

Issue: Qualification/Sick leave; hostile working environment; Ruling Date: September 2, 2004; Ruling #2004-693; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health,
Mental Retardation and Substance Abuse Services
Ruling Number 2004-693
September 2, 2004

The grievant has requested a ruling on whether her January 23, 2004 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) qualifies for hearing. She alleges that the agency has misapplied or unfairly applied its attendance policy and that the application of the policy has created a hostile working environment. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed with the agency as a registered nurse. On April 3, 2003, the grievant was issued a Group I written notice for excessive unscheduled absences. She subsequently initiated a grievance challenging the written notice. This grievance was resolved at the second resolution step by the written notice being rescinded. Since the retraction of the written notice in June 2003, the grievant has not been subjected to any discipline.

On January 23, 2004, the grievant initiated the present grievance, in which she challenges the agency's attendance policy. Specifically, the grievant contends in her Grievance Form A that the agency's policy has been misapplied or unfairly applied, and that the application of the policy has created a hostile work environment in violation of Title VII of the Civil Rights Act of 1964 and Governor's Order No. 1.¹

DISCUSSION

Misapplication or Unfair Application of Policy

¹ The grievant also alleges that the attendance policy constitutes a violation of applicable patient care standards and that the facility's Ethics Committee has misapplied the policy. As these allegations neither pertain directly and personally to the grievant's own employment (*see Grievance Procedure Manual* § 2.4(3)) nor fall within this Department's statutory authority (*see Va. Code* § 2.2-3004) they will not be addressed in this ruling.

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 so unfair as to amount to a disregard of the intent of the applicable policy.

A mere misapplication of policy in itself, however, is insufficient to qualify for a hearing. The General Assembly has limited issues that may qualify for a hearing to those that involve “adverse employment actions.”² The threshold question, therefore, is whether or not the grievant has suffered an adverse employment action.

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.”³ A misapplication of policy may constitute an adverse employment action if, but only if, the misapplication results in a significant adverse effect on the terms, conditions, or benefits of one’s employment.⁴

In this case, it is clear that the January 23, 2004 grievance does not involve an adverse employment action. While the grievant did receive written discipline in April 2003, that discipline may not form the basis of the present grievance. The April 2003 written notice was previously grieved by the grievant and rescinded by the agency in June 2003.⁵ With the exception of that one agency action, the grievant does not claim that the alleged misapplication or unfair application of the attendance policy created a significant adverse effect on the terms, conditions, or benefits of her employment. To the contrary, the grievant admits that her grievance is not related to any action taken against her, other than the rescinded April 2003 written notice. Because the grievant has failed to make the threshold showing of an adverse employment action, her claim of misapplication or unfair application of policy does not qualify for hearing.

Even assuming, however, that the grievant were able to establish that she had experienced an adverse employment action in relation to the present grievance, she would nevertheless not be entitled to a hearing with respect to her claim of misapplication or unfair application of policy. Although in her Form A, the grievant alleged that the agency has unfairly applied its attendance policy, in the course of this Department’s investigation, the grievant clarified that her challenge is to the language of the policy and its impact on agency employees, not to the manner in which the policy has been applied. Specifically, the grievant contends that the policy wrongly encourages employees to

² Va. Code § 2.2-3004(A).

³ Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

⁴ Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

⁵ An employee may not file duplicate grievances challenging the same action or arising out of the same facts. *Grievance Procedure Manual* § 2.4. Moreover, because the agency rescinded the written notice, it does not constitute an adverse employment action against the grievant.

come to work even when ill, unfairly excludes leave protected by the federal Family and Medical Leave Act (“FMLA”) from being counted as an occurrence under the attendance policy, and improperly allows the agency to consider mitigating circumstances in issuing discipline. This type of challenge to the *contents* of a policy is expressly excluded from qualification by the grievance statutes.⁶

Hostile Work Environment

The grievant also alleges that the agency’s attendance policy has created a “hostile working environment.” A claim of workplace harassment or hostile work environment qualifies for a grievance hearing only if an employee presents evidence raising a sufficient question as to whether the challenged actions are based on race, color, religion, political affiliation, age, disability, national origin, or sex.⁷ In this case, the grievant does not assert that the alleged harassment was based on any of these factors. Rather, as the grievant explained in the course of this Department’s investigation, she believes that the agency’s attendance policy has created a hostile work environment because the policy encourages employees to come to work sick, does not penalize employees on FMLA-protected leave, and allows for mitigation. The grievant does not allege, however, that employees of any particular protected class are treated more or less favorably under the policy. Absent such evidence, the grievant’s hostile work environment claim does not qualify for a hearing.⁸

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 the qualification 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.

Claudia T. Farr
Director

⁶ Va. Code § 2.2-3004(C).

⁷ Va. Code § 2.2-3004(A)(iii). *See also* Department of Human Resource Management (DHRM) Policy 2.30, which defines workplace harassment as conduct that “denigrates or shows hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status or pregnancy.”

⁸ *See* Va. Code § 2.2-3004(A).

September 2, 2004
Ruling #2004-693
Page 5

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