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

REPLY BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

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ARGUMENT

In its opening brief, the EEOC urged this Court to reverse the district court's award of summary judgment to Ford. The EEOC argued that 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 ("IBS"). (EEOC Br. at 18-24) The EEOC also argued that a reasonable jury could find that Ford terminated Harris in retaliation for her filing of an EEOC charge of discrimination. (Id. at 24-26)

In its responsive brief, Ford paints Harris's telework request as facially unreasonable, ignoring the fact that its own Telework Policy expressly anticipates the possibility of telecommuting "up to four days per week." (R.60-11, Telework Policy, Pg ID 1103) Moreover, Harris *told Ford* that she would telecommute only as needed for IBS flare-ups and that she did not envision actually needing to telecommute four days per week. (R.66-10, 4/6/09 mtg notes at 2, Pg ID 1320) She testified that "if Ford had offered to let me telecommute 1-2 days per week, that would have been acceptable." (R.66-3, Harris Decl. ¶ 18, Pg ID 1264) She also testified that if Ford had let her telecommute for 30-60 days, her health would likely have improved dramatically due to the reduction in stress. (R.41-3, Harris

Dep. at 146, Pg ID 624) Her doctor confirmed this prediction, telling Ford, "Her work piles up when she is too ill to come into the office, and then the stress of catching up exacerbates her IBS. If she were allowed to work from home/telecommute when her IBS was bad, I think this vicious cycle could be broken." (R.41-5, Ladd Ltr. to Ford, Pg ID 631)

Ford argues that it could not permit Harris to telecommute because regular attendance was an essential function of her job. (Ford Br. at 22) Ford also argues that it satisfied its obligations under the ADA by offering to help Harris look for another job within the company. (Id. at 41) Finally, Ford argues that the EEOC has not raised a genuine issue of material fact regarding retaliation. (Id. at 42) For the reasons stated here and in the EEOC's opening brief, the EEOC asks this Court to reject Ford's arguments and to reverse the district court's judgment.

A. Ford violated the ADA by denying Harris a reasonable accommodation.

Barring undue hardship, the ADA requires an employer to modify the way things are normally done in order to enable an individual with a disability to perform the essential functions of her job. 42 U.S.C. § 12112(b)(5). The ADA requires employers to reasonably accommodate *all* qualified individuals, not only top performers. Id.; see also EEOC v. United Airlines, Inc., 693 F.3d 760, 762-65 (7th Cir. 2012) (ADA may require reassignment of minimally qualified employee

to open job despite availability of more qualified employee), petition for cert. filed, 81 USLW 3340 (Dec. 6, 2012) (No. 12-707).

An employer violates the statute by not trying in good faith to clarify what accommodations an employee needs. Keith v. County of Oakland, 703 F.3d 819, 929 (6th Cir. 2013), petition for cert. filed (Apr. 1, 2013) (No. 12-9611). If a reasonable accommodation exists but the employer has acted in bad faith, the fact that the employee did not specifically identify the accommodation will not eliminate employer liability. Cardenas-Meade v. Pfizer, Inc., No. 12-5043, 2013 WL 49570, at *5 (6th Cir. Jan. 3, 2013) ("employers 'who fail to engage in the interactive process in good faith [ ] face liability . . . if a reasonable accommodation would have been possible'"); Lafata v. Church of Christ Home for Aged, 325 F. App'x 416, at *5 (6th Cir. 2009) (same); see also Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 318 (3d Cir. 1999) ("the jury is entitled to bear in mind that had the employer participated in good faith, there may have been other, unmentioned possible accommodations").

1. Physical presence in the office was not an essential function of Harris's job.

Correctly stating that an employer need not modify an essential job function, Ford wrongly characterizes regular attendance in the workplace as an essential function of Harris's job. (Ford Br. at 23-39) As the EEOC explained in its

opening brief, Ford is confusing essential job functions with the manner in which those functions are normally performed. (EEOC Br. at 18-20) Harris's essential job functions included, inter alia, buying steel from suppliers and reselling it to stampers in a timely manner. (R.60-2, Gordon Decl. ¶ 3, Pg ID 1027) The location in which she carried out those functions is analytically separate from whether or not she bought and sold the steel.

By analogy, an employee with a lifting restriction would still be fulfilling his essential job functions if he moves items from one location to another with the help of a trolley even though all of his coworkers carry the items by hand. The employer needs the items moved from Location A to Location B. How they get from one place to the other is immaterial.

Ford is correct that numerous courts have characterized regular attendance as an essential job function (Ford Br. at 23), but this characterization is erroneous. As technology has advanced and more employees turn to telework, the possibility of performing at least some essential job functions in more than one location has become self-evident.

In some cases, certainly, it is impossible to accomplish essential job functions anywhere but in the workplace. See Brenneman v. MedCentral Health Sys., 366 F.3d 412, 420 (6th Cir. 2004) (hospital pharmacy technician could not

perform essential job functions from home where essential functions included preparing and delivering medications to hospital patients). This does not mean that attendance is, itself, an essential job function – it means only that without attendance, an employee in one of those positions cannot perform his job. A pharmacist without access to drugs cannot fill patient orders. A receptionist who is out of the office cannot greet visitors. The question here is whether Harris's job required regular and predictable attendance in order for her to buy and sell steel. For the reasons expressed in the EEOC's opening brief, a reasonable jury could find that it did not.

2. A reasonable jury could find that Harris would not have become so ill, would not have accumulated so many absences, and would have performed all essential functions of her job satisfactorily if Ford had let her telecommute during flare-ups of her irritable bowel syndrome.

Ford criticizes Harris's attendance and performance without acknowledging its own role in her progressive decline. As the EEOC explained in its opening brief, Harris joined Ford in the first place because Dawn Gontko, the supervisor who recruited her, assured her that she could telecommute. (R.60-6, Harris Dep. at 153, Pg ID 1063) When her IBS flared up, initially Harris took leave under the Family and Medical Leave Act. (R.66-3, Harris Decl. ¶ 3, Pg ID 1252-63) Over time, however, the unpaid leave increased her stress by multiplying her workload

and creating a financial burden. (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) This increased stress aggravated Harris's IBS symptoms. (R.41-5, Ladd Ltr. to Ford, Pg ID 631 (describing Harris's "vicious cycle of irritable bowel syndrome, involving diarrhea and fecal incontinence and work stress"))

Harris repeatedly sought permission to telecommute while she was ill, but 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) Ford refused to pay Harris for work performed at home or in the office after core business hours. (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; R.66-5, Pray Dep. at 52, Pg ID 1269) Ford maintained this inflexible posture despite its own written acknowledgement that "flexibility is no longer a 'perk,' it is an employee expectation." (R.60-11, Telework Policy, Pg ID 1104)

Misleadingly, Ford suggests that it gave Harris two ultimately unsuccessful opportunities to prove that telework was feasible. (Ford Br. at 8) In fact, Ford's trials did not provide the flexibility that Harris needed or sought. For a brief time,

Gontko allowed Harris to work four ten-hour days per week and telecommute on an ad hoc basis. (R.60-3, Gontko Decl. ¶ 3, Pg ID 1043; R.60-7, Gontko Dep. at 20, Pg ID 1089) When Harris's IBS flare-ups did not occur regularly and predictably, however, Gontko pronounced the trials a failure. (R.60-3, Gontko Decl. ¶ 5, Pg ID 1043)

By early 2009, Harris was experiencing her most extreme symptoms to date. (R.41-3, Harris Dep. at 146, Pg ID 624) Again, she pleaded with Ford for permission to telecommute, but Ford said no. (R.60-10, 2/19/09 email to Pray, Pg ID 1100) Harris's health deteriorated, her absences increased, and her work output declined. Ford could have broken this cycle by authorizing work from home, but it chose not to do so.

A reasonable jury could find that if Ford had allowed Harris to telecommute, she could have successfully performed the essential functions of her job. Ford allowed several of Harris's coworkers who performed the same job to telecommute one day per week and allowed one coworker to telecommute two days per week. (R.66-20, Ford Resp. to Interrog. #7, Pg ID 1359-60) This fact undermines Ford's argument that it is essential for retail steel buyers to be available for spontaneous, in-person meetings. (See Ford Br. at 27 ("the efficient functioning of the team necessitates the presence of *all* members during core business hours") (emphasis

added).) If a retail steel buyer must be available at all times to handle unexpected crises, as Ford says (Ford Br. at 7, 11), then it makes no sense to allow any employee to telecommute, even one day per week.

Ford emphasizes Gordon's preference for face-to-face communications (Ford Br. at 28), but communication may occur in multiple ways. Employers may not deny a reasonable accommodation just because they think that their usual way is best. See United Airlines, Inc., 693 F.3d at 762-65 (ADA may require reassignment of disabled employee who is not the best candidate even though employer typically fills positions with best qualified individual). Harris often communicated by email and telephone when working at the office. (R.66-3, Harris Decl. ¶¶ 5-6, Pg ID 1263) A jury could find that by doing the same thing from home, she could fulfill the essential job function of connecting with buyers, sellers, and coworkers.

A jury could also conclude that Ford is exaggerating the likely extent of Harris's absences. Harris's doctor predicted that a reduction in her stress would lead to a corresponding reduction in her IBS symptoms. (R.41-5, Ladd Ltr to Ford, Pg ID 631) This, in turn, would have lessened her need to telecommute. (R.66-10, notes from 4/6/09 mtg. at 2, Pg ID 1320) As for the days when she was sick, even

Ford concedes that parts of her job were fully amenable to work at home. (R.60-5, King Dep. at 42, 47-48, Pg ID 1056-57; R.66-4, Jirik Dep. at 85, Pg ID 1267)

3. Ford did not offer Harris an alternative reasonable accommodation.

Contrary to its argument (Ford Br. at 40), Ford did not offer Harris an alternative accommodation by which she could have performed the essential functions of her job. Although it blames Harris for refusing an offer to move her cubicle closer to the restroom (id. at 12), even with a different cubicle she would have arrived at work with soiled clothes, and she would have continued to embarrass herself and offend others by having accidents while in meetings. (R.66-10, 4/6/09 mtg notes at 2, Pg ID 1320) As she testified, there were times when "you can't . . . even walk because you're soiling your pants at every move." (R.67-3, Harris Dep. at 140, Pg ID 1384)

Ford complains that Harris could have solved the problem herself if she had worn Depends and carried a change of clothes to work. (Ford Br. at 12) Comments on the Depend web site, however, show that Depends are not a complete solution. See www.depend.com/mens-solutions/discussion/support-for-men/fecal-incontinence/14000007038 ("[d]ealing with the emotional stress of a bowel accident in public can be about as challenging as anything I know");

www.depend.com/womens-solutions/discussion/support-for-women/fecal-incontinence/14000007039 ("I live in fear at all times").

Requiring Harris to wear the equivalent of a diaper so that she could soil herself in front of others would deny her professional dignity. See EEOC Enforcement Guidance: "Reasonable Accommodation and Undue Hardship Under the ADA," http://www.eeoc.gov/policy/docs/accommodation.html (rev. Oct. 17, 2002) ("a reasonable accommodation allows an employee with a disability an equal opportunity to enjoy the benefits and privileges of employment that employees without disabilities enjoy"). Harris did not need a medical reason to reject Depends (but see Ford Br. at 12, 41 n.14); her aversion to public humiliation was sufficient. (See R.41-3, Harris Dep. at 146, Pg ID 624 ("I don't think most people want to be around you smelling like that."))

Nor did Ford satisfy its reasonable accommodation obligation by offering to help Harris look for another job. (See Ford Br. at 12, 41) In the first place, reassignment is a reasonable accommodation of last resort, to be used only when reasonable accommodations intended to keep an employee in her current job are not possible. EEOC Interpretive Guidance on Title I of the ADA, 29 C.F.R. app. § 1630.2(o) ("In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue

hardship."). In the second place, Ford never actually offered Harris another job; it merely offered to help her look for one. (R.60-4, Jirik Decl. ¶ 9, Pg ID 1049) There was no guarantee that such a job would be available even if Harris had been willing to leave Raw Materials Purchasing. Her rejection of Ford's invitation to look for another position is hardly the "refusal to accept an available reasonable accommodation" that Ford claims. (Ford Br. at 41)

Ford is wrong that its failure to offer a different telecommuting arrangement "is of no moment." (Ford Br. at 39 n.12) Even if Ford considered Harris's request to telecommute "up to four days per week" to be unreasonable, it should have explored the possibility of letting her telecommute for one or two days a week, as it already did with several of her coworkers. See 29 C.F.R. app. § 1630.9 (when appropriate accommodation is not readily apparent, "it may be necessary *for the employer* to initiate a more defined problem solving process") (emphasis added); Kleiber v. Honda of Am. Mfg., Inc., 485 F.3d 862, 871 (6th Cir. 2007) (same). Ford never asked her to clarify or limit her telecommuting request – it simply insisted that she do all of her work in the office. (R.60-4, Jirik Decl. ¶ 9, Pg ID 1049)

Ford's refusal to grant Harris any flexibility despite the existence of a liberal Telework Policy is evidence of bad faith. See Keith, 703 F.3d at 929 (interactive

process requires good faith exploration of possible accommodations); Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 203 (6th Cir. 2010) (employer must "never hinder the [interactive accommodation] process"), cert. denied, 131 S. Ct. 3071 (2011). A jury could find that Ford could reasonably have accommodated Harris. Accordingly, the district court erred in granting summary judgment. Cardenas-Meade, 2013 WL 49570, at *5; Lafata, 325 F. App'x 416 at *5.

B. Because Ford set Harris up to fail, a reasonable jury could conclude that Ford fired her not for performance issues but in retaliation for her filing of an EEOC charge.

Ford overstates Harris's performance issues, downplays her positive evaluations, and trivializes its own actions in setting her up to fail. A reasonable jury could conclude that even though Harris's performance deteriorated over time, Ford's motivation for firing her was actually retaliation for her EEOC charge.

As the EEOC described in its opening brief (EEOC Br. at 4, 14), Ford consistently rated Harris an "exceptional plus" performer in every evaluation before she contacted the EEOC. Now, in litigation, Ford asserts that it did not mean what it said and that Harris was actually in the bottom 10% of her peers. (Ford Br. at 13-14) Ford's testimony, which is unsupported by any contemporaneous documentation, is suspicious on its face. A jury could disbelieve that Ford would have ranked Harris "exceptional plus" year after year when she

was actually performing far below average. Even as late as 2008, Ford was commending Harris for improving her interactions at work and being "proactive in volunteering for incremental workload and projects when needed." (R.60-13, 2008 Perf. Rev. at 7, Pg ID 1129)

Ford ignores its own role in preventing Harris from staying caught up with her work in 2009. (See supra at 5-7) Her performance review from that year harshly criticized her for "unapproved absence time" but neglected to mention that Ford had repeatedly denied her requests to work from home. (R.66-15, 2009 Perf. Rev., Pg ID 1341) Even while she was fully capable of getting work done, Ford insisted that if she was too sick to come to work, then she was also too sick to work at home. (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) It is self-evident that because Ford forbade her from telecommuting, her work piled up and the burdens on her coworkers increased.

The EEOC does not dispute that Harris made various specific errors during 2009. The real question, however, is to what extent these errors were attributable not to Harris's inattention but to Ford's lack of support. Harris testified that Gordon gave her conflicting instructions (R.60-6, Harris Dep. at 223-24, Pg ID 1067), failed to credit her for significant cost savings (id. at 226-27, Pg ID 1068),

and did not acknowledge that delays or mistakes of others sometimes affected her ability to meet deadlines. (Id. at 227-29, 264, 277-78, 444, Pg ID 1068, 1077-78, 1083) She also testified that Gordon, far from supporting her, forced her to stay in a closed room with him while he yelled at her and told her that standing up or leaving would constitute insubordination. (Id. at 224, Pg ID 1067) Not only did she feel stressed from her backlog of work, she also felt stressed from Gordon's poor treatment. (Id. at 218-21, Pg ID 1066-67)

By the time Ford placed Harris on a performance enhancement plan, it was clear to her that Ford was laying the groundwork for her termination. "I had a list that was probably going to be impossible to achieve in 30 days," she said. (R.60-6, Harris Dep at 247-48, Pg ID 1073). She was so preoccupied with trying to meet Ford's goals that she had no time left to challenge her evaluation in any detail. (Id.) "I had discussions with [Mike Kane] about my disagreements with the review," she said, "but I was told to focus on PEP, so that's what I attempted to do." (Id. at 249-50, Pg ID 1074) At Kane's advice, Harris abandoned the draft of her objections "and set it aside until after I had completed my 30 day PEP." (Id. at 259-60, Pg ID 1076) Harris's laser focus on trying to save her job explains why she was "'too busy' to provide the information necessary for Ford to conduct the investigation." (Ford Br. at 44)

As the EEOC explained in its opening brief (EEOC Br. at 26), Ford's imposition of rigid attendance rules to improve Harris's attendance was irrational under the circumstances and destined to fail. Given the reality of Harris's IBS and her stated inability to come to the office during flare-ups, no one could have believed that these "Workplace Guidelines" would make any difference. A jury could find that Ford put the guidelines into place simply to justify a termination decision that it had already reached.

CONCLUSION

As described more fully in the EEOC's opening brief, the district court erred in granting summary judgment to Ford. A jury could find that Ford denied Harris a reasonable accommodation and then retaliated against her for complaining to the EEOC. For these reasons, the EEOC respectfully asks this Court to reverse the award of summary judgment and remand for further proceedings.

Respectfully submitted,

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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 10th day of May, 2013. I further certify that I served the foregoing brief electronically in PDF format through the ECF system this 10th day of May, 2013, to all counsel of record.

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Designation of Additional Relevant Documents

Record Entry #	**Document Description**	**Page ID #**
60-5	King Deposition	1054-58
66-4	Jirik Deposition	1266-67
66-15	2009 Performance Review	1338-42
66-20	Ford's Response to Interrogatories	1358-60