

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JAMES F. VAN HOUTEN	:	CIVIL ACTION
	:	
v.	:	
	:	
HERSHEL GOBER, ACTING	:	
SECRETARY, DEPARTMENT OF	:	
VETERANS AFFAIRS	:	NO. 98-270

**MEMORANDUM AND ORDER**

YOHN, J. November , 1998

James F. Van Houten claims that his employer, the Philadelphia Regional Office and Insurance Center of the Department of Veterans Affairs, discriminated against him because of his disability in violation of Title VII, 42 U.S.C. § 2000e-16(a) (1994 & Supp. 1998),<sup>1</sup> when it reassigned him to a new position and placed a formal reprimand letter in his personnel file.<sup>2</sup> The government filed a motion to dismiss Van Houten’s complaint under Fed. R. Civ. P. 12(b)(1), claiming that this court lacks subject matter jurisdiction over his claims because he failed to exhaust his administrative remedies. For the reasons described below, the government’s motion will be treated as a motion for summary judgment, and will be denied.

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<sup>1</sup> As explained below, Van Houten asserts a cause of action under the Rehabilitation Act, 29 U.S.C. § 794 (1985 & Supp. 1998), rather than Title VII. *See infra*, at 4, n. 6.

<sup>2</sup> Though Van Houten’s complaint requests judicial review of “all issues in his [EEO] complaint,” which includes the letter of reprimand, he later asserts that “[t]he letter of reprimand is not at issue in this litigation.” Complaint, ¶ 15; Plaintiff’s Response to Motion to Dismiss, at 3. Because Van Houten disavows judicial review of the EEOC’s decision concerning the letter of reprimand, and because it is doubtful whether that claim is properly before this court, I will focus solely on his claims with respect to his reassignment.

## FACTUAL BACKGROUND

In May, 1995, Van Houten was an Insurance Specialist Trainee at the Philadelphia Regional Office and Insurance Center of the Department of Veterans Affairs, and was enrolled in a training class which his position required him to complete. While enrolled in the class, Van Houten wore wrist braces because he suffered from carpal tunnel syndrome and a repetitive motion disorder. See April 17, 1996 EEO Complaint (“EEO Complaint”), at 2. On May 11, 1995, Van Houten became involved in a dispute with his supervisor, which precipitated the events at the center of the current dispute. While Van Houten claimed that his supervisor “treated [him] in an unprofessional, disrespectful, degrading manner” which he viewed as “forms of intimidation, harassment, and a threat to his job status,” the chief of Van Houten’s division claimed that Van Houten’s actions on that day constituted “insubordination and a physical threat to a supervisor,” and “disrespectful conduct to other employees.” See Exhibit B (“Union Grievance”); Exhibit A.<sup>3</sup> On May 30, 1995, Van Houten was notified of a proposed 10-day suspension resulting from his conduct on May 11, 1995, and on May 31, 1995, he was transferred out of the training class and reassigned to a new position as a Claims Clerk. See Exhibit A; Complaint ¶ 6. Van Houten filed a grievance under Article 13, § 7 of his collective bargaining agreement on June 9, 1995, which complained of his treatment on May 11, and requested, as one of his remedies, that he be returned to the training class. See Exhibit S; Union Grievance. His division chief formally denied Van Houten’s grievance on July 14, 1995. See Exhibit C. She explained that, after meeting with Van Houten and his union representative, she had concluded

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<sup>3</sup> Unless otherwise specified, exhibit letters will refer to the exhibits attached to Defendant’s Motion to Dismiss.

that he had not been treated differently from other members of his class, and that he would not be returned to the training class because he was unable to provide the level of service demanded by the job for which he was being trained.<sup>4</sup> See id. Also, on July 14, 1995, Van Houten received a Proposed Suspension Decision Notice and a Letter of Reprimand which informed him that instead of being suspended for 10 days, a letter of reprimand would be placed in his personnel file for three years. See Exhibit D; Exhibit E.

Between July 9, 1995, and February 29, 1996, Van Houten was on medical leave for conditions unrelated to this complaint. When he returned to work on February 29, 1996, he contacted an Equal Employment Opportunity (“EEO”) Counselor and asked the counselor to attempt informally to resolve his complaints regarding both the reassignment and the reprimand. See Exhibit F. Van Houten’s final interview with the EEO Counselor took place on April 2, 1996, and the counselor’s report indicates that Van Houten was dissatisfied with the results of the informal EEO process. See Exhibit H. Van Houten then filed a formal EEO Complaint on April 17, 1996, claiming that the agency discriminated against him because of his disability when it reassigned and reprimanded him, and that its decisions were also retaliation for his previous EEO activity.<sup>5</sup> See Exhibit I, at 3.

Van Houten’s formal EEO Complaint was rejected by the Department of Veteran’s

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<sup>4</sup> The division chief explained that “[o]ur Mission is to provide quality and timely service to veterans in a professional and courteous manner. As I explained to you and your representative, I do not feel that you would be able to service a veteran in a professional and courteous manner if the veteran challenged you or your work.” Exhibit C, ¶ 11.

<sup>5</sup> Van Houten had filed a prior EEO complaint on July 12, 1995, which complained about events in the training class prior to May 10, 1995. See Plaintiff’s Response to Motion to Dismiss, at 2, n. 1. This complaint, and its subsequent history are not relevant to the resolution of his present complaint. See id.

Affairs on May 1, 1996, on grounds that his reassignment claims were barred because he had previously raised them in his grievance, and that his reprimand claim was moot because the letter of reprimand was removed from his personnel file on April 29, 1996. See Exhibit K. The Final Agency Decision on his EEO Complaint, dated September 26, 1996, dismissed his two claims for the reasons outlined in the May 1, 1996, letter. See Exhibit L.

Van Houten appealed the Department's decision to the Equal Employment Opportunity Commission ("EEOC"). On August 13, 1997, the EEOC affirmed the Department's decision to dismiss Van Houten's reassignment claim because he had previously raised it in the union grievance. See Exhibit Q. In its decision, the EEOC noted that the reprimand issue was not before it because the Department had "rescinded its dismissal of that allegation." See id. at 2, n. 1. On December 12, 1997, the EEOC denied Van Houten's request for reconsideration of its August 13, 1997 decision, and explicitly found that his reassignment claims "were subsumed in his grievance," and those claims were "discussed and addressed" by the Department in the meetings concerning his grievance. See Exhibit R, at 3.

Van Houten filed suit in this court on January 20, 1998, asserting that this court has jurisdiction over his claims under 42 U.S.C. § 2000e-16(c), which allows Title VII complainants to file civil actions within 90 days of a final agency action on their claim of discrimination.<sup>6</sup>

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<sup>6</sup> Though Van Houten's complaint alleges Title VII violations, his claims for disability discrimination are not cognizable under Title VII, which prohibits discrimination based only on "race, color, religion, sex or national origin." 42 U.S.C. § 2000e-16(a) (1994 & Supp. 1998); Spence v. Straw, 54 F.3d 196, 201 (3d Cir. 1995) (affirming district court conclusion that "the Rehabilitation Act provides the exclusive means by which a litigant may raise claims of discrimination on the basis of handicap by federal agencies"). His claims are cognizable, however, under the Rehabilitation Act, 29 U.S.C. §§ 791(b), 794 (1985 & Supp. 1998) (providing that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap . . . be subjected to discrimination under any program or activity receiving Federal

## DISCUSSION

### I. Appropriate Legal Standard

The defendant moved to dismiss Van Houten’s complaint on grounds that this court lacks “jurisdiction over the subject matter” of his claims. Fed. R. Civ. P. 12 (b)(1). The question presented here, whether Van Houten has appropriately exhausted his administrative remedies and thus, may turn to the courts for de novo review of his discrimination claims, however, is not a jurisdictional question. See Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997) (holding that district court should have evaluated motion to dismiss Title VII claims for failure to exhaust administrative remedies under Rule 12(b)(6) rather than Rule 12(b)(1)). Rather, questions of exhaustion of administrative remedies “are in the nature of statutes of limitation. They do not affect the district court’s jurisdiction.” Id. (quoting Hornsby v. United States Postal Serv., 787 F.2d 87, 89 (3d Cir. 1986)). Because courts are permitted, in some narrow circumstances, to examine equitable criteria to determine whether to require administrative exhaustion, the failure to exhaust cannot be considered a jurisdictional prerequisite. See id. at 1021-22. Therefore, this court should treat the government’s motion to dismiss as a motion under Rule 12(b)(6) and should evaluate whether Van Houten has satisfied “the precondition to suit specified by Title

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financial assistance or under any program or activity conducted by any Executive agency”). Moreover, the requirements of administrative exhaustion under Title VII and under the Rehabilitation Act are identical for federal employees. See 29 U.S.C. § 794a (a)(1) (1985) (“The remedies, procedures, and rights set forth in . . . 42 U.S.C. § 2000e-16 . . . shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint.”); Spence, 54 F.3d at 201 (“a plaintiff must exhaust Title VII remedies before bringing suit under sections 504 and 505(a)(2) of the Rehabilitation Act, just as he or she must before suing under sections 501 and 505(a)(1) of the Act”). Thus, this court will construe Van Houten’s complaint as alleging claims under the Rehabilitation Act rather than Title VII.

VII” and the Rehabilitation Act - exhaustion of his administrative remedies. Id. at 1022 (citing Hornsby, 787 F.2d at 90). Because both the government and Van Houten presented “matters outside the pleadings” to the court, the motion should actually be treated as one for summary judgment under Rule 56. Fed. R. Civ. P. 12(c); Robinson, 107 F.3d at 1022.

Summary judgment is to be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The court should not resolve disputed factual issues, but rather, should determine whether there are factual issues which require a trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). If no factual issues exist and the only issues before the court are legal, then summary judgment is appropriate. See Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir.), cert. denied, 515 U.S. 1159 (1995). If, after giving the nonmoving party the “benefit of all reasonable inferences,” id., at 727, the record taken as a whole “could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial,’” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), and the motion for summary judgment should be granted.

The record before this court reveals no contested factual issues that are material to the current dispute, and the only remaining issue, whether Van Houten’s union grievance and EEO complaint addressed the “same matter,” is a legal question which the court must decide. See. Americans Disabled for Accessible Public Transportation v. Skinner, 881 F.2d 1184, 1191 n.6 (3d Cir. 1989) (interpretation of statutory language is legal issue for court to decide). Summary judgment is, therefore, appropriate.

## **II. Administrative Exhaustion Requirements Under the Rehabilitation Act and the Civil Service Reform Act**

Van Houten seeks to raise his discrimination and retaliation claims in this court under 42 U.S.C. § 2000e-16© (1994), which provides that a federal employee may file a civil action based on allegations of discrimination within 90 days of a final action on his complaint by the EEOC. See 29 C.F.R. § 1614.408 (1998) (allowing Rehabilitation Act claimant to file suit in district court within 90 days of a final EEOC decision). As a precondition to filing suit, however, Van Houten must have exhausted his administrative remedies. See Brown v. General Services Admin., 425 U.S. 820, 822 (1976); Robinson, 107 F.3d at 1020. Though Van Houten’s claims arise under the Rehabilitation Act, he is required to follow the administrative exhaustion requirements outlined in Title VII. See 29 U.S.C. § 794a (a)(1) (1985); Spence, 54 F.3d at 201. Because Van Houten is a member of a union whose collective bargaining agreement permits claims of discrimination to be resolved in a grievance procedure, he had a choice between two fora in which to exhaust his administrative remedies. See Exhibit S, Art. 13, § 3 (A)(3) (“Under 5 U.S.C. § 7121, the following actions may be filed under the statutory appeal procedure or the negotiated grievance procedure, but not both: . . . discrimination”). Van Houten could either have raised his discrimination claims in a union-negotiated grievance procedure or through the statutory framework of the EEOC regulations, but not both. See Johnson v. Peterson, 996 F.2d 397, 399 (D.C. Cir. 1993) (employee may not proceed under both grievance and statutory procedures); Vinieratos v. United States, 939 F.2d 762, 768 (9th Cir. 1991) (election between statutory and negotiated grievance procedures is “irrevocable”).

Provisions of the Civil Service Reform Act allow a union employee, like Van Houten,

who is

affected by a prohibited personnel practice under section 2302(b)(1) of this title<sup>7</sup> which also falls under the coverage of the negotiated grievance procedure [to] raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first.

5 U.S.C. § 7121(d) (1996). Similarly, the EEOC regulations concerning exhaustion of administrative remedies under Title VII provide that:

[w]hen a person is employed in an agency subject to 5 U.S.C. 7121 (d) and is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both. . . . An aggrieved employee who files a complaint under this part may not thereafter file a grievance on the same matter. An election to proceed under a negotiated grievance procedure is indicated by the filing of a timely written grievance. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under this part 1614 irrespective of whether the agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination.

29 C.F.R. § 1614.301 (a) (1998). If Van Houten elected to proceed under the negotiated grievance procedure, he would be required to exhaust his administrative remedies fully, under that procedure, before bringing suit in this court. See Johnson, 996 F.2d at 400 (employee selecting union grievance procedure must exhaust administrative remedies by appealing arbitrator's decision to EEOC before filing suit). Under the negotiated procedure, Van Houten

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<sup>7</sup> 5 U.S.C. § 2302(b)(1)(D) (1996 & Supp. 1998) prohibits discrimination against employees on the basis of a "handicapping condition."

must present a written grievance to his supervisor within 30 days of the act forming the basis of his complaint, and if not satisfied with his supervisor's resolution, must present the grievance to his Service/Division Chief and to the Director. See Exhibit S, Article 13, § 7 (Steps 1-3). If still dissatisfied, Van Houten must arbitrate his dispute within 30 days of receiving a written decision from the Director. See id., at Article 14, § 1. The arbitrator's decision may be appealed to the Federal Labor Relations Authority within 30 days of the arbitrator's award, see id., at Article 14, § 2(F); 5 C.F.R. § 2425.1 (b), and the decision of the Federal Labor Relations Authority may be appealed, within 30 days, to the EEOC. See 29 C.F.R. § 1614.401 (c), 1614.402 (a) (1998). If Van Houten was dissatisfied with the EEOC's final decision, he could then file suit in district court within 90 days after he received that decision. See 29 C.F.R. § 1614.408 (1998). If Van Houten elected to file a grievance, he is prohibited from filing an EEO claim on the same "matter;" if he does, the agency and the EEOC must dismiss his complaint. See 29 C.F.R. § 1614.107 (d) (1988) ("The agency shall dismiss a complaint . . . [w]here the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination . . . and § 1614.301 . . . indicates that the complainant has elected to pursue the non-EEO process.").

### **III. Van Houten's Reassignment Claim**

The parties agree that Van Houten filed a formal grievance on June 9, 1995, concerning the dispute with his supervisor which occurred on May 11, 1995, and abandoned this grievance without submitting it to arbitration. The parties also appear to agree that Van Houten irrevocably elected to pursue the "matters" raised in the grievance within the negotiated grievance procedure and was thus, foreclosed from raising the same "matters" in an EEO complaint. See 5 U.S.C. § 7121 (d); 29 C.F.R. § 1614.301 (a) (both refer to electing remedies for a particular "matter").

The parties strenuously disagree, however, on the scope of the “matters” that were addressed in his grievance.<sup>8</sup>

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<sup>8</sup> As many of the parties’ arguments about the scope of the grievance depend upon its language, it is set forth, in its entirety, below.

1. This grievance is being filed consistent with the terms and conditions outlined in the Master Agreement between the Department of Veterans Affairs Locals [sic]. Specifically, Article 13, Section 7, Step 1 and Step 2. We are filing this grievance with you because we are not sure as to the exact status of Mr. Van Houten and believe you are the appropriate management official who can effectively deal with the issue and remedy.

2. On May 11, 1995, Mr. Van Houten was treated in an unprofessional, disrespectful, degrading manner by Mrs. Karen Berent, Training Class Coordinator. Mr. Van Houten viewed her actions as forms of intimidation, harassment and a threat to his job status. This caused him emotional stress, embarrassment and humiliation. These types of actions were previously discussed with you and Mrs. Berent in March 1995. At that time we established a procedure to follow to resolve these problems. However, shortly thereafter Mrs. Berent ceased the one on one training. This caused the original problems (which we believed were remedied) to resurface. These circumstances led up to the incident on May 11th.

3. The remedy sought in this grievance is as follows:

(a) An apology from Mrs. Berent for her inappropriate actions and behaviors toward me.

(b) A public declaration from Mrs. Berent to the training class concerning her inappropriate actions and behaviors toward Mr. Van Houten.

© A promotion to the GS-7 level as of June 1, 1995, in the Insurance Claims Division.

(d) My return to the Training Class for the purposes of completing the class.

(d) [sic] No adverse harm as a result of the missed training sessions. An opportunity to catch-up to the current status of the class by being provided specialized instruction.

(e) Specialized training be provided to Mrs. Berent in the areas of how to appropriately design and teach a training class and how to interact with people both in an interpersonal manner and in an educational setting.

4. Please be advised that by his signature, Mr. Van Houten designates AFGE Local 940 to be his representative. Please contact Darlene Green to arrange for a mutually acceptable date, time and location, consistent with Article 6, Section 1(B) of the Master Agreement.

The government contends that because the grievance “dealt in part with the topic of his reassignment from the training class to the position of Insurance Claims Technician,” the fact that the grievance did not specifically allege disability discrimination is irrelevant. See Motion to Dismiss, at 15. Van Houten counters that the grievance concerns only the treatment he received on May 11, 1995, and not the reassignment, which took place on May 31, 1995. See Plaintiff’s Response to Motion to Dismiss, at 3-4. In support of his contention, Van Houten argues first, that this court cannot infer that his grievance encompassed his reassignment because Van Houten and his supervisor discussed his reassignment in the course of attempting to resolve the grievance informally, and second, that requesting an invalidation of his reassignment in the remedy section of his grievance does not mean that he grieved the actual reassignment. See id. at 5-7. For the reasons explained below, I conclude that Van Houten’s discrimination and retaliation claims concerning his reassignment were not included within his grievance, and therefore, that Van Houten was permitted to raise those claims in a later EEO complaint. Thus, Van Houten’s failure to exhaust his administrative remedies with respect to his union grievance are not fatal to his right to bring this suit if he exhausted his administrative remedies with respect to his later EEO complaint raising these claims.

The term “matter,” as used in 5 U.S.C. § 7121 (d), means the underlying employment action. See Bonner v. Merit Systems Protection Bd., 781 F.2d 202, 205 (Fed. Cir. 1986) (interpreting legislative history of the Civil Service Reform Act); Facha v. Cisneros, 914 F. Supp. 1142, 1148 (E.D. Pa. 1996); Macy v. Dalton, 853 F. Supp. 350, 353 (E.D. Cal. 1994). Two complaints refer to the same “matter” if the disputed personnel action at the root of the employee’s complaint is the same, regardless of the legal theory on which the action is

challenged. See 29 C.F.R. § 1614.301 (a) (employee who filed a grievance “may not thereafter file a complaint on the same matter . . . irrespective . . . of whether the grievance has raised an issue of discrimination”); Facha, 914 F. Supp. at 1148 (legal basis of claims concerning the same underlying action are irrelevant). Van Houten’s EEO complaint and his grievance involve the same matter if he “raised a topic in both documents, or if the arbitrators assigned to handle the grievance would necessarily have needed to inquire into a topic in discharging their duties.”<sup>9</sup> Id. at 1149. The standard enunciated in Facha strikes a sensible balance between a narrow definition of “matter,” which would allow an employee to compartmentalize his claims and proceed in several fora simultaneously and a broad definition of “matter,” which may cause an unsophisticated claimant to abandon claims inadvertently. See id. at 1148-49.

Here, Van Houten “raised the topic” of his reassignment in the remedy section of his grievance when he requested a return to the training class, but did not mention the reassignment when he described the subject of his grievance. See Grievance, at ¶ 2. Instead, Van Houten’s grievance asserted that he was being harassed by his supervisor, with whom he had a history of hostile relations. If Van Houten had submitted his claim to arbitration, the arbitrators would have had to resolve whether Van Houten was actually harassed by his supervisor, in retaliation for his prior grievances or EEO activity, or whether his supervisor treated him in an acceptable manner. They would not have been compelled, however, to resolve whether his Division Chief, in deciding to transfer him out of the class because he was temperamentally unsuited to the

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<sup>9</sup> The Facha standard is similar to that employed by the EEOC when it denied Van Houten’s motion for reconsideration. See Exhibit R, at 3. The EEOC concluded that he had raised his reassignment claims in the grievance procedure because his reassignment was “discussed and addressed” during the agency’s meeting with Van Houten and his union representative. Id.

position for which he was being trained, discriminated against him because of his disability or retaliated against him for prior union or EEO activity. The reassignment occurred on a different day, involved a different decisionmaker, and is not an automatic remedy even if Van Houten had prevailed on his harassment claims.

To support its proposition that the reassignment was a matter raised in Van Houten's grievance, the government relies heavily on the fact that Van Houten and his Division Chief discussed his reassignment during their informal attempts to resolve his grievance, and his Division Chief memorialized that conversation in her formal denial of his grievance. See Exhibit C, ¶ 11. A careful reading of her denial of the grievance, however, reveals that the decision to reassign Van Houten was not entirely dependent on the events of May 11, 1995, but rather, was attributable to a pattern of unprofessional conduct of which the confrontation with his supervisor on May 11, 1995, was only one example. See id. ("on several occasions you have allowed your frustration to cause you to react unprofessionally"). The formal denial also reveals that all of Van Houten's requested remedies, including an invalidation of his reassignment, were denied because his Division Chief felt that his supervisor had done nothing wrong, and that Van Houten had not received disparate treatment. See id. Thus, the reassignment claim was not addressed during the grievance procedure as a separate complaint, and an arbitrator presented with Van Houten's grievance would not be obligated to reach the issue of his reassignment in resolving the merits of his harassment claim. The issue would be reached, if at all, in fashioning an appropriate remedy if Van Houten were to prevail on his harassment claim. Therefore, this court concludes that Van Houten's claims concerning his reassignment were not "matters" raised in his union grievance procedure, and thus, that he was not barred from raising these claims in a later

EEO complaint.

My conclusion that the incident of alleged harassment on May 11, 1995, and the reassignment on May 31, 1995, are separate “matters,” is consistent with other courts’ interpretation of “matters” under 5 U.S.C. § 7121 (d). For example, in Facha, the court concluded that the plaintiff raised hostile work environment claims in her EEO complaint that were not raised in her union grievance. See Facha, 914 F. Supp. at 1149. Facha based her allegation that the environment was more difficult for women on two types of comments: those explicitly regarding sex and those regarding her poor work performance. See id. The court held that she could raise her hostile work environment claim based on the sex-related comments in her EEO complaint, but that the hostile work environment claim based on the work-related comments was barred because she had raised claims involving unfair criticism of her work performance in her union grievance. See id. (“The arbitrators assigned to resolve Facha’s grievance would have no need to verify whether the explicitly sex-based comments occurred. They would, however, need to determine the truth of the comments concerning Facha’s work performance.”).

Another district court examined a situation similar to Van Houten’s, where an employee filed a grievance challenging a low performance rating and then filed an EEO complaint challenging the agency’s imposition of a Performance Improvement Plan (“PIP”) designed to improve the employee’s rating. See Bobeck v. Department of Health & Human Serv., No. 95-C-4778, 1996 WL 89111, at \*7 (N.D. Ill. Feb. 27, 1996). Though Bobeck had been subjected to the PIP before he filed his union grievance, as Van Houten had been reassigned before filing his, the court found that the PIP was a separate issue because its effects grew increasingly worse over a

period of time. See id. The effects of Van Houten’s reassignment, including his removal from a career-track position with promotional opportunities, have similarly manifested themselves over a long period of time as the members of his former training class have been promoted. See Plaintiff’s Response to Motion to Dismiss, at 1. Moreover, the court found that “the disposition of [Bobeck’s] grievance proceeding regarding the appraisal rating does not effect the disposition of [his] claims regarding the discriminatory way in which the PIP was implemented.” Id. As discussed above, Van Houten’s harassment claims may also be resolved without determining whether his reassignment was discriminatory. Though Bobeck never asked the agency to remove the PIP as a remedy for his low rating during the grievance procedure, as Van Houten asked the agency to reverse his transfer as a remedy for his harassment, Bobeck’s manager “recognized that [his] grievance dealt only with his performance rating.” Id. In her formal denial of Van Houten’s grievance, the Division Chief also recognized that Van Houten was “grieving the type of treatment that [he] received while in the VIPS training class;” she then expounds upon the details of that treatment for ten numbered paragraphs. Exhibit C, at 1.

Similarly, another court found that a government employee had presented different matters in her union grievance and her EEO complaint when the union grievance was based upon the treatment she received after her return from maternity leave, including the “denial of training, untimely performance appraisal, and loss of a responsible position,” and the EEO complaint was based on an allegedly discriminatory reclassification as a GS-5. Timus v. Whitfield, No. 88-2699, 1988 WL 25509, at \*2 (D.D.C. March 10, 1988). The court found that the grievance, filed almost a month before her EEO complaint, could not have grieved the actual reclassification decision. See id. at \*1.

## **CONCLUSION**

Van Houten's union grievance did not raise the "matter" of his reassignment. As such, he was permitted to pursue his claims concerning the reassignment in the EEOC process, and his complaint will not be dismissed for failure to exhaust his remedies in the union grievance procedure.

An appropriate order follows.



**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JAMES F. VAN HOUTEN	:	CIVIL ACTION
	:	
v.	:	
	:	
HERSHEL GOBER, ACTING	:	
SECRETARY, DEPARTMENT OF	:	
VETERANS AFFAIRS	:	NO. 98-270

**ORDER**

AND NOW, this \_\_\_\_ day of November, 1998, upon consideration of defendant's motion to dismiss or in the alternative, for summary judgment, plaintiff's reply, and the response thereto, IT IS HEREBY ORDERED that the motion is DENIED.

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William H. Yohn, Jr., J.