

Issue: Qualification/Discrimination/Age; Ruling Date: June 17, 2003; Ruling #2003-030; Agency: Department of Health; Outcome: not qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Health  
Ruling Number 2003-030  
June 17, 2003

The grievant has requested a ruling on whether her December 12, 2002 grievance with the Virginia Department of Health (VDH or agency) qualifies for a hearing. The grievant challenges various actions by agency management and fellow employees over a period of years as workplace harassment. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a registered nurse with VDH. On February 11, 1992, the grievant initiated a grievance alleging that her supervisor had engaged in threatening behavior toward her. The February 1992 grievance was concluded by mediation. On December 18, 2001, a doctor with VDH stated numerous reasons why he did not want the grievant assigned to the HIV clinic. Specifically, the doctor claimed that the grievant (1) was not culturally sensitive; (2) was rude to patients and disrespectful of their dignity and privacy; and (3) purposefully made those around her uncomfortable. By grievance dated December 27, 2001, the grievant challenged the doctor's statements as slanderous and discriminatory. The December 2001 grievance was concluded by the grievant after she received a written apology from the doctor.

On August 30, 2002, due to an alleged hostile work environment, the grievant requested a transfer to another clinic (Clinic A) five days per week, or, if not five days, then Thursday and Friday of each week. The grievant claims that she verbally requested a transfer on two occasions prior to her August 30, 2002 written request. The grievant renewed her written request for a transfer on November 29, 2002, citing workplace harassment and discrimination. Additionally, the grievant claims that two VDH employees were allegedly transferred to Clinic A after the grievant's transfer requests. In its third resolution step response, management states that one of the cited transfers was clerical and the other a public health nurse. However, in a statement made during the course of this Department's investigation, the agency asserts that there was only one such transfer on August 26, 2002 and that the VDH employee transferred to Clinic A was a registered nurse and was 52 years of age at the time of transfer. The grievant's request for a transfer to Clinic A on Thursdays and Fridays was eventually granted.

In the present case, the grievant alleges that the agency's failure to transfer her despite repeated requests is workplace harassment. Further, the grievant claims that the denial of transfer is one event in a long history of workplace harassment at VDH. In support of this contention, the grievant cites to the events surrounding the February 11, 1992 and December 27, 2001 grievances<sup>1</sup> and a letter to an EDR consultant dated April 19, 1999.<sup>2</sup> Additionally, the grievant claims that her supervisor's refusal to meet with her upon request, her working as the only nurse three days a week at another clinic (Clinic B) and the alleged transfer of two other VDH employees to Clinic A is further evidence of workplace harassment.

## DISCUSSION

### *Workplace Harassment*

Although all complaints initiated in compliance with the grievance process may proceed through the three resolution steps set forth in the grievance statute, thereby allowing employees to bring their concerns to management's attention, only certain issues qualify for a hearing. For example, while grievable through the management resolution steps, claims of hostile work environment and harassment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on race, color, national origin, age, sex, religion, political affiliation, disability, marital status or pregnancy.<sup>3</sup> The grievant maintains that the alleged workplace harassment she has experienced is based primarily upon management's and staff's personal dislike of her, but may also be based upon her age.<sup>4</sup>

Workplace harassment based on personal dislike does not qualify for hearing because it is not one of the enumerated protected classes set forth above. However, the grievant's claim of a hostile work environment based on age will qualify for hearing if she comes forward with evidence raising a sufficient question that: (1) she was subjected to unwelcome harassment; (2) the harassment was based on age; (3) the harassment was sufficiently severe or pervasive to alter her conditions of employment and create an

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<sup>1</sup> In the management resolution steps of the grievance process, the agency declined to address issues surrounding the February 11, 1992 and December 27, 2001 grievances, stating that the grievance procedure prevents an employee from initiating multiple grievances challenging the same actions or arising out of the same facts. In her December 12, 2002 grievance, the grievant alleges a pattern of workplace harassment. As such, it is appropriate for the grievant to introduce those events that were previously grieved as background evidence to support her current workplace harassment claim.

<sup>2</sup> In the April 19, 1999 letter, the grievant sought a consultation with an EDR Consultant regarding alleged slanderous remarks made by VDH employees about the grievant's personality.

<sup>3</sup> *Grievance Procedure Manual* § 4.1(b)(2), page 10; see also DHRM Policy 2.30 Workplace Harassment (effective 05/01/02).

<sup>4</sup> Although the grievant does not specifically state in her grievance that the alleged workplace harassment is a result of her age, on her Form A she references a November 29, 2002 letter that alleges age discrimination. Additionally, during this Department's investigation, the grievant claimed that she thought the workplace harassment might be based upon her age. Moreover, management addressed the grievant's concerns of workplace harassment due to age during the management resolution steps.

abusive atmosphere; and (4) there is some basis for imposing liability for the harassment on the employer.<sup>5</sup> However, 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.<sup>6</sup>

Because the grievant is over the age of forty, she is a member of a protected class.<sup>7</sup> However, the grievant has presented no evidence to support her claim that any of the above actions or claims were based on her age and, in fact, repeatedly asserted during this Department's investigation that she believed the alleged harassment was based on personal dislike, but *may* be based on age. Mere allegations and possibilities, without more, are not enough to support a claim of workplace harassment based on age. As such, this grievance does not qualify for hearing.

#### 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, the grievant 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 wishes to conclude the grievance.

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Claudia T. Farr  
Director

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Jennifer S.C. Alger  
EDR Consultant

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<sup>5</sup> See Causey v. Balog, 162 F.3d 795, 801(4<sup>th</sup> Cir. 1998).

<sup>6</sup> See Murphy v. Danzig, 64 F. Supp.2d 519, 522 (E.D.N.C. 1999).

<sup>7</sup> It should be noted that the employee transferred to Clinic A was also over the age of forty.