Issues: Qualification – Work Conditions (hostile work environment) and Retaliation (other protected right); Ruling Date: July 1, 2015; Ruling No. 2015-4169, 2015-4170; Agency: Virginia Employment Commission; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Virginia Employment Commission
Ruling Numbers 2015-4169, 2015-4170
July 1, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether her two April 16, 2015 grievances with the Virginia Employment Commission (the "agency") qualify for a hearing. For the reasons discussed below, these grievances do not qualify.

FACTS

The grievant was employed by the agency as an Administrative Office Specialist III. On or about April 16, 2015, the grievant initiated two grievances challenging "harassment" by two of her supervisors. After the parties failed to resolve the grievances during the management resolution steps, the grievant asked the agency head to qualify the grievances for hearing. Her request was denied and she 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.[1] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] 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, whether state policy may have been misapplied or unfairly applied or whether a performance evaluation was arbitrary and/or capricious.[3]

The grievant asserts that her supervisors have created a "hostile work environment." For a claim of a hostile work environment or 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 conduct; (3) sufficiently severe or pervasive so as

[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).

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.[4] 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.[5] "[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."[6] However, the grievant must raise more than a mere allegation of harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination or retaliation.

In this case, the grievant appears to challenge the allegedly hostile manner in which her supervisors interacted with her and directed her work. However, the conduct described by the grievant was not so severe or pervasive that it altered the conditions of her employment. Prohibitions against harassment do not provide a "general civility code" or prevent all offensive or insensitive conduct in the workplace.[7] Further, even if the grievant were able to show the existence of severe or pervasive conduct, there is no evidence to show that this conduct was the result of prohibited discrimination or retaliation, rather than for some other reason, such as an effort to improve her performance. Accordingly, the grievant's claims of a hostile work environment do not qualify for a hearing.

The grievant also notes that at the second management resolution step of her grievance, she received a new Employee Work Profile ("EWP") which changed her job duties and reduced her pay band. The agency has explained that it took this action to bring the grievant's EWP into line with job duties she has performed since a restructuring several years ago. The agency also notes that although the grievant's pay band was lowered, her salary has not been changed, and that because she is not currently at the top of her new pay band, she has room for "upward mobility."

Under Section 2.4 of the *Grievance Procedure Manual*, claims involving additional management actions or omissions may not be added to a grievance once it is initiated. As the changes to the grievant's EWP occurred after the initiation of her April 16, 2015 grievances, the grievant was required to raise any challenges to those changes in a new timely grievance.[8] From EDR's review, however, it appears that even had the grievant's challenges to the EWP changes been raised appropriately, these claims would not have qualified for hearing, as there is

[4] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).
[5] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142-43 (4th Cir. 2007).
[6] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
[7] 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).
[8] To be considered timely, a grievance must be initiated within 30 calendar days of when a grievant knew or should have known of the management action or omission being challenged. *See Grievance Procedure Manual* §§ 2.2, 2.4.

insufficient evidence to show that the EWP changes were the result of a misapplication of policy, retaliation, or discrimination.

For the foregoing reasons, the grievant's April 16, 2015 grievances do not qualify for hearing. EDR's qualification rulings are final and nonappealable.[9]

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[9] *See* Va. Code § 2.2-1202.1(5).