Issue: Wrongful termination (unable to perform requirements of position); Hearing Date: 10/10/02; Decision Date: 10/11/02; Agency: VPI&SU; AHO: David J. Latham, Esq.; Case No.: 5530

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5530

Hearing Date: October 10, 2002
Decision Issued: October 11, 2002

PROCEDURAL ISSUE

Due to the unavailability of participants, the hearing could not be docketed until the 30th day following appointment of the hearing officer.[1]

APPEARANCES

Grievant
Associate Dean for Administrative Services
Attorney for Agency
Three witnesses for Agency
Observer for Grievant

[1] § 5.1 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

ISSUES

Did the agency have a reasonable basis to remove grievant from her employment due to circumstances that prevented her from performing her job? Was the grievant discharged as the result of retaliation or discrimination?

FINDINGS OF FACT

The grievant filed a timely appeal from the termination of her employment.[2] Grievant was discharged from employment effective May 11, 2002 because she was unable to perform the requirements of her job position.[3] Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

Virginia Polytechnic Institute and State University (Virginia Tech) (hereinafter referred to as "agency") has employed grievant for 15 years. She was an administrative & program specialist II at the time of discharge.[4] Her job involves customer service, student training and supervision, and office support. The physical requirements of the position require moderate lifting (20-50 lbs.), lifting, reaching, bending, and pushing.[5] Grievant's supervisor estimates that these functions are involved in 50% - 75% of grievant's work, which involves retrieving books from high and low shelves, and carrying books and book bins.

Agency policy provides that, "An employee may be removed [from employment] if unable to meet the working conditions of the job such as loss of driver's license which is required for the job; incarceration for an extended period of time; loss of certification or license required for the job, etc."[6]

The grievant's immediate supervisor has supervised grievant since late 1999. She had observed a continuing absenteeism problem with grievant and, beginning in January 2001, began to maintain a computer log of grievant's attendance and tardiness.[7] Grievant had been absent for a period of time beginning August 30, 2001 pursuant to the Family and Medical Leave Act (FMLA) of 1993.[8] On February 19, 2002, grievant was again approved for FMLA leave because she had exhausted all other leave balances (sick leave, annual leave, and personal leave).[9] Grievant's supervisor notified her by letter that her 12-week FMLA leave would be expiring on May 11, 2002, and that she would

[2] Exhibit 1. *Grievance Form A*, filed June 14, 2002.
[3] Exhibit 25. Letter to grievant from Associate Dean of Administrative Services, May 14, 2002.
[4] Exhibit 26. Grievant's Employee Work Profile, February 1, 2002.
[5] Exhibit 26. *Ibid.*
[6] Exhibit 28, p. 35. Virginia Tech *Classified Employee Handbook.*
[7] Exhibit 2. Supervisor's attendance log for grievant.
[8] Exhibit 10. Letter to grievant from supervisor, August 30, 2001.
[9] Exhibit 19. Letter to grievant from supervisor, February 19, 2002.

have to return to work on May 14, 2002 or her employment would be terminated.[10]

During grievant's extended absence from February through May 2002, her physician had provided certification that grievant had an acute condition that prevented her from working. On April 24, 2002, grievant's physician again certified that grievant had an acute condition that would keep her from performing the essential functions of her job through June 15, 2002.[11] After grievant received the letter notifying her of the requirement to return to work, her physician submitted a release to return to work on May 14, 2002. The release specifies that the grievant could return to light duty with, "Sedentary work only, no squatting, climbing or bending."[12]

In conjunction with Human Resources, the Associate Dean of Administrative Services evaluated the physician's release and concluded that grievant would be unable to fulfill between 50 percent and 75 percent of her job duties. The agency discharged grievant because she had exhausted all available leave and was unable to return to her regular duties.

Grievant incurred an on-the-job injury in 1997 when she fell into machinery and injured her right shoulder, left knee and lower back. She has received physical therapy from time to time since 1997.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the

[10] Exhibit 24. Letter to grievant from supervisor, May 3, 2002.
[11] Exhibit 8. Certification of Health Care Provider Form, April 24, 2002.
[12] Exhibit 9. Physician release form, May 13, 2002.

> grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must prove her claim by a preponderance of the evidence.[13]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department Human Resource Management promulgated Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. The agency has incorporated a similar policy in its Classified Employee Handbook.[14]

FMLA provides that a covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave *during any 12-month period* for, among other things, medical leave when the employee is unable to work because of a serious health condition.[15] Under FMLA, an employee is entitled to return to the same position or an equivalent position. However, if an employee is unable to perform an essential function of the same or equivalent position, because of a physical or mental condition, the FMLA does not require the employer to reinstate the employee into another job.[16] In the instant case, the employer has demonstrated, by a preponderance of the evidence, that grievant was unable to perform the major essential functions of her job at the time her FMLA leave ended.

Grievant contends that the restrictions ordered by her physician were to last for only four days. However, the grievant never provided a statement to this effect from her physician. She did not raise this issue until August 16, 2002 following the third resolution step of the grievance process. To date, the grievant has still provided no documentation or other evidence to support her contention. The grievant could have requested an Order for the physician to testify at the hearing, or she could have obtained an affidavit from the physician. When a

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[13] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.
[14] Section V, Classified Employee Handbook, *Standards of Conduct and Performance*.
[15] *Compliance Guide to the Family and Medical Leave Act*, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, WH Pub. 1421, June 1993.
[16] 29 C.F.R. § 825.214 (b).

party fails to provide easily obtainable evidence without an adequate explanation, it is presumed that such evidence does not exist.

Grievant points out that the agency had taken action to initiate a possible termination of her employment in February 2002. That action was precipitated by grievant's absence from February 5 - 9, 2002 and the unauthorized alteration of the dates on a physician's excuse.[17] Following grievant's explanation, the agency further investigated the situation and concluded that grievant should not be penalized for what had occurred in the physician's office. The agency advised grievant that the February 15, 2002 correspondence was only a notice of contemplated disciplinary action, and that she had not been discharged from employment.[18] She was further advised that her continuing absence from work was putting her job in jeopardy and that she should report to work on February 19, 2002. However, grievant requested, and was approved for, FMLA leave beginning on February 19, 2002.[19] It is clear that the agency had been considering the possibility of terminating grievant's employment in February. However, following investigation, it decided that termination was not appropriate. The reason for termination on May 14, 2002 (inability to perform major job functions) was totally unrelated to the reason under consideration in February (alleged fraud).

Grievant maintains that the first month of her absence beginning February 19, 2002 should have been covered under worker's compensation. However, the workers' compensation insurance carrier denied payment for this period. Grievant claims that a human resources person told her it should have been covered but grievant never pursued this matter. However, whether worker's compensation should have covered this period is not relevant to this case. The undisputed testimony of a human resources representative established that the worker's compensation program and FMLA are not mutually exclusive programs. It is not uncommon for an employee to be on unpaid leave pursuant to FMLA, and at the same time receive benefits from the workers' compensation program.

Retaliation

Grievant had been promoted from an office service assistant position (OSA) to an office service specialist position (OSS) in 1995. After a period of time, the agency demoted her to an OSA position. Grievant retained an attorney to contest the agency's action and was ultimately reinstated to the OSS position. Grievant believes that the agency's decision to terminate her employment in 2002 was retaliation for her employment of an attorney in 1996.

[17] Exhibit 16. Letter to grievant from supervisor, February 15, 2002.
[18] Exhibit 18. Letter to grievant from supervisor, February 18, 2002.
[19] Exhibit 19. Letter to grievant from supervisor, February 19, 2002.

In order to state a prima facie claim of retaliation, grievant must show that: (i) she engaged in a protected activity, (ii) that she suffered an adverse employment action and, (iii) that there is a causal connection between the protected activity and the employment action.[20] The hiring of an attorney and contesting of a demotion would fall within the definition of a protected activity and, being discharged qualifies as an adverse employment action. However, grievant has not demonstrated a nexus between the protected activity and the termination of her employment. She has presented no witnesses or documentation to corroborate her allegation that the discharge in 2002 was linked to an event that occurred in 1996. In order to establish a causal connection, there must be a reasonable proximity in time between the protected activity and management's action. If management had wanted to retaliate for this event, it would not have allowed grievant to remain employed for six more years before doing so. It is concluded that grievant has not borne the burden of proof to demonstrate retaliation.

Discrimination

Grievant also alleges that she was discriminated against and that this was a factor in her discharge. She presented no evidence to support her allegation other than the assertion that she felt picked on by coworkers. The law prohibits certain types of employment actions, including discharge, if such actions are based on the protected class of an individual. Protected classes include race, sex, color, national origin, religion, age, or political affiliation, or persons with disabilities. Grievant has not alleged that she was singled out for any of these reasons. However, assuming for the sake of argument that grievant would allege discrimination on the basis of her gender or age, an employee must notify management of any discriminatory acts and then give management a reasonable time within which to address the issue. Grievant has not shown that she ever notified management of discriminatory acts or gave management a reasonable time within which to address the matter. Therefore, grievant has not shown that discrimination was a factor in her discharge.

DECISION

The disciplinary action of the agency is affirmed.

The agency's termination of grievant's employment on May 11, 2002 is hereby UPHELD.

[20] *See generally* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999) and, Reinhold v. Commonwealth, 135 F.3d 920 (4th Cir 1998).

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[21]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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David J. Latham, Esq.
Hearing Officer

[21] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.