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QUALIFICATION RULING

In the matter of the Department of Social Services
Ruling Number 2023-5537
June 14, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether her February 8, 2023 grievance with the Department of Social Services (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is qualified for a hearing.

FACTS

On or about February 8, 2023, the grievant initiated an expedited grievance with the agency to challenge her separation from employment. Primarily, she contended that the agency improperly separated her following a period of short-term disability. The grievant's short-term disability benefits were due to exhaust as of January 12, 2023, and she was expected to return to work on that date. However, on January 9, she was apparently hospitalized for a heart attack and therefore unable to return to work that week as scheduled. According to the grievant, on January 13, 2023, the agency's benefits manager informed her that she was separated from employment due to the expiration of her short-term disability benefits.

The grievant claims that the manner of her separation was not only a violation of federal disability protections but also a continuation of retaliation against her by agency management in connection with a prior grievance. In 2021, the agency terminated the grievant's employment on disciplinary grounds, and the grievant challenged that action at an administrative grievance hearing. She ultimately prevailed at the hearing, which resulted in an order for the agency to reinstate her with back pay and benefits. The grievant claims that, since the order to reinstate her, agency managers have engaged in ongoing retaliatory actions against her, including a months-long delay in complying with the reinstatement order and the issuance of erroneous formal discipline against her.[1]

In response to the grievance, the single management respondent asserted that the agency had investigated the grievant's allegations and did not find support for her claims of retaliation or misapplication of policies. However, the respondent stated that the agency was "willing to afford

[1] It appears that the grievant received a Group II Written Notice in June 2022, but it was rescinded upon review by the agency's human resources department.

[the grievant] the opportunity to work; however, it must be in a full-time status to include [her] current ADA accommodations." Subsequently, the agency head designee declined to qualify the grievance for a hearing, although they reiterated a willingness "to return [the grievant] to a position in a full-time capacity" upon sufficient "medical certification releasing [her] to full-time duty."

Based on this response, while the present ruling was pending with EDR, the grievant was in communication with the agency's human resources staff regarding what was needed for reinstatement, as indicated in the agency's written grievance responses. On May 30, 2023, the grievant apparently submitted new documentation from her medical provider releasing her to work full-time (up to 40 hours per week) with certain scheduling limitations, but she alleges the agency has since declined to reinstate her. Accordingly, the grievant seeks qualification of her grievance for an administrative hearing.

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.[2] Generally, the grievance procedure limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] An adverse employment action is defined as a "tangible employment action" constituting "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] Because the grievant in this case was separated from employment, the grievance sufficiently alleges that she experienced an adverse employment action.

In addition, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[6] Thus, claims relating solely to the "[h]iring, promotion, transfer, assignment, and retention of employees" 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 improperly influenced management's decision, or whether state or agency policy may have been misapplied or unfairly applied.[7] 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.

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[2] *See Grievance Procedure Manual* § 4.1.
[3] *See id.* § 4.1(b).
[4] 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)).
[5] 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").
[6] *See* Va. Code § 2.2-3004(B).
[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

Failure to Accommodate

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" 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 select an 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] Under the ADA, 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.[11]

In this case, the parties do not appear to dispute that, as of January 12, 2023, the grievant was a qualified employee with a disability. Although by all accounts she was not able to work on that specific date due to a disabling medical condition, she should still have been considered a "qualified" employee if she would have the ability to resume her essential job duties after a reasonable and finite period of leave, whether paid or unpaid, with or without a reasonable accommodation.[12] Based on the information available, the forms of leave that might have been available to the grievant on January 12, 2023, were limited: she had exhausted her short-term disability benefits and appears not to have been eligible for working long-term-disability benefits or leave under the Family Medical Leave Act. Nevertheless, if a defined period of unpaid leave would have allowed the grievant to resume the essential functions of her job within a reasonable timeframe under the circumstances, the agency would have been required to approve such leave unless it would have imposed an undue hardship on its operations.

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[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.").

[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] *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").

[12] *See* Wilson v. Dollar General Corp., 717 F.3d 337, 345-46 (4th Cir. 2013) (employee may be qualified if they can demonstrate an expected ability to perform essential job functions after leave as an accommodation); Sanchez v. Vilsack, 695 F.3d 1174, 1182 (10th Cir. 2012); *see, e.g.*, Churchwell v. City of Concord, No. 1:17-CV-299, 2018 U.S. Dist. LEXIS 98964, at *8-9 (M.D.N.C. June 11, 2018) (employer had a duty to engage in interactive process regarding employee's request for 30 days of unpaid leave as a disability accommodation); *see also* Equal Employment Opportunity Comm'n, *Employer-Provided Leave and the Americans with Disabilities Act*, May 9, 2016, available at www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act ("An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer. That is the case even when . . . the employee has exhausted the leave the employer provides as a benefit . . . .").

As an initial matter of ADA compliance, the record raises a sufficient question as to whether any interactive process to explore these issues took place. According to the grievant, she spoke with the agency's benefits manager by phone on January 13, 2023, while still admitted to the hospital. The benefits manager advised the grievant that, because she was unable to return to work, she was automatically transitioning to long-term-disability status and therefore was separated from employment. The grievant claims that she questioned whether a disability accommodation was available under the circumstances and whether the benefits manager was the ultimate decision-maker with respect to her termination. The benefits manager allegedly refused to discuss these questions with the grievant, asserting that the grievant was no longer an employee of the agency.[13]

To the extent that the grievant was separated due to the benefits manager's belief that exhaustion of short-term disability benefits automatically leads to separation, this reasoning would appear to be a misapplication or unfair application of state disability policy.[14] Under DHRM Policy 4.57, *Virginia Sickness and Disability Program*, short-term disability benefits end when an employee "is able to perform the essential functions of his or her pre-disability job on a full-time basis."[15] However, when an employee seeks to return to work from a period of disability with documented work restrictions, Policy 4.57 instructs that the agency "must review the request and determine if the restrictions can be accommodated."[16] We acknowledge that the personnel issues arising as of January 13 were complicated for everyone involved: the grievant was reportedly in hospital recovery following an emergency medical event, and most or even all of the options that the agency might typically offer to an employee under the circumstances were seemingly not available. However, such circumstances highlight the need for an interactive, good-faith discussion between the employee and employer to determine what individualized accommodations may be reasonable for an individual with a disability who is temporarily unable to work. We identify no basis in Policy 4.57 or other authority to suggest that these essential ADA requirements can be omitted at the end of a short-term disability period.

EDR recognizes that the absence of an interactive process, in and of itself, is generally not a basis for relief when there is no indication that such a discussion would have revealed a reasonable accommodation. For purposes of this ruling, we assume (without deciding) that a defined period of unpaid leave without pay was the only accommodation that could have allowed the grievant to resume her duties.[17] Even so, although granting such leave may impose an undue hardship on an employer in some cases, we find nothing in the present record to reflect such hardship here. To the contrary, it appears that the agency has consistently represented to the grievant – via multiple managers – a willingness to accommodate her return to a full-time position upon the agency's receipt of appropriate medical clearance. These statements suggest that the grievant could have been retroactively designated as on leave without pay since January 13, 2023,

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[13] Although EDR is not the factfinder for purposes of qualification, we note that, even if the agency disputes the grievant's version of events in this regard, disputed issues of fact are typically appropriate for resolution by a hearing officer, assuming that other hearing qualification requirements are met.

[14] *See* DHRM Policy 2.05, *Equal Employment Opportunity* (providing that all aspects of state human resource management "be conducted without regard to . . . disability . . . ."); DHRM Policy 4.57, *Virginia Sickness and Disability Program* (referencing the ADA's requirement to "provide reasonable accommodation" to "qualified disabled individuals" in the absence of undue hardship).

[15] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, at 21.

[16] *Id.* at 33.

[17] It appears that the grievant provided medical documentation noting expected return-to-work dates at multiple points during the pendency of this grievance.

without unduly burdening the agency's operations. Moreover, while this ruling was pending, the grievant apparently submitted an updated medical clearance to return to full-time work with certain scheduling restrictions as of May 31, in accordance with the agency's request for return-to-work documentation as a condition of reinstatement.

In essence, it appears that the parties have, at least to some extent, been engaging in the interactive process that normally should have occurred prior to the grievant's separation from employment. However, it appears that no resolution has been reached as to the crucial issues of: (1) whether the grievant can perform the essential functions of her former position with or without reasonable accommodations, and (2) whether the grievant could, in the alternative, be reassigned to a different position as a reasonable accommodation. Because it is not clear that these questions will be resolved via the parties' independent discussions, EDR concludes that they would be best resolved by a hearing officer, upon a full presentation of evidence by both parties. At this stage, because it appears that the grievant could have been entitled to a reasonable disability accommodation to maintain her employment status rather than being separated from employment in January 2023, the grievance qualifies for a hearing on this issue.

Retaliation

In addition to her ADA claims, the grievant asserts that the agency's actions with respect to her separation were improperly motivated by retaliation due to the outcome of her previous grievance. By way of background, the agency issued to the grievant two Group III Written Notices with termination effective August 9, 2021.[18] EDR assigned the resulting dismissal grievance to a hearing officer as Case Number 11733.[19] In a decision dated February 10, 2022, the appointed hearing officer reduced the overall discipline to a single Group I Written Notice and ordered the grievant to be reinstated with back pay and benefits.[20]

The grievant claims that she has experienced continuous retaliation in connection with her reinstatement, up to and including her more recent non-disciplinary separation. She alleges that the agency inexplicably took approximately three months to complete her reinstatement and restoration of pay and benefits following the hearing officer's order. In July 2022, less than two months after she returned to work, it appears that her managers issued to her a new Group II Written Notice, without consulting the agency's human resources department or complying with due process requirements. Shortly thereafter, that Written Notice was voluntarily rescinded by the agency. Nevertheless, the grievant claims that the stress of receiving additional formal discipline – which she considered to be baseless, unauthorized, and retaliatory – exacerbated an existing health condition and necessitated a period of short-term disability. Finally, the grievant has expressed that, in addition to violating ADA protections as discussed above, agency managers were insensitive and/or hostile toward her in communications related to her separation.

In general, a qualifiable retaliation claim must be based on evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[21] (2) the employee

[18] *See* Decision of Hearing Officer, Case No. 11733, Feb. 10, 2022.
[19] *Id*.
[20] *Id.* at 8.
[21] Only the following activities are protected activities under the agency's grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking

suffered an adverse employment action;[22] and (3) a causal link exists between the adverse employment action and the protected activity – in other words, whether management took an adverse action because the employee had engaged in the protected activity.[23] If the agency presents a non-retaliatory business reason for the adverse employment action, the grievance may qualify for a hearing only if the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[24] Ultimately, a successful retaliation claim must raise a sufficient question as to whether, but for the grievant's protected activity, the adverse action would not have occurred.[25]

In this case, there is no dispute that the grievant engaged in a protected activity by pursuing a grievance in 2021 and subsequently experienced an adverse employment action in that she was separated from employment. According to the agency, the basis for terminating the grievant's employment was grounded in the agency's interpretation of DHRM policies and other requirements. Although any error in the agency's interpretation of applicable disability requirements may well have been in good faith, the record at this time does not allow EDR to rule out a causal connection between the grievant's protected activity and her ultimate separation from employment.

For example, the grievant alleges that the same benefits manager who informed her of her separation in January 2023 was responsible for restoring her benefits following her 2022 reinstatement. The grievant contends that the benefits manager did not correctly restore the grievant's benefits and thereafter appeared to resent the grievant's insistence on a full remedy; the agency later cited the benefits issue as one reason why the grievant's reinstatement was delayed. The grievant further alleges that, upon the grievant's questioning about the possibility of disability accommodations on January 13, 2023, the benefits manager became "irate" and refused to discuss the issue.

As another example, the grievant has provided communications from her second-level manager dated Wednesday, January 25, 2023, instructing the grievant to return her agency equipment, in person, to a location over an hour's travel for the grievant, by January 30. The grievant claims she was surprised by this communication, as it appeared to ignore her requests for an accommodation discussion as well as her disclosed medical limitations through February 17. The grievant claims that this manager was involved in the formal disciplinary actions issued to her in both 2021 and 2022, all of which were ultimately reduced or rescinded. Given the totality of the circumstances – including the delayed timeline of reinstating the grievant, the improper issuance of formal discipline soon after her return, and alleged disregard of the grievant's ADA inquiries while she was recovering from a heart attack – the grievance record presents a sufficient question as to whether the grievant's separation was caused by retaliatory motives. EDR therefore finds that this grievance qualifies for hearing on these grounds as well.

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to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).

[22] *See* Va. Code § 2.2-3004(A).

[23] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).

[24] *See*, *e.g.*, Felt v. MEI Techs., Inc., 584 F. App'x 139, 140 (4th Cir. 2014).

[25] *See Netter*, 908 F.3d at 938; Villa, 858 F.3d at 900-901.

CONCLUSION

For the reasons explained herein, this grievance is qualified for a hearing. The grievance qualifies in full, including any alternative related theories raised by the grievant to challenge her separation as a misapplication or unfair application of policy. At the hearing, the grievant will have the burden to prove that her removal from employment was improper.[26]

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.[27]

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