

Issue: Qualification/Discrimination/Race; Retaliation/Other Protected Right; Ruling
Date: August 19, 2002; Ruling #2002-046; Agency: Department of Corrections;
Outcome: Not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2002-046
August 19, 2002

The grievant has requested a ruling on whether her October 12, 2001 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that she was discriminated against because of a medical condition¹ and due to her gender. As evidence of discrimination, she alleges that (1) she was not allowed to return to work until September 24, 2001, even though her doctor released her to work on September 12, (2) she was not allowed to continue with flexible work hours, (3) she was subjected to drug testing, (4) she was placed on modified duty when she returned to work, and (5) she was treated differently than a similarly-situated male employee. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is a Hearing Officer with DOC, a position that requires interaction with inmates. In October 2000, the grievant experienced health problems and her doctor required that she take medical leave. She returned in April 2001 to her duties as a DOC Hearing Officer. The grievant claims that when she returned, things were "back to normal." Specifically, she was setting her own docket and conducting hearings. Furthermore, she claims that she and her supervisor had arranged flexible work hours, because mornings were sometimes difficult for her. During this Department's investigation, the grievant stated that her hours began between 9:00 and 9:30 a.m., depending on how she felt.

On April 6, 2001, only a few days after returning to work, the grievant had a stroke. She was out of work until September 2001. The grievant claims that when she returned to work in September, conditions were "different" than when she returned in April. Specifically, she was no longer allowed to keep flexible hours, she was placed on "modified" duty, and she was given a reasonable suspicion drug test. Furthermore, she was not allowed to return to work until September 24, even though her doctor released her from his care on September 12. The grievant initiated a grievance on October 12,

¹ The grievant is also claiming that she suffered retaliation for having a medical condition. This claim is, in essence, a claim of discrimination. Therefore, this ruling will focus on her discrimination claim.

2001, alleging that the above actions were evidence of discrimination based on her medical condition, and that she was treated differently than male employees due to gender discrimination.

DISCUSSION

The grievant's claim that she has been discriminated against for her medical condition can best be described as a claim of disability discrimination. The Americans with Disabilities Act (ADA) makes it unlawful to "discriminate against a qualified individual with a disability because of [her] disability".² 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) she has a physical or mental impairment that substantially limits a "major life function,"³ has a record of such impairment, or is regarded as having such an impairment; (2) she has suffered an adverse employment action; (3) at the time of the adverse action she was performing her 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.⁴ 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.⁵

We will assume for purposes of this ruling only that this grievance presents a sufficient question as to whether the first three elements are met. The grievant's evidence, however, does not raise a sufficient question as to whether the fourth element is met. Specifically, a reasonable fact finder could not find from the evidence presented that the circumstances suggested that unlawful discrimination occurred. Each of the grievant's claims is discussed in turn below.

Failure to Return the Grievant to Work on September 12

As evidence of discrimination, the grievant claims that her doctor released her to work on September 12, but DOC did not allow her to return until September 24. DOC claims that it did not initially return the grievant to work because it had not yet received notification from the grievant's physician whether she was released to full or modified duty. Once management received the doctor's note, the grievant was returned to work. The grievant claims that she had the note in her possession, and if they had allowed her to return on September 12, they would have received the note from her. In any event, once the agency realized that the grievant was capable of returning on the 12th, they compensated her for those days that she did not work between the 12th and the 24th.

² 42 U.S.C. § 12112(a).

³ 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).

⁴ See *Haulbrook v. Michelin North America, Inc.*, 252 F.3d 696, 702 (4th Cir. 2001).

⁵ *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000).

Management has provided a nondiscriminatory reason for its decision, and there is no evidence that its reason was a mere pretext for discrimination.

Change in Working Hours

The grievant alleges that management's decision in September 2001 to require her to arrive at work at 8:00 a.m. is evidence of discrimination. She claims that her doctor had issued a note stating that morning hours were difficult for her, and that her supervisor knew that requiring her to come to work at 8:00 would cause problems for her. Management reported that the schedules of the hearing officers had at one time been staggered so that one hearing officer could hear cases later in the evening. However, a schedule change during the grievant's absence between April and September 2001 eliminated hearings outside of the typical workday.⁶ Therefore, the hearing officers are now on the same schedule, 8:00 a.m. to 4:30 p.m. DOC claims that the change was not meant to inconvenience the grievant, and also states that the grievant's previous "flexible" schedule had caused difficulty for the agency, because her hours were inconsistent.⁷

The need to have consistent hours for its employees, as well as DOC's prerogative to schedule hearings during regular business hours, demonstrate a motive that is not based on discrimination related to the grievant's medical condition. According to Department of Human Resource Management (DHRM) policy, agencies have authority to set schedules of employees and "an employee's schedule may not be adjusted continuously to meet the employee's personal needs."⁸ The grievant has not provided additional evidence that DOC's reasons are merely excuses to "cover up" unlawful discrimination.

Failure to Accommodate

But that does not end the inquiry. Under the ADA, an employer has the duty to provide an "otherwise qualified" employee with a reasonable accommodation that enables her to perform the essential functions of her job.⁹ An accommodation might include adjusting the employee's work schedule to suit the employee's disability.¹⁰ An accommodation, however, is not "reasonable" and thus not required under the ADA or policy if it would create an undue hardship for the employer; for example, if the accommodation would result in significant difficulty or expense, based on the agency's resources and operation of its business.

⁶ The typical workday for state agencies is 8:30 a.m. to 4:30 p.m. DHRM Policy 1.25, "Hours of Work."

⁷ Management noted that the grievant's arrival time was supposed to be at 9:00, but seemed to get later and later. The grievant also acknowledged that on some days, she was unable to arrive before 9:30.

⁸ DHRM Policy 1.25 (III)(B), "Hours of Work."

⁹ The grievant's Form A does not expressly raise DOC's failure to accommodate as an issue, but can be read as making out such a claim, so a discussion here is warranted.

¹⁰ 42 U.S.C. 12111(9)(B).

In this case, DOC attempted to accommodate the grievant when she returned in April by allowing her to work a modified schedule. However, despite the agency's willingness to adjust the grievant's schedule, she was apparently either unwilling or unable to maintain the modified work schedule.¹¹ Thus, the agency was no longer obligated to continue the modified schedule as a potential accommodation once it became apparent that the grievant was either incapable or unwilling to comply with it.

Reasonable Suspicion Drug Testing

As additional evidence that she was discriminated against, the grievant claims that she was required to submit to drug testing because of her medical condition. DOC policy states that "if reasonable suspicion exists . . . any employee may be required to submit to drug testing."¹² The grievant reports that she was given a reasonable suspicion drug test prior to having her stroke in April, and was allowed to return to work when no illegal substances were found. She believes that she was singled out for a second reasonable suspicion drug test after her stroke. Moreover, she claims that this drug test was "different" than her earlier drug test, because she was not immediately allowed to return to work.

Management emphasized that the maintenance of a drug-free workplace is especially important in a correctional facility. DOC policy notes that "employees of [DOC] have a responsibility to protect the public safety" and employees who are under the influence of drugs or alcohol "may have their judgement and performance impaired and are therefore more susceptible to corruption and pose an unacceptable risk to the Department based on issues of security and civil liability."¹³ During this Department's investigation, management reported that the grievant was observed on more than one occasion to have slurred speech and appeared to be unbalanced and under the influence. The grievant acknowledges that another employee observed her, but claims that the questionable behavior was only for a "matter of 40 to 60 seconds."¹⁴

As to why the grievant was not immediately returned to work after the drug test, management reported that the medical officer who conducted the test voiced concerns for the grievant's ability to work in a correctional environment. Specifically, he worried that her prescription medication might pose a threat in an environment where the grievant had daily interaction with inmates. Management asserts that they returned the grievant to work after they received assurances that her medications would not interfere with her work with inmates. It appears that management followed its drug and alcohol policy and did not target the grievant based on her medical condition. Rather, its reasons for testing

¹¹ See *supra* note 7.

¹² DOC Policy 5-55.10. DOC Policy defines "reasonable suspicion" as behavior that is "based upon observable phenomena (such as direct observation of the physical symptoms of using or being under the influence of illegal drugs, controlled substances or alcohol such as, but not limited to, slurred speech, disorientation, a pattern of abnormal conduct or erratic behavior)." DOC Policy 5-55.6.

¹³ DOC Policy 5-55.5.

¹⁴ Memo from the grievant to the Regional Director, dated December 18, 2001.

the grievant were based on an observation of her slurred speech, imbalance, and on its need to provide a safe, drug-free working environment for its employees. The grievant has not provided evidence to demonstrate that the business reason given was without merit, so this discrimination claim is not proper for adjudication by a hearing officer.

Modified Duty

The grievant claims that when she was returned to work on September 24, she was not permitted to return immediately to her hearing officer duties. Management claims that the grievant was not initially sent back to work as a hearing officer not because of her medical condition, but because she had not completed her annual In-Service Training. In support of her discrimination claim, the grievant notes that she had not yet completed the training upon her April return to work, but she was allowed to perform as a hearing officer at that time.

The In-Service Training is mandated for all DOC employees.¹⁵ The grievant completed her training on November 2, 2001 and was returned to work as a hearing officer on November 5. Management has provided a legitimate business reason for its decision to delay the grievant's return to her regular duties. If they allowed her to work in April when she had not completed the training, it was an error that was corrected by the November training. The grievant's evidence has not presented a sufficient question as to whether management's action was motivated by her medical condition or that the reason given was pretextual.

Gender Discrimination

To qualify this claim for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on the grievant's protected status, in other words, that because of her gender, the grievant was treated differently than other “similarly-situated” employees.

The grievant alleges that she was treated differently than a similarly-situated male employee upon her return to work. Specifically, she notes that the male employee was not placed on modified duty after his return from sick leave. Like the grievant, the male employee is a hearing officer and was out of work on extended medical leave. However, *unlike* the grievant, the male employee was current in his annual In-Service Training, therefore, it was not necessary to place him on modified duty until his training was completed. Thus, this presents no evidence of gender discrimination because these two employees were not “similarly-situated.”

The grievant also points out, presumably as evidence of gender bias, that a male employee was allowed to do her job for her while she was away from work. That fact

¹⁵ See DOC Policy 5-50.7(B).

alone, however, cannot support an inference of bias. Indeed, the agency notes that approximately 80% of the workforce at the institution is male, so it is more likely than not that a male employee would substitute for the grievant in her absence.

In sum, the grievant's disability discrimination claim fails because she has not demonstrated that the actions against her were motivated by her medical condition. Nor has she demonstrated discrimination based on her gender. DOC has provided legitimate reasons for its actions and the grievant has not produced sufficient evidence that the agency's stated reasons were merely pretextual. Accordingly, this grievance does not qualify for a hearing.

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, the grievant should 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 will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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