THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
HERMAN VILMENAY	)	OEA Matter No. 1601-0047-09
Employee	)	
	)	Date of Issuance: February 5, 2013
	)	
D.C. PUBLIC SCHOOLS,	)	
DEPARTMENT OF TRANSPORTATION	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Herman Vilmenay ("Employee") was a School Bus Attendant for the D.C. Public Schools, Department of Transportation ("Agency"). On October 27, 2008, Agency sent Employee a notice that he would be terminated from his position effective November 10, 2008.[1] The notice provided that Employee was removed for sexual harassment.[2]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 19, 2008. He argued that there was no basis for his termination and that he was not provided a justification for Agency's action against him. Therefore, he requested that he be

[1] Employee received Agency's final decision terminating him on November 10, 2008.
[2] Agency claimed that Employee inappropriately hugged and kissed a student's parent without her approval. Agency went on to note that based on an investigation of his conduct, Employee's behavior was deemed offensive, inappropriate, and intolerable. *Agency Proposed Notice of Termination* (November 24, 2008).

reinstated with back pay.[3]

Agency filed its Response to Employee's Petition for Appeal on February 23, 2009. It claimed that it received a complaint on October 14, 2008, from Brenda Senn, a parent of one of its students. Ms. Senn alleged that she was sexually assaulted when Employee kissed and hugged her. She explained that the gestures were unwelcomed and unwarranted in the presence of her child. In addition to Ms. Senn, Agency interviewed the bus driver and Employee. It contended that although Employee denied the allegations made by Ms. Senn, the bus driver stated that he observed Employee kiss and hug her.[4] As a result of the investigation, Agency concluded that Ms. Senn's complaint was adequately substantiated.[5]

After conducting an evidentiary hearing, the OEA Administrative Judge ("AJ") issued his Initial Decision in this matter. He held that Employee did kiss and hug the parent. However, he provided that Agency failed to produce any policy, regulation, or statute to define sexual harassment either in its notice to Employee or during the OEA hearing.[6] The AJ reasoned that as the disciplining body, Agency had a duty to specify which cause of action justified Employee's removal. It failed to specify which cause was taken against Employee, and sexual harassment is not a specifically cited cause of action in the DPM. The AJ ruled that because Agency failed to provide the cause of action, it could not legally discipline Employee.[7]

The AJ went on to reason that there were two types of sexual harassment – a hostile-environment and *quid pro quo*.[8] He held that the hug and kiss by Employee did not constitute

[3] *Petition for Appeal* (November 19, 2008).
[4] The bus driver testified that he assumed Employee and Ms. Senn knew each other.
[5] *Agency's Response to Petition for Appeal* (February 23, 2009).
[6] Agency made a generic reference that the District Personnel Manual ("DPM") provided the causes of action that could be taken against an employee.
[7] *Initial Decision,* p. 4-5 (March 24, 2010).
[8] According to the AJ, hostile environment harassment occurs in a work environment where an employee is subjected to unwelcome verbal or physical behavior that is severe or pervasive. *Quid pro quo* is the satisfaction of a sexual demand being made as the basis for an employment decision.

quid pro quo harassment. Similarly, a reasonable person would not determine that Employee's behavior rose to the level of hostile environment harassment because it was not severe or pervasive to create an abusive environment. Moreover, the student's mother was not an Agency employee to justify a hostile work environment or *quid pro quo* harassment. As a result, the AJ ruled that Employee's conduct was not sexual harassment. Consequently, Agency was ordered to reinstate Employee with back pay and benefits.[9]

Agency disagreed with the AJ's ruling and filed its Petition for Review with the OEA Board. It asserts that under DPM §1619(5)(c), removal is warranted for the first offense of sexual harassment. Agency explains that the DPM §1619(5)(c) description of sexual harassment includes touching; thus, Employee's actions against the student's mother was sexual harassment. It further opines that the AJ erred in relying on a definition of sexual harassment that required the existence of a workplace or academic environment, instead of the definition provided in the DPM. Agency reasons that because Employee's actions were covered by DPM §1619(5)(c), its removal action against Employee should be upheld.[10]

Subsequently, Employee filed his Response to Agency's Petition for Review. He argues that the AJ found that Agency failed to prove that any sexual harassment occurred. Employee contends that even if a hug and kiss occurred, a rational person would not find that such conduct was of the nature of sexual harassment. He explains that Agency never defined sexual harassment pursuant to any statutory or regulatory language; thus, it was never an established cause of action against him. Therefore, Employee requests that the Initial Decision be upheld.[11]

The AJ in this matter held that Agency failed to produce any policy, regulation, or statute to define sexual harassment either in its notice to Employee or during the OEA hearing. After

[9] *Initial Decision*, p. 5-8 (March 24, 2010).
[10] *Agency's Petition for Review,* p. 2-3 (April 27, 2010).
[11] *Employee's Response* (June 1, 2010).

review of the record, this Board agrees with the AJ's assessment. Employee's notice of final agency decision is void of any mention of the regulation or statute upon which it relied to terminate Employee. The notice simply states "this letter is to notify you of the proposed termination of your employment as a Bus Attendant . . . for the following just cause(s): sexual harassment –inappropriately touching and kissing a parent without approval."[12] It was not until Agency filed its Petition for Review that it offered that DPM § 1619(5)(c) was used to remove Employee.[13]

DPM § 1619(5)(c) provides that any on duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law, engaging in activities that have criminal penalties or are in violation of federal or District of Columbia laws and statutes, such as:

> (c) assault or fighting on duty; battery; violation of EEO laws; such as incidents of sexual harassment involving physical or financial threats, touching (Class Four felony or stalking); or other violation of EEO law that result in the loss of employment; misuse of funds; resources or property; unfair labor practices or illegal work stoppage; use or distribution of controlled substances; etc.

As provided above, DPM § 1619(5)(c) does not actually define sexual harassment. It does, however, address misconduct that is a violation of EEO laws, such as sexual harassment. Therefore, we must turn to the EEO laws to determine what constitutes sexual harassment.

Title VII of The Civil Rights Act of 1964 ("The Civil Rights Act") established the prohibition of sexual harassment. Section 703(a)(1) of Title VII, 42 United States Code

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[12] *Agency's Notice of Final Decision* (November 24, 2008).

[13] *Agency's Petition for Review,* p. 3 (April 27, 2010). In accordance with OEA Rule 634.4 "any objections or legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." Agency did not reference its reliance on DPM § 1619(5)(c) until it filed its Petition for Review. This regulation was not presented as the cause of action taken against Employee, and, thus, it is within this Board's discretion not to consider Agency's argument that it relied on this regulation. This Board will only address this matter further because, despite Agency's failure to present this cause of action, the AJ addresses the definition of sexual harassment as provided in DPM § 1619(5)(c) and other related regulations.

("U.S.C.") § 2000e-2(a) (1991) provides that "it shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]" In 1980, the Equal Employment Commission issued guidelines declaring sexual harassment a violation of Section 703 of Title VII and established criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment.[14]

Specifically, 29 Code of Federal Regulations ("C.F.R.") § 1604.11(a) (1999) provides the following:

> (a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when
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> (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
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> (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
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> (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Thus, there are three ways in which one's actions are deemed sexual harassment. The unwelcomed sexual conduct must be made as a condition of employment, the basis for employment, or create or interfere with an individual's work environment.

As the Supreme Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), provided, the terms *quid pro quo* and hostile work environment do not appear in the statutory text of 29 C.F.R § 1604.11(a) (1999). These terms first appeared in academic literature by C. MacKinnon titled Sexual Harassment of Working Women (1979). The terms then found their way into a decision by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57

[14] Section 1604.11 of the Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11

(1986). The Court in *Meritor* held that "sexual harassment . . . is directly linked to the grant or denial of an economic *quid pro quo*, where such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." The Court further opined that since the EEOC guidelines were issued, courts have uniformly held that proving discrimination on the basis of sex requires a hostile or abusive work environment. Finally, it reasoned that "for sexual harassment to be actionable, it must be sufficiently severe or persuasive to alter the conditions of [the victim's] employment and create an abusive working environment."[15]

There is a clear definition of sexual harassment offered in the statutory, regulatory, and case law related to EEO claims, as outlined in DPM § 1619(5)(c). Based on these definitions, Employee's behavior of kissing and hugging Ms. Senn did not rise to the level of sexual harassment. His action was not the basis of an employment decision. It was not linked to the grant or denial of an economic deal. Employee's action did not interfere with Ms. Senn's work performance, nor did it create an intimidating, hostile, or offensive work environment. These claims of sexual harassment could not have resulted from Employee's actions because Ms. Senn was not an employee of the Department of Transportation. Title VII of The Civil Rights Act of 1964, 29 C.F.R. § 1604.11(a), and the case law similarly hold that in every definition and description of sexual harassment, the harassment occurs within a work environment. Although the AJ did not rely on the definition of sexual harassment, as provided by the EEO laws, he did properly arrive at the same definition. He applied the facts of this case to the relevant and

[15] *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986). The *Burlington* court held that in *Meritor* the distinction was made between *quid pro quo* claims and hostile environment claims. It reasoned that "both were cognizable under Title VII, though [a hostile environment] requires harassment that is severe or pervasive. The principal significance of the distinction [was] to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain that hostile environment must be severe or pervasive." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 751-753 (1998).

applicable regulations and statutes. As a result, we must DENY Agency's Petition for Review and uphold the Initial Decision.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**.

FOR THE BOARD:

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William Persina, Chair

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Vera M. Abbott

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Sheree L. Price

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.