Issue: Qualification - Discrimination (disability); Ruling Date: October 12, 2010; Ruling #2011-2691; Agency: Virginia Employment Commission; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Employment Commission
Ruling Number 2011-2691
October 12, 2010

The grievant has requested a ruling on whether her April 12, 2010 grievance with the Virginia Employment Commission (the agency) qualifies for a hearing. For the reasons stated below, this grievance does not qualify for a hearing.

FACTS

The grievant was formerly a hearing officer with the agency. The grievant's April 12, 2010 grievance challenges the agency's denial of her request to telework. The agency denied this request because the grievant "cannot currently meet job [requirements]; must have six months sustained satisfactory performance to be considered for telework." However, the grievant requested telework as an accommodation to her medical condition, which has caused her, for example, fatigue and nausea. She states that working from home will eliminate certain causes of stress and nausea and will better allow her to cope with the fatigue. The grievant states that she may be able to meet the job requirements if she is permitted to telework.

During this grievance, the grievant also reportedly requested additional accommodations in her former position. The agency responded by offering the grievant a transfer to a different position in an attempt to accommodate her. The grievant accepted this transfer. This ruling addresses the denial of the accommodation of telework as it relates to the grievant's former position as a hearing officer.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[1] Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or whether state policy may have been misapplied or unfairly applied. In this case, the grievant has asserted a claim of discrimination on the basis of disability and the agency's failure to provide an accommodation thereto.

[1] Va. Code § 2.2-3004(B).

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[3] An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[4] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[5] The allegations in this case are assumed to present a sufficient question of an adverse employment action to pass this threshold question.[6]

DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, age, veteran status, political affiliation, genetics or *disability*."[7] Under DHRM Policy 2.05, "'disability' is defined in accordance with the 'Americans with Disabilities Amendments Act' [sic]," the relevant law governing disability accommodations.[8] Like DHRM 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.[9] 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."[10] Given the symptoms the grievant experiences, for purposes of this ruling, it is presumed that the grievant's condition meets the definition of "disability."[11] The focus of this

---

[2] *See Grievance Procedure Manual* § 4.1(b).

[3] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.

[4] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[5] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

[6] This result is consistent with many federal court ADA decisions, which do not appear even to require that an employee prove an adverse employment action in a failure to accommodate case. The employer's act of failing to satisfy its duty to provide a reasonable accommodation is actionable discrimination and in effect constitutes an adverse employment action in and of itself. *See, e.g.*, Turner v. Hershey Chocolate USA, 440 F.3d 604, 611 n.4 (3d Cir. 2006); Williams v. Philadelphia Hous. Auth. Police Dep't, 380 F.3d 751, 771 (3d Cir. 2004); Harvey v. Wal-Mart La. L.L.C., No. 3:06-cv-02389, 2009 U.S. Dist. LEXIS 90745, at *31 (W.D. La. Sept. 30, 2009); Wade v. DaimlerChrysler Corp., 418 F. Supp 2d 1045, 1051 (E.D. Wis. 2006); Nawrot v. CPC Int'l, 259 F. Supp. 2d 716, 723-24 (N.D. Ill. 2003).

[7] DHRM Policy 2.05, *Equal Employment Opportunity* (emphasis added).

[8] 42 U.S.C. §§ 12101 *et seq.*

[9] 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m). The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1630.2(n).

[10] 42 U.S.C. § 12102(2).

[11] The condition the grievant has is also listed in the EEOC's proposed regulations implementing the ADA Amendments Act of 2008 as an "impairment that will consistently meet the definition of disability." Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 74 Fed. Reg. 48431 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. § 1630.2(j)(5)).

case, then, is whether the grievant can perform the essential functions of the job with or without "reasonable accommodation."

The agency asserts that because the grievant was not performing eight hearings and completing the requisite decisions daily,[12] she was not meeting the requirements of the job and did not have six months of satisfactory performance to permit telework.[13] Whether the required quota of hearings would be considered an "essential function" is not clear, but it would appear to be reasonable to assume so, at least for purposes of this ruling.[14] 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,"[15] job restructuring, part-time or modified work schedules, reassignment and "other similar accommodations for individuals with disabilities" are considered reasonable accommodations.[16] Therefore, assuming that the grievant was not performing the essential functions of her position, the question here is whether the grievant could perform those functions with the accommodation of telework.

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]."[17] 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."[18]

---

[12] At this point, these job duties are the only ones that have been mentioned in the grievance record as those that cannot be met.

[13] It is unclear what six month period the agency is evaluating here. For instance, it is presumed that prior to the grievant's time on disability leave, she had satisfactory performance. However, this period does not appear to be taken into account. It is presumed that the grievant's time on disability is not being counted against her. Therefore, the agency appears to be assessing the grievant's alleged unsatisfactory performance after her return to work, a period during which the determinations of what accommodations would be necessary to enable the grievant to perform her job were being made.

[14] 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. *See* 42 U.S.C. § 12111(8). The ADA regulations provide that other factors to consider 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. *See* 29 C.F.R. § 1630.2(n)(3).

[15] 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)).

[16] 42 U.S.C. § 12111(9)(B).

[17] 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.").

[18] 29 C.F.R. § 1630.2(o)(3).

In this case, while it is not clearly established that the grievant could have performed the quota of hearings required by the agency with the requested accommodation of telework, the grievant asserts that she may be able to attain that level of performance if she were allowed to telework. For instance, according to the grievant, working from home would enable her to avoid the stress of her commute, take her breaks in a relaxing atmosphere, and work in a stress-free environment, which apparently would ameliorate the symptoms of her condition. Based on these allegations, there appears to be at least a sufficient question raised that telework could enable the grievant to attain the level of performance required by the agency.[19] The next question is whether such an accommodation would be an undue hardship[20] to the agency.

It cannot be argued in this case that the responsibilities of the grievant's former position cannot be performed by telework. Indeed, the grievant's former position was presumably designated as eligible for telework as many other agency employees in that same position telework. Rather, the agency's reasons for not granting telework as an accommodation appear to be: 1) the grievant's inability to perform her duties satisfactorily disqualified her from being eligible to telework under its telework policy; and 2) because of the nature of the grievant's work schedule as a result of her condition and level of work she could handle, the agency needed to monitor her progress more directly to keep the work processes moving appropriately.

Although the agency's arguments present evidence of some burden, they would not appear at this juncture to establish any "significant difficulty or expense." For instance, the first of the agency's explanations could at least arguably be a consideration that should be waived. EEOC guidance indicates that an agency may be required to modify workplace policies to allow a disabled employee to work from home.[21] Similarly, with regard to the second explanation, the EEOC has stated that "[a]n employer should not … deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees."[22] While we understand the need to keep close tabs on the grievant's work progress for scheduling purposes, it is arguably possible to do so remotely with appropriate management. Consequently, we cannot resolve these issues at this stage in favor of the agency.

There also seems to be a disconnect between the argument that because the grievant cannot complete her work, she will not be permitted to telework. The grievant requested the accommodation of telework to be able to satisfy the requirements of her job. Conversely, the

---

[19] *Compare* Ellis v. Ethicon, Inc., No. 05-726, 2009 U.S. Dist. LEXIS 106620, at *37 (D.N.J. Nov. 13, 2009) (finding the employee "qualified" because with the accommodation of working from home the employee "'had a very decent chance of being able to do her job'"), *with* Kiburz v. England, 361 F. App'x 326, 335 (3d Cir. 2010) (finding employee was not "qualified" because even if he was allowed to work from home, he "most likely" would not be able to perform his work because of the unpredictable episodes of severe pain requiring him to be immobile for periods of time).

[20] "Undue hardship" is defined as a "significant difficulty or expense incurred by [an agency]" upon consideration of certain established factors, including the "impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business." 29 C.F.R. § 1630.2(p).

[21] *E.g.*, EEOC Fact Sheet, Work at Home/Telework as a Reasonable Accommodation, *available at* http://www.eeoc.gov/facts/telework.html (last modified Oct. 27, 2005).

[22] *Id.*

agency states that the grievant was not permitted to telework because of her inability to meet the requirements of her job. Denying an accommodation due to factors that are a by-product of the employee's disability could be viewed as inconsistent with the ADA.[23]

However, while this grievance and, therefore, this qualification ruling, focuses on whether the agency failed to accommodate the grievant by denying her request to telework, the decision whether this matter should be qualified is unavoidably impacted by the grievant's more recent transfer to her new position. The agency made the offer of transfer to the grievant as an accommodation to her condition. As such, there is a question as to whether the previous requests for accommodation, including telework, involving the grievant's previous position are resolved by the agreement to the transfer.

Generally speaking, an agency should consider accommodation in an employee's current position before offering reassignment to a different position. Indeed, according to guidance provided by the EEOC, reassignment is a last resort and only after the agency has determined "1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship."[24] However, the EEOC guidance also indicates that "if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee."[25]

This Department has reviewed no evidence that would indicate that the grievant's agreement to the transfer was involuntarily given. Further, information provided by the agency indicates that this offer of transfer was made as an attempt to provide accommodation to the grievant's condition in lieu of other requests for accommodation. Therefore, the grievant's acceptance of the reassignment would appear to effectively resolve the grievant's telework request, as well as her other accommodation requests pertaining to her former position.[26] Indeed, it cannot be said that the agency has misapplied or unfairly applied the applicable policies when it offered an alternative accommodation that the grievant accepted. As such, even if a sufficient question could be raised as to whether the agency improperly denied the grievant's earlier request to telework in her former position, this question is no longer pertinent because the position in which the grievant currently finds herself is an alternative accommodation that she was offered and accepted. For that reason, this grievance does not qualify for a hearing.

---

[23] *See* Humphrey v. Memorial Hosps. Ass'n, 239 F.3d 1128, 1137 (9th Cir. 2001) (finding inconsistent with the ADA an employer's denial of an accommodation based on past misconduct that was the result of the disability sought to be accommodated).

[24] EEOC Enforcement Guidance, Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Oct. 17, 2002, *available at* http://www.eeoc.gov/policy/docs/accommodation.html.

[25] *Id.*

[26] *Cf.* Walter v. United Airlines, Inc., No. 99-2622, 2000 U.S. App. LEXIS 26875, at *13 (4th Cir. Oct. 25, 2000) (noting that "the ADA does not require an employer to provide the specific accommodation requested by the disabled employee, or even to provide the best accommodation, so long as the accommodation provided to the disabled employee is reasonable").

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 this Department's 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