

LITIGATION

EMPLOYMENT >> ALERT

EMPLOYERS MAY BE REQUIRED TO ACCOMMODATE EMPLOYEES WHO REQUEST TO WORK PART TIME DUE TO A DISABILITY, EVEN IF THEY HAD PREVIOUSLY WORKED IN FULL-TIME ROLES

Last month, the Sixth Circuit (which has jurisdiction over Michigan, Ohio, Tennessee and Kentucky) revived an employee's claim that the termination of her employment, due to her inability to return to her full-time job because of her post-partum depression and separation anxiety arising from leaving her baby at home, was a violation of the Americans with Disabilities Act (ADA). The employee had argued that her employer was obligated under the ADA to accommodate her disability by allowing her to work part-time and from home, temporarily.

The district court rejected the employee's contention that she remained qualified for her position, and instead sided with the employer's argument that because she could not work full-time, she was no longer qualified for her job, as a matter of law, and dismissed the ADA claim. The Sixth Circuit reversed, reasoning that the lower court had let the employer off too easily because the employer has the burden to show that working full-time was essential and that the employee was not able to do the job, even with an accommodation under the ADA.

EMPLOYEE CANNOT RETURN FROM MATERNITY LEAVE TO HER FULL-TIME JOB

Heidi Hostettler was employed by the College of Wooster as a Human Resources Generalist. As an HR Generalist, she helped managers with

THE BOTTOM LINE

The fact that less than half of disabled individuals of typical working age report having jobs, despite protective laws like the ADA, means that courts are increasingly sympathetic to the requests of the disabled for accommodations. The *Hostettler* decision highlights a common problem for employers: namely how do they say "yes" to what other employees will characterize as "special treatment" for one employee, especially if the accommodation is working from home and part-time, without having the remainder of their workforce becoming resentful or asking for similar treatment. Yet, the ADA, and many state statutes, make clear that the employer's priority, and legal obligation, is to make exceptions to company policies and practices for employees with disabilities, if such an accommodation is reasonable and will allow an otherwise disabled person to be able to do their job. Employers should resist "no" as a default answer to an accommodation request, even if they are otherwise tempted to dismiss a request to work part-time and remotely as out of the question.

employee performance and disciplinary issues, recruited new hires, met regularly with employees and designed training programs. Her usual working hours were from 8 a.m. to 5 or 6 p.m. and she worked from the HR offices on the College's campus.

After Hostettler had a baby, she took a 12-week maternity leave but was unable to return to work as planned. Instead, she provided a note from her doctor stating that she was suffering from severe postpartum depression and separation anxiety, and was

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unable to leave her baby to return to work full-time on the College's campus. Hostettler stayed home for an additional month and eventually returned to work on a part-time schedule, which the College agreed to accommodate for one month. According to the College, her reduced schedule, and her working from home, caused a strain on the HR department, which was already short-staffed.

After a month of working part-time and from home, Hostettler provided another doctor's note stating that she continued to suffer from severe postpartum depression and separation anxiety and could not resume working full-time from the College's campus. She continued to do much of her work from home, however, the parties disagreed about whether she was adequately performing the core tasks of her full-time HR position and the College reiterated that she had to come back to work, full-time. Convinced that Hostettler was inventing, or at least exaggerating, her symptoms, the College terminated her employment after she failed to return to the College's offices full-time.

Hostettler filed suit in federal court, alleging that the College had violated the ADA in refusing to accommodate her request for a part-time and remote schedule due to a disability for which she provided documentation. In granting summary judgment to the College on Hostettler's ADA claim, the district court agreed with the College

that the position of HR Generalist was a full-time position, requiring full-time hours, which meant that Hostettler was not qualified for the position because she could not work full-time.

THE SIXTH CIRCUIT'S REVERSAL AND ANALYSIS

To state an ADA claim arising from an employer's failure to provide an accommodation for a disability, an employee must show:

- 1) that he/she is disabled, and
- 2) that he/she is otherwise qualified for the job despite the disability,
 - a) without accommodation from the employer;
 - b) with an alleged "essential" job requirement eliminated; or
 - c) with a proposed reasonable accommodation.

On appeal, the Sixth Circuit concluded that there were disputed facts as to whether Hostettler was actually performing in her position as an HR generalist despite being unable to be physically present in the office full-time. In addition, the Sixth Circuit determined that Hostettler was entitled to a trial on the issue of whether it would be unreasonable to expect the College to function with a part-time HR Generalist, and therefore Hostettler's request for an accommodation in the form of a part-time and remote schedule, even temporarily, was not required by the ADA.

The Sixth Circuit pointed to facts in the record suggesting that Hostettler was, in fact, performing her job well, albeit it from home and within limited hours. For example, her colleague had testified that Hostettler was doing her work in a timely manner, and that the HR matters were being handled, and nothing was left undone as a result of Hostettler working from home. The College had also given Hostettler a positive performance review for the period that she was working a part-time schedule.

According to the Sixth Circuit, this evidence cannot be ignored simply because the written job description stated that the position was full-time and her supervisor asserted that Hostettler's part-time and remote schedule accommodation would put a strain on the HR department.

The *Hostettler* opinion begins with the startling statistic that "[n]early one in every five Americans has a disability," and yet "a mere 41% of people with disabilities between the ages of 21 and 64 were employed." In reviving Hostettler's ADA claim, the Sixth Circuit sends a message to employers that the ADA requires them to be flexible and forgiving in accommodating disabled employees. The College's stance that Hostettler had to work 9 a.m. - 5 p.m. and from the College's campus was antithetical to the Sixth Circuit's view that the ADA requires employers to adjust to when, where and how work gets done

in order to open up opportunities for disabled people, which is the intent behind the ADA.

EMPLOYER TAKEAWAYS

Employers should be careful not to take a hardline view that certain positions, such as HR, C-Suite and other leadership roles, are only full-time roles such that any request for a modified or reduced schedule, or request to work from home — even temporarily — is judged unreasonable and will not be considered for fear other employees will follow suit. In *Hostettler*, the College seemed to consider that an HR Generalist having to be physically in the office to do her job was a no-brainer. To the contrary, the question of whether an employee's request to work part-time to accommodate a disability is reasonable will be a fact-intensive analysis. Notably, employers bear the burden to link job responsibilities with full-time hours and physical presence at the company's offices.

Employers should scrutinize how the company (or department) is actually suffering due to a disabled employee's temporary part-time schedule, and why the employee's physical presence in the office would fix the problem, before denying an accommodation. The notion that some employees may resent the temporary arrangement, and others may doubt the legitimacy of the disabled employee's limitations, is not enough to meet the employer's burden under the ADA. In *Hostettler*, the company's lack of documentation concerning, for instance, concrete examples of when the employee's absence from the office had a negative effect on operations — such as the employee not being able to counsel other employees — meant that the company would have to go to trial on the employee's ADA claim.

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