

# Northern New England

## MONDAY MORNING MINUTE

May 5, 2014

### Telecommuting May Be A Reasonable Accommodation Under The Americans With Disabilities Act

A recent case from the Sixth Circuit Court of Appeals, which has jurisdiction over Kentucky, Tennessee, Michigan and Ohio, held that a four day a week telecommuting schedule may be a reasonable accommodation under the Americans with Disabilities Act ("ADA"). In *EEOC v. Ford Motor Company*, No. 12-2484 (6th Cir. Apr. 22, 2014), the Court stated that "attendance is no longer synonymous with physical presence in the workplace," likely making it easier for employees to telecommute from home as a reasonable accommodation under the ADA.

In this case, employee Jane Harris worked until 2009 as a resale steel buyer for Ford, charged with making sure that the parts manufacturers suffered no interruption in steel supplies. The position required the employee to use resourcefulness and team-solving skills in the event of an unplanned supply interruption. Harris received generally passing scores on her annual performance evaluations, but was marked down for "disruptive" interpersonal skills.

During her entire employment with Ford, Harris suffered from Irritable Bowel Syndrome ("IBS"), a medical condition leading to fecal incontinence, which sometimes made it difficult for her to stand without soiling herself and to commute to work. Ford permitted Harris to take intermittent FMLA leave when she experienced severe symptoms. It also permitted her to work from home on an informal basis, including during "non-core" evening and weekend hours. Importantly, Ford had allowed other employees to also use telecommuting on an occasional basis.

Harris' disease grew progressively worse and in February 2009 she requested that she be allowed to telecommute when her IBS made it impossible to come in, up to four days per week. This proposal was turned down because Ford concluded that face-to-face contact with co-workers and suppliers was an

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essential function of the job. Harris declined the alternative suggestions of having her cubicle moved closer to a washroom, or transferring to an entirely different kind of work at Ford more compatible with telecommuting.

Harris filed an EEOC charge. Ford then began giving her negative performance reviews, culminating in her termination. Harris sued, claiming (among other things) that by not letting her telecommute, Ford violated the ADA by failing to provide a reasonable accommodation. The district court granted summary judgment in favor of Ford, reasoning that Harris was not a qualified individual with a disability owing to her supposedly excessive absences, and that her termination was prompted by legitimate performance-based shortcomings.

The 6th Circuit reversed, holding that the EEOC raised a genuine dispute of material fact about whether regular physical attendance at work was an "essential function" of working as a resale steel buyer, and whether the request to work from home was a reasonable accommodation under the circumstances. Because Harris otherwise met the qualifications of the job (other than the absenteeism), the burden on this question fell on the employer, Ford. The court held that the presumption of regular attendance as an "essential function," reflected in earlier case law, was outmoded in 2014:

"When we first developed the principle that attendance is an essential requirement of most jobs, technology was such that the workplace and an employer's brick-and-mortar location were synonymous. However, 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. Thus, the vital question in this case is not whether 'attendance' was an essential job function for a resale buyer, but whether physical presence at the Ford facilities was truly essential."

With advances in technology, the Court stated, the workplace can be anywhere that an employee can perform his or her job duties. Because the Court found evidence in the record that much of the work could be done over the telephone or by video conference, and other buyers had worked from home, the Court allowed the plaintiff to proceed with her ADA failure-to-accommodate claim.

The dissenting judge held that, in line with prior circuit case law (and other circuit courts), "an employee who cannot satisfy an employer's basic attendance requirements is unqualified under the ADA as a matter of law." Moreover, according to the dissent, the telecommuting option was not a reasonable accommodation under this record: "Ford has offered overwhelming evidence to support its business judgment that impromptu meetings and problem-solving with the resale buyer team were most effectively handled face-to-face."

In the wake of this decision, it is likely that employers will be faced with more requests to work from home as a reasonable accommodation. In this case at least, the court viewed telecommuting as a standard, rather than an extraordinary, working arrangement. However, it also recognized that plenty of jobs still require physical presence where the employee must interact directly with people or objects at the worksite. Employers who want to insist upon physical presence in the workplace should expect to prove the unreasonableness of a work-from-home request under their particular circumstances and be prepared to identify the job requirements that cannot be performed remotely.

*Your Jackson Lewis Attorney can answer questions regarding this and other employment law issues.*

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## Leaves of Absence: Navigating Increasingly Complex Leave Laws When Checking-The-Box Will Not Suffice

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**Friday, May 9, 2014 | 8:30 –10:30 a.m.**

### Portsmouth Harbor Events and Conference Center

100 Deer Street at 22 Portwalk Place | Portsmouth, NH 03801

There is no cost to attend this program, but space is limited so [click here](#) to register today!

## SAVE THE DATE!

**ON MAY 20<sup>TH</sup>**, Portsmouth Managing Shareholder **Debra Weiss Ford** will be presenting at the

### **“Employment Policies and Handbooks: What You Need...and What You Don’t”**

seminar at **Brightview North Andover Independent & Assisted Living**.

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This interactive seminar will address not only the policies employers must have, but also identify employment policies that actually create unnecessary liability. Learn what policies you need and what policies create ticking time bombs and may violate the NLRA. This seminar will help insulate your company against ex-pensive and time-consuming litigation.

#### **Date/Time:**

Tuesday, May 20<sup>th</sup>, 2014  
8:00 a.m. – 10:30 a.m.

#### **Location:**

Brightview North Andover Independent & Assisted Living  
1275 Turnpike Street | North Andover, MA 01845

#### **Cost:**

\$35.00/person (on or before 05/15/14)  
\$45.00/person (on or after 05/16/14)

#### **Need more info?**

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Hosted by **Family Services EAP**

**Please see attached flyer to register.**