Issue: Qualification/Benefits/VRS and other; Discrimination/Disability; Ruling Date: September 17, 2001; Ruling #2001-046; Agency: Department of Transportation; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Department of Transportation
EDR Ruling #2001-046
September 17, 2001

The grievant has requested a ruling on whether his grievance with the Department of Transportation (VDOT) qualifies for a hearing. The grievant claims that VDOT discriminated against him because of a disability when it removed him from his job on December 20, 2000 without providing him with a reasonable accommodation. He also claims that VDOT misapplied policy by (i) failing to give him advance notice that he would be removed from his job, (ii) failing to allow him to use his sick or annual leave after he was removed, and (iii) failing to grant him holiday pay after his removal. [1] For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant was employed with VDOT as a Maintenance Crew member for over 11 years prior to his removal on December 20, 2000. On February 1, 2000, the grievant was injured on the job. He was placed on Worker's Compensation from February 1, 2000 through June 24, 2000. Upon exhausting Worker's Compensation benefits, the grievant was placed on short-term disability on June 24, 2000.

On September 7, 2000, the grievant was released from the Worker's Compensation physician and he returned to work on a modified work schedule. Prior to beginning work, the Workers Compensation physician provided VDOT with a Physical Ability List, which outlined the grievant's specific work limitations, including, but not limited to, no loading, no mixing chemicals with abrasives, no removal of storm debris, no using a chainsaw, and no heavy equipment usage.[2] VDOT observed these work restrictions by modifying the grievant's duties on a temporary basis.

[1] On his Form A, the grievant indicated that as relief he also wanted his VSDP benefits, hospital insurance, a Worker's Compensation settlement, and relief from physical, mental and monetary stress resulting from his December 20, 2000 separation from VDOT. However, these issues will not be addressed in this ruling, as a grievance hearing is not a forum through which these concerns may be remedied.
[2] See Physical Ability List faxed September 7, 2000.

On December 18, 2000, the grievant's short-term disability benefits were exhausted and long-term disability benefits were triggered. On December 20, 2000, VDOT removed the grievant from his modified work assignment after concluding that he was permanently unable to perform the essential functions of his job. The grievant's primary job functions included pushing and pulling equipment, climbing irregular surfaces and lifting heavy objects. In addition, he was responsible for using a chain saw to cut trees, mixing chemical abrasives, removing storm debris, working with concrete and performing other labor-intensive functions on a daily basis. The grievant was unable to perform these job duties when he was escorted off the VDOT job site on December 20, 2000.[3] Thereafter, VDOT made attempts to place the grievant in other positions. However, there were no positions within a 50-mile radius that would accommodate his disability and for which he was qualified.[4]

DISCUSSION

Americans with Disabilities Act

The grievant claims that the agency failed to provide reasonable accommodation for his disability, which occurred as a result of an on-the-job injury. The relevant law governing disability accommodations is the Americans with Disabilities Act (ADA).[5] The ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability. A qualified individual is defined as an individual with a disability, who, with or without "reasonable accommodation", can perform the essential functions of the job.[6] The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires."[7] Courts have recognized that an accommodation is unreasonable if it requires the elimination of an "essential function."[8]

In this case, it is undisputed that the grievant's physical limitations or medical restrictions would preclude him from performing the job duties of a Maintenance Crew

[3] VDOT reached this conclusion after reviewing information sent to management by the Worker's Compensation physician. See letter dated November 20, 2000.

[4] On January 17, 2001, VDOT's Division of Safety and Health conducted a job analysis on the grievant and concluded that the grievant was totally unable to perform the essential functions of his labor intensive job or similar type of positions within the agency. Thus, no reasonable accommodations were available.

[5] 42 U.S.C. §§12101 *et seq.*

[6] In defining whom the ADA covers and the duties of the employer, the Act does not distinguish between those persons whose disability came about due to a work-related injury versus other disabled individuals.

[7] Courts have considered a number of factors in determining what functions are essential. These factors include, but are not limited to, the employer's judgment regarding which functions are essential, the number of employees available among whom the performance of the functions can be distributed, the amount of time spent performing the functions, the consequences of not performing the function, and the actual work experience of past or current incumbents in the same or similar jobs. See 42 U.S.C. 12111(8); 29 C.F.R. 1630.2(n); *Hill v. Harper*, 6F. Supp.2d 540, 543 (E.D. Va. 1998).

[8] *Hill v. Harper*, 6 F. Supp.2d 540, 543 (E.D.Va. 1998), *citing Hall v. U.S. Postal Service*, 857 F.2d 1073, 1078 (6th Cir. 1988).

member. For example, under no circumstances could the grievant use a chainsaw or jackhammer, shovel asphalt from a raised truck, throw debris in the back of a truck, or push or pull maintenance equipment. VDOT considers all these duties to be essential functions of his job, and there is no evidence that these duties are nonessential. [9] Therefore, eliminating any of these duties to accommodate the grievant's disability would not be reasonable under the law.[10] Accordingly, there is no evidence that VDOT has failed to comply with the ADA by failing to provide reasonable accommodation to the grievant.

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 first claims that VDOT misapplied policy when it failed to give him advance notice of its intent to remove him from his position. Although the grievant was understandably concerned about his unexpected removal from the job site, there is no mandatory state or agency policy that would have required VDOT to give him advance notice under the circumstances.[11]

Second, the grievant claims that policy was misapplied when VDOT failed to allow him to use his sick or annual leave balances after he was placed on long term disability and removed. DHRM Policy No. 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." (Emphasis added.) This policy would preclude the grievant under the circumstances since his disability is permanent. Also, DHRM Policy No. 4.57 states that *employees* may use credited sick leave for absences due to illnesses, injuries, and preventative, well-patient doctors' visits.[12] In this case, the evidence establishes that the grievant's employment ended on December 20, 2000, and thus, he

[9] VDOT has reported to this Department that it attempted to secure other reasonable accommodations, within a 50-mile radius, but was unable to do so because the grievant did not meet the minimum qualifications for other positions.
[10] *Hill v. Harper*, 6 F. Supp.2d at 544; *Martin v. Kansas*, 996 F.Supp. 1282, 1292 (D. Kan. 1998).
[11] The grievant's situation differs from that upon which an employee may expect advanced notice of disciplinary action under the Standards of Conduct (e.g. A Group Notice being issued as disciplinary action under the Standards of Conduct for an employee's unacceptable behavior). Under this circumstance, advance notice of unacceptable behavior would usually be expected. See Department of Human Resources Management's Policy 1.60, Standards of Conduct IV Corrective Action, page 9.
[12] DHRM Policy No. 4.57, Sick Leave- Personal, page 7 ((Effective 01/01/99).

was no longer considered an employee after that date. Accordingly, VDOT was not required to allow him to use any credited sick leave balances after his removal.[13]

Similarly, state policy also provides that *employees* may use their accrued annual leave for vacations and for other personal purposes.[14] Further, employees must be paid in lump sums for the maximum amount of their accrued annual leave when they leave state service.[15] In this case, VDOT could not under policy allow the grievant to use any accrued annual leave because he was no longer an employee after December 20, 2000. The evidence also establishes that VDOT paid the grievant the lump sum amount of his accrued leave (288 hours) upon his separation from state service in accordance with state policy.

Third, the grievant claims that VDOT misapplied policy when it failed to grant him holiday pay after his removal. State policy requires employees to either work or be on paid leave on the workday before and the workday after the holiday in order to be paid for that holiday.[16] In this case, the grievant's employment had already ended before the December and January holidays.[17] Thus, he would not have been entitled to receive holiday pay for the time periods in question. Accordingly, sufficient evidence of a misapplication of policy has not been shown.

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.

Neil A.G. McPhie, Esquire

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[13] The evidence establishes that the grievant's benefits fall under VSDP. VSDP leave use policy allows employees to use sickness and disability leave which incorporates sick leave and family and personal leave. However, neither may be carried over at the end of the calendar year, or paid out upon an employees separation. Accordingly, the grievant would not have been entitled to a lump sum distribution of any sick leave balances even after his separation. See DHRM Policy No. 4.57, VSDP Leave Use, page 7 (Effective 01/01/99).

[14] DHRM Policy No. 4.10, page 1 (effective 12/94).

[15] Id. at 8. VDOT has reported to this Department that the grievant had a total of 288 hours of vacation due to him on December 20, 2000. A lump sum distribution was made to him thereafter in the amount of $3,784.32. VDOT further reported that their current records show that distribution check has not been cashed todate.[TAB 4]

[16] DHRM Policy No. 4.25, III (A) (Effective 09/16/93).

[17] The relevant holidays in question would be December 22, 23, and 24, 2000 and January 1 and 2, 2001.

Director

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