Issues: Qualification – Discrimination (Age and Gender) and Retaliation (Grievance Activity Participation); Ruling Date: February 12, 2009; Ruling #2009-2132; Agency: Virginia Department of Transportation; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling No. 2009-2132
February 12, 2009

The grievant has requested a ruling on whether her May 1, 2008 grievance with the Department of Transportation (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In her May 1, 2008 grievance, the grievant has alleged that she has been subject to "continuous harassment and discrimination," which resulted in a Notice of Improvement Needed/Substandard Performance ("Notice of Improvement") on April 2, 2008. The grievant asserts that the treatment by her supervisors is in retaliation for her past grievance activity, most recently in 2007 when she succeeded in being reinstated to her job. Since that time, the grievant alleges she has been "singled-out." She alleges her supervisor has raised issues with her performance and attendance. The grievant also asserts that the alleged harassment has affected her use of leave and that she was denied the ability to use "flex time" in certain situations.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to the methods, means, and personnel by which work activities are to be carried out "shall not proceed to hearing"[1] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. In this case, the grievant claims both discrimination and retaliation.

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination.[2] To qualify such a grievance for hearing, there must be more than a mere

[1] Va. Code § 2.2-3004(C).
[2] *See Grievance Procedure Manual* § 4.1(b).

allegation of discrimination – 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 a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[3]

The grievant also appears to claim, in a letter to the agency head about her grievance, that the treatment she has endured has been, at least in part, the result of discrimination based on gender. However, the letter makes only a bare allegation of discrimination. Further, the materials submitted for this ruling request do not appear to suggest or support the allegation that the alleged treatment of the grievant was because of her gender. Because the evidence in the grievance package is insufficient to raise a question that the alleged misconduct was the result of discrimination, the grievance does not qualify for hearing.[4]

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;[5] (2) the employee suffered a materially adverse action;[6] 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.[7] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[8]

Initiating a grievance and participating in the grievance procedure are clearly protected activities.[9] However, it does not appear the grievant has suffered a materially

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[3] *See* Hutchinson v. INOVA Health System, Inc., C.A. No. 97-293 A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).

[4] No part of this ruling is meant to indicate that the grievant has not endured unlawful discrimination or harassment, only that she has not presented evidence in connection with her ruling request to raise a sufficient question of discrimination or harassment such that a hearing is warranted.

[5] *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).

[6] 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.

[7] *See, e.g.*, EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

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

[9] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

adverse action since her reinstatement, even taking together all of the grievant's allegations.[10] First, the Notice of Improvement does not constitute a "materially adverse action" required to establish a retaliation claim.[11] For this reason, the grievant's claim relating to the Notice of Improvement does not qualify for a hearing.[12] Further, the alleged monitoring of the grievant's activities, based on the evidence submitted by the grievant, does not appear to have been materially adverse.[13] As noted by the United States Supreme Court, "normally petty slights, minor annoyances, and simple lack of good manners" do not establish "materially adverse actions" that are necessary to establish a retaliation claim.[14] The only other alleged conduct that might amount to a materially adverse action in some cases would be the denial of flex time.[15] However, the grievant's evidence is insufficient to show that the denial of flex time was based on her prior grievance activity. Rather, the agency offers evidence to show that the grievant's "frequent absenteeism" was the reason for the alleged leave issues. Nothing submitted by the grievant indicates that such an explanation was a pretext for retaliation. Because this grievance does not raise a sufficient question as to the elements of a claim of retaliation, it does not qualify for hearing.

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[10] Although the May 1, 2008 grievance appears to focus primarily on the Notice of Improvement and other occurrences since her reinstatement, in fairly reading the grievance materials, the grievant may be raising an additional retaliation claim based on her past opposition to alleged discriminatory practices. For instance, it appears the grievant opposed criticism by certain agency managers about her appearance, haircut, and clothing. The grievant states that the alleged harassment dates back to 2005. However, the materials provided in her ruling request present insufficient evidence to raise a question that the grievant sustained a materially adverse action as a result of this opposition activity prior to her reinstatement in August 2007. Certainly, her termination and past Written Notices would qualify as materially adverse actions, but those matters were remedied by the agency in response to a previous grievance.

[11] *See, e.g.*, EDR Ruling No. 2009-2090, at n.6. We note, however, that while this Notice of Improvement does not have an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. Therefore, should the Notice of Improvement in this case later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of the Notice of Improvement through a subsequent grievance challenging the related adverse action.

[12] Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that she wishes to challenge, correct or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

[13] *See also, e.g.*, Shannon v. Va. Dep't of Juvenile Justice, No. 3:06CV413, 2007 U.S. Dist. LEXIS 25170, at *10-11 (E.D. Va. Apr. 4, 2007), *aff'd*, 258 F. App'x 583 (4th Cir. 2007) (noting that, among other allegations, monitoring plaintiff's activities did not rise to the level of a materially adverse action).

[14] *Burlington N.*, 548 U.S. at 68.

[15] *See, e.g.*, Liggett v. Rumsfeld, No. 04-1363, 2005 U.S. Dist. LEXIS 34162, at *12 (E.D. Va. Aug. 29, 2005) (addressing a denied request for leave as an adverse employment action). *But see also* EDR Ruling No. 2009-2161 (finding single denial of leave was not an adverse employment action under particular facts); EDR Ruling No. 2008-1986 (same).

This ruling does not mean that EDR deems the alleged behavior of the grievant's supervisors to be appropriate, only that the grievance does not raise a sufficient question of retaliation so as to qualify for a hearing. Moreover, this ruling in no way prevents the grievant from raising these matters again at a later time if the alleged conduct continues or worsens.

Finally, 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.

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Claudia T. Farr
Director