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Pandemic Telework May Undermine Employer ADA Defense

By **Robert Nichols and Caroline Melo** (April 6, 2020, 4:55 PM EDT)

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Before the advent of high-speed internet connections in homes over the last 20 years, performing most office jobs from home through a computer and telephone, what is commonly referred to as teleworking, was not a realistic option. Prior to that time, a virtual presence at work through an individual's home computer was not reasonably achievable.

As a result, when faced with claims under Title I of the Americans with Disabilities Act from an employee seeking to perform an office job at home as a reasonable accommodation for a disability, a consensus developed among courts that physical presence in the office was an essential function of virtually any office job. Consequently, courts generally found in litigation that employers were not required to allow employees to work from home as an accommodation under the ADA.

Now the fundamental reshaping of our society, at least for a period of weeks, as part of the nation's efforts to contain the COVID-19 pandemic, will undoubtedly change the perceptions of the public, and perhaps the courts, as to what is achievable and reasonable with respect to teleworking.

Amid the Pandemic, Government Agencies Call for Teleworking

Throughout March, a variety of states and local governments have issued orders effectively requiring most employees to stay home from work. Even the White House has strongly urged federal workers to telework when possible.[1] Stated most bluntly, Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases and a member of the White House's coronavirus task force, instructed in a March television interview that Americans are "going to have to hunker down."[2]

In response, eager to maintain vital operations, businesses have embraced teleworking for office employees in a sweeping fashion.

Undoubtedly, after a period of weeks or more of teleworking, many workers, and some employers, have been struck by how well the process works — at least for some functions and job positions. As a consequence, American businesses cannot help but wonder if teleworking on a much larger scale is here to stay.

The broad embrace of teleworking during this crisis, when juxtaposed against a long-standing antagonism among many businesses and courts to the notion of teleworking as an accommodation for a disability, raises the question of whether federal courts now will move to adopt a different view of the reasonableness of teleworking as an accommodation. To understand what a sea change that shift would be, a consideration of the federal judiciary's past view of teleworking as an ADA accommodation is important.

History of the Federal Courts' View of Teleworking as a Reasonable ADA Accommodation

Soon after the employment provisions of the ADA became effective in July 1992, federal appellate courts began addressing claims by employees that their rights under that law had been violated when their employer failed to allow that individual to work from home as an accommodation for a disability.

Specifically, in a series of appellate court decisions during the mid-1990's, several federal courts of appeals rejected these claims, finding either that physical attendance was an essential function of the job or that working from home by its very nature was an unreasonable accommodation that was not required under the ADA.

For instance, in 1994 in Tyndall v. National Education Centers, Incorporated of California, the U.S. Court of Appeals for the Fourth Circuit found that a request by a business college instructor to perform her work from home to better accommodate her lupus erythematosus condition was unreasonable because physical attendance was an essential function of the job.[3]

The Fourth Circuit observed that "[e]xcept in the unusual case where an employee can effectively perform all work-related duties at home, an employee 'who does not come to work cannot perform any of his job functions, essential or otherwise.'"[4]

The following year, in Vande Zande v. State of Wisconsin Department of Administration, the U.S. Court of Appeals for the Seventh Circuit Court, in a decision written by Judge Richard Posner, rejected an ADA work-from-home accommodation request by a paraplegic worker in an administrative position within the Wisconsin Department of Administration.[5] That employee, who was paralyzed from the waist down as a result of a spinal cord injury, sometimes developed ulcers because of that injury, which made it difficult for her to travel to work for weeks at a time.

Judge Posner, in rejecting her requested accommodation as unreasonable, explained that "[n]o jury ... could in our view be permitted to stretch the concept of 'reasonable accommodation' so far."[6]

That appellate court further observed that:

> Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance.[7]

In 1997 in Smith v. Ameritech, the U.S. Court of Appeals for the Sixth Circuit, in the case of a phone book advertising sales representative with chronic back pain seeking to work from home, held that "the ADA does not require employers 'to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced.'"[8]

The Recent More Receptive Approach to Teleworking From the EEOC and Some Federal Courts

As time passed and technological advancements made working from home more seamless, the U.S. Equal Employment Opportunity Commission and some courts, particularly in the case of office employees who already spend most of their time at their work computers, became more amenable to the concept of working from home, that is teleworking, as a potential ADA reasonable accommodation.

For example, in 2003, the EEOC issued telework guidance adopting a more positive view of the notion of teleworking as a reasonable accommodation under the ADA.[9]

For instance, the agency explained in that guidance that:

> allowing an employee to work at home may be a reasonable accommodation where the person's disability prevents successfully performing the job on-site and the job, or parts of the job, can be performed at home without causing significant difficulty or expense.[10]

Moreover, the EEOC warned that, even if full-time teleworking is not practicable for the employer, there has to be a consideration of potential part-time teleworking as part of the interactive ADA process. Specifically, "if the employer determines that some job duties must be performed in the workplace, then the employer and employee need to decide whether working part-time at home and part-time in the workplace will meet both of their needs."[11]

Additionally, federal courts have been recognizing in more recent decisions that advanced technology has made teleworking feasible for a wide variety of white collar jobs. As the U.S. Court of Appeals for Veterans Claims explained in Speigner v. Wilkie last year, "[a]dvanced technology in the workplace has allowed telework to become an increasingly popular option for employees."[12]

Nonetheless, many federal courts continue to regard the appropriateness of teleworking as an ADA reasonable accommodation to be the exception rather than the norm. Just in 2017, the U.S. Court of Appeals for the Fifth Circuit instructed, "there is general consensus among courts, including ours, that regular work-site attendance is an essential function of most jobs."[13]

The Future

The arguments, made by employers over the last 25 years, in opposition to teleworking have certainly been undermined, at least to some extent, by the widespread use of teleworking during the current national health crisis.

Employers will need to be prepared to explain that they allowed the broad use of working from home during this crisis — not because it serves the company effectively or efficiently, but because it was the only stopgap measure available to avoid a complete shutdown of their operations.

Businesses can point to the problems with teleworking that have been demonstrated during the course of this crisis. For instance, during conference calls participants repeatedly talk over each other in a manner that would not occur to the same degree in a conference room when employees are actually together.

Stated more broadly, while communication over the telephone or internet is possible, these methods often are a disappointing substitute for a live meeting in an office setting. Certainly, the camaraderie

that grows out of human interactions is greatly diminished when employees are not together in the same place.

In sum, employers and their attorneys who are opposed to teleworking as an ADA accommodation in a particular instance will have to be ready to convince judges and juries that the mass teleworking of the COVID-19 crisis truly was not functionally equivalent to having employees in the office — but rather was an emergency make-do approach that was essential during a national crisis and should not represent the future of the American workplace.

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[1] https://www.chcoc.gov/content/updated-guidance-telework-flexibilities-response-coronavirus.

[2] https://www.nbcnews.com/politics/meet-the-press/fauci-americans-are-going-have-hunker-down-significantly-more-fight-n1159381.

[3] Tyndall v. National Educ. Centers, Inc. of California, 31 F.3d 209, 213 (4th Cir. 1994).

[4] Id.

[5] Vande Zande v. State of Wis. Dept. of Admin., 44 F.3d 538, 544 (7th Cir. 1995).

[6] Id.

[7] Id.

[8] Smith v. Ameritech, 129 F.3d 857, 867 (6th Cir. 1997).

[9] https://www.eeoc.gov//facts/telework.html.

[10] Id.

[11] Id.

[12] Speigner v. Wilkie, 31 Vet.App. 41, 43 (Vet.App., 2019).

[13] Credeur v. Louisiana Through Office of Attorney General, 860 F.3d 785, 793 (5th Cir. 2017).