

PUBLICATION

Telecommuting: A New Trend of Reasonable Accommodation?

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Technology has transformed the workplace in almost every industry. The use of cellphones, laptops, tablets, videoconferencing and other electronic media has, in many cases, torn down the walls of traditional offices, and opened up a world where business can be conducted virtually anywhere at any time. While the conveniences created by technology have allowed businesses to grow and expand, advances in technology also keep employers on their toes, trying to navigate the sometimes murky waters of employment law.

On April 22, 2014, the U.S. Sixth Circuit issued an opinion in *EEOC v. Ford Motor Co.* (6th Cir. No. 12-2484), which highlights the ways in which technology has transformed the workforce to such a degree that being physically present in the workplace may no longer be necessary to meet the essential functions of the job. The ADA requires that all employers with 15 or more employees provide reasonable accommodation to qualified employees with disabilities in order to allow them to perform the essential functions of their jobs. In *Ford Motor Co.*, the issue was whether telecommuting four days a week was a reasonable accommodation for a Ford employee's irritable bowel syndrome. Ford argued that the employee could not meet the essential functions of her job as a resale buyer working from home, as those essential functions included interacting in person with her resale team, suppliers and others. The EEOC argued that if "physical presence" were eliminated as a job requirement, the employee would undoubtedly be qualified because of her prior positive performance reviews, and that working from home would provide a reasonable accommodation for her to perform satisfactorily in the position.

The district court agreed with Ford and ruled that the EEOC could not show that the employee was a "qualified" individual with a disability because the proposed accommodation wouldn't allow her to perform the essential functions of her job, including collaboration with her workplace team for which physical presence in the office was a necessity. However, the Sixth Circuit reversed, holding that Ford could not meet its burden of showing that physical presence at the workplace was an "essential function" of the employee's resale buyer position. While the court agreed that for many positions, "regular attendance at the workplace is undoubtedly essential," the court distinguished a line of preceding cases decided between 1998 and 2012 by acknowledging that as a result of technology, "workplace" may no longer be the "physical worksite provided by the employer." The court further noted that "as technology has advanced in the intervening decades, and an ever greater number of employers and employees utilize remote work arrangements, attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location." The court ultimately concluded that determining whether physical presence at the Ford facility was truly essential to the employee's job was a "highly fact specific" question, and the court would look to the following for guidance:

1. the written job description;
2. the business judgment of the employer;
3. the amount of time spent performing the function; and
4. the work experience of past and present employees in the same or similar positions.

The court then distinguished the Ford employee's position, where she already conducted the vast majority of her communications with internal and external stakeholders via conference call, from positions where employees are actually required to interact face-to-face with clients, including cases that concluded a custodian must attend his physical workplace to complete the required manual labor, and that "onsite"

attendance was an essential function of the job for a neo-natal nurse who provided direct patient care. The court was "not persuaded that positions that require a great deal of teamwork are inherently unsuitable to telecommuting arrangements," especially because we now have available "teleconferencing technologies that most people could not have conceived of in the 1990s."

Under this reasoning, could any position with no direct customer/client interaction or manual labor be suitable for telecommuting to some degree or another as an accommodation? As with most tough questions about the law, the answer is: "It depends." While employers must accommodate individuals if the accommodation is "reasonable," employers need not accommodate individuals if such an accommodation would amount to an "undue hardship" for the employer. Determining what is reasonable versus what will constitute an undue hardship can be tricky, as it inherently involves a case by case analysis.

In order to be prepared to handle a request for telecommuting as a reasonable accommodation, employers should be mindful to have detailed job descriptions that explain the essential functions of the job, including those functions that as a practical matter must be performed at the physical worksite. Other office policies, such as attendance policies, can bolster an employer's claim that employees are expected to be regularly present in person on the job. It is also important to make sure that, where appropriate, employees are treated the same. If an employer regularly allows employees in one position to work from home but then denies another individual in a similar position that opportunity, the case can more easily be made that being physically present at the worksite is not an essential function of the job and some amount of work from home would be reasonable. Finally, when an employee requests an accommodation, work with the employee one-on-one to determine what kind of accommodation might be necessary, and document the interactive process, especially where requests may be denied as unreasonable. This process can allow the employer to determine whether the employee's specific position can be accommodated with a reasonable amount of telecommuting while still meeting the needs of the employer and employee.

Finally, if employers allow telecommuting (whether as an accommodation or otherwise), a host of other employment issues may be raised, including wage and hour problems, worker's compensation/injury claims, OSHA claims, and of course, problems with productivity.