Issue: Qualification/Discrimination/Sexual Harassment; Ruling date: July 29, 2003; Ruling #2003-041; Agency: Department of Social Services; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Social Services/ No. 2003-041
July 29, 2003

The grievant has requested a ruling on whether her August 30, 2002 grievance with the Department of Social Services (DSS or the agency) qualifies for a hearing. The grievant claims that her supervisor subjected her to sexual harassment. For the reasons discussed below, this issue does not qualify for hearing.

FACTS

The grievant was employed by DSS as a compliance program specialist.[1] The grievant alleges that her female supervisor sexually harassed her on August 28, 2002. According to the grievant, her supervisor stopped at the entrance of the grievant's cubicle and requested that she stand in order for the supervisor to see her outfit. The grievant was wearing a skirt with a three-button blouse. After the grievant stood, she claims that her supervisor looked her over from head to toe in what she felt was an inappropriate manner and requested that she turn around. Allegedly, the supervisor then entered the cubicle and stated that the grievant would look sexier if she did her blouse differently, at which time she unbuttoned at least one and maybe two of the three buttons on the blouse and then spread the blouse open so that the grievant's skin and part of her brassiere were exposed. The grievant indicates she quickly buttoned the blouse back herself. Immediately after the incident, the grievant became upset, and she telephoned her husband. She then went into the bathroom, began to cry, and informed a co-worker what had occurred. The co-worker advised her that the same supervisor had acted inappropriately toward her previously. Because the supervisor would not be in the office for a few days, the grievant came to work the following day and, as soon as an upper-level manager was available, she informed him of the alleged incident. She initiated her grievance on August 30, 2002.

After investigating the grievant's allegations during the management resolution step process, management determined that the supervisor's actions were definitely inappropriate, but did not rise to the level of sexual harassment. The supervisor was transferred to another position as soon as the investigation began, and she was disciplined by DSS. While the supervisor remains with the agency, she is no longer assigned to the grievant's office. The grievant disputes the agency's determination that she was not subjected to sexual harassment.[2]

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[1] After the initiation of her grievance, the grievant transferred to another position with DSS.

[2] After the completion of the management resolution step process, the grievant raised additional concerns with the agency as well as during the investigation for this ruling, such as her belief that state policy should be revised and that the agency should guarantee her that her former supervisor will never be transferred back to the grievant's office while the grievant is employed by the agency. *See* Letter to Human Resource Director, dated

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[3] Thus, all claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied.[4] The grievant claims she was discriminated against because she was subjected to sexual harassment.

State policy prohibits sexual harassment, which includes both quid pro quo harassment and hostile environment harassment.[5] In this case, the grievant maintains that her supervisor's actions created a sexually hostile work environment. To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination -- the grievant must present evidence raising a sufficient question as to whether the conduct in question was (1) unwelcome; (2) based on her sex;[6] (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 on some factual basis to the agency.[7] If any of these four elements are not met, the grievance may not qualify for hearing.

The grievant has presented evidence raising a sufficient question as to whether the alleged conduct was unwelcome (element 1) and based on her sex (element 2). Additionally, the facts presented establish that the supervisor's actions are imputable to the agency (element 4). In a case such as this, where the alleged harasser is the employee's supervisor, employers are presumptively liable for all acts of harassment.[8] However, because the alleged harassment did not lead to a tangible employment action,[9] the agency may avoid liability if it can

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February 5, 2003. Because these issues were raised after the grievant's initiation of her grievance, they will not be addressed in this ruling. *Grievance Procedure Manual* § 2.4, page 6 ("once the grievance is initiated, additional claims may not be added").

[3] Va. Code § 2.2-3004(B).

[4] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1, pages 10-11.

[5] *See* Department of Human Resource Management (DHRM) Policy No. 2.30, *Workplace Harassment*, page 1 of 4 (effective May 1, 2002). Under state policy, *quid pro quo* sexual harassment occurs "when a manager/supervisor or a person of authority gives or withholds a work-related benefit in exchange for sexual favors," while *hostile environment* sexual harassment occurs "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." *See* Department of Human Resource Management (DHRM) Policy No. 2.30, *Workplace Harassment*, page 1 of 4 (effective May 1, 2002).

[6] In Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998), the U.S. Supreme Court recognized that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII.

[7] Spicer v. Virginia Dep't of Corrections, 66 F.3d 705, 710 (4th Cir. 1995).

[8] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[9] A *tangible employment action* "constitutes 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." *See* Ellerth, 524 U.S. at 761. In this case, the grievant has not presented any evidence of a tangible employment action by DSS.

establish that (i) it exercised reasonable care to prevent and promptly correct any sexual harassment by the supervisor, and (ii) the employee unreasonably failed to avail herself of any corrective or preventative opportunities provided by the agency or to avoid harm otherwise.[10] Here, the agency satisfied the requirements of the first prong. DSS acted promptly to prevent further possible harassment of the grievant by immediately transferring the supervisor to another location, and the supervisor was disciplined for her conduct. But, because the grievant timely informed upper management of the incident and initiated a grievance pursuant to state procedures, the agency has failed to establish the second prong necessary for an affirmative defense.[11]

However, the grievant's evidence does not raise a sufficient question as to element 3 -- whether the alleged harassment was so severe or pervasive as to alter her conditions of employment and to create an abusive or hostile work environment. In this case, the grievant contends that her supervisor stated that the grievant would look "sexier" with her blouse unbuttoned, and she allegedly proceeded to unbutton the first (and maybe the second) button on the grievant's blouse, thereby exposing the grievant's skin and part of her brassiere.

The determination of the sufficiency of an environment's hostility or abusiveness is made by considering the totality of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[12] As a general matter, infrequent, isolated remarks or episodes will not be found to create a hostile work environment.[13] If, however, the conduct is sufficiently severe, one incident can alter the employee's conditions of employment without repetition; for example, a single incident of sexual assault may be prohibited as sexual harassment.[14] Here, while the supervisor's conduct was definitely offensive and improper (and resulted in her being disciplined by management), it did not rise to the level of sexual assault.[15] Further, the inappropriate conduct of "eyeing" the grievant and unbuttoning her blouse was an isolated and discrete act. The grievant has presented no evidence that she was subjected to ongoing harassment by her supervisor. Thus, one cannot reasonably conclude that the unwelcome

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[10] *Id.* at 765; Faragher, 524 U.S. at 807.

[11] *See* Hardy v. University of Illinois at Chicago, 2003 U.S. App. LEXIS 8696 *9-12 (7th Cir. 2003)(summary judgment could not be granted to the University where the University was able to show it took reasonable care to prevent and correct sexual harassment (first prong), but was unable to establish the employee unreasonably failed to avail herself of the University's procedures (second prong)).

[12] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

[13] *See* Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2nd Cir. 1998)(citing Carrero v. New York City Housing Authority, 890 F.2d 569, 577-78 (2nd Cir. 1989)) (the alleged incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive).

[14] *Id*. (citing Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2nd Cir. 1995))(a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive environment)); *see also* Rene v. MGM Grand Hotel, 305 F.3d 1061, 1065 (9th Cir. 2002), cert. denied, 2003 U.S. LEXIS 2203(2003), (stating physical sexual assault has routinely been considered sexual harassment).

[15] *See* Rene v. MGM Grand Hotel at 1065 (discussing cases in various jurisdictions where sexual assault was found, describing incidents of groping, patting, rubbing, grabbing, squeezing and pinching areas of the body linked to sexuality).

conduct pervaded the grievant's work environment in a manner that altered the conditions of her employment.[16]

In sum, while the supervisor's alleged conduct was definitely improper, can in no way be condoned, and was addressed by the agency through discipline, it does not rise to the level of sexual harassment as defined and prohibited by Title VII of the Civil Rights Act and related case law. Nor does it violate the Commonwealth's workplace harassment policy, which is predicated upon Title VII.[17] Therefore, this grievance does not qualify for a hearing.

APPEAL RIGHTS AND OTHER INFORMATION

For additional information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to circuit court, she should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that she does not wish to proceed.

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Claudia T. Farr
Director

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Susan L. Curtis
EDR Consultant

[16] While the grievant was upset by the incident, to be actionable under Title VII, the challenged conduct must also create an objectionably hostile or abusive work environment (based upon a reasonable person standard) that actually alters her conditions of employment. *See* Harris v. Forklift Systems, Inc. at 21-22; *see* Quinn v. Green Tree Credit Corp. at 768 (a male supervisor's comment about a female employee's posterior and his use of papers held in his hand to touch her breast were clearly offensive and inappropriate, but were isolated and discrete and thus did not pervade the employee's work environment in a manner that would alter the conditions of her employment). *See also*, Clay v. State of California Employment Development Department, 1997 U.S. App. LEXIS 30561 (9th Cir.) (unpublished decision). The Clay court held that the alleged co-worker harassment involving touching of employee's partially unbuttoned blouse and asking what she was wearing under the blouse did not subject the employee to sexual harassment so severe or pervasive as to alter the conditions of her employment, and create an abusive working environment. Furthermore, the employee also failed to demonstrate that the conduct was so severe or pervasive that an objectively reasonable woman under the same circumstances would find the workplace hostile or abusive.

[17] DHRM staff advised that the Commonwealth's workplace harassment policy is intended to prohibit conduct that is unlawful under Title VII (conduct that is so severe or pervasive as to alter the conditions of employment), and that it does not establish a stricter standard of conduct.