

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
NORFOLK LOCAL OFFICE**

----- X  
DR. ELIZABETH KOSTAL, :  
 : EEOC Charge No.:  
 Claimant, :  
 : **SUPPLEMENT TO CHARGE OF**  
 v. : **DISCRIMINATION**  
 :  
 SOUTH UNIVERSITY OF VIRGINIA – :  
 MEMBER, LLC and SOUTH :  
 UNIVERSITY OF SAVANNAH, LLC :  
 Respondent.  
-----X

Claimant Elizabeth Kostal (“Claimant” or “Dr. Kostal”), hereby alleges through her counsel, Wigdor LLP, as against Respondents South University of Virginia–Member, LLC and South University of Savannah, LLC (collectively “South University” or “SU”), as follows:

**PRELIMINARY STATEMENT**

1. When Respondent South University ordered all employees back on campus in April 2021 (despite not asking students to do the same), Dr. Kostal—with her severe lung and heart conditions,<sup>1</sup> a pacemaker and ineligibility for the COVID-19 vaccine—was extremely concerned. However, she knew that the Americans with Disabilities Act (“ADA”) protected people with disabilities like hers, so she requested permission to continue to teach remotely (as she had been doing successfully for over a year) as a reasonable accommodation and provided the necessary medical documentation.

2. Respondent South University quickly denied her request less than 24 hours later. In doing so, the University informed Dr. Kostal that it was not approving COVID-19-related

---

<sup>1</sup> Individuals with lung disease, heart conditions and weakened immune systems are more likely to experience severe complications, including death, from COVID-19. See CDC, Covid-19: People with Disabilities, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html> (last visited July 7, 2021).

accommodation requests for her or for anyone.

3. Faced with the decision to either risk her own life or the financial stability of herself and her family, Dr. Kostal made the impossible choice to capitulate to the University and work from campus. She double-masked, shut her office door and lectured anywhere from two to four hours to students who were still remote, only taking the masks off to eat and drink in her car during the day. She did so while surrounded by nursing students and faculty who shared the building and who were exposed to COVID-19 patients on a daily basis. Moreover, because of her various medical conditions and pacemaker, the effect of lecturing for that long while double-masked caused Dr. Kostal's heart to skyrocket to 150 beats a minute for the duration of the lecture, leaving her exhausted, dizzy and with the terrifying knowledge that she might have just damaged her heart even more.

4. Five weeks later, and only because they were faced with the threat of litigation over this anti-accommodation, anti-disability policy, did South University grant Dr. Kostal a 30-day temporary accommodation, while signaling that they would not continue this accommodation for much longer. The University said nothing of those other employees whose accommodations were denied unlawfully and who have had to make the same impossible choice as Dr. Kostal: risk personal health or financial ruin.

5. Unfortunately, South University is only compounding a problem that has created difficult working conditions for those with disabilities. The COVID-19 pandemic has already disproportionately affected individuals with disabilities—a protected class of individuals who represent over 25 percent of adult Americans.<sup>2</sup> Per a recent medical article:

The Coronavirus Disease 2019 (COVID-19) pandemic has killed

---

<sup>2</sup> CDC, Disability and Health Promotion: Disability Impacts All of Us, <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html> (last visited July 7, 2021).

many people globally and has radically changed the ways of life for many others. While politicians frequently comment that COVID-19 does not discriminate, our underlying social structures and systems mean some groups are more at risk in a pandemic context and are therefore more affected than others. This is particularly the case for people with disability, in part because they often have poorer health outcomes relating to underlying conditions, but more significantly due to discriminatory issues . . . .

Sophie Yates & Helen Dickinson, Navigating Complexity in a Global Pandemic, Public Admin. Rev. 2021 Mar 29;10.1111, <https://doi.org/10.1111/puar.13352> (emphasis added).<sup>3</sup>

6. Before the COVID-19 pandemic, the unemployment rate for individuals with disabilities was 7.3 percent. Since the COVID-19 pandemic hit, however, that number has nearly doubled.<sup>4</sup> Employers cannot be allowed to disregard COVID-19-related disabilities and the requirements of the ADA as workplaces go back to in-person work, or those unemployment numbers will only increase further. Some semblance of normalcy may be returning for the majority. But for those with severe pre-existing conditions, who cannot be vaccinated, life may not be fully

---

<sup>3</sup> See also Karen Weintraub & Jayne O'Donnell, COVID-19 Is a Disaster for People with Disabilities. Without 30-Year-Old Law, It Would Be Worse., USA Today (July 26, 2020, 7:00AM), <https://www.usatoday.com/story/news/health/2020/07/26/ada-turns-30-covid-hits-those-disabilities-especially-hard/5490448002/> (“This is another example of a very powerful way that the ADA is an important tool to stop some of the most insidious discrimination – literally discrimination that will have an impact on will you live or will you die” (quoting Alison Barkoff, Director of Advocacy for the Center for Public Representation)); Allison Norlian, Workers With Disabilities Disproportionately Impacted By Covid-19 Pandemic, Forbes (June 22, 2020, 9:37AM), <https://www.forbes.com/sites/allisonnorlian/2020/06/22/workers-with-disabilities-disproportionately-impacted-by-covid-19-pandemic/?sh=487685d61ad1> (“It’s the same story for workers with disabilities across the United States, many of whom were laid off, furloughed or forced to stop working because of the health implications associated with catching Covid-19. Making matters worse: when it comes to unemployment, those same individuals were already disproportionately represented in the labor market before the pandemic began.”); Nicole Baumer, The Pandemic Isn’t Over — Particularly for People with Disabilities, Harvard Health Publishing (May 25, 2021), <https://www.health.harvard.edu/blog/the-pandemic-isnt-over-particularly-for-people-with-disabilities-202105252464> (“The COVID-19 pandemic has greatly disrupted everyone’s lives. Clearly, its effects varied considerably for people of different races, ethnicities, and income levels. But what has been its impact on people with disabilities? . . . Ongoing harms caused by the pandemic have been especially evident for people with disabilities. Disruptions in education, employment, health care, and social services have been amplified.”); Tyler Edwards, Coronavirus: Disabled ‘Pushed Out’ of Post-Lockdown World, BBC News (Sept. 5, 2020), <https://www.bbc.com/news/uk-wales-54029551> (disability equality charity, Scope, “said disabled people had been ‘routinely forgotten’ in the pandemic”).

<sup>4</sup> Bureau of Labor Statistics, News Release, Persons with a Disability: Labor Force Characteristics – 2020, <https://www.bls.gov/news.release/pdf/disabl.pdf> (last visited July 7, 2021).

returned to normal for years. These Americans cannot and should not be left behind by society.

7. At its core, the ADA helps ensure that people with disabilities will be afforded and treated with a level of respect and dignity in the workplace. South University, in refusing to accommodate Dr. Kostal and others during this difficult time, have turned its back on those who require the support of their employer more than anyone else.

### **PARTIES**

8. Claimant Elizabeth Kostal, M.D. currently resides in the State of Virginia. At all relevant times, Dr. Kostal met the definition of an “employee” under all applicable statutes.

9. Respondent South University of Virginia–Member, LLC is a private university formed pursuant to the laws of Virginia. South University of Virginia–Member, LLC’s principal place of business is Virginia Beach, Virginia.

10. Respondent South University of Savannah, LLC is a private university formed pursuant to the laws of the State of Georgia. South University of Savannah, LLC is the sole member of South University of Virginia–Member, LLC. South University’s principal place of business is in Savannah, Georgia.

### **FACTUAL ALLEGATIONS**

#### **I. Dr. Kostal’s Hire at South University**

11. Dr. Kostal is a clinically trained doctor with an additional master’s degree in Nutrition and Human Performance. She is currently in the publishing stage after a four-year Clinical Research Fellowship within the Department of Neuroendocrinology & Metabolic Disorders at Eastern Virginia Medical School.

12. South University hired Dr. Kostal in October 2019 as its Academic Program Director, Public Health and Health Sciences, South University College of Nursing and Health

Sciences, and Associate Professor, Nursing and Health Sciences.

13. She has taught courses in Human Gross Anatomy, Human Physiology, Human Pathophysiology, Epidemiology, Chemistry and Clinical Nutrition, for which she received excellent ratings from her supervisor, Dr. Donald Johnson, and her students, despite teaching virtually for the majority of her tenure due to the COVID-19 pandemic. (*See Exs. A-B*).

## **II. The Powerlessness of the COVID-19 Health and Safety Committee and SU's Push to Reopen at Any Cost**

14. At the beginning of the pandemic, SU established both a COVID-19 Task Force (headed by Steven K. Yoho, PhD, Chancellor of SU) and a Health and Safety Committee (the "Committee").

15. The Task Force handled "collective decision-making regarding phases . . . , communication strategy, and implementation, including planning, training, safety precautions, supplies, and technology."

16. The Committee's goal was purportedly to advise the Task Force "utilizing CDC Guidelines, research, and collective experience in the treatment and prevention of infectious diseases."

17. As the Academic Program Director for Public Health and Health Sciences, Dr. Kostal was a natural choice to participate on the Committee.

18. As a member of the Committee, Dr. Kostal observed that Dr. Yoho has been in a rush to reopen almost since the beginning of the pandemic, attempting to reopen twice—once in July and a second time in December 2020—only to be thwarted by rising COVID-19 rates.

19. On both occasions, the Committee recommended against reopening. Dr. Yoho initially ignored their guidance (which was based on science) and only capitulated when the rate of infection continued to increase (and Dr. Yoho had no other choice).

20. No doubt wishing to avoid the frustration of these prior failed attempts, Dr. Yoho insisted that the next reopening would be a “hard stop,” with no exceptions made for anyone to continue to work remotely.

21. Accordingly, Dr. Yoho ordered SU employees—but not SU’s tuition-paying students—back onto campus as of April 19, 2021.

22. The arbitrariness of this decision is on full display in the reopening announcement made on February 18, 2021. (*See* Ex. C).

23. Even though SU had prematurely announced a reopening on two prior occasions, Dr. Yoho decided to release this announcement a full *two months* before the date of projected reopening.

24. Moreover, while giving lip service to the ADA, the letter announced flatly that “we have permitted exceptions to the general requirements based on the CDC guidelines to assist our faculty and staff with childcare needs. These approvals will end on April 18, 2021 as we move forward with bringing all staff and faculty back on-campus April 19, 2021.” (*Id.*).

25. It is hard not to grasp from this announcement, first, that SU considers it a matter of grace to take public health measures to protect its employees’ health, and second, that it intended to push forward with reopening at any cost, including to its employees’ health, in order to improve its economic bottom line.

26. Dr. Yoho and SU’s management have succumbed to a fallacy in believing that, just because infections are down and a portion of the Virginia population is vaccinated, COVID-19 is no longer a health risk for those individuals with underlying conditions and/or who cannot be vaccinated. Dr. Kostal is one of those individuals.

### **III. Dr. Kostal's Preexisting, Severe Disabilities**

27. Dr. Kostal has asthma with a history of severe bronchitis, dilated cardiomyopathy, superior vena cava syndrome, pacemaker implantation and sick sinus syndrome.

28. All of these conditions and, particularly, the last disability greatly affect her ability to (1) breathe, and (2) wear a mask for long periods of time.

29. Moreover, because of previous adverse reactions to vaccination, Dr. Kostal cannot receive the COVID-19 vaccine.

30. Individuals with sick sinus syndrome essentially have no SA node (sinoatrial nodal function in the heart).

31. The SA node is the natural pacemaker of the heart and drives the heart rate.

32. In addition, it is essentially where one obtains chronotropic ability—the ability of the heart rate to increase with increased demand, or its timing.

33. Chronotropic demand will increase the heart rate and consequently blood pressure when transitioning from sitting, to standing, to running, etc.

34. Dr. Kostal's heart does not have either ability, so, at age 24, she received her first pacemaker and subsequently a full superior vena cava reconstruction under hypothermic circulatory arrest in December of that same year.

35. Dr. Kostal relies on her pacemaker to act as the SA node, as well as to allow her to have some semblance of chronotropic function via algorithms downloaded into the device.

36. Unlike a healthy individual, when Dr. Kostal speaks while wearing a mask, her respiratory rate increases.

37. Due to an increased respiratory rate, she also expels more carbon dioxide ("CO<sub>2</sub>") into her mask when compared to a healthy individual.

38. CO<sub>2</sub> is an acid and so, in terms of acid/base balance, Dr. Kostal begins to breathe in and retain more CO<sub>2</sub> as she continues to speak.

39. When this happens, she is creating an acid/base imbalance known as respiratory acidosis.

40. The natural correction for this would be for Dr. Kostal's heart rate and respiratory rate to increase so that she could essentially expel more CO<sub>2</sub> back into the atmosphere, making herself more alkaline.

41. Dr. Kostal's pacemaker and the mask, however, do not allow for the natural corrective process.

42. Moreover, Dr. Kostal's heart rate—which is controlled by the pacemaker—is based upon a small number of algorithms.

43. She has an accelerometer, which is based upon vibration and positional awareness, and a minute ventilation sensor, which calculates thoracic impedance in her lungs (the volume of air that goes in and out).

44. When Dr. Kostal speaks for lengthy periods with a mask on, however, the algorithms essentially misinterpret the data it receives and increases her heart rate to 150 beats per minute—which is the max setting on the device currently.

45. There is nothing that Dr. Kostal can do to change this.

46. This unhealthy increase in heart rate, of course, feeds upon itself and causes her respiratory rate to increase even more, which causes even more retention of CO<sub>2</sub>, thus creating a positive feedback loop.

47. This is extremely dangerous to Dr. Kostal's health.



#### **IV. Dr. Kostal's Request for a Reasonable Accommodation Due to her Increased Risk of Death from COVID-19 and South University's Illegal, Discriminatory Denial**

48. Of course, Dr. Kostal knew immediately that returning to campus—and having to lecture for two hours or more with two masks on—would be dangerous.

49. Even working remotely, the COVID-19 pandemic has kept Dr. Kostal in constant fear for her life.

50. Thus, on April 15, 2021, Dr. Kostal submitted a disability accommodation request signed by her doctor, Jon Grammes, to SU's Human Resources department ("HR").

51. The form asked Dr. Grammes whether Dr. Kostal "has an impairment that substantially limits one or more major life activities or a record of such impairment."

52. In response, Dr. Grammes marked the box indicating "yes." He also indicated that "the impairment substantially limit[s] a major life activity as compared to most people in the general population" and marked "breathing" as the major life activity.

53. Finally, Dr. Grammes explained that "[v]accination has not been recommended for this patient due to previous adverse reactions."

54. For these reasons, Dr. Grammes wrote that "Dr. Kostal represents a high-risk category for life threatening complications" from COVID-19 infection, and that she should thus continue to work from home "until risk is fully mitigated." (*See Ex. D*).

55. Dr. Grammes' conclusion—that Dr. Kostal should be permitted to teach from home—is not surprising.

56. The CDC, for example, explicitly lists both asthma and cardiomyopathies—two of Dr. Kostal's chronic conditions—as conditions that are more likely to cause severe illness from

complications with COVID-19.<sup>5</sup>

57. HR's response came less than 24 hours later without any interactive process or discussion.

58. The contents of this letter, sent by Hilary Donahoe, Senior Benefits Administrator of HR, are astounding in their callous, bureaucratic disregard for the life of a valued—and beloved—employee.

59. First, the letter wrongly determined that Dr. Kostal did not have a disability: “your form did not outline a disability consistent with an approval for remote working conditions.” (*See* Ex. E).

60. Asthma and chronic heart conditions, however, would have qualified as ADA disabilities even in normal times. During the COVID-19 era, in particular, a pre-existing condition that increases the risk of complications with COVID-19 is an obvious disability.

61. Second, the letter outright admitted that SU gave no serious consideration to the accommodation request, but summarily denied it due to a blanket policy against accommodations: “Please note that remote working approvals are no longer being issued to mitigate the risk of COVID19.” (Ex. E).

62. In submitting her request, Dr. Kostal was not just trying “to mitigate the risk of COVID19.” Dr. Kostal's request came from a desire to preserve her life.

63. Third, the letter outright admitted that SU was not only denying Dr. Kostal's request but also had denied every previous accommodation request brought by other employees:

Your approval for remote working conditions will end along with all COVID19 South University granted remote work approvals on 4/18/2021 to remain consistent with the faculty and staff members

---

<sup>5</sup> CDC, People with Certain Medical Conditions, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last visited July 1, 2021).

who have been evaluated under the ADA for the campus return taking place on 4/19/2021.

*(Id.)*.

64. Finally, as though aiming to pack as much disregard and insult as possible into the one-page letter, Ms. Donahoe closed by referring Dr. Kostal to the “Return to Campus Staff and Faculty Guidelines” —that Dr. Kostal had herself helped author—without any acknowledgment of that fact. *(Id.)*.

65. Dr. Kostal was distraught by SU’s decision. She responded:

What you are essentially now asking me to do is to make a decision, that either way, bears a negative outcome. You are asking me to determine for my family whether my actual physical health is more important than my financial health and potentially vice versa.

*(See Ex. F)*. Dr. Kostal also referenced the Department of Justice as her next step.

66. Attuned to the threat of legal action, Cathy Girardeau, Director of HR, stepped in to argue with the opinion of Dr. Kostal’s treating physician and Dr. Kostal—a clinically-trained doctor and public health professor, respectively.

67. Ms. Girardeau’s response bears close analysis since, in its attempt to find a legal justification to head off Dr. Kostal’s threat of legal action, it inadvertently revealed the absolute lack of any legal foundation for SU’s actions.

68. The letter begins: “We understand your position, but point out we have accommodated you and others with remote work opportunities for over one year during the pandemic.” *(See Ex. G)*.

69. Of course, the general closing of American society, including all higher education institutions, was not an ADA “accommodation,” it was a public health response mandated by state authority, under the guidance of the CDC.

70. Ms. Girardeau then attempted to build SU's case that granting Dr. Kostal's request would make it impossible for her to fulfill certain job functions: "In our view, you cannot adequately perform the full spectrum of job duties contained in your job description via remote work, including partnering with Campus leadership, admissions, and academic staff."

71. Faculty members, however, had been remote teaching for over a year without issue, and students continue to learn from home.

72. SU also did not explain in any way how remote work would make it impossible for Dr. Kostal to partner with "leadership, admissions, and academic staff." The statement was not only vague, but it also verged on an outright lie, since all meetings continue even now to be held by video, including meetings held by Dr. Yoho. For instance, as recently as May 13th, Dr. Yoho sent SU faculty an invitation to a "virtual town hall." (*See Ex. H*).

73. It is hard to credit that Dr. Kostal would be unable to interact with "leadership" or "the community" virtually when the community's leadership continues to hold all meetings virtually.

74. A video call from campus is the same for all intents and purposes as a video call from off-campus.

75. Next, Ms. Girardeau wrote, "you cannot effectively work remotely while promoting your program in the community, especially under circumstances where state and local government have eased COVID restrictions and our business partners have returned to the workplace in person."

76. Again, these community outreach communications have been held remotely for over a year without issue and, even now, continue via video call.

77. Finally, Ms. Girardeau quoted the Equal Employment Opportunity Commission's

(“EEOC”) guidance for granting telework as a reasonable accommodation after reopening, highlighting the essential function argument, but ignoring the rest, which states:

The fact that an employer . . . chose to permit telework, does not mean . . . that telework is always a feasible accommodation, or that it does not pose an undue hardship. **These are fact-specific determinations.** The employer has no obligation under the ADA to refrain from restoring all of an employee’s essential duties at such time as it chooses to restore the prior work arrangement, **and then evaluating any requests for continued or new accommodations under the usual ADA rules.**

(*Id.* (emphasis added)).

78. The guidelines only say that an employer need not *necessarily* grant telework going forward, which has always been the rule under the ADA.

79. The guidelines do not suspend the usual rules for evaluating a reasonable accommodation request or justify the blanket denial of all such requests (nor could they, absent an act of Congress).

80. Indeed, the guidance stipulates the exact opposite of SU’s approach, by requiring that all such requests continue to be given fair, individualized consideration.

81. And, more importantly, in-person attendance is simply not an essential function of Dr. Kostal’s job. (*See Ex. I*).

82. As evidenced by the last year and three months, everything that was done in person can easily be done remotely.

83. Dr. Kostal’s students continued to report in their reviews that they find Dr. Kostal to be both brilliant as a lecturer and supportive as a mentor. (*See Ex. B*).

84. Indeed, in a review completed just this last February, Dr. Kostal’s supervisor, Dr. Donald Johnson, gave her an “exemplary” rating, the highest possible, in his assessment of Dr. Kostal’s effectiveness and classroom management.

85. In particular, he wrote: “[I] want to say that I have seen so many students applaud Dr. Kostal’s class and how much she has helped them in these very difficult science courses.”

86. Dr. Johnson likewise rated Dr. Kostal as “exemplary” in her delivery of content, writing, “Dr. Kostal has received so many laudable comments from students in her class. All of her students respect and are better served by having her as a faculty member.” (*See Ex. A*).

87. Moreover, SU has long experience with distance learning.

88. As part of its course offering, it has, for several years, offered online classes to attract working professionals.

89. In this profitable context, SU boasts to prospective students that “our faculty will hold you to the same high standards of academic excellence that we have for all South University students.”<sup>6</sup>

90. At least when it is profitable and convenient for SU, the University has no problem holding out to the world that it sees no difference between its in-person and its online courses.

91. Because online learning is so woven into the identity of SU, Dr. Kostal already owns a sophisticated studio, replete with commercial-grade internet access and a lectern, that she uses to hold remote class and ad hoc study sessions.

92. SU in general, and Dr. Kostal, in particular, is well adapted to online teaching.

93. Almost absurdly, Ms. Girardeau finished her letter by saying: “We are willing to make the accommodation for you to teach your courses virtually for the remainder of this term from the campus.” (*Ex. G*).

94. As discussed above, this is not an accommodation, it is simply a reiteration of SU’s

---

<sup>6</sup> South University, Online Student Experience, <https://www.southuniversity.edu/online/student-experience> (last visited July 7, 2021).

current instruction to all teachers to return to campus.

95. This “accommodation” is also meaningless, as no on-campus lectures are taking place within Dr. Kostal’s department, and all lectures are by video anyway.

#### **V. South University Forces Dr. Kostal to Return to Work, at Great Risk to Her Life**

96. After SU’s rejection of her request for an accommodation, Dr. Kostal appealed to Dr. Johnson and her Department Chair, Dr. Jason Robertson, for help advocating her position.

97. They did so—of course, via video—to Dr. Brian McAuley, who relayed the information to Dr. Yoho.

98. In response, Dr. Yoho made no attempt to maintain any pretext that Dr. Kostal’s request had been given its legal due, and simply decided that he could not make an exception for Dr. Kostal.

99. In particular, it was said that the University was worried about “opening Pandora’s box,” and that, if an exception was granted for Dr. Kostal, then many other exceptions would have to be made as well.

100. Dr. Johnson then pressed Ms. Donahoe on how many accommodation requests had been granted to date.

101. Ms. Donahoe admitted that none had been granted.

102. Again, these responses reiterate SU’s illegal, one-size-fits-all approach to accommodation requests.

103. Dr. Kostal, finally, was left with no choice. In order to keep her career and her job, she was forced to return on April 19, 2021, and run the extreme risk to her health posed by being in the workplace.

104. Dr. Kostal was forced to lecture in her office with her door closed while wearing

two masks.

105. Outrageously, her office was situated near the housing for nursing faculty and nursing students, who come into daily contact with COVID-19 patients.

106. On campus, she regularly encountered students and colleagues walking around without masks or without proper mask usage, including many who are working with individuals infected with COVID-19.

107. For instance, a favorite student of Dr. Kostal's walked up behind her to give her a hug, ignoring all social distancing requirements.

108. Accordingly, for fear of infection, Dr. Kostal was unable to remove her masks during the day, even while in her office, making it impossible to eat, drink or even use the bathroom.

109. To drink, she was forced to go to her car where she kept a water bottle, or otherwise end the day dehydrated.

110. She has been, and still is, suffering with intense physical and psychological effects due to SU's violation of the law.

## **VI. South University's Most Recent Actions with Respect to the COVID-19 Pandemic Prove Its Continued Disregard for Employee Health and Applicable Law**

111. Though circumstances may be more promising than in July or December, wishful thinking cannot end a pandemic. As of the date of this complaint, only approximately 50 percent of the population of Virginia is fully vaccinated.<sup>7</sup>

112. And, as with all vaccines, the COVID-19 vaccines cannot prevent all outbreaks.

113. For example, on May 4, 2021, a fully vaccinated faculty member working in one

---

<sup>7</sup> See Virginia Dep't of Health, COVID-19 Vaccine Summary, <https://www.vdh.virginia.gov/coronavirus/covid-19-vaccine-summary/> (last visited July 7, 2021).



of SU's labs tested positive after coming to work.

114. She exposed over 40 individuals to COVID-19. Had Dr. Kostal been exposed to this individual, she could have died.

115. Gina Scarborough, Dean of the College of Health Professions and the head of the Committee, ordered that anyone who had been in contact with the infected person should quarantine, but added "I am not sure how HR is handling employees in this situation." (*See Ex. J*).

116. In other words, Ms. Scarborough was unable to require medical quarantine for employees without the approval of HR—non-medical bureaucrats with a known institutional interest in arbitrarily keeping employees on campus.

117. Then, on May 25, 2021, the Committee voted, four versus two, to end social distancing and lift the mask mandate for both vaccinated and non-vaccinated individuals on campus (Dr. Kostal and one other person voted against).

118. This will all be done via the honor system, as SU is not collecting vaccination information from employees or students, even after multiple members admitted that many were not even complying with current COVID-19 protocols.

119. That same day, Ms. Scarborough also admitted to Dr. Kostal that at least one SU campus was allowing its (non-disabled) faculty to work from home during mandatory quarantine periods:

It is not official but one of the campus presidents requested leniency for allowing work remotely due to isolation, HR allowed the campus to make the decision. That being said, it is certain that HR will not allow workers to continue working entirely remotely. You did not hear it from me [smiling emoji]

(*See Ex. K*).

120. Of course, employees with disabilities are not given the same consideration.

## **VII. Dr. Kostal Defends Her Right to Accommodation and Faces Retaliation**

121. On May 27, 2021, facing intolerable working conditions, Dr. Kostal, through counsel, sent a letter to Dr. Yoho and South University, outlining the egregious disability discrimination she had faced to date.

122. Almost immediately, SU, through its counsel, conceded that it would be reasonable to allow Dr. Kostal to continue working remotely until June 4, 2021. In further correspondence dated June 4, 2021, SU granted Dr. Kostal an accommodation for remote work until July 2, 2021. (*See Ex. L*).

123. In doing so, SU made three remarkable admissions. First, it admitted that everything any SU official had previously told Dr. Kostal was incorrect, by granting her remote work as an accommodation. Second, it once again signaled that it would not engage in an interactive process. Third, it showed a continued willingness to shape reality according to its wishes rather than according to facts. The letter is worth quoting directly to demonstrate its various admissions and veiled threats.

This letter is to revisit and clarify the response to your request for a reasonable accommodation to work remotely to perform the essential duties of your role as Academic Program Director for the Public Health program.

We have temporarily granted your request for remote working arrangements, to be re-visited and reconsidered every 30 days . . .

As the pandemic progresses, vaccinations increase, and cases decline. Restrictions have been fully lifted in the state of Virginia. From the standpoint of public health officials and government officials in Virginia, there are no impediments to employees returning to the workplace. The country is looking forward to reaching herd immunity in the near future with a 70% vaccination rate. Our president expects this to be reached as early as the 4<sup>th</sup> of July holiday, at which time we expect the US government to declare

the pandemic-related emergency over. According to published data, Virginia is expected to be at a vaccination rate of approximately 75% by early July 2021 . . .

For these reasons, we are willing to extend your remote working conditions as an accommodation for 30 days through 7/2/2021. At that point, we will re-evaluate your performance, the status of your medical condition, and the state of the pandemic with government and public health regulatory bodies . . . We are willing to consider extension of the 30-day periods of remote work dependent on guidance from public health and governmental authorities as well as your own medical providers.

Summer of 2021 is a critical time in program development. We are expecting to emphasize student recruitment and community involvement, which is key to the program director role. We also plan to transition more courses back to campus as students return, which will require in person student counseling and instruction.

If you wish to continue remote working conditions after 7/4/2021, we will require an updated medical inquiry form due by 6/29/2021 that also indicates your reasoning for being unable to be vaccinated. At that time, we may also consider you for teaching or non-managerial roles that may be better suited for working remotely.

(Ex. L).

124. The letter signals that SU will continue not to engage in an interactive process as required by applicable law. For instance, it does not set forth any detail about the functions of Dr. Kostal's job that require in-person presence, nor does it suggest any ways that those functions may be isolated or altered to reasonably accommodate Dr. Kostal's disability. Instead, it continues to speak in a dichotomy of full-time remote work or full-time in-person work.

125. It also makes no attempt to seriously engage Dr. Kostal's disabilities or consider how they might be accommodated. Thus, it simply continues to implement SU's policy of forcing its employees back to campus for all purposes and just as clearly does not comport with the requirements of the ADA.

126. To enforce its policy of in-person-or-bust, the letter retaliates against Dr. Kostal in

threatening to reduce Dr. Kostal's job responsibilities unless she returns to full-time in-person work.

127. In sum, the letter makes clear that, according to SU, the country will reopen on July 4, 2021, and that, if Dr. Kostal is left behind, it will be her own fault. This is exactly the sort of discriminatory, unfair treatment the ADA is designed to protect against.

128. Employers cannot be allowed to disregard COVID-19-related disabilities and the ADA because they wish to pretend the world is back to normal. Normalcy may be returning for the majority. But for those with severe pre-existing conditions who cannot be vaccinated, life may not be fully returned to normal for years. These Americans should not be left behind by society.

129. If SU goes unpunished, Dr. Kostal's experience will become a common one, with Americans with disabilities, at best, being forced to self-segregate, eat and drink in isolation and remain in constant fear of bodily harm and, at worst, be forced out of the workforce. In short, disabled Americans will become second-class citizens.