

work overtime. The ADA committee also noted that the OIT at it Riverview Plaza facility complied with the Center for Disease Control (CDC) and State Public Employees' Occupational Safety and Health (PEOSH) regulations, and its carpets would be vacuumed regularly. Additionally, the ADA committee indicated that J.R. could apply for intermittent Family Medical Leave Act (FMLA) leave. Further, the ADA committee advised that J.R.'s accommodation would expire on September 29, 2023. Thereafter, J.R. applied and was approved for FMLA and State Family Leave Act (FLA) leave which allowed him to be absent from work three times per week from March 16, 2023, through September 15, 2023, and the notice indicated that absences beyond September 16, 2023, required new paperwork. Additionally, J.R. filed a complaint alleging that the denial to allow him to continue to telework from home five days a week was disability discrimination in violation of the State Policy, which was denied, and led to the subject appeal.

On appeal, J.R. asserts that under most federal and State Equal Employment Office (EEO) guidelines, telework is a valid ADA accommodation. He states that the OIT would not even review his request for an accommodation to telework from home five days a week from March 29, 2023, through September 29, 2023. J.R. presents that he has had a disease for the past 28 years which has slowly deteriorated his body. He notes that he had a 2019 auto accident while driving a State Police vehicle, and he also had a May 2023 lawnmower incident. J.R. states that after the pandemic restrictions were lifted in late 2021, he first learned that his medical issues were causing driving to be unsafe for him.

J.R. complains that the OIT did not go through an interactive process as required under the ADA concerning his accommodation request, which has caused him to use paid time off (PTO) and now FMLA so that he can receive a full paycheck. He emphasizes that he can work full-time if he can telework five days a week. J.R. claims that in response to his request, a Human Resources Manager stated that, "commuting is not our problem." J.R. indicates that he has been teleworking, such as during office closures due to inclement weather or during emergencies, since he started working for the State in 2004. He complains that he has not been given a reason for the denial of his request, and there was no policy when he took the promotion that indicated that he must work in the office. J.R. indicates that one time when he was working late and after hours to finish something, he was then reprimanded for working late. J.R. asserts that working late had not previously been an issue, and he believes that he was retaliated against because of his ADA accommodation request. He argues that he is being treated like a non-ADA employee who is limited to teleworking two days a week. However, he contends that the denial of his request is discrimination in violation of the Equal Employment Opportunity Commission (EEOC) guidelines.

J.R. states that his supervisor will confirm that he is a great employee, and he submits an email from his supervisor that indicates that he can perform his duties

while teleworking from home 100 percent of the time. The statement also indicates that his working only two days a week is a great loss for the VMware unit. He notes that even if he was in the office in Trenton, his work would still be 100 percent teleworking because he supports virtual managed hosting services in Hamilton and West Trenton/Ewing, and soon to be in the cloud with Amazon Web Services.

In response, the OIT presents that J.R. has not been subject to any adverse treatment as he rejected the accommodation that it offered to him and opted to use PTO instead of coming into the office. It indicates that it has engaged in an interactive process with him that began on July 9, 2021, when he first requested an ADA accommodation. Further, the OIT notes that he had been allowed to work from home July 9, 2021, to March 28, 2023, because COVID-19 posed a serious threat to individuals with compromised immune systems. It provides that J.R. has refused to give the ADA committee permission to speak with his doctor so that the committee could get a better understanding of his disability, functional limitations, and need for a reasonable accommodation.

OIT indicates that it continued to engage in an interactive process with him by first granting him the right to telework five days a week due to COVID-19 and his compromised immune system and by modifying the accommodation when the threat posed by COVID-19 subsided. The OIT believes that the accommodation that it offered to J.R. was reasonable as it allows him to cope with his fatigue, provides him with privacy, and limits his exposure to potential allergens and sources of illness. It contends that the offered accommodation allows J.R. to perform the essential functions of his position while helping him meet his needs.

Referring to J.R.'s statement that there was no policy that when he accepted the promotion to work for OIT that he would need to work in the office, the OIT asserts that this belief was incorrect, unreasonable, and unsupported by the facts. It presents a June 8, 2020, letter from an OIT Human Resources Manager regarding his promotion, indicated that his new work location would be at the Riverview Plaza facility. Further, it is J.R. who chose to recently move 95 miles away from the office. Additionally, OIT states that his supervisor advised him during the interview that he would be required to report to Riverview Plaza in Trenton. Moreover, it was known that 100 percent telework would not be permanent and the Temporary Remote Program was only implemented in response to COVID-19. The OIT argues that it is unreasonable for J.R. to believe that his position was or should be 100 percent telework based on conditions that existed during a global pandemic.

In reply, J.R. asserts that he has established a *prima facie* case that the OIT has failed to accommodate his disability. He states that there is no dispute that he has a qualifying disability as this has been documented by his physician that he is immunocompromised as he is at increased risk for severe complications from a variety of illnesses, including, but not limited to COVID-19. Further, J.R.'s physician

explained that his condition is exacerbated by long driving. Additionally, he claims that there is no dispute that he can perform the essential functions of his job remotely. He reiterates that, as part of OIT's VMware unit which is responsible for the administration of the State's virtual environment, whether in the Trenton office or at home, his unit connects remotely to the State's various applications. Additionally, the VMware unit is not responsible for the maintenance of the physical hardware as State contracted vendors manage the physical components. He notes that he has consistently received the highest ratings on his performance assessment reviews (PARs) and he has demonstrated the ability to successfully work remotely the last three years. J.R. presents that the OIT has not identified or communicated any essential job duties that he cannot perform remotely. Further, his superiors have indicated that he can successfully work remotely.

J.R. argues that the accommodations granted by OIT are not effective. He certifies that the OIT denied his request because the State does not have a policy permitting full-time teleworking as a reasonable accommodation and commuting is not part of the work environment. He asserts that the offered accommodations do not effectively address the dangerous impact of his commute due to his disability. Further, since he only works from home twice a week, his work either stockpiles or is redistributed to other employees. J.R. contends that lacking a policy generally authorizing full-time remote work does not excuse OIT of its obligation to provide a reasonable accommodation. He states that the OIT has not offered him a reasonable accommodation as the ability to telework twice a week is offered to all employees.

J.R. states that the OIT is obligated to accommodate his disability-related difficulties regarding his commute to work and provides case law to support his statement. J.R. presents that he has demonstrated that his physical presence in the office is not an essential requirement for his position based on his successful remote work performance. Further, he indicates that allowing him to work remotely meets with the State's goals under the State as a Model Employer of People with Disabilities Act (SAME). J.R. also argues that the OIT cannot establish an undue hardship as OIT has never claimed that his teleworking five days a week is one. Further, if it did, OIT cannot meet its burden as he has successfully teleworked five days a week for three years. Additionally, he questions how if he can telework two days a week, why cannot he not perform his work remotely for the remainder of the week.

Moreover, J.R. believes that the OIT has failed to engage in the interactive process as required under the ADA. He presents that the OIT knew about his disability as it received numerous applications for reasonable accommodations with certifications from J.R.'s longtime physician. However, he argues that the OIT did not make a good faith effort to assist him in seeking accommodations. J.R. states that considering case law, the SAME Act, EEOC guidance on teleworking as a reasonable accommodation, decades of federal sector precedent on commuting, and

his successful work history, it would be unreasonable to conclude that the OIT acted in good faith.

In further response, the OIT asserts that J.R. has not established a *prima facie* case because he was provided a reasonable accommodation that addresses his disabilities and enables him to perform the essential functions of his job. It emphasizes that an employee is only entitled to a reasonable accommodation and not the employee's preferred accommodation. Further, the OIT states that it has the discretion to choose between effective accommodations. The OIT presents that the Job Accommodation Network (JAN) is the leading source of expertise on job accommodations and disability employment. According to JAN, people with certain conditions may develop some limitations that the conditions may bring, but seldom develop all off them, and the degree of limitation will vary among individuals. This is why the ADA committee requested a conversation with J.R.'s doctor. However, J.R. has refused. The OIT believes that the accommodations it offered are consistent with JAN and J.R.'s medical conditions. It presents case law which indicates that courts tend to be less protective of accommodation requests seeking indefinite remote work as opposed to remote work on a limited and defined basis. The OIT states that it went to five days remote due to the extraordinary conditions of the COVID-19 pandemic, but that it would be unreasonable to expect pandemic responses, such as teleworking five days a week, to remain in place long after the pandemic is over. The OIT contends that it has engaged in an interactive process with J.R. regarding his accommodation requests since July 2021 as it approved his full-time telework through March 28, 2023, due to the serious threat that COVID-19 posed to compromised immune systems. However, once concerns about the pandemic subsided, it requested to speak with his doctor. In response, J.R.'s emails indicated that he did not trust the ADA committee as he believed that it would intentionally misconstrue his doctor's words to disadvantage him. The OIT contends that allowing telework five days a week is an extraordinary accommodation and J.R.'s refusal to allow the ADA committee to speak with his doctor represented a breakdown in the interactive process.

In further reply, J.R. states that an adverse employment action is not a required element for failure to accommodate claim in New Jersey. He presents that the New Jersey Law Against Discrimination provides broader protection than its federal counterparts and he presents case law to support this statement. J.R. reiterates his position that he has established a *prima facie* case of discrimination as he has a qualifying disability, he is able to perform the essential functions of his job, and the OIT has failed to reasonably accommodate him.

J.R. asserts that he has and continues to participate in the interactive process by providing sufficient medical information. He believes that it is unclear as to why the ADA committee is requesting to speak with his doctor when he provided sufficient medical information from which the committee can reasonably determine the

existence of the disability and the functional limitations that require a reasonable accommodation. J.R. provides that under federal law, an employer's right to request medical information is not unlimited and must be job-related and consistent with business necessity. Further, he states that the EEOC notes that documentation is sufficient if it "(1) describes the nature, severity, and duration of the employee's impairment, the activity that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and (2) substantiates why the required reasonable accommodations is needed." J.R. contends that the OIT already has sufficient medical information from his doctor as his doctor explained in detail that he is at high risk for infection due to his immunocompromised system and his condition puts him at risk for drives over 15 minutes. He submits that the EEOC previously noted that when an employee provides sufficient evidence of the existence of a disability and the need for reasonable accommodation, continued efforts to require the individual to provide more information could constitute retaliation under the ADA. Therefore, he argues that the ADA's committee's request to speak to his doctor was not made in good faith. Moreover, contrary to the OIT's statement that his case was distinguishable from case law that he presented because he was not denied a request for a reasonable accommodation, he argues that not granting his request to telework 100 percent of the time is a denial.

J.R. contends that the end of the COVID-19 Public Health Emergency does not negate his need for a reasonable accommodation, and OIT's unilateral withdrawal of an effective accommodation is unreasonable. Finally, he presents case law where the employer rescinded a previously successful accommodation, which led to the employee's performance to drop due to increased absences, where the court found that it was up to the jury to determine whether the employer failed to accommodate the employee and failed to engage in the interactive process.

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(n)1 provides that the burden of proof shall be on the appellant.

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 record indicates that J.R. has had certain medical conditions for many years, including when he began his employment with the State Police in November 2004. Further, despite J.R.'s medical conditions, he had been able to commute to a

State facility throughout most of employment with the State. It is also noted that his commute was not insignificant as he previously lived approximately 50 miles from Trenton, and it was only recently that he moved 95 miles away from Trenton. In 2017, pursuant to an Executive Order, J.R. was reassigned to the OIT although he continued to support the State Police. Thereafter, in March 2020, due to the COVID-19 pandemic, J.R., along with his colleagues, began to telework. In June 2020, J.R. was promoted. The promotion letter advised J.R. that his new work location would be located at Riverview Plaza in Trenton, but due to the COVID-19 pandemic, the date of this move would be determined. Subsequently, in 2021, OIT personnel started going back to performing in-person work. However, in a July 9, 2021, letter, the OIT granted his request to continue to work from home five days a week through September 6, 2021. This was the first time that J.R. had requested any accommodations due to his medical condition. Thereafter, J.R. continued to request extensions regarding his request to work from home five days a week due to his medical condition. In support of his requests, he provided notes from his doctor indicating that due to his medical condition, he was at greater risk of having complications from COVID-19 as well as other viruses, and from driving more than 15 minutes. Therefore, his doctor recommended that he continue to work from home. This led to the OIT to issue several notices extending his full-time work from home accommodation. It is noted that some of these notices indicated that his exemption from working in the office was temporary. Subsequently, in a March 15, 2023, letter, the ADA committee advised that effective March 29, 2023, J.R. needed to work in the office three days a week and it provided various accommodations regarding his work in the office due to his medical condition and complications based on potential exposure to viruses as well as fatigue. In response, J.R. filed a complaint asserting that the denial of his reasonable accommodation request under the ADA to work from home five days a week was disability discrimination in violation of the State Policy. Moreover, in response to J.R.'s appeal, the OIT indicates that because the risk from COVID-19 has subsided and his request would be considered extraordinary as other employees are only allowed to telework twice a week, it requested to speak with J.R.'s doctor to better understand J.R.'s disability, functional limitations, and need for a reasonable accommodation; however, J.R. declined. Apparently, J.R. feared that the ADA committee would misconstrue his doctor's words to deny his request.

In this matter, contrary to J.R.'s assertion, the Civil Service Commission (Commission) finds that the extent of his disability and what is a reasonable accommodation is not undisputed. Specifically, the OIT presents that not all people who have J.R.'s medical conditions are unable to commute, and it believes it has reasonably accommodated him regarding his potential exposure to COVID-19 or other viruses, as well as fatigue, while working in the office. Further, considering the indefinite nature of his accommodation request and the standard policy that employees must be in the office three days a week, the Commission finds that the OIT's request to speak with J.R.'s doctor to gain a better understanding of his disability, functional limitations, and need for a reasonable accommodation was in

good faith as part of the interactive process to determine a reasonable accommodation for J.R. It is also noted that there is nothing in the record to suggest that the ADA committee or any other OIT employee was attempting to misconstrue J.R.'s doctor's words to deny his request to work from home on a full-time basis. However, the Commission also finds that there is no dispute that J.R. does suffer from a disability, he has successfully been able to perform his duties when he was working from home five days a week, and there has been nothing presented that indicates that he cannot continue to successfully perform all of the essential duties of his position if he continues to work from home on a full-time basis or such accommodation would otherwise be an undue hardship to the OIT.

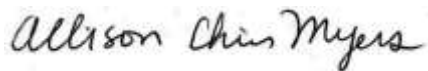
Therefore, the Commission finds that J.R.'s appeal is granted, in part. J.R.'s request for an accommodation to work from home five days a week shall be reinstated immediately. Further, the OIT, within the next 60 days, shall schedule J.R. to visit a doctor authorized by the State to gain a better understanding of his disability, functional limitations, and need for a reasonable accommodation. Upon receipt of the State doctor's evaluation, the OIT shall either continue J.R.'s accommodation to work from home five days a week or modify his accommodation request as appropriate.

ORDER

Therefore, it is ordered that this appeal be granted in part as described above.

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 11TH DAY OF OCTOBER, 2023



Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: J.R.
Patricia A. Villanueva, Esq.
Lisa Blauer
Division of EEO/AA
Records Center