Accommodating the telework employee post-COVID

What was often thought to be an "unreasonable" accommodation request, turns out to be very reasonable after all

By Bryan Schwartz and Cassidy Clark

Plaintiffs' employment lawyers are wondering how our society's response to COVID-19 will change our practice, permanently. We now know that we can take depositions, attend mediation, argue motions, and perform almost every other basic litigation activity remotely, without compromising the quality of our efforts. These changes will also improve our clients' footing when they seek work-from-home disability accommodations.

Employers have long argued that physical attendance at work is an essential function of most jobs. Courts have frequently rejected workers' requests for telework or work from home as reasonable accommodations for disabilities under the federal Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA).

Courts and juries will never see telework the same again. Even as more Americans become vaccinated against COVID-19 and traditional offices resume in-person operations, plaintiffs' attorneys will successfully argue that pre-COVID-19 precedents regarding telework are outdated, and that today, telework is a presumptively reasonable accommodation in most places of employment.

Reasonable accommodations and undue hardship

Under the ADA and FEHA, employers must provide reasonable accommodations to qualified employees where such an accommodation does not cause the employer "undue hardship." (42 U.S.C.

§ 12112(b)(5); Gov. Code § 12940, subd. (m).) The initial burden rests with the employee to show that she is a "qualified individual" under the statutes. A qualified individual is a person who has the requisite education and experience for a job, and can perform the essential functions of the job "with or without reasonable accommodation." (42 U.S.C. § 12111(8); Gov. Code § 12940, subd. (a)(1).)

The statutes provide examples for reasonable accommodations such as "job restructuring, part-time or modified work schedules, reassignment to a vacant position, [and] acquisition or modification of equipment or devices." (42 U.S.C. § 12111(9); Gov. Code, § 12926, subd. (p)(2).) California's FEHA specifically lists, "Permitting an employee to work from home," as an example of a reasonable accommodation. (Gov. Code, § 11065, subd. (p)(2)(L).) As for undue hardship, the statutes instruct courts and juries to consider the financial resources of the employer, the impact of the accommodation on the operations of the employer, and the type of work conducted by the employer. (42 U.S.C. § 12111(10)(B); Gov. Code, § 12926, subd. (u).) This minimal guidance has allowed courts to deny employees the opportunity for telework frequently.

Telework jurisprudence

In February 2019, Bloomberg Law conducted an analysis of ADA telework cases and found that employers won 70 percent of rulings over the prior two years regarding whether they could reject workers' bids for telework as an accommodation for a disability. Many federal and California courts had adopted a "general rule – that regularly attending work on-site is essential to most jobs, especially the interactive ones." (*E.E.O.C. v. Ford Motor Co.* (6th Cir. 2015) 782 F.3d 753, 761; see also *EEOC v. Yellow Freight Sys., Inc.* (7th Cir.2001) 253 F.3d 943, 948; *Tyndall v. Nat'l Educ. Ctrs.* (4th Cir. 1994) 31 F.3d 209, 213; *Samper v. Providence St. Vincent Med. Ctr.* (9th Cir. 2012) 675 F.3d 1233, 1237-38 (collecting cases); *Mason v. Avaya Commc'ns, Inc.* (10th Cir. 2004) 357 F.3d 1114, 1122-24 (same); *McCormick v. Pub. Employees' Ret. Sys.* (2019) 41 Cal.App.5th 428, 441.) As a typical example, the Seventh Circuit opined that "most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation." (*Rauen v. U.S. Tobacco Mfg. L.P.* (7th Cir. 2003) 319 F.3d 891, 896.) One unpublished (thankfully) California Court of Appeal explained (citing federal authorities), "Except in the unusual case where an employee can perform all work-related duties *at home*, an employee who doesn't come to work cannot perform any of his job functions, essential or otherwise." (ital. in orig.) (*Hernandez v. Pac. Bell Tel. Co.* (Cal. Ct. App. Jan. 24, 2017) No. B260109, 2017 WL 345057, at *7 (quoting *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1239 (9th Cir. 2012).)

On the other hand, even before COVID-19, some courts recognized remote work as a possible reasonable accommodation. (See *Samper*, *Id.* ["regular attendance is not necessary for all jobs"]; *Waggoner v. Olin Corp.* (7th Cir. 1999) 169 F.3d 481, 485 ["In some jobs . . . working at home for a time might be an option"]; *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994) ["in appropriate cases, that section requires an agency to consider work at home, as well as reassignment in another position, as potential forms of accommodation"]; *Ravel v. Hewlett-Packard Enter., Inc.* (E.D. Cal. 2017) 228 F.Supp. 3d 1086, 1096 [holding "work from home" may be a reasonable accommodation under FEHA].)

An especially promising 2001 Ninth Circuit decision, *Humphrey v. Memorial Hospitals Association*, should guide plaintiffs' attorneys in a post-COVID-19 landscape. (239 F.3d 1128, 1138 (9th Cir. 2001).) "Working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer." (*Id.* at 1136.) In *Humphrey*, the court reasoned that because other employees were allowed to work remotely for reasons other than disability, working in person may not have been an essential function of the job, and therefore, remote work should have been considered as an accommodation for the plaintiff-employee with a disability. (*Id.* at 1137; see also *Hughes v. U.S. Foodservice, Inc.* (9th Cir. 2006) 168 F. App'x 807, 808 [applying *Humphrey* to FEHA, finding the plaintiff "able to perform the essential functions of the new customer service position from home and that a work-at-home arrangement would not cause [defendant] undue hardship" under FEHA].)

Humphrey teaches us that in analysis of undue hardship and essential functions, courts consider whether the work has been successfully performed by other employees outside of the physical office. Now, following a year of widespread telework wherein most traditional office employers have successfully instituted some form of telework without sacrificing productivity, plaintiffs will be armed with abundant examples of successful telework arrangements. Many plaintiffs will be able to show that they themselves have successfully completed their jobs remotely.

Telework in a post-COVID-19 landscape

Workers' advocates should start by reminding employers – and courts – that employers have the burden of establishing that the stated essential functions are, in fact, essential functions of the job. (See *Bates v. United Parcel Serv., Inc.* (9th Cir. 2007) 511 F.3d 974, 991 ["Although the plaintiff bears the ultimate burden of persuading the fact finder that he can perform the job's essential functions ... an employer who disputes the plaintiff's claim that he can perform the essential functions must put forth evidence establishing those functions."].) In other words, employers cannot simply state that physical attendance is an essential function of the job. Employers must offer evidence supporting their contention that

physical attendance is essential. This will likely become more difficult as many employers have already instituted widespread telework accommodations for their entire workforces.

We can already see a shift occurring. On September 16, 2020, a Massachusetts District Court accepted evidence of an organization's COVID-19 work-from-home arrangement to support a plaintiff-employee's argument that they should be allowed to telework as a reasonable accommodation for their disability going forward. (See *Peeples v. Clinical Support Options, Inc*. (D. Mass. 2020) 487 F.Supp. 3d 56, 65.) In *Peeples*, the employer made the same argument made successfully by so many employers before, that it needed its employees physically in the office to ensure adequate supervision and client interaction. (*Ibid*.) However, here, the plaintiff presented evidence that they performed the same duties on-site that they had provided remotely during the organization's initial COVID-19 response. (*Ibid*.) Thus, because the plaintiff had already demonstrated that they could perform the essential functions of the job remotely, the court held that the balance of hardship weighed in the plaintiff's favor. (*Ibid*.)

Whereas prior to COVID-19, courts were not persuaded that intangibles such as "teamwork, personal interaction, and supervision" could be accomplished through telework, the past year's experience may persuade them otherwise. Before 2020, courts frequently repeated the *Samper* quote, that only in the "unusual case" could an employee effectively perform work-related duties at home. Now, it is much less "unusual" for people to work entirely from home. Additionally, prior to the pandemic, much of the legal profession, including the courts, had never experienced telework. Now, attorneys and courts know that remote work arrangements can be successful.

Further, the widespread nature of telework during COVID-19 accelerated the technology available to employers to facilitate remote work. Prior to March 2020, most of the world had never heard of Zoom and many workplaces had never had video meetings. Now, these technologies are integral aspects of office jobs that courts and juries will take into account.

EEOC guidance

In December, the EEOC, under the prior administration, issued guidance regarding telework in a post-COVID-19 America. (*What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*. EEOC (last accessed April 26, 2021).) The Guidance emphasized that even if a workplace participated in telework during the COVID-19 pandemic, the employer will not be *required* to approve telework as a reasonable accommodation after the pandemic concludes. (*Ibid*.) However, the agency noted, "the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely." (*Ibid*.)

Although this guidance is outdated because of the new administration, the suggested framework of viewing an employee's telework during COVID-19 as a sort of "trial period," may inform plaintiffs' strategy going forward. As in *Peeples*, plaintiffs should consider using their own successful experience working remotely as evidence that they can perform the essential functions of their jobs while working from home.

Conclusion

For far too long, courts disfavored the prospect of telework because of traditional notions of productivity and workplace comradery, even though telework provides an avenue for people with disabilities to have successful careers that otherwise may not be available to them.

One silver lining of having experienced the COVID era may be that plaintiffs' attorneys can move courts and juries toward presumed acceptance of work-from-home disability accommodations. We now know that employers have the capacity to make big changes to keep their workforce employed, including shifting to telework, without losing productivity. What was previously thought of often as an "unreasonable" accommodation request, turns out to be very reasonable after all.


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