



# RIGHTS STUFF

A Publication of The City of Bloomington  
Human Rights Commission

City of Bloomington

September 2014

Volume 181

## Telecommuting May No Longer Be Extraordinary Accommodation, At Least in Sixth Circuit

Ford hired Jane Harris to be a resale steel buyer in 2003. Resale buyers respond to emergency supply issues to make sure parts manufacturers have the materials they need. Some of the job involves updating spreadsheets and visiting sites, but Ford said that the "essence of the job was group problem-solving."

Ford found Harris to be a competent employee, with an "excellent plus" rating from 2004 to 2008.

Harris has irritable bowel syndrome (IBS), which causes fecal incontinence. Her condition got worse over time, and on bad days, she could not drive to work or stand up from her desk without having an accident. She took time off work under the Family and Medical Leave Act when she was having bad days. Her absences began to affect her work. She had not been approved to work from home under Ford's telecommuting policy, but she did do some work at night to try to keep up. Since she did not report to the workplace, these days were still counted as absences. She made errors working at night because she could not reach people for necessary information.

In February, 2009, Harris asked Ford to let her work from home on an as-needed basis, up to four days a week. She told her supervisors that much of her work could be done via telephone or computer, and she

could handle meeting with suppliers as necessary.

Ford decided that her position was not suitable to on-going telecommuting. The company suggested that her cubicle be moved closer to a restroom or that she transfer to another job that would work better with telecommuting. She rejected both of these options and filed a complaint alleging discrimination in employment on the basis of her disability. A few months later, Ford terminated her for failing to meet its objectives for her.

The Equal Employment Opportunity Commission (EEOC) took her case to court, and the Sixth Circuit Court of Appeals recently ruled in her favor. The Court noted that as technology develops, it is easier to do work from home, even when the work involves a great deal of teamwork.

Ford said that allowing Harris to work from home for up to four days a week would have created an undue hardship for the company. The Court said that if that is true, Ford had an obligation under the interactive requirements of the Americans with Disabilities Act (ADA) to explore reasonable alternatives to her request for up to four days of working from home, instead of simply

*(Continued on page 2)*

### BHRC Staff

*Barbara E. McKinney,  
Director*

*Barbara Toddy,  
Secretary*

### Commission Members

*Byron Bangert, Chair*

*William Morris, Vice  
Chair*

*Michael Molenda,  
Secretary*

*Carolyn Calloway-  
Thomas*

*Valeri Haughton*

*Beth Applegate*

*Birk Billingsley*

### Mayor

*Mark Krusan*

### Corporation Counsel

*Margie Rice*

**BHRC  
PO BOX 100  
Bloomington IN  
47402  
349.3429  
human.rights@  
bloomington.in.gov**



### **Telecommuting (continued from page 1)**

rejecting her request.

The accommodations that Ford suggested - moving her cubicle or transferring her to a new job - were not reasonable, according to the Court. She could still have an accident from just standing up from her desk, and reassignment should be considered only when "accommodation within the individual's current position would pose an undue hardship."

Ford said that one reason it fired Harris was her attendance, but the Court said that her absences were related to her disability, and it "would be inconsistent with the purposes of the ADA to permit an employer to

deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated."

Setting up a home office for Harris might be expensive, but the Court essentially said that Ford likely could afford it.

The majority said that most jobs still require a physical presence at the worksite, but not all of them, including possibly Harris' job. The Court remanded the case to the trial court for further proceedings. A strongly worded dissent said, "The majority holds that a telecommuting arrangement allowing an employee to telecommute four out

of five days of the workweek on a spur-of-the-moment, unpredictable basis is a reasonable accommodation under the ADA for a position that involves routine face-to-face interactions." According to the dissent, moving Harris's cubicle was a reasonable accommodation, as she could wear adult diapers and/or bring a change of clothes to work as necessary. And Harris should have at least considered the transfer option, working with Ford to see if a suitable arrangement could have been made, as part of her duty to engage in the interactive process.

The case is Equal Employment Opportunity Commission v. Ford Motor Company, 2014 WL 1584674 (6th Cir. 2014).

### **Woman's Disability Claim May Proceed**

Rosario Alonso went on disability leave for a year from her pharmacy technician job at Walgreens. She attempted to return to her old job in March, 2010, giving Walgreens a note from her doctor that she could resume her old job with some restrictions involving lifting objects and kneeling.

Walgreens decided she could not perform the essential functions of her job with her restrictions. Because of that, because her old job had been filled and because there were no other openings, Walgreens did not offer Alonso her old job back. Instead, Walgreens extended her disability leave. While she was still on leave, Walgreens hired a new pharmacy

technician at a nearby store. Alonso sued, alleging disability discrimination and failure to accommodate her disability. Walgreens tried to get the case thrown out of court on a summary judgment motion, meaning that even if everything Alonso alleged was true, the company should still win. They lost.

The Court said there was a genuine issue that needed to be resolved as to whether the store could have accommodated her. For example, the store said that since Alonso could not lift more than five pounds as a rule, she could not unload flats of bottled water. But Alonso said she could have unloaded the flats by breaking them down into smaller pack-

ages before unloading them. The store said that since she could not squat or kneel, she could not reach items on the lower shelves. Alonso said the shelves are adjustable, and she could use a grabbing device. And it was not clear that Alonso would have had the same problems at the nearby store.

It's always important for employers to carefully evaluate the possibility of accommodations and how they could work in practice before making termination decisions.

The case is Alonso v. Walgreen Co., 2014 WL 243697 (N.D. CA 2014).



## Court of Appeals Finds Indiana Marriage Law Unconstitutional

Indiana's laws regarding who can get married have been in the news lately, but recently, a different aspect of the marriage law was the focus of a Court of Appeals decision. The Court heard a challenge about who may conduct marriages, and found Indiana's law to be unconstitutional.

Indiana law says that the following people may solemnize a marriage: a member of a clergy of a religious organization, a judge, a mayor, a clerk, a clerk-treasurer, the Friends Church, the German Baptists, the Bahá'í Faith, the Church of Jesus Christ of Latter Day Saints and an imam of a mosque. Anyone not on this list who purports to solemnize a marriage commits a crime.

The Center for Inquiry challenged this law. It is a humanist group that promotes ethical living without belief in a deity. According to the Court, the Center tries to show that it is possible to have strong ethical values based on critical reason and scientific inquiry rather than theism and faith, and says its methods and values play the same role in members' lives as religious values play in the lives of religious adherents.

The Center's leader in Indiana, Reba Boyd Wooden, is a certified "secular celebrant." She would like to solemnize marriages in Indiana, but under Indiana law, may not. Two members of the

Center sued, saying they wanted Wooden to perform their wedding ceremonies and that the law discriminated against them.

The District Court found for the state, saying that the Center could call itself a religion and then its leaders could solemnize marriages legally. Or a member could have Wooden conduct a ceremony and then have a clerk perform the official ceremony. The Court of Appeals disagreed. The Court said that "humanists are situated similarly to religions in everything except belief in a deity (and especially close to those religious beliefs that lack deities)." The Court noted that "neutrality is essential to the validity of an accommodation." Under the law, Buddhists, for example, cannot solemnize marriages because they lack clergy and are not mentioned in the law. But a high priestess in the Church of Satan could solemnize a marriage. The law thus is not neutral.

The Court said that the state was willing to recognize marriages performed by hypocrites, but requiring members of the Center to go through a sham marriage was unconstitutional. It said, "It is absurd to give the Church of Satan, whose high priestess avows that her powers derive from having sex with Satan, and the Universal Life Church, which sells credentials to anyone with a credit card, a preferred position over Buddhists, who emphasize

love and peace. A marriage solemnized by a self-declared hypocrite would leave a sour taste in the couple's mouth. Like many others, humanists want a ceremony that celebrates *their* values, not the 'values' of people who will say and do whatever it takes to jump through some statutory hoop."

The Court ordered Indiana to allow certified secular humanists celebrants to solemnize marriages in Indiana without risk of criminal penalties. The Court suggested that the state might want to amend its marriage law to allow notary publics to perform marriages.

The case is Center for Inquiry, Inc. v. Marion Circuit Court Clerk, 2014 WL 3397217.





## **EEOC Updates Pregnancy Discrimination Guidelines**

In July of 2014, the U.S. Equal Employment Opportunity Commission (EEOC) updated its guidelines on pregnancy discrimination. The 36-page document is available on the EEOC's website, [www.eeoc.gov](http://www.eeoc.gov). A few highlights:

- Pregnancy discrimination complaints have risen at a faster rate than the steady influx of women into the workplace, suggesting that pregnant workers continue to face inequality in the workplace.
- The Americans with Disabilities Amendments Act of 2008, with its expanded definition of disability, affords additional protection from discrimination to pregnant women who develop pregnancy-related
- impairments that may require accommodations.
- Infertility is a disability under the ADA, as it is a substantial impairment of a major life activity, reproduction.
- An employer's concern about risk to a pregnant employee or her unborn child will rarely, if ever, justify sex-specific job restrictions for a woman with child-bearing capacity.
- New mothers who are breastfeeding have to be given time and space to express milk under the Patient Protection and Affordable Care Act (aka, Obamacare).
- An employer may not legally fire a woman because she has an abortion or considers having an abortion.
- The EEOC believes that it is illegal for employers to provide light-duty jobs only to employees who were injured on the job, denying such work to employees who need light duty because of injuries suffered on their own time or because of pregnancy. The Supreme Court will decide this issue in its next session.

For more information about the EEOC's update, visit its web page, [www.eeoc.gov](http://www.eeoc.gov).

---

## **Limiting Leave of Absences to FMLA Leave May Violate ADA**

Princeton HealthCare System operates an inpatient hospital and several outpatient medical facilities. Princeton had a fixed leave policy. Employees who were eligible for Family and Medical Leave Act (FMLA) time off could take leaves that lasted up to 12 weeks as the FMLA requires, but they were not allowed to take any additional time off if needed to recover. If they could not return to work after 12 weeks, they were fired. Employees who were not eligible for FMLA (usually because they had not worked for Princeton long enough to be eligible) were fired if they were absent for a short time.

But the Americans with Disabilities Act requires employers to provide reasonable accommodations to qualified employees with disabilities, and extended unpaid leave may be a reasonable accommodation in many cases. It's unclear at what point a leave becomes unreasonable; some courts say six months, and it often will be based on the specific facts of the case.

Some people who had lost their jobs at Princeton sued, and the Equal Employment Opportunity Commission recently announced a settlement in the case. Under the terms of the settlement, Princeton Health-

Care will pay \$1,350,000 in damages and also will change its policies. The company will now engage in an interactive process with its employees to see how much leave is needed for each individual and what the effect of that leave would be on Princeton. It will no longer require returning employees to present a fitness for duty certification stating they are able to work without any restrictions; Princeton will evaluate medical restrictions and see if they can be accommodated. It will not subject employees to progressive discipline for ADA-related absences and will train its employees on the ADA.