Circuit Court for Howard County
Case No. C-13-CV-18-000227

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2159

September Term, 2018

MELAYNE A. C. RICHARDS

v.

JOHNS HOPKINS UNIVERSITY APPLIED PHYSICS LABORATORY, LLC

Beachley,
Wells,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, Sally D., J.

Filed: February 11, 2020

Appellant Melayne A. C. Richards filed a one-count complaint in the Circuit Court for Howard County alleging that Johns Hopkins University Applied Physics Laboratory, LLC ("APL") violated her rights under the Maryland Fair Employment Practices Act ("FEPA"), Md. Code (1984, 2014 Repl. Vol.), § 20-601 *et seq.* of the State Government ("SG") Article. The complaint alleged that Richards notified APL of racial discrimination, and in response APL retaliated against her to "get [her] to drop the case and insulate itself from a proper investigation." APL moved to dismiss the action, arguing that her complaint failed to state an actionable claim. The circuit court, without holding a hearing, granted the motion.

Richards's timely appeal presents two questions for our review, which we have consolidated and rephrased:[1]

> Whether APL's alleged conduct, viewed in a light most favorable to Richards, constituted actionable retaliation under the Maryland Fair Employment Practices Act?

[1] In her brief, Richards presented the following two questions:

1. Did the Circuit Court err in granting Appellee's Motion to Dismiss when it failed to consider that Appellee's conduct of attempting to convince an employee from bringing a race discrimination complaint was by itself retaliatory?

2. Did the Circuit Court err when it failed to consider that all of the Appellee's actions taken together were retaliatory?

We hold that the facts and allegations stated in Richards's complaint, assumed as truthful and viewed in a light most favorable to her, do not constitute actionable retaliatory conduct. We therefore affirm the circuit court's dismissal.

FACTS AND PROCEEDINGS

A. The Complaint

Richards is an African-American woman who resides in Maryland and worked for APL from August 2015 until April 2018. On June 15, 2018, she filed her complaint alleging retaliation in violation of FEPA.

According to Richards, on January 16, 2018, she emailed her first-level supervisor, Ms. Valeree Combs, and "asked her to change her attitude toward [Richards] and if not, she would file a race discrimination complaint against her." Richards claims this email "formally complained and asked Ms. Combs to stop treating her different based on her race," and that it was a discrimination complaint—a protected activity under FEPA.

Richards claims that after that email APL took retaliatory actions. The nine alleged retaliatory incidents, all allegedly in 2018, are the following:

(1) On January 16, Combs responded to Richards's email with a directive "not to write things that she did not mean."

(2) On February 5, Richards asserts she "received a public praise for her work," and that Combs "publicly questioned" that praise.

(3) On that same day, Richards met with Ms. Anjanette Cabrera to discuss an internal workplace investigation.[2] The two discussed the January 16 email, and Richards claims Cabrera "encouraged [her] to drop her discrimination complaint."

(4) On February 9, Richards met with Combs and Susan Sickinger, an APL Human Resources Representative, for a coaching meeting. Combs counseled Richards on becoming a better leader and communicator, but Richards also alleges she "accused [Richards] of spreading confidential information to her staff" and not following guidance.

(5) On February 16, Richards took an off-day, but was available for urgent messages. The complaint states that Ms. Sharon Warner—Richards's second-level supervisor who was directly supervising Richards at the time—instructed Richards to "provide her with a summary of the work that she did at home." Richards asserts this was "an extra request" and "not an official policy."

(6) On March 7, Combs "bypassed" Richards by assigning a contract to a staff member that Richards claims did not possess the required security clearance, which Richards did possess.

[2] In September of 2017 Richards filed internal grievances against Combs and her second-level supervisor, Ms. Sharon Warner, complaining of unnecessary harassment, defamation of character, and retaliation. Cabrera was the outside investigator brought in by APL to investigate those claims. Those claims are not a part of this appeal.

(7) On March 12, Combs "questioned [Richards's] management abilities and reprimanded her via email. All of [Richards's] supervisor peers were on that email, along with some of [her] staff members."

(8) On March 26, "[a]ll of [Richards's] coworkers received an email saying that [APL] needed to seize their computers in preparation of litigation[;] that [Richards] ha[d] brought harassment claims. [Richards] never received a formal email requesting her computer; she just received [a] voicemail saying that there was a litigation hold on her computer."

(9) On April 5, APL notified Richards that it would schedule a meeting to discuss the results of the independent investigation. A week later, however, Richards submitted her two-week resignation notice, so that meeting never occurred.[3]

Richards filed a formal charge against APL with the Equal Employment Opportunity Commission ("EEOC") and the Maryland Commission on Civil Rights on February 7, 2018, and received her right to sue from the EEOC on March 28. After meeting the administrative requirements, she filed suit in the Circuit Court for Howard County on June 15.

B. Motion To Dismiss

On July 27, 2018, APL filed a motion to dismiss the complaint against it with prejudice and requested an award of attorneys' fees and costs. In its memorandum in support of the motion to dismiss, APL argued that Richards alleged only "minor workplace

[3] Richards is not claiming constructive discharge.

events and grievances," and could "plead no set of facts that would support a viable retaliation claim."

APL contended that Richards's complaint did not include any direct factual support of her "vague" claims. It averred that a "verbal reprimand," "additional requirements" at work, and "allegations concerning similarly situated employees" did not constitute materially adverse employment actions, neither individually nor collectively.

The circuit court dismissed Richards's complaint with prejudice on August 13, 2018.

DISCUSSION

Maryland Rule 2-305 directs that "[a] pleading that sets forth a claim for relief . . . shall contain a clear statement of the facts necessary to constitute a cause of action[.]" In considering a motion to dismiss, a court "must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint . . . ." *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643 (2010). "The material facts setting forth the cause of action must be pleaded with sufficient specificity. Bald assertions and conclusory statements by the pleader will not suffice." *Tavakoli-Nouri v. State*, 139 Md. App. 716, 725 (2001) (internal citation omitted). On appeal, we review and assume the truth of the well-pleaded facts in the complaint. We will affirm if those well-pleaded facts do not entitle Richards to relief as a matter of law. *See Samuels v. Tschechtelin*, 135 Md. App. 483, 515–16 (2000). The goal of this review is to "determine whether the court was legally correct," *RRC Northeast*, 413 Md. at 644, and so

we review the trial court's grant of a motion to dismiss without deference. *Gomez v. Jackson Hewitt, Inc.*, 427 Md. 128, 142 (2012).

Richards's complaint names one cause of action, retaliation under FEPA.[4] The pleading requirements for a retaliation claim are that: (1) the employee engaged in a protected activity; (2) the employer took adverse action against the employee; and (3) there is a causal link between the protected activity and the adverse action. *See Lockheed Martin Corp. v. Balderrama*, 227 Md. App. 476, 504 (2016). It is undisputed that Richards's email to Combs about racial discrimination—and subsequent EEOC complaint—are statutorily protected activities. With the first element satisfied, the parties dispute the other two; whether APL's alleged actions were adverse, and whether there was a causal link.

Although it went into effect one day before its federal counterpart, FEPA is Maryland's response to Title VII of the Civil Rights Act of 1964. *Haas v. Lockheed Martin Corp.*, 396 Md. 469, 503 (2007) (Battaglia, J., dissenting). The General Assembly has updated FEPA through the years to align with Title VII, and therefore, we traditionally

[4] SG § 20-606(f) states:

> An employer may not discriminate or retaliate against any of its employees or applicants for employment, an employment agency may not discriminate against any individual, and a labor organization may not discriminate or retaliate against any member or applicant for membership because the individual has:
>
> (1) Opposed any practice prohibited by this subtitle; or
>
> (2) Made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subtitle.

look to federal interpretation of Title VII as relevant authority when interpreting FEPA.[5] *See Haas*, 396 Md. at 481. The Supreme Court, in *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), analyzed Title VII and addressed a circuit split about how harmful the alleged action must be to constitute actionable retaliation. It ultimately adopted the Seventh and District of Columbia Circuits' expansive view and held that a 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."[6] *Id.* at 68 (cleaned up).

[5] The alignment of Maryland and federal statutes does not bind us to the federal interpretation of the relevant statute. "Maryland appellate courts have interpreted state statutes, rules, and constitutional provisions differently than analogous federal provisions on numerous occasions, even where the state provision is modeled after its federal counterpart." *Haas*, 396 Md. at 482 n.10 (explains numerous examples of where and why Maryland has diverged from federal interpretation of a similar statute).

[6] The standards for actionable retaliatory conduct the circuits had adopted that created the split were the following, from the most restrictive to the least:

> The Fifth and Eighth Circuits: Limited to acts "such as hiring, granting leave, discharging, promoting, and compensating." *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997).
>
> The Sixth Circuit: Plaintiff must show a "materially adverse change in the terms and conditions" of employment. *White v. Burlington Northern & Santa Fe Ry. Co.*, 364 F.3d 789, 795 (6th Cir. 2004).
>
> The Seventh and District of Columbia Circuits: Plaintiff must show the "employer's challenged legal action would have been material to a reasonable employee." *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005).
>
> The Ninth Circuit: Plaintiff must establish "adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000).

The Court provided limits and guidelines for interpreting what is adverse. It must be **material**, *i.e.*, it must "produce[] an injury or harm." *Id.* at 67. This is to delineate from trivial harms, as neither Title VII, nor FEPA "set forth a general civility code for the American workplace." *Id.* at 68 (cleaned up). The standard is objective, to "avoid[] the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." *Id.* at 68–69. And because context matters in retaliation cases, we will "consider whether based upon the combined effect of alleged events, a reasonable worker could be dissuaded from engaging in protected activity." *Smith v. Vilsack*, 832 F. Supp. 2d 573, 585 (D. Md. 2011).

Richards argues that the circuit court erred in granting the motion to dismiss because it failed to consider whether, in her words, "all of [APL's] actions" and APL's "attempt[s] to convince [her] from bringing a race discrimination complaint" were retaliatory.[7] APL counters that her complaint presents "at most, a series of 'petty slights' and 'minor annoyances' that, even when considered as a whole, do not meet the standard established in *Burlington Northern.*"

Richards alleges that after she emailed her supervisor threatening to complain of racial discrimination, the supervisor replied and told Richards "not to write things that she did not mean." In her brief, Richards interprets this as an employer "scolding an employee

[7] The complaint does not state what specific actions led Richards to complain of racial discrimination; nor does it have to. *See Burlington Northern*, 548 U.S. at 69 ("This standard does *not* require a reviewing court or jury to consider the nature of the discrimination that led to the filing of the charge.") (emphasis in original) (cleaned up).

to tell the truth when bringing discrimination complaints." The supervisor may have simply meant that Richards should not make an empty threat that she did not intend to back up. But assuming arguendo, as Richards does, that this vague directive was a charge to be truthful, we do not see how such a charge can reasonably be considered as retaliatory.

Richards mistakenly relies on *Egei v. Johnson*, 192 F. Supp. 3d 81 (D.D.C. 2016), to assert that entreating an employee to tell the truth when bringing a complaint is materially adverse. There, the plaintiff brought a Title VII complaint against her supervisor at the Federal Emergency Management Agency ("FEMA"). The administrative law judge presiding over the EEOC proceeding found that the plaintiff's allegations were not credible, and a year and a half later FEMA terminated her for lying during the proceeding. *Id.* at 82. The plaintiff sued for retaliatory termination, and the federal district court concluded that Title VII protects an employee from adverse employment actions based on *any* testimony in an EEOC proceeding. *Id.* Title VII (and FEPA) therefore shields an employee from retaliation based on false statements made during an EEOC proceeding. *Id.* at 88–89. So, *Egei* instructs that if Richards lied in her discrimination complaint, she would be protected from retaliation. It says nothing about what we have here—a statement by a supervisor entreating an employee "not to write things that she did not mean" in response to an employee's threat to file a discrimination claim. We think this action would not dissuade a reasonable employee from bringing a complaint, especially because there could be no consequences for lying.

The balance of the claims in Richards's complaint are so general, vague, and non-specific that they fall short of stating a claim for retaliation. *See Parks v. Alpharma, Inc.*, 421 Md. 59, 85 (2011) (naked allegations that are too general in nature are insufficient to survive a motion to dismiss). To state a claim for retaliation, an employee must allege facts that show a materially adverse employment action. "The key question is whether the challenged action is 'materially adverse' in that it is harmful to the point that it could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Porter v. Houma Terrebonne Hous. Auth. Bd. of Comm'rs*, 810 F.3d 940, 945 (5th Cir. 2015) (cleaned up). Although a transfer to a new job assignment that is less appealing to the employee is not, by itself a 'materially adverse' employment action, *see James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375 (2004), courts have found that a new job assignment with reduced supervisory duties or diminished responsibility can constitute an adverse employment action. *See Czekalski v. Peters*, 475 F.3d 360, 364 (D.C. Cir. 2007) (noting that a lateral transfer can constitute an adverse employment action if it results in the withdrawal of an employee's "supervisory duties" or "reassignment with significantly different responsibilities") (cleaned up); *Kessler v. Westchester Cty. Dep't of Soc. Servs.*, 461 F.3d 199, 206–07 (2d Cir. 2006) (stating that a transfer is an adverse employment action if it causes a "radical change in nature of the [plaintiff's] work") (cleaned up).

We do not have that here. Richards only alleges that a supervisor "publicly questioned" praise for Richards's work, that she was "questioned" and "reprimanded" in an email, and "accused of spreading confidential information"—all allegations too vague

to be assessed by a court against the adverse employment action standard. Richards does not allege that she suffered any formal discipline that would be recorded in her personnel file, lost any pay, was demoted, or even transferred. Nor does she describe what adverse statements were made, or in what context. She offers only conclusory terms—"publicly questioned [praise]" given to her, "reprimanded her via email" and "accused [her] of spreading confidential information."

A workplace usually depends upon rules of conduct, set and enforced by management personnel. It is expected that when an employee does not abide by the workplace rules, her supervisors can legitimately comment adversely upon her performance. An employer can even do so after an employee has initiated some discriminatory claim, within reasonable limits subject to FEPA. An employee does not state an actionable FEPA claim just by alleging he was criticized after initiating a discrimination claim. Mere criticism does not amount to an adverse employment action.

Richards's complaint says nothing about the specifics or even the subject matter of the praise or detraction, or of the reprimand. It is silent on whether Richards's conduct merited the criticism or reprimand. Without knowing more, a court lacks sufficient information to fairly evaluate what "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 458 U.S. at 68. The Supreme Court looks to the "reactions of a reasonable employee because [it] believe[s] that the provision's standard for judging harm must be objective. An objective standard is judicially administrable." *Id.* It is the plaintiff's burden to set forth "a clear statement of

the facts necessary to constitute a cause of action"—to enable a court to make an objective assessment of whether that objective standard has been met. Md. Rule 2-305.

In reaching our conclusion that Richards failed to state a cause of action, we have examined state and federal cases on retaliation. Other cases similarly lacking were dismissed for failure to allege an adverse employment action. *See Cepada v. Board of Educ. of Baltimore Cty.*, 814 F. Supp. 2d 500, 515 (D. Md. 2011) (plaintiff's allegations that he was yelled at and "criticized" for complaining were not materially adverse); *Tawwaab v. Virginia Linen Service, Inc.*, 729 F. Supp. 2d 757, 784 (D. Md. 2010) ("[D]emeaning and disparaging comments by a supervisor . . . do not constitute an adverse employment action.").

The standard for finding an adverse employee action is more relaxed for claims of retaliation than for claims of employment discrimination, *Adams v. N.Y.C.*, 837 F. Supp. 2d 108, 121 (E.D.N.Y. 2011), and a formal warning letter might be considered an adverse action depending on the circumstances. *Yonemoto v. McDonald*, 114 F. Supp. 3d 1067, 1103 (D. Haw. 2015). But "context matters." *Burlington Northern*, 548 U.S at 69. And it matters even at the pleading stage, without the benefit of a full evidentiary record. Unfortunately, Richards provides no context in her bare-bones complaint. We cannot determine if her assertion that she was reprimanded is even a disciplinary matter or just a statement by her employer that she should have done something differently. The two are markedly distinct.

Richards's assertion that APL assigned a contract to another employee rather than her also falls short of a sufficiently pleaded allegation. Richards claims only one instance in which a work assignment was given to someone else, asserting only that the individual "didn't have the right experience or security clearance." She did not include any supporting facts regarding the nature of the work assignment—so it is impossible to determine the importance of her missing out on the assignment or how the non-assignment harmed her.

Likewise, the allegation that APL refused to update Richards on its investigation into her internal grievance fails to allege a harm. The complaint concedes that a meeting to discuss the investigation was scheduled, but Richards voluntarily resigned before that meeting took place. Her brief does not provide us with any cases supporting her claim that cancelling this meeting was actionable retaliation, and we cannot see how Richards was harmed in this respect.

In *Wonasue v. Univ. of Maryland Alumni Ass'n*, 984 F. Supp. 2d 480, 492 (D. Md. 2013) (cleaned up), the U.S. District Court for Maryland gave examples of conduct that does not rise to the level of materially adverse:

> Even with this lower bar [from *Burlington Northern*], none of the following constitutes an adverse employment action in a retaliation claim: failing to issue a performance appraisal; moving an employee to an inferior office or eliminating the employee's work station; considering the employee AWOL; or issuing a personal improvement plan, an Attendance Warning, a verbal reprimand, a formal letter of reprimand, or a proposed termination.

Although we might disagree with the suggestion in *Yonemoto v. McDonald* that a formal reprimand could never be considered retaliatory, Richards's claim that a supervisor's

"extra request" for "a summary of the work that she did at home" is insufficient to allege retaliatory conduct. A work summary can be one aspect of an employee improvement plan, which, as the *Wonasue* court makes clear, is not an adverse action. *See also Cole v. Illinois*, 562 F.3d 812, 816–17 (7th Cir. 2009) (Placing employee on improvement plan was not a materially adverse action that would dissuade employee to forgo exercising rights where the employee was not "deprived of responsibility, hours, pay, or any other relevant accoutrement of her position.").

In *Burlington Northern* the Supreme Court opined about the disparate treatment of employees, stating that a "supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination." *Id.* at 69. Richards's allegation that she received a voicemail about her computer, rather than an email like her coworkers, falls into the former category as a petty slight. The complaint presents no specific facts of how this alleged treatment harmed Richards, and the fact that her coworkers also have their computers taken suggests equal treatment—as similarly situated employees that did not engage in protected activity.

In sum, the allegations in Richards's complaint, even viewed in a light most favorable to her, are insufficient to state a retaliation claim. Viewed in their totality, the incidents in the complaint do not go beyond "petty harms" and "minor slights." When APL filed its motion to dismiss in the circuit court, Richards responded, but did not request

a hearing or leave to amend her complaint. If she had requested a hearing, the circuit court would have been obligated to hold one, as its order was dispositive of her claim. *See* Md. Rule 2-311(f). We see no reason why the circuit court should have refrained from granting APL's motion to dismiss.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.