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Common Sense Prevails: Working From Home Sometimes Will Not Work

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Well, phew.

We like when legal developments we believe raise troubling questions with problematic implications later develop into something seemingly more rational based on the intersection of law and logic. One such pleasant development occurred last week, when a federal appellate court reversed an earlier decision suggesting employers could no longer require many workers to actually come to work. However, employers should also be careful not to mistakenly conclude that telecommuting is not a reasonable accommodation as a general matter.

We reported last May that a panel of the Sixth Circuit Court of Appeals (covering Kentucky, Michigan, Ohio, and Tennessee) had ruled that an employer violated the Americans with Disabilities Act by refusing to accommodate an employee's request to work at home for up to four days per week. The court made that ruling over the employer's assertions that in-person interaction with the employee's team, the employer's suppliers, and others in the company system was an essential component of the employee's job. The appellate court also was unconcerned by the fact the employer had twice previously allowed the employee to work from home multiple days during the week and the employee could not satisfactorily perform her job during those trial periods. In reporting on that ruling, we noted with raised eyebrows the following expansive language from the appellate ruling: "As technology has advanced in the intervening decades, and an ever-greater number of employers and employees utilize remote work arrangements, attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location. Instead the law must respond to the advance in technology in the employment context, as it has in other areas of modern life, and recognize that the 'workplace' is anywhere that an employee can perform her job duties."

Last week the full Sixth Circuit revisited the case and said "not so fast." Reanalyzing the facts, including the employer's proven efforts to consider accommodation, the employee's poor job performance during the trial telecommuting periods, and her admission that she could not perform four of her ten job functions at all and only partially perform another four of those job functions away from the office, the full appellate court changed course and found regular and predictable attendance at the employer's physical workplace was an essential function of the employee's job.

Key to the appellate court's decision was "A sometimes-forgotten guide [that] likewise supports the

general rule [that regular and predictable attendance is an essential job function]: common sense." Application of that logical principle required reversal of the earlier decision and a ruling that the employee's request to be allowed to work from home on an unpredictable basis up to four times a week was not reasonable, meaning the employer did not violate the Americans With Disabilities Act (ADA) for refusing that accommodation.

While we breathe a sigh of relief in the rejection of the assertion that "attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location," employers should consider canceling any celebrations commemorating the demise of working from home as a reasonable accommodation. Key to the appellate court's reversal was the extensive record showing the employer's interactive process efforts and attempts to accommodate the employee and her diminishing performance spanning many months. As noted, the employer had already attempted to accommodate the employee by permitting her to work at home on a trial basis, and her performance during that trial period created strong arguments the further telecommuting would pose an undue hardship. The employer also showed several other steps it had taken to try to provide the employee with flexibility in working at the employer's location during specific hours in the hopes of helping her improve her job performance, all of which proved unsuccessful. On that record, it is hard to trifle with the employer's conclusion it was not reasonable to permit extensive telecommuting for a struggling employee who acknowledged she could not adequately perform eight of her ten key job functions from home.

It would nevertheless be a mistake to conclude from the recent case that working from home is almost never a reasonable accommodation because regular and predictable attendance is an essential function of most jobs. Rather, the proper approach remains to assess the specific circumstances of each employee's job, because with the advent of technology, it may be that regular and predictable physical attendance is not an essential function of a job. Until an employer can make a strong argument to the contrary, ideally supported by tangible or other non-speculative metrics as to the particular employee and his or her specific job requirements, prudent employers should (and legally must) consider the reasonableness of requests for accommodation in the form of working from home. The Sixth Circuit's recent decision is thus an important reminder that even when common sense prevails, the ADA requires employers to assess every accommodation request on its specific circumstances and evaluate on a case-by-case basis what is and is not reasonable.

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