Issues: Qualification – Discipline (Counseling Memo), Retaliation (requested reasonable accommodation), and Work Conditions (supervisor/employee conflict); Ruling Date: October 4, 2017; Ruling No. 2017-4559, 2017-4560; Agency: Virginia Information Technologies Agency; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of the Virginia Information Technologies Agency
Ruling Numbers 2017-4559, 2017-4560
October 4, 2017

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") on whether her February 23, 2017 and March 14, 2017 grievances with the Virginia Information Technologies Agency (the "agency") qualify for a hearing.[1] For the reasons discussed below, the grievances are not qualified for a hearing.

FACTS

On January 24, 2017, the grievant was issued a counseling memorandum based on an incident where she allegedly failed to follow her supervisor's instructions and engaged in disruptive behavior. The grievant filed a grievance on February 23, 2017, disputing the issuance of the counseling memorandum and alleging that her supervisor and her supervisor's supervisor (the "Division Director") have engaged in a series of discriminatory and/or retaliatory actions that have created a hostile work environment.

The grievant subsequently initiated a second grievance on March 14, 2017, arguing that the agency has failed to provide her with a reasonable accommodation that will allow her to perform the essential functions of her position under the Americans with Disabilities Act ("ADA"). The grievant further reasserts her claims that she has been subjected to discriminatory and/or retaliatory behavior that has created a hostile work environment. Both grievances advanced through the management resolution steps and were not qualified for a hearing by the agency head. The grievant now appeals those determinations to EEDR.[2]

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.[3] Additionally, the grievance statutes and procedure reserve to management the exclusive right to

[1] After receipt of the grievances by EEDR, the agency had an investigation conducted as to the grievant's claims of discrimination, retaliation, and hostile work environment. EEDR delayed the completion of its review of the grievances until after the agency had completed its investigation.

[2] While the two grievances were initiated separately, they raise interrelated issues, challenge related management actions, and share a common factual background. As a result, in this ruling EEDR will address the issues the grievant has raised, rather than considering the individual grievances separately.

[3] *See Grievance Procedure Manual* § 4.1.

manage the affairs and operations of state government.[4] Thus, claims relating to issues such as the methods, means 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.[5]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] Thus, typically, a 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8]

Counseling Memo

Among the management actions challenged in this case, the grievant disputes the agency's issuance of a counseling memorandum on January 24, 2017, alleging that she failed to follow her supervisor's instructions and engaged in disruptive behavior.[9] A written counseling is not equivalent to a Written Notice of formal discipline, and does not generally constitute an adverse employment action because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[10] Therefore, the grievant's claims relating to her receipt of the counseling memorandum do not qualify for a hearing.[11]

While the counseling memorandum, by itself, has not had an adverse impact on the grievant's employment, it will also be considered in relation to the grievant's allegations of harassment and hostile work environment, which are discussed further below. In addition, the counseling memorandum could be used later to support an adverse employment action against the grievant. Should the written counseling grieved in this instance later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below

[4] Va. Code § 2.2-3004(B).
[5] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[6] *See Grievance Procedure Manual* § 4.1(b).
[7] Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[9] Notably, the January 24 memo provides instruction for the grievant in her communications regarding workplace concerns and following the chain of command, but does not include any description of any behavior that allegedly violated such instructions. The memo does, however, include a suggestion of disruptive behavior that allegedly occurred on November 10, 2016.
[10] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[11] Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the "Act"). Under the Act, if the grievant gives notice that she wishes to challenge, correct, or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

Failure to Accommodate

In essence, the grievant alleges that the agency has not complied with the ADA because the agency did not approve her requested full-time telework schedule as a reasonable accommodation, and instead determined that four days of telework per week was an appropriate accommodation under the circumstances. DHRM Policy 2.05, *Equal Employment Opportunity*, "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or *disability*. . ."[12] Under this policy, "'disability' is defined in accordance with the 'Americans with Disabilities Amendments Act,'" the relevant law governing disability accommodations.[13] Like DHRM Policy 2.05, *Equal Employment Opportunity*, the ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.[14]

The ADA defines a qualified individual as a person with a disability who, "with or without reasonable accommodation," can perform the essential functions of her job.[15] An individual is "disabled" if he/she "(A) [has] a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment . . . ."[16] As a general rule, an employer must make reasonable accommodations to the known physical or mental limitations of a qualified employee with a disability, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business [or government]."[17] In this case, there appears to be no dispute between the parties that the grievant has a disability and has requested a reasonable accommodation; the central question is whether the agency has failed to provide the grievant with a reasonable accommodation that allows her to perform the essential functions of her position.

"Reasonable accommodations" include "[m]odifications or adjustments that enable [an employee] with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[18] In this case, the agency has approved a schedule of four days of telework per week for the grievant. On the remaining day, the grievant is required to report to the agency's office location. The grievant asserts that a full-

[12] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[13] *Id.*; *see* 42 U.S.C. §§ 12101 *et seq.*
[14] 42 U.S.C. § 12112(a).
[15] *Id.* § 12111(8); 29 C.F.R. § 1630.2(m). The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1630.2(n).
[16] 42 U.S.C. § 12102(1).
[17] *Id.* § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.").
[18] 29 C.F.R. § 1630.2(o)(1)(iii); *see* 42 U.S.C. § 12111(9)(B). A reasonable accommodation encompasses "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. pt. 1630 app. § 1630.2(o).

time telework schedule is the only reasonable accommodation that would allow her to perform the essential functions of her position, and the agency has refused to provide that accommodation. In response, the agency asserts that the grievant's physical attendance is necessary for her to engage in teamwork and collaboration with her co-workers at the office on that day.[19] The agency claims that the essential functions of the grievant's position include at least one day per week of face-to-face interaction with other employees, which cannot be accommodated through a full-time telework schedule.

Essential functions are the "fundamental job duties" of the employee's position, and may be essential, for example, because "the reason the position exists is to perform that function," because a limited number of employees can perform that function, or because it is "highly specialized."[20] In determining what functions are essential, factors such as the employer's judgment as to what functions are essential, written job descriptions, the amount of time spent performing particular functions, and past or present work experience of others in the same or similar jobs are relevant.[21]

The grievant has provided extensive documentation of her medical condition and argues that full-time telework is necessary for her to perform the essential functions of her position. However, it is not clear how the specific limitations articulated by the grievant are not susceptible to accommodation in a manner that would also allow for her physical attendance at the agency's office to some degree. For example, the grievant is presumably capable of working at the agency's office on the one day per week that she reports there. As the facts exist for purposes of this ruling, EEDR has not reviewed information that raises a sufficient question as to whether the grievant's disability may only be accommodated through full-time telework.[22] That the grievant may be able to perform the essential functions of her position while teleworking does not necessarily mean that the agency must approve full-time telework for her as a reasonable accommodation. Indeed, under the ADA, an employer is not required to approve the exact accommodation requested by an employee if some other accommodation is available that will allow her to perform the essential functions of her position.[23] Furthermore, to the extent the grievant's arguments can be understood as a claim that her disability inhibits her ability to commute to the agency's office, a majority of courts have held that employers are not required to provide commuting-related accommodations under the ADA.[24]

---

[19] On days when the grievant is unable to physically report to the office, she is required to use leave to cover her absence. EEDR has not reviewed information to demonstrate that the grievant is required to use leave and also expected to perform her job duties at the same time. Under the facts presented here, the agency's requirement that the grievant use leave when she is unable to report to the agency's office does not appear to be improper in this case, based on the agency's statements that the grievant is not mandated to work from home in these instances.

[20] 29 C.F.R. §§ 1630.2(n)(1), (2); *see* 42 U.S.C. § 12111(8). "The inquiry into whether a particular function is essential . . . focuses on whether the employer actually requires employees in the position to perform the functions" that are considered essential. 29 C.F.R. app. § 1630.2(n).

[21] 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n)(3).

[22] Without getting into the specifics of the grievant's condition in this ruling, by way of example, the grievant has identified a need to "sit stationary" to limit or eliminate any effects from her condition. It is not clear why the grievant's need to remain stationary at home could not also be accomplished in the office environment.

[23] *See* 29 C.F.R. pt. 1630 app. § 1630.9 (stating that an employer should conduct an individualized assessment of the employee's limitations and the job, then "select and implement the accommodation that is most appropriate for both the employee and the employer"); *see also* EEOC Fact Sheet, *Work at Home/Telework as a Reasonable Accommodation*, https://www.eeoc.gov/facts/telework.html.

[24] *See, e.g.*, Regan v. Faurecia Auto. Seating, Inc., 679 F.3d 475, 479-80 (6th Cir. 2012); Filar v. Bd. of Educ. of Chi., 526 F.3d 1054, 1067-68 (7th Cir. 2008) (citation omitted). Other courts have held that employers may be

Having reviewed the grievance record and the submissions of the parties, EEDR is not persuaded by the grievant's assertion that a full-time telework schedule is the only possible reasonable accommodation that will allow her to perform the essential functions of her position. As a result, EEDR finds that the grievant has not raised a sufficient question as to whether the agency failed to provide a reasonable accommodation under the ADA or otherwise comply with policy and/or law such that qualification is warranted at this time.

Based on the preceding analysis, EEDR need not reach the question of whether in-person attendance at the agency's office is an essential function of the grievant's position. In support of its position, the agency relies on *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015), for the proposition that "[r]egular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones."[25] While this general assumption may apply to a great many jobs, each position and its duties must be assessed in light of the particular factors in each case. Some of the relevant factors might support the agency's position in this case, while others might support the grievant's position, at least based on those that have been presented for purposes of this ruling. While in-person attendance may, indeed, be an essential function of many jobs, an employer must be able to demonstrate why physical presence is an essential function of the particular job at issue.

While this ruling was pending, the grievant has submitted a new request for reasonable accommodation to the agency seeking a full-time telework schedule. EEDR has not been apprised as to whether the grievant's request has been evaluated and/or approved by the agency. If there are accommodations other than telework that may satisfy the limitations of her disability, they could potentially be identified through the "informal, interactive process" recommended in regulatory guidance for determining what reasonable accommodation(s) are appropriate.[26] The parties are encouraged to engage openly in this interactive process so that both the agency and the grievant can better understand each other's respective needs and create acceptable workable solutions. Nonetheless, the new request for reasonable accommodation cannot be a subject of this grievance[27] and, accordingly, is not being assessed in this ruling.

Workplace Harassment

The grievant further asserts that the agency has engaged in discrimination, retaliation, and/or harassment that has created an alleged hostile work environment. For a claim of hostile work environment or workplace harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or prior protected activity[28]; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and

---

required to provide commute-related accommodations in certain circumstances. *E.g.*, Livingston v. Fred Meyer Stores, Inc., 388 F. App'x. 738, 741 (9th Cir. 2010); Colwell v. Rite Aid Corp., 602 F.3d 495, 504 (3d Cir. 2010).

[25] 782 F.3d 753, 762-63 (6th Cir. 2015).

[26] 29 C.F.R. § 1630.2(o)(3).

[27] *Grievance Procedure Manual* § 2.4.

[28] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).

(4) imputable on some factual basis to the agency.[29] In the analysis of such a claim, the "adverse employment action" requirement is satisfied if the facts raise a sufficient question as to whether the conduct at issue was sufficiently severe or pervasive so as to alter the conditions of employment and to create and abusive or hostile work environment.[30] "[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."[31]

In this case, the grievant appears to allege that her supervisor, the Division Director, and staff at her agency's human resources office have engaged in harassing conduct based on her race and disability status, as well as her past grievance activity and challenge to the agency's alleged failure to provide a reasonable accommodation under the ADA. The grievant has further provided numerous examples of the allegedly harassing behavior that she asserts she has experienced. For example, the grievant argues that agency management has issued her multiple threats of disciplinary action that are unfounded and/or improper. As discussed above, the grievant was issued a counseling memorandum on January 24, 2017, which she claims was issued to her as the result of an improper directive from her supervisor and addresses conduct that either did not occur as described or was not disruptive. The grievant also argues that she has received at least one other similarly unfounded counseling document in the past. In addition, the grievant claims that agency management made false statements in connection with previous grievances; has given her arbitrary and capricious directives that are improper; failed to investigate her claims of workplace harassment in the past; attempted to prohibit her from having contact with at least one other minority employee; and otherwise engaged in "pervasive, progressive, aggressive, and arbitrary and capricious behaviors and actions."[32]

If an agency were to arbitrarily issue notices of due process to an employee that it knew were unsubstantiated for conduct that would not properly be subject to corrective action under DHRM Policy 1.60, *Standards of Conduct*, EEDR may consider such a practice to raise a sufficient question as to whether severe or pervasive hostile work environment has been created, particularly if combined with additional ongoing alleged harassing behaviors. This does not appear to have been the case here, however. The grievant appears instead to have received communications from agency management addressing work-related issues, which contained management directives. Some of these communications included a description of the potential consequences of failing to follow instructions. The alleged threats of disciplinary action cited by the grievant in this case more closely resemble either counseling with which she disagrees, or management directives that were accompanied by general statements that failure to follow instructions or comply with state and/or agency policy may result in the issuance of formal discipline. While an agency's decision to frequently remind an employee that disciplinary action may be issued for failing to follow instructions could exacerbate a strained workplace relationship, it is not the type of action that, under the circumstances presented in this case, can be considered to have created a hostile work environment.

[29] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[30] *See generally id.* at 142-43.
[31] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[32] These examples represent just some of the instances of allegedly harassing conduct described by the grievant.

However, the agency's investigation addressed, in part, the grievant's claim that agency management had created a hostile work environment.[33] While the report ascribes no discriminatory or retaliatory motive behind the conduct, the investigators determined that the grievant's claims of "hostile/harassment environment" were supported by the evidence, principally resulting from the conduct of the grievant's immediate supervisor. Given this information, when combined with the additional evidence raised in the grievances, there could be a sufficient question raised as to a claim of discriminatory and/or retaliatory hostile work environment. Nevertheless, qualification for hearing is not warranted in this instance.

As a result of the investigation, the agency states it has permanently reassigned the grievant to a new supervisor. At a hearing to determine whether the agency had created a hostile work environment, a hearing officer would have the authority to "order the agency to create an environment free from" the allegedly harassing behavior or "take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence."[34] Even if the grievant were able to establish that workplace harassment had occurred, the relief available through the grievance process would be meaningless as to the grievant's supervisor because the grievant no longer reports to that individual. In essence, the agency has already taken the curative steps that a hearing officer could have ordered: remove the grievant from the alleged hostile work environment, which it has done through the reassignment. While the grievant also argues that the Division Director and employees of her human resources office have participated in the creation of the allegedly hostile work environment, EEDR finds that the evidence with regard to these individuals, when considering the actions already taken by the agency as a result of the grievant's allegations, does not raise a sufficient question such that a hearing is warranted at this time.

EEDR's qualification rulings are final and nonappealable.[35]

Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

[33] The grievant has presented numerous reasons why she disagrees with the agency's investigation report. While the grievant's submissions were reviewed for purposes of this ruling, much of the information provided was not pertinent to EEDR's assessment of whether her grievances qualify for a hearing. The investigation itself is not a subject of either grievance and would not support a basis to qualify for hearing.
[34] *Rules for Conducting Grievance Hearings* § VI(C)(3).
[35] *See* Va. Code § 2.2-1202.1(5).