Issues: Qualification – Management Actions (assignment of duties) and Discrimination (age); Ruling Date: November 14, 2018; Ruling No. 2019-4794; Agency: Department of the Treasury; 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 Department of the Treasury
Ruling Number 2019-4794
November 14, 2018

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management on whether his August 1, 2018 grievance with the Virginia Department of the Treasury (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On July 3, 2018, the grievant was presented with a proposed Employee Work Profile ("EWP") that would reassign him to a new position within the agency. The new EWP changed the grievant's work title and proposed to remove the grievant's supervisory responsibilities; however, the changes would not have affected his salary, pay band, or benefits. The grievant indicates that, believing the new role to be a demotion, he inquired about alternatives to the proposal, and was told his only option was to accept the new position. Two days later, he submitted notice to the agency that he would retire from employment effective October 1, 2018. Based upon his impending retirement, the agency did not reassign the grievant to the proposed new role. However, on August 1, 2018, the grievant initiated a grievance challenging the proposed reassignment alleging that he felt forced to retire. He asserts that, by proposing to assign him to a new role, the agency discriminated against him on the basis of his age. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EEDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[1] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the reassignment or transfer of employees within the agency 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.[2] Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] 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

[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[3] *See Grievance Procedure Manual* § 4.1(b).

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."[4] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[5]

Discrimination

The grievant argues that, by proposing to assign him to a new role, the agency has discriminated against him on the basis of his age. He states that he was directly asked by the agency head when he would retire from employment, and, as he indicated that he planned to retire in March 2019, the proposed reassignment constitutes a pretext for age discrimination. In response, the agency denies that any discrimination occurred, and asserts that upper management had no indication of the grievant's plan to retire. The agency states that, contrary to the grievant's claims, the new role was "designed to be a long-term solution to an operational gap that the agency believed [he] was uniquely situated to fill" and, had the agency known of the grievant's imminent retirement plans, it would not have proposed to assign him to that role.

Grievances that may be qualified for a hearing include actions related to discrimination.[6] For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[7]

Here, there are reasonable questions of fact as to the legitimate reasons proferred by the agency for the proposed reassignment of the grievant, as outlined above. The agency reasonably asserts that the proposed new role was designed to be a "strategic policy, subject matter expert and technology design opportunity specific to the skills [possessed by the grievant]." On the other hand, following the grievant's notification on July 5, 2018 that he would resign and retire effective October 1, there has been no reported movement by the agency to fill this position. Ultimately, however, it is the grievant's decision to resign and retire that determines whether this claim can qualify for a hearing.

Because the grievant decided to resign and retire, the agency did not move the grievant into the newly-created role. Thus, even if we consider whether the reassignment could have been an adverse employment action, he was never actually moved into that position. Accordingly, the grievant never experienced the adverse employment action because he resigned instead. As such, the grievant's claims of discrimination are not qualified for hearing.

[4] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[5] *See, e.g.*, Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[6] *See Grievance Procedure Manual* § 4.1(b).
[7] *See* Hutchinson v. Inova Health Sys. Inc., 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. Apr. 8, 1998).

Constructive Discharge

In his grievance, the grievant argues that he felt his employment would be terminated if he did not accept the proposed reassignment; hence, he submitted notice of his intent to retire effective October 1, 2018. The voluntariness of an employee's resignation is presumed.[8] EEDR has reviewed nothing in the materials presented by the grievant that would rebut this presumption and show that his resignation was not the result of free and informed choice.[9] Rather, the posture of the grievant's arguments is more appropriately reviewed as one of constructive discharge. To prove constructive discharge, an employee must at the outset show that the employer "deliberately made [his] working conditions intolerable in an effort to induce [him] to quit."[10] The employee must therefore demonstrate: (1) that the employer's actions were deliberate, and (2) that working conditions were intolerable.[11] An employer's actions are deliberate only if they "were intended by the employer as an effort to force the [employee] to quit."[12] Whether an employment environment is intolerable is determined from the objective perspective of a reasonable person.[13]

Based upon a review of the situation as presented in his grievance, there is insufficient indication that management deliberately made his working conditions intolerable in an effort to induce him to quit. "[D]issatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign."[14] While the grievant may have perceived the situation as an ethical dilemma, EEDR has not reviewed anything that would suggest the grievant's only choice was to resign. Thus, the actions here cannot support a claim of constructive discharge that would allow this grievance to be qualified for a hearing.

EEDR's qualification rulings are final and nonappealable.[15]

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[8] *See* Staats v. U.S. Postal Serv., 99 F.3d 1120, 1123 (Fed. Cir. 1996).
[9] *See* Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 167, 174 (4th Cir. 1988).
[10] Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 272 (4th Cir. 2001) (internal quotation marks omitted).
[11] *See* Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 186-87 (4th Cir. 2004); Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 244 (4th Cir. 1997).
[12] *Matvia*, 259 F.3d at 272.
[13] *See* Williams v. Giant Food Inc., 370 F.3d 423, 434 (4th Cir. 2004).
[14] James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 378 (4th Cir. 2004)(citations omitted)); *see also*, Williams 370 F.3d at 434 (not intolerable working condition where "supervisors yelled at [employee], told her she was a poor manager, and gave her poor [performance] evaluations, chastised her in front of customers, and once required her to work with an injured back").
[15] *Id.* § 2.2-1202.1(5).