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ADA Ruling Sets Stage For More Work-From-Home Bids

By **Ben James**

Law360, New York (April 24, 2014, 9:40 PM ET) -- A Sixth Circuit decision reviving an Americans with Disabilities Act suit brought on behalf of an ex-Ford Motor Co. worker shows that courts are warming to telecommuting as an ADA accommodation and will lead to more employees asking to work from home, lawyers say.

The appeals court panel's 2-1 ruling Tuesday in the U.S. Equal Employment Opportunity Commission's case against Ford — which centers on a worker who unsuccessfully sought a telecommuting arrangement to deal with irritable bowel syndrome — distanced itself from the notion that the "workplace" has to mean an employer's brick-and-mortar place of business.

In light of technological advances and the increased prevalence of remote work arrangements, it can't simply be assumed anymore that attendance at the workplace means showing up at an employer's physical location, said Judge Karen Nelson Moore's majority opinion.

"Any time that a court recognizes that the workplace of 2014 is very different from the workplace of 1990, when the ADA was enacted, that's a great advance in the law,"said Paul Mollica, of counsel with Outten & Golden LLP.

Peter Petesch, a Littler Mendelson PC shareholder, called the Sixth Circuit's decision an "evolutionary step," adding that it set the stage for a rise in telecommuting requests from workers and would give pause to employers thinking of pushing back.

"One thing this case will do is certainly encourage more employees to demand telecommuting, and it may give them leverage," Petesch said. "It will certainly make employers think twice before saying no."

Lawyers pointed out that certain workers — like firefighters, for example — clearly can't carry out the core functions of their jobs while working from home. And the Sixth Circuit's ruling doesn't change an employer's obligation under the ADA to have an interactive dialogue with a worker who seeks an accommodation to carry out a job's essential functions in spite of a disability, noted Mayer Brown LLP counsel Maritoni Kane.

But the decision will probably make a lot of employers tread lightly when assessing whether a work-from-home arrangement is truly feasible, she said.

"I definitely think that requests will increase based on this opinion and that more requests are likely to

be granted based on this opinion," Kane said.

Tuesday's ruling underscores that employers must at least mull over the pros and cons of any bid to telecommute to accommodate a disability, and that a knee-jerk denial of work-from-home requests is risky business in the ADA context.

An employer who wants to dig in an fight a worker's request for a telecommuting arrangement as an accommodation is going to need a good reason — and perhaps empirical evidence — that will back that decision and withstand potential scrutiny from the EEOC or the courts, said Kohrman Jackson & Krantz PLL partner Jonathan Hyman.

"With this decision, I think what you're seeing is a rethinking of what attendance means in today's workplace," Hyman said. "It's certainly a strong signal that you are not appropriately engaging in the interactive process under the ADA if you're not at least considering working from home as an accommodation."

In addition to attacking the assumption that the workplace is the employer's physical worksite, the majority said an employer's "business judgment" with respect to which functions of a job are essential was just one factor to be considered.

To pursue an ADA claim, an employee has to be able to perform the essential functions of a job, with or without a reasonable accommodation. Ford argued that regular and predictable attendance was an essential function of worker Jane Harris' resale buyer job.

The district court's ruling holding that Harris' request to telecommute for up to four days per week was not reasonable relied on precedent declining to second-guess the employer's business judgment on what that job's essential functions were. And the majority itself noted that courts routinely defer to employers on that point because a court is not equipped to serve as a "super personnel department."

But according to Judge David McKeague's dissent, that was exactly what the majority did by not affording deference to Ford's business judgment and deciding which jobs required face-to-face interaction.

Employers might be well-served to take certain steps in light of Tuesday's ruling, including updating any existing telecommuting policies and job descriptions to make it clear if being physically present in the workplace is an essential part of the job and taking care not to deny work-from-home requests summarily, Ogletree Deakins Nash Smoak & Stewart PC shareholder Meg Alli said.

"We will see more requests for people to work at home, and it's going to be more difficult for employers to defend these," Alli said. "Many employers probably assumed that the workplace was the physical site of the employer's facility or plant."

The fact that the decision doesn't lay out clear guidelines for when its appropriate to require that a given worker be physically present at the employer's site is a problem, she added.

While the Sixth Circuit's ruling will naturally have the most impact within the confines of that circuit — which takes appeals from district courts in Kentucky, Michigan, Ohio and Tennessee — it can be cited as persuasive authority in other jurisdictions, as well. And the rationale underpinning the decision will likely resonate, according to Hyman.

“I think the Sixth Circuit is very much out in front of this issue with this decision,” Hyman said. “I would be surprised, given how technology is today, if other courts didn't fall in line behind this decision.”

--Editing by Kat Laskowski and Chris Yates.

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