Issue: Qualification – Discrimination (disability); Ruling Date: April 30, 2013; Ruling No. 2013-3556; Agency: Virginia Community College System; Outcome: Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Virginia Community College System
Ruling Number 2013-3556
April 30, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) on whether her November 28, 2012 grievance with the Virginia Community College System (the agency) qualifies for a hearing. For the reasons discussed below, this grievance qualifies for hearing.

FACTS

The grievant was employed by the agency as a Human Resources Manager. On May 18, 2012, the grievant suffered a medical issue and was admitted to the hospital until June 7, 2012. In August 2012, she temporarily returned to work; however, subsequently went on short-term disability. On November 19, 2012, the grievant's doctor faxed to the agency an authorization for the grievant to return to work with certain accommodations. Those accommodations included: "reduce the complexity of the current demands at her job. She should be allowed to perform one project at a time w[ith] appropriate time limits for completion." The following day, the agency contacted the grievant and indicated that it would be unable to accommodate this request, as it would create an undue hardship on the college and its Human Resource operations. The agency sent the grievant a letter dated November 20, 2012, indicating that because granting the requested modification would limit the grievant from performing the essential functions of her position, the agency would no longer hold her position open for her return.

On November 30, 2012, the grievant provided the agency with an updated request for the following accommodations: "light retraining on some computer systems, list (in written format) objectives/instructions for special projects as well as set realistic time limits for each task." Additionally, the letter from the grievant's doctor requesting the accommodations indicated that the grievant was able to type, answer phones, answer questions and assist clients with issues within the scope of her knowledge, and communicate effectively with others. The agency agreed to provide the grievant with computer system retraining, but refused to provide the other two requested accommodations. The agency states that essential duties of the grievant's position include "manag[ing] multiple projects requiring independent work and the shifting of priorities to serve faculty and staff." The agency asserts that granting the grievant the requested accommodations would create an undue hardship on the agency and its Human Resource operations. Thus, the agency transitioned the grievant to long-term disability status on December 8, 2012.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[1] Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried out 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 influenced management's decision, or whether state policy may have been misapplied or unfairly applied. In this case challenging her termination, the grievant has asserted claims of discrimination on the basis of disability.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[3] 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."[4] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[5] In this case, the grievant lost employment in her former position, which is clearly an adverse employment action.

Department of Human Resource Management (DHRM) Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, age, veteran status, political affiliation, genetics or *disability*."[6] Under DHRM Policy 2.05, "'disability' is defined in accordance with the 'Americans with Disabilities Amendments Act' (ADA)," the relevant law governing disability accommodations.[7] Like DHRM Policy 2.05, the ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability. A qualified individual is defined as a person with a disability, who, with or without "reasonable accommodation," can perform the essential functions of the job.[8] An individual is "disabled" if 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."[9]

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[1] Va. Code § 2.2-3004(B).
[2] *See Grievance Procedure Manual* § 4.1(b).
[3] Although for the past six years EDR has used the "materially adverse action" standard for retaliation claims, we are returning to the "adverse employment action" standard for the assessment of all claims, including retaliation, as to whether they qualify for hearing. *See* Va. Code § 2.2-3004(A).
[4] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[5] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[6] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[7] 42 U.S.C. §§ 12101 *et seq.*
[8] 42 U.S.C. § 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).
[9] 42 U.S.C. § 12102(1).

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]."[10] "Undue hardship" is defined as a "significant difficulty or expense incurred by [an agency]" upon consideration of certain established factors, including the "impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business."[11] 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."[12]

For purposes of this ruling, it is presumed that the grievant's condition meets the definition of "disability." There are sufficient facts to raise a question that the grievant meets this definition, especially in light of the broad interpretation of "disability" under the ADA.[13] Based on the grievant's assertions and the medical information she provides, she presently has an impairment that impacts her ability to concentrate. The determination of whether an impairment "substantially limits" a major life activity "is not meant to be a demanding standard" or require "extensive analysis."[14] Consequently, there has been sufficient evidence presented on this issue for the qualification stage. The focus of this ruling is whether the grievant can perform the essential functions of the job with or without "reasonable accommodation."

The agency asserts that the grievant's requests for accommodations indicate that she cannot perform the essential functions of her position. Whether a function is essential is evaluated on a case-by-case basis by examining a number of factors. The ADA provides that consideration shall be given to the employer's judgment as to what functions of a job are essential and the employer's written description for that job.[15] Other factors to consider are: (1) the amount of time spent on the job performing the function, (2) the consequences of not requiring the incumbent to perform the function, (3) the terms of any collective bargaining agreement, (4) the work experience of past incumbents in the job, and (5) the current work experience of incumbents in similar jobs.[16] Where an employee is unable to perform the essential functions of her position, she may nevertheless be entitled to reasonable accommodation by the agency. Although some courts have held that an accommodation is

[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(p).
[12] 29 C.F.R. § 1630.2(o)(3).
[13] *E.g.*, 29 C.F.R. § 1630.1(c)(4).
[14] 29 C.F.R. § 1630.2(j).
[15] 42 U.S.C. § 12111(8).
[16] 29 C.F.R. § 1630.2(n)(3).

unreasonable if it requires the elimination of an "essential function,"[17] job restructuring, part-time or modified work schedules, reassignment and "other similar accommodations for individuals with disabilities" are considered reasonable accommodations.[18]

In this case, it is unclear whether the grievant could have performed the essential functions of the Human Resources Manager position, and if not, whether a reasonable accommodation existed that would have allowed the grievant to continue employment with the agency. The grievant asserts that at no time did the agency attempt to discuss with her the essential functions of the Human Resources Manager position and which functions she may or may not be able to perform with or without accommodation. EDR's review of the documentation provided reveals nothing that would contradict this statement, and we find these questions to be appropriately determined at hearing. For example, the grievant's doctor advised that she was able to "answer questions and assist clients with issues pertaining to the scope of her training and knowledge. She is also able to communicate effectively with staff and clients." In light of such evidence, we find that sufficient questions of fact exist regarding the grievant's ability to perform essential functions of her job, warranting further exploration of this issue by a hearing officer. Finally, the grievant indicates that her condition is one which will improve over time and she expects accommodations to be temporary as she recovers. Indeed, the accommodations requested by the grievant in November 2012 may no longer be needed in order for her to perform the functions of her job. However, as these analyses are highly factual, we find that under the facts and circumstances of this case, these questions should be determined by a hearing officer.

In accordance with the *Rules for Conducting Grievance Hearings*, the hearing officer shall have the authority, if he or she finds that discrimination or other improper action occurred in this case, to order the appropriate corrective actions regardless of the timing of the initiation of this grievance.[19] This relief may include, but shall not be limited to, ordering the reinstatement of the grievant with backpay, appropriate attorney's fees, and ordering the agency to create an environment free from discrimination.[20] In short, the hearing officer will have authority to put the grievant back to the point she was prior to the alleged failure to accommodate, if the grievant's claims are substantiated.

To the extent that the grievant has also asserted additional claims and theories regarding the denial of requested accommodations and subsequent loss of employment, EDR deems it appropriate to send all alternative theories and claims raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

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[17] Hill v. Harper, 6 F. Supp.2d 540, 544 (E.D.Va. 1998) (citing Hall v. U.S. Postal Service, 857 F.2d 1073, 1078 (6th Cir. 1988)).

[18] 42 U.S.C. § 12111(9)(B); EDR Ruling No. 2004-879; *see also* Cravens v. Blue Cross & Blue Shield, 214 F.3d 1011, 1017-19 (8th Cir. 2000) (holding that reassignment was a reasonable accommodation where employee could not perform essential functions of current job); EEOC v. Stowe-Pharr Mills, Inc., 216 F.3d 373, 377 (4th Cir. 2000); Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 677 (7th Cir. 1998) ("The option of reassignment is particularly important when the employee is unable to perform the essential functions of his or her current job, either with or without accommodation or when accommodation would pose an undue hardship for the employer.").

[19] *Rules for Conducting Grievance Hearings* § VI(C)(3).

[20] *See Rules for Conducting Grievance Hearings* § VI(D), (E).

CONCLUSION

The grievant's November 28, 2012 grievance is qualified for hearing. This qualification ruling in no way determines that the agency's actions were discriminatory or otherwise improper, but rather only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer, using the Grievance Form B.

EDR's qualification rulings are final and nonappealable.[21]

Christopher M. Grab
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[21] Va. Code § 2.2-1202.1(5).