AG

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2013-0461, Dartmouth Hitchcock Medical Center v. Patricia Gould, the court on April 10, 2014, issued the following order:

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm.

The appellant, Patricia Gould, appeals an order of the superior court vacating a decision of the New Hampshire Human Rights Commission (HRC) that the appellee, Dartmouth-Hitchcock Medical Center (DHMC), discriminated against Gould. See RSA 354-A:7, VII (2009). She contends that the trial court erred by: (1) applying a de novo standard of review under RSA 354-A:22 (2009); (2) concluding that DHMC provided her with reasonable accommodations; and (3) determining that DHMC did not have a duty to engage in an interactive process with her.

We first address whether the trial court applied an incorrect standard of review. Gould argues that the trial court erred by not presuming that the HRC's findings were lawful or reasonable. Even if we were to assume, however, that RSA 354-A:22 requires that the trial court presume that the HRC's findings are lawful or reasonable, the record in this case reveals that the trial court did not reject the HRC's findings of fact. Indeed, it relied entirely on uncontested facts in the HRC record, and, in particular, on Gould's testimony. Cf. Franklin Lodge of Elks v. Marcoux, 149 N.H. 581, 584 (2003) (noting that because appellant did not challenge HRC's factual findings, trial court reviewed only issues of law).

However, it disagreed with the HRC's application of the law to those facts, concluding that: (1) "[t]hese facts do not support the conclusion that DHMC failed to properly accommodate Gould"; and (2) "[b]ecause Gould asked for specific relief and DHMC furnished her with the specific relief that she requested, . . . DHMC was not required to engage in a further interactive process with Gould." Whether an accommodation provided by an employer satisfies RSA 354-A:7, VII is a question of law. Cf. Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 967 (10th Cir. 2002) (whether employee request constitutes reasonable accommodation satisfying Americans with Disabilities Act (ADA) is mixed question of law and fact involving primarily legal principles and is thus reviewed de novo); Carter v. Bennett, 840 F.2d 63, 64-65 (D.C. Cir. 1988) (whether government employer provided "reasonable accommodation" for employee's disability under Rehabilitation Act constituted mixed question of law and fact,

and legal conclusion that employer's actions were adequate "is subject to more rigid appellate scrutiny").

Even under the standards of review advocated by the HRC and Gould, the trial court is not required to defer to the HRC's application of law to fact. Cf. Golf Course Investors of NH v. Town of Jaffrey, 161 N.H. 675, 682 (2011) (while trial court is required to defer to zoning board of adjustment's factual findings, it is not required to defer to board's legally erroneous conclusions of law). Accordingly, even if the trial court erred by interpreting RSA 354-A:22 so as not to require a presumption of lawfulness or reasonableness with respect to the HRC's findings, its error was harmless. See Kessler v. Gleich, 156 N.H. 488, 494 (2007) (declining to reverse where purported error did not affect outcome).

We next address Gould's challenges to the trial court's legal conclusions that DHMC: (1) provided reasonable accommodation and (2) bore no obligation to engage in an "interactive process." We review the trial court's application of the law to the undisputed facts de novo. See 38 Endicott St. N. v. State Fire Marshal, 163 N.H. 656, 660 (2012) (applying State right-to-know law). We look to federal law to aid in our analysis. See Madeja v. MPB Corp., 149 N.H. 371, 378 (2003) (looking to cases developed under Title VII to analyze RSA chapter 354-A (2009)). Absent any communications from an employee regarding the inadequacy of her accommodations, an employer cannot be held responsible for either a breakdown in the interactive process or for failing to correct an inadequate accommodation because it was not made aware that a deficiency existed. Enica v. Principi, 544 F.3d 328, 340 (1st Cir. 2008).

In this case, the HRC record establishes that: (1) in response to Gould's request to work the evening shift as an accommodation to her disability, DHMC scheduled her to work primarily on evening shifts; (2) Gould told DHMC that she could work either the morning or evening shift; (3) she agreed to work the morning shift when asked; (4) she never complained about working the morning shift; and (5) she did not ask for any additional accommodation. In addition, when Gould asked to be assigned to the evening shift due to her disability and her supervisor suggested that she visit DHMC's Occupational Medicine department to ensure that her disability did not prevent her from performing her job, she declined to do so. In fact, she subsequently told DHMC, in writing, that "[m]y feet . . . have never kept me from performing my job" and "I actually can do any shift."

Regardless of whether these statements were true, she did not make DHMC aware that any deficiency existed in her accommodations. As a result, DHMC had no way to know that the accommodations it had provided were inadequate. Without that knowledge, it cannot be faulted for not doing more. See Ekstrand v. School Dist. of Somerset, 583 F.3d 972, 975-76 (7th Cir. 2009) (employee must present evidence that she attempted to engage in interactive

communication with employer and that employer was responsible for any breakdown in process). Thus, we agree with the trial court that "these facts do not support the conclusion that DHMC failed to properly accommodate Gould."

Affirmed.

Dalianis, C.J., and Hicks, Conboy, and Lynn, JJ., concurred.

Eileen Fox,
Clerk

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