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

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In its briefs to the panel and its supplemental brief to the *en banc* Court, the EEOC urged this Court to reverse the district court's award of summary judgment to Ford. The EEOC argued that whether a particular job function is "essential" within the meaning of the Americans with Disabilities Act ("ADA") is a highly fact-specific inquiry that cannot be short-circuited by blind deference to an employer's assertion that it is. Pointing to record evidence raising a genuine issue of material fact, the EEOC contested Ford's characterization of physical presence at the worksite as an essential function of Harris's resale steel buyer position. The EEOC acknowledged older precedents holding that regular attendance is an essential function of virtually all jobs, but argued that technological advances have increased the number of jobs for which this presumption is no longer true. A reasonable jury, the EEOC concluded, could find that Harris's job was one that could be performed successfully off-site one or more days per week.

In its supplemental brief to the *en banc* Court, Ford characterizes the EEOC's fact-specific argument as saying "that *every* case in which the employee disagrees with her employer about a job's essential functions must go to a jury." (Ford Supp. Br. at 2) This is flatly untrue. As the EEOC pointed out in its reply brief to the panel, "[i]n some cases, certainly, it is impossible to accomplish

essential job functions anywhere but in the workplace." (Reply Br. at 4) This would be true, for example for a hospital pharmacy technician, *Brenneman v. MedCentral Health Sys.*, 366 F.3d 412, 420 (6th Cir. 2004), or a neonatal nurse, *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1238 (9th Cir. 2012). Harris's job was different. The EEOC contends only that based on the facts of this case, Ford should not have obtained summary judgment. *See Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998) (ADA rejects presumptions and requires individualized attention to all claims) (citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987)).

A. Ford wrongly denies the existence of material questions of fact.

Ford would have this Court defer to its contention that Harris could not have performed her job from home, and it discourages this Court from considering any evidence to the contrary. (Ford Supp. Br. at 6-8) A reasonable jury, however, could reject Ford's assertion that physical presence was an essential function of Harris's job.

The fact that Harris's coworkers were permitted to work off-site up to two days per week (R.66-21 & R.60-22, Coworkers' Telework Agreements, Pg ID 1362, 1173) undermines Ford's claim that "*at any given time, on any given workday* . . . in-person communications might be essential to the effective performance of her job." (Ford Supp. Br. at 16 (emphasis in original)) Harris's

coworkers with approved telework arrangements could not conduct "essential" in-person communications while working from home. If Ford could find a way around "essential" in-person communications for Harris's teleworking coworkers, there is no reason it could not have done the same for Harris.

Other record evidence also supports the existence of a genuine issue of material fact. Even when employees were at the office, they typically communicated with internal and external stakeholders via telephone or computer. (R.66-3, Harris Decl. ¶ 3, Pg ID 1262-63) Ford relied heavily on its conference call capability; indeed, it was only able to maintain an international purchasing team because of this technology. (*Id.*) Finally, site visits were, by definition, off-site; Harris's ability to make such visits would not depend on whether she set out from the office or from home.

Ford asks this Court to ignore this evidence. (Ford Supp. Br. at 8-9) This request flies in the face of controlling law.

Congress expressly authorized the EEOC to issue regulations implementing Title I of the ADA, 42 U.S.C. § 12116, "(presumably) because Congress wished to capitalize on the agency's expertise in such matters." *Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103, 113 (3d Cir. 2003). The EEOC's regulation on essential functions, promulgated after notice and comment, is entitled to deference under

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). *See Ebbert*, 319 F.3d at 113.

Pursuant to the EEOC's regulation, an employer's judgment that a particular job function is essential is only one of seven factors for a court to consider. 29 C.F.R. § 1630.2(n)(3). This does not mean, as Ford suggests, that the EEOC seeks to "reduce the employer's perspective to practical irrelevance." (Ford Supp. Br. at 8) Rather, it means that a court must consider not only the employer's perspective, but also the rest of the record evidence. "If an employer's judgment about what qualifies as an essential task were conclusive," this Court rightly observed, "'an employer that did not wish to be *inconvenienced* by making a reasonable accommodation could, simply by asserting that the function is essential, avoid the clear congressional mandate that employers mak[e] reasonable accommodations.'" *Rorrer v. City of Stow*, 743 F.3d 1025, 1039 (6th Cir. 2014) (emphasis in original) (citation omitted).

In *Rorrer*, this Court relied on the EEOC's essential function regulation to reverse summary judgment where the employer, like Ford in this case, sought blind deference to its own view. The Court observed, "the district court appear[ed] not only to have given deference to the City's position, but to have considered only the City's position, failing to consider all of the § 1630.2 factors while drawing all reasonable inferences in [the plaintiff's] favor as required at the summary

judgment stage." *Rorrer*, 743 F.3d at 1042. For the reasons described here and in the EEOC's previous briefs, this Court should reach the same conclusion now.

B. Ford, not Harris, wrongly aborted the search for a reasonable accommodation.

Ford acknowledges, as it must, that the ADA required it to provide a reasonable accommodation if physical presence was not an essential function of Harris's job.[1] (Ford Supp. Br. at 4 n.3) However, Ford disingenuously seeks to shift the entire burden of identifying the appropriate accommodation to Harris. (*Id.* at 19)

Ford wrongly states that Harris insisted upon working "predominantly from home on an unpredictable schedule of [her] choosing." (*Id.* at 1) The phrasing of Harris's request to telework "up to four days per week" was taken directly from the wording of Ford's written telework policy. (R.60-11, Telework Policy, Pg ID 1103) Her request for "up to four days" included the possibility of a lesser amount; she did not, as Ford and its *amici* suggest, insist upon teleworking four unpredictable days per week every week. Harris testified that if Ford had offered to let her telework only one or two days per week, she would have accepted that offer. (R.66-3, Harris Decl. ¶ 18, Pg ID 1264)

[1] Notwithstanding this concession, Ford insists that "employers are not required to provide employees a 'virtually stress-free environment.'" (Ford Supp. Br. at 23) The EEOC has never argued that Ford had such an obligation.

Even if Ford were correct in its interpretation of Harris's request, that would not justify Ford's decision to cut off all discussion of telework.[2] Once Harris requested a reasonable accommodation, Ford was obligated to help explore potential options. *See* 29 C.F.R. § 1620.2(o)(3) (directing employers to engage in interactive process); *Rorrer*, 743 F.3d at 1040 ("[F]ailing to assist an employee in seeking an accommodation may suggest bad faith."); *Keith v. County of Oakland*, 703 F.3d 918, 929 (6th Cir. 2013) ("[T]he duty to engage in the interactive process with a disabled employee is mandatory and 'requires communication and good-faith exploration of possible accommodations.'") (citation omitted); *accord Spurling v. C&M Fine Pack, Inc.*, 739 F.3d 1055, 1062 (7th Cir. 2014) (employer must help to identify appropriate accommodation for a qualified individual); *Humphrey v. Mem. Hosps. Ass'n*, 239 F.3d 1128, 1138 (9th Cir. 2001) (same); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 320 (3d Cir. 1999) (same).

[2] Nor do Harris's previous unsuccessful experiences with telework justify Ford's refusal to consider a new telework arrangement. (*See* Ford Supp. Br. at 23) The previous arrangements allowed Harris to work outside core business hours. (R.60-3, Gontko Decl. ¶ 3, Pg ID 1043; R.60-7, Gontko Dep. at 20, PG ID 1089) As the panel observed, "the availability and consistency problems inherent in flex-time arrangements are not necessarily present in telecommuting arrangements because the employee can maintain a standard work schedule. Therefore, Harris's unsuccessful experiment with an alternative work arrangement in the past does not doom to failure the telecommuting arrangement she requested as an accommodation." (Panel Op. at 16)

If Ford was unwilling to grant Harris an *ad hoc*, predominantly teleworking schedule, it could and should have discussed other options. One obvious option would have been to give Harris the same telework arrangement that her coworkers already had. 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) Ford allowed Harris's coworkers to take sick leave when necessary; a jury could find that a structured telework arrangement of only one to two days per week, coupled with the opportunity to take sick leave when necessary, would have been a reasonable accommodation for Harris.[3]

Ford's alarmist suggestion that "holding Ford's telecommuting policy against it . . . could perversely discourage employers from permitting telecommuting" (Ford Supp. Br. at 15) seeks to deflect attention from the fact that its policy is relevant to this case. It also ignores the fact that employers have independent reasons for establishing telework policies. Ford, for example, used

[3] Ford criticizes the EEOC for not arguing that a jury *must* find in its favor. (Ford Supp. Br. at 6, 17 n.37) As the EEOC has stated throughout this litigation, whether physical presence was an essential function and, if not, whether telework would have been a reasonable accommodation are both questions of fact. On this review of summary judgment, the EEOC must show only that a reasonable jury, considering all of the evidence and drawing all reasonable inferences in the EEOC's favor, *could* find for the EEOC. *Planned Parenthood SW Ohio Region v. DeWine*, 696 F.3d 490, 503 (6th Cir. 2012).

the lure of telework to recruit Harris away from a job at U.S. Steel where she was a highly regarded customer service representative. (R.66-3, Harris Decl. P2, Pg ID 1262) Moreover, even if employers eliminate their company-wide telework policies, the ADA might nevertheless require telework as a reasonable accommodation for an individual with a disability. *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) ("[P]references will sometimes prove necessary to achieve the Act's basic equal opportunity goal.").

Ford argues that it was entitled to propose non-telework accommodations (Ford Supp. Br. at 21-22), and this is correct. However, the accommodation that an employer provides must be effective. 29 C.F.R. Pt. 1630, App. § 1630.9; *Hankins v. The Gap, Inc.*, 84 F.3d 797, 800-01 (6th Cir. 1996); *see also EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1110 (9th Cir. 2010) ("[I]neffective modifications . . . are not accommodations."). None of the alternatives that Ford proposed removed the conflict between Harris's disability and Ford's insistence on physical presence. None of the alternatives, therefore, was a reasonable accommodation within the meaning of the ADA.

Ford offered to move Harris's cubicle closer to the restroom, but even with a different cubicle she would have arrived at work with soiled clothes and would have continued to embarrass herself and offend others by having accidents while in meetings. (R.66-10, 4/6/09 mtg notes at 2, Pg ID 1320) Wearing Depends, as

Ford suggested, would not have solved this problem because fecal incontinence results in an offensive odor. *See EEOC v. MCI Telecomm. Corp.*, 993 F. Supp. 726, 730 (D. Ariz. 1998) ("[T]he right not to be singled out, embarrassed and humiliated by one's employer as a result of a disability is a benefit or privilege of employment.").

Ford also offered to help Harris look for another job. Transfers qualify as reasonable accommodations only when no reasonable accommodation would enable an employee to remain in her current position. 29 C.F.R. Pt. 1630, App. § 1630.2(o); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998) ("[G]enerally, transfer or reassignment of an employee is only considered when accommodation within the individual's current position would pose an undue hardship."). It was premature for Ford to suggest a new job when it had not yet exhausted the search for a potential accommodation that would have allowed Harris to remain a resale steel buyer.

Ford's refusal to clarify Harris's request, its failure to engage in the interactive process, and its offer of only ineffective non-telework options would allow a reasonable jury to conclude that it violated both the letter and the spirit of the ADA.

C. Harris was fired in retaliation for complaining to the EEOC.

Although Ford seeks to portray Harris as a mediocre performer, she was rated "exceptional plus" in every evaluation before she contacted the EEOC. (EEOC Opening Br. at 4, 14) Ford's assertion that she was in the bottom percentage of her peers cannot convert an "exceptional plus" rating into a negative evaluation. Harris's evaluations cast doubt on Ford's claim that it fired her for performance reasons.

Ford is also on shaky ground when it points to Harris's "absenteeism." Ford knew that Harris was willing and able to work at home but repeatedly denied her requests to do so. Ford nevertheless blamed her for falling behind in her work and adding to the workload of her colleagues. Even when Harris teleworked on her own initiative, or worked in the office after core business hours, Ford still considered her "absent" and refused to pay her. (*Id.* at 6-8; Reply Br. at 13-14) This conduct added to Harris's stress and worsened her irritable bowel syndrome. Even knowing this, Ford refused to provide a reasonable accommodation that – according to her doctors – could have reversed the course of her illness. (EEOC Supp. Br. at 2)

Ford's treatment of Harris became dramatically worse after she filed an EEOC charge. She received her first-ever low performance review, which specifically pointed to her "poor attendance and attendance reporting." Her supervisor began yelling at her in a threatening manner behind closed doors. Finally, Ford imposed a performance enhancement plan and demanded that she satisfy it without any reasonable accommodation of her disability. (*Id.* at 13-14)

In light of this evidence, a reasonable jury could find that Ford terminated Harris in retaliation for filing a charge with the EEOC. The district court should not have resolved this issue on summary judgment.

CONCLUSION

For the reasons stated here and in the EEOC's original briefs on appeal, 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 7th day of November, 2014. I further certify that I served the foregoing brief electronically in PDF format through the ECF system this 7th day of November, 2014, to all counsel of record.

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