Issue: Qualification – Discrimination (Age); Ruling Date: May 3, 2010; Ruling #2010-2600; 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 2010-2600
May 3, 2010

The grievant has requested a ruling on whether her January 25, 2010 grievance with the University of Virginia (the University) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In her January 25, 2010 grievance, the grievant raises a number of issues about her work environment and treatment by management. She feels she is being harassed. Dating back to at least 2005, the grievant identifies concerns with many issues, including the duties she has been assigned, failure to receive a salary increase, lack of training, counseling about work performance and behavior, and the failure to get a new computer when other employees' computers were updated. The grievant states that her work environment is very stressful, which caused a medical issue. The grievant feels that her job is being threatened. She thinks that supervision waits for any small mistake and finds fault with her performance. The grievant seeks to have this conduct cease. She believes it is based on age.[1] According to the grievant, in a meeting in July 2005, a former higher level supervisor allegedly indicated a preference for younger employees. This higher level supervisor reportedly stated that older employees get "tired and worn out," "resting on their laurels," and cannot produce the same amount of work as younger employees.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[2] In this case, the grievant raises various issues regarding her work environment, interaction with supervisors, and the scrutiny of

[1] The grievant states that she is 56 years old.
[2] Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1(c).

her performance. In so doing, she has asserted a claim of harassment and/or discrimination on the basis of age.[3]

For her 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 her age; (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.[4] "[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."[5]

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 age. Although the grievant asserts that the treatment she has experienced is based on her age, there has been no evidence presented to support this allegation. The grievant points to a statement allegedly made by a former higher level supervisor in 2005 that indicated a preference for younger workers. Even if this statement was made, it does not raise a sufficient question that the grievant has been harassed based on her age by other more direct supervisors. Further, it is not clear that the grievant has experienced "severe or pervasive" harassing conduct. As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a "general civility code"[6] or remedy all offensive or insensitive conduct in the workplace.[7] Because the grievant has not raised a sufficient question as to the elements of a claim of harassment, her claims regarding her work environment do not qualify for a hearing.

This ruling does not mean that EDR deems the alleged actions by the grievant's supervisors, if true, to be appropriate; only that the claim of hostile work environment on the basis of age does not qualify for a hearing based on the evidence presented to this Department. This ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.[8]

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[3] Although there may be other past discrete acts the grievant has discussed, these claims will not be addressed. For instance, it appears the grievant has received an unsatisfactory performance evaluation for 2009. However, even a fair reading of the attachments submitted with her Grievance Form A at the time of initiation shows that this action was not challenged in this grievance. Consequently, even if the grievant is seeking to challenge this management action now, it cannot be added at this stage. *See Grievance Procedure Manual* § 2.4.

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

[5] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

[6] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

[7] *See, e.g.*, 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).

[8] For example, if the University were to take an adverse employment action against the grievant in the future, such as formal discipline or termination, a grievance about such an action could automatically qualify for a hearing. *Grievance Procedure Manual* § 4.1.

Mediation

We note, however, that although this grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. For more information on this Department's Workplace Mediation program, the parties should call 888-232-3842 (toll free) or 804-786-7994.

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

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Claudia T. Farr
Director