Issue: Qualification/retaliation/other protected right; Consolidation/of multiple grievances for purposes of hearing; Ruling Date: April 21, 2006; Ruling #2006-1241; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: qualified and consolidated with previous grievance for hearing

Department of Employment Dispute Resolution

QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR

In the matter of the Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling No. 2006-1241
April 21, 2006

The grievant has requested qualification of her August 9, 2005 grievance. The grievant alleges that the Department of Mental Health, Mental Retardation and Substance Abuse Services (agency) retaliated and discriminated against her following what the grievant characterizes as an unfounded patient abuse charge and a period of short-term disability. For the reasons set forth below, this grievance is qualified for hearing.

FACTS

The agency employs the grievant as a Registered Nurse at one of its facilities. In May of 2005, the grievant went on Short-Term Disability (STD) following surgery. In July of 2005, she returned to work. Shortly after her return, the grievant was informed that she would not be allowed to continue to work the schedule that she had worked since her hire: Saturday, Sunday and Monday. The grievant explained that she needed to be allowed to maintain her Saturday, Sunday, and Monday schedule in order to care for her children, for whom she has custody. The Assistant Chief Nurse Executive responded on August 5, 2005 stating that the grievant's schedule "has generated overtime, and during [her] recent absence we were unable to cover [her] shifts without utilizing overtime."

Five days later, an individual attempting to intervene on the grievant's behalf requested that the facility Director intercede. The following day, August 11, 2005, the Director responded by stating that the grievant is not the only single parent employee nurse at the facility and that he would not play favorites. In addition, he added that "I doubt [grievant's] veracity and good intentions when she now claims her schedule difficulties are because she had some medical problem that required her to go out on STD for most of the summer while school was out. I find that claim fantastic and incredible."

On March 10, 2006, the grievant was issued a Group I Written Notice for an accumulation of unplanned leave. On March 27, 2006, the grievant grieved the Written Notice, asserting that the agency's (1) refusal to apply the self-scheduling model that the Director allegedly agreed to, and (2) failure to allow nurses to switch shifts, led to the accumulation of hours that resulted in the March 10th Written Notice.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[1] 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 agency's actions result in an adverse employment action[2] and the grievant presents evidence raising a sufficient question as to whether the actions were taken for disciplinary reasons, were influenced by discrimination or retaliation, or were the result of a misapplication or unfair application of policy.[3] Here, the grievant asserts that the agency has retaliated against her following an unfounded patient abuse charge and a period of short-term disability.

Short Term Disability/Family Medical Leave Act Retaliation

For a claim of retaliation to qualify for a hearing, generally, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[4] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether 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, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[5] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[6]

For purposes of this ruling, we will assume that the grievant engaged in a protected activity when she went out on Short Term Disability (STD)/Family Medical Leave Act (FMLA) leave. The grievant was out on STD leave from May 31st through July 11th following surgery. Under the Virginia Sickness and Disability Plan (VSDP) "If you are on VSDP and eligible for FML [Family and Medical Leave] because of your own serious health condition,

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[1] Va. Code § 2.2-3004(B).

[2] An "adverse employment action" is defined as a "tangible employment act constituting 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." Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

[3] Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (C).

[4] *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 the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[5] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe v. Total Action Against Poverty, 145 F.3d 653, 656 (4th Cir. 1998).

[6] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

your absence will be counted as FML."[7] The Commonwealth's FML policy stems from the FMLA, [8] and while state policy does not expressly prohibit retaliation for using FMLA leave, the FMLA does.[9] Accordingly, the grievant's use of STD/FMLA leave was a protected activity.

Typically, the employee must next establish that she suffered an adverse employment action. Normally, a schedule change alone does not constitute an adverse employment action. However, there is authority for the proposition that such an action could, in rare cases, constitute actionable retaliation if the schedule change *materially* affected the grievant in an adverse way and was taken in order to dissuade the employee from engaging in the protected activity.[10] Here, the grievant informed the agency that she needed to maintain her Saturday, Sunday and Monday schedule because she had recently been awarded custody of her children Tuesday through Friday. If the agency's refusal to allow her to maintain her schedule was designed to exploit the grievant's need for a weekend work schedule in order to care for her children during the workweek, then such an action might constitute a materially adverse change that could satisfy the second element of a retaliation claim.[11]

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[7] 2004 VSDP Handbook, page 21. Recent changes to VSDP Policy in November of 2005 continue to treat VSDP leave as FMLA leave. *See* Department of Human Resources Management (DHRM) Policy 4.57 which states that "FMLA and VSDP leave run concurrently if: the disability is determined by TPA [third party administrator] to be FMLA qualified, and the agency determines that the employee is FMLA eligible."

[8] The Department of Human Resource Management Policy (DHRM) 4.20 §XII (A) states that:

> This policy is issued by the Department of Personnel and Training pursuant to the authority provided in Chapter 10, Title 2.1, of the Code of Virginia, as well as the federal Family and Medical Leave Act of 1993. This policy is not intended to outline all the provisions of the Family and Medical Leave Act. Accordingly, the provisions of the Act will prevail if there is disagreement.

[9] Section 2615(a)(1) of the FMLA states that "it shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title." 29 U.S.C. § 2615(a)(1). 29 U.S.C. § 2615 prohibits retaliation against employee who protests employer's unlawful leave policies and retaliation against employee who has taken family or medical leave authorized by Family and Medical Leave Act. Rigodon v Deutsche Bank Sec., Inc. 2004 U.S. Dist. LEXIS 22385 (S.D. N.Y 2004).

[10] In Washington v. Illinois Dept. of Revenue, 420 F.3d 658 (7th Cir. 2005), the court held that where an employer exploits an employee's known vulnerability thereby causing a *significant* loss, such deeds may be actionable. In the Washington case, between the years 1984 and 2000, Washington had worked from 7 a.m. until 3 p.m. instead of the standard 9-to-5 schedule at the Illinois Department of Revenue. 420 F.3d at 659. The earlier hours allowed her to care for her son, who has Down syndrome, when he arrived home. *Id.* By 1995 Washington had been promoted to Executive Secretary but over the next few years some of her duties were reassigned to others. *Id.* Believing that this was the result of race discrimination, she filed a formal charge with state and federal officials in June 1999. *Id.* That charge, she maintained, led supervisors to rescind the flex-time schedule on which her son depended. *Id.* The court found that working 9-to-5 was a materially adverse change *for Washington*, even though it would not have been for 99% of the staff. *Id.* at 662.

[11] We recognize that this holding represents a departure from past ruling precedent. *See* EDR Ruling 2004-768 (Despite the grievant's unhappiness with having to make new child care arrangements and reschedule her daughter's counseling sessions, where reassignment did not result in a demotion, loss of promotional opportunities, or a cut in pay or benefits, the reassignment cannot be viewed as "job-related" and was therefore not an adverse employment action.) However, this departure should not be viewed as a wholesale abandonment of the adverse employment action requirement. We held in Ruling 2006-1182, 1197, "if there is a state or federal law that forms the basis of the policy at issue and that state or federal law does not require the presence of an "adverse employment action" for an actionable claim, this Department will defer to the standard set forth

The last element of a retaliation claim is whether a causal relationship exists between STD/FMLA leave and schedule change. The Facility Director has explained that management attempted to end the sort of schedule that the grievant has requested in October of 2004. He asserts that the grievant's supervisor was negligent in allowing the grievant to continue with her Saturday, Sunday, and Monday schedule. He claims that he did not believe there existed the critical mass necessary to allow the sort of flexible scheduling urged by grievant (a "Baylor schedule"). He further asserts that he has nonetheless given the grievant two opportunities to submit alternative schedules for the nursing staff in the building in which the grievant works and that neither of the two plans submitted was workable.

As evidence of the agency's purported retaliatory animus, the grievant points to the Director's August 11th e-mail where he questions her veracity and asserts that her claim that she needed to be out during the summer for medical reasons was "fantastic and incredible." In addition, the proximity in time between the grievant's return to work and the agency's decision to change her schedule is close. Further, the August 5th response from Assistant Chief Nurse Executive ("during your recent absence we were unable to cover your shifts without utilizing overtime"), links, albeit not necessarily directly, the denial of grievant's scheduling request to her period of LTD. Finally, we note that the grievant has recently been disciplined as a result of the accumulation of the unplanned accumulation of leave which she blames on the agency's purportedly retaliatory actions.

In light of the common facts and allegations contained in the instant grievance and March 10th grievance (which will automatically qualify for hearing), this Department deems it appropriate to qualify this grievance for hearing, to help ensure a full exploration of what could be interrelated facts and issues. We note, however, that this ruling in no way determines that the agency's actions with respect to the grievant were a retaliatory, but only that further exploration of the facts by a hearing officer is appropriate.

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by that state or federal law." In this case, the grievant is asserting STD/FMLA retaliation. While courts have typically required an adverse employment action in FMLA retaliation cases, several courts have recently retreated from the adverse employment action requirement in Title VII retaliation cases. *See* Washington 420 F.3d 658; Rochon v. Gonzales, 438 F.3d 1211 (D.C. Cir 2006). In the Rochon case, the court held that the FBI's (employer's) failure to investigate and provide protection following death threats directed at the plaintiff (a special agent) while not an adverse *employment* action was nevertheless "material" or "significant" enough to dissuade a reasonable FBI agent from engaging in activity protected under Title VII. Because the language of the non-retaliation provision of the FMLA is equally expansive as that found in Title VII, we believe it reasonable to adopt in this case the approach of the 7th and D.C. Circuits which focuses not solely upon whether the employee suffered an adverse employment action, but rather whether the "'employer's challenged action would have been material to a reasonable employee,' which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination' . . . regardless whether the alleged retaliatory act is related to the plaintiff's employment." Rochon, 438 F.3d 1211, _____, 2006 U.S. App. LEXIS 5028 at 22-23, quoting Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005). In sum, we believe that reading Washington and Rochon together, an appropriate approach in an FMLA retaliation claim is to inquire whether the employer's action would have been *materially* adverse to the employee, thus dissuading her from exercising her rights under the FMLA, regardless of whether the alleged retaliatory act is "an adverse employment action."

Retaliation for Grievance Activity

The grievant also claims the agency retaliated against her by not allowing her to retain her weekend schedule because of her July 15, 2004 grievance challenge to an "unfounded" patient abuse charge which was reduced during the management resolution steps.[12] Because the issue of STD/FMLA retaliation qualifies for a hearing, this Department deems it appropriate to send this alternative theory for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's August 9, 2005 grievance is qualified. By copy of this ruling, the grievant and the agency are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer.

This Department may consolidate grievances for hearing with or without a request from either party whenever more than one grievance is pending involving the same parties, legal issues, and/ or factual background.[13] EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.[14] This Department finds that consolidation of the August 9, 2005 and March 27, 2006 grievances for hearing is appropriate. The grievances involve the same parties, potential witnesses, share a common factual background, and are essentially intertwined. Furthermore, consolidation is not impracticable in this instance.

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Claudia T. Farr
Director

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William G. Anderson, Jr.
EDR Consultant, Sr.

[12] While the grievant refers to the patient abuse charge as "unfounded," presumably because management reduced the level of discipline during the management resolution steps, the reduced charge was nevertheless upheld by a hearing officer in Case No. 7888.
[13] *Grievance Procedure Manual,* § 8.5.
[14] *Id.*