

Issues: Qualification – Benefits/Leave (VSDP), and Discrimination (Disability, Gender);
Ruling Date: March 1, 2010; Ruling #2010-2406; Agency: Department of
Corrections; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF THE DIRECTOR

In the matter of Department of Corrections
Ruling No. 2010-2406
March 1, 2010

The grievant has requested qualification of her June 15, 2009 grievance with the Department of Corrections (DOC or the agency). For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant was employed as a Corrections Officer Senior with DOC. On September 13, 2008 the grievant broke her leg and as a result, was placed on short-term disability (STD) until November 20, 2008, when she returned to work with job restrictions.¹ Prior to her injury, the grievant was required to alternate working two 12-hour shifts one week and then five 12-hour shifts the next week. Upon her return to work on November 20th, and in accordance with her medical restrictions, the grievant worked 8 hour shifts five days a week. The grievant continued working in this manner until April 27, 2009.

On April 28th, the grievant had surgery on her leg. At this time, the agency discovered that the grievant had been on STD for longer than permitted under policy and should have transitioned into long term disability (LTD) on March 17, 2009. As a result, on April 28, 2009, the grievant was placed in long term disability (LTD) status and was separated from her employment with the agency. The grievant was subsequently released to return to work full-time, full duty with no restrictions on May 25, 2009 and sought reinstatement with DOC, which was denied.

On June 15, 2009, the grievant filed a grievance challenging her termination as a misapplication of policy, discriminatory and in violation of her Constitutional rights. The agency head failed to qualify the June 15th grievance for a hearing and the grievant now seeks a qualification determination from this Department.

¹ According to the agency, the grievant's job restrictions were as follows: "no running, minimal climbing, limit to desk work, no driving greater than two (2) hours, away from inmates, work eight (8) hours per day."

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.² Thus, all claims relating to issues such as the methods, means, and personnel by which work activities are to be carried out generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or applied unfairly.³

Here, the grievant asserts that she was wrongfully terminated from employment with the Commonwealth and for that reason her grievance should have been qualified for a hearing. In this case, however, the grievant was not formally disciplined or dismissed for unsatisfactory performance, thus her grievance does not automatically qualify for hearing.⁴ Rather, because she was separated from employment as a result of her placement in LTD status on April 28, 2009, her Virginia Sickness and Disability Program (VSDP) and sex discrimination claims must be reviewed to determine whether a hearing is warranted.⁵

Misapplication of Policy

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.

The applicable policy in this case is the Virginia Sickness and Disability Program (VSDP), Policy No. 4.57. Under VSDP, “[s]hort-term disability benefits for participating employees shall commence upon the expiration of a seven-calendar-day waiting period.”⁶ On the eighth calendar-day, after authorization by the VSDP provider, short-term disability benefits are provided for a maximum of 125 workdays.⁷ “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.”⁸ LTD is an “income replacement benefit” paid after the expiration of STD.⁹ There is also a long-term disability

² Va. Code § 2.2-3004(B).

³ Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b)-(c).

⁴ *Grievance Procedure Manual* § 4.1 (a).

⁵ Although all complaints may proceed through the three resolution steps, thereby allowing employees to bring legitimate concerns to management's attention, only certain issues qualify for hearing. Constitutional claims are not among the issues identified by the General Assembly as qualifying for a grievance hearing. Accordingly, this issue does not qualify for hearing. Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.

⁶ Va. Code § 51.1-1110(A); *see also* DHRM Policy No. 4.57, Virginia Sickness and Disability Program –(“VSDP”).

⁷ Va. Code § 51.1-1110(B); *see also* DHRM Policy No. 4.57, VSDP.

⁸ Va. Code § 51.1-1112(A); *see also* DHRM Policy No. 4.57, VSDP (“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.”).

⁹ DHRM Policy No. 4.57, VSDP.

working benefit (LTD-W). LTD-W “allows employees to continue to work for their agencies from STD working status.”¹⁰ LTD-W status is in effect when employees “working during STD (modified schedule or with restrictions) continue to work for their agency from STD working status into LTD for 20 hours or more per workweek in their own full-time position.”¹¹ LTD status is in effect when (1) the employee has received the maximum STD benefit and is unable to return to work; (2) the employee is working any schedule outside their agency; or (3) the employee is unable to continue working 20 hours a week in LTD-W.¹²

Upon her return to work on November 20th, the grievant’s status was effectively STD working (in other words, working with restrictions).¹³ According to the agency, the grievant’s STD benefits expired on March 16, 2009. At that time, because she continued to work for the agency for more than 20 hours per week as a corrections officer, with restrictions, the grievant effectively rolled into LTD-W.¹⁴ On April 28, 2009, when she was unable to continue working at all, even in LTD-W as a result of her leg surgery, the grievant reached LTD status. When an employee reaches LTD status, “[r]eturn to pre-disability position is not guaranteed,” and “agencies can recruit and fill their pre-disability position.”¹⁵ As such, the grievant’s separation from state service on April 28, 2009, upon her placement in LTD status that day, was not a misapplication or unfair application of the VSDP. Nor does it appear that DOC misapplied or unfairly applied policy when it failed to return the grievant to work in May 2009. The VSDP states that once an employee moves into LTD status “[r]eturn to [her] pre-disability position is not guaranteed.”¹⁶ Accordingly, this issue does not qualify for a hearing.

The VSDP also requires compliance with the Americans with Disabilities Act (ADA) in providing reasonable accommodations to employees.¹⁷ 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.¹⁸ Major life activities include but are not limited to “caring for oneself, performing

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ The grievant contends that she was working full time, full duty upon her return to work on November 20, 2008 and that the agency essentially failed to acknowledge the restrictions put in place by her physician. However, the grievant admits that from November 20, 2008 through April 27, 2009, she was only working an 8-hour shift rather than her normal 12-hour shift. As such, while the grievant may have been working 8 hours a day, 5 days a week, this was working with restrictions for her position. Accordingly, the grievant was in STD working status during this time.

¹⁴ The agency claims that the grievant should have transitioned into LTD status as of March 17, 2009 and that it made a mistake by allowing her to continue to work past this time as such continuation was in violation of VSDP as well as DOC’s return to work provisions. While it appears that the agency could have separated the grievant from employment on March 17, 2009 if it determined that it could no longer accommodate her job restrictions, the agency’s failure to do so appears to have allowed the grievant to roll into LTD-W.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See DHRM Policy No. 4.57, VSDP, *see also* DHRM Policy No. 2.05, Equal Employment Opportunity.

¹⁸ 42 U.S.C. § 12102(1)(A).

manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”¹⁹

In order to demonstrate that an impairment is substantially limiting, an individual must show that she is “[u]nable to perform a major life activity that the average person in the general population can perform” or is “[s]ignificantly restricted as to the condition, manner or duration under which [she] can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity”²⁰ Additionally, 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 These factors indicate that a temporary impairment, such as recuperation from surgery, will generally not qualify as a disability under the ADA.²² In this case, grievant suffered a leg injury that required surgery and a recovery period, after which she was released to return to work. Accordingly, there is no evidence that the grievant suffered a “substantially limiting impairment” as a result of her leg injury. As evidenced by her eventual release to return to work, the grievant’s injury was of a limited duration and did not appear to have a permanent impact. Thus, it does not appear that the grievant is disabled as defined by the ADA.

Sex Discrimination

The grievant also claims that her separation was discriminatory. Grievances that may be qualified for a hearing include actions related to discrimination on the basis of sex.²³ To qualify her grievance for a hearing however, there must be more than a mere allegation of discrimination—there must be facts that raise a sufficient question as to whether the grievant suffered an adverse employment action as a result of discrimination based on her sex. In other words, that because of her sex, she was treated differently than other “similarly-situated” employees. If however, the agency provides a nondiscriminatory business reason for the alleged disparity in treatment, the grievance should not be qualified for hearing, unless there is sufficient

¹⁹ 42 U.S.C. § 12102(2)(A).

²⁰ 29 C.F.R. § 1630.2(j)(1).

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

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.* 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. This Department notes that Pollard was decided prior to the ADA Amendments Act of 2008, which broadened the definition of “disability.” However, this Department has no reason to believe that impairments of a temporary nature, such as at issue in Pollard and in this case, will fall within the newly expanded definition of disability. In fact, the Equal Employment Opportunity Commission (EEOC) has indicated in its proposed regulations that temporary, non-chronic impairments of short duration with little or no residual effects usually will not be considered disabilities. One example of a temporary, non-chronic impairment cited by the EEOC is a broken bone expected to heal completely. *See* http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm.

²³ *See Grievance Procedure Manual* § 4.1(b).

evidence that the agency's stated reason is merely a pretext or excuse for improper discrimination.²⁴

In support of her claim that her movement into LTD and resulting separation from employment were discriminatory on the basis of sex, the grievant asserts that there are two male employees that continually perform poorly as a result of their alleged illnesses/injuries, yet, they have not been separated from employment while the grievant, who was allegedly performing well and doing her job duties, was separated. As an initial matter, how well the grievant performed her duties does not appear to have any relevance to the grievant's separation in this case, as the grievant was separated solely on the basis of her transition into LTD status. More importantly, according to the agency, the two male employees referenced by the grievant are not similarly-situated to the grievant. Unlike the grievant, at the time of her separation, both of those individuals were working full-time, full duty. Because the grievant and the two male employees were not similarly situated, there is no basis to conclude that the grievant was treated differently because of her sex. Further, as discussed above, the agency appears to have separated the grievant purely based on policy provisions and requirements, not because she is a female. Accordingly, the grievant's claim of sex discrimination does not qualify for hearing.

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 and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

²⁴ Hutchinson v. INOVA Health System, Inc., 1998 U. S. Dist. LEXIS 7723 (E.D. Va. 1998)(citing McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973)).