Issue: Qualification – Discrimination (Age, Race, Sex); Ruling Date: October 26, 2011; Ruling No. 2012-3125; Agency: Virginia Employment Commission; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Employment Commission
Ruling Number 2012-3125
October 26, 2011

The grievant has requested a ruling on whether his March 31, 2011 grievance with the Virginia Employment Commission (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant's March 31, 2011 grievance alleges ongoing disparate and discriminatory treatment, harassment, and hostile work environment based on age, race, and/or sex. Following an investigation into mileage reimbursements, the grievant was put on a corrective action/monitoring plan in 2010, which addressed travel matters as well as other performance-related issues. The grievant asserts that this plan subjects him to improper and discriminatory monitoring as he is allegedly the only employee in his position subject to such a plan. The grievant also states that he is treated differently than other employees in having to perform additional duties and following other procedures for completing his work, such as an apparent 25 or 26 step process for audit submissions. The grievant has raised further issues regarding audits that he has completed having been "lost."

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.[1] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] 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 decision, or whether state policy may have been misapplied or unfairly applied.[3] In this grievance, the grievant has claimed 1) that a discriminatory hostile work environment was

[1] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

created on the basis of age, race, and/or sex, and 2) that the issues amount to constructive discharge.

Hostile Work Environment/Harassment

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[5] An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

For a claim of hostile work environment or harassment, the "adverse employment action" requirement can be met by the grievant presenting evidence raising a sufficient question as to whether the conduct at issue was sufficiently severe or pervasive so as to alter the conditions of employment and to create and abusive or hostile work environment.[8] "[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."[9]

Based on a review of the facts as stated by the grievant, this Department cannot find that the grieved issues rose to a "sufficiently severe or pervasive" level such that an unlawfully abusive or hostile work environment was created. The allegedly hostile work environment challenged by the grievant involves a corrective action/monitoring plan and disparate workloads and duties,[10] which would not be considered adverse employment actions[11] or severe or pervasive conduct.[12] 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.

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[4] *See Grievance Procedure Manual* § 4.1(b).

[5] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.

[6] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[7] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

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

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

[10] It is notable that the third step-respondent has directed management to reexamine the allocation of work to the grievant based on his allegations of disparate workloads between himself and others in his same position.

[11] *See, e.g.,* EDR Ruling No. 2011-2891.

[12] *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 (4th Cir. 1997); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).

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

Constructive Discharge

The grievant also asserts that this treatment in the workplace is so intolerable that he is being constructively discharged. To prove constructive discharge, an employee must at the outset show that the employer "deliberately made [his] working conditions intolerable in an effort to induce [him] to quit."[13] The employee must therefore demonstrate: (1) that the employer's actions were deliberate, and (2) that working conditions were intolerable.[14] An employer's actions are deliberate only if they "were intended by the employer as an effort to force the [employee] to quit."[15] Whether an employment environment is intolerable is determined from the objective perspective of a reasonable person.[16]

It is important to note that the grievant has not been separated. As such, a constructive discharge theory is not necessarily applicable or, more importantly, qualifiable to the grievant's situation without the adverse action of a separation. Further, the grievant has not provided sufficient evidence to show that management has deliberately made his working conditions intolerable in an effort to induce him to quit. Moreover, assuming for purposes of this ruling only the truth of the grievant's allegations, the alleged conduct in this case is not so extreme as to make the grievant's working conditions objectively intolerable. "[D]issatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign."[17] Thus, the actions here cannot support a claim of constructive discharge. Therefore, the grievant's March 31, 2011 grievance does not qualify for 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

[13] Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 272 (4th Cir. 2001) (internal quotation marks omitted).
[14] *See* Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 186-87 (4th Cir. 2004); Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 244 (4th Cir. 1997).
[15] *Matvia*, 259 F.3d at 272.
[16] *See* Williams v. Giant Food Inc., 370 F.3d 423, 434 (4th Cir. 2004).
[17] James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 378 (4th Cir. 2004)(citations omitted)); *see also*, Williams 370 F.3d at 434 (not intolerable working condition where "supervisors yelled at [employee], told her she was a poor manager, and gave her poor [performance] evaluations, chastised her in front of customers, and once required her to work with an injured back").

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