

# Lessons From the *EEOC v. Ford Motor Company* Verdict

## Best practices for defending against disability discrimination failure to accommodate claims.

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In *Equal Employment Opportunity Commission (EEOC) v. Ford Motor Company*, the U.S. Court of Appeals for the 6th Circuit issued a noteworthy decision on the issue of reasonable accommodations under the Americans with Disabilities Act (ADA) in the context of telecommuting arrangements. In that case, the 6th Circuit held that, where attendance is presumed to be an essential function of the job, an employee's telecommuting request does not constitute a reasonable accommodation under the ADA because it prevents the employee from carrying out the essential functions of his position. The decision has significant implications for employers and provides important guidance for analyzing the merits of employee requests to work remotely as well as for implementing best practices to defend against disability discrimination claims based on the denial of such requests.

Jane Harris worked for Ford as one of approximately half a dozen resale buyers on Ford's raw material team. Resale buyers at Ford play a highly interactive role and must constantly interact with the resale buyer team and with a number of contacts both inside and outside of Ford. As a result primarily of her irritable bowel syndrome, Harris worked on a "sporadic and unpredictable basis" and had "chronic attendance issues," which strained her

teammates and imposed significant difficulties on the business.

In April 2009, Harris sought leave "to work up to four days per week from home." Ford determined that Harris' proposed accommodation was unreasonable because resale buyers were required to be available to interact with their teammates, suppliers, and others at a moment's notice. In Ford's business judgment, Harris' request to telecommute up to four days per week could not be reconciled with the essence of the resale buyer position, which was group problem-solving. While Ford declined to grant her requested telecommuting schedule, Harris turned down each alternative accommodation that was offered by Ford management. In September 2009, Ford terminated Harris due to her ongoing performance issues.

After Ford terminated Harris for poor performance, the EEOC filed suit under the ADA, alleging that Ford failed to reasonably accommodate Harris' disability and discharged her in retaliation for filing an EEOC complaint. A divided panel of the 6th Circuit reversed the decision of the trial court granting summary judgment in favor of Ford, finding that a telecommuting arrangement could be a reasonable accommodation for an employee suffering from a severe disability.

Ford appealed, and the 6th Circuit granted an *en banc* review.

### The Law

Many disabled individuals require accommodations to perform their jobs. The ADA addresses this reality by requiring employers to make “reasonable accommodations to the known...limitations of an otherwise qualified individual with a disability,” where such an accommodation does not cause the employer “undue hardship.” Employers are required to accommodate their employees only if such an accommodation is “reasonable,” but not if the accommodation would result in an “undue hardship,” which is defined as “an action requiring significant difficulty or expense when considered in light” of factors such as the nature and cost of the accommodation, the overall financial resources of the facility involved in providing the accommodation, the overall financial resources of the employer, and the type of operations of the employer.

To comply with the ADA, then, employers must reasonably accommodate employees that are qualified. To be “qualified” under the ADA, an employee must be able to “perform the essential functions” of their position “with or without reasonable accommodation.” A reasonable accommodation may include “job restructuring [and] part-time or modified work schedules.” But it does not include removing an “essential function” from the position, for that is *per se* unreasonable. If an employee is unable to perform the essential functions of his position, either with or without a reasonable accommodation, then the employee is not qualified for the position and, thus, cannot claim entitlement to relief under the ADA.

### The Reversal

On appeal, Ford argued that coming to work is an essential job function and that Harris’ resale buyer position is not the “unusual case” where regular attendance is not essential to the job. Rather, Harris’ request to telecommute up to four days a week on an unpredictable schedule was not reasonable because regular attendance in the workplace is an essential function of her position as a resale buyer.

Reversing its own prior decision, the *en banc* court agreed with Ford. The 6th Circuit found that “[r]egular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs.” It held that “an employee who does not come to work cannot perform any of his job functions, essential or otherwise” and that “most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation.”

In Harris’ case, the court found that regular and predictable on-site attendance was essential for her position and her repeated absences made her unable to perform the essential functions of a resale buyer. As such, the court held that Harris’ proposed accommodation was unreasonable. With that said, the *en banc* court did not rule out telecommunicating as a reasonable accommodation across the board. Rather, it held that, under the particular facts of the dispute between Harris and Ford, Harris’ telecommuting request did not constitute a reasonable accommodation because it would have precluded her from carrying out the essential functions of her specific job as a resale buyer.

### Takeaways for Employers

*Ford* is a noteworthy win for employers because it significantly curtails the scope of telecommuting as a reasonable accommodation under the ADA. *Ford* also provides additional important guidance for employers as to how they can defend against the risk of potential disability discrimination claims relating to employment decisions taken in response to accommodation requests.

First, employers should take great care to maintain detailed, written job descriptions describing the essential functions of each individual position in the company. In this regard, the 6th Circuit noted the significance of written job descriptions as it highlighted the general rule that essential functions are “those that the employer’s ‘judgment’ and ‘written [job] description’ prior to litigation deem essential.” Accordingly, written job descriptions that specify the core functions of a particular position will serve as a significant aid in demonstrating that an accommodation request was unreasonable because of its relation to an essential function of the position.

Second, a company’s written employment policies and how those policies are enforced also play a key role in establishing the reasonableness of an employer’s denial of an accommodation request. In this respect, the *Ford* court noted that the validity of an employer’s argument that a given aspect of an employee’s position constitutes an essential function also is analyzed based on the employer’s “words, policies, and practices” regarding that particular aspect of the job in question. Importantly, the court highlighted the fact that summary judgment is required “where an employer’s judgment as to essential job functions—evidenced by the employer’s words, policies, and practices

and taking into account all relevant favors—is ‘job-related, uniformly-enforced, and consistent with business necessity.’”

In the context of telecommuting, if in-person attendance is required for an employee to successfully carry out his job responsibilities, then the employer should specify that attendance is mandatory in the company’s written employment policies. In addition, that policy must thereafter be enforced on a consistent basis, which will provide further support for the conclusion that the function is essential to performing the duties and responsibilities of the position in question. Combined, properly written job descriptions and employment policies, along with regular enforcement of such policies, will provide employers with an extremely strong weapon to defeat disability discrimination claims brought by dissatisfied employees who failed to receive the accommodations that they requested.

Third, *Ford* underscores the importance that is placed on employers’ engaging in the interactive process of finding an accommodation for its employee following a request to accommodate. The court placed significant weight on *Ford*’s efforts to meet with its employee to engage in an “interactive discussion, dialogue, and opportunity to review various options that would meet both the needs of the business as well as [Harris’] personal needs.” In general, taking part in the interactive process provides strong evidence in litigation that the employer has attempted to identify reasonable accommodations to fit the employee’s needs.

Employers can demonstrate a good-faith attempt to accommodate by meeting with the employee, seeking information about the accommodation request, and asking relevant questions that will allow the employer to

make an informed decision regarding the requested arrangement. Once all relevant information has been gathered, the employer must then consider the request, and if the initial request is rejected, the employer must further explore other alternative accommodations. In addition, the employee is required to engage in the interactive process as well. As a result of these mutual obligations, an employer cannot be liable for refusing to accommodate if the process fails due to action or inaction on the part of the employee.

Fourth, the *Ford* opinion provides a robust shield against any arguments put forth by employees that in-person attendance at work is no longer required in light of today's technology. In this respect, it should be anticipated that more and more employees will seek telecommuting accommodations based on the argument that advancements in technology have made on-site attendance unnecessary today.

However, the 6th Circuit specifically addressed this issue. Its discussion pertaining to the impact of technology on the need for being in the office can be used by employers and human resources departments to defeat this particular argument by employees, especially those who perform interactive jobs. The 6th Circuit concluded that today's technologies alone are insufficient to make in-person attendance at the workplace nonessential for those persons holding

interactive positions. Accordingly, *Ford* can be utilized to soundly overcome technology-based arguments as to the reasonableness of a telecommuting accommodation request.

Finally, a note of caution for employers: The court did not hold that telecommuting was an unreasonable accommodation request in all cases. Rather, the court issued a more narrow decision that telecommuting was unreasonable under the facts and circumstances pertaining to the specific position that Harris held with Ford. Thus, under some circumstances, telecommuting may constitute a reasonable accommodation request. As such, there is no one-size-fits-all rule when it comes to evaluating telecommuting arrangements. Rather, employers should be cautious to always assess such requests on a case-by-case basis, with a close analysis of the particular duties and responsibilities of each specific position. Proper analysis of the request requires the employer to engage in the interactive process of finding an accommodation. And, as always, an employer who refuses the accommodation should be able to fully justify that decision.

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