Issues: Qualification – Benefits (VSDP) and Retaliation (complying with any law); Ruling Date: September 12, 2013; Ruling No. 2014-3666; Agency: Department of Corrections; 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 Corrections
Ruling Number 2014-3666
September 12, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether her May 20, 2013 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

The grievant is employed as a Correctional Officer with the agency. On or about April 24, 2013, the grievant submitted a request for reasonable accommodation due to a right tibial stress fracture. The employee's physician explained that the grievant's injury required "limited standing/walking" and stated that she could perform some limited job functions. The agency denied the grievant's request, explaining that Operating Procedure 101.5 prohibits granting any accommodation that would compromise public safety.[1] As a result, the grievant was required to use annual leave and Family and Medical Leave Act ("FMLA") leave.

On or about May 20, 2013, the grievant initiated a grievance to challenge the agency's denial of her request for accommodation. After the grievance had proceeded through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.[2]

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[3] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out "shall not proceed to a hearing"[4] unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or

[1] *See* Department of Corrections ("DOC") Operating Procedure 101.5, *Reasonable Accommodations*, at § IV(G).
[2] On or about June 1, 2013, the grievant was released by her physician to full duty with no restrictions. This ruling, therefore, will address the grievant's claims only as they relate to the period during which she would have required a reasonable accommodation.
[3] *See* Va. Code § 2.2-3004(B).
[4] *Id*. at § 2.2-3004(C).

whether state or agency policy may have been misapplied or unfairly applied.[5] In this case, the grievant has alleged that the agency misapplied and/or unfairly applied Operating Procedure 101.5 by denying her request for accommodation. The grievant also claims the refusal was "retaliatory in nature."

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 the grievant's use of FMLA leave resulted in a loss in pay and/or leave, she has alleged an adverse employment action.

Failure to Accommodate

While the grievant has not explicitly stated her claim as such, her request for reasonable accommodation may be fairly interpreted as challenging the agency's determination not to provide a reasonable accommodation according to the requirements of the Americans with Disabilities Act ("ADA"). 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, age, veteran status, political affiliation, genetics or *disability*."[9] Under DHRM Policy 2.05, "'disability' is defined in accordance with the [ADA]," the relevant law governing disability accommodations.[10] Like DHRM Policy 2.05, the ADA prohibits employers from discriminating "against a qualified individual on the basis of disability."[11] A qualified individual is a person who, with or without "reasonable accommodation," can perform the essential functions of her job.[12] 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."[13]

An individual with a disability is "qualified" for her particular position if she "satisfies the requisite skill, experience, education, and other job-related requirements" of that position.[14] The determination of whether an individual with a disability is qualified "should be based on [her] capabilities . . . at the time of the employment decision," i.e., at the time the employee

[5] *Id*.; *Grievance Procedure Manual* §§ 4.1(b), (c).
[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).
[9] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[10] 42 U.S.C. §§ 12101 *et seq.*
[11] *Id*. at § 12112(a).
[12] *Id*. at § 12111(8); 29 C.F.R. § 1630.2(m).
[13] 42 U.S.C. § 12102(1).
[14] 29 C.F.R. § 1630.2(m); *see* 42 U.S.C. § 12111(8).

submits a request for accommodation.[15] The agency has not argued that the grievant was not qualified for her position at the time she requested accommodation, and in the absence of evidence to the contrary this ruling will assume the grievant was a qualified individual.

This ruling will consider the grievant's physical impairment, a stress fracture of the right tibia, as a claim of actual disability in the form of an "impairment that substantially limits" a major life activity.[16] An impairment of this type is substantially limiting if it affects the "ability of an individual to perform a major life activity as compared to most people in the general population."[17] "Major life activities" include physical activities such as "*walking, standing,* lifting, [and] bending."[18] 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.[19] The ADA's primary purpose is 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."[20] 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.[21] For example, regulatory guidance indicates that "an impairment resulting in a 20-pound lifting restriction" lasting for several months is substantially limiting.[22] Many courts, however, have held that temporary impairments, specifically including broken limbs, are not substantially limiting and therefore do not qualify as disabilities for purposes of the ADA.[23]

In this case, the grievant was unable to walk either for prolonged periods of time or without assistance for a period of approximately one month, between her request for accommodation on April 24, 2013 and when she was cleared for work with no restrictions on or about June 1, 2013. While her injury healed, the grievant needed to use a walker so that her leg would "remain non-weight bearing to allow for fracture healing" and also to assist her with

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[15] 29 C.F.R. app. § 1630.2(m).

[16] 42 U.S.C. § 12102(1). The grievant has not argued that she has a "record of" an impairment or has been "regarded as" having an impairment by the agency. *See id.*

[17] 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*. at § 1630.2(j)(1)(iv).

[18] 42 U.S.C. § 12102(2)(A) (emphasis added); 29 C.F.R. § 1630.2(i)(1)(i).

[19] 29 C.F.R. § 1630.2(j)(1)(ii).

[20] *Id*. at § 1630.1(c)(4). "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." *Id*.

[21] *Id*. at § 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.

[22] 29 C.F.R. app. § 1630.2(j(1)(viii).

[23] *E.g.*, Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 554 (7th Cir. 2011) (stating that "temporary restrictions, with little or no long-term impact, are not substantially limiting"); EEOC v. Chevron Phillips Chem. Co., LP, 570 F.3d 606, 619 (5th Cir. 2009) (noting that temporary and non-chronic impairments, such as broken limbs and concussions, are usually not disabilities). Similarly, legislative intent indicates that "[i]mpairments that last for only a short period of time are *typically not* covered, although they may be covered if sufficiently severe." 154 Cong. Rec. H6068 (2008) (Joint Statement of Representatives Hoyer and Sensenbrenner on the Origins of the ADA Restoration Act of 2008, H.R. 3195) (emphasis added). Congress' intent seems to have been to allow courts to consider "[t]he duration of an impairment" as a factor "in determining whether the impairment substantially limits a major life activity" consistent with the current law on this issue. *Id*.

walking and standing. Agency policy, however, states that it is prohibited to bring any item that "an offender might . . . possess . . . for the purpose of . . . inflicting death or bodily injury" within the secured perimeter of a facility, including medical devices that may pose such a security risk.[24] Because the grievant works in the secured area of her facility, she could not use a walker while at work. Consequently, her physician stated that she was "restricted to light duty" at work and "[needed] to be sitting" in order for her leg to properly heal.

The physician further explained that, without a walker, the grievant could work in the control booth "in any building within a 1-3 min. [sic] walking radius," drive a vehicle, assist with "visitation shakedown/employee shakedown," or work in the mail room. The grievant was, therefore, clearly limited to some extent in her ability to walk "as compared to most people in the general population" during that time, even though her impairment was short in duration, non-chronic, and did not result in any serious or long-term side effects or complications.[25] For purposes of this ruling only, we will assume without deciding that the grievant's impairment was substantially limiting and that she was, therefore, disabled according to the provisions of the ADA.

An individual with a disability who is otherwise qualified is entitled to reasonable accommodation only if she can perform the essential functions of her job, either with or without such accommodation.[26] Essential functions are the "fundamental job duties" of the employee's position, and may be essential, for example, because "the reason the position exists is to perform that function," because a limited number of employees can perform that function, or because it is "highly specialized."[27] In determining what functions are essential, factors such as the employer's judgment as to what functions are essential, written job descriptions, the amount of time spent performing particular functions, and past or present work experience of others in the same or similar jobs are relevant.[28]

Here, the grievant's Employee Work Profile ("EWP") states that the purpose of her position is to "[m]aintain security, custody, and control over inmates" at her facility, and a significant portion of her core job responsibilities require mobility. For example, the grievant must be able to ensure the safety of offenders through "supervision, control, and observation," control security at the facility by using "institutional equipment" such as gates and doors, and "conduct[] searches" for contraband. Furthermore, the agency's list of the physical requirements of the grievant's job specifically includes walking, standing, and other types of physical activity that require the ability walk and/or stand unaided. Standing and walking are, therefore, clearly necessary to perform the grievant's job tasks and responsibilities, and, accordingly, walking and standing are essential functions of the grievant's position.

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[24] DOC Operating Procedure 802.1, *Offender Property*, at § III; *see also* DOC Operating Procedure 101.5, *Reasonable Accommodations*, at § IV(G)(3)(j).
[25] 29 C.F.R. § 1630.2(j)(1)(ii).
[26] *See* 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).
[27] 29 C.F.R. §§ 1630.2(n)(1), (2); *see* 42 U.S.C. § 12111(8). "The inquiry into whether a particular function is essential . . . focuses on whether the employer actually requires employees in the position to perform the functions" that are considered essential. 29 C.F.R. app. § 1630.2(n).
[28] 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n)(3).

The term "reasonable accommodation," in the context of an employee currently performing in her position, means a "modification[] or adjustment[] to the work environment" or the "manner or circumstance under which the position . . . is customarily performed" such that the disabled individual can perform the position's essential functions.[29] Reasonable accommodation may include "job restructuring, part-time or modified work schedules, [or] *reassignment to a vacant position*."[30] In the case of reassignment, only positions that are vacant at the time of the request for accommodation, or that will be available within a reasonable time, must be considered.[31]

The grievant works within the secured perimeter of her facility, and, as stated above, assistive devices such as walkers may not be taken into that area for safety reasons. Based on the information presented to EDR, it appears the grievant was unable to walk or stand for more than one to three minutes at a time without the use of a walker, and thus it does not appear that any accommodation would have allowed her to walk and stand inside the facility's secured area and perform the essential functions of her job. Only reassignment to an unsecured area, where she could have used a walker, would have sufficed. At the time of the grievant's request, there were no positions available for reassignment outside the facility's secured area that either did not require walking and standing, or in which the grievant would have been able to walk and stand with assistance from a walker or other medical device. Consequently, no reasonable accommodation would have enabled the grievant to perform the essential functions (i.e., walking and standing) of her position or of any vacant position to which she could have been reassigned, and as a result the agency was not required to provide her with an accommodation. The grievance does not, therefore, raise a sufficient question as to whether the agency failed to provide a reasonable accommodation under the ADA. Thus, the grievance does not qualify for a hearing on this basis.

Misapplication/Unfair Application of Agency Policy

The grievant further argues that the agency misapplied Operating Procedure 101.5 by its "refusal to consider reasonable accommodation for [her] injuries." She also claims that the agency has unfairly applied that policy to her because other employees, both at her facility and elsewhere, "have received reasonable accommodations for their injuries." 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.

DOC Operating Procedure 101.5, *Reasonable Accommodations*, establishes a two-part classification system for accommodation requests. Accommodations lasting 90 days or less are

[29] 29 C.F.R. § 1630.2(o)(1)(ii).
[30] 42 U.S.C. § 12111(9)(B) (emphasis added); 29 C.F.R. § 1630.22(o)(2)(ii). However, "[r]eassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions . . . ." 29 C.F.R. app. § 1630.2(o).
[31] 29 C.F.R. app. § 1630.2(o).

evaluated by the requesting employee's Organizational Unit Head.[32] All other requests for accommodation are reviewed by the agency's ADA Committee.[33] Operating Procedure 101.5 also states that "[w]hen . . . accommodation is requested by security employees [or employees who work within a secured perimeter of a correctional facility], the first priority must be public safety," including the safety of employees, members of the public, and offenders.[34] Any request that precludes the priority of public safety "shall not be authorized."[35] Examples of impermissible accommodations include those that would "preclud[e] an officer from being available to stand all posts" or "limit[] or eliminate[] the performance of any essential job functions."[36]

Because the grievant sought an accommodation for fewer than 90 days, her request was reviewed by her Organizational Unit Head. As a Correctional Officer, the grievant is a security employee whose job duties require the "immediate control, supervision, and custody of offenders" confined in the facility at which she works.[37] Therefore, the grievant's request was subject to review according to the terms of Operating Procedure 101.5 as it applies to employees who work in secured areas of correctional facilities. The grievant's physician stated that the grievant could only perform the following tasks: working in the control booth in any building within a one- to three-minute radius; driving a vehicle; assisting with visitation and employee shakedown, and working in the mail room. The physician also explained that the grievant "need[ed] to be sitting" because of her leg injury. In other words, the grievant was not cleared by her physician to perform all job functions inside the facility's security perimeter. Relying on these facts, the agency determined that the grievant would not be "available to stand all posts" or perform all essential job functions if her accommodation were approved.

The grievant argues that the agency unfairly applied Operating Procedure 101.5 because "numerous employees" at her facility and elsewhere have requested and received accommodations, while her own request was denied. For example, she claims that two correctional officers returned to work after surgery and received approval to work with job modifications. The agency confirmed that these two employees received accommodations consisting of shorter shifts and lifting restrictions. Two other correctional officers identified by the grievant also received approval for accommodations that consisted of limited walking on certain surfaces and no prolonged walking, climbing, and bending or stooping.

Based on the information presented, we are not convinced that the agency denies all requests for accommodation that "preclud[e] an officer from being available to stand all posts" or "limit[] or eliminate[] the performance of any essential job functions."[38] Indeed, it seems that at least some of the employees referenced by the grievant must have received some type of modification to the performance of their job responsibilities in order to work while subject to

[32] DOC Operating Procedure 101.5, *Reasonable Accommodations*, § IV(A)(2).
[33] *Id*. at § IV(A)(3).
[34] *Id*. at § IV(G)(1).
[35] *Id*. at § IV(G)(2).
[36] *Id*. at §§ IV(G)(3)(e), (i).
[37] *Id*. at § III.
[38] *Id*. at §§ IV(G)(3)(e), (i).

restrictions, despite the agency's claims otherwise. However, we also find that the agency did not unfairly apply Operating Procedure 101.5 to the grievant as compared with the employees in question. The employees cited by the grievant received accommodations in the form of lifting restrictions, modifications to the length of their work hours, and limitations on walking and other physical duties in certain circumstances. The grievant's request for accommodation, in contrast, explicitly stated that she could not perform any tasks that required standing or walking for more than one- to three-minute periods, and as a result the agency was unable to assign her to positions that would have required a greater degree of mobility. Limiting an employee from walking for prolonged periods is different than accommodating an employee who is unable to walk for more than one to three minutes. It seems, from the information presented, that the restrictions ordered by the grievant's physician would have completely prevented her from working inside the secured area of her facility because she was unable to reach any position to which she could have been assigned during the one to three minutes for which she could walk. The facts, therefore, do not support a conclusion that the agency's action was inconsistent or otherwise arbitrary or capricious because other employees did not receive accommodations similar to what was requested by the grievant.

There are facts in the grievance record that support the agency's conclusion that the grievant's request for accommodation, if approved, would have jeopardized security and public safety at the facility according to the terms Operating Procedure 101.5. Furthermore, the grievant has not presented evidence that raises a question as to whether the agency may have unfairly applied the policy to her. The grievance procedure accords significant discretion to management in the administration of its policies and standard facility operating procedures.[39] The agency appears to have followed its policy regarding the approval of requests for accommodation, and EDR will not second-guess management's decisions regarding the administration of its procedures absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[40] The grievant has not presented facts that raise a question as to whether the agency violated a mandatory provision of Operating Procedure 101.5 or that the agency unfairly applied the policy to her. As a result, the grievance does not qualify for a hearing on this basis.

Retaliation

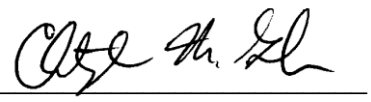
In addition, the grievant claims that the agency's denial of her request for accommodation was retaliatory. For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[41] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the

[39] *See, e.g.*, EDR Ruling No. 2011-2903.
[40] *See, e.g.*, EDR Ruling No. 2009-2090. An arbitrary or capricious decision is defined as a decision made "[i]n disregard of the facts or without a reasoned basis." *Grievance Procedure Manual* § 9.
[41] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

adverse employment action and the 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 employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[42] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[43]

In this case, the grievant seems to allege that the agency retaliated against her for requesting an accommodation under the ADA. The ADA protects employees from retaliation for enforcing or attempting to enforce its provisions, and thus the grievant's request was a protected activity.[44] As stated above, the grievant also suffered an adverse employment action because the denial of her request resulted in a loss of wages through her use of annual and FMLA leave to cover her absence. The grievant has not, however, established a retaliatory connection between her request and the agency's denial. The grievant must present more than a mere allegation of retaliation – there must be facts that raise a question as to whether the agency denied her request for accommodation for a retaliatory reason. While there is, necessarily, a connection between her request and the agency's denial of the request, the denial was based on the agency's interpretation of the requirements of Operating Procedure 101.5, as discussed above. This fact does not, by itself, raise a question as to whether the grievant's request for accommodation was denied for a retaliatory reason and, in the absence of additional evidence, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[45]



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[42] *E.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).
[43] *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981).
[44] *See* 42 U.S.C. § 12203; 29 C.F.R. § 1630.12.
[45] Va. Code § 2.2-1202.1(5).