Issue: Qualification/grievant claims that the agency misapplied or unfairly applied state policy concerning long-term disability, age and disability discrimination; Ruling Date: March 26, 2004; Ruling #2003-487; Agency: Department of Health; Outcome: not qualified. Appealed in the circuit Court for Russell County; Final Order entered August 2, 2004; Decision: Partially reversed; issue of grievant that agency misapplied or unfairly applied state policy when placing grievant on long-term disability is qualified for hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Health / No. 2003-487
March 26, 2004

The grievant has requested a ruling on whether her June 25, 2003 grievance with the Department of Health (VDH or the agency) qualifies for a hearing. The grievant claims that the agency misapplied or unfairly applied state policy when it placed her on long-term disability on June 28, 2003. In addition, she contends that she was discriminated against on the basis of her age and disability. For the following reasons, this grievance is not qualified for hearing.

FACTS

The grievant was employed as an Office Service Specialist at a county VDH facility. She had been employed by VDH for over 28 years and was covered by the Commonwealth's Virginia Sickness and Disability Program (VSDP).

In December of 2002, the grievant began suffering back pain. She was placed on Short Term Disability (STD)[1] on December 18, 2002. (This date was subsequently changed to December 19, 2002, and again to December 30, 2002.)[2]

The grievant received STD benefits and returned to work on or about April 9, 2003 for regular duty but with a reduced schedule of four hours per day. On or about June 3, 2003, the grievant attempted to return to her full-day schedule but informed management, via a note from her health care provider, that she was to work "light duty only." She was sent home, essentially told that the information provided regarding "light

[1] The applicable VSDP Handbook advises employees that "short-term disability benefits begin after a seven-calendar day waiting period." Further, "[o]n the eighth calendar day, after authorization by VSDP, short-term disability benefits provide days of income replacement . . . [and] [s]hort-term disability payments continue for up to 180 calendar days." Virginia Sickness and Disability Program (VSDP) Handbook 2002, "Short-Term Disability," page 7.

[2] The agency appears to attribute the changing of the dates to the grievant's purported manipulation of the VSDP system.

duty" was too vague. The grievant returned on June 6, 2003, with a note that stated that she should be allowed to take a "5 minute break each hour to stretch."

On June 25, 2003, the day the agency first asserted that the grievant moved into Long Term Disability (LTD), the grievant was sent home.[3] She was told that the agency could no longer accommodate her request for an accommodation (the 5-minute break each hour.)[4] On Friday, June 27, 2003, the grievant saw her doctor, who provided her with a release to work full-duty with no restrictions as of the next workday, Monday, June 30th.[5] The grievant claims that she left the release to unrestricted full duty at her workplace on Friday, the 27th.

On Saturday, June 28th, the agency again asserted that the grievant moved into LTD, this time based on the grievant's amended STD start date.[6] On Monday, June 30th, when the grievant attempted to return to work, she was told that she had been separated from state service as of June 28th, when she had been moved into LTD. Further, she was advised that because her doctor had released her to work without restrictions as of June 30th, she was no longer eligible for continued LTD benefits. Thus, she lost both her job and LTD benefits as a result of being moved into LTD status on Saturday, June 28th, and being cleared for unrestricted work on Monday, June 30th.

DISCUSSION

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.[7]

Chief among the applicable policies in this case is the Virginia Sickness and Disability Program (VSDP), various aspects of which are governed by two state agencies, the Virginia Retirement System Board of Trustees (VRS) and the Department of Human

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[3] The applicable VSDP Handbook advises employees that "Long–term disability benefits begin at the conclusion of the 180 calendar days of short-term disability benefits." Virginia Sickness and Disability Program (VSDP) Handbook 2002, "Short-Term Disability," page 10. The agency alleges that the grievant moved into LTD based on "the original start dates of STD &LTD." Agency Head's Qualification Decision, dated November 10, 2003.

[4] Management contends, as a general rule, that it does not provide accommodations for employees who have entered LTD but are *not* considered disabled (as defined by Americans with Disabilities Act (ADA)).

[5] The June 30th return to work (RTW) date was changed on several occasions by the grievant's health care provider, first to June 28th and then to June 27th. The agency asserts that the changes resulted from the grievant's "directing" of the process. The grievant asserts that she was not capable of directing the process.

[6] The grievant's start date into STD was modified on several occasions, which resulted in the date of her movement into LTD also changing. Again, the agency asserts that the changes resulted from the grievant's "directing" of the process.

[7] Va. Code § 2.2-3004(A)(ii); *Grievance Procedure Manual* § 4.1(b)(1), page 10.

Resource Management (DHRM).[8] VRS's VSDP Handbook for employees states that VSDP's ultimate goal "is to return you to gainful employment when you are medically able."[9] The VSDP Handbook further states that the "VSDP encourages agencies to provide reasonable accommodations for disabled employees as long as it does not create an undue hardship for the agency [and] . . . will work with you and your licensed treating professional to coordinate your return to employment."[10] Moreover, the Handbook advises employees that during the course of their disability, "VSDP will call your licensed treating professional to obtain clinical information concerning your disability and to arrange a return-to-work plan for you when medically appropriate [and] . . . . will be contacting your licensed treating professional, on an ongoing basis, to obtain updates on your diagnosis, symptoms, treatment plan and return-to-work plan."[11] Therefore, while VSDP does not guarantee that agencies will hire employees back after a period of LTD,[12] in accordance with VSDP's overriding mission, it would appear that agencies must not disregard VSDP's important goal of returning employees to work from periods of disability unless it would create an undue hardship for the agency.[13]

Other DHRM and VRS documents would also appear to support the contention that agencies must not disregard VSDP's important goal of returning employees to work from periods of disability unless it would create an undue hardship for the agency. Consider for example the *FAQs for VSDP Coordinators and Human Resources Departments*, dated 3/19/02. In that publication the question is posed: "A CORE[14] Job Modification Form has been received that releases an STD employee to return to work with restrictions. What should the agency do?" The response states that the "VSDP Coordinator should contact the employee's department to determine if the restrictions *can* be accommodated." [15] Moreover, it further states in **bold print** that if the employee is released with restrictions to work a full schedule, and if the restrictions do not affect the essential job functions, as determined by the agency, then CORE will close the STD claim and consider the employee returned to work full-time/full duty.[16] The use of the words "can be accommodated" in the FAQ cited above could be interpreted to require

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[8] As provided in VRS's Virginia Sickness and Disability Program Handbook, VRS "by law, has been given the authority to develop, implement and administer the VSDP. However, the authority granted is not intended to supercede the final authority of the Director of the Department of Human Resource Management to develop and interpret leave and related personnel policies and procedures associated with VSDP." VSDP Handbook 2002, "Authority and Interpretation," page 30.

[9] VSDP Handbook 2002, "Objective of Program," page 4.

[10] VSDP Handbook 2002, "Long-Term Disability," page 11. Compare DHRM Policy 4.30 (Leave Policies – General Provisions) at III(C), page 2 of 5 ("[w]hen practicable, and for as long as the agency's operations are not affected adversely, an agency should attempt to approve an employee's request for leave of absence for the time requested by the employee").

[11] VSDP Handbook 2002, "How do I access VSDP Benefits?" page 24.

[12] VSDP Handbook 2002, "Long-Term Disability," page 10.

[13] VDH also has a return to work policy that states that "[t]he policy of the Virginia Department of Health (VDH) is to *actively support* the return to work of employees who have been absent due to illness or injury." Emphasis added.

[14] CORE is the VSDP third party administrator.

[15] VSDP FAQ's for VSDP Coordinators and Human Resource Departments, page 2, (emphasis added).

[16] Id.

agencies to determine whether they are *able* to accommodate the requested accommodation, not whether they are merely *willing* to accommodate.

However, upon this Department's request for clarification, DHRM advised that state agencies have no obligation to return to work employees who still require an accommodation after the 180th day of STD, absent any Workers' Compensation (or ADA[17]) implications. According to DHRM, "[t]here is no mandate by code or otherwise that an agency must consider any requested accommodations or restrictions from the Third Party Administrator."[18] DHRM stated that "[a]lthough the [FAQ] language may imply that they should, and it may be good business practice, the [VSDP] program does not mandate this." Because DHRM, the agency charged with promulgation and interpretation of state policy, has reviewed the facts of this case and found no misapplication of that policy, this Department is compelled to deny qualification on this issue.[19]

The Equal Employment Opportunity Policy

DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, color, religion, gender, age, national origin, *disability*, or political affiliation . . . ."[20] Under Policy 2.05 "'disability' is defined in accordance with the Americans with Disabilities Act."[21]

The relevant law governing disability accommodations is the Americans with Disabilities Act (ADA).[22] 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.[23] The

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[17] Americans with Disabilities Act (ADA), 42 U.S.C. §§12101 *et seq.*

[18] DHRM's interpretation regarding an agency's obligation to provide an accommodation after the 180th day of STD was provided after DHRM consulted with VRS.

[19] Va. Code § 2.2-1201(13) states that DHRM shall "Develop state personnel policies and, after approval by the Governor, disseminate and interpret state personnel policies and procedures to all agencies." Section 2.2-1201(13) further states that "The [DHRM] Director of the Department shall have the final authority to establish and interpret personnel policies and procedures and shall have the authority to ensure full compliance with such policies." *See also* Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989). Also, it must be noted that while the grievant's doctor retroactively changed the grievant's return to work (RTW) date to Saturday, June 28th, then again to Friday, June 27th. The latter revision would have effectively saved the grievant's job by returning her to work prior to her movement into LTD on June 28th. However, CORE, VSDP's third party administrator, dismissed the doctor's RTW date revisions and continues to maintain that Monday, June 30th was the true RTW date. Thus, while there is no evidence that the grievant ever received any LTD benefits, CORE asserts that the grievant was moved into LTD on Saturday, June 28th. Just as this Department is bound by DHRM's interpretations of state policy, we are also bound by CORE's factual determinations regarding VSDP status and benefit eligibility.

[20] DHRM Policy 2.05, page 1 of 4 (emphasis added).

[21] *Id*.

[22] 42 U.S.C. §§12101 *et seq.*

[23] 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.

"essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires."[24] Courts have recognized that an accommodation is unreasonable if it requires the elimination of an "essential function."[25]

A threshold question is whether an employee has a disability as defined by the ADA. The ADA defines a 'disability' as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."[26] Presumably the grievant's back problem qualifies as physical impairment. However, assuming without deciding that 'working' is a major life activity under the ADA,[27] the grievant has not presented evidence that her injury is "substantially limiting."

In order to demonstrate that an impairment is substantially limiting, an individual must show that he is significantly restricted in a major life activity. [28] In determining whether an impairment is substantially limiting, courts may consider the "nature and severity of the impairment," the "duration or expected duration of the impairment," and the "permanent or long term impact" of the impairment.[29] These factors indicate that a temporary impairment, such as recuperation from surgery, will generally not qualify as a disability under the ADA.[30] In this case, grievant suffered a back impairment that required a recovery period of approximately six months, after which she was released to return to work without restrictions. Accordingly, there is no evidence that the grievant suffered a "substantially limiting impairment" as a result of her back impairment. As evidenced by her eventual release to return to work, the grievant's injury was of a limited duration and did not appear to have a permanent impact. Thus, it does not appear that

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[24] 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, 6 F. Supp.2d 540, 543 (E.D. Va. 1998).

[25] 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)).

[26] 42 U.S.C. § 12102(2).

[27] The U.S. Supreme Court has noted "the conceptual difficulties inherent in the argument that working could be a major life activity," but declined to "decide this difficult question." Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 122 S. Ct. 681, 692, (2002). This question is likewise not necessary to the resolution of this case.

[28] Pollard v. High's of Baltimore, Inc. 281 F.3d 462, 467 (4th Cir. 2002); 29 C.F.R. § 1630.2(j)(1).

[29] *Pollard*, 281 F. 3d at 467-468; 29 C.F.R. § 1630.2(j)(2).

[30] *Pollard*, 281 F. 3d at 468. "An impairment simply cannot be a substantial limitation on a major life activity if it is expected to improve in a relatively short period of time." *Id.* The Pollard court noted, citing an earlier decision, that "it is evident that the term 'disability' does not include temporary medical conditions, even if those conditions require extended leaves of absence from work." *Pollard* at 468, 281 F. 3d (citing Halperin v. Abacus Tech. Corp., 128 F.3d 191, 199 (4th Cir. 1997)). In Pollard, where the plaintiff "was left with only the restrictions that she not lift more than twenty-five pounds or bend repetitively," the Court held that a "nine-month absence is insufficient to demonstrate that Pollard had a permanent or long-term impairment that significantly restricted a major life activity." *Pollard*, 281 F. 3d at 469-471.

the grievant is disabled as defined by the ADA. Her grievance is therefore not qualified for hearing.[35]

APPEAL RIGHTS AND OTHER INFORMATION

For more information regarding actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification 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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William G. Anderson, Jr.
EDR Consultant, Sr.

[35] The grievant also claimed that she was discriminated against because of her age but has provided no evidence to support that claim. Accordingly, the issue of age discrimination is not qualified for hearing.