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QUALIFICATION RULING

In the matter of James Madison University
Ruling Number 2020-5090
June 2, 2020

The grievant seeks a ruling from the Office of Employment Dispute Resolution ("EDR")[1] at the Department of Human Resource Management ("DHRM") as to whether her March 24, 2020 grievance with James Madison University (the "university" or "agency") qualifies for a hearing. For the reasons set forth below, EDR finds that the grievance is not qualified for a hearing.[2]

FACTS

On or about March 24, 2020, the grievant filed a grievance challenging certain comments on her most recent annual performance evaluation. The evaluation, initially signed by the grievant's then-supervisor on October 7, 2019, indicated an overall rating of "high contributor."[3] However, the evaluation also allegedly included feedback regarding "areas for improvement" to which the grievant objected.[4] In December 2019, the grievant was selected for a new position in a different department within the university, and in February 2020 the university revised and reissued the grievant's annual evaluation to omit comments listed under "areas for improvement." However, the re-issued evaluation retained general comments by the grievant's former supervisor referencing improvement areas, including feedback that "[s]ignificant numbers of unplanned absences . . . should, to the best of the employee's ability, be kept to a minimum." Alleging that her absences were approved and that many were for medical reasons, the grievant sought removal of all supervisor comments from her evaluation, claiming that they constituted disability discrimination and violated DHRM Policy 2.35, *Civility in the Workplace*. The grievance proceeded through the management steps, and the university declined to grant the requested relief or to qualify the grievance for a hearing. The grievant now appeals that determination.

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[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] The history of this matter demonstrates a question as to whether this grievance could or should have proceeded under the initiation requirements of the grievance procedure. Nevertheless, that question was not raised in this ruling request and, accordingly, EDR will address the grievance as to whether it qualifies for a hearing on its substantive merits.

[3] The university's performance evaluation form provides a five-point rating scale, with "Contributor" as the midpoint, "High Contributor" as the next highest rating, and "Extraordinary Contributor" as the highest.

[4] The grievant has asserted that the improvement feedback was discriminatory and retaliatory.

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 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]

Finally, qualification may not be appropriate even if a grievance challenges a management action that might ordinarily qualify for a hearing. For example, an issue may have become moot during the management resolution steps, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.[12]

In this case, the sole relief sought by the grievant is removal of supervisor comments retained on the annual performance evaluation re-issued to her on or about February 24, 2020. In general, a satisfactory performance evaluation is not an adverse employment action.[13] When the

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[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).
[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] *See, e.g.*, EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.
[13] *E.g.*, EDR Ruling No. 2013-3580; EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; *see also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377-378 (4th Cir. 2004) (holding that, while an employee's performance

grievant presents no evidence of an adverse action relating to the evaluation, such a grievance does not qualify for a hearing.

Here, the grievant objects to comments by the former supervisor that include: "Improvement in the areas listed above is expected over the course of the next twelve months" to maintain the "High Contributor" rating and "[s]ignificant numbers of unplanned absences" should "be kept to a minimum." Other than these general comments, however, the grievant's revised performance evaluation is substantially positive, with most sub-category ratings and the overall rating being above average. A satisfactory performance evaluation such as this one would not ordinarily constitute a tangible employment action having a significant impact on the terms, conditions, or benefits of the grievant's employment.

The grievant appears to contend that the former supervisor's comments contain improper criticism of approved medical absences and/or were made in retaliation for engaging in a protected workplace activity. Although DHRM Policy 2.35 prohibits workplace harassment[14] and bullying,[15] 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.[16] 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.[17]

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

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rating was lower than on his previous evaluation, there was no adverse employment action where he failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment).

[14] 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."

[15] 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."

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

[17] 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).

affirmative obligations on agency management to respond to credible complaints of prohibited conduct and take steps to ensure that such conduct does not continue.[18] Accordingly, where an 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 grievance has alleged facts raising a sufficient question whether the grievant has experienced a hostile work environment that could be imputable to the university at this time. The disputed comments in the performance evaluation do not rise to the level of severe and/or pervasive conduct required to constitute an adverse employment action that could qualify for a hearing. EDR further notes that after the grievant transferred to a different department of the university, it appears that university management agreed to revise her performance evaluation in an attempt to resolve her concerns. Thus, it is not clear what further relief the grievant might obtain through the grievance hearing process. EDR generally does not qualify grievances for a hearing where no meaningful relief would be available.

For similar reasons, EDR cannot find that the grievance qualifies for a hearing based on its retaliation allegations. 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] Here, assuming for purposes of this ruling that the grievant engaged in a protected activity, the facts presented in the grievance record do not create a sufficient question whether the grievant has experienced an adverse employment action that could qualify for a hearing.

For the foregoing reasons, this grievance is not qualified for a hearing. EDR's qualification rulings are final and nonappealable.[20]

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[18] 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 . . . ."
[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 § 2.2-1202.1(5).