STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

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ATTORNEY GENERAL

MEMORANDUM

July 29, 2019
Attorney-Client Privilege

TO: Alma Wheeler Smith
Civil Rights Commission Chairperson

FROM: Jeanmarie Miller
Assistant Attorney General
CLEE Division

RE: Department of Civil Rights

The Department of Attorney General was asked to offer advice regarding the following questions:

1. What was the Michigan Department of Civil Rights' obligations toward its employees following the receipt of a complaint made by an employee regarding the conduct of the Director?
2. Does the Director of the Michigan Department of Civil Rights have any contractual rights in his position as Director?

What was the Michigan Department of Civil Rights' obligations toward its employees following the receipt of a complaint made by an employee regarding the conduct of the Director?

On May 31, 2019, MDCR employee Todd Heywood reported to his immediate supervisor Vicky Levengood that Director Arbulu had made inappropriate comments to him at an MDCR event. The comments were of a sexual nature and were made regarding an individual that Director Arbulu saw in the parking lot of the event. Once this complaint was made, MDCR had an obligation to investigate the complaint.

Michigan law is clear that an employer is liable for the actions of an employee who creates a hostile environment only when the employer knew or should have known of the problem and failed to take prompt, appropriate, remedial action. *Radtke v Everett*, 442 Mich 368, 396 (1993). "An employer, of course, must have notice of the

alleged harassment before being liable for not implementing action." *Id.* at 396-397. Therefore, if an employer wants to avoid liability it must be able to demonstrate that "it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Id.* at 396. Thus, MDCR was obligated to investigate the complaint made by Todd Heywood.

"[A] hostile work environment claim is actionable when the work environment is so tainted that, in the totality of the circumstances, a reasonable person in the plaintiff's position would have perceived the conduct at issue as substantially interfering with employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Radtke v Everett,* 442 Mich 368, 372 (1993). Therefore, an employee must prove that his or her "workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v Forklift Systems,* 510 US 17, 21 (1993) (citations and internal quotation marks omitted). Not all workplace conduct that has sexual overtones can be characterized as forbidden harassment. Rather, harassment must affect a term, condition or privilege of employment. *Meritor Sav Bank v Vinson,* 477 US 57, 67 (1986). As a general rule, isolated incidents of purported harassment will not amount to discriminatory changes in the terms or conditions of employment. *Id.* Cases interpreting this standard illustrate that the severe-and-pervasive standard is difficult to meet. For example,

- In *Clark v United Parcel Service, Inc*, 400 F3d 341 (CA 6, 2005), the Sixth Circuit found that the plaintiff failed to make a prima facie showing of a hostile work environment where she alleged a few relatively isolated incidents over a period of approximately two and a half years in which her supervisor twice placed his vibrating pager on her thigh as he passed her in the hall, pulled at her overalls after she told him she was wearing a thong, and frequently told vulgar jokes. *Id.* at 351.

- In *Burnett v Tyco, Corp*, 203 F3d 980, 981 (CA 6, 2000), the Sixth Circuit found that three instances of alleged sexual harassment—plaintiff's supervisor's placing of a pack of cigarettes and a lighter inside plaintiff's tank top and brassiere; his comment, "Since you have lost your cherry, here's one [a cherry cough drop] to replace the one you lost;" and his singing to her, "Dick the malls, dick the malls, I almost got aroused"—over a five-month period to be insufficient to support a hostile work environment claim.

- In *Stacy v Shoney's Inc*, 142 F3d 436 (CA 6, 1998), the Sixth Circuit determined that a hostile work environment was not shown where, over a

two-month period, a male supervisor continuously made sexually suggestive comments about the female plaintiff's appearance; touched her breast as he removed and replaced a pen from her shirt pocket; leered at her; and told her that if he had someone like her, he would never let her leave the house.

- In *Myers v Todd's Hydroseeding & Landscape*, 368 F Supp 2d 808 (ED Mich, 2005), the court found the following allegations insufficiently severe or pervasive to support a claim of hostile work environment: (1) references to "big boobs," "panty lines," and "G-strings" in sexual statements or jokes; (2) references to the size of genitals as part of sexual joke; (3) touching of plaintiff on her shoulders; (4) comments by a manager that plaintiff has aged well, was pretty, and had a nice figure; (5) the manager's directions to plaintiff to call him from home and to take a call in the conference room instead of at her desk; (6) the manager's massaging of the shoulders of a another female employee in plaintiff's presence; and (7) the manager asking the female employee to come to his house when his girlfriend was away.

When considered under the standards set forth in the cases cited above, it is our opinion that Mr. Heywood's allegations do not amount to "severe or pervasive" sexually harassing conduct. The conduct alleged pales in comparison to that alleged in the cases discussed above, wherein the allegations included explicit sexual conversation and even the touching of private body parts and still the courts held that the conduct either lacked the severity or were insufficiently pervasive to sustain a hostile environment claim.

It should be noted that while it is our opinion that Mr. Heywood's claims may not be actionable under the applicable civil rights statutes, we have not offered an opinion with regard to whether or not the conduct alleged may violate the standards of conduct that MDCR sets for its Director. That is a question that must be answered by the Commission.

Does the Director of the Michigan Department of Civil Rights have any contractual rights in his position as Director?

Based upon the information provided to our office, Director Arbulu was appointed to the position of Director pursuant to a Letter of Appointment. While the Letter of Appointment set forth a term for the employment, it did not contain any other conditions or obligations for either party.

In Michigan, appointment to public office does not create a contractual right to hold that office; any holder of public office necessarily accepts the position with the

knowledge that he or she may be removed as provided by law, and an express contract interfering with the power to abolish an office in the manner provided by law would be void as against public policy. In particular, well over 100 years ago our Supreme Court acknowledged that "[n]othing seems better settled than that an appointment or election to a public office does not establish contract relations between the person appointed or elected and the public." *Attorney General v Jochim*, 99 Mich 358, 368 (1894). See also *Molinaro v Driver*, 364 Mich 341, 350 (1961); *Robbins v Wayne Co Bd of Auditors*, 357 Mich 663, 667 (1959). "A public office cannot be called 'property,' " and it does not provide the officer with a vested right to hold his or her office until the expiration of the term. *Jochim*, 99 Mich at 367. Rather, "[a]n office is a special trust or charge created by competent authority." *Solomon v Highland Park Civil Serv Comm*, 64 Mich App 433, 438 (1975). Public offices are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public. They are not the subjects of contract, but they are agencies for the State, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred it. *Jochim*, 99 Mich at 367.

Thus, based upon the above, it is our opinion that Director Arbulu does not possess any contractual relationship or rights in his appointment to the position as Director.

JM/lsa

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