No. 12-2484

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

FORD MOTOR CO.,
Defendant-Appellee.

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

SUPPLEMENTAL BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT ON REHEARING *EN BANC*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulation

STATEMENT OF FACTS

The EEOC provided a full statement of facts in its opening brief to the panel. The following critical points bear emphasis:

A. Harris did not ask to telework four days per week.

Quoting directly from the language of Ford's written telework policy, Harris sought permission to telework on an as-needed basis "up to four days per week." (R.66-10, 4/6/09 mtg notes at 2, Pg ID 1320) Her request for "*up to* four days" was not the same as a request for "four days per week." Ford understood Harris to be asking for permission to telework whenever her irritable bowel syndrome ("IBS") flared up. (R.60-15, Kane decl. ¶ 10, Pg ID 1138-39) Had Ford pursued discussions with Harris, this open-ended agreement could have been one of the options they discussed. They also could have discussed letting Harris telework on one to two specified days per week, like her coworkers, and requiring her to take sick leave if her IBS flared up on a different day. Harris was open to different arrangements and testified that she would have accepted a telework arrangement of only one to two days per week. (R.66-3, Harris Decl. ¶ 18, Pg ID 1264)

B. Ford refused to let Harris telework for one or two days per week although it allowed her nondisabled colleagues to telework that amount.

Ford permitted Harris's coworkers to telework one to two days per week (R.66-21 & R.60-22, Coworkers' Telework Agreements, Pg ID 1362, 1173), but denied

her the same option. Harris's proposal of "*up to* four days" embraced the possibility of some lesser number of days. Ford refused to consider telework at all.

C. Telework ultimately could have *increased* the number of days Harris spent in the office.

Harris's doctor explained to Ford that her flare-ups were more frequent and more intense when she was under stress. (R.41-5, Ladd Ltr, Pg ID 631) He said, "Jane is caught in a vicious cycle of irritable bowel syndrome, involving diarrhea and fecal incontinence and work stress. Her work piles up when she is too ill to come into the office, and then the stress of catching up exacerbates her IBS." *Id.* This cycle could be broken, he added, if Harris could telework at the first signs of a flare-up. "If she were allowed to work from home/telecommute when her IBS was bad," he said, "[h]er work productivity and her health would both improve." *Id.* As her flare-ups receded, Harris's need for telework would, correspondingly, diminish. A second doctor testified that in the absence of stress, Harris has gone for up to a year without IBS symptoms. (R.64-7, Donat Dep. at 16, Pg ID 1211; *see also* Harris Dep. at 146, Pg ID 624)

ARGUMENT

On this review of a grant of summary judgment, the Court must consider all evidence in the light most favorable to the EEOC and must draw all reasonable inferences in favor of the EEOC. *Planned Parenthood SW Ohio Region v.*

DeWine, 696 F.3d 490, 503 (6th Cir. 2010). Credibility determinations are for a jury, not for the court of appeals. *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

A. The Americans with Disabilities Act requires courts to look beyond an employer's characterization of a job function as "essential."

This Court need not and should not accept Ford's insistence that physical presence was an essential function of Harris's job. "Whether a job function is essential 'is a question of fact that is typically not suitable for resolution on a motion for summary judgment.'" *Rorrer v. City of Stowe*, 743 F.3d 1025, 1039 (6th Cir. 2014) (quoting *Keith v. County of Oakland*, 703 F.3d 918, 926 (6th Cir. 2013)).

When the record suggests a genuine issue of material fact, an employer's characterization of a job function as essential is entitled to consideration but not to deference. *Id.* at 1042. Deference "impl[ies] that the employer's position creates a strong presumption in its favor." *Id.* However, the employer's position is only one of seven relevant factors listed in the ADA regulations on essential functions. 29 C.F.R. § 1630.2(n)(3); *see also Rorrer*, 743 F.3d at 1042; *Feldman v. Olin Corp.*, 692 F.3d 748, 755 (6th Cir. 2012). Other factors include but are not limited to: written job descriptions prepared before advertising or interviewing applicants for the job; amount of time spent on the job performing the function; consequences of

not requiring the employee to perform the function; terms of a collective bargaining agreement; work experience of past incumbents in the job; and/or current work experience of incumbents in similar jobs. 29 C.F.R. § 1630.2(n)(3).

A jury applying these factors could reasonably conclude that physical presence was *not* an essential function of Harris's job. When Harris was recruited for the position and expressed concern about the long commute, Ford expressly told her that the job would be appropriate for telework. (R.60-6, Harris Dep. at 153, Pg ID 1063) Pursuant to a written telework policy acknowledging that telework has become an "employee expectation" (R.60-11, Telework Policy, Pg ID 1104), Ford permitted Harris's colleagues to work from home one to two days per week. (R.66-21 & R.60-22, Coworkers' Telework Agreements, Pg ID 1362, 1173) Harris was already doing much of her work from home. (R.60-21, 4/22/09 email to Horan, Pg ID 1171). She testified that even when she was *in* the office, the vast majority of her contact with coworkers and clients occurred electronically. (R.66-3, Harris Decl. ¶ 3, Pg ID 1262-63). This testimony, which involves statements of fact rather than unsupported opinion, must be believed on a review of summary judgment. *Cordell v. McKinney*, 759 F.3d 573, 587 (6th Cir. 2014); *Harris v. J.B. Robinson Jewelers*, 627 F.3d 235, 239 (6th Cir. 2010).

B. The EEOC does *not* contend that teleworking up to four days per week is a reasonable accommodation as a matter of law in this or any other case.

Whether a proposed accommodation is reasonable under the ADA is a highly fact-specific question, best left to a jury. *See Rorrer*, 743 F.3d at 1044 ("the district court acted prematurely determining that, as a matter of law, Rorrer could not carry his burden of showing that the requested accommodation was reasonable"); *Henschel v. Clare County Road Comm'n*, 737 F.3d 1017, 1025 (6th Cir. 2013) ("The reasonableness of a requested accommodation is generally a question of fact."). As the D.C. Circuit recently observed in a case under the Rehabilitation Act, which applies ADA standards: "Nothing in the Rehabilitation Act establishes, as a matter of law, that a maxiflex work schedule is unreasonable. We leave open for resolution on remand the factual questions of whether or not a maxiflex schedule or other accommodations would have been reasonable in this case . . . ." *Soloman v. Vilsack*, ___ F.3d ___, 2014 WL 4065613, at *1 (D.C. Cir. Aug. 15, 2014).

Ford argues that it would be unreasonable for Harris to set her own telework schedule based on the unpredictable timing of her IBS flare-ups. (Ford Br. at 22) As discussed *supra* at 1, Harris was open to a variety of telework arrangements and was willing to accept a telework arrangement of only one to two days per week. Had Ford not cut off discussions, Harris might well have agreed to the same type

of structured telework arrangement that her coworkers had, coupled with sick leave when necessary. A jury could consider evidence that any degree of telework during flare-ups would reduce the frequency and intensity of Harris's symptoms and would ultimately permit her to work in the office on a more regular basis. (R.41-5, Ladd Ltr, Pg ID 631)

Even if Ford were correct that Harris would only accept an unpredictable telework schedule, the ADA *might* require Ford to accommodate this request. "[P]references will sometimes prove necessary to achieve the Act's basic equal opportunity goal." *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002). "[T]he fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach." *Id.* The reasonableness of this proposed accommodation would be a jury question, and even if a jury found the accommodation to be reasonable "in the run of cases," Ford would remain free to demonstrate undue hardship. *See id.* at 402-03; *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1108 (6th Cir. 2008).

C. A reasonable jury could find that Harris could have performed all essential functions of her job while teleworking.

In asserting that telework could not be a reasonable accommodation, Ford suggests that such an arrangement would render Harris inaccessible during core business hours. (Ford Br. at 27) It is true that Harris's previous experience with

telework occurred in the evenings and over weekends, but this is because *Ford* refused to let her work from home during the regular work day. Her supervisors insisted that if she was too sick to come to work, then she was also too sick to work from home. If she felt capable of working they told her, she would have to come to the office. (R.60-2, Gordon Decl. ¶¶ 8-9, Pg ID 1029-30; R.60-7, Gontko Dep. at 23, Pg ID 1090: R.66-5, Pray Dep. at 50-52, pg ID 1269)

A jury could find that Harris would be just as accessible from home as she would be from the office if she were given permission to work during core business hours. It is possible that with a regular work schedule, regardless of location, Harris would be available to address emergencies or participate in impromptu meetings. (*See* Panel Op. at 13-15)

Ford's preference for face-to-face meetings does not mean that electronic interactions are inherently unreasonable. An employer may not deny a reasonable accommodation to a disabled employee just because it thinks that its usual manner of conducting business is best. An accommodation must be *effective*, not ideal. *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1167-68 (10th Cir. 1999) (en banc) (employer must provide reasonable accommodation under ADA even if another employee could do the job better). Thus, for example, barring undue hardship, the ADA requires employers to appoint disabled employees to vacant positions even though another applicant may be better qualified. *EEOC v. United*

Airlines, Inc., 693 F.3d 760, 764-65 (7th Cir. 2012) (circulated to full court before publication; no member of court asked for *en banc* review) (citing *Smith v. Midland Brake*, 180 F.3d 1154; *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*)), *cert. denied*, 133 S. Ct. 2734 (2013).

Because the ADA requires reasonable, not ideal, accommodations, a jury may find it reasonable for Harris to communicate electronically with coworkers and clients while teleworking. This is especially true because Harris already communicated primarily by email and telephone even when working in the office. (R.66-3, Harris Decl. ¶¶ 5-6, Pg ID 1263)

A jury could also reject Ford's contention that permission to telework would render Harris less able to perform site visits with steel suppliers. (*See* Ford Br. at 29) The record is barren of evidence that Harris's illness routinely forced her to cancel site visits at the last minute. It is purely speculative that she would be scheduled to conduct a site visit during one of her flare-ups. And, as described *supra* at 2, permission to telework at the onset of flare-ups would enable Harris to spend more time working at the office and conducting site visits from there. The degree to which the need to conduct site visits might render Harris's proposed accommodation unreasonable is a question of fact for the jury, not a question of law for the court of appeals.

CONCLUSION

For the reasons stated here and in the EEOC's briefs to the panel, the EEOC respectfully asks this Court to reverse the award of summary judgment and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gail S. Coleman, hereby certify that I filed the foregoing brief electronically in PDF format with the Court via the ECF system on this 26th day of September 2014. I further certify that I served the foregoing brief electronically in PDF format through the ECF system this 26th day of September, 2014, to all counsel of record.

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