

Issue: Hostile Work Environment (sexual harassment); Hearing Date: 06/05/09;
Decision Issued: 06/08/09; Agency: DBVI; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9090; Outcome: No Relief – Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9090

Hearing Date: June 5, 2009
Decision Issued: June 8, 2009

PROCEDURAL HISTORY

On May 8, 2008, Grievant filed a grievance because of her concerns about her Supervisor's behavior. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On June 10, 2008, the Agency Head denied Grievant's request for a hearing. On September 22, 2008, the EDR Director issued Ruling Number 2009-2112 regarding compliance. On April 8, 2009, the EDR Director issued Ruling Number 2009-2159 qualifying the matter for hearing regarding the issue of sexual harassment. On May 6, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 5, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency created a sexually hostile work environment for Grievant?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. 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 for the Blind and Vision Impaired employs Grievant as a Vocational Rehabilitation Counselor at one of its Facilities. Grievant and the other employees working at Grievant's location report to the Supervisor. The Supervisor is visually impaired.

Grievant and the Supervisor had a history of personal conflict. The Supervisor had criticized Grievant for excessive non-business-related discussions with other staff in the office. Grievant believed the Supervisor was singling her out while permitting others in the office to have lengthy personal conversations. The Supervisor counseled Grievant regarding her personal conversations in the office. This upset Grievant. She believed the Supervisor was incorrect and unfair.

Grievant and the Supervisor met periodically to discuss Grievant's cases. The Supervisor would sometimes provide comments he believed would improve her work product. Grievant often viewed these comments as micromanagement and as unnecessary. When Grievant would question the importance of the Supervisor's comments, the Supervisor disliked having his opinion challenged.

On one occasion, the Supervisor was talking to another employee, Mr. C. The Supervisor told Mr. C that he did not like Grievant. The Supervisor did not explain why he did not like Grievant.

On May 1, 2008, Grievant went to the Supervisor's office to discuss some of her cases. The Supervisor did not like the narrative Grievant had written for a particular case she was handling. The Supervisor did not like Grievant's use of the word "instructed". He asked Grievant if she was instructing the client or providing counseling. Grievant told him she was instructing the client on how to perform informational interviews. The Supervisor also did not like Grievant's use of the word "admitted". He said it made the "customer sound as if she's on trial for something". Grievant told the Supervisor it was okay and that she "got it". Grievant told the Supervisor she would change the wording. The Supervisor then said "I'm not sure that you get it". The Supervisor used a sarcastic and condescending tone of voice. Grievant restated that she understood. During this discussion, the Supervisor pulled his cell phone out of his

left pants pocket, put both hands under the desk for a moment, returned the cell phone back to his pocket, and then put both hands under the desk. Grievant could see the Supervisor's hands were moving because the Supervisor's forearms, upper arms and shoulders were moving back and forth as well. Grievant could not see the Supervisor's hands underneath the table, but she concluded he was rubbing his genitals.

The Supervisor told Grievant he was not finished with the discussion and he would let her know when he was finished. He continued with his sarcastic and condescending tone as he continued to review two more cases. In the last case he reviewed, the Supervisor accused Grievant of not saving the narrative to the correct computer drive. Grievant told him she had saved it to the correct drive. The Supervisor said, "no, I'm looking at the file right now and it's not in there". At that time, the Supervisor turned to face his computer and then turned back towards his desk. His hands went back to his lap and he did the same rubbing motion near his groin area.

The Supervisor said, "I'm not going to argue this with you". Grievant responded that he could "go ahead and do what you're going to do underneath the table there" and "I'm stepping out of this office". The Supervisor then stated, "I'm not finished talking to you". Grievant said, "I'm finished with you playing with yourself behind the desk. We're done!"

The Agency conducted an investigation into Grievant's allegations.¹ The Investigator recommended a third-party be present whenever the Supervisor needed to speak privately with Grievant. The Agency adopted this recommendation.²

CONCLUSIONS OF POLICY

Department of Human Resource Policy 2.30 prohibits Workplace Harassment. Workplace harassment is defined 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, age, veteran status, political affiliation, 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.

¹ The Supervisor denied Grievant's allegation regarding touching his genitals.

² The Investigator also suggested that Grievant's working relationship and behavior towards the Supervisor and a majority of the office staff was negatively impacting the office and disrupting to the work environment. He suggested her conduct should be addressed under the State's Standards of Conduct for disruptive behavior. Although this assertion was not supported by the evidence and raises a concern regarding Agency retaliation, the issue of retaliation was not alleged or qualified for hearing.

Sexual harassment is defined 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.

In this case, Grievant alleges that the Supervisor's actions created a sexually hostile work environment. To establish her claim, Grievant must show conduct that was (1) unwelcome, (2) based on her gender, (3) sufficiently severe or pervasive so as to alter her conditions of employment and to create an abusive or hostile work environment, and (4) imputable to the Agency.

Grievant has established that the Supervisor's conduct was unwelcome.

She has not established that the Supervisor's conduct was based on her gender. It is unclear why the Supervisor was repositioning his genitals while seated behind his desk. The Supervisor was involved in a heated discussion with Grievant. He was frustrated with her and focused on conveying his opinions regarding her case files. He may not have realized what he was doing or that Grievant could see what he was doing with his hands underneath the desk. The Supervisor's actions do not appear to have been intended to provoke Grievant because of her gender. It may have been the case that the Supervisor's clothing was ill fitting and he was repositioning it to make himself more comfortable. The Supervisor did not have his pants unzipped. His actions were brief and did not suggest he was masturbating. The evidence suggests the Supervisor may have a bad habit of touching his groin to adjust the positioning of his genitals or clothing. On another occasion when Grievant was passing by the Supervisor's office, she looked inside and observed the Supervisor standing behind his desk and adjusting the position of his genitals. Although Grievant could see the Supervisor, the Supervisor could not see her because of his visual impairment. He did not know that she could see him at that time.

Grievant has established that the Supervisor micromanages her work and he is condescending and inappropriate in his tone.³ The Supervisor focused on insignificant distinctions between Grievant's word choices. Grievant's frustration with the Supervisor was understandable. The Supervisor expressed his concerns to Grievant in a disrespectful manner. His behavior arises out of his management style and his dislike of Grievant and not because of her gender.

Grievant has established that the Supervisor's actions can be imputed to the Agency.

When the evidence is considered as a whole, Grievant has not established a sexually hostile work environment as defined by DHRM Policy 2.30.

DECISION

For the reasons stated herein, the Grievant's request for relief is **denied**.

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that 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. Please address your request to:

³ The nature of the Supervisor's management style is a matter for the Agency to resolve; not the Hearing Officer.

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
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 all of your appeals to the other party and to the EDR Director. 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. 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.⁴

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.