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EMPLOYMENT LAW

Technology Leads to Telecommuting as Reasonable Accommodation

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Special to the Legal

I attended a conference last week at which the general counsel of the U.S. Equal Employment Opportunity Commission, David Lopez, proclaimed that the recent U.S. Court of Appeals for the Sixth Circuit decision, *EEOC v. Ford Motor*, ___ F.3d ___ (6th Cir. Apr. 22, 2014), was in the commission's "zeitgeist." I believe what Lopez meant was the decision was, to the commission, an important recognition that telecommuting could be a reasonable accommodation under the Americans with Disabilities Act, based upon changes in how employees perform their jobs in the year 2014. The decision will, at a minimum, force both employers and courts to give more careful consideration to employee requests to work at home as a possible accommodation to a disability.

FREQUENT ABSENCES FROM WORK

Jane Harris worked as a resale buyer for Ford Motor Co., ensuring that there were no gaps in the company's



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steel supply chain. Harris suffered from irritable bowel syndrome, which caused her to lose control of her bowels, sometimes just by standing up from her desk. Harris worked from home on an ad hoc basis, but was marked absent from work on days when she was not in the office, according to the opinion. Harris' IBS symptoms worsened during the course of her employment, to the point where she was absent from her office more than she was present during the first part of 2009.

Ford considered Harris' attendance in the workplace an "essential function of her job" principally because it believed that the position required "group problem-solving," which included interaction "with

members of the resale team, suppliers and others in the Ford system when problems arose."

TELECOMMUTING REQUEST

In early 2009, Harris formally requested that she be permitted to work at home on an as-needed basis as an accommodation for her condition, the opinion said. Although Ford utilized a telecommuting policy that allowed employees to work from a "telecommuting site" up to four days a week, the company did not believe Harris' position could be successfully performed under this arrangement. Ford proposed alternative accommodations, including a desk closer to the bathroom and a transfer to a position that would be better suited to unpredictable absences. Harris rejected these options.

Harris filed a charge of discrimination in April 2009. As scrutiny of her employment increased, her performance diminished and she was terminated a few months later. Harris brought suit against Ford, claiming that she had been denied an accommodation under the ADA and had

been retaliated against for having filed the EEOC charge. The district court granted summary judgment to Ford and the commission appealed.

IS OFFICE WORK 'ESSENTIAL'?

The Sixth Circuit first addressed the failure-to-accommodate claim by considering whether Harris' regular attendance at Ford's offices was an "essential function of her position." The court went to great lengths to frame the issue as one of where Harris would be performing her work, as opposed to whether she would be permitted to simply not work on an as-needed basis. Courts have uniformly recognized that the latter would, of course, be unacceptable under even the most generous reading of the act.

But Harris provided evidence that she would be able to regularly work, but that her IBS, when active, would require that she do so from home. She stated that even when she was in the office, she did most of her work by email and teleconference and that if she were scheduled to meet with suppliers, she could postpone a meeting if necessary.

TECHNOLOGY CHANGES

The court observed that "when we first developed the principle that attendance is an essential requirement of most jobs, technology was such that the workplace and an employer's brick-and-mortar location were synonymous." The court went on to note that "as technology has advanced in the intervening decades ... attendance in the workplace can no longer be assumed to mean attendance at the employer's physical location. Instead,

the law must respond to the advance of technology ... and recognize that the 'workplace' is anywhere that an employee can perform her job duties."

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While Ford managers believed that face-to-face interactions were necessary to facilitate the group problem-solving inherent in the resale buyer position, the court found that "advancing technology has diminished the necessity of in-person contact to facilitate group conversations. The world has changed since the foundational opinions regarding physical presence in the workplace were issued: Teleconferencing technologies that most people could not have conceived of in the late 1990s are now commonplace."

FORD'S PROPOSAL REJECTED

The court also found that Harris was within her legal right to reject Ford's proposed accommodations. First, given that Harris' IBS could be triggered by as little as standing up, moving closer to the bathroom would not alleviate her issues. With respect to the proposal to find an alternate position, the court held that "reassignment of an employee is only considered when accommodation within the individual's current position would pose

an undue hardship." Inasmuch as the court found there to be an issue of fact as to whether Harris could perform the essential functions of her position, re-assignment was not to be considered.

The court concluded the discussion of the accommodation issue by noting that there remain many jobs requiring an employee's physical presence in the workplace. "We are merely recognizing that, given the modern state of technology, it is no longer the case that jobs suitable for telecommuting are 'extraordinary' or 'unusual.'"

It should be noted that, while the court emphasized how technology is changing the workplace, it specifically referenced only the 20-year-old technologies of email and conference-calling. There was no mention of even video conferencing, raising the question, in this matter, of just how technological advances had changed Harris' work environment.

Nevertheless, the case is sure to be considered whenever an employee seeks the accommodation of working from home. Employers and courts will have to consider more carefully the impact of technology and whether phone and email is a viable substitute for face-to-face workplace interaction. •