THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DOTTIE HATFIELD,
Grievant,

v. **Docket No. 2018-0648-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR CHILDREN AND FAMILIES,
Respondent.

DECISION

Grievant, Dottie Hatfield, has been employed by Respondent, Department of Health and Human Resources ("DHHR"), for sixteen years as an Economic Service Worker. She has been assigned to the Logan County office of the Bureau for Children and Families ("BCF), for her entire tenure with Respondent. Ms. Hatfield filed a Level One grievance form dated October 30, 2017 alleging: "Respondent has created an atmosphere of sexual harassment." As relief Grievant seeks the cessation of sexual impropriety in the work place and to be made whole.

A Level One hearing was held on May 2, 2018. Grievant raised the additional allegation of retaliation against her for filing the grievance and an EEO complaint. The grievance was denied by a decision dated May 23, 2018. The grievance was appealed to Level Two on May 24, 2018, and a mediation was conducted on August 14, 2018. Grievant subsequently appealed to Level Three on August 14, 2018.

A Level Three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on November 16, 2018. Grievant personally appeared and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers

Union. Respondents were represented by Steven R. Compton, Deputy Attorney General and Brandolyn Felton-Ernest, Assistant Attorney General. This matter became mature for decision January 7, 2019, upon receipt of the last of the parties Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant claims that she has been subjected to sexual harassment and a hostile workplace. Grievant also alleges that she has been subjected to reprisal as a result of filing a grievance and EEO complaint. Because of intervening events there is no longer a remedy for Grievant's sexual hostile workplace claim. Grievant proves that she has been subjected to reprisal in one specific respect. The sexual harassment claim is DISMISSED and the grievance is GRANTED in part and DENIED in part.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Dottie Hatfield, has been employed by Respondent, Department of Health and Human Resources ("DHHR"), for sixteen years as an Economic Service Worker. She has been assigned to the Logan County office of the Bureau for Children and Families ("BCF), for her entire tenure with Respondent. Grievant was the back-up supervisor for BCF when her supervisor was out.

2. In the early months of 2017, Grievant reported to Trish Mullins, her direct supervisor, that inappropriate personal activity was taking place in the cubical directly across from hers.

3. Grievant reported that an Economic Services Supervisor E.S.[1], and his subordinate Economic Service Worker, J.G., were engaging in what she described as "heavy flirting" and "inappropriate touching" while Mr. S. was allegedly teaching Ms. G. things about work performance expectations and duties.

4. Both participants were married to other people. The situation was particularly troubling because she had recently found her brother's body after an apparent suicide[2] over an extra-marital affair. Grievant asked Ms. Mullins to move her workstation and Ms. Mullins declined the request.[3]

5. Some weeks later, Grievant again asked Ms. Mullins if she could be moved and told her that there were rumors that E.S. and J.G. had been seen going into and coming out of the men's restoom around the same time. Some coworkers had expressed concerns that there might be some danger if one of the spouses of E.S. or J.G. came to the office to confront them. Ms. Mullins said she could not do anything about the situation because she and E.S. were both supervisors and on the same management level.

6. In the summer of 2017, E.S. was promoted to a supervisor position in the West Virginia Works ("WVW") office located on the same floor of the building as the BCF. In March 2018, J.G. was transferred to a position with child support. That unit is on the same floor of the building but not in Grievant's or E.S.'s unit.

[1] This is a sensitive matter. Initials are being used because neither of these people were involved in the grievance and their names are not necessary to resolve the grievance.
[2] Grievant expressed some doubt as to her brother's death being a suicide.
[3] Ms. Mullins testified that Grievant had requested to be moved to an office with a window and that was why she denied the request.

7. Also, during that summer Kimberly Vance, a coworker in the WVW offices, organized a thirtieth birthday party for Adam Wooten. While Mr. Wooten was a WVW employee, his cubicle was in the same general area as Grievant's.

8. At least two poster-size signs were put up in the office where they were visible to everyone which were sexually suggestive. One had a horn attached and the line "If you like Adam's package blow the horn." Coworkers would blow the horn and make sexually charged comments. Another sign was a combination of text and attached candy bars which was also suggestive. A representative line stated: "Have your "Whoppers' turned to 'Milk Duds'."[4]

9. Grievant complained about the signs but they stayed up until October 2017.

10. Grievant applied for two supervisory positions within the Logan office of the DHHR in the fall of 2017 and was not selected for either position.[5]

11. Grievant filed this grievance shortly after being notified that she had not been selected for either of the supervisory positions for which she applied. This grievance was dated October 30, 2017. Grievant also filed an EEO complaint with the Employee Management Department of the DHHR.

12. Dawn Atkins, Director of Employee Management, was notified about the EEO complaint on October 30, 2017, and spoke with Grievant on November 2, 2017. On the same day Director Atkins went to Carlotta Gee, an EEO Officer, in her department and instructed Ms. Gee to "drop everything else" and investigate these allegations.

[4] The words "whoppers" and "milk duds" were on boxes of each brand of candy. (Grievant Level One Exhibit 1.)
[5] Grievant's non-selection for these positions is the subject of a separate grievance.

13. Ms. Gee investigated the allegations and issued a report in early January 2018. She split her investigation into two parts: the matters related to the alleged workplace tryst and the allegations related to the birthday party signs and behavior. She visited the workplace and interviewed many of the employees. She issued separate letters dated January 18, 2018, to Grievant[6] and Eugene Snyder[7] stating that the allegations had been substantiated in part and a full report was sent to the Commissioner and the Human Resource Director.

14. EEO Officer Gee found that E.S. and J.G. were going into a bathroom together during work time and engaging in other inappropriate activity in the workplace. She also found that there was a pervasive environment of sexual harassment in the workplace and the birthday was a large example of this problem. She noted that the signs were as described by Grievant. The signs in the front of the office had been taken down fairly quickly but the one regarding the candy bars stayed up "for quite some time."[8] Most employees she interviewed found the signs to be inappropriate and offensive. She found that supervisors Mullins and Snyder knew about the posters and did nothing even though the posters violated DHHR policy related to workplace conduct.

15. The Community Service Manager ("CSM") took action regarding the relationship issue and other corrective action was taken to remedy the remaining issues. Additionally, the CSM required that a specific EEO and Sexual Harassment training be developed by the EEO unit. All DHHR employees in the building were required to complete the training during December 2017. EEO Officer Gee felt that proper corrective

[6] Grievant Level One Exhibit 2.
[7] Grievant Level One Exhibit 3.
[8] Level Three testimony of Carlotta Gee, EEO Officer.

action had been taken by the time she submitted her report and all the offensive behavior had stopped.

16. Grievant has been moved to the third floor in the building. She is away from all the people who were involved in the previous harassment allegations. Grievant is satisfied with her new placement.

17. Grievant has experienced fewer inquires or requests for assistance from coworkers in her role as back-up supervisor.

18. Previously, Grievant had been assigned to address alerts which are generated daily on the ESAP program which tracks the unemployment benefits status of clients. Pursuant to federal regulation related to privacy concerns a very limited number of employees have access to this program and the data therein. Other economic service workers need information from the system and must get it from one of the individuals who have access to it. Grievant received frequent requests for assistance from coworkers for data when she had access to the program. She enjoyed helping others by providing that information.

19. Effective July 1, 2018, Grievant was no longer allowed access to the ESAP program. Another employee was assigned to address the alerts generated by the program which alleviated Grievant's need to access the program on a regular basis. This action was taken after Grievant complained that she had more duties than she can get done and asked for some relief.

20. Grievant sent an email dated July 11, 2018, to Jeffrey Dean asking why she had been denied access to the ESAP program. (Grievant Level Three Exhibit 1). Mr. Dean replied that there were a limited number of slots available in the program and she was no

longer assigned to address the generated alerts as a normal part of her daily activities. Mr. Dean further stated:

> This was done as an effort to expedite the process of getting information processed in the RAPIDS System and not delay, deny or overpay benefits to a client, the individual assigned to this tasking will need this access and not having their functions hindered because staff with this access are either absent or too busy to search the information for the assigned worker.

Id.

21. On April 20, 2018, Grievant received an interim Employee Performance Appraisal (Form EPA – 2). The EPA 2 was completed by her supervisor Patricia Mullins and covered the period of September 1, 2017, through February 28, 2018. The overall rating grievant received was, "Fair, But Needs Improvement." Under "Performance Development Needs" – "You need to work on paying particular attention to detail about cleaning your dashboard and in ROADS correctly. You have had some applications go out of time compliance for processing." "This adversely affects the client and their benefits being received timely." Grievant was also admonished during the meeting that she should not talk about personal matters with her coworkers and could not have her cell phone out during work. She could use her cell phone during breaks and lunch only.

22. Prior to this event, Grievant had only received ratings indicating that she met standards. Grievant felt singled out by supervisor Mullins as a result of this EPA.

23. Supervisor Mullins made the comments on Grievant's EPA because, while reviewing Grievant's work she found cases which had been marked "completed" which had not actually been cleared. Such action can cause client's benefits to be seriously

delayed. This was also the reason why she rated the client as “Fair, But Needs Improvement.”

24. Supervisor Mullins completed EPA – 2s for all her subordinates during the same time. She addressed with them issues she felt were important to correct in the office. One of those issues was too much use of cell phones and employees engaging in personal conversations rather than addressing business issues. She told all her subordinates that they could only use their cell phones during breaks and lunch and had to keep them out of sight and any other time. She also admonished her subordinates against engaging in personal conversations during work hours.

25. Since the issuance of the EEO report, Grievant has felt ostracized by Ms. Mullins, Ms. Vance and Mr. Snyder. These individuals do not get on the elevator if Grievant is on it and exit the elevator if Grievant gets on with them. They also do not speak with Grievant in informal work settings.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE R §156-1-3 (2108). *Burden of Proof.* "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant argues that she has been subject to sexual harassment and a hostile work environment. She also alleges that she has been subjected to retaliation as a result

of filing a grievance and EEO complaint to address the harassment. Respondent argues that the issue is now moot because Respondent's agents investigated the complaints and took action to stop any improper behavior. Respondent denies that Grievant has been subjected to retaliation or reprisal.

Respondent's EEO Unit investigated Grievant's allegations of a sexually hostile work environment. EEO Officer Gee visited the workplace and conducted extensive interviews. She concluded that there was a pervasive environment of sexual harassment in the workplace and the birthday was a large example of this problem. She noted that the signs were as described by Grievant. While some of the signs had been taken down quickly at least one of them had been left up for "quite some time." Most employees she interviewed found the signs to be inappropriate and offensive. Officer Gee found that supervisors knew about the inappropriate conduct and did nothing even though some of it violated DHHR policy related to workplace conduct. It seems apparent that Grievant was subjected to a sexually hostile workplace.[9] However, the lack of a remedy precludes a full examination of this issue.

Once the CSM became fully aware of the situation, action was taken regarding the relationship issue and other corrective action was taken to remedy the remaining issues. The CSM required that a specific EEO and Sexual Harassment training be developed by the EEO unit. All DHHR employees in the building were required to complete the training during December 2017. EEO Officer Gee found that proper corrective action had been

[9] Courts have recognized that a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. *Faragher v. City of Boca Raton,* 524 U.S. 775, 787, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

taken by the time she submitted her report in January 2018, and all the offensive behavior had stopped. Grievant also testified that the hostile work environment had been rectified and inappropriate activities were no longer taking place.

As a remedy, this Board has generally ordered a Respondent to "take whatever steps that are appropriate and necessary, utilizing the corrective and disciplinary measures available" to stop harassment when the Respondent was aware of a situation in which an employee was harassing co-workers and took "no meaningful action to correct the situation." *White v. Monongalia County Bd. of Educ*., Docket No. 93-30-371 (March 31, 1994). In this situation that remedy is not available because Respondent has already taken action which has been effective at stopping the sexual harassment. Further damages such as medical expenses, mental anguish, stress, and pain and suffering which may be available in other forums, are viewed as "tort-like" damages which have been found to be unavailable under the Grievance Procedure. *Dunlap v. Dep't of Environmental Protection,* Docket No. 2008-0808-DEP (Mar. 10, 2009). *Spangler v. Cabell County Board of* Education, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ*., Docket No. 97-20-007 (June 30, 1997). Any decision on the issue of sexual harassment at this point would only be an advisory opinion with no real remedy available.

"Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561

(Sept. 30, 1996). In situations where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. 'This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991).' *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

There is no remaining remedy which can be awarded by the Grievance Board for the sexual harassment claim. Therefore, the issue is moot and cannot be further addressed herein.

Grievant claims that there has been retaliation taken against her because she filed a grievance and an EEO claim. Grievant cites three examples of this retaliation: a "needs improvement" score on a subsequent EPA-2; Exclusion of access to the ESAP database containing information related to client unemployment benefit status; and shunning by coworkers.

WEST VIRGINIA CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity;
>
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;

> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Carper v. Clay County Health Dep't, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural* Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ*., Docket No.

93-01-154 (Apr. 8, 1994). *See, Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

There is no question that filing a grievance and making an EEO complaint are protected activities. W.VA. CODE § 6C-2-3 (h) prohibits retaliation against anyone participating in the grievance process and the Division of Personnel ("DOP") *Prohibited Workplace Harassment Policy* Section V (4) states that it is every employee's responsibility to "Not retaliate against those who participate in the complaint and/or investigation process." *Id.*

Grievant has been treated in an adverse manner by her employer. Grievant received an EPA below the level on "Meets Standards" for the first time in her career, she lost access to the ESAP database and she has been shunned by coworkers who are supervisors.

Grievant's supervisors had actual knowledge that she had filed a grievance and EEO complaint. The DOP informed Respondent immediately upon Grievant's filing of the EEO complaint and her direct supervisors were interviewed by the EEO investigator. Additionally, the supervisors were witnesses in the Level One hearing for the grievance.

The first three elements for reprisal have been met leaving only the issue of a causal connection between the protected activity and the adverse actions. An inference may be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the adverse action.[10] *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

[10] What constitutes a "short time period" has not been specified by the West Virginia Supreme Court.

The EEO investigation report was issued early in January 2018. Within six months she received a negative comment on her performance appraisal, lost access to the ESAP database, and was almost immediately shunned by some of her coworkers. This is a short enough time period to infer that the adverse actions resulted from retaliatory motives. Grievant has made a *prima facia* case of retaliation.

Since Grievant established a *prima facie* case of reprisal, Respondent may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *See Mace, supra.* With regard to the score on the EPA-2, Ms. Mullens stated that she gave Grievant a “needs Improvement” because she found case files which Grievant had been marked “completed” which should not actually been cleared. This can cause a delay in clients receiving benefits when the mistake is discovered, and additional work is necessary to complete the case. The mid-term EPA-2 is intended to allow the supervisor to point out problems with the employee’s performance so the employee has time to address them before the final performance appraisal at the end of the term.

Grievant also felt that during the EPA meeting Ms. Mullins singled her out by telling her not to talk to coworkers about personal matters and to keep her cellphone put away except during lunch time and breaks. Supervisor Mullins admitted to having this discussion with Grievant. She said she completed the EPA-2s for all her subordinates about the same time and addressed the issue of personal conversations and cell phone usual with all of them because she viewed it as an impediment to getting work accomplished. Respondent proved a legitimate non-retaliatory reason for the EPA-2

score, and Grievant did not provide any evidence indicating that this reason was a mere pretext.

The same is true for removing Grievant's access to the ESAP database. When Grievant asked Manager Dean why he had taken this action, he responded that another employee had been assigned the duty to address the alerts generated by the ESPA. That person needed access to the database to complete these tasks. Since the number of employees with access to the program was required to be limited, it made sense to remove Grievant's access at that time. The new person was assigned to address the alerts because Grievant had complained about having too many duties. Manager Dean's response[11] was reasonable as was the decision to give the database access to another employer. Respondent proved a legitimate non-retaliatory reason for removing Grievant's access to the ESPA database and Grievant did not provide any evidence indicating that this reason was a mere pretext.

Finally, Grievant testified that since she filed the grievance and EEO complaint that she has been ostracized by supervisors Mullis, Vance and Snyder. This has taken the form of ignoring Grievant in the hallways, avoiding contact with her and refusing to ride the elevator when Grievant is on it. This may seem trivial, but it is particularly troubling since Ms. Vance and Ms. Mullins are Grievant's immediate supervisors.[12] The Grievance Board has held in such cases that "all employees are "expected to treat each other with

[11] *See,* FOF 20, *supra.*

[12] Supervisors "may be held to a higher standard of conduct, because [they are] properly expected to set an example for employees under their supervision, and to enforce the employer's proper rules and regulations, as well as implement the directives of [their] supervisors." *Wiley v. Div. of Natural Res.*, Docket No. 96-DNR-515 (Mar. 26, 1988); *Linger v. Dep't of Health & Human Res.*, Docket No. 2010-1490-CONS (Dec. 5. 2012).

a modicum of courtesy in their daily contacts." *See Fonville v. DHHS*, 30 MSPR 351 (1986) (*citing Glover v. DHEW,* 1 MSPR 660 (1980)). *Crews v. Dep't of Veterans Assistance,* Docket No. 2017-0344-DVA (Mar. 14, 2016); *McDaniels v. Div. of Highways*, Docket No. 2017-1404-CONS (June 30, 2017)." The undisputed actions of these supervisors seem more akin to a high school clique than the minimum civility expected in workplace behavior. As noted in *Crews* and *McDaniels supra,* such "disrespectful behavior [is] not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000).

Grievant has proved by a preponderance of the evidence that she has been retaliated against by Respondent's supervisors of reasonable office civility toward Grievant. Accordingly, the issue of a sexually hostile work environments is DISMISSED as moot, and the grievance is GRANTED to the limited extent that Grievant proved that she has been subjected to reprisal by the behavior of three of respondent's supervisors. In all other respects the grievance is DENIED. Respondent is not expected to be the "manners police" on a daily basis, but it is required to take whatever steps that are appropriate and necessary, to abate the uncivil workplace behavior of these employees toward Grievant.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE R §156-1-3. *Burden of Proof.* "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a

contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996). In situations where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. 'This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.,* Docket No. 91-35-229/239 (Nov. 27, 1991).' *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

3. Grievant's claim for sexual harassment and a hostile workplace are moot because there is no longer a remedy available in this forum. That claim must be dismissed.

4. WEST VIRGINIA CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity;
>
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Carper v. Clay County Health Dep't, Docket No. 2012-0235-ClaCH (July 15, 2013); *Cook v. Div. of Natural* Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ*., Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

5. If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Carper v. Clay County Health Dep't*, Docket No. 2012-0235-ClaCH (July 15, 2013); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). *See, Sloan v. Dept. of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

6. Grievant establish a *prima facia* case of reprisal by a preponderance of the evidence.

7. Respondent proved by a preponderance of the evidence that there were legitimate, non-retaliatory reasons for Grievant's EPA-2 rating and the removal of Grievant's access to the ESAP database.

8. Respondent offered no reason for the shunning of Grievant by three supervisors.

9. "All employees are expected to treat each other with a modicum of courtesy in their daily contacts." *See Fonville v. DHHS*, 30 MSPR 351 (1986) (*citing Glover v. DHEW,* 1 MSPR 660 (1980))." . . . "Disrespectful behavior [is] not acceptable or conducive to a stable and effective working environment. *Hubble v. Dep't of Justice,* 6 MSPR 659, 6 MSPR 553 (1981). *See Graley v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-406 (Oct. 31, 2000)." *Crews v. Dep't of Veterans Assistance,* Docket No. 2017-0344-DVA (Mar. 14, 2016); *McDaniels v. Div. of Highways*, Docket No. 2017-1404-CONS (June 30, 2017).

Accordingly, the sexual harassment issue is DISMISSED. The grievance is GRANTED to the limited extent that Grievant proved that she has been subjected to reprisal by the behavior of three of respondent's supervisors. In all other respects the grievance is DENIED.

Respondent is ORDERED to take whatever steps that are appropriate and necessary, to abate the uncivil workplace behavior of its employees toward Grievant.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA.

CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: February 5, 2019.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE