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SECOND ADMINISTRATIVE REVIEW

In the matter of the University of Virginia Medical Center
Ruling Number 2021-5179
December 8, 2020

The University of Virginia Medical Center (“the University” or “the agency”) has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s remand decision in Case Number 11513-R. For the reasons set forth below, EDR will not disturb the remand decision.

FACTS

The relevant facts in Case Number 11513, as found by the hearing officer, were recited in EDR’s first administrative review in this matter, and they are incorporated herein by reference.¹ Following that ruling, the hearing officer reopened the record to take additional evidence on the issue of whether the grievant’s separation was consistent with the requirements of the Americans with Disabilities Act (“ADA”) and related state policies² requiring reasonable accommodation. Based on this additional evidence, the hearing officer made additional findings of fact as follows:³

Grievant worked as an Administrative Assistant with some possible contact with patients. There is no reason to believe Grievant could not perform the essential functions of her position while wearing a mask.

....

The University provides exceptions to the flu vaccine if an employee can show a [Centers for Disease Control & Prevention] contraindication for the influenza vaccine. The University accommodates these employees by permitting them to work while wearing masks without requiring them to take the flu shot.

¹ EDR Ruling No. 2021-5140, at 1-3.

² See 42 U.S.C. §§ 12101 through 12213; DHRM Policy 2.05, *Equal Employment Opportunity*.

³ Remand Decision of Hearing Officer, Case No. 11513-R (“Remand Decision”), October 26, 2020, at 2.

Based on these findings, the hearing officer determined that “wearing a mask and being exempt from taking the flu vaccine is a reasonable accommodation for Grievant.”⁴ Further, he concluded that allowing the grievant to be exempt from the flu shot and wear a mask while working did not pose an undue hardship on the University.⁵

The University now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure.”⁶ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.⁷ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁸ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

Hearing officers are authorized to make “findings of fact as to the material issues in the case”⁹ and to determine the grievance based “on the material issues and the grounds in the record for those findings.”¹⁰ Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses’ credibility, and make findings of fact. As long as the hearing officer’s findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In requesting administrative review of the remand decision in this case, the University primarily challenges EDR’s previous conclusion regarding whether the grievant could be considered an individual with a disability under the ADA who would merit an interactive process to discover potential accommodations.¹¹ The University also contends that, even if the grievant could be considered an individual with a disability, exempting the grievant from its vaccine requirement would not be reasonable and/or would impose an undue burden on the University by creating a precedent that “any individual who states that they are fearful of receiving a vaccination should be exempted.”¹²

⁴ *Id.* at 3. The hearing officer also found that the grievant had effectively requested such an accommodation when she asked to be exempt from the University’s vaccination requirement, and the “University should have examined Grievant’s request within the context of the ADA and not just under its vaccination policies.” *Id.*

⁵ *Id.* at 3-4.

⁶ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁷ See *Grievance Procedure Manual* § 6.4(3).

⁸ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

⁹ Va. Code § 2.2-3005.1(C).

¹⁰ *Grievance Procedure Manual* § 5.9.

¹¹ Request for Administrative Review at 3-5.

¹² *Id.* at 5.

Application of the ADA

In our previous administrative review, EDR concluded that the record “supports [the hearing officer’s] conclusion that the University was on adequate notice that the grievant may be entitled to an accommodation under the ADA and related state policy and, thus, it failed to engage in an interactive process to determine whether she could perform the essential functions of her job with a reasonable accommodation.”¹³ While upholding the hearing officer’s conclusion on this point, in the interests of efficiency and finality, EDR remanded the matter to the hearing officer to take evidence and make findings “as to whether the University failed to grant a reasonable accommodation to the grievant that would allow her to perform the essential functions of her job” without “impos[ing] an undue burden on the organization.”¹⁴ The parties were advised that they could request administrative review of any *new* matter addressed in the remand decision, *i.e.* any matters not resolved by the original decision.¹⁵ Because the issue of whether the agency failed to engage in a required interactive process based on the grievant’s medical history was addressed in the original hearing decision and resolved by EDR Ruling Number 2021-5140, EDR concludes that this issue is not appropriate for further review.¹⁶

That said, we will briefly address concerns that the University has articulated in its most recent request for administrative review. These concerns appear to be premised on the University’s view that it is being required to offer ADA accommodations where no disability exists, based solely on the grievant’s subjective fear of vaccines. EDR reiterates that the grievant’s disability rights are supported not by subjective fear but by her record of a physiological condition that caused her to have a severe, life-threatening reaction to the Dtap vaccine earlier in life, as well as by her current treating professional’s recommendation that she not be required to receive other immunizations as a result of that history.¹⁷ As explained in our previous ruling:

While the record is silent as to the particular mechanism that caused the grievant’s reaction to her childhood vaccine, the history she provided sufficiently implies that she may have a “physiological disorder or condition . . . affecting one or more body systems” that, when active, can substantially limit major life activities by inducing seizures and coma. That the grievant may have avoided recurrence of these reactions through the learned behavioral modification of avoiding all vaccines does not exclude her from ADA protection.¹⁸

¹³ EDR Ruling No. 2021-5140, at 5.

¹⁴ *Id.* at 10. The original hearing decision reinstated the grievant with instructions for the parties to engage in an interactive process, which the hearing officer concluded the University should have facilitated before it terminated the grievant’s employment. Decision of Hearing Officer, Case No. 11513 (“Hearing Decision”), July 6, 2020, at 6-7.

¹⁵ EDR Ruling No. 2021-5140, at 10.

¹⁶ *See, e.g.*, EDR Ruling No. 2020-5051.

¹⁷ *See* J.D. v. Colonial Williamsburg Found., 925 F.3d 663, 670-71 (4th Cir. 2019). The University asserts that the grievant herself “emphatically” denies having a disability. Request for Review at 5, 6. However, EDR’s review of the record does not reveal evidence or other statements by the grievant to indicate that she was not seeking legal disability accommodations.

¹⁸ EDR Ruling No. 2021-5140, at 7.

Thus, the grievant's eligibility for reasonable accommodation in this case is not based on a generalized and/or subjective fear of vaccines. The record presents no dispute that the grievant has a record of a condition causing a severe, life-threatening reaction to the Dtap vaccine, which has caused her to decline all other vaccines since that time, apparently in continuing consultation with personal medical providers who are in a position to provide her with individualized advice on health risks and benefits. Under the ADA, when a qualified individual with a disability effectively requests accommodations allowing her to perform the essential functions of her job, an employer may nevertheless decline to grant a proposed accommodation if it is unreasonable and/or if granting it would otherwise impose an undue hardship on the employer's operations. Consistent with our remand instructions, these issues were the focus of the remand decision.

Failure to Accommodate

As articulated in EDR Ruling No. 2021-5140, an employer generally 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]."¹⁹ ADA regulatory guidance states that, during a pandemic, "[a]n employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents [him or her] from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship"²⁰

Here, the hearing officer concluded that "wearing a mask and being exempt from taking the flu vaccine is a reasonable accommodation" for the grievant because the University provides the same accommodation to other employees.²¹ The hearing officer further determined that allowing the grievant to be one of the employees exempted from the flu vaccination requirement "does not create an undue hardship on the University."²² Finding that exemptions from the vaccination requirement indicated that the University could tolerate the risks of having at least some unvaccinated employees, the hearing officer observed that "the University presented no evidence showing the risk created by the addition of another employee who has not had the flu shot but is wearing a mask."²³

¹⁹ 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."). 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." U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, #40, Oct. 17, 2002.

²⁰ U.S. Equal Emp't Opportunity Comm'n, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, #13, Oct. 9, 2009 (updated Mar. 21, 2020) ("Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it."). Similar considerations must be made as to employees' sincerely-held religious beliefs.

²¹ Remand Decision at 3.

²² *Id.* at 3-4.

²³ *Id.* at 4.

The University challenges the hearing officer's conclusions on this point, explaining that its vaccination requirement is stringent after "experienc[ing] a near outbreak of measles" at some point in the past.²⁴ The University asserts that, based on this experience, its goal is for "95% of the relevant employee population" to be vaccinated.²⁵ Although this argument and its underlying allegations could well form the basis of an undue hardship showing with sufficient evidence in a similar case, it does not appear that the University offered such evidence at either the first or second hearing in this matter. EDR's review of the record does not reveal a foundation for the asserted 95-percent threshold and the relevant employee population, or evidence about how that threshold would be implicated by the grievant's exemption. While the University's infectious-disease expert testified as to the general scientific principles behind a policy to maximize the vaccinated employee population, the hearing officer explained that "[i]t is unclear how many employees are granted exemptions under its policy and how the number of employees and risk of infection is affected by attrition."²⁶ Upon review of the record evidence, EDR cannot say that the hearing officer erred in his consideration of the evidence, or lack thereof, on this issue.

For all of the reasons explained above, EDR does not interpret the remand decision to create the slippery slope described in the University's request for administrative review. The University expresses concern that, "[b]ased on the Hearing Officer's findings, any individual who states that they are fearful of receiving a vaccination should be exempted."²⁷ However, nothing in this ruling, the remand decision, or our first administrative review dictates such a conclusion. Rather, in this case an employee requested a vaccine exemption based on a medical condition that had had apparently caused "an unusual and exceptional event generating fear of death."²⁸ In addition, the employee's risk/benefit assessment regarding additional vaccinations was supported by her treating professional. To the extent that the University concludes that accommodating employees in similar situations creates an undue hardship on its operations, it will have the opportunity to prove as much pursuant to the ADA's accommodation framework, should those issues arise at a grievance hearing.

In sum, neither the remand decision nor our review suggests that other employees' fears must be treated as disabilities or that workforce-level risk considerations cannot establish undue hardship. Instead, this ruling concludes that the hearing officer complied with the grievance procedure in finding that the University could reasonably accommodate the grievant in this case and that no undue hardship was apparent from the evidence in the record.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer's remand decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been

²⁴ Request for Administrative Review at 5.

²⁵ *Id.*

²⁶ Remand Decision at 4.

²⁷ Request for Administrative Review at 5.

²⁸ Remand Decision at 4.

decided.²⁹ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.³⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³¹

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²⁹ *Grievance Procedure Manual* § 7.2(d).

³⁰ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³¹ *Id.*; see also Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).