Issue: Qualification – Discrimination (Sexual Harassment) and Discrimination (Other); Ruling Date: May 9, 2012; Ruling No. 2012-3288; Agency: Department of Correctional Education; Outcome: Partially Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Minority Business Enterprise
Ruling Number 2012-3288
May 9, 2012

The grievant has requested a ruling on whether her July 16, 2010 grievance with the Department of Minority Business Enterprise (the agency) qualifies for a hearing. For the reasons discussed below, this grievance qualifies, in part, for a hearing.

FACTS

The grievant's July 16, 2010 grievance concerns a number of issues of alleged discrimination and harassment. The precipitating issue of this grievance concerns incidents with another agency employee, Mr. B. The grievant alleges that Mr. B, in a private meeting on June 16, 2010, touched her "private area." The grievant also refers to two other incidents involving Mr. B when she was allegedly touched inappropriately, once on her leg and once by Mr. B buttoning her shirt. After this grievance was filed, the agency investigated the grievant's claims. The agency investigation determined that the grievant's claims could not be substantiated. The grievance continued through the management resolution steps without resolution whereupon the grievant has now requested qualification of her grievance for a hearing.[1]

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.[2] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] 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.[4] In this grievance, the grievant has claimed, with regard to different individuals, that a discriminatory

[1] Additional facts related to the grievant's other allegations will be discussed in the following sections involving those claims.
[2] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[3] *See* Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

hostile work environment was created on the basis of race, gender, and/or the grievant's status as a single mother and/or a previously laid off employee.

For a claim of a discriminatory 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.[5] "[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."[6] 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.

Allegations regarding Mr. B – inappropriate touching

The most serious allegations raised in this grievance concern the incidents on April 22, June 14, and June 16, 2010, in which Mr. B allegedly touched the grievant inappropriately. If the allegations regarding the meeting on June 16, 2010 are true, such an incident alone is sufficient to raise a question of all the elements of a claim of hostile work environment and/or sexual harassment. The critical issue is whether the allegations are true.

The agency has investigated the grievant's claims and determined them to be unsubstantiated and not credible. This Department has reviewed the agency's report and we understand their findings. However, the grievant has also presented statements, which, if true, are extremely troubling. This Department is unable to find that the grievant's allegations are completely incredible given the level of detail provided and that the grievant has maintained her position on these matters for such a long time. While it is possible that the grievant's claims are fabricated, we are unable to make that determination based on the information available to us at this time. At the qualification stage, where the claimed facts or conclusions drawn therefrom are in direct conflict, and without any clear indication of lack of credibility from either side, this Department cannot make that factual finding. Such determinations are more suited for a hearing officer who will have the benefit of the witnesses being placed under oath to testify in person. Therefore, the claim of sexual harassment and/or hostile work environment arising out of the allegations of inappropriate touching qualifies for a hearing.

In addition to the claims regarding the inappropriate touching, issues related to the grievant's sexual harassment allegations involving Mr. B, and the agency's alleged response or non-response, depending on what facts are found to be true, are qualified for a hearing. Such claims are inextricably intertwined with the underlying sexual harassment claims and, therefore,

[5] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).
[6] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

must be qualified for adjudication by a hearing officer to help ensure a full exploration of what could be interrelated facts and issues. A matter that could arise from these facts, and which should be addressed at hearing if evidence is presented on such a point, is whether the agency may establish any legal defenses to the grievant's claims.[7]

This ruling is not meant to indicate that the grievant was the subject of harassment or a hostile work environment or that the agency has engaged in any wrongful conduct. Further, no part of this ruling is meant to suggest that this Department has found sufficient evidence to establish the grievant's case. This ruling only determines that there are sufficient questions raised by the facts for the grievance to qualify for hearing.

Other Harassment Claims

Based on a review of the rest of the grievant's allegations, it is this Department's determination that no further grievance issues qualify for a hearing. Other than the allegations of inappropriate touching, the grievant's allegations do not raise a sufficient question of any protected status basis, or are not significant enough to rise to the level of "severe or pervasive" harassment. For example, the grievant has made certain allegations regarding denied requests for leave. The requests were either ultimately granted by management or otherwise involve no indication that discrimination played a role. Similarly, the grievant complains about such issues as not being allowed to talk on her personal phone at her desk. However, the agency has indicated that this is the rule for all employees. There are additionally no factual indications that the grievant's alleged "improper training," was based on any protected status, much less that the grievant actually received inadequate training.

The rest of the grievant's claims cannot be viewed as "severe or pervasive." These claims include allegations of the grievant being "harassed" about how she kept her files, her lunch being interrupted for work-related matters, an instruction that the grievant not eat lunch at her desk, or being prevented from laughing or talking during lunch. Even taken together, this Department cannot find that these issues rose to a "sufficiently severe or pervasive" level such that an unlawfully abusive or hostile work environment was created.[8] There is no indication that the terms, conditions, or benefits of the grievant's employment were detrimentally impacted. The remaining hostile work environment/harassment claims do not qualify for a hearing.

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[7] *See, e.g.,* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807-808 (1998). Whether any such defense can be substantiated or is even relevant to the grievant's claims are matters for the hearing officer to decide.

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

Overtime

The grievant also alleges that she was not paid overtime for certain work done at home. The agency invited the grievant to submit any documentation to support her claim for unpaid overtime, but the grievant has apparently not done so. This Department has not reviewed any documentation in the submitted paperwork that supports a claim for unpaid overtime. For this reason, there is no factual basis on which to qualify such a claim for a hearing.

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

The grievant's July 16, 2010 grievance is qualified for hearing to the extent described above. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing using the Grievance Form B.

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 any remaining issues not qualified in this ruling, 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.[9]

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Claudia T. Farr
Director

[9] If the grievant appeals to circuit court, the claims that are qualified in the grievance will be stayed until the resolution of the appeal.