

IS WORKING FROM HOME A REASONABLE ACCOMMODATION?

BY DALLAS D. JONES



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What would you do if you were approached by an employee with a disability who requested permission to work from home as a reasonable accommodation? Would you take the time to consider the request, or laugh with a response of “in your dreams”?

Employees may have a difficult time justifying an accommodation request to work at home when their presence is needed at the workplace and their employer offers reasonable alternatives as mandated by the Americans with Disabilities Act (ADA). However, employers should realize that whether an employee's request is reasonable needs to be determined on a case-by-case basis. In making a determination on the employee's request, the employer should look at the essential functions of the employee's job to determine whether the request is a reasonable one. It will vary from employer to employer as to what is considered a reasonable request, although the type of work in which the employee is engaged, as well as how the employer has treated employees in the past, will shape what is considered reasonable with respect to that employer.

Although employers must look at each employee's individual circumstances before determining whether the request is reasonable, courts have generally found there are many reasonable justifications for the employer to deny a request to work from home. Some reasons upon which courts have found an employer justifiably denied the employee's request to work from home include the following:

- The employee's presence at work is necessary for purposes of office morale or to promote teamwork among the employees. This may be considered especially important in a smaller office, where relationships among fellow employees could be looked at as more vital to the organization's success.
- Direct supervision of the employee is necessary. Certain occupations require an employer to constantly supervise or be in contact with an employee. In these circumstances, it is not reasonable for an employee to expect an employer to allow the employee to work out of the home.

- The employee is still learning the job and is not qualified to work at home, even if such a program is offered by the employer.
- The employee's presence is needed at work, such as if the employee serves in a managerial role. It is not hard to conceive that certain job positions require the employee to physically be at the workplace. For example, a manager's job almost always requires that she be in touch with and available to the employees she manages. Other job positions would presumably require presence at the workplace as well, such as an employee in charge of computer maintenance.
- Allowing the employee to work at home as a reasonable accommodation would go against company policy or practice. If the company does not allow its employees to work from home, then the employer may not be required to grant an employee's request to work from the home. It should be noted, however, that if no other reasons prevent the employee from working out of the home, then this reason alone may not be sufficient. In addition, if the employer has a policy of not allowing employees to work out of the home, the employer must still offer the employee other reasonable alternatives.

Even if an employer allows an employee to work at home, the employer is allowed to require the employee to return to work under certain circumstances. If the employee is allowed to work at home, the employer may be allowed to require the employee to return to the workplace if situations at the workplace change. For example, if an employer makes a change in the structure of the workplace that would necessitate the employee to interact with others, the employer may require the employee to return to the workplace. Also, an employer who temporarily allows an employee to work from home is not necessarily required to allow the employee to work at home on a permanent basis.

In summary, each request to work from home must be addressed on an individual basis. Certain circumstances may exist upon which a request to work from home would be a reasonable accommodation which must be granted by the employer.

YOU CAN'T FIRE ME . . . CAN YOU?

BY JARROD S. BOITNOTT



Jarrod S. Boitnott

Employers often wonder whether an employee who is underperforming can be terminated, and if so, will the employee turn around and sue the employer upon discharge. A disgruntled ex-employee can, and oftentimes will, sue the employer, no matter the circumstances. What is within the employer's control is to take all the necessary precautions to reduce the risk of liability if a wrongful termination suit is brought.

While it is true that a terminated employee may always elect to bring suit by simply filing a piece of paper and paying a filing fee, only those who can "pigeonhole" themselves into an exception to Nebraska's "at will" employment doctrine have potentially viable claims. At will employment means that when there is not an actual employment contract which sets forth a definite term of employment or which places restrictions upon the right of discharge, an employer may discharge an employee for any reason, or for no reason at all, without incurring liability, so long as state and federal laws are not violated.

State and federal laws generally prohibit discrimination against employees who belong to a "protected class" based on their race, color, religion, sex, age, disability, marital status or national origin. These laws also prohibit employers from retaliating against employees who "blow the whistle" by making complaints to the state or federal Equal Employment Opportunity Commissions (NEOC and EEOC) or for reasons that violate public policy considerations.

However, these laws do not prohibit employers from terminating employees who are habitually tardy or excessively absent from work, who have a poor attitude or poor job performance, or whose negativism on the job conflicts with co-workers, no matter their race, age, etc. These laws also do not prohibit terminating at will employees as part of a properly executed reduction in force plan. In fact, one of the most costly mistakes

employers routinely make is continuing to employ persons they should have fired years earlier, out of fear of being sued.

This is not to say that those fears are unfounded. A risk that employers face if found liable for unlawful termination includes reinstatement of the employee to his former position. Employers also risk adverse judgments that award the employee back wages, attorney fees and punitive damages which are not covered by insurance.

What is crucial is that employers train their supervisors from day one that they can avoid creating a hostile work environment by treating all employees fairly and equally. It is also crucial that employers do not refer to employment with the company as being other than "at will." Employers should also maintain detailed personnel files in which all employee discipline problems are properly and sufficiently documented.

Once the decision to terminate is made, it is imperative to provide the employee proper notice, to make sure that all decision-makers within the company fully understand the specific reasons the employee was terminated, and to comply with all existing company policies and procedures. It is also important to document the termination process and to make sure two company representatives are present at the final meeting with the employee.

Terminating an employee is never risk free. Resulting lawsuits often turn into "he said, she said" affairs. However, by treating all employees fairly, consistently and with dignity, even at the time of termination, an employer can increase company productivity by eliminating problematic and inefficient employees while, at the same time, minimizing the risk of embarrassing and costly litigation.

THE NEW LOOK

Of course Baylor, Evnen, Curtiss, Grimit & Witt, LLP is the traditional law firm you have depended on for so many years. But in the past decades we have consciously grown and kept pace with modern legal issues and modern technology. To communicate our growth, we have re-examined the Baylor Evnen appearance and updated it to reflect our evolution as a firm. The new BE image projects our desire to live in the day while holding close the values that created our success.

Baylor Evnen is proud of our adaptability in meeting clients' evolving legal challenges. We have done it with our depth of full service legal representation. We have done it with our technological support for delivering value and we have done it with our emphasis on intelligent, creative solutions for new problems.

Such an evolution deserves a new logo and fresh color; this newsletter format is a direct product of the past year's efforts. It stands for our commitment to excellence, our depth of full service legal representation, and our legal tradition.

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