“Telecommuting” Issues In The Wake Of EEOC V. Ford

Telecommuting is on the rise. Between 2005 and 2012, the number of telecommuting employees grew 80%. Approximately 3.3 million U.S. employees now telecommute at least half the time. And roughly 25 million employees telecommute at least one day a month. Moreover, lawmakers are extolling the economic benefits of telecommuting. By one estimate, $1 trillion (or 7.2% of GDP) in time and travel expenses is expended every year by employees commuting to the workplace.

Even still, most legal commentators were jolted this April by the Sixth Circuit Court of Appeals’ landmark decision on telecommuting, which was vacated shortly thereafter. In EEOC v. Ford Motor Company, a three-judge panel of the Sixth Circuit issued a sweeping ruling holding that due to technological advances enabling employees to work remotely, telecommuting is now a reasonable accommodation that many employers may have to offer to their disabled employees under the Americans with Disabilities Act (ADA).

For a few short months, it appeared that the Sixth Circuit had adopted a bold position on telecommuting, previously held by a minority of circuits. However, in August, the Sixth Circuit vacated the panel’s decision. The case will now be reheard in front of all the Sixth Circuit’s active judges. How the full panel will rule is anyone’s guess. Regardless, Ford has caught the attention of employers eager to prepare for changes in telecommuting law.

The Details of EEOC v. Ford

The plaintiff in Ford was Jane Harris, a “resale buyer” at the Ford Motor Company. Essentially, she was a problem solver. Her role was to respond to emergencies in the steel supply process, ensuring that Ford’s parts manufacturers received the steel they needed. This was principally achieved by group problem-solving with her co-workers at Ford and the steel suppliers, and by making in-person site visits to observe the steel production process.

Harris had a severe form of Irritable Bowel Syndrome (IBS) that caused fecal incontinence. On bad days she could not drive to work or stand up from her desk without soiling herself. Initially, Ford allowed Harris to work from home on a trial basis. However, Ford cancelled the program because Harris failed to establish regular and consistent work hours, leading to mistakes and missed deadlines. For instance, while trying to catch up on work from home during the weekend, she submitted a purchase order containing incorrect and outdated pricing information. Harris’s co-workers and her steel suppliers had to correct her mistakes, and her co-workers had to assume some of her responsibilities.

Due to her illness, Harris continued to take days at home. But Ford discounted any work she did from home, marking her “absent” because she was not in the office. Her absences multiplied.

Harris formally requested permission to telecommute 4 out of every 5 days on an “as needed” basis. Ford’s policy actually allowed telecommuting up to 4 days a week for all salaried employees. But it also stated that telecommuting was not appropriate for “all jobs, employees, work environments or even managers.” After consideration, Ford denied Harris’s telecommuting request.
Instead, Ford offered Harris alternative accommodations. It offered to move Harris's office closer to the restroom, and to find her a different position within the company more suitable to telecommuting. Harris rejected these options. Meetings to resolve the issue became unproductive. Harris’s relationship with Ford deteriorated, ending with Harris’s termination.

The Equal Employment Opportunity Commission (EEOC) sued Ford on Harris’s behalf in the Eastern District of Michigan, alleging failure to accommodate under the ADA and retaliatory firing. The District Court granted summary judgment for Ford. Following long-standing precedent, the Court reasoned that Harris was unqualified for her job due to her excessive absenteeism. It also credited Ford’s business judgment that Harris’s request to telecommute 4 days a week was not reasonable.

A three-judge panel of the Sixth Circuit Court of Appeals reversed. In a 2-1 decision, the majority held that Harris was entitled to have a jury decide whether Ford had failed to offer her a reasonable accommodation for her IBS.

The majority reasoned that due to advancements in technology, the “workplace” is no longer just the employer’s physical location. “The world has changed,” the majority announced. “The ‘workplace’ is anywhere that an employee can perform her job duties.” As a result, physical attendance is not necessarily an “essential function” of all jobs. And since employees may “attend” work via technological means, the majority explained, Harris was otherwise qualified for her job because she could “attend” work from home.

The appellate court was unpersuaded by Ford’s argument that physical attendance was in fact an essential function of Harris’s job. The majority believed Ford had 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.” But the majority replied that these meetings could be conducted by teleconference. The court also rejected Ford’s contention that Harris’s job required face-to-face interactions with clients. These interactions could be handled via conference call, the court decided. And if physical attendance was so crucial, the court queried, why were other resale buyers at Ford permitted to telecommute?

According to the dissenting opinion, the central question in Ford was “Just how essential is showing up for work on a predictable basis?” Under long-standing precedent, employers were entitled to insist on regular, predictable attendance for almost all jobs. Excessive absenteeism rendered an employee unqualified for her position as a matter of law (and thus ineligible to demand a reasonable accommodation from her employer). The majority had turned this principle on its head, by holding that Harris, an employee with excessive absences, may still be qualified for her job.

And what about the oft-cited Sixth Circuit principle that it would be the “unusual case” where an employee could perform all her job duties from home? The Ford majority evaded this principle by declaring that thanks to innovations in technology, the number of jobs suitable to telecommuting had “greatly expanded.”

Even if the pool of jobs suitable to telecommuting had expanded, the dissent rejoined, there was no evidence to suggest that Harris’s position was one of those jobs. On the contrary, Ford’s managers and other resale buyers had universally agreed that Harris’s position required face to face communications, and that her chronic absences, and errors, strained the team. Moreover, even the EEOC had conceded that Harris’s position required in-person visits to steel suppliers. In addition, the other resale buyers at Ford who were allowed to telecommute were given just 1-2 days a week to do so, not the 4 days Harris was requesting.
But the majority held that Harris had effectively countered Ford's evidence by presenting her own testimony that she could perform the vast majority of her job functions from home. The dissent was particularly troubled by this ruling. By permitting Harris to survive summary judgment on her own self-serving testimony, the majority had “dramatically reduced what a plaintiff must show” to avoid summary judgment.

The dissent also criticized the majority for providing just one example of how technology had "changed the world": teleconferencing—a medium that has existed for quite some time. Was the state of communications technology in 2014 really that different than in the 2000's, when the Sixth Circuit had held that employers generally need not offer telecommuting as a reasonable accommodation?

Let's see what the Sixth Circuit decides after its rehearing in Ford. The oral arguments to the en banc Sixth Circuit just took place.

So What's A Telecommuting Friendly Company To Do?

In the meantime, many companies have adopted telecommuting policies. Indeed, Ford Motor Company allowed some of its employees to telecommute. It appears telecommuting is becoming more acceptable based on the requirements of the specific job in question and the availability of new high tech avenues to meet face-to-face via teleconference all from a home office.

Benefits of telecommuting include:
1) a family friendly culture that promotes work life balance;
2) company cost savings, such as a smaller home office, less real estate costs, etc.;
3) the environmental benefits of saving time and expenses related to driving to and from work;
4) telecommuting expands the geographic area for a company to find the best candidates for the position, instead of focusing solely on a local area or being concerned about moving costs;
5) research conducted reported an increased productivity telecommuting of employees; and
6) the savings on relocation costs.

On the other hand, the problems with telecommuting include:
1) the lack of in person interaction, where in person interaction may foster innovation, trust, and solidarity;
2) there is less management interaction between supervisors and employees;
3) delay of work due to service needs at a local home office;
4) costs of an appropriate home work environment, which may have to be borne by the employer;
5) liability and implementation issues of telecommuting;
6) resentment of telecommuters by non-telecommuters; and
7) potential for lapses in communication and direct oversight.

Indeed, in 2014 the Human Resources head for Yahoo!
Jackie Ress, indicated that telecommuting would no longer be acceptable at the company. The memo she forwarded last year to employees indicated that, "speed and quality are often sacrificed when we work from home. We need to be one Yahoo! and that starts with physically being together. Beginning in June, we are asking all employees with work-from-home arrangements to work in the Yahoo! offices."

There are a number of key legal issues implicated by telecommuting. Some of those legal concerns are listed here in summary form:

1) issues with wage and hour complaints under the FLSA and State law, such as the ability to monitor employee's work schedule from home, making sure that the employee clocks in or clocks out and does not work overtime, recordkeeping, etc.;
2) privacy and data protection, i.e., retaining confidentiality of client lists, product lists, pricing, etc.;
3) work-place safety and Occupational Safety Health Act (OSHA) compliance at the work-place home site;
4) Worker's Compensation, i.e. if an employee is traveling from their home office to the refrigerator or kitchen to get a cup of coffee and they fall and break their arm, is it a Worker's Comp claim;
5) ADA, FMLA, and related state law issues;
6) employer access to the employee home, that is, can the employer enter the home to examine the home office, must the employer provide the desks, office equipment, and computers, etc.; and
7) reimbursing employee travel from the employee's home office to the employer's physical location;
8) risk management;
9) zoning issues with having a home office;
10) taxes, which may include State and local taxes if an employee is working in a different location or state and the separate location or State wants to tax the wages of the employee in their location, which is not where the home office is located.

It is important, if telecommuting is permitted, to have a telecommuting policy in place for employees. That telecommuting policy should:

1) limit eligibility based on the length of employee's tenure and quality of job performance;
2) begin with a trial period of telecommuting;
3) determine equipment needs for the telecommuting arrangement;
4) ensure that employees protect privileged and confidential information;
5) evaluate whether the employee has an appropriate work environment in his or her home;
6) include the ability to visit the employee’s home by the company representatives to evaluate hazards and suggest modifications;
7) agree on the number of days per week, the schedules to maintain, and the manner and means of communication with the employee;
8) the requirement that all telecommuting employees who are not exempt from the overtime requirements of the FLSA must record all hours in the manner designated by the organization and the policies are reasonable to protect the employer under the Act or any State Act;
9) consider tax implications resulting from the employee's business use of his or her home;
10) reinforce telecommuting is not designed or cannot be used as a replacement for child care.

Finally, the employee should be required to sign a specific agreement with the employer outlining and agreeing to the policy in place. It is also important to have a very specific and up to date job description for the telecommuting employee for purposes of evaluation, job responsibility, and protocol for the telecommuting environment.

Telecommuting appears to be the wave of the future, at least for some categories of jobs, and the ADA may require telecommuting under certain circumstances.

Be prepared.

Ryan J. Dwyer, Esq.
RDwyer@Rendigs.com

Felix J. Gora, Esq.
FGora@Rendigs.com