

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 OF THE EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION AS APPELLANT

---

P. DAVID LOPEZ  
General Counsel

CAROLYN L. WHEELER  
Acting Associate General Counsel

GAIL S. COLEMAN  
Attorney

EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION  
Office of General Counsel  
131 M Street, NE, Room 5SW24L  
Washington, DC 20507  
(202) 663-4055  
[gail.coleman@eoc.gov](mailto:gail.coleman@eoc.gov)

TABLE OF CONTENTS

Table of Authorities ..... ii

Statement Regarding Oral Argument ..... 1

Statement of Jurisdiction.....2

Statement of the Issues.....2

Statement of the Case.....3

    A. Course of Proceedings .....3

    B. Statement of Facts.....3

    C. District Court’s Decision .....15

Summary of Argument .....16

Argument.....17

    A. Standard of Review.....17

    B. A reasonable jury could find that regular attendance was not an essential function of Harris’s job and that a flexible telecommuting arrangement would have been a reasonable accommodation for her irritable bowel syndrome .....18

    C. A reasonable jury could find that Ford terminated Harris in retaliation for her filing of an EEOC charge of discrimination.....24

Conclusion .....27

Certificate of Service

Addendum: Designation of Relevant Documents

TABLE OF AUTHORITIES

Cases

Cehrs v. Ne. Ohio Alzheimer’s, 155 F.3d 775 (6<sup>th</sup> Cir. 1998) .....20

Humphrey v. Mem. Hosp. Ass’n, 239 F.3d 1128 (9<sup>th</sup> Cir. 2001) .....24

Mason v. Avaya Commc’ns, Inc., 357 F.3d 1114 (10<sup>th</sup> Cir. 2004) .....21

McMillan v. City of NY, \_\_\_ F.3d \_\_\_, 2013 WL 779742  
(2d Cir. Mar. 4, 2013) ..... 21, 23-24

Planned Parenthood SW Ohio Region v. DeWine,  
696 F.3d 490 (6<sup>th</sup> Cir. 2010)..... 17-18

Rauen v. U.S. Tobacco Mfg. L.P.,  
319 F.3d 891 (7<sup>th</sup> Cir. 2003)..... 16, 21-22

Robert v. Bd. of Cnty. Comm’rs of Brown Cnty., Kan.,  
691 F.3d 1211 (10<sup>th</sup> Cir. 2012).....19

U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002) .....23

Vande Zande v. Wisconsin, 44 F.3d 538 (7<sup>th</sup> Cir. 1995) .....19

Ward v. Mass. Health Research Inst., Inc.,  
209 F.3d 29 (1<sup>st</sup> Cir. 2000).....21

Woodruff v. Peters, 482 F.3d 521 (D.C. Cir. 2007) .....22

Statutes

28 U.S.C. §1291 .....2

28 U.S.C. § 1331 .....2

Americans with Disabilities Act

    42 U.S.C. § 12112.....18

    42 U.S.C. § 12117(a).....2

Title VII of the Civil Rights Act of 1964

    42 U.S.C. § 2000e-5(f) .....2

Rules

Federal Rules of Appellate Procedure

    Rule 4(a)(1)(B) .....2

Miscellaneous

EEOC Enforcement Guidance: “Reasonable Accommodation and Undue Hardship Under the ADA,”  
<http://www.eeoc.gov/policy/docs/accommodation.html>  
(rev. Oct. 17, 2002) ..... 18-19

EEOC Fact Sheet, “Work at Home/Telework as a Reasonable Accommodation,”  
<http://www.eeoc.gov/facts/telework.html> (Oct. 27, 2005) .....22, 23

## STATEMENT REGARDING ORAL ARGUMENT

Citing outdated case law, the district court held that an employee with “excessive absences” is unqualified for her job even when reasonable accommodation to a disability would have prevented the absences in the first place. The court uncritically accepted Ford’s claim that Harris could not have performed the essential functions of her job from home, ignoring record evidence to the contrary. The court also overlooked evidence from which a reasonable jury could find that Ford retaliated against Harris for filing an EEOC charge of discrimination. The EEOC requests oral argument to explain why the record requires this Court to remand for trial.

## STATEMENT OF JURISDICTION

The district court had jurisdiction over this Americans with Disabilities Act (“ADA”) case under 28 U.S.C. § 1331 and 42 U.S.C. § 121117(a), which incorporates by reference sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) and (3). On September 10, 2012, the district court granted summary judgment to Ford. (R.68, Slip Op., Pg ID 1390) The district court entered final judgment that same day. (R. 70, Judgment, Pg ID 1405) Pursuant to Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure, the EEOC filed a timely notice of appeal on November 9, 2012. (R.74, Notice of App., Pg ID 1461) This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Could a reasonable jury find that regular attendance was not an essential function of Harris’s job and that a flexible telecommuting arrangement would have been a reasonable accommodation for her irritable bowel syndrome?
2. Could a reasonable jury find that Ford terminated Harris in retaliation for her filing of an EEOC charge of discrimination?

## STATEMENT OF THE CASE

### A. Course of Proceedings

The EEOC filed this ADA action against Ford Motor Co. on August 26, 2011 (R.1, Compl., Pg ID 1), and filed an amended complaint on September 13, 2011. (R.9, Amended Compl., Pg ID 24) Ford moved for summary judgment on June 29, 2012. (R.60, Motion for Sum. J., Pg ID 991) On September 10, 2012, the district court granted this motion. (R.68, Slip Op., Pg ID 1390) The district court entered final judgment that same day. (R.70, Judgment, Pg ID 1405). The EEOC filed a timely notice of appeal on November 9, 2012. (R.74, Notice of App., Pg ID 1461)

### B. Statement of Facts

Jane Harris was a highly regarded customer service representative at U.S. Steel when Dawn Gontko, a Ford employee, encouraged her to become a resale steel buyer at Ford. (R.66-3, Harris Decl. ¶ 2, Pg ID 1262) Resale steel buyers are intermediaries between companies that produce steel and companies that use the steel to produce parts. (R.60-2, Gordon Decl. ¶ 3, Pg ID 1027) Harris expressed some reluctance to change jobs because working at Ford would mean a much longer commute (R.60-6, Harris Dep. at 147, Pg ID 1061), but Gontko said that

Ford permits employees to telecommute up to four days per week. “She basically told me that my job would be appropriate for telecommuting,” Harris said. “She said you will be able to telecommute because you will be a buyer and I have buyers who telecommute.” (R.60-6, Harris Dep. at 153, Pg ID 1063)

Harris took the job with Ford. Her supervisors (first Gontko and then John Gordon) rated her performance as “excellent plus” each year from 2004-2008. (Annual Perf. Revs, R.66-2 at 3, Pg ID 1260 (2004), R.60-14 at 6, Pg ID 1135 (2006), R.60-12 at 6, Pg ID 1122 (2007), R.60-13 at 7, Pg ID 1129 (2008); R.60-6, Harris Dep. at 210, Pg ID 1064) In 2004, Ford singled her out “for her positive attitude in the workplace and leadership qualities in driving for results,” giving her an award granted to only 6% of eligible employees annually. (R.66-2 at 2, Pg ID 1259) In 2006, Ford wrote that “Jane has strong commodity knowledge and works diligently to complete assignments with minimal supervision.” (R.60-14 at 6, Pg ID 1135) Ford commended her in 2007 for her “broad understanding of resale purchasing and steel purchasing,” and noted that she “executes most of her core job responsibilities with minimal supervision.” (R.60-12 at 6, Pg ID 1122) In 2008, Ford reported, Harris “has shown a noticeable improvement in how she relates to her supervisor and coworkers” and noted “she is also proactive in volunteering for incremental workload and projects when needed.” (R.60-13 at 7, Pg ID 1129)



In litigation, Ford pointed to its occasional criticisms of Harris's performance, including its observation in 2007 that "Jane can be argumentative and does not respond to coaching from her supervisor regarding disruptive behaviors." (R.60-12 at 6, Pg ID 1122) Ford also asserted in litigation that Harris ranked in the lowest 10-22% of her peers. (R.60-2, Gordon Decl. ¶ 13, Pg ID 1034-35) This statistic does not appear in any of Harris's performance reviews. None of Ford's criticisms, moreover, affected Harris's "exceptional plus" rating from 2004-2008.

From the beginning of her employment with Ford, Harris struggled with irritable bowel syndrome, an illness that causes uncontrollable diarrhea and fecal incontinence. (R.60-6, Harris Dep. at 154, Pg ID 1063; R.67-3, Harris Dep. at 140, Pg ID 1384) Initially, her symptoms were mild with occasional flare-ups. (R.41-3, Harris Dep. at 103, Pg ID 623) Over time, however, the flare-ups became more frequent and lasted longer. (R.41-4, Medical Records, Pg ID 628) The incontinence sometimes became so bad that she soiled herself every time she stood up. (R.67-3, Harris Dep. at 140, Pg ID 1384) She cried when "it started pouring out of me" at work. (R.41-4, Medical Records 7/20/06, Pg ID 628)

"It was not easy sitting at your desk shitting your pants," Harris said, "or walking through the tunnel to a meeting and know that you had shit your pants, sitting in a meeting next to someone." (R.41-3, Harris Dep. at 93-94, Pg ID 622)

She often had no physical sensation to tell her when she needed to change her clothes, and she could not always tell from the smell. (Id. at 146, Pg ID 624) She was aware that it was unpleasant for her coworkers to be near her when she had an accident, and it was embarrassing for her to be around them. (Id. at 146, pg ID 624; R.67-3, Harris Dep. at 142, 144, 149, Pg ID 1385, 1387) On bad days, she said, she would be unable to make it to work without having an accident in her car. (R.41-3, Harris Dep. at 319, Pg ID 625; R.66-10, Notes from 4/6/09 mtg at 2, Pg ID 1320)

Stress exacerbated the severity and duration of Harris's IBS symptoms. (R.41-5, Ladd Ltr. to Ford, Pg ID 631; R.64-6, Fraser Dep. at 25, Pg ID 1210; R.64-7, Donat Dep. at 15-16, Pg ID 1211) Because it was so stressful for her to be at work during her IBS flare-ups, Harris took leave when necessary under the Family and Medical Leave Act ("FMLA"). (R.66-3, Harris Decl. ¶ 3, Pg ID 1262-63) Her supervisors insisted that if she was too sick to come to work, then she was also too sick to work at home. If she felt capable of working, they told her, she would have to come to the office. (R.60-2, Gordon Decl. ¶¶ 8-9, Pg ID 1029-30; R.60-7, Gontko Dep. at 23, Pg ID 1090; R.66-5, Pray Dep. at 50-52, Pg ID 1269)

Even when Harris disregarded this directive and used her remote access to get work done while home sick, Ford treated the day as an "absence" and refused to pay her. (R.60-6, Harris Dep. at 237, Pg ID 1071; R.60-4, Jirik Decl. ¶ 5, Pg ID

1047; R.60-2, Gordon Decl. ¶ 7, Pg ID 1029) Ford also considered Harris “absent” when she worked in the office after core business hours, no matter how long she stayed. (R.60-4, Jirik Decl. ¶ 5, Pg ID 1047; R.60-2, Gordon Decl. ¶ 7, Pg ID 1029; R.66-5, Pray Dep. at 52, Pg ID 1269) Such work, Ford said, was “casual overtime,” expected of all salaried employees according to the demands of their jobs. (R.66-5, Pray Dep. at 50-52, Pg ID 1269) As a dedicated employee, Harris sometimes worked anyway, without pay, to keep from falling too far behind. (R.60-6, Harris Dep. at 355-56, Pg ID 1080)

Notwithstanding Harris’s efforts to keep up with her work, her supervisors repeatedly criticized her for her absences. (R.60-2, Gordon Decl. ¶ 8, Pg ID 1029-30; R.60-7, Gontko Dep. at 22, Pg ID 1090; R.60-3, Gontko Decl. ¶ 5, Pg ID 1043; R.60-6, Harris Dep. at 210, 221, Pg ID 1064, 1067) Gontko once allowed Harris to try a combination of an alternative work schedule and telecommuting for two weeks, specifying the hours she would work in the office and the hours she would work at home. (R.60-3, Gontko Decl. ¶ 3, Pg ID 1043; R.60-7, Gontko Dep. at 20, Pg ID 1089) In the end, Gontko pronounced the trial a failure because Harris “was unable to establish regular and consistent work hours.” (R.60-3, Gontko Decl. ¶ 5, Pg ID 1043)

Gordon likewise complained about Harris’s unpredictable schedule. He criticized her for adding to the workload of her colleagues but simultaneously

forbade her from solving this problem by working at home. (R.60-2, Gordon Decl. ¶¶ 8-9, Pg ID 1029-30) Harris testified that Gordon treated her poorly -- denying her training that was available to the rest of her team, closely monitoring her hours, and fostering resentment of Harris among her colleagues. (R.60-6, Harris Dep. at 212, 216-17, 225, 232, 234, Pg ID 1064-66, 1068-70)

In 2008, using Ford's strict count of her absences, which disregarded all of Harris's efforts to compensate for her absences by working at home or overtime, Harris missed an average of 1.5 work days per week. (R.66-3, Harris Decl. ¶ 17, Pg ID 1264) The stress of not being allowed to work from home but being held responsible for completing all of her work anyway, coupled with the financial hardship of not being paid for days when she worked outside the office and/or outside core business hours, exacerbated her IBS symptoms. (R.41-5, Ladd ltr, Pg ID 631; R.66-10, 4/6/09 mtg notes at 2, Pg ID 1320; R.66-12, EEOC charge, Pg ID 1330) By early 2009, Harris was experiencing her worst symptoms to date. (R.41-3, Harris Dep. at 146, Pg ID 624)

In February 2009, Harris formally asked Ford to let her telecommute as a reasonable accommodation to her disability. (R.60-10, 2/19/09 email to Pray, Pg ID 1100) "If I would have been able to telecommute for 30-60 days," she said, "there's a very good chance that a lot of that stress would have gone away from my life and I wouldn't have had to deal with it again." (R.41-3, Harris Dep. at 146, Pg

ID 624) She explained that her IBS would be less of a barrier at home than it was at the office. “It doesn’t really matter if I’m sitting at home by myself [and have an accident],” she said. “The person sitting next to me isn’t sniffing it or choking on it or being distracted by it. I’m doing my job. I’m on the phone. I’m on the computer.” (Id. at 148, Pg ID 624)

In support of her request to telecommute, Harris pointed to language in Ford’s official telework policy stating that “flexibility is no longer a ‘perk,’ it is an employee expectation.” (R.60-11, Telework Policy, Pg ID 1104) That policy, she noted, authorizes Ford employees to telework (with supervisor permission and on a preapproved schedule) from one to four days per week. (Id.) She noted that she was already doing much of her work from home (R.60-21, 4/22/09 email to Horan, Pg ID 1171) and reminded Ford that several of her coworkers successfully telecommuted. (R.66-21 & R.60-22, Coworkers’ Telework Agreements, Pg ID 1362, 1173) She said that most of her work could be done via computer or telephone, and said that if she was unable to work on a day she had a meeting with suppliers, she would call and reschedule. Most meetings, she said, could be attended remotely (R.66-10, 4/6/09 mtg notes at 1-2, Pg ID 1319-20); indeed, “the vast majority of communications and interactions with both the internal and external stakeholders were done via a conference call.” (R.66-3, Harris Decl. ¶ 3,

Pg ID 1262-63) The conference call capability, she added, was what enabled Ford to have a global, rather than a regional, purchasing team. (Id.)

Harris asked for permission to telecommute on an as-needed basis up to four days per week but explained that she did not expect to telecommute that often. (R.66-10, 4/6/09 mtg notes at 2, Pg ID 1320) She asked for up to four days per week because Ford's telework policy expressly states that "the scope of this program includes those arrangements in which an employee may work 1-4 days from the telecommuting/alternate work site (i.e., work at least one day per week from a company work site)." (R.60-11, Telework Policy, Pg ID 1103) "If Ford had offered to let me telecommute 1-2 days per week," she testified, "that would have been acceptable." (R.66-3, Harris Decl. ¶ 18, Pg ID 1264) Harris noted that she would no longer need FMLA leave and would no longer have absences if she could work (with pay) from home. (R.66-10, 4/6/09 mtg notes at 2, Pg ID 1320)

In April 2009, Ford denied Harris's request. (R.60-4, Jirik Decl. ¶ 9, Pg ID 1049) Her supervisors disagreed that her job was amenable to telecommuting "up to four days per week" and insisted upon the necessity of a regular and predictable schedule. (R.60-15, Kane Decl. ¶ 10, Pg ID 1138-39) Resale steel buyers, they said, constantly react to changing situations. "The essence of the job," Gordon said, "was group problem-solving, which required that a buyer be available to interact with members of the resale team, suppliers, and others in the Ford system

when problems arose.” (R.60-2, Gordon Decl. ¶ 11, Pg ID 1033-34) He emphasized that these interactions “were most efficiently handled, in my business judgment, through face to face meetings.” (Id.) Supervisors complained that Harris’s frequent and unpredictable absences had required Gordon to shift some of her work to her colleagues, unfairly burdening them with extra responsibilities. (R.60-21, 4/28/09 Jirik email, Pg ID 1172) Fundamentally, Ford objected because Harris “essentially requested that Ford deviate from the established telecommuting policy and create a version that applied only to her.” (R.66-13, Ford’s Position Statement, Pg ID 1334)

Harris rejected a suggestion by Personnel Relations representative Karen Jirik that Ford accommodate her by moving her cubicle closer to the restroom. (R.60-4, Jirik Decl. ¶ 9, Pg ID 1049) She explained that, in the first place, moving her cubicle would undermine Gordon’s stated objective of keeping her near the rest of her work team. (R.60-21, 4/28/09 Jirik email, Pg ID 1172) In the second place, she said, “it wouldn’t matter even if it was right outside the women’s bathroom because when [I stand] up, on a bad day [I ‘shit my] pants.” (R.66-10, 4/6/09 mtg notes at 2, Pg ID 1320) Moving her cubicle, moreover, would not solve the problem of her soiling herself on the way to work. (Id.) Likewise, Harris rejected Jirik’s offer to let her seek another job within Ford. Her expertise was within Raw

Materials Purchasing, Harris said, and she did not want to start anew somewhere else.<sup>1</sup> (R.66-10, 4/15/09 mtg notes at 5, Pg ID 1323)

One week later, Harris filed a charge of discrimination with the EEOC. (R.66-12, EEOC charge, Pg ID 1330) Shortly thereafter, Gordon held a team meeting to discuss how the team could best handle Harris's many absences. (R.41-3, Harris Dep. at 329, Pg ID 627) Harris fled the meeting in tears. (Id. at 327-28, Pg ID 627) Her doctor later described the incident as a panic attack. (Id. at 326-27, Pg ID 627) Members of Ford's security team escorted Harris to the medical department and her husband took her home. (R.66-5, Pray Dep. at 128-29, Pg ID 1272-73) Ford would not let her return to work for over a month, requiring her first to see a psychiatrist and then to obtain clearance from Ford's medical department. (R.41-10, Freedman 6/4/09 ltr, Pg ID 639-41; R.66-11, Blaney Dep. at 44, Pg ID 1328; R.66-7, Attendance Chart at 25, Pg ID 1300) By the time Harris returned from this Ford-imposed absence, her FMLA leave was nearly exhausted. (R.60-4, Jirik Decl. ¶ 3, Pg ID 1046)

---

<sup>1</sup> At the conclusion of this meeting, Harris took Jirik aside and complained that Gordon had been harassing her because of her leave-related absences. Jirik told Harris to provide a written statement with details regarding her complaint. No investigation was ever conducted. (R.67-2, Jirik Dep. at 110-12, Pg ID 1382; R.66-10, 4/15/09 mtg notes at 6, Pg ID 1324)



Stress from having been denied a reasonable accommodation exacerbated Harris's symptoms, causing her to be "absent" (as Ford defined it) with increasing frequency. (R.60-4, Jirik Decl. ¶ 3, Pg ID 1046) In mid-July, Gordon placed her on "Workplace Guidelines" – a supervisory tool for "assist[ing] an employee in achieving acceptable attendance." (Id.) Pursuant to these guidelines, Harris was required to be at work every day at her regularly scheduled start time. Early departure due to illness had to be approved in advance by Medical, and she had to call Gordon no later than 7:00 a.m. each day to report any absence due to illness. Within one week after each absence, she had to submit a "narrative letter" from her doctor including a return to work date and an actual (not stamped) doctor's signature. She was not allowed to call in and ask for personal business days or unscheduled vacation hours. Any breach of these guidelines, the document warned, could result in termination. (R.66-14, Workplace Guidelines, Pg ID 1337)

At around this same time, Gordon began to call Harris into the conference room for closed-door, one-on-one meetings that Harris considered physically threatening. (R.60-6, Harris Dep. at 218, Pg ID 1066) "I was physically scared of him in the room," she said. "It was military style yelling at me that I would agree he was a good manager; did I agree he was a good manager? He was a good manager; did I agree?" (Id. at 219, Pg ID 1066) Gordon persisted in yelling at her even when she protested that she had work to do, and he told her that it would be

“insubordination” if she got up and left the room. (Id. at 219-20, Pg ID 1066) “It was just the two of us behind a closed door,” Harris recalled. “That’s what was so scary. I was scared that he would physically harm me. He’s a big guy and he was very adamant, and if I just sit back down, it’s insubordination, and if I leave it’s insubordination, and I was scared.” (Id. at 221, Pg ID 1067)

In late July, only three months after she filed her EEOC charge, Harris received her first-ever low performance review. Ford rated her overall performance as “lower achiever” and specifically pointed to her “poor attendance and attendance reporting.” (R.60-16, 2009 Interim Rev., Pg ID 1141-42) Gordon immediately placed her on a 30-day Performance Enhancement Plan. (Id., Pg ID 1141; R.60-18, PEP, Pg ID 1344) Harris disagreed with Gordon’s assessment and wrote at the bottom of her performance review, “This review represents retaliatory harassment behavior on the part of my supervisor, John Gordon, due to my filing a charge of disability discrimination with the EEOC. I do not agree with the review’s stated accomplishments nor do I agree with the stated ratings. I requested a reasonable amount of time (10 calendar days) to document a rebuttal. However, the request was denied by Ford HR Rep Leslie Pray per email dated 7/30/09.” (R.60-16, 2009 Interim Rev., Pg ID 1140) At the conclusion of thirty days, Ford determined that Harris had failed to meet many of the objectives in her Performance Enhancement Plan, categorized her performance as “unsatisfactory,”

and terminated her employment. (R.60-18, 7/29/09-8/28/09 Perf. Rev., Pg ID 1150)

C. District Court's Decision

The district court granted summary judgment to Ford on the EEOC's claims that Ford had failed to accommodate Harris's disability and had retaliated against her for filing an EEOC charge. (R.68, Slip Op. at 14, Pg ID 1403)

Acknowledging the EEOC's arguments that Harris would not have incurred so many absences if Ford had allowed her to telecommute and had credited her time worked outside core hours (id. at 9, Pg ID 1398), the district court concluded that these arguments were irrelevant. "It is clear from the record," the district court said, "that Harris was absent more often than she was at work. On this basis alone, Harris is not a 'qualified' individual under the ADA." (Id.)

The court also deferred to Ford's judgment that Harris could not successfully perform the essential functions of her job from home. "Although a few other buyers were permitted to telecommute," the court said, "they did so once a week, on a regularly scheduled day. No other buyer was permitted to telecommute 'up to four days per week,' whenever she determined she was unable to come in to the office." (Id. at 10, Pg ID 1399) The district court did not mention that Harris requested "up to four days per week" because Ford's Telework Policy specifically mentions four days per week as a possibility. (See R.60-11, Telework Policy, Pg

ID 1103) Nor did the court mention that Harris did not anticipate typically needing to telecommute that often.

Observing that “in general courts have found that working at home is rarely a reasonable accommodation,” the court likened this case to Rauen v. U.S. Tobacco Mfg. L.P., 319 F.3d 891 (7<sup>th</sup> Cir. 2003), where telework was held to be an unreasonable accommodation in part because the employee’s job required teamwork, interaction, and coordination. (R. 68, Slip Op. at 11-12, Pg ID 1400-01) “Harris’s opinion to the contrary,” the court concluded, “is not sufficient to overcome Ford’s reasoned business judgment that the resale buyer position does not lend itself to frequent, unpredictable workdays out of the office.” (Id. at 12, Pg ID 1401)

Finally, the district court rejected the EEOC’s retaliation claim because the EEOC did not dispute “the specific performance deficiencies documented by Ford in the interim review.” (Id. at 13, Pg ID 1402)

#### SUMMARY OF ARGUMENT

Regardless of Gordon’s preference for face-to-face communication, a reasonable jury could find that Harris could perform the essential functions of her job while working from home when needed up to four days per week. The district court wrongly accepted Ford’s characterization of Harris’s accommodation request as unreasonable without acknowledging important facts to the contrary. First,

Ford's Telework Policy specifically authorizes supervisors to permit up to four days of telework per week. Second, Harris told Ford that she did not envision needing to telework four days per week every week, but only anticipated that she might need flexibility during her IBS flare-ups. Finally, Ford permits several of Harris's coworkers to telecommute, finding ways to work around the absence of face-to-face contact when necessary. A reasonable jury could conclude that if spontaneous, in-person meetings were as important as Ford claims, all of Ford's resale steel buyers would be required to work at the office full-time.

A reasonable jury could also find that Ford terminated Harris in retaliation for her filing of an EEOC charge of discrimination. Ford ranked Harris as an "exceptional plus" performer for every year of her employment until Harris filed her charge. Only after she complained to the EEOC did Ford rate her performance as "unsatisfactory." A reasonable jury could find that Harris's performance in 2009 was not significantly different from her performance in all previous years. A jury could also consider Gordon's harassing conduct, which escalated after Harris filed her charge, as evidence of retaliation.

## ARGUMENT

### A. Standard of Review

This Court reviews an award of summary judgment de novo. Planned Parenthood SW Ohio Region v. DeWine, 696 F.3d 490, 503 (6<sup>th</sup> Cir. 2010). The

Court must consider all evidence and draw all reasonable inferences in favor of the non-moving party, here the EEOC. Id. ““Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.”” Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). Summary judgment is appropriate only if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Id. (citing Fed. R. Civ. P. 56(a)).

B. A reasonable jury could find that regular attendance was not an essential function of Harris’s job and that a flexible telecommuting arrangement would have been a reasonable accommodation for her irritable bowel syndrome.

The ADA forbids discrimination on the basis of disability when an employee can perform the essential functions of her job. 42 U.S.C. § 12112. Under the statute, an essential job function is a duty to be performed, not the location in which it is done. EEOC Enforcement Guidance: “Reasonable Accommodation and Undue Hardship Under the ADA,” <http://www.eeoc.gov/policy/docs/accommodation.html> at n.65 (rev. Oct. 17, 2002) (citing 29 C.F.R. § 1630.2(n)(1)-(2)).

Although at times a job function and the location in which it is performed may appear to be intertwined, they are analytically distinct. Thus, a receptionist – whose essential job function is to greet people as they enter the premises – can

only perform the job function when physically present at the worksite. A proofreader, however, whose essential job function is to correct mistakes in a document, can probably perform the job equally well in a variety of locations. See id. at text accompanying notes 100-01 (essential functions of food server and store cashier can only be performed at the work site; essential functions of telemarketer and proofreader could be performed at home).

The district court relied on outdated case law to hold that regular attendance is an essential function of most jobs. (R.68, Slip Op. at 9-10, Pg ID 1398-00 (citing cases from 1994 and 1999)) Such case law wrongly merged job functions (tasks to be performed) with the location in which those functions could be carried out. For the most part, this merger was analytically harmless in the days before computer usage became widespread. However, as early as 1995, the Seventh Circuit predicted that the necessity for regular attendance “will no doubt change as communications technology advances.” Vande Zande v. Wisconsin, 44 F.3d 538, 544 (7<sup>th</sup> Cir. 1995).

Those technological advances have now occurred. See R.60-11, Ford Telework Policy, Pg ID 1104 (“flexibility is no longer a ‘perk,’ it is an employee expectation”). In light of current technology, “when an individual can execute the essential functions of her job from home, working remotely may be a reasonable accommodation.” Robert v. Bd. of Cnty. Comm’rs of Brown Cnty., Kan., 691

F.3d 1211, 1217 n.2 (10<sup>th</sup> Cir. 2012); cf. Cehrs v. Ne. Ohio Alzheimer's, 155 F.3d 775, 783 (6<sup>th</sup> Cir. 1998) (noting in leave of absence context that “no presumption should exist that uninterrupted attendance is an essential job requirement”).

Contrary to the district court’s conclusion, a reasonable jury could find that Harris could perform the essential functions of her job while working from home when needed up to four days per week. A jury could believe Harris’s testimony that she could do most of her work via email or computer and that she could attend most meetings remotely. “The vast majority of communications and interactions with both the internal and external stakeholders,” Harris said, “were done via a conference call.” (R.66-3, Harris Decl. ¶ 3, Pg ID 1262-63) Indeed, the conference call capability is what permits Ford to have a global, rather than a regional, purchasing team. (Id.)

“I participated in a lot of conference calls,” Harris said, “which were being used instead of meetings to allow Ford to integrate Ford North America, Europe, and Asia.” (Id. ¶ 8, Pg ID 1263) All notices regarding meetings, Harris testified, included a conference call number and each buyer had an individual conference call identification. (Id. ¶ 3, Pg ID 1262-63) Even when she was physically in the office, Harris said, she sometimes stayed at her desk and attended meetings via conference call. (Id.)



Significantly, Ford already permits some of its resale steel buyers to telecommute, albeit not as often as Harris desires. (R.66-21 & R.60-22, Coworkers' Telework Agreements, Pg ID 1362, 1173) The fact that Ford permits telecommuting despite its avowed need for frequent, spontaneous, in-person meetings suggests that physical presence in the office is not as essential as Ford says. See McMillan v. City of NY, \_\_\_ F.3d \_\_\_, 2013 WL 779742, at \*4 (2d Cir. Mar. 4, 2013) ("the fact that the City's flex-time policy permits all employees to arrive and leave within one-hour windows implies that punctuality and presence at precise times may not be essential"); Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 35 (1<sup>st</sup> Cir. 2000) ("the existence of a flexible schedule creates the obvious impression that [the employer] is not bothered by some periods of unsupervised work"); see also Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1119 (10<sup>th</sup> Cir. 2004) (court should not defer to employer's judgment on essential functions if its description is not "uniformly enforced").

Ford's willingness to permit some telecommuting distinguishes this case from Rauen v. United States Tobacco Manufacturing Ltd., 319 F.3d 891 (7<sup>th</sup> Cir. 2003). In Rauen, the employer refused to allow a disabled employee to work from home because, like Ford, it said the job required teamwork, interaction, and immediate problem-solving. 319 F.3d at 896-97. The Seventh Circuit agreed that under the facts of that case, telecommuting would be an unreasonable

accommodation. Id. at 897. However, unlike here, there were no employees in Rauen with a job similar to the plaintiff's who were already successfully telecommuting. By permitting other resale steel buyers to telecommute, Ford has called into question its claim that teamwork, interaction, and immediate problem-solving necessarily require physical presence in the workplace.

The fact that Harris sought a more flexible and less predictable telecommuting arrangement than Ford normally allows does not doom her request. See Woodruff v. Peters, 482 F.3d 521, 528 (D.C. Cir. 2007) (genuine issue of material fact on whether proposed accommodation, which would allow more flexible telecommuting than employer normally allowed, was reasonable). Ford wrongly insists that Harris is not entitled to any telecommuting arrangement that departs from its typical telework practices. (R.66-13, Ford's Position Statement, Pg ID 1334) Significantly, Ford's Telework Policy states that employees may telecommute 1-4 days per week. ((R.60-11, Telework Policy, Pg ID 1103)

In any event, even if Ford limits most telecommuters to one or two days per week, the ADA specifically anticipates that an employer may need "to waive certain eligibility requirements or otherwise modify its telework program for someone with a disability who needs to work at home." EEOC Fact Sheet, "Work at Home/Telework as a Reasonable Accommodation,"

<http://www.eeoc.gov/facts/telework.html> at question 1 (Oct. 27, 2005); see also

U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 398 (2002) (“preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal”).

An employee such as Harris who suffers from periodic flare-ups of her symptoms “might need to work at home on an ‘as needed’ basis, if this can be done without undue hardship.” See EEOC Fact Sheet, supra, at question 5.

A jury could discount the extra burden that Harris’s absences placed on her coworkers as a reason to deny her leave to telecommute. Harris specifically and repeatedly asked for permission to work from home, but Ford consistently told her that if she was too sick to come to the office, she was too sick to work. (R.60-2, Gordon Decl. ¶¶ 8-9, Pg ID 1029-30; R.60-7, Gontko Dep. at 23, Pg ID 1090; R.66-5, Pray Dep. at 50-52, Pg ID 1269) Not surprisingly, because Ford would not let Harris work from home, her coworkers had to pick up the slack. If Ford had not denied Harris’s requests to telework, Harris would no doubt have gotten more done on her own and her coworkers would have been less involved.

Having made it impossible for Harris to keep up with her workload, Ford should not be allowed to rely on her diminished output to demonstrate the ineffectiveness of telecommuting. As the Second Circuit recently explained:

Here, it is undisputed that [plaintiff] was tardy because of his disability and that he was disciplined because of his tardiness. In other words, [plaintiff] was disciplined because of his disability. Pretext is not an issue in this case; instead, [plaintiff] need only demonstrate that, with

reasonable accommodations, he could have performed the essential functions of his job.

McMillan, \_\_\_ F.3d \_\_\_, 2013 WL 779742, at \*7; see also Humphrey v. Mem. Hosp. Ass'n, 239 F.3d 1128, 1137 (9<sup>th</sup> Cir. 2001) (inconsistent with remedial purpose of ADA to permit employer to rely on disability-related infraction to deny a reasonable accommodation that could have prevented the infraction).

C. A reasonable jury could find that Ford terminated Harris in retaliation for her filing of an EEOC charge of discrimination.

The record evidence suggests that Ford may be overstating Harris's 2009 performance deficiencies. A reasonable jury could find that Ford terminated Harris not because she had suddenly gone from being an "exceptional plus" performer to an underachiever, but because she had filed an EEOC charge.

The district court wrongly said that the EEOC did not dispute the accuracy of the specific criticisms on Harris's 2009 performance reviews. (R.68, Slip Op. at 13, Pg ID 1402) To the contrary, the EEOC highlighted that one of Ford's specific criticisms was of Harris's attendance and attendance reporting. (R.66, Opp. to SJ at 16-17, Pg ID 1251-52) Her attendance would have been a non-issue if Ford had allowed her to telecommute. The EEOC also observed that Harris challenged the 2009 performance review as retaliatory but that Ford never investigated her claim. (Id. at 17, Pg ID 1252; see also R.60-16, 2009 Interim Rev., Pg ID 1140)

The performance Ford rated as unsatisfactory in 2009 was not substantially different from the performance it had previously rated as “exceptional plus.” Both before and after 2009, Harris had numerous absences, incomplete work, and interpersonal issues. (See Annual Perf. Revs.; R.66-2 (2004), Pg ID 1260; R.60-14 (2006), Pg ID 1135; R.60-12 (2007), Pg ID 1122; R.60-13 (2008), Pg ID 1123) Ford was willing to overlook these matters before 2009 but not after Harris filed her EEOC charge. The district court correctly acknowledged that “the timing of these [negative] reviews could be sufficient to establish the causal link to set forth a prima facie case.” (R.68, Slip Op. at 13, Pg ID 1402)

Harris testified that “the [2009] performance review was not a true reflection of the work I had done.” (R.60-6, Harris Dep. at 230, Pg ID 1069) Not only did Ford exaggerate her purported failings, Harris testified, but Gordon “really didn’t give me credit where credit was due.” (Id. at 228, Pg ID 1068) She noted, for example, that Gordon criticized her for needing help on a leakage project without noting that it was a new project, so everyone needed help, and that Harris was the only one to complete it. (Id.) Also, she observed, Ford criticized her for having 18 open materials claims without acknowledging that the reason so many claims were open was that she was waiting for responses from other people. (Id. at 264, Pg ID 1077)

Likewise suggestive of retaliation is that fact that Ford placed Harris on Workplace Guidelines “in an effort to improve her attendance” even while knowing that her absences were disability-related. (R.60-2, Gordon Decl. ¶ 9, Pg ID 1030) “It is your responsibility,” the Guidelines stated, “to be on the job at your regularly scheduled starting time.” (R.66-14, Workplace Guidelines, Pg ID 1337) Ford already knew from Harris’s accommodation request, however, that her IBS precluded regular, predictable attendance. No one could have seriously believed, at the time the Guidelines were imposed, that placing her on Workplace Guidelines would improve her attendance record. Nevertheless, the Guidelines warned, “Any breach of the guidelines will result in further disciplinary action, which may include termination of your employment.” (Id.)

A final indication of pretext is Gordon’s treatment of Harris after she filed her EEOC charge. It was shortly after the filing that Gordon began to yell at her behind closed doors. (R.60-6, Harris Dep. at 218-20, Pg ID 1066) Also, it was around this same time that he held a team meeting to discuss Harris’s absences – a meeting that was so upsetting to Harris that she fled it in tears and wound up having a panic attack. (R.41-3, Harris Dep. at 326-29, Pg ID 627)

Although the evidence does not compel a finding of retaliation, it also does not preclude such a finding. The district court erred by deciding this issue on summary judgment.

## CONCLUSION

Despite knowing that Harris's IBS was exacerbated by stress, Ford repeatedly criticized her for adding to her colleagues' workload while denying her the opportunity – indeed, forbidding her -- to work from home. Ford marked her as “absent” even on days when she worked – unpaid -- at home and/or after hours. Ford refused to offer Harris a telecommuting agreement of any number of days per week, even though its written policy permitted telework of up to four days per week and several of her coworkers already teleworked successfully. Moreover, although Ford had called Harris an “exceptional performer” for year after year, almost immediately after she filed an EEOC charge, Ford gave her a first-ever low performance review. Not only was Harris's performance during that time span much like the performance Ford had previously considered exceptional, but the review also emphasized Harris's absences – absences that would have been unnecessary if Ford had permitted her to work from home during IBS flare-ups.

The record evidence would permit a jury to find that Ford denied Harris a reasonable accommodation and then retaliated against her for complaining to the EEOC. For all of these reasons, the EEOC respectfully asks this Court to reverse the award of summary judgment and remand for further proceedings.

Respectfully submitted,

P. DAVID LOPEZ  
General Counsel

CAROLYN L. WHEELER  
Acting Associate General Counsel

/s Gail S. Coleman  
GAIL S. COLEMAN  
Attorney  
EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION  
131 M Street, NE, Room 5SW24L  
Washington, DC 20507  
(202) 663-4055  
gail.coleman@eeoc.gov



CERTIFICATE OF SERVICE

I, Gail S. Coleman, hereby certify that I filed the foregoing brief electronically in PDF format with the Court via the ECF system on this 13th day of March, 2013. I further certify that I served the foregoing brief electronically in PDF format through the ECF system this 13th day of March, 2013, to all counsel of record.

/s Gail S. Coleman  
GAIL S. COLEMAN  
Attorney  
EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION  
131 M Street, NE, Room 5SW24L  
Washington, DC 20507  
(202) 663-4055  
gail.coleman@eeoc.gov

## Designation of Relevant Documents

<b>Record Entry #</b>	<b>Document Description</b>	<b>Page ID #</b>
1	Complaint	1-5
9	Amended Complaint	24-28
10	Answer to Amended Complaint	29-33
41-3	Harris Deposition	622-27
41-4	Medical Records	628-30
41-5	Ladd Letter	631
41-10	Freedman Letter	639-41
60	Ford's Motion for Summary Judgment	991-1023
60-2	Gordon Declaration	1026-41
60-3	Gontko Declaration	1042-44
60-4	Jirik Declaration	1045-53
60-6	Harris Deposition	1059-87
60-7	Gontko Deposition	1088-90
60-10	Harris Email to Pray	1100-01
60-11	Ford's Telework Policy	1102-16
60-12	2007 Performance Review	1117-22
60-13	2008 Performance Review	1123-29
60-14	2006 Performance Review	1130-35
60-15	Kane Declaration	1136-39
60-16	2009 Interim Performance Review	1140-42
60-18	Performance Enhancement Plan	1144-50
60-21	Emails About Accommodations	1171-72
60-22	Coworker Telework Agreement	1173
64-6	Fraser Deposition	1210
64-7	Donat Deposition	1211
66	EEOC's Opposition to Motion for Summary Judgment	1229-56
66-2	2004 Performance Review	1258-60
66-3	Harris Declaration	1261-65
66-5	Pray Deposition	1268-73
66-7	Attendance Chart	1276-1301
66-10	Notes from April 2009 Meeting	1318-24
66-11	Blaney Deposition	1325-28
66-12	EEOC Charge	1329-31
66-13	Ford's Position Statement	1332-35

66-14	Workplace Guidelines	1336-37
66-21	Coworkers' Telework Agreements	1361-63
67	Ford's Reply in Support of Motion for Summary Judgment	1373-89
67-2	Jirik Deposition	1381-82
67-3	Harris Deposition	1383-89
68	Opinion and Order Granting Summary Judgment	1390-1403
70	Final Judgment	1405
74	Notice of Appeal	1461-62