Issue: Discrimination/Age, Discrimination/Disability, Retaliation/Other Protected Right, Separation/Other; Ruling Date: September 26, 2001, Ruling #2001-034; Agency: Department of Transportation; Outcome: All issues not qualified. Appealed in the Circuit Court for the City of Staunton; File date: October 15, 2001; Case # CL010000084-00; EDR Decision affirmed November 8, 2001.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
EDR Ruling # 2001-034
September 26, 2001

The grievant has requested a ruling on whether his November 7, 2000 grievance with the Department of Transportation (VDOT) qualifies for a hearing. The grievant claims that he was subjected to (1) formal disciplinary action; (2) unfair application and misapplication of policies, (3) age and disability discrimination; (4) adverse employment issues; and (5) retaliation. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant was employed as an Engineering Technician III with the Department of Transportation and has been absent from the workplace since approximately May 25, 2000 for medical reasons. On June 16, 2000, the grievant forwarded to management a letter from his physician recommending that he retire and seek disability. On July 5, 2000, management requested clarification and additional information regarding the grievant's medical condition. On July 14, 2000, the grievant was placed on Family and Medical Leave (FMLA) and was permitted use of his accrued sick leave during the twelve-week period ending approximately October 11, 2001. On July 24, 2000, the grievant requested a policy interpretation on FMLA and his sick leave usage from the Department of Human Resource Management (DHRM).[1] On July 28, 2001, the grievant's physician indicated on a "Physical Capabilities Evaluation" that the grievant's restrictions were permanent, the grievant could not work fulltime and that he was 100% disabled. On October 10, 2000, the District Human Resources Manager, via memorandum, informed the grievant of the following: he could no longer use sick leave to cover his absences due to the permanent nature of his medical condition; he was permitted to use his accrued annual leave to cover his absences; he was offered assistance in applying for regular or disability retirement; he was advised to apply for retirement or to report to work with a physician's release. The grievant claims that the agency denied

[1] See E-mail dated 7/24/00 and grievant's Form A attachments outlining subsequent conversations with DHRM personnel.

him use of his available sick leave balances forcing him into early retirement and resulting in a loss of salary and benefits.[2]

DISCUSSION

Formal Disciplinary Action

The grievant asserts that the letter from the District Human Resources Manager constituted formal disciplinary action. However, formal disciplinary actions, by definition, involve the issuance of a Written Group Notice on a standardized form outlining the type of offense and the resulting discipline.[3] The HR Manager's letter provided details of relevant state policy and information concerning the grievant's sick leave. It did not include a Written Group Notice, nor did it identify any offense or resulting discipline. Thus, the HR Manager's letter cannot be considered formal disciplinary action.

Misapplication of Policy

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. The grievant alleges that management misapplied DHRM Policy 4.55 "Sick Leave" by restricting his computer access, and by giving him inaccurate information.

DHRM Policy 4.55(II)(A) states that employees are allowed to use accrued sick leave "during an employee's temporary disability from performing his or her duties." Management interpreted this policy as providing employees with paid sick leave for "temporary," rather than permanent, medical conditions. Thus, management concluded that this policy did not apply to the grievant, whose physician had described his disability as "100%" and "permanent."[4] In support of his claim, the grievant provided an e-mail from a DHRM analyst that outlined FMLA policy and use of sick leave. However, this correspondence does not address the issue of sick leave use during a period of permanent disability. Upon review, management's interpretation of DHRM 4.55 appears reasonable and does not conflict with the policy's plain language. Further, during this Department's investigation, DHRM personnel confirmed that Policy 4.55 does not allow paid sick leave to be used for permanent disabilities.

The grievant also states that management denied him computer access without notification and continually gave him inaccurate or misleading information. However, management's restriction on the grievant's computer access on state property does not

[2] The grievant did not provide any actual monetary figures in his grievance. Further, while this ruling does not discuss with particularity each argument advanced in the grievant's request, each of those arguments has been reviewed and considered.
[3] Department of Human Resource Management (DHRM) 1.60 II(C), effective 9/16/93.
[4] Physician documentation dated 6/16/00, 7/28/00, and 9/22/00.

appear to breach any state or agency policy and falls within management's authority to manage the operations of the division.[5] Moreover, management has provided a legitimate business reason for the grievant's computer restriction -- the agency's potential liability in permitting the grievant to return to the worksite for computer usage in light of the grievant's permanent medical condition and approved absence. Further, assuming without deciding that the grievant received inaccurate information from the agency, such misinformation, while unfortunate, would not be sufficient to support a claim of misapplication of policy.

Age Discrimination

For a claim of age discrimination to qualify for a hearing, however, there must be more than a mere allegation that discrimination has occurred. Rather, an employee must be forty years of age or older, and must present evidence raising a sufficient question as to whether (1) he suffered an adverse employment action, and (2) the employer would not have taken the action but for the employer's motive to discriminate on the basis of age.[6] Where the agency, however, presents a legitimate, nondiscriminatory reason for the employment action taken, the grievance should not qualify for a hearing, unless there is sufficient evidence that the agency's stated reason was merely a pretext or excuse for age discrimination.[7]

In this case, the grievant was over 40 years of age, and asserts that he was forced to apply for Virginia Retirement System (VRS) disability benefits and denied use of his sick leave due to his thirty years of state service, which he equates with age. The agency, however, offers a legitimate, nondiscriminatory reason for denying the use of sick leave--state policy would not allow it. Moreover, as grievant's own physician confirmed his disability as 100% and permanent, the grievant was eligible for, and received, his full state retirement benefits and compensation. The grievant presents no evidence that the agency's stated nondiscriminatory reasons are a mere pretext for age discrimination.

Disability Discrimination

The grievant claims that he was subjected to disability discrimination because (1) he was "instructed to apply for disability or report to work with an appropriate doctor's release;" (2) he was denied use of his sick leave; and (3) that another employee was permitted to use sick leave to cover an extended absence. For a claim of disability discrimination to qualify for hearing, an employee must come forward with evidence raising a sufficient question as to whether (1) he has a physical or mental impairment that

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[5] Va. Code § 2.1-116.06(B): Management reserves the exclusive right to manage the affairs and operations of state government.

[6] See *O'Connor v. Consolidated Coin Caters Corp.*, 56 F. 3rd 542, 545 (4th Cir. 1995), *rev'd on other grounds*, 517 U.S. 308 (1996). See also *Ullman v. Rector and Board of Visitors of the University of Virginia*, 996 F. Supp. 557, 561 (W.D. Va. 1998) which adopts the *McDonnell Douglas* (411 U.S. 792) test.

[7] *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000).

substantially limits a "major life function,"[8] has a record of such impairment, or is regarded as having such an impairment; (2) he has suffered an adverse employment action; (3) at the time of the adverse action he was performing his job at a level that met the employer's legitimate expectations; and (4) the action occurred under circumstances that would raise a reasonable inference of unlawful discrimination.[9] Where the agency, however, presents a legitimate, nondiscriminatory reason for the employment action taken, the grievance should not qualify for a hearing, unless there is sufficient evidence that the agency's stated reason was merely a pretext or excuse for disability discrimination.[10]

As with the age discrimination discussed above, management has provided nondiscriminatory business-related reasons for the denial of sick leave---the grievant's medical condition, which his own physician considered permanent, required disability retirement considerations under state policy.[11] The grievant has presented no evidence that management's stated business reason was a pretext for disability discrimination. Further, management asserts that the employee named by the grievant as having been permitted to use extended sick leave, unlike the grievant, had a temporary, rather than permanent, medical condition.

Retaliation

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;[12] (2) the employee suffered an adverse employment action;[13] and (3) a causal link exists between the 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 action, the grievance does not qualify for a hearing, unless the employee presents

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[8] A "major life function" includes "functions such as caring for oneself, performing manual tasks, walking seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(i).

[9] See *Haulbrook v. Michelin North America, Inc*., 252 F.3d 696, 702 (4th Cir. 2001). See also *Ennis v. National Ass'n of Business and Educ. Radio, Inc*., 53 F.3d 55, 58 (4th Cir. 1995).

[10] *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000).

[11] DHRM Policy 4.55 (II)(A)(1) states that sick leave may be used for an "employee's *temporary* disability." (Emphasis added).

[12] The *Grievance Procedure Manual* §4.1(b)(4), page 10. 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 a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law."

[13] An "[a]dverse employment action includes any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the 'terms, conditions, or benefits' of employment." *Von Gunten v. Maryland Dept. of the Environment*, 243 F.3d 858, 866 (4th Cir. 2001). This would encompass any tangible employment action by management that has some significant detrimental effect on factors such as an employee's hiring, firing, compensation, job title, level of responsibility, or opportunity for promotion. *Boone v. Goldin*, 178 F.3d. 253, 256 (4th Cir. 1999).

sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[14]

The grievant asserts that the HR Manager's letter and the computer access restriction were retaliatory adverse employment actions. However, the grievant has not established that he engaged in a "protected activity" as defined under the grievance procedure. Moreover, neither of the alleged retaliatory management actions constitutes an "adverse employment action." An "adverse employment action" must adversely effect one of the "terms, conditions, or benefits" of employment.[15] As discussed previously, management's actions were consistent with state policy in light of the grievant's permanent medical condition, which required disability retirement considerations.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, he must notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency must request the appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

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Neil A.G. McPhie, Esquire
Director

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Tracey D. Watkins
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[14] *Matvia v. Bald Head Island Management, Inc.*, 259 F.3d 261, 271, citing to *Von Gunten*, 243 F.3d at 863.
[15] *Von Gunten*, 243 F.3d at 866.