Issue: Qualification – Retaliation (Other Protected Right); Ruling Date: September 4, 2009; Ruling #2009-2284; Agency: College of William & Mary; Outcome: Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the College of William and Mary
Ruling No. 2009-2284
September 4, 2009

The grievant has requested a ruling on whether her February 3, 2009 grievance with the College of William and Mary (agency) qualifies for a hearing. In her grievance, the grievant asserts that she has been a victim of retaliation for her union membership. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

The grievant is employed as a housekeeper. The grievant, a union steward, asserts that as a result of her union affiliation, she is forced to work in an intimidating, offensive work environment and that her promotional opportunities have been compromised. She asserts that her supervisor and department managers have orchestrated scenarios designed to undermine her credibility and brand her as a troublemaker. Among some of the actions that the grievant asserts that management has taken against her are a denial of training, overtime hours, and a promotion, and that other employees have been instructed not to talk to the grievant.

DISCUSSION

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;[1] (2) the employee suffered a materially adverse action;[2] 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

[1] *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).
[2] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006).

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.[3] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[4]

Beginning with the first element, an agency may not retaliate against an employee for exercising any right otherwise protected by law. The grievant's participation in a labor organization/association appears to be an activity protected by state law.[5] Moreover, when reviewed collectively, the alleged denial of training, overtime hours, and promotion, along with the alleged instruction to other employees that they not talk to the grievant raise a sufficient question as to whether the grievant has suffered a materially adverse employment action.[6] Thus, the only question remaining is whether a causal link exists between the grievant's participation in a labor organization/association and the management actions listed above.

Based on a totality of the circumstances, there remain issues relating to causation which are best answered by a fact-finder at a grievance hearing. For instance, the grievant asserts that she has been routinely intimidated, taunted, belittled, and disrespected by management. While the agency denies this is the case, at least one other employee asserts that management has been openly hostile to the grievant. The grievant asserts that she was told that her denial of overtime was related to the fact that employees cannot cross zones. However, other employees say that they routinely cross zones to work overtime. The agency asserts that it has had to counsel the grievant on having "lengthy conversations" during work hours. The grievant, on the other hand, counters that she has not had lengthy conversations during her work shift, which a co-worker appears to corroborate. In sum, this Department concludes that the grievant has presented evidence that raises a sufficient question as to whether a causal connection

---

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

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

[5] Virginia Code § 40.1-57.3 states that "[n]othing in this article shall be construed to prevent employees of the Commonwealth, its political subdivisions, or of any governmental agency of any of them from forming associations for the purpose of promoting their interests before the employing agency." *See also* EDR Ruling No. 2007-1538; 40.1-58 (right to work shall not be denied or abridged on account of union membership). 40.1-58.1 expressly applies to state government.

[6] In *Burlington N. & Santa Fe Ry. Co*., 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 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* at 68. (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (DC Cir. 2006)).
In adopting the "materially adverse" standard the Court noted that the requirement of "materiality" is critical to "separate significant from trivial harms." *Id*. The latter, including normally petty slights, minor annoyances, snubbing, and simple lack of good manners, do not deter protected activity and are therefore not actionable. For the same reason, in the context of the grievance process, a retaliation grievance based on a trivial harm will not be qualified for hearing by this Department.

exists between her participation in a labor organization/association and the complained of management acts.

Therefore, after careful review of the evidence, this Department concludes that, based on the totality of the circumstances, the grievant has demonstrated that sufficient questions of fact exist with respect to her retaliation claim. The hearing officer, as a fact finder, is in a better position to determine whether retaliatory intent contributed to the purported adverse actions described by the grievant. As such, this grievance qualifies for hearing. We note, however, that this qualification ruling in no way determines that the agency's actions with respect to the grievant were retaliatory or otherwise improper. Rather, we merely recognize that, in light of the evidence presented, further exploration of the facts by a hearing officer is appropriate, as a hearing officer is in a better position to determine questions of motive and credibility.

CONCLUSION

The grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to adjudicate the qualified claims, using the Grievance Form B.

_____

Claudia T. Farr
Director