Issue: Wrongful termination (misapplication of ADA policy); Hearing Date: 05/29/08; Decision Issued: 07/17/08; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8859; Outcome: Full Relief; **Administrative Review: EDR Admin Review request received 08/01/08; Outcome pending; Administrative Review: DHRM Admin Review request received 08/01/08; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8859

Hearing Date: May 29, 2008
Decision Issued: July 17, 2008

PROCEDURAL HISTORY

On November 27, 2007, Grievant timely filed a grievance to challenge the Agency's action of removing him from employment. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On April 11, 2008, the EDR Director issued Ruling 2008-1908 qualifying this grievance for hearing.[1] On May 5, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 29, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

1. Whether the Agency discriminated against Grievant because of his disability?

[1] The law regarding the American's with Disabilities Act is well-stated in this ruling and the Hearing Officer adopts portions of its language.

2. Whether the Agency complied with State policy?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief you seek 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:

The Virginia Community College System employed Grievant as an Academic Coordinator at one of its facilities. The purpose of his position was:

> The Academic Coordinator is the liaison between the target high schools and the Upward Bound Program, is responsible for scheduling weekly academic activities and providing weekly academic services. Screens and recommends tutors for hiring, as well as trains and supervises tutors. Develops Upward Bound Curriculum for Academic Year as well as Summer on Campus Program. The Academic Coordinator supervises work/study students and all travel events. Provides career guidance, educational counseling, and college admission/financial aid application assistance for participants. Maintains comprehensive participation records. Assist Director in overall program planning for Upward Bound.[2]

Grievant's responsibilities included chaperoning high school student travel and overnight field trips

Grievant had been diagnosed with a condition called Urethral Stricture Disease for which he had been prescribed hydrocodone. He had been taking hydrocodone for several years and became addicted. Grievant decided to seek medical treatment which would require his absence from work for a short period of time. He expected to begin treatment from Dr. M. That treatment would include using Suboxone to help Grievant reverse his addiction to hydrocodone.

On October 11, 2007, Grievant asked to speak to the Supervisor. He told her that he needed to take leave next week because he was entering an outpatient drug treatment program in a nearby city. He said that for the last four months he had been snorting heroin every evening when he got home from work. He said that his body was starting to suffer and he decided to quit. Grievant told the Supervisor he had contacted

[2] Agency Exhibit 7.

a physician's group in another city and had an appointment on Tuesday, October 16, 2007 to enter an intensive outpatient program where he would be given Suboxone. Grievant denied any use of drugs during work hours and stated that he usually was asleep by 7:30 p.m. or 8:00 p.m. every evening which enabled him to get up early and be at work. The Supervisor sent an email to the Manager and to the Human Resource Officer advising them of her conversation with Grievant.[3]

On Friday, October 12, 2007, the Manager advised the Supervisor to notify Grievant that he could not return to campus, go out to any of the local schools, or have any contact with students whatsoever. On Saturday, October 13, 2007, the Supervisor called Grievant and left a message on his cell phone. Instead of specifically instructing Grievant not to return to the campus, the Supervisor left a message saying that she had spoken with her supervisor and that he did not need to come to school or go around campus or be with the kids. Grievant did not construe the Supervisor's message as an instruction not to return to the campus.

On Monday, October 15, 2007, Grievant arrived at work. Agency managers assumed that the Supervisor had clearly instructed Grievant not to return to work and that he was defying her instruction. The Vice President instructed that Grievant should be escorted away from the campus by the Agency's security officer. The Vice President believed Grievant was addicted to heroin at the time he decided Grievant could not remain on the campus. Grievant was shocked, humiliated, and embarrassed to be escorted away from the Agency's facility.[4]

October 16, 2007, the Human Resource Officer sent Grievant a letter advising him of the services available from the Employee Assistance Program. She also told him:

> Also, as a participant of the Virginia Sickness and Disability Program (VSDP), you may wish to consider accessing the benefits available through this resource. I have enclosed a copy of the VSDP Handbook in case you do not have your copy.[5]

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[3] Grievant denies telling the Supervisor that he had been snorting heroin for the last four months. He contends he told her that he was taking a substance that was "like snorting heroin". The Supervisor's testimony was credible regarding what Grievant told her. She made detailed notes immediately after her conversation with Grievant describing what she had heard. She was familiar with the effects of opiates based on her background working in community mental health. She was certain that Grievant had told her he was snorting heroin because she was shocked when he said it and responded sarcastically "yea right!" Grievant then restated that he had been snorting heroin. Based on the credibility of witnesses, the Hearing Officer finds that Grievant told the Supervisor that he had been snorting heroin for the past four months. It may be the case that Grievant did not intend to say he had been snorting heroin, however, it is clear that he did so.

[4] As Grievant was escorted from the Agency's campus, the security guard told him "they don't want you around the kids".

[5] Agency Exhibit 2.

On October 16, 2007, Grievant began receiving treatment from Dr. M, a Board Certified neurologist and psychologist skilled in the treatment of addiction. Dr. M treated Grievant for his hydrocodone addiction, not for heroin use.

On November 6, 2007, Grievant met with the Vice President, Manager, Supervisor, and Human Resource Officer. Grievant described his medical condition regarding a closed urethra and monthly treatments from a urologist. Grievant explained that he wanted to end his addiction to hydrocodone and was seeing a doctor for that issue only. He said that the Supervisor misunderstood his comments about heroin. Grievant said he told the Supervisor on October 11, 2007 that he was taking something "akin to heroin" and that she misunderstood him. Grievant presented a note from Dr. M indicating that he could return to work. The Vice President scoffed at the note and suggested it would be easy for any employee to get a note from a doctor saying the employee could return to work. The Vice President discarded the note. Grievant said that he would probably have surgery within the next couple of weeks. The Vice President told Grievant he was obligated to participate in the Employee Assistance Program and that he had to contact an Employee Assistance Program provider by November 9, 2007. The Human Resource Officer provided Grievant with information about filing for Short Term Disability under the Virginia Sickness and Disability Program. Grievant was "strongly encouraged again to apply for STD benefits as a possible means to continue to provide paid leave without utilizing your annual leave."[6]

On November 7, 2007, the Vice President sent Grievant a letter summarizing their meeting and reminding Grievant that he was, "again instructed not to be on the … campus while these issues are pending."[7]

On November 8, 2007, Grievant initiated a claim for benefits with the Third Party Administrator. Although the Agency did not require Grievant to apply for Short Term Disability with the Third Party Administrator, it provided him with relevant information and encouraged him to consider applying for Short Term Disability. Grievant's application was approved. His "Benefit Start Date" for Short Term Disability was October 16, 2007. His "STD End Date" was April 22, 2008.[8] As a result of the stress from being removed from employment, Grievant experienced mental health difficulties leading to his qualification for Short Term Disability.

On November 9, 2007, Grievant called the Vice President and said he had called the Third Party Administrator and the EAP. Grievant said he had an appointment with a counselor.[9] The Vice President sent Grievant a letter dated November 12, 2007 saying, in part, "It is good to hear that you have followed through with the Employee Assistance Program."[10]

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[6] Agency Exhibit 1. See, December 10, 2007 letter from the Vice President to Grievant.

[7] Agency Exhibit 1.

[8] Agency Exhibit 8.

[9] Grievant received services from Counselor C.

[10] Agency Exhibit 1.

As part of its Third Step response on December 20, 2007, the Agency Head told Grievant:

> You have not been terminated from your current position. You may return to work when you submit a drug test from an approved medical source verifying that you are not using illegal drugs or misusing or abusing prescription drugs and also participate in periodic drug testing.

On February 15, 2008, Grievant took a urine drug test at Dr. M's office.[11] He tested positive for only one drug, a sleep medication. He had a prescription for that drug. He did not test positive for heroin. Grievant mailed the drug test to the Agency. The Agency did not contact Grievant once it had received the satisfactory drug test.

On April 29, 2008, the Third Party Administrator sent Grievant a letter notifying him that he was approved for Long Term Disability through the VSDP.

On May 12, 2008, the Agency sent Grievant a letter notifying him that because of his transition to Long Term Disability, his employment with the Agency has ended.

On May 22, 2008, the Hearing Officer ordered Grievant to produce documents to the Agency as follows:

> Any and all records related to any and all medical conditions or illnesses for which Grievant has received medical care from October 15, 2007 to present.
>
> Any and all records related to any and all medications prescribed to Grievant for such medical conditions or illnesses, to include but not limited to copies of prescriptions written by medical professionals. Grievant should detail for which medical conditions or illnesses such prescriptions are written.
>
> Any and all records related to Grievant's receipt of short term disability and long term disability benefits.

Grievant failed to produce all of these documents as ordered without just cause. Accordingly, the Hearing Officer will draw an adverse inference against Grievant. The Agency suggested that the adverse inference should be that Grievant did not have a valid prescription for all of the hydrocodone he consumed and that Grievant did not successfully complete a drug treatment program required by the Agency as a condition of its Third Step response. The Hearing Officer makes such findings in accordance with the Agency's suggestion.

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[11] Hearing Officer Exhibit 1.

CONCLUSIONS OF POLICY

DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or *disability* . . . ."[12] Under Policy 2.05, "'disability' is defined in accordance with the Americans with Disabilities Act," the relevant law governing disability accommodations.[13] Like Policy 2.05, the Americans with Disabilities Act (ADA) prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.

To establish a *prima facie* claim of disability discrimination under the ADA, the Grievant must show that: (1) he is within the ADA's protected class (i.e., a "qualified individual with a disability"); (2) he experienced an adverse employment action; (3) and the adverse employment action occurred "in circumstances that give rise to an inference of unlawful discrimination based on disability."[14]

ADA Protected Class

A qualified individual is defined as a person with a disability, who, with or without "reasonable accommodation," can perform the essential functions of the job.[15] An individual is "disabled" if he "(A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [has] a record of such an impairment; or **(C) [has been] regarded as having such an impairment**."[16] (Emphasis added). The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires."[17]

Individual with a Disability

In determining whether an employee is disabled, the initial inquiry is whether he or she has a physical or mental impairment, a record of such impairment, or has been regarded as having such impairment. Physical or mental impairment is defined to include "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[18]

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[12] DHRM Policy 2.05 (emphasis added).

[13] 42 U.S.C. §§12101 *et seq.*

[14] *See* Rask v. Fresenius Medical Care N.A., 509 F.3d 466, 469 (8th Cir. 2007). Once an employee establishes a *prima facie* case, an agency may nevertheless prevail if it can establish one of the defenses enumerated in 29 C.F.R. § 1630.15. *See generally* Peter A. Susser, *Disability Discrimination and the Workplace* 1014-26 (BNA Books 2005).

[15] 42 U.S.C. § 12111(8).

[16] 42 U.S.C. § 12102(2).

[17] 29 C.F.R. § 1630.2(n).

[18] 29 C.F.R. §1630.2(h)(2).

While "[t]he terms disability and *qualified individual with a* disability do not include individuals currently engaging in the illegal use of drugs," the term "illegal use of drugs" does "not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by [federal law]."[19] Moreover, the terms "disability" and "qualified individual with a disability" do not exclude an employee who has successfully been rehabilitated from the illegal use of drugs, is participating in a supervised rehabilitation program and is no longer engaging in the illegal use of drugs, **or "[i]s erroneously regarded as engaging in such use, but is not engaging in such use.**"[20] (Emphasis added).

Grievant was an individual with a disability because the Agency regarded Grievant as having a physical or mental impairment that substantially limits one or more of his major life activities. Drug addiction is an impairment under the ADA.[21] EEOC, Title II Technical Assistance Manual, Covering State and Local Government Programs and Services Section II-2.6000, "Regarded as", provides:

> The ADA also protects certain persons who are regarded by a public entity as having a physical or mental impairment that substantially limits a major life activity, whether or not that person actually has an impairment. Three typical situations are covered by this category:
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> 1) An individual who has a physical or mental impairment that does not substantially limit major life activities, but who is treated as if the impairment does substantially limit a major life activity;
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> ILLUSTRATION: A, an individual with mild diabetes controlled by medication, is barred by the staff of a county-sponsored summer camp from participation in certain sports because of her diabetes. Even though A does not actually have an impairment that substantially limits a major life activity, she is protected under the ADA because she is treated as though she does.
>
> 2) An individual who has a physical or mental impairment that substantially limits major life activities *only* as a result of the attitudes of others towards the impairment;
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> ILLUSTRATION: B, a three-year old child born with a prominent facial disfigurement, has been refused admittance to a county-run day care program on the grounds that her presence in the program might upset the other children. B is an individual with a physical impairment that

[19] 29 C.F.R. §1630.3(a).

[20] 29 C.F.R. §1630.3(b).

[21] EEOC, Title II Technical Assistance Manual, Covering State and Local Government Programs and Services II-2.3000 Drug addiction as an impairment.

substantially limits her major life activities only as the result of the attitudes of others toward her impairment.

3) An individual who has no impairments but who is treated by a public entity as having an impairment that substantially limits a major life activity.

ILLUSTRATION: C is excluded from a county-sponsored soccer team because the coach believes rumors that C is infected with the HIV virus. Even though these rumors are untrue, C is protected under the ADA, because he is being subjected to discrimination by the county based on the belief that he has an impairment that substantially limits major life activities (i.e., the belief that he is infected with HIV).

In October 2007, Grievant was not impaired by current use of heroin because he was not using heroin at that time. The Agency regarded Grievant as a drug addict because he said he had been snorting heroin for the prior four weeks. The Agency regarded Grievant's perceived addiction as substantially limiting a major life activity of interacting with others.[22] Accordingly, Grievant satisfies the requirements for being an individual with a disability.

Otherwise Qualified

A qualified individual is defined as an individual with a disability, who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.[23]

As a general rule, if an employee is disabled under the ADA, an employer must make "reasonable accommodations" unless the employer can demonstrate that the accommodation "would impose an undue hardship on the operation of the business [or government]."[24] In order to determine the appropriate reasonable accommodation, it may be necessary for the employer "to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[25]

[22] It is also likely that the Agency considered Grievant unable to work at any position because of the inability of someone addicted to heroin and under the influence of heroin to perform the essential functions of any job.

[23] 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

[24] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business").

[25] 29 C.F.R. § 1630.2(o)(3)

However, an employee is free to refuse an accommodation.[26] In such a case, the employer may require the employee to perform the essential functions of his job without accommodation and take disciplinary or corrective measures if the employee is unable to meet the employer's expectations.[27] An employer generally may not exclude an employee from returning to his position where he has refused an accommodation, unless the employer can demonstrate that the employee would pose a direct threat to the health or safety of the employee or his co-workers, or the employee is unable to perform the essential functions of his position in the absence of the refused accommodation (or another reasonable accommodation).[28]

Grievant is a qualified individual because he had the background necessary and can perform the essential functions of his position as an Academic Coordinator. The Supervisor testified that prior to Grievant's comment that he was snorting heroin, she did not observe any deficits in Grievant's work performance relating to any physical malady.

Essential Functions of the Job

Grievant was performing the essential functions of his position without any accommodation. There is no reason to believe Grievant could not perform the essential functions of his position had the Agency permitted him to continue working on their campus. He satisfies the requirements of the ADA with respect to performing the essential functions of his position.

Direct Threat Exception

The EEOC has explained that "[u]nder the ADA, an employer may lawfully exclude an individual from employment for safety reasons only if the employer can show that employment of the individual would pose a 'direct threat.'"[29] The term "direct threat"

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[26] *See* 29 C.F.R. § 1630.9(d) ("A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.") At the same time, however, courts have held that an employer does not have to allow an employee to perform a particular job function that an employee's physician has specifically forbidden. *See* Alexander v. The Northland Inn, 321 F.3d 723, 727 (8th Cir. 2003) (finding that employer did not have to allow employee to vacuum, where the employee's physician explicitly stated that the employee was to perform "[n]o vacuuming")

[27] *See* Hankins v. The Gap, Inc., 84 F.3d 797, 801-02 (6th Cir. 1996); *see also* 29 C.F.R. § 1630.9(d).

[28] *See generally* Williams v. Philadelphia Housing Authority Police Dept., 380 F.3d 751, 770 n.15 (3d Cir. 2004); Alexander, 321 F.3d at 727; EEOC Enforcement Guidance: Workers' Compensation and the ADA, at Questions 11, 13, 14, 21, and fn 7; EEOC Fact Sheet on the Family and Medical Leave Act, the American with Disabilities Act, and Title VII of the Civil Rights Act of 1964, at Question 14.

[29] EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at section entitled "Direct Threat." *See also* Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999) (noting that because "direct threat" is an affirmative defense, the employer bears the burden of proof); *But see, e.g.*, EEOC v. Amego, Inc. 110 F.3d 135, 144 (1st Cir. 1997).

is defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[30]

Whether an individual poses a direct threat to the health and safety or himself or others "shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job."[31] Further, the assessment must be based "on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[32] Factors to be considered in determining whether an individual poses a direct threat are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.[33]

In evaluating a direct threat defense, the first step is to "consider whether the employer has demonstrated that the employee cannot perform the job without a significant risk of harm."[34] If such a risk is demonstrated, the question becomes whether the employer can make a reasonable accommodation so that the employee can perform her job without a significant risk of harm.[35] Only if no accommodation exists that would either eliminate or reduce the risk to an acceptable level may an employer discharge an employee on direct threat grounds.[36]

No credible evidence was presented suggesting Grievant was a threat to himself, any other employees, or any of the high school students with whom he interacted as

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[30] 29 C.F.R § 1630.2(r); *see also* Appendix to CFR Part 1630—Interpretative Guidance on Title I of the Americans with Disabilities Act, at § 1630.2(r) ("An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient.")

[31] 29 CFR § 1630.2(r).

[32] *Id.* Where "an employer has a reasonable belief that an employee's present ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition, the employer may make disability-related inquiries or require the employee to submit to a medical examination." EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, at Question 17.

[33] 29 CFR § 1630.2(r) *See also* Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 86 (2002) ("The direct threat defense must be 'based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence,' and upon an expressly 'individualized assessment of the individual's present ability to safely perform the essential functions of the job,' reached after considering, among other things, the imminence of the risk and the severity of the harm portended.")

[34] Nunes, 164 F.3d at 1248.

[35] *Id.*

[36] Appendix to CFR Part 1630—Interpretative Guidance on Title I of the Americans with Disabilities Act, at § 1630.2(r).

part of position. Grievant was not a threat to anyone during any relevant time period of this grievance.[37]

Adverse Employment Action

An adverse employment action is defined as a "tangible employment act constituting a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[38]

Grievant was removed physically from employment and not permitted to return to work by the Agency. Grievant was compelled to use his accumulated leave balances in order to maintain 100 percent of his salary as his short term disability diminished over time. Grievant has suffered an adverse employment action.

Inference of Unlawful Discrimination Based on Disability

The Agency removed Grievant from the workplace because it regarded him as being addicted to heroin. By doing so, the Agency discriminated against a qualified individual with a disability contrary to the Americans with Disabilities Act and DHRM Policy 2.50.

The Hearing Officer's relief is limited to restoring Grievant to the position he would have been in had the Agency not taken the discriminatory action against him. Accordingly, Grievant must be restored to his position as if he had not been removed by the Agency on October 15, 2007. At the time of the hearing, however, Grievant was on Long Term Disability. The Agency is not obligated to reinstate Grievant in the event he is unable or unwilling to return to work. The Agency must provide Grievant with a reasonable opportunity to return to his position. In the event he declines to return to his position or is unable to do so, the Agency's obligation will cease.

One could argue that the application of the ADA in this case is counter intuitive. On the one hand, an employee who is currently using heroin is not a disabled person under the ADA. On the other hand, an employee who is not currently using heroin but who is reasonably regarded by the employer as using heroin can be a qualified person with a disability. The ADA does not appear to require an examination of the reasons as to why an employer regarded the employee as having a disability. In other words, the ADA appears to treat as the same (1) an employer who observes an employee's demeanor and falsely assumes that the employee is using heroin and (2) an employee who tells the employer he is using heroin but his statement is not true. In the former

[37] Grievant was not taking heroin. He had been taking hydrocodone for several years without anyone at the Agency noticing a change in his work behavior.

[38] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998). See, EDR Ruling No. #2004-624, 2004-648.

circumstance, it is clear that the employer should bear the consequences of its false assumption regarding the employee's drug use. Making a false assumption about an employee is within the control of the employer and not within the control of the employee. In the latter circumstance, it would be logical for the employer to expect the employee to tell the truth and it would be appropriate for the employer to rely on the employee's statements. The reason for the employer's conclusion that the employee is using heroin is solely within the control of the employee. It is unclear why the employer should suffer the consequences of a false statement made by an employee who would otherwise be expected to express facts correctly. The ADA, however, does not appear to focus on the employer's perspective in this scenario. In other words, the ADA does not distinguish between an employer whose behavior is unreasonable (falsely assuming an employee is using heroin) and an employer whose behavior is reasonable (relying on the employee's admission he is using heroin).[39]

ANCILLARY ISSUES

Grievant contends that the Agency's method of removing him from employment created unnecessary stress an embarrassment for him. Grievant's concern is understandable. The Supervisor failed to give Grievant a clear instruction not to return to work on October 15, 2007. The Vice President mistakenly assumed the Grievant had been given a clear instruction by the Supervisor and assumed that Grievant appeared at work on October 15, 2007 in defiance of that instruction. Accordingly, he ordered that the Agency's security officer escort Grievant from the Facility. The Agency could have simply clarified its instruction to Grievant leave the workplace and he would have left on his own accord. Although Grievant's removal from employment could have been handled in a more deferential manner, the Agency did not violate any State policy or discriminate against Grievant based on a protected disability by removing him from employment.

Shortly after Grievant was removed from employment on October 15, 2007, the Vice President sent an email to a local public high school advising that school's administrators that Grievant was on leave from the Agency. The principal of the high school e-mailed all of the teachers in that high school advising them that Grievant should not be allowed on the high school's campus. This created rumor and speculation at the high school regarding what Grievant did to justify his exclusion from the high school campus. Grievant learned of the speculation and believed that the Agency had portrayed him in a "False Light".

There is no basis to grant Grievant relief because of the Agency's email to the high school. The Vice President sent the email because he believed Grievant was using heroin and he believed the high school administrators should be aware that Grievant was on leave from the Agency. The email did not discuss Grievant's medical condition and, thus, did not violate his right of privacy regarding his medical information.

[39] In this case, it is clear that Grievant was "at fault" for causing the Agency to regard him as being addicted to heroin. The Agency is not "at fault" for believing Grievant and, indeed, the Agency would have been irresponsible if it had ignored Grievant's statements that he had been snorting heroin. The ADA does not appear to distinguish between Grievant's fault and the Agency's absence of fault.

In support of his argument, Grievant presented the testimony of Mr. M. Mr. M testified that he had heard rumors around campus about Grievant. He tried to find out what had happened to Grievant. He was unable to find that any information about Grievant from members of the community college. Mr. M. testified he was told, "there was nothing I needed to know." Grievant has not presented evidence showing that any Agency's employee disclosed the reasons why Grievant was no longer reporting for work at the campus.

Grievant argues that the Agency improperly suspended him when it removed him from the Agency's campus October 15, 2007. Grievant's concern is now moot. Upon his reinstatement, Grievant will be made whole.

DECISION

For the reasons stated herein, the Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

In the event of Grievant is unwilling to return to his former position or an objectively similar position, the Agency's obligation to reinstate Grievant will cease at that time. In the event Grievant is unable to return to his former position or an objectively similar position after being given a reasonable opportunity to do so by the Agency, the Agency's obligation to reinstate Grievant will cease at that time.[40]

APPEAL RIGHTS

You may file an administrative review request within **15 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. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

[40] Grievant's other requests for relief are denied.

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. Please address your request to:

    Director
    Department of Employment Dispute Resolution
    830 East Main St. STE 400
    Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-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.[41]

[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].

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

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