BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

GINA A. BLOOM, Employee/Grievant, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Employer/Respondent.	))))))))))	**DOCKET No. 12-02-537** **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 9:30 a.m. on July 19, 2012 at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Dr. Jacqueline Jenkins, Acting Chair, John F. Schmutz, Victoria D. Cairns, and Paul R. Houck, 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

Gina A. Bloom
Employee/Grievant *pro se*

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument on three issues raised by the Board *sua sponte*: (1) Does the Board have jurisdiction to hear an appeal from a "Needs Improvement" job performance evaluation? (2) If not, can the employee/grievant, Gina A. Bloom (Bloom), still grieve a retaliation claim based on that evaluation; and (3) Has Bloom pleaded sufficient facts to state a hostile work environment claim?

The Board heard testimony on these issues from Bloom and Gwen M. Griffith, Director, Audit & Recovery Management Services (ARMS).

FINDINGS OF FACT

The Board makes the following findings of jurisdictional facts.

Bloom works as an Investigator I in the ARMS Unit. On May 10, 2011, Bloom received her performance review for the period January 1 – December 31, 2010. The review cited "a backlog of investigative cases dating back to February 2009" and stated that Bloom "needs to focus on accuracy in the completion of her investigative reports and overpayments." Bloom's overall evaluation was "**Needs Improvement**."

In discussing this evaluation with her supervisors, Bloom took issue with their statistical analysis of her investigative cases. She felt that the negative numbers were overstated because she was out on family medical leave for five months in 2010.

Bloom's supervisors revised her performance evaluation, but the overall rating remained "**Needs Improvement.**" Bloom refused to sign the evaluation because she felt the revised numbers only looked worse and did not accurately reflect her job performance.

Bloom's supervisors placed her on a 90-day performance improvement plan starting May 20, 2011. According to Bloom, she has remained on an improvement plan ever since.

At the hearing, Bloom acknowledged that her "Needs Improvement" performance review did not disqualify her from promotion or pay raises, including the recent 1% pay increase for State employees. The budget bill for Fiscal Year 2013 granted a 1% pay increase to every State employee effective July 1, 2012 except for those employees with an unsatisfactory performance rating.

At the hearing, Bloom proffered that she and other witnesses would testify to several incidents to support her hostile work environment claim:

1. One time, Bloom's supervisor, Carl McIlroy, yelled at her in his office and slammed his fist on his desk calling Bloom a liar.

2. Another employee, Gordon Andrews, had authority to approve investigations for everyone in the ARMS Unit except Bloom.

3. While Bloom was out on family medical leave, her cases were not re-assigned to other employees to prevent a back-log. Her co-workers took it upon themselves to work her cases.

4. After Bloom returned from family medical leave, McIlroy would not process or approve her cases.

5. On several occasions, McIlroy tried to intimidate Bloom by yelling at her.

CONCLUSIONS OF LAW

Section 5943(a) of the Merit statutes provides:

> **Standing of a classified employee to maintain a grievance shall be limited to an alleged wrong that affects his or her status in his or her present position.**

29 *Del. C.* §5943(a).

Merit Rule 13.4 provides:

> **Review. Appeal. The employee shall have the right to discuss any performance review or documentation with the next level of authority and may submit written comments.**

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.**

A. Needs Improvement Performance Evaluation

In *Sullivan v. Department of Health*, C.A. No. 00A-02-009, 2000 WL 1211239 (Del. Super., Aug. 22, 2000), *aff'd*, 781 A.2d 696 (2001), the court held the employee could not grieve a needs improvement performance evaluation. Merit Rule 21.0121 provided: "[A]ny employee may request a written review of his/her performance appraisal by the Personnel Commission [MERB] following an unacceptable Step 3 decision if the employee's overall performance appraisal was unsatisfactory and this directly led to the denial of a pay increase." This rule only provided for an appeal to the Board of an unsatisfactory performance evaluation. Accordingly, the employee "had no right to appeal his 1999 performance evaluation beyond the head of the agency because he did not receive an overall performance evaluation of unsatisfactory." 2000 WL 1211239, at p.1.

Sullivan is no longer controlling on this issue. On January 1, 2004, the Board adopted revised Merit Rules. The new Rules eliminated former Merit Rule 21.0121 on which *Sullivan* was decided.

Merit Rule 13 is the only Merit Rule which now addresses performance reviews. Merit Rule

13.4 gives an employee "the right to discuss any performance review or documentation with the next level of authority" and to "submit written comments." Merit Rule 13.3 provides, in the event of an unsatisfactory evaluation, "the performance shall be documented in writing, and the specific weaknesses must be made known to the employee. The employee shall be given documented assistance to improve by the designated supervisor. An opportunity for re-evaluation will be provided within a period of 3 to 6 months."

The current Merit Rules are silent as to what kinds of performance evaluations an employee can grieve to the Board. However, the Merit statutes authorize a grievance for "an alleged wrong that affects his or her status in his or her present position." 29 *Del. C.* §5943(a).

In *Olsen v. DSCYF*, MERB Docket No. 11-04-518 (Mar. 5, 2012), Olsen grieved a "Meets Expectations" performance evaluation claiming she should have received "Exceeds Expectations." In applying Section 5943(a), the Board decided that "Olsen's overall rating of 'Meets Expectations' in her revised 2010 performance review did not affect her status in her position of Administrative Specialist II. With that rating, she remained eligible for promotion and pay raises. Her performance review did not have any adverse effect on her position."

The Board concludes as a matter of law that Bloom's 2010 "Needs Improvement" performance rating did not have any adverse effect on her position as an ARMS Investigator I. She remained eligible for promotion and pay raises and in fact received the statewide 1% pay increase effective July 1, 2012. [1]

[1] In a July 18, 2012 e-mail to the Board, Bloom claimed that DHSS violated Section 5940 of the Merit statutes because she did not receive her 2010 performance evaluation until May 2011. Section 5940 provides: "The review date for employees of the classified service shall be December 31 of each fiscal year, ..." 29 *Del. C.* §5940.Section 5940 only prescribes the period for performance reviews, not the time for the actual review.

B. Retaliation

"'The term 'retaliation' does not appear in Merit Rule 2.1, but the Board believes that for an employer to retaliate against an employee's exercise of a protected activity is discrimination based on a non-merit factor.'" *Moison v. DHSS*, MERB Docket No. 07-09-400 (June 18, 2009) (quoting *Hilferty v. Department of State*, MERB Docket No. 07-12-406 (Aug. 27, 2008)).

"To establish a prima facie claim of retaliation [Bloom] must tender evidence that: (1) she engaged in [a protected activity]; (2) the employer took adverse employment action against her; and (3) there was a causal connection between her participation in the protected activity and the adverse employment action." *Moore v. City of Philadelphia*, 461 F.3d 331, 340-41 (3rd Cir. 2006).

Bloom claims that DHSS retaliated against her after she questioned her first "Needs Improvement" performance evaluation. Bloom had a right under Merit Rule 13.4 to "discuss any performance review or documentation with the next level of authority." Undoubtedly, that is a protected activity.

However, the Board concludes as a matter of law that Bloom has not established a prima facie claim of retaliation because she did not suffer any adverse employment action. Her second "Needs Improvement" performance evaluation did not adversely affect her status in her position as an ARMS Investigator I. [2]

Bloom also claimed in her e-mail that DHSS violated Merit Rule 4.12.4 which provides: "Employees shall receive the pay increase provided in the Budget Act, unless their latest Performance Review is unsatisfactory." That rule does not apply to Bloom because she did not receive an unsatisfactory performance review.

[2] The Board notes that *Sullivan v. DHSS* is still good law to the extent the Board found that the "real nature" of the grievance "was an objection to the performance rating and not a claim of retaliation." 2000 WL 1211239, at p.2. The Board also believes that Bloom's "grievance was not one of retaliation but instead one contesting [her] performance rating." *Id.* at p.3.

A. Hostile Work Environment

Title VII of the Civil Rights Act prohibits employers "from discriminating against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. §2000e-2(a)(1). [3]

"Title VII proscribes only workplace discrimination on the basis of sex, race, or some other status that the statute protects; it is not a 'general civility code' designed to purge the workplace of all boorish or even harassing conduct." *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 808 (7th Cir. 2001). "Inappropriate conduct that is inflicted regardless of sex is outside the statute's ambit." *Id.* "[A]n employer cannot be held liable for creating or condoning a hostile working environment unless the hostility is motivated by gender." *Id.*

In *Berry*, a female employee alleged a number of hostile actions by co-workers:

> [O]n various occasions in June and July several Argenbright employees were rude and uncooperative towards Berry, making it difficult for her to perform her job. For example, one Argenbright employee refused to help Berry with an international air bill in front of a customer. Others would not listen to Berry when she attempted to communicate with them, forcing her to write down work-related information and hand it to them. [Another employee] repeatedly stonewalled Berry when she sought his assistance regarding customer service or inventory

[3] The Board 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." Nevertheless, the Board will assume, for purposes of this case only, that it has jurisdiction under Merit Rule 2.1 to consider Bloom's hostile work environment claim.

> by either hanging up the phone when she called him, or by walking away or simply ignoring her when she made her requests in person.

7602 F.3d at 807.

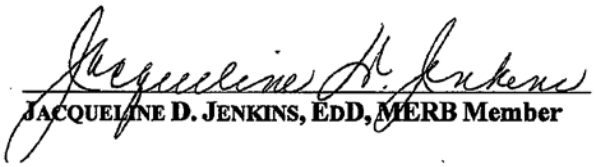
"[I]t is clear that the incidents of workplace 'harassment,' while unfortunate, are not actionable as sexual harassment under Title VII because Berry has presented no evidence suggesting that any of these incidents were motivated by her gender or by any anti-female animus." *Id.* at 809. "[N]othing in the record suggests that the 'cold shoulder' treatment that Berry received from other Argenbright employees was motivated by Berry's sex." *Id.* She has not "offered anything suggesting that the hostility had a gender bias." *Id.*

At the hearing, Bloom proffered that she and other witnesses would testify to six instances of harassment listed in her July 18, 2012 e-mail to the Board. The Board concludes as a matter of law that such testimony would not support a hostile work environment claim. There is nothing to suggest that these alleged instances of harassment were motivated by Bloom's sex. She has not proffered any evidence to the Board to suggest that hostility towards her in the workplace was gender-biased. *See Hervey v. County of Koochiching*, 527 F.3d 711, 722 (8th Cir. 2008) (employee claimed her supervisor constantly criticized her, made her report to an undersheriff, and yelled at her on several occasions; there was no evidence that she "was the target of harassment because of her sex, and that the offensive behavior was not merely non-actionable vulgar behavior").

DECISION AND ORDER

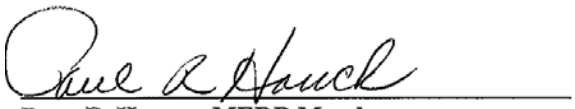
It is this **24th** day of July, 2012, by a unanimous vote of 4-0, the Decision and Order of the Board to dismiss Bloom's appeal for lack of jurisdiction and/or failure to state a claim upon which

relief can be granted as a matter of law.



JACQUELINE D. JENKINS, EDD, MERB Member

JOHN F. SCHMUTZ, MERB Member



PAUL R. HOUCK, MERB Member

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