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QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2020-5011
January 2, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Virginia Department of Human Resource Management ("DHRM")[1] on whether her October 30, 2019 grievance with the Department of Behavioral Health and Developmental Services (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is partially qualified for a hearing.

FACTS

The grievant was employed at an agency hospital as a Staffing Scheduler. On February 26, 2019, she began a period of short-term disability ("STD") leave related to a mental health condition.[2] In May 2019, while the grievant was still on leave, the hospital adjusted the responsibilities for Staffing Schedulers to incorporate a category of duties classified as "Accountability." These tasks deployed non-clinical staff (such as the grievant) to provide certain aspects of direct patient care, acting as "personal care sitters" who would monitor patients as needed to ease demands on medical staff's time. Before the grievant's STD leave, the hospital permitted, but did not require, Staffing Schedulers to perform Accountability tasks. The grievant had declined to take on these tasks due to a physical medical condition, which had unpredictable symptoms that could interrupt patient monitoring.[3]

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] The grievant alleges that, during January and February 2019, her supervisor counseled her and threatened her with additional disciplinary action (by making statements such as "prepare yourself" and "heads will be rolling") for reasons the grievant considered groundless. The grievant characterizes her supervisor's conduct as "harassment, bullying and threatening."

[3] The grievant alleges that this medical condition did not impair her ability to perform her job duties before those duties included "Accountability" tasks.

The grievant returned to work in June 2019. Shortly thereafter, her supervisor ordered her to complete Accountability training.[4] When the grievant reminded her supervisor of her medical restrictions for Accountability tasks, the supervisor referred her to the hospital's human resources staff, who allegedly sent the grievant home pending medical documentation of her restrictions for Accountability tasks. As of June 17, 2019, the grievant began another period of short-term disability leave due to a relapse of her mental health condition.[5]

After exhausting her STD benefits, the grievant returned to work on August 19, 2019.[6] On the understanding that she was to provide a documented medical excuse from Accountability tasks, the grievant submitted a medical release to return to work with restriction to "desk duty only." The grievant's supervisor and human resources staff allegedly expressed confusion about the restriction and said the agency could not accommodate the grievant without a more detailed explanation of her restrictions. Within 24 hours, the grievant produced a doctor's note stating: "I recommend [the grievant] to return to work for desk duty with following restriction. To avoid prolong walking, climbing or lifting. Avoid direct patient care." The hospital's human resources staff sought additional clarification as to what constituted "prolong[ed] walking." The grievant replied she believed it meant "no long distance walking" or "no walking back and forth on the floor."

Apparently concluding that the grievant could not return to her position as a Staffing Scheduler, the hospital reassigned her to a "temporary" position in the Information Technology department. On August 29, 2019, human resources staff at the agency's central office explained that the new assignment would be in effect "until we gather more medical information from your doctor or until it is no longer a business need." However, on September 18, 2019, hospital staff advised the grievant by letter that "[t]ransitional duty is only for thirty (30) calendar days," although the agency was extending this period for nine additional days to conclude on September 30, 2019. The letter further advised: "If you are unable to return to work full-time/full-duty and perform the essential functions of your Employee Work Profile as a Direct Service Associate III/Staffing Scheduler by October 1, 2019, you will be separated from your position and transition into long-term disability . . . ." On October 1, 2019, the grievant produced a medical excuse from work for September 30 to October 7. On October 3, 2019, the agency advised the grievant by letter that her "long-term disability – working (LTD-working) benefit period ended on September 30, 2019. . . . *Therefore, your position will not be held for you and your active employment with the Commonwealth of Virginia will cease at the conclusion of your long-term disability – working period.*"

On October 30, 2019, the grievant filed a grievance alleging disability discrimination. She contended that, following her STD period, her job was not held open, her assigned duties were

[4] According to the grievant, she had told her supervisor the previous year that she could not take on Accountability tasks for medical reasons. The grievant alleges that her supervisor told her that she was being assigned Accountability tasks because the position she had held prior to her STD leave had been filled. The agency maintains that it kept the grievant's position open during her STD leave, using temporary employees to assist during her absence.

[5] The grievant attributes the relapse to further threats of unfounded discipline by her supervisor.

[6] During the final week of the grievant's STD leave, her supervisor allegedly had an assistant ask the grievant to come to work for a meeting. The grievant asked if the meeting could wait until she returned to work the following week, considering that she was still on leave and lived over an hour's drive from the hospital. According to the grievant, her supervisor and human resources staff arranged to meet with her on the morning of her return but did not explain the purpose of the meeting.

increased for retaliatory reasons to incorporate duties she could not perform, and her health insurance benefits were erroneously deactivated. She sought reinstatement to "full time employment status." Following an agreed-to abbreviation of the management resolution steps, the agency head declined to qualify the grievance for a hearing, partially on grounds that the hospital "made efforts to provide reasonable accommodations to you during your employment and assist you with the medical leave process." The agency head further explained: "You were unable to return to work full-duty because your physician did not provide a medical release prior to [October 1, 2019]." The grievant now appeals that determination to EDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[7] Thus, by statute and under the grievance procedure, complaints relating solely to issues such as the hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to a hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[8] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the facts must 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."[9] Thus, typically, the 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."[10] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[11] In this case, the grievant experienced an adverse employment action because she was separated from her position.[12]

Disability Discrimination – Failure to Accommodate

Fairly read, the grievance contends that the agency failed to reasonably accommodate the grievant's medical condition and otherwise took adverse actions against her because of an actual or perceived impairment, in violation 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, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or *disability*. . ."[13] Under this policy, "'disability' is defined in accordance with the [ADA]", the relevant law

[7] *See* Va. Code § 2.2-3004(B).
[8] *Id.* § 2.2-3004(C); *See Grievance Procedure Manual* §§ 4.1(b), (c).
[9] *See Grievance Procedure Manual* § 4.1(b).
[10] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[11] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[12] According to the grievant, she also lost health insurance benefits at the conclusion of her STD leave, incurring provider costs as a result.
[13] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).

governing disability accommodations.[14] Like Policy 2.05, the ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.[15] A qualified individual is defined as a person who, "with or without reasonable accommodation," can perform the essential functions of the job.[16]

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]."[17] "Reasonable accommodations" include "[m]odifications or adjustments that enable [an employee] with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[18] 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."[19] Under the ADA, an employer is not required to approve the exact accommodation requested by an employee if some other accommodation is available that will allow her to perform the essential functions of her position.[20]

In this case, the grievant's federal and state disability rights interact with her disability benefits as provided by DHRM Policy 4.57, *Virginia Sickness and Disability Program*. Policy 4.57 entitles employees eligible for STD to receive income "for up to 125 workdays when the employee is unable to work due to an illness or injury that has been qualified by the [state's third-party benefits administrator]."[21] Under Policy 4.57, "[a]gencies may allow employees to [return to work] full-time/full-duty, no restrictions, if they present a doctor's note with full [return to work] indicated."[22] If an employee provides a medical release to return to work *with* restrictions, "the

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[14] *Id.*; *see* 42 U.S.C. §§ 12101 through 12213. A disability may refer to "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ." 42 U.S.C. § 12102(1). Because the record presents no dispute on this issue, EDR presumes for purposes of this ruling that the grievant satisfies the definition of an individual with a disability.

[15] 42 U.S.C. § 12112(a).

[16] *Id.* § 12111(8); 29 C.F.R. § 1630.2(m).

[17] 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.").

[18] 29 C.F.R. § 1630.2(o)(1)(iii); *see* 42 U.S.C. § 12111(9)(B). A reasonable accommodation encompasses "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. pt. 1630 app. § 1630.2(o).

[19] 29 C.F.R. § 1630.2(o)(3).

[20] *See id.* pt. 1630 app. § 1630.9 (stating that an employer should conduct an individualized assessment of the employee's limitations and the job, then "select and implement the accommodation that is most appropriate for both the employee and the employer"); *see also* EEOC Fact Sheet, *Work at Home/Telework as a Reasonable Accommodation*, https://www.eeoc.gov/facts/telework.html.

[21] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 13.

[22] *Id.* at 33.

agency must review the request and determine if the restrictions can be accommodated."[23] If so, "then the employee may [return to work] immediately."[24]

When an employee's maximum STD period expires, eligible employees may claim long-term disability ("LTD") benefits that "provide employees with income replacement if they become disabled and are unable to perform the full duties of the job without any restrictions."[25] One form of LTD is LTD Working status ("LTD-W"), which is in effect when (as relevant here) "[e]mployees working during STD (modified schedule or with restrictions) continue to work for their agency from STD working status into LTD for 20 hours or more per workweek in their own full-time position." Policy 4.57 advises agencies to "review this status every month to determine if they can continue to accommodate the restrictions based on agency business needs."[26]

Here, the parties disagree as to whether the grievant can perform her essential job duties with or without reasonable accommodation. As an initial matter, the grievant appears to dispute whether Accountability tasks are among her essential job functions. A job function may be "essential" when:

> the reason the position exists is to perform that function, when there aren't enough employees available to perform the function, or when the function is so specialized that someone is hired specifically because of his or her expertise in performing that function. If an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. Other relevant evidence can include the employer's judgment as to which functions are essential, the amount of time spent on the job performing the function, the consequences of not requiring the incumbent to perform the function, and the work experience of people who hold the same or similar job.[27]

While the agency's identification of essential job functions is entitled to substantial deference, the grievance record nevertheless raises a sufficient question whether, under the ADA, Accountability duties are essential for the hospital's Staffing Schedulers. The grievant's Employee Work Profile, signed October 5, 2018, defines the purpose of her position as "inputting and developing staffing schedules for nursing departments." It contemplates 80 percent of employee time devoted to "schedule entry" and "communication" responsibilities. The record presents no indication that Staffing Schedulers were required to perform Accountability or direct-care duties before the grievant's STD absence. Assuming that the hospital redistributed those duties in May 2019 based on legitimate business needs, the new duties list distributed to Staffing Schedulers focuses almost exclusively on expectations for staffing coordination, but adds that "[s]taffers must

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[23] *Id.*

[24] *Id.* If the agency cannot accommodate the employee's restrictions, it must notify the third-party administrator "so that the claim can be approved for no modified duty." *Id.* at 33-34.

[25] *Id.* at 21.

[26] *Id.* at 22. Policy 4.57 also provides that, as part of this review, "[a]gencies should also review for compliance with ADA." *Id.*

[27] Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 579-80 (4th Cir. 2015) (citing 42 U.S.C. § 12111(8); 29 C.F.R. §§ 1630.2(n)(2), 1630.2(n)(3)) (internal quotation marks omitted) (finding that "providing customer service" was not necessarily one of a court clerk's essential job duties, even though it was listed in her job description); *see* 29 C.F.R. app. § 1630.2(n) ("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).

assist with accountability and hall monitoring on all floors if needed." On August 29, 2019, central-office staff explained to the grievant that Accountability duties could be required for "0-3 hours per week or month; however, some schedulers have worked Accountability for up to 8 hours." The agency has further explained to EDR that the hospital's "business needs, call-outs, vacancy rates and staff attendance" make it "impossible to predict when or if [S]chedulers would be [needed] to conduct Accountability." It appears that hospital management is working to ensure that staffing challenges do not undermine patient care, in part by assigning administrative staff to provide certain "non-clinical" patient services on a contingent basis. While this type of contingent availability could be an essential job function under certain circumstances, the factual record at this stage nevertheless raises a sufficient question whether such direct-care responsibilities were in fact "essential" to the grievant's position under the ADA when she returned from STD leave.

Even if Accountability duties were indeed among the grievant's essential job functions, the grievant has also alleged facts presenting a sufficient question as to whether a reasonable accommodation existed that would have allowed her to perform those tasks as required. Although some courts have held that an accommodation is unreasonable if it requires the elimination of an "essential function,"[28] "job restructuring, part-time or modified work schedules," reassignment, and "other similar accommodations for individuals with disabilities" can be considered reasonable accommodations.[29] Where an employee seeks a reasonable accommodation, ADA regulatory guidance provides that "the employer, using a problem solving approach, should:

(1) Analyze the particular job involved and determine its purpose and essential functions;
(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer."[30]

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[28] *E.g.*, 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)).

[29] 42 U.S.C. § 12111(9)(B); EDR Ruling No. 2004-879; *see also* EEOC v. Stowe-Pharr Mills, Inc., 216 F.3d 373, 377 (4th Cir. 2000) (stating that "[t]he term reasonable accommodation may include . . . reassignment to a vacant position" (citation and internal quotation marks omitted)); Cravens v. Blue Cross & Blue Shield, 214 F.3d 1011, 1017-19 (8th Cir. 2000) (holding that reassignment could be a reasonable accommodation where the employee could not perform the essential functions of his current job); Dalton v. Subaru-Isuzu Auto., 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.").

[30] 29 C.F.R. Pt. 1630 App'x § 1630.9. 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." Equal Emp't Opportunity Comm'n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, #40, Oct. 17, 2002.

Here, according to the grievant, hospital staff did not appear to be expecting her return from STD leave on June 10, 2019 (although she had provided notification), and no one initially informed her of the additions that had been made to her job duties. After eventual discussions with her supervisor and human resources staff, the grievant understood that Accountability tasks that had previously required special training and supervisory approval were now mandatory in the absence of a medical excuse. Accordingly, she obtained the documentation she believed hospital staff required to substantiate her restriction, which was primarily a physical restriction unrelated to her STD absence. But when the grievant provided that documentation, management determined that her restrictions were incompatible with her position as a Staffing Scheduler such that she could not conclude her disability period. At this time, EDR is unable determine the extent to which hospital management considered possibilities such as eliminating, limiting, and/or delaying the grievant's responsibility for Accountability duties, and the grievant alleges that potential accommodations were not solicited from her following either of the two instances where she returned from STD leave. The grievant maintains that she was and is able to perform Accountability duties for a limited time period. However, upon her return from her STD absence, she did not initially understand that the agency now considered Accountability essential to her position, and she did not perceive that hospital management was open to discussion of potentially reasonable accommodations that would allow her to fulfill her essential job functions.

The agency offers a starkly contrasting account of its interactions with the grievant. According to hospital human resources staff, the grievant's supervisor timely and thoroughly discussed the new duties for Staffing Schedulers with her. The grievant was allegedly unreceptive and uncooperative on multiple occasions in August and September when staff sought to engage her on how they might accommodate her restriction. She allegedly insisted she could not perform any Accountability tasks and became angry when staff attempted to explain her options. The agency nevertheless accommodated the grievant by placing her in a temporary position, classifying the grievant's status as LTD-W. However, after notifying the grievant numerous times that medical clearance to return to work full-time/full-duty was a condition of continued employment, the agency never received such medical release and ultimately separated her from her position on that basis.

At the qualification stage, EDR must conclude that these competing accounts create a sufficient factual question whether the agency's separation of the grievant from her Staffing Scheduler position was consistent with the requirements of the ADA. The record leaves substantially unresolved the issue of whether the grievant could perform the essential functions of her job with or without reasonable accommodation(s). First, EDR cannot find that Accountability duties were essential functions that the agency could appropriately require the grievant to perform, notwithstanding any disability. Second, the record suggests that, even if Accountability duties were essential, the grievant may have been able to perform these duties to a limited extent or with further contingencies in place. Third, the parties dispute whether the agency took adequate steps to explore whether these or other accommodations were reasonable through an interactive process.

Notably, the record does not establish that the agency's 39-day transitional assignment of the grievant to its IT department was sufficient to satisfy the ADA's accommodation requirements. While the agency may legitimately consider the assignment as one accommodation of the grievant's medical restrictions, it is not clear whether or how such accommodation became unreasonable or began to impose an undue burden as of October 1, 2019. The ADA's requirement

to make reasonable accommodations "is an ongoing one."[31] Thus, on that date, the requirement remained in effect.[32] Accordingly, if the grievant could have performed the essential duties of her position with or without reasonable accommodation on and after October 1, the ADA required the agency to make such accommodations in the absence of an undue burden on its business.[33] As of this ruling, EDR is unable to verify that the agency met its obligations in this regard before separating the grievant from employment. Because these questions are substantially grounded in factual considerations, EDR concludes that they are most appropriately resolved at a hearing.

As stated above, these qualifiable failure-to-accommodate issues are intertwined with the agency's administration of the grievant's disability benefits under DHRM Policy 4.57. According to the grievant, upon her return from STD leave in June 2019, her supervisor informed her that her pre-STD position had been filled and that her new position included duties that the supervisor knew presented medical challenges for the grievant. Although she had already provided a release to return to work, the agency allegedly sent the grievant home again, pending its receipt of documentation that she was medically restricted from these contingent duties for which she had not previously been responsible. When the grievant complied, the agency prohibited her from returning to her position, assigning her instead to LTD-W status, which transitioned to LTD status, *i.e.*, separation from employment. If true, these allegations could potentially support claims that the agency misapplied or unfairly applied Policy 4.57 by imposing return-to-work requirements that disregarded the intent of the policy to provide STD benefits with job protection.

The agency maintains that it did hold open the grievant's position, added Accountability duties for legitimate business reasons, and was required by Policy 4.57 to obtain return-to-work documentation pertaining to these duties. At the very least, however, it appears that the agency's administration of the grievant's disability benefits may have limited the interactive process, restricting the potential accommodations considered and ultimately leading to the grievant's separation from employment. Further, the record raises a sufficient question whether the agency could, consistent with Policy 4.57, prohibit the grievant from returning to her pre-STD position without a release to perform new, contingent Accountability duties. Because the record as a whole supports qualifying failure-to-accommodate issues that were exacerbated by the grievant's STD leave, and because the grievant presents concerning allegations regarding her supervisor's management of her STD return, the grievant may also present evidence at the hearing on the issue of whether the agency misapplied or unfairly administered her short-term disability benefits under Policy 4.57.

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[31] Equal Emp't Opportunity Comm'n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, #32, Oct. 17, 2002; *see* 29 C.F.R. § 1630.9(a).

[32] *See id.* To the extent that the agency ended the grievant's LTD-W status and separated the grievant from her employment based on provisions of DHRM Policy 4.57 without considering whether the grievant could perform the essential functions of her job with or without reasonable accommodations, such decision would likely be a misapplication of the policy. *See* DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 22 (When administering LTD-W status, "[a]gencies should also review for compliance with ADA.").

[33] By way of analogy, regulatory guidance interpreting the ADA cautions that an employer cannot simply apply a "no-fault" automatic termination policy to an employee with a disability who needs leave beyond the set period. Instead, the employer should modify its "no-fault" policy to provide additional leave as a reasonable accommodation, unless (1) another reasonable accommodation exists or (2) granting additional leave would cause undue hardship. *See* Equal Emp't Opportunity Comm'n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, #17, Oct. 17, 2002.

Retaliation

The grievant further alleges that the hospital's addition of Accountability tasks to her job responsibilities was done in retaliation for opposing her supervisor's "harassment, bullying and threatening" behavior in January and/or February 2019. A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) she engaged in a protected activity;[34] (2) she suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[35] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[36]

EDR cannot find that the facts support the grievant's allegation that the addition of Accountability duties to her job occurred because of her opposition to her supervisor's allegedly harassing conduct, or by any other complaint of a hostile work environment. The sole instances of such "opposition" offered by the grievant were occasions where the supervisor raised the possibility of disciplinary action, and the grievant disputed the substance of such action. Even assuming that these interactions could have been considered protected activity, the record does not support the contention that the grievant would not have been required to perform Accountability duties, notwithstanding any disability, but for those interactions. While the grievant's allegations raise concerns about her supervisor's communication of expectations, it appears that hospital management had legitimate reasons to enlist Staffing Schedulers for Accountability duties and that decisions about the grievant's employment status were primarily influenced by the hospital's administration of disability benefits. Therefore, the grievant's claim of retaliation for opposing her supervisor's conduct does not qualify for a hearing.[37]

CONCLUSION

The facts presented by the grievant constitute certain claims that qualify for a hearing under the grievance procedure.[38] Because the grievant has raised sufficient questions as to the claims discussed above, the grievance partially qualifies for a hearing on these grounds.

At the hearing, the grievant will have the burden of proof.[39] 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

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[34] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the agency's 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 a violation of fraud, waste or abuse to the state Hotline or exercising any right otherwise protected by law." *See also Grievance Procedure Manual* § 4.1(b)(4).

[35] *See* Felt v. MEI Techs., Inc., 584 F. App'x 139, 140 (4th Cir. 2014).

[36] *Id.*

[37] The grievance also alleges that, in the course of the grievant's return from STD in August 2019, her health insurance was temporarily deactivated because of the hospital's uncertainty regarding her disability leave status. The agency alleges that coverage was restored and retroactive, but the grievant alleges that she nevertheless incurred substantial out-of-pocket costs for medical services during the period of deactivation. While the grievant is understandably frustrated that the agency's administration of her benefits included a lapse in insurance coverage, it does not appear that the grievant attempted to recover her outlays from either her medical providers or the insurance company after agency representatives took steps to restore her coverage. Accordingly, EDR cannot conclude that the grievant's allegations with respect to an insurance lapse are part of an adverse employment action that could proceed to a hearing.

[38] *See Grievance Procedure Manual* § 4.1.

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

leave.[40] Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

EDR's qualification rulings are final and nonappealable.[41]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[40] Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).
[41] *See* Va. Code § 2.2-1202.1(5).