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QUALIFICATION RULING

In the matter of the Department of Motor Vehicles
Ruling Number 2021-5275
November 3, 2021

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 March 12, 2021 grievance with the Department of Motor Vehicles (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about March 12, 2021, the grievant initiated a grievance alleging that she experienced "false statements, harassment, bullying, unfair treatment, retaliation, etc., my safety."[1] The relief sought from the grievant was for "everyone to be treated/respected the same." The agency head responded that he "was in full agreement with and in support of the relief [she] requested: that all employees be treated and respected equally" and that he "simply will not tolerate any form of disrespectful treatment or discriminatory treatment at [the agency]." He subsequently declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

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.[2] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] 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.[4]

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[1] Additional facts regarding the specifics of the situation are included in the Discussion section below.
[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

Further, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7] 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."[8]

The grievant alleges that she has been a target of "false statements, harassment, bullying, unfair treatment, retaliation, etc., my safety." Although DHRM Policy 2.35, *Civility in the Workplace*, prohibits workplace harassment[9] and bullying,[10] 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 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 on some factual basis to the agency.[11] 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.[12]

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[5] Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).
[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] 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)).
[9] 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."
[10] 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."
[11] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[12] 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).

In support of her claims, the grievant cites multiple incidents of false statements allegedly made about her by coworkers. For example, on February 10, 2021, management addressed with the grievant an accusation that she talked about not liking a coworker and was otherwise "rude" in the workplace. The grievant denies saying she did not like the coworker, but she did not feel she could adequately respond to management's inquiries because she was not told the specifics of the complaint against her or who made it. The incident made her feel she was "being watched in order to be terminated especially since [she] filed a grievance [previously]." On March 16, 2021, the grievant advised a coworker to make a call using their office cordless phone, not their cell phone. Shortly afterward, the coworker returned with the Assistant Manager to get the cell phone. The grievant subsequently apologized to the Assistant Manager and explained she believed they were only supposed to use the cordless phone. The Assistant Manager responded that the coworker had said the grievant "said the opposite."

The grievant also alleges that, on January 13, 2021, a coworker may have spoken falsely to one of their customers about the grievant. That day, the grievant and her coworker were both assisting customers. The coworker asked the grievant for assistance, however, the grievant did not have time to help at the moment so she continued to the back to speak with the Supervisor. Once the grievant finished assisting her customer, the coworker's customer suddenly accused the grievant of being racist. The grievant was "bothered" by this comment because she "never interacted with this customer" and felt concerned for her safety since she is "recognized outside of the [agency] because of [her] height, skin color, and hair." The grievant expressed that "the only explanation that [she] can think of is that [the coworker] said something false to the customer for them to say this."

In addition, the grievant claims areas for improvement noted in her June 2021 performance evaluation had never been raised to her previously She believes that management is trying to "start a paper trail to fire her." The grievant alleged that due to the close relationship between her supervisor and another coworker, employees are not treated fairly. She stated that there are inconsistencies regarding who is allowed to use their personal cell phones at work and who is not.

In sum, the grievance record reflects the grievant's account of her working relationship with her managers and coworkers as one that is difficult to navigate and stressful. However, as stated above, grievances only qualify for a hearing if they raise an adverse employment action, which, in the context of a hostile work environment, means objectively "severe or pervasive" harassment, bullying, or retaliatory conduct against the grievant. Based on EDR's review of the grievance record, the grievant has not raised a sufficient question as to the existence of such "severe or pervasive" conduct at this time. Although the grievant's account suggests significant tensions with coworkers and certain members of management, the record does not contain allegations that would rise to the level of severe or pervasive harassment or bullying of the grievant such that the grievance qualifies for a hearing under the grievance statutes.[13] No other adverse employment action is apparent from the record. To the extent the grievant contends that the agency is planning to terminate her employment in retaliation for her previously filed grievance, nothing

[13] *Compare Parker*, 915 F.3d at 304-05; *Strothers*, 895 F.3d at 331-32.

in the record indicates that the agency has taken steps to do so during the time period relevant in this grievance.

Accordingly, the grievance does not qualify for a hearing on any of the cited grounds.[14] However, if the grievant experiences future incidents of harassing or retaliatory conduct, she should report the information to the agency's human resources department or another appropriate authority. 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.[15] Lastly, this ruling in no way prevents the grievant from raising these matters in a later grievance if the alleged pattern of conduct continues or worsens.

CONCLUSION

For the reasons expressed above, the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure at this time.[16] EDR's qualification rulings are final and nonappealable.[17]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[14] To the extent this ruling does not address any specific issue raised in the grievance, EDR has thoroughly reviewed the grievance record and determined that the grievance does not raise a sufficient question as to whether the grievant experienced an adverse employment action, whether discrimination, retaliation, or discipline may have improperly influenced any management decision cited in the grievance, or whether the agency may have misapplied and/or unfairly applied state policy that would warrant qualification for a hearing.

[15] Under Policy 2.35(D)(4), "[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 . . . ."

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

[17] *See* Va. Code § 2.2-1202.1(5).