Issues: Qualification – Discrimination (Disability) and Retaliation (Other Protected Right); Ruling Date: February 6, 2009; Ruling #2009-2206; Agency: Virginia Community College System; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Community College System
EDR Ruling No. 2009-2206
February 6, 2009

The grievant, an employee of a community college (the College or agency), has requested a ruling on whether his August 27, 2008 grievance with the Virginia Community College System (the System) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In his August 27, 2008 grievance, the grievant has raised the following issues: "harassment, creating a hostile work environment, creating undue stress, discrimination." The alleged concerns appear to be related to the grievant's return to work following an extended medical absence and his continuing health condition. The grievant returned to work in late July 2008 from short-term disability, but questions apparently arose about his condition. The grievant's understanding was that he was on "light duty" at the time, but the College was not aware of any restrictions. As such, the grievant was asked to provide documentation from his doctor about his restrictions. A note, dated August 11, 2008, was eventually provided indicating that the grievant was on "light duty" with certain weight lifting limitations. The College again sought clarification on what was meant by "light duty" because, in part, the grievant and his supervisor appeared to have different ideas of the grievant's restrictions. A further note, dated August 18, 2008, from the grievant's physician was provided on August 25, 2008. In this note, it appeared that, due to the grievant's health condition and stress at work, a leave of absence was suggested. According to the grievant, the College sent him home and the grievant was eventually approved for short-term disability. The grievant eventually returned to work without restrictions at the end of September 2008.

The grievant's allegations of a hostile work environment and harassment arose during this period between late July 2008 and his eventual placement on short-term disability in late August 2008. The grievant states that his supervisor was, "disrespectful," and, perhaps in his perception, hostile toward his medical condition and restrictions. The grievant's supervisor reportedly told him things like, "I don't want you here unless you're 100%." In another instance, according to the grievant, when he

explained to his supervisor that he could not do a particular task, his supervisor said something to the effect, "are you telling me you can't do your job?" The grievant also states that when he gave his supervisor the August 18, 2008 note from his doctor, his supervisor remarked that "it's time for you to step up to the plate." It also appears that conflict had developed between the grievant and his supervisor as a result of the supervisor's management style, which was different than the grievant's previous supervisor.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[1] 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 has effectively raised issues regarding harassment and retaliation.

Hostile Work Environment/Harassment

For a claim of discrimination based on a 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;[2] (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.[3] "[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."[4]

Certainly some of the supervisor's inquiries into the grievant's condition and related restrictions would have been understandable, as the initial physician's note did not appear to be specific or consistent with the grievant's own understanding. However, assuming the alleged conduct of the grievant's supervisor occurred as the grievant describes, it is also understandable how the grievant could have perceived harassment. Some of the supervisor's alleged statements, if made, could be described as insensitive to an individual with a health condition similar to the grievant's. Further, if the supervisor's

[1] Va. Code § 2.2-3004(B).
[2] For a claim of harassment or hostile work environment based on disability, the grievant would also have to show that he or she is a qualified individual with a disability under the ADA. *E.g.*, Fox v. Gen. Motors Corp., 247 F.3d 169, 177 (4th Cir. 2001). This element need not be analyzed in this ruling.
[3] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[4] Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

attitude was consistent with the grievant's description, it would be hard to imagine that it positively contributed to resolving any of the issues they faced. That said, however, the supervisor's allegedly insensitive conduct does not appear to have risen to the requisite level of "severe or pervasive" in this case. As courts have noted, prohibitions against harassment, such as those in Title VII, do not provide a "general civility code"[5] or remedy all offensive or insensitive conduct in the workplace.[6] This Department is further persuaded and encouraged by the fact that, according to the grievant, the allegedly hostile behavior has ceased and a civil, though possibly tense, working relationship now exists. As such, evidence of the relatively few incidents and limited duration of alleged harassing conduct in this case is insufficient to raise a question of a hostile work environment to qualify for hearing.

This ruling does not mean that EDR deems the alleged behavior of the supervisor, if true, to be appropriate, only that the claim of hostile work environment on the basis of disability 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 resumes or worsens.

Retaliation[7]

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;[8] (2) the employee suffered a materially adverse action;[9] 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.[10] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[11]

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[5] Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

[6] *See, e.g.,* Beall v. Abbott Labs., 130 F.3d 614, 620-21 (4th Cir. 1997); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996).

[7] Though not specifically stated as such, the grievant's allegations of supervisory hostility toward his medical condition, restrictions, and related leave, fairly read, could be viewed as a claim of retaliation for exercising rights protected by law.

[8] *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).

[9] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

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

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

For purposes of this ruling, it is assumed that the grievant engaged in a protected activity when he exercised his right to take short-term disability (STD) leave before returning to work in late July 2008. Arguably, such use of leave qualifies under the Family and Medical Leave Act (FMLA). Under the Virginia Sickness and Disability Plan (VSDP), "If you are on VSDP and eligible for FMLA because of your serious health condition, your absence will be counted as FMLA."[12] The Commonwealth's Family and Medical Leave policy stems from the FMLA,[13] and while state policy does not expressly prohibit retaliation for using FMLA leave, the FMLA does.[14] Accordingly, the grievant's use of STD/FMLA leave may have potentially been a protected activity.[15]

Assuming without deciding, for the purposes of this ruling only, that the grievant engaged in protected activity, his retaliation claim nevertheless fails to qualify for hearing. The alleged hostile acts described by the grievant as arising on account of his medical condition and related leave, even taken together,[16] do not rise to the requisite level of being materially adverse.[17] The grievant's perception of a stressful work environment and potentially insensitive conduct by his supervisor is understandable.[18] However, as noted by the 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.[19] Because the grievant has not presented evidence raising a sufficient question as to the elements of a claim of retaliation, this grievance does not qualify for hearing.

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[12] 2008 VSDP Handbook, at 26; *see also* Department of Human Resource Management (DHRM) Policy 4.57.

[13] DHRM Policy 4.20.

[14] *See* 29 U.S.C. § 2615(a)(1).

[15] EDR Ruling No. 2006-1241.

[16] Considering the totality of the circumstances when assessing whether the College's actions might well have dissuaded a reasonable employee from participating in protected conduct is consistent with an analysis of a claim of retaliatory harassment, which focuses not on individual incidents, but the overall scenario, in light of the standard provided in the *Burlington Northern* decision. *See* Hare v. Potter, No. 05-5238, 2007 U.S. App. LEXIS 6731, at *28-33 (3d Cir. Mar. 21, 2007) (altering analysis of traditional "severe and pervasive" element of a claim of retaliatory harassment to apply the materially adverse standard following *Burlington Northern*); Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006) (same); *see also* EDR Ruling No. 2007-1669.

[17] *See, e.g.,* 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); 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"); 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).

[18] As stated above, certain of the supervisor's actions are also understandable.

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

Mediation Statement

We note, however, that although this grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue to remedy any ongoing workplace conflict. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the College, 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).

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 System will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the System of that desire.

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Claudia T. Farr
Director