Employment Alert

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Showing Up For Work May Be Essential … Really!

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In recent years, the American workplace has undergone a dramatic transformation. How, when and where employees perform work continues to evolve with technological advances and demographic changes. Even traditional brick and mortar industries employ advanced robotics and electronics. Employees work "flex schedules" (a favorite of the Millennial generation) and many employees work more than 40 hours a week (thank you, Blackberry and Apple). Finally, an increasing number of employees work from home or other remote locations (Starbucks). Recent surveys show that over 60% of employers permit some type of remote work. These changes have been driven by both technological advancements and employer responses to employee demands. Given these changes, when does an employee have to be physically present at the workplace and who gets to decide whether physical presence is an essential function of the job? The Sixth Circuit Court of Appeals has been grappling with these issues in the context of an American With Disabilities Act claim brought by the Equal Employment Opportunity Commission.

In *EEOC v. Ford Motor Co.*, an *en banc* (full bench) Sixth Circuit Court of Appeals reversed a prior decision issued by a three-judge panel and held regular attendance **was** an essential function of the plaintiff's job and that the plaintiff's request to telecommute four days per week was an unreasonable accommodation request.

Jane Harris was employed by Ford as a resale steel buyer. Her position involved serving as an intermediary between steel suppliers to Ford and parts producers. Throughout her employment, Harris suffered from Irritable Bowel Syndrome (IBS). One of her symptoms was loss of bowel control. She was permitted to take FMLA leave when her symptoms required, but over time, her conditioned worsened.

Ford maintained a telecommuting policy that permitted some employees to telecommute up to four days per week. Harris requested permission under the policy to telecommute four days per week and she had telecommuted in the past. Other resale buyers had been granted permission to telecommute one day per week. Ford determined Harris' position was not appropriate for four-day telecommuting as it required face-to-face meetings and "email and telecommuting was an insufficient substitute for in-person team problem-solving." Ford suggested that Harris' cubicle be moved closer to the restroom or she transfer to an open position that would permit her to telecommute. Harris refused and filed a disability discrimination claim with the EEOC. Ford alleged that Harris' performance deteriorated and she was discharged. She then filed a second charge alleging retaliation.

In reversing the prior decision of a three-judge panel, the majority in this case held that Ford had established that being physically present was an essential function of Harris' job.

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However, the Sixth Circuit cautioned that its decision did not provide "blind deference" to an employer's judgment as to essential job functions but that essential functions are generally those that an employer deems essential and includes in written job descriptions. The majority noted employers will receive favorable determinations where the employers' determinations are "job related, uniformly enforced and consistent with business necessity."

The Sixth Circuit majority noted that Harris' position required teamwork, meetings with suppliers and on-site availability to participate in face-to-face interactions — which all necessitated regular and predictable attendance. Even Harris agreed that four of her ten primary duties could not be performed from home. Given these job duties, the Sixth Circuit majority opinion found that regularly attending work was an essential function of the job and not merely incidental.

Lessons for Employers

1. **Although regular attendance at the workplace is typically considered an "essential job function" employers still need to carefully consider all requests for accommodation.** There is no bright line rule that excessive absenteeism from the workplace renders an employee "unqualified" as a matter of law under the ADA. Instead, employers need to ask the question: "Considering the nature of the position, is the individual's presence at work essential?" This may involve an analysis of written job descriptions, employer business justifications for the employee's physical presence at the workplace and the past experiences of other employees in the same or similar positions.

2. **Extensive engagement in the interactive process is mandatory**. Employers need to continue to engage in the interactive process to either reach an accommodation or at least exhaust potential alternatives. A single conversation merely considering and rejecting a requested accommodation will be insufficient in most cases.

3. **"Disabled" is defined broadly**. The Sixth Circuit spent little time analyzing whether IBS was a disability under the ADA. Congress and the courts have instructed employers to find ways to accommodate disabled employees instead of challenging the existence of a disability.

4. **Do not retaliate!** Retaliation is now the most common charge filed with the EEOC. Retaliation charges are also the most difficult for employers to defend. Employers must stress to their employees (especially front line supervisors) that retaliation against those who complain against discrimination will not be tolerated.

5. **Re-visit telecommuting arrangements**. Employers and employees have recognized the many benefits of telecommuting arrangements. Conversely, employers also need to recognize the many risks associated with employees working remotely. Telecommuting agreements can allocate risks and clarify expectations for telecommuters and should be used by employers for telecommuting employees.

James B. Yates and Sarah E. Pawlicki are members in Eastman & Smith's Labor & Employment Practice Group and are both Senior Professionals in Human Resources (SPHRs) and SHRM Senior Certified Professionals (SHRM-SCPs). Between them, they have over 30 years of experience partnering with human resource professionals to make workplaces better (and legally compliant). Should you have any questions about ADA or telecommuting, please contact either Mr. Yates or Ms. Pawlicki.
