Daily Journal

July 16, 2014

Should telecommuting be a reasonable accommodation?

By John F. Baum

Associated Press

Yahoo CEO Marissa Mayer gestures as she speaks during a session at the World Economic Forum in Davos, Switzerland, Jan. 22, 2014.

Increased use of telecommuting reflecting flexibility in the workplace has been the trajectory for many businesses, especially those in technology markets. Then Yahoo CEO Marissa Mayer decided to take a very different stance last year. She rescinded the company's telecommuting policy and explained that employees needed to work side-by-side to maximize the creativity, speed and productivity of the workforce. Many employers quietly supported her position because they have always wanted employees to be at work. They believe that productivity markedly decreases when employees are not at work and held accountable for deliverables.

The dynamic of whether to allow an employee to telecommute becomes substantially more complex if the employee is an individual with a disability who requests telecommuting as a reasonable accommodation. The answer cannot be a simple "no" without further analysis. As with any reasonable accommodation situation, the employer must determine on a case-by-case basis whether that employee's limitation due to the disabling condition can be reasonably accommodated through a variety of options, including adaptive devices, restructuring job duties, or an extended leave of absence.

The Equal Employment Opportunity Commission has recognized for years that telecommuting is one option, as stated in its 1999 Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (revised October 17, 2002). The 9th U.S. Circuit Court of Appeals in *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir. 2001) held that telecommuting was a potential reasonable accommodation for a medical transcriptionist who suffered from obsessive-compulsive disorder because physical attendance at the office was not an essential job function. On Dec. 30, 2012, the California disability discrimination regulations were expanded to explicitly include telecommuting as a reasonable accommodation. California Code of Regulations, Title 2, Section 7293.6(p)(2). Thus, telecommuting as a potential reasonable accommodation is a well-established option for employers to consider.

In the past, from the employer's perspective, the saving grace when doing this analysis was always that the employer (*not* the employee) would determine whether it was reasonable to allow an employee to work from home and do the job. For many employers, the answer was usually "no" because an essential part of the job required interaction with others to accomplish the job responsibilities. Some employers could be flexible and allow telecommuting one day per week, but it was not reasonable to allow it to occur four or five days per week. The analysis, although it may require careful consideration, had a reasonableness that employers found acceptable.

The 6th U.S. Circuit Court of Appeals in *EEOC v. Ford Motor Co.*, 12-2484 (April 22, 2014), has offered a different analysis that places a greater burden on employers.

Jane Harris worked as a resale steel buyer for Ford and her main job was to "respond to emergency supply issues to ensure that there is no gap in steel supply to the parts manufacturers." Although some individual tasks were required, the core of the position required "group problem-solving, which required that a buyer be available to interact with members of the resale team, suppliers and others in the Ford system when problems arose." Harris developed irritable bowel syndrome and requested a reasonable accommodation to telecommute as needed. Ford had a telecommuting policy that allowed working from home up to four days per week, but specifically stated that it was not appropriate for all jobs.

Ford denied Harris' request for telecommuting because her job required in-person team problem-solving. They suggested other options, but Harris rejected them. Ultimately, Harris filed a charge with the EEOC and the agency stepped in to bring the civil lawsuit alleging failure to accommodate Harris' disability, among other claims.

The 6th Circuit overturned the district court's granting of Ford's motion for summary judgment. Although Ford had argued that Harris physical presence was an essential function of the job given the team problem-solving and required face-to-face interactions, the court held otherwise. The court noted that its prior decisions had recognized the principle that attendance is an essential function of most jobs, but found that times had changed: "[A]s technology has advanced in the intervening decades, and an ever-greater number of employers and employees utilize remote work arrangements, attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location. Instead, the law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the 'workplace' is anywhere that an employee can perform her job duties."

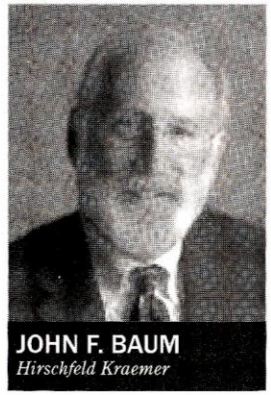
The court further reasoned, "[A]dvancing technology has diminished the necessity of in-person contact to facilitate group conversations. The world has changed since the foundational opinions regarding physical presence in the workplace were issued: teleconferencing technologies that most people could not have conceived of in the 1990s are now commonplace." The court concluded, "[W]e are not persuaded that positions that require a great deal of teamwork are inherently unsuitable to telecommuting arrangements."

The court rejected the argument that Ford's business judgment should solely control the process, finding it "should carefully consider all of the relevant factors, of which the employer's business judgment is only one." The court looked at Ford having a telecommuting policy, that people in Harris' position were telecommuting one day per week, and that Ford considered no alternative that Harris could telecommute more than one day per week and accomplish her job.

Still, even with technology advances, the court acknowledged that most modern jobs may not be amenable to telecommuting; many jobs require a physical presence because the employee must interact directly with people or objects at the worksite, such as a custodian. The court recognized that "given the state of modern technology, it is no longer the case that jobs suitable for telecommuting are 'extraordinary' or 'unusual.'"

The *EEOC v. Ford* decision places a greater burden on the employer to carefully consider telecommuting as an option, especially in technology workplaces where co-workers may work remotely and their interactions are almost exclusively conveyed by electronic communication, teleconference or video conference. Employers would be prudent to not immediately reject telecommuting as an option because they prefer that employees come to the office. The employer should evaluate the nature of the job, the frequency and necessity of communication with co-workers, and the options of how those interactions occur. As technology continues to facilitate communication among co-workers with increasing sophistication, the option of telecommuting as a reasonable accommodation will become more common and acceptable.

John F. Baum *is a partner in the San Francisco office of Hirschfeld Kraemer LLP. He exclusively represents employers in labor and employment law, including litigation, advice and counsel, training and conducting internal investigations.*



JOHN F. BAUM
Hirschfeld Kraemer