



COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of Northern Virginia Community College
Ruling Number 2022-5411
June 16, 2022

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) on whether her September 13, 2021 grievance with Northern Virginia Community College (the “college” or the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On September 13, 2021, the grievant initiated a grievance alleging that a manager at the college had engaged in “libel/character assassination/defamation of [her] professional reputation” and failed to “respect professional boundaries,” citing an August 24 email in which the manager described concerns about a work-related issue involving the grievant.¹ The grievant also claims the manager engaged in disability discrimination in an August 10 email addressing the grievant’s schedule and hours of work. The grievant further argues that both emails, taken together, are evidence that the manager has created a discriminatory hostile work environment based on her race. As relief, the grievant requested an apology from the manager and an investigation of the manager’s conduct.

In response to the grievance, the college’s human resources office conducted an investigation of the grievant’s concerns.² The investigation found no violations of policy by the manager, but made recommendations concerning the individual involved to prevent further issues going forward. Following the management resolution steps,³ the college president declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

¹ The manager is not in the grievant’s direct reporting structure, though the evidence in the grievance record indicates that the manager has “dotted-line” supervisory authority over some aspects of the grievant’s work.

² The management step responses appear to have been delayed by agreement of both parties while the agency investigated the matter.

³ The second-step respondent also indicated that they would make recommendations to agency management and human resources about improving working relationships for the parties.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.⁴ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁵ Thus, claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.⁶

Further, while grievances that allege discrimination or other misapplication of policy may qualify for a hearing, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."⁷ Typically, then, the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."⁸ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁹ Workplace harassment rises to this level if it includes conduct that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."¹⁰

In this case, the grievant essentially asserts that a manager at her community college has engaged in harassing and/or discriminatory conduct that created a hostile work environment. Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment¹¹ and bullying,¹² alleged violations must meet certain requirements to qualify for a hearing. Whether discriminatory or non-discriminatory, harassment or bullying may qualify for a hearing as an adverse employment action if the grievant presents evidence that raises a sufficient question as to whether the conduct was (1) unwelcome; (2) sufficiently severe or pervasive that it alters the conditions of employment and creates an abusive or hostile work environment; and (3) imputable

⁴ See *Grievance Procedure Manual* § 4.1.

⁵ Va. Code § 2.2-3004(B).

⁶ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁷ Va. Code § 2.2-3004(A); see *Grievance Procedure Manual* § 4.1(b).

⁸ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁹ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

¹⁰ *Strothers v. City of Laurel*, 895 F.3d 317, 331 (4th Cir. 2018) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

¹¹ Traditionally, workplace harassment claims were linked to a victim's protected status or protected activity. However, DHRM Policy 2.35 also recognizes non-discriminatory workplace harassment, defined as "[a]ny targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion towards a person not predicated on the person's protected class."

¹² DHRM Policy 2.35 defines bullying as "[d]isrespectful, intimidating, aggressive and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person." The policy specifies that bullying behavior "typically is severe or pervasive and persistent, creating a hostile work environment."

on some factual basis to the agency.¹³ As to the second element, the grievant must show that they perceived, and an objective reasonable person would perceive, the environment to be abusive or hostile.¹⁴

EDR has reviewed the grievance record in its entirety, including written submissions from the grievant with additional information about the nature of her claims.¹⁵ In essence, the grievant's concerns center around two emails sent by the manager on August 10 and 24, 2021, respectively. In the August 10 email, directed to the grievant, her supervisor, and two other employees, the manager asked whether the grievant and one of the other employees copied on the message were at work since they did not appear to be present. The grievant had apparently notified her supervisor that she would be absent on August 10, but the manager was unaware. The August 24 email, directed to the grievant's supervisor as well as several other supervisors, describes work-related concerns with a group of academic advisors, including the grievant.¹⁶ The grievant contends that these emails violated DHRM Policy 2.35, were libelous and untrue, constituted a failure to respect professional boundaries, and generally undermined the grievant's professional reputation. In response to the grievance, the college conducted an investigation of these matters. The college determined that the grievant's allegations of discrimination and workplace harassment were unfounded. Nevertheless, the grievant appears to argue that the investigation did not adequately address her concerns, and she disagrees with many of the college's conclusions about the manager's conduct.

As an initial matter, we note that claims such as false accusations, defamation, and libel are not among the issues identified by the General Assembly as qualifying for a grievance hearing.¹⁷ Consequently, these aspects of the grievant's arguments would not be appropriate for resolution through the grievance procedure and cannot be qualified for a hearing on their own.

¹³ See *Gilliam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

¹⁴ *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 421 (4th Cir. 2014) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23 (1993)); see DHRM Policy Guide – Civility in the Workplace (“A ‘reasonable person’ standard is applied when assessing if behaviors should be considered offensive or inappropriate.”). “[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. 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.” *Harris*, 510 U.S. at 23 (1993); see, e.g., *Parker v. Reema Consulting Servs.*, 915 F.3d 297, 304-05 (4th Cir. 2019) (finding that a false rumor that an employee was promoted for sleeping with a manager altered the conditions of her employment because the employee was blamed for the rumor and told she could not advance in the company because of it); *Strothers*, 895 F.3d at 331-32 (holding that a hostile work environment could exist where a supervisor overruled the employee's bargained-for work hours, humiliated the employee for purportedly violating the dress code, required her to report every use of the restroom, and negatively evaluated her based on perceived slights).

¹⁵ While this ruling was pending, the grievant contacted EDR to provide additional information about the matters raised in her grievance. We have carefully considered the grievant's written responses along with the evidence in the grievance record.

¹⁶ It appears that the grievant's supervisor sent the grievant a copy of the August 24 email.

¹⁷ Va. Code § 2.2-3004 (A); *Grievance Procedure Manual* § 4.1. Because this ruling addresses only the question of whether the grievance qualifies for a hearing, EDR takes no position on the merits of the grievant's libel allegation. Moreover, libel, as a legal cause of action, would not be within the scope of the hearing officer's authority to grant relief to the extent the grievant sought monetary damages. See *Grievance Procedure Manual* § 5.9(b); *Rules for Conducting Grievance Hearings* §§ VI(C), (D).

However, we have considered the claims articulated in the grievance, in their entirety, as amounting to an assertion that the manager's conduct violated DHRM Policy 2.35.

Having carefully reviewed the grievance record and considering the grievant's claims as a whole, EDR cannot find that the facts as alleged raise a sufficient question as to whether the grievant has described conduct that was so severe or pervasive as to alter the conditions of her employment such that the grievance qualifies for a hearing.¹⁸ DHRM Policy 2.35 and its associated guidance make clear that agencies must not tolerate workplace conduct that is disrespectful, demeaning, disparaging, denigrating, humiliating, dishonest, insensitive, rude, unprofessional, or unwelcome. These terms must be read together with agencies' broader authority to manage the means, methods, and personnel by which agency work is performed, but management's discretion is not without limit. Generally, then, agency management has authority to determine, among other things, the grievant's performance expectations, the substance and scope of the grievant's work assignments, the level of communication and information necessary to complete those assignments, and the appropriate manner of substantive feedback to address identified performance deficiencies. Although the grievant unquestionably found the manager's emails subjectively offensive and considers the actions described in the grievance as harassing and/or discriminatory in nature, her belief does not, in itself, render the manager's actions improper. Moreover, without facts that would cause an objective reasonable person to perceive the college's investigative response as creating or condoning a hostile or abusive work environment, EDR cannot conclude that its failure to meet the grievant's subjective standards constitutes any conduct prohibited by DHRM Policy 2.35. In this case, the evidence before EDR indicates that neither the circumstances giving rise to the August 10 and 24, 2021 emails, nor the content of the emails themselves, were so severe or pervasive that they could establish a discriminatory, hostile, or abusive work environment as necessary to qualify for a hearing.¹⁹

Accordingly, because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment, bullying, or other discriminatory conduct at this time, the grievance does not qualify for a hearing on any of these grounds. If the grievant experiences additional incidents of alleged harassing or discriminatory conduct, she should report the information to the college's human resources department or another appropriate authority. DHRM Policy 2.35 places affirmative obligations on agency management to respond to credible complaints of prohibited conduct and take steps to ensure that such conduct does not continue.²⁰ In addition, to the extent the grievant may wish to pursue a complaint of discrimination, she may consider filing a complaint about those matters through a different process, such as the federal Equal Employment Opportunity Commission or the Office of Civil Rights within the Virginia

¹⁸ See, e.g., EDR Ruling No. 2014-3836; cf. *Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.

¹⁹ Regarding the grievant's claim of disability discrimination, the college noted during the management steps that the grievant has not requested or received reasonable accommodation for a disability, and we have not reviewed evidence to suggest otherwise. It does appear that the grievant has approval to use family and medical leave under certain circumstances, which may be the basis of the grievant's allegation of disability discrimination.

²⁰ Under Policy 2.35, "[a]gency managers and supervisors are required to: Stop any prohibited conduct of which they are aware, whether or not a complaint has been made; Express strong disapproval of all forms of prohibited conduct; Intervene when they observe any acts that may be considered prohibited conduct; Take immediate action to prevent retaliation towards the reporting party or any participant in an investigation; [and t]ake immediate action to eliminate any hostile work environment when there has been a complaint of workplace harassment"

Attorney General's Office. Lastly, this ruling in no way prevents the grievant from raising these matters again in a future grievance if the alleged conduct continues or worsens.

CONCLUSION

For the reasons expressed above, the facts presented in the grievant's September 13, 2021 grievance do not raise claims that qualify for a hearing under the grievance procedure.²¹ EDR's qualification rulings are final and nonappealable.²²

Christopher M. Grab
Director
Office of Employment Dispute Resolution

²¹ See *Grievance Procedure Manual* § 4.1.

²² See Va. Code § 2.2-1202.1(5).