Issue: Qualification-FMLA, Workers Compensation; Ruling Date: July 23, 2002; Ruling #2002-121; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome; not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation,
and Substance Abuse Services
No. 2002-121
July 24, 2002

The grievant has requested a ruling on whether her November 26, 2001 grievance with the Department of Mental Health, Mental Retardation, and Substance Abuse Services (agency) qualifies for a hearing. The grievant claims that the agency violated the Worker's Compensation Act and the Family Medical Leave Act (FMLA) when it terminated her while she was suffering a work-related injury and when she was entitled to FMLA leave, and that her termination violated state policy. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant was employed by the agency as a Licensed Practical Nurse until October 31, 2001. On July 26, 1994, while moving a patient's food tray, she suffered a back injury for which she is receiving Worker's Compensation benefits. In February 1996, she returned to work in a light duty capacity. In November 1998, the grievant suffered further injury to her back from an automobile accident, and her doctor limited her working hours to 4-6 hours per day. She remained at work in a light duty/limited hour capacity until June 2001, when her doctor indicated that she had reached maximum medical recovery and would never be able to perform the essential functions of her job.

The agency informed the grievant that since she had reached maximum recovery, she had to return to full duty or apply for disability retirement. On July 2, 2001, the grievant attempted to return to work on full duty, but was unable to finish her shift because of pain. She received a letter from the agency on July 12, 2001, placing her on Leave Without Pay (LWOP) status for three months. On October 31, her LWOP expired and she was terminated from her nursing position because she was not able to return to full-duty in her pre-injury position. She was then referred to Managed Care Innovations, (MCI) the Commonwealth's Worker's Compensation case management contractor, for outplacement assistance.

DISCUSSION

Worker's Compensation Act

The Virginia Worker's Compensation Act (VWCA) compensates employees who are injured in the course of their employment.[1] Similarly, the Commonwealth's Worker's Compensation Plan "protects all Commonwealth of Virginia state employees from financial loss due to lost work (lost wages), medical expenses and other costs associated with a covered injury sustained arising out of and in the course and scope of employment subject to the provisions of the Workers' Compensation Act."[2] The facility where the grievant works also has a policy that compensates employees for work-related injuries and outlines the procedures for filing claims.[3]

In this case, it is undisputed that the grievant suffered a work-related injury and is entitled to benefits under the Worker's Compensation Act. The grievant has been receiving benefits under the Act and under state policy since her injury in July 1994. The grievant claims that the agency violated law and policy when it terminated her while she suffered from a work-related injury for which she was receiving Worker's Compensation benefits. The VWCA expressly forbids employers from terminating an employee *because* he or she filed a Worker's Compensation claim.[4] However, the Act does not prohibit an employer from discharging an employee receiving Worker's Compensation benefits for some other reason, such as the employee's inability to perform the essential functions of the job she was hired to do. Moreover, although no longer employed by the agency, the grievant is still receiving income replacement benefits from Worker's Compensation.[5] Therefore, it does not appear that the agency violated any provisions of the VWCA.

Nor is there evidence that the agency violated state or agency policy. Both state and facility Worker's Compensation policies defer to the VWCA. Moreover, the state's Worker's Compensation Plan encourages agencies to return employees to work after a work-related disability.[6] It appears that the agency attempted to do this for the grievant when it referred her to MCI. MCI has been working with the grievant since October 2001, when she was separated from employment. Furthermore, the longstanding agency practice has been to offer outplacement assistance or recommend disability retirement to employees who are unable to return to their pre-injury positions after suffering a Worker's Compensation injury. The agency notified the grievant of this practice on

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[1] *See* Virginia Worker's Compensation Act, Va. Code § 65.2-100 *et seq.*
[2] *See* http://www.dhrm.state.va.us/WorkersComp/workcomp.htm.
[3] Hospital Instruction No. 29, Reporting of Employee Injury - Worker's Compensation (effective April 8, 1999).
[4] Va. Code § 65.2-308.
[5] According to the agency's Human Resources office, the grievant is entitled to 500 weeks of income replacement under VWCA, which has not yet expired.
[6] *See* http://www.dhrm.state.va.us/WorkersComp/returntowork.pdf.

October 20, 1994.[7] Therefore, it appears that the agency has not violated any provisions of state or agency policy and this issue does not qualify for a hearing.

Family and Medical Leave Act

The grievant further claims that the agency wrongfully terminated her when she was eligible for leave under the Family and Medical Leave Act (FMLA). The FMLA guarantees employees twelve weeks of unpaid leave each year for medical reasons.[8] Similarly, DHRM policy allows employees to take leave without pay "for up to 12 workweeks during a calendar year" for the birth or adoption of a child, to care for a family member with a serious medical condition, or because the employee's own "serious personal health condition" makes him or her unable to "perform the functions of his or her position."[9]

In this case, the grievant left work on July 2, 2001 when she was unable to complete a full work-day because of her back pain. On July 12, 2001, the agency placed the grievant on leave without pay (LWOP) status for three months.[10] She was terminated on October 31, 2001, because she was unable to perform the essential functions of her job. Therefore, she was on LWOP for nearly 16 weeks, more than what is required under FMLA or state policy. While true that the agency did not notify the grievant in July that her three months on LWOP would count as her FMLA leave, the agency's failure to inform is not actionable.[11] Accordingly, this issue does not qualify for a hearing.

Misapplication of Policy

The grievant further alleges that her termination from the agency violated state policy. The grievant claims that the agency discriminated against her when it failed to provide light duty accommodations for her disability, which occurred as a result of an on-the-job injury. The relevant policy governing disability discrimination is DHRM Policy 2.05, which references the Americans with Disabilities Act (ADA).[12] The ADA prohibits an employer 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

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[7] This longstanding practice goes into effect as an agency policy, effective July 1, 2002. *See* Departmental Instruction No. 521(HRM)02, Return to Work/Worker's Compensation Management Program.
[8] Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*
[9] DHRM Policy 4.20, "Family and Medical Leave."
[10] While she was on LWOP status, the grievant continued to receive income replacement from Worker's Compensation.
[11] *See* Ragsdale v. Wolverine World Wide, Inc., 122 S. Ct. 1155 (2002) (invalidating federal regulation CFR § 825.700(a) which states that "if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.")
[12] 42 U.S.C. §§ 12101 *et seq. See also* DHRM Policy 2.05, "Equal Employment Opportunity."

functions of the job.[13] The "essential functions" are the "fundamental duties of the job the person with a disability holds or desires."[14] Courts have recognized that an accommodation is unreasonable if it requires the elimination of an "essential function."[15]

In this case, it is undisputed that the grievant's physical limitations or medical restrictions would preclude her from performing the job duties of a Licensed Practical Nurse. For example, the grievant is prohibited from having contact with combative patients and is severely limited in the amount of lifting, walking, and standing that she can do. Moreover, she is unable to work on her feet for an entire eight-hour shift. The agency considers all these duties to be essential functions of her job, and there is no evidence that these duties are nonessential. Therefore, eliminating any of these duties to accommodate the grievant's disability would not be reasonable under the law. Accordingly, there is no evidence that the agency has failed to comply with the ADA by failing to provide reasonable accommodation to the grievant.[16]

It should be noted that under agency policy, light duty assignments "may be offered to an employee who is injured on the job, *to allow him to continue to work for the Department during his recovery period.*"[17] However, the policy further notes that this period of light duty may not normally exceed 120 calendar days, and that if an employee who is unable to return to her pre-injury position, she will be separated, placed on disability retirement, or offered a new position.[18] Although this policy was not in effect at the time of the grievant's separation from the agency, the agency's Human Resources office reported during this Department's investigation that this has been the long-standing practice of the agency. This contention is supported by a memorandum to the grievant on October 20, 1994, which emphasized that light duty would be available while the grievant was "temporarily, partially disabled."[19] The memo further stated that if her limitations were permanent, the agency would try to find another position for her, offer outplacement assistance, or help her apply for disability retirement.

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[13] 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.

[14] Courts have considered a number of factors in determining what functions are essential. These include, but are not limited to, the employer's judgement 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* 29 CFR § 1630.2(N); Hill v. Harper, 6 F. Supp.2d 540, 543 (E.D. Va. 1998).

[15] Hill v. Harper, 6 F. Supp.2d at 543, *citing* Hall v. U.S. Postal Service, 857 F.2d 1073, 1078 (6th Cir. 1988).

[16] While the grievant did not receive the accommodation she preferred (light duty), the agency has attempted to find another job for the grievant by referring her to Managed Care Innovations. Human Resources noted during this Department's investigation that the grievant is "geographically challenged" because it is hard to find a nursing job in her area that could accommodate her limitations.

[17] Departmental Instruction No. 52 (HRM)02, § 521-5 (emphasis added).

[18] *Id.*

[19] October 20, 1994 memorandum to the grievant from the agency Human Resources Manager.

The grievant remained on light duty from July 1994 until June 2001, when the grievant's physician indicated that she had reached maximum medical recovery and would not be able to perform the essential functions of her job. The agency allowed the grievant to remain on light duty for so long because it was hopeful that she would recover from her injuries. When it became evident that she would not be able to return to her pre-injury position, the agency referred her for outplacement assistance. This action was in accordance with long-standing agency practices and with policy. Therefore, the grievant's claim that the agency misapplied policy does not qualify for a hearing.

Other Issues

Finally, the grievant alleges that the agency "violated its own term" when she attempted to come back to work four weeks after she was unable to complete her shift on July 2. During this Department's investigation, the agency reported that her doctor released her after four weeks for eight-hour days, but with strict limitations. However, the doctor never released the grievant to full duty. As noted above, the alteration of an employee's essential job functions is not a reasonable accommodation under state policy or the ADA. Moreover, according to agency policy, the agency was not required to continue the grievant on light duty assignments after her injury was found to be permanent in nature. Accordingly, this issue is not appropriate for adjudication by a hearing officer.

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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Claudia T. Farr
Director

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