

Issue: Qualification/grievant claims discrimination and harassment on basis of misapplied policy; Ruling Date: April 2, 2004; Ruling # 2003-549 Agency: Virginia State University; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia State University
Ruling Number 2003-549
April 2, 2004

The grievant has requested a ruling on whether her November 12, 2003 grievance with Virginia State University qualifies for hearing. The grievant claims that management's requirement that she provide documentation for sick leave absences constituted an unfair or misapplication of the sick leave policy, and was part of a pattern of discrimination and harassment. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Co-Curricular Programs Coordinator. On November 4, 2003, the grievant departed work three hours early due to illness, but did not seek medical care. On November 5, she was instructed by her supervisor to submit a sick leave form for the absence, with an accompanying doctor's note. She was further told that if she had failed to seek medical care, she must use annual leave for the three-hour absence. The grievant submitted a sick leave form but did not provide a doctor's note as instructed. Subsequently, she was asked by her supervisor to submit another leave slip charging her absence to annual leave. The grievant failed to comply and on November 12, 2003, her supervisor initiated a leave form documenting the absence as annual leave.

The grievant asserts that male employees are not required to verify their sick leave. She claims that by requiring her to verify her sick leave, her supervisor has misapplied or unfairly applied state personnel policy, discriminated against her based on her gender, and along with other allegedly harassing actions, has created a hostile work environment designed to compel her resignation.

DISCUSSION

Gender Discrimination/Hostile Work Environment

Under the grievance procedure, a claim of discrimination based on gender may qualify for a hearing.¹ To do so, 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.² 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.³ In this case, the grievant claims that male employees are not required to provide verification of sick leave, but female employees are.

As a female, the grievant is a member of a protected class. Further, for purposes of this ruling only, we will assume that requiring the use of annual leave for claimed illness, as opposed to sick leave, could be viewed as an adverse employment action.⁴ Also, the grievant has provided evidence tending to show that her job performance was satisfactory.⁵ However, the grievance fails to raise a sufficient question as to whether the grievant was treated differently than similarly-situated males.

In this case, the grievant has provided no evidence to show that male employees with a similar leave usage profile were treated differently. The only evidence offered to support her claim is a conversation that she had with one of the male employees who allegedly stated that he was not required to provide verification of sick leave. During this Department's investigation of this matter, the male employee stated that he is in fact required to provide verification of sick leave under certain circumstances. In any event, the grievant's supervisor has provided a legitimate, nondiscriminatory reason for his requirement that the grievant verify her sick leave absences: in his judgment, the grievant has established a pattern of requesting leave when significant tasks for which she is responsible are due or when important student activities are scheduled, resulting in disruptions and increased workload for other staff.⁶ In sum, the grievant has failed to provide sufficient evidence to establish that she was treated differently than other similarly-situated employees because of her sex.

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 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

¹ *Grievance Procedure Manual*, § 4.1(b), page 10.

² See *Hutchinson*, 1998 U.S. Dist. LEXIS 7723 at 3-4 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

³ *Id.*

⁴ Compare EDR Ruling Number 2003-054, issued June 17, 2003.

⁵ The grievant was rated as **Contributor** on her annual 2003 performance evaluation.

⁶ Specifically, when leave requests or absences (1) appear or seem to be lengthy; (2) appear or seem excessive, e.g., occurring in "rapid succession" or exceeding leave balances; (3) cause disruptions, and/or increased and unnecessary workloads for other staff members; (4) occur when significant, key and important tasks, responsibilities, or activities are required; and (5) when the supervisor draws an inference or forms a perception of impropriety.

based on gender; (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.⁷

Here, the grievant alleges that the supervisor (1) required that she verify sick leave and justify other unscheduled absences; (2) threatened to place her on Leave Without Pay for unscheduled absences on September 10, September 22, and November 4, 2003; and (3) disapproved two requests for her to participate in the Employee Tuition Waiver Program. However, the only evidence she provides in support of her claim that these actions created a “hostile work environment” is the alleged comment by one male employee that he is not required to provide sick leave verification. While the grievant's evidence may point to generalized conflict between her supervisor and herself, her grievance fails to raise a sufficient question of a gender-based harassment or hostile work environment. Generalized conflict, supervisory hostility or an employee's disagreement with her supervisor's management style do not, in and of themselves, qualify for a hearing.

Misapplication or Unfair Application of Policy

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was as unfair as to amount to a disregard of the intent of the applicable policy. The grievant claims that management has unfairly applied policy by requiring that she provide verification each time that she is absent on sick leave, while not requiring that of other employees.

Department of Human Resource Management (DHRM) Policy 4.55, Sick Leave, expressly provides that employees who wish to use sick leave must comply with management's request for verification, and that the use of paid sick leave may be denied if an employee fails to provide such verification.⁸ Thus, absent an improper motive such as discrimination, policy would appear to allow a supervisor to exercise his managerial discretion to require sick leave verification of some employees (those for whom, in the supervisor's judgment, a disruptive pattern has developed) but not for others (those for whom, in the supervisor's judgment, a disruptive pattern has not developed). As discussed above, this grievance provides little or no evidence of unlawful discrimination or any other improper motive. In light of the state's express sick leave policy provisions, it appears that the grievant's supervisor was merely acting within his authority under policy by requiring the grievant to provide him with sick leave verification.

APPEAL RIGHTS AND OTHER INFORMATION

⁷ See *Spriggs v. Diamond Autoglass*, 242 F.3d 179 (4th Cir. 2001).

⁸ See DHRM Policy No. 4.55(III)(A)(1)(2).

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 wishes to conclude the grievance and notifies the agency of that desire.

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Director

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