VERMONT LABOR RELATIONS BOARD

APPEAL OF:	)	
	)	DOCKET NO. 02-23
CATHY FARMAN	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On May 9, 2002, Cathy Farman ("Appellant") filed an appeal with the Vermont Labor Relations Board pursuant to 3 V.S.A. Section 1001(a), contending that she was improperly terminated from employment with the State of Vermont, Air National Guard, Starbase Program ("Employer") during her original probationary period based on sex and age discrimination and harassment.

A hearing on the merits was held before Labor Relations Board Members Edward Zuccaro, Acting Chairperson; Carroll Comstock and John Zampieri on June 19, 2003, in the Board hearing room in Montpelier. Appellant represented herself. Assistant Attorney General William Reynolds represented the Employer. Appellant and the Employer filed post-hearing briefs on July 3, 2003.

FINDINGS OF FACT

1. Starbase Vermont was started at the Vermont Air National Guard in 1994. It serves students and teachers by providing hands-on learning experiences, including teambuilding, in science, math and technology. During the school year, schools apply to have their students participate in a five-day curriculum conducted over five weeks. Off-site programs and summer sessions also are available. Starbase offers workshops for teachers (State's Exhibit 10).

2. In the summer of 2001, the Employer placed newspaper advertisements announcing that the Starbase program was expanding and seeking to fill five vacancies: two Training Coordinators (pay grade 21), one in South Burlington and one in Rutland; one Training Specialist in Rutland (pay grade 19) ; and two Program Specialists (pay grade 18), one in South Burlington and one in Rutland (State's Exhibit 8).

3. The Training Coordinator provides instructional development and training work involving the coordination, administration and operations of the Starbase program, and fund raising and instruction for the program. Duties include supervision of other members of the Starbase program staff, overseeing modifications of the curriculum, and organizing, overseeing and implementing public relations functions (Appellant's Exhibits 16-17).

4. On August 31, 2001, Appellant, who lived in Castleton, filed an employment application with the Vermont Department of Personnel for a Training Coordinator position with the Starbase Program. Appellant stated on the application that the reason for leaving her current position as Executive Coordinator at Killington was "to resume a teaching career" (State's Exhibit 9).

5. At the time she applied for the Training Coordinator position, Appellant had a Bachelor of Science degree in Elementary Education from Keene State College and a Masters degree in Education from the University of Vermont. Included among her previous work experience was six years, from 1983 to 1989, as an elementary school teacher with the Franklin Central Supervisory Union in St. Albans, Vermont. She had worked at the Killington Resort for the two and one-half years preceding her application, first as a junior accountant and then as Executive Coordinator (State's Exhibit 9).

6. Doug Gilman, Director of the Starbase program, hired Chris Dermody for the South Burlington Training Coordinator position in October 2001. At the time he was hired, Dermody had a Bachelor of Science degree from Johnson State College and a Masters degree in Education from the University of Vermont. He had 30 years teaching experience. He had approximately five years experience teaching the Starbase curriculum and had instructed other teachers how to teach the Starbase curriculum. Dermody requested to be hired at above the normal starting salary for the Training Coordinator position due to his qualifications and experience. Gilman agreed to Dermody's request.

7. Shortly after making the decision to hire Dermody in October 2001, Gilman was called to active duty with the Vermont Air National Guard. Dan Myers, who taught in the Starbase program, was appointed Interim Director of Starbase. Dermody did not begin work until late December 2001.

8. Prior to going on active duty, Gilman had chosen the applicants to be interviewed for the Rutland Training Coordinator position. One of the applicants he chose to interview was Appellant. On December 18, 2001, a three- person panel consisting of Myers, Jean Kleptz and Dick Strifert interviewed Appellant. During her interview, Appellant discussed her teaching experience and stated that she was a team player. When Appellant was asked the question "Why do you want this job?", she responded with words to the effect of: "I love teaching, and this sounds like a dream job" (State's Exhibit 11).

9. Myers and Strifert decided that Appellant was the best candidate for the Rutland Training Coordinator position. In a memorandum to his superiors, Myers summed up the reasoning for selecting Appellant: "Although all three of the finalists

have the appropriate education and training, Cathy stood out as a team player with an enthusiasm and love for teaching that surpassed the other candidates" (State's Exhibit 11).

10. Appellant was offered the job in early January 2002. In a January 9, 2002, telephone conversation, Dermody informed Appellant that the Rutland Starbase site was not yet completed, and that she would work at the South Burlington Starbase office until the Rutland site was completed. Dermody also told Appellant that she would be able to do some of her work from home when computer network capability was established. Appellant accepted the Training Coordinator position. Appellant did not request to be paid above the normal starting salary for the position. Appellant reported to work at the South Burlington Starbase office on January 15, 2002.

11. When Appellant started work, the Employer provided her with a copy of the New Employee Orientation Handbook. The Handbook contained the State of Vermont Personnel Policies and Procedures, including Policy and Procedures 3.1 and 3.3. Police and Procedure 3.1 provides that the "State of Vermont is opposed to and prohibits without qualification the harassment of anyone on the basis of gender", and "commits itself to quick and effective actions to ensure that sexual harassment does not occur or persist". It further provides:

> T)he fulfillment of that commitment will in large part depend on the willingness of employees to report prohibited behavior. A timely response to sexual harassment is essential to protect victims from further unwelcome behavior. It also ensures that the person responsible for objectionable behavior understands its impact on others. A timely report provides the best opportunity for the employer to expeditiously and effectively address the matter with the least possible adverse impact on all parties concerned.
>
> Therefore, all employees should report any incidents of sexual harassment they experience, witness, or know of. . .

. . .
Any employee who believes (s)he has been the subject of sexual harassment shall report the alleged act(s) as soon as possible to any one of the following:

1. the immediate supervisor;
2. any departmental management staff;
3. any departmental personnel officer;
4. any departmental Equal Employment Opportunity (EEO) Officer;
5. any member of the Department of Personnel Employee Relations staff, 110 State Street, Montpelier, VT, 802-8283454.

. . .

(State's Exhibits 3, 6)

12. Policy and Procedure 3.3 states in pertinent part:

PURPOSE AND POLICY STATEMENT

The State of Vermont is opposed to and contractually bound to respond to discrimination against employees on the basis of . . . sex . . . age . . . The purpose of this policy is to establish protocols for reporting and investigating allegations of discrimination. . .

. . . (E)very manager and supervisor within the State of Vermont is responsible for providing a work place free from discrimination. This duty includes disseminating this policy so that all employees are aware that:

they are not required to endure discrimination,

. . .; and

charges of discrimination will be impartially and immediately investigated.

. . .

REPORTING AND RESOLUTION OF COMPLAINTS

The State, through this policy, commits itself to take necessary action to deter discrimination in the workplace. However, the fulfillment of this commitment will, in large part, depend on the willingness of employees to report prohibited behavior. A timely response to discrimination is essential to protect victims from further unwelcome behavior. It also ensures that the person responsible for objectionable behavior understands its impact on others. A timely report provides the best opportunity for the employer to expeditiously and effectively address the matter with the least possible adverse impact on all parties concerned.

> Therefore, all employees should report any incidents of discrimination, based upon any of the prohibited factors, that they experience, witness, or of which they are aware. In some instances, such as where discriminatory or offensive behavior may be unintentional, informal and direct objection can be the best way to remedy a problem. In such instances, employees are encouraged, but not required, to identify objectionable actions to those who commit them, and to try to resolve issues informally.
>
> The following process allows employees to freely report incidents of discrimination, free from threats of reprisal, and protects the rights of all parties involved.
>
> . . .
>
> Any employee who believes (s)he has been the subject of discrimination shall report the alleged act(s) as soon as possible to any of the following:
>
> an immediate supervisor;
>
> any agency management staff;
>
> any agency personnel officer (agency personnel officers act as agency Equal Employment Opportunity (EEO) Officers); or
>
> any member of the Department of Personnel Employee Relations staff, 110 State Street, Montpelier, VT 05620, 802-828-3454.
>
> (State's Exhibit 4)

13. In January of 2002, the Starbase program was short-staffed. There were three vacant positions: Administrative Assistant in South Burlington, Training Specialist and Program Specialist in Rutland. The Employer had hired Angie Perez in early December 2001 as a Program Specialist in South Burlington. Perez was younger than Appellant. As of January 2002, Myers was the only Starbase employee who had sufficient experience to fully teach the Starbase curriculum. Even though he was Interim Director, Myers decided that he had to spend most of his time out of the office teaching

classes along with Perez. Myers placed Dermody in charge of administrative matters for the Starbase program, including working on getting the Rutland site up and running.

14. One of Dermody's responsibilities was to ensure that all monies allocated to the Rutland Starbase budget for the year were spent by February 28, 2002, the deadline for expenditure of monies for the Rutland office. Dermody requested that Appellant process the purchase orders for the Rutland site. A conflict developed between Dermody and Appellant over the purchase orders. Dermody requested that Appellant develop a new purchase order form. There was delay in the form being finalized. This ultimately resulted in there being insufficient time for Dermody to properly review the purchase orders and expend all the monies allocated to the Rutland budget. Dermody blamed Appellant's delay in creating the new form for the purchase order problem. Appellant attributed the problem to the Employer's business office not wanting to change the old purchase order form.

15. On January 22, 2002, Myers and Perez taught at the Orchard School. Appellant was assigned to observe them. Among the planned activities was launching model rockets. Appellant appeared at the school wearing a dress. Myers informed Appellant that casual clothing was worn on rocket launch days because they were setting up and launching rockets in the snow. Myers believed that Appellant's dress could be damaged due to chemicals and dirt involved in rocket launching.

16. January 23, 2003, was another rocket launch day at the Orchard School. Appellant appeared at the school wearing slacks and a blouse. Myers informed Appellant that the Starbase program was not responsible for damage to her clothing.

17. During the workweek of February 4 – 8, 2002, Dermody scheduled a week of classes at the Clarendon School, which is located near Rutland. Dermody stayed in a Rutland-area hotel that week rather than commute from his home in St. Albans. Appellant was involved with Dermody in the teaching of classes.

18. Classes that week ended before the end of the workday for Dermody and Appellant. After class, they traveled to locations outside the school to do work. They shopped for equipment and supplies. On one occasion, they went to the Rutland Library. On another occasion, Dermody suggested that they go to Sewards to have milk shakes and discuss the day. On another occasion, when Dermody realized that he did not have the computer software he needed to download photographs, he asked Appellant if they could go to her house to use her son's computer, which Appellant previously had mentioned to Dermody, to download the software. Appellant denied Dermody's request. Appellant called her husband at his office and arranged to use a computer there to download the software. During this week, Dermody did not make sexually suggestive comments or sexual overtures to Appellant.

19. Dermody initially informed Appellant that she would be issued a cell phone, an e-mail account, and a laptop computer with remote access to the Starbase system, which would enable her to work at home part of the time. Dermody experienced technical difficulties in attempting to establish an e-mail account for Appellant. When he inquired about getting a cell phone for Appellant, he discovered that a long service contract would be required. Due to not having a work cell phone and e-mail account, Appellant used her personal cell phone and email account. Appellant did not request reimbursement for expenses associated with use of her cell phone and e-mail account for

work matters. The Employer provided Appellant with a laptop computer but remote access to the Starbase system was never achieved due to network security issues and technical problems. Due to these issues, none of the Starbase employees have remote access to the Starbase system.

20. In February 2002, Appellant expressed concerns to Dermody about having to commute daily to the Starbase office in South Burlington and told him that the work she was performing did not meet her job description. Dermody discussed these concerns with Gilman and Myers. At a February 25 meeting among Appellant, Dermody and Myers, Dermody handed Appellant a letter from him that provided:

> Cathy,
>
> After listening to your concerns about traveling to Burlington and that the job did not meet the description it would be good to clarify some points. Your concerns were brought to the attention of Dan Myers and Doug Gilman.
>
> Yes, the position you were hired for was/is the Training Coordinator in Rutland. Unfortunately, there is no Rutland site and there is nothing to supervise at the moment in Rutland during your probationary period, the needs of the Starbase organization you will need to plan to drive to Burlington and Northern Schools for the next cycles. (sic)
>
> We will pay you travel time as part of your work day, and the state will pay $.36 a mile for driving from your home to Burlington. If you wish you may sign a car out of the motor pool, when available, and use it to drive back to the Rutland Armory. This car should be available for a week at a time.
>
> In May you will be planning and running the Rutland Town School Classes with support from BTV. It should be a time when you can count on working in Rutland.
>
> Cathy please understand that by June it is hoped that there is a home in Rutland for the Rutland staff. If this is not the case traveling. (sic) We will if possible make accommodations for you but it is best to state that travel is the fact for the time being. Perhaps when the other Rutland staff are on board you can car pool coming to Burlington.

> Since we are such a small operation we are in need of all being a team. Right now there are needs in Burlington.
>
> /s/ Chris
>
> (Appellant's Exhibit 15)

21. At the February 25 meeting, Appellant appeared angry. She did not engage in discussion seeking to resolve matters at issue. Appellant told Myers and Dermody that she did not know whether she wanted to stay in her Starbase position. She told them she would let them know later that week whether she was going to stay. Appellant informed them later in the week that she intended to stay in her position.

22. Myers and Dermody met with Appellant on February 26, 2002, to further address Appellant's concerns, provide her with performance feedback and clarify their expectations of the Training Coordinator position. They gave Appellant a copy of the job specifications for the Training Coordinator position. They discussed with her job expectations. This included supervision of students, teamwork, positive work behavior, and knowledge that extensive travel is part of the job. Myers and Dermody discussed positive work behavior with Appellant because they viewed her attitude as negative during her employment. They also discussed the importance of understanding the Starbase program with respect to teaching (i.e., mentoring, teamwork and knowledge of material) and office/budget matters. Myers and Dermody also discussed with Appellant the Starbase schedule for the next several months (Appellant's Exhibits 16 & 17; State's Exhibit 17, pages 61, 63-64).

23. Appellant was scheduled to be on the interview panel for the hiring of the Administrative Assistant for the Rutland Starbase office. On February 28, 2002, the day before the interviewing was to begin, Appellant informed Myers that she had a medical

appointment on one of the interview days and asked Myers if this was a problem. Myers did not indicate that it was a problem. Myers then arranged to have Perez replace Appellant on the interview panel. On March 1, 2002, after the panel interviewed a candidate, Appellant told the panel that she did not care for the candidate and would not hire her. Myers told Appellant that her comments were inappropriate because she was not on the interview panel and had no right to comment (State's Exhibit 19).

24. On March 21, 2002, Appellant taught a class at the Bristol Elementary School. Myers observed the class. Appellant had problems during the class: she did not control the class, she blocked the view of some students of the overhead projector screen, she talked to the screen instead of the students, and did not connect well with the students. After the class, Myers gave Appellant feedback on her performance.

25. On March 22, 2002, Appellant taught physics and teambuilding at a class in Williston. In teaching physics, Appellant was unable to explain some physics concepts and did not cover all of the assigned material. Myers intervened to explain the physics concepts to the students. Appellant was inadequately prepared to teach the physics lesson. In the teambuilding lesson, Appellant left out one of the key elements of the exercise.

26. Myers observed Appellant teaching on three or four subsequent occasions. He did not notice an improvement in Appellant's teaching. He found her to not connect with students and to be condescending towards them.

27. On March 27, 2002, interviews were conducted of applicants for two positions in the Rutland Starbase office. After the interview, Myers made a comment to the effect that Appellant probably would not be teaching at Starbase for 15 years.

28. In early April, 2002, Appellant and Perez attended the National Congress on Aviation and Space Education in Arlington, Virginia. Appellant asked if she could bring her family on the trip and Myers and Dermody agreed. Dermody made the original reservations at the Marriott Hotel in Arlington for Appellant and Perez. Dermody arranged to have the Employer send a check to the hotel directly to pay for Appellant's and Perez's rooms but suggested to both Appellant and Perez that they use their personal credit cards to hold the reservations for their rooms in case they arrived late (State's Exhibit 18).

29. Dermody reserved a smoking room for Appellant. Appellant wanted a non-smoking room. When Dermody informed Appellant that he reserved a smoking room for her, she called the hotel and was able to reserve a non-smoking room. She reserved the room with her personal credit card. When Appellant told Dermody of the reservation she had made, Dermody contacted the hotel and canceled the reservation he had made for Appellant (Appellant's Exhibits 53-55).

30. Dermody reserved a room for Perez at the Marriott Hotel in Arlington. Perez did not have a credit card and her debit card did not have sufficient funds to cover the cost of her room. She informed Dermody of this and asked him if she could be given a State check to cover the cost of her hotel room as a precaution. Dermody arranged for Perez to receive this check. Perez ultimately used this check to pay for her hotel room. The check that the Employer had sent to the hotel directly to pay for Appellant's and Perez's rooms had not been cashed or credited by the hotel.

31. When Appellant checked in at the Marriott Hotel in Arlington, she was informed that her room reservation was canceled. Appellant made reservations at a hotel

one block away from the Marriott, the Sheraton Crystal City Hotel. Appellant charged her room on her credit card and received reimbursement from the Employer. Appellant believed that the cancellation of her room was the fault of the Employer. Appellant left a message with Employer Personnel Administrator Judy Stone blaming the Employer for the cancellation of her room. The evidence does not indicate that the Employer was at fault (Appellant's Exhibits 57-59, State's Exhibit 18).

32. On April 1, 2002, Myers informed Appellant and Perez that he would be meeting with them on April 15, 2002, to review their performance. On April 15, Appellant called into the office and indicated that she would not make it to work that day because her car would not start. Thus, Myers did not meet with her that day. Myers and Dermody met with Perez on April 15 and discussed her job performance.

33. Neither Myers nor Dermody performed a written performance evaluation on Appellant.

34. On April 19, 2002, Myers gave Appellant a letter that provided in pertinent part:

> This letter is to advise you that you are separated from employment during your original probationary period as a Training Coordinator with the Military Department's STARBASE Vermont Youth Program. This action will be effective immediately upon receipt of this letter. It has become evident during your tenure in this position that you have not met the performance expectations for the position.
>
> (State's Exhibit 20)

35. Myers and Dermody concluded that Appellant should be dismissed because she had displayed a negative work attitude during her employment and had performed poorly as a teacher. They concluded that she was not a team player and that her attitude had an adverse effect on the work environment. Myers believed that her

performance as a teacher was poor; that she was unprepared, left important parts out of lessons, did not control the class, displayed poor teaching techniques and did not connect well with students (State's Exhibit 19).

36. The collective bargaining agreement between the State of Vermont and the Vermont State Employees' Association provides in pertinent part as follows:

> . . .
> 1. Probationary employees may be . . . dismissed by the State solely at the discretion of management without regard to the provisions of this agreement and with no right to the grievance process . . .
>
> . . .
> 2. Upon execution of this Agreement, the parties agree that the (Vermont Supreme) Court's ruling (in VSEA v. State of Vermont, Sup.Ct.Doc.No. 84-509) does not expand nor diminish the statutory rights of probationary employees to grieve decisions relative to their original probationary status in accordance with Title 3 VSA, Ch. 27 Section 1001 . . .

(State's Exhibit 1)

37. Appellant did not make any reports or file any complaints alleging sex and age discrimination and harassment prior to her dismissal.

OPINION

Appellant contends that the Employer improperly terminated her from employment during her original probationary period based on sex and age discrimination and harassment in violation of 3 V.S.A. Section 1001(a). Section 1001 (a) provides in pertinent part that "classified employees in their initial probationary period . . . may appeal to the state labor relations board if they believe themselves discriminated against on account of their . . . sex . . . age". The right of probationary employees to appeal their dismissal to the Board is limited to the reasons specified in Section 1001(a). Grievance of Rogers, 18 VLRB 109, 112-114 (1995).

In cases alleging that adverse actions were taken against employees on account of prohibited factors such as sex and age, the Board has adopted the analysis developed by the United States Supreme Court in such cases. Grievance of Butler, 17 VLRB 247, 311 (1994); *Affirmed*, 166 Vt. 423 (1997). Grievance of Lowell, 15 VLRB 291 (1992). Grievance of Day, 14 VLRB 229, 285-87 (1991). Appellant alleges that her dismissal resulted from disparate treatment due to her sex and age. The central focus of inquiry in a disparate treatment case is always whether the employer is treating "some people less favorably than others because of their . . . sex" or age. Furnco Construction Corp. v. Waters, 480 U.S. 567, 577 (1978). Grievance of Day, 14 VLRB at 286. To establish a disparate treatment claim, "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." Butler, 166 Vt. at 431; *citing* Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).

The U.S. Supreme Court articulated the burdens of proof in disparate treatment cases, distinguishing between the burden of proof in a "mixed motive" case and a "pretext" case. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Here, Appellant is not bringing a "mixed motive" case since she contends that she was dismissed solely based on discrimination and not on job performance. Thus, we will analyze this as a "pretext" case.

In a "pretext" case, the issue is whether the legitimate business reason offered by the employer for the adverse action is just a pretext for the real reason of discrimination. Id. The issue in pretext cases is whether illegal or legal motives, but not both, were the true motives behind the decision. Id. In pretext cases, the analysis used is that which is set forth in Burdine, supra. Lowell, 15 VLRB at 329; Day, 14 VLRB at 286-88.

The complainant carries the initial burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination. Id. If the complainant succeeds in proving the *prima facie* case, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse action against the employee. Id. Should the employer carry this burden, the employee has to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. Id. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the employee. Id.

Thus, we first determine whether Appellant has established a *prima facie* case based on gender or age. The burden of establishing a *prima facie* case of disparate treatment is not onerous. Id. The complainant must prove by a preponderance of the evidence that he or she was subject to an adverse employment action under circumstances which gave rise to an inference of discrimination. Id. The Burdine court stated:

> As the Court explained in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors". Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. 450 U.S. at 254.

The Board has specifically applied this standard to establish a *prima facie* case in other cases when state employees in an original probationary period have contended that their employment was terminated based on the prohibited factor of gender. Grievance of Butler, supra. Appeal of Bartley-Cruz, 19 VLRB 225, 232-33 (1996).

In contending that she was dismissed due to discrimination based on gender and age, Appellant contends that she was subject to harassment due to a hostile environment. A hostile work environment exists when conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. Grievance of Butler, 17 VLRB 247, 314 (1994); *Affirmed*, 166 Vt. 423 (1997). This occurs "when the workplace is permeated with discriminatory intimidation, ridicule, and insult" that "is sufficiently severe or pervasive to alter the conditions of the victim's employment". Butler, 17 VLRB at 315, 166 Vt. at 428; *citing* Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993); Allen v. Dept. of Employment and Training, 159 Vt. 286, 289-90 (1992).

This standard requires an objectively hostile or abusive environment - one that a reasonable person would find hostile or abusive - as well as the victim's subjective perception that the environment is abusive. Butler, 17 VLRB at 315; *citing* Harris, 510 U.S. at 21. We can only determine whether an environment is "hostile" or "abusive" by looking at all the circumstances. Id. "These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. Harassment may be actionable if it is sufficiently patterned or pervasive. Butler, 17 VLRB at 315, 166 Vt. at 429.

We conclude that Appellant has not established a hostile work environment based on either gender or age discrimination. Any subjective perception by Appellant that she was subject to an hostile environment is far from supported by an objective view of the circumstances. She objected to Chris Dermody’s actions during the week the two of them

were involved in teaching classes in Clarendon. She viewed his suggestions concerning the two of them going together to locations after classes ended as evidence of a hostile environment based on her gender. We disagree. Dermody's suggestions were reasonable given that classes ended before their workday ended and the purpose of these post-class visits was limited to dealing with work issues. Further, during this week, Dermody did not make sexually suggestive comments or sexual overtures to Appellant that would be evidence contributing to a determination that sexual harassment occurred. Instead, the evidence presented by Appellant falls well short of demonstrating a hostile environment, and also does not support a conclusion that her dismissal occurred under circumstances which gave rise to an inference of discrimination based on gender.

Appellant also objected to Dan Myers' comments to her about the clothing she wore on days that they were involved in rocket launching as contributing to a hostile environment. Again, we disagree. Myers' comments that she wear more casual clothing on these days were reasonable given that clothing could be damaged due to chemicals and dirt involved in the rocket launching process. Appellant further objected to Myers' comment to the effect that Appellant would not be teaching at Starbase for 15 years. This isolated comment standing by itself is not sufficient, standing by itself, to indicate a hostile environment based on Appellant's age, and also does not support a conclusion that her dismissal occurred under circumstances which gave rise to an inference of discrimination based on her age. There is no evidence of pervasive or patterned conduct by Myers indicating that he was harassing Appellant or discriminating against her due to her age. Although Appellant testified that there were other instances where Myers

commented on her age, she did not provide specifics allowing us to examine whatever comments were made and the context in which they may have occurred.

Our conclusion that the evidence does not support a determination that Appellant was subject to harassment is bolstered by the fact that, prior to her dismissal, Appellant did not make any reports or file any complaints alleging sex or age harassment. If Appellant believed she was being subjected to a hostile environment, she should have reported it. This would have provided the best opportunity for the Employer to address alleged harassment.

Nonetheless, the absence of a hostile environment does not end the inquiry as to whether Appellant was subject to dismissal under circumstances which gave rise to an inference of discrimination against Appellant based on her gender or age. We need to examine other evidence to determine whether Appellant has established a *prima facie* case of discrimination. Upon such examination, we conclude that Appellant has not established such a case.

Appellant asserts that her claim of sex discrimination is supported by the fact that she was paid less than Chris Dermody for the Teaching Coordinator position. We conclude that the difference in their salaries does not support a discrimination claim. Dermody had much more teaching experience than Appellant, including several years teaching the Starbase curriculum. Given the importance of this teaching experience to the Training Coordinator position, Dermody had superior qualifications to Appellant and we cannot conclude that the Employer's decision to pay Dermody more than Appellant raises an inference of discrimination.

Appellant is critical of the Employer for her need to travel to South Burlington on a daily basis even though her position was advertised to be in Rutland. However, this does not assist Appellant's efforts to establish an inference of discrimination based on gender or age. Appellant had to travel to the South Burlington Starbase office rather than a Rutland location much closer to her home for the simple reason that the Rutland Starbase office was not yet completed, and the evidence does not indicate that this had anything to do with discrimination against Appellant due to her gender or age. Further, the evidence indicates that the Employer engaged in substantial efforts to lessen the adverse impact on Appellant for her travel by considering her commute between home and South Burlington as part of her regular workday, reimbursing her for her mileage and making other attempted accommodations.

Appellant also faults the Employer for not issuing her a cell phone or an e-mail account, and not providing her with remote access to the Starbase system which would have enabled her to work at home part of the time. Although Dermody had initially informed Appellant that these technological aids to her performing her work would be provided, the failure to do so does not suggest discrimination based on gender or age. Instead, technical difficulties, security issues and costs were the motivating factors.

Appellant points to her difficulties with her hotel reservations, and a younger co-worker's lack of such difficulties, when they both attended a conference in Virginia as evidence of discrimination based on her age and gender. It is true that Appellant's hotel room was canceled, requiring her to secure alternative accommodations, and that she had to charge the room to her credit card. Meanwhile, her co-worker's reservation was not canceled, and the Employer provided her with a check to pay for her room.

Nonetheless, these circumstances do not provide evidence of discrimination against Appellant based on her age or gender. It is a fact of life that hotel reservations are sometimes canceled by mistake. The evidence does not demonstrate that the Employer caused the cancellation of Appellant's hotel room or that the cancellation resulted from anything other than a mistake. Also, the fact that Appellant charged the hotel room to her credit card and the Employer provided a check to her younger co-worker is explained by the younger co-worker asking the Employer to give her a check because she did not have a credit card and her debit card did not have sufficient funds to cover the cost of her room. Appellant has not demonstrated that discrimination against her played any part in the differences in the payment of hotel rooms.

Appellant also contends that evidence of age discrimination is indicated by the Employer setting up a meeting to evaluate her performance while the performance of a younger probationary employee was not evaluated. This assertion of Appellant is not supported by the evidence. Myers met with the younger probationary employee to evaluate her performance the same day there was a meeting between Myers and Appellant scheduled to evaluate Appellant's performance.

Appellant further contends that Myers' and Dermody's criticism of her performance did not result from performance deficiencies on her part but instead solely reflected their discrimination against her due to her age and gender. The Employer contends to the contrary that the dismissal of Appellant during her original probationary period resulted from her not meeting the performance expectations for her position; that dismissal resulted from Appellant displaying a negative work attitude during her employment and performing poorly as a teacher.

The Employer has demonstrated these performance deficiencies of Appellant. There were various instances where Appellant displayed a negative attitude. These included being resistant to working out a mutually amicable solution to address her concerns about her lengthy daily commute, making inappropriate comments about a job candidate even though she was not involved in the hiring process, blaming the Employer for cancellation of her hotel room absent firm evidence to support her charge, and being unprepared to teach class. Similarly, she demonstrated substantial deficiencies as a teacher. She was unprepared for class, left important parts out of lessons, did not control the class, displayed poor teaching techniques and did not connect well with students. We conclude that these deficiencies caused Appellant's dismissal and Appellant has not demonstrated that she was dismissed under circumstances giving rise to an inference of discrimination.

In sum, we conclude that Appellant has not established a *prima facie* case of gender and age discrimination. Even assuming *arguendo* that Appellant met her burden of establishing a *prima facie* case, the Employer articulated legitimate and nondiscriminatory reasons for dismissing her - i.e., Appellant's negative attitude and poor teaching performance. Appellant has not established that these reasons for her dismissal were a pretext for discrimination. The Employer dismissed Appellant for legitimate and non-discriminatory performance reasons, rather than because of improper discrimination.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the Appeal of Cathy Farman is dismissed.

Dated this ____ day of August, 2003, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

_____
Edward R. Zuccaro, Acting Chairperson

_____
Carroll P. Comstock

_____
John J. Zampieri