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QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2022-5421
August 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 April 16, 2022 grievance with the Department of Behavioral Health and Developmental Services (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is qualified for a hearing.

FACTS

The grievant was employed as a medical clerk at one of the agency's hospitals. On October 14, 2021, the grievant began a period of short-term disability. She returned to work on or about January 18, 2022, providing multiple doctors' notes indicating that the grievant "may return to work" but "should not lift anything greater than 10 [pounds]." Her supervisor agreed to accommodate this lifting restriction. Meanwhile, the state's third-party disability benefits insurer closed the grievant's claim, apparently based on other medical documentation indicating a return to work with no restrictions. During the next three months, the grievant appears to have reported to work on a full-time basis but maintained the lifting restriction.

On or about April 7, 2022, upon consulting with the benefits insurer, the agency determined that the grievant's short-term disability period should have continued following her return to work, in light of her ongoing restrictions. In coordination with the agency, the insurer reopened the grievant's claim, retroactively drawing down her short-term disability benefits until they expired as of April 6, 2022. The agency informed the insurer that April 13, 2022, was the last day it was willing to accommodate the grievant's lifting restriction, alleging that such lifting duties were a "requirement of her job duties" and that accommodating the restriction was causing a hardship on the grievant's department. By letter dated April 14, 2022, the agency confirmed to the grievant that her employment would end that day, due to the retroactive exhaustion of her short-term disability benefits and her continuing work restrictions.

On or about April 16, 2022, the grievant initiated a grievance challenging her separation from employment and seeking reinstatement. The agency declined to grant the requested relief or to qualify the grievance for a hearing. The grievant has appealed the latter 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.[1] Generally, the grievance procedure limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] An adverse employment action is defined as a "tangible employment action" 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."[3] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[4] Because the grievant in this case was separated from employment, the grievance sufficiently alleges that she experienced an adverse employment action.

In addition, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] Thus, claims relating solely to the "[h]iring, promotion, transfer, assignment, and retention of employees" generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state or agency policy may have been misapplied or unfairly applied.[6] Here, the grievant appears to allege that the agency misapplied and/or unfairly applied state policies by retroactively charging disability benefits based on the grievant's lifting restriction, ultimately leading to her separation. 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.

Virginia Sickness and Disability Program

In this case, the grievant argues that the agency misapplied or unfairly applied DHRM Policy 4.57, *Virginia Sickness and Disability Program*. Under Policy 4.57, short-term disability (STD) benefits end when an employee "is able to perform the essential functions of his or her pre-disability job on a full-time basis."[7] If an employee exhausts their short-term disability benefits, long-term disability (LTD) benefits may commence.[8] LTD benefits may take the form of LTD-Working status, such that state employment continues, or LTD status, such that state employment ends. LTD-Working status applies to employees who have worked during an STD period and then continue to work "into LTD for 20 hours or more per workweek in their own full-time position."[9]

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[1] *See Grievance Procedure Manual* § 4.1.
[2] *See id.* § 4.1(b).
[3] Ray v. Int'l Paper Co. 909 F.3d 661, 667 (4th Cir. 2018) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).
[4] Laird v. Fairfax County, 978 F.3d 887, 893 (4th Cir. 2020) (citing Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds "less appealing").
[5] *See* Va. Code § 2.2-3004(B).
[6] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[7] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 21.
[8] *Id.*
[9] *Id.* at 22.

When an employee seeks to return to work from a period of disability with documented work restrictions, Policy 4.57 instructs that the agency "must review the request and determine if the restrictions can be accommodated."[10] The agency also "should fax" the medical documentation of the restriction(s) to the benefits insurer and "call to confirm release."[11] Moreover, "the employee should be sent home until the restrictions are coordinated" with the insurer.[12] For employees in STD who return to work full-time, but with modifications to job duties, the disability claim continues while the employee is working.[13]

In this case, the parties do not appear to dispute that the grievant provided a medical release to return to work to the insurer and to her supervisor by January 18, 2022. The release stipulated "light duties," with a restriction on lifting more than 10 pounds. The insurer nevertheless closed the grievant's disability claim at this time. Meanwhile, the grievant's supervisor agreed to accommodate the lifting restriction. From this point until early April 2022, the grievant claims she was under the impression that her claim was closed, based on communication from the insurer and her return to full-time work, while the agency appears to have treated the claim in some respects as ongoing, based on the grievant's continuing work restriction.

On April 7, 2022, the agency contacted the insurer to inquire whether the grievant's claim was "still approved as working with restrictions of no lifting over 10 pounds." On April 11, 2022, the insurer responded: "this employee was released to return to work full time full duty on 01/17/2022. We do not have anything from the employee or provider with restrictions." The agency then apparently forwarded the relevant documentation noting the grievant's restrictions. On April 12, 2022, the insurer's representative advised the agency: "I have reopened Short Term Disability and . . . I have spoken with the employee. Short Term Disability does exhaust on 4/6/2022 we will need to open a Long Term Disability claim for this employee for 4/7/2022 forward." The insurer then sent a notice to the agency stating that the grievant had "submitted an extension request" for STD benefits. On April 13, the agency advised the insurer that it would no longer accommodate the grievant's lifting restrictions, and the insurer then sent another notice to the agency stating that the grievant had submitted a leave request for long-term disability, to begin on April 7, 2022. Agency management then called the grievant to inform her that her employment was ending effective the following day, April 14.

According to the grievant, she was not aware of these communications between the agency and insurer regarding her re-opened claim or transition to long-term disability. The grievant further alleges that multiple representations by the insurer in these exchanges were incorrect: the grievant denies speaking with the insurer's representative or anyone else about her disability claim prior to April 13, when the agency verbally notified her of her separation, and she asserts that she made no requests related to her disability benefits.

Upon a thorough review of the record, EDR concludes that the grievance raises a sufficient question whether the agency misapplied or unfairly applied DHRM Policy 4.57 in its coordination of the grievant's disability claim and benefits. Under Policy 4.57, the agency's responsibilities include "[c]oordinat[ing] disability claim[s] and benefits with the [insurer], employee, and

[10] *Id.* at 33.
[11] *Id.*
[12] *Id.*
[13] *Virginia Sickness and Disability Program Handbook* at 9.

employee's supervisor," as well as "[e]nsur[ing that the] employee receives appropriate communication regarding the [Virginia Sickness and Disability Program]."[14] Here, the agency has not presented information to suggest that it adequately coordinated the grievant's claims and benefits upon her return to work in January. According to the agency, the normal procedure for an employee returning to work with restrictions is that the insurer sends a restriction request form for the agency to complete. When the grievant returned to work, the agency did not receive the standard request form – likely because the insurer had closed the grievant's claim. However, even assuming that the insurer closed the grievant's claim in error, Policy 4.57 appears to place an administrative burden to confirm release for work and determination of accommodations on the agency.[15] In this case, although the agency was aware that the grievant was returning to work with restrictions noted, the record does not reveal any steps the agency might have taken to resolve the apparent discrepancy with the insurer at that time.[16] Indeed, the first documented instance of the agency's outreach to the insurer about the status of the grievant's claim occurred on April 7, 2022 – the day after the grievant's STD benefits were projected to expire had her claim remained open since January.

Moreover, the agency's steps to resolve the error, undertaken from April 12 to 13, also may represent a misapplication or unfair application of Policy 4.57, in that it is disputed whether the grievant received any notice of potential actions regarding her disability benefits until those actions had already occurred. The grievant has presented troubling allegations that the insurer's agent misrepresented communicating with the grievant during this time, and then unilaterally entered requests from the grievant to extend her claim, without her knowledge. Although these charges are not attributable to the agency, Policy 4.57 nevertheless makes the agency responsible for ensuring that the employee receives appropriate communication about disability benefits. In this case, the record does not reveal any steps the agency might have taken to confirm the grievant's knowledge of actions taken on her behalf as to her employment benefits, or to discuss options with her related to her medical circumstances.

As a result, the basis for the grievant's separation was apparently the grievant's most recent medical documentation of her restrictions. That document, dated March 21, 2022, stated that the grievant "needs to limit any lifting to less than 10 pounds until further notice." The grievant provided this note to the agency upon its inquiry whether she had been released to full-duty work. We identify nothing in the record that should have put the grievant on reasonable notice that this documentation could be the basis for her separation. The grievant has since alleged that she would have sought a medical release to full duty if she had been aware the agency was no longer willing to accommodate her documented restriction. Policy 4.57 provides for employees to return to work without restrictions if they present a corroborating doctor's note. However, in this case, it does not appear that the grievant had a meaningful opportunity to consult with her medical provider(s) as to her capacity to meet work requirements that could not be accommodated, as the agency had

[14] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 31.
[15] *Id.* at 33 ("If clarification is needed regarding restrictions, the [agency's] coordinator should contact the [insurer] … for assistance. The employee should be sent home until the restrictions are coordinated with the [insurer].").
[16] The agency has alleged that the insurer contacted the grievant by phone on January 18, 2022, to confirm she was returning to work full-time, full-duty. The grievant allegedly communicated to the insurer that she understood her status. It does not appear that the agency was aware of this phone call until after the grievant's separation. In any case, to the extent the agency relies on the insurer's summary of the call, in addition to the grievant's own responsibility to understand her benefit plan features under DHRM Policy 4.57, EDR cannot conclude that these factors resolve the issue of whether the agency misapplied or unfairly applied its own responsibilities under the policy.

apparently not communicated its updated requirements to her. These circumstances present a sufficient question as to whether the agency misapplied or unfairly applied Policy 4.57.

Americans with Disabilities Act

In addition, the record raises a sufficient question as to whether the grievant's separation was consistent with the requirements of the Americans with Disabilities Act (ADA) and related state policy.[17] 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 demonstrate that the accommodation would impose an undue hardship on the operation of the business [or government]."[18] "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."[19]

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."[20] 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.[21]

Here, the grievance presents a sufficient question whether the grievant could perform the essential functions of her job, with or without a reasonable accommodation. Generally, a job function may be "essential" when:

> the reason the position exists is to perform that function, when there aren't enough employees available to perform the function, or when the function is so specialized that someone is hired specifically because of his or her expertise in performing that function. If an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. Other relevant evidence can include the employer's judgment as to which functions are essential, the amount of time spent

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[17] *See* 42 U.S.C. § 12112(a); *see* 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m); DHRM Policy 2.05, *Equal Employment Opportunity*. Under these standards, 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). For purposes of this ruling, EDR assumes that the grievant has sufficiently alleged she met this definition, with a record of a physical impairment that substantially limited her ability to lift items. *See* 42 U.S.C. § 12102(2)(A) (listing "lifting" as an example of a major life activity).

[18] 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.").

[19] 29 C.F.R. § 1630.2(o)(1)(iii); *see* 42 U.S.C. § 12111(9)(B).

[20] 29 C.F.R. § 1630.2(o)(3).

[21] *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").

> on the job performing the function, the consequences of not requiring the incumbent to perform the function, and the work experience of people who hold the same or similar job.[22]

In this case, the evidence is mixed as to whether the essential functions of the grievant's position included lifting more than 10 pounds. According to the grievant's Employee Work Profile (EWP), the purpose of the grievant's position is to provide indirect patient care and to serve as an admissions and census clerk, including providing clerical support. The grievant was responsible for collecting, updating, and tracking various metrics for her facility, including census and admissions data, patient locations, and court documents. She was also responsible for producing reports from this information and circulating it to relevant agency staff. The grievant alleges that these duties primarily involved electronic documents, although some records were still handled in hard copy.

The Physical Demands Worksheet associated with the grievant's position indicates that her job could involve lifting up to 25 pounds at a time, but not on a daily basis. According to the grievant's managers, her lifting restriction most frequently affected hospital admissions tasks each day, which are completed in a physical admissions register weighing 10 to 12 pounds. Two other regular lifting-intensive tasks occurred monthly: carrying binders for the preparation of monthly reports, and maneuvering boxes of census documents for retention processing. The agency has explained that other employees took on the lifting portions of these duties for the grievant to accommodate her medical restriction temporarily.

An agency's identification of essential job functions is entitled to substantial deference. However, given the grievant's allegation that her responsibilities primarily involved electronic records, and given that the heaviest lifting was only a monthly responsibility, we conclude that the grievance presents a sufficient question whether lifting more than 10 pounds was an essential function of the grievant's job.

Even assuming that at least some of these lifting tasks were essential, the record does not reflect an interactive process that could have identified new potential accommodations, after management concluded it could no longer reasonably assign lifting tasks to the grievant's coworkers. First, we observe that the evidence is inconclusive as to the severity of the burden imposed on the grievant's coworkers and whether that burden would have constituted an undue hardship for the agency, had it continued. Secondly, the ADA's requirement to make reasonable accommodations "is an ongoing one."[23] Here, there is nothing to suggest the parties ever discussed the feasibility of alternative accommodations, such as handling the daily admissions register but not the heavier monthly documents, using a handcart, and/or establishing a reasonable end date for accommodations. As a result, as explained above, it is not clear that the grievant had a meaningful opportunity to obtain an adequately nuanced medical opinion as to her work capabilities, accounting for the accommodations her employer was and was not willing to make.

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[22] Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 579-80 (4th Cir. 2015) (citing 42 U.S.C. § 12111(8); 29 C.F.R. §§ 1630.2(n)(2), 1630.2(n)(3)) (finding that "providing customer service" was not necessarily one of a court clerk's essential job duties, even though it was listed in her job description); *see* 29 C.F.R. app. § 1630.2(n) ("The inquiry into whether a particular function is essential . . . focuses on whether the employer actually requires employees in the position to perform the functions" that are considered essential).

[23] 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).

In sum, in light of all the evidence, we conclude that a hearing officer would be best positioned to determine the extent to which lifting was an essential function of the grievant's job, as well as the existence of reasonable accommodations to which the grievant may have been entitled under the ADA, in lieu of separation.

CONCLUSION

For the reasons explained herein, this grievance is qualified for a hearing. The grievance qualifies in full, including any alternative related theories raised by the grievant to challenge her separation as a misapplication or unfair application of policy. At the hearing, the grievant will have the burden to prove that her removal from employment was improper.[24]

Within **five workdays** of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear the claims qualified for hearing, using the Grievance Form B. However, this ruling is not intended to prevent or discourage the parties from resolving the underlying issues outside the context of a hearing. Should the parties wish to pursue resolution of the issues herein prior to a hearing date, EDR is available to assist in such any efforts as desired and appropriate.

EDR's qualification rulings are final and nonappealable.[25]

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[24] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(C).
[25] *See* Va. Code § 2.2-1202.1(5).