Issue: Qualification/retaliation/other protected right; work conditions/supervisor-employee conflict; work conditions/violence in the workplace; Ruling Date: October 13, 2006; Ruling #2007-1391; Agency: Department of Social Services; Outcome: violence in the workplace issue qualifies; other issues non-qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling No. 2007-1391
October 13, 2006

The grievant has requested a ruling on whether her April 24, 2006 grievance with the Department of Social Services (DSS or the agency) qualifies for a hearing. The grievant claims that her supervisor has engaged in intimidating behavior, harassed her, creating a hostile work environment, and retaliated against her.

FACTS

The grievant is employed as a Support Enforcement Specialist Senior with DSS. On April 24, 2006, she initiated a grievance alleging that her supervisor (Supervisor A) intimidates and threatens her, harasses her, creating a hostile work environment, and engages in retaliatory behavior. After the parties failed to resolve the grievance during the management resolution steps, the grievant requested qualification of her grievance for hearing. The agency head denied the grievant's request, and she has appealed to this Department.

One of the grievant's co-workers (Grievant B) also filed a grievance as a result of Supervisor A's alleged threatening and physically harmful conduct. In her grievance, Grievant B alleges harassment/hostile work environment and misapplication and/or unfair application of the workplace violence policy.[1] As a result of Grievant B's grievance, the agency head ordered an internal investigation into Supervisor A's behavior to "determine if any managerial improprieties exist(ed)." The internal investigation revealed "no evidence of a hostile work environment," but did find that Supervisor A's behavior in the workplace needed to be modified and monitored.

[1] More specifically, Grievant B alleges that Supervisor A intentionally bumped into her on two occasions, refused to move out of her way so that she could get to the copy machine thereby causing physical contact between them, and threatened her by saying, "next time somebody is going to get hurt." *See* EDR Ruling # 2006-1364.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the method, 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 influenced management's decision, or whether state policy may have been misapplied or unfairly applied.

In this case, the grievant alleges that Supervisor A has engaged in intimidating and threatening behavior, harassed her, creating a hostile work environment, and retaliated against her. Each of these claims will be addressed below.

Intimidation

Although not specifically designated as such, the grievant's claim that Supervisor A has engaged in intimidating behavior implicates a misapplication and/or unfair application of Department of Human Resource Management (DHRM) Policy 1.80, "Workplace Violence." For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that show that the grievant was subjected to an adverse employment action[3] and that 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 intent of the applicable policy.

The grievant cites to numerous instances of how Supervisor A has engaged in threatening and/or intimidating behavior in the workplace. Examples of such behavior include but are not limited to Supervisor A raising her voice, invoking her authority as a manager, and reprimanding the grievant. Additionally, the grievant claims that Supervisor A has other employees watch the grievant and listen to the grievant's conversations, talks and spreads rumors about the grievant, and repeatedly declares that she, Supervisor A, has a close relationship with the district manager and agency head. Further, the grievant claims that in a team meeting, Supervisor A looked at the grievant and stated "if anyone wants to look for a job she would help" and "would give a good reference and even show [you] how to look for jobs." The grievant claims that she perceived Supervisor A's comments as a threat to her job.

---

[2] *See* Va. Code § 2.2-3004(B).

[3] Va. Code § 2.2-3004(A). 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).

Further, the grievant asserts that Supervisor A has threatened her on various occasions. More specifically, the grievant alleges that (1) Supervisor A stated "I'm going to fix her I'm going to get her back" and "there's a new sheriff in town;" (2) Supervisor A told the grievant that she was to talk to her if there is a problem, not the district manager, and when the grievant responded that she wanted her to tell the district manager that she wanted to discuss a transfer, Supervisor A said "come here let me hit you I don't want you to transfer but I will give her the message;" and (3) when Supervisor A unexpectedly had to perform a duty she felt should have been performed by the grievant, she reprimanded the grievant and when the grievant responded to Supervisor A's reprimand, Supervisor A stated "Oh don't get ghetto with me because I can give it back." It should be noted also that since the filing of her grievance, the grievant claims that she has been subjected to further workplace violence by Supervisor A. More specifically, the grievant claims that on April 26, 2006, Supervisor A repeatedly poked the grievant in the shoulder while talking to her.

Policy 1.80 requires an agency to provide a safe working environment for its employees.[4] Federal and state laws also require employers to provide safe workplaces.[5] Thus, an act or omission by an employer resulting in actual or threatened workplace violence against an employee, or an unreasonably unsafe work environment for that employee, can reasonably be viewed as having an adverse effect on the terms, conditions, or benefits of his employment.[6]

"Workplace violence" is defined as "[a]ny physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties."[7] Prohibited conduct includes, but is not limited to the following: engaging in behavior which subjects another individual to extreme emotional distress and includes shouting and "an intimidating presence."[8] This Department has previously sought informal guidance from DHRM regarding the applicability of the Workplace Violence policy to claims of supervisor-subordinate conflict. DHRM subsequently advised this Department that

---

[4] DHRM Policy No. 1.80.

[5] 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). Virginia state employees are 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); 16 VAC 25-60-30.

[6] *See* Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742 (7th Cir. 2002), describing a "materially adverse employment action" or "tangible employment action" as including the circumstance where "the employee is not moved to a different job or the skill requirements of his present job altered, but the *conditions* in which he works are changed in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment…."315 F.3d at 744 (emphasis in original).

[7] DHRM Policy 1.80.

[8] *Id.*

Policy 1.80 may be violated if the employee subjectively experiences the supervisor's conduct as threatening or intimidating.[9]

The agency contends that corrective action has been taken in accordance with the findings of its internal investigation of Supervisor A. In contrast, both the grievant and Grievant B claim that their safety continues to be compromised.[10] Based on the totality of the circumstances in this case, and most importantly, the grievant's assertion that her safety continues to be compromised, this Department concludes that the grievant has presented evidence raising a sufficient question as to whether the agency's actions failed to protect her against the threat of workplace violence and/or were otherwise contrary to the state's workplace violence policy. Accordingly, the grievant's claim of misapplication and/or unfair application of the workplace violence policy qualifies for hearing.

Harassment/Hostile Work Environment

While all grievances may proceed through the management resolution steps, to qualify for a hearing, claims of supervisory harassment and/or a "hostile work environment" must involve "hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status, or pregnancy."[11] Here, the grievant has not alleged that Supervisor A's actions were based on any of these factors. As such, her claim of supervisory harassment resulting in a hostile work environment does not qualify for hearing.

Retaliation

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) 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.

---

[9] *See* EDR Ruling Nos. 2006-1248, 1249, 1278.

[10] In particular, the grievant claims that on September 15, 2006, 4 months after the agency investigation and alleged corrective action, Supervisor A stated to a co-worker, "let me tell you about a friend of mine that got beat up." The grievant perceived Supervisor A's comment a threat to her safety. Grievant B also heard Supervisor A's comment and claims she felt threatened as well. In addition, Grievant B claims that she and three of her co-workers, including the grievant in this case, stopped outside after work to talk. Supervisor A allegedly was talking on her cell phone and paced back and forth behind the Grievant B and the grievant. Grievant B's supervisor saw Supervisor A pacing back and forth and allegedly later told Grievant B that he was concerned that Supervisor A was capable of physically harming her.

[11] DHRM Policy 2.30, "Workplace Harassment" (effective 5/1/02). DHRM revised Policy 2.30 on May 16, 2006 and workplace harassment is defined as "[any] unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation or disability."

Only the following activities are protected activities under the grievance procedure: (1) participating in the grievance process, (2) complying with any law or reporting a violation of such law to a governmental authority, (3) seeking to change any law before the Congress or the General Assembly, (4) reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or (5) exercising any right otherwise protected by law.[12] Here, the grievant has presented no evidence that she engaged in any of the protected activities above. Rather, the grievant alleges that Supervisor A's retaliatory behavior is in response to the grievant's having trained Supervisor A and then having provided the district manager with a report on the training.[13] Accordingly, the issue of retaliation does not qualify for a hearing.

CONCLUSION

For the reasons discussed above, this Department qualifies for hearing the grievant's claim that the agency misapplied and/or unfairly applied the workplace violence policy. This qualification ruling in no way determines that the agency's actions were a misapplication of policy or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear this issue, using the Grievance Form B.

For additional information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal to the circuit court the denial of qualification of her claims of retaliation and harassment/hostile work environment, she should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify these issues, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that she does not wish to proceed.

Claudia T. Farr
Director

[12] *See Grievance Procedure Manual* §4.1(b)(4).

[13] This type of workplace communication is not "a right otherwise protected by law." For example, this sort of communication made by an employee pursuant to her official job duties is not protected by the First Amendment. *See* Garcetti v. Caballos, 126 S.Ct 1951 (2006).