Issue: Qualification – Discrimination (race) and Retaliation (other protected right); Ruling Date: November 30, 2007; Ruling #2008-1821; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling Number 2008-1821
November 30, 2007

The grievant has requested a ruling on whether her June 12, 2007 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant alleges that she has been subject to a hostile work environment and a discriminatory work environment. She asserts that she has been discriminated against on the basis of race. The grievant alleges that the general manner in which certain supervisors have treated her and the manner in which her schedule has been changed are different for herself as a Caucasian than for African-American employees in her work area.

The grievant raised her concerns to management and agency human resources in April 2007, leading to a meeting that occurred on April 13, 2007. The grievant's daughter, who worked in the same facility as the grievant, was terminated on May 7, 2007. The grievant alleges that the agency terminated her daughter, who was a probationary employee at the time, in retaliation for the grievant's having raised the issue of discrimination with management. Because the discriminatory conduct allegedly continued, the grievant initiated this grievance on June 12, 2007, and now seeks qualification of her grievance for hearing.

DISCUSSION

Hostile Work Environment

For a claim of hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or prior protected activity; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or

hostile work environment; and (4) imputable on some factual basis to the agency.[1] "[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."[2]

The grievant alleges that she has been "screamed" at and been subject to discriminatory schedule changes on the basis of her race.[3] The allegations of changed schedules largely involve the grievant's claims as to how supervisors force various permanent employees in the grievant's area to change their schedule, while letting a temporary employee work his choice of schedule because he is attending college. The agency states that an inconsistent schedule change protocol, which varied between supervisors, caused the irregularities alleged. Moreover, the evidence appears to indicate that the schedule changes involving the temporary employee are not based on race, but rather on differing treatment between permanent employees and the temporary employee. In light of the above, the grievant's evidence has not raised a sufficient question as to whether the alleged schedule changes were made on the basis of race.

The grievant's other allegations could raise a question that she may have been treated differently because of her race, especially when considering the general allegations of other past agency employees.[4] Ultimately, however, the evidence is insufficient to show that the alleged discriminatory conduct rose to the level of "severe or pervasive," which is needed to sustain a claim of hostile work environment. Specifically, the grievant asserts that in one instance her schedule was changed in a discriminatory fashion around the 2007 Easter holiday. In addition, the grievant alleges poor treatment, when compared to how other employees are treated.[5] However, while the grievant's claims and evidence could reflect potentially problematic issues in the past management style of certain supervisors, neither the claims nor the evidence rise to the level of "severe or pervasive" discriminatory conduct. Moreover, the grievant has admitted that the situation has improved in the workplace since she filed this grievance. Because the grievant's evidence has not raised a sufficient question as to the elements of a claim of hostile work environment, this claim does not qualify for hearing.

This ruling does not mean that EDR deems the alleged behavior of the supervisors at issue to be appropriate, only that the claim of hostile work environment on the basis of race

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[1] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).

[2] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S. Ct. 367 (1993).

[3] Neither Title VII nor state policy restricts race discrimination claims to only minority employees. Indeed, such claims of so-called "reverse discrimination" have been recognized by the United States Supreme Court since the 1970s. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-79 (1976); *see also* Lucas v. Dole, 835 F.2d 532, 533-34 (4th Cir. 1987).

[4] The grievant submitted written statements from a few past agency employees who felt that certain specific actions they observed during their employment were discriminatory.

[5] The grievant's allegations of poor treatment include supervisors screaming at her, a supervisor refusing to use her name and referring to her as "you," and the perceived difference between the friendly manner in which supervisors interact with African-American employees while supervisors are unfriendly to her.

does not qualify for a hearing. Moreover, this ruling in no way prevents the grievant from raising the matter again at a later time if the alleged conduct continues or worsens.

Retaliation

The grievant has also alleged that the agency fired her daughter in retaliation for the grievant's having raised a complaint of race discrimination with management. 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;[6] (2) the employee suffered a materially adverse action;[7] 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 was a mere pretext or excuse for retaliation.[8] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[9]

Assuming, for the purposes of this ruling only, that the grievant engaged in a protected activity and suffered a materially adverse action,[10] her retaliation claim nevertheless fails to qualify for hearing because there is insufficient evidence of a causal link between the alleged protected activity (raising the issue of race discrimination with management) and the materially adverse action (the termination of her daughter). The only inference of causation comes from the timing of the termination of the grievant's daughter. The grievant met with management regarding her discrimination complaint on April 13, 2007, and her daughter was fired on May 7, 2007. While these two events are certainly close in time, there is no other evidence indicating a causal link between them. The agency has also provided evidence of a nonretaliatory business reason that led to the grievant's daughter's termination, the grievant's daughter's history of tardiness and unplanned leave issues. The only evidence the grievant

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[6] *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).
[7] *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006); s*ee, e.g*., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.
[8] *See* EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).
[9] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).
[10] A materially adverse action is one that might dissuade a reasonable employee in the grievant's position from participating in protected conduct. In *Burlington Northern*, the Court noted that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." 126 S. Ct. at 2415. "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Id.* The Court determined that "plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

has provided indicating that this explanation may have been pretextual was the timing of the termination. While timing may be enough in some cases to overcome the agency's explanation, the stated facts do not appear to do so in this case. Because the grievant has not presented evidence raising a sufficient question that her daughter's termination was in retaliation for her having raised a complaint of discrimination, this grievance does not qualify for hearing.

APPEAL RIGHTS AND OTHER INFORMATION

For 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 the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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Claudia Farr
Director