



**STATE OF NEW JERSEY**

In the Matter of S.P., Office of  
Information Technology

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

CSC Docket No. 2024-146

Discrimination Appeal

**ISSUED:** November 1, 2023 (SLK)

S.P., a Technical Support Specialist 2 with the Office of Information Technology (OIT), represented by Patricia A. Villanueva, Esq., appeals the determination of an OIT Equal Employment Officer (EEO)<sup>1</sup>, which found that the appellant was not subjected to disability discrimination under the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, S.P. lives in Midland Park and his position with OIT is at its Riverview Plaza facility in Trenton. He began teleworking five days a week in March 2020 due to the COVID-19 pandemic. During the pandemic, S.P. developed a neurological condition caused by Long COVID-19 (Long COVID) that impacts his ability to drive more than 15 to 20 minutes. He also has sleep apnea, generalized anxiety disorder and Attention Deficit Hyperactivity Disorder (ADHD). Thereafter, even when other employees began returning to work in the Riverview Plaza facility, due to S.P.'s inability to drive long distances, S.P. received several accommodations in six-month increments to allow him to continue to work from home. It is noted that it is an approximately a one hour and 30 minute drive from S.P.'s home to Riverview Plaza. Subsequently, S.P. received notice that effective December 28, 2022, he would no longer be allowed to telework five days a week. Instead, he would only be allowed

<sup>1</sup> S.P. also alleged that OIT's determination was not timely. This agency's Acting Director, Division of Equal Employment Opportunity/Affirmative Action, determined that the OIT's determination was timely. Thereafter, S.P. filed the subject appeal within 20 days of the Acting Director's decision. Therefore, S.P.'s appeal in this matter is timely.

to telework two days a week and he was to be provided certain accommodations while in the office. S.P. filed a complaint alleging that OIT's refusal to extend his accommodation to allow him to telework five days a week was disability discrimination in violation of the State Policy. Thereafter, S.P. worked remotely two days a week and used Family Medical Leave Act (FMLA), sick and vacation time to cover the remainder of the week until such time was exhausted, and since July 10, 2023, he is only being paid for working two days a week. In OIT's investigation, the EEO found that there was no violation of the State Policy.

On appeal, S.P. presents that he has established a *prima facie* case as there is no dispute that he has a qualifying disability. Specifically, his physician documented that he suffers from a neurological condition with symptoms such as cognitive impairment, memory loss, and extreme fatigue. S.P. indicates that these symptoms prevent him from safely driving long distances. He notes that his condition resulted in a car accident where he lost control of his car and hit a rock. Further, S.P. presents that his physician explained that his condition is exacerbated by long drives. He asserts that there is no dispute that he can perform the essential functions of his position from home as all his work is on a computer and he remotely connects to various servers and systems within the State. Additionally, S.P. presents that he has consistently received "exceptional" ratings on his performance assessments. He provides that courts have held that positive performance reviews are evidence that an employee can perform the essential duties of their position. Further, the OIT has never identified or communicated any essential duties that he cannot perform remotely. Moreover, S.P. indicates that his direct supervisor found that he can successfully perform his duties remotely. Also, S.P. states that the OIT never explained why he cannot work remotely full-time or work at a Department of Transportation (DOT) office which is close to his home. Finally, he contends that the in-office accommodations that OIT has offered are not effective because such accommodations do not address his issue, which is the inability to drive long distances. S.P. presents case law to support his position that the OIT is obligated to accommodate his disability-related difficulties in his commute to work. He emphasizes that he has worked successfully remotely for three years and the State is committed to being a model employer for people with disabilities. S.P. contends that the OIT cannot establish, nor has it ever claimed, that his teleworking five days a week would create an undue hardship. Instead, he provides that the current accommodation, where he takes a leave of absence, results in the stockpiling of work and reduced efficiency for OIT. He also requests to be credited for all the leave time he was forced to use. Finally, S.P. believes that OIT has failed to engage in an interactive process as required under the Americans with Disabilities Act (ADA) concerning his request for accommodation.

In response, the OIT presents that S.P. is being treated by Dr. Jennifer Monck for sleep apnea and a "neurological disability that causes tiredness or fatigue, difficulty thinking or concentrating which makes driving or commuting impossible."

It notes that as of December 6, 2022, Dr. Monck indicated that the use of a C-PAP machine has not resulted in any change regarding S.P.'s sleep apnea. Additionally, the OIT presents that S.P. is being treated by Dr. Richard Waldron for ADHD and Generalized Anxiety Disorder, and he is currently on medication for these conditions. Dr. Waldron indicated that S.P.'s attention during driving is limited to 20 minutes. The OIT highlights that while Dr. Monck recommended that S.P. telework five days a week, Dr. Waldron recommended a hybrid schedule where S.P. would telework two days per week and work in the office for three days a week, while limiting his drive time to 15 to 20 minutes. The OIT presents that it has granted S.P. a reasonable accommodation under the ADA which consists of him teleworking two days a week, working in the office on slower days, a private rest area with liberal rest breaks that can be supplemented with granted intermittent leave under the FMLA and public transportation options to limit his drive time on commuting days. It states that these reasonable accommodations are consistent with Dr. Waldron's recommendations. The OIT asserts that it has engaged in an interactive process with S.P. as he was approved for several accommodations to work from home full time beginning in 2021. Thereafter, the aforementioned accommodation was offered in 2022. Concerning S.P.'s sleep apnea, the Equal Employment Opportunity Commission (EEOC) has expressed skepticism as to whether sleep apnea meets the ADA's definition of a disability and at least one federal appellate court found that it did not. Also, while S.P. claims that the commute time via public transportation would take five hours using three buses and a train, it presents that the appellant could drive from his home to a nearby train station, and take trains and a local shuttle bus to Riverview Plaza. OIT states that the commute would be roughly two and one-half hours. Concerning the suggestion that S.P. be allowed to work in an office of another State agency that is close to his home, it indicates that this is not a viable option because it can not require other State agencies to provide workspaces for OIT employees. OIT emphasizes that under the law, it is not required to provide the accommodation that the employee wants, but it is only required to provide an accommodation that is effective. It asserts that the accommodation that S.P. requests exceeds what Dr. Waldron recommended.

In reply, S.P. states that although the OIT says that working in the office of another State agency is not viable, the DOT Chief Information Security Officer informed OIT in December 2022 that it had the space and no objections to S.P. working in one of its offices. Concerning the accommodations that OIT has offered at Riverview Plaza, as his main issue is his inability to commute long-distances, these accommodations do not address his disabilities. Further, he indicates that requiring him to take a leave of absence three days a week is not effective because he is not performing his job duties on those days. Additionally, OIT's position that S.P. should be required to have a five-hour commute round trip each in-office day, even if his drive time is limited to 20 minutes, is ineffective because of the fatigue he experiences due to Long COVID. He believes that such a commute might even exacerbate his condition.

In further response, the OIT presents that it explored the possibility of having S.P. work at the office of another State agency that was close to his home; however, the DOT facility manager denied the request. Instead, it offered the previously described accommodations which limited his drive time to under 20 minutes. Concerning S.P.'s memory, OIT presents that this was first mentioned in June 2022, and it has received no further documentation regarding this condition. Therefore, it is requesting further documentation about the functional limitations that are associated with this diagnosis. OIT asserts that the specific limitations imposed by S.P.'s memory loss are unclear, and it expresses that someone with such a condition may be better off working in the office where his co-workers could ensure that his memory loss did not have an adverse impact on work. It states that S.P.'s memory loss may create an undue burden if he works from home.

### 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 prior to March 2020, S.P. commuted by car approximately one and one-half hours each way five days a week to the OIT's Riverview Plaza facility. Thereafter, in March 2020, due to the COVID-19 pandemic, S.P. began teleworking five days a week. Further, at some point during the pandemic, S.P. contracted a neurological condition due to Long COVID, which limits his ability to drive no more than 20 minutes at a time. S.P. also suffers from other health conditions, including fatigue and memory loss. As OIT employees started returning to the Riverview Plaza facility, due to his inability to drive long distances, S.P. sought accommodation to continue to telework five days a week, and said request was granted in six-month increments. Subsequently, S.P. was informed that starting on December 28, 2022, he was no longer permitted to telework five days a week. Instead, he was required to work in the office three days a week, and he could telework two days a week. Further, the OIT offered certain changes to his work environment while in the office. The OIT made this change in S.P.'s accommodation because although one of his treating doctors, Dr. Monck, recommended that he continue to telework five days a week, another one of his treating doctors, Dr. Waldron, recommended a hybrid schedule where S.P. would telework two days per week and work in the office

for three days a week, while limiting his drive time to 15 to 20 minutes. Therefore, the OIT indicated that S.P. could commute to the office by taking a 10-minute drive to a nearby train station and then commute by train and a shuttle bus to Riverview Plaza. It estimated that it would take S.P. approximately two and one-half hours each way to commute to Riverview Plaza this way. S.P. alleged that the suggested commute was not reasonable due to the fatigue that he suffers from, and he expressed concern that such a commute would only exacerbate his condition. He also asserted that the OIT's accommodations concerning certain changes to his in-office work environment would be ineffective because the issue is his inability to drive long-distances, which such changes would not impact. Concerning S.P.'s alternative suggestion, the OIT indicates that it does not have permission to allow S.P. to work in the office of another State agency that is closer to his home. Since the change in S.P.'s accommodation, S.P. has been teleworking two days a week, and he used FMLA, sick, and vacation time to cover the other three days, until such time was exhausted, and now he teleworks two days a week and takes an unpaid leave of absence for the other three days.

In this matter, the Civil Service Commission (Commission) finds that the OIT has engaged in an interactive process in good faith. Specifically, the OIT initially granted S.P.'s request to telework five days a week in six-month increments. Further, considering the indefinite nature of his accommodation request and the standard telework policy that employees must be in the office three days a week, the Commission finds that the OIT's decision to require S.P. return to the office three days a week was in good faith as the change complied with Dr. Waldron's recommendation. Further, the OIT states that it did research S.P.'s alternative suggestion, but the DOT did not grant the OIT permission to allow S.P. to work in one of its offices near his home. Therefore, S.P.'s request to be credited for all the leave time he used after the change in his accommodation is denied. However, the Commission also finds that there is no dispute that S.P. does suffer from a disability which impacts his ability to drive long distances, 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 presently 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 S.P.'s appeal is granted, in part. S.P.'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 S.P. to visit a doctor authorized by the State to gain a better understanding of his disability, functional limitations, and need for a reasonable accommodation. Of specific concern, the doctor should indicate as to whether OIT's suggested approach for S.P. to commute, up to five hours per day, three days a week to the Riverview Plaza facility is reasonable based on his documented neurological condition. Upon receipt of the

State doctor's evaluation, the OIT shall either continue S.P.'s accommodation to work from home five days a week or modify his accommodation request as appropriate.

Regarding the OIT's comments about S.P.'s memory loss, there is nothing in the record to suggest that his memory loss is currently adversely impacting his ability to work from home. However, it is noted that a reasonable accommodation is fluid. While today it may not be an undue burden for S.P. to telework, if S.P.'s is unable to sustain his positive performance while teleworking due to memory loss or any other reason, his ability to telework may be an undue burden in the future which cannot be reasonably accommodated.

### 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 1<sup>ST</sup> DAY OF NOVEMBER, 2023

*Allison Chris Myers*

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