Issues: Qualification – Discrimination (gender), Retaliation (other protected right), and Hostile Work Environment; Ruling Date: September 22, 2008; Ruling #2009-2107; Agency: Department of Social Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling No. 2009-2107
September 22, 2008

The grievant has requested a ruling on whether her April 3, 2008 grievance with the Department of Social Services (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant initiated this grievance to challenge an alleged hostile work environment and retaliation. She states that she is being retaliated against for reporting issues regarding a federal grant to others in the agency, including the agency's Human Resources and General Services departments, toward the end of November 2007, which has allegedly resulted in a hostile work environment. When her supervisors were notified about the issues the grievant raised, a meeting was held on December 3, 2007. The grievant states that she was told to "never go over my immediate supervisor's head," and, according to the grievant, her supervisors said the problems with the grant were her fault.

The grievant states she was also verbally reprimanded later in December 2007, by her supervisor in relation to a trip she had taken to Northern Virginia without her supervisor's permission. In addition, the grievant's supervisor reportedly criticized her in relation to other workplace conduct at the time. The grievant asserts that she has received numerous written and verbal reprimands since February 2007 when her supervisor told her "she did not want to be friends or work with [her] any longer."

The grievant further claims that a co-worker has been allowed to "vent" at her during staff meetings, allegedly occurring on November 1, 2007 and January 5, 2008. The grievant alleges that she was "berated" in a March 18, 2008 meeting as well by her supervisor and the same co-worker.[1] The grievant also states that she has been excluded from certain meetings and communications.

[1] It should be noted that the grievant has asserted a number of other incidents that have occurred since the filing of her grievance. While acts subsequent to the initiation of the grievance might be considered as evidence in determining motive or causation, the acts themselves cannot be raised as part of this grievance because new management actions cannot be added to the grievance once it is initiated. *See, e.g.,* EDR Ruling Nos. 2008-2055, 2008-2056; EDR Ruling No. 2007-1561 & 2007-1587; *Grievance Procedure Manual* § 2.4.

The grievant has additionally raised the issue of "gender-bias" by her supervisor. The grievant states that her supervisor "pits one [woman] against another." The grievant has added that this work environment has adversely affected her health.

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. The grievant has raised issues regarding harassment and retaliation.

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]

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[2] Va. Code § 2.2-3004(B).

[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] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); *see, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. 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." 548 U.S. at 69. "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 schoolage 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.* at 68 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 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).

The grievant alleges that she has been retaliated against for raising concerns she had regarding a grant with others in the agency. Assuming without deciding, for the purposes of this ruling only, that the grievant engaged in protected activity, her retaliation claim nevertheless fails to qualify for hearing. The grievant's allegations of being the subject of "venting," reprimanded, excluded from meetings, and "berated" on one occasion, even taken together,[7] do not rise to the level of being materially adverse.[8] Further, the grievant has not raised a sufficient question as to whether these acts occurred because of her having raised concerns about a grant. For instance, the grievant states that her supervisor's conduct and various reprimands began in February 2007, well before she went to others in the agency about the grant in November 2007. The grievant has certainly described a stressful, non-collaborative work environment. However, because she has not presented evidence raising a sufficient question as to the elements of a claim of retaliation, this grievance does not qualify for hearing.[9]

Harassment/Hostile Work Environment

For a claim of gender-based harassment or hostile work environment 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 her gender; (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.[10] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at

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[7] The same result is reached even if the grievant's claim is analyzed as one for retaliatory harassment. *See* EDR Ruling Nos. 2007-1577, 2008-1957 (discussing retaliatory harassment claim in relation to materially adverse action standard).

[8] *See* Allen v. Am. Signature Inc., No. 07-3698, 2008 U.S. App. LEXIS 7714, at *8 (7th Cir. Mar. 31, 2008) (written reprimand and criticism from co-workers not materially adverse); Chang v. Safe Horizons, 254 F. App'x 838, 839 (2nd Cir. 2007) (oral and written warnings do not amount to materially adverse conduct); Borrero v. Am. Express Bank Ltd., 533 F. Supp. 2d 429, 437-38 (S.D.N.Y. 2008) (stating that "public criticism, overbearing scrutiny, and other less than civil behavior on the part of [the employer] do not rise to the level of a materially adverse action"); Gordon v. Gutierrez, No. 1:06cv861, 2007 U.S. Dist. LEXIS 253, at *32 (E.D. Va. Jan. 4, 2007) (a verbal counseling that is deserved, properly conducted, and resulted in no further disciplinary action against the plaintiff is not a materially adverse action); Gomez v. Laidlaw Transit, Inc., 455 F. Supp. 2d 81, 89-90 (D. Conn. 2006) (noting that "criticizing [the employee's] work, standing over her, not letting her leave, or leaving her a stack of papers, or [a] comment about being sick and tired of [the employee] being sick" were "minor annoyances" and not "materially adverse"); *cf.* Monk v. Stuart M. Perry, Inc., No. 5:07cv00020, 2008 U.S. Dist. LEXIS 62028, *7-8 (W.D. Va. July 18, 2008) (Title VII of the Civil Rights Act "protects plaintiffs from retaliation that produces an injury or harm and does not serve to shield employees from trivial harms, petty slights, minor annoyances, the ordinary tribulations of the workplace, or simple lack of good manners" and "does not set forth a general civility code for the American workplace.") (citations and internal quotations omitted).

[9] The alleged incidents that took place since the initiation of this grievance cannot be considered in determining whether the grievant has experienced a materially adverse action. Any management actions that occurred after this grievance was initiated would have to be raised as part of a new grievance. We must also note that any such grievance could use the acts cited in this grievance as background evidence and, potentially, to show that the conduct in the workplace has devolved to a level that could be considered materially adverse. The grievant would still be required to show a causal link with her alleged protected conduct.

[10] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

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."[11]

Further, the grievant must raise more than a mere allegation of harassment or hostile work environment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on gender. All the grievant has stated regarding conduct based on gender is that her female supervisor allegedly pits female employees against one another. Even if true, this bare allegation is insufficient to raise a question that the conduct the grievant has experienced was because of her gender. Consequently, this claim does not qualify for a hearing.

We note, however, that although this grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. For more information on this Department's Workplace Mediation program, the parties should call 888-232-3842 (toll free) or 804-786-7994.

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 and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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.

Claudia T. Farr
Director

[11] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).