Telecommuting as an Accommodation – A Legal Quandary For Employers

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Employers increasingly permit their employees to telecommute. A recent survey of employers with at least 50 employees reports that 38 percent permit their employees to work at least some hours from home on a regular basis. K. Matos & E. Galinsky, 2014 NATIONAL STUDY OF EMPLOYERS (Families and Work Institute). This article will discuss whether and under what circumstances an employer is *legally required* to permit an employee to work from home as an accommodation for the employee's disability.

The Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq*. ("ADA") is the primary source for the legal obligation of employers to accommodate their disabled employees. Both federal court decisions and Equal Employment Opportunity Commission ("EEOC") guidance have articulated that telecommuting may be a required accommodation. Although currently no reported New Jersey court decision has addressed the same obligation under the Law Against Discrimination, N.J.S.A. § 10:5-1 *et seq*. ("LAD"), the New Jersey Courts look to the ADA for guidance on reasonable accommodation issues for LAD purposes. *See Victor v. State*, 203 N.J. 383, 403-07 (2010).

When a disabled employee cannot perform one or more essential functions of the job without some type of accommodation, and the employee makes a work-at-home request that the employer believes is not a viable option, the ADA requires the employer to engage in an "interactive process" with the employee to attempt to find a reasonable accommodation to enable the employee to continue working. The employer may deny the request provided it can demonstrate (1) there is an alternative accommodation available, (2) telecommuting will not enable the employee to perform all the essential functions of the job, or (3) telecommuting will create an "undue hardship" for the employer.

The EEOC has addressed the issue by issuing "guidances" (which do not have the force of law) and, in recent years, by commencing litigation against employers who rejected a disabled employee's request to telecommute as an accommodation. The EEOC first explained that working from home may be a form of reasonable accommodation in its 1999 Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with

Disabilities Act (rev. Oct. 17, 2002), in which it noted the possibility of adequate supervision and the employee's need for specific tools and equipment are amongst the "critical" considerations to determine whether a job can be effectively performed from home. In its later informal guidance, the EEOC expanded on these "critical considerations" to include "whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace." EEOC Fact Sheet, Work At Home/Telework as a Reasonable Accommodation (Oct. 27, 2005) The EEOC also recognizes that jobs involving "impromptu team meetings [that] occur frequently [where] project members can discuss new developments and share information" may justify an employer to deny a telecommuting accommodation request. See EEOC, Employer Best Practices for Workers with Caregiving Responsibilities (Jan. 19 2011)

While the EEOC written guidance suggests a balanced approach, on the litigation front, the EEOC has more aggressively promoted telecommuting as a reasonable accommodation, creating uncertainty for employers presented with work-at-home accommodation requests. The most significant decision to date was issued by the United States Court of Appeals for the Sixth Circuit in *EEOC v. Ford Motor Company*, 782 F.3d 753 (6th Cir. 2015). When a panel of the Sixth Circuit reversed a summary judgment in favor of Ford, the EEOC hailed the ruling as a major victory, only to see the panel's, decision reversed and summary judgment for Ford reinstated by the Sixth Circuit sitting *en banc*.

The EEOC had filed suit on behalf of Jane Harris, a Ford resale steel buyer, who had requested Ford to permit her to telecommute on an unpredictable basis up to four days per week as an accommodation for her irritable bowel syndrome, the symptoms of which included fecal incontinence. Although Ford had a limited telecommuting policy for resale buyers, the company rejected Harris' request as unreasonable, concluding that a number Harris' job responsibilities – which involved a significant amount of interaction with members of her team – could not be performed, or performed effectively, from home. Dissatisfied with Harris' performance, the company placed her on a performance enhancement plan and terminated her after she had failed to meet the plan's objectives.

In its *en banc* ruling upholding summary judgment in favor of Ford, the Sixth Circuit noted the "general rule" that "regularly attending work on site is essential to most jobs, especially the interactive ones," and that for jobs "involving teamwork and a high level of interaction, the employer will require regular and predictable on-site attendance. . . ." The Court further noted that the EEOC's own regulations and informal guidance gave deference to the employer's judgment regarding the need for predictable, on-site attendance. The Court rejected the EEOC's argument that the company's permitting other resale buyers to telecommute one or two days per week on a predictable basis was evidence that Harris' request to telecommute four days per week on an unpredictable basis was a reasonable accommodation. Finally, the Court rejected the EEOC's contention that advances in technology (video and audio conferencing, computers, email) have made some essential job functions capable of being performed at home. The Court found, on the record before it, no evidence showing that technological advances made Harris' highly interactive job capable of effective performance at home. Although the Court cautioned that an employer's descriptions of essential job functions are not entitled to "blind deference," the Court ruled that an employer is entitled to prevail when its "judgment as to essential job functions – evidenced by the employer's words, policies, and practices and taking into account all relevant factors – is 'job-related, uniformly-enforced, and consistent with business necessity.'"

Despite its setback in the *Ford Motor Company* case, the EEOC continues to challenge employers who deny their employees the accommodation of telecommuting arrangements. For example, on May 14, 2015, the EEOC issued a press release announcing that a Texas-based construction company agreed to pay $58,000 and provide "substantial injunctive relief" to settle a disability discrimination claim in *EEOC v. Baker Concrete Construction, Inc. (*S.D. Tex. 2014). *See* EEOC, Press Release, Baker Concrete to Settle EEOC Disability Case. There, the EEOC alleged that Baker Concrete terminated its payroll manager, Maria Castillo, after she requested to work from home for a period because of her asthmatic reaction to chemical dust in the workplace. The human resource employees who terminated Castillo allegedly told her that even were the company to permit her to work at home for a period of time, she could no longer perform her job because she would relapse when she returned. Under the settlement, the court entered a consent degree providing that Baker (1) pay Castillo $58,000, (2) institute EEOC-monitored training on employment discrimination law at its facility, and (3) implement an ADA accommodation policy that includes telework where appropriate.

Litigation concerning telecommuting as a reasonable accommodation is likely to expand, particularly as employees are becoming more aware of telecommuting as an option in general and given the technological improvements making it easier to establish virtual offices. It is important for employers to remember, especially those who lack experience with telecommuting and who might be inclined to uniformly oppose it, that they are required to engage with the employee in the "interactive process." Employers who believe telecommuting is not a viable option for the job in question should take a proactive approach by exploring with the employee alternative accommodations to telecommuting. For example, an employee who has difficulty commuting because of a disability might be able to commute to a different office closer to home, or the employer may be able to provide other assistance to enable the employee to get to work. *See Nixon-Tinkleman v. N.Y. Dep't of Health & Mental Hygiene,* 434 Fed. Appx. 17 (2d Cir. 2011). Also, changing the employee's work schedule may prove to be a reasonable accommodation in lieu of telecommuting. *See Colwell v. Rite Aid Corp.*, 602 F.3d 495 (3d Cir. 2010). Out-of-the-box thinking by an employer to propose effective, alternative accommodations could satisfy its obligation to engage in the interactive process.

The importance of the employer's participation in the interactive process before denying a work-at-home request cannot be overemphasized. *See Graffius v. Shinseki*, 672 F. Supp. 2d 119, 127-29 &n.13 (D.D.C. 2009), where the court, in denying the employer's motion for summary judgment on the plaintiff's failure to accommodate claim based on her request to telecommute, chastised the employer for failing to engage in the interactive process. If the interactive process does not lead to an agreement with the employee, the employer should be comfortable in explaining why telecommuting either (1) will not allow the employee to perform all the essential functions of the job, or (2) will otherwise cause the employer undue hardship. In this regard, *EEOC v. Ford Motor* teaches that a court is far more likely to give deference to an employer's judgment as to essential job functions when the employer has promulgated clear and comprehensive job descriptions. Finally, employers should have in place the processes and procedures to evaluate requests to work from home, and human resources personnel and managers should be trained to respond effectively to employee accommodation requests. Taking these actions will serve the employer well when confronted with a failure to accommodate claim.