Issues: Qualification – Discrimination (Disability and Other), and Retaliation (Other Protected Right); Ruling Date: May 10, 2013; Ruling No. 2013-3567; Agency: Department of Motor Vehicles; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Motor Vehicles
Ruling Number 2013-3567
May 10, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") on whether her December 6, 2012 grievance with the Department of Motor Vehicles (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On December 6, 2012, the grievant initiated a grievance challenging a number of agency actions, which she asserts were taken in retaliation for her workers' compensation claims. Specifically, the grievant alleges that the agency failed to accommodate her request for reasonable accommodation, delayed in adjusting her leave time, denied her the opportunity to work overtime or obtain outside employment, denied her opportunities for advancement, and otherwise harassed and discriminated against her. She also asserts that the agency has discriminated against her because of an actual or perceived disability and has violated Executive Order 109.[1] After the parties failed to resolve the grievances during the management resolution steps, the grievant asked the agency head to qualify the grievances for hearing. The agency head denied the grievant's request, and the grievant now seeks a qualification ruling by 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.[2] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] Thus, claims relating to issues such as to the methods, means, and personnel by which work activities are to be carried

[1] In particular, the grievant alleges that the agency has failed to follow Executive Order ("E.O.") 109 "in regards to the return to work program." To the extent that E.O. 109 arguably mandates agencies to perform actions with respect to individual employees, those duties are not more expansive than the duties imposed by the Americans with Disabilities Act, as incorporated by Department of Human Resource Management ("DHRM") Policy 2.05, *Equal Employment Opportunity*. Accordingly, we will merge the grievant's assertions regarding E.O. 109 into our discussion of that policy.
[2] *See Grievance Procedure Manual* § 4.1.
[3] *See* Va. Code § 2.2-3004(B).

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 improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.

Failure to Accommodate

The grievant asserts that since her return from surgery related to a work-related injury, the agency has delayed in providing reasonable accommodations for her physical disabilities. In particular, she alleges that she has requested a chair, step stool and a floor mat, but that these items have not been timely provided. 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*."[4] Under DHRM Policy 2.05, "'disability' is defined in accordance with the 'Americans with Disabilities Act'," the relevant law governing disability accommodations.[5] Like DHRM Policy 2.05, the Americans with Disabilities Act (ADA) prohibits employers from discriminating on the basis of disability against a qualified individual.[6] A qualified individual with a disability is a person who, with or without "reasonable accommodation," can perform the essential functions of the job.[7] An individual is "disabled" if she "(A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment."[8]

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]."[9] "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."[10] 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."[11]

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[4] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[5] 42 U.S.C. §§ 12101 *et seq.*
[6] 42 U.S.C. § 12112(a).
[7] 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).
[8] 42 U.S.C. § 12102(1).
[9] 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.").
[10] 29 C.F.R. § 1630.2(p).
[11] 29 C.F.R. § 1630.2(o)(3).

In this case, it appears that the grievant, her medical providers, insurance case managers, and the agency have been in discussions over a prolonged period in an effort to address the grievant's request for accommodations. While the grievant asserts that the agency has wrongfully failed to provide her the accommodations required, it appears from the record that the agency has attempted to adjust her work counter to an appropriate height,[12] provided a chair that the grievant rejected because of its condition, and offered to provide the grievant a mat, which she appears to have rejected because it was not the type she requested. To the extent there has been delay, it appears to be primarily due to the nature of the interactive process and the agency's legitimate efforts to determine, from the grievant, her medical providers and the case managers, what actions are medically necessary and appropriate for the grievant's condition.

As of the agency head's qualification decision in this grievance, the agency had arranged for a rehabilitation specialist from the Department of Rehabilitative Services to meet with the grievant to assess workplace accommodations. The agency has now ordered a new chair for the grievant and has provided the grievant with a fatigue mat and step stool. Under these circumstances, we find that the grievant has not raised a sufficient question that the agency has failed to satisfy its duty to provide reasonable accommodations. While delays of this type are unfortunate, it appears that this accommodation process is still ongoing. Accordingly, this claim is not qualified for hearing at this time.[13]

Other Alleged Retaliation and Discrimination

The grievant further asserts that the agency has retaliated and discriminated against her by failing to calculate her leave time following her most recent workers' compensation claim, denying her job opportunities, refusing to allow her to work overtime or have a part-time job, failing to provide her with training, having to cross-train, and harassing her regarding her disability, including "a disabled parking placard being expired when it was not." For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[14] (2) the employee suffered an adverse employment action[15]; and (3) a causal link exists between the adverse employment action and the

[12] In December 2011, after the grievant and her medical provider advised the agency that sitting was "not recommended" for someone with her diagnosis, the agency hired a private firm to raise the counter height and provided her with a higher stool. After some confusion between the parties and at least one attempt to change the height of the grievant's desk, which apparently need further adjustments, the agency counseled the grievant that it is important that requests for accommodation should be made in writing and supported by her medical provider, so that accommodations could be provided satisfactorily. Although the grievant asserts that this "scolding" response constitutes harassment, it appears instead to be an effort by the agency to gain clarity under the circumstances regarding appropriate and medically warranted accommodations.

[13] Should the situation evolve or additional issues arise regarding the grievant's allegations that the agency is not providing reasonable accommodations in an appropriate and/or timely manner, this ruling in no way prevents the grievant from raising such matters in a new grievance.

[14] *See* Va. Code § 2.2-3004(A) and *Grievance Procedure Manual* § 4.1(b)(4).

[15] As noted in EDR Ruling Nos. 2013-3446, 2013-3447, 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).

protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.[16] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[17]

Similarly, for a claim of disability discrimination to qualify for hearing, there must be more than a mere allegation that discrimination has occurred. Rather, there must be facts that raise a sufficient question as to whether any adverse employment actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[18]

In this case, the grievant has demonstrated that she engaged in protected activity, at a minimum, through initiating previous workers' compensation claims. She has also presented evidence raising a sufficient question of an actual or perceived disability. Further, the grievant's claims regarding leave time and employment opportunities could constitute adverse employment actions. 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."[19] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[20] However, the grievant has failed to offer sufficient evidence that the challenged actions were taken in retaliation for her previous workers' compensation claims or to discriminate against her because of her disability status.

The leave issues raised by the grievant appear to result in part from a clerical error and have since been corrected. Further, while the agency concedes there has been some delay in processing the grievant's leave, that delay appears to result primarily from the need for the agency to interact with the third party workers compensation administrator, as well as the grievant's delay in reporting leave, rather than any intent to discriminate or retaliation against the

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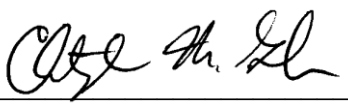
[16] *See*, *e.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).
[17] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10 (1981).
[18] *See* Hutchinson v. INOVA Health System, Inc., Civil Action No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. April 8, 1998).
[19] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[20] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007). Her claims regarding cross-training and the disabled parking placard do not rise to this level, as they do not constitute actions having a significant adverse effect on the terms, conditions or benefits of her employment. As such, these claims do not qualify for hearing. While the grievant's allegation that employees who came to her facility after her were given more extensive training presents a closer call, the grievant does not assert that the lack of training constituted a significant change in employment status. Further, even if the allegedly less extensive training were considered to constitute an adverse employment action, the claim would nevertheless not qualify for hearing because the grievant has not provided any evidence that it was the result of a retaliatory or discriminatory motive.

grievant. The remainder of the leave sought by the grievant was apparently addressed in a 2011 adjudication by the Virginia Workers' Compensation Commission and cannot be readjudicated through the grievance process. With respect to the grievant's claim that she has been denied employment opportunities, she has not presented evidence to show that any denial was the result of a retaliation or discrimination rather than the appropriate application of state and agency hiring policies.[21]

The agency's policy of limiting the ability of an employee taking medical leave for a work-related injury to work overtime or have a part-time job is more troubling. While this was a blanket policy not targeted at the grievant, and therefore not taken with a retaliatory or discriminatory motive toward her, it arguably singled out for an adverse effect those employees seeking treatment for injuries covered by workers' compensation. However, the challenged policy has since been discontinued by the agency, and the grievant has been advised that she may work overtime or seek part-time employment in accordance with general policies on employment. As a consequence, even assuming that such a policy evidenced an improper motive toward the grievant, qualification would nevertheless not be warranted, as a hearing officer would not be able to grant meaningful relief on this issue.[22]

CONCLUSION

For all the foregoing reasons, the grievant's December 6, 2012 grievance does not qualify for hearing. EDR's qualification rulings are final and nonappealable.[23]



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[21] In an apparent effort to resolve the grievance, the second-step respondent indicated that the agency would be willing to help the grievant make a lateral transfer to another work assignment. The grievant wrote in response, "Not intereste[d]/not an option."

[22] We note that in this case, the grievant has not shown any specific economic loss she suffered because of the agency's policy during the 30 days preceding the grievance. *See Rules for Conducting Grievance Hearings* at § VI.A (limiting a hearing officer's authority to awarding pay for the 30 day period prior to the initiation of the grievance). To the contrary, the only period she identifies in which she tried to work overtime was in 2010, and overtime is apparently not available to any employees in her current assignment.

[23] Va. Code § 2.2-1202.1(5).