COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

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QUALIFICATION RULING

In the matter of Central Virginia Community College
Ruling Number 2022-5398
June 16, 2022

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether her March 4, 2022 grievance with the Central Virginia Community College (the "college" or "agency") qualifies for a hearing. For the reasons discussed below, the grievance is qualified for a hearing.

FACTS

The grievant was employed at the college for more than 10 years. During the 2020-2021 academic year, the college operated virtually due to the COVID-19 pandemic, and the grievant teleworked full-time during this period. In January 2021, the grievant alleges she developed an illness that required her to take approximately two weeks of medical leave. According to the grievant, she continued to experience long-term complications of the illness, but she remained able to perform her job duties remotely, and she did not require or request any accommodations in order to do so.

In mid-2021, the college began preparations to re-open its facilities for in-person services, including mandatory onsite work for most employees. In June 2021, the grievant informed her supervisor that she was experiencing sustained impairments from her January illness and, as a result, she would not be able to work onsite five days per week as scheduled. In support of her request, the grievant submitted a note from her medical provider stating: "I feel it would be in [the grievant's] best interest to have the ability to work from home at minimum 3 days a week. . . . She may increase on campus time if she tolerates her return to work with these accommodations." It appears that, in the subsequent days, the grievant provided additional documentation at the request of the college's human resources staff, as part of its process for evaluating disability accommodations. During July and August 2021, while waiting for a determination on her accommodation request, the grievant apparently reported for onsite work two days each week and drew on her paid leave balances for the remaining three weekdays.

On August 12, 2021, the grievant wrote to the college vice president to express concern that she would run out of leave before receiving a determination as to her telework request. At some point, the college's human resources director verbally suggested that the grievant apply for

short-term disability ("STD") benefits.[1] The grievant did so, and the state's third-party benefits insurer approved her claim for a period of "continuous leave" beginning August 20, 2021. However, according to the parties, the grievant continued to work onsite two days a week. The grievant claims that, during the subsequent months, she inquired "many times" whether the college would approve a partial telework schedule for her, even if only one day per week.

On February 1, 2022, the grievant emailed the college's human resource director to advise him that, according to her recent communications with the state's disability insurer, "it looks like I will be transitioning to Long Term Disability on February 11th. . . . [The insurer] told me to ask, what does this look like for me at [the college]?" The human resource director advised the grievant to "discuss with [her supervisor] what accommodations may be available." According to the grievant, she met with her supervisor on February 3, 2022, and again requested a partial telework schedule, noting that her medical provider could submit any new documentation necessary. The grievant claims that she received no further information about her request.[2] She reported to work as usual on Monday, February 14, 2022, on the reasoning that she had not been instructed otherwise. It appears that college management ultimately advised her to return home, although the grievant claims she still lacked clarity as to her status. On February 16, 2022, the grievant claims she learned that she was no longer considered an employee when she began to receive notes of concern from colleagues, who had received notice of the grievant's separation by email from her supervisor.

On March 4, 2022, the grievant initiated an expedited grievance claiming disability discrimination and failure to grant her a reasonable work accommodation, as well as separation from her employment without adequate notification. The grievant also challenged the college's deduction of over $900 from her final paycheck, which management claimed was necessary to recoup the college's auto-payment toward the grievant's health insurance premium following her separation. As relief, the grievant sought, among other things, reinstatement, restoration of leave and benefits, and reimbursement of the paycheck deduction. The college president declined to grant relief or to qualify the grievance for a hearing. The grievant appeals that determination to EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[3] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[4] Thus, claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether

[1] *See generally* DHRM Policy 4.57, *Virginia Sickness and Disability Program*. According to the grievant, she did not interpret this suggestion as a final determination on her request for partial telework as a reasonable accommodation under the Americans with Disabilities Act. She believed instead that management was responding to her practical concern about depleting all of her available leave. EDR is not aware that any documented ADA determination exists in connection with this matter.

[2] The grievant acknowledges that, in this meeting, the supervisor expressed that it was too difficult to coordinate work with the grievant remotely. However, it is not clear whether this response was intended as an ADA determination.

[3] *See Grievance Procedure Manual* § 4.1.

[4] Va. Code § 2.2-3004(B).

discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[5] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action in its totality was so unfair as to amount to a disregard of the applicable policy's intent.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] Typically, then, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] Because the grievance challenges the grievant's separation from her employment with the college, we assume for purposes of this ruling that the grievant has met this threshold standard to qualify for a hearing. Accordingly, we assess whether her separation resulted from discrimination or other misapplication or unfair application of policy.

Americans with Disabilities Act

In this case, the grievant contends that the agency failed to reasonably accommodate her medical condition and otherwise took actions against her because of her impairment, in violation of the Americans with Disabilities Act ("ADA"). DHRM Policy 2.05, *Equal Employment Opportunity*, "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or *disability*. . ."[9] Under this policy, "'disability' is defined in accordance with the [ADA]", the relevant law governing disability accommodations.[10] Like Policy 2.05, the ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.[11] A qualified individual is defined as a person who, "with or without reasonable accommodation," can perform the essential functions of the job.[12]

In this case, the grievant contends that the college has violated mandatory provisions of the ADA and related state policy in part by failing to reasonably accommodate her disability. As a general rule, the ADA requires an employer to make reasonable accommodations to the known physical or mental limitations of a qualified employee with a disability, unless the employer "can

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[5] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[6] *See id.* § 4.1(b)
[7] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[9] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[10] *Id.*; *see* 42 U.S.C. §§ 12101 through 12213. A disability may refer to "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ." 42 U.S.C. § 12102(1). Because the record presents no dispute on this issue, EDR presumes for purposes of this ruling that the grievant satisfies the definition of an individual with a disability.
[11] 42 U.S.C. § 12112(a).
[12] *Id.* § 12111(8); 29 C.F.R. § 1630.2(m).

demonstrate that the accommodation would impose an undue hardship on the operation of the business [or government]."[13] "Reasonable accommodations" include "[m]odifications or adjustments that enable [an employee] with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[14]

In order to determine the appropriate reasonable accommodation, it may be necessary for the employer "to initiate an informal, interactive process with the 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."[15] Under the ADA, an employer is not required to approve the exact accommodation requested by an employee if some other accommodation is available that will allow them to perform the essential functions of the position.[16] However, ADA regulatory guidance provides that "the employer, using a problem solving approach, should:

(1) Analyze the particular job involved and determine its purpose and essential functions;
(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer."[17]

Here, the parties do not appear to dispute that the grievant would have required an accommodation to perform the essential duties of her job, or that she requested such an accommodation with supporting documentation from her medical provider. Although the college has not provided any documented determination as to the grievant's accommodation requests, the record indicates that the college effectively denied it by never affirmatively granting telework permission or any other accommodation. Therefore, we assess whether the grievant has presented a sufficient question whether partial telework would have been a reasonable accommodation given

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[13] 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.").
[14] 29 C.F.R. § 1630.2(o)(1)(iii); *see* 42 U.S.C. § 12111(9)(B).
[15] 29 C.F.R. § 1630.2(o)(3).
[16] *See id.* pt. 1630 app. § 1630.9 (stating that an employer should conduct an individualized assessment of the employee's limitations and the job, then "select and implement the accommodation that is most appropriate for both the employee and the employer"); *see also* EEOC Fact Sheet, *Work at Home/Telework as a Reasonable Accommodation*, https://www.eeoc.gov/facts/telework.html.
[17] 29 C.F.R. Pt. 1630 App'x § 1630.9. Even if the employee does not specifically seek an accommodation, "an employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation." Equal Emp't Opportunity Comm'n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, #40, Oct. 17, 2002.

the grievant's essential job functions, and whether an interactive process occurred that may have identified other potential accommodations.

The grievant worked as an administrative assistant and program coordinator for the college. Her core responsibilities included serving as the main office manager and receptionist for the college's arts and sciences division, providing administrative support to faculty, and coordinating one of the division's early college programs. Although the grievant does not dispute that many of her duties have historically been public-facing, she argues that she has continued to accomplish many of her responsibilities "online" while working onsite.[18] The grievant provided management with a list of specific duties she claims she can perform fully remotely, such as: collecting faculty syllabi and managing book orders, coordinating student applications and enrollments, editing the division's website, handling department purchasing, tracking attendance and grades, meeting with high school students and families who still prefer virtual communications, preparing recommendation letters, and responding to emails. In response, the grievant's supervisor noted that both she and the grievant's peer in the administrative office "have had to interrupt our duties and help faculty or students . . . with their needs" on days that the grievant is not in the office. College management has expressed skepticism that students are adequately served by remote meetings with the grievant.

In sum, both parties have presented potentially legitimate reasons why partial telework may or may not have been a reasonable accommodation for the grievant in this situation. The record at this stage does not resolve whether some amount of telework would have been a reasonable accommodation, or whether it would have unduly burdened the college's operations. More significantly, however, the extent to which the college explored potential accommodations for the grievant through an interactive process is not apparent from the record. For example, it is not clear that management ever assessed whether an accommodation of one or two telework days per week would have been reasonable. It appears that management instead relied on the original documentation from the grievant's medical provider to the effect that it was in the grievant's "best interest" not to work onsite more than two days per week. But we perceive nothing in the medical documentation, or in state policy, that would necessarily have foreclosed discussions of a narrower accommodation than initially recommended, if reasonable. Indeed, the grievant claims that she repeatedly offered to obtain a new medical opinion updated to address accommodations that the college might be willing to make for a documented disability.[19] The college has also indicated that management was concerned that work onsite exacerbated the grievant's health problems,

[18] The grievant also alleges that, in 2019, she received an informal promotion such that she was no longer stationed at her office's front desk as the first contact for visitors. According to the grievant, her supervisor reassigned her back to the front desk after learning of her illness.

[19] Management has maintained that the college was bound by her medical documentation as the "authoritative opinion about [the grievant's] capacity to work." Further, management has expressed that only the grievant's medical provider – not the college or the grievant – should have proposed the appropriate number of telework hours for the grievant to manage her medical condition. However, it is not clear that the initial medical opinion expressed a prohibitive restriction on more than two onsite workdays, and there is nothing to indicate that the grievant's medical provider ever opined on whether fewer telework days would be in the grievant's "best interest" as a contingency if the college deemed three days to be unreasonable. To the extent the college argues that medical opinions must be rendered without regard for the employee's actual options, as determined by the employer, EDR is not persuaded that such a requirement would be consistent with the ADA. Where, as here, an employee's impairment takes the form of chronic and/or cumulative limitations from causes that may not be fully understood by medical professionals, the ADA may in fact require flexibility wherever reasonable, provided the employee has otherwise demonstrated their status as a qualified individual with a disability.

ultimately concluding that she should be recovering three days a week, rather than working. However, an employer would not ordinarily be qualified to direct employees' management of their medical conditions, and there is nothing in the record to indicate that the grievant's performance was declining during her work hours.

Accordingly, we conclude that the record presents a sufficient question whether a reasonable accommodation would have allowed the grievant to perform her essential job duties, and whether the college failed to grant such an accommodation. Further development of the evidence on these fact-specific issues would be best accomplished in the context of a hearing. In addition, we acknowledge numerous allegations that the grievant's supervisor's treatment of her deteriorated after becoming aware of her long-term medical challenges – *e.g.* criticizing the grievant's work conditions (schedule, lighting); questioning the grievant's illness; emphasizing the difficulties caused by the grievant's extended work absences; expecting the grievant to complete five days' of work in two; and expressing to other employees that the grievant simply "didn't want to come to work." We have no need to resolve these concerning allegations at this stage, and they are not determinative in this ruling. However, as the grievant's ADA claims are qualified for a hearing, the grievant will have an opportunity to present relevant evidence as to any discriminatory or retaliatory motive that she claims may have motivated the college's failure to grant her a reasonable accommodation.

Virginia Sickness and Disability Program

The grievant's claims regarding ADA accommodation are intertwined to some extent with the agency's administration of her disability benefits as provided by DHRM Policy 4.57, *Virginia Sickness and Disability Program*. Policy 4.57 entitles employees eligible for STD to receive income "for up to 125 workdays when the employee is unable to work due to an illness or injury that has been qualified by the [state's third-party benefits insurer]."[20] When an employee's maximum STD period expires, eligible employees may claim long-term disability ("LTD") benefits that "provide employees with income replacement if they become disabled and are unable to perform the full duties of the job without any restrictions."[21]

One form of LTD is Long-Term Working status ("LTD-W"), which is in effect when "[e]mployees working during STD (modified schedule or with restrictions) continue to work for their agency from STD working status into LTD for 20 hours or more per workweek in their own full-time position."[22] Policy 4.57 advises agencies to "review this status every month to determine if they can continue to accommodate the restrictions based on agency business needs."[23] Because the ADA's requirement to make reasonable accommodations "is an ongoing one,"[24] the general ADA standards discussed in the foregoing section would likewise apply to an employee's request to work with the status of LTD-W.[25]

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[20] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 13.
[21] *Id.* at 21.
[22] *Id.* at 22.
[23] *Id.*
[24] Equal Emp't Opportunity Comm'n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, #32, Oct. 17, 2002; *see* 29 C.F.R. § 1630.9(a).
[25] *See id.* DHRM Policy 4.57 also provides that, as part of any review for LTD-W eligibility, "[a]gencies should also review for compliance with ADA."

In this case, the evidence raises concerns regarding the administration of the grievant's claim(s) for disability benefits. First, the record indicates that the grievant applied for STD benefits in August 2021 only because the college did not approve her request for an ADA accommodation. As discussed above, the record is inconclusive as to whether the grievant would have been entitled to an accommodation at that time, such that she could have avoided the depletion of her STD benefits. In addition, the record presents potentially conflicting evidence about the nature of the grievant's STD period. Although the insurer's determination letter indicated approval for "one continuous block of time off" for a maximum of 125 workdays, the grievant apparently maintained a regular work schedule throughout this period and was considered to be in "STD working" status. Because of the apparent discrepancy between the available STD records and the grievant's actual work schedule, we view the evidence as inconclusive as to whether this arrangement constituted a proper application of state disability benefit policies.

Moreover, the record presents a sufficient question whether the agency misapplied DHRM Policy 4.57 with respect to the grievant's transition to LTD status. Under Policy 4.57, agencies are responsible for "[c]oordinat[ing] disability claims and benefits with the [benefits insurer], employee, and employee's supervisor." Employees are responsible for "[u]nderstanding the program features of VSDP and [their] role and responsibilities of participating in the program." Read together, these provisions contemplate communications between the employer and employee sufficient to allow the employee to understand and utilize their benefits of employment.

The grievant alleges that, although she requested guidance from both her supervisor and from human resources staff as to whether she could transition to LTD-W status, she again received an effective denial by lack of response. Accordingly, the grievant claims she was unsure of her status until management announced her separation to her (former) colleagues. The college has maintained that it was the third-party benefits insurer's responsibility to determine the grievant's status, but under Policy 4.57, eligibility for LTD-W status is heavily dependent on agency business needs. Even assuming that the college's administrative needs were not conducive to any accommodation for the grievant's medical impairments, we find little to no evidence in the record that such accommodations were substantively discussed with the grievant, that the college considered her request for LTD-W according to ADA principles, or that management ultimately communicated to the grievant its conclusions about her status. In the absence of such evidence, and in light of the grievant's allegations of ongoing requests for clarity, the record raises a sufficient question as a separate qualifying issue whether the college failed to carry out its mandatory responsibilities under Policy 4.57 to assist the grievant with understanding and coordinating her disability benefits in the context of separation from employment, or whether its approach to these responsibilities was so unfair as to amount to a disregard of the policy's intent.

Finally, the grievant has claimed that, partially due to the lack of clarity around her status, she was surprised to learn that the college planned to immediately recover over $900 from the grievant's final paycheck, to match the amount "auto-charged" to the college as its bimonthly share of the grievant's health insurance premiums. Under Policy 4.57, employees who transition to LTD status may continue their state health coverage but must assume responsibility for the premiums.[26] According to the policy, employees have 31 days from their last day of employment to decide whether to continue coverage.[27] To the extent that the college required the grievant to cover the

[26] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 26.
[27] *Id.*

cost of an "auto-charged" premium to the health insurer after she was no longer an employee, it is not clear that the college's approach would be a fair application of the 31-day decision period contemplated by Policy 4.57. As the grievance is qualified for a hearing on other grounds, the grievant will have the opportunity to present evidence that the college misapplied policy by automatically paying her insurance premium after she was no longer employed and then deducting that amount from her pay.

CONCLUSION

The facts presented by the grievant constitute claims that qualify for a hearing under the grievance procedure.[28] The grievance qualifies in full, including any alternative related theories raised by the grievant to challenge the college's disability accommodation process and her ultimate separation from employment. At the hearing, the grievant will have the burden to prove that the college's acts and omissions were a misapplication or unfair application of state policies.[29] If the hearing officer finds that the grievant has met this burden, they may order corrective action as authorized by the grievance statutes and grievance procedure, including reinstatement, back pay, and restoration of benefits such as leave.[30]

Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer, using the Grievance Form B.

EDR's qualification rulings are final and nonappealable.[31]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[28] *See Grievance Procedure Manual* § 4.1.
[29] *Rules for Conducting Grievance Hearings* § VI(C).
[30] Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).
[31] *See* Va. Code § 2.2-1202.1(5).