Issues: Qualification – Discrimination (Disability), Management Actions (Assignment of Duties), Retaliation (Grievance Activity and Other Protected Right), Separation from State (Layoff), and Work Conditions (Telecommuting); Ruling Date: August 17, 2009; Ruling #2009-2261; Outcome: Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF THE DIRECTOR

In the matter of Virginia Employment Commission
Ruling No. 2009-2261
August 17, 2009

The grievant has requested qualification of his January 5, 2009 grievance with the Virginia Employment Commission (VEC or the agency). For the reasons set forth below, this grievance qualifies for a hearing.

FACTS

The grievant is currently employed by the agency as a Workforce Services Counselor/Workforce Services Representative at Location X. The grievant had previously worked for the agency as a Workforce Services Counselor (WSC) at the agency's Location Y. The grievant had been transferred to Location X when Location Y was closed. As a result of the transfer, the grievant's commute purportedly increased considerably (from approximately 5 miles to a drive of over one hour each way), and he was required to assume the duties of a Workforce Services Representative (WSR), which he had not been performing at Location Y. The grievant asserts that the lengthened commute has exacerbated a back injury, to the extent of his becoming dependent on a cane. In addition, he asserts that the addition of WSR duties, to the exclusion of his previous duties as a WSC, was in retaliation for his having taken short-term disability leave related to his back injury and/or for his past grievance activity.

On January 5, 2009, the grievant initiated a grievance challenging his reassignment to Location X, as well as an alleged failure by the agency to reasonably accommodate his back injury. 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 the grievant has appealed to this Department.

DISCUSSION

Reasonable Accommodation for Disability

The grievant asserts that the agency failed to comply with policy by not providing him with a reasonable accommodation for his alleged disability. 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 . . . ."[1] Under Policy 2.05, "'disability' is defined in accordance with the 'Americans with Disabilities Act,'" the relevant law governing disability accommodations.[2] 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.[3] 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."[4] The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires."[5]

I. Was the Grievant Disabled?

The initial inquiry is whether the grievant has a physical or mental impairment that substantially limits one or more of his major life activities. Through his statements and those of his physician, the grievant has presented evidence of a physical impairment. Thus, for purposes of this ruling only, we assume that the grievant has a physical impairment.

The next question is whether his impairment substantially limits a major life activity.[6] To be "substantially limited" in a major life activity, the plaintiff must be significantly restricted in performing the activity.[7] 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.[8] These factors indicate that a temporary impairment will generally not qualify

[1] DHRM Policy 2.05 (emphasis added).
[2] 42 U.S.C. §§12101 *et seq.* In 2008, Congress passed the Americans with Disabilities Act Amendments Act of 2009 (ADAAA). This Act, which became effective on January 1, 2009, was intended to expand the number of individuals covered by the ADA. In particular, the ADAAA expressly states that the current EEOC ADA regulations "express [ ] too high a standard" by defining "substantially limits" as "significantly restricted." As the EEOC has not yet issued regulations interpreting the ADAAA, and the application of the ADAAA is not necessary to our decision in this matter, we will analyze the grievant's claim under the ADA as it existed at the time of the actions challenged in the Grievance Form A. In considering the grievant's claims at hearing, however, the hearing officer should apply the provisions of the ADAAA to the extent the grievant asserts that the allegedly wrongful failure to accommodate extended after January 1, 2009.
[3] 42 U.S.C. § 12111(8).
[4] 42 U.S.C. § 12102(1).
[5] Courts have considered a number of factors in determining what functions are essential. These factors include, but are not limited to, the employer's judgment regarding which functions are essential, the number of employees available among whom the performance of the functions can be distributed, the amount of time spent performing the functions, the consequences of not performing the function, and the actual work experience of past or current incumbents in the same or similar jobs. *See* 42 U.S.C. 12111(8); 29 C.F.R. 1630.2(n); Hill v. Harper, 6 F. Supp.2d 540, 543 (E.D. Va. 1998).
[6] 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).
[7] Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 196-97, 122 S. Ct. 681, 691 (2002).
[8] Pollard v. High's of Balt., Inc. 281 F.3d 462, 467-468 (4th Cir. 2002); 29 C.F.R. § 1630.2(j)(2).

as a disability under the ADA.[9] However, "[a]n intermittent manifestation of a disease must be judged the same way as all other potential disabilities."[10] Similarly, if an intermittent impairment is a characteristic manifestation of an admitted disability, it is considered a part of the underlying disability and a condition that the employer must reasonably accommodate.[11]

In this case, the grievant allegedly suffers from an ongoing back problem that apparently causes him significant pain. The question of whether the grievant is substantially limited is a question of fact best determined by a hearing officer at hearing. Here, the complete extent of the grievant's impairment and the impact of that impairment on his daily life activities are not fully evident. As such, a hearing officer is generally better situated to determine whether the grievant is in fact "disabled" where it appears that the impairment is likely a manifestation of his underlying permanent back problem and evidently affects one major life activity (i.e., walking).

2. Did the Agency Reasonably Accommodate the Grievant?

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]."[12] Under the ADA, job restructuring, part-time or modified work schedules, reassignment and "other similar accommodations for individuals with disabilities" are considered reasonable accommodations.[13] However, courts have recognized that an accommodation is unreasonable if it requires the elimination of an "essential function."[14] In determining what functions of the job are essential, due consideration shall be given to the employer's judgment.[15]

VEC has advised the grievant that it is unable to grant his request to telecommute as it considers the grievant's "physical presence in the local office" to be an essential function of his position. The agency further states that it has already provided the grievant with a number of accommodations, including limiting his time at the front desk and allowing him to work in an alternative office two days a week. The grievant disputes the agency's claim that he has received reasonable accommodation.

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[9] *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.* The Pollard court noted, citing an earlier decision, that "it is evident that the term 'disability' does not include temporary medical conditions, even if those conditions require extended leaves of absence from work." *Pollard*, 281 F. 3d at 468, (citing Halperin v. Abacus Tech. Corp., 128 F.3d 191, 199 (4th Cir. 1997)). In Pollard, where the plaintiff "was left with only the restrictions that she not lift more than twenty-five pounds or bend repetitively," the Court held that a "nine-month absence is insufficient to demonstrate that Pollard had a permanent or long-term impairment that significantly restricted a major life activity." *Pollard*, 281 F. 3d at 469-471.

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

[11] *See* Vande Zande v. State of Wisconsin Department of Administration, 44 F.3d 538, 544 (7th Cir. 1995).

[12] 42 U.S.C. § 12112(b)(5)(A).

[13] 42 U.S.C. § 12111(9)(B).

[14] 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)).

[15] 42 U.S.C. § 12111(8).

Whether a task is considered an essential function of the job and whether a reasonable accommodation would enable the disabled employee to perform the essential functions of a job are fact-specific inquiries and best left to the determination of a hearing officer at hearing.[16] Accordingly, the issue of misapplication of EEO Policy 2.05 is qualified for hearing.

Alternative Theories and Claims

Because the issue of misapplication of Policy 2.05 qualifies for a hearing, this Department deems it appropriate to send any alternative theories and claims related to the grievant's transfer and assignment of duties for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

The grievant's January 5, 2009 grievance is qualified for hearing. This qualification ruling in no way determines that the agency's actions were a misapplication of policy 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

[16] *See Hill* 6 F.Supp.2d at 543.