Issue: Qualification/disability, retaliation from other protected right; Ruling Date: August 11, 2005; Ruling #2006-1044; Agency: Department of Corrections; Outcome: all issues not qualified.

# *COMMONWEALTH of VIRGINIA*
## ***Department of Employment Dispute Resolution***

## QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2005-1044
August 11, 2005

The grievant has requested a ruling on whether her April 12, 2005 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant claims that the agency has discriminated against her on the basis of her disability, alcoholism, and has retaliated against her for reporting racial discrimination. Specifically, the grievant asserts that the agency improperly and unfairly failed to accommodate her and that the failure to accommodate led to her separation from employment. For the reasons set forth below, this grievance is not qualified for hearing.

### FACTS

Prior to her separation from employment the grievant worked as a Corrections Nurse Technician. In late 2003, the grievant complained to the Human Resource Officer that Caucasian nurses received the most favorable schedules. In April of 2004, she was terminated during her probationary period for unsatisfactory attendance. Following an agency investigation, she was reinstated with full pay and benefits. The Human Resource Office had concerns over her being terminated on the basis of attendance rather than performance.

Upon her return, she informed management that she could not work night shifts or overtime. For 60 days the agency granted her request. Upon the expiration the 60-day period the grievant was separated from employment because of her inability to "perform the essential functions of the position (work all shifts and schedules, including required overtime.)" The Warden informed the grievant that she would be eligible for rehire when she no longer had any overtime or shift restrictions. The grievant is currently employed as a nurse at a nursing home where she works day shifts.

### DISCUSSION

*Disability Discrimination*

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 . . . ."[1] Under Policy 2.05, "'disability' is defined in accordance

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

with the Americans with Disabilities Act," the relevant law governing disability accommodations.[2] Like DHRM Policy 2.05, the Americans with Disabilities Act (ADA) prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.[3] A qualified individual is defined as a person with a disability, who, with or without "reasonable accommodation," can perform the essential functions of the job. An individual is "disabled" if she "(A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment."[4]

*I. Was the Grievant "a Qualified Individual with a Disability?"*

The initial inquiry is whether the grievant has a physical or mental impairment that substantially limits one or more of her major life activities. Alcoholism is not a "per se" disability under the ADA.[5] It is, however, a "physical or mental impairment."[6] To qualify as an ADA disability, however, the grievant's alcoholism must "substantially limit one or more of [her] major life activities."[7] To be "substantially limited" in a major life activity, the plaintiff must be significantly restricted in performing the activity.[8] 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.[9] Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[10]

Here the grievant asserts that she is limited in the major life activity of sleeping. Several circuit courts have held that sleeping is a major life activity under the ADA.[11] While the severity and duration of the grievant's sleep problems are not fully evident, as

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[2] 42 U.S.C. §§12101 *et seq.*

[3] It should be noted that DOC Procedure Number 5-54 provides "a process for employees and supervisors to implement Title I of the ADA and provide appropriate accommodations for 'qualified individuals with disabilities.'"

[4] 42 U.S.C. § 12102(2).

[5] *See* Roberts v. New York State Dep't of Correctional Servs., 63 F. Supp. 2d 272, 285 (W.D.N.Y. 1999) (citing Burch v. Coca-Cola Co., 119 F.3d 305, 316 (5th Cir. 1997); McKey v. Occidental Chem. Corp., 956 F. Supp. 1313, 1317 (S.D. Tex. 1997)).

[6] Roberts, 63 F. Supp. 2d at 285.

[7] In McKey v. Occidental Petroleum Corp., 956 F. Supp. 1313, 1317-18 (S.D. Tex. 1997) the court notes that "In fact, the ADA does not designate any impairment as a disability *per se*. Instead, the Interpretive Guidelines to the ADA emphasize the impact an alleged impairment has on the individual. 'The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.''' 29 C.F.R. 1630.2(j), App. (1996). 42 U.S.C. § 12102(2)(A).

[8] Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 196-97, 122 S. Ct. 681, 691 (2002).

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

[10] 29 C.F.R. § 1630.2(i).

[11] *See, e.g.,* Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 643 (2d Cir. 1998); EEOC v. Sara Lee Corp., 237 F.3d 349, 352-53 (4th Cir. 2001); McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999); Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999).

explained below, even if the grievant is assumed to be a qualified individual with a disability, she has not provided evidence that she can perform the essential function of her position with or without a reasonable accommodation.[12]

*II. Could the Grievant Perform the Essential Functions of Her Position with or without a Reasonable Accommodation?*

The "essential functions" of a job are the "fundamental job duties of the employment position the individual with a disability holds or desires." In this case, DOC has determined that the essential functions of the nurse position require that nurses be able to work all shifts and overtime. Whether a function is essential is evaluated on a case-by-case basis by examining a number of factors. The ADA provides that consideration shall be given to the employer's judgment as to what functions of a job are essential and the employer's written description for that job.[13] The ADA regulations provide that other factors to consider are: (1) the amount of time spent on the job performing the function, (2) the consequences of not requiring the incumbent to perform the function, (3) the terms of any collective bargaining agreement, (4) the work experience of past incumbents in the job, and (5) the current work experience of incumbents in similar jobs.[14]

Under the facts of this case, this Department concludes that the agency's determination that the ability to work all shifts and overtime is an essential function of the grievant's job, and that it could not accommodate the grievant's need to avoid the 3rd shift and any overtime, is not a misapplication or unfair application of state or agency policy. First, the grievant concedes that in the past, overtime was common. Indeed, documentation provided by the Human Resource Office confirms that during several pay periods combined overtime hours of facility nurses exceeded 40 hours. Secondly, the consequences of not requiring the grievant to perform the function could potentially be significant. If, for instance, another nurse calls in sick or has to leave early for an

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[12] It is not clear whether the grievant's impairment would rise to the level of a disability because if the impairment (sleeping problems) can be eliminated through medication then it would not rise to level of a disability. *See* Sutton v. United Air Lines, 527 U.S. 471, 475 (1999) in which the Court held that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment." The Court concluded that because the petitioners' visual impairments could be corrected by wearing glasses, the petitioners were not substantially limited in the major life activity of seeing. 527 U.S. at 488-89. In this case, the grievant takes medication which helps her to sleep. It is not evident that the grievant is substantially limited in sleeping when she takes her prescribed medication. Furthermore, to the extent that the grievant were to assert that she is limited in the major life activity of working, such a claim would fail. *See* Kellogg v. Union Pac. R.R. Co., 233 F.3d 1083, 1087 (8th Cir. 2000) ("An employee is not substantially limited in the major life activity of working by virtue of being limited to a forty-hour work week."); Tardie v. Rehabilitation Hosp. of R.I., 168 F.3d 538, 542 (1st Cir. 1999) (holding that inability to work overtime was not a disability because "there are vast employment opportunities available which require only 40-hour work weeks"); Kolpas v. G.D. Searle & Co., 959 F. Supp. 525, 529 (N.D. Ill. 1997) ("The inability to work more than forty hours per week by itself does not constitute a substantial limitation on the major life activity of working.").

[13] *See* 42 U.S.C. § 12111(8).

[14] *See* 29 C.F.R. § 1630.2(n)(3); Hill v. Harper, 6 F. Supp.2d 540, 543 (E.D. Va. 1998).

emergency, other nurses would likely have to cover by working later. Where an absence of a shift or even a day may be acceptable in a clerical position, a shortage of direct care providers (nurses) could presumably pose an unacceptable risk to patients. As to the third factor, there is no collective bargaining agreement at play here. As to the fourth and fifth factors, as noted, the grievant concedes that overtime was common and that she routinely rotated shifts. As mentioned, documentation provided by Human Resources confirms that overtime was routine, sometimes exceeding 40 hour in a pay period. Likewise, documentation shows that nurses continue to work a variety of shifts.[15] Rotating shifts and overtime are not uncommon in the nursing profession. The potential impact of a shortage of direct care providers at infirmary or hospital is clear: the health of patients could be jeopardized. The agency does not find potential risk to be acceptable and this Department will not second-guess the agency in this regard.[16] Therefore, the issue of disability discrimination is not qualified.

*Retaliation*

The grievant also contends that the agency terminated her employment in retaliation for her complaining about alleged racial bias in scheduling.

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;[17] (2) the employee suffered an adverse employment action; 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.[18] If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.[19] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[20]

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[15] The agency concedes that one nurse works primarily at night. However, the agency emphasizes that this individual is available to work overtime and other shifts as required.

[16] An employer is entitled to considerable deference as to what it considers an essential function of a position where the plaintiff has presented no evidence of discriminatory intent, animus, or even pretext. *See* EEOC v. Amego, Inc., 110 F.3d 135, 145 (1st Cir. 1997). It should be noted that the grievant's Employee Work Profile (EWP) states that she must be able to work overtime and all shifts.

[17] *See* Va. Code § 2.2-3004 (A)(v). 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 an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[18] Dowe v. Total Action Against Poverty, 145 F.3d 653, 656 (4th Cir. 1998).

[19] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe, 145 F.3d at 656.

[20] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

Complaining about racial discrimination is a protected activity. A job termination is clearly an adverse employment action. As to the third element, however, there is nothing that links the adverse employment action to the protected activity, with the exception of the relatively close proximity in time of the two events. Moreover, the agency has proffered a legitimate business reason for its action: that it requires that it employees be able to work all shifts and overtime because staffing shortages can have a critical impact on any hospital or infirmary, particularly one housed in a correctional institution. The grievant has not provided evidence to rebut the stated business reason for its actions. Accordingly, this issue is not qualified for 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 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.
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