

Issue: Qualification – Retaliation (Race); Ruling Date: July 21, 2011; Ruling No. 2011-3008; Agency: Department of Corrections; Outcome: Not Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULING OF DIRECTOR**

In the matter of the Department of Corrections  
Ruling Number 2011-3008  
July 21, 2011

The grievant has requested a ruling on whether his February 2, 2011 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about January 29, 2011 during muster, a Captain informed the employees in attendance, including the grievant, that they were expected to communicate effectively with one another. Shortly after the meeting, the grievant observed two supervisors conversing about the meeting. One reportedly remarked to the other, "well I guess next we all need to hold hands and sing Kumbaya." The supervisors laughed and then sang a lyric of the song Kumbaya. The grievant asserts that this conduct was racist and directed at him and others at the facility. He has challenged this conduct as creating a hostile work environment and requests that the two supervisors be dismissed from employment. While the warden of the facility found no racist connotation to the supervisors' conduct, he indicated that their behavior was inappropriate and has taken "appropriate management action."

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.<sup>1</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>2</sup> Thus, claims relating to issues such as the methods, 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 improperly influenced management's

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<sup>1</sup> See *Grievance Procedure Manual* § 4.1 (a) and (b).

<sup>2</sup> See Va. Code § 2.2-3004(B).

decision, or whether state policy may have been misapplied or unfairly applied.<sup>3</sup> In this grievance, the grievant has claimed that a discriminatory hostile work environment was created on the basis of race.

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.<sup>4</sup> “[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.”<sup>5</sup>

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. Based on a review of the facts as stated by the grievant, this Department can find no indication that the conduct described was based on a protected status such as race. Further, the action challenged does not rise to the level of severe or pervasive conduct necessary to support a claim of harassment or hostile work environment.<sup>6</sup> Because the grievance fails to raise a sufficient question as to the elements of hostile work environment, the grievance does not qualify for a hearing.

This ruling does not mean that EDR deems the alleged actions by the supervisors, if true, to be appropriate; only that the claim of harassment or hostile work environment on the basis of race 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.

#### 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

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<sup>3</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

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

<sup>5</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

<sup>6</sup> See *Gilliam*, 474 F.3d at 142. As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a “general civility code,” *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998), or remedy all offensive or insensitive conduct in the workplace. See, e.g., *Beall v. Abbott Labs.*, 130 F.3d 614, 620-21 (4<sup>th</sup> Cir. 1997); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4<sup>th</sup> Cir. 1996).

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

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Claudia T. Farr  
Director