Employer Must Prove Physical Presence in Workplace is Essential Function, Sixth Circuit Rules

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Likely making it easier for employees to telecommute from home as an accommodation under the Americans with Disabilities Act, the U.S. Court of Appeals for the Sixth Circuit, 2-1, has determined that "attendance" is no longer synonymous with physical presence in the workplace. *EEOC v. Ford Motor Company*, No. 12-2484 (6th Cir. Apr. 22, 2014). The Sixth Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

In this case, a buyer, Jane Harris, requested that she be allowed to work from home when necessary to accommodate her severe irritable bowel syndrome (IBS), which sometimes made it difficult for her to stand without soiling herself. The employer, which had allowed other buyers to work from home on a more limited basis, refused her request, in part because of the expected frequent nature of the need to work from home. The employer determined that being in the office was an essential function of the job due to the emphasis placed on teamwork and in-person team problem-solving.

The district court concluded that Harris's proposal was not reasonable under the ADA and granted summary judgment to the employer.

The Sixth Circuit, however, determined that there was an issue of fact as to whether the request to work from home was a reasonable accommodation under the circumstances. With advances in technology, the Court stated, the workplace can be anywhere that an employee can perform his or her job duties. In this case, because the Court found evidence in the record that much of the work could be done over the telephone or by video conference, and other buyers had worked from home, the Court allowed the plaintiff to proceed with her ADA failure-to-accommodate claim.

Judge David W. McKeague dissented from the majority's opinion. He pointed out that "the stated law of this circuit ... is that attending work on a regular, predictable schedule is an essential function of a job in all but the most unusual cases, namely, positions in which *all* job duties can be done remotely." (Emphasis in original.) Judge McKeague also noted, "The majority further holds that an employee's flat-out rejection of an employer's offer to help her find another position does not constitute an alternative reasonable accommodation, despite the fact that the reason talks could not evolve to a point of identifying a specific position was because of the employee's refusal to consider the possibility."

Following the Sixth Circuit's decision, employers can expect to receive more requests to work from home. The Court recognized that telecommuting is not as unusual as it once was. However, it also recognized that plenty of jobs still require physical presence where the employee must interact directly with people or objects at the worksite. Employers who want to insist upon physical presence in the workplace should expect to prove the unreasonableness of a work-from-home request under their particular circumstances. It is essential employers plan for this eventuality now. The reasonableness of the request will depend upon the job requirements, written job descriptions and realities of the position. Employers should be prepared to identify the job requirements that cannot be performed remotely.

Further, employers who must accommodate an employee should plan for the related employment issues that go along with working from home, including tracking hours for non-exempt employees, monitoring employee productivity and performance remotely, and maintaining data privacy and security of sensitive company and client information when this information is accessed remotely or maintained at an employee's residence.

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Management group observes, “Employers have long considered that ‘being there’ was a fundamental attendance requirement and important to effectively perform the job. The Court’s decision plainly calls into question this time-honored view of work.” Lynett recommends that employers “drill down more than ever on these requests during the ADA’s interactive process, gathering all the relevant circumstances, to defend, if necessary, why the request to telecommute was not granted. Employers also should update job descriptions to confirm the importance of presence in the workplace to perform certain jobs, as well as update telecommuting policies.”

Please contact the Jackson Lewis attorney with whom you regularly work if you have any questions about this case or need assist in reviewing job descriptions and accommodations policies.