Issues: Qualification – Discrimination (sexual harassment), Retaliation (grievance activity participation and other protected right), Separation from State (layoff); Ruling Date: July 9, 2007; EDR Ruling #2007-1601; Agency: Virginia Community College System; Outcome: All issued qualified for hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of New River Community College
Ruling Number 2007-1601
July 9, 2007

The grievant has requested a ruling on whether her January 31, 2007 grievance with the New River Community College (NRCC or the college) qualifies for hearing. For the reasons discussed below, this grievance is qualified for hearing.

FACTS

Prior to the elimination of her position and layoff in January 2007, the grievant was employed as a horticulture specialist with the college. The grievant's primary responsibilities were to perform "the maintenance and beautification of the college grounds by weeding, pruning, mulching, etc." and to propagate, plant, water, fertilize and implement pest control measures as needed to keep "all flower beds looking fresh and new."

On May 23, 2006, the grievant filed a workplace violence incident report with the college stemming from a May 12, 2006 confrontation with her supervisor in which the grievant claims her supervisor engaged in "verbal abuse," "profane/vulgar language," "verbal intimidation at the workplace," and blocked her movement. The incident in question was investigated and it was determined that although the supervisor "could have handled the situation in a less confrontational manner," it did not rise to a level of workplace violence.

On January 8, 2007, the grievant's supervisor proposed a reorganization of the Facilities Services Department. The proposed reorganization would eliminate the grievant's position and replace her landscaping and other "grounds" functions with contract labor. The reorganization was approved by the college President and the Vice President for Finance and Technology on January 11, 2007. The grievant's position was subsequently eliminated effective January 31, 2007.

DISCUSSION

Retaliation

The grievant claims that her supervisor proposed her layoff in retaliation for her report of workplace violence and her prior grievance activity.[1] For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[2] (2) the employee suffered a materially adverse action;[3] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially 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

[1] In 1994, the grievant filed a grievance challenging a Group I Written Notice issued by her current supervisor.

[2] *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 Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

[3] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006). Based on this Department's construction of the grievance statutes, a grievance must involve a non-trivial harm to qualify for hearing. Frequently, the non-trivial harm constitutes an "adverse employment action," (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"). However, we have recognized that in some circumstances it is appropriate to send grievances to hearing when the grievant may not have suffered an "adverse employment action." For example, this Department qualified a grievance involving a purported violation of the state's military leave policy (DHRM Policy 4.50). The agency had allegedly failed to reinstate an Army National Guard member to his former position and duties upon his return from active military duty. In EDR Ruling Nos. 2006-1182 and 2006-1197, we noted that Virginia law served as the underpinning for the state's policy and that the Virginia statute requires that an employee must be returned to the position he held when ordered to duty unless such position has been abolished or otherwise ceases to exist. Moreover, we noted that there is no adverse employment action requirement under the state statute (or pertinent provisions of federal law). Thus, we concluded that "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 by that state or federal law." Thus, consistent with developments in Title VII law (*Burlington Northern*), on July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, this Department adopted the "materially adverse" standard for qualification decisions based on retaliation. We note that in the *Burlington Northern* decision the Court observed that the requirement of "materiality" is critical to "separate significant from trivial harms." *Burlington N.*, 126 S. Ct. at 2415. The latter, including normally petty slights, minor annoyances, snubbing, and simple lack of good manners, do not deter protected activity and are therefore not actionable. For the same reason, in the context of the grievance process, a retaliation grievance based on a trivial harm will not be qualified for hearing by this Department. Moreover, to establish a consistent standard for retaliation cases, this Department has construed the grievance statutes and the *Grievance Procedure Manual* and adopted the materially adverse action standard for all claims of retaliation, whether they arise under a Title VII analog or not.

was a mere pretext or excuse for retaliation.[4] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[5]

Here, the grievant engaged in a protected activity by filing a grievance and reporting an alleged violation of the workplace violence policy.[6] In addition, being separated from her employment constitutes a materially adverse action. Thus, the only question remaining is whether a causal link exists between the grievant's participation in the grievance process and/or her report of alleged workplace violence and her layoff. While the agency has provided a nonretaliatory business reason for the grievant's separation (i.e., the grievant's position was eliminated for organizational and financial reasons),[7] this Department concludes that, based on the totality of the circumstances, a sufficient question remains as to the existence of a causal link between the protected activity and the materially adverse action.

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[4] *See* EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).

[5] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

[6] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* §4.1(b). Moreover, under the Occupational Safety and Health Act of 1970 (OSHA), an employer must establish "place[s] of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). OSHA protects from retaliation employees who report unsafe working conditions to their employers. 29 U.S.C. § 660(c)(1). Virginia state employees are likewise covered by the Virginia Occupational Safety and Health Program (VOSH) which also requires "every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious harm to his employees." Va. Code § 40.1-51.1(A). Employees who report a safety issue shall not be discharged or discriminated against because of such a complaint. *See* Va. Code § 40.1-51.2:1. Moreover, the Commonwealth has recognized the potential danger of workplace violence and has established a policy that prohibits violence in the workplace. *See* DHRM Policy 1.80, *Workplace Violence*. That policy further prohibits agencies from "retaliating against any employee, who, in good faith, reports a violation of this policy." *Id*. Therefore, under VOSH and state policy, it would appear that the grievant engaged in a protected activity when she reported the alleged workplace violence incident.

[7] The agency also asserts that the grievant's layoff, while initiated by her supervisor, was supported and approved by the President and Vice President for Finance and Technology. The fact that the ultimate decision to separate the grievant was approved by someone other than the grievant's supervisor is of little significance if the grievant's supervisor was in a position to exert influence over the decision-makers in this case. *See* McDonald v. Rumsfeld, 166 F.Supp. 2d. 459, 464-465 (E.D. Va. 2001) ("This Court will follow suit [of other circuit courts] and hold that it will look beyond who officially made the adverse employment decision to determine who actually made the decision or caused the decision to be made. Under circumstances indicating that the decisionmaker's determination may have been tainted by another supervisor or employee's discriminatory animus toward the plaintiff, it is appropriate to infer the causal connection if the evidence demonstrates that the supervisor or employee possessed leverage, or exerted influence**,** over the decisionmaker.") Given that the supervisor's proposed reorganization was approved within approximately three days of submission to the President and that the grievant's supervisor serves as the Director of Facilities Services, this grievance raises a sufficient question at to whether the grievant's supervisor was in a position to exercise influence over the decision-maker.

In particular, after her complaint of workplace violence in May 2006 and prior to her ultimate layoff in January 2007, the grievant claims that she was subjected to the following retaliatory actions by her supervisor: (1) she was assigned "arbitrary and capricious" duties that prevented her from completing her landscape duties;[8] (2) attempted to deny her time away from work to attend classes, which had always been approved in the past;[9] (3) he purportedly misrepresented to the grievant what had been stated regarding her work at a meeting of the Campus Beautification Committee on August 31, 2006;[10] (4) in a June 12, 2006 e-mail, he "went off the hook" and called her a "misinformer;"[11] (5) he allegedly accused her of falsifying her time records; and (6) he purportedly accused her of violating policy by using a state vehicle to attend classes, an action she had been engaging in for years with approval. While these alleged acts of ongoing antagonism between the grievant and her supervisor could be explained by a myriad of non-retaliatory reasons,[12] such acts could also be probative of retaliatory intent.[13] As such, this grievance raises a sufficient question as to whether the grievant's layoff resulted from an intent to retaliate due to her prior protected activity, or from nonretaliatory reasons, such as a legitimate business reason or even personal animosity

[8] According to the agency, the grievant's duties are "seasonal" and affected by the weather and as such, her duties can change on any given day. Moreover, the agency asserts that the grievant was asked to perform duties due to the departure of two part-time employees in the fall of 2006. These duties were, according to the agency, included in the grievant's employee work profile (EWP).

[9] The grievant was ultimately approved by her supervisor to attend classes. This approval was signed by the grievant's supervisor on the same day (January 8, 2007) that he submitted his proposal to the Vice President for Finance and Technology for an agency reorganization and elimination of the grievant's position.

[10] The grievant, a member of the Campus Beautification Committee, was not present at this meeting as it was allegedly held while she was attending a class.

[11] In the email, the grievant's supervisor stated, "I believe you tried to mislead me and this ***false information stops today***."

[12] For instance, in this case, these alleged acts of antagonism could be the most recent events in a long history of apparent discord between the grievant and her supervisor. Prior to and after the initiation of the 1994 grievance, there have allegedly been numerous incidents of disagreement and/or antagonism between the grievant and her supervisor. In particular, in the first management resolution step response of her 1994 grievance, the grievant's supervisor recognizes the conflict between them by stating "[m]y concern about improving attitudes and considerations is the primary objective. I believe that our meeting of October 13th brought this issue out and showed both of us ways to work together to create the pleasant working environment we want . . . . I hope we can continue to build our relationship on respect and cooperation." In addition, in a memorandum dated July 14, 2006 to both the grievant and her supervisor, the President of the college stated

> "[o]ver the years, and with increasing frequency of late, I have heard reports of disagreements between the two of you. Rather than involve myself in the most recent episodes, I have decided instead to offer you a fresh start. With this memo, I am asking both of you to begin anew to shape your respective behaviors and attitudes toward one another as well as your jobs. Please realize that you cannot control or change others – only yourself. So I want you both to have the opportunity to do just that."

[13] *See* Lettieri v. Equant, Inc. 478 F.3d. 640, 650 (4th Cir. 2007) (continuing retaliatory conduct and animus directed at the plaintiff in the seven-month period between her report of gender discrimination and termination was enough to establish a causal link between the complaint and termination).

due to causes other than her prior protected activity." [14] Thus, further exploration of the facts by a hearing officer is appropriate, as a hearing officer is in a better position to determine such issues.[15] Accordingly, the issue of retaliation is qualified for hearing. We note that this qualification ruling in no way determines that the agency's decision to separate the grievant was retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

Alternative Theories for Layoff

The grievant has advanced alternative theories related to the agency's decision to eliminate her position, including allegations of a hostile work environment, discrimination based on her gender and that the college has misapplied or unfairly applied policy. Because the issue of retaliation qualifies for a hearing, this Department deems it appropriate to send all alternative theories advanced 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 January 31, 2007 grievance is qualified and shall advance to hearing. By copy of this ruling, the grievant and the college are advised that the college has five workdays from receipt of this ruling to request the appointment of a hearing officer.

Claudia T. Farr
Director

[14] *Cf.* EDR Ruling Nos. 2006-1221, 2007-1222. (If the non-retaliltory reason for the layoff was based on something other than a legitimate business reason, such as personal animosity, the layoff could be viewed as a misapplication or unfair application of the layoff policy.)

[15] "Resolution of questions of intent often depends upon the 'credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination." Ross v. Communications Satellite Corp., 759 F.2d 355, 364-365 (4th Cir. 1985), *disapproved on other grounds*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (quoting Morrison v. Nissan Motor Co., 601 F.2d 139, 141 (4th Cir. 1979)