

Issues: Qualification – Management Actions (Non-disciplinary transfer), Discrimination (sex), and Retaliation (other protected right); Ruling Date: September 15, 2011; Ruling No. 2012-3073; Agency: Department of Motor Vehicles; Outcome: Not Qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of the Department of Motor Vehicles  
Ruling Number 2012-3073  
September 15, 2011

The grievant has requested a ruling on whether her May 7, 2011 grievance with the Department of Motor Vehicles (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant was previously an administrative assistant reporting to the District Manager. In her May 7, 2011 grievance, the grievant raises issues of workplace harassment and retaliation dating back to the grievant's performance evaluation in 2010. She describes instances of workplace disputes she has had with the District Manager. She alleges that this conduct amounts to workplace harassment and retaliation for having challenged her 2010 performance evaluation and raising other workplace concerns. So that she would no longer report to the District Manager, the grievant had sought to be transferred into a new administrative assistant position in her district within 30 minutes of her home. On or about April 7, 2011, the grievant was transferred to a different facility to work as a Generalist Senior Floater. Although she previously served as an administrative assistant in the district office, she now works in a service center. However, this service center is closer to her home than the district office.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>1</sup> Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the reassignment or transfer of employees within the agency 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 decision, or whether policy may have been misapplied or unfairly applied.<sup>2</sup> In this case, the grievant has alleged discrimination (harassment), retaliation, and, essentially, misapplication and/or unfair application of policy.

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<sup>1</sup> See Va. Code § 2.2-3004(B).

<sup>2</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

*Misapplication and/or Unfair Application of Policy – Transfer*

For a claim of misapplication and/or unfair application of policy to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy provision or whether the challenged action, in its totality, is so unfair as to amount to a disregard of the intent of the applicable policy. However, the grievance procedure accords much deference to management's exercise of judgment, including decisions as to the assignment of employees. Such matters are generally within the agency's discretion. Even though agencies are afforded great flexibility in making decisions such as those at issue here, agency discretion is not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions, qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.<sup>3</sup>

This Department has not found any provision of policy that the agency violated by transferring the grievant in this case, and the grievant has cited to none, or that the transfer was without a reasoned basis. Rather, it appears that management was attempting to honor the grievant's request to no longer work with or for the District Manager. Although the grievant sought transfer into another administrative assistant position, no other such position existed in her district. While the grievant may dispute the transfer, it cannot be said that the agency lacked a reasoned basis for or the authority to transfer her in the manner it did. Nor has there been any evidence presented that the grievant was treated differently than others at the agency with this transfer. The grievance fails to raise a sufficient question of whether the agency misapplied or unfairly applied policy. As such, this grievance does not qualify for hearing.

*Retaliation*

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;<sup>4</sup> (2) the employee suffered a materially adverse action;<sup>5</sup> and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated

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<sup>3</sup> See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); see also, e.g., EDR Ruling 2008-1879.

<sup>4</sup> See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

<sup>5</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

reason was a mere pretext or excuse for retaliation.<sup>6</sup> Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.<sup>7</sup>

The grievant alleges that management, primarily the District Manager, has retaliated against her for appealing her 2010 performance evaluation and/or raising other matters with management. Attempting to address workplace concerns with management is protected conduct.<sup>8</sup> However, the grievance does not raise a sufficient question as to whether a causal link exists between the grievant's protected conduct and her transfer. Rather, it appears that agency management was concerned about the status of the working relationship between the grievant and the District Manager and sought to separate them. Unfortunately, there was no identical position to which the grievant could be transferred in her district. Consequently, she was placed in an open position with the same pay working closer to her home. These facts do not demonstrate any retaliatory motive.

In addition, with the possible exception of the transfer, the grievant's allegations regarding her recent conflict with the District Manager, even taken together,<sup>9</sup> do not rise to the level of being materially adverse. As noted by the Supreme Court, "normally petty slights, minor annoyances, and simple lack of good manners" do not establish "materially adverse actions" that are necessary to establish a retaliation claim.<sup>10</sup> Although the grievant has described a non-collaborative work environment, it does not appear the conduct the grievant has experienced rises beyond this level to establish materially adverse action by the agency. Because the grievance does not raise a sufficient question as to the elements of a claim of retaliation, this grievance does not qualify for a hearing.

#### *Harassment/Hostile Work Environment*

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.<sup>11</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>12</sup>

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<sup>6</sup> See, e.g., EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4<sup>th</sup> Cir. 2005).

<sup>7</sup> See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

<sup>8</sup> See Va. Code § 2.2-3000.

<sup>9</sup> The same result is reached even if the grievant's claim is analyzed as one for retaliatory harassment. See EDR Ruling Nos. 2007-1577, 2008-1957 (discussing retaliatory harassment claim in relation to materially adverse action standard).

<sup>10</sup> *Burlington N.*, 548 U.S. at 68.

<sup>11</sup> See *Gilliam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 142 (4<sup>th</sup> Cir. 2007).

<sup>12</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

However, the grievant must raise more than a mere allegation of a hostile work environment – 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.<sup>13</sup> The grievant has not presented evidence raising a sufficient question that the work-related conduct by the District Manager was based on a protected status. Consequently, this grievance does not qualify for a 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 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

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<sup>13</sup> 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, age, veteran status, political affiliation, or disability”).