

Issues: Discrimination, work place harassment, hostile work environment, character assassination; Hearing Date: 11/15/07; Decision Issued: 12/05/07; Agency: DCE; AHO: Sondra K. Alan, Esq.; Case No. 8712; Outcome: No Relief – Agency Upheld In Full.

DECISION OF HEARING OFFICER  
In Re: Case #8712

Hearing Date: November 15, 2007  
Decision issued: December, 5, 2007

PROCEDURAL ISSUES

The Grievant filed a request for hearing after she had exhausted a second stage and third stage grievance procedure. The Agency qualified the matter for hearing. The matter was scheduled for hearing during a pre-hearing telephone conference on October 25, 2007, at which time the case was set for November 15<sup>th</sup> at 1:00 pm at the location of Grievant's employment. Grievant was represented *pro se* and Agency was represented by an attorney, both of whom were present at the hearing. Testimony was taken in person and by telephone conference call. Each witness was sworn, and the matter was completed on the November 15<sup>th</sup> date.

APPEARANCES

Grievant  
9 witnesses for Grievant  
Agency representative  
3 witnesses for Agency

ISSUE

Does grievant have a valid claim of discrimination, work place harassment, hostile work environment or character assassination based on evidence of events occurring in May of 2007?

FACTS

Grievant has worked for the Commonwealth of Virginia for thirty-two (32) years<sup>1</sup>. In May of 2007, she was employed as a Program Support Technician and responsible for budget concerns and purchase orders to name a few of her tasks. At a staff meeting on 05/07/2007, Grievant's superintendent made a comment regarding the budget, and Grievant felt this comment was negative and directed specifically at her<sup>2</sup>. Grievant felt embarrassed in the company of other employees due to the statement which was made. On 05/08/2007, Grievant was talking on the phone to a person regarding computer information when her supervisor came into the room voicing comments while she was on the phone<sup>3</sup>. On 05/09/2007, Grievant's supervisor had an oral conversation with her regarding work performance, which was followed by putting this conversation in writing on 05/14/2007.<sup>4</sup> Grievant filed a timely grievance on 06/08/2007.<sup>5</sup>

Grievant presented several witnesses who had been present during some of the incidences and others who attested that she was emotionally upset after these incidences.

#### APPLICABLE LAW

In order to establish a successful claim of workplace harassment, the Grievant must prove by a preponderance of the evidence that there has been:

“unwelcome oral, written, or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, color, national origin, age, gender, religion, disability, marital status or pregnancy 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

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<sup>1</sup> Agency Exhibit 4, attachment “Discrimination Complaint Form”

<sup>2</sup> Agency Exhibit 2, “Investigation Complaint Report”

<sup>3</sup> Agency Exhibit 2, “Investigation Complaint Report”

<sup>4</sup> Agency Exhibit 2, “Investigation Complaint Report”

<sup>5</sup> Agency Exhibit 4, “Employee Grievance Procedure Form A”

3. Affects an employee's employment opportunities or compensation."<sup>6</sup>

While it is clear that the interactions between Grievant and her supervisor in May of 2007 were unwelcome, it has not been shown that the unwelcome conduct was directed at her *based on any protected classification*. In fact, Grievant has not alleged that the unwelcome conduct was based on her gender or any other protected classification.

Further, while said interactions were unwelcome, these interactions do not rise to the level of actionable offenses. It is necessary to separate material adversarial interactions from trivial harms.<sup>7</sup> See 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 669 (3d ed.1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and " 'snubbing' by supervisors and co-workers" are not actionable under § 704(a)).<sup>8</sup>

#### OPINION

While there is no doubt grievant has been a loyal employee for many years and no doubt from testimony that Grievant felt slighted and hurt, there are no substantiated matters of any significance that would be classified as discrimination, work place harassment, hostile work environment or character assassination. While several witnesses stated Grievant showed signs of emotional upset in the month of May, none were able to point to any specific statement or action of the superintendent which singled out Grievant in the present of her peers. Some of Grievant's own witnesses

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<sup>6</sup> Agency Exhibit 3, Definition of Workplace Harassment as provided on page 2 of the Department of Correctional Education Policies and Procedures Manual, dated February 2004.

<sup>7</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006). Based on [the Department of Employment Dispute Resolution]'s construction of the grievance statutes, a grievance must involve a non-trivial harm to qualify for a hearing. Frequently, the non-trivial harm constitutes an "adverse employment action," (defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits").

<sup>8</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006).

stated the issues regarding her rudeness and emotionality brought up in the superintendent's letter to Grievant were experienced by themselves in dealing with Grievant. Other possible explanations for Grievant's emotional lability might have been the pressure of the fiscal year end budget concerns and personal stressors in her life. Both of which explanations were mentioned in testimony.

All exhibits were reviewed and no evidence was presented which would indicate the actions of Grievant's supervisor qualified as an actionable behavior on the part of the supervisor.

### DECISION

This hearing officer believes grievant suffered no actionable harm. The second and third stage resolutions are upheld.

### APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director  
Department of Human Resource Management  
101 N. 14<sup>th</sup> St, 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director  
Department of Employment Dispute Resolution  
830 E. Main Street, Suite 400  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>9</sup> 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.<sup>10</sup>

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<sup>9</sup> An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation, or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

<sup>10</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

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

#### Judicial Review of Final Hearing Decision

Within thirty (30) 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.

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Sondra K. Alan, Hearing Officer