No. 12-2484

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

FORD MOTOR CO.,

Defendant-Appellee.

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

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, KENTUCKY CHAMBER OF COMMERCE, MICHIGAN CHAMBER OF COMMERCE, OHIO CHAMBER OF COMMERCE, AND TENNESSEE CHAMBER OF COMMERCE AND INDUSTRY IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING *EN BANC*

Kathryn Comerford Todd
Warren Postman
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

Rae T. Vann
Ann Elizabeth Reesman
Counsel of Record
NORRIS, TYSSE, LAMPLEY
& LAKIS LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
areesman@ntll.com
(202) 629-5600

Attorneys for *Amici Curiae*

June 6, 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, Chamber of Commerce of the United States of America, Kentucky Chamber of Commerce, Michigan Chamber of Commerce, Ohio Chamber of Commerce and Tennessee Chamber of Commerce and Industry 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 June 6, 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.

s/ Ann Elizabeth Reesman
Ann Elizabeth Reesman
Counsel of Record
NORRIS, TYSSE, LAMPLEY
& LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
areesman@ntll.com
(202) 629-5600

Attorneys for *Amici Curiae*

RULE 29(c)(5) STATEMENT

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

No counsel 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.

Respectfully submitted,

/s/ Ann Elizabeth Reesman

Kathryn Comerford Todd
Warren Postman
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

Rae T. Vann
Ann Elizabeth Reesman
Counsel of Record
NORRIS, TYSSE, LAMPLEY
& LAKIS LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
areesman@ntll.com
(202) 629-5600

Attorneys for *Amici Curiae*

June 6, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

The Equal Employment Advisory Council, Chamber of Commerce of the United States of America, Kentucky Chamber of Commerce, Michigan Chamber of Commerce, Ohio Chamber of Commerce, and Tennessee Chamber of Commerce and Industry respectfully submit this brief *amici curiae* subject to the granting of the accompanying unopposed motion for leave to file urging the court to grant Defendant-Appellee Ford Motor Co.'s Petition for Rehearing *En Banc.*

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 are among industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as 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.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every

region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community. The Chambers of Commerce of Kentucky, Michigan, Ohio, and Tennessee, representing the four state jurisdictions within the Sixth Circuit, join EEAC and the Chamber herein.

Amici's members are employers, or representatives of employers, subject to the employment provisions of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, as amended, and its implementing regulations. Thus, the issues presented in this case are extremely important to the nationwide constituencies that they represent.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The divided panel ruling permits the employee to determine her work schedule in an unpredictable, ad hoc manner based upon her own subjective judgment on a day-to-day basis, despite evidence presented by the employer that regular, predictable attendance and physical presence in the office were essential functions of the job in question. In addition to disregarding over twenty years of established precedent, the panel's decision also will have a devastating effect on employers within the Sixth Circuit and on many of their employees as well.

REASONS FOR GRANTING THE PETITION

I. The Panel Majority Decision Conflicts With Prior Decisions Of The Sixth Circuit And Other Circuit Courts Of Appeals

The panel majority's ruling contravenes twenty years of established precedent from this and other circuit courts of appeals. *Brenneman v. 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 Co.*, 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). Indeed, it is the "exceptional case[in which a job can be] performed at home without a substantial reduction in quality of performance." *Smith v. Ameritech*, 129 F.3d 857, 867 (6th Cir. 1997). The ADA directs courts to consider an employer's judgment when

determining what job functions are essential, 42 U.S.C. § 12111(8), and does not require employers to eliminate essential functions as a reasonable accommodation. *Jones v. Walgreen Co.*, 679 F.3d 9, 17 (1st Cir. 2012); *Kallail v. Alliant Energy Corporate Servs., Inc.*, 691 F.3d 925, 932 (8th Cir. 2012). Accepting uncritically the EEOC's assertions about the advantages of technology, the divided panel overrode the employer's judgment as to the essential functions of the job in question, 42 U.S.C. § 12111(8), concluding that allowing an employee to determine her work schedule in an unpredictable, ad hoc manner based upon her own, effectively unreviewable assessment of her medical condition on a day-to-day basis could be a reasonable accommodation under the ADA. For that reason alone, this Court should grant rehearing *en banc* and vacate the panel decision.

II. The Panel Decision Will Have A Substantial Negative Impact On Employers And Employees In The Sixth Circuit

A. The Decision Below Incorrectly Wrests Control Of The Workplace Away From Employers, Seriously Jeopardizing Business Outcomes

The panel majority decision effectively held that the ADA can require an employer, as an accommodation, to allow an employee to work essentially when and where she wants. The decision takes reasonable control of the workplace out of the hands of employers, ultimately jeopardizing the work product and the business itself. To maintain a successful business, companies must be able to expect employees to perform their jobs regularly and reliably, and to be available

to do so during core work hours when the other people with whom they must interact are also working.

The panel majority placed far too much reliance on its perception of recent technological advancements as a cure-all for the need to show up at work, when in reality, as Judge McKeague pointed out, e-mail, computers and conference calls have been available for years. *EEOC v. Ford Motor Co.*, No. 12-2484, slip op. at 29 (6th Cir. Apr. 22, 2014) (McKeague, J., dissenting). In any event, face-to-face "brainstorming" and other impromptu discussions conducted in the same room with other team members, with access to the same resources, is substantially more valuable and efficient, and often is necessary to reaching the optimal results. As Silicon Valley giant Yahoo! explained in revoking its telework policy entirely:

> To become the absolute best place to work, communication and collaboration will be important, so we need to be working side-by-side. That is why it is critical that we are all present in our offices. Some of the best decisions and insights come from hallway and cafeteria discussions, meeting new people, and impromptu team meetings. Speed and quality are often sacrificed when we work from home. We need to be one Yahoo!, and that starts with physically being together."[1]

Yahoo!'s experience illustrates dramatically that even companies with the most sophisticated communications technology may continue to recognize—as this

[1] Kara Swisher, *"Physically Together": Here's the Internal Yahoo No-Work-From-Home Memo for Remote Workers and Maybe More*, All Things D (Feb. 22, 2013), *available at* http://allthingsd.com/20130222/physically-together-heres-the-internal-yahoo-no-work-from-home-memo-which-extends-beyond-remote-workers/.

Court and all other courts have done—that in-office presence is essential. Despite some improvements, meetings by teleconference, and particularly by videoconference, invariably require considerable advance planning and still are often poor substitutes for face-to-face communication. Even with substantial setup time, state-of-the-art software, and skilled technical support, potentially unsteady connections, interference, glitches, poor video and/or audio quality and the like can render such communications tools frustrating and far less effective than a face-to-face conversation.

More generally, the panel majority's decision overrides an employer's right to establish the essential functions of the job – such as regular, predictable attendance and presence in the workplace – and undermines the ADA's instruction that deference is to be accorded such business judgments. Instead, it purports to create a federally protected right under which a single employee may dictate when and where she is going to work, regardless of when and where she is required to interact directly with co-workers, customers and others.

The ADA Amendments Act, Pub. L. No. 110-325, 122 Stat. 3554 (2008), substantially broadened the scope of the ADA's coverage, leading to many more requests for accommodations of every nature. Thus, for employers, the panel majority's decision, if allowed to stand, will have significant, negative practical consequences. The panel decision overlooks the substantial disruptions that occur

when an employee's availability is utterly unpredictable, requiring rescheduling of meetings, onsite client conferences, and the like. For a job that requires considerable face-to-face interaction, near-constant teamwork, and predictable availability, the panel decision leaves employers with the Hobson's choice between granting every on-demand telework request and risking the cost and burden of litigating the issue through a jury trial every time the issue arises.

B. The Panel Decision 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 gets done. Companies want to be flexible, but must maintain some structure in order to plan ahead and meet their business needs.

As dissenting Judge McKeague noted correctly, the panel majority's decision is likely to have an "unfortunate impact" on employees in the Sixth Circuit by causing employers to reassess and perhaps restrict or eliminate existing flexible telecommuting policies. *EEOC v. Ford Motor Co.*, No. 12-2484, slip op. at 32 (6th Cir. Apr. 22, 2014) (McKeague, J., dissenting). The panel majority justified its ruling in part on the fact that Ford's telecommuting policy allowed

other employees in the same job 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. If affording some employees the option to telecommute on a limited, prearranged (and thus predictable) basis indeed opens the door to the type of open-ended, unpredictable arrangement the panel majority countenanced, employers will reconsider whether doing so is worth the risk. As a result, as Judge McKeague said, "countless employees who benefit from generous telecommuting policies will be adversely affected by the limited flexibility." *Id.*

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that the petition for rehearing *en banc* should be granted.

Respectfully submitted,

/s/ Ann Elizabeth Reesman

Kathryn Comerford Todd
Warren Postman
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

Rae T. Vann
Ann Elizabeth Reesman
Counsel of Record
NORRIS, TYSSE, LAMPLEY
& LAKIS LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
areesman@ntll.com
(202) 629-5600

Attorneys for *Amici Curiae*

June 6, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2014, I electronically filed the Brief *Amici Curiae* of the Equal Employment Advisory Council, Chamber of Commerce of the United States of America, Kentucky Chamber of Commerce, Michigan Chamber of Commerce, Ohio Chamber of Commerce, and Tennessee Chamber of Commerce and Industry in Support of Defendant-Appellee's Petition for Rehearing *En Banc* 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.

s/ Ann Elizabeth Reesman
Ann Elizabeth Reesman
Counsel of Record
NORRIS, TYSSE, LAMPLEY
& LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
areesman@ntll.com
(202) 629-5600