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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of C.M., Department of
Law and Public Safety

CSC Docket Nos. 2016-3657

Discrimination Appeal

ISSUED: **FEB 10 2017** (SLK)

C.M., a Supervising Investigator, Law and Public Safety, appeals the decision of the Director, Office of Employee Relations (OER), which found insufficient evidence to support a finding that she had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, the appellant alleged that she was discriminated against on the basis of her disability because a leave she requested in 2013 due to a medical condition was denied. The Equal Employment Opportunity (EEO) office's investigation revealed that the appointing authority denied the request due to the overly broad nature of the amount of leave requested. Specifically, the appointing authority found that the appellant's doctor was unable to state with reasonable specificity how often she would need leave. However, it continued to work with the appellant and her doctor, and in 2014, the appellant obtained an accommodation. The investigation also revealed that she was not eligible for other leave programs due to her attendance history and prior disciplines, but found that once her attendance improved, she would become eligible for additional leave programs. Therefore, the investigation did not substantiate her allegation.

On appeal, the appellant questions the thoroughness of the investigation since she was not interviewed. She disputes the EEO's finding that her doctor was unable to state with reasonable specificity how often she would need leave as her doctor indicated that, due to the nature of her condition, which includes unanticipated flare-ups, she would need intermittent leave for brief periods of time. She emphasizes that the nature of her condition made it impossible to determine with precise specificity when the flare-ups would occur, which would trigger the need for an accommodation. Although her doctor submitted numerous updated and

revised certifications, she contends that the appointing authority's burdensome requests for "reasonable specification" caused her doctor to stop sending additional information which forced her to change doctors. The appellant also states that she was unable to report to work and disciplined because of flare ups due to her medical condition. Thus, if her initial request for an accommodation was accepted, she would not have had any disciplinary issues. The appellant presents that another disciplinary action was withdrawn after her claims that she was harassed and discriminated against by her former supervisors and the personnel office's Director were investigated. Further, she disagrees that she reached an acceptable accommodation with the appointing authority in 2014 as she is waiting for written confirmation that her final disciplinary action has been withdrawn. The appellant also states that she worked out an accommodation with her current supervisor which allows her to accommodate flare-ups caused by her medical condition without the fear of disciplinary action for violating the attendance policy.

In reply, the appointing authority, represented by Alia Grimes, Deputy Attorney General, indicates that the appellant received a 75 working day suspension in September 2013 for chronic and excessive absenteeism and lateness. Additionally, it presents that the appellant was charged with chronic and excessive absenteeism in February 2012 and that she failed to provide documentation supporting her absences, but no decision has been reached in that matter. In December 2010, the appointing authority denied her request for leave because she used all of her time and did not qualify for leave under the Family and Medical Leave Act (FMLA). The appellant was advised to speak with her doctor so that he could make a recommendation as to what accommodation would still allow her to perform the essential functions of her job. However, her doctor's notice did not give any details as to why she needed time off. Further, the appellant took time off anyway even though her leave request was denied. The appointing authority notes that several requests were made to her doctor for more specificity, but none of the responses gave the necessary information.

The appointing authority states that the appellant was granted accommodations from April 2007 until 2009 and a June 2013 request that was initially denied, but later granted in 2014. The appointing authority emphasizes that although the investigator did not meet with the appellant, there were numerous emails and phone calls with her. Additionally, the appellant supplied the investigator with voluminous emails, dating back many years, from human resources and the American's with Disabilities Act (ADA) Coordinator regarding things such as furlough requests, doctor's notes, donated leave, and accommodation requests. Germane to the present matter, her doctor sent a letter in June 2013 stating that she "could be absent from work 3 to 5 days a week and may arrive 1-2 hours late due to [her] medical condition." Thereafter, the ADA Coordinator for the appointing authority advised the appellant that the indefinite and unpredictable nature of the proposed leave rendered the request unreasonable and an undue

burden. Additionally, the ADA Coordinator told her that if she could supply more specific medical documentation, the decision could be reconsidered. However, as acknowledged on appeal, the appellant did not supply any additional documentation at that time as her doctor refused to provide additional documentation. It contends that the current modification to her work schedule when she has a flare-up that she has made with her current supervisor can be viewed as an acceptable accommodation.

CONCLUSION

The ADA is a federal statute designed to eliminate discrimination against individuals with disabilities. 42 U.S.C.A. § 12101. State courts have concurrent jurisdiction with federal courts over ADA claims; however, existence of such concurrent jurisdiction does not alter the fact that ADA actions are federal question cases. *Jones v. Illinois Cent. R. Co.*, 859 F. Supp. 1144 (N.D. Ill. 1994). Specifically, the court in *Jones* held that:

Enforcement of ADA's prohibitions against handicap discrimination expressly draws its sustenance from Title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. §§ 2000e to 2000e-17) -- as ADA's 42 U.S.C. § 12117(a) specifies:

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

In *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 110 S.Ct. 1566, 108 L.Ed. 2d 834 (1990), a unanimous Supreme Court has held that the state courts have concurrent jurisdiction with the federal courts for the adjudication of Title VII claims brought by employees under 42 U.S.C. § 2000e-5(f). That being so, it necessarily follows that the state courts have concurrent jurisdiction over ADA claims as well. *Id.* at 1145.

See also N.J. Citizen Action v. Riviera Metal Corp. 296 N.J. Super. 402, 413 (App. Div. 1997). Nowhere in the ADA or in relevant case law is jurisdiction over ADA claims extended to State agencies. However, the Civil Service Commission (Commission) may review ADA issues collaterally, when they are implicated in an appeal properly before the Commission, such as in a disciplinary action or in a discrimination appeal. *See Matter of Allen*, 262 N.J. Super. 438, 444 (App. Div.

1993); *In the Matter of John Soden* (MSB, decided September 10, 2002) (noting that jurisdiction was proper when the ADA was implicated as a defense to a disciplinary removal); *In the Matter of Michael Giannetta* (MSB, decided May 23, 2000) (the ADA may be applied in deciding an issue concerning removal from an eligible list).

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).

N.J.A.C. 4A:7-3.1(a) states, in pertinent part, that employment discrimination or harassment based upon a protected category, such as disability, is prohibited and will not be tolerated. A violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another.

N.J.A.C. 4A:7-3.2(i) provides that at the EEO/AA Officer's discretion, a prompt, thorough, and impartial investigation into the alleged harassment or discrimination will take place.

N.J.A.C. 4A:7.3-2(m)4 states, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

The Commission has conducted a review of the record and finds that the appellant has not established that she has been subject to a violation of the State Policy. As stated above, under the ADA, the term "reasonable accommodation" means 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. In other words, an employer does not need to accept a request for an accommodation from an employee with a disability if the request does not enable that employee to perform an essential function of the position. The appellant is a Supervising Investigator, Law and Public Safety. A review of the job specification for this title indicates that an incumbent supervises investigators and performs investigations. In order to supervise staff, a supervisor needs to be regularly available. Further, the appellant needs to be able to complete investigations. The appellant acknowledged that her flare-ups are unpredictable. Further, the appointing authority represents that the appellant's doctor indicated, in a June 2013 letter, that she could be absent 3 to 5 days a week and may arrive 1 to 2 hours late due to her condition. The appellant has not disputed this representation. Further, the appellant has not submitted any documentation or made any argument that the ADA Coordinator did not attempt to work with her to determine how her condition could be accommodated to perform the essential functions of her job supervising staff and performing investigations, if she was regularly arriving late or may miss more than 50 percent of a work week without notice. As such, while the Commission can appreciate the difficulties that the

appellant has in performing her work due to her disability, there is no evidence presented that she submitted the required medical documentation that would provide the appointing authority with a basis to determine if/what type of accommodation would enable her to perform the essential duties of her position. Moreover, while the investigator may not have conducted an in-person interview with the appellant, numerous emails and telephone calls were made between the appellant and the investigator. Further, the investigator reviewed voluminous emails from human resources and the ADA Coordinator regarding such things such as the appellant's furlough requests, doctor's notes, donated leave, and accommodation requests.

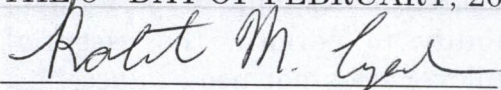
Accordingly, the Commission finds that the EEO's investigation was thorough and impartial. Therefore, the Commission finds that appellant failed to support her burden of proof and no basis exists to find a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace.

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 8th DAY OF FEBRUARY, 2017



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