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DISABILITY ACCOMMODATION THROUGH TELECOMMUTING MORE REASONABLE IN MODERN WORKPLACE

In *EEOC v. Ford Motor Company*, the federal Sixth Circuit appellate court (covering Kentucky, Michigan, Ohio, and Tennessee) recently held that telecommuting may be a reasonable accommodation under the Americans with Disabilities Act ("ADA") for an employee with severe Irritable Bowel Syndrome ("IBS").

Factual Background

Jane Harris worked for Ford as a resale steel buyer. Her job was to respond to emergency supply chain issues and ensure continuity of the steel supply to parts manufacturers. Her role involved both individual tasks, such as updating spreadsheets, periodic site visits to observe the production process, etc., as well as group problem-solving tasks requiring her to interact with suppliers and members of her team. From 2004 to 2008, she received good performance reviews, although she was critiqued for being disruptive and argumentative at times.

Harris suffered from IBS, and her symptoms became worse over time often resulting in incontinence. She frequently was unable to commute to work or stand up from her desk without soiling herself. Accordingly, Harris began taking intermittent Family and Medical Leave Act ("FMLA") leave on days when she had severe IBS symptoms. These absences negatively affected her performance. Her supervisor offered her a flex-time schedule on a trial basis, but revoked the offer because Harris was unable to maintain consistent work hours. Harris then began working from home informally (without approval from Ford), often in the evenings and on weekends. Because Ford had not approved a telecommuting schedule for Harris, it counted every day that she did not show up to work as an absence for illness, claiming that if she was too ill to come to work, she was too ill to work at all. Further, Harris made mistakes when she worked on nights and weekends, possibly because she lacked access to suppliers during non-business hours. For the first seven months of 2009, Harris was absent more than she was present during normal business hours, and her supervisor was forced to give some of her work to others to ensure coverage.

Ford had a written policy allowing telecommuting for salaried employees for up to four days per week, but it recognized in the policy that this arrangement was not appropriate for all jobs, employees, or managers. Other employees at Ford, including buyers in similar roles as Harris, telecommuted once per week. In early 2009, Harris formally requested to work from home for up to four days per week (as needed) to accommodate her IBS. Harris claimed that most of her work could be done via telephone or computer and that she could reschedule any meetings as needed. Ford denied the request since it determined that her position was not suitable for telecommuting, especially given the great deal of teamwork involved. As alternatives, Ford proposed moving Harris' cubicle closer to the bathroom or finding another job at the company that was suitable for telecommuting. Harris rejected these options and Ford refused to entertain Harris' counterproposal of telecommuting one or two times per week.

About two months after her formal telecommute request, Harris filed a charge with the Equal Employment Opportunity Commission ("EEOC") for discrimination and failure to accommodate her disability. Thereafter, her supervisor held a meeting with her colleagues, which Harris attended, to discuss how to handle her workload in light of her absences. He also scheduled weekly performance meetings in which he allegedly engaged in "military style yelling" and refused to let her leave the room, rated her as a low achiever in her interim performance review, and placed her on a 30-day performance improvement plan. Ford terminated her at the end of the performance improvement plan as it determined that she failed to meet its objectives.

In 2011, the EEOC filed a complaint on her behalf against Ford alleging that it failed to accommodate her under the ADA and had retaliated against her for filing an EEOC charge. Although the lower court granted summary judgment in favor of Ford, the Sixth Circuit reversed, holding that the EEOC had provided enough information to allow the case to continue. In the process, the court strongly hinted that a telecommuting accommodation would have been reasonable in this case, and that, given the modern workplace and its remote capabilities, such arrangements are less "extraordinary" or "unusual" than they used to be.

Court's Decision

The court's opinion focused on whether (1) Harris' physical presence at the workplace was an essential function of her job, as Ford argued, and (2) telecommuting was a reasonable accommodation.

As for physical presence, the court noted that "attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location. …the law must respond to the advance of technology…and recognize that the 'workplace' is anywhere that an employee can perform her job duties." Ford's main argument for physical presence being an essential function was that "teamwork" was integral to Harris' position. In response, the court noted that technology has "diminished the necessity of in-person contact to facilitate group conversations" and as such it did not believe that positions requiring teamwork are inherently unsuited to telecommuting.

The court went on to find that telecommuting likely was a reasonable accommodation given Harris' duties, and that any cost to set up a home office for Harris (which Ford pledged to do in its telecommuting policy) was minimal especially in light of Ford's resources. The court reminded Ford that the undue hardship threshold is high and greater than simply showing that accommodation would be annoying to administer or "disruptive to the operating routine." Ford's alternative accommodations — a cubicle closer to the bathroom or reassignment — did not impress the court. Moving Harris' cubicle closer to the bathroom would not alleviate her problem of soiling herself during her commute or when getting up from her desk. Further, reassignment to another job that was purportedly more amenable to telecommuting was only appropriate if her current accommodation request would pose an undue hardship, which the court held was not the case.

Showing some balance in the law, the court explicitly stated that it was not holding that most modern jobs are suited to telecommuting, and it maintained that many jobs still require physical presence to interact directly with coworkers and objects at the workplace. It also acknowledged that determining whether physical presence is essential to a job is a highly fact specific inquiry and courts should consider a variety of factors when making that determination, including job descriptions, the employer's business judgment, the amount of time spent performing the function, and the work experience of employees in similar roles.

Take-Away

This case highlights the importance of engaging in a meaningful interactive process with disabled employees to find the appropriate accommodation and shows the broader consideration courts are giving to telecommuting arrangements in today's modern workplace.

EMPLOYER CAN REQUIRE FITNESS-FOR-DUTY EXAMINATION AFTER RETURN FROM FMLA LEAVE

A California appeals court in *White v. County of Los Angeles* held that an employer could require a fitness-for-duty examination after returning an employee to work based on her medical provider's certificate, provided that the exam is job-related and consistent with business necessity.

Susan White was an investigator with the Los Angeles County District Attorney's Office, and she carried a firearm as part of her job (which included making arrests, interrogating suspects, booking prisoners, and serving arrest warrants). From late 2009 through mid-2011, White exhibited strange behavior at work — she experienced erratic and emotional highs and lows, made various tactical errors that jeopardized the safety of herself and her co-workers, and provided inconsistent and inaccurate testimony in connection with a criminal case to which she was a witness. She also referred to herself as a "whack job," admitted she was on medication for her psychological

condition and that it made her feel "stupid," and cried in multiple meetings with her supervisor. In April 2011, White requested medical leave for treatment. Upon exhausting her FMLA leave, the County granted her leave under the ADA. White's doctor provided a letter allowing her to return to work on September 7, 2011.

The County returned White to work effective September 7, 2011, but assigned her to her home for medical reasons and placed her on paid administrative leave. Thereafter, per applicable Civil Service Rules, the County requested that White undergo a medical reevaluation. White failed to appear on two separate occasions for the evaluation, and then sought a court injunction prohibiting the exam and preventing the County from disciplining her for failing to appear. The court granted the injunction and the County appealed.

White argued that the reevaluation constituted interference with her FMLA rights, but the appellate court disagreed. First, it recognized that employees are entitled to reinstatement from FMLA leave upon certification by the employees' healthcare provider. Second, it acknowledged that an employer cannot seek a fitness-for-duty examination *before* reinstating the employee. Third, it stated that after an employee returns from a medical leave, the ADA requires that any medical exam conducted by the employer must be (1) at its expense, (2) job-related, and (3) consistent with business necessity.

Here, the court held that there was no violation of the FMLA, and that the County could conduct the reevaluation, because the ADA (not FMLA) governed since White had been returned to work. The County satisfied the requirements under the ADA since the exam was job-related and consistent with business need given her role at the County, which included carrying a firearm, and because White had put herself and others in danger, made poor tactical decisions, and provided inaccurate testimony in a criminal case. The court did note that an employer cannot delay an employee's return to work while arranging for and having the employee undergo an exam.

Employers should be careful when deciding to conduct medical examinations to ensure compliance with various disability and leaves of absence laws.

NEWS BITES

Yelling At Employee And Throwing Book In Her Direction Not Sufficient To Support Hostile Work Environment Claim

In *Brooks v. Grundmann*, a federal court of appeals in the District of Columbia held that a manager's conduct amounted to no more than "ordinary tribulations of the workplace" and was thus insufficient to support a minority female employee's federal race and sex hostile work environment claims under Title VII of the Civil Rights Act of 1964.

Plaintiff Patricia Brooks worked in the Office of Information Resources Management of the Merit Systems Protection Board (the organization tasked with addressing federal employees' grievances). Brooks alleged that from 2005 to 2008, her male supervisor (An-Minh Hwang) created a hostile work environment by allegedly yelling at and insulting Brooks in front of her co-workers, and throwing a notebook in her direction when he was upset with her demonstration of a new project. In 2005, Hwang and his deputy gave Brooks a performance rating of "Fully Successful," but were critical of her management skills. Over the next few years, Hwang's deputy accused Brooks of falsely reporting time worked on her timesheet, Hwang and his deputy provided her various performance reviews with progressively lower overall ratings (the lowest being "Unacceptable"), they expressed annoyance when she lodged internal complaints about them, and Hwang selectively enforced the time and attendance policy to Brooks' detriment. In 2008, Hwang placed Brooks on a performance improvement plan, which she met. Between 2005 and 2008, Brooks lodged a handful of internal complaints against Hwang and his deputy and filed a civil complaint.

Ultimately, the court dismissed Brooks' claims. In order to prevail in her hostile work environment claims, she had to prove (among other factors) that the conduct that created the alleged hostile work environment was severe *or* pervasive. Based on Brooks' allegations, and the fact that Hwang had some legitimate concerns about her performance and had counseled her accordingly, the court held that the conduct was not sufficiently severe or pervasive to support her claims. It noted that isolated expressions of frustration and singular incidents (unless extremely

serious) do not amount to a hostile work environment. Further, "petty insults, vindictive behavior, and angry recriminations" are similarly not actionable under Title VII.

Employers should note that isolated, inappropriate and boorish behavior by a supervisor, although it is ill-advised and should be subject to discipline, does not necessarily constitute a hostile work environment.

Reminder — Summer Intern Hiring

As summer swiftly approaches, companies should consider their hiring practices for summer interns. The law governing paid and unpaid interns can be murky, but is becoming better defined and most often favors paying interns minimum wage and classifying them as non-exempt, hourly employees subject to overtime laws.

The law is redefining how companies treat interns. In fact, effective June 14, 2014, New York City will expand its local anti-discrimination and harassment law (the New York City Human Rights Law) to paid and unpaid interns. This is in response to an October 2013 ruling in a New York district court that dismissed an unpaid intern's sexual harassment complaint under the law because unpaid interns are not employees and therefore not protected by it. The expansion will also require employers to reasonably accommodate interns' disabilities under certain circumstances.

Reminder — California Minimum Wage Increase July 2014

Effective July 1, 2014, California's minimum wage will increase from $8 to $9. This hike will not only affect non-exempt, hourly workers, but also workers in various exempt, salaried positions that are subject to minimum salary requirements calculated based on the minimum wage. For example, employees in white collar exemptions (i.e., executive, administrative, and professional) must earn at least $3,120 per month ($37,440 per year) and commissioned, inside salespeople must earn at least $13.50 per hour to be exempt from overtime.

Employers should ensure they are paying the appropriate hourly rate to hourly employees and conduct an audit of compensation for salaried employees to ensure compliance with the law.

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