentiality of human resource information. Prior to meeting Ms. M, Grievant questioned the decision to place Ms. M at the Facility. On April 18, 2017, Grievant sent the Human Resource Officer an email stating:

> Do you really think this is a good decision based on the person in the [Facility] OSS position has access to the confidential employee information? Is there a mail room position anywhere or some other clerical position where the duties are non-critical and not considered a confidential position? The employees here are really going to be upset.

[20] Agency Exhibit 4.

[21] Grievant Exhibit 42.

Ms. M demonstrated ignorance of an important human resource principle – confidentiality. Ms. M failed to secure several boxes full of confidential employee records. Ms. M transferred the boxes to another office where the boxes could have been accessed by other employees including employees and applicants participating in job interviews for Facility positions. The consequences for the Agency could have been significant. For example, if Employee 1 had discovered that Employee 2 had a "doctor's note" from a mental health professional and Employee 1 disseminated that information throughout the Facility, Employee 2 may have felt betrayed and blamed Grievant and the Agency. Grievant's concerns about Ms. M's failure to secure confidential employee records were justified. Grievant could have removed Ms. M from employment, but instead chose to cross-train Ms. M. Grievant had discretion regarding whether to cross-train employees at the Institution. The Agency has not presented any policy showing Grievant was prevented from cross-training employees without prior approval from Agency managers. Grievant felt it was important to have more than one employee trained to perform human resource and recordkeeping duties. Grievant did not increase Ms. M's workload by having her cross-trained. Grievant changed the nature of Ms. M's workload during the cross-training period.

The Agency contends Grievant transferred Ms. M to another position. What constitutes an involuntary transfer is not defined by State policy. A Voluntary Transfer requires movement within the same role or to a different role in the same pay band but with a different position number. A Reassignment Within the Pay Band involves Agency staffing or operational needs to the same or different Role in the same pay band but with a different position number.[22] A lateral Role Change involves movement to a different Role in the same pay band but with the same position number. Grievant's email to Ms. M and Ms. F indicated "[t]his opportunity will afford each employee additional training in records and human resources." The Agency has not established that Grievant's action amounted to anything more than providing each employee with additional training in records and human resources.[23]

Grievant did not attempt to cross-train Ms. M as a pretext to discriminate against Ms. M or retaliate or interfere with her placement at the Facility.

Leggings

The Agency's discipline is based on the assertion that Grievant falsely accused Ms. M of wearing leggings on May 22, 2017 when Ms. M was not actually wearing leggings and, thus, should not have sought the issuance of a Notice of Improvement Needed/Substandard Performance.

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[22] An involuntary transfer is best described as a reassignment within a pay band. Even if Grievant's behavior could be constructed as an involuntary transfer, no credible evidence was presented showing she lacked the authority to make an involuntary transfer.

[23] Making Ms. F a point of contact for HR would be consistent with cross training Ms. F in HR duties. Ms. M's perception of her conversations with Grievant was not credible. For lack of a better phrase, Ms. M heard what she wanted to hear when speaking with Grievant.

Ms. M was advised of the dress code and twice violated the dress code by wearing leggings. Grievant was justified in counseling Ms. M. Grievant did not counsel Ms. M as a form of discrimination, retaliation, or interference. Grievant did not attempt to humiliate Ms. M in front of other employees when Grievant observed Ms. M wearing leggings and violating the Facility's dress policy a second time. Grievant's actions towards Ms. M were not a pretext for discrimination, retaliation, or interference.

Internet Usage

Whether Ms. M accessed Facebook and logged into her Facebook account is different from whether Ms. M took actions that created a reasonable suspicion in Grievant's mind that Ms. M may be using the Agency's internet inappropriately. It is not necessary for Grievant to show that Ms. M successfully logged into her Facebook account using the Agency's internet in order to raise a reasonable suspicion. Grievant entered Ms. M's office and observed the Facebook logo on Grievant's computer screen. In response to Grievant's entering Ms. M's office, Ms. M quickly shut down her computer which Grievant construed as an attempt to hide inappropriate behavior. Ms. M's behavior raised a reasonable suspicion in Grievant's mind that Ms. M may be using the Agency's internet inappropriately. Grievant sought to determine whether Ms. M had acted inappropriately by contacting the Agency's Information Security Officer.

Grievant's testimony that she observed a Facebook logo on Ms. M's computer screen was credible. Her credible testimony was supported by documents showing that Ms. M's computer repeatedly attempted to access Facebook. No credible evidence was presented showing that the Facebook logo only appears once a user successfully logs into to his or her Facebook account.[24]

Grievant presented a print out of Ms. M's computer usage. Ms. M had a unique login identification and password. The Agency was able to determine what websites she accessed using her Agency computer. According to the Agency's Information Security Officer, Ms. M did not access Facebook using the Agency's computer because the Agency's "firewall" prohibited employees from accessing Facebook. Although Ms. M may not have actually logged into her Facebook account, the printout of Ms. M's internet activity clearly shows facebook.com in the uniform resource locator of Ms. M's computer browser. The Agency's evidence including the testimony of the Agency's Information Security Officer is not credible or persuasive to the extent the Agency alleges Ms. M could not have a Facebook logo on her computer screen. Ms. M's attempts to access Facebook explain the presence of a Facebook logo on her computer screen. Grievant did not seek review of Ms. M's internet use as a pretext for discrimination, retaliation, or interference.

A violation of DOP 150.3, *Reasonable Accommodations*;

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[24] Although not part of the evidence and not necessary to resolve this grievance, the Virginia Department of Corrections has its own Facebook page. The Agency's internet home page (vadoc.virginia.gov) contains a Facebook logo with a link to its Facebook page. If Ms. M attempted to view the Agency's public internet home page, a Facebook logo could have appeared on the screen.

DOC Operating Procedure 150.3 provides:

> The Committee's decision is binding on all parties upon delivery of the decision to the Organizational Unit Head.

Grievant complied with the decision to place Ms. M at Grievant's Facility. Grievant took corrective action against Ms. M based on Ms. M's work performance. Grievant did not violate DOP 150.3.

<u>A violation of DOP 145.3, *Equal Employment Opportunity*;</u>

DOP Operating Procedure 145.3 governs Equal Employment Opportunity. Discrimination is defined as:

> Any policy or action taken that results in an unfair disadvantage to either an individual or group of individuals who are considered part of a protected group related to race, sex (including sexual harassment, pregnancy, and marital status), color, national origin, religion, sexual orientation, gender identity, age, political affiliation, veteran status, or against otherwise qualified persons with disabilities.

Section IV(A)(10) provides:

> No state appointing authority, other management principals, or supervisors shall take retaliatory actions against persons making complaints of discrimination and/or harassment or against individuals participating in a complaint investigation.

Section IV(A)(11) provides:

> A state employee found in violation of this procedure shall be subject to appropriate disciplinary action under Operating Procedure 135.1, Standards of Conduct.

Grievant did not take action resulting in an unfair disadvantage to Ms. M. Ms. M received corrective action because of her poor work performance and not because of her pregnancy or ethnicity. Grievant did not retaliate against Ms. M for making a complaint or participating in an investigation.

The policy defines Workplace Harassment as:

> Any unwelcome verbal, written or physical conduct that denigrates or shows hostility or aversion towards a person that:
> - Has the purpose or effect of creating an intimidating, hostile or offensive work environment.
> - Has the purpose or effect of unreasonably interfering with an employee's work performance.

- Affects an employee's employment or opportunities or compensation. Workplace harassment on the basis of race, sex (including sexual harassment, pregnancy, and marital status), color national origin, religion, sexual orientation, gender identity, age, political affiliation, veteran status, or against otherwise qualified persons with disabilities is illegal. Workplace harassment not involving protected areas is a violation of DOC operating procedures.

The Agency's policy prohibits workplace harassment but it specifies:

> This operating procedure does not permit or require the lowering of bona fide job requirements, performance standards, or qualifications in order to give preference to any state employee or applicant for state employment.

Grievant did not engage in workplace harassment of Ms. M. Grievant's actions toward Ms. M were directed at correcting Ms. M's unsatisfactory work performance and not directed at Ms. M for any reason other than Ms. M's work performance. Grievant did not denigrate Ms. M. Grievant did not show hostility or aversion towards Ms. M. Grievant engaged in behavior consistent with a supervisor correcting inappropriate behavior by a subordinate. To the extent Ms. M perceived her workplace as hostile, it was because of her poor work performance and Grievant's application of bona fide job requirements.

<u>A violation of DHRM Policy 2.05, Equal Employment Opportunity;</u>

DHRM Policy 2.05 prohibits employment discrimination on the basis of race, sex, color, national origin, religion, age, veteran status, political affiliation, genetics, or against otherwise qualified persons with disabilities.

The prohibition against employment discrimination applies to all aspects of the hiring process and employment practices, including:

> • hiring, demotion, promotion, role change, in-band adjustment, layoff, and transfer;
> • performance management and employee development;
> • corrective actions, including disciplinary actions; and compensation, pay practices, benefits, and other terms, conditions, and privileges of employment.

However, this policy does not permit the lowering of bona fide job requirements, performance criteria, or qualifications in order to give preference to any state employee or applicant for state employment on the basis of the above prohibitions.

Grievant did not violate DHRM Policy 2.05 because she did not discriminate against Ms. M on the basis of race, sex, color, national origin, religion, age, veteran status, political affiliation, genetics, or against otherwise qualified persons with disabilities. Grievant took corrective action against Ms. M because Grievant was

applying the Agency's performance criteria in order to improve Ms. M's future work performance.

A violation of DHRM Policy 2.30, Workplace Harassment;

DHRM Policy 2.30 governs Workplace Harassment.

The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer on the basis of an individual's race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability.

The Commonwealth will not tolerate any form of retaliation directed against an employee or third party who either complains about harassment or who participates in any investigation concerning harassment.

DHRM Policy 2.30 defines Workplace Harassment as:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation. (Emphasis added).

Any employee who engages in conduct determined to be harassment or encourages such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

DHRM Policy 2.30 defines Retaliation as:

Overt or covert acts of reprisal, interference, restraint, penalty, discrimination, intimidation, or harassment against an individual or group exercising rights under this policy.

DHRM Policy 2.30 defines Sexual Harassment as:

Any unwelcome sexual advance, request for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-workers or non-employee (third party).
• Quid pro quo – A form of sexual harassment when a manager/supervisor or a person of authority gives or withholds a work-related benefit in exchange for sexual favors. Typically, the harasser requires sexual favors from the victim, either rewarding or punishing the victim in some way.

• Hostile environment – A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

A hostile work environment is not simply one where an employee feels closely scrutinized by a supervisor. Grievant did not act contrary to DHRM in Policy 2.30 because she did not act on the basis of race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability.

Grievant did not take any action against Ms. M because Ms. M sought or received an ADA accommodation. Grievant did not take any action against Ms. M because Ms. M filed a complaint with the Agency falsely alleging discrimination. Grievant did not take any overt or covert actions of reprisal, interference, restraint, penalty, discrimination, intimidation, or harassment against Ms. M for seeking an accommodation or because of Ms. M's ethnicity or pregnancy or because Ms. M complained about Grievant.

Americans with Disabilities Act (ADA) for retaliation

A request for reasonable accommodation constitutes protected activity under the ADA. It is, therefore, unlawful and a violation of state policy to retaliate against employee who has requested reasonable accommodation.[25] DOC Operating Procedure 145.3(IV)(E)(4) provides:

> It is the policy of the DOC to provide a reasonable accommodation on the basis of pregnancy, childbirth, or related medical conditions. Women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations. Request for any accommodations are to be considered in accordance with Operating Procedure [150.3], *Reasonable Accommodations.*

DOP Operating Procedure 145.3(IV)(A)(10) provides:

> No state appointing authority, other management principals, or supervisors shall take retaliatory actions against persons making complaints of discrimination and/or harassment or against individuals participating in a complaint investigation.

Retaliation is defined by DOP Operating Procedure 145.3 as:

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[25] Ms. M was not disabled under the ADA. Even if the Agency regarded her as disabled, she was not entitled to reasonable accommodation under the ADA. Nevertheless, the Hearing Officer will presume Ms. M was no different from an employee who actually was disabled and entitled to reasonable accommodation under the ADA. This assumption does not affect the outcome of this grievance.

> Any adverse, overt or covert action taken by an employer against an employee, or former employee, who has participated in a protected activity, i.e. exercised their rights under anti-discrimination laws, reported or participated in an investigation into violation of the sexual abuse/harassment policies, filed a grievance, or assisted someone in exercising their rights, where there is established a causal connection between the protected activity and the adverse action. Types of retaliation include, but are not limited to employment actions such as termination, refusal to hire, denial of promotion, threats, harassment, intimidation, unjustified negative evaluations, unjustified negative references, increased surveillance, etc.

Ms. M requested an accommodation because she was pregnant. Her request was a protected activity. The Agency granted her request and placed Ms. M at Grievant's Facility.

Ms. M was subject to corrective action and criticism for wearing leggings, failing to keep HR records confidential and attempting to access Facebook.

The Agency has not established a connection or "causal connection" between Ms. M's protected activity and Grievant's corrective action and criticism of Ms. M. Grievant took action against Ms. M because of Ms. M's poor work performance and not because Ms. M received an accommodation from the Agency. Grievant's actions were not a pretext for retaliation against Ms. M.

<u>Americans with Disabilities Act (ADA) for interference</u>

> Regulatory guidance provides that "[i]t is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by" the ADA. The Equal Employment Opportunity Commission ("EEOC") has also published guidance stating that "[t]he scope of the [ADA's] interference provision is broader than the anti-retaliation provision" and "protects any individual who is subject to coercion, threats, intimidation, or interference with respect to ADA rights." *** Here, the agency has essentially adopted the EEOC's guidance that "conduct that is reasonably likely to interfere with the exercise or enjoyment of ADA rights" is prohibited. EEDR finds that this is the standard to be applied by the hearing officer in evaluating whether the grievant engaged in ADA interference with regard to Ms. M.

Grievant did not take any action that was reasonably likely to interfere with the exercise or enjoyment of ADA rights by Ms. M. Grievant did not stop Ms. M's placement at Grievant's facility. Grievant did not remove Ms. M from employment. While she may have discussed removing Ms. M because of Ms. M's poor work performance, Grievant decided not to do so and attempted to correct Ms. M's poor work performance. Grievant did not coerce, intimidate, threaten, harass or interfere with Ms. M's ADA rights. Ms. M's ADA rights did not include immunity from corrective action for poor work

performance. Grievant corrected Ms. M's unsatisfactory performance as she was obligated to do by the Agency.

Unsatisfactory Performance, and Disruptive Behavior

Grievant's work performance was not unsatisfactory because she was engaging in behavior authorized and expected of her position as a supervisor. Her actions were devoted to improving the work performance of Ms. M. Grievant's behavior was not disruptive because she was acting in accordance with the duties of her position and her authority to act.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer