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Even Under the ADA, Some Jobs Require Being On-Site; Court of Appeals Decision Offers Lessons

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Last month in *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (en banc), the United States Court of Appeals for the Sixth Circuit found that a Ford employee was not qualified for her job under the ADA because she was not able to come to work on a regular basis. Ford offered her various accommodations, including telecommuting on a limited basis, but the employee eventually asked to telecommute up to four days a week. Ford refused because her job required face-to-face interaction. The Sixth Circuit ultimately agreed with Ford, explaining that regular, in-person attendance is an essential function of most jobs and that a "sometimes-forgotten guide" supported this conclusion: "common sense." But don't get ahead of yourself; the decision is more complicated than that. Guidance follows.

The Underlying Facts

The employee, Jane Harris, was a resale buyer at Ford. Resale buyers purchase raw steel from suppliers and resell it to parts manufacturers called stampers. The stampers make the parts and provide them to employees who assemble the vehicles. To make these deals, resale buyers must regularly interact with suppliers and stampers. Some of this communication can be accomplished by email and telephone, which could be done remotely. But resale buyers also routinely meet with suppliers at the suppliers' work sites and with employees at Ford's work site. Ford argued that these fact-to-face meetings were necessary to accomplish this job. Indeed, Ford even requires resale buyers to work in the same building as stampers in case they need to meet on a moment's notice.

Harris's irritable bowel syndrome interfered with these duties. Before she was terminated, her condition reached a severe state, effectively resulting in fecal incontinence. Not surprisingly, the condition not only affected her performance but also limited her ability to attend work and to remain at work.

Ford tried to accommodate these limitations for years, but Harris's performance and attendance grew increasingly worse. Harris's first supervisor adjusted her work schedule on several occasions, and even allowed her two trial periods in which she worked four 10-hour days during which she could telecommute as needed. Each trial period lasted one to two months, but none succeeded. Harris "was unable to establish regular and consistent work hours" and failed "to perform the core objectives of the job." Another supervisor allowed her to telecommute both during and after core business hours, and both supervisors worked with her using a reporting tool designed to help employees with attendance issues tied to illness. Harris's attendance and performance nevertheless remained poor.

In fact, after reviewing the evidence, the court described Harris as a "subpar" employee. During her last year with Ford, her performance was in the bottom 10% of her peer group, and she received an evaluation that complained she "was not performing the basic functions of her position." Harris also missed work regularly. The year before she was terminated, she missed on average a day and a half each week. The year she was fired, Harris was absent more than she was present. Ford also presented evidence showing that when Harris did come to work, she was often late or left early. In short, her attendance was "sporadic and unpredictable," which caused her co-workers and supervisors to have to perform her job for her, particularly the duties she could not do at home.

Harris eventually requested that she be allowed to work from home up to four days a week. Although Ford's telecommuting policy generally allowed for such an arrangement, it limited resale buyers to telecommuting one set day a week because, according to Ford, the job required "face-to-face contact." Further, Ford generally only allowed strong performers with solid time-management skills to telecommute. Harris did not fit that bill.

Ford ultimately decided that Harris's request was unreasonable, but not until meeting with her in person to discuss the request. During that meeting, Harris admitted that she could not perform four of her ten main responsibilities from home. Though Ford refused the request, it countered Harris's request by describing the type of telecommuting schedule that could work: a predictable schedule in which the employee agrees to come to work as needed even on set telecommuting days. Several of Harris's co-workers were already on such a schedule. But Harris was not interested. Ford also offered her other accommodations such as moving her closer to the restroom and considering her for jobs better suited to telecommuting. Harris declined these offers as well. Soon after, she filed a Charge of Discrimination with the EEOC claiming that Ford's refusal to accommodate her violated the Americans with Disabilities Act (ADA).

The Resulting Lawsuit

After filing the EEOC Charge, Harris's performance got even worse. Ford put her on a performance improvement plan. When Harris failed to meet its requirements, Ford terminated her, and she added retaliation to her Charge. Almost two years later, the EEOC sued Ford on Harris's behalf. The district court concluded that working from home four days a week was not a reasonable accommodation and granted summary judgment for Ford. The EEOC appealed to the United States Court of Appeals for the Sixth Circuit, and a divided panel of three judges reversed the decision. Ford convinced the Sixth Circuit to review the decision en banc, which vacated the panel's decision and allowed a panel of thirteen appellate judges to consider the issue.

The Sixth Circuit's Opinion

The court framed its analysis by acknowledging that "[m]any disabled individuals require accommodations to perform their jobs." But it also noted that to be qualified under the ADA, Harris must be able to "perform the essential functions of [a resale buyer]…with or without reasonable accommodation." Though a reasonable accommodation may include job restrictions or modified work schedules, the court explained that an employer does not have to remove an essential function of the job. It then held that "regular and predictable on-site job attendance" was an essential function of Harris's resale-buyer job.

The court supported its holding by noting the general rule that "an employee who does not come to work cannot perform any of his job functions, essential or otherwise." This general rule still aligns with the text of the ADA and the EEOC's regulations on the issue despite the growing popularity of telecommuting. The EEOC's Fact Sheet on working from home even states that an employer may refuse a telecommuting request when the job requires "face-to-face interaction and coordination of work with other employees" and "in-person interaction with outside colleagues, clients, or customers." Simply put, when the job requires teamwork and personal interaction, working on-site is an essential job function.

The court brought the analysis home by applying what it described as the "sometimes-forgotten guide" of common sense: "Regular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones." Therefore, because Harris could not come to work, she was not qualified for the job and Ford had no duty to accommodate her. The court then took this conclusion to its next logical step, and explained that Harris's requested telecommuting schedule—which removed an essential function of her job—was therefore unreasonable as a matter of law. The district court's award of summary judgment to Ford was affirmed.

Employer Takeaways

Common sense ruled the day, for once. We have to be careful, however, to not get carried away. The Sixth Circuit's opinion is tied to these specific facts, and nothing is hard and fast when it comes to accommodating employees under the ADA. But we can tease out some guidance:

- First, don't get cocky. Accommodating an employee with a disability covered by the ADA requires patience, creativity and meticulous record-keeping. Ford engaged in the interactive process with this employee for years and gave her every opportunity to improve or come up with an accommodation that worked. It even tried accommodations that it likely knew were not going to work. And even under these facts, five of the thirteen judges on the Sixth Circuit's panel filed a dissenting opinion because they thought Harris deserved her day in court.
- Second, if a requested accommodation would exempt the employee from performing an essential job function, it's an unreasonable accommodation. If the determination is this obvious, refuse the accommodation. If not, try the accommodation for a trial period to see if it is workable. If it's not, you'll have much better proof that it was not a reasonable accommodation than if you dismiss it outright. You'll also show good faith, which can set the tone in any resulting litigation.
- Finally, you don't have to give in to the telecommuting craze. An employer can legally make on-site attendance a job requirement, especially if it has policies and job descriptions in place that (1) are consistently enforced, and (2) explain why on-site attendance is key. Some jobs – in fact, most jobs – require an employee to show up for work. Common sense, remember?