

The Americans With Disabilities Act, Telecommuting, and Reasonable Accommodations

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The Americans With Disabilities Act, along with the ADA Amendments Act, court decisions, and technological advances, have combined to create a situation which, at the time of original ADA's passage in 1990, would have been virtually unthinkable—employees with some disabilities now have the right to legally demand that they be allowed to work from home. With the advancing age of the workforce, and increases in networking abilities to link the home into the office, the number of employers facing said demands is certain to increase. The following is a guide for analyzing and dealing with said demands.

OVERVIEW OF AMERICANS WITH DISABILITIES ACT

The Americans With Disabilities Act of 1990¹ and ADA Amendments Act of 2008² (collectively hereafter “ADA,”) applies to any non-Governmental employer with 15 or more employees for each working day for 20 weeks in the current or preceding calendar year. It prohibits discrimination against a qualified employee or applicant in hiring and promotion, and precludes harassment of the disability. Further, the disability must “impair a major life activity”³ and can either be physical or psychological in nature, current or past in nature, and does not even have to actually exist—the employer must merely perceive it to be a disability.

What that last part means in simple terms is: 1. *If an employee⁴ has a genuine disability they are covered against discrimination in employment.* 2. *If they had the disability in the past, they are covered against discrimination in employment.* 3. *If they have never had a disability but the employer thinks that the employee is or was ever disabled, they are covered against discrimination in employment related to that belief in there being a disability.*

What constitutes a disability that affects a “major life activity” is perhaps well illustrated by the following: An employee gets a poison ivy rash on their arms and face, and it itches and burns. The

employer and co-workers “rib” the affected employee, who finds the itching annoying. The ADA probably does not apply. Now vary the fact pattern so that the employee’s eyes start to swell shut and/or the rash is in a location where some normal biological functions become excruciating. In those cases, because major life activities (being able to see, or easily go to the restroom) are affected, the ADA might very well apply, and even the same ribbing given in the first fact pattern could violate the employee’s rights. Make no mistake, this is an extreme extension of the ADA, but it is used to show the boundaries that exist. Furthermore, varying the latter fact pattern so that the affected employee can still see perfectly fine, but the employer fires them for “inability to do the job of safely driving the forklift,” would result in the employee having a claim for being terminated for a perceived disability.

To take the example of the forklift driver with poison ivy one step further—vary the fact pattern so that the employee’s eyes are indeed swollen almost shut and vision is impaired 60%. The employee has no sick time left, and no vacation days left. Can the employer terminate the employee, or must they provide a “reasonable accommodation” instead?

REASONABLE ACCOMMODATIONS AND UNDUE BURDEN

The employer probably cannot terminate the partially blinded forklift driver described above. Instead, the employer must strive to make a reasonable accommodation for the employee—can they be laid off for a week or two until their vision clears? Can another qualified forklift driver cover the employee’s duties while the employee is given janitorial or other duties where sharp vision is not required? Can the employee be placed on grounds keeping details for those two weeks? Provided none of those place an undue burden on the employer, the employer could be required by the ADA to offer any of those to the employee as a reasonable accommodation.

Loosely illustrated, a “reasonable accommodation” is doing something to the facilities, job duties, or otherwise accommodating the employee’s handicap so that they can still remain a productive employee in the same or even different working position. If there are no other duties the temporarily—yet partially blinded—victim could fill, then it may very well be acceptable to lay them off, if the person is given a right of coming back after the illness abates.

If an accommodation is an “undue burden,” then the employer is not required to make the accommodation. For example, if a receptionist with no other job skills was in a traffic accident that left him a quadriplegic unable to talk, the ADA and courts would be very unlikely to require the employer to hire him a helper to effectively do his job for him. Such an accommodation would effectively double the cost the employer would be paying for an effectively low-level job.

Once more, to understand the parameters of the ADA, let the facts be changed. Make the injured receptionist instead employed as the Director of Research at the Centre for Theoretical Particles at Yale University. The employee wishes to do their job with a student helper and voice box the same way that Dr. Stephen Hawking does his job. In that case, the ADA might very well be used to argue such would be a reasonable accommodation—the costs involved are a fraction of what the University is already spending on that position, and provided the employee can still do their job reasonably well, such accommodations could be perceived as not an undue burden, but rather a reasonable accommodation.

If there is no reasonable accommodation the employer can make that will permit an otherwise qualified employee to perform needed job duties, without creating an undue burden on the employer, then and only then can the employee be terminated for the inability to effectively perform job duties as caused by the disability.

REASONABLE ACCOMMODATIONS, IBS, AND TELECOMMUTING

The facts of Equal Employment Opportunity Commission v. Ford Motor Company⁵ are very straightforward. The employee, Jane Harris was hired by Ford in 2003 as a resale buyer. Between 2004 and 2008 she was rated “excellent plus” in her annual reviews. However, because 80% of the buyers

received the “excellent plus” rating, Ford also had internal, “manager only” critiques where she, and presumably other employees, scored low in various areas.

During the entire course of her employment, Harris suffered from Irritable Bowel Syndrome (IBS), which during particularly extreme bouts would leave her subject to fecal incontinence to the point of soiling herself when she would stand up. She would, on bad days, use up the Family Medical Leave Act days she had in reserve. In 2005, Ford permitted her to work on a flex-time telecommuting trial basis. This, however, proved unsatisfactory to Ford, because she “was unable to establish regular and consistent work hours.” Indeed, on days she did not work during “core hours,” she was marked as “absent,” even if she worked that day outside of those “core” hours. Ford’s official position was salaried employees were expected to work overtime as exempt employees, and thus her “overtime” hours did not count towards the required “normal” work hours—thus leaving her in a position where she could theoretically work a 40 hour week and have Ford count it as uncompensated overtime, while still marking her down as having missed 40 hours of work that week.

There were mistakes that were made in these “overtime” hours that could be traced back to the inability of Harris to contact people during normal work hours⁶ Ultimately, Ford cancelled the trial accommodation, and Harris was ordered back to work at her office. This, because of her medical condition, led to unscheduled missed days. In February, 2009, Harris formally requested to be permitted full-time telecommuting which, under Ford’s own policies, permitted an employee to telecommute up to 4 days per week, with 1 day per week of in-house work time.

Ford rejected this request, and instead offered to move Harris’s office closer to a bathroom. Harris rejected that accommodation as being unworkable⁷ and also rejected an offer that she be re-assigned to a position that permitted her to telecommute. Harris then filed an EEOC claim alleging that her supervisor had started to harass her over her leave-related absences. From there, the situation devolved into a series of events described by Ford as Harris being unwilling to even meet them half-way with their attempts to work with her, and Harris claiming her supervisors were openly hostile to the point of yelling and screaming at her. Ultimately Ford terminated her because she refused, according to Ford, to attempt any of the remedial measures they had required of her.

The EEOC then filed a lawsuit against Ford on behalf of the Harris.

THE DISTRICT COURT, AND SUMMARY JUDGMENT, AND APPELLATE STANDARD OF REVIEW

At the District Court (trial court) level, the court granted a Motion for Summary Judgment in favor of Ford. The District Court reasoned that it wished to decline “to second guess an employer’s business judgment regarding the essential functions of a job.” Therefore, the District Court found that because Ford had said it was an unreasonable request for Harris to telecommute up to four days per week, the underlying ADA claim should be dismissed. Further, the District Court believed that the EEOC could not establish that the low performance reviews, disciplinary measures, and termination were related to the attendance issues Harris had related to her IBS, therefore, the retaliation claim would have to fail as well.

Mind you, this was without a trial. The District Court looked over the record and basically said, “The employer said the request made by Harris was unreasonable, and that her termination was not related to her medical condition, therefore, I see no reason to have a trial on the issues—Ford wins.”

As the Sixth Court of Appeals pointed out when the case was appealed:

A grant of summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In determining whether the district court’s grant of summary judgment was proper, “we must view all evidence in the light most favorable to the nonmoving party.” *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868 (6th Cir. 2007) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

EEOC v. Ford at 7

The language, “we must view all evidence in a light most favorable to the nonmoving party” is a special standard of review used when a Motion for Summary Judgment is being decided. The generally accepted view of what that entails can be summarized as this: “If we believe everything the non-moving party⁸ says, and none of what the moving party says, then the moving party still wins.” If that burden is met, then and only then should summary judgment be granted to the moving party.

However, the Court of Appeals found that the District Court erred by not following well-established laws on the respective burdens held by Ford and the EEOC/Harris. This standard of law and respective burdens is:

“The plaintiff bears the burden of establishing that he or she is disabled. (2) The plaintiff bears the burden of establishing that he or she is “otherwise qualified” for the position despite his or her disability: (a) without accommodation from the employer; (b) with an alleged “essential” job requirement eliminated; or (c) with a proposed reasonable accommodation. (3) The employer will bear the burden of proving that a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship upon the employer.”

EEOC v. Ford at 9⁹

The Court of Appeals then went on to state that the IBS Harris suffered left her “undisputedly disabled under the ADA.” The Court then went on to state that taken in the light most favorable to the EEOC/Harris as the non-moving party, there were genuine disputes as to whether or not Harris was offered reasonable accommodations by Ford, and whether or not the discipline and termination was in fact retaliation by Ford.

The Court of Appeals also dismissed Ford’s claim that it had legitimate concerns over telecommuting because Harris had missed too many days in the past. Rather, the Court reminded Ford that, “Ford cannot rely on Harris’s past disability-related attendance issues to disqualify her from telecommuting.” In essence, the employee’s prior deficiencies, which are related to their disability, cannot be counted as a basis to deny them an accommodation. Had Harris been lackadaisical in her work attendance, that could be used to deny her such. However, using her medical-condition caused deficiencies was improper—that would be penalizing her for precisely the situation the ADA was created to remedy.

Further, in regards to the claim that Ford had offered Harris two accommodations—to move her office or reassign her to another position—the Court of Appeals decided that:

1. Offering to move Harris closer to the restroom when she might, in fact, soil herself while sitting at her desk or getting up from it, was not a realistic accommodation.
2. Offering Harris another position is only warranted if there are no other reasonable accommodations that can be made. The legal standard is that reassignment is almost a last resort.

Once Harris had rejected both of those legally unreasonable offers, the burden remained on Ford to either grant her the telecommuting position, or work with her to fashion another workable accommodation.

Thus, the Sixth Circuit Court of Appeals found the Summary Judgment decision in favor of Ford was in error, and sent the case back to the District Court for further proceedings consistent with their decision¹⁰.

TECHNOLOGY, TELECOMMUTING AND THE ADA

Of special note from the EEOC v. Ford decision was the fact that the Court of Appeals took the time to point out that while it had previously found telecommuting was “not a reasonable accommodation for most jobs,” but was rather warranted in “unusual situations” in Smith v. Ameritech¹². The Court then

stated that, “the class of cases in which an employee can fulfill all requirements of the job, while working remotely, has greatly expanded.”

In the 17 years since Smith v. Ameritech, technology changed dramatically. High speed internet in homes, virtual private networks, and better software has made it possible for many office jobs to be done from one’s home. “Face-to-face” meetings are now teleconferences with participants scattered across the country or globe. Email alerts and PDF files have in many cases replaced time-consuming meetings and hand-outs. Business unit teams interact in real time despite being in different regions. Looking at these advancements, which business has readily accepted as time and expense-saving, it can be difficult for an employer to justify demanding that an employee be in the building—especially when considering that many similar positions and job duties have been outsourced to third-parties.

The EEOC and Harris might prevail in their trial. Ford might prevail. Perhaps there will be an undisclosed settlement. The important lesson from this case is that as technology has advanced, and business has embraced new communication methods and employee interaction, the reasonableness of employee requests for ADA mandated telecommuting accommodations grows. It might be very difficult for a bank to argue that its customer service center can be in India, or spread out amongst stay-at-home mothers and fathers, but that a disabled auditor in Houston cannot be given the accommodation of working from home.

THE BOTTOM LINE BENEFITS OF MAKING ADA ACCOMMODATIONS

Not only is it important for Human Resource Professionals to understand the ADA requirements for making accommodations, it is also important for them to identify the benefits that these accommodations, including allowing telecommuting, could have for their company. There have been a number of studies and articles that suggest there are a great many important organizational benefits to making ADA Accommodations.

The study *Optimising Employee Ability in Small Firms: Employing People With a Disability* (Hindle, Gibson, & David, 2010) offered seven suggested benefits to making workplace accommodations, and to allow the hiring and advancement of people with disabilities. These benefits included reflecting the customer base of a company, increasing sales by attracting customers who have associations with family or friends with disabilities, developing a culture of inclusion, allowing recruiting from the biggest pool of skills, innovations made to accommodate people with disabilities could be used to make it safer and more comfortable for all staff and customers; to minimize legal exposure, and that disabled workers often make better employees as they have been found to be rated higher on performance, demonstrate better attendance, use less sick leave, require lower recruitment costs, and lower safety and other insurance costs.

Turning Givers into \$: A Business Case for Hiring People with Disabilities (Wittmer & Wilson, 2010) also cites a series of studies that suggest that workers with disabilities have higher-than-average retention rates and company loyalty, that hiring people with disabilities boosts customer loyalty and also cuts Worker’s Compensation costs. A final advantage cited by these workers is that it is possible to receive a number of financial incentives from the federal government when companies hire people with disabilities who meet specific standards. Among these incentives are The Work Opportunity Tax Credit (WOTC), and the U.S. Social Security Administration’s Ticket to Work Program (TTW).

Finally, perhaps the most complete data on benefits of accommodation comes from an on-going study (started in 2004) by The Job Accommodation Network (JAN) (Loy, 2013), designed to investigate the direct and indirect benefits of making accommodations. As of July 30, 2013 this study had conducted interviews with 1,989 different employers on this topic. The study found that the direct benefits of ADA accommodations included, by percentage of employers citing:

- Retaining a valued employee (90%)
- Increasing the employee’s productivity (71%)
- Eliminating costs associated with training a new employee (61%)

- Increasing the employee's attendance (54%)
- Increasing diversity of the company (41%)
- Saving on Workers' Compensation or other insurance costs (39%)
- Allowing hiring a qualified person with a disability (13%)
- Allowing promotion of an employee (9%).

In addition, indirect benefits cited, by this same study included:

- Improved interactions with co-workers (64%)
- Increased overall company morale (60%)
- Increased overall company productivity (56%)
- Improved interactions with customers (44%)
- Increased workplace safety (44%)
- Increased overall company attendance (38%)
- Increased profitability (30%)
- Increased customer base (17%).

Clearly, the above cited works suggests that there are a great many benefits that can potentially accrue to an organization that makes effective use of accommodations and that these benefits are likely to be present for the specific accommodation of allowing workers to telecommute. It is therefore essential that an organization develop effective HR policies concerning telecommuting not merely to avoid EEOC and other legal difficulties, but also from the desire to increase productivity with minimal costs.

WHAT STEPS TO TAKE

The following guide is based on the distillation of a number of documents supplied by the EEOC and the Job Accommodation Network, and an article by Maureen Dwyer¹². For an employer, there are several considerations to be made when deciding if an employee should be allowed an accommodation of telecommuting to work. These are:

1. **Consider allowing employees to work at home as an accommodation.** The recent court rulings concerning the ADA now makes telecommuting a potential "reasonable accommodation," but other alternative accommodations can also be considered and the manager can choose which ever choice meets the needs of the employee. The employee is not entitled to dictate their choice of accommodations, provided the accommodation(s) offered by the employer meets the employee needs. Having said this, telecommuting is an increasingly chosen option by organizations and should receive strong consideration as a potential accommodation.

2. **Recognizing an accommodation request.** An employee does not need to mention the "ADA" or the words "reasonable accommodation" before a request is considered. All the employee must do is indicate that s/he has a medical condition that will require some change in the way they execute their responsibilities. As part of this process, managers should engage in an informal interactive discussion with the employee to help him/her understand in what ways the disability interferes with performance on the job and how the person could do the job from home. Managers should also identify other accommodations that could be provided at work to resolve the underlying issue(s) in case telecommuting is not the only effective option. As part of this discussion, the manager should ascertain whether the accommodation need be implemented on a full time basis, for only some days of the week or month, or on an "as needed basis" depending on the lack of predictability in which the disability presents itself.

3. **Determine if the employee has a disability.** Is the person genuinely disabled? While there are nuances to the ADA definition of "disabled," and consulting an attorney seasoned in this area of law is

advised if you have a question, a good “rule of thumb” would be: *If they have a medical condition which interferes with their ability to do the job, they probably are covered under the ADA.* Any request for medical information should be limited to determining, for a person with a non-obvious disability, if the person’s medical issues qualify them under the ADA as having a disability.

4. **Determine whether or not the job is appropriate for telecommuting.** The first step in making this determination is to examine what are the essential and nonessential aspects of the position. It is well established that jobs that permit flexibility and autonomy lend themselves more to telecommuting or flex-time accommodations. Jobs which require minimal direct supervision and little face-to-face interaction are also more suitable for telecommuting. But with some creativity, a great many other positions can work as telecommuting positions.

In making accommodation decisions, managers are under no obligation to remove any essential job function but should be open to removing or substituting other minor job duties to make the accommodation work. In determining the viability of performing the work at the employee’s home, one needs to determine if there are aspects of the position that can only be performed at the work location. These aspects may include:

- Access to equipment, tools, or resources that cannot be duplicated at home due to such things as expense or physical space required
- Ability to supervise employee’s work from home
- Interaction requirements such as the need to coordinate work with others, for face-to-face interactions with co-workers, customers, suppliers, colleagues, or clients, or to physically attend scheduled meetings
- The need to use information only available at the workplace¹³
- Deadline requirements.

If some of these criteria do require the employee presence at the workplace, one still needs to determine whether or not the job can be performed with “occasional” or “part-time” attendance at the workplace. Great care should be used before declaring that attendance at work is critical, as it is becoming increasingly difficult to give alternative options to people with disabilities covered under the ADA. Having said that, if a requested accommodation can be shown to impact other staff with increased workloads, less desirable shifts, lower departmental efficiency, or require reallocation of work duties, than the employee request can be deemed “unreasonable.”¹⁴

5. **Work through other potential legal issues related to telecommuting.** Legal issues related to telecommuting that must be closely attended to include the Fair Labor Standards Act (FLSA), Occupational Safety and Health Act (OSHA), and Worker’s Compensation¹⁵. Most telecommuting positions discussed have been for jobs “exempt” from overtime under FLSA overtime laws. If an accommodation is made for a “non-exempt” position, one needs to maintain careful tracking of hours in order to calculate overtime. Managers need to ensure that telecommuting employees are forbidden from working unpaid hours, or the employee may be legally entitled to overtime. Also, while employer liability is limited for assuring safety in the employee’s home, employers must still keep records of all work-related injuries even if they are at the employee’s home¹⁶, and managers should consider inspecting home offices or homes for potential safety problems to avoid liability or work-related injuries. Finally, employers are still required to report any work-related injuries for telecommuting workers and that organizations need to determine if they need to set up Worker’s Compensation accounts in each state where employee(s) work from home.

6. **Safeguard information security.** Organizations need to set up plans to monitor an employee’s information access and web use to ensure that the same security protocols are used for telecommuting workers as for workers on location. Failure to do so could result in a loss of critical data and exposure to liability by the company for employee actions.

7. **Document decisions.** If telecommuting is not an option, and alternate accommodations will not work properly, then the employer should prepare a written report to the employee documenting why there are no reasonable accommodations that will fit both the employees and the employer's needs. Be aware—this report is a two-edged sword. If litigation occurs, said report will probably be a limit on possible defenses for a civil lawsuit. The employer will not be able to advance new factual theories to support their claim because it will be apparent that they did not know such things at the time the report was prepared. However, the report should also invite the employee to supply additional facts to support their telecommuting request, or explain why the offered alternate accommodations will not work. This shows a good faith effort on the employer's part to continue to work to find a suitable accommodation, and also to a degree locks the employee into admitting they knew of no other reasonable alternatives at that time should litigation later take place.

8. **Set reasonable work rules and quotas.** In the *EEOC/Harris* case, it was undisputed that Harris made mistakes because she was initially trying to telecommute at what would be described as “off hours.” If the mistakes rose above the level of other employees or acceptable standards, she would be subject to normal discipline. Ford could have required her to telecommute during normal working hours. If her mistake level was still too high, or proved too costly, Ford could have then placed her through additional training and ultimately termination.

9. **Do not appear unsympathetic.** While not a legal standard, from a practical standard Ford's act of marking her absent on days she worked because she did not work during “core hours” looks bad for Ford. Calling those hours “discretionary overtime” and thus not giving Harris credit for them as “work hours” can look very bad to a judge or jury. It may have helped the EEOC decide to take on Ford. It appears that Ford was trying to find two different and mutually exclusive arguments to nullify giving Harris any credit for the hours she did work. Those are not the actions of a company trying to comply with the ADA, but rather appear to be a company that is trying to justify getting past the ADA.

CONCLUSION

Recent court rulings make it clear that telecommuting will be used increasingly as a “reasonable accommodation.” We encourage companies to review our suggestions and make sure that their human resource policies reflect these new realities and put together the best telecommuting policies possible in order for firms to progress in the age of new technology and expectations.

ENDNOTES

1. 42 U.S.C. 126 §§ 12111–12117, the Americans With Disabilities Act, or “ADA”.
2. Public Law 110-325, Americans with Disabilities Act Amendments Act of 2008.
3. As defined by law.
4. The law also covers applicants in the hiring process. However, to avoid repeatedly saying “employees or people applying for employment”, the term “employee” will be utilized to cover and extend to both situations where applicable.
5. Equal Employment Opportunity Commission v. Ford Motor Co., No. 12-2484 (6th Cir. Apr. 22, 2014)
6. It is not known from the case itself if these errors were major, minor, or of a higher than average number.
7. While moving her closer to a restroom would resolve some of her issues on some days, as it was already established that she would become incontinent and soil herself while standing up, one wonders how moving her closer to a bathroom would resolve the issues Harris faced.
8. Harris, in this case, with Ford as the moving party.
9. The cases supporting this burden allocation was cited by the Court of Appeals as: Kleiber v. Honda of Am. Mfg., Inc., 485 F.3d 8623d at 869 (5th Cir. 2007) (quoting Hedrick v. Western Reserve Care Sys., 355 F.3d

- 444, 452 (6th Cir. 2004)); see also Hoskins v. Oakland Cnty. Sheriff's Dep't, 227 F.3d 719, 724 (6th Cir. 2000); Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1182–83 (6th Cir. 1996), abrogated on other grounds by Lewis v. Humboldt Acquisition Corp., 681 F.3d 312 (6th Cir. 2012) (en banc).
10. The Court of Appeals also found that that the “Retaliation” claim filed by the EEOC/Harris against Ford had been erroneously dismissed, and while the penalties for that could turn out to be very substantial, that is not the subject of this paper.
 11. Smith v. Ameritech, 129 F.3d 857, 867 (6th Cir. 1997)
 12. Dwyer, Maureen. (July 2011). Considering Flextime? 6 Issues You Must Factor In. *Compensation & Benefits*, July, 6.
 13. Caveat: With the vast amount of information flow available through the Internet, including the ability to create a Virtual Private Network to link the employee directly into the company computer system remotely, this criteria should be viewed very carefully. If the required information can be gained without physically visiting a specific worksite, there is probably a high chance it can be gathered by the employee while online with minimal accommodation changes.
 14. Podias, Kimberlainne. *Reasonable Accommodation or Special Privilege? Flextime, Telecommuting, and The AD*. Business Horizons (September-October 2001): 61-65.
 15. Dwyer, supra.
 16. Dwyer, supra.

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STATUTES

- 42 U.S.C. 126 §§ 12111–12117, the Americans With Disabilities Act, or “ADA”.
Public Law 110-325, Americans with Disabilities Act Amendments Act of 2008.

CASES

- Equal Employment Opportunity Commission v. Ford Motor Co., No. 12-2484 (6th Cir. Apr. 22, 2014)
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