

Issue: Qualification/Discrimination/Sexual Harassment; Ruling Date: February 28, 2003; Ruling #2002-198; Agency: Department of Taxation; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Taxation
Ruling No. 2002-198
February 27, 2003

The grievant has requested a ruling on whether her March 25, 2002 grievance with the Department of Taxation (agency) qualifies for a hearing. The grievant alleges harassment and discrimination by her supervisor. While this ruling does not discuss with particularity each argument advanced by the grievant, each has been reviewed and carefully considered. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant was an Interstate Auditor who had worked for the agency for over 11 years.¹ On December 18, 2001, the grievant sent a letter to the agency's Director of Human Resources claiming sexual harassment and discrimination on the part of her immediate supervisor and asking for assistance in remedying the situation.² On March 7, 2002, the Human Resource Director sent a letter to the grievant stating in pertinent part that "[a]n extensive investigation was conducted...While [your immediate supervisor's] actions do not rise to the level of 'harassment' as defined by state and federal regulations, there appears to be a communication issue between you and him. Findings indicated that he tends to give very direct feedback that can be perceived as harsh. It is the desire of TAX management to come to an acceptable resolution of this issue. The Interstate Audit Manager will contact you to schedule a face-to-face meeting in the near future so that the above issues can be addressed. Until this matter has been resolved, [the Interstate Audit Manager] has requested that you report directly to her."³

On March 25, 2002, the grievant filed a grievance regarding her initial December 18, 2001 complaints, how those complaints were handled, and asking as relief that she be reassigned to another Team Leader. Throughout the course of the grievance resolution steps, management upheld its actions. The agency head denied qualification

¹ During this investigation this Department was informed by human resources that the grievant submitted a resignation in January 2003 and is no longer employed by the agency.

² See correspondence from grievant to Director of Human Resources dated December 18, 2001.

³ See correspondence to grievant from the Human Resource Director dated March 7, 2002.

of the grievance and the grievant subsequently requested that the Director of this Department qualify it for hearing.

DISCUSSION

Discrimination

Under the grievance procedure, a claim of discrimination arising from membership in a protected class (in other words, on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex) may qualify for a hearing.⁴ The grievant's complaint of discrimination is based on a long history of supervisory conflict and her perception that she is being treated differently because she is a woman and Jewish.⁵

To qualify for hearing, a grievant must establish: (1) that she is a member of a protected class; (2) that her job performance was satisfactory; (3) that in spite of her performance she suffered an adverse employment action; and (4) that she was treated differently than similarly-situated employees outside the protected class.⁶ If the agency provides a legitimate, non-discriminatory reason for its actions, the grievance should not be qualified for a hearing, absent sufficient evidence that the agency's professed business reason was a pretext or excuse for discrimination.⁷

In this case, the grievant has not met all of the above four elements of a discrimination claim. It is undisputed that the grievant is a member of a protected class based on both her gender (female) and religion (Jewish). Further, we will assume for purposes of this ruling only that her performance had been satisfactory as shown by the "Contributor" rating on her 2001 annual performance review.⁸

However, the grievant has not provided sufficient evidence that the actions she challenges in this case constitute "adverse employment actions" for purposes of a discrimination claim. An adverse employment action is defined as a "tangible employment act constituting 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

⁴ *Grievance Procedure Manual*, § 4.1(b), page 10.

⁵ The grievant's claim of being discriminated against because she is from New York does not constitute a claim of discrimination against a protected class and thus will not be discussed.

⁶ See *Hutchinson*, 1998 U.S. Dist. LEXIS 7723 at 3-4 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

⁷ *Id.*

⁸ See rating page from grievant's EWP dated 10/9/01.

⁹ *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

In support of her claim of gender and/or religious discrimination, the grievant relates an elevator incident in which she alleged that her supervisor “leered at her breast.” However, during this Department’s investigation, the grievant clarified that this was “not sexual but meant to simply make [grievant] upset.”¹⁰ The grievant also contends that at least one woman has left the agency because of the supervisor. As another example, the grievant relates being asked by her supervisor to obtain a certain certificate from a funeral home, an activity that the grievant considered “useless” but admits is a “normal part of the process.” Finally, the grievant cites an incident in which her supervisor asked her to correct a travel reimbursement request to correctly identify the place of her overnight lodging. The grievant had stayed at a different motel than originally approved, because the motel she chose was closer to a synagogue where she and another employee attended an evening holiday service while in Richmond for agency business. Although the grievant claims that her supervisor’s request for a correction constituted or demonstrated religious discrimination, the grievant stated, during the investigation for this ruling, that she included this claim in her grievance because she believed another employee had alleged religious discrimination and had gained some relief and that “it fit the pattern of the supervisor picking on vulnerable people and enjoying seeing people upset.” Further, the grievant described her supervisor’s behavior toward her as “a personality thing, he just likes to intimidate.”

While the grievant found her immediate supervisor’s actions to be unpleasant and inappropriate, there is no evidence that any of the above incidents had a significant detrimental effect on the “terms, conditions, or benefits of her employment.”¹¹ Specifically, the incidents did not constitute a loss of pay, position title, or shift, or promotional opportunities. Even if the actions taken could be considered adverse employment actions, the grievant has not presented sufficient evidence that the actions were taken because of her sex or religion, rather than a general desire to harass and intimidate others. Indeed, the grievant’s own allegations and assertions appear to describe a supervisor whose personal style contributes to generalized, but nondiscriminatory conflict at the workplace.¹²

¹⁰ The context in which the “leering” incident occurred is as follows: The grievant explains that she had inadvertently placed a visitor pass upside down on her chest. Her supervisor pointed to the pass, and said, “you know you have that on upside down.” See grievant’s December 18, 2001 letter to the Director of Human Resources.

¹¹ *Munday v. Waste Management of North America*, 126 F.3d 239, 243 (4th Cir. 1997).

¹² Nor is there evidence that the supervisor’s actions created a discrimination-based “hostile work environment.” For a claim of a hostile work environment based on gender and/or religion 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 gender and/or religion; (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. See *Spriggs v. Diamond Autoglass*, 242 F.3d 179 (4th Cir. 2001). Here, while the grievant’s evidence may point to generalized conflict, she presents no evidence of harassment based on her gender or religion.

In conclusion, the facts cited in support of the grievant's claim can best be summarized as describing significant conflict between the grievant and her supervisor concerning his decisions and actions surrounding her work performance. Such claims of supervisory conflict, while grievable through the management steps, are not among the issues identified by the General Assembly that may qualify for a hearing. Accordingly, this grievance does not qualify for a hearing.¹³

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.

Claudia T. Farr
Director

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¹³ During this Department's investigation the grievant requested consolidation of this ruling request with another grievance that she asserts is related as it has many of the same claims in addition to the claim of retaliation. The second grievance is currently at the third resolution step. Since this grievance does not qualify for hearing the grievant's request for consolidation is moot.