

Issues: Qualification: Discipline – Written Notice for Workplace Harassment, Work Conditions – Supervisor/Employee Conflict, Work Conditions – Violence in the Workplace; Ruling Date: May 2, 2007; Ruling #2007-1575; Agency: University of Virginia; Outcome: Not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the University of Virginia
Ruling Number 2007-1575
May 2, 2007

The grievant has requested a ruling on whether his December 20, 2006 grievance with the University of Virginia (UVA or the agency) qualifies for a hearing. The grievant asserts that he has been repeatedly harassed by management. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a welder. The grievant alleges that on November 21, 2006, his supervisor's supervisor, Mr. W, cursed him in front of several other employees. The grievant asserts that this was not "the first time" Mr. W had engaged in this behavior. The grievant states that subsequently, on December 15, 2006, Mr. W threatened him with being written up for spending time in the shop. He also alleges that prior to the November 21st incident, Mr. W had advised the grievant's direct supervisor "not to send any more good evaluations to him on [the grievant] because he wouldn't be signing them."

On December 20, 2006, the grievant initiated a grievance challenging Mr. W's alleged conduct. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and the grievant has appealed to this Department.

DISCUSSION

Workplace Harassment

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 a protected status or class--race, color, national origin, age, sex, religion, political affiliation, disability, sexual orientation, veteran status¹--or were taken in retaliation for the grievant's previous involvement in protected activity.² Here, the grievant has not alleged that management's purported actions were based on any of these factors. Rather, the facts cited in support of the grievant's claim can best be summarized as describing general work-related conflict between the grievant and Mr. W. Such claims of supervisory conflict are not among the issues identified by the General Assembly that may qualify for a hearing.³

Unfair Application of Policy

Fairly read, the grievance also asserts a claim that Mr. W's alleged conduct towards the grievant was in violation of state and agency Workplace Violence policies. For an allegation of misapplication 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 or unfair application of policy itself, however, is insufficient to qualify for a hearing. Rather, the General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."⁴ 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 action constitute[ing] 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."⁵ As a matter of law, adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁶

Here, even if the truth of the grievant's allegations is assumed for the purposes of this ruling, the grieved conduct does not constitute an adverse employment action, as he has not shown that he in fact experienced a significant and tangible change in his

¹ *Grievance Procedure Manual* § 4.1(b)(2); *see also* DHRM Policy 2.30 Workplace Harassment (effective 05/16/06).

² *See Grievance Procedure Manual* §4.1(b)(4) *see also* EDR Ruling No. 2004-750 (discussing claim of retaliatory harassment).

³ *See* Va. Code § 2.2-3004 (A).

⁴ Va. Code § 2.2-3004(A).

⁵ *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

⁶ *Munday v. Waste Management of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997).

employment status through Mr. W's alleged conduct⁷. Accordingly, the grievant's claim of misapplication and/or unfair application of policy 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 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

⁷ See *Smalls v. Allstate Ins. Co.*, 396 F. Supp. 2d 364, 371 (S.D.N.Y. 2005) ("However, the court also notes here that `being yelled at, receiving unfair criticism, receiving unfavorable schedules or work assignments...do not rise to the level of adverse employment actions...because they [do] not have a material impact on the terms and conditions of Plaintiff's employment'" (citing *Lee v. New York State Dept. of Health*, 2001 U.S. Dist. LEXIS 11287, at *69 (S.D.N.Y. 2001))).