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QUALIFICATION RULING

In the matter of the Department of State Police
Ruling Number 2021-5178
January 19, 2021

The grievant seeks a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") as to whether her August 14, 2020 grievance with the Department of State Police (the "agency") qualifies for a hearing. For the reasons set forth below, the grievance is qualified for a hearing.

FACTS

On or about August 14, 2020, the grievant filed a grievance to challenge the agency's termination of her employment, asserting that her separation was retaliatory.[1] In June 2020, the grievant had requested full-time telework as an accommodation pursuant to the Americans with Disabilities Act ("ADA") "while [she] managed an illness that prevented [her] from working at full capacity." The agency denied full-time telework as unreasonable, but proposed several other potential accommodations. The grievant maintained that these proposals were not responsive to her condition and asked the agency to reconsider full-time telework. As the parties apparently reached an impasse on the issue, and with the grievant having already exhausted her annual and family medical leave, the agency approved leave-without-pay status from June 30 to July 6, 2020. She returned to work on July 7, but left work early on July 8 upon experiencing symptoms of her medical condition. Later in the day on July 8, the grievant sent an email to the agency asking to "explore any other options" available to her. On July 10, the agency denied the grievant's request for additional unpaid leave, stating that she was expected to report for work on July 13. The grievant did not report to work on July 13 or 14 and allegedly filed a claim for short-term disability on July 14. The grievant alleges that, shortly after she made the agency aware of her short-term disability claim on July 14, management informed her that she was being removed from her position as of that date because she had "abandoned [her] employment with the agency." After following the expedited grievance process, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

[1] The timeliness and nature of the grievance was addressed in EDR Ruling No. 2021-5147, which instructed that the grievance, though timely, was "not eligible for the dismissal grievance process" invoked by the initial grievance form because the grievance did not challenge a termination due to a Written Notice of disciplinary action or for unsatisfactory job performance. *See generally* DHRM Policy 1.60, *Standards of Conduct*, §§ E, H.

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] Generally, the grievance procedure limits grievances that qualify for a hearing to those that involve "adverse employment actions."[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] Because the grievant in this case was separated from employment, EDR assumes for purposes of this ruling that she experienced an adverse employment action.

Actions that automatically qualify for a hearing include the issuance of formal discipline, such as a Written Notice, and dismissals for unsatisfactory performance.[6] Other claims, including those involving separation, do not qualify for a hearing unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, a misapplication or unfair application of policy, or a sufficient factual basis to question the underlying circumstances of the termination.[7]

Here, the grievant contends that the agency failed to reasonably accommodate her medical condition by permitting her to telework on a full or partial schedule. The grievant submitted a note from her medical provider advising of a disability and "strongly recommend[ing] she be allowed to work from home/telecommute." 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*. . ."[8] Under this policy, "'disability' is defined in accordance with the [ADA]," the relevant law governing disability accommodations.[9] 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.[10] A qualified individual is defined as a person who, "with or without reasonable accommodation," can perform the essential functions of the job.[11]

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[2] *See Grievance Procedure Manual* § 4.1.
[3] *See id.* § 4.1(b).
[4] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[5] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[6] *Grievance Procedure Manual* § 4.1(a); *see* Va. Code § 2.2-3004(A).
[7] Va. Code §§ 2.2-3004(A), 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[8] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).
[9] *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.
[10] 42 U.S.C. § 12112(a).
[11] *Id.* § 12111(8); 29 C.F.R. § 1630.2(m).

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]."[12] "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."[13] 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."[14] 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.[15]

In this case, the record presents disputes regarding full or partial telework as a reasonable accommodation that would allow the grievant to perform the essential functions of her job as a public relations coordinator for the agency. The agency has maintained that telework is not a reasonable accommodation for multiple reasons. First, employees in the grievant's position have not historically worked remotely. Second, the grievant's duties "require a teamwork environment, with face-to-face interaction. Many projects are known suddenly, and their responses are crucial to the success of the section. Further, [the grievant's] section has undergone several changes to include new supervision; a new advertising agency; and a new fiscal budget cycle." Third, when the grievant was granted limited telework approval in the past, it appears that management developed concerns about her availability/reliability during work hours.[16] Thus, in response to the grievant's request for accommodation, the agency provided a generic list of other potential accommodations to allow the grievant to perform the essential functions of her job.

In contrast, the grievant maintains that she performed most or all of her work "electronically on a computer, with little to no face-to-face interaction with clients or collaboration with co-workers." Addressing the agency's view of the need for in-person teamwork, the grievant offered:

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[12] 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.").
[13] 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).
[14] 29 C.F.R. § 1630.2(o)(3).
[15] *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.
[16] Although it appears these concerns became the subject of performance-management efforts extending into the spring of 2020, the record does not reflect that the agency ever issued formal discipline in connection with these issues.

> . . . I can be available for meetings that require me to have face to face interactions for job related projects and can collaborate with individuals when needed on projects. In the two years that I have been working for the [division's] program, my only collaboration has been with our contracted ad agency, which I have a standing Monday meeting with, which is conducted via telephone. I am equipped with a laptop that has VPN access and a department iPhone.

While it appears that both parties engaged to a somewhat limited extent in an interactive process for ADA purposes, the record presents a sufficient factual basis to question the underlying circumstances of the grievant's separation from employment. First, the record presents a factual dispute whether the grievant's requested accommodation was reasonable, given her job duties. Maintaining that her responsibilities were substantially conducive to remote work, the grievant attempted further discussion of the possibility of partial and/or conditional telework approval; the record does not reflect a response from the agency. The record also does not reflect that further discussion of other potential accommodations occurred following the grievant's request a few days later to "explore any other options" available to her. Although a lack of response may not raise an ADA compliance issue in every case, here the agency was aware that the grievant had little or no remaining options to manage a medical reason to avoid her workplace,[17] and indeed she was deemed to have abandoned her job only a few days later – allegedly just after filing a new short-term disability claim.

EDR notes that the record suggests previous efforts by the agency to support a flexible work schedule for the grievant, as well as an attempt to discuss numerous alternative accommodations with the grievant prior to her separation. However, at the qualification stage, EDR must conclude that the parties' competing accounts of the nature of the grievant's essential job functions at the time of her separation, and the extent to which these required her presence onsite five days per week, are appropriate for resolution by a hearing officer, who will be best positioned to determine as a matter of fact whether the agency failed to reasonably accommodate the grievant's limitations pursuant to the ADA, and/or to engage in an interactive process to discover appropriate accommodations, leading to her separation from employment.

As another factor supporting qualification under the circumstances, the record raises a sufficient question whether the agency effectively dismissed the grievant for performance reasons. The stated explanation for her dismissal was that the agency presumed she had "abandoned her job." EDR cannot conclude that this explanation necessarily aligns with non-disciplinary removal as contemplated by DHRM Policy 1.60, *Standards of Conduct*, which permits such removal due

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[17] The grievant alleges that her disability can result in panic attacks when she is exposed to certain stressors, and she maintains that her workplace presented such stressors due to retaliatory "intimidation and harassment at work by individuals within my chain of command." In January 2020, the grievant reportedly filed a charge with the Equal Employment Opportunity Commission against the agency, following an internal hostile work environment complaint. The grievant claims that after making these complaints, agency management interfered in the processing of her short-term disability claim and, while she was out on leave, contacted her at home unnecessarily, including to advise her that she was being reassigned until further notice. The grievant also alleges that she had her "[j]ob duties stripped" following her complaints and that, during the spring of 2020, she was denied telework approval while "everyone else was teleworking" due to a public health emergency.

to "inability to meet working conditions" – *e.g.*, "inability to perform the essential functions of the job after reasonable accommodation (if required) has been considered."[18] Indeed, Policy 1.60 specifically cites unauthorized absences as examples of offenses that would normally merit a Group II or Group III Written Notice[19] – formal disciplinary actions which, if grieved, automatically qualify for a hearing.[20] Although the agency did not take any disciplinary action, it at least arguably dismissed the grievant for the offense of failing to report to work when ordered to do so.

Moreover, the record reflects a history of performance concerns that seemingly led the agency to conclude that telework was not reasonable for the grievant in particular. The agency's submissions cite past issues with the grievant's attendance, reliability, insubordination, and work quality, many of which specifically related to the limited telework permissions the grievant was allegedly given in the past. Assuming for purposes of this ruling that the agency's concerns are valid, such performance issues are not necessarily a legitimate basis to deny an otherwise reasonable accommodation under the ADA. DHRM Policy 1.60 sets forth a mandatory framework for informal and formal performance management, establishing available penalties for instances of misconduct. These penalties include, for example, suspension, demotion, or disciplinary transfer associated with an appropriate Written Notice of formal discipline.[21] While the policy defines how such penalties may impact benefits, it does not contemplate the denial of leave benefits or other rights as a stand-alone penalty for performance issues. Accordingly, on a full review of the parties' submissions, the record raises a sufficient question whether management effectively addressed its performance concerns by way of the ADA accommodation process, rather than via the disciplinary/performance management system prescribed by DHRM Policy 1.60.

In sum, although the agency is generally entitled to discretion as to its employees' telework privileges and to enforce employee attendance expectations, the totality of the facts and circumstances surrounding the grievant's separation in this case implicates both the ADA and potential performance issues to such an extent as to raise a sufficient question whether the removal occurred in contravention of the grievant's ADA rights, "to correct or penalize behavior by enforcing applicable standards of conduct or performance,"[22] or both. While nothing in this ruling should be read to deem the agency's accommodation efforts insufficient at this stage, the grievant will have the opportunity at a hearing to prove that her removal was inconsistent with law and/or policy.

CONCLUSION

The facts presented in the grievance record constitute claims that qualify for a hearing under the grievance procedure.[23] The grievance qualifies in full, including any alternative and

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[18] DHRM Policy 1.60, *Standards of Conduct*, § H, p. 18.
[19] DHRM Policy 1.60, *Standards of Conduct*, Att. A.
[20] *See Grievance Procedure Manual* § 4.1(a).
[21] *See* DHRM Policy 1.60, *Standards of Conduct*, at 7-10.
[22] *Rules for Conducting Grievance Hearings* § VI(B)(1).
[23] *See Grievance Procedure Manual* § 4.1.

related theories raised by the grievant to challenge her removal. At the hearing, the grievant will have the burden to prove that her removal was improper.[24]

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. However, this ruling is not intended to prevent or discourage the parties from resolving the underlying issues outside the context of a hearing. Should the parties wish to pursue resolution of the issues herein prior to a hearing date, EDR is available to assist in such any efforts as desired and appropriate.

EDR's qualification rulings are final and nonappealable.[25]

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[24] *Rules for Conducting Grievance Hearings* § VI(C).
[25] *See* Va. Code § 2.2-1202.1(5).