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TELECOMMUTING: A REASONABLE ACCOMMODATION? NOT NECESSARILY

Last year, we blogged about a decision issued by the Sixth Circuit Court of Appeals, which has jurisdiction over courts in Kentucky, Michigan, Ohio and Tennessee, that held that allowing a disabled employee to telecommute could be a reasonable accommodation under the Americans with Disabilities Act ("ADA"). Last week, however, that decision was reversed by the Sixth Circuit Court of Appeals, sitting *en banc* (meaning that the case was heard by all of the judges on the Sixth Circuit Court of Appeals rather than just a panel of three judges). EEOC v. Ford Motor Company (Sixth Circuit, April 10, 2015)

TELECOMMUTE FOUR DAYS A WEEK?

A Ford Motor Company employee who suffered from irritable bowel syndrome, requested that she be permitted to telecommute on an as-needed basis up to four days a week as an accommodation for her disability. Ford met with her to discuss her telecommuting request, but the request was eventually denied (although Ford did offer several other accommodations to her). The employee filed an EEOC charge of discrimination in 2009 and was terminated from employment a few months later.

REGULAR, IN-PERSON ATTENDANCE IS AN ESSENTIAL FUNCTION

In determining whether Ford had discriminated against the employee by failing to allow her to telecommute as a reasonable accommodation, the full Sixth Circuit Court of Appeals considered whether regular and predictable on-site job attendance was an essential function of her job as a resale buyer. After considering several factors, the court determined that physical presence *was* essential to the position. In making its decision, the court stated that:

> Regular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones. That's the same rule that case law from around the country, the statute's language, its regulations, and the EEOC's guidance all point toward.

Applying this general rule to the employee, the court found that regular and predictable on-site attendance was essential for her position as a resale buyer, and her repeated absences made her unable to perform the essential functions of her job. As background, Ford's resale buyers purchase raw steel from steel suppliers and then resell the steel to parts manufacturers who then supply the steel parts to vehicle assemblers who put together the vehicles. The court noted that, "[a]s an intermediary between steel and parts suppliers, the resale buyer's job is *highly interactive*. Some of the interactions occur by email and telephone. *But many require good, old fashioned interpersonal skills*." Although Ford did allow some resale buyers to telecommute one day per week, the court stated that a resale buyer's regular and predictable attendance was essential, not incidental, to the resale buyer job. Because the employee's proposed accommodation would exempt her from an essential function of her job, her proposed accommodation was unreasonable.

Interestingly, the panel of the Sixth Circuit Court of Appeals judges who decided this case back in April 2014 made a point of how technology has advanced such that the "workplace" is anywhere that an employee can perform her job duties. However, sitting *en banc*, the Sixth Circuit Court of Appeals disagreed with that determination. Instead, the court indicated that technology changing in the *abstract* is not the same as technology changing in this particular case, and no evidence was presented in this case to show technology made the highly interactive resale buyer job one that could be effectively performed at home.

WHAT THIS MEANS FOR EMPLOYERS

The EEOC has long taken the position that permitting employees to telecommute may be a reasonable accommodation. In fact, since 2005, the EEOC has made available a *Work At Home/Telework as a Reasonable Accommodation Fact Sheet*, available here, which states that:

> Not all persons with disabilities need - or want - to work at home. And not all jobs can be performed at home. But, allowing an employee to work at home may be a reasonable accommodation where the person's disability prevents successfully performing the job on-site and the job, or parts of the job, can be performed at home without causing significant difficulty or expense.

This remains true - permitting employees to telecommute *may* be a reasonable accommodation in *some situations*. However, the Sixth Circuit Court of Appeals' decision in this case is beneficial to employers because it reinforces the fact that telecommuting will not *always* be

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a reasonable accommodation for all employees. Rather, the determination continues to require a case-by-case determination, which hinges upon whether attendance is an essential function of a particular employee's job.

If you have any questions about telecommuting as a reasonable accommodation, please contact Mary Kate Liffrig at mliffrig@hallrender.com or your regular Hall Render attorney.

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