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### *Labor and Employment Alert: It's Common Sense: Sixth Circuit Holds That (Generally) Regular, Predictable Attendance is an Essential Function of the Job*

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Last year, the Sixth Circuit opened the floodgates on telecommuting as a reasonable accommodation under the Americans with Disabilities Act (ADA). In *EEOC v. Ford Motor*, the Equal Employment Opportunity Commission (EEOC) sued Ford under the ADA for failing to accommodate Jane Harris' (a former employee) irritable bowel syndrome by refusing her request to telecommute as-needed up to four days a week. The trial court agreed with Ford that Harris' job as a resale steel buyer required in-person interactions with resale team members, suppliers, and other Ford employees. The Sixth Circuit reversed (in a 2-1 decision), ignoring Ford's business judgment about the job's requirements, and finding that Harris' physical presence in the workplace was not truly essential. Ford appealed to the full Sixth Circuit.

On April 10, 2015, the Sixth Circuit (in an 8-5 decision) reinstated the trial court's decision for Ford and dismissed the lawsuit. The Court rejected the EEOC's arguments that Harris' testimony about her job duties, other resale buyers' telecommuting schedules, and advances in technology created a genuine dispute of fact on whether on-site attendance was essential. Instead, the Court held that "regular and predictable attendance" at the workplace was an essential function of the resale buyer job "and a prerequisite to other essential functions" (in other words, because she was not at the workplace, she couldn't perform the rest of her essential job duties). Because Harris couldn't perform the essential functions of her job (even with Ford's efforts at reasonable accommodation), she wasn't a "qualified" individual under the ADA.

In so ruling, the Court stated the "general rule" that "attending work on-site is essential to most jobs, especially the interactive ones" is consistent with the ADA, the EEOC's regulations and policy guidance, and case law from across the country. The Court also pointed to "a sometimes-forgotten guide [that] likewise supports the general rule: common sense. Non-lawyers would readily understand that regular on-site attendance is required for interactive jobs."

The Court explained that Harris' testimony about what she believed to be the essential functions was irrelevant. "Neither the statute nor regulations nor EEOC guidance instructs courts to credit the employee's opinion about what functions are essential." This is because "every failure-to-accommodate claim involving essential functions would go to trial because all employees who *request* their employer to exempt an essential function *think* they can work without that essential function."

Next, the Court found that accepting the EEOC's position that Ford must permit Harris' unpredictable and irregular telecommuting schedule because it allowed other resale buyers to telecommute "would cause practical harm to private employers." Unlike Harris, other resale buyers had a set telecommuting schedule to work one or two days at home and would come to the workplace whenever needed. "[I]f the EEOC's position carries the day, once an employer allows one person the ability to telecommute on a *limited* basis, it must allow *all* people with a disability to telecommute on an *unpredictable* basis up to 80% of the week (or else face trial)." "That's 180-degrees backward. It encourages—indeed requires—employers to *shut down* predictable and limited telecommuting as an accommodation for any employee."

Finally, the Court rejected the EEOC's argument that technology made it possible for employees to perform at least some of their essential functions at home. The Court found that, based on the record before it, "technology has not changed so as to make regular in-person attendance marginal for [the resale buyer] job." The Court clarified that its ruling does not require "blind deference" to what an employer says is an essential function. But summary judgment for an employer is warranted where the employer's judgment as to essential functions is (as Ford had proven) "job-related, uniformly enforced and consistent with business necessity."

While the Sixth Circuit's decision is a welcome one for employers, it highlights the fact-intensive and fact-specific nature of disability cases. Contact your Vorys lawyer if you have questions about reasonable accommodations or other ADA compliance issues.