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>> SPEAKER: Good morning everyone. Thank you so much for joining us for session number three. Work from home as a reasonable accommodation. I have the pleasure of introducing my esteemed colleagues and speakers for today's session, hearing examiner Darlene Hemerka Martin and deputy chief counsel Morgan Williams. As they make their way to the stage I will begin with hearing examiner Darlene Hemerka Martin bio. Darlene Hemerka Martin Esquire brings a passion for equity and inclusion to her role as a hearing examiner for the Pennsylvania Human Relation Commission. Martin became an attorney to enforce civil rights laws. Part of her passion stems from the fact that she was born with cerebral palsy and uses a walker to ambulate. Prior to joining the PHRC Martin with a staff attorney at the legal clinic for the disabled. Her responsibilities included overseeing the intake line from educating families and practitioners on guardianship for adults with disabilities and representing tenants and municipal poor in front of the Philadelphia fair housing commission. Martin worked at the public interest law center. She began her time at the law center as an equal Justice Works fellow. As a fellow she designed the product to ensure students with disabilities ages 14 to 21 received appropriate transition services. Activities designed to prepare the student for employment and further education. After completing her fellowship Martin became staff attorney at the law center and worked on education cases. Before joining the law center Martin was a traditional law court at the - - court in New Jersey, drafting orders and family members and communicating with self presented litigants. Deputy Chief Counsel Morgan Williams had been with the Pennsylvania Human Relation Commission for 10 years serving at different capacities in the Office of Chief Counsel. In her role, Debbie as Chief Counsel, she supervises offices prosecuting attorneys who advocate on behalf of persons pursuing complaints of unlawful determination. At public hearings and cases where public probable cause is found. In addition to her role as a supervisor she works with senior management on a variety of complex issues including policy, legislation, regulations, internal HR matters and various special projects as assigned by Executive Director and/or chief counsel. Prior to serving in her role as deputy chief counsel, Williams was a senior prosecutor within the office of chief counsel where she handled complex litigation and appeals. At the time of her commission, she served as interim chief counsel and interregional director. The Legal Star award and Legal Directors award, Deputy Chief

Counsel Williams serves the people of the Commonwealth out of the Pittsburgh regional office. Before her tenure with the commission, Williams cut her teeth in private practice and record the commission's partners at the Philadelphia Human Relation Commission. Williams holds a juris doctor degree from Widener University School of Law. Please get ahead of our panelists.

>> SPEAKER: Good morning again. For this session we will talk about a very timely topic about whether working from home is a reasonable accommodation. If you could go to the next slide, please. And again, if you could advance. Want to acknowledge the information we are going to provide is not legal advice. If you have a specific case he should speak with an attorney. We recognize we are the presentation before luncheon want to be sure you stay awake. Ranger Hannah type in chat if you have ever received a request for me from an employee to work from home as a reasonable accommodation or if you have ever requested an accommodation of working from home. Quite a large number of people in the room which tells us how timely this topic is. Our agenda for today. It's an overview of the Pennsylvania Human Relation Commission. Defining disability and discrimination. Defining otherwise qualified tips for determining whether something is an essential function and finally some resources. This lays out the mission and values of the Pennsylvania Human Relation Commission. But we have heard a lot about that today. So, I'm going to move to the next slide. And again, we have offices across the Commonwealth in Philadelphia, Pittsburgh and Harrisburg. We have existed since 1955 and we are an independent commission created and directed by the Pennsylvania Human Relations Act and the Pennsylvania fair educational opportunities act. As you've heard a lot about today, we are governed by two laws, one of the Pennsylvania Human Relations Act in the other, the Pennsylvania Fair Educational Opportunities Act which relates mostly to higher education. And finally, we have talked quite a bit about our sectors of protection, this will focus on employment and disability discrimination.

>> SPEAKER: Can everyone hear me? This microphone sounds odd. Before we move on to speaking about the protective cause of disability, we wanted to point out regulatory resources relating to protected classes. In 2023 the Pennsylvania Human Relation Commission relegated - - further defined race, religious creed and steps. We encourage everybody to read those regulations in addition and not on the slide. I would just like to refer people to a great resource that the commission has relating specifically to disability protections. That is promulgated for disability. Those resources can be found on our website. I want to talk about the definition of disability which is touched on earlier today. There are three prongs that someone can qualify for the Pennsylvania Human Relations Act. Someone with an impairment that substantially limits a major life activity. Someone can also get in a class if they have a record of a disability and I think the example of that regional director Roth gave, for example, a cancer survivor. You can get into the class if an individual regards you as someone with a disability. When talking about reasonable accommodations and accommodations that work from home or the use of technology, we are talking about individuals who qualify as becoming, who comes into the class as either an actual disability, someone who has an actual physical/mental impairment or record of a disability. You cannot get reasonable accommodation if someone regards you as being disabled. Those are the two prongs we would look at requalification to determine whether your summoner meets the definition of disability. Next slide.

>> SPEAKER: Sorry about that. Technology is great when it works. Not so much when it doesn't. I wanted to remind folks the definition of disability is the same under state and federal law but we

only enforce the Pennsylvania Human Relations Act. But case law has said and regulations say that the PHRA - - those that you see on screen our impairments in virtually all cases. Deafness, blindness, intellectual disability, autism, cancer, diabetes. Epilepsy and bipolar disorder. That is a non-exhaustive list. This is just examples. We will talk about the definition of discrimination. Employment discrimination includes not making reasonable accommodations to known physical or mental impairments. Unless the employer can show that the requested accommodation would impose an undue hardship. Then here on the slide there is a case from the Commonwealth Court that adopted the test used by federal courts to determine liability for an employer's failure to make reasonable accommodation. And employer must show that he or she is otherwise qualified perform essential functions of the job with or without reasonable accommodation. And severed adverse action, including an adverse action including the denial of reasonable accommodation. What does it mean to be qualified? The burden is on the employee to show that they are qualified. Meaning they have the requisite education and skills and also, they can perform the essential functions with or without a reasonable accommodation. Let's get to the biggest and most litigated question of what are essential functions? Neither the Pennsylvania Human Relations Act and regulations define essential functions, PHRC looks to regulations under the Americans With Disabilities Act which outlines several factors to be considered. The employer's judgment as to what is an essential function, the job description prepared for the job was posted. The amount of time spent doing the function. The impact if the function is not completed. The collective bargaining agreement if there is one. The work experience of past incumbents of the job and the current work experience of incumbents in similar jobs.

>> MORGAN WILLIAMS: Can anyone give? Where are my manners? We are going to wake up. Can anyone give us an example of what might be an essential function of a job? My job as a clerk typist. What might be an essential function of my job? Who can I get? This is your chance to make us run.

>> SPEAKER: Let's see who can get there first. Typing.

>> MORGAN WILLIAMS: Typing. What else? What did you say? Spelling? We will talk about that. We spelling.

>> MORGAN WILLIAMS: What's next?

>> SPEAKER: Processing mail.

>> MORGAN WILLIAMS: Processing mail. What else?

>> SPEAKER: Photocopying.

>> SPEAKER: Negotiating terrain.

>> MORGAN WILLIAMS: Negotiating terrain?

>> SPEAKER: Correct.

>> MORGAN WILLIAMS: Let's switch gears. I'm an attorney. What are the essential functions of an attorney's job? Anybody?

>> SPEAKER: Litigation and client representation.

>> SPEAKER: Another here.

>> SPEAKER: One right here.

>> SPEAKER: Preparing redrafting briefs.

>> MORGAN WILLIAMS: Great. I love where this audience is going with this.

>> SPEAKER: Litigation.

>> MORGAN WILLIAMS: Litigation again.

>> SPEAKER: Over here?

>> SPEAKER: Filing motions.

>> MORGAN WILLIAMS: Where are my attorneys?

>> SPEAKER: Document review.

>> MORGAN WILLIAMS: Document review, research. Our runners are running.

>> SPEAKER: Participating in discovery.

>> MORGAN WILLIAMS: Participating in discovery.

>> SPEAKER: Being able to read.

>> MORGAN WILLIAMS: We will discuss that.

>> SPEAKER: Auditing.

>> MORGAN WILLIAMS: No one is funny today? I gave you perfectly low hanging fruit.

>> SPEAKER: I was going to say getting on her nerves.

>> MORGAN WILLIAMS: There you go. It's a great segue. I am screaming into the microphone. Where will we find typically what an essential function of a job is? Shouted out. Where do you typically see this? Job descriptions. Thank you runners. Job descriptions. I want to talk about a concept that can sometimes be clear as mud. That is the difference between what's the qualification standard and an essential job function. Job descriptions often merge these things. You'll see in job descriptions sometimes things listed out that look like physical qualifications, things that look like academic requirements. Job tasks. It's all lumped together under the heading of essential functions. Everyone see that? Nobody has seen that? Okay. I want to talk about qualification standards. It's unlawful for an employer to use a qualification standard that's going to tend to screen out folks with disabilities. And you can see the task on the slide that comes from disability regulations, I strongly recommend everybody read, especially PHRC folks in the room. The role is if you have a qualification standard euros and make sure the test, device or other selection criteria is job-related for the position in question. If there is an alternative related test or criteria that does not screen out people, we want you to use thought. But the test is laid out. But I want to explain about qualification standards as opposed to job functions is that qualification standards tend to be those things we talk about like reading. Like maybe spelling. You know, these

are things that walking, lifting, physical demands. These are usually qualification standards. And employers put those qualification standards in place and don't necessarily tie them to what is actually a job function. Let's talk about really what is a function of a job as opposed to a qualification standard. So, on the screen I have a chart here. You can see the difference between what is a qualification standard on the left and an actual job task on the right. So, where you see these job descriptions that lay out things like must lift 50 pounds, must be able to stand for eight hours. Must be able to climb stairs or must be able to read. I'm going to challenge you to not accept that as an essential function of the job. But rather to look at it as a qualification standard that the employer has to tie back to some job task that person is actually doing. Then they have to further analyze the job task to determine is that actually an essential function? Because if it's not and it is screening out someone with a disability, they may need to reassign that function if it is marginal and not essential. So, give me some examples apart from what is on the screen here. Of what are qualifications that might screen out individuals with disabilities? Anyone? Give me a qualification standard that might screen people out. Education? Sure. That might screen out people with cognitive perhaps disabilities. What else? Reporting to the office. Right on time. Reporting to the office, certainly. What kinds of disabilities would be reporting to the office screen out? Can I get a volunteer for that? Go ahead. Absolutely. Mental health, Agoura phobia. Someone who is immunocompromised. Excellent.

>> SPEAKER: Standing for a long time, lifting weights.

>> MORGAN WILLIAMS: What disability might that screen out? What kind of disability.

>> SPEAKER: Muscular bone disorder. Neurological disorder. It could screen out a whole gamut of things.

>> MORGAN WILLIAMS: What else? What are other qualification standards that you see associated with job descriptions that are going to tend to screen folks out? We talked about one earlier. What about reading? Is that a qualification standard or job function?

>> SPEAKER: We have a comment back here.

>> SPEAKER: Driving.

>> MORGAN WILLIAMS: Driving. Any others? If you are an employer and you're writing these job descriptions for your employee reading a job description and you come across qualification standards anything to yourself this is going to tend to screen out people with certain things, you need to ask yourself why does this person need to lift 50 pounds? Is it because they need to lift boxes in an assembly line? That's my first question. The second one is does this person have to do this as part of their job? If the answer is yes then my third question is can this person accomplish this task through a reasonable accommodation. That is the distinction between qualification standard and an essential job function. What about office presence? Do we think that is essential job function or a qualification standard? I might argue that it is called something different. Who thinks qualification standard? Who thinks reporting to the office is a job function? Just raise your hand. Who thinks it's a job function? Who thinks it's a qualification standard that might screen people out? It may depend on the job. I would argue it is probably the location of the job function is done. There are accommodations that can be provided depending on the job to allow a person

with a disability cannot be screened out. To allow that person to perform essential functions perhaps from home. What is the PHRC seeing here? What the PHRC is seeing here are a lot of claims that working from the office is an essential function. Many of those claims are not associated with a corresponding job task. -- In an office setting which could be an essential function of let's say a medical professional's job. So, what we are seeing is working from the office and being labeled as an essential function. We are seeing employees that have been able -- it is still here but has evolved, let's say. Now the employer is looking to have people come back. And we have put a lot of things in place, job being capable of being done from home. The landscape of where you need to do your job has changed. We are seeing technology that exists now that either was not widely available or was not utilized prior to the pandemic. Employees are able to get a lot more creative on how they can do their jobs. They have also grown accustomed to working from home and perhaps they have seen as mentioned the benefits of working from home for that person's disability. We are also seeing employers that are not exhausting all of the resources available to them before they make decisions not to accommodate people. AG Martin, we are going to give you resources. One of them being the job assistance network and the other being the office of vocational rehabilitation, of ER. I would argue an employer has not done enough until they reach out to these entities. We are seeing a lot of the slippery slope arguments. If I allow this employee to work from home and accommodate their disability all of their fill in the blank job description, job title employees will want to do the same. So, we see the slippery slope arguments. And we are seeing how much employees, who have greatly benefited from the ability to work from home. And so that is what I think the PHRC is seeing. I will turn it over to examiner Martin now. To discuss case examples.

>> DARLENE HEMERKA MARTIN: Yeah, so one case I want to talk about is a case that we had at PHRC. And I was the hearing examiner for the case and drafted the recommendation for the commissioners. Involving an employee who worked for a state agency and was given a job. She had the job prior to the pandemic. And was reporting to work five days a week. The pandemic began and all employees were sent home. And while working from home she was promoted. And when the agency began asking employees to return to work, she requested a reasonable accommodation to be able to continue to work remotely. One of the arguments that lawyer made was that it was office policy that employees would return to work on a hybrid schedule. And then the other argument the employer made was that there were certain, I guess it wasn't an argument in their written materials but essential functions on the job description would have had to be done in person. However, through the testimony, it was found out that no one in that particular job had performed those tasks for the entire year. Also, it was found out through the hearing that HR never spoke to the employee about specifically what she did throughout the day but also never spoke to the employee supervisor about if there were certain tasks that had to be reassigned because this person was working from home or if there is any impact on productivity of the office. And so, I want to caution everyone. With regard to job descriptions. Even if it is in the job description make sure you talk to the employee as part of the interactive process to find out if it is something they actually do on a regular basis. It is also important to talk to supervisors and not just HR because at least in this particular example the HR individuals did not know what that person did on a regular basis. They just looked at the job description but again, no one had asked the individual with a disability or supervisor whether these functions or tasks had to happen and it came out that no one, not just the individual requesting the accommodation but anyone with the job title. I think it's a good example

of the kinds of questions employers should be asking throughout the interactive process. That's why we have the interactive process. About whether this person could report to the office on a quarterly basis. But again, that question was really raised during the interactive process. When you think about potential solutions in the interactive process, it could also be, yes this is what the person requested but, maybe it's not work from home every day or maybe they do have to report to the office quarterly but not weekly. I just really encourage folks to get creative and I will say they were awarded more than \$70,000 worth of damage. There are cases on appeal so we are waiting to see if the Commonwealth Court will affirm the decision. Now, to get you thinking as well, either put in the chat or shout out examples of technology that is available in 2025 that maybe wasn't available or widely utilized that allows working from home. Teams, jobs.

>> MORGAN WILLIAMS: What's - - for those I don't know?

>> SPEAKER: A screen reader software you can install on your computer, for those who are visually impaired to be able to navigate their computer.

>> DARLENE HEMERKA MARTIN: Just in case those online missed the beginning, the audience number was describing what was jaws. It was also brought out in a particular case that the employer had given employee laptops now so every employee now had laptops and I know that the PHRC has done that for its employees. Something we are seeing a lot more of. Folks now have their own individual laptops that they can bring to and from the office. Anything else in terms of technology that is enabling people to work from home? Electronic signatures. Remote facts. With that, we will take questions.

>> SPEAKER: Less of a question, more of a comment, there are three of us in our office, I'm the only one that doesn't speak Spanish. It was on a requirement when she was hired however, it is an essential function of her job and it is also possible that she is someone who could work from home. But I can see how there is a discriminatory quality of hiring folks who speak Spanish and not paying them for Spanish-speaking when we are counting on them to do that for their job. Using that as a prerequisite for now, you can't work from home. Because we need you in the office to speak Spanish because 50 percent of our clientele speak Spanish. I thought I would throw that out to confuse everybody in the room. But it's interesting that I hadn't thought about that piece of it until we talk about the possibility of working from home and then the assumptions - - that we are saying are essential. Until they ask a question about can I work from home? And we think no, because unless you're in the office who will do this function?

>> DARLENE HEMERKA MARTIN: Are there questions in the chat? That's more of a comment.

>> SPEAKER: There was a comment that the PA office of rehabilitation is a resource for those that need accommodation assistance with their employee or employer. So, I wanted to highlight that.

>> MORGAN WILLIAMS: Oh, VR has blind visual services that I encourage folks to use as well. I mentioned this earlier as part of our presentation but I think that an employer has not exhausted all options unless they thought about these resources. And that should be done as part of an interactive process. We can reach out to folks like oh VR to see if they know of any technology that might help people to work from home. There may be barriers for people with disabilities that exist

from working from home. Perhaps even technology that needs to be put in place to help them or facilitate work from home. Does anyone else have any other questions? Thank you.