

Issue: Qualification – Discrimination (gender); Ruling Date: February 19, 2008;
Ruling #2008-1883; Agency: Department of Conservation and Recreation;
Outcome: Qualification granted.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Conservation and Recreation
Ruling Number 2008-1883
February 19, 2008

The grievant has requested a ruling on whether her September 10, 2007 grievance with the Department of Conservation and Recreation (the agency) qualifies for a hearing. For the reasons discussed below, this grievance qualifies for hearing.

FACTS

In August 2007, the agency reorganized the Soil and Water Conservation Division (“the Division”) and changed certain positions in the Division. The grievant claims that her position was substantially altered. For instance, before the change, the grievant allegedly supervised many agency employees and regional managers in the agency’s regional offices. Additionally, as a result of the reorganization, the grievant no longer supervises the regional offices and is no longer a member of the Division leadership team. The grievant did not lose pay in the reorganization, but her job title was changed from an assistant director to a coordinator position.¹ The grievant initiated her grievance on September 10, 2007, to challenge this reorganization and her “demotion” as disciplinary in nature.

In addition to her claim of informal discipline, the grievant alleges “discrimination on the basis of her gender” resulting in a hostile work environment. The grievant states that another Senior Division Employee has, for years, unfairly criticized her, personally and professionally, and led an effort to undermine her in the eyes of the Division Director. According to the grievant, this Senior Division Employee has caused other Division employees to support his accusations and efforts. The grievant also states that, many years ago, the Senior Division Employee referred to her in at least one public meeting as a “super bitch.”² The grievant alleges that the Senior Division Employee’s accusations and efforts to undermine her have led to management having no confidence in her abilities and to other acts including the “demotion” that occurred in August 2007. The grievant also claims that her current supervisor has joined an effort to undermine her and treat her differently because of her gender as well. She states that her supervisor ignored the chain of command on various occasions in dealing with those she supervises. In addition, the grievant claims she was excluded from meetings she should have attended based on her duties. She alleges that

¹ The grievant alleges numerous other changes to her position in the reorganization, including having the ability to provide input on management, legislative, and financial issues.

² The agency states that the Senior Division Employee was disciplined for this conduct.

similar issues arose with at least one other female Division employee as well. The grievant has also provided a listing of various events and activities allegedly involving different treatment between male and female employees in the Division. The grievant alleges that she has raised these issues in the past to the Division Director, but little was done to correct the problems.

DISCUSSION

Hostile Work Environment

For a claim of hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.³ “[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.”⁴

There is no question that the grievant's allegations sufficiently raise a question as to the first and last elements of a hostile work environment claim. The conduct described by the grievant would clearly be unwelcome and imputable to the agency. Additionally, the conduct alleged also appears to be pervasive in that it has occurred over the course of many years based on the grievant's allegations. Moreover, the grievant alleges that the criticism by the Senior Division Employee and others was an effort to discredit her performance in the eyes of the Division Director and to make her appear incompetent, specifically with regard to her ability to supervise the regional offices, a duty that was removed during the reorganization. The result of this type of conduct, i.e., destroying an employee's opportunity to succeed in the workplace, is one tangible effect of discrimination that Title VII was enacted to prevent.⁵ Furthermore, if the reorganization of the grievant's position was part of the alleged hostile work environment, the grievant's allegations would also appear to describe a severe act. The grievant's position was allegedly substantially modified with extensive supervisory responsibilities removed, which would at least arguably appear to be an adverse employment action. Therefore, based on the totality of the circumstances, the grievant's allegations have raised a question as to whether the conduct was severe or pervasive. The more difficult question is whether the conduct alleged was based on the grievant's protected status.

The grievant has alleged a number of situations in which she feels that she has been treated differently because of her gender, as well as a general culture in existence in the

³ See *Spriggs v. Diamond Autoglass*, 242 F.3d 179, 183-184 (4th Cir. 2001).

⁴ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

⁵ E.g., *Shepherd v. Comptroller of Public Accounts*, 168 F.3d 871, 874 (5th Cir. 1999), *cert. denied*, 528 U.S. 963 (1999); see also *Harris*, 510 U.S. at 22 (noting one of the tangible effects of discriminatory conduct is keeping employees from advancing in their careers).

Division. She has pointed to conduct in years past by the Senior Division Employee that could be seen as directly related to her gender. She has also identified at least one other past female Division employee who was allegedly subject to similar behavior. The agency disputes the grievant's contentions and characterizations of the facts.⁶ Indeed, the agency states that the grievant has perceived that the situations were based on gender when, in the perception of those in management, they were not. This Department's investigation at this qualification stage cannot determine the veracity of the allegations and explanations in this case given the parties' divergent viewpoints and the nature of the claims made. Perceptions about the pertinent events clearly play a role in these relationships. However, these are all disputed issues of fact and credibility that are more properly decided by a hearing officer. Because the grievant has presented evidence that raises a sufficient question as to the elements of a claim of hostile work environment, her grievance is qualified for hearing.⁷

Alternative Theories and Claims

Because the grievant's claim regarding hostile work environment qualifies for hearing, this Department deems it appropriate to send all alternative theories raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues. As such, the grievant's other claim asserted on the Form A, informal discipline, also qualifies for hearing.

CONCLUSION

For the reasons set forth above, the grievant's September 10, 2007 grievance is qualified for hearing. This qualification ruling in no way determines that the agency's actions were discriminatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

Claudia Farr
Director

⁶ For instance, the Division Director stated that it may have been a "matter of opinion" that the grievant felt she should have been included in meetings she was not.

⁷ This ruling in no way determines that these actions were because of the grievant's gender. Indeed, these events could very easily be the product of a strained workplace as a result of years of unresolved disagreement and dislike between various agency employees. However, because the facts are unclear, and the grievant has raised substantial allegations involving potentially adverse actions, the grievance must be qualified for a hearing officer to explore the situation further.