Issues: Qualification – Benefits/Leave (FMLA, VSDP), Discrimination (disability), and Separation from State (transitioned into LTD); Ruling Date: July 25, 2017; Ruling No. 2017-4502; Agency: Department of Corrections; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution[1]

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2017-4502
July 25, 2017

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") on whether her December 16, 2016[2] grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about June 15, 2016, the grievant began receiving short-term disability ("STD") benefits pursuant to the Virginia Sickness and Disability Program ("VSDP").[3] She returned to work with medical restrictions on October 1, 2016. On November 7, 2016, the grievant provided the agency with additional medical documentation showing that she was unable to work, and resumed receiving STD benefits as of that date. The third-party administrator ("TPA") of the VSDP determined that the grievant's STD benefits had been exhausted as of December 6, 2016, and appears to have concluded that her inability to return to work on December 7 was a continuation of the prior disability for which she had received STD benefits. As a result, the grievant was transitioned to long-term disability ("LTD") and separated from employment with the agency on December 7, 2016.[4]

The grievant filed an expedited grievance on or about December 16, 2016, alleging that the agency had not complied with the medical restrictions ordered by her doctor between October 1 and November 7, 2016, and further disputing her separation on LTD.[5] After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EEDR.

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[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. The *Grievance Procedure Manual* has now been updated to reflect this Office's name post-merger as the Office of Equal Employment and Dispute Resolution.

[2] Although the grievance itself includes different dates, the date-stamp on the form indicates that it was provided in-person by the grievant on December 16, 2016.

[3] *See* Va. Code § 51.1-1100 *et seq.*; DHRM Policy 4.57, *Virginia Sickness and Disability Program*.

[4] The grievant's LTD claim was ultimately denied by the TPA, and it appears that she never received LTD benefits.

[5] It appears that, due to a clerical error, the single management step-respondent did not receive the grievance until January 11, 2017. There has been no argument raised that the grievance was untimely filed to dispute the challenged management actions.

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.[6] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[7] Thus, claims relating to issues such as to the establishment or revision of wages, salaries, position classifications, or general benefits 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.[8]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[9] Thus, typically, 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."[10] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[11] Because the grievant has effectively lost her position with the agency, the grievance raises a sufficient question as to whether the grievant has experienced an adverse employment action.

Virginia Sickness and Disability Program

In her grievance, the grievant disputes her agency's decision to separate her from employment when her STD benefits were exhausted. By statute and under the DHRM Policy 4.57, *Virginia Sickness and Disability Program* (the "VSDP Policy"), "short-term disability benefits for participating employees shall commence upon the expiration of a seven-calendar-day waiting period."[12] On the eighth calendar day, and after authorization by the TPA, STD benefits are provided for a maximum of 125 workdays.[13] In this case, the grievant submitted her initial request for STD to the TPA on June 8, 2016. The grievant began receiving STD benefits on June 15, the eighth calendar day after her initial date of disability. The grievant returned to work with medical restrictions from October 1 until November 7, at which time she provided documentation that she was no longer able to work. Under the VSDP Policy, days when an employee is working with medical restrictions are considered part of the 125 workdays for which

[6] *See Grievance Procedure Manual* § 4.1.
[7] *See* Va. Code § 2.2-3004(B).
[8] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[9] *See Grievance Procedure Manual* § 4.1(b).
[10] Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[11] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[12] Va. Code § 51.1-1110(A); DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[13] Va. Code § 51.1-1110(B); DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.

STD benefits are provided.[14] Counting 125 workdays from June 15, the TPA's records accurately reflect that the final day of STD for the grievant was December 6, 2016.[15]

The VSDP statutes and Policy further provide that "long-term disability benefits for participating employees shall commence upon the expiration of the maximum period for which the participating employee is eligible to receive short-term disability benefits . . . ."[16] "LTD benefits provide employees with income replacement if they become disabled and are unable to perform the full duties of the job without any restrictions."[17] LTD status is in effect when: (1) the employee "has received the maximum STD benefit and is unable to [return to work]"; (2) the employee is "working any schedule outside [her] agency"; or (3) the employee is "unable to continue working 20 hours a week in LTD-W."[18]

The grievant was unable to return to work on December 7, 2016. The TPA appears to have determined that the medical condition preventing the grievant from returning to work was a continuation of the disability for which she had received STD benefits. EEDR has reviewed nothing to suggest any error in the TPA's determination that the grievant's medical condition on December 7 was anything other than a continuation of her previous disability, and the grievant does not appear to argue otherwise. Thus, EEDR finds no basis to conclude that the TPA erred by determining that the grievant's STD benefits had been exhausted and that she had entered LTD status at that time.

DHRM policy provides that if an employee reaches LTD status, she is not guaranteed return to her pre-disability position and the agency "can recruit and fill [her] pre-disability position."[19] It does not appear that the agency agreed to hold the grievant's position open after she was enrolled in LTD. EEDR finds no basis to conclude that the agency violated any mandatory provision of the VSDP Policy when it separated the grievant from employment with the Commonwealth upon the exhaustion of her STD benefits. Likewise, there is no indication that the agency's actions were so unfair as to amount to a disregard of the intent of the applicable policy. Accordingly, the grievance does not qualify for a hearing on this basis.

Family and Medical Leave Act

The grievant's challenge to her separation could also be interpreted as a claim that the agency has misapplied and/or unfairly applied the statutory and/or policy provisions of the Family and Medical Leave Act ("FMLA").[20] DHRM Policy 4.20, *Family and Medical Leave* (the "FMLA Policy") provides "guidance regarding the interaction of the FMLA and the Commonwealth's other Human Resource policies" for state employees.[21] Under the FMLA

[14] DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[15] "The 125-workday period is based on a Monday-through-Friday workweek and includes paid holidays." Va. Ret. Sys., *Virginia Sickness and Disability Handbook* at 14. Thus, any holidays that fell between June 25, 2016 and December 6, 2016 would have been factored into the 125-workday period of the grievant's STD.
[16] Va. Code § 51.1-1112(A); DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[17] DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[18] *Id.*
[19] DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[20] 29 U.S.C. § 2601 *et seq.*
[21] DHRM Policy 4.20, *Family and Medical Leave*.

Policy, eligible employees are entitled to receive "up to 12 weeks of unpaid family and medical leave per leave year because of their own serious health condition . . . ."[22]

Under the VSDP Policy, however, family and medical leave and VSDP leave run concurrently.[23] Assuming the grievant was eligible for family and medical leave when her absence on STD began, she was disabled and unable to work for more than twelve weeks, and thus would have had no remaining family and medical leave to cover her continued absence at the time she was separated on December 7. The grievance does not, therefore, raise a sufficient question as to whether the agency may have misapplied or unfairly applied the FMLA Policy to the grievant or whether the agency's actions were so unfair as to amount to a disregard of the intent of the FMLA Policy. Accordingly, the grievance does not qualify for a hearing on this basis.

Failure to Accommodate

Fairly read, the grievance also alleges that the agency did not comply with the Americans with Disabilities Act ("ADA"), as amended. 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*. . ."[24] Under this policy, "'disability' is defined in accordance with the 'Americans with Disabilities Amendments Act,'" the relevant law governing disability accommodations.[25] Like DHRM Policy 2.05, *Equal Employment Opportunity*, the ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.[26]

The ADA defines a qualified individual as a person with a disability who, "with or without reasonable accommodation," can perform the essential functions of her job.[27] An individual is "disabled" if he/she "(A) [has] a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment . . . ."[28] As a general rule, an employer must 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]."[29] Accordingly, EEDR must consider whether the grievance raises a sufficient question as to whether the grievant was disabled at the time of her separation, whether a reasonable accommodation was available to the grievant, and whether such accommodation would have imposed an undue hardship.

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[22] *Id.*; *see* 29 U.S.C. § 2612(a)(1).
[23] DHRM Policy No. 4.57, *Virginia Sickness and Disability Program*.
[24] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[25] *Id.*; *see* 42 U.S.C. §§ 12101 *et seq.*
[26] 42 U.S.C. § 12112(a).
[27] *Id.* § 12111(8); 29 C.F.R. § 1630.2(m). The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1630.2(n).
[28] 42 U.S.C. § 12102(1).
[29] *Id.* § 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.").

Was the grievant disabled?

Under the ADA, "[a]n impairment is a disability . . . if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population."[30] "Major life activities" include, but are not limited to, activities such as "walking, standing, lifting, bending, . . . and *working*."[31] Importantly, "[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting," although not every impairment will constitute a disability.[32] The primary purpose of the ADA Amendments Act of 2008 was to "make it easier for people with disabilities to obtain protection," and, consequently, "the definition of 'disability' . . . shall be construed broadly in favor of expansive coverage."[33] As a result, "[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting" for claims of actual disability.[34] For example, regulatory guidance indicates that "an impairment resulting in a 20-pound lifting restriction" lasting for several months is substantially limiting.[35]

In this case, the grievant submitted a doctor's note to the agency requesting pregnancy-related work restrictions beginning on October 1, 2016, when she returned from STD. The grievant states that these restrictions were not respected by the agency. Conversely, the agency argues that it "accommodated [the grievant's] pregnancy restrictions" during this time and further asserts that she was "not disabled." While pregnancy itself is not an impairment under the ADA, "a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition."[36] Even assuming the grievant's pregnancy-related work restrictions rendered her "disabled" under the ADA, there is no relief a hearing officer can provide at this point as to this allegation of failure to accommodate. The grievant submitted a doctor's note to the agency on or about November 7, 2016, stating that she was unable to work until approximately March 1, 2017 due to "illness" and "stress," and no longer worked at the agency thereafter, which led to her eventual separation. Consequently, unless it is determined that the grievant was improperly separated and is returned to work, any potential order from a hearing officer would be ineffectual to address an alleged failure to accommodate work restrictions. Because, as discussed below, the grievant's claim regarding her separation will not be qualified for a hearing, this alleged failure to accommodate also does not qualify for a hearing.[37]

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[30] 29 C.F.R. § 1630.2(j)(1)(ii). Determining whether an impairment substantially limits a major life activity "requires an individualized assessment" of the particular facts of each case. *Id.* § 1630.2(j)(1)(iv).
[31] 42 U.S.C. § 12102(2)(A) (emphasis added); 29 C.F.R. § 1630.2(i)(1)(i).
[32] 29 C.F.R. § 1630.2(j)(1)(ii).
[33] *Id.* § 1630.1(c)(4); *see* 42 U.S.C. § 12102(4)(A). "The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability." 29 C.F.R. § 1630.1(c)(4).
[34] 29 C.F.R. § 1630.2(j)(1)(ix); *see* Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.
[35] 29 C.F.R. pt. 1630 app. § 1630.2(j)(1)(viii).
[36] *Id.* pt. 1630 app. § 1630.2(h).
[37] This ruling does not address whether the grievant might have a legitimate claim in this regard under a different process, such as, for example, filing a complaint with the federal Equal Employment Opportunity Commission, or other legal proceeding.

In addition to the November 7, 2016 note provided to the agency, the grievant has provided EEDR with additional medical documentation indicating that, during that time, her doctor determined she was "severely depressed and having anxiety attacks" as a result of her pregnancy. Regulatory guidance states that "major depressive disorder" is considered a mental impairment that "substantially limit[s] brain function," and thus should ordinarily constitute a disability for purposes of the ADA.[38] EEDR has not reviewed any information to dispute or question the grievant's medical condition and, accordingly, finds that the grievance raises a sufficient question as to whether the grievant had a mental impairment (depression) that substantially limited a major life activity such that she was disabled as of November 7, 2016.

Was a reasonable accommodation available?

"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."[39] The agency asserts that its decision to separate the grievant from employment "was not a denial of a disability-related accommodation" because the VSDP Policy states that "once employees transition to LTD, then they has [sic] been separated from employment." The agency further claims that it was the grievant's burden to request additional unpaid leave as an accommodation, and that it "did not have an affirmative duty to assess whether her position should have been held open after her STD benefits expired." The Equal Employment Opportunity Commission ("EEOC"), the federal agency responsible for enforcement of the employment-related provisions of the ADA,[40] however, has taken the position that, "[w]hen an employee requests leave, or additional leave, for a medical condition, the employer *must* treat the request as one for a reasonable accommodation under the ADA."[41] Upon receiving a request for reasonable accommodation from an employee, an employer must engage in an "informal, interactive process" to "identify the precise limitations resulting from the disability and potential accommodations that could overcome those limitations."[42]

On November 7, 2016, the grievant provided the agency with a doctor's note stating that she would be unable to work until March 1, 2017 due to her medical condition. Under the facts provided by the parties, and particularly considering that the grievant and the agency were both aware the grievant's STD benefits would expire before March 1, 2017, EEDR is unable to determine how the doctor's note could be considered anything other than a request for additional leave, which should have triggered the interactive process intended to determine whether potential reasonable accommodations, including additional unpaid leave after the expiration of the grievant's STD benefits, would have been available. The grievant, however, states she was informed by the agency she would be separated from employment upon the expiration of her STD benefits, and she received a letter dated November 22, 2016, stating as much. The agency

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[38] 29 C.F.R. § 1630.2(j)(3)(iii); *see* EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, https://www.eeoc.gov/policy/docs/psych.html.
[39] 29 C.F.R. § 1630.2(o)(1)(iii); *see* 42 U.S.C. § 12111(9)(B). A reasonable accommodation encompasses "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. pt. 1630 app. § 1630.2(o).
[40] *E.g.*, 29 C.F.R. pt. 1630 app. intro.
[41] Employer-Provided Leave and the American with Disabilities Act, https://www.eeoc.gov/eeoc/publications/ada-leave.cfm (emphasis added).
[42] 29 C.F.R. § 1630.2(o)(3).

has presented no information to show that it considered unpaid leave or any other reasonable accommodation as an alternative to separating the grievant from employment and, indeed, appears to have taken the position that it was under no duty to conduct such an assessment after the grievant exhausted her STD benefits. In short, based on the facts presented by the parties in this case, it does not appear that an interactive process occurred prior the grievant's separation.[43]

Furthermore, the EEOC has published ADA enforcement guidance stating that reasonable accommodations "can include making modifications to existing leave policies and providing leave when needed for a disability . . . ."[44] More specifically, the EEOC advises that "[a]n employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer."[45] Unpaid leave may be required as "a reasonable accommodation for absences related to a disability" even when it would require an employer to modify existing policies that prescribe the maximum amount of leave available to employees.[46] The EEOC further notes, however, that "[i]ndefinite leave – meaning that an employee cannot say whether or when she will be able to return to work at all – will constitute undue hardship, and so does not have to be provided as a reasonable accommodation."[47]

Having considered all of the information in the grievance record, it is EEDR's conclusion that the grievant has not raised a sufficient question as to whether additional unpaid leave would have been a reasonable accommodation in this case. The grievant's medical documentation provides an "estimated return to work date" of March 1, 2017. This approximate return to work date appears to have been based on the expected date on which she would give birth to her child, and thus would likely have been subject to modifications. EEDR must further consider that the grievant had been unable to work for virtually the entire time she was receiving STD benefits, other than the period between October 1 and November 7, 2016. With the knowledge known at the time in November/December 2016, it is unclear what additional treatment the grievant would undergo between November 8, 2016 and February 28, 2017, or whether that treatment would have resulted in her being able to return to work and perform the essential functions of her position no later than March 1, 2017. Furthermore, EEDR must also consider the nature of the grievant's position and the agency's business needs in relation to whether unpaid leave would have been a reasonable accommodation through the estimated, but indefinite, period identified by the grievant. While the grievant was unable to work, her position was unfilled and her work duties were assumed by other employees, who either performed the grievant's duties in addition to their own or worked overtime. For the agency to continue to hold the grievant's position open until her estimated return to work date of March 1, 2017, and potentially longer given the indefinite nature of her request for leave, would have created additional burdens beyond those

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[43] Some courts have held that employers who do not engage in the interactive process may face liability if a reasonable accommodation would have been possible. *See, e.g.*, Cardenas-Meade v. Pfizer, Inc. 510 F. App'x 367, 372 (6th Cir. 2013).

[44] Employer-Provided Leave and the American with Disabilities Act, https://www.eeoc.gov/eeoc/publications/ada-leave.cfm.

[45] *Id.*; *see* 29 CFR pt. 1630 app. § 1630.2(o) (stating that "accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment . . . .")

[46] Employer-Provided Leave and the American with Disabilities Act, https://www.eeoc.gov/eeoc/publications/ada-leave.cfm.

[47] *Id.*

incurred while the grievant was receiving STD benefits and adversely impacted the agency's operations.

Under these circumstances, EEDR cannot conclude that the information provided by the grievant demonstrates that her request for leave beyond the period covered by her STD benefits was sufficiently definite that it could be considered a reasonable accommodation under the facts presented in this case. As a result, the grievant has not raised a sufficient question as to whether the agency's decision not to provide her with a period of additional unpaid leave constituted a failure to accommodate under circumstances such that her claims should be further evaluated by a hearing officer. As a result, the grievance does not qualify for a hearing on this basis.[48]

EEDR's qualification rulings are final and nonappealable.[49]

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[48] Again, this ruling does not address whether the grievant might have a legitimate claim in this regard under a different process, such as, for example, filing a complaint with the federal Equal Employment Opportunity Commission, or other legal proceeding.
[49] *See* Va. Code § 2.2-1202.1(5).