Issue: Benefits/VSDP; Discrimination/disability; retaliation/other protected right; Ruling Date: November 22, 2006; Ruling #2007-1452; Agency: Virginia Commonwealth University; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
QUALIFICATION RULING OF THE DIRECTOR

In the matter of Virginia Commonwealth University
No. 2007-1452
November 22, 2006

The grievant has requested qualification of his August 8, 2006 grievance against Virginia Commonwealth University (VCU or the University). For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant was employed at VCU as a lead worker in the asbestos abatement department. In July 2005, the grievant aggravated a work-related injury that he had previously sustained. The grievant's disability began on July 12, 2005, with Short Term Disability (STD) benefits beginning following the seven calendar-day waiting period on July 19, 2006. The grievant returned to light-duty work on July 21, 2005, continuing on STD. On January 10, 2006, VCU and the VSDP provider placed the grievant into Long Term Disability-Working (LTD-W), as the grievant was still only working light-duty. The grievant returned to full-duty work on January 17, 2006. Following another aggravation of the same work-related injury, the grievant was placed out of work on May 19, 2006. He was returned to work light-duty on May 30, 2006 (following the Memorial Day weekend). However, citing DHRM Policy 4.57 (Virginia Sickness and Disability Program), VCU placed the grievant on Long Term Disability (LTD) because the grievant was not able to return to full-duty work. The grievant was informed following his placement on LTD that his position would not be held open and that he was separated from employment with the Commonwealth.

On investigation by this Department, VCU has stated that the reason for placing the grievant into LTD was solely based on application of the VSDP and DHRM policies. In addition, VCU stated that taking into account the need to have a full-time, full-duty employee in the grievant's previous position and the grievant's medical condition, the University decided to not hold the grievant's position open while he was on LTD. The grievant's injury involves a degenerative condition in his knee. It has prevented the grievant, for instance, from being able to climb ladders, which is a required component of his job description. By the grievant's own admission, he is no longer able to perform asbestos and paint work because of his inability to climb up and down ladders as part of his job. The grievant's physician had placed light-duty restrictions on the grievant's work concerning climbing

ladders, squatting, and kneeling. VCU does not appear to have ever held a position open for an employee on LTD.

The grievant initiated this grievance to challenge his separation from state employment as being the result of retaliation and harassment and to seek reinstatement. He also alleges that he endured retaliation and harassment from his immediate supervisor and others while he was employed with VCU. The grievant previously filed a race discrimination complaint against his immediate supervisor in 2003. He alleges that the retaliation he endured was a result of that complaint.

DISCUSSION

The grievant asserts that his separation from employment with the Commonwealth was improper. This Department has interpreted his grievance as challenging the University's action because it was a misapplication or unfair application of policy, and because it was done in retaliation for having filed a race discrimination complaint. The grievant has not presented sufficient evidence to qualify for a hearing under either of these theories.

Misapplication of Policy

The grievant claims that management misapplied or unfairly applied policy, procedures, rules or regulations by putting him in LTD status and refusing to hold his job open, which effectively separated the grievant from state employment. 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.

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 Resource Management (DHRM).[1]

"Short-term disability benefits for participating employees shall commence upon the expiration of a seven-calendar-day waiting period."[2] On the eighth calendar-day, after authorization by the VSDP provider, short-term disability benefits are provided for a

[1] As provided in VRS's Virginia Sickness and Disability Program Handbook in effect at the time that the grievant transitioned into LTD, VRS "by law, has been given the authority to develop, implement and administer the VSDP. However, the authority granted is not intended to supersede 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 2005 ("VSDP Handbook"), "Authority and Interpretation," p. 30.

[2] Va. Code § 51.1-1110(A); *see also* DHRM Policy No. 4.57, Virginia Sickness and Disability Program – ("VSDP"), pp. 14-15 of 33; VSDP Handbook, "Short-Term Disability," p. 7.

maximum of 125 workdays.[3] "Long-term disability benefits for participating employees shall commence upon the expiration of the maximum period for which the participating employee is eligible to receive short-term disability benefits."[4]

The grievant's relevant period of disability began no earlier than July 12, 2005. At that time, the VSDP provider applied the mandatory seven calendar-day waiting period and commenced the grievant's STD benefits on July 19, 2005. After 125 workdays passed, the grievant had still yet to return to full duty work. The STD period lapsed after the 125-workday period, and the grievant rolled over into LTD-W status on January 10, 2006.[5] The grievant returned to full-duty work on January 17, 2006. However, when he aggravated the same injury in May 2006, it was within 125 workdays of his last period of disability.[6] Consequently, no waiting periods were required and the grievant was immediately put into LTD, instead of beginning a new STD claim. DHRM Policy 4.57 provides that once an employee has been on LTD, the employee cannot return to LTD-W status for the same injury.[7] The University was, therefore, unable under policy to put the grievant back into LTD-W status when he was approved to return to work light-duty on May 30, 2006.

Once an employee is moved into LTD, the employee is not considered an employee of the Commonwealth. DHRM, the agency charged with implementation and interpretation of the Commonwealth's personnel policies, has held that once an employee has been placed into LTD, the employee has been separated from employment under state policy *unless the agency has agreed to hold the position open for the employee*.[8] It is undisputed that the University did not agree to hold the grievant's position open. Accordingly, the grievant has not presented evidence that the University violated any mandatory VSDP policy provision when it moved him into LTD, effectively separating him from employment with the Commonwealth.

Under VSDP and DHRM Policy 4.57, agencies are permitted, and encouraged, to make reasonable accommodations for an employee as part of a return to work program.[9] However, it does not appear that the University misapplied or unfairly applied policy when it chose not to return the grievant to work following his placement on LTD and approval for light-duty work by his physician in May 2006. The University asserts that taking into account the grievant's condition and prognosis, as well as the need to have a full-duty employee in the grievant's prior position, it decided that it could neither keep the grievant's position open

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[3] Va. Code § 51.1-1110(B); *see also* DHRM Policy No. 4.57, VSDP, p. 13 of 33; VSDP Handbook, "Short-Term Disability," p. 7.
[4] Va. Code § 51.1-1112(A); *see also* DHRM Policy No. 4.57, VSDP, p. 20 of 33 ("LTD benefits, which include LTD-W and LTD … begin at the conclusion of a 7 calendar day waiting period … and 125 workdays of receipt of a STD benefit."); VSDP Handbook, "Long-Term Disability," p. 10 ("Long-term disability benefits will begin at the conclusion of a seven calendar-day waiting period and 125 workdays of short-term disability.").
[5] *See* DHRM Policy No. 4.57, VSDP, p. 21 of 33; VSDP Handbook, "Long-Term Disability," p. 10.
[6] Va. Code § 51.1-1113(A); *see also* DHRM Policy No. 4.57, VSDP, p. 24 of 33; VSDP Handbook, "Long-Term Disability," p. 10.
[7] DHRM Policy No. 4.57, VSDP, pp. 21 & 23 of 33.
[8] *See* EDR Ruling No. 2006-1334.
[9] DHRM Policy No. 4.57, VSDP, p. 32 of 33; VSDP Handbook, "Long-Term Disability," p.10-11.

while he was on LTD nor provide accommodation to the grievant's work limitations. Moreover, the VSDP Handbook states that once an employee moves into LTD, return to the pre-disability position is not guaranteed.[10]

DHRM Policy 4.57 also requires compliance with the Americans with Disabilities Act (ADA) in providing reasonable accommodations to employees.[11] However, there is no evidence that the ADA applies to the grievant's claims. The initial inquiry into whether an individual is "disabled" under the ADA is whether the individual's impairment substantially limits a major life activity.[12] To be "substantially limited" in a major life activity, the grievant must be significantly restricted in performing the activity.[13] Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[14]

In this case, there is no evidence that the grievant's physical impairment substantially limits any major life activity. The grievant's light-duty restrictions at work concerned climbing ladders, kneeling, and squatting, which by themselves are not considered major life activities.[15] Moreover, "[t]o be substantially limited in the major life activity of working, … one must be precluded from more than one type of job, a specialized job, or a particular job of choice."[16] The impairment must "significantly restrict" an individual's ability to perform a wide range of jobs.[17] There is no evidence that the grievant's job-related restrictions prevent him from performing other jobs or a "wide range of jobs."[18] Consequently, there is no evidence to suggest that the University's actions violated any mandatory state policy or were so unfair as to amount to a disregard of the intent of VSDP policy.

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[10] VSDP Handbook, "Long-Term Disability," p. 10.
[11] *See* DHRM Policy No. 4.57, VSDP, pp. 1, 21, & 23 of 33; *see also* DHRM Policy No. 2.05, Equal Employment Opportunity, p. 1 of 4.
[12] 42 U.S.C. § 12102(2).
[13] Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 196-97 (2002).
[14] 29 C.F.R. § 1630.2(i).
[15] *See, e.g.*, Hockaday v. Brownlee, 370 F. Supp. 2d 416, 423 (E.D. Va. 2004) ("The abilities to lift a certain amount of weight, crawl, kneel, squat, or climb, are not major life activities."), *aff'd*, 119 F. App'x 567 (4th Cir. 2005); Bailey v. Charlotte-Mecklenburg Bd. of Educ., No. 3:98cv565-MU, 2000 U.S. Dist. LEXIS 21275, at *19 (W.D.N.C. 2000) ("Inability to climb a ladder is not a major life activity.") (citing Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 758 n.2 (5th Cir. 1996)).
[16] Sutton v. United Air Lines, 527 U.S. 471, 492 (1999); *see also* Halperin v. Abacus Tech. Corp., 128 F.3d 191, 199 (4th Cir. 1997) (holding that "when the major life activity at issue is working, the inability to perform a single, particular job does not constitute a substantial limitation").
[17] Halperin, 128 F.3d at 199.
[18] *See, e.g.*, Dean v. Philip Morris USA Inc., No. 1:02cv149, 2003 U.S. Dist. LEXIS 13035, at *10 (M.D.N.C. 2003) (finding that factory worker's knee trouble prevented her from performing only certain jobs that caused stress to her knee, rather than a broad range of manufacturing jobs); Petty v. Freightliner Corp., 123 F. Supp. 2d 979, 983 (W.D.N.C. 2000) (holding that knee injury prevented truck assembler from performing his job, but not a class of jobs).

Retaliation

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;[19] (2) the employee suffered a materially adverse action;[20] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[21] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[22]

The grievant asserts that he was "terminated" in retaliation for filing a race discrimination complaint against his supervisor in 2003, which is clearly a protected activity. However, there is insufficient evidence to show a causal link between the grievant's protected conduct (filing a race discrimination complaint in 2003) and the University's action (placing him on LTD and refusing to allow him to return to work). On the contrary, the University has stated that the grievant was placed into LTD based on the VSDP and DHRM policies. In addition, the University exercised its discretion to not keep the grievant's position open during his LTD period based on the nature of the grievant's medical condition and the University's need to fill the position with a full-time, full-duty employee. The grievant has presented no evidence from which a reasonable fact-finder could conclude that VCU's purported reasons were merely a pretext for retaliation.

Additional Claims

The grievant has also asserted that he was subject to harassment and/or retaliation while he was employed at VCU. However, once an employee separates from state employment, the only claim for which he or she may have access to the grievance procedure is a challenge to a termination or an involuntary separation.[23] Thus, because the grievant did not initiate this grievance until after his separation from employment with the

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[19] *See* Va. Code § 2.2-3004(A). 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." *Grievance Procedure Manual* §4.1(b)(4).

[20] Burlington N. & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405, 2414-15 (2006).

[21] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe v. Total Action Against Poverty, 145 F.3d 653, 656 (4th Cir. 1998).

[22] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

[23] To have access to the grievance procedure, an employee "must have been employed by the Commonwealth at the time the grievance is initiated (unless the *action grieved* is a termination or involuntary separation)." *Grievance Procedure Manual* § 2.3 (emphasis added). In addition, the employee must satisfy the other requirements for access to the grievance procedure, such as non-probationary status. *Id.*

Commonwealth,[24] he can only challenge the separation, not the issues of harassment and/or retaliation while employed. As such, it is this Department's ruling that no portion of this grievance qualifies for a hearing.[25]

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 University will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the University of that desire.

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Claudia T. Farr
Director

[24] It is undisputed that the grievant 1) was notified that his position would not be held open and that he was separated from employment with the Commonwealth effective July 9, 2006, and 2) that he initiated his grievance on August 8, 2006.

[25] The grievant has also asserted that there was a "conspiracy to terminate my job." While there may have been many University employees involved in the decision and execution of the grievant's separation from employment with the Commonwealth, any "conspiracy" would require that the agreed course of action was improper. The impropriety of the University's actions was considered above in the allegations of misapplication of policy, retaliation, and discrimination. Because the grievant has not raised a sufficient question that the University's actions were improper, there is no evidence to qualify the grievance for a hearing based on mere allegations of a "conspiracy."