Issue: Qualification – Discrimination (sexual harassment); Ruling Date: April 8, 2009; Ruling #2009-2159; Agency: Department for the Blind and Vision Impaired; Outcome: Qualified for Hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department for the Blind and Vision Impaired
Ruling Number 2009-2159
April 8, 2009

The grievant has requested a ruling on whether her May 8, 2008 grievance with the Department for the Blind and Vision Impaired (the agency) qualifies for a hearing. The grievant alleges that she has been subjected to sexual harassment and abusive treatment by her supervisor. For the reasons discussed below, this grievance qualifies for hearing.

FACTS

The grievant is a Vocational Rehabilitation Counselor with the agency. She asserts that on May 1, 2008, she went to her supervisor's office to discuss several of her cases. She contends that her supervisor spoke to her in a sarcastic and condescending tone about her work. She further asserts that during this discussion, her supervisor, who was seated behind his desk, repeatedly touched himself in an inappropriate sexual manner. The grievant asserts that her supervisor had engaged in this sort of behavior in the past.

The grievant reported her supervisor's behavior to management and the agency conducted an investigation into the alleged incident. The grievant found the investigation to be inadequate because the Human Resources Consultant who conducted the investigation purportedly did not interview all of the individuals that the grievant identified as persons who may possess relevant information. The agency's Investigation Summary Report concluded that the grievant's supervisor denied touching himself in any sort of inappropriate way and that there were no corroborating witnesses or evidence to support the grievant's allegation. The Investigation Summary Report further concluded that the grievant's disruptive behavior should be addressed under the state's Standards of Conduct.[1]

Despite the absence of any supporting evidence, the agency recommended that for the protection of both the grievant and her supervisor, a third party should be present anytime her supervisor needs to speak with the grievant in private. The grievant asserts, however, that on

[1] The Investigation Summary Report found that despite the grievant's assertions regarding her supervisor's allegedly hostile treatment, in "interviews with the [regional office] staff everyone described a good to excellent working relationship with [the supervisor]." The Report also found that "[e]veryone interviewed specifically identified issues and difficulties in working with [the grievant.]"

at least one occasion since the third-party witness recommendation was adopted, the supervisor inappropriately touched himself in her presence.

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 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.[3]

Clearly the supervisor's alleged conduct was considered by the grievant to be unwelcome (element 1). Also, assuming without deciding that the conduct described occurred, there remains a sufficient question as to whether such conduct was based on the grievant's sex (element 2),[4] and as to whether the conduct was so severe and pervasive such as to create a hostile work environment for the grievant (element 3).[5] In addition, assuming each of the first three elements is satisfied, it appears that the alleged conduct, if it occurred, could be imputable to the agency (element 4).[6] Finally, there remains a question as to whether the agency is entitled to an affirmative defense in this matter, similar to that afforded to defendant-employers in Title VII cases.[7] Although it does not appear that the alleged

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[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 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, Workplace Harassment.

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

[4] 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). (citations omitted)

[5] *See* EEOC v. Dillards, Inc., No. 6:07-cv-1496-Or1-19GJK, 2009 U.S. Dist. LEXIS 23605 at * 26-29 (M.D. Fla. March 23, 2009) (discussion on whether witnessing acts of masturbation meets "severe and pervasive" standard).

[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807-808 (1998). An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.

[7] *See id*. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see *Fed. Rule. Civ. Proc. 8(c)*. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And

harassment led to a tangible employment action,[8] there remains a sufficient question as to whether 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 given that the grievant: (1) informed the agency of the incident, (2) initiated a grievance pursuant to state procedures, and (3) asserts that the conduct has continued.[9]

In sum, this grievance provides evidence raising a sufficient question as to whether the grievant was subjected to sexual harassment by her supervisor, and thus warrants further exploration of the facts at hearing. Accordingly, this grievance is qualified.

CONCLUSION

For the reasons set forth above, the grievant's May 8, 2008 grievance is qualified for hearing. This qualification ruling in no way determines that the agency's actions were discriminatory, harassing, 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.

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Claudia Farr
Director

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while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action.

[8] 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.

[9] *See id.* at 765; Faragher, 524 U.S at 807. *See also* 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).