BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

DANA LeCOMPTE, Employee/Grievant, v. DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Employer/Respondent.	))))))))))	**DOCKET No. 12-07-550** **DECISION AND ORDER**

After due notice of time and place this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on February 7, 2013 at the Commission on Veterans Affairs, Robbins Building, 802 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Dr. Jacqueline Jenkins, Acting Chair, John F. Schmutz, and Victoria D. Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of
Health and Social Services

Dana LeCompte
Employee/Grievant *pro se*

BRIEF SUMMARY OF THE EVIDENCE

The Department of Health and Social Services (DHSS) offered and the Board admitted into evidence eleven documents marked for identification as Exhibits E-O.

The employee/grievant, Dana LeCompte (LeCompte), offered and the Board admitted into evidence ten documents marked for identification as Exhibits 1-3, 5-9, 12, 15, and 23.

LeCompte testified on her own behalf. The Board called upon William Wharton, Labor Relations Specialist and the agency representative at the hearing, to testify about his investigation of LeCompte's complaint.

At the close of LeCompte's case, DHSS made a motion for involuntary dismissal. "If a grievant presents all of his or her evidence, and the Board finds that no grievance is established, [there] is no rule or procedure which would prevent the Board from denying the grievance without hearing the agency's evidence . . . If at the conclusion of the grievant's presentation of evidence, the Board concludes that upon the facts and the law the [grievant] has shown no right to relief it would be superfluous to make the opposing party present evidence." *Christman v. DHSS*, C.A. No. 08A-07-101-JTC, at p.5 n.4 (Del. Super., July 14, 2011).

FINDINGS OF FACT

On a motion to dismiss, the Board must accept all of LeCompte's well pleaded facts as true.

According to LeCompte, she was subjected to a hostile work environment by two co-workers, Lawson Losh and Raymond (Chuck) Davidson. LeCompte is an Environmental Health Specialist III in the Environmental Health Field Services office in Kent County. Losh is

a Plumbing Inspector who works in the same office as LeCompte but, at the relevant time, was not supervised by LeCompte (although she had once been his supervisor). Davidson is an Environmental Health Specialist III in the Environmental Health Field Services office in Sussex County. Davidson supervises the plumbing inspectors in Kent and Sussex County, including Losh.

LeCompte recounted three instances of alleged harassment by Losh and/or Davidson.

February 2, 2011

According to LeCompte, Losh became angry and negative after he asked her whether a pool at the Brumley Campground was private, or a public pool subject to Division of Public Health regulation. According to LeCompte, she told Losh that the pool issue was outside her jurisdiction and he should talk with his supervisor, Chuck Davidson. But Losh kept pushing the issue saying it was LeCompte's responsibility. To avoid any further confrontation, LeCompte took it upon herself to confirm that the pool was private, not public.

February 24, 2011

According to LeCompte, she was about to go out on family medical leave and was trying to set up a dedicated telephone line for farmers to call to schedule inspections during her absence. According to LeCompte, Losh "barked" at her about trying to "change the office" and said, "What are you trying to do, put us in a broom closet?"

June 29, 2011

According to LeCompte, when she returned to the office from a Royal Farms site inspection, another co-worker told her that Losh was asking about LeCompte's whereabouts in

the afternoons since her return from medical leave. LeCompte called Losh's supervisor, Chuck Davidson, because she felt Losh was acting inappropriately. LeCompte then heard Losh and Davidson talking on the telephone. According to LeCompte, Losh started yelling and cursing, denying that he had inquired about LeCompte's medical leave status and then slamming the phone receiver down. According to LeCompte, Losh then started to berate her for calling his supervisor. According to LeCompte, Losh's tirade went on for five minutes and he used the "F" word. Even after LeCompte told him, "I don't want to talk about this anymore," he continued to yell at her as he followed her to her office.

By e-mail dated July 7, 2011 to William Wharton, LeCompte made a complaint of harassment against Losh and Davidson. In the e-mail, LeCompte alleged: "I believe the way that Mr. Davidson managed this situation was the cause of the outburst from Mr. Losh [on June 29, 2011]. I also believe that Mr. Davidson has created other incidences where he has tried to intimidate me, displayed disrespectful behavior towards me and created hostile situations for me."

Wharton conducted an investigation. According to Wharton, he asked LeCompte to provide him with documentation, but she did not at first. According to LeCompte, she contacted Wharton two weeks later to inquire about the status of the investigation. According to Wharton, he told her he still had not received her documentation. According to LeCompte, she provided Wharton with 45 pages of e-mail documentation.

Wharton interviewed Losh and Davidson by telephone. He did not interview LeCompte. Wharton sent an e-mail to LeCompte on July 26, 2011 notifying her: "The allegations have been investigated and found to be unsubstantiated."

LeCompte was upset because she felt the investigation had been cursory and Wharton had not even interviewed her. In August 2011, LeCompte met with her supervisor, Dr. Ming Lau, Wharton, and Vincent Damiano (an agency Human Resources Labor Relations Manager). They assured her that there would be a "re-do" of the investigation.

This time, Wharton interviewed Losh and Davidson in person. He also interviewed two other employees who witnessed the June 29, 2011 incident with Losh: Wayne Mabrey and Daniel Yutzy. According to LeCompte, Wharton interviewed her but only for three minutes.

By e-mail dated October 17, 2011, Wharton notified LeCompte: "I have completed the investigation of Lawson Losh and Raymond Davidson. You allege they had created a hostile work environment. Both allegations were found to be unsubstantiated."

CONCLUSIONS OF LAW

Merit Rule 2.1 provides:

> **Discrimination in any human resource action covered by these rules or Merit system law because of race, color, national origin, sex, religion, age, disability, sexual orientation, or other non-merit factors is prohibited.**

"Merit Rule 2.1 mirrors Title VII of the Civil Rights Act. Like the Delaware courts, the Board will rely 'on principles of federal law as the interpretative framework and guide for interpreting the counterpart Delaware statute.'" *Hilferty v. Department of State*, MERB Docket No. 07-12-406, at p.10 (Aug. 7, 2008) (quoting *Thompson v. Dover Downs, Inc.*, 887 A.2d 458, 461 (Del. 2005)). [1]

[1] The Board notes that it "is not convinced that Merit Rule 2.1 is co-extensive with Title VII so as to encompass a hostile work environment claim. Merit Rule 2.1 prohibits discrimination 'in any human resource action.' It is hard to see how a supervisor's gender-based hostility is a 'human resource action.'" *Bloom v. DHSS*, MERB Docket No. 12-02-537, at p.7 n.3 (July 24, 2012).

To prevail on a hostile work environment claim, LeCompte must prove: (1) she "suffered intentional discrimination" because of her race or sex; (2) "the discrimination was pervasive and regular"; (3) "the discrimination detrimentally affected [her]"; (4) "the discrimination would detrimentally affect a reasonable person of the same sex [or race] in that position; and (5) "*respondeat superior* liability existed." *Knabe v. The Boury Corp.*, 114 F.3d 407, 410 (3rd Cir. 1997).

In *Clay v. United Parcel Service*, 501 F.3d 695 (6th Cir. 2007), Marie Moss (an African-American) claimed that her supervisor created a racially hostile work environment. According to Moss, her supervisor constantly criticized her for matters for which he did not criticize white co-workers: for eating during work; for leaving her work station to get a cup of coffee; for using the bathroom at the end of her break; for not getting to her work area on time (her supervisor even had her timed to see how long she took).

Moss did not allege that any racially derogatory comments were made in the workplace. However, "[c]onduct that is not explicitly race-based may be illegally race-based and properly considered in a hostile work environment analysis when it can be shown that but for the employee's race, she would not have been the object of harassment." 501 F.3d at 706. "Given that Moss was the only black employee in her work area and she alleges that [her supervisor] disciplined her for things for which he did not discipline her co-workers, Moss has created an inference, sufficient to survive summary judgment, that race was a motivating reason behind [her supervisor's] behavior." *Id.* at 707.

But Moss failed to prove that the harassment was sufficiently severe or pervasive to alter the conditions of her employment. "[T]he harassment complained of by Moss did not rise to the level of severity or pervasiveness that would unreasonably interfere with her ability to work.

Recounting the incidents raised in the affidavits, totaling fifteen specific incidents spanning a two-year period, the district court found that these incidents were isolated and were not pervasive." 501 F.3d at 707.

"For the most part, the incidents complained of amounted to 'mere offensive utterances,' which are not actionable under Title VII." *Id.* at 706. "While we do not wish to diminish the gravity of the situation, these incidents, as a matter of law, do not meet the severe or pervasive requirement for a hostile work environment." *Id.*

The Board concludes as a matter of law that LeCompte satisfied three of the five elements of a prima facie case of hostile work environment. She was the only African-American woman in her workplace so the Board can infer that Losh and Davidson harassed her on the basis of her race and sex, based on LeCompte's testimony that they did not treat other co-workers that way. It is clear that this discrimination detrimentally affected her, especially the June 29, 2011 incident, which LeCompte described as a "verbal assault" which left her very shaken. The Board believes that this discrimination would detrimentally affect a reasonable person of the same sex or race in that position.

To satisfy the fifth element of a hostile work environment claim and hold DHSS vicariously liable for Losh's and Davidson's behavior, LeCompte must show that DHSS "failed to take prompt remedial action." *Knabe*, 114 F.3d at 411. Prompt remedial action requires "careful and complete investigation of sexual harassment complaints." *Id.* at 412 n.10. Any remedial action must be "reasonably calculated to prevent further harassment." *Id.* at 413.

"[T]he law does not require that investigations into sexual harassment complaints be perfect." 114 F.3d at 413. However, "there may be cases in which an employer's investigation is so flawed that it could not be said that the remedial action was adequate. For example, the

investigation might be carried out in a way that prevents the discovery of serious and significant harassment by an employee such that the remedy chosen by the employer could not be held to be reasonably calculated to prevent the harassment." *Id.* at 414.

If the investigation of LeCompte's complaint had ended with Wharton's July 26, 2011 e-mail, the Board believes that the investigation was neither careful nor complete and was not prompt remedial action. Wharton did not interview Losh or Davidson face-to-face. He did not interview LeCompte, or two eye-witnesses to the June 29, 2011 incident (Mabrey and Yutzy).

But there was a second investigation. This time, Wharton interviewed Losh and Davidson in person, and the two other witnesses to the June 29, 2011 incident. The Board is still troubled that, according to LeCompte, Wharton only interviewed her for three minutes, which strikes the Board as perfunctory.

While a close call, the Board ultimately does not have to decide whether the investigation was prompt remedial action because the Board concludes as a matter of law that LeCompte did not establish a prima facie case that the discrimination was pervasive and regular.

LeCompte alleged that there were numerous, unspecified instances of harassment, some dating back to 2010. But the only incidents before the Board are the three she cited in 2011 (February 2, February 24, and June 29). The Board does not believe these incidents were sufficiently severe or pervasive to amount to a hostile work environment. "For the most part, the incidents complained of amounted to 'mere offensive utterances,' which are not actionable under Title VII." *Clay*, 501 F.3d at 706. "While we do not wish to diminish the gravity of the situation, these incidents, as a matter of law, do not meet the severe or pervasive requirement for a hostile work environment." *Id.*

Because LeCompte did not make a prima facie case of a hostile work environment, the

Board grants the agency's motion to dismiss for failure to state a claim upon which relief can be granted. However, the Board is compelled to voice several concerns about how the agency handled LeCompte's complaint.

Given the serious nature of LeCompte's allegations, the Board believes she deserved a fuller explanation than a one-line e-mail saying they were unsubstantiated. At the very least, someone could have met with LeCompte to explain why the investigator did not believe that the legal elements for a hostile work environment claim were supported by the documents she provided and other witnesses.

Even if the situation did not rise to the level of a hostile work environment, it is clear to the Board that there were problems in the workplace which needed to be addressed. The Board understands that Mr. Wharton only played a limited role to determine whether there was evidence to substantiate LeCompte's hostile work environment complaint. But he could have alerted someone in management at the Division of Public Health of the ongoing problems involving LeCompte and Losh and Davidson so they could take steps to rectify the situation.

The Board sympathizes with LeCompte's frustration in seeking redress. According to LeCompte, she has asked numerous times where and how to file a complaint in accordance with Executive Order No. 8, only to get the run-around with no answer. [2] She is concerned that, if she does not file a complaint in a timely fashion, it might be time-barred, but she has no idea where to go which is why she appealed to the Board. Unfortunately, the Board does not have the authority to grant her the relief she seeks.

[2] Executive Order No. 8 requires every agency in the executive branch to establish a "complaint procedure to permit and encourage employees to discuss any problems resulting from alleged bias, discrimination, . . . or any similar matter, with appropriate Division or Agency supervisory personnel. The procedure shall provide for the lodging of employee complaints, and for a response made within a reasonable time."

DECISION AND ORDER

It is this **15th** day of February, 2013, by a vote of 3-0, the Decision and Order of the Board to dismiss LeCompte's appeal for failure to state a claim upon which relief can be granted as a matter of law.

JACQUELINE D. JENKINS, EDD, MERB Member

JOHN F. SCHMUTZ, MERB Member

VICTORIA D. CAIRNS, MERB Member