

Issue: Retaliation and failure to provide reasonable accommodations due to disability;
Hearing Date: 10/07/03; Decision Issued: 11/04/03; Agency: UVA Health System;
AHO: Carl Wilson Schmidt, Esq; Case No. 5804



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5804

Hearing Date: October 7, 2003
Decision Issued: November 4, 2003

PROCEDURAL HISTORY

On April 4, 2003, Grievant filed a grievance seeking relief because the University transferred her to another position. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 28, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. This matter was originally scheduled to be heard on September 18, 2003. The Hearing Officer found just cause to extend the hearing date due to the effect of Hurricane Isabel. On October 7, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUE

Whether the University retaliated against Grievant and failed to provide her with reasonable accommodations due to her disability.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant began working for the University of Virginia Health System on January 13, 1997. She is a Registered Nurse Clinician III and started in the Thoracic Cardio Vascular (TCV) unit in February 1998. She began her career as a critical care nurse in 1980. The role of a Registered Nurse Clinician III is summarized as:

An experienced and highly skilled clinician who is recognized for knowledge and skills by their peers. Utilizes an interdisciplinary team approach to patient care service delivery across the continuum of care. Has an emerging leadership style and functions consistently and autonomously in this role. Is learning to negotiate the health care system to maximize the delivery of quality care and to minimize cost of patient care services.

Grievant suffers from “multiple heritable exostoses” which is a disease causing the lining of her bones to become weak. The result is painful bone spurs that affect her ability to stand for lengthy periods of time.¹ Grievant’s current symptoms are somewhat variable and intermittent and most of the time she is able to perform the duties of a nurse. Sometimes she needs assistance. Prolonged walking will at times become an issue for Grievant.²

Grievant had her first surgery at the age of six and has had over 30 surgeries during her lifetime. Approximately three years ago, Grievant’s disease began increasing in its severity. Her hip started to hurt her more often and she began experiencing more difficulty walking. She had bone spurs all over her body and decided

¹ Grievant’s physician states Grievant’s “pain is clearly affected by prolonged standing and walking.” See, Physician Note dated September 10, 2003.

² See, Physician Note dated March 19, 2003.

to have surgery. Following one of her surgeries in July 2001, Grievant was out of work for 13 weeks. Surgery has not been effective in eliminating all of Grievant's pain. She continues to have pain, especially after prolonged walking.

For the past several years, most of the nurses working with Grievant in the TCV unit have complained about Grievant's failure to come to work as scheduled. When Grievant was unable to come to work due to her health, she would notify her supervisor shortly before her shift began. Her supervisor would then contact the "on-call" nurse to come to work in Grievant's place. Although the on-call nurse may know he or she was obligated to work on short notice, the on-call nurse probably already had planned other activities than working and did not wish to come to work. Since the on-call nurse status was rotated among the nurses in the TCV unit, most of the nurses had been called into work at the last minute to substitute for Grievant. Several of the nurses were bitter towards Grievant and resented Grievant because Grievant frequently was unable to work as scheduled. Resentment against Grievant became so pronounced that Grievant felt compelled to confront several of the nurses and explain to them the nature of her health concerns. Grievant was hoping that if her co-workers knew she did not have control over her unscheduled absences, they may be more forgiving towards her. Even after speaking individually with several nurses, the level of resentment against Grievant remained unaffected. Six nurses, in particular, felt Grievant's unscheduled absences were inappropriate.

Patients in the TCV unit require intensive medical attention because many remain under anesthesia and/or on ventilators following heart or lung transplants or other surgery. Nurses in the TCV unit typically are assigned two to three³ patients to monitor closely. The TCV unit has ten beds available for patients. Once the activity level of TCV patients improves, they are moved to the 4W unit. Nurses in the 4W unit typically are assigned three to four patients. Patients in the 4W unit are no longer ventilator dependent and can sit up with minimal assistance. Thirty beds are available for patients in the 4W unit. The walking distance between rooms in the TCV unit and 4W unit is approximately the same.

On February 7, 2003, Grievant was transferred from the TCV unit to the 4W unit.⁴ After being transferred to the 4W unit, Grievant expressed concern to her Supervisor about the amount of walking she had to do in her new position. The Supervisor began assigning Grievant patients located in beds near one another and provided her with a medication/ supply cart to be located near her patients so that Grievant would not have to walk to another part of the floor to obtain these items.

Grievant's Supervisor transferred her to the 4W unit because of Grievant's high level of unscheduled absences and the complaints of Grievant's co-workers.

³ A nurse may be assigned three patients if the unit is short-staffed.

⁴ Her first day of work in the 4W unit was February 11, 2003.

Approximately 85 percent of staff in the TCV unit are nurses.⁵ When Grievant was absent from the TCV unit, her absence significantly affected the unit because her duties had to be assumed by another nurse. Approximately 50 to 60 percent of the staff in the 4W unit are nurses and there are more nurses in 4W than in TCV. When a nurse is absent in the 4W unit, non-nursing staff can provide some assistance because the level of patient medical need is lower in the 4W unit than in the TCV unit. In short, Grievant's unexpected absences would have a lesser impact on the 4W unit than on the TCV unit.

Grievant's hours, salary, benefits, and seniority remained the same following her transfer. Her opportunity to be a charge nurse and her Clinician III status remained unchanged.

CONCLUSIONS OF POLICY

The Governor's Executive Order on Equal Opportunity prohibits employment discrimination against otherwise qualified persons with disabilities.⁶ Employees may not be discriminated against regarding many aspects of employment including, for example, hiring, transfer, demotion, layoff, termination, rehiring, and any other term, condition, or privilege of employment.⁷

The Agency must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability, unless the Agency can demonstrate that the accommodation would impose an undue hardship on the operation of its business.⁸

A qualified individual with a disability is one who "satisfies the requisite skill, experience, education and other job-related requirement of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."⁹

An individual is considered to have a disability if that individual either (1) has a physical or mental impairment which substantially limits one or more of his or her major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.¹⁰ Under the first option, "[m]erely having an impairment does not make

⁵ Typically, eight nurses are scheduled to work during Grievant's shift.

⁶ DHRM Policy 2.05.

⁷ 42 U.S.C. § 12112. 29 CFR § 1630.4(b)(i). (Although no federal agency has been given authority to issue regulations interpreting the Americans with Disabilities Act, the EEOC has done so.)

⁸ 42 U.S.C. § 12112(b)(5)(A); 29 CFR § 1630.9(b).

⁹ 29 CFR § 1630.2(m).

¹⁰ DHRM Policy 2.05. 42 U.S.C. § 12102(2).

one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity.”¹¹ “Major life activities¹² mean functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”¹³ An individual must also show that the limitation on a major life activity is substantial.¹⁴ “[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long-term.”¹⁵ The existence of a disability must be determined on a case-by-case basis.¹⁶

Grievant is a qualified individual with a disability. She has the requisite skill, experience, education and other job related requirements and with reasonable accommodation can perform the essential functions of her position. Grievant’s major life activity of walking is substantially limited because she is significantly restricted as to her ability to walk as compared to the average person in the general population who can walk. Grievant’s impairment is severe and permanent. She will always feel extensive pain after walking for several hours. The University is obligated to make reasonable accommodation to Grievant’s work environment.

Reasonable accommodation includes modification or adjustments to the work environment, or to the manner or circumstances under which the position is customarily performed that enables Grievant to perform the essential functions of her position.¹⁷ Essential functions are the fundamental job duties of Grievant’s position.¹⁸ The University clusters patients assigned to Grievant and provides her with a cart containing necessary supplies to perform her duties. In addition, other staff are available to assist Grievant on occasion. These modifications materially reduce the amount of walking Grievant would otherwise experience without any accommodation. By reducing the amount of distance Grievant would otherwise be required to walk during her shift, the University has provided Grievant with reasonable accommodation.

¹¹ Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. 184, 122 S.Ct. 681 (2002).

¹² Other major life activities include, but are not limited to, sitting, standing, lifting, and reaching. 29 CFR § 1630.2(h)(Appendix).

¹³ 45 CFR § 84.3(j)(2)(ii). Congress drafted the Americans with Disabilities Act definition of disability almost verbatim from Section 706(8)(B) of the Rehabilitation Act. Thus, referencing relevant sections of Title 45 of the Code of Federal Regulation is appropriate.

¹⁴ 42 U.S.C. § 12102(2)(A).

¹⁵ Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. 184, 122 S.Ct. 681 (2002).

¹⁶ Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. 184, 122 S.Ct. 681 (2002).

¹⁷ 29 CFR § 1630.2(o).

¹⁸ 29 CFR § 1630.2(n).

Grievant contends she should be returned to the TCV Unit because she would have shorter distances to walk.¹⁹ Reasonable accommodation, however, “does not have to be the ‘best’ accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated.”²⁰ Although the accommodation given to Grievant may not be what Grievant considers to be the best, but it is adequate to meet the standard of reasonableness and meets Grievant’s job-related needs.

Grievant argues the University should accommodate her by creating a new position for her which would provide necessary educational services, but the position would not require too much walking. Providing reasonable accommodations does not require the University to create a new position. The University may create and modify positions based on its customary business needs.

Grievant contends the Agency retaliated against her by requiring her to obtain fitness for duty reports from her medical providers. The evidence, however, showed that the University had an adequate basis to request a fitness for duty evaluation each time one was required. For example, on February 13, 2003, Grievant was upset and crying while working and informed other staff that it was necessary for her to take up to six prescription pain medication pills in order to relieve the pain she was experiencing. The University feared that the type and amount of medication Grievant was taking could affect her judgment with respect to patient care. The University required Grievant to provide a fitness for duty authorization by medical providers in order to ensure Grievant could provide competent services to patients. Given the importance of providing proper medical care and the legal consequences for failing to do so, the University acted appropriately.

Grievant contends she was demoted and transferred to the 4W unit because she filed an EEO complaint. The evidence showed that Grievant was transferred because of the University’s business concerns and not as retaliation for filing an EEO complaint. Moreover, Grievant’s transfer was not a demotion.

DECISION

For the reasons stated herein, Grievant has not established that the University failed to provide her with reasonable accommodations or retaliated against her. Her request for relief is denied.

APPEAL RIGHTS

¹⁹ Grievant does not contend the University must accommodate her by eliminating her need to walk. Instead, she objects to the amount of walking that is necessary to carry out her duties in the 4W unit.

²⁰ 29 CFR § 1630.9 Appendix.

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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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