Issue: Qualification/discrimination/sexual harassment; Ruling Date: April 14, 2006; Ruling #2006-1189; Agency: Department of Corrections; Outcome: not qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2006-1189
April 14, 2006

The grievant has requested a ruling on whether her July 12, 2005 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant essentially claims that her female supervisor[1] has subjected her to harassment by kissing her on the back of her neck. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

At the time of the events at issue in this case, the grievant was employed as a Corrections Health Assistant (CHA) with DOC. According to the grievant, she was called into her supervisor's office on June 13, 2005. The grievant claims that after she sat down, her supervisor, who was standing behind her, reached over her shoulder and placed a copy of the work schedule in front of her. The grievant's supervisor allegedly proceeded to ask the grievant if she would work overtime the following day. When the grievant agreed, she claims that her supervisor, still standing behind her, bent down and kissed the back of her neck.

The grievant's supervisor claims that she asked the grievant to work overtime while they were in the chart room, not her office, but nonetheless admits that when the grievant agreed, she kissed the grievant out of gratitude. The grievant subsequently informed upper management of her supervisor's actions as well as filed criminal assault charges against her supervisor. On July 12, 2005, the grievant filed a grievance challenging her supervisor's actions.

DISCUSSION

Sexual Harassment

State policy prohibits sexual harassment, which includes both quid pro quo harassment and hostile environment harassment.[2] In this case, the grievant maintains that her supervisor's

[1] It should be noted that on September 10, 2005, the grievant transferred from the medical department to the security department and works under different supervision. As such, in this ruling, the "grievant's supervisor" references her former supervisor, not her current supervisor.

[2] 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

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;[3] (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.[4] 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 the facts presented establish that the supervisor's actions are imputable to the agency (element 4).[5] However, assuming without deciding that the grievant could establish her supervisor's conduct was sufficiently severe or pervasive so as to alter her conditions of employment and to create an abusive or hostile work environment (element 3),[6] the grievant's evidence does not raise a sufficient question as to element 2 -- whether the conduct was based on her sex.

The critical issue in the "because of sex" inquiry is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[7] During this Department's investigation, the grievant stated that although extremely inappropriate, she did not think the supervisor's kiss was "sexual" in nature and believed the kiss was her supervisor's way of thanking her for agreeing to work overtime the following day. By her own admissions, this Department concludes that the grievant has failed to raise a sufficient question that she was subjected to disadvantageous conditions of employment because she is a female, and as such, has not met her burden that the kiss inflicted upon her by her supervisor was based upon her sex. Accordingly, while this

---

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, page 1 of 4 (effective 05/01/02).

[3] 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.

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

[5] In a case such as this, where the alleged harasser is the employee's supervisor, employers are presumptively liable for all acts of harassment. *See* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[6] As a general matter, infrequent, isolated remarks or episodes will not be found to create a hostile work environment. *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). 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. Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2nd Cir. 1998) (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, Inc., 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).

[7] Harris v. Forklift Systems, Inc., 510 U.S. 17, 25 (1993) (Justice Ginsburg, concurring).

Department agrees that the supervisor's conduct was definitely improper, it did not rise to the level of sexual harassment. Therefore, this issue does not qualify for a hearing.

Retaliation

The grievant also arguably asserts that her supervisor has retaliated against her for informing management of the kiss and because she filed criminal assault charges against her.[8] In support of her retaliation claim, the grievant provided to the rulings investigator numerous examples of alleged retaliatory acts by her supervisor. Of the complained of actions, however, it appears that only one occurred prior to the initiation of her grievance: her work schedule was changed from four ten-hour days to five eight-hour days. The remaining actions occurred after she initiated her grievance and thus should have been challenged in subsequent grievances.[9]

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[10] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[11] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[12]

The grievant's complaint of sexual harassment to management is a protected activity. However, a schedule change is generally not an adverse employment action.[13] Moreover, the

---

[8] The Grievance Form A merely states "no retaliation" in the relief section.

[9] *See* Grievance Procedure Manual § 2.3 ("Once a grievance is initiated, additional claims may not be added.") The grievant did challenge one of these later acts through a subsequent grievance. On August 3, 2005, she was issued a Group II Written Notice that she received for "[f]ailure to follow a supervisor's instructions, perform assigned work or otherwise comply with written policy." The Group II Written Notice was issued by the grievant's supervisor's supervisor for behavior that occurred during the pendency of the criminal assault charges against her supervisor, when the grievant was being temporarily supervised by someone other than her usual supervisor. The grievant challenged the Group II Written Notice by initiating a grievance on September 1, 2005, which she subsequently closed when the Group II was reduced to a Group I at the second management resolution step. Because the Written Notice was issued after the instant grievance was initiated and addressed in an earlier grievance, it will not be further considered here.

[10] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[11] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656 (4th Cir. 1998).

[12] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

[13] *See* EDR Ruling 2004-768 (Despite the grievant's unhappiness with having to make new child care arrangements and reschedule her daughter's counseling sessions, where reassignment did not result in a

grievant has not presented evidence that tends establish that the schedule change was based on her prior protected activity. As an initial point, it appears that the schedule change occurred prior to any prior protected activity. Specifically, the grievant was required to work five eight-hour days during the week of June 12, 2005 due to an LPN being out on sick leave and a CHA being on vacation. [14] Moreover, the agency claims that the grievant's work hours were changed to ensure that there was adequate staff coverage for the facility. More specifically, the agency alleges that at the time the grievant's schedule was changed there was one RN on light duty, one transferred to another facility and one quit. Additionally, there was an LPN out on maternity leave. Management claims that these staffing issues made it difficult to maintain coverage for the facility and as such, the grievant's and another CHA's schedule was changed from working four ten-hour days to five eight-hour days.[15] In sum, it appears that the grievant, as well as others, experience schedule changes depending on facility staffing needs. For all the reasons discussed above, the issue of retaliation is not qualified.[16]

---

demotion, loss of promotional opportunities, or a cut in pay or benefits, the reassignment cannot be viewed as "job-related" and was therefore not an adverse employment action.)

[14] Assuming without deciding that filing an assault and battery charge is a protected activity, the grievant filed charges against her supervisor on July 1, 2005 and she informed the second-step respondent of the kissing incident on June 29, 2005. The schedule changes appear to have begun the week of June 12, 2005. The adverse action(s) must follow the protected act, rather than predate it, in order to create an inference of retaliation. *See* Durkin v. City of Chicago, 341 F.3d 606, 615 (7th Cir. 2003) ("An employer cannot retaliate if there is nothing for it to retaliate against."). *See also* Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1233-34 (10th Cir. 2000)(employer's decision to discharge truck driver not retaliatory because employer's decision pre-dated truck driver's filing of a union grievance).

[15] The grievant's supervisor's supervisor confirms that the grievant was not the only one whose schedule was changed in this manner at the same time.

[16] As mentioned above, the remaining acts of purported retaliation all occurred after the initiation of this grievance and therefore should have been addressed through subsequent grievances. However, even if they had been, it is not likely that the grievant could have prevailed. For a claim of retaliatory harassment to be qualified for hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on her prior protected activity; (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.

The grievant has demonstrated that the conduct alleged was unwelcome, thus satisfying the first element of her retaliatory harassment claim. Moreover, the grievant's complaint of sexual harassment to management is a protected activity. In addition, the grievant has presented evidence demonstrating that the cited conduct creating the alleged hostile work environment was imputable to the agency. However, the grievant has failed to demonstrate that any of the alleged acts were taken based upon her prior protected acts. Rather, based on the following, it appears that the grievant was treated comparably to her co-workers with regard to overtime, scheduling, leave and work assignment issues.

First, the grievant claims that her overtime was taken away and that her supervisor required her, and not others, to seek permission to work overtime. According to both parties, the grievant had been permitted to work overtime prior to the start of her scheduled shift. However, in a June 30, 2005 monthly nurses meeting, the grievant's supervisor informed all staff that coming to work early and signing in prior to the scheduled start time was prohibited unless the employee was given specific permission to do so. Further, while the grievant was denied the ability to work overtime prior to the start of her shift, she was permitted on several occasions to work overtime at the conclusion of her shift. Finally, the grievant's supervisor claims that she told all staff, not just the grievant, to let her know if they would be working for an extended period past their scheduled departure time.

With regard to the grievant's claim that she was denied leave in retaliation for her complaints, the denial of the grievant's leave request does not appear to have been based upon her prior protected acts, but rather was based upon a staff shortage. Specifically, on January 16, 2005, the grievant requested leave for August 22,

APPEAL RIGHTS AND OTHER INFORMATION

For 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 the 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.

_____
Claudia Farr
Director

_____
Jennifer S.C. Alger
EDR Consultant

2005 through August 31, 2005. On August 16, 2005, the grievant's supervisor denied the grievant's leave request due to an alleged staff shortage. There were three other employees who were also denied leave for the same time period (i.e., August 22, 2005 through August 31, 2005) as a result of staffing problems.

Additionally, with regard to the grievant's claim that she was transferred from the pill room to the triage side of medical in retaliation for her prior protected acts, the grievant's supervisor claims that this was done at the direction of her supervisor. The grievant's supervisor's supervisor states that as a CHA, the grievant was expected to be able to work both the pill room and the triage side of medical and could be moved between them as the need arose.

Finally, the grievant has not provided any evidence to refute the agency's stated non-retaliatory reasons for its actions. In fact, she concedes that her supervisor has fired or "run off" a number of employees and routinely treats all but two or three employees as badly as the grievant. Even if we were to assume that the remaining alleged management action (the grievant's supervisor talks about her to other employees) was based upon the grievant's prior protected activity, such an act, without more, lacks the requisite severity and intimidation to meet the high legal standard for "hostile or abusive." *See* Von Gunten v. Maryland, 243 F.3d 858, 870 (4th Cir. 2001) ("the imposition of generally applicable departmental policies" and "non-actionable office unpleasantries" that are at most "the result of 'predictable tension' in the workplace following the lodging of discrimination and retaliation charges" are not enough to create a hostile work environment.)