No. 12-2484

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellant,

v.

FORD MOTOR COMPANY,

Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan Southern Division
Case No. 5:11-cv-13742-JCO-MAR

BRIEF FOR APPELLEE

Elizabeth P. Hardy
KIENBAUM OPPERWALL HARDY
& PELTON, P.L.C.
280 North Old Woodward Avenue
Suite 400
Birmingham, Michigan 48009
Telephone: (248) 645-0000
Facsimile: (248) 645-1385

Eugene Scalia
Porter Wilkinson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
EScalia@gibsondunn.com

Counsel for Appellee Ford Motor Company

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Appellee Ford Motor Company makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. Ford Motor Company certifies that it has no parent corporation and that it is not a subsidiary of a publicly owned corporation. There are publicly traded corporations that may, from time to time, own more than 10% of Ford's stock as trustee or independent fiduciary for various employee plans. The most recent trustee owner in this capacity is State Street Corporation (NYSE: STT). The following is a list of publicly traded domestic and foreign companies in which Ford Motor Company directly or indirectly owns an equity interest of at least 10% but less than 100%: (1) China- Jiangling Motors Corporation, Limited and (2) Turkey- Ford Otomotiv Sanayi Anonim Sirketi (Otosan).

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

The EEOC's brief is heavy on facts about Jane Harris's medical condition, but light on facts about her position at Ford Motor Company. For purposes of summary judgment, Ford has not disputed that Harris is disabled with the meaning of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*. ("ADA"). The question before the Court—on which the EEOC bore the burden—is whether Harris was qualified for her position and sought a reasonable accommodation. This Court and other courts repeatedly have held that coming to work is an essential job function, and the EEOC offered no evidence that Harris's resale buyer position is the "unusual case" where regular attendance is not essential to the job. Ford, on the other hand, submitted voluminous evidence that steel resale buyers work in a dynamic, interactive environment where they must engage in group problem solving and face-to-face interactions with co-workers and customers. Ford's longstanding view is that the team functions most effectively when members are physically present, and that regular and predictable attendance is required because it is often difficult to anticipate when business needs will necessitate face-to-face interactions or on-site visits.

That evidence is uncontroverted, except for Harris's unsubstantiated assertions that she could perform her job from home up to four days per week. The EEOC lacks any authority for the proposition than an employee's subjective opin-

ion about how a job is best performed is sufficient to create a triable issue of fact. To the contrary, courts have consistently *rejected* employees' self-serving attempts to redefine their job functions. The EEOC's remaining arguments are based on an incomplete portrayal of Ford's Telecommuting Policy and of other buyers' limited telecommuting arrangements, and overlook Harris's rejection of alternative accommodations suggested by Ford. As a matter of law, the EEOC's arguments fail to create a genuine issue of whether attendance was an essential function of her job.

The EEOC also fails to show that Harris's termination for poor performance was retaliatory. Overwhelming record evidence establishes that Harris had long-standing difficulties in her position and her performance trended downward over the years. In an effort to improve her performance, in July of 2009, Ford put her on a Performance Enhancement Plan ("PEP") with easily achievable goals. It is undisputed that Harris failed to meet many of the PEP objectives. As a result, she was terminated. There is simply no record evidence that Harris's termination was animated by anything other than her failure to perform her PEP objectives.

Because the EEOC cannot create any material issue of fact, the district court correctly granted summary judgment to Ford on Harris's ADA and retaliation claims. The decision should be affirmed.

JURISDICTIONAL STATEMENT

Ford agrees with the EEOC's statement of jurisdiction. (Appellant Br. 2)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Could a reasonable jury find that Harris was qualified for a job that she could not perform at the work site, or that Ford must accommodate Harris by allowing her to work away from the office on an unpredictable schedule most days of the week?

2. Could a reasonable jury find that Ford terminated Harris in retaliation for filing an EEOC charge?

STATEMENT OF THE CASE

A. Course Of Proceedings

Ford terminated Harris for poor performance. The EEOC brought this action under the ADA, alleging that Ford failed to accommodate Harris's disability and discharged her in retaliation for filing an EEOC complaint. (R.1, Compl., Pg ID 1) Ford moved for summary judgment. (R.60, Mot. for Summ. J., Pg ID 991)

The district court granted summary judgment to Ford. It concluded that Harris is not a qualified individual under the ADA because of her excessive absenteeism. (R.68, Slip Op., Pg ID 1398) The court reasoned that Harris's frequent and unpredictable absences negatively affected her performance and increased her colleagues' workloads. (*Id*. at Pg ID 1399) The court also explained that Harris's

opinion that she could perform the essential functions of her work at home was insufficient 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*.) Likewise, it concluded that evidence about other employees' telecommuting arrangements did not undermine Ford's contention that regular and predictable attendance was an essential function of the resale buyer job because no other buyers were permitted to telecommute "up to four days per week" whenever they wished. (*Id*.)

The court also held that Harris's proposed accommodation was unreasonable as a matter of law and that Harris had failed to demonstrate that Ford's stated reason for terminating her—poor performance—was pretextual. (R.69, Slip Op., Pg ID 1401–03)

The EEOC appeals from that order. (R.74, Notice of Appeal, Pg ID 1461)

B. Statement Of Facts

1. The Nature Of Harris's Resale Buyer Position

Harris worked for Ford from April 2003 through September 10, 2009, as one of approximately five to seven resale buyers on the Raw Material team within the Body & Exterior Department of Vehicle Production Purchasing. (R.60-2, Gordon Decl. ¶ 2, Pg ID 1026–27; R.60-3, Gontko Decl. ¶ 2, Pg ID 1042–43) Resale buyers play a highly interactive role in which they buy steel from steel suppliers and

resell it to "stampers" who then manufacture and supply vehicle parts to Ford's assembly plants. (R.60-2, Gordon Decl. ¶ 3–5, Pg ID 1027–28) Resale buyers ensure that there is no gap in the steel supply available to Ford by responding quickly to emergency supply issues such as steel shortages. (*Id*. at ¶ 3–4, Pg ID 1027–28) Resale buyers thus play an essential role in ensuring that the parts are delivered on a timely basis to the plants so that vehicle production remains constant. (R.60-5, King Dep. at 43, Pg ID 1056; R.60-8, Pompey Decl. ¶ 9, Pg ID 1094)

Resale buyers must constantly interact with the resale buyer team and with a number of contacts both inside and outside of Ford. (R.60-15, Kane Decl. ¶ 10, Pg ID 1139; R.60-5, King Dep. at 42–48, Pg ID 1056–57) Harris's former supervisor, John Gordon, attested that "the essence of the job [is] group problem-solving, which require[s] that a buyer be available to interact with members of the resale team, suppliers and others in the Ford System when problems ar[i]se." (R.60-2, Gordon Decl. ¶ 11, Pg ID 1034) Indeed, resale buyers must engage in constant problem-solving dialogues with steel suppliers, stampers, past buyers, material engineers, lean manufacturing specialists, and others on the Raw Material team and within the entire Purchasing department. (*Id*. at ¶ 5, Pg ID 1028; R.60-9, Radl Decl. ¶ 4, Pg ID 1097)

Resale buyers must often attend unplanned, spur of the moment meetings. (R.60-2, Gordon Decl. ¶ 11, Pg ID 1034) Often, buyers meet with external and in-

ternal stakeholders to problem-solve; other times, buyers travel to supplier sites to watch parts being made. (R.60-5, King Dep. at 46, Pg ID 1057) In fact, Ford requires the stampers to physically work in the same building as the resale buyers "so that they are able to quickly meet and respond to any urgent situations." (R.60-15, Kane Decl. ¶ 10, Pg ID 1139)

In Ford's business judgment, these meetings are most efficiently and effectively handled face-to-face because the spontaneous exchange of information would be compromised if problem solving were to be delayed until a conference call could be scheduled. (R.60-4, Jirik Decl. ¶ 8, Pg ID 1048–49; R.60-2, Gordon Decl. ¶ 5, Pg ID 1028; R.60-3, Gontko Decl. ¶ 4, Pg ID 1043) Indeed, several Ford resale buyers and Director of Purchasing, Lisa King, attested that interactions via the telephone, video-conferencing, or email are insufficient because the core of resale buyer problem solving does not occur unless the team comes together. (R.60-5, King Dep. at 48, Pg ID 1057; R.60-9, Radl Decl. ¶ 6, Pg ID 1098; R.60-8, Pompey Decl. ¶ 8, Pg ID 1094) According to Gordon, a resale buyer's "availability to participate in th[e]se face-to-face interactions [is] essential to being a fully functioning member of the resale team." (R.60-2, Gordon Decl. ¶ 11, Pg ID 1034)

Not only is the resale buyer job highly interactive, it is also highly reactive. On many days, resale buyers are "barely at [their] desk." (R.60-5, King Dep. at 43, Pg ID 1056) Harris's teammates attested, "[t]here is no way of knowing what a

given day will bring since emergencies are beyond the buyer's control and require, on a moment's notice, that the buyer put aside what they are doing to interact with one or more of the different stakeholders." (R.60-8, Pompey Decl. ¶ 9, Pg ID 1094; R.60-9, Radl Decl. ¶ 5, Pg ID 1097–98) One of Harris's teammates stated that, in her experience, she "could not work from home more than one day a week and be able to effectively perform the duties of the resale buyer position." (R.60-8, Pompey Decl. ¶ 11, Pg ID 1095) Even then, she attested that she would need to attend work if an emergency arose on a day that she had otherwise planned to work from home. (*Id*.)

Toward the end of Harris's employment at Ford, the steel industry was in turmoil because of a global steel shortage. (R.60-2, Gordon Decl. ¶ 6, Pg ID 1028) These conditions created more emergency situations in which the resale buyers and other Ford constituents were required to come together on short notice to engage in problem-solving discussions. (*Id*.; R.60-8, Pompey Decl. ¶ 10, Pg ID 1094)

To perform their job responsibilities within this dynamic environment, resale buyers must adhere to a consistent and predictable schedule of attendance during core business hours. (R. 60-2, Gordon Decl. ¶ 7, Pg ID 1029) Ford considers it essential for resale buyers to be at work during "core" business hours because re-sale buyers must be available to interact with business associates at a moment's notice. (*Id*.; R.60-4, Jirik Decl. ¶ 4, Pg ID 1047) Gordon attested that, "[e]vening

and weekend work is not a substitute for working during the business day because a buyer is not able during those off hours to participate in problem-solving dialogues and does not have access to the stakeholders to obtain the information that is needed to efficiently and effectively perform their job." (R.60-2, Gordon Decl. ¶ 7, Pg ID 1029)

2. Harris's Absenteeism And Ford's Efforts To Assist Her

While at Ford, Harris made repeated requests to work from home on an ad hoc and unpredictable basis, to begin her workday at some other time than her agreed-upon start time, or to work on the weekends or after hours. (R.60-4, Jirik Decl. ¶ 5, Pg ID 1047)

Even though Harris's unpredictable and frequent absences strained her teammates and imposed difficulties on the business, Harris's supervisor, Dawn Gontko, attempted to accommodate her in various ways. For instance, on two occasions in 2005, Gontko allowed Harris to work an alternative schedule on a trial basis, whereby Harris worked four 10-hour days, working from home on an ad hoc basis. During these periods, Gontko stated that Harris "was unable to establish regular and consistent work hours" and failed "to perform the core objectives of the job." (R.60-3, Gontko Decl. ¶ 3, Pg ID 1043; R.60-7, Gontko Dep. at 20, Pg ID 1089) Indeed, Harris's absences were so frequent that Gontko placed her on "Workplace Guidelines," which are used at Ford to require employees with signifi-

cant attendance issues to report absences and provide medical justification. (R.60-3, Gontko Decl. ¶ 5, Pg ID 1044)

In 2006, Gordon replaced Gontko as Harris's supervisor; like his predecessor, Gordon continued to make efforts to adjust to Harris's constant absences. At times, Gordon assumed Harris's job responsibilities or asked her teammates to do so. (R.60-2, Gordon Decl. ¶ 8, Pg ID 1029) Gordon also occasionally permitted Harris to work from home or during non-business hours, but continually informed her that she was expected to be at work during core business hours. (*Id*.) Again, Harris's absences were so frequent that Gordon placed Harris on Workplace Guidelines. (*Id*. at ¶ 9, Pg ID 1030)

Within the first seven months of 2009, Harris had exhausted her 80 hours of company paid sick and personal business days, had taken a number of additional sick days, and had taken vacation. (R.60-2, Gordon Decl. ¶ 10, Pg ID 1030–33) It is undisputed that in 2009, Harris was absent from the workplace more often than not during core business hours. (*Id*.)

3. Harris's Request To Work From Home Up To Four Days A Week

Ford has a Telecommuting Policy that permits employees to enter into agreements with their supervisors to work from home under limited conditions. The supervisor has discretion whether to approve a request based on a number of factors, including the nature of the job. (R.60-4, Jirik Decl. ¶ 7, Pg ID 1048; R.60-

11, Telecommuting Policy, Pg ID 1105) The policy states clearly that telecommuting is not an entitlement, that a specific telecommuting schedule should be agreed upon in advance, and that an employee with an approved telecommuting arrangement should be prepared to come into the office on telecommute days when the business or management requires it. (R.60-4, Jirik Decl. ¶ 7, Pg ID 1048; R.60-11, Telecommuting Policy, Pg ID 1104) The policy contemplates that jobs with face-to-face contact may not be suitable for telecommuting, and suggests that employees with poor performance issues may not be suitable candidates for telecommuting. (R.60-11, Telecommuting Policy, Pg ID 1105)

Although a handful of other buyers in the Body & Exterior area were permitted to telecommute, the EEOC concedes that no buyer telecommuted "as often as Harris desire[d]." (Appellant Br. 21, 22) A few buyers telecommuted once a week, on a regularly scheduled day. (R.66-21 & R.60-22, Telecommuting Agreements, Pg ID 1362–63, 1173; R.68, Slip Op., Pg ID1399) The buyers were expected to be in the workplace on their designated telecommute day if the business required their presence. (R.60-4, Jirik Decl. ¶ 7, Pg ID 1048)

In February 2009, Harris formally requested to telecommute up to four days per week as an accommodation to her disability. (R.60-10, 2/19/09 Email from Harris to Pray, Pg ID 1100) On April 6, 2009, Karen Jirik of Personnel Relations, Gordon, and Leslie Pray of Human Resources met with Harris to discuss Harris's

request. (R.60-4, Jirik Decl. ¶ 7, Pg ID 1048; R.60-21, 4/22/09 and 4/28/09 Emails re: Accommodation, Pg ID 1172) Gordon went through each of Harris's responsibilities and asked her to comment on how she would perform each responsibility if she were to telecommute. Harris admitted that there were tasks that she could not perform from home, including supplier-site visits. (R.66-10, Notes from April 2009 Meeting, Pg ID 1319) When asked how she would handle meetings with suppliers, Harris stated that she would call and reschedule those meetings if they happened to fall on days when she was working from home. (Appellant Br. 9; R.66-10, Notes from April 2009 Meeting, Pg ID 1319)

Gordon and Jirik ultimately decided that Harris's request was untenable because resale buyers must be available to interact with their teammates, suppliers, and others at a moment's notice. (R.60-2, Gordon Decl. ¶ 11, Pg ID 1034) In Gordon's business judgment, Harris's request to telecommute up to four days per week could not be reconciled with the essence of the resale buyer position, which was group problem solving. (*Id*.)

Jirik agreed that Harris could not adequately perform her job over the phone or via email because the nature of Harris's position was both spontaneous and dynamic. In Jirik's business judgment, the fact that Harris would not be able to predict in advance what days she would be in the office made her request all the more unworkable. (R.60-4, Jirik Decl. ¶ 8, Pg ID 1049)

Jirik and Gordon met with Harris on April 15, 2009, to explain why her request to work an unpredictable "up to four days per week" schedule was irreconcilable with her position, and to propose alternative accommodations. Jirik offered to move Harris's cubicle closer to the restroom so that she could still be near her teammates and available for face-to-face interactions, yet able to respond more quickly to her medical condition.[1] Harris rejected that proposal and declined to consider (in conjunction or separately) "self-help" steps such as using Depends (a product specifically designed for incontinence) and bringing a change of clothes to the workplace; Harris presented no medical reason for why these steps would be inadequate. (R.60-6, Harris Dep., at 145–49, Pg ID 1060–62) Jirik also suggested that Harris consider transferring to a different position in the company that would be more amenable to a telecommuting arrangement. (R.60-4, Jirik Decl. ¶ 9, Pg ID 1049) Harris rejected any offer to consider a new position because she did not want to start anew somewhere else. (*Id.*; R.66-10, Notes from April 2009 Meeting, Pg ID 1323; Appellant Brief at 12)

On April 22, 2009, Harris sent an email complaining that the denial of her request violated Ford's ADA policy and that Gordon treated her differently. Jirik

[1] Despite Harris's contentions that it was unpleasant for her coworkers to be near her, and embarrassing to Harris to be around them, there is no record evidence that any co-worker knew of her condition or its effects. (R.60-6, Harris Depo. at 142–49, Pg. ID 1060–62; R.60-9, Radl Decl. ¶ 8, Pg ID 1098–99; R.60-2, Gordon Decl. ¶ 19, Pg ID 1038; R.60-8, Pompey Decl. ¶ 7, Pg ID 1094)

asked Harris to provide a statement detailing the basis for her complaint, but Harris refused to prepare the statement, stating that she was "too busy." (R.60-4, Jirik Decl. ¶ 10, Pg ID 1049) Harris filed a charge of discrimination with the EEOC on April 23, 2009. (R.66-12, ADA Charge and Notice of Charge, Pg ID 1330–31)

4. Harris's Performance Difficulties

By the EEOC's own admission, "Harris had numerous absences, incomplete work, and interpersonal issues" over the years. (Appellant Br. 25) Indeed, Harris's performance reviews reflect that her performance trended downward over time and that Ford had serious concerns about her performance as early as 2007. (R.60-15, Kane Decl. ¶ 4, Pg ID 1137; R.60-2, Gordon Decl. ¶ 13, Pg ID 1035) In 2006, 2007, and 2008, Harris received an "EP" for her overall rating, which 80% of buyers in Purchasing received. (R.60-2, Gordon Decl. ¶ 13, Pg ID 1035; R.60-4, Jirik Decl. ¶ 14, Pg ID 1051) Because of the wide range of performance levels among employees, managers also provide one of three "contribution assessment" ratings—from highest to lowest, "EP1," "EP2," or "EP3,"—as well as job related skills assessments. In 2007, Harris received the lowest contribution assessment—EP3—which placed her within the bottom 22% of her peer group; she also received the second lowest rating or lower in 7 of 11 job related skills assessment areas. (R.60-2, Gordon Decl. ¶ 13, Pg ID 1035; R.60-4, Jirik Decl. ¶ 16, Pg ID 1052) Although Ford noted that she improved her interpersonal skills in 2008, her

review reflected that other aspects of her performance had declined since the previous year. She received an EP3 rating again, which that year placed her in the bottom 10% of her peer group. (R.60-2, Gordon Decl. ¶ 13, Pg ID 1035; R.60-15, Kane Decl. ¶ 4, Pg ID 1137) She also received an even lower job-related skills assessment, receiving the second lowest rating or lower in 9 of 11 skills areas. (R.60-4, Jirik Decl. ¶ 16, Pg ID 1052) Supervisors use ratings in these areas to "send a message" to an employee, before lowering the employee's overall rating. (*Id*. at ¶15, Pg ID 1052)[2]

Harris's poor performance and attendance issues negatively affected the steel resale buyer team. The unpredictability of Harris's absences meant that any one of her teammates might need to set aside his or her own work on a moment's notice to assume her responsibilities. (R.60-8, Pompey Decl. ¶ 4, Pg ID 1092–93) Indeed, Harris's primary backup, Stephanie Radl, attested that Harris's absences "created a great deal of stress" for her and that she had "difficulty" "keeping up with [her own] workload as well as a substantial portion" of Harris's workload. (R.60-9, Radl Decl. ¶ 7, Pg ID 1098) On several occasions, Radl asked other steel resale buyers to assist her because she could not perform both her own job and Harris's simultaneously. (*Id*.) This arrangement undermined morale and caused

[2] Although the EEOC states that statistics about Harris's low performance rankings do not appear in her performance reviews (Appellant Br. 5), it does not dispute the data's accuracy.

stress for Harris's team members. (R.60-8, Pompey Decl. ¶ 4, Pg ID 1092–93) Harris's errors compounded the tension; her teammates were required to take extra time to seek clarification from suppliers, who, in turn, became frustrated. (*Id*. at ¶ 5, Pg ID 1093)

As noted, Harris's 2008 year-end rating placed her in the bottom 10% of her peer group and included lower "skill area" ratings, which Ford supervisors commonly use to signal that an employee's overall rating is in jeopardy. Harris's performance continued to decline in the first part of 2009. She was often unprepared. Her 2009 interim review noted one instance where Harris was assigned several sections in a presentation but told a coworker during the presentation, "You can do this because I haven't read this yet." (R.60-16, Harris's 2009 Interim Performance Review, Pg ID 1142)

Harris also made multiple pricing mistakes and missed deadlines. (R.60-16, 2009 Interim Performance Review, Pg ID 1142) For example, in April 2009 (*before* filing her EEOC charge) Harris knowingly processed a number of steel source documents known as "Material Specification Sheets" with outdated pricing information. Harris did not have the updated information because she was working from home during non-core hours; had she processed these documents during core hours, the pricing information would have been immediately available. (R.60-2, Gordon Decl. ¶ 16, Pg ID 1036) Despite the fact that the steel source later contact-

ed Harris with the correct pricing information and asked her to amend the documents, Harris made no effort to correct the misinformation. Harris's inaction forced the steel source to contact Gordon directly to request that the errors be fixed; in turn, Gordon asked one of Harris's teammates to fix the errors. (*Id*. at ¶ 16, Pg ID 1036–37) On this and on multiple other occasions, Harris's untimeliness and errors frustrated suppliers who depended on her to process information correctly. (R.60-8, Pompey Decl. ¶ 5, Pg ID 1093; R.60-9, Radl Dec. ¶ 7, Pg ID 1098; R.60-16, Harris's 2009 Interim Performance Review, Pg ID 1142)

In 2009, Ford changed its performance ratings to Top Achiever, Higher Achiever, Achiever, Lower Achiever, and Unsatisfactory. (R.60-4, Jirik Decl. ¶ 16 n.2, Pg ID 1052) For her 2009 mid-year/interim review, Harris received a "lower achiever" rating, placing her in the bottom 10% of her peers. (R.60-2, Gordon Decl. ¶ 14, Pg ID 1035) She received these ratings because she had failed to perform the core functions of her job, her interpersonal skills continued to be problematic, she lacked a concern for quality, and she had difficulty delivering timely results. (*Id*.)[3]

[3] At the urging of Harris's co-workers, Gordon initiated a team meeting in May 2009 to address work-load balance and how best to distribute Harris's work without overburdening her assigned backup. (R.60-2, Gordon Decl. ¶ 19, Pg ID 1038) At the meeting, Harris "immediately became confrontational with [Gordon] and her co-workers." (*Id*.) She "abruptly left," and was later observed "screaming and crying in the women's restroom." (*Id*.) Security was called to intervene. (R.60-16, Harris's 2009 Interim Performance Review, Pg ID 1142)

In the wake of the April 2009 pricing incident and in view of Harris's continued decline in performance, Gordon and his supervisor, Mike Kane, developed a Performance Enhancement Plan ("PEP") in July 2009 to help Harris improve her performance. Ford commonly uses PEPs to establish specific requirements that underperforming employees must meet to improve their performance. (R.60-15, Kane Decl. ¶ 5, Pg ID 1138) Gordon and Kane discussed the PEP with Jirik and Lisa King, who also supervised Gordon. The PEP contained objectives for Harris to achieve over 30 days. (R.60-2, Gordon Decl. ¶ 20–21, Pg ID 1039) They included that Harris (1) resolve certain disputes between steel suppliers and stampers known as "material claims" within 90 days of receipt and process all Material Specification Sheets within 120 days of receipt; (2) complete the one-page Buyer Responsibility Matrix spreadsheet that she had been assigned to keep up-to-date since 2006; (3) plan an in-house training session for the resale buyers that she had previously been assigned earlier that year; and (4) develop a workable plan for finishing a database project that she had been assigned in 2008. (*Id*. at ¶ 20–25, Pg. ID 1039–40)

In crafting the PEP, Ford management discussed that the objectives should be easily achievable within the time frames given and consistent with a buyer's basic responsibilities. (R.60-15, Kane Decl. ¶ 6, Pg ID 1138) Jirik confirmed that the PEP clearly stated these objectives and plainly set forth the consequences for

failing to accomplish the objectives in the time frame provided. (R.60-4, Jirik Dec. ¶ 17; *see also* R.60-5, King Dep. at 68, Pg ID 1058; R.60-15, Kane Decl. ¶ 6, Pg ID 1138) Harris has identified nothing unreasonable or inappropriate among the PEP requirements.

Nevertheless, Harris failed miserably at these objectives and did not respond with the urgency management expected. (R.60-15, Kane Decl. ¶ 7, Pg ID 1138) With respect to the first objective, Harris's outstanding 90-day-plus-old material claims *grew* from 14 to 18 at the end of the 30-day PEP period. (R.60-2, Gordon Decl. ¶ 22, Pg ID 1039) She made only nominal progress with respect to the outstanding 120-day-plus-old Material Specification Sheets, reducing the number by two. (*Id*.) Harris's failure to complete this objective negatively affected Ford's business, since payments for steel shipments are frozen until claims are processed. (R.60-18, Harris's Performance Enhancement Plan, Pg ID 1146)

Harris fared no better with respect to the other objectives. Despite the fact that both Kane and Gordon attempted to assist her by making a number of suggestions for the internal training session for the Raw Material Team, Harris does not contest that she failed to schedule it. (R.60-6, Harris Dep. at 277–80, Pg ID 1078; R.60-2, Gordon Decl. ¶ 23, Pg ID 1040; R.60-18, Harris's Performance Enhancement Plan, Pg ID 1147) Nor did Harris properly complete the one-page Buyer Responsibility Matrix by the end of the PEP period even though she had been respon-

sible for maintaining its accuracy since 2006. (R.60-2, Gordon Decl. ¶ 24, Pg ID 1040)[4] Because the matrix was incomplete, Ford could not contact a supplier during a critical supply situation until two days later. (R.60-16, Harris's 2009 Interim Performance Review, Pg ID 1140) Finally, Harris admits that she failed to complete a workable plan for finishing the database project. (R.60-6, Harris Dep. at 468–70, Pg. ID 1085–86; R.60-2, Gordon Decl. ¶ 25, Pg ID 1040)

5. Ford's Decision To Terminate Harris's Employment

During the PEP period, Gordon scheduled weekly one-on-one meetings with Harris to review her performance. (R.60-2, Gordon Decl. ¶ 26, Pg ID 1040) Kane attended the first meeting and received numerous updates from Gordon thereafter. (R.60-15, Kane Decl. ¶ 7, Pg ID 1138)

In September of 2009, at the conclusion of the PEP period, Kane and King met to discuss Harris's performance. (Gordon was on vacation.) (R.60-15, Kane Decl. ¶ 8, Pg ID 1138) King made the decision to terminate Harris because she had failed to meet the performance criteria for her position and failed to meet the objectives of the PEP. (*Id.*; R.60-4, Jirik Decl. ¶ 17, Pg ID 1053) Kane called Gordon to report the decision. Gordon had no knowledge of the decision until this telephone call. (R.60-2, Gordon Decl. ¶ 26, Pg ID 1041; R.60-15, Kane Decl. ¶ 8, Pg ID 1138)

[4] Harris is not in a position to dispute that the matrix was inaccurate. (R.60-6, Harris Dep. at 481, Pg ID 1087)

SUMMARY OF ARGUMENT

I. Summary judgment was warranted because the EEOC cannot show that Harris was qualified for the resale buyer position or that telecommuting on an unpredictable schedule—up to four days a week—was a reasonable accommodation. This Court and other courts repeatedly have held that it is "unusual" and "exceptional" for a job not to require regular attendance at the workplace, and Ford presented overwhelming evidence that predictable workplace attendance was an essential function of Harris's job and that her erratic schedule placed great strain on her managers and coworkers. Consistent with controlling precedent, the district court correctly refused to displace Ford's business judgment with the complainant's own contrary opinion or generic statements regarding the benefits of technological advances. There is no evidence that the resale position "was one of those exceptional cases where" the job could have been "'performed at home without a substantial reduction in quality of . . . performance.'" *Smith v. Ameritech*, 129 F.3d 857, 867 (6th Cir. 1997) (citation omitted).

In the alternative, Harris is not a qualified individual under the ADA because she rejected Ford's offers to accommodate her, including an offer to assist Harris in finding another position within the company that would have allowed her to work from home.

II. Nor could a reasonable jury find that Ford terminated Harris in retaliation for her decision to file an EEOC charge of discrimination. The district court correctly concluded that the record evidence fully supported Ford's stated justification for terminating Harris—poor performance. The EEOC lacks any evidence that Ford's reasons for establishing the PEP or terminating Harris were pretextual.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *Donald v. Sybra, Inc.*, 667 F.3d 757, 760 (6th Cir. 2012). This Court should affirm the district court's grant of summary judgment if there is no genuine issue of material fact and the moving party, here Ford, is entitled to judgment as a matter of law. *Id*. (citing Fed. R. Civ. P. 56(a)). Although this Court must draw all inferences in favor of the EEOC, "[a] mere scintilla of evidence in support of [the EEOC's] position will be insufficient for [its claims] to survive summary judgment. Rather, there must be enough evidence such that the jury could reasonably find for [it]." *Id*. at 760-61. As the nonmoving party, the EEOC has an affirmative duty to highlight the specific portions of the record upon which it relies to allege a genuine issue of material fact. *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001). This Court can affirm the district court's decision for any reason that finds support in the record. *See Pahssen v. Merrill Cnty. Sch. Dist.*, 668 F.3d 356, 362 (6th Cir.), *cert. denied*, 133 S. Ct. 282 (2012).

ARGUMENT

A. The District Court Properly Granted Summary Judgment Because This Court And Other Courts Repeatedly Have Held That Regular Attendance In The Workplace Is An Essential Job Function; The Resale Buyer Position Is Not The "Unusual Case" To Which That Rule Does Not Apply.

To establish a prima facie case for failure to accommodate under the ADA, a plaintiff typically must show that: (1) the individual is disabled within the meaning of the Act; (2) she is otherwise qualified for the position, with or without the reasonable accommodation; (3) her employer knew or had reason to know about her disability; (4) she requested an accommodation; and (5) the employer failed to provide the necessary accommodation. *See Melange v. City of Center Line*, 482 F. App'x 81, 84 (6th Cir. 2012). For purposes of this appeal, Ford does not dispute that Harris is disabled within the meaning of the Act. The question is whether a reasonable jury could find that Harris could perform the essential functions of her job, with or without reasonable accommodation. The district court correctly granted summary judgment because Harris is not a qualified individual under the ADA and the one accommodation she requested—telecommuting up to four days a week on an unpredictable schedule—was not reasonable. Alternatively, Harris is not qualified because she rejected a reasonable accommodation offered by Ford.

1. The Collaborative, Interactive, And Dynamic Nature Of The Resale Buyer Position Requires Reliable And Predictable Presence In The Workplace.

To establish a prima facie case, the EEOC must show that Harris is otherwise qualified for the position. *Keith v. County of Oakland*, 703 F.3d 918, 923 (6th Cir. 2013). "[A]n individual is 'otherwise qualified' if he or she can perform the 'essential functions' of the job with or without reasonable accommodation." *Id*. at 925 (citing 42 U.S.C. § 12111(8)).

Far from relying on "outdated case law" (Appellant Br. 19), the district court correctly applied binding Sixth Circuit precedent to hold that Harris is not a qualified individual under the ADA because she is not capable of regular and predictable attendance in the workplace. (R.68, Slip Op., Pg ID 1398) The majority of circuits have held that attendance is ordinarily an essential function of a job.[5] The

[5] *See*, *e.g.*, *Colón-Fontánez v. Municipality of San Juan*, 660 F.3d 17, 33 (1st Cir. 2011) ("This Court—as well as the majority of circuit courts—has recognized that attendance is an essential function of any job.") (internal quotation marks omitted)); *Vandenbroek v. PSEG Power CT LLC*, 356 F. App'x 457, 460 (2d Cir. 2009) ("[R]egularly attending work is an essential function of virtually every job.") (internal quotation marks omitted); *Tyndall v. Nat'l Educ. Ctrs, Inc. of Cal.*, 31 F.3d 209, 213 (4th Cir. 1994) ("[A] regular and reliable level of attendance is a necessary element of most jobs."); *Hypes ex rel. Hypes v. First Commerce Corp*., 134 F.3d 721, 727 (5th Cir. 1998) (per curiam) ("[R]egular attendance is an essential function of most jobs."); *EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 949 (7th Cir. 2001) (en banc) ("Common sense dictates that regular attendance is usually an essential function in most every employment setting.") (internal quotation marks omitted); *Browning v. Liberty Mut. Ins. Co*., 178 F.3d 1043, 1048 (8th Cir. 1999) ("[I]t is axiomatic that in order for [an employee] to show that she could perform the essential functions of her job, she

EEOC—which bears the burden of showing that Harris was qualified for the job and the reasonableness of her proposed accommodation—fails to establish that the resale buyer position is the "unusual case where an employee can effectively perform all work-related duties at home" without a substantial reduction in the quality of her performance. *Smith v. Ameritech*, 129 F.3d 857, 867 (6th Cir. 1997) (internal quotation marks omitted).

As this Court has "flatly held," an "employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA." *Melange*, 482 F. App'x at 84 (internal quotation marks and alterations omitted); *see also Samper v. Providence St. Vincent Medical Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012) ("Both before and since the passage of the ADA, 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.").[6]

---

must show that she is at least able to show up for work."); *Mason v. Avaya Commc'ns, Inc*., 357 F.3d 1114, 1119 (10th Cir. 2004) ("[O]ther circuits have recognized physical attendance in the workplace is itself an essential function of most jobs."); *Davis v. Fla. Power & Light Co*., 205 F.3d 1301, 1306 (11th Cir. 2000) ("[J]ob presence . . . has been held to be an essential function of a job.").

[6] Neither *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775 (6th Cir. 1998) nor *Robert v. Board of County Commissioners of Brown Cnty., Kan*, 691 F.3d 1211 (10th Cir. 2012) shows that Harris was qualified under the ADA. (Appellant Br. 19-20) *Cehrs* merely holds that *a leave of absence* is not per se an unreasonable accommodation. Importantly, the plaintiff in *Cehrs*, unlike *Harris*, submitted evidence from her doctor that she was expected to recov-

In *Brenneman v. Medcentral Health System*, 366 F.3d 412 (6th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005), this Court concluded that, as a matter of law, a diabetic pharmacist technician was not otherwise qualified for his position because he was unable to satisfy his employer's attendance requirements. *Id*. at 418-19. In reaching that conclusion, the Court refused to displace the business judgment of the employer and explicitly relied on the employee's supervisor's testimony that regular attendance was an essential function of the position. *Id*. at 420. That decision—which the EEOC does not cite, much less attempt to distinguish—controls the outcome of this case and requires this Court to affirm the district court's grant of summary judgment for Ford.[7]

---

er from her disability and return to work part-time in a matter of weeks, and full-time in less than two months. 155 F.3d at 778. Moreover, Harris was granted many leaves of absences; it was the frequency of her sporadic and unpredictable absences that caused the burden on her management team and coworkers, and negatively affected her performance. The EEOC's other case—*Robert*, 691 F.3d at 1217 n.2—actually supports Ford's position that working from home is *not* reasonable where, among other things, necessary site visits cannot be performed from home.

[7] *See also Denman v. Davey Tree Expert Co.*, 266 F. App'x 377, 380 (6th Cir. 2007) (holding that an employee who failed to report to work for two weeks was unqualified under the ADA solely because his employer's leave of absence policy made clear that proper attendance was necessary for its employees); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998) (holding that an employee who fails to show up to work cannot perform the essential functions of the job); *see also 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*, 831 F.2d 298 (6th Cir. 1987).

Voluminous record evidence illustrates the common-sense notion that regular and predictable attendance at the job was necessary because the resale buyer position required (1) teamwork and group problem solving; (2) face-to-face interactions with internal and external constituencies; and (3) supplier site visits.

First, physical attendance is "required simply because [Harris] must work as part of a team." *Samper*, 675 F.3d at 1237 (internal quotation marks omitted). It is well-recognized that presence in the office is an essential function of positions requiring teamwork. *See Mason v. Avaya Commc'ns, Inc*., 357 F.3d 1114, 1122 (10th Cir. 2004) (attendance was an essential function of a service coordinator position "because the position required supervision and teamwork"); *Hypes*, 134 F.3d at 727 (concluding that attendance was an essential function of loan analyst position because the analyst "was a part of a team and the efficient functioning of the team necessitated the presence of all members"); *Vande Zande v. Wis. Dep't of Admin*., 44 F.3d 538, 544 (7th Cir. 1995) ("[T]eam work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance."). Indeed, the EEOC's own guidance recognizes that an employer is justified in refusing a telecommuting request when, among other things, "[i]t would be difficult for an employee who works remotely" to participate in frequent "impromptu team meetings" to discuss developments and share information. EEOC, *Employer Best Practices for Workers with Caregiving Responsi-*

bilities, available at: http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (last accessed on Apr. 22, 2013).

Ford managers and Harris's coworkers testified that the resale buyer position required teamwork and group problem solving, and that the efficient functioning of the team necessitates the presence of all members during core business hours. *See supra* pp. 4-8. The record below contains uncontroverted testimony that the essence of the resale job is group problem solving, which requires that a buyer be available to interact with members of the resale team, suppliers, and others in the Ford System. (R.60-2, Gordon Decl. ¶ 11, Pg ID 1034) Resale buyers must engage in problem-solving discussions with several external and internal stakeholders, and these interactions often require them to attend several unplanned, spur of the moment meetings. (R.60-2, Gordon Decl. ¶¶ 5, 11, Pg ID 1028, 1034; R.60-9, Radl Decl. ¶ 4, Pg. ID 1097) Far from being Gordon's idiosyncratic "preference" for "face-to-face" meetings (Appellant Br. 16), the universal judgment of Ford's managers is that the core problem-solving function was best achieved by the team coming together to achieve resolutions. (R.60-5, King Dep. at 48, Pg ID 1057) Indeed, Ford requires stampers and resale buyers to work in the same building, so they are able to quickly meet and respond to urgent situations. (R.60-15, Kane Decl. ¶ 10, Pg ID at 1139) Moreover, employees working outside core business hours cannot participate in all problem-solving dialogues and do not have access to

all the information needed to efficiently and effectively perform the job. (R.60-2, Gordon Decl. ¶ 7, Pg ID 1029) In light of this uncontroverted evidence, a juror would have no choice but to find that the collaborative and interactive aspects of the resale buyer position required team member's regular and predictable attendance in the workplace.

Second, and relatedly, attendance in the workplace is required because the job "require[s] face-to-face interaction with clients and other employees." *Samper*, 675 F.3d at 1237. Case law supports the common-sense notion that physical presence is an essential function of jobs requiring in-person interaction with supervisors, coworkers, and customers. *See*, *e.g.*, *Carlson v. Liberty Mut. Ins. Co*., 237 F. App'x 446, 449 (11th Cir. 2007) (per curiam) (attendance is an essential function for a medical director because the employee's supervisor testified that the position required interaction with various stakeholders and for the employee to be accessible); *Nesser v. Trans World Airlines, Inc*., 160 F.3d 442, 446 (8th Cir. 1998) (attendance is an essential function for an airline customer service agent because the job "involve[s] face-to-face contac[t]" with customers).

Once again, uncontested record evidence demonstrates that resale buyers frequently interacted with internal and external contacts and that, in Ford's business judgment, these interactions were best handled face-to-face. *See supra* pp. 4-8. Specifically, the resale buyer position involved internal strategy meetings and

supplier meetings that required live interaction and exchange of information. According to Gordon, a resale buyer's "availability to participate in th[e]se face-to-face interactions [is] essential to being a fully functioning member of the resale team." (R.60-2, Gordon Decl. ¶ 11, Pg ID 1034) Gordon also attested that regular and consistent attendance permitted him to schedule meetings based on employee availability, since he knew who he could rely upon on a certain day to respond to urgent matters. (*Id*. at ¶ 5, Pg. ID 1028) In light of this uncontroverted evidence, a juror would have no choice but to find that the face-to-face aspect of Harris's job required her attendance at the job site.

Third, physical attendance is required because buyers must visit supplier sites. *See*, *e.g*, *Robert*, 691 F.3d at 1217 n.2 (working from home was not a reasonable accommodation because the employee was required to perform site visits); *Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894, 900 (7th Cir. 2000) (attendance is an essential function of a factory position where maintenance and production functions could not be performed at home).

The record evidence reflects that buyers must visit suppliers on occasion to ensure that parts are being produced correctly. *See supra* pp. 4-8; (R.60-5, King Dep. at 46, Pg ID 10572) Indeed, Harris admitted as much during the meeting in which she, Gordon, Jirik, and Prey discussed whether the telecommuting arrangement was a feasible one. (R.66-10, Notes from April 2009 Meeting, Pg ID 1319)

Harris's suggestion that "if she was unable to work on a day she had a meeting with suppliers, she would call and reschedule" cannot be squared with evidence that her frequent absences frustrated suppliers (Appellant Br. 9; R.60-8, Pompey Decl. ¶ 5, Pg ID 1093; R.60-9, Radl Dec. ¶ 7, Pg ID 1098; R.60-16, Interim Performance Review, Pg ID 1142), the undisputed testimony that her job required her to respond quickly so that there would be no gaps in production (R.60-2, Gordon Decl. ¶ 3–4, Pg ID 1027–28), or with basic business judgment. Repeatedly canceling and rescheduling supplier meetings is not an acceptable business practice, and is not a reasonable accommodation. A juror would have no choice but to find that attendance was an essential function of Harris's job because she needed to be physically present at supplier sites.

Just as in *Brenneman*, moreover, Ford demonstrated that Harris's absenteeism placed a tremendous burden on her coworkers, who were frequently and unpredictably called upon to perform her job as well as their own. *See supra* pp. 14-15. Indeed, her teammates explained that her absences created a great deal of stress for them as they struggled to manage their workload as well as Harris's, often at a moment's notice. (R.60-9, Radl Decl. ¶ 7, Pg ID 1098; R.60-8, Pompey Decl. ¶ 4, Pg ID 1092–93) Beyond the sheer number of days out of the office, Harris's inability to provide advance notice of what days she would be in the office exacerbated the burden placed on supervisors and teammates. The ADA does not

require Ford to reassign Harris's responsibilities to other employees in order to accommodate her disability. *See Fuentes v. Krypton Solutions, LLC*, No. 11-581, 2013 WL 1391113 (E.D. Tex. Apr. 4, 2013) ("It is well established that the ADA does not require an employer to reassign an employee where doing so would result in other employees having to work harder or longer.") (citing *Burch v. City of Nacogdoches*, 174 F.3d 615, 621 (5th Cir. 1999)).[8]

The EEOC, which does not dispute that Harris's absences burdened her small team, asserts instead that a jury could "discount" that undeniable burden because Harris would have been more productive if she had been allowed to telecommute. (Appellant Br. 23) The EEOC's unsupported contention that Harris's coworkers would be "less involved" if her telecommuting request had been granted is pure speculation. (*Id.*) Indeed, the undisputed facts illustrate that, even when Harris was working from home, her coworkers were still forced to perform work that Harris could not perform at home and correct errors that Harris made while at home. (R.60-2, Gordon Decl. ¶ 16, Pg ID 1036–37; R.60-8, Pompey Decl. ¶¶ 4–5, Pg ID 1092–93; R.60-9, Radl Dec. ¶ 7, Pg ID 1098; R.60-16, Harris's 2009 Interim Performance Review, Pg. ID 1142)

[8] The fact that Ford employed only seven to ten resale buyers underscores the essentiality of regular and predictable attendance. *See* 29 C.F.R. § 1630.2(n)(2)(ii) (recognizing that a job function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed).

In short, this case presents a particularly poor candidate for the EEOC's request that this Court abandon its precedents as "outdated." (Appellant Br. 19) In addition to this Court's established rule that it is "unusual" and "exceptional" for a job not to require regular presence in the workplace, Ford presented overwhelming evidence to substantiate its judgment that regular and predictable on-the-job attendance was essential to the resale buyer position. Ford's judgment that the resale buyer position requires physical attendance is supported by the EEOC's own guidance, which states that "critical considerations" in determining whether a particular job can be performed at home "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; and whether the position in question requires the employee to have immediate access to . . . information located only in the workplace." EEOC Fact Sheet, *Work at Home/Telework as a Reasonable Accommodation*, available at: http://www.eeoc.gov/facts/telework.html (last accessed on Apr. 22, 2013); *see also supra* pp. 26-27. Moreover, the complainant here had performance short falls directly related to instances where she attempted to work from home, and presented the problem—not merely of absence from the workplace—but of an admittedly unreliable, unpredictable schedule that she even *anticipated* would cause her to cancel meetings at the last minute.

In the face of all this evidence, the EEOC points to (1) Harris's subjective testimony about her ability to perform the job and (2) an incomplete description of Ford's Telecommuting Policy and other employees' limited telecommuting arrangements. (Appellant Br. 16-17, 20-23) As a matter of law, those arguments fail to create a factual question on whether attendance was an essential function of her job.

First, Harris's self-serving testimony that she felt that she could do most of her job from home is insufficient to create a genuine issue of material fact concerning the essential functions of the resale buyer position. It is the employer, not the employee, who defines the essential functions of a particular job. *See, e.g.*, *Knutson v. Schwan's Home Serv., Inc.*, No. 12-2240, 2013 WL 1316314, at *3 (8th Cir. Apr. 4, 2013) (employee's "specific personal experience is of no consequence in the essential functions equation. Instead it is the written job description, the employer's judgment, and the experience and expectations of all Managers generally that establish the essential functions of the job.") (internal quotation marks, citation, and alterations omitted); *Keith*, 703 F.3d at 923 (listing employer's judgment as relevant factor in determining essential function); *Mulloy v. Acushnet Co.*, 460 F.3d 141, 150 (1st Cir. 2006) ("substantial weight" should be afforded to employer's view of the job requirements).

Permitting plaintiffs and juries to redefine the parameters of a job description would allow them to "sit as a super personnel department[,] second guess[ing] employers' business judgments." *Mason*, 357 F.3d at 1122 (internal quotation marks omitted). Thus, courts have refused to credit an employee's "self-serving" attempt "to define the essential functions of [her] position[] based solely on [her] personal viewpoint and experience." *Id.*; *Mulloy*, 460 F.3d at 150 (same).

Nevertheless, according to the EEOC, "[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." (Appellant Br. 20) The unsupported assertion that Harris could perform "most"—but not all—of her work remotely is a tacit acknowledgment that the resale buyer position was not "the unusual case where an employee can effectively perform *all* work-related duties at home." *Smith*, 129 F.3d at 867 (emphasis added) (internal quotation marks omitted). The ADA does not require employers "to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced." *Id*. (internal quotation marks omitted).

Moreover, Harris's belief that she did not need to engage in face-to-face communications and that she could cancel supplier meetings if she was unable to work on a given day only demonstrates that she did not understand (or refused to acknowledge) the full requirements of her job and the impact her absences had on

her performance, team morale, and Ford's business operations. (Appellant Br. 9, 20) Although she may believe that email and telephone communications were an adequate substitute for live interactions, her managers did not agree. Nor does Ford agree that last-minute cancellation of supplier meetings is a suitable way to conduct business.

Harris's conjecture regarding the frequency of spontaneous, in-person meetings is also insufficient to create a genuine issue of fact whether attendance is required. Even infrequent job tasks can be essential. *See Knutson*, 2013 WL 1316314, at *3. Harris cannot dispute that buyers must visit supplier sites, that her job required teamwork, that resale buyers informally strategize outside of formal meetings, and that not all formal meetings may be scheduled in advance.[9]

Second, neither Ford's Telecommuting Policy nor its limited telecommuting arrangements with other buyers in the Body & Exterior area negates Ford's proven need for predictable and regular workplace attendance by its resale buyers. (Appellant Br. 16-17, 21-23). Ford's Telecommuting Policy permits employees to telework from home one to four days per week, only with supervisor permission and on a preapproved schedule. Far from creating an "'expectation'" that Ford's hun-

[9] *Woodruff v. Peters*, 482 F.3d 521, 528 (D.C. Cir. 2007), cited by the EEOC, is inapposite. (Appellant Br. 22) There, the employer put forth no evidence as to why physical attendance was an essential function of a Federal Aviation Administration worker and the employer had allowed the disabled employee to work for months with the proposed accommodations. That is simply not the case here.

dreds of thousands of employees may telecommute (Appellant Br. 9), the policy instead delegates authority to an employee's supervisor to determine the suitability of telework arrangements on a case-by-case basis. (R.60-11, Telecommuting Policy, Pg ID 1104) Even where such arrangements are approved, Ford's Telecommuting Policy requires buyers to report to work on designated telecommute days if pressing business necessitates their presence. (R.60-4, Jirik Decl. ¶ 7, Pg ID 1048; R.60-8, Pompey Decl. ¶ 11, Pg ID 1095) No resale buyer is permitted to telecommute up to four days per week; most arrangements were for one day per week on a predictable and agreed-upon schedule. (R.66-21 & R.60-22, Coworkers' Telecommuting Agreements, Pg ID 1362–63, 1173; R.68, Slip Op., Pg. ID 1399)[10]

According to the EEOC, Ford's allowance of limited telecommuting arrangements prevents it from credibly contending that Harris's request—to be out of the workplace up to four days a week as she saw fit—was unreasonable. (Appellant Br. 17, 21-22) But Ford's allowance of some pre-planned telecommuting does not obligate it to allow Harris's unprecedented request for unplanned absences up to four days per week. (*Id*. at 22 (conceding that Harris's request was "less predictable" than "telecommuting arrangement than Ford normally allows")) Her

[10] *McMillan v. City of New York*, No. 11-3932, 2013 WL 779742 (2d Cir. Mar. 4, 2013), *Ward v. Massachusetts Health Research Institute, Inc.*, 209 F.3d 29, 35 (1st Cir. 2000), and *Mason*, 357 F.3d at 1114, cited by the EEOC (Appellant Br. 21), are inapposite because they concern inconsistent enforcement of company policies. The EEOC proffers no evidence to suggest that Ford does not uniformly apply its telecommuting policy.

request to telecommute sporadically—without advanced planning—is fundamentally different than the set, pre-planned telecommuting arrangements of her coworkers. *Smith*, 129 F.3d at 867; *see also Samper*, 675 F.3d at 1240 (rejecting argument that employer's demonstrated ability to work around some unplanned absences indicates "it ought to be able to accommodate [the charging party] for an unspecified number of absences"); *Buckles v. First Data Res., Inc*., 176 F.3d 1098, 1101 (8th Cir. 1999) ("[u]nfettered ability to leave work at any time" was not a reasonable accommodation, even though the company accounts for possible employee absences).[11] Moreover, permitting "a good deed" to "rachet up liability" in this way would "deter employers from providing greater accommodations than are required by law" and "undermine Congress' stated purpose of eradicating discrimination against disabled persons." *Smith*, 129 F.3d at 868 (internal quotation marks omitted); *Robert*, 691 F.3d 1217 ("To give weight to such a fact would perversely punish employers for going beyond the minimum standards of the ADA by providing additional accommodation to their employees.").

Harris's request for a wholly unpredictable telecommuting arrangement is unreasonable on its face. The Ninth Circuit recently held that an employee's similar request for an unspecified number of unplanned absences was unreasonable as a

[11] *Cf. Robert*, 691 F.3d at 1217 (an employer's willingness to accept temporary nonperformance of essential duties is not evidence that those duties are nonessential); *Richardson v. Friendly Ice Cream Corp*., 594 F.3d 69, 78 (1st Cir. 2010) (same).

matter of law, stating that the request "so far exceeds the realm of reasonableness that her argument leads to a breakdown in well-established ADA analysis." *Samper*, 675 F.3d at 1235, 1240. "In most cases," the court observed, "the essential function and reasonable accommodation analyses are separate." *Id*. at 1240. But like Harris, the charging party in that case "essentially ask[ed] for a reasonable accommodation that *exempts* her from an essential function, causing the essential functions and reasonable accommodation analyses to run together." *Id*.

In a belated attempt to make her request sound more reasonable, Harris contends that she "did not anticipate typically needing to telecommute that often," and might only have needed to telecommute for "30-60 days." (Appellant Br. 8, 16, 17) (internal quotation marks omitted) What she requested, however, was to telecommute up to four days per week as she determined necessary. Ford reasonably rejected her request, especially given her previous, undisputed performance deficiencies when working an alternative schedule. *See supra* pp. 8-9. Moreover, Harris's unsubstantiated assertion that she might not have needed to work from home as often as she requested is wholly speculative; indeed, she elsewhere maintains that she cannot predict when her condition will flare up. (R.67-3, Harris Dep. at 140–41, Pg ID 1384–85)[12]

[12] The EEOC's argument that Harris would have accepted a "1-2 days per week" accommodation is similarly unavailing. (Appellant Br. 10) (internal quotation marks omitted) The EEOC does not dispute that Harris rejected both of Ford's

Harris's request was unreasonable for the additional reason that she cannot show that her performance would have improved had she been permitted to telecommute. *See Keith*, 703 F.3d at 927 (the disabled employee bears the burden of showing that an "accommodation is objectively reasonable" by showing that it is "efficacious") (internal quotation marks omitted). Harris "failed to present any facts indicating that [her job] was one of those exceptional cases where [she] could have performed at home without a substantial reduction in the quality of [her] performance." *Smith*, 129 F.3d at 867 (internal quotation marks omitted).

Indeed, the record evidence squarely contradicts the EEOC's unsupported assertion that Harris would have "gotten more [work] done on her own" had Ford permitted her to telecommute. (Appellant Br. 23) Prior to 2009, Ford attempted to accommodate her by reassigning work and permitting her to work from home on an ad hoc basis during two different trial periods. In those periods, Harris indisputably "was unable to establish regular and consistent work hours" and failed "to perform the core objectives of the job." (R.60-3, Gontko Decl. ¶ 3, Pg ID 1043; R.60-7, Gontko Dep. at 20, Pg ID 1089) The EEOC does not and cannot explain why Harris's request would work now, when it failed twice before. Thus, working

---

suggested accommodations and offered no suggestion other than the unpredictable 'up to four days per week' arrangement. That Ford did not offer a different telecommuting arrangement is of no moment because it is well-settled that the employee, not the employer, has the burden of proposing the accommodation. *See Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 202 (6th Cir. 2010), *cert denied*, 131 S. Ct. 3071 (2011).

from home would not have solved Harris's numerous performance problems relating to interpersonal skills, customer relations, and attention to detail. (*See* R.60-2, Gordon Decl. ¶ 16, Pg ID at 1036)[13]

2. In the Alternative, Harris Is Not A Qualified Individual Under The ADA Because She Refused A Reasonable Accommodation Offered By Ford.

In the alternative, Harris is not a qualified individual because she rejected a reasonable accommodation. *See* 29 C.F.R. § 1630.9(d). It is well-settled that "an employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided." *Keever v. City of Middletown*, 145 F.3d 809, 812 (6th Cir. 1998) (internal quotation marks omitted). "[T]he employer providing the accommodation has the ultimate discretion to choose between effective accommodations," this Court has said, "and may choose the less expensive accommodation that is easier for it to provide." *Hankins v. The Gap, Inc.*, 84

[13] The EEOC's reliance on *McMillan*, 2013 WL 779742, and *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir. 2001) is misplaced. (Appellant Br. 23-24) *McMillan* concerned whether *late arrival* to the workplace—not *complete absence from the workplace*—can ever be a reasonable accommodation. The Second Circuit explicitly stated that "there is an important distinction between complete absence and tardiness in jobs that require work to be done at the office: an absent employee does not complete his work, while a late employee who makes up time does." 2013 WL 779742, at *5 n.3. In *Humphrey*, the court concluded that a disabled medical transcriptionist created a genuine issue of fact as to whether working at home was a reasonable accommodation, but the record made clear that the employer had denied her request because she was involved in a disciplinary action, not because physical attendance was an essential function of her job. 239 F.3d at 1132, 1137-38.

F.3d 797, 800 (6th Cir. 1996) (internal quotation marks omitted); 29 C.F.R. pt. 1630, app. at 404. Indeed, the EEOC has explicitly recognized that an employer may "select any effective accommodation, even if it is not the one preferred by the employee" rather than granting a request to work at home. *See* EEOC, *Work at Home/Telework as a Reasonable Accommodation*, Question 6, *available at* http://www.eeoc.gov/facts/telework.html (last updated Oct. 27, 2005).

Among other accommodations, Ford offered to assist Harris in finding another position within the company that would have allowed her to work from home. (R.60-4, Jirik Decl. ¶ 9, Pg ID 1049; Appellant Br. 11-12) Harris's refusal to accept an available reasonable accommodation precludes her from arguing that other accommodations should have been provided. *See Hankins*, 84 F.3d at 802; 42 U.S.C. § 12111(9) ("The term 'reasonable accommodation' may include . . . reassignment to a vacant position.").[14]

Harris's decision to reject the offer because she did not want to "start anew" does not raise a genuine issue of material fact as to whether the accommodation was *reasonable*. (Appellant Br. 12) Indeed, in *Keever*, this Court ruled that an offer to transfer a disabled police officer to a desk job was reasonable despite the fact

[14] Harris also rejected out of hand Ford's offer to move her cubicle closer to the restroom, and would not consider "self-help" steps, such as wearing Depends (a product designed specifically for incontinence) and bringing a change of clothes to the workplace. She presented no medical reason why those steps would be inadequate. *See supra* p. 12.

that the police officer rejected the job on the ground that it "involved significantly diminished material responsibilities" and was otherwise "demeaning." *Keever*, 145 F.3d at 812. As in *Keever*, the offer to transfer Harris to a new position was a reasonable accommodation even though "it did not provide [her] with [her] *preferred* accommodation." *Id*. at 813. Because Harris refused this reasonable accommodation, she cannot "be considered a qualified individual with a disability." *Id*. at 812; *Hankins*, 84 F.3d at 800-01.

B. The EEOC Has Not Met Its Burden Of Raising A Genuine Issue Of Material Fact Regarding Ford's Reason For Terminating Harris: Poor Performance.

The EEOC's retaliation claim fails as a matter of law. The EEOC cannot demonstrate that Ford's proffered reason for terminating Harris—poor performance—"(1) had no basis in fact, (2) did not actually motivate [Ford's] action, or (3) [was] insufficient to motivate [Ford's] action." *Harris v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 594 F.3d 476, 486 (6th Cir. 2010) (internal quotation marks omitted).

The district court correctly granted Ford summary judgment on Harris's retaliation claim because the EEOC failed to cast any doubt that Ford terminated Harris for performance-related reasons. (R.68, Slip Op., Pg ID1402–03) The EEOC's brief similarly fails to show that Ford's legitimate business concerns were pretextual.

First, the EEOC focuses on the fact that Harris received "exceptional plus" reviews until 2009. (Appellant Br. 24-25) Yet, the EEOC *admits* that both "before and after 2009" Harris had "incomplete work[ ] and interpersonal issues." (*Id*. at 25) While she had performance problems over many years, her performance declined further in the spring of 2009, which lead to her "lower achiever" ranking in her interim review and the imposition of the PEP. *See supra* pp. 13-19. The district court correctly concluded that the EEOC did not rebut the performance deficiencies documented by Ford in the interim review (R.68, Slip Op., Pg ID 1402), such as updating the Material Specification Sheets, Buyer Responsibility Matrix, and other paperwork. (R.60-2, Gordon Dec. ¶¶ 14–19, Pg ID 1035–38)[15]

In July 2009, Harris failed to complete basic PEP objectives that provided her with a specific roadmap of what she needed to accomplish to retain her job. Even though her supervisors offered to assist, Harris did not keep paperwork up-to-date; did not schedule the training session despite receiving an extension; failed to complete a one-page contact sheet; and failed to complete even a timetable for finishing a project. *See supra* pp. 16-19. Harris's failure to complete even these most basic tasks resulted in financial loss and deficient customer service. (R.60-2, Gordon Decl. ¶ 20–25, Pg. ID 1039–40; R.60-18, Harris's Performance Enhancement

[15] The EEOC contends that Harris's attendance would not have been an issue if she had been allowed to telecommute (Appellant Br. 24), but the agency does not dispute her *performance deficiencies* unrelated to attendance. To the contrary, the EEOC admits that Harris had performance shortcomings. (*Id*. at 25)

Plan, Pg ID 1146) The EEOC tacitly concedes these shortcomings by failing to dispute them.

Harris's self-serving testimony that she felt the performance reviews exaggerated her failings is "wholly insufficient" to withstand summary judgment. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 585 (6th Cir. 1992). "Courts have repeatedly held that [a] denial of the defendant's articulated legitimate reason without producing substantiation for the denial is insufficient" to withstand a motion for summary judgment. *Id.*; *see*, *e.g.*, *Chen v. Dow Chem. Co.*, 580 F.3d 394, 402 (6th Cir. 2009) (same); *Irvin v. Airco Carbide*, 837 F.2d 724, 727 (6th Cir. 1987) (same).

Additionally, the EEOC's disingenuous assertion—that Ford allegedly failed to investigate Harris's complaint that the 2009 performance review was retaliatory—cannot suggest an improper motive (Appellant Br. 24); the EEOC does not dispute the district court's conclusion that Harris stated she was "too busy" to provide the information necessary for Ford to conduct the investigation. (R.60-4, Jirik Decl. ¶ 5, Pg ID 1049)

Second, contrary to the EEOC's contention, the fact that Ford placed Harris on Workplace Guidelines—as it had done repeatedly since 2006—is not evidence that her termination was pretextual. (Appellant Br. 26) Undisputed record evidence establishes that Ford placed Harris on Workplace Guidelines in an attempt to

improve her attendance *before* Harris filed her EEOC complaint, and continued to do so afterward. (R.60-3, Gontko Decl. ¶ 5, Pg ID 1044; R.60-2, Gordon Decl. ¶ 9, Pg ID 1030) *See Cain v. Airborne Express*, No. 98-3454, 1999 WL 717948, at *4 (6th Cir. Sept. 10, 1999) (evidence that the employer treated the employee the same way before and after she files an EEOC complaint "fails to evidence pretext").

Third, Gordon's alleged mistreatment of Harris does not cast doubt on the fact that Ford terminated Harris for her poor performance. The undisputed evidence reflects that Gordon did not make the decision to terminate Harris' employment and, indeed, he did not know that she was being terminated (R.60-2, Gordon Decl. ¶ 26, Pg ID 1041; R.60-15, Kane Decl. ¶ 8, Pg ID 1138).[16] Harris does not contend that Gordon "yell[ed]" at her about her filing an EEOC complaint or for requesting an accommodation. (Appellant Br. 13) Indeed, the alleged "yelling" boils down to nothing more than a series of discussions Gordon had with Harris about *his* performance, her performance, and his attempts to accommodate her by reassigning some of her work. This Court has held that "conversations between an employee and [her] superior[] about [her] performance do[] not constitute harassment simply because they cause the employee distress." *Keever*, 145 F.3d at 813. Even then, Harris admitted that the only reason she felt scared of Gordon was be-

[16] Harris does not attribute any retaliatory motive to King (the decision-maker) or Kane (who concurred in King's decision to terminate).

cause he is "kind of a big guy and he was just very adamant, and I mean if I just did this, sit back down, it's insubordination, if you leave it's insubordination." (R.60-6, Harris Dep. at 222, Pg ID 1067).

Fourth, in a last-ditch effort to show that Harris was terminated for retaliatory reasons, the EEOC urges this Court to consider the timing of Harris's termination. (Appellant Br. 25) This argument lacks merit because the "law in this circuit is clear that temporal proximity cannot be the sole basis for finding pretext." *Donald v. Sybra, Inc*., 667 F.3d 757, 763 (6th Cir. 2012). This Court should affirm because there is no evidence that Ford terminated Harris for anything other than her performance.

CONCLUSION

Because there are no genuine issues of material fact and Ford is entitled to judgment as a matter of law, this Court should affirm the district court's decision to grant summary judgment in favor of Ford.

Dated: April 22, 2013

Respectfully submitted,

/s/ Eugene Scalia

Elizabeth P. Hardy
KIENBAUM OPPERWALL HARDY
& PELTON, P.L.C.
280 North Old Woodward Avenue
Suite 400
Birmingham, Michigan 48009
Telephone: (248) 645-0000
Facsimile: (248) 645-1385

Eugene Scalia
Porter Wilkinson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

Counsel for Appellee Ford Motor Company

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,538 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Eugene Scalia
Eugene Scalia
Porter Wilkinson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
EScalia@gibsondunn.com

Dated: April 22, 2013

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2013, I electronically filed the foregoing Brief for Appellee Ford Motor Company with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that counsel for Appellant is a registered CM/ECF user and that service will be accomplished using the CM/ECF system

/s/ Eugene Scalia
Eugene Scalia
Porter Wilkinson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
EScalia@gibsondunn.com

Appellee's Designation of Relevant Documents

Record Entry #	Document Description	Page ID #
1	Complaint	1
60	Motion for Summary Judgment	991
60-2	Gordon Declaration	1026-1041
60-3	Gontko Declaration	1042-1044
60-4	Jirik Declaration	1047-1053
60-5	King Deposition	1056-1058
60-6	Harris Deposition	1060-1086
60-7	Gontko Deposition	1089
60-8	Pompey Declaration	1092-1095
60-9	Radl Declaration	1097-1098
60-10	2/19/09 Email from Harris to Pray	1100
60-11	Telecommuting Policy	1104-1111
60-15	Kane Declaration	1137-1139
60-16	Harris's 2009 Interim Performance Review	1140-1142
60-18	Harris's Performance Enhancement Plan	1146-1147
60-21	4/22/09 and 4/28/09 Emails re: Accommodation	1172
60-22	Telecommuting Agreement	1173
66-10	Notes from April 2009 Meeting	1319-1323
66-12	ADA Charge and Notice of Charge	1329-1331

Record Entry #	Document Description	Page ID #
66-21	Telecommuting Agreements	1361-1363
67-3	Harris Deposition Transcript Excerpt	1384-1386
68	Opinion and Order Granting Summary Judgment	1398-1403
74	Notice of Appeal	1461