Employers Heave a Sigh of Relief Over Telecommuting Decision

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The Sixth Circuit recently restored the faith of the management community by recognizing that "regular and predictable on-site job attendance" can be an essential function of the job, thereby precluding a telecommuting accommodation. In *EEOC v. Ford Motor Company*, the plaintiff was one of several resale buyers on a team who purchased and resold steel to suppliers. The plaintiff essentially acted as a liaison between Ford's suppliers and parts manufacturers, facilitating supply and resolving disputes. Her job was highly interactive and required a lot of in-person contact, including periodic on-site visits and impromptu meetings.

Trial Court Rules in Ford's Favor

Throughout her employment, the plaintiff had chronic attendance problems. She suffered from Irritable Bowel Syndrome (IBS), which made it difficult for her to leave her desk, or even drive to work or to client contacts. Ford's telecommuting policy authorized employees to work up to four days per week from a telecommuting site, and several other buyers telecommuted one day per week. However, the policy explained that jobs requiring "face-to-face contact" and employees who were not "strong performers" and had inadequate time-management skills would not be allowed to telecommute. The plaintiff was first permitted to work on an informal flex-time telecommuting schedule, but her absenteeism continued to increase. The plaintiff then requested an accommodation of working from home up to four days a week under the telecommuting policy, which would allow her to still perform her job duties, but better manage her IBS symptoms. Ford denied her accommodation request, asserting that her job required too much face-to-face interaction. Ford instead offered to accommodate her by moving her closer to a restroom or by finding her another job. The plaintiff filed an EEOC Charge, and the EEOC filed suit on her behalf. The trial court granted summary judgment in Ford's favor, concluding that the plaintiff was not "otherwise qualified" due

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to her absenteeism and declining to second-guess Ford's business judgment that her telecommuting request was unreasonable.

Several Turns in the Sixth Circuit

A three-judge panel from the Sixth Circuit initially reversed the trial court's decision. The panel ruled that physical presence at the workplace might not be an essential job function and that telecommuting could be a reasonable accommodation, despite Ford's stance that the plaintiff's position was not suitable for telecommuting. Although the Court did not definitively establish that Ford failed to make reasonable accommodations, its decision made it clear that the determination should be left up to the jury. Following the ruling, several state Chambers of Commerce and other interest groups asked the full Sixth Circuit to reconsider the panel ruling. They argued that the panel's decision essentially gave employees considerable leverage to decide when and where they were able to work. On Friday, August 29, 2014, the Sixth Circuit entered a summary order vacating the panel's opinion and redocketing the case for consideration by the Court *en banc*.

This month, a nine-judge majority of the Sixth Circuit vacated the previous opinion that had reversed the trial court's decision of summary judgment for Ford. The majority explained that the ADA "does not endow all disabled persons with a job—or job schedule—of their choosing." The majority recognized that an employer could refuse a telecommuting request if the job had certain requirements, such as in-person interaction with clients, customers, or coworkers and immediate access to materials or information only found at work. Notably, Ford had a long-time practice of placing resale buyers in the same building as the stampers they supplied, which was consistent with on-site work. Buyers who were allowed to telecommute were only allowed to do so one day per week, with the explicit agreement that they would come in if needed. What's more, although the plaintiff claimed that most of her interactions were by phone, she admitted that four of her ten main duties could not be performed at home. The Court therefore concluded that the plaintiff's "up-to-four-days telecommuting proposal" was not reasonable.

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Important Takeaways for Employers

Employers are no doubt relieved by the Sixth Circuit's change of heart, although there are certainly some important lessons that follow from the divisive ruling. Going forward, employers should review their scheduling, flex-time, and/or telecommuting policies and practices to determine whether they properly carve out limitations and exceptions for employees whose jobs need to be performed at certain times and under particular circumstances. Employers should also review their job descriptions to ensure that regular attendance, in-person interaction, and/or on-site presence are included as essential job functions, where appropriate. Finally, employers should be aware that allowing accommodations for one employee in a certain job title may well translate to providing the same accommodation—perhaps even to a greater extent—for others in the same job title. All of these factors will be at play in future telecommuting cases, and the successful employer will have anticipated and prepared for them.

For more information, please contact Jennifer Asbrock or any other attorney in the Frost Brown Todd Labor and Employment Practice Group.

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