Toledo Area Human Resource Association

Telecommuting Employees: Changing Times, Changing Liabilities

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In recent years, the American workplace has undergone a dramatic transformation. How, when, and where employees perform work continues to evolve with technological advances and demographic changes. Even traditional brick and mortar industries employ advanced robotics and electronics. Employees work "flex schedules" (a favorite of the Millennial generation) and many employees work more than 40 hours a week (thank you, Blackberry and Apple). Finally, an increasing number of employees work from home or other remote locations (Starbucks). Recent surveys show that over 60% of employers permit some type of remote work. These changes have been driven by both technological advancements and employer responses to employee demands. In many respects, the law and courts have been slow to keep up with the changing workplace. However, the Sixth Circuit Court of Appeals explicitly acknowledged those changes to the workplace as a deciding factor when it recently held that telecommuting may be required as a reasonable accommodation under the Americans With Disabilities Act (ADA). In so holding, the majority rejected the employer's assertion that "face-to-face" interactions in problem-solving meetings were an essential function of the job.

In *EEOC v. Ford Motor Co.,* 2014 Fed App. 0082P (6th Cir.), the Sixth Circuit Court of Appeals reversed a Michigan Federal District Court decision in favor of Ford Motor Company and held that a question of fact existed as to whether an employee with a disability could perform all of the essential functions of her position from home, as she requested. Jane Harris was employed by Ford as a resale steel buyer. Her position involved serving as an intermediary between steel suppliers to Ford and parts producers. Throughout her employment, Harris suffered from Irritable Bowel Syndrome (IBS). One of her symptoms was loss of bowel control. She was permitted to take FMLA leave when her symptoms required, but over time, her conditioned worsened.

Ford maintained a telecommuting policy that permitted some employees to telecommute up to 4 days per week. Harris requested permission under the policy to telecommute 4 days per week and she had telecommuted in the past. Other resale buyers had been granted permission to telecommute 1 day per week. Ford determined that Harris' position was not appropriate for 4-day telecommuting as it required face-to-face meetings and "email and telecommuting was an insufficient substitute for in-person team problem-solving." Ford suggested that Harris' cubicle be moved closer to the restroom or that she transfer to an open position that would permit her to telecommute. Harris refused and filed a disability discrimination claim with the EEOC. Ford alleged that Harris' performance deteriorated and she was discharged. She then filed a second charge alleging retaliation.

The District Court granted Ford summary judgment relying upon several legal theories. First, courts are reluctant to question an employer's business decisions and act as a "super personnel department." Second, many courts have held that "regular attendance" is an essential function of most jobs. The Sixth Circuit majority noted technological advancements "that most people could not have conceived of in the 1990s are now commonplace" and held that, while a court may not sit as a "super personnel department," it also may not "allow employers to redefine the essential functions of an employee's position to serve their own interests." Ultimately, the majority held that Harris could establish she was qualified to perform the position without being "physically present." The majority also rejected Ford's argument that providing Harris with the requested telecommuting accommodation was an undue burden. Finally, the majority ruled that a factual issue existed regarding whether Ford's termination of Harris was retaliatory.

Lessons for Employers

1. **Regular attendance at the workplace is not always an "essential job function," especially in the Sixth Circuit.** There is no bright line rule that excessive absenteeism from the workplace renders an employee "unqualified" as a matter of law under the ADA. Instead, employers need to ask the question: "Considering the nature of the position, is the individual's presence at work essential?" This may involve an analysis of written job descriptions, employer business justifications for the employee's physical presence at the workplace and the past experiences of other employees in the same or similar positions.
2. **Extensive engagement in the interactive process is mandatory**. Although Ford engaged in the interactive process, the majority held that its efforts fell short. Employers need to continue to engage in the interactive process to either reach an accommodation or at least exhaust potential alternatives. A single conversation merely considering and rejecting a requested accommodation will be insufficient in most cases.
3. **"Disabled" is defined broadly**. The majority spent virtually no time analyzing whether IBS was a disability under the ADA. Congress and the courts have instructed employers to find ways to accommodate disabled employees instead of challenging the existence of a disability.
4. **Don't retaliate!** Retaliation is now the most common charge filed with the EEOC. Retaliation charges are also the most difficult for employers to defend. Employers must stress to their employees (especially front line supervisors) that retaliation against those who complain against discrimination will not be tolerated.
5. **Re-visit telecommuting arrangements**. Employers and employees have recognized the many benefits of telecommuting arrangements. Conversely, employers also need to recognize the many risks associated with employees working remotely. Telecommuting agreements can allocate risks and clarify expectations for telecommuters and should be used by employers for telecommuting employees.

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