Issues: Qualification – Discrimination (complying with any law), and Work Conditions (employee/supervisor conflict); Ruling Date: February 15, 2019; Ruling No. 2019-4827; Agency: Department of Veterans Services; 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 Department of Veterans Services
Ruling Number 2019-4827
February 15, 2019

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 September 12, 2018 grievance with the Department of Veterans Services (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

Prior to the events at issue in this case, the grievant's shift assignment allowed her to have Friday as a regularly scheduled day off. In August 2018, the facility implemented a new staff coverage system that resulted in changes to the grievant's work schedule, and more particularly resulted in her being scheduled to work on Fridays. The grievant submitted a written request on September 4, 2018 to have Friday as her regularly scheduled day off each week. The agency later informed the grievant that it could not accommodate her request. The grievant initiated a grievance with the agency on September 12, 2018, alleging that management at her facility had engaged in "retaliation" against her because she "put[] in a request to have Friday's [sic] off during the week . . . ." After proceeding through the management 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, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] 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.[3]

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

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]

Retaliation

The grievant contends that, after she submitted her request to have Fridays off on September 4, 2018, the agency retaliated against her by denying her request for a permanent schedule change, declining her request(s) to use leave on Fridays, and assigning her to different areas of the facility where she does not normally work.[7] For a claim of retaliation to qualify for hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[8] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[9] Ultimately, to support a finding of retaliation, EEDR must find that the protected activity was a but-for cause of the alleged adverse action by the employer.[10]

In this case, the grievant arguably engaged in protected activity by discussing workplace-related concerns about her work schedule with agency management.[11] However, EEDR finds that the management actions challenged in the grievance cannot be considered adverse employment actions. In general, an employee's subjective preferences do not render an employment action

[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] Some of the documents in the grievance record suggest that the grievant is attempting to challenge the agency's denial of requests for leave that she submitted after initiating the grievance. Because additional management actions or omissions cannot be added to a grievance after it is filed, this ruling will not address the grievant's arguments regarding these additional issues. *Grievance Procedure Manual* § 2.4. The grievant may file another grievance, if timely, to challenge additional management actions or omissions. Any such grievance must comply with the initiation requirements of the grievance procedure, as set forth in Section 2.4 of the *Grievance Procedure Manual*.
[8] *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).
[9] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[10] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).
[11] *See* Va. Code §§ 2.2-3000(A).

adverse without sufficient objective indications of a detrimental effect.[12] Under the facts presented to EEDR, it does not appear that the agency's actions here amounted to an adverse employment action, as they do not appear to have affected her title, salary, or responsibilities. While the grievant's concerns about her schedule and work assignments are understandable, nevertheless, there is insufficient evidence that the agency's denial of her request for a schedule change and/or other related actions have had a significant detrimental effect on her employment. An employee's unmet preference regarding work hours or job location is not enough to result in an adverse employment action.[13] Accordingly, the grievance does not qualify for a hearing on this basis.

Moreover, even if EEDR were to assume the grievant has raised a question as to whether the management actions at issue in this case were adverse employment actions, and even inferring a causal connection between the grievant's protected activity and the denial of the grievant's schedule-related requests and/or work assignments based on their temporal proximity,[14] the agency has provided legitimate, nonretaliatory business reasons for its decisions. During the management steps, the agency explained to the grievant that it implemented a new scheduling system at the facility in August 2018 based on feedback from staff. These changes limited management's ability to grant individual employees' scheduling preferences, including the grievant's request to have Friday as her regular day off. The agency further indicated that, due to staffing and operational needs, the grievant may be assigned to work in other areas of the facility and may not be approved to use leave on Fridays. Under the facts presented, EEDR finds that there was nothing unreasonable about agency's exercise of discretion to deny the grievant's request for modifications to her work schedule or change her typical work assignments.

In summary, EEDR's review of the grievance record shows that the agency's denial of the grievant's request to have Friday as her regularly scheduled day off, assign her to work in different areas of the facility, and/or decline to approve her request(s) for annual leave were based on legitimate, nonretaliatory business reasons, and there is nothing to demonstrate that those reasons were merely a pretext for retaliation. Furthermore, there are no facts that would indicate the grievant's protected activity was the but-for cause of the agency's actions. Accordingly, EEDR conclude that the grievant's claim does not raise a sufficient question as to whether retaliation has occurred, and does not qualify for a hearing on this basis.

Workplace Harassment

Finally, and taken as a whole, the grievant's assertions also appear to amount to a claim that the agency has engaged in discrimination, retaliation, and/or harassment that has created an

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[12] *See, e.g.*, Jones v. D.C. Dep't of Corr., 429 F.3d 276, 281 (D.C. Cir. 2005); James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377; Fitzgerald v. Ennis Bus. Forms, Inc., No. 7:05CV00782, 2007 U.S. Dist. LEXIS 875, at *14-15 (W.D. Va. Jan. 8, 2007).

[13] *See* EDR Ruling Nos. 2016-4203, 2016-4206; EDR Ruling No. 2015-3936.

[14] *See* Tinsley v. First Union Nat'l Bank, 155 F.3d 435, 443 (4th Cir. 1998) (stating that "merely the closeness in time between" an employee's exercise of protected activity and the adverse action is sufficient to establish a causal connection for a claim of retaliation under Title VII (citing Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989))).

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.[15] 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.[16] "[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."[17]

In support of her position, the grievant argues that the agency's actions relating to her work schedule and assignments, as discussed above, are "discriminatory, unfair[,] and unjust."[18] Having thoroughly reviewed the grievance record and the information provided by the parties, however, EEDR cannot find that the grieved management actions rose to a sufficiently severe or pervasive level to create an abusive or retaliatory hostile work environment. Though the grievant may reasonably disagree with the agency's decisions, prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[19] In this case, the facts alleged by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[20] Because the grievant has not raised a sufficient question as to the existence of severe or pervasive harassment reaching the level of an abusive or hostile work environment, the grievance does not qualify for a hearing on this basis.

EEDR's qualification rulings are final and nonappealable.[21]

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[15] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[16] *See generally id.* at 142-43.
[17] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[18] Grievances that may be qualified for a hearing include actions that occurred due to discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity or expression, age, political affiliation, genetics, disability, or veteran status. *See, e.g.*, Executive Order 1, *Equal Opportunity* (2018); DHRM Policy 2.05, *Equal Employment Opportunity*. EEDR has thoroughly reviewed the grievance record and cannot identify any protected status on which the grievant's allegation of discrimination is based.
[19] 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).
[20] *See Grievance Procedure Manual* § 4.1.
[21] *See* Va. Code § 2.2-1202.1(5).