

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BEFORE THE  
OFFICE OF EMPLOYEE APPEALS

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In the Matter of:	)	
	)	
Harcourt Masi,	)	
Employee,	)	
	)	
v.	)	OEA Matter No.: 1601-0045-05
	)	
D.C. Department of Corrections,	)	Date of Issuance: March 11, 2010
Agency.	)	
	)	Rohulamin Quander, Esquire
_____	)	Senior Administrative Judge

Mitchell Franks, Esq., and Fred Staten, Agency Representatives  
Omar Vincent Melehy, Esq., Employee Representative, and  
Andrew J. Perlmutter, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On April 13, 2005, Harcourt Masi (“the Employee” or “Masi”) a Correctional Officer with the District of Columbia Department of Corrections (the “Jail”), filed a Petition for Appeal with the Office of Employee Appeals (the “Office” or “OEA”), challenging Agency’s imposition of a 120-day suspension, effective March 13, 2005, which stemmed from Agency’s allegations, dated September 22, 2004, that Employee had engaged in sexual harassment of certain co-workers. The parties engaged in an extended period of discovery, and pre-hearing, and status conferences. As the presiding Administrative Judge (the “AJ”), I determined that several factual issues were in dispute and that an evidentiary hearing was necessary. Accordingly, an evidentiary hearing was initially convened on December 14 and 15, 2006, and concluded on January 25, 2007. The sum and substance of this *Initial Decision* is based upon the testimonial and documentary evidence as presented by the parties during the evidentiary hearing, the official record created by the parties at the Agency level, plus the Petition for Appeal, Agency’s Answer, attachments that were filed by the respective parties, and results gleaned from discovery. The record is now closed.

Agency cited Employee for the adverse action cause of “Malfeasance,” to wit: any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations, due to a probable cause finding of sexual harassment violations. LaVerna Simms (“Simms”), Director of Outpatient Mental Health Services for

the Center for Correctional Health Policy Studies (CCHPS), and the contract medical provider at Agency's D.C. Jail, is the initiating complainant in this charge of sexual harassment.

The sexual harassment investigation was conducted by the U.S. District Court appointed Office of Special Inspector (OSI). Carolyn Lerner, an attorney by profession, served as the Special Inspector (SI). The OSI investigation determined that Employee, in addition to sexually harassing LaVerna Simms, by creating a hostile abusive work environment because of her sex, also sexually harassed five (5) other female employees of CCHPS. The females were identified as: Karen Harrison, Teresa Nwankwo, Gloria Robertson, Cynthia Kittrell and Coryne Farmer. Not wanting to get involved with Simms' case, generally concerned about retaliation and adverse impact upon the future work environment, several of the Agency witnesses were reluctant and skeptical about being connected to this matter.

### BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

The Burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably True than untrue.

OEA Rule 629.3, *id.* states:

For appeal file on or after October 21, 1998, the Agency shall the burden of proof, except for issues of jurisdiction.

### ISSUES

The issues to be decided are:

- A) Whether the evidence to be presented of alleged "Malfeasance" will support a finding that Employee was suspended for 120 days from his position by Agency for "cause" as that term is defined by District of Columbia Office of Personnel (DCOP) Rule 1603.3, 47 D.C. Reg. 7094, 2096 (2000).
- B) If Agency's action was taken for cause, whether Employee's violation of the cause standard was *de minimus*.

- C) If Employee's violation of the cause standard was not de minimus, whether the penalty Agency imposed was appropriate given any aggravating or mitigating circumstances that may have existed.<sup>1</sup>

### TESTIMONIAL EVIDENCE

The following persons testified at the Evidentiary Hearing as Agency witnesses: LaVerna Simms, Complainant, Carolyn Lerner, Christina Roye, and Gloria J. Robertson. The following persons testified as witnesses on behalf of the Employee: Harcourt Masi, Employee, Hilda Short, Nilfa M. Guzman, Gloria Profit, and Tyrone Jenkins.

#### **AGENCY'S CASE TESTIMONY**

*1. LaVerna Simms, Ph.D., Initiating Complainant, Transcript ("Tr."), Vol. 1, Pp. ("Pages") 32-139.*

LaVerna Simms ("Simms"), initiating complainant, testified on December 14, 2006. She was employed with the Center for Correctional Health and Policy Studies ("CCHPS") and based at the Mental Health Unit of the D.C. Department of Corrections. CCHPS had a contract with the District of Columbia Government to provide medical and mental health services at the two correctional facilities in the District of Columbia. Furthermore, Simms disclosed that she was also one of the co-founders of CCHPS. Her last position of record was that of Mental Health Director. She had worked for CCHPS for the contract period, six years to date. Prior to that, she worked for the Medical Receiver at the D.C. Jail, beginning approximately March 17, 1997.<sup>2</sup>

She knew Employee from her tenure with the Department of Corrections, where he held the position of Corporal. His job-related focus was safety and security. She first met or became aware of Employee shortly after she began working for the Medical Receiver.<sup>3</sup> Employee introduced himself to her, then asked her out on a date. She testified that she told him, "I was not interested!" Simms further testified that every time she saw Employee thereafter, he would ask her out on a date, or make unwanted comments. The following Questions ("Q") and Answers ("A") address some of the comments Simms was subjected to by Employee:

(Q): Describe in your own words to the Court these comments.

(A): He would make comments referencing my body, my dress, how we would do as a couple. For instance, I said, you know, "I don't want to go out with you, I'm dating someone else." [His reply,] Oh, I'll pay for both of you to go, bring your friend, too."

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<sup>1</sup> See AJ Order dated June 9, 2006.

<sup>2</sup> Tr. Vol. 1, P. 33, Lines 1-22, and P. 34, Lines 1-2.

<sup>3</sup> Tr. Vol. 1, P. 34, Lines 3-22, and P. 35, Lines 1-7.

(Q): When you say he made comments about your body, was it just your whole body or did he make any comment about a specific body part?

(A): He did say that I had a nice body, wanted to know if I worked out. He liked the way my clothes fit me.

(Q): And what was your response to these comments?

(A): Usually, I would just ignore them or just would ask him to leave me alone.

(Q): And would he?

(A): Until the next time he saw me.

(Q): And then what would happen the next time he saw you?

(A): It would start all over again. It was constant, it was humiliating, it was frustrating.

(Q): And approximately how long did this go on?

(A): Initially, two years. Initially, there was two years before there was any break in his behavior. From the moment I met him, two straight years.

(Q): Then there was a break?

(A): Yes.

(Q): How long of a break?

(A): I can't give you a specific time of the break, but I know I can give you when the break generally started was at some point in '99, late '99, 2000.

(Q): And then it resumed, is that correct?

(A): Yes, it did.

(Q): And what happened, describe his conduct after it resumed.

(A): Well, I would tell him that I was going to tell the Warden, you know, that I was going to tell the Warden about his behavior, and he would just laugh because of their relationship.

(Q): Who was the Warden at that time?

(A): Patricia Britton, Patricia Britton Jackson.

(Q): Describe when the conduct resumed, describe if you will, please, the frequency, to the best of your recollection, of the conduct after it resumed.

(A): After it resumed, he was in a different spot, he was in the bubble. I don't know if you're familiar with the Jail, but it's a glass, Plexiglas, and so he could see everything around it and he controlled who would go in or out. So where the Mental Health hallway was, I had to, you know, press a button and then he could let me out. And then to go out, to exit the facility, he would have to push another button.

So then I would get there, he could always say, "Open your lab jacket, let me see your body," all of that before he would open the door.

(Q): Now this bubble, did it control the doors in an out?

(A): Yes.

(Q): And could he control the doors from within the bubble?

(A): He was the only person who could control them, yes.

(Q): How did you view those comments?

(A): Humiliating, frustrating. You're trying to leave the building and he is not going to open the door.

(Q): Do you remember approximately when this occurred?

(A): When he came onto that post, as soon as he came onto that post. That had to be around '99 or 2000.

(Q): Dr. Simms, there's evidence in the record that you filed a complaint against Mr. Masi in January of 2004, Is that correct?

(A): Yes.<sup>4</sup>

The additional lines of (Q) and (A) occurred with Dr. Simms on Direct Examination.

(Q): Dr. Simms, my question to you is that the record reflects that you filed

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<sup>4</sup> Tr. Vol. 1, Pg. 37, Lines 10-22; Pp. 38-40, Lines 1-22.

a complaint of sexual harassment against Mr. Masi on January 6, 2004. And I ask you specifically, what led to the filing of the complaint at that time?

(A): I guess over the years, because he just wouldn't stop, and it kept increasing. And when he went to work in the bubble, all of that was prior to me filing the complaint, which had also led up to me filing the complaint. He wouldn't open the door, he would just make comments, "Open your jacket, let me see your body," you know, rear back in the chair with his hands behind his neck. I mean because he was in control, you could not leave out without him opening the door.

(Q): Were there other things that you tried, other than filing the complaint, to get him to just leave you alone?

(A): Initially, I wasn't sure what to do or who to talk to or who to go to. So initially, I spoke to my peers about it and they talked to him and would ask him to just leave me alone.

It's a punitive environment when you work in the Jail already and because of my job there, I relied on the officers for my safety and security. Okay, so I just wanted it to go away. There's some fear that comes into light there if you're just going to go and say something about an officer. That's one part of it.

The other part of it was his relationship with the Warden. I mean, where do you go?<sup>5</sup>

The additional following lines of (Q) and (A) occurred with Dr. Simms on Direct Examination.

(Q): Do you recall anyone else that you may have told or discussed about how Masi was treating you?

(A): I talked to Gwendolyn Sinclair. She was also a co-founder of Center for Correctional Health and Policy Studies. She was the pharmacist there.

I spoke to one of his colleagues, Officer Reise, about it. I spoke with, I think, he was the deputy warden at the time, Dennis Harrison, about it. I spoke to I think Captain McCormick about it. And I'm sure there were other people along that time that were his peers, as well as mine. I spoke to a lot of my peers about it, probably on a daily basis.

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<sup>5</sup> Tr. Vol. 1, P. 44, Lines 3-22; and P. 45, Lines 1-10.

(Q): Describe for us what happened after you filed the complaint. In other words, was an investigation conducted?

(A): Yes, an investigation was conducted. The air became very chilly at the Jail. I was fearful to go to the units, actually, and the Department had said they would have someone escort me when I went to the units.

After I filed, I would still see Corporal Masi, although he wasn't supposed to come to my post, he was supposed to be like 300 feet away from me. He continued to come up on my post, he continued to be stationed on my post.

There came a time, and I don't have it here with me, but I could bring it, where he just - - when you work on the Mental Health post, it's your responsibility to call the units and get those clients up there. And I just told the clinicians to begin putting the notes. So I just started telling the clinicians to put a note in the chart saying, you know, who worked the post and if the client was not brought up to the area for them to receive their mental health assessment.

After that point, he didn't really say anything to me, he just would stare me down or make -- I mean like if he was talking with one of his peers, you know, he may, you know - - but nothing directly to me. He just would stare me down.

(Q): Did there come a point either prior to you filing the complaint or after filing the complaint and during the investigation, where Mr. Masi actually touched you, invaded your body space?

(A): Yes he did. He was actually working the post that day and when I was on my way to the ladies' room. And as I was trying to enter the ladies' room, he stood up and fondled my arm, across my chest.

(Q): And what did you do?

(A): I mean I really just lost it, you know, just started telling him if he ever touched me again - - and then that's when I went down to the Warden's office and basically how the whole thing got out of the way. The Warden was like, you know, "Let me talk to him first, let me talk to him." ... "Let me talk to him before you know, you file."<sup>6</sup>

The following (Q) and (A) exchanges occurred between the AJ and Dr. Simms.

(Q): Let me clarify something. We're talking about just before or just after the

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<sup>6</sup> Tr. Vol. 1, P. 50, Lines 7-22; Pp. 51-53, Lines 1-22; and P. 54, Lines 1-4.

complaint was filed?

(A): This was before, before it was filed.

(Q): Is this close to the last act?

(A): Yes, that was the next to the last. The last act was when he did it the second time, the same way, on my way into the ladies' room, the exact same thing.<sup>7</sup>

The following additional lines of (Q) and (A) occurred with Dr. Simms on Direct Examination.

(Q): So even after you put him on notice the first time that he fondled your arm and across your shoulder, he did it a second time?

(A): Yes.

(Q): On a different day?

(A): Yes, like a week later, after the Warden had spoken with him.

(Q): And was this the last straw?

(A): That was it. That's when I - - yes, that was the last straw. That's when I spoke with Corbett and he told me what steps to take.

(Q): What happened, what was the process after you filed with the Special Inspector?

(A): After I called Carolyn Lerner, I had to set up an appointment and go over and meet with her. I met with her and then she assigned a Special Inspector, Janet Goldstein, to the case.

(Q): And were you interviewed by Janet Goldstein?

(A): Yes, I was.

(Q): And what was the nature, the method of the interview?

(A): It was taped. I had several conversations with her that were taped. I had several more interviews with her over the telephone, telephone interviews.

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<sup>7</sup> Tr. Vol. 1, P. 54, Lines 5-15.



(Q): Do you recall whether or not your testimony during this taped interview was sworn testimony?

(A): It was, even the telephone conversation was.

(Q): Explain to the Court how the Employee's conduct toward you, how did that make you feel as a person and a woman?

(A): Well, especially for me in my field, you feel like you can handle it yourself, initially. And then there is some embarrassment towards it happening to you. Then you feel powerless, it's humiliating. At some point, I felt like I was being stalked by him. I mean imagine someone's supposed to be working and they're just standing outside of your office.<sup>8</sup>

Simms testified to a number of other occasions during the six (6) year period that she endured and tolerated Employee's sexual harassment. She testified that at a Christmas Party in 2002, which she helped to plan and was collecting tickets, when Employee arrived at the party, he stood there around her, rather than join the party. Thereafter, his comments were the same, "How I looked! What I had on! Did I want a drink?" Employee was always staring at her and looking at her up and down, as if he was undressing her. There were times at work that she would wear her lab jacket when she otherwise would not do, such as when leaving the building, or when Employee was working the Sallyport bubble, because of his comments and conduct of staring her down.

She testified that, "Because of the stare down, and even with my lab jacket on, he still made those comments, 'Open your lab jacket, let me see your body,' you know, those type of things, before he would open the door." She added, "I would just put my shades on when I was leaving out of the building so I just would not have to see him. I would never turn back around, I would just stand there. As long as it would take for him to open the door, I would just stand there. I would not turn around. A lot of times, I would get someone else to just leave the building with me."<sup>9</sup>

Simms authenticated Agency Exhibits #1 and #2, as being her taped and transcribed interview testimonies provided on January 23, 2004, and May 19, 2004, respectively, to Janet Goldstein ("Goldstein"), the OSI Investigator who investigated her complaint of sexual harassment. Simms also authenticated Agency Exhibit #3, as the notes that she provided to OSI investigator Goldstein, which she started keeping on her computer pertaining to the sexual harassment by Employee.<sup>10</sup>

On cross examination<sup>11</sup> there was considerable query by Counsel for Employee pertaining to Simms' testimony regarding her reference to two words, "fondled" and

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<sup>8</sup> Tr. Vol. 1, P. 54, Lines 17-22; P. 55, Lines 1-22; and P. 56, Lines 1-21.

<sup>9</sup> Tr. Vol., 1, Pp. 57-59.

<sup>10</sup> Tr. Vol. 1, Pp. 64-67.

<sup>11</sup> Tr. Vol. 1, Pp. 69-139.

“stalking,” neither of which words was specifically used in her initial complaint. Responding that indeed some form or meaning of both words characterized her complaint, on redirect examination, Simms was referred to Agency Exhibit #2, her sworn testimony to OSI Goldstein on May 19, 2004, and directed to Page 8, Lines 21-50, where some form of the word “fondle” is used six times to describe Employee’s unwanted touching of Simms’ body.<sup>12</sup>

Simms denied allegations of bias against foreigners and specifically denied having a bias against Employee because of his Nigerian nationality. *See also*, Agency Exhibit #2, Page 9, where Simms made explicitly clear in her OSI testimony that she never made any derogatory remarks to or about Employee’s national origin, that she never used the term, “fucking foreigner,” in her conversations with or about Employee, and that she did not use profanity.<sup>13</sup>

2. *Christine Roye, Tr. Vol. 1, Pp. 248-286.*

Christina Roye (“Roye”) was employed with CCHPS as a Mental Health Technician from 2002, until the mental and health services contract expired in September 2006. While employed with CCHPS, she worked on the Third Floor and knew Employee from working on the Mental Health Floor. She had engaged in casual, innocuous and informal conversations with Employee on a number of occasions. On at least one or more occasions, Masi even bought her lunch. Testifying during her interview with OSI Goldstein, witness Roye acknowledged that Employee had asked her for a date. While she believed that she was in her office at that moment, but was not really certain, she was definitely at work at the time when Employee asked her for a date. She said “No,” and showed him her ring, indicating that she was married. Roye testified that she was not sure whether Employee asked her for a date on more than one occasion, but she knew he did not ask her on numerous occasions to be his date.<sup>14</sup>

Roye emphasized that she did not file a sexual harassment complaint against Employee, despite Simms pressuring her to do so. Further, she never asked Simms to file, nor authorized Simms to file a sexual harassment complaint on Roye’s behalf.<sup>15</sup> During her own testimony, Simms acknowledged that Roye never asked her to file a complaint on Roye’s behalf, and that such complaint partially emerged from some comments that Simms made to Goldstein during the OSI investigation.<sup>16</sup>

3. *Gloria J. Robertson, Tr. Vol. 2, Pp. 296-364.*

Gloria J. Robertson (“Robertson”) currently works for the Agency. She has worked at the Jail in various medical capacities since 1995. In 2001, she started working

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<sup>12</sup> Tr. Vol. 1, P. 236, Lines 20-22; P. 237, Lines 1-22; and P. 238, Lines 1-20.

<sup>13</sup> Tr. Vol. 1, Pp. 224-235; and P. 236, Lines 1-12.

<sup>14</sup> Tr. Vol. 1, Pp. 248-254; and P. 255, Lines 1-3. *See also*, Em-ee Exhibit #4, Pp. 8-11.

<sup>15</sup> Tr. Vol. 1, Pp. 258-261; P. 273.

<sup>16</sup> Tr. Vol.1, Pp. 63.

for CCHPS as a licensed practical nurse until the contract expired in 2006. She was introduced to Employee in 1996, and thereafter during conversations, Employee would invite her to functions or ask her to go somewhere with him. She considered this to be an invitation to go out on a date, but declined. She would always say “No!” Employee’s invitations and request for dates covered a period of four to five years. However, she always said “No, or no thank you.”<sup>17</sup>

Employee made comments to her from time to time that she looked good, that he’d like to see what she looked like underneath her lab coat. He would ask her to turn around. Most of the time she may just respond to the comments with a thank you, just so she could get away. This type of behavior from Employee became annoying, because of the frequency of the times that he would do it. Employee touched her one day while she was sitting in the nurse’s station and had her back to him. He walked into the room and put his hand on her shoulder. She got upset with him and told him never to touch me again. There were no further incidents with him.<sup>18</sup>

Despite Employee’s subsequent testimony to the contrary during both the OSI investigation and at the later convened OEA evidentiary hearing, Robertson testified that she never attended a social function with Employee. However, she attended at least two functions in which Employee was also present. One of the functions was in 1997, a 40<sup>th</sup> birthday celebration that a female friend of hers was having for her husband, who was also a Case Manager at the D.C. Jail. Robertson and a friend, Valeria Gentry, attended the function together. They arrived together and sat together. At some point while at the party, she and Gentry, or perhaps it was another female, were standing in the same area when Employee Masi walked up and asked them to take a picture with him. As a courtesy, now regretted, she agreed. The other function, where Masi was present, was at an Agency-sponsored Christmas Party. She saw Masi at the party. However, she denied that they attended the party together, that they meet at the party, or that they sat together at the party. To the best of her knowledge and recollection, they did not take any pictures together at that party.<sup>19</sup>

When shown a photograph that included three people, Employee in the middle and Robertson on the right, with his arm around her upper body, she still denied that she and Masi had arrived together at whatever location the photo came from, or were a dating couple that evening. When asked how she got to the event or whether she arrived in the company of another person, she questioned where and when the photograph was taken, noting that that would be determinative of how she got there and with whom.<sup>20</sup>

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<sup>17</sup> Tr. Vol. 2, P. 296, Lines 13-22; Pp. 297-300; and P. 301, Lines 1-20.

<sup>18</sup> Tr. Vol. 2, P. 302, Lines 1-22; and P. 303, 1-18.

<sup>19</sup> Tr. Vol. 2, Pp. 304-306.

<sup>20</sup> Tr. Vol. 2, Pp. 336-337.

The following line of (Q) and (A) occurred with Robertson regarding her move from one home address to another, including whether Employee physically assisted her with the move and/or provided her with money to help facilitate the move.<sup>21</sup>

(Q): Since you've been doing your time at the D.C. Jail, did you move from one address to another?

(A): Yes, I did.

(Q): Did anyone from the D.C. Jail assist you in moving?

(A): Yes, they did.

(Q): Did Mr. Masi assist you moving?

(A): No, he didn't.

(Q): Did you ask Mr. Masi to assist you with moving?

(A): No, I didn't.

(Q): Did Mr. Masi volunteer to help you move?

(A): No, he didn't.

(Q): Did you solicit any funds to help you in the moving process?

(A): No, I didn't.

(Q): Did you ask Mr. Masi for any funds to help you move?

(A): No, I didn't.

(Q) Did Mr. Masi offer you any funds to help you move?

(A): No, he didn't.<sup>22</sup>

Robertson did not file a complaint of sexual harassment against Employee because she thought that she could handle it on her own, although she was subjected to the sexual harassment for four to five years. However, she was one of the women interviewed by OSI Goldstein regarding the investigation of a complaint that was filed against Masi by Simms. Robertson knew Simms and that she was the Mental Health Supervisor for

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<sup>21</sup> Masi's subsequent testimony would contradict virtually everything that Robertson stated during her sworn testimony.

<sup>22</sup> Tr. Vol. 2, P. 308, Lines 1-22; and P. 309, Lines 1-2.

CCHPS. Simms never made any derogatory comments to her about Masi, including comments about Masi's ethnicity or national origin. Further, she never heard Simms make any derogatory comments pertaining to foreigners.<sup>23</sup>

Robertson authenticated Agency Exhibit #12 and its sworn to contents as being the taped and transcribed testimony she provided under oath to OSI Goldstein.<sup>24</sup> Her testimony in the OEA proceeding on December 15, 2006, is consistent with the OSI testimony that she provided on March 23, 2004.<sup>25</sup> On cross examination, she responded to the litany of questions propounded by Counsel for Employee. The highlight of that testimony was that LaVerna Simms did not supervise her in any form or fashion. However, if Simms told her to do something, she would do it, because Simms was a supervisor and Robertson respected her authority. She never observed a sexual harassment by Masi against Simms, and although she had several incidents of Masi's harassing her, she only learned of Simms' complaint during the investigative phase from OSI. Robertson acknowledged that she had received the sexual harassment training provided by Agency and that she understood her rights to file a complaint of sexual harassment against Employee. However, she elected instead to handle the matter herself.<sup>26</sup>

In his subsequent OEA testimony,<sup>27</sup> Masi disputed Robertson's denial<sup>28</sup> that he provided her with up to \$1,200.00 in moving expenses, in response to Robertson approaching him to solicit money to fund her moving. Masi also claimed that Robertson never paid back the entire amount owed.<sup>29</sup> Tyrone Jenkins, Employee's witness, would testify that, based upon what Masi had told him, he believed that Employee had loaned as much as \$1000-\$1500 to Robertson for moving expenses, money which Robertson had accepted. The record reflects that Masi's OEA testimony directly contradicted his prior sworn OIS testimony before Investigator Goldstein, in which he stated that he did not lend any such funds to Robertson, and indeed, did not have any money to lend, as well.<sup>30</sup>

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<sup>23</sup> Tr. Vol. 2, P. 309, Lines 3-22; P. 310, Lines 1-22; and P. 311, Pp. 1-10.

<sup>24</sup> Tr. Vol. 2, P. 312, Lines 13-22; and P. 313, Lines 1-18.

<sup>25</sup> Tr. Vol. 2, Pp. 296-318; and Agency Exhibit #12.

<sup>26</sup> Tr. Vol. 2, Pp. 321-356.

<sup>27</sup> Tr. Vol. 3, Pp. 739-40, 793-94, 829-30, 834.

<sup>28</sup> Tr. Vol. 2, Pp. 308-09.

<sup>29</sup> Tr. Vol. 3, P. 744.

<sup>30</sup> See Agency Exh. #14", P. 7, Lines 38-42; and P. 8, Lines 1-6.

4. *Testimony of Carolyn Lerner, Deciding Official, Tr. Vol. 1, Pp. 140-286.*

Carolyn Lerner (“Lerner”) is a practicing attorney. Beginning in 1997, she has provided legal services to the Agency, initially as a consultant to the Special Master pursuant to the legal follow up in the U.S. District Court case, *Neal vs. the D.C. Department of Corrections*.<sup>31</sup> She worked with the Special Master until her appointment in 2003 as the Special Inspector for the D.C. Department of Corrections, pursuant to a court order issued in the *Neal* case.<sup>32</sup>

She performed services as the Special Inspector, pursuant to the *Neal* case Consent Decree, occasioned by several plaintiffs' class action suit, which resulted in a settlement of the litigation. The Consent Decree included, as one of its provisions for injunctive relief, the establishment of an Office of the Special Inspector. The role of the Office of the Special Inspector was: a) to create new policies on sexual harassment for the Department of Corrections; b) to investigate all claims of sexual harassment and retaliation at the Department; and c) to make final decisions on those claims. Lerner established an Employee Advisory Committee and Office of the Ombudsman as part of the consent decree, and did all the sexual harassment training for the Department of Corrections. Further, she operated independently of the Department of Corrections during her tenure as Special Inspector. She reported to the U.S. District Court Judge Lamberth, who had retained jurisdiction over the case.<sup>33</sup>

All of the OSI investigators were lawyers with experience in employment law. She trained each of them in the procedures to be used in conducting sexual harassment investigations in the Department of Corrections. She also supervised them. Lerner further explained the process, stating:

Once we received a complaint of sexual harassment, I would review it, do the initial review to make sure that it was within my jurisdiction. If I was satisfied that it was, I would assign an investigator who initially would do an interview of the complainant. That would be the first step. And we had all interviews transcribed. There were a few, if they were inconsequential or just very focused interviews, we might not transcribe those, but for the most part, all interviews were transcribed. . . . And once all the interviews were completed and the transcripts were available, the investigator would write a report of investigation, which I would then review and make sure that it was complete.<sup>34</sup>

Sometimes potential witnesses names are identified in the written initial complaints that they receive from the individual complainant. Sometimes witnesses are

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<sup>31</sup> See *Bessye Neal v. D.C. Department of Corrections, et al*, C.A. 93-2420 (RCL), USDC, DC 1993.

<sup>32</sup> Tr. Vol. 1, P. 141, Lines 1-22; and P. 142, Lines 1-10.

<sup>33</sup> Tr. Vol. 1, P. 142, Lines 16-22; P. 143, Lines 1-22; and P. 144, Lines 1-13.

<sup>34</sup> Tr. Vol. 1, P. 145, Lines 1-22; and P. 146, Lines 1-17.

identified during the investigation process. Lerner recognized “Harcourt Masi” as Employee’s name, and LaVerna Simms as a complainant. She classified Simms as a very reluctant complainant in the investigation that took place about Masi. Lerner further stated:

[Simms] initially contacted the Deputy Warden’s Office, I believe, about concerns or a supervisor about concerns. She was then referred to me as Special Inspector. Ms. Simms did not want to file a complaint against Mr. Masi, she did not want - - she was concerned about retaliation, she was concerned about just the consequences of filing a complaint. But as I told Ms. Simms, I had no choice but to investigate, once I was on notice of a concern about sexual harassment. It wasn’t discretionary. Once I was on notice of a complaint, I had to investigate it.<sup>35</sup>

OSI Agent Janet Goldstein was appointed to conduct the investigation into Simms’ sexual harassment complaint against Masi. After completing her investigation, she submitted a report of investigation with recommendations of a probable cause finding and a penalty of termination. Further, OSI Goldstein was also the Proposing Official in the adverse action against Masi, pursuant to authority granted to the OSI personnel under the Consent Decree and the Program Statement.<sup>36</sup>

Lerner identified and authenticated Agency Exhibits #4 through #8 as being documents that she reviewed in rendering her final decision to suspend Employee for 120 calendar days. She noted as well, that the Recommendation of Hearing Officer Tom Hoey, which proposed that the penalty of removal be reduced to a 120 days suspension without pay, tied her hands, preventing termination, because of a provision in the collective bargaining agreement that prohibits the deciding official from increasing the penalty recommended by the Hearing Officer.<sup>37</sup> She opined, therefore, that despite the recommendation for termination, which she concurred with fully, she could not do anything higher than the 120 days suspension. Specifically, Lerner testified that, “It was my view, based on the record as I reviewed it, this was a case meriting termination.” Lerner then identified and authenticated Agency Exhibit #9 as being the final decision notice reluctantly rendered by her in Employee’s adverse action case.<sup>38</sup> Lerner also identified and authenticated Agency Exhibit #10, as the taped and transcribed testimony of Estelle Hunter which was taken by OSI Goldstein during her investigation of Simms’ complaint of sexual harassment against Employee.<sup>39</sup>

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<sup>35</sup> Tr. Vol. 1, P. 146, Lines 20-22; Pp. 147-48; and P. 149, Lines 1-2.

<sup>36</sup> Tr. Vol. 1, P. 149, Lines 3-22; and P. 150, Lines 1-6.

<sup>37</sup> See Agency Ex. #8, Memorandum to Carolyn Lerner from Tom Hoey, dated January 19, 2005.

<sup>38</sup> Tr. Vol.1, P. 152, Lines 14-22; Pp. 153-169, Lines 1-22; and P. 171, Lines 1-19.

<sup>39</sup> Tr. Vol. 1, P. 171, Lines 20-22; Pp. 172-175, Lines 1-22; and P. 176, Lines 1-3.

*5. Testimony of Estelle Hunter, as given to OSI Goldstein, Agency Exhibit #10.*

Estelle Hunter's ("Hunter") taped and transcribed interview was conducted by OSI Goldstein on January 30, 2004. Hunter did not testify at the OEA Evidentiary Hearing. OSI Goldstein's interview was conducted as a component of Simms sexual harassment complaint against Masi, and was taken under penalty of perjury, and accepted into evidence as Agency's Exhibit #10.<sup>40</sup> Simms testified during the OEA proceeding that she had talked with Hunter, a Health Services Administrator for CCHPS, regarding Employee's on-going sexual harassment against her. All of Hunter's testimony was considered during the OSI Investigation. Hunter had been CCHPS's Health Services Administrator since about a month after they got the contract in 2000. Prior to that position, she worked for the Medical and Mental Health Receiver from 1996 to 2000. Simms had told her that she was having problems with Masi – that he was asking her for dates and making a lot of comments about her appearance. Hunter further testified that Simms related to her that she kept emphasizing, and made it clear to [Masi] that she was not interested in him, and to please leave her alone.

Hunter further testified that:

More recently, she told me that Masi had approached her again – he was still pursuing her and it was unwanted. She made it known to him and he continued. And when she came to me, she appeared exasperated and she said, you know, he's even approached Ms Roye. And she said, so I really do have to talk about this, and she said she had to talk to the deputy warden about it. And apparently, it went further from there because the deputy warden, their major got involved. And someone approached him. Like she said, she just thought the deputy warden would deal with it. She wasn't trying to create, you know, the kind of situation where he could lose his job. She just wanted him to leave her alone.<sup>41</sup>

***EMPLOYEE'S CASE TESTIMONY***

*1. Testimony of Hilda Short, Tr. Vol. 2, Pp. 368-457.*

Hilda Short ("Short") was a Correctional Officer with the Agency from 1982 until her retirement in 2004. She testified as Employee Masi's witness. For approximately the last three to four years prior to her retirement, she worked as the Mental Health Officer on the Third Floor, where Simms served as Director for Mental Health Services. Employee worked the Third Floor Bubble (Sallyport) and often worked in Short's post as the Mental Health Officer when she was on leave.<sup>42</sup> Regarding any interaction between Employee and Simms, Short testified that, "I would believe that Ms. Simms liked him.

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<sup>40</sup> See sworn statement of Estelle Hunter, dated January 30, 2004, Agency Exhib. #10.

<sup>41</sup> Agency Exhibit #10, Pp. 4-6.

<sup>42</sup> Tr. Vol. 2, Pp. 412-431.



She was always flirting with him, because every time he sat on that bench and every morning she came in, ‘Oh, you here again, sitting. Why are you here?’<sup>43</sup> you know.’<sup>44</sup>

In her testimony before OEA, Short reaffirmed her prior OSI testimony before Goldstein, including that she witnessed Employee ask Christina Roye out for a date. The first time, Roye didn’t really say anything. When he asked her the second time, she told him she was married. Short further testified that Employee said he was not going to ask her anymore, because he found out that she was married.<sup>45</sup> Short never heard Simms make any racial or ethnic slurs against anyone. Nor did she ever hear Simms refer to Employee as a foreigner, although there was a rumor to that effect.<sup>46</sup>

Short has dated two employees in the Agency, the last one for ten years. She concluded her testimony by stating that if someone asked her out for a date and she was not interested, she would not go. If she tells the person, “No!,” she means no. If the person continued to ask her for a date, that would be sexual harassment. She further testified that commenting on a person’s body parts and touching when the person didn’t want to be touched is sexual harassment.<sup>47</sup>

*2. Testimony of Nilfa M. Guzman, Tr. Vol. 2, Pp. 460-504.*

Nilfa M. Guzman (“Guzman”) testified on cross examination that she and Employee were colleagues for almost nine years. Guzman asserted that she had had several professional differences with Simms, including having successfully filed a discrimination complaint against her. However, she did not ever remember hearing Simms make any derogatory remarks regarding Masi.<sup>48</sup>

*3. Testimony of Gloria Profit Tr. Vol. 2, Pp. 507-549.*

Sergeant Gloria Profit (“Profit”) is a Sergeant with the Agency, assigned to the D.C. Jail. Profit began her employment with Agency in 1982. On cross examination, she testified that she took the Zero Tolerance Sexual Harassment Training, implemented by

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<sup>43</sup> During her testimony, Simms characterized Masi’s presence near her office or on the bench very differently, incorporating his presence as a component of the harassment, not a bonding between them. For example, when she said, to him such things as, “Why are you here?,” it was not intended as any endearment, but an implied query, i.e., “Don’t you have some other place to go to?” She considered Masi’s hanging around to be a constant nuisance, and initially tried to get rid. of him by making a point of being mean in her temperament towards him, to no avail. See Agency appeal Exhib #1, P 6, Lines 6-19, January 24, 2004.

<sup>44</sup> Tr. Vol. 2, P. 436, Lines 19-22; and P. 437, Lines 1-3.

<sup>45</sup> Tr. Vol. 2, P. 441, Lines 5-22; and P. 442, Lines 1-7.

<sup>46</sup> Tr. Vol. 2, P. 442, Lines 8-21.

<sup>47</sup> Tr. Vol. 2, P. 445, Lines 16-22, P. 446, Lines 1-22; and P. 447, Lines 1-8.

<sup>48</sup> Tr. Vol. 2, P. 501, Lines 2-7.

Director Margaret Moore, and had been one of the claimants [complainants] in [the Bessye Neal] case. She is a current member of Agency's Sexual Harassment Advisory Committee. As a Zone Sergeant, she moves around the facility because of the different work zones and housing units. In her joint capacities as Sergeant and a Sexual Harassment Advisory Committee Member, she has a responsibility in either capacity to report inappropriate behavior of a sexual nature.

Further, it would be unreasonable for an employee to commit acts of sexual harassment in her presence. As such, she could not speak for Employee or his conduct, when he was not in her presence. Profit had never heard Simms make any derogatory remarks about Masi.<sup>49</sup>

*4. Testimony of Tyrone Jenkins, Tr. Vol. 2, Pp. 559-657.*

Tyrone Jenkins ("Jenkins") is a fellow Correctional Officer at the Agency, working with the official job title of "Property Officer." He appeared as Employee's witness, describing himself as a co-worker. During his testimony he identified a photograph of Employee taken with two women, one of whom was Robertson. The undated photo allegedly depicted a certain location at the Zanzibar night club.<sup>50</sup> Based upon his observations of that night, Jenkins concluded that Masi and Robertson were in attendance as a couple, "more than casual friends. They would lean and touch each other during the conversations." Beyond that occasion, Jenkins also observed Masi and Robertson in the workplace reacting in a friendly manner, that included joking and laughing, even present in each other's personal space.<sup>51</sup> Jenkins testified on Cross Examination by Agency that Employee told him that he was dating Robertson and that he loaned her money to help her move. Not knowing differently, he was inclined to believe what Masi had told him.<sup>52</sup>

*5. Testimony of Harcourt Masi, Employee, Tr. Vol. 3, Pp. 678-851.*

Harcourt Masi is a Correctional Officer with the Agency, primarily assigned to the control bubble / Sallyport on the third floor of the Mental Unit located at the D.C. Jail. In response to the sexual harassment complaint initiated against him by Simms, Employee provided sworn testimony to OSI Goldstein, under penalty of perjury on March 5, 2004, and again on May 26, 2004. Employee testified on both occasions that he understood his testimony was being taken under penalty of perjury.

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<sup>49</sup> Tr. Vol. 2, Pp. 540-545; and P. 546, Lines 1-7. See also Employee Exhibit #8, Pp. 3-6.

<sup>50</sup> See Employee Exhib. #5.

<sup>51</sup> Tr. Vol. 2, Pp. 575-576.

<sup>52</sup> Tr. Vol. 2, P. 636, Lines 13-22; Pp. 637-638, Lines 1-22; P. 639, Lines 1-9, and P. 651, Lines 4-13; See also, Employee Exhibit #9.

Employee testified to OSI that he had worked the mental health post for 17 years,<sup>53</sup> even “on his days off.”<sup>54</sup>

Employee, in his OSI testimony before Goldstein, denied that he ever asked Simms out; denied that he told her he could show her a good time; denied that he ever said to her that he could use his position as a Mason to get some tickets; denied that when she started working there, that he would ask her out several times a week; denied that he ever made comments to her about her clothes or appearance, asserting that the only social conversation between Simms and himself was when she asked him to buy a ticket to the Christmas party. He characterized her as “not approachable.”<sup>55</sup>

Beyond Simms’ complaint, Employee, in his OSI testimony, denied ever asking Christina Roye out on a date, despite striking up a conversation with her.<sup>56</sup> Employee, in his second OSI sworn testimony, provided to OSI Goldstein on May 26, 2004, denied ever asking Robertson out for dates; making frequent comments on her appearance, such as telling her she was attractive; asking to see what she looked like without her lab jacket; asking her to turn around so he could see what she looked like; putting his hands on her shoulder; and that she told him she did not ever want him to touch her again. Employee testified that, “At no time did I ever ask her out because at the time she was going - - she was dating Sergeant Fisher who is my Masonic brother, at the time; and at no time did I ever invite her to any function, ask her out, delay the doors, ask her to turn around. At no time did I ever, ever ask Miss Robertson or say any of those things that she said I said. At no time.”<sup>57</sup>

Employee further testified before OSI that, conversely, it was Robertson who would come on to him by asking him to loan her money. She also asked him to buy her lunch one time, when she was moving. Employee testified that, “She was moving to a new house. She asked me to give her money to help her move. Okay. Of course, you know, I didn’t have the money. So, I couldn’t assist her. Okay. And she also asked me to assist her in moving. But I could not because I was with Sharon Dorsey. So, she was upset about that; and after that, things didn’t go too well as far as, uh - - you know, as far as her feeling towards me.”<sup>58</sup>

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<sup>53</sup> Agency Exhibit #13, P. 3, Lines 17,-19; P. 5, Lines 1-2. Employee misspoke testimony during the OEA Evidentiary Hearing. D.C. personnel records reflect that Masi entered on duty with Agency in early 1990, which tallied approximately 14 years of service with Agency on March 5, 2004, the date he initially testified before the OSI.

<sup>54</sup> The record reflects that it was quite common for employees at the Agency to report to work on their assigned days off, likewise serving at a work site different from their usual work assignment location.

<sup>55</sup> Agency Exhibit #13, P. 8, Lines 17-45; and P. 9, Lines 1-9.

<sup>56</sup> *Id.* at Ex. #13, P. 18, Lines 17-45.

<sup>57</sup> Agency Exhibit #14”, P. 4, Lines 18-22.

<sup>58</sup> *Id.* at Ex. #14”, P. 7, Lines 38-42; and P. 8, Lines 1-6.

During the OEA proceeding, Employee testified on Direct Examination from his Counsel, that he went out on a date with Gloria Robertson “about three times, about ‘97, 2000, 2002, and that Robertson initiated it on all three occasions.” Employee also testified that he loaned Robertson money because she was moving to a new place. The loaning of money started off with \$300.00, then it went to about 11 to 1200 [dollars], and this was in 2000. Employee testified that when Robertson approached him and asked for the money, and because she was a friend, he loaned it to her.<sup>59</sup> On Cross Examination, and after reaffirming the OSI testimony that he gave in his second interview on May 26, 2004, regarding Robertson, and his not asking her out for dates because she was dating a Masonic Brother of his, Employee left the matter of loaning money very confused and inconsistent. At one point he asserted that he declined to make the loan to Robinson, because he did not have the money. Yet, on other occasion, likewise a crucial component of this case, Masi claims to have lent Robertson as much as \$1,200, apparently given in installments.<sup>60</sup>

On Cross Examination, Masi denied constantly and consistently asking Robertson for dates from about 1996 to 2002; denied touching her on her shoulder without her permission; denied that she told him that she did not ever want him to touch her again; admitted that he told Officer Tyrone Jenkins that he attended the party at Bolling Air Force Base with Robertson; denied making comments about Robertson’s appearance; denied stating to Robertson that he would like to see what she looked like without her lab coat; denied asking her to turn around so he could see what she looked like; admitted telling Officer Jenkins that he gave Robertson some money because she was moving; and admitted telling Jenkins who Robertson was dating.<sup>61</sup>

Employee, on Cross Examination, admitted that he made statements in an EEO complaint that he had an intimate and sexual relationship with Patricia Britton from approximately 1999 to 2003, and that she served as the Warden at D.C. Jail from about 1999 until 2003.<sup>62</sup> Employee, on Cross Examination, testified that he has received sexual harassment training three to four times since becoming employed with Agency.<sup>63</sup>

Regarding Simms, Agency queried Employee during the OEA proceedings regarding his prior OSI testimony concerning Simms’ allegations that he had sexually harassed her. Employee denied that he ever asked Simms for a date, or ever sexually harassed her. He reaffirmed his prior OSI testimony as now likewise to his OEA testimony. Employee also denied ever making any comments to Simms about her clothes or appearance; and reaffirmed his prior OSI testimony to that effect. Employee denied

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<sup>59</sup> Tr. Vol. 3, P. 738, 15-22; and P. 739, Lines 1-22. No receipts for this alleged installment loan, i.e., cancelled checks, promissory notes, etc., were produced, to verify this supposed all cash transaction.

<sup>60</sup> Tr. Vol. 3, Pp. 785-790. Compare with Agency Exhib. #14, P. 7, Lines 38-42; and P. 8, Lines 1-6.

<sup>61</sup> Tr. Vol. 3, P. 791, Lines 8-22, Pp. 792-793; and P. 794, Lines 1-9.

<sup>62</sup> Tr. Vol. 3, P. 794, Lines 10-22; and P. 1-11.

<sup>63</sup> Tr. Vol. 3, P. 813, Lines 21-22; and P. 814, Lines 1-11.

ever asking Simms if he could bring her lunch, because he was dating Sharon Dorsey, an employee of CCHPS who worked next door to Simms. Masi reaffirmed that as his testimony, as well.<sup>64</sup>

Employee denied telling Simms that he could show her a good time; denied telling her he could use his position as a Mason to get tickets to some events; denied that Simms told him not to put his hands on her; and denied that she told him that you must think that sexual harassment is a joke.<sup>65</sup>

Employee admitted that he knew Roye as an employee of CCHPS and that they often worked in the same general location on the Third Floor. Throughout his testimony, Employee denied ever asking Roye for a date on more than one occasion; denied asking her for a date at least one time; denied asking her out on more than one occasion; denied asking her out at least one time; denied that Ms. Roye showed him her wedding ring to let him know that she was married and therefore, not interested in going out on a date with him; and denied asking Ms. Roye if she was married.<sup>66</sup>

*Background – highlighting the working atmosphere at the Department of Corrections (the “Jail”)*

To properly understand this case, it is helpful to first explain the working atmosphere and some basic facts about the D.C. Jail and nature of that environment, which seems quite unique among agencies in the D.C. Government. The Jail became a place whose EEO system was so severely defective with respect to sexual harassment claims that a civil suit was filed resulting in a judicial decree issued by the federal court which also yielded a full investigation of sexual harassment claims, including the creation of a *sui generis* investigative office.<sup>67</sup> This is a situation unique among any local, state or federal agency. From all appearances, Jail employees, including contractors and volunteers, generally form a small and cloistered family of sorts, often working 16-hour shifts, sometimes on official days off. Some of this staff appear to mostly limit their off-work-off site hours to socializing amongst themselves.<sup>68</sup> Such familiarity might facilitate an environment where relationships between co-workers may well become more personal than in other working environments.

Several of the witnesses’ respective testimonies reflected that fraternization and dating among Jail coworkers at all levels is typical. Short and Profit, two Employee witnesses with a combined 46 years of experience at the Jail, testified that perhaps as much as 90 percent of the personnel at the Jail had dated or were dating each other at any

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<sup>64</sup> Tr. Vol. 2, P. 777, Lines 1-22.

<sup>65</sup> Tr. Vol. 3, P. 782, Lines 9-22; P. 783, Lines 1-2.

<sup>66</sup> Tr. Vol. 3, P. 783, Lines 4-22; and P. 784, Lines 1-15.

<sup>67</sup> See *Bessye Neal v. D.C. Department of Corrections*, CA 93-2420 (RCL), USDA, DC (1993).

<sup>68</sup> Tr. Vol. 2, P. 386, P. 444.

given time, a situation that had endured for years.<sup>69</sup> Jenkins, Employee's witness, placed the dating percentage at any given time closer to 75 percent.<sup>70</sup> Further, Agency witness Roye, a then-employee of Jail contractor CCHPS, confirmed the high level of fraternization at the Jail, as did Agency witness Robertson, who confirmed the presence of a significant amount of inter-dating at the Jail.<sup>71</sup>

From all appearances, the Jail condoned this state of affairs, as several witnesses testified that the Jail made no real effort to enforce any formal prohibition against workplace dating. Witnesses expressed uncertainty about whether the Jail's toleration of this state might have been a violation of some D.C. personnel regulation, if any such a rule existed, noting that this conduct is separate from the general prohibition regarding sexual harassment.<sup>72</sup> Just as the Jail is ripe with fraternization, sexual touching and sexual commentary are quite prevalent. The witnesses have testified that potentially sexually harassing activities, including many personnel at the Jail groping their coworkers, are common place at the Jail. Short reported numerous situations where personnel at the Jail would touch each other on the arms, legs, and the butt during her last two years of employment from early 2002 to early 2004.<sup>73</sup> Robertson reported being touched by Jail personnel on the arm and shoulder.<sup>74</sup> Profit reported comments being made about her physical appearance and that of other female coworkers frequently: "all the time"; "more than once a week."<sup>75</sup>

By all accounts, Agency neglected to provide in a more timely manner any meaningful training on sexual harassment. As a result, this sexually tinged atmosphere and state of affairs continued to fester. Agency maintained that even the existence and purpose of the decision issued in *Bessye Neal* could not fix this problem. The Office of the Special Inspector, created as a result of that case, has likewise proven to be just as incapable of providing comprehensive training and stemming the problem as the regular Agency or contractor staff. On paper, the Special Inspector is supposed to train all employees of the Jail at least annually. Further, the Jail is responsible for permanently maintaining posters explaining complaint procedures on employee bulletin boards.<sup>76</sup> From all accounts, this never happened. Complaining witness Simms reported that during her tenure there had been only one training session, which focused on types of sexual harassment, rather than a discussion and the details related to the complaint procedures.<sup>77</sup> Simms further reported seeing no posters.

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<sup>69</sup> Tr. Vol. 2, Pp. 369, 386, 444-45, 508, 514; See also, Employee Exhib. #6.

<sup>70</sup> Tr. Vol.2, P. 598; See also Employee Exhib. #9, P.

<sup>71</sup> Tr. Vol. 1, 262; and Vol. 2, Pp. 321-322, 517, 598.

<sup>72</sup> Tr. Vol. 1, Pp. 263, 324, 385, 514-515.

<sup>73</sup> Tr. Vol. 2, P. 457.

<sup>74</sup> Tr. Vol. 2, Pp. 351-52.

<sup>75</sup> Tr. Vol. 2, Pp. 548-49, 552-53.

<sup>76</sup> See Agency Exhib. #4, at Pp. 9, 14.

<sup>77</sup> Tr. Vol. 1, Pp. 71-74.

Roye confirmed that only one training had occurred, focused on the issue of “What constitutes sexual harassment?,” which was immediately followed by a session organized by Simms in which she attempted to solicit a claim of sexual harassment from Roye against Employee.<sup>78</sup> Guzman, another CCHPS employee, corroborated Roye’s account.<sup>79</sup>

Lerner, the Special Inspector during the relevant period, conceded the existence of deficiencies in the sexual harassment training program under her watch, with gaps in the annual training schedule and posters not being displayed until after the claims against Employee were initially filed.<sup>80</sup> As a result of this deficient training, the Jail’s staff, which conceivably was aware of what constituted sexual harassment, was generally unaware of the existence of the sexual harassment complaint system.<sup>81</sup>

Aside from failing to provide proper sexual harassment training, it is suspected that the Jail played an active, but behind-the-scenes, role in attempting to influence the outcome of any proceeding stemming from enforcement of the sexual harassment policies. Witnesses Profit and Jenkins separately testified that they expected that some retaliation would be placed against them for testifying before the Office in this matter. Jenkins reported a sudden reversal by Jail management on the disposition of a repeatedly-rebuffed grievance filed by his common-law wife, which was effectuated just prior to his anticipated testimony in the instant matter.<sup>82</sup> Indeed, some believed that the Jail provided enticing rewards to some witnesses just prior to their testimony before this Office. As well, it was noted that Robertson, a staff nurse at the Jail, and who testified on behalf of the Agency, was promoted to the position of Health Services Program Specialist in the Jail’s headquarters facilities just three days before she testified on behalf of the Agency.<sup>83</sup>

#### FINDINGS OF FACT

1. For a sustained period of time, Agency’s Jail facility became recognized as a place where sexual harassment had become a major problem. A sexual harassment suit was filed in the U.S. Federal Court for the District of Columbia. Effective January 8, 1999, a Consent Decree was signed by all parties and approved by the Presiding U.S. District Court in the *Bessye Neal, et al., Plaintiffs v. Director, D.C. Department of Corrections, et al., Defendants*, Civil Action No. 93-2420 (RCL), a class action civil matter. One subsequent component of the suit resulted in the creation of Agency’s admittedly ineffective sexual harassment program, which was transitioned on February 16, 2002, to the then recently created Office of the Special Inspector (the “OSI”).<sup>84</sup>

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<sup>78</sup> Tr. Vol.1, Pp. 260-62, 280-82, 285.

<sup>79</sup> Tr. Vol. 2, Pp. 488-90, 501.

<sup>80</sup> Tr. Vol. 1, Pp. 181, 187-188.

<sup>81</sup> Tr. Vol. 1, Pp. 188-189.

<sup>82</sup> Tr. Vol. 2, Pp. 598-601, 623-25.

<sup>83</sup> Tr. Vol. 1, Pp. 296-298.

<sup>84</sup> See Agency’s Pre-Hearing Statement, Exhib. #1, Consent Decree.

2. The Court retained jurisdiction as it monitored compliance. Several directives were established, including the creation of the above-noted OSI, and the creation of the Special Investigator (“SI”) position. The SI personnel were vested with the authority to conduct investigations, independent of Agency’s authority and cooperation.
3. Carolyn Lerner, an attorney trained and experienced in sexual harassment matters, was appointed as the SI, and pursuant to the Court’s directive, charged to identify, address, and root out allegations of sexual harassment. The remedies available to the SI were enumerated in the Consent Decree.

4. Section II (A)(2) of the Consent Decree provides in full that:

The Office of the SI will have authority over all sexual harassment and retaliation complaints. Subject to applicable District of Columbia law, the SI shall have the authority to hire or contract for investigators to work full-time for the SI as well as such other staff as may be necessary to carry out the responsibilities of the Office of the SI. The investigators will investigate all complaints of sexual harassment or retaliation for having opposed sexual harassment. The SI will have the authority to issue findings of probable cause or no probable cause for each complaint. The investigators will be the proposing officials, as that term is used in Chapter 16, DPM, and will have authority to propose disciplinary action against employees found to have engaged in sexual harassment or retaliation. The proposed disciplinary action shall proceed under terms of Chapter 16 of the DPM and shall include the right of the employee to seek review by a disinterested designee (DD). The SI, however, shall have authority as the deciding official. Any challenge to the final decision shall proceed under Chapter 16 of the DPM or terms of any collective bargaining agreement. *Id.*

5. On January 6, 2004, LaVerna Simms, complainant herein, filed a sexual harassment complaint with OSI, alleging that for the past several years, and most recently within approximately the last month before she noted her complaint, that she had been the victim of sexual harassment by Harcourt Masi, a Correctional Officer, and one of her co-workers. The OSI Investigation Report documents that, prior to filing her complaint with OSI, Simms informed Deputy Warden Dennis Harris of Masi’s sexually harassing her and one of her employees, Christina Roye. It appears that no action was taken against Masi at that time. On January 6, 2004, Simms notified Special Inspector Carolyn Lerner by telephone that Masi had refused to perform work for her staff in retaliation for Simms’s prior complaint, which had become known.<sup>85</sup>
6. During the ensuing investigation of Simms’ claims by Janet Goldstein, OSI Investigator, she identified and interviewed five other employees in the medical

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<sup>85</sup> See OSI Investigation Report, Agency Prehearing Exhib. #5.



Unit at the D.C. Jail, each of whom alleged that Masi had made unwanted overtures to them as well. These individuals were: Karen Harrison, Teresa Nwankwo, Gloria Robertson, Cynthia Cottrell and Coryne Farmer. However, none of these five women initiated a sexual harassment complaint against Employee. Pursuant to the mandates of the OSI to investigate and remediate all acts of sexual harassment within the Agency, Goldstein included these allegations in her investigation of Masi's behavior.<sup>86</sup>

7. The essence of Simms's complaint is that during the prior six years, Masi sexually harassed her by repeatedly making unwanted overtures towards her. Masi's overtures included asking Simms out, making comments on her appearance and body, seeking Simms out at work and social events, telephoning her, photographing her, and grabbing her by the arm. Simms also alleged that when Masi worked the infirmary control bubble, he continually delayed opening the exit door in order to stare at her. Finally, Simms charged that after she reported Masi's behavior in December 2003, he retaliated against her by not performing required work for one of her technicians, Donna Coakley.<sup>87</sup>
8. Simms also described to Goldstein how Employee's unwanted and unsolicited sexual harassment had grown more aggressive within the immediate prior two years prior to filing her complaint. She described how Employee repeatedly asked her for dates, and then how he invaded her body space by grabbing her arm and telling her to come to him.<sup>88</sup>
9. During the course of the investigation, Goldstein interviewed nine (9) witnesses, some on more than one occasion, in connection with Simms' complaint against Employee. A synopsis of the interview results is as herein enumerated:
  - (9a) Estelle Hunter ("Hunter"), Health Services Administrator for the medical contractor at D.C. Jail, testified in the OSI investigation that "Simms first complained to her about Masi's behavior around the time that pharmacist Teresa Nwankwo complained to her supervisor that she had received 'unwanted attention' from Masi. . ." Hunter further testified that "Simms again complained to her recently that Masi was still pursuing her and it was unwanted."<sup>89</sup>
  - (9b) Maxine Reise ("Reise"), a co-worker and friend of La Verna Simms, testified in the OSI Investigation that "Simms complained to her about Masi's overtures for "years." Reise further testified that "Simms mentioned several times that he had made unwanted advances to her, asking her out and stuff like that." In addition to being knowledgeable about Simms's problems with Masi, on several

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<sup>86</sup> *Id.* at Ex. #5.

<sup>87</sup> *Id.* at Ex. #5.

<sup>88</sup> *Id.* at Ex. #5.

<sup>89</sup> *Id.* at Ex. #5, P. 8

occasions, she also witnessed co-worker Karen Harrison's efforts, Trying to avoid Masi.<sup>90</sup>

(9c) Janna McCargo ("McCargo"), a former Mental Health Clinician for the medical contractor at the D.C. Jail, and a colleague and friend of Simms, testified during the OSI Investigation that Simms complained to her on numerous occasions, "that [Masi] was asking her out, pursuing her, and that this was not a welcome thing." McCargo further testified that she observed Masi checking Simms out, physically looking her up and down, focused on her backside. At the office Christmas party in 2002, Masi was lurking around Simms, just looking at her, holding a drink in his hand. He allegedly did or said something that irritated Simms, and was asked by Ms. Hunter to leave the event. Simms bluntly rejected Masi's overtures. At some point, McCargo heard Simms tell Masi that she would not talk to him or go out with him.<sup>91</sup>

(9d) Karen Harrison ("Harrison") worked two days per week as a Podiatrist for the Medical Contractor at the D.C. Jail. She did not socialize or otherwise interact with Simms. Harrison first had contact with Masi around 2000 when Masi was assigned to the 3<sup>rd</sup> floor control bubble. Masi asked Harrison to go out with him about half of the time he would see her. Initially she did not want to be rude, so she told him that she would give it thought but it's not something that she was interested in. Eventually, Masi's invitations slowed down and it was not much of a problem after that. Therefore, she did not complain to anyone about Masi's behavior.

In the beginning of 2003, however, Masi began bothering her again. While working the control bubble, Masi would delay opening the exit door for her. When she encountered Masi at the officer's desk in the medical room, ". . . he was always either putting his arm around my shoulder or putting his hand on the small of my back." Masi did this "every time he saw me. . . . Every Wednesday and Friday." For a while, she would just move away. Finally, around September 2003, "I saw it to be a pattern and so I finally just told him that he had no right to touch me there." After that, Masi "would attempt to [touch me] and then think about it or I would step away after that." Once Masi stopped working in the control bubble, she did not see him too much. If she did, she tried to avoid him. If she knew Masi was coming up, she would run to her office and get out of the way. Masi's advances made it difficult for her to do her work.<sup>92</sup> Gloria Robertson, a nurse on the 3rd floor, also testified to OSI that she saw Harrison hiding from Masi.<sup>93</sup>

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<sup>90</sup> *Id.* at Ex #5, P. 8, 12.

<sup>91</sup> *Id.* at Ex. #5, P. 9.

<sup>92</sup> *Id.* at Ex. #5, Pp. 9, 10 and 11.

<sup>93</sup> *Id.* at Ex. #5, P. 10.

(9e) Teresa Nwankwo began working at the Agency as a pharmacist on April 3, 2000. She never worked for Simms and does not socialize with her. When she first started working, Masi would beckon her to come to him in the control bubble and talk whenever she passed through the Sallyport area. Nwankwo did not recall Masi's specific comments to her, but that he may have made comments on her appearance. Masi never asked her out, but was beckoned towards him in the control bubble a few times. Later this ceased. Instead, she would wave and say, "Later!", smile, and keep going. At some point she told Masi she "wasn't interested in him" and that she was "married with children." She was not sure how long Masi's behavior continued. She estimated "maybe a week or so." She went to her supervisor, Gwendolyn Sinclair, because she felt that "he was not getting the message."<sup>94</sup>

(9f) Gloria Robertson, in addition to witnessing Masi's overtures to Harrison, testified to OSI that she too was subjected to sustained unwanted advances from Masi. She has worked for the Agency since 1995, and while she interacts with Simms professionally, Simms had no oversight over her work. They do not socialize or eat lunch together. Beginning around 1996, she would see Masi on the 3<sup>rd</sup> floor, in the parking lot and hallways. Masi often invited her to social functions and out on dates. She estimated that over the years, Masi asked her out on dates five to six times. She refused all of his invitations. Masi also made frequent comments on her physical appearance. She had problems with Masi when he worked in the 3<sup>rd</sup> floor control bubble. He would not open the exit door until she turned around and looked at him. Finally, in 2001 or 2002, Masi came up from behind her when she was sitting in the nurses' station and put his hands on her shoulders. She stated to Masi, "I don't know who you think you are, but don't you ever touch me again."<sup>95</sup>

(9g) Cynthia Kittrell has worked as a dental assistant at the Agency since 1998. Simms has no oversight over her work, and their interaction is limited to exchanging greetings in the hallway. Kittrell also testified that she had contact with Masi when he was working the 3<sup>rd</sup> floor control bubble. Masi asked her to go out to social functions with him and on dates. She estimated that he has asked her out on dates at least 20 times. The last time she saw Masi in the parking lot, he said, "You know the offer still stands." She always refused Masi's offers to take her out. Further, she never said or did anything that might suggest to Masi that she was interested in going out with him. From time to time, Masi offered her financial assistance. He would frequently pull out his money wad and show it to me, or say money's not a problem with him. He would use money in his conversations with her. Masi did delay her exit from the 3<sup>rd</sup> floor Sallyport area on several occasions.<sup>96</sup>

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<sup>94</sup> *Id.* at Ex. #5, P. 12.

<sup>95</sup> *Id.* at Ex. #5, Pp. 13 and 14.

<sup>96</sup> *Id.* at Ex. #5, P. 14.

- (9h) Coryne Farmer (“Farmer”) has worked in the Medical Unit at D.C. Jail since July 2002. She has no personal relationship with Simms. Shortly after she started working, Masi stopped her in the Sallyport area, offered her his business card and asked if she “would give him a call, in relation to going out.” Farmer said she understood Masi to be inviting her out on a date, rather than to a business or social function. She was “quite amazed” at Masi’s overtures because she had not paid him any attention. In fact, Farmer stated that she had been “quite rude” to him because she had heard from others that Masi made “advances” to women. Farmer testified that she told her supervisor, Jackie Farmer, what had occurred. Supervisor Farmer told her that Masi was going out with Sharon Dorsey, the office manager, and that Sharon would be angry with Farmer, if she dated Masi.<sup>97</sup>
- (9i) Harcourt Masi (“Masi” or “Employee”) denied ever making sexual overtures to or asking out any of the women identified in the OSI report. Masi also denied retaliating against Simms by refusing to perform his duties. Masi alleged that Simms was biased against him because he is a “foreigner” and that she brought false charges against him to insure that her friend, Corporal Reise, rather than Masi, would be assigned to the mental health post following the retirement of the post officer.<sup>98</sup>
10. The OSI Report, Section VII. Analysis, Subsection A. stated that “There is overwhelming evidence that Masi made unwanted advances to Simms and five additional women in the Medical Unit. The OSI Report further stated “The Supreme Court recognized in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) that sexual harassment is a form of sex discrimination which violates Title VII if it, explicitly or constructively, alters the terms or conditions of an individual’s employment. Sexual Harassment includes conduct of a sexual nature that unreasonably interferes with an individual job performance or creates an intimidating, hostile or offensive work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 56, 66 (1986), 29 C.F.R. Section 1604.11(a)(1) & (2). Simms’ allegations and the testimony of the other five medical employees present this type of “hostile environment” claim.<sup>99</sup>
11. OSI Investigator Goldstein further opined in the above noted section that:
- The central issue in this case is whether one should believe Simms and the other five women (Harrison, Nwankwo, Robertson, Kittrell, and Farmer) who each testified to OSI that Masi made unwanted advances towards them, or Masi, who denied ever making any overtures to any of these women.<sup>100</sup>

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<sup>97</sup> *Id.* at Ex. #5, Pp. 15 and 16.

<sup>98</sup> *Id.* at Ex. #5, P. 29.

<sup>99</sup> *Id.* at Ex. #5, P. 30.

<sup>100</sup> *Id.* at Ex #5, P. 30.

12. One of the five women, Robertson, also testified before this AJ during the evidentiary hearing. Further, three of the other women (Hunter, Reise, and McCargo) had been told by Simms at various times that Employee was sexually harassing her, and that such conduct was not wanted.
13. After assessing the total record created by the OSI investigation, Investigator Goldstein found the testimony of Simms and the five medical workers to be more credible than the denials of Masi. She likewise rejected his claim of innocence regarding Simms' allegations against him.
14. OSI Investigator Goldstein further noted that:

First, and most importantly, the sheer number of individuals who have testified that Masi made unwelcome advances to them gives credence to these allegations. While an individual complainant may make a false or inaccurate charge against another employee as a result of a grievance or misunderstanding, it is highly unlikely that six individuals would do so. This is especially the case here where, with the exception of Simms, none of the other victims initiated action against Masi. Rather, they provided testimony against him, often reluctantly, because the OSI compelled their appearances as witnesses. Moreover, there is no apparent reason why any of these individuals would lie to support Simms' case. Although friendly with some of them, none of the five women were personal friends of Simms, and did not work for her in the Mental Health Unit.

Second, each victim provided consistent yet not identical testimony about Masi's conduct. All six women testified that Masi deliberately delayed opening the third floor exit door for them at various times throughout his assignment to the infirmary control bubble. All of the women testified that Masi did so in order to stare at them, talk with them or otherwise subject them to his unwanted attentions. Five of the women testified that Masi asked them out, sometimes repeatedly, despite their unambiguous refusals, and made inappropriate comments on their physical appearance.

Third, Masi has not provided persuasive evidence that would undermine the credibility of any of these women. He has not even attempted to explain why Harrison or Kittrell would make false accusations against him. As to Farmer, Masi unconvincingly opined that she might have made accusations against him because she was angry that her supervisor was fired shortly after Farmer was hired in 2002. Masi said he had nothing to do with the supervisor's termination and did not explain why it would cause Farmer to make false accusations.<sup>101</sup>

15. The OSI Investigator further opined:

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<sup>101</sup> *Id.* at Ex. "5", P. 31.

The remaining question is whether Masi's behavior toward Simms and the five members of the medical staff is sufficient to prove a "hostile environment" claim. To establish such a claim, a complainant must show that the conduct at issue was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993). The resultant work environment must be both objectively and subjectively offensive. In other words, the complainant must show that a reasonable person would have found the environment hostile and abusive, and that the affected employee did perceive it that way.

The DCDC Program Statement defines sexual harassment as "unwelcome sexual advances" both verbal and physical that affect the conditions of employment.<sup>102</sup> The Program Statement offers specific examples of verbal and nonverbal behaviors that might constitute sexual harassment, including:

- 8(1)(1)(a) Making suggestive or sexual comments about another person's or one's own anatomy, figure, appearance, or clothing; . . . . .
- 8(1)(1)(f) Asking out a person who has made it clear that she or he is not interested; . . . . .
- 8(1)(2)(a) Looking a person up and down, fixing eyes on sexual parts of anatomy; . . . . .
- 8(1)(2)(i) Touching a person's body, hair or clothing.

In this case, Masi's conduct clearly created a hostile environment for the 3<sup>rd</sup> floor staff. Even if one were to consider only Masi's behavior toward Simms, there is ample evidence that Masi sexually harassed Simms over a six-year period. His overtures included repeatedly asking her on dates, making inappropriate remarks about her physical appearance, staring at her, photographing her, touching her and abusing his position as the control bubble officer to force Simms to endure his advances. Masi's conduct made Simms feel very uncomfortable. She even started wearing a lab coat and sunglasses when exiting the 3<sup>rd</sup> floor to make her feel less vulnerable to Masi's overtures. Masi was fully aware that these overtures were unwelcome since Simms made it patently clear to Masi at the onset of their relationship that she was not interested in him.

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<sup>102</sup> See DCDC Program Statement, HRM, 3310.4F, December 22, 2003.

Masi's behavior toward Harrison, Nwankwo, Robertson, Kittrell and Farmer also constitutes sexual harassment. While his overtures toward the five women varied in their severity and duration, they were plainly inappropriate and unwelcome. Moreover, Masi's abuse of his power as the floor control officer made his behavior even more coercive and offensive. Each of these women felt uncomfortable with or annoyed by Masi's behavior. At its most extreme, Masi's advances toward Harrison forced her to spend considerable time hiding from him in 3<sup>rd</sup> floor offices. Under these circumstances, Masi plainly violated the DCDC Program Statement by creating a hostile environment through his repeated sexual advances.<sup>103</sup>

16. The OSI Investigator further opined in Analysis VIII (B) of the OSI Report that Masi's behavior created a hostile work environment.

17. In Section VIII. Recommendation, the OSI Investigator opined the following:

Based on the foregoing reasons, it is recommended that a probable cause finding be made that Harcourt Masi sexually harassed La Verna Simms, Karen Harrison, Teresa Nwankwo, Gloria Robertson, Cynthia Kittrell and Coryne Farmer by creating a hostile work environment. It is further recommended that a finding of no probable cause be made on the claim that Masi retaliated against Simms for reporting his sexual harassment.<sup>104</sup>

18. The OSI Investigator submitted a request to the Agency's Human Resource Management Office on August 6, 2004, for issuance of an advance notice of proposal to terminate Employee, based on the June 24, 2004-issued Report of Investigation. The Report found convincing evidence that Masi sexually harassed the above referred La Verna Simms, Karen Harrison, Teresa Nwankwo, Gloria Robertson, Cynthia Kittrell and Coryne Farmer by creating a hostile work environment. In recommending the penalty of removal, the OSI Investigator stated the following:

I am recommending termination of employment as the penalty in this case. This sanction is warranted by the severity of Masi's conduct, its disruptive effects on the 3<sup>rd</sup> floor medical and mental health staff, Masi's refusal to acknowledge his actions, his dishonesty and his prior disciplinary violation.<sup>105</sup>

19. Employee was issued an Advance Written Notice of Proposal letter dated September 22, 2004, notifying him of the proposal to terminate him for the cause of Malfeasance, to wit: any on-duty or employment related act or omission that

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<sup>103</sup> *Id.* at Ex. #5, Pp. 33 and 34. See also, Agency Exhib. #4, Program Statement on Sexual Harassment Against Employees.

<sup>104</sup> *Id.* at Ex. #5, P. 35.

<sup>105</sup> Agency Ex. #6.

interferes with the efficiency or integrity of government operations. The specifications in support of the charge and proposed action were premised on the OSI Investigation Report, and were fully set forth in the Advance Written Notice. Further, the notice properly apprised Employee of his due process rights, including the right to an administrative review of his case and/or the right to an administrative hearing by a designated hearing officer.<sup>106</sup>

20. Tom Hoey, the assigned Administrative Review Hearing Officer (the “Hearing Officer”) made the following recommendation:

Based on my review of the Office of the Special Inspector’s investigative report, the transcriptions of interviews conducted by the OSI, the response by Cpl. Masi’s counsel, Mr. Omar Vincent Melehy, Esquire, I concur with Investigator Janet Goldstein’s probable cause finding that Cpl. Masi sexually harassed Ms. LaVerna Simms. In addition, his behavior toward Meses. Harrison, Robertson, Farmer and Kittrell appears to constitute sexual harassment under the criteria set forth in DCDC Program Statement, HRM, 3310.4F, December 22, 2003. After reviewing the facts surrounding Ms. Nwankwo’s case and her direct testimony, I could not arrive at a similar conclusion.

The testimony provided by the other alleged victims also provides insight into the existence of a pattern of personal behavior, and significantly contributes to assessments of the credibility of the charge and the likelihood of unwanted advances actually taken place. All five of the women interviewed were not friends of Ms. Simms, were unrelated, and yet gave remarkably similar portrayals of unwanted overtures. None of them made formal complaints despite the passage of time, and thus had no reason to make false accusations against Cpl. Masi.

This case pivots on who you believe: Cpl. Masi or Ms. Simms. Ms. Simms put up with a hostile environment for six years before going over the edge in December 2003. The sheer passage of time and her statement to Ms. Hunter that she did not want Cpl. Masi to lose his job portrays a reluctant complainant to me. This is a case of the proverbial “straw that broke the camel’s back.”<sup>107</sup>

21. Hearing Officer Hoey further opined the following:

The single biggest hurdle accepting Cpl. Masi’s version of events rests with the serious questions raised about his fundamental veracity. Witness his: a) Telling the OSI investigator that Ms. Robertson was mad because he refused to lend her money for her move, and then his friend, Cpl. Tyrone Jenkins, testifying that Cpl. Masi told him he lent money to Ms. Robertson for her move;

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<sup>106</sup> Agency Ex. #7.

<sup>107</sup> Agency Ex. #8.



- b) Telling the OSI investigator that he reported Ms. Simms ethnic slurs to Ms. Hunter, and Ms. Hunter subsequently testifying that Cpl. Masi never made such a report to her; and c) Testifying that Ms. Simms was “not approachable,” and then saying she “came on to him” in subsequent testimony.<sup>108</sup>
22. After comprehensively evaluating the entire situation, the Administrative Review Hearing Officer stated the following:

In my judgment, Cpl. Masi developed a habit of making unwanted advances to selected women in DCDC for the period in question, and sometimes had trouble knowing when to back off. While his behavior does not appear to be as egregious as many cases that have been documented, it is nonetheless an annoying pattern that can produce a tension laden workplace and have a detrimental effect on employee performance.

I do not concur with Investigator Goldstein’s recommendation to terminate Cpl. Masi. While repulsive, Cpl. Masi’s behavior was not a level where termination is merited in the first case where culpability is established. Cpl. Masi’s behavior was exceedingly annoying, a term used by several of the victims. Termination on an initial probable cause judgment also conflicts with the widely embraced Human Resource Management concept of progressive discipline. As Cpl. Masi’s counsel correctly points out, Cpl. Masi was never found culpable of a similar offense and he was never counseled by his superiors regarding his behavior. Given these facts and the seriousness of the behavior in question, I would recommend a 120 days suspension.<sup>109</sup>

23. On March 3, 2005, Carolyn Lerner, Special Inspector and Deciding Official, issued to Employee a Final Notice of Decision letter, dated March 3, 2005, but served and signed for by Employee on March 8, 2005. The Deciding Official stated in relevant parts that:

I have reviewed the proposing official’s recommendations on disciplinary action, and the Hearing Officer’s Recommendation. Based on this review, I have decided to uphold the proposed charge of “Malfeasance.” However I have decided to reduce the proposed penalty of termination, and I accept the Hearing Officer’s recommendation of 120 days suspension without pay.

These actions are premised on a probable cause finding by the Office of the Special Inspector that you violated the Department’s Program Statement on Sexual Harassment when you harassed La Verna Simms, a contractor for the D.C. Department of Corrections. You were previously provided with a copy of the Report of Investigation and given an opportunity to respond to

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<sup>108</sup> *Id.* at Ex. #8.

<sup>109</sup> *Id.* at Ex. #8.

the probable cause finding.<sup>110</sup>

24. As the presiding AJ in this matter, my evaluation of the substantial amount of evidence produced at all stages of this case underscores that the outcome turns most significantly upon the issue of witness credibility. Were the issue of credibility left solely to a comparison between the viability of the conflicting sworn testimonies of complainant Simms and Cpl. Masi, the accused, Simms and the Agency would have most probably prevailed, making their case by the weight of producing the substantial evidence required to prove sexual harassment.
25. Still, Masi mounted a powerful response. Seeking to discredit Simms and to cast doubt on how to interpret the interaction between Simms and himself, he flooded the record with virtually every personnel and performance document ever created during his tenure with the D.C. government. He also mounted a powerful discovery effort, and solicited the testimony of likewise credible witnesses, none of whom was able to shed much or any light on the issue of Masi's alleged sexual harassment, and Simms' response to his advances. Therefore, I find that their testimonies, while credible, are of little to no value in the record of this proceeding.
26. I find Simms' testimony and her version of what occurred over a sustained period of up to six years, and most especially in the approximately one month preceding her initialing her complaint, to be credible. I further find that the testimony of Agency's five female witnesses was likewise credible. All of them found Employee's behavior to be extremely bothersome, a nuisance, harassing even, although none of them elected to file a formal complaint.
27. Given the history of all that became involved in pursuing the sexual harassment complaint, including the many humiliations that Simms was subjected to in the course of seeking justice, it is no small wonder that five other women at the work site elected to put up with the harassing behavior, and to take no action, until they were forced to testify during the OSI investigation of Simms' complaint.
28. Masi sought to discredit most of these women in some way, either in his sworn testimony offered during his responses to the OSI Investigator, or in subsequent sworn testimony before me during the Evidentiary Hearing, or both. He attacked their character, alleging that they came onto him, looking for dates, or that they had other agendas, including that of a sexual nature. Still, each of them stood her ground, and made it clear that they had no personal axe to grind against Masi.
29. I find that the various allegations lodged by Masi against Simms, regarding her supposed negative image of foreigners, including his assertion that she described him in the most vile language, and her supposed favoritism towards getting a certain other correctional officer, instead of Masi, assigned to operating the

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<sup>110</sup> Agency Ex. #9.

- Sallyport, to be unfounded. The fact that Simms might have been involved in a personnel-related dispute with one Latino co-worker over certain job assignments, while not insignificant, does not of itself prove that she dislikes foreigners.
30. I find that the totality of the evidence presented supports a finding that Employee engaged in malfeasance, which conduct was enumerated by the Agency and further developed by the credible testimony of several witnesses who has suffered as a direct result of Employee's otherwise unacceptable behavior.
31. I further find that Masi's conduct towards complainant Simms created a hostile work environment, as provided for in the Program Statement.<sup>111</sup>

#### ANALYSIS OF DOCUMENTARY AND TESTIMONIAL EVIDENCE

As referenced by me above, the outcome in this matter is driven most significantly by the issue of credibility. Factoring in all of the formal exhibits entered into the record during the three-day Evidentiary Hearing, coupled with the underlying record created by OSI during its investigation, and filed with the Office as the Agency's official Answer to Employee's initial Petition for Appeal, there is a huge physical record in this matter, consisting of more than 1,500 pages of testimony, and totaling well more than 2,000 pages in all.

Throughout the record, Employee's component of the matter was predicated upon one denial after the other. For example, testifying under oath in both the OSI and OEA proceedings, he swore that he never asked Roye out; claimed to have had perhaps three dates with Robertson, and, at one time to have lent her moving money, while elsewhere in this record, pointedly denying ever doing so. As well, he characterized Simms as "unapproachable."

Yet, credible testimony from witnesses, some of whom otherwise testified favorably towards Employee, and supplemented and reinforced by corroboration, points in a significantly different direction. Hilda Short, who appeared as Employee's witness in the OEA matter, testified in both proceedings that she witnessed Employee asking Roye for a date on two occasions, including asking her if she was married, to which she answered in the affirmative. Tyrone Jenkins, Employee's witness, testified to Employee's having asserted that he had lent money to Robertson, which Jenkins believed, only to be elsewhere contradicted by Masi himself in contrary testimony that he would not lend Robertson money, partly because he had no money to lend. The effect of Jenkins's testimony was neutralized by Employee's own boastful, chauvinistic, but inconsistent statements, which I conclude were made with the intent to mislead Jenkins, and to convey Employee as someone that he was not.

Roye testified in both the OSI and OEA proceedings that Employee asked her

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<sup>111</sup> See DCDC Program Statement, *Supra*.

for a date on at least one occasion. Declining, she showed him her ring, indicating that she was a married woman. Her testimony reflects no misrepresentation or making false statements against Employee. Short's testimony that Roye's representation of the events regarding Employee asking her for a date was truthful, serves to underscore the accuracy of Roye's testimony. Roye considered Employee to be bothersome, a nuisance, yet she did not file a sexual harassment complaint against him. I conclude that she would have no motive to be less than truthful about the events.

Employee, in his OSI testimony, testified that he neither asked Robertson out on a date, nor loaned her any money, although she allegedly asked him for a loan to help with her moving expenses. Employee testified that he would never ask Robertson for a date because she was already dating one of his Masonic brothers. Further, he did not have the money to loan her anyway. Conversely, Employee did not claim either that Robertson asked him to go out on dates, and whether he accepted her alleged offers. Employee also testified that Robertson asked him to assist her in moving, but he declined because he was with Sharon Dorsey, another Agency Employee, and such an activity would be inappropriate under that circumstance.

Employee later testified to the opposite during the subsequent OEA proceeding, including that he went out on dates with Robertson about three times, because she asked him. Also, Employee claimed to have lent her money, apparently given in installments, eventually totaling about \$1,100 to \$1,200 dollars. There is likewise an alleged substantial balance due on the repayment. This version of the story was shared with Jenkins who testified to Employee boasting of money that he allegedly loaned to Robertson. During the three-day Evidentiary Hearing, and obviously knowingly testifying to the direct contrary of his prior sworn testimony to OSI, and under the penalty of perjury, Employee proceeded to offer directly conflicting testimony during his OEA testimony, in direct contradiction to his OSI testimony. Considering the diametrically opposite content of the details of Employee's sworn testimony before OSI and subsequently before me at OEA, I must conclude that Employee's testimony and version of events is less than the full story of whether there was sexual harassment of Simms, and the other five women who testified to that effect. He chose one approach before OSI, and reversed himself before OEA. Which story is true and correct no longer matters. His credibility is damaged, and no repair efforts, if such were possible, have been made.

Gloria Robertson did not file a sexual harassment complaint against Employee for the four to five years of sexual harassment that she endured from him. She testified that she felt able to handle the matter herself, particularly since she laid him out, and put him in his place for the unwanted touching incident in 2002. His harassment of her stopped. Consequently, I conclude that there was no motive for Robertson to lie or misrepresent any information during her OSI testimony in 2004 or her subsequent OEA testimony in 2006. The OSI Investigator sought out her testimony while investigating LaVerna Simms' sexual harassment complaint, and then Agency sought out her testimony in the OEA proceeding. In neither instance did she come forward on her own to make a complaint against Employee, or to offer testimony against him. Robertson's and Jenkins's sworn testimonies are at odds over whether Robertson and Masi were "dating"

or together on several social occasions. Regardless of the facts, and whether Robertson ever dated Masi, under the enumerated provisions of the Program Statement, once she directed Masi to leave her alone, and reiterated that directive, which apparently was not heeded, his conduct amounted to sexual harassment. Once mandated by OSI and then OEA to testify, I conclude that her testimony in both proceedings was credible and consistent.

A review of the total record underscores that LaVerna Simms was at most a reluctant complainant. The evidence, while very convincing, also underscores that she did not want to file the complaint of sexual harassment against Employee. Perhaps she appreciated the magnitude of what filing a sexual harassment complaint entailed. As well, it is clear that neither Agency nor OSI staff had done a good job of fully acquainting Agency employees on the full components of sexual harassment, particularly the details of how to pursue filing a harassment claim, and what to expect as the claim progressed.

Simms endured his sexual harassment for approximately six years. The claim ripened to a complaint when Masi touched her a second time, after she had clearly put him on notice not to ever do so again, following the first incident. That Employee's counsel has sought to make a major distinction between a "touch" and a "fondle" is without merit or distinction, given that Simms had tried for such a long period to deflect Employee's unwanted attention from herself, including that he seemingly undressed her with his eyes on occasion. I conclude that Simms's testimony before me was credible and consistent.

Goldstein, the OSI Investigator, determined in her investigation that Employee was not credible, and had no defense to the testimonies of LaVerna Simms and the five other CCHPS employees who testified that Employee had, on at least one to two occasions, and up to 20 times in another instance, asked them for dates. Further, in some instances, he also made comments of a sexual nature to some of them.

Tom Hoey, the Administrative Review Hearing Officer, did not find Employee to be credible in his defense of the proposed adverse action for termination, which was premised upon the probable finding of sexual harassment by the OSI. For a variety of reasons, Hoey recommended a lesser penalty, i.e., a 120-day suspension, because Employee had no previous sexual harassment violation in his employment history. As well, Hoey apparently did not view Employee's conduct as egregious enough to warrant removal, a decision which sent huge shockwaves throughout certain sectors of Agency's staff, who were beyond frustration that such sustained, highly inappropriate conduct on Employee's part, could be met with less than the maximum penalty of termination, despite being the "first offense."

Regardless of the Agency-based politics at work, coupled with a claim that provisions in the union contract contributed mightily to Agency's not being able to terminate Employee on his first offense, I find that Masi's sworn testimony was grossly contradictory between the two proceedings, the effect of which renders his total testimony, including his OEA testimony, as not credible. In the face of the convincing

testimony from multiple credible witnesses, I find that the OEA should sustain Agency's cause generated by the gross misconduct on Employee's part, clear evidence of Malfeasance, as defined in DPM § 1603.4. Further, nothing in the nature of how he comported himself in this matter over a sustained period of time could reasonably be determined to lead to only a *de minimis* offense, which might carry no corrective or adverse action.<sup>112</sup> Employee's offense was gross and very significant in every respect. I find that the Agency-imposed penalty of a 120-day suspension should likewise be upheld.

### CONCLUSIONS OF LAW

The courts have long established that an adverse action may be taken against an employee who has engaged in "conduct unbecoming" to their employment.<sup>113</sup> Indeed, the history of DPM Chapter 16, General Discipline And Grievances (June 9, 2000) § 1603 Definition Of Cause: General Discipline, is rooted in the ability of the D.C. Government to discipline employees who are found to have engaged in conduct unbecoming their status as an employee.

Subsection 1603.3, provides that the definition of "cause" includes, without limitation, Malfeasance.<sup>114</sup> Employee was charged with Malfeasance. Therefore, Agency's action was for cause as defined in §1603.4. Section 1603.5 provides that "No employee may be subject to a corrective or adverse action under this chapter for a *de minimis* violation for the cause standard contained in this section." Sexual Harassment is defined in Agency's Program Statement, Subject: Sexual Harassment Against Employees, 3310.4F (December 22, 2003) as:

[U]nwelcome sexual advances, requests for sexual favors, and other conduct (verbal or physical) of a sexual nature when:

1. Submission to such conduct is made a term or conditions of employment, either explicitly or implicitly;
2. Submission to or rejection of such conduct by an employee is used as the basis for employment decisions affecting such employee;
3. Such conduct had the purpose or effect of unreasonably interfering with an employee's work performance; or
4. Such conduct creates an intimidating, hostile or offensive working environment.

Among the list of unwelcome verbal behaviors provided in the policy are:

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<sup>112</sup> See DPM § 1603.5. As well, *Black's Law Dictionary*, Eighth Edition (1999), defines *de minimis* as something trifling, lacking significance.

<sup>113</sup> See *Kelly v. Johnson*, 125 U.S. 238 (1976); and *Fugate v. Phoenix Civil Service Board*, 791 F.2d 736 (9<sup>th</sup> Cir. 1996).

<sup>114</sup> See DPM § 1603.3(7), Malfeasance. As well, *Black's* defines "Malfeasance" as a wrongful or unlawful act, especially by a public official.

1. Making suggestions or sexual comments about another person's or one's own anatomy, figure, appearance, or clothing;
2. Asking out a person who has made it clear that she or he is not interested;
3. Turning work discussions to sexual topics;

Unwelcome non-verbal or physical behaviors include:

1. Looking a person up and down, fixing eyes on sexual parts of anatomy;
2. Touching a person's body part, hair or clothing.

The U.S. Supreme Court held in *Meritor Savings Bank v. Vinson*, 477 U.S. 56, 57, 66 (1986), 29 C.F.R. Section 1604.11(a)(1) and (2), that sexual harassment is a form of sex discrimination which violates Title VII if it, explicitly or constructively, alters the terms or conditions of an individual's employment. The Court further held that sexual harassment includes conduct of a sexual nature that unreasonably interferes with an employee's job performance or creates an intimidating, hostile or offensive work environment.

The U.S. Supreme Court subsequently held in *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993), that to establish a hostile environment claim, a complainant must show that the conduct at issue was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. The Court further held that the "resultant work environment must be both objectively and subjectively offensive." In other words, the complainant must show that (a) a reasonable person would have found the environment hostile and abusive, and (b) the employee did perceive it that way. *Id at Pp. 21-22.*

Adhering to the guideline enumerated by the Supreme Court, the Seventh Circuit Court held in *Bakerville v. Culligan International Co.*, 50 F.3d 428 (7<sup>th</sup> Cir. 1995), that when a plaintiff bases a claim of sexual harassment on the "hostile environment" theory, a Title VII violation will be found only where the incidents, comments, or conduct complained of occur with some frequency. Although Title VII matters are beyond the jurisdiction of OEA, a finding that Employee's conduct created a hostile work environment is still within this AJ's authority to determine. And in that vein, I do so find that his conduct, engaged in over a multi-year period, did indeed create a hostile work environment, as reflected in the sworn testimony of several female witnesses, all of whom considered Employee to at least be a nuisance, but at least two of whom, Simms and Robertson, considered him to be very harassing over a sustained period of several years.

### ORDER

Based upon my evaluation of the substantial record that was created in this matter, including the evidence adduced during three days of the evidentiary hearing, Agency's and Employee's substantial pleadings, and all exhibits entered into the record, it is,

ORDERED, that Agency's Motion to sustain a finding that Employee's actions constituted sexual harassment and supported the cause of charging Employee with Malfeasance, is GRANTED; and it is,

FURTHER ORDERED, that Agency's action, having determined that Employee committed the act of sexual harassment as charged, which conduct included creating a sustained hostile work environment, is UPHELD; and it is,

FURTHER ORDERED, that Agency's decision to impose upon Employee a disciplinary penalty of a 120 calendar days suspension without pay for sexual harassment violations, is likewise UPHELD.

FOR THE OFFICE:

/ S /

Rohulamin Quander, Esq.  
Senior Administrative Judge