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QUALIFICATION RULING

In the matter of the Department of Social Services
Ruling Number 2024-5677
April 3, 2024

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management on whether her March 28, 2023 grievance with the Virginia Department of Social Services (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is qualified for a hearing.

FACTS

In May 2022, the grievant made a written request to her agency management for full-time telework as a disability accommodation. Pending the resolution of her accommodation request, between May and December 2022, the grievant had multiple periods of extended medical leave but, when she was working, apparently worked fully remotely. On or about December 8, 2022, management denied the grievant's request for full-time telework but approved two days of telework per week. Maintaining that she was not able to report to work onsite for the other three weekdays, the grievant then applied for a period of short-term disability, which appears to have begun on December 21, 2022. Although the grievant maintains she remained able to work on her two approved telework days during this period, she claims the agency did not approve her to work a partial workweek. Accordingly, she was considered totally disabled during this period, was not offered alternative accommodations, and therefore drew on her income-replacement benefits as defined by DHRM Policy 4.57, *Virginia Sickness and Disability Plan*.

On or about March 28, 2023, during her disability leave, the grievant initiated a grievance with the agency identifying two issues: "disability discrimination" and "breach of confidentiality." On or about April 11, 2023, still on disability leave due to her inability to work onsite, the grievant made a new accommodation request to the agency for full-time remote work, which was initially denied. On June 12, 2023, following a meeting, the second-step respondent in the grievance process provided a detailed response to the issues in the grievance. Based on discussion during the meeting of the grievant's current position, the respondent stated that the grievant "was candid and explained that many of the job duties she could not perform when working from home. The grievant has been working from home five days a week for over a year. Many of her job duties

have been completed either by other staff or by her supervisor." Accordingly, the second-step respondent concluded:

> Allowing the grievant to continue working from home five days a week has created and will continue to create an undue hardship on the [agency]. Therefore, . . . the only reasonable accommodation is reassignment to a new job . . . .
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> . . . . Once it was determined that the grievant could not perform all her essential job duties working full-time remotely from home and that her inability to do so created an undue hardship on [her division], HR should have taken the next step and started the search for another position that would have allowed her to telework full-time. For the period from December 8, 2022, to June 12, 2023, HR should determine any days the grievant used annual leave (paid leave) to avoid working in person in the office and evaluate whether the grievant's leave should be reinstated for any of that time. . . .
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> Permanent reassignment is appropriate in this case. Pursuant to the ADA, the Department must attempt to place the employee in a vacant position for which she is qualified.

On June 13, 2023, the agency's employee relations office contacted the grievant to offer reassignment to a position within that office. The grievant accepted and, according to the parties, continues to work full-time in that role as of the date of this ruling.

On or about September 19, 2023, the grievant requested for her grievance to qualify for a hearing, primarily on grounds that the agency's delay in exploring potential reasonable accommodations caused negative impacts to her pay and leave benefits during her short-term disability period. On October 6, 2023, the agency head declined to qualify the grievance for a hearing, stating that the agency had created a "new position especially for [the grievant] based on the requirements you need," because "there were no existing positions within the agency that met your requirements for a fully remote position . . . ." Moreover, the agency head stated that the grievant's leave time used to supplement her short-term disability leave was her choice, and thus he did "not agree to reinstatement of these leave hours." The grievant has appealed the agency's head's determination to EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[1] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out generally do not qualify for

[1] *See Grievance Procedure Manual* § 4.1.
[2] Va. Code § 2.2-3004(B).

a 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 unfairly applied.[3] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must 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 applicable policy's intent.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Typically, then, a threshold question is whether the grievant has suffered an adverse employment action. 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6]

Here, there is no apparent dispute that the grievant was on a lengthy period of approved disability leave in accordance with DHRM Policy 4.57, during which she received only partial income replacement.[7] Because the grievant alleges that she had to take such leave due to the agency's failure to reasonably accommodate her disability, the grievance sufficiently alleges an adverse employment action, including the grievant's lost income (and/or depleted paid-leave balances to supplement her partial-income disability benefits) and leave accrual during this period. Accordingly, the grievance may qualify for a hearing if the grievant's lost income and/or benefits resulted from a misapplication or unfair application of policy.

Americans with Disabilities Act

The grievant's primary claim is that that she lost wages and benefits because of the agency's misapplication of its obligations under the Americans with Disabilities Act (ADA) and related state policy. As a general rule, the ADA requires an employer to make reasonable accommodations to the known physical or mental limitations of a qualified employee with a disability, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business [or government]."[8] "Reasonable accommodations"

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[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[4] *See id.* § 4.1(b)
[5] Ray v. Int'l Paper Co., 909 F.3d 661, 667 (4th Cir. 2018) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).
[6] Laird v. Fairfax County, 978 F.3d 887, 893 (4th Cir. 2020) (citing Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds "less appealing").
[7] The grievant alleges she received compensation at 60 percent for 122 workdays during her disability leave period. *See generally* DHRM Policy 4.57, *Virginia Sickness and Disability Plan*, at 14.
[8] 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.").

include "[m]odifications or adjustments that enable [an employee] with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[9] In order to determine the appropriate reasonable accommodation, it may be necessary for the employer "to initiate an informal, interactive process with the 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."[10] To the extent that the employee has a continuing need for reasonable accommodation(s), this interactive process is an "ongoing" obligation to identify potential accommodations.[11] By engaging in this process, the employer may be in a position to determine whether more than one reasonable accommodation would allow the employee to perform their essential functions. An employer is not required to approve the exact accommodation requested by an employee if some other accommodation is available that will allow them to perform the essential functions of their position.[12]

In the absence of other reasonable accommodations that would allow an employee to perform the essential functions of their position, the employee may be entitled to be reassigned to a vacant position for which they are qualified.[13] The ADA requires reassignment only after the employer determines that "(1) there are no effective accommodations that will enable the employee to perform the essential functions of [their] current position, or (2) all other reasonable accommodations would impose an undue hardship."[14] Because an employer is in the best position to know which of its positions are open or will become so, the employer may be "obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment" as part of the interactive process if no other accommodations are apparent.[15]

Upon a thorough review of the information provided to EDR, we conclude there is a sufficient question whether the agency met its responsibility to attempt to identify potential reasonable accommodations that would allow the grievant to perform the essential functions of her job, to include potential reassignment in the absence of other accommodations. On May 9, 2022, the grievant informed her supervisor that she would be pursuing an ADA accommodation request for full-time telework. On May 16, the supervisor referred the grievant to the agency's employee

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[9] 29 C.F.R. § 1630.2(o)(1)(iii); *see* 42 U.S.C. § 12111(9)(B).
[10] 29 C.F.R. § 1630.2(o)(3).
[11] Equal Emp't Opp. Comm'n, "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," No. 32, Oct. 17, 2002, available at www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada; *see* 29 C.F.R. § 1630.9(a).
[12] *See id.* pt. 1630 app. § 1630.9 (stating that an employer should conduct an individualized assessment of the employee's limitations and the job, then "select and implement the accommodation that is most appropriate for both the employee and the employer"); *see also* EEOC Fact Sheet, *Work at Home/Telework as a Reasonable Accommodation*, https://www.eeoc.gov/facts/telework.html.
[13] 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).
[14] EEOC, "Enforcement Guidance," *supra* n. 11; *see* Elledge v. Lowe's Home Ctrs., 979 F.3d 1004, 1014-16 (4th Cir. 2020) (noting that "reassignment's last-resort status [as a potential accommodation] encourages employers to take reasonable measures to accommodate their disabled employees in the positions they already hold").
[15] EEOC, "Enforcement Guidance," *supra* n. 11; *see, e.g.*, Cravens v. Blue Cross & Blue Shield, 214 F.3d 1011, 1019-22 (8th Cir. 2000) (denying summary judgment based in part on the employee's claim that they "asked for assistance in identifying alternative positions from other members of the human resources department and received minimal help in that regard").

relations staff, and the grievant subsequently submitted a Reasonable Accommodation Request Form and Medical Certification to the agency's employee relations staff.[16] On August 18, 2022, after meeting with human resources staff, the grievant described in writing her specific disabling conditions that were triggered by being at the worksite, as well as how these conditions affected her functioning. On August 31, 2022, after meeting with human resources staff, the grievant submitted an addendum from her medical provider in response to the agency's follow-up inquiries.

After meeting again with the grievant on December 8, 2022, human resources staff notified the grievant that her accommodation was "approved for two days of telework" and that "[a]t this time, we are closing your request for reasonable accommodation." This notice did not clarify the basis for its two-day telework proposal, *i.e.* whether the agency concluded that two days of telework would be sufficient to allow the grievant to perform her duties,[17] or instead whether the agency was unable to accommodate the grievant's need beyond two days of remote work. As such, it is also unclear whether, during this process, the agency proposed alternative accommodations, such as reassignment, that might allow the grievant to work full-time.

Shortly after filing her grievance in March 2023, the grievant submitted a new accommodation request, with the agency's required medical certification completed again by her medical provider. This most recent certification, which identified several health conditions that impaired at least eight major life activities, stated that the grievant would benefit from working at home because she experienced "significant emotional and digestive distress when in public spaces including buildings with multiple floors, parking garages, and environments with large numbers of people." Nevertheless, on April 24, 2023, the agency's human resources staff replied that "it is unclear what exact essential function(s) you cannot complete," but noted that the grievant's current position required several in-office duties that were not consistent with a fully-remote schedule. Again, the agency's response did not clarify whether the grievant's need for accommodation was in dispute and, if not, whether any practical accommodations might be reasonable. The response concluded that the agency "cannot further process this request without discussion with you and your supervisor."

Following the agency's April 24 response, the grievant escalated her request to the agency head and human resources director. In the meantime, she identified and applied for other open agency positions advertised as fully remote. Although the grievant alleges she proposed to human resources staff that she could be reassigned, she claims these proposals were ignored or rejected. One of these positions was allegedly first advertised in February 2023. It appears that, after completing the competitive recruitment process, the grievant actually received an offer for one of these positions at some point in May 2023. According to the grievant, she inquired with the hiring manager whether a higher salary was possible and did not receive a response; the agency's recruitment system later reflected (incorrectly, according to the grievant) that she had declined the

[16] According to the grievant, she had already submitted these forms to human resources in May 2022 but submitted them again upon request in July 2022.

[17] The grievant, who had been working fully remotely up to this point when not on sick leave, has presented some evidence to suggest that her job duties were updated in mid-December to include more substantial onsite responsibilities.

offer. She was subsequently invited to interview for another position she had applied for on May 24, 2023.

The grievant's allegations in this regard may call into question the agency's position that no reasonable accommodations, including reassignment, were available during her short-term disability period between December 2022 and June 2023. In his statement denying the grievant's request for an administrative hearing, the agency head stated that "there were no existing positions within the agency that met your requirements for a fully remote position [for] which you were also minimally qualified." The offers the grievant apparently received via competitive recruitments – one finalist offer, and one interview offer – are in potential conflict with the agency's assertion in this regard. In addition, the grievant has identified at least two other positions for which she asserts she was minimally qualified. While the agency apparently disputes the grievant's qualifications for other positions, in light of the multiple potential accommodation opportunities identified by the grievant and the record as a whole, EDR concludes that a hearing officer would be best positioned to make a factual determination as to the earliest point at which a reasonable accommodation existed – including but not limited to reassignment – that would have allowed the grievant to work full-time, instead of filing for a prolonged period of short-term disability during which she received only partial pay. If such an accommodation existed, then the hearing officer would have authority to order ADA requirements to be reapplied at that point along with other remedies, such as back pay and benefits, to cure any ADA violation supported by the evidence.[18]

Although the foregoing analysis primarily addresses whether the agency may have failed to reasonably accommodate the grievant, EDR notes that the grievant has claimed "disability discrimination" as the primary issue in her grievance. Because we find that the grievance raises a sufficient question whether the agency misapplied the requirements of the ADA, we decline to distinguish between these claims for qualification purposes. To the extent that the grievant wishes to advance a claim that discriminatory motives caused an adverse employment action, such allegations are clearly within the scope of the grievance and EDR finds no basis to prevent the grievant from presenting them to a hearing officer as part of her overall ADA claims. The grievant's ADA claims within the reasonable scope of the grievance are qualified in full.

Breach of Confidentiality

In addition to the ADA issues discussed above, the grievant identifies "breach of confidentiality" as a separate grievance issue. Specifically, the grievant alleged that a coworker made derogatory and discriminatory comments about the grievant's remote-work and disability status, which the grievant alleges the coworker could only know about if their mutual supervisor discussed the grievant's confidential information with others. The alleged comments included statements by the grievant's coworker that the grievant was "bad news" due to her request for remote work and the coworker's opinion that the grievant did not have a legitimate disability. In response, the agency head stated that the issue had been investigated and "it was determined no breach of confidentiality took place."

[18] *See Rules for Conducting Grievance Hearings* §§ VI(C), (D).

To the extent that the grievant's allegations about her coworker's statements are relevant to the qualified ADA claims discussed above, she will have the opportunity to present evidence as to these allegations at the hearing. However, although the allegations are concerning, we cannot conclude that they sufficiently describe an adverse employment action that could qualify for a hearing independent of the ADA claims.

CONCLUSION

For the reasons explained herein, this grievance is qualified for a hearing as to the grievant's allegations that the agency misapplied the requirements of the Americans with Disabilities Act and related state policies. At the hearing, the grievant will have the burden to prove that she experienced an adverse employment action due to the agency's failure to apply such requirements appropriately.[19] If she prevails, the hearing officer will have authority to order appropriate remedies, including restoration of pay and benefits, for example, those that the grievant would not have depleted had she not been denied reasonable accommodation(s).[20]

Within **five workdays** of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear the claims qualified for hearing, using the Grievance Form B. However, this ruling is not intended to prevent or discourage the parties from resolving the underlying issues outside the context of a hearing. Should the parties wish to pursue resolution of the issues herein prior to a hearing date, EDR is available to assist in such any efforts as desired and appropriate.

EDR's qualification rulings are final and nonappealable.[21]

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[19] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(C).
[20] *Rules for Conducting Grievance Hearings* § VI(C)(1).
[21] *See* Va. Code § 2.2-1202.1(5).