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EMPLOYMENT LAWSCENE ALERT: MUST EMPLOYERS OFFER TELECOMMUTING AS A "REASONABLE ACCOMMODATION"?

A number of courts have traditionally held that attendance is an essential function of most jobs and, on that basis, have found that telecommuting, or working from home, as an accommodation is not reasonable. Recently, however, the United States Court of Appeals for the Sixth Circuit departed from this traditional notion and held that an employee's request for telecommuting as an accommodation was reasonable and that her physical presence at work was not an essential function of her job. This recent decision by the Sixth Circuit may present a problem for some employers and may be a signal that other federal courts, such as the Seventh Circuit, which oversees the federal district courts in Illinois, Indiana, and Wisconsin, may now be willing to recognize that allowing an employee to work from home may be a reasonable accommodation.

At issue in *EEOC v. Ford Motor Company* was whether a telecommuting arrangement could be a reasonable accommodation for an employee in a resale steel buyer position suffering from irritable bowel syndrome ("IBS"). The employee had formally requested that she be permitted to telecommute on an as-needed basis as an accommodation for her disability. Ford did maintain a telecommuting policy that authorized employees to telecommute up to four days per week, but specifically provided that telecommuting was not appropriate for all jobs, employees, work environments or managers. Ford ultimately determined that the employee's position was not suitable to telecommuting and denied her request.

In defending against the EEOC's claim, it was Ford's position that the employee was not "otherwise qualified" because physical presence at the workplace was an essential job function and that the employee's inability to demonstrate regular attendance made her unable to perform an essential function of her job and, therefore, she was not a "qualified" individual under the ADA and did not fall within the statute's protections.

The Sixth Circuit rejected Ford's argument and, for the following reasons, found that Ford could not show that the employee's physical presence at work was essential to performing her job:

- The assumption that attendance at the workplace is essential for most jobs no longer applies due to technological advances that allow employees to perform a number of

tasks remotely;
- Because of those technological advances, positions that require a great deal of teamwork are not inherently unsuitable to telecommuting arrangements;
- The EEOC offered evidence that cast doubt on the importance of face-to-face interactions in the employee's position;
- The employee could still conduct on-site visits to suppliers' places of business if she worked partially or even primarily from her home rather than the employer's facilities; and
- The employer permitted other resale buyers to telecommute, albeit on a more limited basis.

The Sixth Circuit emphasized that determining whether physical presence is essential to a particular job is a highly fact-specific question and that it considered several factors to guide its inquiry, including the following: written job descriptions, the business judgment of the employer, the amount of time spent performing the function, and the work experience of past and present employees in the same or similar positions.

What Does This Decision Mean for Employers?

Although this decision comes out of the Sixth Circuit, it has opened the door for the EEOC to take an aggressive approach on the issue of whether physical presence in the workplace is truly essential to performing a specific job. The Sixth Circuit's decision in *EEOC v. Ford Motor Co.*, represents a significant departure from the traditional majority viewpoint that regular attendance at the workplace is usually an essential function of the job. For example, in 1995 in *Vande Zande v. Wisconsin Department of Administration*, the Seventh Circuit stated:

"Most jobs in organizations public or private involve teamwork under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance. This will no doubt change as communications technology advances, but is the situation today. Generally, therefore, an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home. This is the majority view . . . . But we think the majority view is correct. An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced. No doubt to this as to any generalization about so complex and varied activity as employment there are exceptions, but it would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home."

The Sixth Circuit's decision in *EEOC v. Ford Motor Co.*, may be a signal to other courts that technology has advanced such that the courts need to re-consider this traditional viewpoint.

With the federal courts and the EEOC beginning to embrace the concept that physical presence at the employer's place of business is not an essential job function, this may be the

beginning of a slippery slope toward requiring employers to consider telecommuting as an accommodation. The question most employers will have is whether such an accommodation is reasonable, particularly because many employers, like Yahoo! CEO Marissa Mayer, are committed to the philosophy that in-person, face-to-face communication, and interaction fosters the type of collaboration, innovation, and production that is essential to a successful business.

Employers should keep a close eye on how other federal courts address the issue of telecommuting as a reasonable accommodation.