



**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

STEPHEN MALLOY,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA (SAN FRANCISCO),

Respondent.

Case No. SF-CE-1221-H

PERB Order No. Ad-499-H

January 4, 2023

Appearances: Stephen Malloy, on his own behalf; Gordon Rees Scully Mansukhani by Marcie Isom Fitzsimmons and Zulma A. Munoz, Attorneys, for Regents of the University of California (San Francisco).

Before Banks, Chair; Shiners and Paulson, Members.

DECISION¹

BANKS, Chair: This case is before the Public Employment Relations Board (PERB or Board) on Stephen Malloy's appeal of an administrative law judge's (ALJ) denial of two requested accommodations for formal hearing on the basis that they were unreasonable. Malloy appealed the rulings and the ALJ certified the appeal to the Board itself pursuant to PERB Regulation 32200. In addition to appealing the ALJ's ruling, Malloy requested a stay of activity at all levels of PERB, which was

¹ PERB Regulation 32320, subdivision (d) authorizes the Board to designate a decision, or any part thereof, as non-precedential. (PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.) Having applied the criteria enumerated by the regulation, we designate as non-precedential part II of the Discussion. The Introduction, Background, and the remaining parts of the Discussion are precedential.

denied. Malloy appealed that determination. We consolidate these issues for decision and affirm the denials of the requested accommodations and the request for a stay at all levels.

BACKGROUND

On April 9, 2019, Malloy filed this unfair practice charge; he amended it on October 25, 2019. On January 9, 2020, the Office of the General Counsel (OGC) issued a complaint alleging that the respondent, Regents of the University of California (San Francisco) released Malloy from his probationary employment in retaliation for his HEERA-protected activities.² On January 28, 2020, the University filed an answer to the complaint, asserting several affirmative defenses, including that “Charging Party failed to use ordinary care and diligence in the performance of his duties and failed to comply with the reasonable directions of his employer.”

On November 30, 2020, Malloy filed documents seeking immunity from providing any form of testimony at PERB as an accommodation under the Americans with Disabilities Act (ADA).³ On December 3, 2020, the University filed an opposition to the request on the grounds that it intended to call Malloy as a witness for its defense. The following day, the University submitted a subpoena for the ALJ’s signature seeking to require Malloy’s testimony as a witness for its defense. On December 15, 2020, the ALJ provided the parties a tentative ruling that informed Malloy he could lodge medical documentation in support of his request for the ALJ’s in

² HEERA is the Higher Education Employer-Employee Relations Act, codified at Government Code section 3560 et seq.

³ The ADA is codified at 42 U.S.C. section 12101 et seq.

camera review, which Malloy did on December 17, 2020. On December 18, 2020, the ALJ issued an order finding that Malloy was a qualified individual with a disability, but denying the request without prejudice.

On July 14 and 15, 2021, Malloy renewed his request for immunity from testifying, contending that relief is legally necessary under disability law as a reasonable accommodation. On July 23, 2021, the University opposed the request.

On August 5, 2021, Malloy filed a separate request for accommodation, seeking a continuance of the formal hearing that was scheduled for September 20, 2021. The ALJ granted that request and placed the case in abeyance until April 5, 2022.

On August 6, 2021, the ALJ appointed another PERB ALJ as an accommodations coordinator responsible for assisting Malloy in exploring possible accommodations to effectively participate in PERB's process.

At a prehearing conference on May 10, 2022, Malloy requested as an ADA accommodation that PERB appoint counsel to represent him. Neither party sought oral argument, and the University declined the opportunity to file a written response. On May 31, 2022, the ALJ issued an order denying the request without prejudice.

At a prehearing conference on July 19, 2022, the parties were provided the opportunity to present oral argument regarding Malloy's August 5, 2021 request to be immunized from testifying. After the parties stated their positions, the ALJ denied the request.

On July 18, 2022, Malloy filed a request to seek review from the Board itself of the ALJ's interlocutory orders denying Malloy's requests to be immunized from testifying and to have counsel appointed. On August 25, 2022, the ALJ issued an

order joining in the request and certifying the appeal to the Board itself pursuant to PERB Regulation 32200.

On August 31, 2022, Malloy filed a notice of request for stay of activity at all levels of PERB pursuant to Regulation 32370. On September 2, 2022, the Appeals Office informed Malloy that his request for a stay of activity at all levels of PERB was denied.

On September 20, 21, 22, and 23, Malloy filed five documents titled as interlocutory appeals, along with supporting exhibits.⁴ On October 4, 2022, we issued *Regents of the University of California (2022)* PERB Order No. Ad-495-H (non-precedential), ordering an immediate stay of all case-related activity at the Division of Administrative Law. On October 12, 2022, the University filed its opposition to Malloy's appeals.

On October 13, 2022, Malloy filed a motion with the Board requesting as an accommodation an ex parte oral argument before the Board itself. On October 14, 2022, Malloy filed a motion requesting a tentative decision from the Board itself.

DISCUSSION

Malloy's appeal presents the questions of whether his disability warrants accommodations of appointing counsel for his representation or immunizing him from testifying in his case at PERB. Malloy has also appealed the denial of his request to

⁴ Malloy's five appeals take issue with the Board's denial of his request to stay activity at all levels. They also present arguments regarding other matters that were not certified to the Board or relevant to the Board's denial of the stay of activity at all levels, and therefore are not appropriately before the Board itself. To the extent these appeals present arguments regarding other matters that are not appropriately before the Board, we decline to address them.

stay activity at all levels of PERB.⁵

I. Reasonable accommodations at PERB

Under Title II of the ADA, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” (42 U.S.C. § 12132.) California’s Unruh Civil Rights Act provides that “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their . . . disability [or] medical condition . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” (Civ. Code, § 51, subd. (b); see also Civ. Code, § 54.)

In keeping with these policies, public entities such as PERB are required to “make reasonable modifications in policies, practices, or procedures, unless the public

⁵ Malloy filed a motion with the Board requesting as an accommodation an “Ex Parte, In Camera, ADA Oral on the Record Accommodation per PERB Regulation 32190 (a)(1)(2)4(c)(d): to Review Respondent’s 10/12/22 Response to Board Stay Order for Motion to Strike & Dismiss Respondent Complaint for Falsity & Fraud. Judgement. Response to Reply.” Regulation 32190 governs motions generally, so we infer that this request is for an ex parte oral argument before the Board itself because Malloy has previously requested oral argument in the above documents styled as interlocutory appeals. An ex parte argument made to the Board itself is contrary to PERB’s regulations. (PERB Reg. 32295.) Because PERB is bound to follow its regulations, PERB will not grant an accommodation request that violates an express regulatory requirement. (*Regents of the University of California and Teamsters Clerical Local 2010 (Polk)* (2016) PERB Order No. Ad-437a-H, p. 2 [“a fundamental tenet of administrative law is that an agency must follow its own rules”].) In any event, the issues before us are sufficiently clear that oral argument is unnecessary, so we deny this motion. (*City of Commerce* (2018) PERB Decision No. 2602-M, p. 2, fn. 2.)

entity can demonstrate that making such modifications would result in undue financial and administrative burdens or would fundamentally alter the nature of the service, program, or activity offered.” (*Regents of the University of California and Teamsters Clerical Local 2010 (Polk)* (2016) PERB Order No. Ad-437-H (*Polk*), p. 5, citing 28 C.F.R. §§ 35.130(a), (b)(7), 35.164.) Reasonable accommodations “may include reasonable changes to the public entity’s calendaring or scheduling policies, practices or procedures to provide additional time for persons with disabilities to file papers, to prepare for hearing, or otherwise to ensure full and equal access to the public entity’s services.” (*Polk, supra*, PERB Order No. Ad-437-H, pp. 5-6, citing *County of Santa Clara* (2012) PERB Decision No. 2267-M, p. 4; *In re Marriage of James & Christine C.* (2008) 158 Cal.App.4th 1261, 1273 & 1274, fn. 4; *Vesco v. Superior Court* (2013) 221 Cal.App.4th 275, 279 (*Vesco*); Cal. Rules of Court, rule 1.100(a)(3).)

A reasonable accommodation may be given indefinitely or for a particular case or appearance, and other policies or statutes may not serve as an automatic limit on the duration of a particular accommodation. (*Polk, supra*, PERB Order No. Ad-437-H, p. 6, citations omitted.) However, a reasonable accommodation does not require PERB to wait indefinitely for an impairment or medical condition to improve or be corrected. (*Ibid.*, citing *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226-227.) To determine whether a requested accommodation is reasonable, a public entity may request additional information about an applicant’s impairment or medical condition, including its severity, and for some indication that the requested accommodation will in fact enable the applicant to participate in the service, program or activity offered by the public entity without resulting in undue financial and

administrative burdens or fundamentally altering the nature of the service, program or activity. (*Polk, supra*, PERB Order No. Ad-437-H, p. 6.)

If a party requests a reasonable accommodation that involves the other party or parties to the case in the accommodation process, they will have a corresponding right to receive notice and an opportunity to view medical documentation relied upon in support of the requests, and to present arguments to the ALJ regarding any such request. (*Vesco, supra*, 221 Cal.App.4th at pp. 279-280 [because requested continuance was an accommodation the opposing party was forced to make, they were “involved in the accommodation process”].)⁶ In such a case, the ALJ must take steps to maintain the requesting party’s privacy to the furthest extent feasible. For example, the ALJ may hold the hearing on the accommodation request in camera, order the opposing party and its counsel not to disclose the contents of the medical records, seal the record of the proceedings, and take other steps that the ALJ deems appropriate. (*Id.* at p. 280.)

II.*

⁶ *Vesco* interprets California Rule of Court, rule 1.100. Though PERB is not bound by the Rules of Court, and currently is in the process of promulgating regulations governing reasonable accommodations, we find that rule 1.100 fairly implements the legal requirements of the ADA and the Unruh Civil Rights Act. We therefore apply the principles of the *Vesco* decision and others interpreting rule 1.100 here, keeping in mind that the nature of accommodations sought may vary greatly, as will the accommodation’s impact on the opposing party. Accordingly, the scope of the other party’s right to access related medical documentation will vary as well.

* See footnote 1, *ante*.

III. Malloy's appeal of the denial of his request to stay all activity

On August 31, 2022, Malloy filed a request with the Board itself seeking to stay activity in this case at all levels of PERB. This request was denied and Malloy appealed. On October 4, the Board issued *Regents of the University of California, supra*, PERB Order No. Ad-495-H (non-precedential), ordering an immediate stay of all activity at the Division of Administrative Law pending the Board's deciding the accommodation issues presented in Malloy's interlocutory appeal. We issued the stay because the Division of Administrative Law was moving forward with the formal hearing without waiting for the Board to resolve whether Malloy's requested accommodations were reasonable. As the ALJ properly recognized in certifying Malloy's appeal to the Board, resolution of the reasonable accommodation issues would have a significant impact on the manner in which the hearing will be conducted. Because interlocutory appeals necessarily involve controlling issues (PERB Reg. 32200), in most cases it is appropriate for a Board agent certifying an interlocutory appeal to the Board itself to pause activity in the case pending the Board's resolution of the issue(s) on appeal. (*Ibid.*; see also PERB Reg. 32170, subd. (b)(4) [the hearing officer shall have the authority to regulate the course and conduct of the hearing].)

On appeal Malloy argues that the stay at all levels was appropriate in order to allow the Board to investigate his accommodations appeals and allow him to continue having reasonable accommodations discussions with the ALJ assigned as his accommodations coordinator. But a stay at all levels would have put the Board's processing of Malloy's instant appeal on hold as well, leaving the parties without any

guidance as to whether the requested accommodations would be deemed reasonable. Because Malloy presented no sufficient reason for the Board to stay its review of his appeals, the decision to deny the requested stay was proper.

ORDER

Malloy's appeals are hereby denied. Because we find Malloy's two requested accommodations unreasonable, we remand this case to the Division of Administrative Law for further processing consistent with this decision, including adjudication on the merits. Malloy may, if he chooses, request the ALJ provide alternative reasonable accommodations for his disability, such as testifying remotely over a web-based video platform, or taking periodic rest breaks. If the requested accommodation impacts the Respondent, such as a continuance or abeyance, to the extent the Respondent is "involved in the accommodation process" the Respondent will have a corresponding right to receive and examine medical documentation Malloy provides in support of his requests, and to present arguments to the ALJ regarding any such request, as set forth above. (See *Vesco*, *supra*, 221 Cal.App.4th at pp. 279-280.)

If the ALJ determines Malloy has demonstrated that placing the case in abeyance is a reasonable accommodation, Malloy is to provide quarterly updates to the ALJ and the Respondent that include specific information regarding his readiness to proceed to hearing. If such an abeyance continues for two years, the case will automatically be referred to the Board pursuant to PERB Regulation 32143, subdivision (a) for decision as to whether any further abeyance is appropriate.

Members Shiners and Paulson joined in this Decision.