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Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002522-MR

KENTUCKY RETIREMENT SYSTEMS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 05-CI-00099

WILMA MARTIN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND MOORE, JUDGES; GUIDUGLI,¹ SENIOR
JUDGE.

CAPERTON, JUDGE: The Kentucky Retirement Systems (“KRS”) appeals the
judgment of the Franklin Circuit Court, whereby the court reversed the Kentucky
Retirement Systems’ Disability Appeals Committee of the Board of Trustees’ (“the
Board”) denial of disability benefits to Wilma Martin, the County Clerk of

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Henderson County. This case presents a novel issue before this Court as Martin was her own supervisor and thus did not report to an “employer.” Therefore, the question becomes whether the accommodation(s) granted by Martin to herself, as an elected official and in the posture of supervisor/employee, were reasonable when she subsequently applied for disability benefits. After considering the arguments provided by the parties, a thorough review of the record and the accompanying law, we affirm the Franklin Circuit Court.

Martin served as the Henderson County Clerk for thirteen years.² As such, she had no official supervisor. As of the date of her last employment, December 31, 2002, Martin was sixty-one. Due to her numerous health problems, which had impacted her work for the previous two years, Martin declined to run for reelection in 2002 as she knew that she would be unable to fulfill the duties of County Clerk for another term.

Martin then sought disability benefits pursuant to Kentucky Revised Statutes (KRS) 61.600 from KRS for a myriad of reasons, including: diabetes; enlarged liver; psoriasis; arthritis; sleep apnea; numbness in feet, legs, and hands; problems walking and standing; and stress. Martin’s claim was denied and she appealed, requesting a hearing. Following the evidentiary hearing, the hearing officer recommended that Martin’s application be denied. The Board accepted the hearing officer’s recommendation. The reason for the denial of application was twofold: (1) that Martin had failed to meet her burden of proof to show entitlement

² Martin worked for the Commonwealth for a total of 22.75 years.

to the benefit sought, and (2) that the accommodations that Martin had provided to herself³ were reasonable and thus she did not qualify for disability under KRS 61.600.⁴

At the evidentiary hearing Martin was required to prove that she was disabled as of the last day of employment and could not return to a job of like duties. In determining whether Martin could return to a job of like duties, any reasonable accommodations provided by the employer were to be considered. *See* KRS 61.600 and KRS 13B.090.

The evidence presented at the hearing included the deposition of Dr. Gregory, Appellee's primary treating physician; the medical records of Dr. Parmenter; and the testimony of Martin and of Renny Mathews, Martin's chief deputy clerk. In addition, the record contains the opinions of three of KRS's

³ Normally, the phraseology would have been "reasonable accommodations provided by her employer" but since Martin was her own supervisor, consideration then focuses on the reasonability of the accommodations she extended to herself.

⁴ KRS 61.600 requires an assessment of reasonable accommodation given the definition provided in 42 United States Code Annotated (U.S.C.A.) § 12111(9), which states:
The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification 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.

29 Code of Federal Regulations (C.F.R.) Part 1630.9 requires the employer to provide a reasonable accommodation unless it can prove that such accommodation imposes an undue hardship upon the employer.

reviewing physicians, Drs. Strunk, Keller, and McElwain, and the medical records from Martin's specialists.

Martin testified as to the effect her health problems had on her office, which consisted of herself and nineteen deputy clerks, and her duties in light of the accommodations she granted herself. One such accommodation was her high rate of absenteeism from the office. Martin testified that in the last few years of her term, she was absent from the office as much as 50 percent of the time. Another accommodation she granted herself was to delegate her work duties, including the supervision of subordinate employees.

However, not all of Martin's duties were delegable, and those which were not went undone. Martin testified that she failed to complete her recommended forty hours of training per year and that when she did attend she often fell asleep. Evidence was also given of how Martin was unable to stay awake while at work and would fall asleep while talking with people. Martin was unable to lobby for additional funding for her office and, as a result, she claims that her office lost five seasoned employees. Martin was also unable to participate in public functions in order to promote the Clerk's Office in the community. Moreover, she was unable to implement her "surprise cash counts" which provided her with a way to uncover and deter embezzlement.

The hearing officer determined that Martin had to meet her burden of proof to show entitlement to the benefits sought. The hearing officer found that Martin was eligible to apply for retirement on disability as she had more than

sixteen years of eligible service. The hearing officer then found that Martin had requested reasonable accommodations and was able to perform her job duties with such accommodations.

Expounding on the reasonable accommodations, the hearing officer found that, since Martin was her own supervisor, she was the one who granted the accommodations to herself. The hearing officer concluded that Martin's credibility was diminished as she seemed to grant herself accommodations and then at the hearing advocate that the accommodations were unreasonable.

The hearing officer found that Martin had no set hours as County Clerk, that she had a staff of nineteen to whom she could delegate duties, that Martin provided herself the accommodations, and that she had no testimony that the duties of the County Clerk were not fulfilled during her term. Therefore, she was granted reasonable accommodations. Further, the hearing officer found that Martin's job was sedentary in nature and that she did not prove a disabling impairment of her residual functional capacity.

As to Martin's ailments, the hearing officer addressed each one separately. First, the hearing officer found that Martin's ankle condition, which required surgery by Dr. Parmenter and left her handicapped according to the medical assessment, would not have interfered with Martin's sedentary job and should not be considered as it arose months after Martin's date of last employment. Second, the hearing officer relied on Dr. Strunk's determination that Martin's diabetes and hyperlipimidia were not disabling. Third, the hearing officer noted

that Drs. McElwain and Strunk determined that Martin's heart condition had normalized as of July 2002. Fourth, Dr. Cocanower, a sleep medicine specialist, concluded that Martin's sleep apnea, provided she continued her treatment, should show improvement. In addition, the hearing officer determined that even if the sleep apnea was not under control, that Martin's ability to delegate and the nature of her job would prevent the sleep apnea problems from being disabling. Fifth, Dr. McElwain dismissed Martin's arthritis as disabling because she still retained a full range of motion, even though Martin's MRI studies were conclusive for arthritis. Lastly, the hearing officer relied upon the opinions of Drs. McElwain and Strunk and concluded that Martin was not disabled because of insufficient medical evidence.

That evidence was contrasted by the opinion of Dr. Keller, who determined that Martin was disabled due to Martins' numerous co-morbidities. The hearing officer determined that Dr. Keller's opinion should be given little weight as it was based upon a nonmedical factor and noted that Dr. Keller himself stated, "the material and contributing factor in the decision is the fact that the claimant does have 22.75 years of service." The hearing officer interpreted this phrase to mean that the opinion was not based on objective medical evidence, but instead was based on Martin's impressive and lengthy public service record.

Dr. Gregory's opinion that Martin was disabled was also given little weight as Dr. Gregory had not treated Martin in the year prior to her last employment date. Further, the hearing officer noted that Dr. Gregory acted as a

liaison between the numerous specialists, who did not determine Martin to be disabled, and that Dr. Gregory's restrictions on Martin would not impair Martin's job.

The hearing officer issued his conclusions of law which stated that:

(1) Martin requested reasonable accommodations and was able to perform her job with the accommodations that were provided, and (2) Martin failed to prove by the preponderance of the evidence that she is totally and permanently incapacitated since her last day of paid employment, so as to prevent her from performing her former job, or jobs of like duties, taking into account any reasonable accommodations by the employer. Thus, the hearing officer concluded that Martin was not entitled to disability benefits under KRS 61.600.

The Board adopted the recommendation of the hearing officer to deny disability benefits to Martin. Martin appealed to the Franklin Circuit Court, which determined that the Board denied Martin's disability benefits on the erroneous conclusion that she was provided reasonable accommodations. The circuit court concluded as a matter of law that these accommodations were not reasonable. Further, the court concluded that the Board considered each of Martin's medical problems separately and not the effect they had cumulatively on her in assessing whether or not Martin was disabled.

The court also concluded that Dr. Keller was the only reviewing physician that viewed the cumulative effect of Martin's health problems and that the Board ignored the opinions of Drs. Keller and Gregory. The circuit court

adjudged the Board's conclusions to be unsupported by substantial evidence and found that the evidence compelled a finding that Martin was totally and permanently disabled and that no reasonable accommodations could be provided for her. As such, the circuit court reversed the Board's decision. It is from this judgment that KRS appeals.

KRS argues two errors on appeal. First, KRS asserts that the trial court erroneously substituted its judgment for that of the Board and misapplied the law. Second, KRS argues that the denial of Martin's application was supported by substantial evidence in the record as Martin failed to prove she was disabled as of the last day of her employment and thus failed to meet her burden of proof.

Martin disagrees with the position taken by KRS and argues that the trial court did not substitute its judgment for that of the Board; that Martin was disabled if the accommodations necessary for continued employment were unreasonable; and last, that the accommodations necessary for Martin were in fact unreasonable. Accordingly, Martin asserts that she is disabled under the law.

We turn now to the first argument put forth by KRS, namely, that the trial court erroneously substituted its judgment for that of the Board and misapplied the law; we shall first address the alleged substitution of judgment by the circuit court.

KRS cites to the trial court's order "that the hearing officer ignored the opinions of . . . Dr. Gregory . . . and Dr. Keller." In support of this argument

KRS asserts that the hearing officer did not ignore the opinions of two physicians, but instead, justifiably chose to give those opinions little weight.

As to the opinion by Dr. Gregory⁵ confirming the disability of Martin, KRS argues that the hearing officer had sufficient reasons to give little weight to Dr. Gregory's opinion. First, inconsistencies between Dr. Gregory's opinion and the remainder of the medical evidence, combined with the fact that Dr. Gregory had not treated Martin for the last year of Martin's employment, certainly placed the credibility of her opinion into issue. Further, Dr. Gregory acknowledged that she was not an expert in many of the areas of practice in which she was called upon in the deposition to give an opinion. Lastly, many of the functional restrictions placed on Martin would not be in conflict with Martin's sedentary job.

As to Dr. Keller's opinion, which also determined that Martin was disabled, KRS asserts that the hearing officer rightly found that the statement "the material and contributing factor in the decision is the fact that the claimant does have 22.75 years of service" was vague, open to multiple interpretations, and accordingly, afforded his opinion little weight.

Lastly, KRS points to the hearing officer's statement that "there was no testimony that the duties of the County Clerk were not fulfilled during her term in office" and that Martin "testified that she thought she would have been reelected had she run." KRS argues that the testimony of Martin establishes that the

⁵ Dr. Gregory is Martin's treating physician who coordinated her numerous specialists.

accommodations she provided herself were reasonable, as the taxpayers would certainly not reelect an official that was a derelict.⁶

As to the misapplication of law aspect of KRS's argument, KRS asserts that the trial court misapplied the law by stating that KRS must make a determination on whether or not an accommodation granted by an employer was reasonable. According to KRS, the applicable federal law sets up an adversarial system for litigation, and since Martin was her own supervisor ostensibly in the position of both employer and employee, then her testimony has no relevance in the matter at hand. Therefore, KRS says they should be allowed to rely on Martin's actions; *i.e.*, the extension of accommodations while in office in determining what was reasonable.⁷

KRS asserts that to do otherwise would encourage misconduct in elected officials as Martin benefitted from two years of full salary and then would be entitled to disability retirement benefits for shirking her duties. KRS argues that to require KRS to make the assessment of whether the accommodation was reasonable instead of relying on the actions of Martin,⁸ will result in an additional undertaking by KRS not contemplated by the statute.

⁶ We note that whether Martin was reelected is speculative and as such we do not find this argument persuasive. Further, what may be a reasonable accommodation to finish one term of office may not be a reasonable accommodation for another full term upon reelection. To restate, what may be a reasonable accommodation for a limited time may not be reasonable *ad infinitum*.

⁷ This argument appears to simply resolve to the premise that if the employer extended an accommodation, then it must be reasonable.

⁸ We note that Martin was elected by the people to serve as the County Clerk; therefore, it is doubtful that there is a true "employer" as envisioned by the drafters of the Americans with Disabilities Act of 1990 (ADA).

As to the second argument made by KRS, that Martin failed to prove she was disabled on her last day of employment and, thus, the denial of her application for disability was supported by substantial evidence, KRS argues that the circuit court incorrectly framed the issue as one of reasonableness of accommodations and not the true issue of whether Martin met her burden of proving her disability. KRS further argues that Martin failed to produce substantial evidence to prove the unreasonableness of the accommodations she granted herself, as the only evidence offered was her own testimony, and the testimony of her chief deputy clerk, Renny Mathews.⁹

In support of their second argument, KRS argues that there was not substantial evidence to support Martin's disability. In so arguing, KRS cites to each individual ailment separately to show Martin was not disabled as of the last day of her employment.

First, KRS asserts that Martin's ankle condition could not be disabling as it was diagnosed over six months after her last day of employment. Next, KRS argues that Martin was not disabled from her diabetes and hyperlipidemia, as Dr. Gregory noted that Martin's diabetes was not to the point of severe and was non-insulin dependent. While Martin suffered from neuropathy as a result of her diabetes, KRS notes that Dr. Gregory stated it was treatable with medication. KRS also points out that Martin's heart condition and hypertension seemed to be under control prior to her last day of employment. Further, KRS asserts that Dr.

⁹ We note that this was the only testimony presented on this issue by either party.

Cocanower noted that Martin's sleep apnea was improving prior to her last day of employment. KRS argues that Martin's arthritis, gout, and psoriasis were also not disabling. Accordingly, KRS argues that these conditions cumulatively were not disabling and that the trial court erred in deciding otherwise.

In response, Martin argues that the trial court did not substitute its judgment for that of the Board and likewise cites medical evidence to support the trial court's judgment. First, Dr. Gregory testified that Martin's hypertension, heart condition, diabetes, enlarged liver, and sleep apnea were all permanent conditions. Dr. Gregory explicitly identified Martin's hypertension as disabling because it had affected her kidneys. Martin's diabetes has since required Dr. Parmenter to perform surgery on Martin's ankle to prevent amputation of her foot. Dr. Parmenter stated that Martin was absolutely handicapped following the surgery. Dr. Gregory testified that Martin's enlarged liver would result in fatigue. Testimony by Martin and by Renny Mathews described Martin falling asleep while at work, which is consistent with her sleep apnea. Dr. Gregory reported that Martin's sleep apnea was not completely treatable. Dr. Gregory opined that any one of Martin's illnesses alone would be disabling, but in combination, Martin would not be able to work a normal eight-hour day. Last, testimony of Martin and Renny Mathews provided ample evidence of how Martin's ailments impaired her duties as County Clerk.

Martin asserts that the Board's decision was based on the incorrect legal conclusion that the accommodations Martin granted herself were reasonable.

Moreover, Martin asserts she was clearly disabled as it is unacceptable for any person in a supervisory role to be unable to stay awake during the day, miss substantial amounts of work, and delegate most of her duties. Martin argues that the hearing officer incorrectly determined that Martin was not disabled by finding that she could delegate most of her work to others and had the ability to provide herself with a flexible work schedule. Thus, Martin argues, the hearing officer incorrectly concluded that Martin was not disabled based upon the erroneous findings that the accommodations were reasonable.

Martin asserts that the delegation of her duties¹⁰ and her absenteeism were certainly not reasonable accommodations given her vital role as a supervisor. Further, Martin argues that she followed the proper procedure to file for disability by declining to seek reelection.

In its reply brief, KRS disagrees with the position taken by Martin and argues that the issues of accommodations and disability are intertwined; that the hearing officer did not have to accept all testimony provided by Martin and found correctly that the duties of the County Clerk were fulfilled during Martin's term. Further, the medical records Martin urged the trial court to rely on were flawed, as the diabetes treatment concerning the foot issue was not undertaken until months after her last day of employment, that surgery was not performed until a year after her last day of employment, and that Dr. Gregory did not treat Martin for the last

¹⁰ We characterize Martin's argument regarding delegation of her duties as the argument that it is unreasonable for her to delegate essential functions of her position as County Clerk.

year of her employment - thus his opinion was appropriately given little weight by the hearing officer.

KRS offers multiple legal arguments in support of its assertion that the arguments presented by Martin are fundamentally wrong. First, that the adversarial nature of the employer/employee relationship as provided by federal law for an employee seeking accommodations from their employer was not present in the matter *sub judice* in that Martin was her own supervisor. Second, Martin is under the mistaken belief that as a constitutionally elected officer that she could not resign.

KRS argues that the appropriate manner for Martin to seek disability benefits would have required her to resign and then file for disability benefits; to permit otherwise encourages such officers to fraudulently extend themselves unreasonable accommodations and continue to collect their full pay. KRS asserts that by Martin's extending herself benefits and accepting full pay, she implied that the benefits she granted herself were reasonable and she should now be estopped from claiming otherwise. With these arguments in mind we now turn to the applicable law.

When a reviewing court is presented with an appeal from an administrative agency, the court's function is to ensure that the agency did not act arbitrarily in that its decision is based on substantial evidence of fact in the record and that it did not apply the wrong rule of law. *Kentucky Unemployment Insurance Comm'n v. King*, 657 S.W.2d 250 (Ky. App. 1983). Evidence is substantial if

“when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men.” *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972) (citing *Blankenship v. Lloyd Blankenship Coal Co., Inc.*, 463 S.W.2d 62 (Ky. 1970)). An agency acts arbitrarily when it denies relief to a party and “the record compels a contrary decision in light of substantial evidence therein.” *Bourbon County Bd. of Adjustment v. Currans*, 873 S.W.2d 836, 838 (Ky. App. 1994).

Moreover, when the agency denies relief to the party with the burden of proof or persuasion, “the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it.” *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003).

On factual issues, a reviewing court is not free to substitute its judgment for that of the agency, unless the agency decision is arbitrary or capricious. *Id.* When the reviewing court is faced with statutory interpretation, the agency is not entitled to deference, as the matter is a question of law and thus, reviewed *de novo*. *Liquor Outlet, LLC v. Alcoholic Beverage Control Bd.*, 141 S.W.3d 378, 381 (Ky. App. 2004).

While the parties present numerous arguments, the issues before this Court condense into only two. First, were the accommodations Martin provided herself reasonable in light of either our Commonwealth or federal law? This necessarily involves a legal conclusion and thus will be reviewed *de novo*. *See Id.*

Second, did the agency improperly determine that Martin had not met her burden of proof in order to find her disabled as of the last day of employment? This requires our Court to determine if the evidence in Martin's favor is so compelling that no reasonable person could have failed to be persuaded by it. *See McManus, supra.*

The applicable statutory framework, KRS 61.600,¹¹ requires that a person seeking disability retirement benefits must prove that he or she has been mentally or physically incapacitated to perform the job, or jobs of like duties, from the last date of employment. KRS 61.600(3)(a) goes on to explain, “[i]n determining whether the person may return to a job of like duties, any reasonable

¹¹ KRS 61.600 Disability retirement states:

- (1) Any person may qualify to retire on disability, subject to the following conditions:
 - (a) The person shall have sixty (60) months of service, twelve (12) of which shall be current service credited under KRS 16.543(1), 61.543(1), or 78.615(1);
 - (b) For a person whose membership date is prior to August 1, 2004, the person shall not be eligible for an unreduced retirement allowance;
 - (c) The person's application shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment, as defined in KRS 61.510, in a regular full-time position, as defined in KRS 61.510 or 78.510; and
 - (d) The person shall receive a satisfactory determination pursuant to KRS 61.665.
- (2) A person's disability reapplication based on the same claim of incapacity shall be accepted and reconsidered for disability if accompanied by new objective medical evidence. The reapplication shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full-time position.
- (3) Upon the examination of the objective medical evidence by licensed physicians pursuant to KRS 61.665, it shall be determined that:
 - (a) The person, since his last day of paid employment, has been mentally or physically incapacitated to perform the job, or jobs of like duties, from which he received his last paid employment. In determining whether the person may return to a job of like duties, any reasonable accommodation by the employer as provided in 42 U.S.C. sec. 12111(9) and 29 C.F.R. Part 1630 shall be considered;
 - (b) The incapacity is a result of bodily injury, mental illness, or disease. For purposes of this section, "injury" means any physical harm or damage to the human organism other than disease or mental illness;
 - (c) The incapacity is deemed to be permanent; and
 - (d) The incapacity does not result directly or indirectly from bodily injury, mental illness, disease, or condition which pre-existed membership in the system or reemployment, whichever is most recent. For purposes of this subsection, reemployment shall not mean a change of employment between employers participating in the retirement systems administered by the Kentucky Retirement Systems with no loss of service credit.
- (4) Paragraph (d) of subsection (3) of this section shall not apply if:
 - (a) The incapacity is a result of bodily injury, mental illness, disease, or condition which has been substantially aggravated by an injury or accident arising out of or in the course of employment; or
 - (b) The person has at least sixteen (16) years' current or prior service for employment with employers participating in the retirement systems administered by the Kentucky Retirement Systems.
- (5) (a) 1. An incapacity shall be deemed to be permanent if it is expected to result in

accommodation by the employer as provided in 42 U.S.C. sec. 12111(9) and 29 C.F.R. Part 1630 shall be considered.”

The statutory definition of (and accompanying regulation regarding) reasonable accommodation is contained in the Americans with Disabilities Act of 1990 (ADA). The ADA imposes upon employers the duty to provide reasonable

death or can be expected to last for a continuous period of not less than twelve (12) months from the person’s last day of paid employment in a regular full-time position.

2. The determination of a permanent incapacity shall be based on the medical evidence contained in the member's file and the member's residual functional capacity and physical exertion requirements.

(b) The person's residual functional capacity shall be the person's capacity for work activity on a regular and continuing basis. The person's physical ability shall be assessed in light of the severity of the person's physical, mental, and other impairments. The person's ability to walk, stand, carry, push, pull, reach, handle, and other physical functions shall be considered with regard to physical impairments. The person's ability to understand, remember, and carry out instructions and respond appropriately to supervision, coworkers, and work pressures in a work setting shall be considered with regard to mental impairments. Other impairments, including skin impairments, epilepsy, visual sensory impairments, postural and manipulative limitations, and environmental restrictions, shall be considered in conjunction with the person's physical and mental impairments to determine residual functional capacity.

(c) The person's physical exertion requirements shall be determined based on the following standards:

1. Sedentary work shall be work that involves lifting no more than ten (10) pounds at a time and occasionally lifting or carrying articles such as large files, ledgers, and small tools. Although a sedentary job primarily involves sitting, occasional walking and standing may also be required in the performance of duties.

2. Light work shall be work that involves lifting no more than twenty (20) pounds at a time with frequent lifting or carrying of objects weighing up to ten (10) pounds. A job shall be in this category if lifting is infrequently required but walking and standing are frequently required, or if the job primarily requires sitting with pushing and pulling of arm or leg controls. If the person has the ability to perform substantially all of these activities, the person shall be deemed capable of light work. A person deemed capable of light work shall be deemed capable of sedentary work unless the person has additional limitations such as the loss of fine dexterity or inability to sit for long periods.

3. Medium work shall be work that involves lifting no more than fifty (50) pounds at a time with frequent lifting or carrying of objects weighing up to twenty-five (25) pounds. If the person is deemed capable of medium work, the person shall be deemed capable of light and sedentary work.

4. Heavy work shall be work that involves lifting no more than one hundred (100) pounds at a time with frequent lifting or carrying of objects weighing up to fifty

accommodations for known disabilities unless doing so would result in undue hardship to the employer. 42 U.S.C. § 12112(b)(5)(A). An accommodation is reasonable only if it enables the employee to perform the essential functions of his or her job. 29 C.F.R. § 1630.2(o)(ii).

Typically, in an ADA discrimination case, the plaintiff is required to prove that an accommodation that would allow the plaintiff to perform essential functions of the job is reasonable. The burden then shifts to the employer/defendant to prove that the proposed accommodation would pose an undue hardship upon the employer. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S.Ct. 1516 (2002). The determination of whether a reasonable accommodation will allow a plaintiff to perform the essential functions of his or her job is an individualized inquiry. *Hall v. U.S. Postal Service*, 857 F.2d 1073, 1078-1079 (6th Cir. 1988).

In a disability case, the approach is similar. The employee must prove that he or she cannot perform the essential functions of his or her job and that the reasonable accommodation offered by the employer is not sufficient to allow the employee to safely perform those functions. *See* KRS 61.600 and KRS

(50) pounds. If the person is deemed capable of heavy work, the person shall also be deemed capable of medium, light, and sedentary work.

5. Very heavy work shall be work that involves lifting objects weighing more than one hundred (100) pounds at a time with frequent lifting or carrying of objects weighing fifty (50) or more pounds. If the person is deemed capable of very heavy work, the person shall be deemed capable of heavy, medium, light, and sedentary work.

13B.090(7).¹² Thus, a determination of whether a reasonable accommodation will allow the employee to perform the essential functions of the job is required.

In the case *sub judice*, we agree with the circuit court that Martin should not be penalized for attempting to serve out her term as County Clerk and thus fulfill her obligation to the voters of Henderson County.¹³ It would be unreasonable to continue and seek out reelection when Martin knew that she would be unable to fulfill the duties of her job any longer, much less for a term of office.

While we agree with KRS that Martin could have resigned, we do not

¹² KRS 13B.090(7) states:

In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.

¹³ KRS argues, in essence, that either the absenteeism is a condition that is susceptible to reasonable accommodation or is an “abuse of office” (phrased as “inequitable and inappropriate” by KRS). We decline to agree with either argument. While absence for a period of time or sporadic absence over a period of time may be accommodated, as time passes such absence may not be acceptable. Much depends on the duties of the office; compare the duties of the County Clerk with those of another, though former, constitutional official, the Railroad Commissioner.

believe this is the only avenue for an elected official to “prove” their disability.¹⁴

As an elected official, Martin has a duty to conduct her office in a professional and proper manner, as well as fulfill her commitment to her constituents by serving out her term of office, if at all possible. Martin should be commended for putting forth effort above and beyond her physical disabilities to complete her term of office rather than acquiesce to premature resignation and leave her constituents without an elected official to conduct the affairs of the office. Further, we do not agree with KRS that such behavior encourages misconduct in our elected officials. Martin still must qualify for disability as required by statute.

The issue then becomes whether a supervisor, such as Martin, in extending accommodations which are reasonable at their inception can become unreasonable with the passage of time. Surely one can envision circumstances when an employer gives an employee an accommodation because of a temporary inability of the employee to perform. Such an accommodation, in the determination of the employer, may be reasonable for some determinate time but not for an indefinite time.

We find the Sixth Circuit’s reasoning in *Walsh v. United Parcel Service*, 201 F.3d 718 (6th Cir. 2000) to be persuasive. In *Walsh*, the court held “when . . . an employer has already provided a substantial leave, an additional

¹⁴ We do not find dispositive the timing of Martin’s application for disability, as she was required to meet the statutory requirements set forth in KRS 61.600. While an elected official could resign and file for disability, we see little relevance to the fact that an official may resign and file for disability the day before a term of office was to end or the day after a term of office began in contrast to allowing the term to naturally expire. To find otherwise would encourage elected officials to resign in an attempt to collect disability.

leave period of a significant duration, with no clear prospects for recovery, is an objectively unreasonable accommodation.” *Id.* at 727. Such is the case *sub judice*. Martin as supervisor/employer, extended herself various accommodations to complete her term of office and fulfill her commitment to the voters, but in so doing recognized that such continued accommodations would be unreasonable.

While the facts of this case are unique and will infrequently arise, KRS 61.600 does not carve out exceptions for its requirements when the person applying for disability is an elected official, nor should we. KRS 61.510(5), the definitional section for KRS 61.600, particularly includes such officials in defining employee as “every regular full-time, appointed or elective officer or employee of a participating department” There is no argument before our Court that Martin is not an “employee” of a participating department. Thus, Martin is eligible to apply for disability under KRS 61.600.

KRS 61.600 clearly requires a determination whether a reasonable accommodation will provide the claimant the ability to perform a job of like duties in light of federal law. KRS argues that an elected official, characterized by KRS as both an employer and employee, may provide any accommodation to himself or herself and thus magically pronounce that the accommodation so provided is reasonable. We disagree, as this usurps the responsibility of the hearing officer in determining if the accommodation is reasonable in light of federal law as mandated by KRS 61.600.

KRS argues that allowing Martin to determine what act is a reasonable or unreasonable accommodation imposes an additional burden upon KRS. This argument is disingenuous, as the parties are to submit the proof and the hearing officer is to determine the reasonability of the accommodation. Moreover, the fact that Martin extended herself accommodations during her term of office should be considered as evidence, susceptible to being controverted, despite KRS's argument that the "adversarial nature of the proceedings" is not present in its traditional posture. We also disagree with KRS's reasoning that Martin is thereby estopped from controverting such evidence. Martin did successfully controvert the implication of her actions in extending herself accommodations by the testimony of both herself and Deputy Clerk Mathews.

We now turn to the issue of whether Martin's accommodations were reasonable as a matter of law. Under the ADA, an employer is not required to reassign the essential functions of a job to accommodate a disability. 29 C.F.R. Pt. 1630, and *Bratten v. SSI Services, Inc.*, 185 F.3d 625 (6th Cir. 1999). In *Bratten* the Sixth Circuit held that a partial delegation of an *essential function* was not a reasonable accommodation under the ADA. 29 C.F.R. § 1630.2(n) defines an essential function of a job as:

(1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

- (i) The function may be essential because the reason the position exists is to perform that function;
- (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
- (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

- (i) The employer's judgment as to which functions are essential;
- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

In light of the statutory definition, Martin's supervisory duties were clearly an essential function of her job. As such, the delegation of those supervisory duties to the magnitude required by Martin constituted an unreasonable accommodation.

See also Stubbs v. Marc Center, 950 F.Supp. 889 (C.D.Ill.1997) (employee's request that his duties temporarily be shifted to his coworkers and subordinates was not request for reasonable accommodation under ADA).

As the Board in the case *sub judice* incorrectly determined as a matter of law that Martin's accommodations were reasonable in light of KRS 61.600 and the accompanying law, its decision must be reversed.

We now turn to the last issue presented on appeal, whether the circuit court erroneously determined that the record compelled a finding in favor of Martin that she was disabled. We agree with the circuit court that the record compelled such a finding.

Our review of the record reveals a claimant with a considerable number of maladies. We agree with the trial court that the substantial evidence in the record compelled a finding that Martin was disabled. *See McManus, supra* and *Currans, supra*.

In light of the entire record, the hearing officer wrongfully determined that Martin was not disabled. The hearing officer reached this determination by discounting the opinions of Drs. Keller and Gregory. A review of these opinions shows that both doctors undertook an overall assessment of Martin's health in reaching their conclusion that Martin was disabled.

As to the opinion of Dr. Gregory, the hearing officer wrongfully discounted Dr. Gregory's opinion because Martin had not treated with Dr. Gregory for a year prior to her disability application. It should be noted that even though Dr. Gregory left private practice to pursue work as an emergency room physician, she was still a qualified medical professional. Further, Dr. Gregory had examined and treated Martin, was the referring physician, coordinated Martin's care amongst

various physicians, had reviewed the records submitted in the disability proceeding generated by the various medical specialists, and did give testimony as to Martin's various maladies. Thus, even if less weight was due Dr. Gregory's opinion because she had not recently treated Martin, her opinion could not be wholly discounted as she was both a treating physician and a medical expert.

Dr. Keller's opinion was discounted because the hearing officer found that the opinion was based on a nonmedical factor, the number of years of Martin's service. Taken in context with the rest of the report, we agree with the circuit court that it is clear that the comment by Dr. Keller was taken out of context. Moreover, the same subject matter of the comment was addressed in Dr. Strunk's opinion that Martin "has more than 16 years of service and as such pre-existing illness will not be an issue in this determination." As evidenced from the recitation of her years of service, both doctors properly determined that Martin's conditions were not subject to preexisting conditions.

The evidence presented to the hearing officer compelled a finding that Martin was disabled and no reasonable person could have found otherwise. Thus, based on the record, we find that Martin met her burden of proof that she was totally and permanently disabled. *See McManus, supra*. Therefore, the Board's decision is arbitrary and must be reversed.

In light of the aforementioned reasons, we find that the Franklin Circuit Court properly reviewed the applicable law and facts surrounding Martin's appeal and reversed the Board. Accordingly, we affirm the Franklin Circuit Court.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

GUIDUGLI, SENIOR JUDGE, CONCURS IN RESULT ONLY.

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