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Litigator of the Week: Helgi Walker of Gibson, Dunn & Crutcher

By Scott Flaherty
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Judging by a recent appellate decision, Jane Harris wasn't what you'd call a model employee. Toward the end of her six years as a steel resale buyer for Ford Motor Co., Harris was barely performing her job, Ford claimed. She alienated co-workers, botched communications with suppliers, and, by the end, missed more days than she worked.

For employers, that track record made it all the more worrisome when, last year, the U.S. Court of Appeals for the Sixth Circuit revived claims by the U.S. Equal Employment Opportunity Commission that Ford violated the Americans with Disabilities Act by firing Harris, who suffered from severe irritable bowel syndrome, after refusing to let her work primarily from home.

And it helps to explain the collective sigh of relief after Gibson, Dunn & Crutcher's Helgi Walker convinced the full Sixth Circuit to shut down the EEOC's case.

Following a rare en banc rehearing, the appeals court on April 10 rejected the EEOC's claims that Ford retaliated against Harris and failed to accommodate her condition by denying her request to telecommute up to four days per week.

"The Americans with Disabilities Act requires employers to reasonably accommodate their disabled employees; it does not endow all disabled persons with a job—or job schedule—of their choosing," the court ruled.

According to Walker, the decision could benefit employers and employees alike, since it means that companies can allow some disabled employees to telecommute without facing automatic liability from those for whom such an arrangement is a poor fit.

"It clarifies that attendance is usually an essential function for most jobs," said Walker. But at the same time, "employers won't be discouraged from offering win-win telecommuting policies."

EEOC spokeswoman Christine Nazer said the agency's reviewing the Sixth Circuit's ruling, but declined to comment further.

The ruling affirms a 2012 decision by a district judge in Ann Arbor, Michigan, who granted summary judgment to Ford. (The company was defended at the lower court by Kienbaum, Opperwall, Hardy & Pelton, which served as co-counsel on appeal.)

In April 2014, a Sixth Circuit panel voted 2-1 to reverse the district court, finding that a reasonable jury might have sided with the EEOC. That decision alarmed many employers, both because of Harris' job performance and because the evidence showed that Ford had tried at least twice to come up with a telecommuting arrangement that might work for Harris.

Following the panel ruling, Ford's appellate team at Gibson Dunn petitioned the full Sixth Circuit to rehear the case. The petition, filed by partner Eugene Scalia, was far from a sure bet: Some suggest that it's nearly as hard to convince the Sixth Circuit to grant en banc review as it is to get a case before the U.S. Supreme Court.

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Helgi Walker

After beating the odds on the rehearing, Walker led the way for Ford in supplemental briefing and at oral arguments in early December 2014. At the time, Walker was relatively new to Gibson Dunn, having joined in September 2013 from Wiley Rein. The assignment allowed her to work with Ford's general counsel, David Leitch, with whom she overlapped in the White House Counsel's Office early in George W. Bush's presidency.

Presenting the government's case at the December Sixth Circuit hearing was EEOC lawyer Gail Coleman, who maintained that Ford didn't engage in the "interactive process" called for in the ADA to try to find a reasonable accommodation. Although Ford presented Harris with some options—such as sitting closer to the bathroom or taking a different job more amenable to telework—Coleman said the company failed to consider keeping Harris in the same position with a one- or two-day-a-week telecommuting arrangement.

Walker countered that Harris was unqualified to carry out the essential duties of her job, which required regular, in-person contact with steel suppliers and face-to-face interaction with coworkers.

"There was no evidence," Walker told the court, "that could have supported the notion that Ms. Harris was either a qualified employee or what she had asked for was reasonable."

In adopting Walker's arguments, the Sixth Circuit reassured defendants that the ADA's mandate for accommodation doesn't trump employers' need to count on their employees.

"No reasonable jury could find that Ford—a for-profit corporation—would continue to pay an employee who failed to do her job well in the past, and who, by her own admission, could not perform the essential elements of her job in the future," the court wrote.

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