

Issue: Qualification – Work Conditions (Supervisor/Employee Conflict); Ruling Date: February 24, 2010; Ruling #2010-2544; Agency: Virginia 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 No. 2010-2544
February 24, 2010

The grievant has requested a qualification ruling in her August 18, 2009 and August 25, 2009 grievances with the Department of Health (the agency). For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

In both of the grievances at issue in this ruling, the grievant claims that she has endured harassment and a hostile work environment. In her August 18, 2009 grievance, the grievant asserts that her supervisor yelled at her on at least two occasions.¹ In her August 25, 2009 grievance, the grievant alleges that she complained about the harassment and asked to be moved to another work location. According to the grievant, this request was denied. The grievant states that this action returned her to the alleged hostile work environment.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.² Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or whether state policy may have been misapplied or unfairly applied. The grievant has alleged that she has been subject to harassment and a hostile work environment.

¹ The agency has asserted that one of these occasions occurred on July 15, 2009, which was more than 30 calendar days before the initiation of this grievance, making the grievant's challenge to that incident untimely. However, a claim of harassment is raised in a timely manner if some agency action alleged to be part of the harassing conduct occurred within the 30 calendar days preceding the initiation of the grievance. *See Nat'l R.R. Pass. Corp. v. Morgan*, 536 U.S. 101, 115-18 (2002) (Title VII hostile work environment harassment case). Because the second incident of alleged harassment occurred on August 18, 2009, which was within the 30 days preceding the initiation of the grievance, the grievant was timely to raise the harassment claim.

² *See* Va. Code § 2.2-3004(B).

For a claim of harassment or hostile work environment 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

However, the grievant must raise more than a mere allegation of harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status.⁵ Although the grievant alleges that she was yelled at by her supervisor on at least two occasions and that management did not grant her request to transfer away from the environment, the grievant has not presented evidence that the alleged harassment and/or hostile work environment was based on a protected status.⁶ Consequently, this claim does not qualify for a hearing.⁷

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 Department’s qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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.

If the grievant does appeal this qualification determination to circuit court, she must notify this Department, as well. If this Department receives no such notification within five workdays of the grievant’s receipt of this ruling, we will proceed with the appointment of a hearing officer in the grievant’s other Three Grievances that have been consolidated in EDR Ruling Nos. 2010-2517, 2010-2518, 2010-2519. If the grievant does appeal this qualification determination to circuit court, this Department will continue to stay the Three Grievances until

³ See *Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

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

⁵ See also, e.g., DHRM Policy 2.30, *Workplace Harassment* (defining “Workplace Harassment” as conduct that is based on “race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability”).

⁶ As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a “general civility code” or remedy all offensive or insensitive conduct in the workplace. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *Beall v. Abbott Labs.*, 130 F.3d 614, 620-21 (4th Cir. 1997); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996).

⁷ This ruling in no way prevents the grievant from presenting evidence of the incidents identified in her August 18, 2009 and August 25, 2009 grievances at the consolidated hearing in her other Three Grievances, if such evidence is deemed relevant to the claims in those matters.

the issues of qualification and/or consolidation for the August 18, 2009 and August 25, 2009 grievances are determined. If either party objects or seeks to proceed with a hearing on the Three Grievances alone without further delay, notification in writing should be made to this Department, with a copy to the opposing party, for consideration by the EDR Director.

Claudia Farr
Director