

Fielding Remote Work Accommodations Requests Post-COVID

By **Kenneth Winkler** (February 14, 2023)

One of the most interesting issues concerning the Americans with Disabilities Act that arose from the COVID-19 pandemic is whether performing work on-site is an essential function of the job. In other words, if an employee was able to successfully work remotely during the pandemic, is on-site work post-pandemic essential?



Kenneth Winkler

On Nov. 16, 2022, the U.S. Court of Appeals for the Eighth Circuit issued a decision indicating that successful telework could establish that continued remote work would be a reasonable accommodation. The court's opinion may provide a road map for employers handling remote work accommodation requests going forward.

In *Mobley v. St. Luke's Health System Inc.*,^[1] a former managerial employee diagnosed with multiple sclerosis filed a lawsuit against his employer for failure to accommodate under the Americans with Disabilities Act. The key facts in the case are described below.

Background Facts

As a patient access supervisor, the employee was responsible for training and managing a team of approximately 20 employees to assist patients over the phone in verifying insurance coverage and determining out-of-pocket health care costs. Most of the employee's direct reports telecommuted full time, although the lowest performing members on the team worked in the office.

The employer's policy allowed managers to telecommute two days per week, however, the employee's manager allowed her direct reports additional teleworking days on a case-by-case basis.

After several years of employment, the employee was diagnosed with MS. As his MS progressed, the employee began to have difficulty walking, standing and breathing, and experienced fatigue and burning sensations in his eyes and hands, particularly when his MS flared.

The employee requested to telecommute when he experienced flare-ups of his MS. The employer refused the request as a blanket accommodation, but agreed to consider requests to telecommute on a case-by-case basis when the employee experienced flare-ups of his MS.

The employer, in fact, allowed the employee to telecommute upon request. The employee resigned, however, as he feared that he was in danger of being discharged due to his condition. The employee then sued his employer claiming, among other things, that the employer refused to accommodate him in violation of the ADA and state law.

The Court's Decision

Despite the employer's claim that it was necessary for the employee to be on-site to manage his direct reports, the court held that the employee could possibly show that he was able to perform the essential functions of his job through his proposed accommodation

of teleworking while he experienced a flare-up of his condition.

Specifically, the court stated that by allowing the employee to consistently work remotely aside from his medical condition, the employer implicitly demonstrated a belief that the employee could perform his essential job functions without being in the office full time.

Moreover, while working remotely, the employee continued to receive positive performance reviews, reflecting that he was able to effectively supervise his employees despite not being on-site.

The EEOC's Position and Action

The Mobley decision is consistent with the U.S. Equal Employment Opportunity Commission's approach to remote work as a reasonable accommodation post-pandemic.

In its published guidance,^[2] the EEOC states that the temporary telework experience during the pandemic could be relevant to considering a renewed request for remote work.

For example, the period spent teleworking during the COVID-19 pandemic could serve as a trial period to show whether an employee with a disability can satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information.

The EEOC's guidance reaffirms three key ADA principles regarding remote work as a reasonable accommodation:

1. The right to remote work is not automatic.

Not every employee with a disability is entitled to telework as a reasonable accommodation. If the nature of the employee's disability does not require telework, the employer is not obligated to provide telework as an accommodation. Also, if the employer can effectively enable the employee to perform the essential job functions with a different accommodation on-site, then the employer can choose that accommodation instead of allowing telework.

2. The employer does not have to eliminate an essential function.

It is well established that the ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

Therefore, an employer does not have to continue allowing an employee to telework as a reasonable accommodation after the workplace reopens if doing so excuses the employee from performing an essential function.

3. A temporary accommodation is not a permanent change of job duties.

If an employer temporarily excused performance of one or more essential job functions during the pandemic it does not mean that the employer permanently changed the essential job functions. In other words, by allowing telework during the pandemic an employer is not automatically required to allow telework when employees return to the worksite post pandemic. Under the ADA, accommodation requests are to be analyzed on a case-by-case basis.

EEOC Legal Action

The EEOC backed its guidance with legal action. In December 2021, the EEOC settled its first case alleging disability discrimination based on an employer's refusal to allow an employee to continue to work from home following pandemic-related remote work.[3]

ISS Facility Services Inc., a workplace experience and facility management company, agreed to pay \$47,500 and provide other relief to settle the dispute. The lawsuit, Equal Employment Opportunity Commission v. ISS Facility Services Inc., was filed in the U.S. District Court for the Northern District of Georgia.

According to the complaint, Ronisha Moncrief worked for ISS as a health and safety manager. Moncrief had a pulmonary condition that placed her at a greater risk of contracting COVID-19.

From March 2020 through June 2020, ISS required its employees to work remotely four days per week due to COVID-19. In June 2020, when ISS asked workers to return to the site full time, Moncrief requested to work remotely two days per week and to be allowed frequent breaks while working on-site, due to her condition.

Although ISS allowed other employees in Moncrief's position to work from home, it denied Moncrief's request and soon after terminated her employment purportedly for performance.

Takeaway

Although the Mobley case did not involve remote work due to COVID-19,[4] the opinion may indicate how a court will analyze whether remote work is a reasonable accommodation in which the employee successfully performed work remotely during the pandemic.

It can be expected that the EEOC will carefully scrutinize any charge alleging a violation of the ADA based on an employer's failure to allow an employee with a disability to work remotely if the employer previously permitted remote work during the pandemic.

Against this backdrop, employers should continue to engage in the interactive process when an employee puts the employer on notice of a disability and the need for accommodation. An employee's request for remote work should be carefully and thoughtfully evaluated.

An employer should not reject a request for a continued remote work arrangement as an accommodation unless it is able to show that on-site work is truly essential or that continuing remote work would create an undue hardship.

Therefore, any time an employer allows an employee not to perform an essential job function, the employer should document that its decision to relax the requirement is temporary and does not suggest that working on-site is neither preferred nor essential. This includes making such documentation in performance evaluations. Even if the employer rejects the request for remote work, it should explore other possible accommodations and document its efforts to help the employee.

Kenneth N. Winkler is a shareholder at Berman Fink Van Horn PC.

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[1] *Mobley v. St. Luke's Health System Inc.*, No. 21-2417, 2022 WL 16955465 (8th Cir. Nov. 16, 2022).

[2] What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, U.S. Equal Emp. Opportunity Commission (last updated July 12, 2022), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D>.

[3] ISS Facility Services to Pay \$47,500 to Settle Disability Discrimination Lawsuit, U.S. Equal Emp. Opportunity Commission (Dec. 20, 2022), <https://www.eeoc.gov/newsroom/iss-facility-services-pay-47500-settle-disability-discrimination-lawsuit>.

[4] <https://www.bfvlaw.com/eeoc-guidance-when-is-covid-a-disability/>.