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Sixth Circuit Opens Floodgates on Telecommuting as a Reasonable Accommodation

By Peter J. Petesch

In Quentin Tarantino's classic film, "Pulp Fiction," two hitmen, Jules and Vincent (played by Samuel L. Jackson and John Travolta), find themselves in a farcical and escalating "mess"—requiring the advice of a "fixer" known as "The Wolf" (played by Harvey Keitel). The Wolf arrives at the scene, assesses the situation with cool detachment, and develops a detailed plan to extricate Jules and Vincent from their unsavory and very bloody dilemma. Imagine "The Wolf" insisting on phoning in his assistance instead of working in person with Jules and Vincent. Would he have been as effective? Yet, in *EEOC v. Ford Motor Company*, the U.S. Court of Appeals for the Sixth Circuit concluded that allowing a problem solver in a fast-moving team environment to telecommute *could* be a legally required reasonable accommodation under the Americans With Disabilities Act (ADA), and that traditional assumptions on the need to be physically present in the workplace sometimes fall by the wayside.

Facts Behind the Case

The claimant was a "resale buyer" with Ford, acting as an intermediary to ensure a steady supply of steel to Ford's parts manufacturers. The job involves troubleshooting supply interruptions, interacting with suppliers, and group problem solving with other members of her team. Her managers believed that the group problem-solving meetings were most effective when handled in person, face-to-face.

The claimant developed Irritable Bowel Syndrome (IBS), which caused her to soil herself unpredictably. The symptoms impeded her commute, and limited her ability to move about the office without sudden episodes of incontinence.

The employer had allowed other employees to telecommute, depending on the nature of their jobs and work environments. The employer, in turn, allowed the claimant to try flex-time telecommuting on a trial basis, but believed that the experiment was unsuccessful because the employee could not establish regular and consistent work hours. The employer concluded the telecommuting prevented the claimant from participating effectively in team problem solving or accessing suppliers during normal work hours. Still, the claimant requested to telecommute during standard work hours for at least 80% of the time. The employer declined her request, but offered the accommodations of a cubicle closer to a restroom or a transfer to another position better suited to telecommuting as an accommodation—accommodations that the claimant declined.

The claimant began a pattern of unpredictable absences from work due to her condition. Her work suffered, and co-workers bore the brunt of filling in for her and correcting her errors. She filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), claiming failure to accommodate her disability. Shortly thereafter, the claimant was placed on a performance improvement plan and was ultimately terminated.

The EEOC sued on the claimant's behalf, alleging failure to accommodate and retaliation. The employer successfully obtained summary judgment from the trial court, with the trial court holding that the claimant was not a "qualified individual with a disability" because of her absenteeism and because the employer's judgment on the unsuitability of telecommuting for her job should not be disturbed.

How the Court Ruled on Telecommuting

The Sixth Circuit reversed the trial court, and held that there were genuine issues of fact to be resolved at trial on whether the claimant remained "qualified" and whether telecommuting was a reasonable accommodation under her circumstances. It ruled that the EEOC and the claimant presented sufficient evidence to suggest that she remained qualified for her position if the employer eliminated the requirement that she be physically present, and instead worked during regular business hours by telecommuting. The court further held that the employer then shouldered the burden of showing that the claimant's physical presence was indeed an essential job function or that telecommuting created an undue hardship. Proving undue hardship, the court added, does not equate to a mere "showing that an accommodation would be bothersome to administer or disruptive of the operating routine."

The court acknowledged that "[f]or many positions, regular attendance at the work place is undoubtedly essential." Yet, it challenged the assumption "that the 'workplace' is the physical worksite provided by the employer," and that "the workplace and an employer's brick-and-mortar location [are] synonymous." It reasoned that "as technology has advanced in the intervening decades, and an ever-greater number of employers and employees utilize remote work arrangements, attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location. Instead, the law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the 'workplace' is anywhere that an employee can perform her job duties." This, the court noted, is a "highly fact specific question." At the claimant's instance, the court held that telecommuting was not necessarily antithetical to the job's requirement of interacting regularly with team members during core business hours—so long as the employee could be available during the business day and maintain predictable (albeit remote) attendance.

Departure or Evolution?

A host of prior court decisions rejected plaintiffs' ADA claims based on failure to provide telecommuting as a reasonable accommodation. None of the decisions, however, rejected telecommuting outright as a reasonable accommodation. Rather, they acknowledged a "never say never" approach in keeping with the case-by-case analysis inherent to the ADA. The cases simply concluded telecommuting was not a reasonable or effective accommodation for many jobs that required the employee's physical presence (*e.g.*, passenger service agent at an airport, neonatal nurse, filing clerk, pharmacy technician, or even positions where telecommuting would undermine the quality of the employee's work).

In *Ford*, the Sixth Circuit refused to pigeonhole the claimant's troubleshooter position into other jobs where the employee's constant physical presence is still necessary. Although the employer argued that, in its business judgment, face-to-face interactions best facilitated group problem solving, the court rejected that justification on summary judgment. The court said "we are not persuaded that positions that require a great deal of teamwork are inherently unsuitable to telecommuting arrangements." The court, however, noted the tension between employees who improperly attempt to redefine the essential functions of their jobs "based on their personal beliefs about job requirements" and employers who "redefine the essential functions of an employee's position to serve their own interests."

The dissent stated that the majority had upset the assumption that "attending work on a regular, predictable schedule is an essential function of a job in all but the most unusual cases, namely, positions in which *all* job duties can be done remotely." The dissent did not believe that the EEOC and the claimant had sufficiently demonstrated that she could perform all of her essential job functions by telecommuting 80% of the time. Finally, the dissent warned:

> [T]he lesson for companies from this case is that, if you have a telecommuting policy, you have to let every employee use it to its full extent, even under unequal circumstances, even when it harms your business operations, because if you fail to do so, you could be in violation of the law. Of course, companies will respond to this case by tightening their telecommuting policies in order to avoid legal liability, and countless employees who benefit from generous telecommuting policies will be adversely affected by the limited flexibility.

This final warning did not account for the possibility that telecommuting may still be a reasonable accommodation option in workplaces that do not otherwise allow telecommuting—as modification of certain policies may be reasonable accommodations.

What Employers Need to Know

The ADA's concept of reasonable accommodations often challenges assumptions on *how* a job is traditionally performed. One observant client equated accommodations with the circus act of keeping plates spinning on poles. Jobs change; the employee's physical needs change; and assistive technologies change. The palette of accommodation options therefore changes. In view of these "moving target" principles and the Sixth Circuit's ruling, employers may want to devote greater patience to the accommodation process overall, and greater thought to telecommuting as a reasonable accommodation in appropriate situations.

Ford will enhance the leverage of employees demanding telecommuting accommodations. Employers can expect more employees—particularly those in office environments—with varying conditions (anxiety disorders, physical disabilities rendering commuting difficult, recovery from major illnesses) to request and expect varying levels of telecommuting accommodations. Employers will need to be more prepared to justify and explain why physical presence in the workplace is indeed "essential."[1]

More broadly, the Sixth Circuit's decision in *Ford* sends the signal that obtaining summary judgment may become more difficult in cases over disputed reasonable accommodations, or cases disputing the "essential functions" of any particular job. It already became clear under the ADA Amendments Act that fewer cases would be susceptible to summary judgment over the threshold issue of whether the plaintiff was protected under the law. *Ford* and others illustrate the increasing difficulty of obtaining summary judgment on whether a requested accommodation is "reasonable."

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If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, or Mr. Petesch at ppetesch@littler.com.

1 For further discussion on telecommuting and flexible work arrangements, *see* Brian Dixon et. al., *Mitigate or Litigate: Flexible Working and Legal Exposure*, The Littler Report (Feb. 2011), *available at* http://www.littler.com/publication-press/publication/mitigate-or-litigate-flexible-working-and-legal-exposure.