

## Telecommuting: A Reasonable Accommodation?

The Sixth Circuit Court of Appeals recently considered whether telecommuting is a reasonable — and workable — accommodation under the Americans with Disabilities Act. In an important ruling for employers, the court confirmed that regular on-site presence is an essential function of most jobs — particularly interactive jobs — and that an employer is not required to remove an essential job function to accommodate an individual with a disability. In other circumstances, however, telecommuting may be a viable reasonable accommodation. Given advancing technology, employers may want to re-examine job requirements, update job descriptions, and periodically review their telecommuting policies and practices.

### Background

The Americans with Disabilities Act (ADA) generally prohibits employment discrimination on the basis of disability, and allows an individual with a disability to request a reasonable accommodation for the hiring process and on the job. Barring undue hardship, employers must reasonably accommodate a disabled applicant's or employee's known limitations if the individual is "qualified" — if the individual can perform the essential functions of the job with or without a reasonable accommodation. To satisfy the ADA, employers must first make an individualized assessment of whether the disabled individual is qualified for the job he or she holds or seeks, and then engage in an interactive process to identify a reasonable accommodation for the physical or mental impairments of an otherwise qualified applicant or employee.

Jane Harris was a resale buyer for Ford Motor Company. Her job required her to coordinate with her co-workers and steel suppliers (including through in-person site visits) to make sure the company's parts manufacturers had the steel they needed to make parts for Ford vehicles. Harris had health issues that caused attendance problems. When repeated absences affected her job performance, the company allowed her to try teleworking and different telecommuting schedules. Because Harris failed to work on a regular and consistent schedule, the burden fell on her co-workers and suppliers to keep things on track.

Company policy allowed salaried employees to telecommute up to four days a week, but made clear that working from home was not appropriate for "all jobs, employees, work environments or even



managers.” Both company policy and practice limited telecommuting for resale buyers to one set day per week at most, and those buyers agreed in advance to come into work if needed. When Harris requested a flexible telecommuting schedule that would allow her to work from home up to four days a week, the company did not agree but looked for other ways to accommodate her. The company proposed various alternatives that would allow her to regularly work on site and engage in the face-to-face interactions the resale buyer’s job required, and suggested that she also could seek another job within the company that would be more suitable for telecommuting.

Harris rejected each option the company offered, and filed a disability discrimination charge with the EEOC. Due to ongoing performance problems, she was placed on a 30-day performance enhancement plan several months later and was subsequently terminated when she failed to meet any of the plan’s objectives. The EEOC sued, claiming that the company violated the ADA by denying Harris’s request to telecommute and terminating her in retaliation for going to the EEOC. Finding that Harris was not a qualified individual because of her excessive absenteeism and refusing to second-guess the company’s business judgment regarding essential job functions, the district court dismissed the suit. The EEOC appealed.

In a 2-1 [decision](#) issued last year, a three-judge panel of the US Court of Appeals for the Sixth Circuit reversed the lower court’s ruling. The panel found that Harris was a qualified individual if on-site attendance was not considered, and that the company had the burden to prove that physical presence at work was an essential job function. The panel reasoned that technology has expanded the workplace and made it possible for employees to “attend” work from home. Concluding that physical presence in the workplace may no longer be an essential job function, the panel held that telecommuting was a reasonable accommodation that employers have to offer under the ADA. The company asked the full Sixth Circuit to vacate and review the panel’s decision. The court agreed.

## The Sixth Circuit’s View

In an 8-5 [decision](#), the Sixth Circuit recently upheld the district court’s dismissal of the EEOC’s claims against the company. In *EEOC v. Ford Motor Company*, the court acknowledged that the ADA requires employers to reasonably accommodate employees with a disability, but made clear that “it does not endow all disabled persons with a job — or job schedule — of their choosing.”

### The Accommodation Claim

The court found that a resale buyer’s job was fundamentally interactive, and that regular and predictable physical presence on site was an essential job function. Relying on both the general rule that regularly working on site is essential to most jobs — especially interactive ones — and the EEOC’s own informal [guidance](#) on telework, the court concluded: “An employer may refuse a telecommuting request when, among other things, the job requires ‘face-to-face interaction and coordination of work with other employees,’ ‘in-person interaction with outside colleagues, clients, or customers,’ and ‘immediate access to documents or other information located only in the workplace.’”

#### Essential Job Functions

The ADA provides that “consideration shall be given to the employer’s judgment as to what functions of a job are essential.” However, as the court pointed out, that judgment is not dispositive. Rather, all relevant factors must be taken into account.

While the court said that essential functions are generally those deemed essential in the employer’s judgment and in written job descriptions, its ruling does not “require blind deference to the employer’s stated judgment.” Rather, all relevant factors — including the employer’s words, policies and practices — must be taken into account in

determining whether a particular function is essential. Among the factors the court gave weight to in this case were: the company's assessment of the job requirements; the employee's poor performance; Harris's prior history of telecommuting; and the terms of her proposed telecommuting schedule.

The court held that the burden was on the employee to propose an accommodation that would allow her to perform the essential functions of her job effectively. Here, Harris's telecommuting proposal removed an essential function of her job — regularly attending work. While acknowledging that a reasonable accommodation under the ADA may include job restructuring or a modified work schedule, the court made clear that it does not include eliminating an essential job function. Because Harris could not regularly and predictably work on site, the court found that she was not qualified to perform the job.

### **The Retaliation Claim**

The court gave no credence to the retaliation claim, holding that no reasonable jury could find that the company would have continued to employ Harris in light of her past performance failures and her inability to perform essential job functions going forward. Further undermining her retaliation claim was the fact that Harris received performance evaluations that placed her in the bottom 10% of her peer group both before and after she filed her complaint. The court noted that her termination occurred four months after the EEOC complaint was filed, but said that the EEOC could not establish a causal connection between the complaint and her termination.

### **In Closing**

While advances in technology have made telework arrangements increasingly commonplace, the Sixth Circuit affirms that the essential duties of some jobs can only be performed in the workplace. An employee's request to work from home because of a disability may not be a reasonable accommodation in those circumstances, but telecommuting may be a workable option in others. Employers must continue to assess requests for such an accommodation on a case-by-case basis, and engage in the interactive process of finding a reasonable accommodation for a qualified individual with a disability.

**Authors**

Nancy Vary, JD  
Abe Dubin, JD

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