The Potential Impact of EEOC v. Ford on Commute-Related Requests

Ryan J. Dwyer
Associate

Email: RDwyer@Rendigs.com
Direct: 513 381 9236
Fax: 513 381 9206

If allowed to stand,[1] the Sixth Circuit's recent decision in *EEOC v. Ford*, 752 F.3d 634 (6th Cir. 2014), holding that telecommuting may be a reasonable accommodation under the Americans with Disabilities Act (ADA) for an employee with Irritable Bowel Syndrome, may have far-reaching consequences for other types of commute-related requests from disabled employees. For instance, disabled employees frequently request shift changes or modified start and end times. Until now, many courts have concluded that these accommodations are not required under the ADA, either because the employer has no duty to assist with commuting problems, or because the ability to show up to work at an employer-designated time is deemed an "essential function" of the job. But *Ford* casts significant doubt on the continuing validity of these conclusions.

Consider that part of *Ford*'s rationale in favor of telecommuting was that, due to advancements in technology such as teleconferences and e-mail, physical presence in the workplace is no longer necessarily an "essential function" of many jobs. This is no small development. After all, if showing up to work is not an essential function, then telecommuting may just be the beginning of the accommodations employers must offer to disabled employees who struggle to make the daily shlep to the office. What about requests for relatively less burdensome accommodations, such as shift changes and modified start/end times?

To appreciate the potential impact that *Ford* might have on these questions, consider that just two years ago, the Sixth Circuit had taken a rather dim view of commute-related requests. In *Regan v. Faurecia Automotive Seating, Inc.*, the issue was whether a narcoleptic employee was entitled to work a modified work schedule because of difficulty with her commute.[2] Regan, a narcoleptic, typically worked a 6:00 a.m. to 3:00 p.m. shift for a Michigan automotive supplier. When her employer changed her hours to 7:00 a.m. to 4:00 p.m., Regan informed her supervisor that this would pose a problem. She contended that her new hours would require her to commute in heavier traffic, and that she got sleepier more quickly in such traffic. Accordingly, she requested permission to continue working the 6:00 a.m. to 3:00 p.m. shift, or alternatively, to work from 7:00 a.m. to 3:00 p.m. without a lunch break. Her employer denied her request, and she resigned.

Regan then sued, arguing that her employer's failure to provide a reasonable accom-

Rendigs, Fry, Kiely & Dennis, LLP
600 Vine Street, Suite 2650
Cincinnati, Ohio 45202

modation for her disability violated the ADA. The United States District Court for the Eastern District of Michigan granted summary judgment in favor of the employer, holding that her request for a modified work schedule was essentially geared to "minimize her commute time," and was not a required reasonable accommodation. The Sixth Circuit, in a case of first impression, upheld the district court's decision, writing that the ADA "does not require an employer to accommodate an employee's commute." "While an employer is required to provide reasonable accommodations that eliminate barriers in the work environment," the court continued, "an employer is not required to eliminate those barriers which exist outside the work environment."

The Sixth Circuit's sweeping pronouncement in *Regan* that an employer has no duty to accommodate a disabled employee's commute-related troubles fell in line with the decisions of several other circuits. The Eleventh Circuit, for instance, had held that a plaintiff with epilepsy who could not drive to work was not entitled to a daily, employer-provided taxi ride.[3] The court reasoned that attendance at the office was an essential function of the job, and that in any case, the plaintiff's form of epilepsy did not constitute a disability. Similarly, the Seventh Circuit had held that a plaintiff with vertigo who was unable to drive to work was not entitled to an accommodation under the Rehabilitation Act because other jobs in urban Chicago were accessible by walking or by public transportation.[4]

Other circuits, however, had already warmed to the idea of commute-related accommodations. The Third Circuit, for example, had held that under the ADA, a drugstore cashier whose vision problems rendered her incapable of driving after dark was entitled to work a daytime shift.[5] The Ninth Circuit reached the same conclusion in a similar case involving a wine steward who vision impacted her ability to drive at night.[6] In finding that she was entitled to an earlier shift, the court recognized an employer's duty to "accommodate an employee's limitations in getting to and from work." And in perhaps the most far-reaching opinion, the Second Circuit had held that an employer may even have a duty to assist an employee with getting to work.[7] The plaintiff, who had a variety of ailments including cancer and heart problems, requested assistance with her commute. The Second Circuit held that "there is nothing inherently unreasonable . . . in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work." It instructed the district court to consider several accommodations that could have been offered by the employer, including providing the plaintiff with a car or parking permit.

The First Circuit, for its part, has been unwilling to recognize such a hard-and-fast duty to assist with commuting problems. But it has left open the possibility that an employer may need to accommodate an employee's commute-related request on a case-by-case basis. The issue in *Jacques v. Clean-Up Group, Inc.*[8] was whether an epileptic plaintiff who bicycled to work was entitled to a later start time. The employer had offered the plaintiff a new position at a different

location further away from the plaintiff's home, thus necessitating a longer bike ride. Unlike the Third and Ninth Circuits, the First Circuit sidestepped the issue of whether, as a matter of law, an employer needs to accommodate a disabled employee's commuting difficulties. Instead, it held that reporting to work by 8:00 a.m. was an "essential function" of the job, and that the plaintiff's inability to fulfill this function meant that he was not "otherwise qualified" for the position.

In sum, a key reason why some circuits have not recognized an employer's duty to accommodate requests for shift changes and modified start/end times is that they view attendance at the office as an "essential function" of the job. But in the Sixth Circuit at least, Ford poses a direct challenge to that rationale, because of its holding that physical presence in the workplace is not necessarily an "essential function" of many jobs in the era of modern technology. Whether a full panel of the Sixth Circuit will uphold Ford on rehearing is anyone's guess. But if they do, watch for the ripple effects to reach cases like *Regan* that concern commute-related accommodations like shift changes and flexible start/end times. Telecommuting may be just the tip of the iceberg, and employers may need to re-consider their approach to commute-related requests.

Ryan Dwyer *practices in general civil litigation, with an emphasis on federal court practice, employment law, and insurance defense.*

Prior to joining Rendigs, Ryan served as a law clerk to U.S. District Court Judge David L. Bunning in the Eastern District of Kentucky, and to U.S. District Court Judge William J. Zloch in the Southern District of Florida. He has also served as a State Prosecutor in Indiana, and as an advisor to a national non-profit corporation in Washington, D.C.

[1] *The 2-1 panel decision in Ford has been vacated, and rehearing en Banc has been granted.*
[2] *679 F.3d 475 (6th Cir. 2012)*
[3] *Carlson v. Liberty Mut. Ins. Co.*, 237 F. App'x 446 (11th Cir. 2007). This case was decided under the Florida Civil Rights Act, which is analyzed under the same framework as ADA claims.
[4] *Kimble v. Potter, 390 F. App'x 601 (7th Cir. 2010).*
[5] Colwell v. Rite Aid Corp., 602 F.3d 495 (3d Cir. 2010).
[6] *Livingston v. Fred Meyer Stores, Inc., 388 F. App'x 738 (9th Cir. 2010).*
[7] *Nixon-Tinkelman v. N.Y. City Dep't of Health & Mental Hygiene, 434 F. App'x 17 (2d Cir. 2011).*
[6] *96 F.3d 506 (1st Cir. 1996)*