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IS WORKING FROM HOME A REASONABLE ACCOMMODATION? "RARELY."

By David Zins

Modern technology is challenging our conception of the traditional workplace, especially in the service and information sectors. Remote network connections, online videoconferencing, portable Web-enabled devices, and other advances have made it possible for workers to complete many of their job duties from just about anywhere. Do these technological capabilities mean that working from home is a reasonable accommodation under the Americans with Disabilities Act (ADA)? How should an employer respond if an employee requests to telecommute as an accommodation for her disability?

General Background

The stakes are high when an employer must consider whether an employee's requested accommodation is reasonable under the ADA. When it cannot provide the requested accommodation, all too often the employer must endure the distraction and expense of defending its decision in a charge of discrimination, frequently followed by a lawsuit.

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During the 2012 fiscal year, the U.S. Equal Employment Opportunity Commission (EEOC) received over 13,000 charges alleging failure to accommodate in violation of the ADA.¹ This represented half of all charges filed federally under the ADA² and more than a 50% increase from the number of reasonable accommodation charges filed with the agency in 2010.³

ADA employment lawsuits are similarly prevalent. A recent study found that plaintiffs were filing close to 200 ADA lawsuits a month in federal district courts in 2012.⁴ This represented a 12% growth over 2011 litigation levels and an incredible 90% increase over 2007.⁵ And these numbers exclude the large volume of ADA suits filed in state court.

An employer may incur significant legal expenses to defend its accommodation decisions in such administrative and legal challenges. In the end, the employer may additionally face liability for a violation, or choose to pay a settlement to make the whole issue go away. Employers are well-advised to handle accommodation requests carefully.

EEOC v. Ford Motor Company. The Case Against Telecommuting

Is working from home a reasonable accommodation? The EEOC appears to think so. Its website touts “the important role telework can have for expanding employment opportunities for persons with disabilities.”⁶ Indeed, the website expressly states that “allowing an individual with a disability to work at home may be a form of reasonable accommodation.”⁷

However, the federal district court in the Eastern District of Michigan rejected the EEOC’s view in its recent decision in *EEOC v. Ford Motor Company*.⁸ It concluded that Ford, the employer, did not face ADA liability for denying an employee’s request to work from home as an accommodation for her disability. More fundamentally, it held that telecommuting is “rarely” a reasonable accommodation. This holding, which the court based on decisions from several federal circuits, is clearly helpful to employers. In addition, the court’s discussion highlights important principles that may guide human resources (HR) professionals and in-house counsel as they consider such requests from their own employees.

Factual Background

Jane Harris worked for Ford from April 2003 to September 2009 as a buyer on a team of five to seven other buyers. Harris was responsible for specific accounts. Her job responsibilities included preventing supply interruptions and facilitating resolution of pricing or quality disputes between Ford’s suppliers and its parts makers. Her role was highly interactive, requiring face-to-face interaction and frequent supplier visits.

Harris had chronic attendance problems on the job. After she returned from a medical leave in February 2005, her supervisor attempted to accommodate her absenteeism by reassigning her work to others, permitting a later start time on Mondays, allowing ad hoc work from home, and other means. Despite her supervisor’s

efforts, Harris absenteeism persisted, and her supervisor declined to approve a telecommuting arrangement for her. In addition to her attendance problems, Harris also began experiencing other performance difficulties at work, which her reviews reflected in 2007 and 2008.

In February 2009, Harris sent an email to Ford’s HR manager requesting that she be allowed to “work up to four days per week from home” as an accommodation for irritable bowel syndrome, which she described as her “disability.” The HR manager, Harris supervisor, and a personnel relations representative met with Harris to discuss the request. At the meeting, they discussed the job responsibilities of a buyer, and how and to what extent her tasks could be performed at home.

Ford decided to deny Harris request to telecommute. Central to its rationale were the regular interactions required between Harris and other buyers, and between Harris and various other internal and external contacts. Ford also cited Harris performance problems, as well as the unpredictability of her proposed telecommuting arrangement. Ford communicated its decision to Harris at a meeting in April 2009, and suggested other possible accommodations for her. Harris rejected all of these. Instead, Harris emailed an internal complaint alleging that the denial of her telecommuting request violated Ford’s ADA policy. She also complained that her supervisor was treating her differently, though she did not elaborate the basis for her complaint when Ford pressed. She then filed an EEOC charge alleging that Ford denied her a reasonable accommodation for her disability.

Meanwhile, Harris’ job performance continued to deteriorate. Ultimately, Ford concluded that her poor performance necessitated an interim review in May 2009, as a result of which Harris was placed on a performance improvement plan. She failed to meet many of the objectives set forth in this plan, and her employment was terminated in September 2009. Shortly thereafter, Harris filed a second EEOC charge, alleging that the interim review, performance improvement plan, and termination were done in retaliation for her filing of the initial charge. Ultimately, the EEOC filed suit on her behalf.

Legal Analysis

A plaintiff establishes a prima facie case of failure to accommodate under the ADA by showing that:

1. The individual is disabled within the meaning of the ADA;
2. She is otherwise qualified for the position, with or without reasonable accommodation;
3. Her employer knew or had reason to know about her disability;
4. She requested an accommodation; and
5. The employer failed to provide the needed accommodation.

If the charging party or plaintiff succeeds in making this showing, the employer will face liability unless it can show that providing the accommodation would be an undue hardship.⁹

Ford argued—and the court ultimately concluded—that the EEOC’s case fell short of a prima facie showing in two different respects. First, Harris was not “otherwise qualified” for her position, given her excessive absenteeism. Second, Harris request to telecommute was not a “reasonable” accommodation.

An individual is “otherwise qualified” for a position if she can perform the essential functions of the job with or without reasonable accommodation. The court first considered whether attendance at work was an essential job function, such that Harris was not “qualified” because of her absenteeism.

Regular attendance is an essential function of most jobs.

The court cited authority across numerous federal circuit Courts of Appeals holding that “[a]n employee who cannot meet the attendance requirements of the job at issue cannot be considered a “qualified” individual protected by the ADA.”¹⁰ “Indeed,” the court opined, “regular attendance is a basic requirement of most jobs.” The undisputed facts of the case revealed that Harris was absent more often than she was present at work. “On this basis alone,” the court observed, “Harris is not a ‘qualified’ individual under the ADA.”

Courts should not second-guess employers’ business judgment regarding essential job functions. The EEOC further argued that, whatever the requirement of most jobs, regular attendance was not an essential function of Harris buyer position because Harris could have performed her job duties at home. However, the court observed that “her managers did not agree that she could successfully perform her essential job functions at home on a regular basis ‘up to four days’ per week.” Her managers’ assessment was crucial because “[c]ourts have declined to second-guess an employer’s business judgment regarding the essential functions of a job,” so long as the employer’s description is “job-related, uniformly enforced, and consistent with business necessity.”¹¹

Here, “the evidence suggest[ed] that the essential functions of Harris’s job could not be performed at home ‘up to four days per week.’” Thus, despite Harris’ claims to the contrary, the court accepted the judgment of Harris’ managers, noting that the court was “reluctant to allow employees to define the essential functions of their positions based solely on their personal viewpoint and experience.”¹² Further, no other buyer was permitted the telecommuting arrangement that Harris had requested.

Working at home is rarely a reasonable accommodation. Turning to Ford’s second argument, the court cited precedent in numerous circuits holding that “working at home . . . is rarely a reasonable accommodation . . . because most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation.”¹³ The court reviewed Ford’s evidence that Harris’s position required “spur-of-the-

moment, group problem-solving” with colleagues and supplier contacts, which could be “most effectively handled in person.” This made her position like most jobs.

The court distinguished an “‘exceptional’ class of jobs that could potentially be ‘performed at home without a substantial reduction in the quality of . . . performance.’”¹⁴ In this regard, it briefly discussed a Ninth Circuit case involving a medical transcriptionist, “whose position could be performed entirely on a computer and did not require interaction with others.”¹⁵ However, Harris’ position did not belong to this exceptional class by Ford’s “reasoned business judgment.” Harris’ opinion to the contrary was insufficient to convince the court otherwise.

The court concluded that Harris’ proposed accommodation to work from home up to four days a week was not reasonable. Thus, Ford’s denial of the request did not give rise to ADA liability as a matter of law.

The retaliation claim. The court also disposed of the retaliation claim. The timing of Harris’s initial EEOC charge and her subsequent interim review, performance improvement plan, and termination might suffice to establish a causal link for a prima facie showing of retaliation. However, the EEOC did not dispute the performance deficiencies documented in the review, nor Harris’ failure to meet the objectives in the performance improvement plan. Thus, the EEOC could not overcome Ford’s legitimate, non-retaliatory reason for its actions. Nor could the EEOC point to an alleged failure by Ford to investigate Harris’ allegation of different treatment as evidence of retaliatory motive. This was because Harris had refused to provide the information necessary for Ford to conduct an investigation. Thus, the court concluded, Ford had not retaliated against Harris.

Cautionary Lessons for Employers

In addition to its helpful holding based on numerous useful principles, the case suggests a number of cautionary lessons for employers as well:

Courts will consider the evidence to see whether an employer has described essential job functions that are job-related, uniformly enforced, and consistent with business necessity. A court may not allow an employee to define the essential functions of her position according to her personal viewpoint and experience, but neither will the court allow the employer to describe essential functions that the evidence will not support. An employer should ensure that its job descriptions are accurate. If it is an essential job function, regular attendance at work should be part of the job description, or the description should specify the interactive tasks that make regular attendance essential.

Allowing other employees to work at home may undercut an employer’s argument that telecommuting is not a reasonable accommodation. It was crucial to the court in *Ford Motor Company* that other buyers telecommuted at most once a week, on a scheduled day. No buyer was permitted to telecommute up

to four days a week, whenever she determined she was unable to come in to the office. Otherwise, Ford would have been hard-pressed to argue that regular attendance at work is an essential job function and thus that the proposed telecommuting schedule was not reasonable.

There may be exceptional cases in which regular attendance at work is not an essential job function. The court considered the case of a medical transcriptionist, whose position could be performed entirely on the computer and did not require interaction with others. In such a case, the court suggested, an employer may have greater difficulty arguing that regular attendance at work is an essential job function.

An employer considering a request for accommodation must engage in an interactive process with the requesting employee. The employer should talk to the employee about her requested accommodation with respect to her job duties and the employer's needs. If the request is not feasible, the employer should discuss alternatives with the employee, seek her further input, and so forth. While the court did not emphasize this process in *Ford Motor Company*, the outcome likely would have been different had Ford not engaged in such a process with Harris.

A viable retaliation claim does not require a meritorious underlying claim of discrimination or failure to accommodate. Rather, a viable retaliation claim merely requires protected activity (such as filing a charge of discrimination, irrespective of its merits), an adverse employment action (such as a termination), and a causal link. Further, an employer must always be able to support

its adverse employment actions with legitimate, non-retaliatory (or non-discriminatory) justifications to rebut a prima facie showing of retaliation (or discrimination).

The outcome may be different under state laws imposing a similar requirement to reasonably accommodate employees' disabilities. In California, for example, regulations taking effect at the end of 2012 added "permitting an employee to work from home" as a specific example of what "may" be a reasonable accommodation under the Fair Employment and Housing Act.¹⁶

Conclusion

Ford Motor Company is certainly favorable to employers in holding that telecommuting is rarely a reasonable accommodation under the ADA. Further, the court's analysis of Harris' request and her underlying employment situation may help HR managers and counsel better understand the reasonable accommodation inquiry in general: how attendance relates to being "otherwise qualified" under the ADA, why telecommuting is rarely reasonable, and what role the employer's judgment plays in the inquiry. This will benefit employers as they face inevitable administrative charges and litigation challenging such decisions.

David Zins is an associate in the Employment & Labor Group in Morrison & Foerster's San Francisco office and can be reached at (415) 268-6693 or dzins@mof.com.

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1 See EEOC Enforcement and Litigation Statistics, Statutes by Issue, http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited Feb. 14, 2013).

2 See *id.* at Americans with Disabilities Act of 1990 (ADA) Charges, <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm> (last visited Feb. 14, 2013). Charges alleging failure to accommodate accounted for 13,263, or 50.3%, of the 26,379 ADA charges received overall in 2012.

3 See *id.* at Statutes by Issue, http://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm (last visited Feb. 14, 2013). The 13,263 reasonable accommodation ADA charges filed in 2012 represent a 57.9% increase over the 8,400 such charges filed in 2010.

4 See "Increase in Employment Discrimination Lawsuits Under the Americans with Disabilities Act," *TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE REPORTS* (May 30, 2012), <http://trac.syr.edu/tracreports/civil/282/>.

5 See *id.*

6 See EEOC Disability Discrimination Overview, "Work at Home/Telework as a Reasonable Accommodation," <http://www1.eeoc.gov/facts/telework.html> (last visited Feb. 14, 2013).

7 See *id.*

8 Case No. 11-13742, 2012 U.S. Dist. LEXIS 128200 (E.D. Mich. Sept. 10, 2012).

9 See 29 C.F.R. § 1630.2 (2012).

10 See *Ford Motor Co.*, 2012 U.S. Dist. LEXIS 128200 at *14 (citing *Tyndall v. National Educ. Ctrs. Inc.*, 31 F.3d 209, 213 (4th Cir. 1994)); see also *Brenneman v. MedCentral Health Sys.*, 366 F.3d 412 (6th Cir. 2004) (same holding); *Waggoner v. Olin Corp.*, 169 F.3d 481, 485 (7th Cir. 1999) (same holding).

11 See *Ford Motor Co.*, 2012 U.S. Dist. LEXIS 128200 at *15 (citing *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004)).

12 See *id.* at *16 (citing *Mason*, 357 F.3d at 1122).

13 See *id.* at *16-17 (citing *Raven v. United States Tobacco Mfg. L.P.*, 319 F.3d 891 (7th Cir. 2003)); see also *Vande Zande v. Wisc. Dep't of Admin.*, 44 F.3d 538, 544-45 (7th Cir. 1995) (same holding); *Smith v. Ameritech*, 129 F.3d 857, 867 (6th Cir. 1997) (same holding).

14 See *Ford Motor Co.*, 2012 U.S. Dist. LEXIS 128200 at *17 (citing *Vande Zande*, 44 F.3d at 544).

15 See *id.* (discussing *Humphrey v. Memorial Hosps. Ass'n*, 239 F.3d 1128 (9th Cir. 2001)).

16 Cal. Code Regs., tit. 2, § 7293.6, subd. (p)(2) (2012).

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Wende Arrollado | Morrison & Foerster LLP
12531 High Bluff Drive, Suite 100 | San Diego, California 92130
warrollado@mof.com