Issue: Qualification – Benefits/Leave (FMLA); Ruling Date: July 17, 2017; Ruling No. 2017-4575; Agency: Department of Veterans Services; Outcome: Qualified in Full.

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 Veterans Services
Ruling Number 2017-4575
July 17, 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 March 31, 2017 grievance with the Department of Veterans Services (the "agency") qualifies for a hearing. For the reasons described below, the grievance is qualified for a hearing.

FACTS

On or about January 3, 2017, the grievant submitted a medical certification form to the agency requesting leave under the Family and Medical Leave Act ("FMLA"). On the form, the grievant's doctor noted that the grievant suffered from "[c]hronic back pain" and related medical issues that would require treatment visits at least twice per year. The form also states that the grievant would have episodic flare-ups of her condition approximately one to two times per month, during which time it would be medically necessary for her to miss work. The grievant's doctor also noted that her condition was exacerbated by working shifts longer than eight hours. In a separate January 3, 2017 letter, the doctor released the grievant to return to work with "[m]odified duty." The only restriction noted was that the grievant "[m]ay only work 8 hour shifts at this time." In a letter dated January 24, 2017, the agency informed the grievant that it "would not be able to accommodate" her requested use of FMLA leave to restrict her from working overtime for the year. The agency placed the grievant on FMLA leave as of January 10, 2017, and the grievant was effectively removed from the workplace.[2]

The grievant submitted a follow-up letter from her doctor on or about February 22, 2017, clarifying that she needed intermittent leave under the FMLA because she was unable

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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] The agency appears to have provided conflicting accounts of the date on which the grievant's FMLA leave began. While its correspondence with the grievant indicated that her FMLA leave began on January 10, 2017, the agency informed EEDR that the last day the grievant worked was January 12, 2017. This detail is ultimately immaterial to the outcome of this ruling, as EEDR finds that that the grievance should proceed to a hearing regardless of the specific date on which the grievant began using her FMLA leave.

to work when she had flare-ups from her condition, but that "[m]ost of the time" she was "able to perform all of her job duties." The agency responded on March 7, 2017, again stating that it could not "accommodate" her request for FMLA leave to restrict her from working overtime. The grievant's FMLA leave expired on April 3, 2017, and since that time she has been placed on leave without pay ("LWOP") status by the agency.

The grievant filed a grievance on March 31, 2017, challenging the agency's denial of her request for FMLA leave.[3] 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.

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.[4] Fairly read, the grievant alleges that the agency has misapplied and/or unfairly applied the statutory and/or policy provisions of the FMLA.[5] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that 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 intent of the applicable policy.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] 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."[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 this situation has resulted in a loss in pay and/or leave, the grievant has sufficiently alleged an adverse employment action.

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.[9] Under the FMLA Policy, eligible employees are

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[3] The grievant previously filed a grievance on January 30, 2017, which was administratively closed as discussed in EDR Ruling Number 2017-4518. The March 31, 2017 grievance at issue in this ruling was filed to challenge the same and/or related issues from the January 30 grievance, as they existed at the time the March 31 grievance was filed. *See* EDR Ruling Number 2017-4518.
[4] *See Grievance Procedure Manual* § 4.1.
[5] 29 U.S.C. § 2601 *et seq.*
[6] *See Grievance Procedure Manual* § 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 4.20, *Family and Medical Leave*.

entitled to receive "up to 12 weeks of unpaid family and medical leave per leave year because of their own serious health condition . . . ."[10] To be eligible for FMLA leave, an employee must "have been employed by the Commonwealth for a total of at least 12 months in the past seven years and have worked for at least 1,250 hours in the previous 12-month period . . . ."[11] The FMLA Policy provides that "[e]ligibility determinations are made as of the date that the family and medical leave is to begin."[12] In this case, there appears to be no dispute between the parties that the grievant was eligible for leave under the FMLA when she submitted her medical certification form on January 3, 2017. Indeed, the agency has applied the grievant's twelve work weeks of FMLA leave to cover her absence while the grievance advanced through the management steps, for the period between January 10 and April 3, 2017. Accordingly, EEDR finds that the grievant has raised a sufficient question as to whether she was eligible for FMLA leave.

Under the FMLA, an employee may take leave "on an intermittent basis or work a reduced schedule," so long as leave taken is "medically necessary"[13] and does not exceed 480 hours (i.e., 12 work weeks).[14] "A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday," while intermittent leave is "taken in separate blocks of time due to a single qualifying reason."[15] Regulatory guidance provides that "[a]bsences attributable to incapacity [for chronic conditions] qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days."[16]

In this case, the medical certification completed by the grievant's doctor indicates that she is able to perform the functions of her job in general, but may not work shifts greater than eight hours in length, as that requirement exacerbates her serious health condition. The agency asserts that it cannot "accommodate" the grievant's inability to work overtime. The agency has not permitted the grievant to return to work on the basis that she cannot perform the essential functions of her position, which include working overtime when directed to do so. As a result, the agency has applied the grievant's twelve weeks of FMLA leave to cover her absence since January 12, 2017, and has placed her on LWOP status since her FMLA leave was exhausted.

An employer may not "interfere with, restrain, or deny the exercise of or the attempt to exercise" any rights provided by the FMLA.[17] Any violation of the FMLA or regulations implementing the FMLA is considered interference with an employee's exercise of rights

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[10] *Id.*; *see* 29 U.S.C. § 2612(a)(1). A "leave year" is defined as the period between January 10 of one year and January 9 of the following year. *See* DHRM Policy 4.10, *Annual Leave*.
[11] DHRM Policy 4.20, *Family and Medical Leave*; *see* 29 U.S.C. § 2611(2)(A).
[12] DHRM Policy 4.20, *Family and Medical Leave*.
[13] 29 U.S.C. § 2612(b)(1).
[14] DHRM Policy 4.20, *Family and Medical Leave*; 29 U.S.C. § 2612(b)(1).
[15] 29 C.F.R. § 825.202(a).
[16] *Id.* § 825.115(f).
[17] 29 U.S.C. § 2615(a)(1); 29 C.F.R. 825.220(a).

provided by the FMLA.[18] Having considered circumstances presented by this case, the grievance has raised a sufficient question as to whether the agency's actions constitute a proper application of the FMLA Policy and, by extension, the statutory requirements of the FMLA incorporated therein. At least two courts has held that an employee with a serious health condition who is entitled to FMLA leave may use intermittent leave and/or a reduced leave schedule to alter the hours of his or her position, with the result that an employer's requirement for the employee to work mandatory overtime must be eliminated.[19] These courts further noted that there is nothing in the FMLA to limit the obligation of employers to approve such "prophylactic" leave, so long as that leave is ordered by the employee's doctor because of his or her serious health condition—i.e., so long as it is "medically necessary."[20]

In addition, the United States Department of Labor's Wage and Hour Division, which is tasked with enforcement of the FMLA,[21] has a "Frequently Asked Questions" page on its website that explicitly states "[e]mployees with proper medical certifications may use FMLA leave in lieu of working required overtime hours . . . ."[22] Regulatory guidance further states that an employee with asthma "may be unable to report to work . . . because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level."[23] In other words, there is, at a minimum, some question as to whether an employee may use FMLA leave to change her hours of work in order to avoid the onset of illness, including eliminating mandatory overtime.[24] As a result, EEDR finds that the grievant has raised a sufficient question as to whether the agency interfered with her exercise of rights under the FMLA such that qualification of the grievance is warranted.

Finally, EEDR notes that the agency's reliance on its inability to "accommodate" the grievant's request for FMLA leave is unpersuasive. Under the Americans with Disabilities Act ("ADA"),[25] 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]."[26] To the extent the agency is arguing that the ability to work overtime is an essential function of the grievant's position and eliminating the requirement that she work mandated overtime would impose an undue hardship, no such defense is available for an employee's request for leave under the FMLA.[27] In a situation where an

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[18] 29 C.F.R. § 825.220(b).
[19] Santiago v. DOT, 50 F. Supp. 3d 136, 145 (D. Conn. Sept. 25, 2014); Whitaker v. Bosch Braking Sys. Div., 180 F. Supp. 2d 922, 926-933 (W.D. Mich. Aug. 27, 2001).
[20] *Santigao*, 50 F. Supp. 3d at 145-46; *Whitaker*, 180 F. Supp. 2d at 931; *see* 29 U.S.C. § 2612(b)(1).
[21] *See* 29 C.F.R. § 825.401(a).
[22] FMLA Frequently Asked Questions, https://www.dol.gov/whd/fmla/fmla-faqs.htm.
[23] 29 C.F.R. § 825.115(f).
[24] *See Santiago*, 50 F. Supp. 3d at 144-49.
[25] 42 U.S.C. §§ 12101 *et seq.*
[26] *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.").
[27] *See Santiago*, 50 F. Supp. 3d at 148.

employee is otherwise entitled to use her statutorily mandated FMLA leave, an employer cannot deny that request solely on the basis that it would impose an undue hardship. Accordingly, EEDR finds that the the grievant has raised a sufficient question as to whether she has a serious health condition for which intermittent leave and/or a reduced leave schedule was medically necessary, and whether the agency's actions in relation to her request for FMLA leave constitute interference with the grievance's exercise of rights under the FMLA. As such, the grievance is qualified for a hearing.

In addition, the grievant appears to allege that the agency's actions violate other requirements of policy and/or law, including the ADA, or were otherwise improper. Because the grievant's claim that the agency has not complied with the requirements of the FMLA qualifies for a hearing, EEDR considers it appropriate to send any alternative theories and claims for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.[28]

Whether the grievant's claims related to the agency's denial of her request for intermittent leave and/or a reduced leave schedule under the FMLA are supported by the evidence in this case are factual determinations that a hearing officer, not EEDR, should make. At the hearing, the grievant will have the burden of proof on this issue.[29] If the hearing officer finds that the grievant has met this burden, he or she may order corrective action as authorized by the grievance statutes and grievance procedure, including back pay and restoration of benefits such as leave.[30] This qualification ruling in no way determines that any of the grievant's claims are supported by the evidence, but only that further exploration of the facts by a hearing officer is warranted.

CONCLUSION

The grievant's March 31, 2017 grievance is qualified for a hearing as described above. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for a hearing, using the Grievance Form B.

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

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Office of Equal Employment and Dispute Resolution

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[28] As with her claim that the agency has misapplied the statutory and/or policy provisions of the FMLA, the grievant will have the burden of proving that the agency's actions were inconsistent with any other requirements of policy and/or law, or were otherwise improper. *Rules for Conducting Grievance Hearings* §§ VI(C)(1), VI(C)(3).

[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).