

Issue: Qualification – Discrimination (race); Ruling Date: February 18, 2018; Ruling No. 2018-4681; Agency: Virginia Community College System; 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 Community College System
Ruling Number 2018-4681
February 20, 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 her November 20, 2017 grievance with Virginia Community College System (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a law enforcement officer at one of the agency’s community colleges. The grievant is African American. On November 17, 2017, the grievant was notified that a Vice President at the college had a concern about a facility maintenance issue. The grievant and another employee went to the Vice President’s office and spoke with him. The grievant alleges that the Vice President “showed clear expressions of dissatisfaction and frustration” during their conversation. After speaking with the grievant, the Vice President sent an email about the issue that the grievant argues “called [her] a liar,” and she contends that a “proper investigation was not considered before making such a direct statement.” The grievant claims that the Vice President “made a quick leap to judgment” based on a report about the issue from two white employees, and that the Vice President favors white employees at the college over her.

The grievant filed a grievance with the agency on or about November 20, 2017, alleging that the Vice President discriminated against her on the basis of her race, and that he has “employed Racial Discrimination actions against” her on previous occasions. After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EEDR.

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.¹ Additionally, by statute and under the grievance procedure, management is reserved the

¹ See *Grievance Procedure Manual* § 4.1.

exclusive right to manage the affairs and operations of state government.² Thus, claims relating to issues such as to 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.³ Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁴ Thus, typically, 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."⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁶

In this case, the grievant essentially argues that the Vice President engaged in discrimination 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; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.⁷ 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 an abusive or hostile work environment.⁸ "[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."⁹

Other than the November 17, 2017 incident discussed above, the grievant has not identified or described any additional instances of allegedly discriminatory and/or harassing behavior by the Vice President. Although the grievant is understandably concerned by what she perceives as inappropriate conduct, the workplace harassment described by the grievant essentially involves alleged unprofessional conduct by the Vice President, which does not generally rise to the level of an adverse employment action or severe or pervasive conduct.¹⁰ Prohibitions against harassment do not provide a "general civility code" or prevent all offensive

² See Va. Code § 2.2-3004(B).

³ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

⁴ See *Grievance Procedure Manual* § 4.1(b).

⁵ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁷ See *Gilliam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

⁸ See generally *id.* at 142-43.

⁹ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

¹⁰ See, e.g., EDR Ruling No. 2014-3836.

or insensitive conduct in the workplace.¹¹ Furthermore, the agency appears to have conducted a thorough review of the grievant's allegations during the management resolution steps, determined that the Vice President could have responded to the grievant more constructively, and recommended a meeting between the grievant, the Vice President, and other management representatives to discuss the grievant's concerns in greater detail. For these reasons, EEDR finds that the grievant has not raised a sufficient question as to the existence of a severe or pervasive hostile work environment, and the grievance does not qualify for a hearing.

This ruling does not mean that EEDR deems the alleged behavior of the Vice President, if true, to be appropriate, only that this grievance does not qualify for a hearing based on the evidence presented to EEDR. Moreover, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.

EEDR's qualification rulings are final and nonappealable.¹²



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¹¹ Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (“[C]onduct must be extreme to amount to a change in the terms and conditions of employment”); see Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).

¹² Va. Code § 2.2-1202.1(5).