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EEOC V. FORD MOTOR COMPANY: IS TELECOMMUTING A REASONABLE ACCOMMODATION AFTER ALL?

By David Zins

Over a year ago, we published an *Employment Law Commentary* on *Equal Employment Opportunity Commission ("EEOC") v. Ford Motor Company*, a federal district court decision in the Eastern District of Michigan, which held that telecommuting would only rarely be a reasonable accommodation under the Americans with Disabilities Act ("ADA") and, accordingly, granted summary judgment in favor of the employer Ford.[1] In a controversial 2-1 decision, the Sixth Circuit recently reversed and, in doing so, suggested that working from home may be a reasonable accommodation more often than previously thought.[2] The Sixth Circuit also called into question courts' traditional deference to an employer's business judgment in deciding whether attendance is an essential job function. It remains to be seen whether Ford will petition for a rehearing *en banc*, and many other circuits continue to hold that physical attendance in the workplace is indeed an essential function of most jobs.[3] Nonetheless, in-house counsel and HR professionals alike should understand the Sixth Circuit's *Ford Motor Company* decision and its potential implications

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because plaintiffs' lawyers will undoubtedly try to use it around the country. More employee requests for work-from-home arrangements as an ADA accommodation are bound to come.

Factual Background

At issue in the case is Jane Harris's charge that Ford purportedly failed to provide reasonable accommodation and retaliated against her in violation of the ADA. Harris worked for Ford as a buyer, and the essence of her job was group problem-solving, which required frequent interaction with others at Ford and Ford's suppliers when problems arose. In Ford's business judgment, such interactions were most effectively handled face-to-face; email or teleconferencing was an inadequate substitute for in-person meetings.

Harris suffered from irritable bowel syndrome throughout her employment at Ford, and her condition caused chronic absenteeism. Ford tried out a flex-time telecommuting schedule on a trial basis with Harris, but the trial was ended because Harris proved unable to establish regular and consistent work hours. The chronic attendance problems persisted, and Harris apparently worked from home on an informal basis, without Ford's approval, including on evenings and weekends. Ford maintained that such off-hours work was not a sufficient substitute for work during normal hours because it precluded the team problem-solving and supplier contact necessary to the job. Indeed, working off hours caused Harris to make mistakes and miss deadlines, because she lacked access to suppliers.

In February 2009, Harris formally requested that she be permitted to telecommute as needed as an accommodation for her disability. Ford maintained a telecommuting policy that allowed employees to telecommute up to four days a week, though the policy noted that telecommuting was not appropriate for all jobs, employees, work environments or even managers. A number of buyers telecommuted on one scheduled day of the week under this policy. Ford denied Harris's request after her supervisors concluded that her position was not suitable for the requested work-from-home arrangement. Ford's HR representative suggested several alternative accommodations, such a 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 denied her a reasonable accommodation for her disability. Meanwhile, Harris's job performance continued to deteriorate. Ultimately, Ford concluded that her poor performance necessitated an interim review in May 2009, as a result of which Harris was placed on a performance improvement plan. She failed to meet many of the objectives set forth in this plan, and her employment was terminated in September 2009. Shortly thereafter, Harris filed a second EEOC charge, alleging that the interim review, performance improvement plan and termination were done in retaliation for filing her initial charge.

The District Court Opinion

The EEOC filed suit on Harris's behalf in the Eastern District of Michigan. However, the district court granted summary judgment on September 12, 2012, in favor of Ford because regular attendance is a basic requirement for most jobs, the undisputed record revealed Harris's extensive absenteeism and Harris was thus not a "qualified" individual under the ADA. In addition, the court credited Ford's business judgment that regular attendance was an essential function of Harris's job, given the teamwork involved. Her position — like most positions — required regular attendance, meaning that the requested telecommuting accommodation was not reasonable. As for the retaliation claim, the court held that Harris could not overcome Ford's legitimate, non-retaliatory reason for its actions, i.e., her poor performance.

The Sixth Circuit Majority Opinion

Earlier this month, the Sixth Circuit reversed the district court's grant of summary judgment. Because of the "advance of technology in the employment context," the majority opined, the law must "recognize that the 'workplace' is anywhere that an employee can perform her job duties." Thus, the court recast the question from "whether 'attendance' was an essential job function" to "whether physical presence at the Ford facilities was truly essential." In answering this reformulated question, the court considered Ford's evidence that it was, but the court also observed that "advancing technology has diminished the necessity of in-person contact to facilitate group conversations." In light of "teleconferencing technologies that most people could not have conceived of in the 1990s," the court was "not persuaded that positions that require a great deal of teamwork are inherently unsuitable to telecommuting arrangements."

In deciding which job functions are essential, the court stated that it would "carefully consider all of the relevant factors, of which the employer's business judgment is only one." The court quipped, "[W]e should not abdicate our responsibility as a court to company

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personnel boards." In addition to downplaying the importance of an employer's business judgment, the court appeared to contemplate a fact-intensive inquiry — into factors including Harris's own testimony about her job — poorly suited to resolution at summary judgment.

Of further significance, the court pointed to Ford's decision to allow other buyers to telecommute on a limited basis as evidence that physical presence in the workplace was not an essential function of the job.

For all of these reasons, the court concluded that the EEOC had presented evidence that Harris was a qualified individual with a reasonable telecommuting accommodation, which shifted the burden to Ford to prove that such an arrangement would be an undue hardship. But the majority speculated that the cost of outfitting a home workstation for Harris is likely *de minimis*, "considering Ford's financial resources and the size of its workforce." Moreover, the court cited Ford's telecommuting policy, which pledges to absorb these expenses for employees approved to telecommute. For these reasons, the court said, Ford could not prove on a summary judgment motion that a work-from-home arrangement would create an undue hardship.

With respect to retaliation, Harris had established a prima facie case, and Ford had met its burden of providing legitimate and nondiscriminatory reasons for disciplining and terminating Harris. However, the court concluded that there was evidence of pretext — namely, that Harris's deficient performance prompted a negative review and performance improvement plan only after her EEOC charge was filed — which defeated summary judgment.

The Sixth Circuit Dissent

The dissent acknowledged that "teleconferencing is more commonplace today, and that the class of jobs in which all duties can be done at home has likely increased over the last few years." But "such abstractions," it observed, do not transform Harris's buyer position into "one of the jobs in which all duties may be done from home." To the contrary, Ford had presented "overwhelming evidence" supporting its business judgment that impromptu meetings and group problem-solving required in-person interactions. That certain other buyers telecommuted a single day during the week did not support the EEOC's claim that telecommuting up to four days a week is reasonable, because "[t]he difference between one or two days versus four days speaks for itself." Further, the dissent explained that there is a good reason why courts are reluctant to allow employees to define the essential functions of their positions based solely on their personal viewpoint and experience, namely that any employee could provide "self-serving testimony" that "her job was amenable to telecommuting." The majority had improperly turned itself into a "super personnel department," deciding on its own which positions require face-to-face interaction rather than deferring to Ford's business judgment.

Further, the dissent poked holes in the majority's "technology has advanced" argument, given that the Sixth Circuit affirmed as recently as 2012 that attendance is an essential function of nearly all jobs. Moreover, two opinions the majority dismissed as "early cases" were decided in 1997 and 2004, when "it cannot be said that email, computers, or conference call capabilities were not available."

The dissent also objected to the majority discrediting Ford's offer to identify a different position for Harris amenable to working from home. The only reason Ford did not do so, the dissent observed, was that Harris flat-out refused to consider this alternative. Had Harris been less intransigent initially, Ford would have proceeded to identify a specific position, which would have been a reasonable accommodation under the circumstances. Perversely, the majority decision rewarded Harris for her unwillingness to cooperate.

The dissent would have upheld summary judgment as to the retaliation claim too. The EEOC admitted that Harris had performance issues. This necessarily would have prevented the EEOC from proving, as it must, (1) that Ford's proffered reason for disciplining and firing Harris was false and (2) that retaliation was the real reason.

Updated Lessons for Employers

The *Ford Motor Company* case highlights the perils facing an employer when considering an employee's request to telecommute as an ADA accommodation. In light of the Sixth Circuit opinion, we have revisited and updated a number of our cautionary lessons from early last year.

We noted last year that courts will consider the evidence in assessing an employer's business judgment regarding essential job functions. The Sixth Circuit has revisited this proposition and challenged the traditional deference given to an employer's business judgment altogether. Not only must the employer's business judgment be supported by evidence (which Ford's was), but an employer's business judgment is only one of the "relevant factors" a court may consider, according to the Sixth Circuit. A court apparently may even credit an employee's self-serving testimony to create a genuine issue of fact to

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Introduction of a Universal Minimum Wage in Germany: Update

By Lawrence Rajczak

While the majority of countries across the EU (including France, the UK and most of Eastern Europe) have introduced a statutory minimum wage, this has not been the case in Germany so far. Instead, minimum wages have been introduced sector-by-sector via negotiated collective bargaining agreements between labor unions and employer associations. Consequently, up until now, minimum wage rates have not applied across the board for all industries and employers, but only for certain specific sectors of employment (e.g., the construction sector).

Due to a key demand of the social-democrat coalition partner, the newly elected government is now set to introduce new legislation which is supposed to provide for a universal statutory minimum wage. The newly installed Federal Minister of Labor presented an official first draft of a respective bill in late March.

According to what the parties forming the new government had planned in their coalition agreement, the draft bill provides for a statutory universal minimum wage of €8.50 per hour, effective as of January 1, 2015.

There will be a transitional period until the beginning of 2017, during which minimum wages lower than €8.50 per hour can still be agreed upon in collective bargaining agreements – however, not any longer in individual employment agreements. As of 2018, the minimum wage's level is supposed to be reviewed and adjusted regularly by an expert committee. The expert committee will be made up of an equal number of labor union and employer association representatives, as well as an impartial chairperson.

However, how the draft will ultimately turn out to be implemented is, at this time, still unclear, as the legislation is still the subject of a heated political debate between the coalition partners – the discussion's critical point being whether the bill should provide for certain exemptions from the minimum wage rate of €8.50 per hour.

Currently, the proposed draft provides for the exemption of employees younger than 18 years of age, as well as long-term unemployed, during the first six months of a new employment. Representatives of the conservative coalition partner and employer associations are however loudly calling for broader exemptions. According to their demands, even more groups of the workforce should be exempt, in addition to also extending the exemptions to certain sectors and regions (i.e., most importantly, the economically weaker eastern part of Germany).

The most likely compromise seems to be that the exemption currently contained in the draft will also be extended to other groups of the workforce, such as working pensioners, students, and so-called "marginal" and seasonal workers.

It therefore still remains to be seen how the minimum wage will ultimately be implemented in Germany. If the current debate can be taken as an indication of where a possible compromise will lie, the "patchwork approach" to introducing a minimum wage, which has characterized the situation thus far, is most likely going to persist – perhaps in a different incarnation. Should the broad exemptions be implemented as called for by the conservative coalition partner, the implementation will most likely not bring about the dramatic changes augured by critical commentators. Instead, a substantial part of the low-wage labor market – which would almost exclusively be affected by the planned minimum wage – will most likely fall under one of the contemplated exemptions.

defeat summary judgment. It is unclear how a court, in considering all these factors, avoids becoming a "super personnel department." It is also unclear whether other courts around the country will adopt this view.

Allowing other employees to work at home may undercut an employer's argument that telecommuting is not a reasonable accommodation. Indeed, as the dissent makes clear, "the 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."

Even the district court contemplated exceptional cases in which regular attendance at work is not an essential job function. The Sixth Circuit has now expanded upon this view. Both the majority and the dissent in *Ford Motor Company* agreed that technology has enabled the class of jobs in which all duties can be done at home to increase in recent years. The majority opined that even jobs requiring extensive teamwork may not be unsuited to telecommuting.

An employer considering a request for accommodation must engage in an interactive process with the requesting employee. Here, the lesson may be that no good deed goes unpunished. Ford engaged in an interactive process with Harris and even suggested two alternative accommodations in lieu of telecommuting. Still, it apparently did not go far enough because it did not actually identify an alternative position for Harris, ironically because Harris refused to entertain the possibility. It is unclear how Ford's interactive process could have satisfied the Sixth Circuit on these facts, but the importance of a thorough interactive process is beyond doubt.

It is easy for an employee to state a prima facie case of retaliation, and fact-intensive questions such as pretext can be ill-suited to summary judgment. No one disputed that Harris's poor performance predated her EEOC charge. But the fact that Ford did not discipline or terminate her until after her protected activity was potentially evidence that Ford's proffered reason for its actions was pretextual. This was enough to defeat summary judgment.

Conclusion

Employee requests for telecommuting accommodations are certain to increase going forward. The Sixth Circuit's *Ford Motor Company* decision, while limited to the upper Midwest as controlling precedent, will undoubtedly be cited in other circuits as persuasive authority for an expanded right to telecommute as a reasonable accommodation under the ADA and highlights the dangers to employers in considering such requests. Employers need to carefully consider these requests as well as the current form of their telecommuting policies to avoid the type of challenge that ultimately prevailed in the *Ford Motor Company* decision.

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1 Case No. 11-13742, 2012 U.S. Dist. LEXIS 128200 (E.D. Mich. Sept. 10, 2012).

2 *EEOC v. Ford Motor Company*, No. 12-2484, 2014 U.S. App. LEXIS 7502 (6th Cir. Apr. 22, 2014).

3 See, e.g., *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1235 (9th Cir. 2012); *Colón-Fontánez v. Municipality of San Juan*, 660 F.3d 17, 33 (1st Cir. 2011); *Vandenbroek v. PSEG Power, CT LLC*, 356 F. App'x 457, 460 (2d Cir. 2009); *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1119-1121 (10th Cir. 2004); *EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 949 (7th Cir. 2001) (en banc); *Davis v. Florida Power & Light Co.*, 205 F.3d 1301, 1306 (11th Cir. 2000); *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1048 (8th Cir. 1999).