IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

KENDA KIRBY,	)	
	)	
Petitioner,	)	
	)	**Calendar 6**
vs.	)	**Case No.: 2005 CA 008805 P(MPA)**
	)	**Judge Alprin**
DISTRICT OF COLUMBIA FIRE & EMERGENCY MEDICAL SERVICES AGENCY, *et al.*,	)	
	)	
Respondents.	)	

ORDER REVERSING AGENCY DECISION AND REMANDING CASE

Before the court is Kenda Kirby's[1] Petition for Review of Agency Decision, filed October 26, 2005. Respondent District of Columbia Fire & Emergency Medical Services Agency ("FEMS") filed a copy of the certified agency record with the court on March 14, 2006. Respondent filed its brief on the matter on December 20, 2006. Petitioner replied on January 29, 2007. At issue is a determination by the Office of Human Rights ("OHR") that there is no probable cause to believe that the Respondent subjected Petitioner to (1) a hostile work environment on the bases of Petitioner's sexual orientation (lesbian), gender (female), and personal appearance (androgynous); (2) retaliation for engaging in a protected activity by lodging a complaint regarding the alleged hostility. Based on a review of Kirby's petition, FEMS's brief in opposition, Petitioner's reply, and the entire agency record, the court will **REVERSE** the OHR's determination of no probable cause and **REMAND** this case for further proceedings, for the reasons stated below.

[1] Petitioner's name is listed in various court documents and pleadings as either "Kendra" or "Kenda." It is the court's understanding that her name is, in actuality, "Kenda."

I. BACKGROUND

A. Facts at Issue

This is a petition for review of an agency order pursuant to Rule 1 of Section XV of the Rules of Civil Procedure for the Superior Court of the District of Columbia.[2] According to the record, Petitioner was hired as a Training Specialist in Human Diversity on February 10, 2003. (R. at 102.) As a specialist, her role was to provide expert advice and classroom instruction, "...on culture, race, sexual orientation, national origin and other human diversity issues affecting the workplace environment." *Id.* As part of her job description, Petitioner was entrusted with the responsibility of delivering and implementing the Tyra Hunter Human Diversity Training Series. (R. at 86.)

On May 15, 2003, Petitioner found an internet printout of a website, "The Watch Desk Forums," in her office mailbox. (R. at 103.) Designed as a "web chat" for firefighters, the chat printout contained postings from several individuals using screen names, who were affiliated with FEMS. *Id.* The postings were critical of Petitioner's manner of dress, particularly that she was permitted to dress in official uniform. *Id.* The postings ridiculed Petitioner's sexual orientation and androgynous physique, with one individual writing, "...Circle one Male, Female, Both, unknown, in the process of changing, If you answer one of the last 3 items you now [sic] a BFC (Battalion Fire Chief)," and "...Chief decided to promote new chiefs who actually do not have a set of balls instead of just faking it." *Id.* One poster exclaimed, "I thought the dress uniform for women was a skirt?!!! WTF is going on?" (R at 10.) Another added, "BTW, does anyone remember the SNL skit about

[2] In truth, Rule 1 concerns appeals of agency decisions under the District of Columbia Government Comprehensive Merit Personnel Act of 1978. Petitioner brings her claims under the District of Columbia Human Rights Act ("DCHRA"). While the DCHRA does not explicitly provide for judicial review of OHR findings of no probable cause, the Court of Appeals for the District of Columbia has found that the District of Columbia Superior Court has judicial review over such findings. *Simpson v. D.C. Office of Human Rights*, 597 A.2d 392, 399 (D.C. 1991).

'Pat?' Enuff Said."[3] (R. at 157.) The postings characterized Petitioner as "...non-qualified, non-dedicated, non-competent..." and challenged her right to wear official uniform. (R at 103.)

Petitioner pursued the matter, meeting with Respondent FEMS' Equal Employment Opportunity ("EEO") Officer, Fredreika Smith, and General Counsel, Theresa Cusick, on May 16, 2003. In that meeting, Petitioner was told that juries never rule in favor of complainants who allege sexual orientation or gender-based discrimination. (R. at 105.) After this meeting, FEMS did make certain efforts concerning the matter. On May 19, 2003, Petitioner was pulled out of a meeting at the FEMS Training Academy because the Fire/EMS Chief did not want her there. *Id.* Once Petitioner had left, the Chief excoriated the attendees because someone had told Petitioner about the Watch Desk web chat. *Id.* So as to mollify the members of FEMS who had made those postings, Petitioner was told not to wear her badge. *Id.*

Officially, respondent FEMS took two corrective actions. First, the D.C. Office of the Chief Technology Officer ("OCTO") commenced an investigation into the matter. The OCTO concluded that the postings on the "Watch Desk" site were made from Fire/EMS computers. *Id.* Second, in a Training Academy meeting, the Chief conveyed that Fire/EMS would not tolerate the use of Department computer equipment to deliver postings such as those at issue in this matter. (R. at 106.) The matter was subsequently referred to the Office of Inspector General ("OIG"). Ms. Theresa Cusick, General Counsel for Respondent, constructed a memo to the Fire/EMS chief that highlighted its response efforts to the matter, including having the "Watch Desk" site blocked. (R. at 107.) In a memo effective February 5, 2004, Respondent reinforced that it was, "not acceptable...to make derogatory comments about a person's race, gender, national origin, or sexual

[3] "Pat" is character from the television show Saturday Night Live. Performed by actress Julia Sweeney from the late 1980's and early 1990's, Pat was portrayed on that program as a comically androgynous individual, whose actual gender remained unknown to those around him/her.

preference in the workplace." *Id.* Petitioner claims that relative to prior incidents at the agency, Respondent has not exhaustively inquired into or rectified the matter. (R. at 108.)

Apart from "the Watch Desk Forums" incident and its aftermath, Petitioner cites several other events that demonstrate a hostile work environment. Petitioner claims that Respondent has obstructed her from obtaining access to a budget necessary to carry out her diversity trainings. *Id.* Petitioner also claims that Respondent's Diversity Management Officer failed to spend $28,000 that the Chief recommended for diversity training. While FEMS responds that any and all diversity training is optional and that budgetary constraints did not allow for full funding of the program, (R. at 108-09), Petitioner counters that the Respondent did not consider budget-permitting cost-reducing alternatives to implement and fund the diversity training. (R. at 109.) Petitioner further claims that Respondent prevented her from fully implementing the Tyra Hunter Program and impeded her overall job responsibilities; that the Respondent's Diversity Management Officer failed to answer her memoranda on budget-related issues and complained to the Chief that the Petitioner was trying to obtain a budget; and that, because she was denied procurement and the resources to facilitate community outreach, Petitioner was forced to cancel community events, making her appear irresponsible. (R. at 110.)

As to her retaliation claim, Petitioner contends that the Respondent retaliated after she complained about the Watch Desk Postings by failing to inform her of certain scheduled diversity trainings on January 7, 2004 and intentionally scheduling multiple trainings in different locations on January 19, 2004, thereby preventing her from carrying out her duties. *Id.* Respondent "failed to notify her of training, failed to post official memos, failed to alert Training Academy Directors of the training, held training away from the Training Academy facilities, and removed training materials under [Petitioner's] care without her knowledge." *Id.* Finally, during a fact-finding conference on February 9, 2004, Respondent's General Counsel, Ms. Cusick, yelled at and made derogatory

comments towards Petitioner. *Id.* At one point, Ms. Cusick put her hands on the table, leaned on her arms, and glared at Petitioner. (R. at 68.) She repeatedly yelled, among other things, "How dare you?!," "Look at her! Look at her! Will you look at her?", and "There should be a law so that I can sue you for this." Respondent does not question the validity of these accounts, but contends that these aforementioned facts do not rise to the level of retaliation. (R. at 110.)

B. Procedural History

In an OHR complaint dated August 31, 2003, Petitioner alleged that FEMS violated the DCHRA by subjecting her to a hostile work environment and retaliating against her when she complained about that environment. Pursuant to that Act, OHR must initially determine whether there is probable cause to believe that the respondent has engaged in an unlawful discriminatory practice. *Simpson v. D.C. Office of Human Rights*, 596 A.2d 392, 396-97 (D.C. 1991). On August 31, 2005, OHR issued its Letter of Determination, concluding that no probable cause exists. In reaching that decision, OHR applied the standard of review that, "in order for the Complainant to prevail, the OHR's record must contain credible, probative and substantial evidence from which a reasonable person could conclude that Complainant met the prima facie elements of discriminatory or retaliatory behavior, and that a legitimate, nondiscriminatory explanation for the behavior does not exist." 4 DCMR § 715.1; 4 DCMR § 499.1.

As to the hostile work environment claim, OHR found that the Petitioner failed to show that the harassment was severe and pervasive enough to affect terms and conditions of employment, and consequently failed to establish a prima facie case of hostile work environment. (R. at 113, 115.) OHR concluded that Petitioner essentially cites only one incident: the Watch Desk Postings. *Id.* It further concluded that only two statements within those postings mention the Petitioner's protected classes. *Id.* As a result of these apparently isolated events, OHR determined that there is no probable cause to believe that, "Respondent subjected Complainant to a hostile work environment,

on the basis of Complainant's sexual orientation, sex, and personal appearance." (R. at 116.) As to the claim of retaliation, OHR found that Petitioner could not show that Respondent's actions constituted adverse employment actions. *Id.* It concluded that "minor changes in work related duties, unless accompanied by some other adverse change in the terms, conditions, or privileges of employment, are not sufficient to establish an adverse action. *Id.*

II. DISCUSSION

Because this case is not reviewed pursuant to D.C. Super. Ct. R. Civ. P. Agency Rev. 1, the standard of review established by that rule cannot be applied. Moreover, the Court of Appeals for the District of Columbia has never firmly established what standard is appropriate for reviews of OHR determinations of no probable cause. The court has rejected the standard of "arbitrary, capricious, or an abuse of discretion" proposed by the District of Columbia as "unduly narrow for a case in which the agency action potentially results in the premature demise of a claim of unlawful discrimination." *Simpson, supra*, 596 A.2d at 406. The standard of "arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with law*" proposed by the plaintiff in *Simpson* has been described as "reasonable," though not specifically adopted. *Id.* It is this latter standard, then, that the court applies here.

A. Hostile Work Environment

The D.C. Human Rights Act ("DCHRA") prohibits discrimination based upon, "an individual's age, race, color, religion, sex or national origin," "with respect to compensation, terms, conditions, or privileges of employment." D.C. Official Code § 2-1402.11(a)(1) (2001 Edition). DCHRA claims are generally analyzed under the same rubric as claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-2(a)(1). *Wallace v. Skadden, Arps, Slate, Meagher & Flom LLP, et al.*, 715 A.2d 873, 889 n.31 (D.C. 1988). To establish a prima facie case of hostile work environment, the claimant must show four elements: (1) that he or she is a member of a protected

class, (2) that he or she has been on the receiving end of unwelcome harassment, (3) that the harassment was based upon being a member of the protected class, (4) that the harassment is "severe or pervasive enough," to affect a term, condition or privilege of employment. *Howard University v. Best*, 484 A.2d 958, 978 (D.C. 1984). A hostile work environment exists when the workplace is saturated with discrimination that is based upon "intimidation, ridicule, and insult," and the employee's work conditions are altered. *Harris v. Forklift Systems Inc*, 510 U.S. 17, 21 (1993). Whether employment conditions are hostile is determined by "looking at all the circumstances," which takes into consideration four characteristics of the proffered discriminatory conduct: (1) its frequency, (2) its severity, (3) whether it is of a physically threatening or humiliating nature, and (4) whether it unreasonably interferes with the employee's work performance. *Id.* at 23.

There is no set number of incidences of harassment that need to have occurred in order to support a claim of hostile work environment; however, there need to be "more than a few isolated incidents." *Raymond v. U.S. Capitol Police Board*, 157 F. Supp. 2d 50, 93 (D.D.C. 2001). An employer can avoid liability for hostile work environment by taking corrective action, and by showing that it adopted policies which communicated to the employee that the employer did not accept a discriminating environment, and that the employee could have reported the environment to the employer without fearing adverse action against her. *Gary v. Long*, 59 F.3d 1391, 1398 (D.C. Cir. 1995).

This court agrees with the OHR that Petitioner has met the first three elements of a prima facie case of hostile work environment. (R. at 113.) OHR found that Petitioner had not met the fourth element of a prima facie case: that the harassment was severe or pervasive enough to affect a term or condition of employment. *Id.* The court cannot agree. There is substantial evidence in the record that the harassment was pervasive and severe, that Petitioner's employment was adversely affected, and that this harassment was based upon the Petitioner's membership in protected classes.

Moreover, the harassment was severe, it was humiliating, and it unreasonably interfered with Petitioner's work.

The OHR failed to take into account substantial evidence in the record that attests to the severity and pervasiveness of the harassment to which Petitioner was subjected. Specifically, OHR neglected to consider a chronology of events that underscore a hostile work environment. In May 2003, Petitioner found the printout "Watch Desk Forums" in her mailbox, conspicuously placed there to ensure her viewing. (R. at 8.) The postings referenced the Petitioner in a number of derogatory ways: deriding her manner of dress, ridiculing her androgynous physical features, and challenging the necessity of her position as a member of D.C. FEMS. (R. at 10-12.) In his affidavit, Ret. Deputy Fire Chief Michael Smith testified that the Petitioner was "very upset . . .[and] felt threatened." He also averred that D.C. FEMS had known of the "Watch Desk Forums" for some time and had given tacit approval to the site by failing to block them from D.C. FEMS computers. (R. at 423.)

The Petitioner was informed by Deputy Chief Smith that there had been jocular deliberations among other "Chiefs" over whether she would be allowed to use the male or female restroom, even though her gender was not in dispute. (R. at 8). On one occasion during her tenure at D.C. FEMS, the Petitioner was yelled at as she walked into the female restroom. Deputy Chief Smith stresses in his affidavit, that when confronted with the issue of the web postings, Respondent's EEO Director Smith and General Counsel Cusick failed to conduct a serious investigation into the matter. (R. at 424.) In fact, in a meeting on the matter between the Petitioner, Cusick, and Smith, Theresa Cusick remarked, "a jury of your peers never ruled in favor of anyone who's gay." *Id.* This statement reflects a discriminating sentiment and the Respondent's readiness to quash the Petitioner's notions of any potential legal recourse. As Deputy Chief Smith pursued the Petitioner's case further, he was told by his superiors "to stop" and was stripped of any investigatory

involvement in the matter, while in other cases he had been permitted to do a full investigation. (R. at 425.) The sum total of this evidence supports findings of a history and culture of homophobia and sexism in D.C. FEMS. This ethos, which characterized Petitioner's work environment, created impediments to her responsibilities and cover for her colleagues to belittle her. One affiant avers that, as a whole, "many women in the agency have endured lots of harassment," and that, "few people, if any, trust the EEO process" to address situations of gender or sex-based discrimination within the agency. (R. at 434.)

The record reflects that this constant stream of hostility manifested itself in a number of ways. In one instance, Petitioner had recommended that the Psychological Suitability Exam was biased against females. (R. at 426). These findings were ignored by both Respondent Fire Chief and EEO Officer Smith. *Id.* In another instance, Respondent EEO Officer recommended that Petitioner not wear her badge in order to "mollify rank and file who may discriminate against her." The implications of this suggestion are significant, as being forced to remove her badge would, in effect, strip the Petitioner of her rank. *Id.*

The treatment of Petitioner as a civilian employee differed greatly from the treatment of other civilian employees at FEMS. Another employee, a white, heterosexual male, was never told to remove his badge or component part of his uniform. *Id.* This employee had access to Department records, a budget, and a car. *Id.* Other civilian employees had similar privileges. Petitioner was privy to none of these things. In fact, it was averred by a former Deputy Fire Chief that among FEMS personnel, "[r]ank without[a car and a budget] basically means that you are [perceived as] a joke in the Department." Denied of these accessories to her job, Petitioner was forced needlessly to work much harder to accomplish even the most basic tasks.

Petitioner was also directly impeded from implementing the elements of the Tyra Hunter program. (R. at 427). While Petitioner was hired principally to administer this program, Respondent

EEO Officer Smith did not inform her of some of the scheduled training. *Id.* At other times, Ms. Smith allegedly deliberately double-scheduled trainings at the same time to ensure that Petitioner could not attend. *Id.* Smith went further, removing training manuals from Petitioner's purview and drastically shrinking the Tyra Hunter program in its scope. *Id.*

Based on this record, the court finds that the Petitioner has demonstrated that the harassment was severe and pervasive enough to affect the conditions of her employment. While FEMS did take some corrective action, the strength of that action does not compare to the strength of the harassment on record. This is particularly evident from the Chief's reprimand of the individuals, not for making the postings, but for informing Petitioner about them. Accordingly, the court finds, contrary to the OHR, that Petitioner has established a prima facie case of hostile work environment.

B. Retaliation

In order to establish a prima facie claim of retaliation, an employee must demonstrate that: (1) he or she engaged in a protected activity, (2) the employer took adverse action against her, and (3) a causal relationship exists between the protected activity and the adverse action. *Young v. Sutherland*, 631 A.2d 354, 368, n.28 (D.C. 1993). The court agrees with the OHR that the Petitioner established the first element of a prima facie case of retaliation--she engaged in protected activity when she complained to her employers about the postings on the Watch Desk Forums website. OHR maintains, however, that the Petitioner failed to establish the remaining two elements of a prima facie case. Specifically, the OHR concluded that if diminution of pay or benefits has not occurred, then the complainant must show actions materially adverse to the terms, conditions, or privileges of employment or future employment opportunities. Citing to *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999), OHR concludes that, "mere idiosyncrasies of personal preference are not sufficient to state an injury." But, under the DCHRA, unlike under Title VII, "the prohibited adverse action

(taken by an employer) is not limited to retaliatory action affecting the terms and conditions of employment." *Young*, 631 A.2d at 368, n.31 (citing *Mitchell v. Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985)). More specifically, § 1-2525(a) of the DCHRA states that, "[i]t shall be unlawful discriminatory practice to coerce, threaten, retaliate against, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected under this chapter." 1973 Ed., § 6-2271; Dec. 13, 1977, D.C. Law 2-38, title II § 261, 24 DCR 6038. (codified at D.C. Code § 2-1402.61 (2001)). Broadly speaking, these rights include an "equal opportunity to participate fully in the economic, cultural, and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations." D.C. Code § 2-1402.01 (2001).

Subsequent to her complaints of harassment, several events occurred that interfered with Petitioner's ability to perform her job—in the language of the DCHRA, to participate in employment. Respondent failed to notify Petitioner when the Tyra Hunter Human Diversity trainings were to be held. Respondent further scheduled multiple trainings at the same time, rendering it impossible for Petitioner to carry out her duties by attending and heading these sessions. (R. at 115.) Respondent's General Counsel yelled at Petitioner, making comments suggesting Petitioner's appearance warranted the treatment that she received. OHR acknowledged that these actions adversely affected Petitioner, but nonetheless concluded that Petitioner had not met her burden. (R. at 116.) The negative impact of these actions on Petitioner represents far more than "mere idiosyncrasies of personal preference." Respondent's actions impeded Petitioner from carrying out her job responsibilities, and the Respondent's General Counsel's behavior toward the Petitioner at the fact-finding conference showed that the Department had no interest in resolving the matter. Such actions certainly constitute adverse actions. Even assuming, *arguendo*, that the

Petitioner does have to show that the adverse actions affected the "terms, conditions, or privileges of employment," Petitioner has met that burden. As the record shows, Respondent prevented Petitioner from carrying out her duties with respect to the Tyra Hunter Program. The court therefore cannot agree with the OHR's application of the law to the facts in this case.

Having concluded that Petitioner has satisfied her burden of demonstrating that she engaged in a protected activity and the employer took adverse actions against her, the court is left to determine whether a causal relationship exists between the two. Under Title VII and the DCHRA, an employee may satisfy this third element by showing that he or she engaged in a protected activity of which the employer was aware, and that the adverse action came shortly thereafter. *Mitchell v. Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985). Here, the close temporal nexus between the protected activity and these adverse actions evidences the causal nexus between them. Petitioner filed her internal complaint on May 15, 2003. Only four days later, Petitioner was asked to leave a meeting so that the Chief could reprimand personnel, not for making the postings, but for informing Petitioner about them. Over the next few months, Petitioner was asked to stop wearing her badge, the Tyra Hunter training was scheduled so as to conflict with Petitioner's schedule, and Petitioner was subjected to derogatory yelling at the hands of Respondent's General Counsel. This time frame of only seven months is sufficient to create a causal relationship. *See, e.g., Dowe v. Total Action Against Poverty*, 145 F.3d 653 (4th Cir. 1998) (seven months); *Clark v. Chrysler Corp.*, 673 F.2d 921 (7th Cir. 1982) (two years). Accordingly, Petitioner has established a prima facie case of retaliation.

Therefore, it is this 3rd day of April, 2007,

ORDERED, that the determination of no probable cause is **REVERSED**; it is further

ORDERED, that this matter be **REMANDED** to the Office of Human Rights for further proceedings; and it is further

ORDERED, that the status hearing scheduled before this court on May 18, 2007 at 10:30 a.m. is **CANCELLED**.

Geoffrey M. Alprin
Associate Judge

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