



STATE OF NEW JERSEY

In the Matter of G.G., Department of
Labor and Workforce Development

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket No. 2023-1712

Discrimination Appeal

ISSUED: May 24, 2023 (SLK)

G.G., an Unemployment Insurance Clerk with the Department of Labor and Workforce Development, appeals the determination of a Chief of Staff which was unable to substantiate that she was subject to discrimination in violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, G.G. alleged that she was discriminated against because she was denied an Americans with Disabilities Act (ADA) accommodation to work remotely five days a week or transfer to another position. Further, G.G. alleged that a subsequent decision to revoke her remote work privilege was discriminatory based on disability. In April 2022, prior to the Telework Pilot Program, she was granted an ADA accommodation to work remotely two days a week. Later, G.G. requested to work remotely five days a week until a lateral or promotional opportunity became available. Her request to work fully remote was denied as the essential functions of her position required substantial in-person activities including handling incoming mail, and under the ADA and the State Policy, an employer is not required to restructure essential functions of a position to accommodate an employee with a disability. Instead, an employer may provide an effective alternative accommodation through an interactive process. Further, the investigation revealed that G.G. was provided assistance to apply for transfer opportunities, but she was not selected based on her interview scores and there were no lateral transfer opportunities with the same or similar qualifications as her current position. It was also noted that G.G. did not apply for the promotional opportunity within her unit.

The Office of Diversity and Compliance (ODC) also determined that the revocation of her telework privileges was supported by documented telework violations, including her failure to provide documentation upon request. Therefore, the ODC was unable to substantiate that G.G. was discriminated against based on disability.

Additionally, G.G. alleged that during a 2019 meeting, she was told she did not get a promotion or lateral transfer because of her disability and absences. She further alleged that co-workers and supervisors in her unit created a hostile work environment based on age because they frequently commented about her missing work, not having available leave time, and hung a disparaging sign referencing her disability. However, G.G. did not name specific individuals. The investigation revealed that there were no witnesses who confirmed the comment. However, there was one witness who recollected that G.G. informed her of the comment immediately following the meeting. Further, there were no witnesses who confirmed that there were disparaging comments about her leave time or missing days. Additionally, while there was a sign on the unit, its content did not reveal that it was based on disability or disparaging to persons with disabilities. Therefore, the ODC was unable to substantiate that G.G. was subjected to a hostile work environment based on her disability.

On appeal, G.G. states that she is appealing the decision made by the Equal Employment Office about her request to transfer out of the Claims Intake Department. She asserts that she supplied pertinent information that justifies that her request should be granted. G.G. claims that mistreatment from other superiors were excluded in the determination letter which impacted the decision. She argues that she provided documentation to demonstrate unfairness, mistreatment, and discrimination that took place in the Claims Intake Division that she endures daily. G.G. indicates that she has more documentation to demonstrate her mistreatment, which was overlooked in the determination letter. She presents that she feels that she is being treated unfairly. G.G. submits an August 2016 letter describing mistreatment where M.R., her then-supervisor and now an Assistant Disability Insurance Supervisor¹ made inappropriate remarks about her daughter's pregnancy and other inappropriate comments to her. She also submits a Grievance Procedure Form that indicates that the issue was resolved "in-house." G.G. also submits a statement that she made after a September 10, 2019, meeting and a response from A.G., an Administrative Analyst 2, Management Auditor. Additionally, G.G. submits a July 2022 letter from her doctor indicating that G.G. has anxiety and panic attacks from working in person in her current section which cause her certain health issues where her doctor recommends that she work remotely three days a week until she can transfer to another section. G.G. also submits a March 2023 letter from her doctor that states that in addition to anxiety, she also had an episode of major depression and the doctor now recommends that G.G. work remotely five days a week until she can be transferred to another section. Further, G.G. submits documentation that

¹ At the time of the letter, M.R. was a Senior Claims Examiner, Unemployment and Disability.

indicates that she has been approved for federal Family and Medical Leave Act (FMLA) leave from September 19, 2022, until April 2, 2023.

In response, the ODC presents that G.G. was approved to telework two days per week in April 2022 prior to the implementation of the Telework Pilot Program in July 2022. Thereafter, G.G. requested to work remotely five days a week until a transfer was available due to interpersonal issues with co-workers and supervisors as precipitators to her medical conditions. It presents that in July 2022, the ADA unit denied her request to work remotely five days a week until a transfer became available. Thereafter, in August 2022, a grievance hearing was held where the hearing officer determined that G.G. did not provide testimony or evidence to corroborate that she worked in a harassing environment and, therefore, she had not met her burden of proof. Subsequently, G.G. filed a discrimination appeal based on disability discrimination. The investigation did not find that M.A., a Personnel Assistant 1, had discriminated against her based on disability nor was she subjected to a hostile work environment.

G.G. also filed a complaint indicating that unnamed co-workers and supervisors discriminated against her based on disability. The ODC presents that she alleged that the State Policy was implicated by the denial of her accommodation to work remotely five days a week, denial/unavailability of a transfer unit, a sign that hung in the office, and comments from co-workers about her absences and available sick time, and a comment made to her that she was not getting a promotion due to her absences. The investigation identified five witnesses while G.G. did not identify any witnesses. The investigation revealed that none of the five witnesses corroborated her allegations. The ODC notes that G.G. did not reference the 2016 incident which she indicates on appeal when she filed her complaint. Regarding current harassment, the ODC provides that when it asked her who was currently harassing her, she provided, "pretty much everybody, I can't say names."

The ODC states that the investigation revealed that G.G.'s essential functions require in-person work that could not be completed on a fully remote schedule. Additionally, approving a fully remote schedule for her would require restructuring the entire unit, which is not required under the ADA. Further, there were no lateral opportunities available at the time the ADA unit provided G.G. assistance for prepping for promotional opportunities.

The ODC argues that G.G. has not met her burden of proof that she has been subjected to a hostile work environment based on disability as she has not submitted any evidence or counter arguments that corroborate the alleged incidents. Further, it indicates that she failed to provide examples of on-going harassment or identified any co-workers by name. The ODC also notes that G.G. did not submit her 2016 grievance document or her 2019 email communications regarding family leave that she submits on appeal. Therefore, these documents were not investigated nor were

any determinations made regarding these documents. Moreover, the ODC asserts that these documents do not independently corroborate that G.G. was subjected to harassment based on disability because these documents are only G.G.'s accounting as to what occurred. Regarding the 2019 email that references her FMLA application, it notes that the document discusses procedural changes that took place at the time of G.G.'s 2019 FMLA request and do not describe discriminatory practices. Moreover, the ODC argues that G.G. has not demonstrated that her denied transfer was discriminatory and not based on legitimate business reasons as there were no lateral transfers that were available to her and there is no evidence to suggest this legitimate business reason was false or pretextual. It also states that even if any new allegations submitted on appeal were substantiated, G.G.'s transfer to another unit or division cannot be guaranteed.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) provides, in pertinent part, the State is committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment. Under this policy, forms of employment discrimination or harassment based upon disability will not be tolerated.

N.J.A.C. 4A:7-3.2(m)4 provides that the appellant shall have the burden of proof in all discrimination appeals brought before the Civil Service Commission (Commission).

Initially, it is noted that the second determination in the appointing authority's letter referenced allegations regarding a 2019 meeting and other allegations of G.G. being subjected to harassment. The determination letter indicated that there was insufficient evidence to substantiate these allegations. Further, as G.G. has not presented any argument or evidence regarding this determination, it shall not be addressed in this decision. Additionally, G.G. submits documentation on appeal regarding a 2016 grievance and a 2019 FMLA request. The ODC indicates that these documents were not submitted with her disability discrimination complaint and, therefore, it did not investigate them. Therefore, these documents cannot be considered on appeal. If G.G. is making new allegations of discrimination and/or harassment based on these documents, she may file a new discrimination complaint. Similarly, if G.G. is claiming that specific individuals are currently causing her a hostile work environment based on her disability, she can file a separate discrimination complaint that names specific individuals, names specific incidents of disability discrimination, and names specific witnesses or other evidence that can corroborate these allegations.

In this matter, G.G. is appealing the denial of her request to be accommodated for her disability by being able to work remotely five days a week until she is

transferred to another section. In support of her request, she submits notes from her doctor that indicate that she suffers from anxiety and has had panic attacks and bouts of major depression related to working in her current section. The doctor further explains the medical issues that this situation has caused G.G. and the doctor recommends that she work remotely five days a week until she can be transferred to a new section for in-person work. G.G. also submits documentation to demonstrate that she received FMLA leave from September 19, 2022, to April 2, 2023. G.G. states that her documentation demonstrates that her request is justified. However, G.G. appears to be under the false impression that because she has a disability, she is automatically entitled to an accommodation, and the denial of such request is discrimination. Instead, under the ADA, a request for an accommodated is only required to be granted if the request can be reasonably accommodated.

Under the ADA, the term “reasonable accommodation” means: (1) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; (2) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or (3) modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. A reasonable accommodation may include, but is not limited to: (1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (2) job restructuring: part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training, materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. *See 29 C.F.R. § 1630.2(o) (1999).*

Further, the ADA requires that, where an individual’s functional limitation impedes job performance, an employer must take steps to reasonably accommodate, and thus help overcome the particular impediment, unless to do so would impose undue hardship on the employer. *See 29 C.F.R. § 1630.2(p).* Such accommodations usually take the form of adjustments to the way a job customarily is performed, or to the work environment itself. This process of identifying whether, and to what extent, a reasonable accommodation is required should be flexible and involve both the employer and the individual with the disability. No specific form of accommodation is guaranteed for all individuals with a particular disability. Rather, an accommodation must be tailored to match the needs of the disabled individual with the needs of the job’s essential function. The ADA does not provide the “correct” answer for each employment decision concerning an individual with a disability. Instead, the ADA simply establishes parameters to guide employers in how to

consider, and to take into account, the disabling condition involved. *See* 29 *C.F.R.* § 1630.2(o) and 29 *C.F.R.* § 1630.9.

It is noted that in providing an accommodation, an employer does not have to eliminate an essential function or fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without a reasonable accommodation, is not a “qualified” individual with a disability within the meaning of the ADA. *See* 29 *C.F.R.* 1630.2. *See also* *Ensslin v. Township of North Bergen*, 275 *N.J. Super.* 352, 361 (App. Div. 1994), *cert. denied*, 142 *N.J.* 446 (1995) (No reasonable accommodation of Police Sergeant’s disability would permit him to perform essential functions of job, and thus the township did not violate the New Jersey Law Against Discrimination by terminating the Sergeant after he was rendered paraplegic in skiing accident); *Albertson’s Inc. v. Kirkingburg*, 527 *U.S.* 555 (1999) (Truck driver with monocular vision who failed to meet the Department of Transportation’s visual acuity standards was not a “qualified” individual with a disability under the ADA).

The investigation revealed that G.G.’s current title, which is a clerical position, involves substantial in person activities including handling incoming mail. G.G. did not address or otherwise dispute this claim. Further, the investigation revealed that multiple witness statements and documents reviewed confirmed that these duties are essential to the job and require a total restructuring of the position to allow for a fully remote schedule. G.G. did not address or otherwise dispute this claim. Under the ADA, an employer is not required to restructure essential functions of a position to accommodate an employee with a disability. Therefore, the appointing authority did not violate the State Policy when it did not grant G.G.’s request to work remotely five days a week.

The investigation also revealed that although Human Capital Strategies provided G.G. with assistance in applying to and preparing for transfer opportunities, she was not selected based on interview scores. Also, upon reviewing the interview scoring, there was no evidence that the process was biased against her. Further, the investigation revealed that there were no transfer opportunities available that would have allowed for a lateral transfer to a position with the same or similar qualifications as her current position. Additionally, the investigation revealed that G.G. did not apply for the promotional opportunity within her unit.² Moreover, the investigation indicated that G.G. did not engage in an interactive process to identify alternative effective accommodations to assist with barriers to completing her essential functions. Finally, the investigation found that the revocation of her telework privileges was supported by documented telework policy violations, including failure to provide documentation upon request. G.G. did not address or otherwise dispute

² The record does not address whether the G.G. was qualified for this promotional opportunity, the likelihood that she would have been appointed if she applied, or whether the essential duties of this position could be performed fully remote.

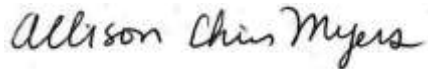
the above claims. Therefore, the record indicates that that despite G.G.'s disability, there was no reasonable accommodation that could be afforded to her and the appointing authority did not violate the ADA or the State Policy when it did not grant her requests to either work fully remotely or be transferred to another unit.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 24TH DAY OF MAY, 2023



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