Issues: Qualification – Benefits (FMLA and Sick Leave), Suspension, and Discrimination (Disability); Ruling Date: April 11, 2008; Ruling #2008-1908; Agency: Virginia Community College System; Outcome: Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF THE DIRECTOR

In the matter of Virginia Community College System
Ruling No. 2008-1908
April 11, 2008

The grievant has requested qualification of his November 27, 2007 grievance with the Virginia Community College System (VCCS or the agency). For the reasons set forth below, this grievance qualifies for a hearing.

FACTS

The grievant is employed by the agency as an Academic Coordinator. The agency alleges that on October 11, 2007, the grievant advised his supervisor that he needed to take leave to enter an outpatient drug treatment program for his use of heroin. The grievant admits that he spoke to his supervisor about taking leave to enter drug treatment, but he asserts that he did not tell his supervisor that he had been using heroin. Rather, the grievant claims, he advised his supervisor that he was seeking treatment for his use of the prescription drug hydrocodone for a medical condition. He states that he explained to his supervisor that the reason he had chosen to seek treatment is that he had learned "about the effects of hydrocodone on the brain being akin to heroin and in fact was worse since hydrocodone is specifically engineered for receptor sites in the brain."

The next day, the grievant's supervisor alerted human resources and higher-level management about the grievant's alleged confession of heroin use and plan to seek treatment. The agency states that on October 13, 2007, it notified the grievant that he was on voluntary leave for treatment and that he was not to return to the facility's campus, go to any of the schools with which he had contact as part of his job, or have any contact with their students. The grievant alleges that on Monday, October 15, 2007, he was escorted off the campus, but that he did not learn of the allegations of heroin use until November 6, 2007, during a meeting with human resources and facility administration.

On November 27, 2007, the grievant initiated a grievance challenging his "suspension."[1] The grievance asserts that the agency has wrongfully discriminated against him because of his serious health condition and/or disability, and has failed to keep medical information confidential, in violation of the Family and Medical Leave Act and Americans with Disabilities Act. He also alleges that the agency has failed to act in accordance with the

[1] The agency states that the grievant was not suspended, but rather was placed on leave.

Freedom of Information Act (FOIA) and cast him in a "False Light" by "causing the principal of [a] High School to email all [] High School teachers informing them that [the grievant] was not allowed on campus." Finally, he alleges that the agency misapplied state and agency policy, as well as the "Virginia Employment Opportunity Act."

After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and he has appealed to this Department.

DISCUSSION

Disability Discrimination

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* . . . ."[2] Under Policy 2.05, "'disability' is defined in accordance with the Americans with Disabilities Act," the relevant law governing disability accommodations.[3] 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.[4] An individual is "disabled" if he "(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."[5] The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires."[6]

To establish a *prima facie* claim of disability discrimination under the ADA, the grievant must show that: (1) he is within the ADA's protected class (i.e., a "qualified individual with a disability"); (2) he experienced an adverse employment action; (3) and the adverse employment action occurred "in circumstances that give rise to an inference of unlawful discrimination based on disability."[7] The grievant satisfies the second of these elements, as he has not been allowed to return to his work at the agency but has instead been required to use his available leave balances and to go on short-term disability. The remaining elements will be addressed below.

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[2] DHRM Policy 2.05 (emphasis added).
[3] 42 U.S.C. §§12101 *et seq.*
[4] 42 U.S.C. § 12111(8).
[5] 42 U.S.C. § 12102(2).
[6] 29 C.F.R. § 1630.2(n).
[7] *See* Rask v. Fresenius Medical Care N.A., 509 F.3d 466, 469 (8th Cir. 2007). 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).

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."[8]

While "[t]he terms disability and *qualified individual with a* disability do not include individuals currently engaging in the illegal use of drugs," the term "illegal use of drugs" does "not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by [federal law]."[9] Moreover, the terms "disability" and "qualified individual with a disability" do not exclude an employee who has successfully been rehabilitated from the illegal use of drugs, is participating in a supervised rehabilitation program and is no longer engaging in the illegal use of drugs, or "[i]s erroneously regarded as engaging in such use, but is not engaging in such use."[10]

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. While the current use of heroin would clearly disqualify the grievant, we note that although the agency asserts that the grievant engaged in the illegal use of heroin, the grievant maintains that he sought assistance for the lawful use of prescribed drugs.[11] Moreover, it appears that the grievant is in treatment with a physician, who has performed one or more drug screenings.

The next question is whether any actual or past impairment substantially limits a major life activity, or whether the agency perceived him as having such an impairment.[12] To be "substantially limited" in a major life activity, the grievant 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]

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[8] 29 C.F.R. §1630.2(h)(2).
[9] 29 C.F.R. §1630.3(a).
[10] 29 C.F.R. §1630.3(b).
[11] In its search of the grievant's office, the agency apparently found prescription bottles for hydrocodone. While not conceding that its assertion regarding heroin use is in error, the agency has argued, in the alternative, that this medication was not lawfully prescribed.
[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).

In this case, there is evidence that the agency refused to allow the grievant to return to work because it believed he was unable to perform in this capacity. We therefore conclude, for purposes of this qualification ruling only, that the grievant has presented sufficient evidence that he was regarded by the agency as having an impairment substantially limiting him in a major life activity, that he in fact has such an impairment, and/or he has a record of such an impairment. We note, however, that in reaching this conclusion, we are merely determining that the evidence warrants 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.

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 his job without accommodation and take disciplinary or corrective measures if the employee is unable to meet

[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. The 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")

the employer's expectations.[19] An employer generally may not exclude an employee from returning to his position where he 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 his co-workers, or the employee is unable to perform the essential functions of his position in the absence of the refused accommodation (or another reasonable accommodation).[20] In this case, the agency appears to argue that allowing the grievant to return to his position as Academic Coordinator would pose a direct threat to students.

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 himself 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]

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[19] *See* Hankins v. The 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.

[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); *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

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."[26] If such a risk is demonstrated, 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.[27] 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.[28]

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.[29] The agency concedes that at the November 6, 2007 meeting, the grievant presented a note from his doctor that stated the grievant was able to return to work. This conclusion could be construed as inconsistent with a finding that the grievant's condition constituted a direct threat to himself or others. Further, it is unclear what direct threat would be presented by the grievant's taking hydrocodone, as he claims, rather than heroin, as alleged by the agency. Even assuming, however, that the agency were able to establish that returning the grievant to working as an Academic Coordinator would create a significant risk of harm, questions remain as to whether the agency could have made a reasonable accommodation that would have allowed, reduced or eliminated the risk.[30]

Even where an employee is unable to perform the essential functions of his position, he 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,"[31] job restructuring, part-time or modified work schedules, reassignment and "other similar accommodations for individuals with disabilities" are considered reasonable accommodations.[32] With respect to reassignment, the EEOC has explained that

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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] Nunes, 164 F.3d at 1248.

[27] *Id.*

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

[29] *See* Whitney v. Board of Educ., 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.")

[30] In determining if the agency has shown that returning the grievant to the Academic Coordinator 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.

[31] 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)).

[32] 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

"[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."[33]

In this case, it is unclear whether the grievant could have performed the essential functions of the Academic Coordinator 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). While the agency asserts that it "did not have any related positions available to place [the grievant]," because 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 disability discrimination, we turn next to the remaining element—whether his suspension occurred under circumstances that raise a reasonable inference of unlawful discrimination. It appears to be undisputed that the grievant's psychological and/or medical condition was a primary factor in the agency's decision not to allow him to return to work. While such a refusal 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

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 leave and the agency's handling of medical information for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.[34]

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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).

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

[34] We note, however, that while the hearing officer may determine that the agency's actions were not consistent with law or otherwise violated policy, the hearing officer does not have the authority to award relief for claims of defamation or for violations under FOIA.

CONCLUSION

The grievant's November 27, 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