Issue: Qualification; Discrimination/Race, Disability; Hostile Work Environment; Ruling Date: December 20, 2001; Ruling #2001-129; Outcome: Not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of George Mason University/ No. 2001-129
December 20, 2001

The grievant has requested a ruling on whether her April 13, 2001 grievance initiated with George Mason University (GMU) qualifies for a hearing. The grievant claims that she has been discriminated against based on her race and disability, and that her supervisor engaged in a pattern of harassing conduct toward her that created a "hostile work environment." For the reasons set forth below, the issues raised in her grievance are not qualified for hearing.

FACTS

The grievant is an African American female. She began classified employment with the state in June 1999, and was hired by her supervisor as an Administrative and Program Specialist III (Pay Band 3), at a University research center on October 25, 2000. Among the grievant's job duties in this position was to create and maintain a working budget for three major research projects. Almost immediately after the grievant began working in this position, her supervisor noted that she was not performing this budget duty satisfactorily. On January 16, 2001, the grievant's supervisor counseled her, advising that she (1) had not created a working budget as requested; (2) had exhibited a negative tone towards her supervisor; (3) had disregarded instructions (e.g., to keep her office door open, to seek clarification on assignments from her supervisor, rather than co-workers); and (4) had been inappropriately critical of her supervisor in conversations with co-workers The grievant received documented counseling and verbal warnings on these same issues on several more occasions, including February 3, March 1 and March 19, 2001.

In November 2000, the grievant had been diagnosed with rheumatoid arthritis and "costochondritis."[1] Between January and April 2001, the grievant met with the University's Equity Office to discuss accommodation under the Americans with Disabilities Act (ADA) for her physical and mental health issues, the latter of which she characterized as being "unable to concentrate at times" and "feeling depressed."[2] The Equity Office arranged several temporary workplace modifications for the grievant pending a determination of whether she was covered under the ADA. The modifications included flexible work hours to accommodate the grievant's medical appointments, a speakerphone, and a more ergonomic arrangement of her office furniture. Subsequently, the grievant did not provide the medical

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[1] Costochondritis involves a painful inflammation of the cartilage of the ribs, which can worsen with movement or contact.
[2] March 26, 2001 Draft Memorandum from University Equity Office.

documentation requested by the Committee to determine whether she was covered under the ADA, and she withdrew her request for accommodation on April 16, 2001, citing concerns about confidentiality and potential retaliation by her supervisor. Also, as explained below, the grievant had transferred to a new position by this date.

Beginning in December 2000, the grievant complained to her Human Resources Office that her supervisor had been creating a progressively worse working environment for her. At a March 15, 2001 meeting with Human Resources, the grievant claimed that this treatment escalated such that her supervisor was creating a hostile work environment "to eventually force [her] to quit or transfer" because the supervisor "did not want an employee who had physical and/or mental limitations working for her."[3] The grievant claimed that the supervisor was subjecting her to unwarranted criticism of her job performance, and to offensive comments about gender and race, as well as the grievant's own mental and physical health. The Human Resources Office discussed the grievant's concerns with her supervisor and others. That Office also discussed with the grievant the supervisor's concerns about her job performance and demeanor.

Later in March, at the grievant's request, a recruitment officer assisted her with a job search for another position within the University. With this assistance, the grievant applied through the competitive selection process for a position in another department. She was interviewed on March 27, 2001, and was offered and accepted the position on April 4, 2001. The position was at Pay Band 2, but with no decrease in salary or benefits. Initially, the grievant requested that she start her new position on April 17, 2001, in order to provide two weeks notice, and to finish projects in her current position and schedule several medical appointments prior to beginning her new job. The Human Resources Office instead required the grievant to begin her new position the following day, on April 5, 2001, with flexibility granted for her to use paid leave during the two weeks for her medical appointments. The transfer was processed as a voluntary demotion for the grievant.[4]

DISCUSSION

Discrimination

Discrimination Based on Disability: For a claim of disability discrimination to qualify for hearing, a grievant must come forward with evidence raising a sufficient question as to whether: (1) she has a physical or mental impairment that substantially limits a "major life function,"[5] has a record of such impairment, or is regarded as having such an impairment; (2) she has suffered an adverse employment action; (3) at the time of the adverse action she was performing her job at a level that met the employer's legitimate expectations; and (4) the

[3] April 13, 2001 Grievance Form A attachment, page 4.
[4] *See* April 3, 2001 Memorandum from Director of Operations and Budget for grievant's new department; April 5, 2001 Classified Personnel Action Form.
[5] A "major life function" includes "functions such as caring for oneself, performing manual tasks, walking seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(i).

action occurred under circumstances that would raise a reasonable inference of unlawful discrimination.[6]

In this case, even if the grievant could show that she has an impairment limiting a major life function, has a record of such an impairment, or is regarded as such, there is insufficient evidence that the grievant was performing her job at a level that met the employer's legitimate expectations, particularly in light of the performance-related counseling memoranda she received. Nor can the grievant show that she suffered an adverse employment action. An "[a]dverse employment action includes any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the 'terms, conditions, or benefits' of employment."[7] This would encompass any tangible employment action by management that has some significant detrimental effect on factors such as an employee's hiring, firing, compensation, job title, level of responsibility, or opportunity for promotion.[8]

Here, the grievant's transfer did not affect her compensation, benefits, shift, or type of work (administrative support). And while an involuntary demotion to a lower pay band could be viewed as adverse employment action, there is insufficient evidence in this grievance that the agency forced her to accept an involuntary transfer or demotion. Indeed, the evidence would appear to show that the grievant's transfer to a lower-banded position was not coerced, but resulted from her own voluntary request to be separated from her supervisor.[9] Nothing in the record indicates that management failed to put forth a good faith effort to find for the grievant the type of work that she desired. As courts have instructed, "if an employee who believes she has been the victim of discrimination requests reassignment, and her employer reassigns her *in good faith*, then we must view with some skepticism that employee's claim that the reassignment constituted an adverse employment action."[10]

Discrimination Based on Race: To qualify this claim for hearing, the grievant must present evidence raising a sufficient question as to whether: (1) she is a member of a protected class; (2) her job performance was satisfactory; (3) in spite of her performance she suffered an

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[6] *See* Haulbrook v. Michelin North America, Inc., 252 F.3d 696, 702 (4th Cir. 2001); *See also* Ennis v. National Ass'n of Business and Educ. Radio, Inc., 53 F.3d 55, 58 (4th Cir. 1995).
[7] Von Gunten v. Maryland Dept. of the Environment, 243 F.3d 858 (4th Cir. 2001)).
[8] *See* Boone v. Goldin, 178 F.3d. 253 (4th Cir. 1999).
[9] A transfer or resignation may be the result of duress or coercion and therefore, involuntary, if in the totality of circumstances it appears that the employer's conduct in requesting the transfer effectively deprived the employee of free choice in the matter. Factors to be considered are (1) whether the employee was given some alternative to the transfer; (2) whether the employee understood the nature of the choice she was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether she was permitted to select the effective date of transfer or resignation. Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 174 (4th Cir. 1988). In this case, there is no evidence that the grievant did not have alternatives, that she misunderstood the nature of her choice to transfer, or that she was not given a reasonable amount of time to consider her choice. Also, the Human Resources Office appears to have set the effective date of the transfer only in the context of whether the grievant would work out her two weeks notice or be transferred immediately to her new post. While the grievant may have decided to transfer because of the supervisor's actions, she has presented insufficient evidence from which a reasonable fact finder could conclude that the supervisor or the agency forced or coerced her resignation by effectively depriving her of free choice in the matter.
[10] *See* Von Gunten v. Maryland Dept. of the Environment, 243 F.3d 858 (4th Cir. 2001)(italics added).

adverse employment action; and (4) she was treated differently than similarly situated employees outside the protected class.[11] If the agency provides a legitimate, non-discriminatory reason for its actions, the grievance should not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext or excuse for discrimination.[12]

As an African American, the grievant is a member of a protected class. However, as discussed above in the section addressing disability discrimination, the grievant has not shown that she suffered an adverse employment action, nor is there sufficient evidence that her job performance was satisfactory, particularly in light of the counseling memoranda she received. Finally, the grievant provides no evidence that she was treated differently than similarly situated employees who were not African American. The supervisor's alleged one-time statement about African American male athlete students being "pushed through college with substandard academic performance," even if proved, is insufficient to prove that she had discriminated against the grievant on the basis of race. Indeed, the supervisor who allegedly discriminated against the grievant is the same individual who hired her less than six months earlier, with a clear awareness of her race. This fact creates a strong inference that the supervisor's stated reasons for her actions are not a pretext for racial discrimination.[13]

Hostile Work Environment/Harassment

Hostile Work Environment/Harassment Based on Race and Disability: The grievant claims that her supervisor subjected her to discriminatory harassment that created a "hostile work environment" by inappropriately discussing her health with others, hyper-criticizing her job performance, and subjecting her to offensive comments relating to her race and health conditions, specifically, comments to the effect that "this [the grievant's employment] just isn't working" the grievant should "just get another job," and that male African American athlete students were "pushed through college with substandard academic performance."

For a claim of a hostile work environment based on race and/or disability to qualify for hearing, an employee must come forward with evidence raising a sufficient question that: (1) she was subjected to unwelcome harassment; (2) the harassment was based on race and/or disability; (3) the harassment was sufficiently severe or pervasive to alter her conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability for the harassment on the employer.[14] In both race and disability harassment, the factors to consider in determining whether the alleged harassment was severe or pervasive 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

[11] *See* Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)).
[12] Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998).
[13] *See* Proud v. Stone, 945 F.2d 796 (4th Cir. 1991)("In cases where the hirer and the firer [or adverse actor] are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.").
[14] *See* Spriggs v. Diamond Autoglass, 242 F.3d 179 (4th Cir. 2001).

interferes with an employee's work performance."[15] Further, courts have uniformly held that while a statement may be insensitive and offensive, a mere offensive utterance that occurred once and did not unreasonably interfere with an employee's ability to work cannot be said to create a hostile work environment based on race or any other protected class.[16]

In this case, there is no evidence that the supervisor discussed the grievant's physical or mental health conditions with anyone other than the University personnel who were handling the grievant's employment matters, such as her request for accommodation and transfer. Further, as discussed in the *Discrimination* section above, there is insufficient evidence that the supervisor's criticism of the grievant's job performance was based on the grievant's race or disability. Moreover, even if the grievant would find it offensive, the only alleged comment directly related to race, (regarding male African American athlete students), is not sufficiently severe or pervasive such as to create a racially hostile work environment. Likewise, comments such as "this [the grievant's employment] just isn't working" or that the grievant should "just get another job" are not sufficiently severe or pervasive such as to create, on the basis of any disability, an abusive working environment that unreasonably interferes with the grievant's capacity to work.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, she should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that she does not wish to proceed.

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Neil A.G. McPhie, Esquire
Director

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Jeffrey L. Payne
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[15] *See* Spriggs v. Diamond Autoglass, 242 F.3d 179 (4th Cir. 2001)(citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993).
[16] *See* Murphy v. Danzig, 64 F. Supp.2d 519 (E.D.N.C. 1999).