EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2020-4986
October 24, 2019

The grievant seeks a ruling from the Office of Employment Dispute Resolution ("EDR")[1] at the Department of Human Resource Management as to whether her July 18, 2019 grievance with the Virginia Department of Corrections (the "agency") qualifies for a hearing. For the reasons set forth below, EDR finds that the grievance is not qualified for a hearing.

FACTS

As alleged in the grievance and supporting documents, the grievant and a coworker had a dating relationship during 2018. When the relationship dissolved in late 2018, the coworker demanded that the grievant return a substantial amount of money he had given her in the course of the relationship. In arguing about repayment, the coworker made intimidating statements to the grievant, initially outside of work. Then, on January 24, 2019, the coworker came to the grievant's work area appearing angry and asking about payment.[2] That day, the grievant obtained a protective order against the coworker; he nevertheless appeared in her workspace multiple times in the months afterward, allegedly without a work-related reason. He also sued her for over $10,000, with process served to her at work. After the grievant filed a grievance (the "First Grievance") alleging "harassment in the workplace/threatening hostile work environment," the facility warden prohibited the coworker from entering the grievant's work area, pending formal resolution of the lawsuit. Believing the separation was indefinite, the grievant agreed with this resolution and concluded the First Grievance.

On or about July 12, 2019, the warden called a meeting with the grievant and the coworker and advised them that "we are now going back to normal operations." Upset by the decision to rescind the resolution to her First Grievance, the grievant alleges that the tenor of the meeting was

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] A witness reported that the grievant yelled at the coworker not to come to her office and the coworker responded that his position allowed him to go wherever he wanted in the facility; he allegedly dared the grievant to report him to the warden.

hostile and retaliatory. On or about July 18, 2019,[3] the grievant filed another grievance (the "Second Grievance") in which she alleged "retaliation after filing a grievance . . ., contesting actions of institution, hostile work environment and harassment in the workplace." The Second Grievance sought "disciplinary action to lead to a safe, non-intimidating and non-threatening environment" and "no retaliation." More specifically, the grievant sought to return to the First Grievance's resolution and/or to be notified before the coworker planned to be in her area for work reasons. The agency head declined to qualify the Second Grievance for a hearing, noting that the agency had taken steps to "keep both of you separated, as long as they do not interfere with regular operations."[4] The grievant now appeals that determination.

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.[5] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[6] 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.[7] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action in its totality was so unfair as to amount to a disregard of the applicable policy's intent.

Further, while grievances that allege retaliation or other misapplication of policy may qualify for a hearing, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."[8] 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."[9] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's

[3] The Grievance Form A indicates that the grievant first signed it on July 8, 2019. However, the form indicates that the grievance occurred on July 12, 2019; this date is confirmed by an attachment dated July 15, 2019. The Form A is date-stamped as having been received at the grievant's facility on July 18, 2019. For purposes of this ruling, and because none of these dates appears to raise a timeliness issue, EDR will treat the grievance as having been initiated on July 18, 2019.

[4] The agency has represented that the two employees have been assigned to separate "learning teams" when previously they were on the same team. The employees' supervisors are also purportedly on notice that they will be responsible for receiving and responding to complaints of further inappropriate behavior, in consultation with human resources staff. Although the agency has also suggested that the grievant's supervisor is to be notified whenever the coworker has a need to be in their work area (as the grievant has requested), EDR has been unable to confirm that anyone at the facility recognizes or follows this practice.

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

[6] Va. Code § 2.2-3004(B).

[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

[8] Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).

[9] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

employment.[10] 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."[11]

Workplace Harassment

Although DHRM Policy 2.35 prohibits workplace harassment[12] and bullying,[13] alleged violations must meet certain requirements to qualify for a hearing. Like discriminatory workplace harassment, a claim of 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.[14] As to the second element, the grievant must show that he or she perceived, and an objective reasonable person would perceive, the environment to be abusive or hostile.[15] "[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."[16]

DHRM Policy 2.35 and its associated guidance make clear that agencies must not tolerate workplace conduct that is disrespectful, demeaning, disparaging, denigrating, humiliating, dishonest, insensitive, rude, unprofessional, or unwelcome. Thus, while these terms must be read together with agencies' broader authority to manage the means, methods, and personnel by which agency work is performed, management's discretion is not without limit. Policy 2.35 also 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.[17] Accordingly, where an

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[10] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[11] 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)).
[12] 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."
[13] 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."
[14] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[15] 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.")
[16] *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).
[17] 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

employee reports that work interactions have taken a harassing or bullying tone, Policy 2.35 requires agencies to determine in the first instance whether such perceptions are supported by the facts. Where an agency fails to meet these obligations, such failure may constitute a misapplication or unfair application of Policy 2.35 such that the harassing or bullying behavior is imputable to the agency.

Having thoroughly reviewed the grievance record and the information provided by the parties, EDR cannot find that the grievant has alleged facts sufficient to qualify for a hearing at this time. Even assuming for purposes of this ruling that the grievant has experienced severe and/or pervasive harassment that amounts to an adverse employment action, the agency responded to known incidents of harassment, and EDR is not aware of any further harassment that can fairly be imputed to the agency. While the grievant is understandably unsatisfied with the agency's response to date, EDR cannot find at this time that management's approach has violated any mandatory policy provision or is so unfair as to amount to a disregard of an applicable policy's intent.

The First Grievance alleged facts that arguably raised a legitimate claim that the coworker was harassing the grievant to the point of creating a hostile work environment. After an investigation of these allegations, the warden addressed professional expectations with the coworker,[18] restricted him to areas where he would not interact with the grievant, and assigned him to a new learning team. However, when the warden learned that the court presiding over the coworker's lawsuit had rendered judgment, the warden met with both employees, their supervisors, and a human resources representative to explain that the coworker would no longer be restricted from areas of the facility, that both parties should conduct themselves professionally, and that continuing problems should be reported to the employees' respective supervisors in consultation with human resources. While this approach risked the re-emergence of a potentially hostile work environment if the coworker disregarded the warden's directive to behave professionally, EDR does not perceive facts raising a sufficient question whether (1) a hostile environment has in fact re-emerged, or (2) the warden's approach violated a mandatory policy provision or was so unfair as to disregard the intent of policies related to workplace harassment.

The grievant argues that the coworker continues to pursue legal actions against her as a creditor and that he has been in her general work area at least three times since the July meeting. However, she does not allege that he was there for any improper reason or that his behavior in these instances was hostile or intimidating. The agency has represented that it received no complaints about these occasions. As explained above, Policy 2.35 mandates that agencies respond to credible complaints of prohibited conduct and take steps to ensure that such conduct does not continue. In this case, it appears that the agency investigated the allegations in the First Grievance, addressed the coworker's unprofessional conduct with him, and enforced a strict but temporary physical separation between the two employees. It was within the agency's discretion to decide, after three months had passed, that expectations had been adequately communicated to the coworker that the remedy of barring him from entire areas of the facility was no longer appropriate.

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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 . . . ."

[18] As one form of relief, the Second Grievance requests "disciplinary action to lead to a safe, non-intimidating and non-threatening environment." While freedom from intimidation and/or threats is undoubtedly a legitimate request for any employee to make, a grievant is not entitled to direct disciplinary action against other employees or to learn about others' disciplinary or other personnel records. *See* DHRM Policy 6.05, *Personnel Records Disclosure*. Thus, the agency in this case appropriately denied this aspect of the grievant's requested relief.

The grievant's distress at "going back to normal operations" is understandable and perhaps should have weighed more heavily in both the decision process and how it was communicated to her. However, physical separation is only one of many potential agency responses to alleged harassment, depending on operational needs and other situation-specific details. Under these circumstances, EDR cannot conclude that it was unfair or unreasonable under Policy 2.35 for the agency to expect its performance management to be effective.

Retaliation

The grievant contends that the warden's decision in July 2019 to go "back to normal operations" was made in retaliation for her complaints about the coworker's harassment. A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether the grievant's protected activity is causally connected to a subsequent adverse employment action against her.[19] For retaliation purposes, the First Grievance alleging workplace harassment is a protected activity.[20] However, the grievant's evidence does not raise a sufficient question whether her initiation of the First Grievance caused the warden's decision to lift separation measures. On the contrary, the First Grievance caused the warden to impose such measures in the first place. Further, in June 2019 – approximately one month before the July meeting – the warden documented his approach to separating the employees, connecting its duration to the coworker's lawsuit. While the grievant may reasonably dispute the warden's logic given that the legal dispute is now in an enforcement phase, EDR cannot say that his explanation supports any inference of causal connection to the First Grievance or to any related complaints by the grievant.

Finally, as explained above, the available facts do not present a sufficient question whether the grievant has experienced an adverse employment action that has not already been effectively remedied by the agency. The grievant has not presented evidence tending to show that the coworker continues to harass her despite the agency's response to date. To the extent that the grievant contends that the warden became angry and hostile toward her during the meeting when she objected to the decision, EDR is aware of no alleged conduct during the meeting that was so severe as to constitute an adverse employment action.[21] Finally, the grievant alleges that, following the July meeting, she was removed from her learning team (where the coworker is also assigned), which meets near her work area, and re-assigned to a new team some months later. Although EDR agrees that involuntary transfers of harassment complainants can create the appearance of retaliation, EDR perceives no facts in this case to create a sufficient question whether removal from the grievant's previous learning team constitutes a tangible action affecting the terms, benefits, or conditions of the grievant's employment.

Accordingly, the grievant's retaliation claim is not qualified for a hearing.

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[19] *See id.*; Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338 (2013)). Ultimately, a successful retaliation claim must raise a sufficient question as to whether, but for the grievant's protected activity, the adverse action would not have occurred. *Id.*

[20] *See* Va. Code § 2.2-3004(A).

[21] The grievant alleges that the warden accused her of being uncooperative, raised his voice, and misinterpreted her request to leave the meeting as a request to resign from her job. While yelling would typically rise to the level of unprofessional conduct prohibited by DHRM Policy 2.35, EDR cannot find that such conduct as alleged here might constitute an adverse employment action.

CONCLUSION

For the foregoing reasons, the Second Grievance does not present issues that qualify for a hearing at this time. However, EDR notes that one purpose of DHRM Policy 2.35 "is to ensure that agencies provide a welcoming, safe, and civil workplace for their employees . . . ." Thus, where an agency finds that an employee has experienced harassment, its response should consider whether reasonable measures exist to restore the complainant's view of the workplace. Here, it appears that the agency has declined to implement the grievant's request to be notified when her coworker will be visiting her area. While EDR cannot say that this determination exceeds the agency's discretion at this time, nothing in this ruling prevents the grievant from re-asserting ongoing harassment – perpetrated by the coworker and tolerated by the agency – should she experience any further incidents of inappropriate conduct that the agency fails to address effectively. In evaluating such a future grievance, EDR would again consider the full history of such harassment and whether the agency has rejected modest requests that would allow the grievant to avoid interacting with a coworker with a history of harassing her. To the extent that future responses by the agency do not account for this history, a third grievance could qualify for a hearing on grounds that the agency misapplied or unfairly applied the mandates of DHRM Policy 2.35 and/or its own harassment policies.

EDR's qualification rulings are final and nonappealable.[22]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[22] *See* Va. Code § 2.2-1202.1(5).