Issue: Qualification/discrimination based on disability; Consolidation/of grievances for purposes of hearing; Ruling Date: July 13, 2006; Ruling #'s 2006-1220, 2006-1239; Agency: Department of Corrections; Outcome: qualified for hearing and consolidated

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2006-1220, 2006-1239
July 13, 2006

The grievant has requested a ruling on whether her August 10, 2005 and September 12, 2005 grievances with the Department of Corrections (DOC or the agency). For the reasons stated below, these grievances qualify and are consolidated for hearing.

FACTS

The grievant was employed by the agency as a counselor at a correctional facility. The grievant admits that in November 2004, she was hospitalized for a psychological condition. She apparently remained hospitalized from November 3, 2004 until November 22, 2004. On February 11, 2005, a psychiatrist apparently treating the grievant released her to return to work on a part-time basis on March 1, 2005.

According to the agency, the grievant returned to work at the facility on March 3, 2005. The agency states that on March 3rd and 4th, she worked in her office for 6.7 hours each day. According to notes produced by the agency, at 3:00 on the afternoon of Friday, March 4th, the grievant was advised by her supervisor that she would need to speak with the warden to alter her work schedule for more than five days.

The grievant returned to work on Monday, March 7th, and met with the warden, her supervisor, and the facility's Human Resources Officer. The agency states that during that meeting, the grievant was informed that in order to accommodate her restriction to part-time work, the agency would need additional information from her physician (specifically, a completed questionnaire based on the essential functions and the physical requirements of her position). The agency states that the grievant was also advised that she would not be allowed to return to work until the additional paperwork was completed; that the paperwork was to be returned no later than March 14, 2005; and that any accommodation by the warden would be made on a temporary basis for no more than 90 days[1]. The agency alleges that the grievant was upset by the request for additional paperwork and walked out of the meeting. Agency notes also indicate that the grievant suggested that she did not need any accommodation from the agency.

[1] This 90-day period is based on DOC Policy 5-52, "Temporary Adjustments to Work Assignments." Section 5-52.10 of that policy provides that "adjusted work assignments" shall not exceed 90 days unless extended by the Organizational Unit Head and approved by the Administrator of Employee Relations and Training.

The grievant asserts that she was upset by the warden's alleged statements that he did not have anything for her to do and that she could not work until she had the proper release papers, because she had already turned in her FMLA paperwork. She states that she left the meeting because she did not want inmates to see her breaking down. The grievant admits that during the meeting, she told the warden "that every man, boy, girl, female or male will reap what they sow and his seeds was his deeds." She alleges that simply because she was hospitalized and seeking treatment from a psychiatrist did not mean that she was unable to perform her duties.

On or about March 14, 2005, the warden was notified by an agency employee, Ms. K, that the grievant had come to Ms. K's home on March 12th to advise Ms. K that she was having a problem with the warden and the warden was trying to fire her. Ms. K informed the warden that in the course of her conversation with the grievant, the grievant stated that she had been out of work because someone from the facility had poisoned her water, and that she could only work half-days because her brains and intestines needed to shift to the right place. Ms. K also alleged that the grievant was unkempt and had an offensive odor.

On March 18, 2005, the grievant notified the agency that she was still trying to get the necessary paperwork from her doctor to return to work.[2] The grievant subsequently appears to have provided the agency with a completed questionnaire dated March 24, 2005, executed by her primary care physician. In that questionnaire, the physician indicated that the grievant was not able to perform the physical requirement of stress management, or the essential functions of analyzing situations, performing shift work, and maintaining public contact. In response to a question asking whether the grievant's condition posed any threat to safety in a security setting, the physician wrote, "Probably not."[3] The physician indicated that he expected the grievant's condition to last for 2-3 months.

The grievant states that on April 6, 2005, her supervisor called her at home to tell her that the warden wanted her to come in on April 7th to talk about employment. Subsequently, on April 7th, the grievant was allowed to return to work in the agency's mailroom. Although the grievant's assigned hours of work were 9:00 am to 4:30 pm, the mailroom closed at 2:30 pm each day. In a letter dated April 20, 2005, the agency advised the grievant that when additional work was not available in the administration building after the mailroom's closing, she would be required to utilize her leave balances for the period from 2:30 to 4:30 pm.[4] The agency also again reminded the grievant that she would only be accommodated for a 90-day period, ending on July 5, 2005, and advised her that if she was unable to return to her previous

[2] On March 23, 2005, the agency apparently sent the grievant notice that her absences since January 10, 2005 were being charged against her yearly Family and Medical Leave Act (FMLA) leave. The agency also requested that the grievant complete an FMLA "Certification of Health Care Provider," although it appears that such a form, completed by a psychiatrist, was provided to the agency prior to the grievant's return to work on March 3rd.

[3] It is unclear when the agency received this documentation. In a letter of April 20, 2005, the agency noted that it had not received requested "physician documentation."

[4] Although the grievant's psychiatrist indicated, in his February 11, 2005 certification, that the grievant would need to "start part time four h[ou]rs a day starting 3/1/05," the agency appears to have assigned the grievant to work for at least six hours per day in the mailroom, with a possible two additional hours of work when available.

position at that time, she would need to seek an accommodation through the agency's ADA Review Committee, apply for disability retirement, seek other positions, or separate from employment.[5]

The agency states that during a meeting on June 27, 2005, the grievant was advised that her accommodation would end on July 5, 2005, and that the grievant would be required to provide documentation "if [she was] being released to return to regular duty." The agency asserts that it met again with the grievant on July 11, 2005, at which point documentation from the grievant's family physician was reviewed. That documentation did not identify any essential functions which the grievant could not perform, but indicated that the grievant needed a note of release from her psychiatrist regarding stress, judgment, and public contact. The agency states that during the July 11th meeting, the Warden advised the grievant that she would have to have an essential functions and physical requirements form completed by her psychiatrist to return to work.

The agency asserts that on July 15, 2005, the facility's Human Resources Manager called the grievant at home to see if she had any questions about the necessary documentation. An e-mail from the Human Resources Manager to the warden recounting the conversation states that the grievant was "very agitated" during the conversation and stated that the agency was wrongfully not allowing her to return to work (presumably in her position as counselor) even though she had been released to return to work by her health care providers. According to the Human Resources Manager, the grievant also repeatedly stated that what goes up must come down and the warden would get his, and asserted that she was going to "file a grievance and take it all the way to the Federal Supreme Court."

The agency asserts that on July 21, 2005, the grievant notified the agency that her physician would need two weeks to return the requested documentation.[6] The agency states that the grievant asked to return to work during this period, but that it refused the grievant's request because "the maximum accommodation had already been afforded" and documentation from the grievant's physician was still needed. The agency states that it advised the grievant, however, that it would approve her leave of absence through August 4, 2005, to allow her to obtain return-to-work documentation from her physician.

The agency states that on August 5, 2005, the grievant called to explain that she would be going to her physician to obtain the requested release on August 10, 2005. On August 10, 2005, the grievant initiated the first of her two grievances, in which she alleged that she had lost wages and time "due to unfair misapplication of sick leave and doctor order."

According to the agency, on August 11, 2005, the grievant presented documentation from her family physician indicating that she had no physical impairments that would preclude her from performing her essential job functions, as well as documentation from a

[5] The grievant was the subject of an April 8, 2005 Incident Report for allegedly sleeping in her car during work time, as well as for allegedly failing to arrive at work on time and taking too-long lunches.
[6] The agency states, in a letter dated *July 20, 2005*, that the grievant "called the Institution on July 21, 2005."

psychiatrist indicating that the grievant could return to work part time in a low stress setting.[7] The agency apparently advised the grievant that her position was "neither low stress nor part time" and reminded her that she had received "the maximum accommodation that could be allowed by Department policy." The agency states that it reminded the grievant of her options to pursue additional accommodation through the agency's ADA Review Committee or to file for disability retirement, but that the grievant stated, as she allegedly had in previous meetings as well, that there was nothing wrong with her and there was "no way" she "would have anything to do with disability."

The agency alleges that after the August 11th meeting, the grievant went to the training house and requested training, even though the warden had advised her that she would not be allowed to return to work. The agency states that when the grievant was advised that she could not enter training without a release, she "became hostile" and made comments about "what goes up must come down and even birds fall from the sky." The incident report filed by the lieutenant involved does not characterize the grievant's behavior as "hostile," but alleges that the grievant made comments like "what is at the top can't stay forever and even bird fall from the sky" and stated that she would not "be treated like this and that she was going to take this to court." The grievant states that she told the lieutenant she had filed a grievance and "wasn't going to worry about it because what goes around, comes around, what goes up must come down and I never saw a bird fly high without coming down and nest." The grievant asserts that what she meant by these statements was that people "ought to show compassion" and remember what they "came from."

By letter dated August 12, 2005, the grievant was advised that she had exhausted all her leave balances as of July 29, 2005 and had been placed on LWOP.[8] She was also informed in the August 12th letter that effective August 1, 2005, she was responsible for insurance premiums, and that if she chose not to continue her insurance, she would be responsible for all bills incurred after August 1, 2005.[9] The agency states that the grievant's coverage in fact ended on July 31, 2005.

In a letter dated August 17, 2005, the agency advised the grievant that she was released from state employment effective August 12, 2005.[10] The agency stated that this decision was made because the grievant's physician had not released her, the requested documentation had not been filled out, they had no estimate of the duration of her disability,

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[7] The agency alleges that the note from the grievant's psychiatrist was not on the "requested Essential Functions of a CIRC paperwork," as the grievant purportedly stated that her physician refused to complete that form.

[8] The agency states that the grievant was informed in a telephone conversation on July 27, 2005 that her leave balances would be exhausted as of July 29, 2005.

[9] The grievant apparently attempted to continue coverage, but the agency states that the grievant's check could not be accepted because it was not submitted in "a timely manner."

[10] More than three weeks after the grievant's separation from employment, the facility's Human Resources office sent the grievant a letter detailing certain procedural information about her separation (such as information regarding her retirement and payment of leave balances). That letter, dated October 7, 2005, informed the grievant that she had 31 days from the effective date of her separation to convert her insurance coverage to an individual policy. In an attachment to the October 7th letter, the grievant was advised that her extended coverage election form had to be delivered to the Benefits Administrator by September 29, 2005, approximately one week *earlier*.

the grievant refused to participate in the employment/benefits options available to her, and she had made "hostile potentially threatening comments to staff."

On September 12, 2005, the grievant initiated a second grievance challenging her separation from employment and related issues. After the parties failed to resolve the August 10th and September 12th grievances during the management resolution steps, the grievant asked the agency head to qualify the grievances for hearing. The agency head denied the grievant's requests, and she has appealed to this Department.

DISCUSSION

Qualification:

In her August 10th grievance, initiated prior to her separation from employment, the grievant alleges that the agency misapplied and/or unfairly applied "sick leave and doctor order." In addition, the grievant alleges the following in her September 12th grievance: (1) "[d]iscrimination, harassment and retaliation" because of her psychological condition, in violation of the Americans with Disabilities Act, as well as policy; (2) "[d]isposition of character," in that the agency wrongly considered her unable to perform her job because of her psychological condition**;** "[v]iolation of Privacy Act/Doctor & Patient," by which the grievant means that the warden allegedly tried to obtain information on her diagnosis; "[e]ntering false information in report," in that the agency has allegedly made several false statements in correspondence about the grievant's and its own conduct; "[u]nable to use Public Health Services," in that the agency cancelled her insurance in July 2005, prior to her August 2005 termination; "[u]nder the old sick leave/never enter new sick leave," which the grievant alleges means that she could not have been terminated; "[r]eleased from State Service for No Justify Reason" ; and "[c]ausing cruel and unusual punishment," by which the grievant means that she suffered economic loss and mental anguish because of the agency's actions. These allegations will be addressed below.

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 . . . ."[11] Under Policy 2.05, "'disability' is defined in accordance with the Americans with Disabilities Act," the relevant law governing disability accommodations.[12] Like 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.[13] 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.[14] An

[11] DHRM Policy 2.05, page 1 of 4 (emphasis added).
[12] 42 U.S.C. §§12101 *et seq.*
[13] In addition, DOC Procedure Number 5-54 provides "a process for employees and supervisors to implement Title I of the American with Disabilities Act (ADA) and provide appropriate accommodations for 'qualified individuals with disabilities.'"
[14] 42 U.S.C. § 12111(8).

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."[15] The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires."[16]

In her September 12th grievance, the grievant asserts that she has been terminated from employment in violation of the ADA and state policy. To establish a *prima facie* claim of wrongful discharge under the ADA, the grievant must show that: (1) she is within the ADA's protected class (i.e., a "qualified individual with a disability"); (2) she was discharged; (3) "her job performance met her employer's expectation when she was discharged"; and (4) "her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination."[17] It is undisputed that the grievant satisfies the second of these elements, as she has been terminated from employment with the agency. The remaining elements will be addressed below.

I. Qualified Individual With a Disability

a. Was the Grievant Disabled?

In determining whether an employee is disabled, the initial inquiry is whether he or she has a physical or mental impairment, a record of such an impairment, or has been regarded as having such an impairment. Physical or mental impairment is defined to include "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[18]

In this case, the grievant and the agency have presented evidence that the grievant was hospitalized for a psychological condition in November 2004 and that this condition required her to remain out of work until March 2005. The parties have also presented evidence that the grievant was again hospitalized in September-October 2005, and the grievant apparently asserts that this hospitalization was due to her inability to pay for the medication prescribed for her condition. Finally, the agency was apparently aware of the grievant's November hospitalization at a "behavioral healthcare center," knew that she was being treated by a psychiatrist, and apparently terminated her employment, at least in part, because it believed that she was unable to return to her position as Counselor. In light of this evidence, we conclude, for purposes of this ruling only, that the grievant has presented sufficient evidence of an actual, past and/or perceived impairment, as that term is defined under the ADA.

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[15] 42 U.S.C. § 12102(2).
[16] 29 C.F.R. § 1630.2(n).
[17] Rohan v. Networks Presentations, LLC, 2003 U.S. Dist. LEXIS 26687, at n.5 (D. Md. Apr. 17, 2003), *aff'd*, 375 F.3d 266 (4th Cir. 2004). Once an employee establishes a *prima facie* case, an agency may nevertheless prevail if it can establish one of the defenses enumerated in 29 C.F.R. § 1630.15. *See generally* Peter A. Susser, *Disability Discrimination and the Workplace* 1014-26 (BNA Books 2005).
[18] 29 C.F.R. § 1630.2(h)(2).

The next question is whether her actual or past impairment substantially limits a major life activity, or whether the agency perceived her as having an impairment substantially limiting a major life activity.[19] To be "substantially limited" in a major life activity, the plaintiff must be significantly restricted in performing that activity.[20] 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.[21]

A temporary impairment will generally not qualify as a disability under the ADA.[22] However, "[a]lthough short-term, temporary restrictions generally are not substantially limiting, an impairment does not necessarily have to be permanent to rise to the level of a disability."[23] Further, "[a]n intermittent manifestation of a disease must be judged the same way as all other potential disabilities."[24] In addition, the EEOC has explained that "[c]hronic, episodic conditions may constitute substantially limiting impairments if they are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms."[25]

In this case, the grievant has presented evidence that the agency refused to allow her to return to work as a Counselor, at least in part, because it believed her psychological condition made her unable to do so. In addition, the grievant has presented evidence that she was taken out of work for a several-month period because of a psychological condition, and that she was subsequently hospitalized for an extended period in relation to that condition. In light of this evidence, we conclude, for purposes of this ruling only, that the grievant has presented sufficient evidence that she was regarded by the agency having an impairment which substantially limited her in a major life activity, that she in fact has an impairment which substantially limits her in a major life activity, and/or that she has a record of such an impairment.[26] We note, however, that in reaching this conclusion, we are merely determining that the evidence is such as to warrant further exploration by a hearing officer. The ultimate

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[19] Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 CFR § 1630.2(i). *See also* EEOC Compliance Manual § 902.3(b) ("Mental and emotional processes such as thinking, concentrating, and interacting with others are examples of major life activities.")

[20] Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 195-97, 122 S. Ct. 681, 690-691 (2002).

[21] *Pollard v. High's of Baltimore., Inc.* 281 F.3d 462, 467-468 (4th Cir. 2002); 29 C.F.R. § 1630.2(j)(2).

[22] *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.*

[23] EEOC Compliance Manual at § 902.4(d) .

[24] EEOC v. Sara Lee Corporation, 237 F.3d 349, 352 (4th Cir. 2001).

[25] EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at Question 8.

[26] *See, e.g.*, Quiles-Quiles v. Henderson, 439 F.3d 1, 6 (1st Cir. 2006) (noting that "[t]he belief that the mentally ill are disproportionately dangerous is precisely the type of discriminatory myth that the Rehabilitation Act and the ADA were intended to confront"); Doebele v. Sprint/United Management Co., 342 F.3d 1117, 1133-35 (10th Cir. 2003) (finding that the plaintiff had "presented a fact issue on whether Sprint's adverse employment actions were motivated by the fact that her supervisors regarded her as substantially limited from a broad class of jobs by her mental impairments."); Peters v. Baldwin Union Free School Dist., 320 F.3d 164, 168 (2d Cir. 2003) (finding triable issue of fact where the plaintiff submitted evidence "adequate to show that her employer perceived her as suffering from a mental illness that made her suicidal and in imminent danger of taking her life with her husband's revolver").

question of whether the grievant is disabled under the ADA must be determined by a hearing officer at hearing.

b. Was the Grievant Otherwise Qualified?

A qualified individual is defined as an individual with a disability, who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.[27] In this case, the agency appears to allege that the grievant was not otherwise qualified, a claim the grievant disputes.

As a general rule, if an employee is disabled under the ADA, an employer must make "reasonable accommodations" unless the employer can demonstrate that the accommodation "would impose an undue hardship on the operation of the business [or government]."[28] In order to determine the appropriate reasonable accommodation, it may be necessary for the employer "to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[29]

However, an employee is free to refuse an accommodation.[30] In such a case, the employer may require the employee to perform the essential functions of her job without accommodation and take disciplinary or corrective measures if the employee is unable to meet the employer's expectations.[31] An employer generally may not exclude an employee from returning to her position where she has refused an accommodation, unless the employer can demonstrate that the employee would pose a direct threat to the health or safety of the employee or her co-workers, or the employee is unable to perform the essential functions of her position in the absence of the refused accommodation (or another reasonable accommodation).[32]

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[27] 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

[28] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business").

[29] 29 C.F.R. § 1630.2(o)(3)

[30] *See* 29 C.F.R. § 1630.9(d) ("A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.") At the same time, however, courts have held that an employer does not have to allow an employee to perform a particular job function that an employee's physician has specifically forbidden. *See* Alexander v. Northland Inn, 321 F.3d 723, 727 (8th Cir. 2003) (finding that employer did not have to allow employee to vacuum, where the employee's physician explicitly stated that the employee was to perform "[n]o vacuuming.")

[31] *See* Hankins v. Gap, Inc., 84 F.3d 797, 801-02 (6th Cir. 1996); *see also* 29 C.F.R. § 1630.9(d).

[32] *See generally* Williams v. Philadelphia Housing Police Dept., 380 F.3d 751, 770 n.15 (3d Cir. 2004); Alexander, 321 F.3d at 727; EEOC Enforcement Guidance: Workers' Compensation and the ADA, at Questions

In this case, the agency argues, in effect, that allowing the grievant to return to her position as Counselor would pose a direct threat. In addition, the agency asserts that the grievant was unable to perform the essential functions of her position, and that it had no duty, under the circumstances present, to provide further accommodation. These arguments are addressed below.

Direct Threat

The EEOC has explained that "[u]nder the ADA, an employer may lawfully exclude an individual from employment for safety reasons only if the employer can show that employment of the individual would pose a 'direct threat.'"[33] The term "direct threat" is defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[34]

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."[35] 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."[36] 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.[37] An employee "does not pose a 'direct threat' simply by virtue of having a history of psychiatric disability or being treated for a psychiatric disability."[38]

11, 13, 14, 21, and fn 7; EEOC Fact Sheet on the Family and Medical Leave Act, the American with Disabilities Act, and Title VII of the Civil Rights Act of 1964, at Question 14.

[33] EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at section entitled "Direct Threat." *See also* Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999) (noting that because "direct threat" is an affirmative defense, the employer bears the burden of proof); Rohan , 2003 U.S. Dist. LEXIS 26687, at n. 10; *but see, e.g.*, EEOC v. Amego, Inc. 110 F.3d 135, 144 (1st Cir. 1997).

[34] 29 C.F.R § 1630.2(r); *see also* Appendix to CFR Part 1630—Interpretative Guidance on Title I of the Americans with Disabilities Act, at § 1630.2(r) ("An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient.")

[35] 29 CFR § 1630.2(r).

[36] *Id.* Where "an employer has a reasonable belief that an employee's present ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition, the employer may make disability-related inquiries or require the employee to submit to a medical examination." EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, at Question 17.

[37] 29 CFR § 1630.2(r) *See also* Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 86 (2002) ("The direct threat defense must be 'based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence,' and upon an expressly 'individualized assessment of the individual's present ability to safely perform the essential functions of the job,' reached after considering, among other things, the imminence of the risk and the severity of the harm portended.")

[38] EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at section entitled "Direct Threat." *See also* Quiles-Quiles, 439 F.3d at 6 (noting that legislative history to ADA

In evaluating a direct threat defense, the first step is to "consider whether the employer has demonstrated that the employee cannot perform the job without a significant risk of harm."[39] If so, the question becomes whether the employer can make a reasonable accommodation so that the employee can perform her job without a significant risk of harm.[40] Only if no accommodation exists that would either eliminate or reduce the risk to an acceptable level may an employer discharge an employee on direct threat grounds.[41]

Applying this test to the evidence presented in this case, we find that sufficient questions of fact exist to warrant further exploration of this issue by a hearing officer.[42] While evidence presented by the agency shows that the grievant's psychiatrist stated in August 2005 that she could "return to work part time in a low stress setting," we note that this restriction does not necessarily mean that allowing the grievant to return to her work as a Counselor would create a significant risk of harm. To the contrary, the psychiatrist's statement that the grievant could "return to work" could be construed as inconsistent with a finding that the grievant's psychological condition constituted a direct threat to herself or others, as presumably if the grievant's condition created a risk to safety or health, she would not have been allowed to return to work at all. We also note that after her return to work in March 2005, the grievant worked for at least two days in her position as Counselor, and subsequently worked for a period of 90 days in the mailroom, without apparently engaging in conduct which harmed the safety or health or herself or her co-workers.[43]

In addition, the medical documentation provided to the agency does not indicate that the grievant's condition would result in a significant risk to safety or health. In a form dated March 24, 2005, the grievant's family physician stated, in response to a question about whether the grievant's condition posed any threat to safety, "probably not." The agency appears not to have sought further clarification from the physician regarding the use of the word "probably," however, and it appears to have continued to allow the grievant to work in the mailroom. Further, that same physician completed a subsequent form on July 8, 2005, and he did not make any response to the same question regarding safety. The March 24th form also significantly predated the August 10, 2005 release by the grievant's psychiatrist for her to "return to work."

"emphasizes that 'the determination that an individual with a [mental] disability will pose a safety threat to others must be made on a case-by-case basis and must not be based on generalizations, misperceptions, ignorances, irrational fears, patronizing attitudes, or pernicious mythologies" (citations omitted)).

[39] Nunes, 164 F.3d at 1248.

[40] *Id.*

[41] Appendix to CFR Part 1630—Interpretative Guidance on Title I of the Americans with Disabilities Act, at § 1630.2(r).

[42] *See* Whitney v. Board of Educ. Of Grand County, 292 F.3d 1280, 1286 (10th Cir. 2002) (finding material question of fact as to whether teacher diagnosed with depression "posed any significant risk to the students and, if so, whether that risk could be eliminated by reasonable accommodation.")

[43] Interestingly, when the grievant returned to work on March 3, 2005, she did so with a restriction from her psychiatrist to four hours of work daily. Although documentation by the agency suggests that it had not yet received any additional documentation from the grievant's health care providers, the agency apparently advised the grievant on April 7, 2005 that she would be expected to work in the mailroom and administrative offices for up to 8 hours a day.

While the agency points to statements by the grievant that it labels "hostile potentially, threatening comments to staff," documentation presented by the grievant and the agency suggests that most, if not all, of these comments were made in discussions in which the grievant was also threatening to use the grievance procedure or to take legal action against the agency—raising a question as to whether the grievant's "threats" were related to physical harm (a claim she denies), or rather to her seeking redress through appropriate channels. Finally, assuming that the agency were able to establish that returning the grievant to working full-time as a Counselor would create a significant risk of harm, questions remain as to whether the agency could have made a reasonable accommodation (see discussion below) that would have allowed, reduced or eliminated the risk, and whether the grievant's insistence that she could return to her position relieved the agency from having to make any reasonable accommodation.[44]

Ability to Perform Essential Functions

The agency also asserts that because the grievant's psychiatrist indicated that she needs a part-time, low-stress position, she cannot perform the essential functions of the Counselor position. 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.[45] 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.[46]

Where an employee is unable to perform the essential functions of her position, she may nevertheless be entitled to reasonable accommodation by the agency. Although some courts have held that an accommodation is unreasonable if it requires the elimination of an "essential function,"[47] job restructuring, part-time or modified work schedules, reassignment and "other similar accommodations for individuals with disabilities" are considered reasonable accommodations.[48] With respect to reassignment, the EEOC has explained that

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[44] In determining if the agency has shown that returning the grievant to the Counselor position would constitute a direct threat, the hearing officer may consider whether the agency's concerns were reasonable, whether the agency made appropriate and adequate efforts to obtain information to determine if returning the grievant to the position would result in a significant risk of harm (*see* fn 35 above), and if so, the impact of any failure by the grievant to provide requested information.

[45] *See* 42 U.S.C. § 12111(8).

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

[47] Hill v. Harper, 6 F. Supp.2d 540, 544 (E.D.Va. 1998)(citing Hall v. U.S. Postal Service, 857 F.2d 1073, 1079 (6th Cir. 1988)).

[48] 42 U.S.C. § 12111(9)(B) (specifically identifying reassignment as a form of reasonable accommodation); EDR Ruling No. 204-879; *see also* Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011, 1017-19 (8th Cir. 2000) (rejecting argument that reassignment was not reasonable accommodation where employee could not perform essential functions of current job); EEOC v. Stowe-Pharr Mills, Inc., 216 F.3d 373 (4th Cir. 2000);

"[t]his type of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship."[49]

In this case, it is unclear whether the grievant could have performed the essential functions of the Counselor position. The agency argues that the Counselor position, as it exists, was neither low-stress nor part-time, and that it was not required to restructure the position to eliminate what it deems to be essential functions of that position. In contrast, the grievant contends that the agency erred in its characterization of the essential functions of the Counselor position, and she challenges the agency's apparent decision that she could not perform in that position because of her psychological condition and/or the restrictions imposed by her psychiatrist.[50] As the essential function analysis is a highly factual one, we find that under the facts and circumstances of this case, whether the grievant was able to perform the essential functions of the Counselor position should be determined by a hearing officer.

It is also unclear whether a reasonable accommodation existed which would have allowed the grievant to continue employment with the agency, and whether, if the grievant is found to be disabled under the ADA, the agency met its duty to provide such an accommodation. It appears that the agency did not consider any alternatives other than allowing the grievant to work in the Counselor position after the ninety-day temporary accommodation period ended. To the contrary, the agency suggests that it was not required to accommodate the grievant beyond ninety days unless she applied for and received an accommodation from the agency's ADA Review Committee. While the agency is correct that the reasonable accommodation process is an interactive one requiring participation from both parties, it does not follow that an employer necessarily has discharged its burden simply by providing a temporary accommodation, pending further action by the employee.[51] Certainly,

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Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 677 (7th Cir. 1998) ("The option of reassignment is particularly important when the employee is unable to perform the essential functions of his or her current job, either with or without accommodation or when accommodation would pose an undue hardship for the employer."); Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 350 n. 4 (4th Cir. 1996). *But see* Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995)(criticized by other courts as stated in Cravens, 214 F.3d at n. 4, as being based on Rehabilitation Act case law superseded by statute).

[49] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship, at section on "Reassignment."

[50] We note that the agency does not assert, as a basis for the grievant's termination, that the grievant's performance was unsatisfactory before her leave began in November 2004; and because the agency did not allow the grievant to return to work after her leave ended (with the exception of two days in March), it is unclear whether the grievant would not, in fact, have been able to perform the essential functions of her job upon her return to work.

[51] *See* Cravens, 214 F.3d at 1020-22 (finding factual question as to whether employer made a good faith effort to engage in the interactive process where employer contended that it gave the employee temporary work to allow her time to find another position, vacant job openings were available to the employee, and the employee had the opportunity to apply for posted positions through the internal application procedure, but did not do so); *see also* Gile v. United Airlines, Inc., 213 F.3d 365, 373-74 (7th Cir. 2000) (rejecting claim that employee failed to engage in interactive process where she failed to avail herself of the employer's bidding and competitive transfer procedures).

the grievant's apparent failure to apply to the Review Committee for additional accommodation, as well as her alleged failure to provide all the medical documentation requested by the agency, may be evidence of her failure to engage in the interactive process, or of a refusal of accommodation.[52] However, whether an agency has met its reasonable accommodation burden is dependent on all of the particular facts and circumstances of each case.[53] Such questions of fact are best left to the determination of a hearing officer.

2. Remaining Elements of Prima Facie Case

Having concluded that the grievant has presented sufficient evidence to qualify for hearing with respect to the first and second elements of the *prima facie* case of wrongful discharge, we turn next to the remaining two elements—whether her job performance met her employer's expectation when she was discharged, and whether her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.

With respect to the first of these elements, we note that the agency has not asserted the grievant's work performance as a basis for her separation. We therefore conclude, for purposes of this ruling only, that the grievant has presented sufficient evidence that her performance met the agency's expectation at the time of her discharge. With respect to the second element, it appears to be undisputed that the grievant's psychological condition—and the accompanying restrictions—were a primary factor in the grievant's separation from employment. While termination because of a disability would not necessarily be wrongful discrimination (for example, termination would not be improper if the agency were able to establish the direct threat defense), for the reasons set forth in our discussion of the grievant's "otherwise qualified" status, we find that there are sufficient questions of fact to warrant further exploration by a hearing officer. Accordingly, the grievant's claim of disability discrimination is qualified for hearing.

Alternative Theories and Claims

The grievant also asserts a number of other theories and claims in her August 10, 2005 and September 12, 2005 grievances. Because the issue of disability discrimination qualifies for a hearing, this Department deems it appropriate to send these alternative theories and claims for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

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[52] *See* Wells v. Shalala, 228 F.3d 1137, 1145-46 (10th Cir. 2000) (noting that where an employee fails to provide "necessary medical documentation," an employer is not liable for failing to provide a reasonable accommodation) (citing Templeton v. Neodata Servs. Inc., 162 F.3d 617, 619 (10th Cir. 1998); Taylor v. Phoenixville School Dist., 184 F.3d 296, 317 (3d Cir. 1999) ("an employer cannot be faulted if after conferring with the employee to find possible accommodations, the employee then fails to supply information that the employer needs or does not answer the employer's request for more detailed proposals").

[53] These facts and circumstances include, in a case such as this one, any obstacles or difficulties in communication which relate to the grievant's psychological condition. *See* Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 (7th Cir. 1996) ("In a case involving an employee with mental illness, the communication process becomes more difficult. It is crucial that the employer be aware of the difficulties, and 'help the other party determine what specific accommodations are necessary.'")

Consolidation:

Written approval by the Director of this Department or her designee in the form of a compliance ruling is required before two or more grievances are permitted to be consolidated in a single hearing. EDR strongly favors consolidation and will generally consolidate grievances involving the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.[54]

This Department finds that consolidation of the August 10, 2005 and September 12, 2005 grievances is appropriate. The grievances involve the same parties, potential witnesses, and share common themes. Furthermore, consolidation is not impracticable in this instance. This Department's rulings on compliance are final and nonappealable.[55]

CONCLUSION

The grievant's August 10th and September 12th grievances are qualified and consolidated for hearing. This qualification ruling in no way determines that the agency's actions were discriminatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

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Claudia T. Farr
Director

[54] *Grievance Procedure Manual*, § 8.5.
[55] Va. Code § 2.2-1001 (5).