On Law

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Attorneys and Counselors At Law

1965 50th Anniversary 2015

Failure to Accommodate Disability

Telecommuting May be a Reasonable Accommodation Under Title I of the Americans with Disabilities Act (ADA)

Elizabeth Rae-O'Donnell

In April of 2014, the Sixth Circuit Court of Appeals (covering Michigan, Kentucky, Ohio, and Tennessee) decided in a 2-1 decision that telecommuting may be a reasonable accommodation for an employee's disability under the ADA. *Equal Employment Opportunity Commission (EEOC) v. Ford Motor Company,* 752 F.3d 634 (2014).

The facts of this case showed that the Plaintiff, Jane Harris, was a resale steel buyer for Ford Motor Company. Harris suffered the debilitating symptoms of Irritable Bowel Syndrome (IBS). Harris was a consistently competent, though not perfect, employee as noted in her performance reviews. Over time, Ms. Harris' symptoms worsened and on particularly bad days she was unable to drive to work or stand at her desk without soiling herself. Harris began to take intermittent FMLA leave when she experienced severe IBS symptoms.

As a resale steel buyer, Harris served as an intermediary between the steel suppliers and "stampers," the companies that use steel to produce parts for Ford. Harris' role was to respond to emergency supply issues to ensure that there would be no gap in steel supply parts for the parts manufacturers. Her position involved some individual tasks, such as uploading spreadsheets and periodic site visits to observe the production process, but the essence of her job was group problem-solving, which required her to be available to interact with members of the resale team, suppliers, and others in the Ford system when problems arose. Ford managers made the business judgment that such meetings were most effectively handled face-to-face and that email or teleconferencing was an insufficient substitute for in-person team problem-solving.

When Harris' symptoms worsened, her supervisor allowed her to work on a flex-time commuting schedule on a trial basis, but found this to be unsuccessful because Harris was unable to establish regular and consistent work hours. Harris' absences started to affect her job performance. Harris formally requested that she be allowed to telecommute on an as-needed basis to accommodate her disability. Ford denied this request. Ford suggested alternative accommodations, including moving Harris' cubicle closer to the restroom or seeking another job within Ford more suitable to telecommuting. Harris rejected both of those offers and filed a charge of discrimination with the EEOC. Eventually, after being placed on a Performance Evaluation Plan (PEP) and after failing to achieve identified objectives, Ford terminated Harris' employment.

In 2011, the EEOC filed a complaint in the Eastern District of Michigan alleging that Ford failed to accommodate Harris' disability and that it retaliated against her for filing a charge with the EEOC. Ford moved for summary judgment on both claims and the district court dismissed Harris' case.

Following an appeal by the EEOC, the Sixth Circuit Court of Appeals reversed the dismissal and sent the case back to the trial court. The Sixth Circuit did not find that Harris could perform the essential functions of her job and it did not determine that telecommuting was a reasonable accommodation, finding that these were important facts in dispute to be sorted out at the trial court level. The Sixth Circuit did say that telecommuting could be a reasonable accommodation in some cases and that it was possible this was a reasonable accommodation for Harris. If so, Ford would have been obligated to provide this accommodation to Harris, and by not doing so, the company would be in violation of the ADA. The importance of this decision is that previously, the Sixth Circuit and other circuits have held that telecommuting is acceptable only in exceptional circumstances. In the past,

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Failure to Accommodate Disability (cont.)

Courts have often deferred to the employer's definition of a job's essential functions and have held that attendance is an essential job function. This case could signal a change. Prior cases were decided before technology made it possible to perform essential job functions from a remote location. The Sixth Circuit stated that they were recognizing, "that given the state of modern technology, it is no longer the case that jobs suitable for telecommuting are 'extraordinary' or 'unusual.'"

As the Court noted in the Ford case, "we respond to the world as it exists now." The lesson for employers is that technology is changing the rules for employers whose workers are covered by the ADA.

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Takeaways from this Case

1. Telecommuting should not be confused with flex-time. Telecommuting is about where work is done and flex-time is about when the work is done.

2. Attendance and physical presence should not be confused. Technology makes it possible to do many jobs from anywhere, making physical presence less critical to the performance of certain jobs.

3. Offer reasonable and feasible alternatives. Engage in the ADA interactive process and take the request seriously. In the Ford case, the Court felt the company's offers of accommodation were not reasonable.

4. Clear Job Descriptions. If physical presence necessary, be clear as to why this is the case in the job description.

5. Document your response to telecommuting and the reasons why or why not the request should be granted.

6. Document the cost of establishing and monitoring an effective telecommuting program.

7. Protect Data. Employers should require telecommuters to take steps to protect the confidentiality of sensitive data or trade secrets.

8. If, under the circumstances, telecommuting is not a reasonable accommodation, the employer does not have to allow it.

E-Verify: Understanding Responsibilities and Rights

Sara E. Lowry

E-Verify is a federal program that employers use to verify a new employee's employment eligibility in the United States. The use of E-Verify has grown exponentially in the last few years and its use only continues to increase. According to the United States Citizenship and Immigration Services, just over 1,000 employers were enrolled in E-Verify in 2001, and by 2015, over 688,000 employers were enrolled.

A contributing factor to this rising number is that many states are enacting comprehensive legislation requiring all employers in that state to enroll in E-Verify and with each passing year similar legislation grows throughout the country. While Michigan has not enacted such sweeping legislation, certain employers are still required to enroll. For example, as of September 2009, federal law requires all federal contractors and subcontractors to use E-Verify, and in 2012, Michigan enacted legislation that mandated the use of E-Verify by contractors and subcontractors of the transportation department for construction, maintenance, and engineering services.

With continued growth and legislation of E-Verify, Michigan employers should be knowledgeable of their responsibilities and obligations. First, employers must not use E-Verify on a discriminatory basis. While E-Verify is commonly associated with an employee's immigration status, it should not be used as a tool to verify that person's legality in the U.S., only his or her employment eligibility. Therefore, E-Verify should be used to confirm all new hires' work eligibility. Second, E-Verify is not to be used as a pre-screening tool. An employee should be verified through E-Verify only after he or she has been hired.

Third, and one of the most difficult areas for employers to navigate, is when the verification of an employee comes back as a "Tentative Nonconfirmation" (TNC). A TNC means that information from an employee's Form I-9 did not match government databases. Because a TNC does not automatically mean that the employee is ineligible to work or is in the county unlawfully, employers are prohibited by federal law to terminate employment, lower pay, withhold pay, reduce work hours, delay training, or treat that employee any different than any other employee because of the TNC.

The employer should also know and understand the employ-

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E-Verify: Understanding Responsibilities and Rights (cont.)

ee's rights, if a TNC is received. The employee has a right to a hard-copy of the TNC notice and a right to understand what a TNC means. Next, it is the employee who has the option moving forward. The employee may contest the TNC or decide not to challenge it. If the employee chooses not to challenge the TNC, he or she may not be allowed to continue employment. If the employee chooses to contest the TNC, the employer must provide the employee with a referral letter from E-Verify, eight federal work days to initiate resolution, and allow the employee any necessary time off to obtain a resolution. It is then the employer's responsibility to check for updates on the E-Verify program regarding an employee's TNC status.

With steep fees and consequences for businesses who hire employees unauthorized to work in the U.S., immigration reform constantly on the horizon, and increasing state legislation enacted around the country, Michigan employers should have an understanding of the E-Verify program and the accompanying employer responsibilities and rights of their employees.

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Public Act 152: Caught Between a Rock and a Hard Place

Patrick R. Sturdy

In 2011, the Governor signed into law PA 152 of 2011, known as the Publicly Funded Health Insurance Contributions Act. The Act caps the amount of money public employers, such as colleges, cities, townships, and villages can pay towards employee health care. The law provides employers with two options for cost sharing. The default option is a monetary "hard cap" based on an employee's marital and family status. Employees would be required to pick up the difference if insurance exceeded the "hard cap." The second option allows the public employer to opt out of the monetary "hard cap" and institute an 80/20 split in the cost for health care benefits. The Act imposes severe penalties for failing to comply with its requirements.

The decision to opt out of the "hard cap" must be made annually by the public employer's governing body. The governing body's annual election is not required to be negotiated with collective bargaining units. In *Decatur Public Schools v. Van Buren County Education Assoc, et al*, the Michigan Court of Appeals recently ruled that a public school district had no duty to collectively bargain with a collective bargaining unit regarding the school district's choice between the "hard cap" or the 80/20 election regarding expenditures for total employer annual health care costs for employees. Health care benefits (and, presumably, plan design, deductibles, out-of-pocket maximums, etc.) continue to be mandatory subjects of bargaining and a public employer may not make unilateral changes to these benefits without first meeting its bargaining duty.

Despite the fact that the governing body's election between the "hard cap" and the 80/20 options must occur annually, and is within the sole discretion of the governing body, a MERC Administrative Law Judge in Garden City Public Schools has held that a public employer may not unilaterally change from an 80/20 contribution to a "hard cap" during the term of a collective bargaining agreement, when "hard cap" was included in the agreement. The Administrative Law Judge held that a school district's decision to unilaterally change from an 80/20 contribution to a "hard cap" during the term of a collective bargaining agreement, when hard cap was included in the agreement, violated the Michigan Public Employment Relations Act (PERA). Instead, a public employer must wait until the collective bargaining agreement expires before implementing the governing body's election to move between the "hard cap" and the 80/20 options.

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CMDA'S 50 A MONTH
50th Anniversary 1965 2015

To commemorate CMDA's 50th Anniversary, every month throughout 2015 we are donating 50 (or more) items to a local charity. April is Prevention of Cruelty to Animals in Michigan, and we are donating items to benefit the Dearborn Animal Shelter. The Shelter is in need of a variety of items, such as newspapers, dog/cat food, treats, collars, toys, etc. Please stop by our Livonia office throughout April if you are interested in donating. Thank you for your support.

APRIL

Donation: Dog/Cat food, treats, collars, toys, etc.
Recipient: Dearborn Animal Shelter

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Our Vision

To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

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