Issue: Qualification/Discrimination/Disability; Ruling Date: November 9, 2005; Ruling #2006-1118; Agency: Department of Virginia State Police; Outcome: qualified for hearing

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Virginia State Police
Ruling Number 2006-1118
November 9, 2005

The grievant has requested a ruling on whether her August 4, 2005 grievance with the Department of Virginia State Police (VSP or the agency) qualifies for a hearing. The grievant claims that the agency improperly failed to return the grievant to work as a Trooper on the basis of her disability. For the reasons set forth below, this grievance is qualified for hearing.

FACTS

Prior to her transfer to the position of dispatcher in October 2004, the grievant was employed as a State Trooper with VSP. On June 2, 2004, while driving her VSP vehicle, the grievant was involved in an accident and badly injured. The grievant has insulin-dependent diabetes and at the time of the accident, the grievant's blood glucose levels were allegedly too low.

Sometime after her accident, the grievant claims she went to see the VSP physician regarding when she may be able to return to work as a Trooper. She asserts that the VSP physician told her that he did not know enough about diabetes to make an assessment and advised her to see a specialist. The VSP physician further allegedly told the grievant that if she were to get an insulin pump and the specialist cleared her to return to work as a Trooper, then he would see no problem with clearing her to return to work in that capacity.

The grievant subsequently saw the specialist and asserts she began using an insulin pump in March 2005. After closely monitoring her progress and use of the insulin pump, on May 16, 2005, the specialist cleared the grievant to return to work as a Trooper. The VSP physician, however, recommended that the grievant not be returned to the position of State Trooper because of the risk she could pose to herself as well as the citizens of Virginia if she were to suffer another hypoglycemic episode while performing her duties as a Trooper. Based on this recommendation, on June 23, 2005, VSP denied the grievant's request for reinstatement to her position as Trooper.

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 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.

Under the ADA, "discriminate" can mean "using qualification standards . . . that screen out or tend to screen out an individual with a disability."[3] However, the ADA permits employers to impose, as a qualification standard, the requirement that an individual "not pose a direct threat to the health or safety of other individuals in the workplace."[4] "The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[5] An employee also poses a direct threat if her disability endangers her own safety on the job.[6]

An employee that poses a direct threat that cannot be eliminated or reduced through reasonable accommodation is not a qualified individual under the ADA.[7] Whether an individual poses a direct threat to the health and safety or herself or others "shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job."[8] Further, the assessment must be based "on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[9] Factors to be considered in determining whether an individual poses a direct threat are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.[10]

Given the agency's assertion that the grievant poses a direct threat to the health and safety of herself and others, it must be determined whether (1) the grievant is disabled; and (2) a qualified individual under the ADA.

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[1] DHRM Policy 2.05, page 1 of 4 (emphasis added).
[2] 42 U.S.C. §§ 12101 *et seq.*
[3] 42 U.S.C. § 12112(b)(6).
[4] 42 U.S.C. § 12113(b).
[5] 42 U.S.C. § 12111(3).
[6] *See* Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 76, 153 L. Ed. 2d 82, 122 S. Ct. 2045 (2002).
[7] *See* Branham v. Snow, 392 F.3d 896 (7th Cir. 2004).
[8] 29 C.F.R § 1630.2(r) (2005).
[9] *Id.*
[10] *Id.*

I. Is the Grievant Disabled under the ADA?

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."[11] The initial inquiry then is whether the grievant has a physical or mental impairment[12] that substantially limits one or more of her major life activities. Diabetes appears to be a "physical impairment."[13] Thus for purposes of this ruling only, we will assume that the grievant has a physical impairment.

To qualify as an ADA disability, however, the grievant's physical impairment must "substantially limit one or more of [her] major life activities."[14] To be "substantially limited" in a major life activity, the plaintiff must be significantly restricted in performing the activity.[15] 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.[16] Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[17] Eating may also be considered a major life activity.[18]

According to the grievant, because of her diabetic condition, she is constantly watching what she eats and in particular, those foods that contain carbohydrates. Moreover, the grievant must always carry snacks with her in case her blood glucose levels get too low. The grievant is further required to check her blood glucose levels before she gets in the car and at least 4 to 6 times per day. Additionally, although the grievant can control her diabetes to some extent with the help of the insulin pump, her diabetic condition is permanent.

In some cases, it may be readily apparent that an employee's impairment does not substantially limit a major life activity. While this is not such a case, the grievance here does raise sufficient question as to that issue, a question of fact best determined by a hearing officer at hearing.

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[11] 42 U.S.C. § 12102(2).
[12] "Physical or mental impairment means: (1) [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine." 29 CFR 1630.2(h)(1).
[13] *See* Fraser v. Goodale, et al., 342 F.3d 1032 (9th Cir. 2003) ("[d]iabetes is a physical impairment under the ADA because it is a physical condition affecting the digestive, hemic, and endocrine systems.")
[14] *See* 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(g)(1) (2005).
[15] Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 196-97, 122 S. Ct. 681, 691 (2002).
[16] Pollard, 281 F. 3d at 467-468; 29 C.F.R. § 1630.2(j)(2).
[17] 29 C.F.R. § 1630.2(i).
[18] *See* Branham at p. 904.

II. Is the Grievant a Qualified Individual?

A qualified individual is defined as "an individual with a disability, who, with or without reasonable accommodation, can perform the essential functions[19] of the employment position that such individual holds or desires.[20] As stated above, an employee that poses a direct threat to the health and safety of herself or others, even with reasonable accommodation, is not a qualified individual under the ADA.[21]

In this case, the grievant claims that she can fully perform the functions of a Trooper with reasonable accommodations (i.e., the use of the insulin pump, monitoring blood glucose levels, carrying snacks with her at all times, etc.). VSP, on the other hand, appears to have determined that the grievant is unqualified for the position of Trooper because even with reasonable accommodation(s), the grievant would pose a direct threat to herself and others while performing at least one of the essential functions of the Trooper position, driving.[22] As stated above, the agency's determination is based primarily upon the opinion and assessment of the VSP physician and the grievant's previous motor vehicle accident while working as a Trooper. However, the specialist that examined the grievant opined in writing that the grievant is capable of returning to work as a State Trooper. There is also a question as to the basis for the VSP physician's conclusion that the grievant should not return to work as a Trooper. The grievant claims that the VSP physician told her that although she was the healthiest diabetic from VSP that he had seen, he could not return her to work as a Trooper because he hopes that VSP will adopt a policy barring insulin-dependent diabetics from being Troopers. The agency admits that the VSP physician believes the grievant to be the healthiest insulin-dependent diabetic he has seen at VSP, and confirms that the VSP physician believes that insulin-dependent diabetics should not be law enforcement officers. The agency further asserts, however, that despite his opinion, the VSP physician makes his decisions on an individualized basis.

In light of the competing medical opinions regarding the grievant's present ability to safely perform the essential functions of a State Trooper with reasonable accommodations, as well as the VSP physician's opinion that no insulin-dependent diabetic could function as a Trooper, this grievance raises a sufficient question as to whether the grievant is in fact a qualified

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[19] The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires." 29 CFR 1630.2(n). 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 CFR. 1630.2(n); Hill v. Harper, 6 F. Supp. 2d 540, 543 (E.D. Va. 1998).

[20] 42 U.S.C. § 12111(8).

[21] *See* Branham v. Snow, 392 F.3d 896 (7th Cir. 2004).

[22] While VSP did not expressly state that the grievant posed a significant risk to the health or safety of others even with reasonable accommodation, the VSP physician and agency took the grievant's insulin pump and monitoring regimen into consideration in making the determination that she could not return to the position of Trooper. One can infer that by asserting the grievant posed a direct threat, VSP determined that even with such accommodations, the grievant would pose such a risk.

individual or whether her return as a Trooper would pose a direct threat to the health and safety of herself or others.[23]

CONCLUSION

For the reasons discussed above, this grievance raises a sufficient question as to whether VSP discriminated against the grievant on the basis of her disability when it failed to return her to the position of Trooper and is therefore qualified for hearing. This qualification ruling in no way determines that the agency's decision not to reinstate the grievant to her former position as State Trooper was discriminatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

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Claudia T. Farr
Director

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Jennifer S.C. Alger
EDR Consultant

[23] Based upon the relevant case law, it is unclear whether the grievant would be considered otherwise qualified for the position of Trooper and such a determination must be based upon an individualized assessment of the grievant's particular situation. *See, e.g.*, Gragg v. NYS Department of Environmental Conservation, 2000 U.S. Dist. LEXIS 19607 (After suffering from several seizures at work, the plaintiff, an insulin-dependent diabetic, had his driving privileges revoked and was reassigned to office duty. The plaintiff subsequently underwent new medical treatment which dramatically reduced his seizures. As a result, the plaintiff claimed that he no longer posed a threat to himself or the safety of others. The court found that the plaintiff had stated a prima facie case of disability discrimination under the ADA and opined that "[r]apid advances in medical science mandate" an "individualized factual inquiry" into whether the plaintiff is "otherwise qualified" for the position he seeks. As such, the defendant's motion to dismiss the plaintiff's claim that the defendant violated the ADA by refusing to reassign the plaintiff to driving duty after his condition improved was denied) and Branham v. Snow, 392 F.3d 896 (7th Cir. 2004) (The court found a genuine issue of material fact as to whether the employee, an insulin-dependent diabetic that uses an insulin pump, was a direct threat and therefore not qualified to perform the job of criminal investigator.) *But see* Burroughs v. City of Springfield, 163 F.3d 505 (8th Circ. 1998) (The employee, a diabetic, suffered two hypoglycemic episodes while serving as a police recruit causing him to become disoriented and dysfunctional while on duty. Relying upon the medical judgment of a diabetes specialist that the employee "could conceivably" be a danger to himself and others, the employer determined that the employee could no longer perform police work. The court found the employer's decision to remove the employee from duty appropriate stating "[t]he inherent and substantial risk of serious harm arising from such [hypoglycemic] episodes, given the nature of police work, is self-evident."); Burden v. Southwestern Bell, 2005 U.S. Dist. LEXIS 22202 (N.D. Texas 2005) (The plaintiff, an insulin-dependent diabetic, was found to be unqualified for the position of customer service tech because his numerous hypoglycemic episodes at work rendered him a significant risk to himself and the safety of others) and Siefken v. Village of Arlington Heights, 1994 U.S. Dist. LEXIS 13015 (N.D. Ill. 1994) (The court found that the employee, an insulin-dependent diabetic, was not entitled to a "second chance" in his position of police officer when he had admittedly failed to adequately control his diabetes and as a result, suffered a hypoglycemic episode while driving his squad car.)