

TENTH CIRCUIT DECISION GOOD NEWS FOR HOSPITALS NOT WILLING TO ALLOW PERMANENT TELECOMMUTING IN THE PANDEMIC'S WAKE

As the world anticipates a gradual return to normalcy, there are numerous questions about the extent to which the “new normal” will look like the “old normal,” from the **commercial real estate market** to social norms regarding personal space and **social touching** (such as hugs and handshakes). Within employment law, one of the questions is whether hospitals and other employers now face a heightened obligation to allow telecommuting as a “reasonable accommodation” for employees whose disabilities make travel or in-person work difficult. There are good arguments that this may be the case: if hospitals have allowed remote work and invested in technology and processes that make remote work feasible, then a request to work remotely may now be reasonable where before it was not. Even before the pandemic—since **at least 2003**—the EEOC took the position that the ADA may in certain cases require employers to allow disabled employees to telecommute as a reasonable accommodation and that whether such an accommodation would be reasonable must involve a case-by-case evaluation.

While the Tenth Circuit’s recent *Unrein* decision did not even mention the pandemic, and indeed the employment decisions at issue took place before the pandemic began, the court’s reasoning suggests that it is not now more inclined than before to second-guess a hospital employer’s determination that physical presence at the workplace is an essential job function.

Ms. Unrein was employed as a clinical dietician for a rural Colorado hospital. She lived 60 miles away from the rural hospital, and after becoming legally blind due to macular dystrophy, she relied on friends and family for transportation to work, who could be unreliable. She requested a flexible schedule “to accommodate [her] transportation.” She later changed her request, asking to be allowed to telecommute full-time. The hospital denied this request, stating in part, “Predictable and regular attendance at the hospital so that you can meet with patients, assess their condition and perform other tasks is an essential function of your position as a Clinical Dietician.” The Tenth Circuit agreed with this determination (and that of the trial court): certain tasks, such as oversight of patients’ food trays, required her physical presence. The Tenth Circuit also held that the hospital had no legal obligation to allow Ms. Unrein to work a flexible schedule due to her transportation barrier: “Unrein could move closer to the hospital or secure more reliable rides.” “[E]mployers have no obligation under the ADA to accommodate disabled employees for problems they face outside the workplace unrelated to the essential job functions of their positions or privileges of employment.”

PRACTICAL TAKEAWAYS

A few general principles may be derived from the *Unrein* decision:

- If there are good reasons an employee’s physical presence is required to perform one or more essential job functions, then it likely remains within an employer’s discretion to terminate employees unable to be reliably present.
- If it is feasible to perform all essential job functions virtually without undue additional cost or other hardship, then disability law may require an employer to permit remote work.
- Employers generally have no ADA obligation to accommodate problems faced by disabled employees outside of the workplace and unrelated to the job, such as problems with transportation to work.

Although these are general principles one can derive from the recent decision, it remains an employer’s obligation to consider each accommodation request on a case-by-case basis. Courts in different jurisdictions, or when presented with different facts, might reach different conclusions.

Should you have any questions regarding this recent decision or ADA accommodations, please contact:

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