Issue: Qualification – Discrimination (sexual harassment), Discrimination (age), Retaliation (whistle-blowing); Ruling Date: October 16, 2006; Ruling #2007-1421; Agency: Department of Corrections; Outcome: Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2007-1421**S**
October 16, 2006

The grievant has requested a ruling on whether her May 2, 2006 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. For the reasons discussed below, this grievance qualifies for hearing.

FACTS

The grievant alleges that she has been subjected to sexual harassment and retaliation for filing a sexual harassment complaint with her agency. She alleges that members of the agency's inspector general's office ("the investigators") are responsible for creating the hostile work environment in which she has found herself. The facts giving rise to her grievance began with an investigation run by the investigators in September 2005. At that time, the grievant was required to take a polygraph exam. During the test, the grievant was allegedly asked numerous sexually explicit questions about her sexual past, which had little or no bearing on the charges being investigated.[1] These questions were asked multiple times in various orders, both with the polygraph machine on and off. In January 2006, the grievant submitted a sexual harassment complaint to the agency's human resources office based on the investigators' conduct during and surrounding the polygraph exam.[2]

Since filing the sexual harassment complaint, the grievant has allegedly endured additional harassing and intimidating conduct by the investigators. Primarily, she asserts that

[1] The subject of the investigation was the relationship, if any, between the grievant and an inmate. In recognition of the agency's security concerns regarding the disclosure of the questions posed in the polygraph examination (discussed in EDR Ruling 2007-1549, 2007-1550), the questions actually posed to the grievant are not listed in this ruling. In addition, for the same reason (security concerns), the paraphrased questions that appeared in the original version of this ruling have also been removed. For purposes of this ruling, it can be stated that the grievant was questioned extensively in very explicit terms about her entire past sexual history, including the timeframe prior to being employed by DOC. (If pending litigation results in a court decision denying the agency the ability to continue to use the questions posed in this case, this Department intends to publish the questions (or a paraphrasing of them) absent clear evidence of some genuine residual security threat in doing so.)

[2] The agency investigation did not find any evidence of sexual harassment as a result of the polygraph exam. However, the grievant asserts that the polygraph report did not contain the sexually explicit questions that were asked.

she has been intimidated or harassed by one of the investigators, who has allegedly put himself in a situation to have direct contact with her on an ongoing basis, even though he works in a separate facility. This investigator also reportedly caused a disturbance at the grievant's second job, which is outside state employment.

The grievant was the subject of two additional investigations by the investigators in April 2006. The investigators questioned the grievant in an allegedly intimidating manner in both instances, but purportedly no further investigation was conducted other than interviewing the grievant. The grievant received no discipline as a result of these internal investigations, except for a suspension that lasted only a few hours, because her supervisor asked the grievant to return to work later the same day. The grievant believes additional harassing conduct has occurred, in the form of damage to her car. She asserts that on one occasion her car broke down because certain lugnuts had been loosened, while at another time she had a flat because a nail had been driven into one of the tires.

The grievant's opportunities for advancement and transfer have also been allegedly suppressed because of her sexual harassment complaint. The grievant has reportedly experienced mental anguish as a result of the investigators' conduct. She has sought counseling and treatment since the allegedly intimidating and harassing acts began. The grievant initiated this grievance to bring an end to the alleged harassment.[3]

DISCUSSION

Sexual Harassment

State policy prohibits sexual harassment, which includes both quid pro quo harassment and hostile environment harassment.[4] In this case, the grievant maintains that the investigators' 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) 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.[5]

---

[3] On the Form A, the attachments thereto, and during the resolution step process the grievant has requested a number of forms of relief including a transfer to another facility, removal of information from her personnel file, an investigation and/or reprimand of the investigators, compensation for her counseling and treatment, and an apology. The grievance procedure and the hearing process are not authorized to award most of these types of relief. Nevertheless, the grievant has sought an end to the allegedly harassing and intimidating conduct, which is within a hearing officer's authority to order following appropriate findings of fact.

[4] 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." Department of Human Resource Management (DHRM) Policy No. 2.30, page 1 of 4 (revised 05/16/06).

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

Based on the initial polygraph exam alone, the grievant has presented evidence raising a sufficient question as to whether the alleged conduct was unwelcome (element 1), based on her sex (element 2),[6] and imputable to the agency (element 4).[7] In addition, the agency is not entitled to an affirmative defense in this matter, similar to that afforded to defendant-employers in Title VII cases.[8] Though the alleged harassment did not lead to a tangible employment action,[9] it does not appear that the agency would likely be able to establish that the grievant unreasonably failed to avail herself of any corrective or preventative opportunities provided by the agency.[10] The grievant informed the agency of the incident and initiated a grievance pursuant to state procedures; she also previously filed a sexual harassment complaint.[11]

Moreover, when combined with the additional post-polygraph instances of the investigators' conduct toward the grievant, this grievance has raised a sufficient question as to whether the conduct the grievant has allegedly endured was so severe and pervasive such as to create a hostile work environment for the grievant (element 3).[12] Indeed, the alleged harassment has reportedly caused the grievant to experience ongoing mental anguish and distress during confrontations with the investigators. The grievant's opportunities for advancement and transfer have also been allegedly influenced by the investigators or others at the agency. Consequently, the grievant has raised a sufficient question as to all the elements of a grievance for sexual harassment.

---

[6] The Fourth Circuit evaluates this element by asking the question, "[w]ould the complaining employee have suffered the harassment had he or she been of a different gender?" Ocheltree v. Scollon Prods., Inc., 308 F.3d 351, 356 (4th Cir. 2002). The grievant has presented sufficient evidence to raise a question on this issue.

[7] The investigators who allegedly harassed the grievant are employed by the same agency as the grievant and responsible for investigating the conduct of agency employees, including the grievant. Therefore, though not true supervisors, the authority the investigators wield over the grievant and the manner in which that authority is exercised, i.e., in the form of investigations, make their actions "aided by the agency relation." *See* Mikels v. City of Durham, 183 F.3d 323, 331-34 (4th Cir. 1999).

[8] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (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." Ellerth, 524 U.S. at 761. In this case, the grievant has not presented any evidence of such an action by the agency.

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

[11] *See* Hardy v. University of Ill. at Chicago, 328 F.3d 361, 364-66 (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, but was unable to establish the employee unreasonably failed to avail herself of the University's procedures).

[12] 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 Auth., 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)).

Alternative Theories and Claims

The grievant also asserts claims of retaliation, sex discrimination and age discrimination. Because the grievant's claims of sexual harassment qualify for a hearing, this Department deems it appropriate to send all alternative theories and claims raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons set forth above, the grievant's May 2, 2006 grievance is qualified for hearing. This qualification ruling in no way determines that the agency's actions were discriminatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

_____

Claudia Farr
Director