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QUALIFICATION and CONSOLIDATION RULING

In the matter of the Department of Environmental Quality
Ruling Number 2025-5784
November 25, 2024

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether her September 3, 2024 grievance with the Department of Environmental Quality (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is qualified and consolidated to be heard with the grievant's subsequent dismissal grievance.

FACTS

In early 2023, the grievant requested four days of telework weekly as an accommodation under the Americans with Disabilities Act (ADA). In her request and supporting medical documentation, the grievant identified impairments including an anxiety disorder that could be severely exacerbated by leaving her home. On May 31, 2023, the grievant received approval for a regular weekly schedule of three remote-work days and two in-office days.

The grievant alleges that, during and after a discussion with her Supervisor about difficulties related to her disability, Supervisor began to engage in a pattern of hostile and discriminatory behavior toward the grievant. The grievant alleges that, during this discussion, she informed her supervisor that her disability causes her to experience adverse effects with too much in-person interaction. In response, according to the grievant, Supervisor criticized the grievant for focusing on her own needs. Supervisor further allegedly suggested that the grievant's social anxiety could be mitigated with increased socialization in the workplace. Supervisor then instructed the grievant to engage in more in-person discussions when in the office and to take on increased public-facing duties (*e.g.* phones, front desk).

On April 24, 2024, Supervisor issued to the grievant a Notice of Improvement Needed/Substandard Performance. Among the issues cited were: (1) tardiness, (2) failure to follow instructions, and (3) unprofessionalism in emails to Supervisor. The grievant provided a written response acknowledging tardiness but objecting to most other items and requesting additional discussion/clarification.

On August 14, 2024, the grievant met in-person with Supervisor and Manager (her next-level supervisor) to discuss the grievant's Interim Evaluation. The Evaluation form indicated that the grievant "has significantly improved her attendance" and on-time arrivals and "has not called out on the days that she is scheduled to be at the office." The form noted the following ongoing goals:

1) Follow supervisor's instructions and avoid interfering with supervisor's instructions to other teammates.
2) Communicate with your team in an appropriate, respectful and professional manner, both online and in-person, to adequately determine office needs and workloads. . . .
3) Develop[] effective working relationships and promote[] teamwork and agility in response to challenges. This entails[] making yourself available to the team without supervisors prompting.

In addition, the form identified the following areas for improvement: "Communicate with the team in other ways than via [Microsoft T]eams. Take advantage of in office days to build a professional working relationship with your co-workers, request day-to-day information to co-workers and supervisor, be involved in the daily administrative duties not only when prompted by supervisor."

On August 15, 2024, the grievant attempted to initiate a grievance arising from the August 14 meeting. In an email to human resources staff, she stated that she "was asked yet again yesterday to 'be observed participating in more face-to-face interactions with specific coworkers'" and "was verbally ordered to maintain eye contact during yesterday's meeting, and shamed when I could not."[1] She also asserted that, when she asked for human resources staff to be involved in the meeting, her management told her that doing so would start a process that would lead to termination of her employment. It appears that the grievance form the grievant submitted on this date may not have had all fields completed, and human resources staff administratively closed it on that basis.

On September 3, 2024, the grievant apparently submitted a new grievance form to human resources staff. This form challenged Supervisor's requirement for her to "be observed" interacting with coworkers, alleging that such requirements were retaliatory for the grievant seeking an accommodation for anxiety. She claimed that management had specifically instructed her that, because of her "special accommodation" for remote work, she "must work harder on the days that I am in the office to create additional face-to-face connections in my social relationships." According to the grievant, she received feedback that her collegial relationships with her "cube-mates" were insufficient to meet expectations, and she must improve her relationships with

[1] In a subsequent interview with EDR staff, the grievant elaborated that she began to avoid eye contact with Supervisor during the meeting because she was feeling distressed by accusations that she was not socializing enough. The grievant has stated that her reaction was related to her disability. In response, the grievant alleges that Supervisor began to snap her fingers in the grievant's face and demand eye contact, which the grievant found to be disrespectful and intimidating.

additional coworkers. In her message to human resources staff, the grievant wrote: "No one else in our office is asked to do this, and it feels extremely uncomfortable for all involved . . . ."[2]

On September 18, 2024, Supervisor issued to the grievant a due process memorandum to inform her of potential disciplinary action. The cited charges included: (1) failure to follow instructions regarding documentation of work and required work processes; (2) objecting to a process change communicated by Supervisor during a group meeting; (3) contradicting Supervisor's instructions to a new employee, who the grievant was training; and (4) being disrespectful to Supervisor throughout the August 14 meeting by continually interrupting her and insisting on discussing issues only with Manager, rather than Supervisor directly. On September 20, the grievant provided a response disputing the allegations in detail, noting that her actions during the August 14 meeting "were in response to my supervisor being inappropriate, discourteous, and unprofessional toward me."

On October 2, 2024, the single management-step respondent provided a response declining to grant relief.[3] On October 23, 2024, the agency head similarly declined to grant relief or to qualify the grievance for a hearing, concluding that "[S]upervisor's oral requests you outlined . . . , if implemented, would result in an environment where you are working cooperatively with your colleagues to achieve agency . . . goals and objectives . . . ." The grievant subsequently appealed the agency head's qualification to EDR.

On or about October 28, 2024, agency management issued to the grievant an annual performance evaluation, with an overall rating of "Below Contributor." This rating was based on two "Below Contributor" sub-ratings, including in the category comprising 70 percent of her job. In that category, the rating was attributed to "the backlog of files not in [the agency's records management system], lack of communication with supervisor, failure to follow supervisory instructions, and by creating a challenging learning environment for her peers." In the other "Below Contributor" sub-category relating to support of agency objectives, it was noted that the grievant "has faced challenges in developing effective working relationships with her supervisor and teammates."

On November 4, 2024, the agency issued to the grievant four Group II Written Notices with termination, each citing offenses described in the September 18 due process memorandum. The grievant submitted a dismissal grievance to EDR on November 6, 2024. That grievance has been assigned EDR Case Number 12204 and is pending appointment to a hearing officer.

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[2] In an interview, the grievant elaborated that she and coworkers have resorted to rote social exchanges with raised voices so that the grievant may "be observed" interacting with colleagues. The grievant alleges these forced exchanges create an unwanted and toxic environment for all participants.

[3] It appears that the parties proceeded with a single management-step respondent due to the grievant's allegations of retaliation by multiple members of her supervisory chain.

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.[4] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] Thus, claims relating to issues such as the means, methods, 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.[6] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action in its totality was so unfair as to amount to a disregard of the applicable policy's intent.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[7] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action that could be remedied by a hearing officer. An adverse employment action involves an act or omission by the employer that results in "harm" or "injury" to an "identifiable term or condition of employment."[8] Workplace harassment rises to this level if it includes conduct that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[9]

The September grievance is fairly read to assert a hostile and/or abusive work environment, in addition to multiple claims potentially arising under the ADA: failure to accommodate, discrimination, and retaliation. These issues will be addressed in turn.

Hostile Work Environment

In her grievance, the grievant wrote: "due to what can only be described as a toxic workplace, I am asking for help." Although DHRM Policy 2.35 prohibits workplace harassment[10] and bullying,[11] alleged violations must meet certain requirements to qualify for a hearing.

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[4] *See Grievance Procedure Manual* § 4.1.
[5] Va. Code § 2.2-3004(B).
[6] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[7] *See Grievance Procedure Manual* § 4.1(b); *see* Va. Code § 2.2-3004(A).
[8] *See* Muldrow v. City of St. Louis, 144 S. Ct. 967, 974 (2024) (addressing a required element of a Title VII discrimination claim); *see, e.g.*, Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998) (defining adverse employment actions under Title VII to include "tangible" acts "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits").
[9] Strothers v. City of Laurel, 895 F.3d 317, 331 (4th Cir. 2018) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)).
[10] DHRM Policy 2.35 defines workplace harassment as "[a]ny targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion towards a person not predicated on the person's protected class."
[11] DHRM Policy 2.35 defines bullying as "[d]isrespectful, intimidating, aggressive and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person."

Harassment, bullying, or other prohibited conduct may qualify for a hearing as an adverse employment action if the grievant presents evidence that raises a sufficient question whether the conduct was (1) unwelcome; (2) sufficiently severe or pervasive that it alters the conditions of employment and creates an abusive or hostile work environment;[12] and (3) imputable on some factual basis to the agency.[13]

DHRM Policy 2.35 and its associated guidance make clear that agencies must not tolerate workplace conduct that is disrespectful, demeaning, disparaging, denigrating, humiliating, dishonest, insensitive, rude, unprofessional, or unwelcome. While these terms must be read together with agencies' broader authority to manage the means, methods, and personnel by which agency work is performed, management's discretion is not without limit. Policy 2.35 also places affirmative obligations on agency management to respond to credible complaints of prohibited conduct and take steps to ensure that such conduct does not continue. Specifically, "[a]gency managers and supervisors are required to: [s]top any prohibited conduct of which they are aware, whether or not a complaint has been made; [e]xpress strong disapproval of all forms of prohibited conduct; [i]ntervene when they observe any acts that may be considered prohibited conduct; [t]ake immediate action to prevent retaliation towards the reporting party or any participant in an investigation; [and t]ake immediate action to eliminate any hostile work environment when there has been a complaint of workplace harassment . . . ."[14] When an agency fails to meet these obligations, such failure may constitute a misapplication or unfair application of Policy 2.35 such that the harassing or bullying behavior is imputable to the agency.

In this case, the grievance record presents a sufficient question whether the grievant was experiencing a hostile work environment. The grievant has alleged several interactions and directives from Supervisor that, if true, would likely constitute prohibited conduct under DHRM Policy 2.35 – *e.g.*, telling the grievant that her anxiety challenges were selfish and she should "just take a few deep breaths" to manage them; snapping her fingers in the grievant's face during the August 14 meeting. In essence, the grievant's claim is that, when Supervisor learned of work-related difficulties that the grievant was having as a result of her disability, Supervisor's response was to insist that the grievant *increase* her exposure to those difficulties by mandating unwanted "socializing" and increasing the grievant's front-facing assignments on days that she was in the office. Such a response, if it occurred, could fairly be described as harassment or bullying as

[12] The grievant must show that he or she perceived, and an objective reasonable person would perceive, the environment to be abusive or hostile. Freeman v. Dal-Tile Corp., 750 F.3d 413, 421 (4th Cir. 2014) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23 (1993)). "[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." *Harris*, 510 U.S. at 23 (1993); *see*, *e.g.*, Parker v. Reema Consulting Servs., 915 F.3d 297, 304-05 (4th Cir. 2019) (finding that a false rumor that an employee was promoted for sleeping with a manager altered the conditions of her employment because the employee was blamed for the rumor and told she could not advance in the company because of it); *Strothers*, 895 F.3d at 331-32 (holding that a hostile work environment could exist where a supervisor overruled the employee's bargained-for work hours, humiliated the employee for purportedly violating the dress code, required her to report every use of the restroom, and negatively evaluated her based on perceived slights).

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

[14] DHRM Policy 2.35, *Civility in the Workplace*.

defined by Policy 2.35. The record also provides at least some support for the grievant's allegations that Supervisor was insensitive and dismissive of her disability, as well as punitive in the implementation of the grievant's approved telework accommodation.

Based on Supervisor's account of the August 14 meeting as reflected in the due process memorandum, we infer that she would offer a conflicting account of her interactions with the grievant. To the extent that agency management investigated any of the grievant's claims that Supervisor demeaned and "shamed" her in connection with her disability during this meeting or previously, such an investigation is not reflected in the information submitted to EDR. However, even assuming that the Supervisor and/or agency would deny the grievant's claims as to what was said during the interactions at issue, such denials would raise questions of fact that would best be resolved by a hearing officer. Accordingly, we conclude that the September grievance sufficiently alleges an adverse employment action in the form of a hostile work environment, meeting the threshold requirement to qualify for a hearing.

Although a hostile work environment imputable to the agency is by definition a misapplication or unfair application of DHRM Policy 2.35 and would qualify for a hearing solely on that basis, we also address the potential application of the ADA and related state policies to the grievant's claims below.

Americans with Disabilities Act

As a general rule, the ADA requires an employer to make reasonable accommodations to the known physical or mental limitations of a qualified employee with a disability, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business [or government]."[15]

"Reasonable accommodations" include "[m]odifications or adjustments that enable [an employee] with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[16] In order to determine the appropriate reasonable accommodation, it may be necessary for the employer "to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[17] To the extent that the employee has a continuing need for reasonable accommodation(s), this interactive process is an "ongoing" obligation to identify potential accommodations.[18] By engaging in this process, the employer may be in a position to determine whether more than one reasonable accommodation

[15] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.").
[16] 29 C.F.R. § 1630.2(o)(1)(iii); *see* 42 U.S.C. § 12111(9)(B).
[17] 29 C.F.R. § 1630.2(o)(3).
[18] Equal Emp't Opp. Comm'n, "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," No. 32, Oct. 17, 2002, available at www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada; *see* 29 C.F.R. § 1630.9(a).

would allow the employee to perform their essential functions. An employer is not required to approve the exact accommodation requested by an employee if some other accommodation is available that will allow them to perform the essential functions of their position.[19]

Moreover, DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability." Discrimination on the basis of disability may qualify for a hearing if the grievance raises a sufficient question as to whether the issues describe an adverse employment action that has resulted from prohibited discrimination. If the agency provides a legitimate, nondiscriminatory business reason for the acts or omissions grieved, the grievance will not be qualified for hearing absent sufficient evidence that the agency's proffered justification was a pretext for discrimination.[20] Similarly, a retaliation claim may qualify for a hearing if the grievant presents evidence raising a sufficient question whether the grievant's protected activity is causally connected to a subsequent adverse employment action against him.[21]

Upon a thorough review of the information provided to EDR, we conclude that the record contains sufficient evidence linking the alleged hostile work environment described above with the grievant's status as an individual with a disability and/or her request for reasonable accommodations. Although the record indicates that Supervisor framed her expectations regarding socializing and collaboration as agency business needs, the record contains conflicting and unclear evidence as to whether the grievant's work relationships were actually deficient so as to affect her job performance. Moreover, the grievant alleges that these expectations became issues only after the grievant successfully pursued a disability accommodation. In addition to the grievant's allegations, the record contains evidence that Supervisor counseled the grievant for medical absences on multiple occasions. Based on the allegations supporting a potentially hostile work environment above, and evidence in the record that Supervisor took corrective action when the grievant raised work-related concerns, the record contains sufficient evidence that a hearing officer could arguably find that Supervisor's treatment of the grievant was a pretext for discrimination or retaliation. Accordingly, these claims are qualified for a hearing.

Finally, in light of the other qualified claims and the grievant's subsequent dismissal from employment, the record as a whole raises a sufficient question whether the agency adequately responded to the grievant's need for reasonable accommodations. It appears that, in February 2024, the grievant sought to change her in-office days as a reasonable accommodation of her disability. According to the grievant, she discussed her proposal with Supervisor, who advised her to proceed through the accommodation process. More than one month later, the grievant's request was unresolved. Ultimately, it appears Supervisor may have indicated that the day change would

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[19] *See id.* pt. 1630 app. § 1630.9 (stating that an employer should conduct an individualized assessment of the employee's limitations and the job, then "select and implement the accommodation that is most appropriate for both the employee and the employer"); *see also* EEOC Fact Sheet, *Work at Home/Telework as a Reasonable Accommodation*, https://www.eeoc.gov/facts/telework.html.

[20] *See Strothers*, 895 F.3d at 327-28; *see, e.g.*, EDR Ruling No. 2017-4549.

[21] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).

present a hardship for their team's operations, and the accommodation request was not granted. Given the history and context that could reflect a discriminatory and/or hostile work environment related to the grievant's disability during this time, as described above, the record raises a sufficient question whether the grievant was, at the time she filed her September grievance, receiving reasonable accommodations that might have been required for her to be able to perform her essential job functions in light of her disability.

Accordingly, to the extent the grievance asserts any claims arising from the ADA and related state policies, those claims are qualified in full.

Consolidation

EDR may consolidate grievances for hearing without a request from either party.[22] EDR strongly favors consolidation and will consolidate grievances when they involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.[23]

EDR finds that consolidation of the September grievance with pending EDR Case Number 12204 is appropriate. These grievances involve the same parties and appear likely to share at least some common themes, claims, and witnesses. For example, the grievant has asserted that she views the written notices and resulting termination as a continuation of the hostile, retaliatory work environment that she challenged in the September grievance. According to the allegations represented in the grievance records, this hostile environment included denial of requested disability accommodations, unfounded corrective actions, prohibited interpersonal conduct under DHRM Policy 2.35, a "Below Contributor" overall performance rating, and the grievant's ultimate termination. Because both grievances are fairly read to challenge the agency's acts and omissions with respect to this alleged hostile environment, these issues would appear to be most efficiently addressed in a single hearing. Further, we find that consolidation is not impracticable in this instance.

Therefore, the two grievances are consolidated for a single hearing.[24]

CONCLUSION

For the reasons explained herein, the September grievance is qualified for hearing in full and consolidated with the dismissal grievance already pending for a hearing. At the hearing, the agency will have the burden to prove by a preponderance of the evidence that its disciplinary actions were warranted and appropriate under the circumstances,[25] and the grievant will have the burden to prove any affirmative defenses. To the extent not raised in her affirmative defenses, the

[22] *Grievance Procedure Manual* § 8.5.
[23] *See id.*
[24] Pursuant to the fee schedule established by EDR's Hearings Program Administration policy, two consolidated grievances shall be assessed a total flat hearing fee of $5,000. *See* EDR Policy 2.01, *Hearings Program Administration,* Attach. B.
[25] *Rules for Conducting Grievance Hearings* § VI(B)(1).

grievant will also have the burden to prove any misapplication or unfair application(s) of policy within the scope of the September grievance.[26] If she prevails, the hearing officer will have authority to order appropriate remedies, potentially including reinstatement, back pay and back benefits, rescission of any formal disciplinary actions not proven by the agency, and "order[s] . . . to create an environment free from discrimination and/or retaliation" or "to take appropriate corrective actions necessary to cure [a sustained policy] violation and/or minimize its recurrence."[27]

Because the agency has already submitted its Form B for EDR Case Number 12204, the resulting hearing officer appointment will be for the two consolidated matters described herein. This ruling is not intended to prevent or discourage the parties from resolving the underlying issues outside the context of a hearing. Should the parties wish to pursue resolution of the issues herein prior to a hearing date, EDR is available to assist in such any efforts as desired and appropriate.

EDR's qualification and compliance rulings are final and nonappealable.[28]

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[26] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(C).
[27] *Rules for Conducting Grievance Hearings* § VI(C)(1), (3).
[28] *See* Va. Code § 2.2-1202.1(5).