No. 12-2484

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

FORD MOTOR CO.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan
Hon. John Corbett O'Meara, Judge

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-2484 Case Name: EEOC v. Ford Motor Co.

Name of counsel: Ann Elizabeth Reesman

Pursuant to 6th Cir. R. 26.1, the Equal Employment Advisory Council and Chamber of Commerce of the United States of America, make the following disclosures:

1. Are said parties a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

CERTIFICATE OF SERVICE

I certify that on April 26, 2013, the foregoing document was filed with the Clerk of the Court. The Court's ECF system will send notification to all parties in the appeal.

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FEDERAL RULE 29(c)(5) STATEMENT

No counsel for a party authored this brief in whole or in part;

No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amici curiae*, their members or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

Respectfully submitted,

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The Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* subject to the granting of the accompanying unopposed motion for leave to the file. The brief urges the court to affirm the decision below and thus supports the position of Defendant-Appellee Ford Motor Co. before this Court.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes close to 300 major U.S. corporations. EEAC's directors and officers are among industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its

members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

EEAC's and the Chamber's members are employers subject to the employment provisions of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, as amended, and its implementing regulations. Many also are federal government contractors or subcontractors subject to the nondiscrimination and affirmative action requirements of Section 503 of the Rehabilitation Act of 1973 (Section 503), 29 U.S.C. § 793.

Amici's member companies routinely make reasonable accommodations to enable qualified employees with disabilities to perform essential job functions. In some cases, however, the sole accommodation the employee will accept is unreasonable and will not enable the employee to perform the essential functions of the job. Thus, the issues presented in this case are extremely important to the nationwide constituencies that EEAC and the Chamber represent.

The district court below ruled correctly that an employee's request to work from home on an unpredictable and frequent basis is not reasonable. With rare exceptions, employers expect their employees to maintain reasonably regular, predictable attendance. Quite simply, the work, whatever that work may be, does not get done unless someone is there to do it.

For this reason, EEAC's and the Chamber's members have a strong interest in being able to require each employee to meet reasonable attendance requirements. Where an employee with a disability needs occasional leave, or some minor scheduling adjustment, certainly such an accommodation may be reasonable. *Amici's* members also allow employees to telecommute and/or work a flexible schedule, on a structured basis, if the job permits. It is not reasonable, however, to compel an employer to allow an employee to decide unilaterally whether and to what extent she comes to work.

Because of their interest in ensuring sound application of the nation's civil rights laws, EEAC and the Chamber have filed several hundred briefs as *amicus curiae* before the U.S. Supreme Court, the U.S. Circuit Courts of Appeals and numerous federal trial courts in cases involving a range of important issues, including the proper interpretation of the ADA. Thus, *amici* have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their expertise in these matters, EEAC and the Chamber are well-situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

The following statement of the case is based on the factual findings of the district court below as reported in *EEOC v. Ford Motor Co.*, 2012 U.S. Dist.

LEXIS 128200 (E.D. Mich. Sept. 10, 2012). Jane Harris worked for Ford Motor Company (Ford) from April 2003 to September 2009 as a resale buyer within the Body & Exterior Department of Vehicle Production Purchasing. 2012 U.S. Dist. LEXIS 128200, at *1-*2. She was responsible along with other resale buyers for purchasing steel and reselling it to manufacturers of vehicle parts to various Ford assembly plants. *Id.* at *2.

The resale buyer position requires juggling a variety of moving parts to ensure that there is never a gap in the steel supply to the manufacturers. *Id.* at *2-*3. Resale buyers must convey requirements accurately and resolve issues quickly before they interrupt the supply chain. *Id.* The job requires near-constant interactions with the resale buyer team and others, often in situations in which time is of the essence and group problem solving can be critical. *Id.*

Harris missed work more often than not. *Id.* at *3-*5. Over years of poor attendance, her supervisors tried to counterbalance her absences by assigning some of her work to other people, allowing her a later start time, allowing her to work from home on an ad hoc basis, and trying an alternative work schedule of four ten-hour days per week. *Id.* Still, Harris was unable to establish regular and consistent work hours. *Id.*

In 2007, Harris's work performance also began to decline, and in 2008 she was rated in the bottom ten percent of her peer group. *Id.* at *5.

In 2009, Harris formally asked to be allowed to work from home indefinitely for up to four days per week on an "as needed" basis as an accommodation for her irritable bowel syndrome. *Id.* at *6. Three Ford representatives, one from Human Resources, one from Personnel Relations, and Harris' supervisor, met with Harris to discuss the requirements of her job and to what extent they could be performed from her home. *Id.* Because of the nature of the job, Ford concluded that having Harris work from home for up to four days a week and be in the office only on an unpredictable basis would not be effective. *Id.* at *6-*7. Among other things, the company determined that Harris's position required her to interact regularly not only with her team, but also with outside contacts, and that those interactions could not be handled effectively over the telephone or via email. *Id.* at *6. As alternatives, Ford suggested moving Harris's desk closer to the rest room, and also offered assistance in identifying another position inside Ford that would be better suited to work from home. *Id.* at *7. Harris refused to consider anything other than her specific request to work from home in her current position for up to four days per week. *Id.*

Harris filed a charge with the U.S. Equal Employment Opportunity Commission (EEOC) accusing Ford of failing to make a reasonable accommodation for her disability in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.* *Id.* at *8. Over the course of the next

several months, her performance continued to decline. *Id.* After several performance-related incidents and continued absenteeism, Ford terminated Harris' employment. *Id.* at *8-*11. Thereafter, she filed a second EEOC charge alleging unlawful retaliation. *Id.* at *11-*12.

The EEOC filed suit on Harris's behalf. *Id.* at *12. The district court granted summary judgment in favor of Ford, observing that "Harris was absent more often than she was at work . . . and on [that] basis alone [] is not a 'qualified' individual under the ADA." *Id.* at *14. The court below also held that the proposed accommodation of working up to four days a week as needed was unreasonable and therefore not required by the ADA. *Id.* at *18. While other buyers sometimes were allowed to work from home, unlike the haphazard arrangement that Harris sought, "they did so once a week, on a scheduled day." *Id.* at *16. The EEOC appealed.

SUMMARY OF ARGUMENT

An accommodation of working from home indefinitely and on an unpredictable basis is unreasonable on its face. The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, requires employers to make reasonable accommodations for a qualified individual with a disability, 42 U.S.C. § 12112(b)(5)(A), defined as one who, with or without reasonable accommodation, can perform the essential functions of the job. 42 U.S.C. § 12111(8). The ADA

directs courts to consider an employer's judgment when determining what job functions are essential, *id.*, and does not require employers to eliminate essential functions as an accommodation. *Jones v. Walgreen Co.*, 679 F.3d 9, 17 (1st Cir. 2012); *Kallail v. Alliant Energy Corporate Servs.*, 691 F.3d 925, 932 (8th Cir. 2012).

Regular and predictable attendance at the workplace is an essential function of most jobs. *Brenneman v. Medcentral Health Sys.*, 366 F.3d 412 (6th Cir. 2004). Indeed, it is the "exceptional" case in which a job can be performed adequately at the employee's home. *Smith v. Ameritech*, 129 F.3d 857, 867 (6th Cir. 1997). "[M]ost jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation." *Rauen v. US Tobacco Mfg. L.P.*, 319 F.3d 891, 896 (7th Cir. 2003) (citation omitted). And remote communications are not always an effective substitute for face-to-face interaction. Moreover, even an employee working from home must be ready and available for work during core working hours, where the job requires collaboration or supervision.

The ADA does not require an employer, as an accommodation, to eliminate the essential functions of being present in the workplace and available for work. Thus, where an employer needs an employee to maintain regular, predictable attendance at the workplace in order to perform the essential functions of the job,

an accommodation of working from home for up to four days a week is unreasonable on its face.

As a practical matter, the EEOC's position that the ADA requires an employer to allow an employee to work from home whenever she wants is a functional impossibility that would have a devastating effect on private sector business operations. Employers must have the ability to require employees to maintain regular, predictable attendance in order to operate effectively. While many employers offer telecommuting and flexible hours as forms of workplace flexibility arrangements, they do so if and only if the job can be performed effectively in that way. Even then, such arrangements are permitted only in a structured manner that ensures that the needs of the business will be met.

ARGUMENT

I. A REQUESTED ACCOMMODATION OF WORKING FROM HOME AT UNPREDICTABLE HOURS WITHOUT ANY ADVANCE NOTICE TO THE EMPLOYER IS UNREASONABLE ON ITS FACE

A. The ADA Permits Employers To Use Their Judgment As To What Job Functions Are Essential, And Does Not Require Them To Waive Essential Functions As An Accommodation

The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, makes it unlawful for a covered employer to "discriminate against a qualified individual on the basis of disability …." 42 U.S.C. § 12112(a). It requires covered employers to make "reasonable accommodations to … an otherwise qualified

individual with a disability … unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business ...." 42 U.S.C. § 12112(b)(5)(A). "The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The ADA does not require an employer to eliminate an essential function as an accommodation. *Jones v. Walgreen Co.*, 679 F.3d 9, 17 (1st Cir. 2012); *Kallail v. Alliant Energy Corporate Servs.*, 691 F.3d 925, 932 (8th Cir. 2012).

The statute mandates that "consideration shall be given to the employer's judgment as to what functions of a job are essential ...." 42 U.S.C. § 12111(8). Similarly, the EEOC's own regulations interpreting the ADA state that "[t]he employer's judgment as to which functions are essential" is one of the types of evidence that is used to determine whether a function is indeed essential. 29 C.F.R. § 1630.2(n)(3)(i).

Indeed, "[i]t is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards." EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. 1630 (2013) (Section 1630.2(n) Essential

Functions); s*ee also Mulloy v. Acushnet Co.*, 460 F.3d 141, 147 (1st Cir. 2006) (noting that "our inquiry into essential functions 'is not intended to second guess the employer or to require the employer to lower company standards'") (quoting *Mason v. Avaya Communs., Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004)). In other words, the employer's legitimate business judgment as to how much work an employee is expected to perform, and how well, should not be open to debate.

B. Regular, Predictable Attendance Is An Essential Function Of Most Jobs

As this Court and others have held, regular, predictable attendance, *i.e.*, showing up and performing work on a regular, predictable basis, is essential to the performance of most jobs. *Brenneman v. Medcentral Health Sys.*, 366 F.3d 412 (6th Cir. 2004) (holding as a matter of law that a pharmacy technician was unable to perform the essential functions of his job due to excessive absenteeism); *Gantt v. Wilson Sporting Goods*, 143 F.3d 1042, 1047 (6th Cir. 1998) (noting that "an employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA") (citation omitted); *Wimbley v. Bolger*, 642 F. Supp. 481, 485 (W.D. Tenn. 1986) ("It is elemental that one who does not come to work cannot perform *any* of his job functions, essential or otherwise"), *aff'd mem.*, 831 F.2d 298 (6th Cir. 1987). *See also EEOC v. Yellow Freight Sys.*, 253 F.3d 943, 948 (7th Cir. 2001) (noting that "in most cases, attendance at the job site is a basic requirement of most jobs) (collecting cases).

"[I]n most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability." *Waggoner v. Olin Corp.*, 169 F.3d 481, 484 (7th Cir. 1999). As the Ninth Circuit pointed out recently, "a majority of circuits have endorsed the proposition that in those jobs where performance requires attendance at the job, irregular attendance compromises essential job functions." *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012). In other words, regular, predictable attendance is almost always an essential requirement of the job itself or to the performance of various job functions.

C. Jobs Usually Cannot Be Performed Effectively By An Employee Working Entirely Or Substantially From Home

1. All but the most unusual jobs require the employee's presence at a worksite

Furthermore, being *on* the job typically means being *at* the job, not at home. Courts have identified a number of reasons why most jobs cannot be performed effectively from home. Most obviously, some jobs simply cannot be performed elsewhere, *e.g.*, where the employee's duties involve running manufacturing equipment, doing construction, providing patient care, serving restaurant patrons, showing a house to potential buyers, repairing utility lines, delivering packages, and the like. *Cf. Brenneman v. Medcentral Health Sys.*, 366 F.3d 412, 420 (6th

Cir. 2004) (pharmacy technician); *Samper*, 675 F.3d at 1238 (neo-natal nurse); *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209 (4th Cir. 1994) (teacher).

Similarly, many jobs require employees to be physically in the workplace in order to interact directly with coworkers, clients and others, or to work under direct supervision, or both. "Courts that have rejected working at home as a reasonable accommodation focus on evidence that personal contact, interaction, and coordination are needed for a specific position." EEOC Enforcement Guidance: *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, at n.101 (Oct. 17, 2002).[1] As the Seventh Circuit has articulated, "[t]he reason working at home is rarely a reasonable accommodation is because most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation." *Rauen v. US Tobacco Mfg. L.P.*, 319 F.3d 891, 896 (7th Cir. 2003).

This Court reached a similar conclusion in *Smith v. Ameritech*, 129 F.3d 857 (6th Cir. 1997). There, a traveling sales representative who developed chronic back pain that left him unable to perform the solo lifting requirements of his job proposed that the company create a position that would allow him to work from home. Finding that the plaintiff "failed to present any facts indicating that his was one of those exceptional cases where he could have performed at home without a

[1] *Available at* http://www.eeoc.gov/policy/docs/accommodation.html

substantial reduction in quality of [his] performance," 129 F.3d at 867 (citation omitted), this Court concluded that the plaintiff had failed in his obligation to "propose an objectively reasonable accommodation for his disability." *Id.* Similarly, the First Circuit has held that being present in the office was essential in a situation in which claims adjudicators were "key players on a team" in a system that "often relies on on-the-spot collaborative efforts." *Kvorjak v. Maine*, 259 F.3d 48, 57 (1st Cir. 2001). Likewise, the Fifth Circuit has found that in a job involving teamwork, "efficient functioning of the team necessitated the presence of all members. … [I]t was critical to the performance of [the plaintiff's] essential functions for [him] to be present in the office regularly and as near as possible to normal business hours." *Hypes v. First Commerce Corp.*, 134 F.3d 721, 727 (5th Cir. 1998); *see also Mason v. Avaya Communs., Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004) (request for accommodation of working at home was "unreasonable on its face" because it would have eliminated the function of physical attendance, which was essential due to supervision and teamwork requirements); EEOC Fact Sheet, *Work At Home/Telework as a Reasonable Accommodation* (Oct. 27, 2005) (noting that "critical considerations 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").[2]

[2] *Available at* http://www.eeoc.gov/facts/telework.html

Certainly, there are some jobs for which all of the required duties can be performed entirely from the employee's home. Those jobs are few and far between, however. This Court has labeled such situations as "exceptional." *Smith*, 129 F.3d at 867. The Seventh Circuit calls them "very extraordinary," *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995), and the Ninth Circuit "unusual." *Samper*, 675 F.3d at 1239. Therefore, "[e]xcept in the unusual case where an employee can effectively perform all work-related duties at home, an employee 'who does not come to work cannot perform *any* of his job functions, essential or otherwise.'" *Tyndall v. Nat'l Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir. 1994) (citation omitted).

Cases in which an employee can perform her job entirely, or almost entirely, (*e.g.*, up to four days per week) from home are rare exceptions to the rule. Accordingly, it simply is not reasonable, in most situations, to expect an employer to allow employees to work almost exclusively from home, isolated and without interaction with their colleagues, if in the employer's business judgment, interaction is essential to the job.

2. Remote communications cannot always substitute for face-to-face interaction

Where a job involves teamwork, interaction, brainstorming and group problem-solving, it simply is not always the case that "[l]ong-distance is the next

best thing to being there."[3] While it is now possible to conduct some types of business meetings "virtually" via video or teleconference, such meetings invariably require considerable advance planning and often are poor substitutes for face-to-face communication. Even with substantial setup time, state-of-the-art software, and skilled technical support, potentially unsteady connections, interference, glitches, poor video and/or audio quality, and the like can render such communications frustrating and occasionally ineffective.

Indeed, face-to-face "brainstorming" and other impromptu discussions, conducted in the same room with other team members, with access to the same records, equipment, and other resources, is substantially more valuable and efficient, and often is necessary to reaching the optimal business outcome. The EEOC's own guidance makes this critical point. In a discussion regarding equal opportunities for employees who are being permitted to work from home due to their family responsibilities, the EEOC offers these two divergent examples:

> Example: Employer J solicits assistance from employees on a large-scale project for an important client. Nicole has a flexible work schedule that enables her to work from home several days a week so she can care for her young son. Nicole volunteers to assist with the project and is selected for the team. The majority of work for the project can be performed off-site and circulated electronically to team members. Nicole also volunteers to come to the office for meetings with the client.

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[3] http://www.beatriceco.com/bti/porticus/bell/bellsystem_ads.html

> Example: Same facts as above, except Nicole is not selected for the project. Necessary files and equipment are stored on-site and cannot be removed. *Furthermore, impromptu team meetings occur frequently so project members can discuss new developments and share information. As a result, it would be very difficult for an employee who works remotely to participate in this assignment*. Employer J is justified in refusing Nicole's request to participate on this basis.

EEOC, *Employer Best Practices for Workers with Caregiving Responsibilities* (Apr. 2009) (emphasis added).[4]

Brief exchanges and spontaneous encounters in the workplace can provide unparalleled opportunities for creative collaboration and fresh ideas, with significant results. "Digital communication tends to be very good for planned interactions, like formal meetings. But a lot of the value of working with people comes from all those interactions that you didn't plan."[5]

At least in private industry, spontaneity can be vital for business purposes, and its absence can cost a company both time and money. Indeed, Yahoo! told employees recently that:

> To become the absolute best place to work, communication and collaboration will be important, so we need to be working side-by-side. That is why it is critical that we are all present in our offices. Some of the best decisions and insights come from hallway and cafeteria discussions, meeting new people, and impromptu team

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[4] *Available at* http://www.eeoc.gov/policy/docs/caregiver-best-practices.html

[5] Ben Waber, C.E.O. of Sociometric Solutions, quoted by James Surowiecki in *Face Time*, The New Yorker (Mar. 18, 2013), *available at* http://www.newyorker.com/talk/financial/2013/03/18/130318ta_talk_surowiecki

> meetings. Speed and quality are often sacrificed when we work from home. We need to be one Yahoo!, and that starts with physically being together."

Kara Swisher, *"Physically Together": Here's the Internal Yahoo No-Work-From-Home Memo for Remote Workers and Maybe More*, All Things D (Feb. 22, 2013).[6]

For these reasons, the EEOC's assertion that the case law relied upon by the district court[7] has become "outdated" by advances in technology[8] is simply not true. While advances in technology over the past twenty years have enabled many more people with disabilities to work, those advances have neither eliminated essential job functions such as attendance, teamwork and collaboration, nor overridden relevant case law.

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[6] *Available at* http://allthingsd.com/20130222/physically-together-heres-the-internal-yahoo-no-work-from-home-memo-which-extends-beyond-remote-workers/. Similarly, consumer electronics retailer Best Buy recently changed its telecommuting policy to require the manager's agreement before an employee can work from home. Julianne Pepitone, *Best Buy ends work-from-home program*, CNNMoney (Mar. 5, 2013), *available at* http://money.cnn.com/2013/03/05/technology/best-buy-work-from-home/index.html.

[7] The district court undoubtedly would have cited *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233 (9th Cir. 2012), had the decision been available at the time.

[8] Brief of the Equal Employment Opportunity Commission as Appellant, at 19.

D. An Employee Working From Home Must Be Available For Work And Able To Perform During Working Hours

An employee whose job *can* be done from home must actually *perform* the job from home in order for working at home to be an effective accommodation. *Cf. Humphrey v. Mem'l Hosps. Assn.*, 239 F.3d 1128, 1136-37 (9th Cir. 2001) (noting that the plaintiff "[did] not dispute that regular and predictable *performance* of the job is an essential part of the transcriptionist position because many of the medical records must be transcribed within twenty-four hours, and frequent and unscheduled absences would prevent the department from meeting its deadlines") (emphasis added). There will still be deadlines to meet, conversations to have, and problems to solve interactively on a timely basis with coworkers and others.

Moreover, where teamwork, collaboration, customer contact, supervision, and the like are involved, an employee must be able to perform her work at specified times, *e.g.*, during normal business hours, or whatever hours the team works. *Cf. Samper*, 675 F.3d at 1239 (noting that "even when an employee 'work[s] at home . . . regular hours on a consistent basis' often remain a requirement") (quoting *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994)). The job simply cannot be performed during off hours when other team members are off duty. Likewise, where supervision is an issue, a supervisor cannot adequately supervise someone who is not working the same or similar hours.

Further, the employer must actually know when the employee is working and available. For rapid problem solving on a team basis, immediate availability is critical. That availability is compromised if the employee working from home has an unpredictable schedule. This is the same reason that even off-duty employees in some fields need to be "on-call" from time to time, so that the appropriate personnel in the company know that they are available in the event that they are needed. Accordingly, it is not reasonable to expect an employer to allow an employee unilaterally to decide when, for how long, and where he or she will be available for work, without restriction or plan. *Samper*, 675 F.3d at 1239-40.

E. The ADA Does Not Require An Employer, As An Accommodation, To Eliminate The Essential Functions Of Being Present In The Workplace And Available For Work

Whether the need for an employee's presence in the workplace is characterized as an essential function of the job, as some courts have done, or merely as an essential element of various essential job functions, as the EEOC chooses to do, the legal conclusion remains the same. Both the ADA and the courts afford substantial weight to the employer's judgment as to what functions are essential. 42 U.S.C. § 12111(8). *See, e.g.*, *Brenneman*, 366 F.3d at 420 (holding that regular attendance was an essential function of the job based on supervisor's affidavit); *Mulloy*, 460 F.3d at 147 (noting that "we generally give substantial weight to the employer's view of job requirements") (citation omitted).

An employee's self-serving views of how he or she might perform the job from home are simply insufficient to create a genuine issue of material fact. *Mulloy*, 460 F.3d at 150. *See also Mason*, 357 F.3d at 1122 (noting that "[w]e are reluctant to allow employees to define the essential functions of their positions based solely on their personal viewpoint and experience"). In the instant case, the EEOC relies solely on Harris' assertions that she could perform her job working from home on an "as-needed" basis for up to four days a week.[9]

Nor does the ADA require the employer to create a new position as an accommodation, *Smith*, 129 F.3d at 867, for example, much less one that permits the individual to work at home most days, at hours to be determined entirely by the employee. Indeed, even where a job duty *can* be performed at home, it does not follow that an employer must allow the employee to work from home, if in the employer's business judgment the duty can be performed *better* at the worksite, particularly where, as here, the employer has offered other effective accommodations that the employee has rejected out of hand.

The EEOC's position in this case is that the ADA requires an employer to allow an employee to work from home on an "as-needed" basis for up to four days a week as an accommodation for her irritable bowel syndrome.[10] Ford has a

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[9] Brief of the Equal Employment Opportunity Commission as Appellant, at 20.

[10] Brief of the Equal Employment Opportunity Commission as Appellant, at 16.

telecommuting policy, the EEOC argues, and the ADA requires Ford to modify that policy in order to allow Harris to work from home on essentially no schedule at all. As a practical matter, the EEOC would require Ford to allow Harris to work from home up to 80% of the time on an unpredictable, "as needed" basis simply because other employees in other jobs are allowed to telecommute under much more limited circumstances.[11]

Ultimately, the issue is whether an accommodation is "objectively reasonable."[12] *Smith v. Ameritech*, 129 F.3d 857, 866 (6th Cir. 1997). *See also Regan v. Faurecia Auto. Seating, Inc.*, 679 F.3d 475, 480 (6th Cir. 2012). Where

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[11] As the agency concedes in its opening brief, Harris rejected the other alternatives that Ford proposed. Brief of the Equal Employment Opportunity Commission as Appellant, at 11. Notably, the explanations Harris gave for rejecting Ford's proposed reasonable accommodations underscore the fact that the only accommodation she was even willing to consider was to be permitted to work from home on an "as needed" basis for up to four days a week. She refused a desk closer to the rest room because, she argued, her supervisor wanted her closer to her work team, *id.*, although her preferred accommodation would have put her much further away. She rejected the offer to help her find another job within Ford because "she did not want to start anew somewhere else." *Id.*

[12] Notably, the EEOC cites *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002), for the proposition that the ADA requires employers to grant "preferences." Brief of the Equal Employment Opportunity Commission as Appellant, at 23. As the EEOC well knows, however, the dicta to which the agency attaches so much significance did not affect the outcome of the case. In *Barnett*, the Supreme Court ultimately held that the employer did not violate the ADA and that the ADA does not ordinarily require an employer to reassign an employee with a disability when doing so would violate an established seniority system.

an employer needs an employee to maintain regular, predictable attendance at the workplace in order to perform the essential functions of the job, an accommodation of working from home for up to four days a week is unreasonable on its face.

II. THE EEOC'S POSITION THAT THE ADA REQUIRES AN EMPLOYER TO ALLOW AN EMPLOYEE TO WORK FROM HOME AT HER COMPLETE DISCRETION WOULD HAVE A DEVASTATING EFFECT ON PRIVATE SECTOR BUSINESS OPERATIONS

A. Employers Must Have The Ability To Require Employees To Maintain Regular, Predictable Attendance In Order To Operate Effectively

An employer needs to be able to hire and retain employees who appear for work when expected, and to discharge those who do not meet attendance standards. *Cf. Boyd v. USPS*, 1983 U.S. Dist. LEXIS 15022, at *18 (W.D. Wash. 1983) (noting that the "Postal Service possesses a legitimate and compelling interest in maintaining a stable and reliable workforce"), *aff'd*, 752 F.2d 410 (9th Cir. 1985). Factory workers must be on the production line when scheduled; restaurants need chefs and servers to work their assigned hours; law office support staff members have to be in the office to produce their work product in order for a firm to run efficiently and productively. And as in this case, buyers who must collaborate with coworkers and others in impromptu, time-sensitive problem-solving meetings must be available when their presence is required.

Towards that end, employers maintain reasonable attendance policies, designed to ensure a predictable attendance level. These policies generally provide for disciplinary action against employees who do not appear for work when scheduled. At the same time, many employers as a matter of company policy provide their employees with sufficient paid sick leave and paid annual (vacation) leave to accommodate the needs of most people for time off. In this manner, employers provide a kind of insurance program for employees to enable them to meet personal needs without jeopardizing their jobs.[13]

Employers also typically make accommodations when an employee with a disability needs leave for medical treatment or for other disability-related reasons, and such accommodations may be quite reasonable. When an employee does not maintain regular, predictable attendance, however, it disrupts the workforce and negatively affects the business.

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[13] According to a recent study conducted on behalf of the U.S. Department of Labor regarding the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq.*, 80% of FMLA-covered employers provide paid sick leave, about 70% provide paid disability leave, more than 90% provide paid vacation, more than 60% provide paid maternity leave, about 45% provide paid paternity leave, and nearly half provide other paid time off, while only 17% provide no paid leave. Abt Assocs., *Family and Medical Leave in 2012: Technical Report* (Sept. 7, 2012 & Supp. Feb. 4, 2013), at 36, *available at* http://www.dol.gov/asp/evaluation/fmla/FMLATechnicalReport.pdf

B. Employers Structure Successful Flexible Working Arrangements In A Way That Ensures That The Needs Of The Business Will Be Met

Many of EEAC's and the Chamber's member companies have established structured workplace flexibility programs in an attempt to address employees' personal needs and preferences while still ensuring that the work gets done. Indeed, some companies look to flexible work arrangements as one way to become recognized as an "employer of choice" in the quest to acquire and retain talented employees. Allowing employees to work from home part of the time (also known as telecommuting or telework) and/or to work on a flexible schedule is likely to be a component of a typical corporate workplace flexibility arrangement.

As EEAC President Emeritus Jeffrey A. Norris told the EEOC at a Commission meeting in 2009, "Workplace flexibility arrangements exist in many forms at EEAC member companies." [14] Mr. Norris explained that such arrangements "may not be available for all jobs nor are they necessarily available at all times for the same job." *Id.* Rather, he said, "[t]he primary criteria for use of flexible work arrangements are (1) the needs of the business, (2) the needs of the

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[14] Statement of Jeffrey A. Norris, President, Equal Employment Advisory Council, Before the U.S. Equal Employment Opportunity Commission, Meeting on Best Practices to Avoid Discrimination Against Caregivers (Apr. 22, 2009), *available at* http://www.eeoc.gov/eeoc/meetings/4-22-09/norris.cfm. *See also* WorldAtWork, *Survey on Workplace Flexibility* (Feb. 2011), *available at available at* http://www.worldatwork.org/waw/adimLink?id=48160

employee, and (3) the ability of the employee to perform his or her job." *Id.* In addition, he commented, "[s]upervisory authorization is almost invariably required as a condition to using a flexible work arrangement." *Id.*

In other words, companies want to be flexible, but need to maintain some structure in order to plan and carry out business functions effectively. The threshold question will be whether the job in question is amenable to telework or flextime at all. If it is, the company will implement a structure that sets the parameters of the arrangement which may include a set or maximum number of days per week or per month, core work hours, productivity and performance requirements and the like. Some require employees to have maintained, and continue to maintain, a certain level of performance in order to be eligible for a workplace flexibility arrangement. Some require employees to sign agreements that set out the terms and conditions for being permitted to work at home and/or during flexible hours.

Ford's own telecommuting policy provides a good example. The company lists, among other characteristics that make a job appropriate for telecommuting, that the job "requires little unscheduled face-to-face contact" where the "individual already works alone handling information, such as writing, reading, telephoning, planning, computer programming, words processing, and data entry," and involves "large blocks of time when the employee works independently of others." Ford

Human Resources Telecommuting Policy (Jan. 31, 2008), R. 60-11, at 1105. The policy also requires execution of a Telecommuting Agreement that establishes the number of hours the individual will work at the company's worksite and at the alternative worksite on each day of the week. *Id.* at 1116.

As discussed above, however, the EEOC's position in this case that the ADA somehow requires an employer, as an accommodation, to allow an employee to work essentially when and where she wants, is simply unworkable for a host of reasons, some of which are identified in the EEOC's own guidance documents. Moreover, the agency's position reflects a profound lack of appreciation for the manner in which private industry operates. In all but the rarest of circumstances, employers need the assurance that the people they hired to perform job functions will actually perform those functions, regularly and reliably, and be available to do so during core work hours when other people with whom they interact are also working.

For employers, the EEOC's view of the instant case reflects a true worst-case scenario. Employers have learned to manage situations in which employees need long-term leave due to their own illness or some other reason. Most of them even provide paid leave. Harris, however, did not want leave, assuming that she had leave remaining, which in 2009 she did not. Rather, she sought to work from home for up to four days per week on an "as needed" (*i.e.*, unpredictable) basis, at

her own discretion, without any appreciable prior notice. The EEOC asserts that the ADA requires Ford to provide exactly that. Such an arrangement, if it can be called that, would leave Harris' supervisors, her teammates, Ford's steel suppliers, and the manufacturers for whom she was expected to facilitate a steady uninterrupted steel supply, with no way of knowing, from day to day, whether or when she would be available and doing her job.

CONCLUSION

For the foregoing reasons, the *amici curiae* Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit that the decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Ann Elizabeth Reesman, hereby certify that this Brief *Amici Curiae* of the Equal Employment Advisory Council and Chamber of Commerce of the United States of America in Support of Defendant-Appellee and in Support of Affirmance complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B)(i). This brief is written in Times New Roman fourteen-point typeface using MS Word 2007 word processing software and contains 6,294 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2013, I electronically filed the Brief *Amici Curiae* of the Equal Employment Advisory Council and Chamber of Commerce of the United States of America in Support of Defendant-Appellee and in Support of Affirmance with the Clerk of the Court via the Court's ECF system. I further certify that service to all counsel of record will be accomplished via the Court's ECF system.

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