

Teleworking and Title VII

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As teleworking becomes more common, it may become an issue in more employment litigation, particularly in gender discrimination cases. On one hand, employees who telework may become stigmatized and find their careers derailed in the same way that women on the “mommy track” experienced. On the other hand, an employee may raise the denial of a telework arrangement as evidence of discrimination.

So far neither situation has become a frequent subject of litigation. At least one federal court has considered a case in which an employee accused her supervisor of retaliating against her for teleworking during her pregnancy. *Goodum v. White*, 2006 WL 566469 (N.D. Ill. March 3, 2006). The court granted summary judgment to the employer because the plaintiff offered “nothing but hearsay statements and gender-neutral comments to support this assertion.” *Id.* at *23. The plaintiff argued that it was “undisputable that [her supervisor] exhibited a malignant heart toward Plaintiff when she began telecommuting,” but the court chose not to read this as an assertion of unlawful retaliation. Instead, it dismissed this argument with the reminder that “personality conflicts between employees...are not the business of the federal courts.” *Id.*

Several courts have considered plaintiffs' allegations that their employers' denial of permission to telework constituted discrimination, but none has squarely decided whether such a denial could constitute unlawful discrimination.

- In *Thompson v. Sears, Roebuck & Co.*, 2006 U.S. Dist. LEXIS 79354 (D. Pa. 2006), the plaintiff alleged that his employer "denied his repeated requests to telecommute to work even though another employee, Tom Nelson, a white male over fifty years old, who worked in the same position as Plaintiff, was allowed to do so." *Id.* at *7. The employer argued that it prohibited telework arrangements but that the comparator, Nelson, "had been grandfathered in before the ban on telecommuting went into place." *Id.* at *11. The employer also argued that the plaintiff's job "required him to work closely with" colleagues and therefore precluded a telework arrangement. In the alternative, the employer argued that denying the plaintiff's requests to telework was not an adverse employment action because it did not "alter[] the terms of his employment"; the employer noted that the plaintiff knew when he accepted the job that it was located at the employer's facility. *Id.* at *12. The court ruled against the plaintiff on a dispositive motion without reaching the merits of the telework claim.

- In *Cleary v. Gonzales*, 2006 U.S. Dist. LEXIS 71314 (D. Ohio 2006), the plaintiff alleged that his employer discriminated against him based on his race, sex, and age, and retaliated against him for protected activities, by denying him permission to telework. The court did not reach the merits of this claim.

- In *Davis v. Lockheed Martin Ops Support, Inc.*, 84 F. Supp. 2d 707 (D. Md. 2000), the plaintiff alleged that her employer discriminated against her based on her sex by denying her "a flexible home work schedule," while granting such a schedule to a

“similarly situated male employee with a disability.” *Id.* at 715. The court rejected this claim because the male comparator “was not similarly situated.” *Id.*

It is likely that allegations of discrimination based on teleworking and of discriminatory denial of teleworking will both increase as more employees work from home. This should not deter employers from offering the option of telework where appropriate, as it offers numerous advantages to both employers and employees. Well thought-out policies that are administered fairly will help prevent litigation. Several organizations are looking at best practices in this area, including:

- The Center for WorkLife Law, “a research and advocacy center that seeks to eliminate employment discrimination against mothers and other family caregivers such as adult children of aging parents.” <http://www.worklifelaw.org/AboutUs.html>
- The Center for Work-Life Policy, which “undertakes research and works with employers to design, promote, and implement workplace policies that increase productivity and enhance personal/family well-being. CWLP is committed to promoting policies that enable individuals to realize their full potential across the divides of gender, race and class.” <http://www.worklifepolicy.org/index.php/pageID/26>