Issues: Qualification - Retaliation (Other Protected Right), Separation from State (Involuntary Resignation), and Work Conditions (Co-Worker Conflict); Ruling Date: July 16, 2008; Ruling #2008-1964, 2008-1970; Outcome: Partially Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling No. 2008-1964; 2008-1970
July 16, 2008

The grievant has requested a ruling on whether her two December 13, 2007 grievances with the Department of Corrections (DOC or the agency) qualify for a hearing. In Grievance #1, the grievant claims that she was the victim of harassment and retaliation because she challenged her performance evaluation. In Grievance #2, the grievant asserts that she was harassed by another agency employee. For the reasons set forth below, Grievance 1 is partially qualified. Grievance 2 is not qualified.

FACTS

Prior to her resignation from the agency, the grievant was employed as a Probation and Parole Officer. The grievant asserts that she asked her supervisor to reconsider her annual performance evaluation. When her supervisor refused to do so, the grievant asked her supervisor's supervisor (the reviewer) to reassess her evaluation. The grievant asserts that shortly after the reviewer modified her evaluation, her supervisor screamed at her on a number of occasions, called her a liar, and threatened to "write her up" (issue formal discipline). All these alleged actions form the basis of Grievance 1. Also, while not obviously asserted on the Grievance Form A, the grievant also appears to challenge her resignation as a constructive discharge. Both the Grievance Form A and replies to step responses make references to a forced resignation.

The grievant also asserts that on several occasions in November, another agency employee approached her and attempted to provoke arguments. These incidents are challenged in Grievance 2.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[1] Thus, all 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 hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's

[1] Va. Code § 2.2-3004(B).

decision, or whether state policy may have been misapplied or applied unfairly.[2] In this case, the grievant claims in Grievance 1 that she has been the victim of retaliation and harassment by her supervisor. In Grievance 2, she asserts that she has been a victim of harassment by a co-worker.

Grievance 1

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;[3] (2) the employee suffered a materially adverse action;[4] 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.[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]

In this case, the grievant claims that the agency is retaliating against her because she challenged her performance evaluation. It would appear that such a challenge would constitute a protected activity. Under Virginia Code § 2.2.-3000, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Thus, bringing a concern about an annual performance evaluation to a reviewer would appear to be an act "otherwise protected by law."

As to the requirement that the employee suffer a materially adverse action, the grievant asserts that (1) her supervisor screamed at her on a number of occasions, (2) called her liar, and (3) threatened to "write [her] up." For the grievance to qualify for hearing, the action taken against the grievant must have been materially adverse to a reasonable worker, such that a reasonable employee might be dissuaded from challenging her performance evaluation.[7] This determination will depend on the particular circumstances of each case. As discussed in the *Burlington Northern* decision, the anti-retaliation provisions of Title VII (which are comparable with those under the grievance procedure) address significant, not trivial, harms, and are not

---

[2] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b)-(c).
[3] *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)(4).
[4] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 66-68 (2006).
[5] *See* EEOC v. Navy Fed. Credit Union, 424 F.3d. 397, 405 (4th Cir. 2005).
[6] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).
[7] *See* Burlington N., 548 U.S. at 68.

meant to "immunize [an] employee from those petty slights or minor annoyances that often take place at work and that all employees experience."[8] Rather, the goal is "to prevent employer interference with 'unfettered access'" to remedial measures, which is accomplished by "prohibiting employer actions that are likely 'to deter'" employees from making complaints to the appropriate authorities.[9] "[N]ormally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence."[10]

Being "yelled at" may not always rise to the level of a materially adverse action, especially standing alone.[11] However, when all of the alleged supervisory conduct in this case is viewed collectively,[12] including the alleged threat of possible disciplinary action,[13] as well as the apparently undisputed[14] assertion that the grievant's supervisor accused the grievant of having "lied,"[15] we conclude that the alleged conduct rises above the level of petty slights and minor annoyances to a degree that would deter a reasonable employee from challenging her performance evaluation.

The final element of the retaliation claim is the establishment of a causal link between the materially adverse action and the protected activity. In this case, the grievant asserts that almost immediately after she challenged her evaluation, the harassment began. Based on the short proximity in time between the protected activity and the alleged retaliatory conduct in this case,[16] Grievance 1 is qualified for hearing for further exploration of the facts surrounding the grievant's challenges to the alleged screaming, accusation of lying, and threats of discipline.[17]

---

[8] Burlington N., 548 U.S. at 68.
[9] *Id.* (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).
[10] *Id.*
[11] *See* Nolan v. Swartz Campbell, LLC, 2:05-cv-1508, 2008 U.S. Dist. LEXIS 15501, at *58 (W.D. Pa., February 29, 2008) (Judge Cerone held that "[b]eing yelled at by a supervisor for making a complaint about gender-derogatory jokes contained in past emails and failure to receive a raise, while inappropriate and no doubt unpleasant, does not reflect materially adverse action.") *But see* Smith v. Potter, Civil Action No. 04-881, 2007 U.S. Dist. LEXIS 21389, at *35 (W.D. Pa. March 26, 2007) (Judge Conti found that being "unreasonably yell[ed] at," meets the materially adverse employment action requirement).
[12] *See* Billings v. Town of Grafton, 515 F.3d 39, 54, n. 13 (1st Cir. 2008), ("[O]f course, retaliatory actions that are not materially adverse when considered individually may collectively amount to a retaliatory hostile work environment.")
[13] *See* Highwood v. Indiana State Police, Case No. 2:06-CV-180 PS 2007 U.S. Dist. LEXIS 82622, at *33 (N.D.Ind. November 5, 2007)("Unlike in discrimination actions, threats and warnings of disciplinary actions, standing alone, may constitute materially adverse actions for purposes of Title VII retaliation claims.")
[14] *See* First Resolution Step Response to Grievance 1, December 19, 2007.
[15] *See* Bernheim v. Litt, 79 F.3d 318, 324-26 (2d Cir. 1996) (adverse employment actions may include negative evaluation letters, express accusations of lying, assignment of lunchroom duty, reduction of class preparation periods, failure to process teacher's insurance forms, transfer from library to classroom teaching as an alleged demotion, and assignment to classroom on fifth floor which aggravated teacher's physical disabilities).
[16] *See* Tinsley v. First Union National Bank, 155 F.3d 435, 443 (4th Cir. 1998) (noting that merely the closeness in time between a protected act and an adverse employment action is sufficient to make a prima facie case of causality). *See also* Jaudon v. Elder Health, Inc., 125 F. Supp. 2d 153, 165 (D. Md. 2000) (indicating that temporal proximity and ongoing antagonism can be a sufficient basis to establish a causal link.)
[17] The agency asserts that because the grievant has resigned, a hearing officer could provide her with no additional relief. February 11, 2008 Agency Head's Qualification Determination. We disagree. Retaliation can outlive the duration of the employment relationship. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 339, 346, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (holding that post-employment injuries can be actionable under Title VII because the term

Constructive Discharge

The grievant asserts that she was forced to resign from her position. To prove constructive discharge, an employee must at the outset show that her employer "deliberately made her working conditions intolerable in an effort to induce her to quit."[18] The employee must therefore demonstrate: (1) that the employer's actions were deliberate, and (2) that working conditions were intolerable.[19] An employer's actions are deliberate only if they "were intended by the employer as an effort to force the [employee] to quit."[20] Whether an employment environment is intolerable is determined from the objective perspective of a reasonable person.[21]

The grievant has not provided sufficient evidence to show that the supervisor deliberately made her working conditions intolerable in an effort to induce her to quit. Moreover, assuming for purposes of this ruling only the truth of the grievant's allegations, the alleged conduct in this case was not so extreme as to make the grievant's working conditions objectively intolerable. "[D]issatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign."[22] Thus, while if true the actions here were regrettable, they cannot support a claim of constructive discharge. Therefore, the issue of constructive discharge does not qualify for hearing.

Grievance 2

In Grievance #2, the grievant asserts that she was harassed by a co-worker. While grievable through the management resolution steps, claims of hostile work environment and harassment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on a protected status or class--race, color, national origin, age, sex, religion, political affiliation, disability, sexual orientation, veteran status.[23] Here, the grievant has not alleged that her co-worker's purported actions were based on any of these factors. Rather, the facts cited in support of the grievant's claim can best be summarized as describing general work-related conflict between the grievant and a co-worker. Such claims of

---

"employees," as used in Title VII's anti-retaliation provision, includes former employees bringing suit for retaliatory, post-employment actions, such as a negative reference to a potential employer). Thus, if a hearing officer found that the agency had retaliated against the grievant, he could order that all retaliation cease, including any potential post-employment retaliation. Such an order could be implemented by the circuit court in the jurisdiction in which the grievant arose. Va. Code § 2.2-3006 (D).

[18] Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 272 (4th Cir. 2001) (internal quotation marks omitted).

[19] *See* Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 186-87 (4th Cir. 2004); Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 244 (4th Cir. 1997).

[20] *Matvia*, 259 F.3d at 272.

[21] *See* Williams v. Giant Food Inc., 370 F.3d 423, 434 (4th Cir. 2004).

[22] James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 378 (4th Cir. 2004)(citations omitted)). *See also*, Williams 370 F.3d at 434 (not intolerable working condition where "supervisors yelled at [employee], told her she was a poor manager, and gave her poor [performance] evaluations, chastised her in front of customers, and once required her to work with an injured back").

[23] *See Grievance Procedure Manual* § 4.1(b)(2); *see also* DHRM Policy 2.30 Workplace Harassment (effective 05/16/06).

workplace conflict are not among the issues identified by the General Assembly that may qualify for a hearing.[24] Accordingly, Grievance 2 is not qualified.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, the challenges to the allegedly retaliatory actions of the supervisor's screaming, accusation of lying, and threats of discipline in Grievance 1 are qualified for hearing. The constructive discharge claim is not. Likewise, Grievance 2 is not qualified. 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 either the qualification determination regarding the constructive discharge claim in Grievance 1 or Grievance 2 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 either Grievance 1's constructive discharge claim or Grievance 2, 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.

If the grievance does not appeal this Department's qualification determination, the agency shall request the appointment of a hearing officer to hear Grievance 1, within 5-workdays of the expiration of the 5-day circuit court appeal timeframe.

_____
Claudia T. Farr
Director

[24] *See* Va. Code § 2.2-3004 (A).