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 Rehearing *En Banc* of an Appeal from the
United States District Court for the Eastern District of Michigan
Hon. John Corbett O'Meara, Judge

SUPPLEMENTAL BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF DEFENDANT-APPELLEE

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October 29, 2014

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

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

Name of counsel: Ann Elizabeth Reesman

Pursuant to 6th Cir. R. 26.1, the Equal Employment Advisory Council and the Society for Human Resource Management make the following disclosures:

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

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

CERTIFICATE OF SERVICE

I certify that on October 29, 2014 the foregoing document was filed with the Clerk of the Court. The Court's ECF system will send notification to all parties in the appeal.

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RULE 29(c)(5) STATEMENT

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

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

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

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The Equal Employment Advisory Council and the Society for Human Resource Management respectfully submit this supplemental brief *amici curiae* in support of Defendant-Appellee and in support of affirmance of the decision below, with the consent of all parties.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Founded in 1948, the Society for Human Resource Management (SHRM) is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has

more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

ARGUMENT

A. The Americans With Disabilities Act Requires Courts To Consider The Employer's Judgment That Being Present At The Workplace On A Predictable Basis Is An Essential Function Of The Job

The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, specifically requires courts to consider "the employer's judgment as to what functions of a job are essential ...." 42 U.S.C § 12111(8). Consideration of the employer's judgment thus is a statutory requirement, despite the EEOC's attempts to downplay it in favor of other, non-statutory considerations contained in the EEOC's own regulations interpreting the ADA. 29 C.F.R. § 1630.2(n)(3)(i).[1]

In this case, the employer's judgment is that presence at work during normal business hours is essential in order to solve problems quickly by engaging in teamwork and interacting face-to-face with coworkers and clients. As this Court and others have held, coming to work and performing job duties on a regular, predictable basis is essential to the performance of most jobs. *Brenneman v.*

[1] Although this Court, as the EEOC points out, said in *Rorrer v. City of Stow*, "At the summary judgment stage, the employer's judgment will not be dispositive on whether a function is essential when evidence on the issue is 'mixed,'" 743 F.3d 1025, 1039 (6th Cir. 2014) (citations omitted), *Rorrer* is factually distinguishable. There, the "mixed" evidence casting doubt on the employer's judgment came from the employer itself and not, as here, from the employee's own views of how the job should be performed.

Medcentral Health Sys., 366 F.3d 412 (6th Cir. 2004) (holding as a matter of law that a pharmacy technician was unable to perform the essential functions of his job due to excessive absenteeism); *Gantt v. Wilson Sporting Goods*, 143 F.3d 1042, 1047 (6th Cir. 1998) (noting that "an employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA") (citation omitted); *Wimbley v. Bolger*, 642 F. Supp. 481, 485 (W.D. Tenn. 1986) ("It is elemental that one who does not come to work cannot perform *any* of his job functions, essential or otherwise"), *aff'd mem.*, 831 F.2d 298 (6th Cir. 1987). As the Ninth Circuit has pointed out, "a majority of circuits have endorsed the proposition that in those jobs where performance requires attendance at the job, irregular attendance compromises essential job functions." *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012). In other words, regular, predictable attendance itself is nearly always an essential function of the job, being necessary to the performance of all other job functions, as it is in this case. The EEOC's speculation that Harris could perform her job effectively working from home by telephone and computer cannot supersede Ford's judgment that the job actually requires face-to-face communication, spur-of-the moment problem solving, and the like.

B. A Requested Accommodation Of Telework For Up To Four Days A Week In A Job That Requires Frequent Face-To-Face Coworker And Client Interaction Is Unreasonable

1. Presence in the workplace can be an essential job function that need not be eliminated as an accommodation

The district court below properly rejected the EEOC's contention that allowing the employee to work from home for up to four days per week on an unpredictable basis could be a reasonable accommodation that would allow her to perform the essential functions of the job.[2] Many jobs, like this one, require employees to be physically in the workplace in order to interact directly with coworkers, clients and others. Indeed, this Court has recognized that jobs capable of being performed mostly or entirely at home are "exceptional cases," not the norm. *Smith v. Ameritech*, 129 F.3d 857, 867 (6th Cir. 1997). As the EEOC has conceded, "Courts that have rejected working at home as a reasonable accommodation focus on evidence that personal contact, interaction, and coordination are needed for a specific position." EEOC Enforcement Guidance: *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, at n.101 (Oct. 17, 2002).[3] *See also Rauen v. U.S. Tobacco Mfg. L.P.*, 319 F.3d 891, 896 (7th Cir. 2003) (holding that "The reason working at home

[2] The EEOC's insistence that "up to four days per week" differs somehow from "four days per week" is incomprehensible. If an employee may telework for up to four days a week, then the employer must anticipate that the employee indeed will not be present in the workplace for as many as four days each week.

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

is rarely a reasonable accommodation is because most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation"); *Kvorjak v. Maine*, 259 F.3d 48, 57 (1st Cir. 2001) (holding that being present in the office was essential in a situation in which employees were "key players on a team" in a system that "often relies on on-the-spot collaborative efforts"); *Hypes v. First Commerce Corp.*, 134 F.3d 721, 727 (5th Cir. 1998) (holding that in a job involving teamwork, "efficient functioning of the team necessitated the presence of all members ... [so that] it was critical to the performance of [the plaintiff's] essential functions for [him] to be present in the office regularly and as near as possible to normal business hours"); *Mason v. Avaya Communs., Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004) (request for accommodation of working at home was "unreasonable on its face" because it would have eliminated the function of physical attendance, which was essential due to supervision and teamwork requirements) (citations omitted); EEOC Fact Sheet, *Work At Home/Telework as a Reasonable Accommodation* (Oct. 27, 2005) (noting that "critical considerations include whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary").[4]

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

That is precisely this case. As the district court correctly found, the job in question requires near-constant interactions with the resale buyer team and others, often in situations in which time is of the essence and group problem solving is critical. *EEOC v. Ford Motor Co.*, 2012 WL 3945540, at *1 (E.D. Mich. Sept. 10, 2012). In Ford's view, "the interaction between the buyer and the suppliers is most effectively performed face to face and often includes supplier site visits." *Id.* Thus, the EEOC's presumption that Harris could do her job from home at the same performance level Ford requires of all of its resale buyers is fundamentally flawed. The agency cannot simply substitute its own judgment for Ford's as to what the job requires in the way of interaction with coworkers and clients, on-the-spot consultation, and emergency problem-solving. Rather, as the EEOC's own guidance observes, "[i]t is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards." Section 1630.2(n) Essential Functions, *Interpretive Guidance on Title I of the Americans with Disabilities Act*, 29 C.F.R. app. 1630; s*ee also Mulloy v. Acushnet Co.*, 460 F.3d 141, 147 (1st Cir. 2006) (noting that "our inquiry into essential functions 'is not intended to second guess the employer or to require the employer to lower company standards'") (quoting *Mason v. Avaya Communs., Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004)). In other words, the

employer's legitimate business judgment as to how much work an employee is expected to perform, and how well, is not be open to debate.

The ADA does not require an employer to eliminate an essential function as an accommodation. *Jones v. Walgreen Co.*, 679 F.3d 9, 17 (1st Cir. 2012); *Kallail v. Alliant Energy Corporate Servs.*, 691 F.3d 925, 932 (8th Cir. 2012). Accordingly, where presence in the workplace is an essential function of the job, the employer need not eliminate it as an accommodation.

2. The ADA does not require accommodations that would not enable the employee to perform her job effectively

The EEOC historically has taken an overly broad view as to what the ADA requires as an accommodation. The Supreme Court years ago rejected the EEOC's interpretation that any "effective" accommodation is *per se* "reasonable." *U.S. Airways, Inc., v. Barnett*, 535 U.S. 391, 401 (2002).[5] Rather, the Court said, the statute does not "demand action beyond the realm of the reasonable." *Id.*

[5] Notably, the EEOC again cites *U.S. Airways, Inc. v. Barnett* for the proposition that the ADA requires employers to grant "preferences." EEOC Supplemental Brief at 6. As the EEOC well knows, however, the *dicta* to which the agency attaches so much significance did not affect the outcome of the case. In *Barnett*, the Supreme Court ultimately held that the employer did not violate the ADA and that the ADA does not ordinarily require an employer to reassign an employee with a disability when doing so would violate an established seniority system. 535 U.S. at 403.

Here, the EEOC suggests that the ADA requires accommodations that are "*effective*, not ideal."[6] EEOC Supplemental Brief at 7. The argument implies that as long as Harris can perform some aspects of the job from her home, Ford must abandon any expectation that she should engage in teamwork and solve problems with the alacrity and at the level at which the company needs her to perform. As noted above, the agency's contention second-guesses Ford's production and performance standards, which the ADA does not permit.

Similarly, the EEOC contends that allowing Harris to work from home for up to four days per week would be a reasonable accommodation because she "already communicated primarily by email and telephone even when working in the office." EEOC Supplemental Brief at 8. This argument overlooks another key point. According to the EEOC's ADA regulations, while "[t]he amount of time spent on the job performing the function" is one type of evidence to be considered in determining whether a function is essential, 29 C.F.R. § 1630.2(n)(3)(iii), "[t]he

[6] As the agency concedes in its opening brief, Harris rejected the other alternative accommodations that Ford proposed. Brief of the Equal Employment Opportunity Commission as Appellant at 11. Notably, the explanations Harris gave for rejecting Ford's proposed reasonable accommodations underscore the fact that the only accommodation she was even willing to consider was to be permitted to work from home on an "as needed" basis for up to four days a week. She refused a desk closer to the rest room because, she argued, her supervisor wanted her closer to her work team, *id.*, although her preferred accommodation would have put her much further away. She rejected the offer to help her find another job within Ford because "she did not want to start anew somewhere else." *Id.* at 12.

consequences of not requiring the incumbent to perform the function" is another, equally important, consideration. 29 C.F.R, § 1630.2(n)(3)(iv). Indeed, the EEOC's own Technical Assistance Manual uses the example that "[a]n airline pilot spends only a few minutes of a flight landing a plane, but landing the plane is an essential function because of the very serious consequences if the pilot could not perform this function." *A Technical Assistance Manual on the Employment Provisions (Title 1) of the Americans with Disabilities Act*, at II.3.d. (EEOC 1992).[7]

"[I]t is the resale buyer's job to ensure that there is no gap in the steel supply, respond to supply issues such as shortages or changes in specifications, and facilitate quality or pricing disputes between the stampers and steel sources." *EEOC v. Ford Motor Co.*, 2012 WL 3945540, at *1 (E.D. Mich. Sept. 10, 2012), *rev'd*, 752 F.3d 634 (6th Cir. 2014), *vacated and reh'g en banc granted*, (6th Cir. Aug. 29, 2014). The consequences of failure are "disruptions in the supply chain." *Id.* Moreover, as Ford pointed out, after a number of steel suppliers went out of business in 2009, the prevailing business "conditions created more emergency situations, in which the resale buyers, suppliers and internal Ford constituencies were required to come together on short notice for problem-solving dialogues." *Id.*

[7] *Available at* http://askjan.org/links/ADAtam1.html

Accordingly, the panel majority's broad assertion that that "the workplace is anywhere that an employee can perform her job duties," *EEOC v. Ford Motor Co.*, 752 F.3d 634, 641 (6th Cir. 2014), *vacated and reh'g en banc granted,* (6th Cir. Aug. 29, 2014), is correct only to the extent that the job duties in question can be performed "anywhere." That assertion fails where, as here, the job requires the employee to be physically present at work.

C. A Ruling By This Court That The ADA Requires An Employer To Allow An Employee To Work From Home At Her Discretion Would Have A Severe Impact On Employers And Employees Alike

1. To operate effectively, employers must be able to expect employees to maintain regular, predictable attendance

As *amici curiae* explained in their initial brief in this case, employers need employees who can come to work and get the job done. To that end, employers maintain reasonable attendance policies that generally provide for disciplinary action against employees who do not appear for work when scheduled. At the same time, many employers provide their employees with sufficient paid sick leave and paid annual (vacation) leave to accommodate the needs of most for time off. In this manner, employers provide a kind of insurance program for employees to enable them to meet both personal needs and job responsibilities.

When an employee does not maintain regular, predictable attendance, however, it disrupts the workforce and negatively affects the business.

2. A contrary ruling will lead employers to reconsider, restrict, and possibly eliminate telework and flextime policies in order to reduce ADA liability risks

Numerous employers, including many of *amici's* member companies, and the federal government as well, have established structured workplace flexibility programs, including telework and flextime, in an attempt to address employees' personal needs and preferences while still ensuring that the work is done. The accepted premise of workplace flexibility initiatives is a "mutually beneficial arrangement between employees and employers in which both parties agree on when, where and how work gets done."[8] Successful workplace flexibility programs must meet employer's business objectives and employees' needs simultaneously. Companies recognize the benefits of a flexible workplace, but must maintain some structure in order to plan ahead and meet their business needs. While individual circumstances may vary, at a core level employers need the assurance that the people they hired to perform a particular job will actually perform the essential functions of that job when needed, regularly and reliably, and be available to do so during core work hours when other people with whom they interact are also working.

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[8] Mark Schmit, Ph.D., Foreword to Ellen Ernst Kossek, *et al.*, *Leveraging Workplace Flexibility for Engagement and Productivity*, at iii (SHRM Found. 2014), *available at* http://www.shrm.org/about/foundation/products/Documents/9-14%20Work-Flex%20EPG-FINAL.pdf

The EEOC contends that because Ford's telecommuting policy allowed other employees to telecommute on *one* scheduled day a week – with the understanding that they would come into the office on that day if business needs so required – then the ADA may require Ford to allow Harris to work from home for up to *four* days per week, at her sole discretion, and with *no* requirement that she come into the office if needed. If this is true, then employers will have to reassess and perhaps eliminate existing flexible telecommuting policies, with a resultant "unfortunate impact" on employees, as Judge McKeague noted correctly in his dissent to the panel majority's decision. *EEOC v. Ford Motor Co.*, 752 F.3d 634, 655 (6th Cir. 2014) (McKeague, J., dissenting), *vacated and reh'g en banc granted*, (6th Cir. Aug. 29, 2014). If affording some employees the option to telecommute on a limited, prearranged (and thus predictable) basis indeed creates an obligation to provide the type of open-ended, unpredictable arrangement the EEOC seeks in this case, then employers will reconsider whether doing so is worth the risk of having to litigate every case in which an employee seeks telework as an accommodation in a job in which telework is infeasible. As a result, as Judge McKeague said, "countless employees who benefit from generous telecommuting policies will be adversely affected by the limited flexibility." *Id.* at 656.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that the decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2014, I electronically filed the Supplemental Brief *Amici Curiae* of the Equal Employment Advisory Council and the Society of Human Resource Management in Support of Defendant-Appellee with the Clerk of the Court via the Court's ECF system. I further certify that service to all counsel of record will be accomplished via the Court's ECF system.

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