

Issue: Retaliation (other protected right); Hearing Date: 10/19/09; Decision Issued: 10/21/09; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 9194; Outcome: Full Relief; **Judicial Review: Appealed to the Circuit Court in Albemarle County on 11/18/09; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9194

Hearing Date: October 19, 2009
Decision Issued: October 21, 2009

PROCEDURAL HISTORY

On April 6, 2009, Grievant timely filed a grievance to challenge the Agency's transfer of her from Location C to Location W. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 27, 2009, the EDR Director issued Ruling 2010-2373 qualifying the grievance for hearing. On September 16, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 19, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUE

1. Whether the Agency retaliated against Grievant for taking Family Medical Leave?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Motor Vehicles employs Grievant as a DMV Customer Service Generalist Senior at Location W. The purpose of her position is:

Performs customer service transactions, administers vision, knowledge and road tests for driver licensing, and issues DMV credentials. Performs daily essential management functions as assigned in management absence and performs other senior level functions as assigned. All programs and services are administered in a customer service-focused manner and in accordance with statutory and administrative procedural requirements such as Motor Vehicle Code of Virginia, DMV policies, procedures, rules and regulations, the Privacy Protection Act and the Freedom of Information Act.¹

In 2003, Grievant was conducting a driver’s test to determine whether a customer should receive a driver’s license. Grievant was a passenger in a vehicle driven by the applicant. The driver abruptly accelerated the vehicle and crashed it into another vehicle. Grievant suffered injuries. As a result of that collision, Grievant began experiencing sudden and severe migraine headaches. She continues to have the headaches today and her condition appears permanent. The migraine headaches are so severe that they can affect her ability to see and her sensitivity to sound. She can become nauseous. When she experiences a migraine headache she can become unable to work. Grievant’s symptoms can be exacerbated by movement of her body. Having to drive can cause her symptoms to increase. She sometimes finds it necessary to take Family Medical Leave in order to accommodate her medical condition.

Until April 2009, Grievant worked at Location C. Her office was approximately a quarter of a mile away from her home. When Grievant experienced migraine headaches, she would be able to go home quickly and sometimes be able to return to work later in the day if the migraine passed.

¹ Agency Exhibit 2.

In early 2009, Agency managers decided to review the operations at Location C to determine how to improve its operations. They concluded staffing changes needed to be made including moving Grievant out of Location C.

In April 2009, Grievant was transferred to Location W which is approximately 32 miles from her home. Prior to the transfer, Grievant could walk to work if necessary or drive to work in a few minutes. After the transfer to Location W, Grievant required approximately 45 minutes to travel from her home to Location W. Grievant had to travel over a tall mountain whose elevation was high enough to cause her sometimes to be nauseous as she drove over the mountain. When Grievant felt she might experience a migraine headache at Location W, she would have to leave work and drive home immediately rather than trying to wait and see how severe the migraine would be. Grievant did not wish to risk having a severe migraine at work and not be able to leave the office until it passed. As a result, Grievant used more FML while working at Location W than she would have had to use had she been working at Location C.

Grievant took FML from 2005 through 2008. The Agency considered Grievant to have a serious medical condition and did not contest her claim of FML. Transferring Grievant to Location W caused her hardship and caused her to have to exhaust all of her FML in 2009. She had not exhausted her available FML in prior years.

On January 12, 2009, Grievant's doctor completed a Certification of Health Care Provider stating that Grievant had a permanent serious health condition as defined under the Family and Medical Leave Act.

The Second Step Respondent replied to Grievant, in part, as follows:

The decision to transfer you to a different [Customer Support Center] stemmed from a recommendation I made based upon the needs of the particular CSC's. While the transfer was approved by those in upper management, the genesis of the transfer came from me. ***

You have been exercising your rights under FMLA for several years. The issue in this matter is not the use of FMLA. Rather, it is that irregular and unpredictable attendance creates a significant hardship on the staffing and service levels of the [Location C] office. At present, the [Location W] office is better suited to manage the difficulties that are created by sporadic attendance. Additionally, that office's staff has not suffered the turnover that [Location C] has endured. Consequently, on the whole that office is better trained and more flexible with regard to staff assignments. The [Location W] office does not have the volume of complex transactions as does [Location C]. You are capable of performing any transaction however; the Generalists Senior must be able to train and mentor others, and lead the work of others. Regular and predictable attendance is necessary when responsible for the training of others. I have not attempted to provide an exhaustive list of the difficulties in these two

offices; however, I assure you the decision was made with an eye toward finding a balance between your needs and the business needs of this District.²

CONCLUSIONS OF POLICY

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;³ (2) suffered a materially adverse action⁴; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁵

Under Department of Human Resource Management (DHRM) Policy 4.20, "Family and Medical Leave," as well as the federal FMLA, 29 U.S.C. § 2601 *et seq.*, on which Policy 4.20 is based, an eligible employee can take up to 12 workweeks (60 workdays or 480 work hours) of unpaid FMLA leave per calendar year. By using Family Medical Leave, Grievant engaged in a protected act.⁶

Grievant suffered a materially adverse action. The risk of transferring an employee to an office farther away from his or her home is an action that might dissuade a reasonable person from engaging in a protected activity. Transferring Grievant away from her home was a materially adverse action. Doing so caused her to travel a farther distance and increased her usage of FML to account for the extra travel and to avoid the risk of being stuck at Location W while having a severe migraine.

² Grievant Exhibit 1.

³ See Va. Code § 2.2-3004(A)(v) and (vi). 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 the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁴ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

⁵ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

⁶ DHRM Policy 4.20; see *also* 29 U.S.C. § 2612(a)(1) and § 2615(a).

Grievant was transferred farther away from her home, in part, as a result of having sought and utilized FML. The Agency has admitted that it moved Grievant because she was absent from work at a level it considered excessive.

The Agency argues that it transferred Grievant to Location W because she was an unreliable employee. Her excessive absences from work adversely affected its ability to provide services to customers at Location C. There is little doubt that Grievant's absences interfered with the Agency's operations and caused some hardship on other employees. There is little doubt that the Agency's decision to transfer Grievant was based on a sincere desire to improve customer service and fulfill its mission to the citizens of the Commonwealth.

The Agency contends it did not specifically focus on Grievant's use of FML and move her because she took FML. The Agency transferred Grievant because her irregular and unpredictable attendance created a significant hardship on the staffing and service levels of Location C. This argument misses the mark. It is not necessary, however, for Grievant to establish a specific intent or malicious intent on the part of the Agency to target her because she took FML. All Grievant must show is that the Agency took action against her in part as a result of her taking leave protected under the FMLA. In this case, Grievant's use of FML diminished her reliability as an employee. The Agency moved her because she was no longer a reliable employee. Grievant has established that she was transferred as a result of her taking FML. Grievant's work performance when she was at work was otherwise satisfactory to the Agency. It is clear that had she been a reliable employee, the Agency would not have decided to transfer her. She was deemed unreliable because she took FML. Transferring Grievant because of her unpredictable attendance is the same as transferring her because of her taking of FML.

The Agency argues it was authorized to transfer Grievant based on DHRM Policy 4.20. Section VI(E) provides:

When the conditions noted in section VI(A) above are applicable, the agency can temporarily transfer the employee to another position that better accommodates the intermittent leave or reduced schedule as long as the new position carries equivalent pay and benefits.

The conditions in section VI(A) refer to intermittent leave or leave on a reduced schedule. The Agency contends it transferred Grievant to better accommodate the intermittent leave while keeping Grievant's pay and benefits the same. Although it is not clear whether the Agency has correctly applied this section of DHRM Policy 4.20⁷, the Hearing Officer will assume for the sake of argument that the provision supports the Agency's position.

⁷ It does not appear that the Agency transferred Grievant on a temporary basis. It is not clear how the transfer accommodated Grievant. The transfer appears to accommodate only the Agency.

29 CFR Sec. 825.204(d) specifically contradicts the Agency's position regarding the application of DHRM Policy 4.20. This section states:

(d) An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employer to make such a transfer will be held to be contrary to the prohibited acts of the FMLA.

In this case, the Agency reassigned Grievant to a branch office a significant distance away from her normal job location.

Based on the evidence presented, the Agency retaliated against Grievant for engaging in protected activity. In order to undue the effect of the retaliation, the Hearing Officer will order the Agency to restore Grievant to her former location.

Grievant seeks reimbursement for attorney's fees. Nothing in statute or under the Grievance Procedure Manual authorizes the Hearing Officer to award attorney's fees under these circumstances.

Grievant seeks restoration of her FML balances that she exhausted because of the transfer. She is currently on leave without pay when she is absent from work and does not accrue leave. Insufficient evidence was presented for the Hearing Officer to calculate the amount of FML that Grievant used because of the transfer. In addition, the Grievance Procedure Manual does not authorize the Hearing Officer to grant such relief.

Grievant seeks to have a portion of her 2008 evaluation revised. Grievant was criticized for excessive absences. Grievant did not timely appeal her 2008 evaluation and, thus, the Hearing Officer cannot grant Grievant's request.

DECISION

For the reasons stated herein, the Agency's transfer of Grievant from Location C to Location W is rescinded. The Agency is ordered to return Grievant to Location C.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁸

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.