Issue: Qualification – Benefits (VSDP) and Discrimination (disability); Ruling Date: January 2, 2008; Ruling #2008-1754; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF THE DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services
Ruling No. 2008-1754
January 2, 2008

The grievant has requested qualification of her March 28, 2007 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency). For the reasons set forth below, this grievance qualifies for a hearing.

FACTS

The grievant was employed by the agency as a psychology associate. In this position, she was responsible for performing "comprehensive psychological assessments and other psychotherapeutic services," providing "consultation and training to other disciplines," serving "a leadership role within a treatment team setting," and providing the facility "with leadership and participation on projects and committees as assigned." The KSA's for the grievant's position are defined by the agency in the grievant's August 2006 Employee Work Profile (EWP) as:

> Considerable knowledge of principles and methods of psychological service delivery including psychological assessments, diagnostic evaluations, psychotherapy, behavioral programming/research and treatment modalities, and program designs and evaluation. Demonstrated ability to conduct psychotherapy in the treatment of patients with emotional/behavioral dysfunctions. Demonstrated ability to develop and administer psychological treatment. Ability to communicate with other disciplines, patients, families and outside agencies.

Documentation provided by the agency shows that the grievant initially went on short-term disability leave on September 2, 2005, after contracting pneumonia, and returned to work on December 21, 2005, without any restrictions. The grievant subsequently went out again on short-term disability leave beginning on February 1, 2006, for shoulder surgery. She returned to work April 10, 2006, with a restriction of "approp prof judgement [sic] for self-

directed pacing of activity." She went on leave again beginning May 5, 2006, for the same shoulder issue, and returned to work on August 26, 2006.[1] On November 29, 2006, the grievant began short-term disability leave for what the agency characterizes as chronic fatigue syndrome.[2]

On March 21, 2007, the grievant submitted a "Physical Limitation/Return to Work Form" which had been completed by Dr. Y, a psychiatrist.[3] That form indicated that beginning on March 26, 2007, the grievant would be able to resume work with a partial schedule of three days per week. The form further indicated that the grievant had no additional restrictions and could resume client contact.

The agency subsequently advised the third-party administrator for its short-term disability insurance that it could not approve the "accommodations" requested by the grievant. Specifically, the agency asserted:

1. "The nature of [the grievant's] work would be difficult to accomplish in a part time capacity and will be disruptive to patient care."
2. "The presence of the specific cognitive impairments discussed by Dr. [Z, a neurologist] in [Dr. Z's] previous 7 assessments [of the grievant] precludes [the grievant] from performing the essential duties of her positions. For example, her position requires administering and interpreting detailed psychological tests, which relies on a number of mental functions that Dr. [Z] has found to be impaired. Additionally, [the grievant] consults with treatment teams on difficult behavior cases and works one-on-one with an unpredictable patient population. It is difficult to reconcile Dr. [Z's] findings with the current release to work." [4]
3. "Dr. [Z] made a reference to the results of neuropsychological testing in which [the grievant] participated (during a previous short term disability claim). His report was there were substantial deficits that could prove highly problematic in her cognitively demanding role as a psychologist."

On March 28, 2007, the grievant initiated a grievance challenging the agency's refusal to allow her to return to work. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for

[1] In connection with the grievant's return to work in August 2006, she was apparently issued a new EWP by the agency. Among the changes in the August 2006 EWP was the removal of the grievant's previous responsibility as the "Acting Forensic Coordinator." The grievant's October 2006 performance evaluation notes that the grievant met the responsibilities of the "Acting Forensic Coordinator" role, during the time she was assigned such responsibility.

[2] Although the agency's documentation characterizes the grievant's diagnosis as chronic fatigue syndrome, the grievant's return to work form describes the grievant's condition as "Cognitive Disorder NOS + chronic fatigue syndrome."

[3] Although the return to work form does not identify Dr. Y's area of specialization, the public database maintained by the Virginia Board of Medicine shows that Dr. Y is a psychiatrist.

[4] The grievant states that Dr. Z concurred in Dr. Y's assessment of her ability to return to work.

hearing. The agency head denied the grievant's request, and she has appealed to this Department. As the grievant was not allowed to return to work on a part-time basis, she remained on leave until May 22, 2007, when she was placed in long-term disability (LTD) status and terminated from employment with the agency.

DISCUSSION

Disability Discrimination

The grievant asserts, in effect, that she has wrongfully been terminated from employment in violation of the ADA and state policy. DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or *disability . . . .*"[5]

Under Policy 2.05, "'disability' is defined in accordance with the Americans with Disabilities Act," the relevant law governing disability accommodations.[6] 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. 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.[7] 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."[8] The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires."[9]

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."[10] The grievant satisfies the

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[5] DHRM Policy 2.05 (emphasis added). *See also* the facility's Hospital Instruction No. 92, "Return to Work—Workers' Compensation and VSDP Covered Sickness and Injuries," effective Jan. 10, 2006, at p. 3 ("If it is determined that the employee has long-term restrictions that result in his/her inability to perform the essential functions of his/her primary position, the provisions of the Americans with Disabilities Act (ADA) and other applicable laws will be applied to determine suitability for employment.")

[6] 42 U.S.C. §§12101 *et seq.*

[7] 42 U.S.C. § 12111(8).

[8] 42 U.S.C. § 12102(2).

[9] 29 C.F.R. § 1630.2(n).

[10] 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).

second of these elements, as she has been separated 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."[11] Here, there is sufficient evidence that the grievant has an actual, past, and/or perceived impairment, as that term is defined under the ADA, to warrant additional inquiry by a hearing officer.

The next question is whether her actual or past impairment substantially limits a major life activity, or whether the agency perceived her as having such an impairment.[12] To be "substantially limited" in a major life activity, the plaintiff must be significantly restricted in performing that activity.[13] 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.[14]

In this case, there is evidence that the agency refused to allow the grievant to return to work as a psychology associate, as least in part, because it believed her psychological condition made her unable to perform in this capacity. We note, in this regard, the assertion by the agency to the third-party administrator that "[t]he presence of the specific cognitive impairments . . . in her previous 7 assessments precludes her from performing the essential duties of her positions," as well as the agency's determination that previous neuropsychological testing of the grievant showed "substantial deficits that could prove highly problematic in her cognitively demanding role as a psychologist." In light of these assertions by the agency, we conclude, for purposes of this qualification ruling only, that the grievant has presented sufficient evidence that she was regarded by the agency as having an impairment substantially limiting her in a major life activity, that she in fact has such an impairment, and/or she has a record of such an impairment. 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 question of whether the grievant is disabled under the ADA must be determined by the hearing officer at hearing.

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[11] 29 C.F.R. §1630.2(h)(2).
[12] 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).
[13] Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 196-98, 122 S. Ct. 681, 691 (2002).
[14] *Pollard v. High's of Balt., Inc.* 281 F.3d 462, 467-468 (4th Cir. 2002); 29 C.F.R. § 1630.2(j)(2).

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.[15] 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]."[16] 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."[17]

However, an employee is free to refuse an accommodation.[18] 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.[19] 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).[20]

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[15] 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

[16] 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").

[17] 29 C.F.R. § 1630.2(o)(3)

[18] *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.")

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

[20] *See generally* Williams v. Philadelphia Housing Authority 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 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.

In this case, the agency has arguably suggested that allowing the grievant to return to her position as Psychology Associate would pose a direct threat to patients. In addition, the agency appears to assert 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.'"[21] 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."[22]

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."[23] 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."[24] 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.[25] 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."[26]

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[21] 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).

[22] 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.")

[23] 29 CFR § 1630.2(r).

[24] *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.

[25] 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.")

[26] EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at section entitled "Direct Threat." *See also* Quiles-Quiles v. Henderson, 439 F.3d at 6 (1st Cir. 2006) (noting that

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."[27] 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.[28] 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.[29]

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.[30] The grievant presented evidence that effective March 26, 2007, she was released, by a psychiatrist, to resume her normal work duties on a part-time basis (3 days a week). In particular, the psychiatrist completing the grievant's return-to-work form indicated that the grievant could "resume client contact." This conclusion 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. Even assuming, however, that the agency were able to establish that returning the grievant to working as a psychology associate 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.[31]

Ability to Perform Essential Functions

The agency also asserts that the grievant cannot perform the essential functions of the Psychology Associate 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.[32] The ADA regulations provide that other factors to consider

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legislative history to ADA "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)).

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

[28] *Id.*

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

[30] *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.")

[31] In determining if the agency has shown that returning the grievant to the psychology associate 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 25 above), and if so, the impact of any failure by the grievant to provide requested information.

[32] *See* 42 U.S.C. § 12111(8).

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.[33]

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,"[34] job restructuring, part-time or modified work schedules, reassignment and "other similar accommodations for individuals with disabilities" are considered reasonable accommodations.[35] With respect to reassignment, the EEOC has explained that "[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."[36]

In this case, it is unclear whether the grievant could have performed the essential functions of the Psychology Associate position, and if not, whether a reasonable accommodation existed which would have allowed the grievant to continue employment with the agency (for example, reassignment to a position for which the grievant was otherwise qualified). As these analyses are highly factual, we find that under the facts and circumstances of this case, these questions should be determined by a hearing officer.

II. 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.

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

[34] Hill v. Harper, 6 F. Supp.2d 540, 544 (E.D.Va. 1998)(citing Hall v. U.S. Postal Service, 857 F.2d 1073, 1078 (6th Cir. 1988)).

[35] 42 U.S.C. § 12111(9)(B) (specifically identifying reassignment as a form of reasonable accommodation); EDR Ruling No. 2004-879; *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, 377 (4th Cir. 2000); 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).

[36] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, at section on "Reassignment."

With respect to the first of these elements, we note that the agency has not expressly asserted the grievant's work performance as a basis for her separation. To the contrary, the grievant received a performance rating of "Contributor" in October 2006. 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 and/or medical condition was a primary factor in the grievant's separation from employment. While termination because of a disability would not necessarily be wrongful discrimination, 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, in effect, that the agency failed to comply with applicable policies regarding leave. Because the issue of disability discrimination qualifies for a hearing, this Department deems it appropriate to send any alternative theories and claims related to the grievant's separation from employment for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

The grievant's March 28, 2007 grievance is qualified for hearing. This qualification ruling in no way determines that the agency's actions were discriminatory or otherwise improper, but rather 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