

## SIXTH CIRCUIT SIDES WITH FORD MOTOR COMPANY IN ADA TELECOMMUTING CASE

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### Labor, Employment and Workplace Safety Alert

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Employers often grapple with what constitutes a reasonable accommodation under the American with Disabilities Act ("ADA"). This issue becomes increasingly complex when evaluating whether telecommuting is an appropriate and reasonable accommodation. The Sixth Circuit Court of Appeals has brought telecommuting to the forefront in *U.S. Equal Employment Opportunity Commission v. Ford Motor Company*. [1] In an *en banc* opinion, the Sixth Circuit held that the employee on whose behalf the EEOC filed suit was not qualified under the ADA because her excessive absences prevented her from performing the essential functions of the job, and her requested accommodation, working remotely up to four days per week, was unreasonable for her position. The majority of the court deployed what it dubbed a "common sense" approach, recognizing that physical presence in the workplace is a necessary component of most jobs. The opinion highlights several key issues for employers dealing with telecommuting requests and accommodations requests generally.

### BACKGROUND

Jane Harris worked as a resale steel buyer for Ford. In that role, she worked as an intermediary between steel suppliers and parts manufacturers. Her position was "highly interactive," often requiring her to respond to emergency supply issues and to meet with suppliers at the job sites and with members of the Ford team. During her tenure at Ford, Harris suffered from debilitating irritable bowel syndrome. As her symptoms progressed, her job attendance suffered. In response, Ford allowed Harris to telecommute on a flex schedule on a trial basis. The trials were ultimately unsuccessful because Harris was unable to establish regular and consistent work hours, which led her to make mistakes and miss deadlines.

In February 2009, Harris requested to work remotely up to four days per week as an accommodation for her disability. Ford rejected that proposed accommodation because her position involved teamwork and client interaction that it believed required face-to-face meetings. Ford suggested several alternative accommodations, such as moving her cubicle closer to the restroom or seeking another job within Ford more suitable for telecommuting. Harris rejected these alternatives.

In late April 2009, Harris filed a charge of discrimination with the EEOC alleging that Ford failed to reasonably accommodate her disability. In May 2009, Harris was placed on a performance improvement plan. After she failed to meet the objectives identified in the plan, she was terminated in September 2009. Thereafter, Harris filed a second EEOC charge alleging that Ford's actions were taken in retaliation for filing her initial charge.

The EEOC subsequently filed suit on Harris's behalf in the U.S. District Court for the Eastern District of Michigan. Throughout the litigation, Ford argued that physical presence in the workplace was an essential function for her

position and that, because she was unable to be present, she was not "qualified" for the position. Ford also argued that the proposed telecommuting accommodation was unreasonable because, in its business judgment, the required meetings were best handled face to face, and e-mail or teleconferencing was an insufficient substitute for in-person problem solving. The district court agreed with Ford and granted the company summary judgment on the EEOC's claims. [2]

In April 2014, a panel of the Sixth Circuit reversed the district court. [3] The panel determined there was a genuine issue of material fact as to whether Harris could perform her job duties remotely. The panel's determination was in sharp contrast to caselaw from the 1990s recognizing that telecommuting would rarely be a reasonable accommodation because it would be an unusual case when an employee could effectively perform all work duties at home. In addressing its departure from earlier caselaw, the panel explained that the world has changed since the foundational opinions addressing physical presence in the workplace, and that teleconferencing technologies are now commonplace.

## THE EN BANC DECISION

The Sixth Circuit granted *en banc* review vacating the panel's decision. The court explained the general rule is that "regularly attending work on site is essential to most jobs, especially interactive ones." [4] This principle aligns with longstanding caselaw, the ADA's text, EEOC regulations, and "common sense." Applying this rule to Harris's situation, the court determined that Harris's position necessitated regular attendance. For example, Ford required resale buyers to work in the same building as stampers to facilitate meetings and face-to-face interaction. Moreover, Ford required all other resale buyers to regularly and predictably attend work on site. Even those resale buyers who were allowed to take advantage of Ford's telecommuting policy were only allowed to work remotely one set day per week. Accordingly, the court agreed with Ford that showing up to work was an essential function of Harris's position.

As a result of this determination, the court held that Harris was not "qualified" under the ADA because her excessive absences prevented her from performing the essential functions of a resale buyer with or without reasonable accommodation. The court acknowledged that job restructuring and modified or part-time work schedules could constitute reasonable accommodations. However, it would be unreasonable to require Ford to remove an "essential function" of the position to accommodate Harris's disability.

Harris's testimony claiming she could perform her duties remotely did not create a genuine issue of material fact precluding summary judgment in Ford's favor. The court noted that employees simply cannot define the essential functions of their jobs based upon their own personal experiences.

The EEOC pointed to Ford's telecommuting policy and the fact that Ford had allowed resale buyers in other situations to telecommute as support for its position that this employee's requested accommodation was reasonable. However, the court determined that other resale buyers' use of the policy differed markedly from that requested by Harris and weighed in favor of finding physical presence was an essential function of her position. The court also was also swayed by Ford's policy argument that holding its telecommuting policy against it could have the unintended consequence of discouraging employers from permitting telecommuting under appropriate circumstances. The court noted that "if the EEOC's position carries the day, once an employer allows one person the ability to telecommute on a limited basis, it must allow all people with a disability the right to telecommute on

an unpredictable basis up to 80% of the work week (or else face trial)." This would create an incentive for employers to restrict or eliminate telecommuting.

In contrast, the court gave great weight to Ford's judgment as to whether resale buyers could effectively perform their essential functions from home. The court noted that "blind deference" to an employer's determination of what constitutes an "essential function" is not required. However, where as here, the employer's "words, policies, and practices" are job related and consistently applied, summary judgment is appropriate.

The Sixth Circuit also found in Ford's favor with regard to Harris's retaliation claim. The court noted that temporal proximity alone will not result in a finding of pretext. Ford established that it terminated Harris due to her poor performance.

## KEY TAKEAWAYS FOR EMPLOYERS

The Sixth Circuit's decision highlights the fact-intensive nature of the inquiry as to what accommodations are reasonable. More importantly, it provides three important takeaways for employers.

- Telecommuting is not always a reasonable accommodation. While employers still need to evaluate all the underlying circumstances of the request to assess whether it is reasonable, employers can have positions that require the employee to be in the office to perform the essential functions of his or her job.
- Employers will be afforded discretion to use their judgment in assessing what constitutes a reasonable accommodation. Where an employer has clear policies and accurate job descriptions that are consistently enforced and applied, as Ford did here, courts are more likely to give their assessment of the "essential functions" of a position greater deference.
- Employers must remember the importance of meaningfully engaging in the interactive process with employees who have a disability. While not determinative for the majority in this case, the court noted that Ford met with Harris several times, identified alternative accommodations and attempted to engage in additional discussion even after its alternative accommodations were rejected. Ford's actions demonstrated that it was acting in good faith with respect to Harris's accommodation request.

### Notes:

[1] *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (*en banc*).

[2] *EEOC v. Ford Motor Co.*, No. 11-13742, 2012 WL 3945540 (E.D. Mich. Sept. 10, 2012).

[3] *EEOC v. Ford Motor Co.*, 752 F.3d 634 (6th Cir. 2014).

[4] See *EEOC v. Ford Motor Co.*, 782 F.3d 753, 761 (6th Cir. 2015) (*en banc*), which was an 8-5 decision.

## KEY CONTACTS



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