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QUALIFICATION RULING

In the matter of the Department of Social Services
Ruling Number 2023-5562
July 6, 2023

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 September 15, 2022 grievance with the Department of Social Services (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is qualified for a hearing.

FACTS

On or about September 15, 2022, the grievant initiated a grievance asserting that the agency failed to grant her a reasonable disability accommodation. In April 2022, the agency had approved full-time telework as a disability accommodation for the grievant. Subsequent to the approval, however, the agency requested additional information to support a continuance of the accommodation.[1] On or about August 17, 2022, the grievant submitted the agency's "Request for Reasonable Accommodation Medical Certification" form, as completed by her health-care provider. The form identified medical impairments that substantially limited several of the grievant's major life activities, including sitting up and concentrating. As it related to the grievant's job, the provider wrote that the grievant had trouble "coming to the office, sitting up & walking," and that the grievant "needs to be able to recline as changing head positions is difficult for her, and increases dizziness leading to high risk of falls."

On or about August 23, 2022, agency management arranged a meeting to discuss the grievant's accommodation request, attended by the grievant, two of her managers, and a human resources representative. At the meeting, the grievant was asked to provide additional explanation as to how her disability affected her ability to perform the essential functions of her job. The grievant reportedly referenced the Medical Certification form her provider had already completed, but she expressed that she was uncomfortable sharing further details of her medical condition with her managers present. The following day, the agency provided a written denial of the grievant's

[1] According to the agency, the grievant's previous accommodation request for telework was granted as a matter of course because, at the time, most agency staff including the grievant were already teleworking full-time for public health reasons. However, in the summer of 2022, most agency employees returned to work onsite three days per week.

accommodation request, on grounds that "your disability does not affect your ability to perform the essential functions of your job."[2]

The grievant initiated a grievance to challenge the agency's determination on or about September 15, 2022, and also began a period of short-term disability leave around the same time. As the grievant's short-term disability benefits were expiring, the grievant claims that her provider completed a return-to-work form noting full-time telework as an accommodation, due to the grievant's difficulty with driving as well as other impairments. However, according to the grievant, an agency manager then called her to advise that the restriction would not be accommodated. The grievant then obtained an updated return-to-work form indicating a return with no restrictions. On the updated form, the provider noted that the grievant was expected to work a "regular schedule of 2 days at home & 3 in office," but the employer "do[es] not approve accommodation." The grievant returned to work as of March 3, 2023.

Although it appears that the management resolution steps were paused during the grievant's short-term disability leave, the steps resumed in April 2023. On May 2, 2023, the agency head's designee determined that the grievance did not qualify for a hearing. The grievant now 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] Generally, the grievance procedure limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] Consistent with prior rulings, EDR assumes that an agency's failure to provide disability accommodations to which the grievant is entitled under applicable law and policy would generally constitute an adverse employment action.[7]

In addition, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[8] 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,

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[2] Nevertheless, the letter encouraged the grievant to pursue, as needed, options such as leave, closer parking, and ergonomic seating.
[3] *See Grievance Procedure Manual* § 4.1.
[4] *See id.* § 4.1(b).
[5] 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)).
[6] 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").
[7] *See, e.g.*, EDR Ruling No. 2021-5181.
[8] *See* Va. Code § 2.2-3004(B).

or whether state or agency policy may have been misapplied or unfairly applied.[9] 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.

Failure to Accommodate

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] . . . ."[10] "Reasonable accommodations" include "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position . . . is customarily performed, that enable [the employee] to perform the essential functions of that position" or that "enable [the employee] to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[11]

In order to select an 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."[12] 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 their position.[13]

In this case, although no dispute is evident regarding the nature of the grievant's disability, the parties appear to disagree as to whether the grievant is entitled to any accommodations in order to perform the essential functions of her job. According to the grievant's Employee Work Profile, she serves as a Financial Services Specialist for the agency. In that position, 50 percent of her work involves research, analysis, drafting, and other preparation of documents. Another 30 percent involves preparation specifically of "refund vouchers." The grievant's remaining job duties involve responding timely to client inquiries and serving as a "backup" for other staff.[14] The agency has indicated that the grievant was performing her duties fully remotely until at least April 2022, consistent with employees working remotely agency-wide.

However, the grievant has alleged that her disability presents significant challenges to her ability to travel to her agency office and complete her duties there. Based on the grievant's medical

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[9] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

[10] 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.").

[11] 29 C.F.R. § 1630.2(o)(1)(ii), (iii); *see* 42 U.S.C. § 12111(9)(B).

[12] 29 C.F.R. § 1630.2(o)(3).

[13] *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.").

[14] Based on the information available at this time, it is unclear whether serving as a backup to complete other staff's duties would properly be considered an "essential" function of the grievant's own position.

documentation, she has a neurological condition that causes her to experience "chronic dizziness, headaches, unsteadiness, mental fogginess, memory [problems], fatigue, shortness of breath, [and] joint pain." The grievant claims that these symptoms are exacerbated by sitting upright for long periods of time, but manageable with the ability to view her screen from a very reclined position (which she can do at home). More significantly, the grievant alleges that driving for her is dangerous, as it involves many factors that tend to impair her perception and concentration, especially in heavy traffic to and from work.[15] The grievant has claimed that days when she must report to work involve worsening symptoms and stress from being in situations that put her at increased physical risk. Although she has asked to telework on days when she does not feel well, the grievant's supervisor has allegedly advised her to draw down her accumulated leave in those situations instead.

Based on the information that has been provided to EDR, the only category of the grievant's essential duties not necessarily conducive to remote work is the preparation of refund vouchers, which must be prepared in hard copy format. According to the grievant, she prepares up to twelve vouchers per week for her supervisor's signature. The parties have presented conflicting accounts regarding the extent to which telework impacts the grievant's ability to fulfill this responsibility. When the grievant is in the office, she is expected to print the vouchers she has prepared electronically and place the print versions on her supervisor's desk for signature. When the grievant is teleworking, she claims she is able to prepare her work product electronically and print it remotely to the agency's office, which does require another person (such as her supervisor) to retrieve it from the printer.

In contrast, the supervisor has claimed that, when the grievant is not present, the supervisor not only must retrieve the printed work product but also format, print, retrieve, and collate it herself. According to the supervisor, these additional tasks create an undue hardship. The supervisor also appears to view the grievant's "backup" duties as essential.

Upon a thorough review of the record as a whole, EDR concludes that the grievance raises a sufficient question as to whether the agency has denied her a reasonable accommodation to which she is entitled. It appears that the grievant has made the agency aware of a number of impairments that affect her ability to drive safely and to complete her duties while in an upright sitting position in her office. These impairments have been documented in detail by the grievant's medical providers and provided to the agency. Accordingly, EDR is not able to identify a basis for the

[15] When an otherwise qualified employee has a disability that limits their ability to travel to the worksite, a modification to the employee's work environment and/or related agency policies may be required if the modification allows the employee to perform the essential functions of their job and does not impose an undue hardship on the agency. *See* Equal Employment Opp. Comm'n, "Work at Home/Telework as a Reasonable Accommodation," No. 2, Feb. 3, 2003, available at www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation ("Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework."); Equal Employment Opp. Comm'n, "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA," No. 34, Oct. 17, 2002, available at www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada; *see, e.g.*, Colwell v. Rite Aid Corp., 602 F.3d 495, 505 (3d Cir. 2010) (the ADA does not "address only those problems that an employee has in performing her work that arise once she arrives at the workplace."); Jona R. v. U.S. Dep't of State, EEOC Appeal No. 0120182063 (EEOC Jan. 23, 2020) (employee whose disability sometimes prevented her from driving to work was entitled to telework as a reasonable accommodation when no undue hardship would result).

agency's stated conclusion that the grievant's disability does not affect her ability to perform the essential functions of her job.[16]

Moreover, the record presents factual disputes as to whether full-time remote work would be a reasonable accommodation for the grievant. Although the grievant's supervisor asserts it is onerous to print the grievant's prepared vouchers, EDR cannot say that printing documents would be unduly burdensome on its face. Furthermore, even if we assumed that some portion of the grievant's essential functions could not be performed remotely, it does not appear that the parties have fully discussed potential accommodations that would allow the grievant to perform her essential duties while adhering to advice from her medical providers as much as possible. For example, the grievant claims that the printed vouchers do not need to be signed by her supervisor on the same day; even now, she and her supervisor reportedly work together in the office only once per week. If so, it is not clear why a reduced in-person schedule would be unreasonable as an accommodation. While the agency has suggested that telework is not conducive to other documents the grievant must prepare, at best this claim creates a factual dispute that would best be resolved by a hearing officer upon a full exploration of the evidence from both parties.

Relatedly, EDR acknowledges the possibility that accommodations other than telework could be reasonable under the circumstances. However, the appropriateness of such accommodations should be explored through an interactive process. The agency has identified other options such as parking accommodations and ergonomic furniture for the grievant; however, the record raises substantial doubt as to whether these options would sufficiently address the specific impairments and difficulties identified in the grievant's medical documentation. Although these issues may ultimately be determined by a hearing officer pursuant to this ruling, nothing herein prevents the parties from pursuing appropriate constructive discussions regarding potential accommodations in the meantime.[17]

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 as to why the agency's failure to accommodate her disability was a misapplication or unfair application of policy. At the hearing, the grievant will have the burden to prove that the agency's failure to reasonably accommodate her disability was improper.[18] If she prevails, the hearing officer will have authority to order appropriate remedies, including restoration of benefits that the grievant would not have depleted had she not been denied reasonable accommodation(s).[19]

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[16] The record presents a stark difference in the parties' respective views on the grievant's current working conditions. The agency has indicated that the grievant's return to work on a hybrid schedule has not appeared to create any problems. By contrast, the grievant has described substantial health impacts and risks that she must manage daily as a result of the agency's requirement for her to report to work in person.

[17] A covered employer's obligation to provide reasonable accommodations to qualified employees "is an ongoing one." Equal Emp't Opp. Comm'n, "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," No. 32, Oct. 17, 2002, available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada; *see* 29 C.F.R. § 1630.9(a).

[18] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(C).

[19] *Rules for Conducting Grievance Hearings* § VI(C)(1).

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.[20]

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[20] *See* Va. Code § 2.2-1202.1(5).