No. 12-2484

In the
United States Court of Appeals
for the Sixth Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

FORD MOTOR COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan at Ann Arbor, No. 5:11-cv-13742.
The Honorable **John Corbett O'Meara**, Judge Presiding.

SUPPLEMENTAL BRIEF OF THE 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 AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(c)(1) and 26.1, amici curiae the Chamber of Commerce of the United States of America, the Kentucky Chamber of Commerce, Michigan Chamber of Commerce, Ohio Chamber of Commerce, and Tennessee Chamber of Commerce and Industry (collectively, "the Chambers") state that they are not a subsidiary of any corporation, and no publicly held corporation owns 10% or more of their stock.

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber 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, 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. The Chamber thus regularly files *amicus curiae* briefs in cases raising issues of concern to the Nation's business community. The Kentucky Chamber of Commerce, the Michigan Chamber of Commerce, the Ohio Chamber of Commerce, and the Tennessee Chamber of Commerce and Industry represent the four state jurisdictions within the Sixth Circuit.

Amici have a direct interest in this important case concerning the ability of their member companies to establish basic workplace attendance policies. The Chambers' members are subject to the Americans with Disabilities Act ("ADA") and its implementing regulations, as well as the similar obligations imposed on

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

federal government contractors and subcontractors under Section 503 of the Rehabilitation Act. The Chambers therefore have a strong interest in ensuring that these statutes are interpreted to allow their members to decide for themselves what job functions, including predictable workplace attendance, are essential to their business operations. Accordingly, *amici* support Defendant-Appellee in seeking affirmance of the district court's judgment.

SUMMARY OF THE ARGUMENT

By second-guessing Ford's reasonable judgment that regular workplace attendance is an essential function of the resale-buyer position, the panel's decision ignored the express command of the ADA that courts shall defer to employers regarding the essential tasks of a particular job. The ADA was never intended to install courts as architects of the myriad workplaces in the American economy. And in disregarding Ford's judgment that regular workplace attendance was essential, the panel's decision provides an apt example of why the judicial review process is ill-suited to this task.

Indeed, it is vital that employers be permitted to determine for themselves whether regular, predictable attendance is necessary to ensure that the business operates effectively. The EEOC's position that the ADA requires an employer to allow an employee to work from home without any advance warning is a practical impossibility that would have a significant effect on private sector business

operations. Although many employers offer telecommuting as a form of workplace flexibility arrangements, they do so only if the job can be performed effectively in that manner. Even then, such arrangements typically are permitted only as part of a structured regime designed to ensure proper attention to business objectives. Ford determined that the *ad hoc* arrangement Harris sought was inappropriate given the demands of her resale buyer position. That judgment should have been respected.

At base, the panel's interpretation of the ADA—which would require the essentiality of regular workplace attendance to be litigated *de novo* in every case—leaves employers with the Hobson's choice of granting every on-demand telework request or risking the cost and burden of litigating the issue through a jury trial each time a dispute arises. And if affording some employees the option to telecommute on a limited, prearranged (and thus predictable) basis as Ford does opens the door to the type of open-ended, unpredictable arrangement the EEOC proposes, employers might be discouraged from offering these opportunities at all. The district court's judgment should be affirmed.

ARGUMENT

I. Employers Must Be Allowed To Exercise Their Business Judgment As To Whether An Employee's Regular Attendance In The Workplace Is An Essential Job Function.

To be "qualified" under the ADA, 42 U.S.C. § 12112, an employee must prove that she "can perform the essential functions" of the job "with or without reasonable accommodation," *id.* § 12111(8). "A job function is essential if its removal would fundamentally alter the position." *Kiphart v. Saturn Corp.*, 251 F.3d 573, 584 (6th Cir. 2001) (quotation omitted). To be qualified, an employee therefore must be able to perform the job's essential functions; the "ADA does not demand that an employer exempt a disabled employee from an essential function of the job as an accommodation." *Brickers v. Cleveland Bd. of Educ.*, 145 F.3d 846, 850 (6th Cir. 1998).

In determining what constitute essential functions, the ADA expressly commands that "consideration shall be given to the employer's judgment as to what functions of a job are essential." 42 U.S.C. § 12111(8). Thus, at least prior to the panel's decision, the Courts of Appeal had uniformly held that "the applicable statutory and regulatory framework accords a significant degree of deference to an employer's own business judgment regarding which functions are essential to a given position[.]" *Jones v. Walgreen Co.*, 679 F.3d 9, 14 (1st Cir. 2012). The courts' task is not "to second guess the employer or to require the employer to lower company standards." *Tate v. Farmland Indus., Inc.*, 268 F.3d 989, 993 (10th Cir. 2001). In short, "[p]rovided that any necessary job specification is job-related, uniformly-enforced, and consistent with business

necessity, the employer has the right to establish what a job is and what is required to perform it." *Id*. That should have been the end of the matter. Slip Opinion ("Op.") 24-26 (McKeague, J., dissenting).

Disregarding these well-established principles, the panel found that the essentiality of workplace attendance for Ford resale buyers was a jury issue based on nothing more than its own sense that the "world has changed" due to unidentified "advancing technology" and Harris's opinion that "in-person interaction may not be as important as Ford describes[.]" Op. 11-12. That was error. A business must be able to structure its operations based on its understanding that maintaining regular, predictable attendance at the workplace "is an essential function of *any* job." *Colón-Fontánez v. Municipality of San Juan*, 660 F.3d 17, 33 (1st Cir. 2011) (quotation omitted; emphasis added). Ordinarily, then, an employer's requirement that employees come to work to perform their jobs should be determinative of the essentiality of workplace attendance.

To be sure, occasionally a genuine factual dispute might arise. But that mainly would be because the employee has placed in controversy whether the employer *actually follows* a policy of requiring a particular job function. For example, an employee might dispute "whether an employer actually requires all employees in the particular position to satisfy the alleged job-related requirement," *Tate*, 268 F.3d at 993, or produce objective evidence that the employer's position

is pretextual, 29 C.F.R. § 1630.2(n)(2). Thus, the EEOC can litigate whether an employer *does* have a policy requiring regular workplace attendance for a particular position; employers "cannot recast what the essential functions of a job are for ADA purposes[.]" *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555, 1563 (N.D. Ga. 1995). In most cases, however, once an employer has in fact established a policy of treating a particular job function as an essential, the EEOC will not be in a position to try to a jury whether the employer *should* have such a policy. Under the ADA, "employers do have the right to define the essential functions of a job." *Id.*

Allowing an employee's "personal opinion" backed only by the court's own sense of workplace realities to create a jury question would eviscerate that prerogative. On the panel's reasoning, "attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location." Op. 10. But if the EEOC is allowed to second-guess whether an employer should have structured a particular job in the manner it did a jury question could arise in virtually every ADA dispute. That is incompatible with the ADA.

At bottom, the ADA does not empower juries to set the core functions of individual jobs, and permitting them to overrule employers on a case-by-case basis would create intolerable uncertainty for employers who must establish job qualifications without guidance from a jury. That is why the rule has been (and

should remain) that "attending work on a regular, predictable schedule is an essential function of a job in all but the most unusual cases, namely, positions in which *all* job duties can be done remotely." Op. 23 (McKeague, J., dissenting).

II. The Panel Decision Illustrates The Significant Problems With Second-Guessing An Employer's Business Judgment As To The Essential Functions Of A Particular Job.

There is a good reason why the ADA does not authorize courts to "sit as 'super personnel department[s].'" Op. 11 (quoting and altering *Mason v. Avaya Commc'ns., Inc.*, 357 F.3d 1114, 1122 (10th Cir. 2004)). They are ill-equipped to perform the task. Without citation to any relevant authority, the panel announced that due "to the advance of technology in the employment context … the 'workplace' is anywhere that an employee can perform her job duties." Op. 10. That sweeping conclusion finds no support in the record nor does it have anything to do with "this employee." Op. 29 (McKeague, J., dissenting). But even setting those defects aside, the panel's assertion that the "world has changed" regarding the need for predictable workplace attendance has no basis in fact. Op. 11.

The panel claimed that the legal regime it disregarded was constructed at a time when "the workplace and an employer's brick-and-mortar locations were synonymous." Op. 10. But far less has changed since 1997 than the panel thought. The "email, computers, or conference call capabilities" upon which Harris would presumably rely to work remotely were all available then too. Op. 29 (McKeague,

J., dissenting). It is true, of course, that "teleconferencing technologies that most people could not have conceived of in the 1990s are now commonplace." Op. 11. But no evidence in this case shows these advances have relevance to Harris's request. The practical issue here is Ford's legitimate business judgment that, for resale buyers, an *ad hoc* telecommuting arrangement is not an acceptable substitute for regular face-to-face interaction with co-workers and a predictable schedule. There was no valid basis for disregarding that judgment, and no (unidentified) teleconferencing technology—however cutting edge—can square that circle.

The panel's general claim that these technological advances have sparked "an even-greater number of employers and employees to utilize remote work arrangements" is overstated and in any event inapposite. One recent study found that "approximately 10 percent of workers telecommuted in the mid-1990s. The rate of telecommuting increased slightly to 17 percent in the early 2000s and then remained constant to the mid-2000s." Mary C. Noonan & Jennifer L. Glass, *The hard truth about telecommuting*, Monthly Labor Review (U.S. Bureau of Labor Statistics June 2012), at 40 (citation omitted).[2] Hence, more than 80% of workers do *not* telecommute; and for most who do, telecommuting tends to complement workplace attendance instead of replacing it. *Id.* at 45 (finding that 67% of

[2] http://www.bls.gov/opub/mlr/2012/06/mlr201206.pdf.

telecommuting hours in one study and 50% in another "push respondents' work hours above 40 per week and essentially occur as overtime work"). These data do not reflect the sizable shift in workplace expectations that the panel relied on as a justification for abandoning circuit precedent. Nor do these general statistics account for the wide variety of employment relationships—and telecommuting arrangements—that make a particular employer's choice to allow a particular type of telecommuting wholly irrelevant to whether another employer has a legitimate interest in denying a different type of telecommuting for a different job.

Indeed, these studies only drive home the importance of workplace collaboration to most businesses. Teamwork, interaction, brainstorming, and group problem solving are essential to successful enterprises. While it is now possible to conduct some types of meetings "virtually" via video or teleconference, such meetings invariably require considerable advance planning. Even with substantial setup time, state-of-the-art software, and skilled technical support, potentially unsteady connections and interface glitches, as well poor video and/or audio quality, can render such communications frustrating and occasionally entirely ineffective. From a technical perspective alone, then, teleconferences and other virtual meetings are a poor substitute for face-to-face interactions.

But even when virtual meetings come off without a hitch, they still might fall short. "It is often difficult to establish a mutual trusting and supportive

relationship among individuals who infrequently interact face-to-face." The Center For Work and Family, Bringing Work Home: Advantages and Challenges of Telecommuting (2002) ("Bringing Work Home"), at 13.[3] Thus, "telecommuting can present challenges to the formation and maintenance of organizational culture. Difficulties can arise in disseminating the organizational culture to remote workers, developing a climate of trust between telecommuters and their managers, and sustaining telecommuters' identification with the organization." *Id*. at 17. "The fundamental point is that much of the value that gets created in a company comes from the ways in which workers teach and learn from each other." James Surowiecki, *Face Time*, The New Yorker (Mar. 18, 2013).[4] For these reasons, while periodic telecommuting may be a valuable supplement to actual, physical attendance in the workplace, employers may legitimately conclude that frequent predictable in-office presence and personal interaction are essential to an effectively functioning workforce.

Teleconferencing also does not replicate all of the vital interactions that occur at the workplace. "On the simplest level, telecommuting makes it harder for people to have the kinds of informal interaction that are crucial to the way

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[3] http://www.bc.edu/content/dam/files/centers/cwf/research/publications/pdf/BCCWF_Telecommuting_Paper.pdf.

[4] http://www.newyorker.com/magazine/2013/03/18/face-time.

knowledge moves through an organization." *Id*. Brief and spontaneous exchanges can be critical. "The role that hallway chat plays in driving new ideas has become a cliché of business writing, but that doesn't make it less true." *Id*. "'Digital communication tends to be very good for planned interactions, like formal meetings. But a lot of the value of working with people comes from all those interactions you didn't plan.'" *Id*. (quoting Ben Waber, CEO of Sociometric Solutions). To reap those gains, employees need to be in the workplace.

Even companies with state-of-the-art technology have found there is no virtual substitute for predictable workplace attendance. Yahoo!, for example, recently announced it was abandoning its telecommuting program:

> 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.

Kara Swisher, "*Physically Together": Here's the Yahoo No-Work-From-Home Memo for Remote Workers and Maybe More*, All Things D (Feb. 22, 2013).[5] Hewlett Packard and Best Buy have moved in the same direction. *See* Arik

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[5] http://allthingsd.com/20130222/physically-together-heres-the-internal-yahoo-no-work-from-home-memo-which-extends-beyond-remote-workers/.

Hesseldahl, *Yahoo Redux: HP Says "All Hands on Deck" Needed, Requiring Most Employees to Work at the Office (Memo)*, All Things D (Oct. 8, 2013);[6] *Best Buy copies Yahoo, reins in telecommuting*, USA Today (Mar. 6, 2013).[7]

Of course, there are also advantages to telecommuting arrangements and in many circumstances businesses find it beneficial to encourage telecommuting for productive employees. Many companies therefore have workplace flexibility programs; allowing employees to work from home part of the time often will be a component of such a program. Ford's policy is a prime example of a company providing its employees the opportunity to work remotely within reasonable limits guided by sound business judgment. The issue, then, is not whether a business should *choose* to offer their employees the flexibility to telecommute when the employer, the employee, and the position are all suited to the arrangement. The issue is whether the ADA *compels* the business to do so when it contradicts the employer's business judgment concerning the position's essential functions.

In sum, "[n]ot every position can be accomplished remotely and not every individual is suitable to work remotely …. Assessment of person and job-fit to a

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[6] http://allthingsd.com/20131008/yahoo-redux-hp-says-all-hands-on-deck-needed-requiring-most-employees-to-work-at-the-office-memo/.

[7] http://www.usatoday.com/story/money/business/2013/03/06/best-buy-telecommuting-ban-yahoo/1966667/.

telecommuting arrangement is essential." Bringing Work Home at 29. Employers must be permitted to draw those lines as the judicial process is ill-suited to deciding how the near-limitless variety of American workplaces should be structured. Further, if companies, like Ford, forfeit that right by allowing *some* employees to telecommute, they will be forced into an unfortunate all-or-nothing choice. Op. 32 (McKeague, J., dissenting). Congress did not intend for the ADA to discourage employers from allowing some employees the flexibility to telecommute because there are other employees, like Harris, whose essential job functions are incompatible with that arrangement.

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted,

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Dated: October 29, 2014

CERTIFICATE OF COMPLIANCE

This brief complies with the page limitations of Fed. R. App. P. 29(d) because it contains no more than one-half the maximum length authorized by this Court's rules for a party's principal brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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s/ William S. Consovoy
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2014, a true and correct copy of the Supplemental Brief of the 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 as *Amici Curiae* in Support of Defendant-Appellee was filed with the Clerk of the United States Court of Appeals for the Sixth Circuit via the email address of Beverly_Harris@ca6.uscourts.gov. The Court will send notice of such filing to all counsel who are registered CM/ECF users.

s/ William S. Consovoy
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