

Employment Law Briefing



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Can telecommuting be an accommodation?

Sixth Circuit weighs in on growing ADA issue

With mobile technology exploding and work/life balance a valid concern of many employers, telecommuting is more popular than ever. In *Equal Employment Opportunity Commission v. Ford Motor Company*, the U.S. Court of Appeals for the Sixth Circuit weighed in on whether a telecommuting arrangement of four days per week could be a reasonable accommodation under the Americans with Disabilities Act (ADA).

Not reasonable

The plaintiff suffered from irritable bowel syndrome. After she was terminated for poor performance, the Equal Employment Opportunity Commission (EEOC) filed suit on her behalf alleging that the employer had:

- Discriminated against the plaintiff based on her disability by not providing the accommodation of telecommuting, and
- Retaliated against her for filing an EEOC charge.

The employer moved for summary judgment, alleging that regular in-office attendance was a requirement for the employee's position, so telecommuting wasn't a reasonable accommodation. The employer further alleged that it had terminated the employee because of her poor work performance.

The district court granted summary judgment in favor of the employer. It held that regular in-office attendance was a basic requirement for most jobs and, thus, the plaintiff wasn't a qualified individual under the ADA. Furthermore, the district court agreed with the employer's business judgment in finding that regular attendance was an essential function of this particular employee's position.

As a buyer, the plaintiff was required to frequently interact with co-workers and outside suppliers to solve problems. The employer believed that in-person contact was more effective in solving these problems than teleconferencing or e-mailing. It also believed that the work needed



to be done during normal work hours, when the suppliers were available.

The employer asserted that the employee had missed deadlines and made mistakes because she lacked access to the suppliers during normal work hours while telecommuting on a trial basis. She was also unable to establish regular and consistent work hours while working away from the office.

Thus, as mentioned, the district court found that telecommuting wasn't a reasonable accommodation. The court further found that other accommodations offered by the employer — and rejected by the employee — were reasonable. One example was moving the employee's desk closer to the restroom.

In addition, the district court held that the employer's actions of terminating the employee weren't retaliatory or pretextual because the employee couldn't overcome the employer's legitimate, nonretaliatory reasons for its action. The plaintiff appealed.

Physical presence

The Sixth Circuit reversed the district court's decision. The appellate court found that, because of technological advancements, an employee's workplace can be anywhere that an employee can perform his or her job duties. Therefore, the court stated that the question asked should be whether a physical presence at the employer's facilities, not attendance, was an essential job function.

Was a physical presence at the employer's facilities, not attendance, an essential job function?

As such, the Sixth Circuit found that there was a genuine issue of fact as to whether the plaintiff's physical presence at the employer's facility was essential. The court stated that there are other factors to consider in deciding which

job functions are essential, in addition to the employer's business judgment, such as the employee's own testimony about her job.

The Sixth Circuit went on to note that the employer allowed other employees to telecommute on a limited basis of one day per week. This, it said, was evidence that physical presence in the workplace wasn't an essential job function.

Regarding the plaintiff's retaliation claim, the court also reversed summary judgment. It found that there was evidence of pretext because the employee's negative reviews started only after her EEOC charge was filed, casting doubt that her poor performance was the actual reason for termination.

Increasingly common

As telecommuting becomes increasingly common, requests for it as both an employment arrangement and an ADA accommodation are sure to increase as well. If you have a telecommuting policy in place, you may have to allow more employees access to it — even under distinguishable circumstances, such as in this case. ♦

Looking back at an important precursor

An important precursor to *Equal Employment Opportunity Commission v. Ford Motor Company* (see main article) was the 2003 case of *Rauen v. U.S. Tobacco Mfg. Ltd. Partnership*. Here, the U.S. Court of Appeals for the Seventh Circuit also considered whether allowing an employee to work from home would be a reasonable accommodation under the Americans with Disabilities Act (ADA). The plaintiff was a software engineer dealing with the side effects of cancer treatment, such as frequent bathroom usage and fatigue. The employer had offered to provide her with private bathroom facilities and a place to rest during the day, which the plaintiff rejected.

At trial, the district court granted summary judgment in the employer's favor, holding that the plaintiff wasn't entitled to an accommodation because she could perform her essential job functions without any accommodation. The Seventh Circuit affirmed and dismissed the plaintiff's lawsuit, finding that the employee's request to telecommute was unreasonable because, based on her own admission, she couldn't perform her essential job functions at home. For example, she couldn't monitor outside contractors' work or be immediately available to answer their questions.

The court stated that, "generally, an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home." The employee's situation didn't present an exceptional case, according to the Seventh Circuit. The ruling didn't, however, clarify what those exceptional circumstances would be. In addition, now that telecommuting is more common because of technological advances, courts may view it as a less atypical accommodation.

Considering a co-worker's power to prompt a termination

All employees presumably know that their supervisors have the power to terminate them. But can the co-worker sitting at the next desk or in the office down the hall prompt a termination as well? This question was broached in *Velazquez-Perez v. Developers Diversified Realty Corp.*, a case heard by the U.S. Court of Appeals for the First Circuit.

Hotel incident

The plaintiff asserted claims against his employer for sex discrimination and retaliation pursuant to Title VII. His co-worker was an HR representative for the employer in the region where the plaintiff worked. She provided advice to management on human resource issues, including employee discipline. But she wasn't the plaintiff's supervisor.

The plaintiff admitted that, for ten months, their relationship was flirtatious but never harassing. When his co-worker expressed romantic interest, he always politely rebuffed her. But, in April 2008, while traveling for a company meeting and staying at the same hotel, the co-worker followed the plaintiff to his room and tried to force her way in. He refused to let her in and even threatened to call security. The co-worker waited outside his room and then finally left.

Thereafter, the co-worker sent many e-mails to the plaintiff and called his hotel room multiple times. Later, she sent him e-mails threatening to have him fired for rejecting her. The plaintiff complained verbally to his supervisor about the incident. But he never filed a written complaint, and the company had no investigative procedures in place.

The co-worker then began discussing the plaintiff's job performance with his supervisors and recommended that he be terminated. By August 2008, the co-worker had convinced the supervisors, and the plaintiff was terminated — allegedly for absenteeism and unsatisfactory performance.

The district court granted summary judgment in favor of the employer on both causes of action. The plaintiff appealed.

3 circumstances

The First Circuit vacated and remanded the district court's grant of summary judgment on the sex discrimination claim, but it affirmed summary judgment in favor of the employer on the retaliation claim.

Just because the co-worker wasn't the plaintiff's supervisor didn't necessarily absolve the employer of potential liability for the discharge, the court began. An employer can, according to the First Circuit, face liability for sex discrimination by a co-worker if three circumstances are met:

1. The co-worker acted for discriminatory reasons with the intent to cause the plaintiff's firing,
2. The co-worker's actions were, in fact, the proximate cause of the termination, and
3. The employer allowed the co-worker's acts to achieve their desired effect even though it knew, or reasonably should have known, of the discriminatory motive.

According to the court, a reasonable jury could find that the co-worker's persistent lobbying for the plaintiff's termination could be the proximate cause of his discharge. The First Circuit further held that the employer could be found liable for negligently allowing the co-worker's



discriminatory acts to cause the plaintiff's firing — even though the co-worker wasn't his supervisor.

Regarding the retaliation claim, the court held that the plaintiff must show that he wouldn't have been fired had he not complained. But the First Circuit determined that the plaintiff had waived his claim because he didn't pursue it on appeal, so the claim was unsupported by argument or fact.

Two days: A Title VII case

There's no bright line test for establishing a hostile work environment. But two factors that courts commonly look at are the *frequency* and *severity* of the discriminatory conduct. In *Boyer-Liberto v. Fontainebleau Corp.*, the U.S. Court of Appeals for the Fourth Circuit considered whether the use of a racially derogatory term over the course of two days could support a racial discrimination claim based on a hostile work environment under Title VII.

Filing suit

The plaintiff, an African-American woman, sued for race discrimination and retaliation, claiming that:

1. A white co-worker called her a racial epithet twice over two days, and
2. She was fired for complaining about the comments to her employer.

The plaintiff did complain to HR about the co-worker's comments. In response, the employer issued a written warning to the co-worker — even though she denied making the comments. The plaintiff testified that she knew the co-worker wasn't a supervisor or manager.

Her employer argued that she was terminated because, after review of her job performance, it found that she'd "failed at four jobs" in one month. The employee was originally a hostess at a restaurant, but, because she couldn't keep up with the fast pace of the position, she requested other jobs in the hotel. She was permitted to work as a server, bartender and banquet worker. But none of these positions worked out because of her low skill level (at bartending) and other problems, such as

Fair warning

This case provides fair warning to employers: Your employees could have a cause of action against you for a co-worker's discriminatory and vengeful acts. Make sure all of your termination decisions are based on logical, business determinations — not on a supervisor's or co-worker's intent of ill will or revenge. ♦



her unprofessional manner, inability to get along with co-workers and poor response to criticism.

The district court granted summary judgment in favor of the employer, finding that the co-worker's offensive conduct was too isolated to support the employee's discrimination and retaliation claims. The plaintiff appealed.

Affirming dismissal

On appeal, the plaintiff argued that the racial epithet used was particularly severe and humiliating. She also argued that, because of the short duration of her employment (one month), the use of the term twice was relatively frequent. In addition, she felt threatened because her co-worker was physically close to her during the first conversation, when the comment was initially made.

Unswayed, the Fourth Circuit affirmed the district court's dismissal. The appellate court agreed that the comments made were highly offensive and derogatory. But

it found that a reasonable juror couldn't conclude that the co-worker's two statements — which were really one incident over two days — created a workplace that was permeated with discriminatory intimidation.

The Fourth Circuit went on to point out that the plaintiff hadn't provided any other cases that found there was a hostile work environment based on one such incident. The court further held that, because the plaintiff knew that the co-worker wasn't a supervisor, there was less of a risk of the plaintiff thinking that the offensive statements discriminatorily altered the terms of her employment.

Regarding the retaliation claim, the Fourth Circuit stated that the plaintiff didn't engage in a protected activity for purposes of proving retaliation. The plaintiff couldn't have held an objectively reasonable belief that she was complaining about a hostile work environment, because the

incident with the co-worker was isolated and her supervisors never made any racially derogatory comments. In fact, they issued a written warning to the co-worker. Thus, the court also affirmed the district court's dismissal of the retaliation claim.

Being clear

As this case shows, as an employer, you may respond appropriately to an incident of racial harassment and still find yourself in court. But in no way does this undermine the importance of implementing and enforcing clear anti-discrimination policies and complaint procedures.

Moreover, this decision reinforces that you *can* terminate an underperforming employee even if he or she has complained of discrimination. The key is creating a comprehensive record of the worker's poor performance. ♦

The Family and Medical Leave Act

Refusal to rehire protected employee proves costly

Even under the best of circumstances, granting an employee leave under the Family and Medical Leave Act (FMLA) can be fraught with risk. Employers must handle the application for, and implementation of, leave clearly and thoroughly. And they need to smoothly reintegrate the employee in question back into the workplace when the leave is concluded.

This already precarious process can rise to even greater heights of risk when an employee is terminated following FMLA leave and then attempts to regain employment. Case in point: *Jackson v. City of Hot Springs*. Here, the U.S. Court of Appeals for the Eighth Circuit considered whether a plaintiff had established that he'd been retaliated against

for taking FMLA leave when his employer refused to rehire him.

Reapplying for the job

The plaintiff was employed by the City of Hot Springs, Arkansas. He underwent surgery and was granted leave under the FMLA, which was then extended by the city for a month. When the plaintiff was then unable to return to work, he was terminated.

After receiving approval from his doctor to return to work, he reapplied for his position on two occasions. But the city wouldn't rehire the plaintiff, claiming that he couldn't perform the essential functions of the position in question. In response, the plaintiff filed claims for, among other things, retaliation based on the employer's failure to



rehire him, pursuant to the FMLA and the Arkansas Civil Rights Act (ACRA).

The district court denied the employer's motion for judgment as a matter of law. A jury returned a verdict in favor of the plaintiff on both causes of action and awarded him lost compensation and emotional distress damages. But the district court vacated the award of emotional distress damages. Both parties appealed.

Performing job functions

The employer claimed on appeal that there was insufficient evidence for a jury to conclude that:

1. The plaintiff could perform the essential functions of his job at the times of the refusals to rehire him, and
2. The evidence didn't show a causal link between its failure to rehire him and the plaintiff's FMLA leave.

Looking initially at the first point, the Eighth Circuit found that there was indeed sufficient evidence to support the jury's finding that the plaintiff would have been able to perform the essential functions of his job. The employer claimed that medical records showed that the plaintiff wouldn't be able to do the lifting work required for his position. But the court noted that the plaintiff had sufficiently explained that he could perform the lifting using forklifts and a small handheld lift.

The employer's reasons for not rehiring the plaintiff shifted from one occasion to the next, supporting an inference of a retaliatory motive.

The Eighth Circuit also rejected the employer's claim that the plaintiff's use of painkillers established that he couldn't perform his job functions. The court cited the plaintiff's note from his doctor releasing him to work, which stated that he could work even after disclosing and remaining cognizant of his use of painkillers.

Inferring retaliation

The Eighth Circuit then turned to the second point above. It found that there was a causal link and sufficient evidence to support an inference of a retaliatory motive on



the part of the employer — primarily because the employer's reasons for not rehiring the plaintiff shifted from one occasion to the next.

At first, the employer claimed that it didn't rehire the employee because, while he was recommended for hire, his interview was tainted when proper procedures weren't followed. Then, the employer claimed that the department needed someone with better computer skills than the plaintiff had. This change in reasoning discredited the employer's motives for not rehiring the plaintiff.

The court further held that the jury was entitled to make a credibility determination as to whether it believed the employer's reasons for not rehiring the plaintiff. The jury chose not to believe the city. Moreover, the plaintiff was entitled to liquidated damages, according to the Eighth Circuit, because the employer hadn't asserted that it had acted in good faith in not rehiring him.

Accommodating and rehiring

This case illustrates a couple of separate, but related, issues regarding FMLA leave. First, as an employer, you always need to stay aware of your obligations to provide reasonable accommodations to qualified applicants to enable them to perform their essential job functions. Don't ignore available accommodations or minimize (or ignore) a physician's note supporting an employee's ability to work.

Second, if the hiring process comes back into play as it did here, step even more carefully. Thoroughly review and follow your stated policies for preventing discrimination. And keep thorough written records of each employment candidate, detailing valid reasons why he or she wasn't hired or rehired. ♦

A message to our clients and friends ...

The attorneys in our Employment and Labor Section are available to answer your questions about the articles in the Briefing. We also stand ready to respond to any other questions you might have. It has always been our goal to provide timely and practical advice whenever and wherever a client has a problem. You can contact each of us directly. Call us or send us an email message. We will be there for you.

“Above all, we are at your service ...”



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