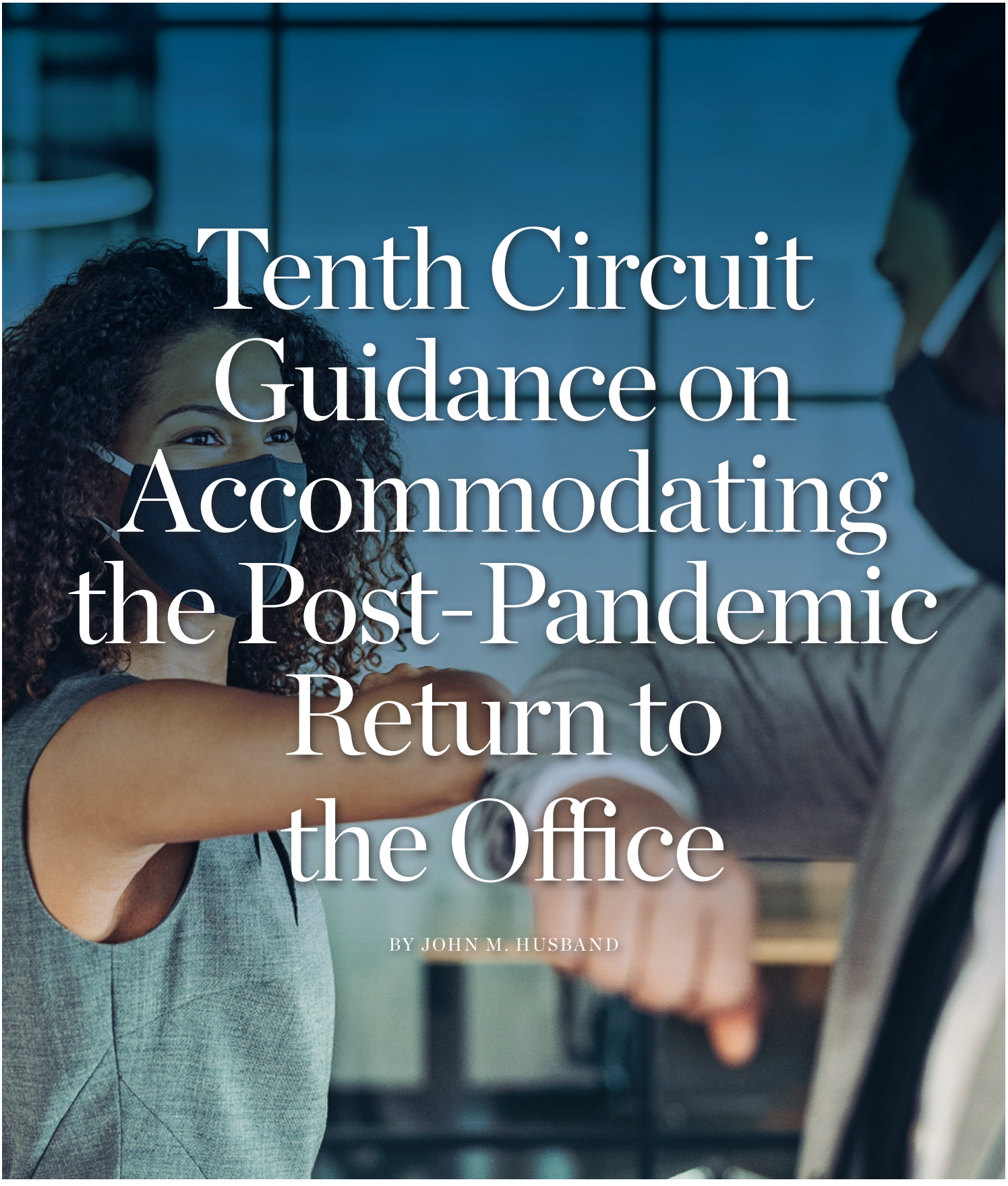

Tenth Circuit Guidance on Accommodating the Post-Pandemic Return to the Office

BY JOHN M. HUSBAND

This article discusses the recent Tenth Circuit Court of Appeals opinion in Unrein v. PHC–Fort Morgan, Inc.*, which clarifies the analysis of essential job functions under the Americans with Disabilities Act.*

The COVID-19 pandemic has demonstrated that many employees can perform their jobs effectively on nontraditional schedules and at remote locations. As vaccination rates increase and governmental bodies ease pandemic-related restrictions, employers are planning for employees to return to the office. However, some employees will likely request ongoing flexible schedules or remote work arrangements due to concerns about COVID-19 or underlying health conditions. Such requests can implicate the Americans with Disabilities Act (ADA).

This article discusses the recent Tenth Circuit Court of Appeals opinion *Unrein v. PHC–Fort Morgan, Inc.*,[1] which provides much needed guidance for analyzing work accommodations under the ADA.

The ADA Framework

The ADA forbids discrimination against disabled individuals. As to employment, the ADA prohibits discrimination "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[2]

In *Hennagir v. Utah Department of Corrections*[3] the Tenth Circuit set out the standard for proving an ADA discrimination claim. An employee must

1. meet the ADA's definition of "disabled,"
2. be qualified to perform the essential job functions with or without reasonable accommodation, and
3. have suffered discrimination on the basis of the disability.

More than any other employment law, the ADA specifically defines its terms, which the courts have largely construed. Language such as "qualified individual with a disability," "with or without reasonable accommodation," "undue burden," "substantially limits a major life activity," and "essential functions of the job" are terms of art that courts have given meaning to. In *Unrein*, the Tenth Court clarified further the meaning of "essential functions of the job." Practitioners can use this guidance to analyze whether particular jobs require accommodations under the ADA, particularly as the workplace recovers from the COVID-19 pandemic.

Essential Job Functions

"Essential functions of the job" has long eluded a precise definition. The Equal Employment Opportunity Commission (EEOC) regulations define "essential functions" to mean the performance of duties that are "fundamental" but not "marginal."[4] Although an employer's judgment about which functions are considered essential is given considerable deference, courts must review the particular facts of each situation under the totality of the circumstances. Relevant factors in this analysis include written job descriptions, time spent on the function, the impact of not requiring the employee to perform the task, the impact on other employees, and the work experience of past and current employees in similar jobs.[5]

An essential part of the analysis revolves around the fundamental job function. In the current remote working world of the pandemic, the central question is whether physical presence at a place of employment on a set and predictable schedule is an essential job function. The ADA defines essential functions of a position to include "the fundamental job duties of the employment position the individual with the disability holds or desires."[6] In *Hennagir*, the Tenth Circuit stated that the employee bears the burden of showing his or her ability, with or without reasonable accommodation, to perform the essential job functions. But other Tenth Circuit authority makes clear that the employer bears the burden of demonstrating that a job function is essential. On this point, the Tenth Circuit has held that courts must give consideration to the employer's judgment as to which job functions are essential,[7] stating further that it "will not second guess the employer's judgment when it's description is job related, uniformly enforced, and consistent with business necessity."[8]

The *Unrein* Opinion

The facts in *Unrein* were not disputed. Unrein became legally blind after years of working as a clinical dietician at a hospital. The hospital initially accommodated Unrein's blindness by providing special magnifying equipment at the hospital, but she lived about 60 miles from the hospital and became unable to drive herself to work. Unrein was also unable to secure a ride service or public transportation, so she relied on friends and family for work transportation. As a result, her ability to get to and from work was inconsistent, and she was unable to keep a predictable work schedule. Unrein therefore requested an accommodation to work a flexible work schedule, without a set schedule.

Rather than summarily deny Unrein's request, the hospital accommodated her with limitations to ensure the flexible schedule did not adversely impact patient care or place undue burdens on other employees. But over the course of 15 months Unrein's performance declined, as did her patient satisfaction scores. The hospital concluded that Unrein's inability to be physically present at the hospital on a regular, predictable schedule was not working, so it ended the flexible work arrangement. Unrein then asked the hospital to reinstate her request and, later, to telecommute full time.

While these requests were pending, Unrein requested and the hospital approved her for full

time medical leave for issues unrelated to her blindness. After seven months of medical leave, Unrein was approved for long term disability and social security benefits. At that point, the hospital terminated her employment. Nevertheless, the hospital offered to continue discussing other accommodations with Unrein and encouraged her to apply for other open hospital positions for which she was qualified. She never did so.

The ADA Claim

Unrein sued the hospital, claiming, among other things, that the hospital violated the ADA by failing to accommodate her vision disability and engage in an interactive process. The accommodation issue turned on whether her physical presence at the hospital on a set and predictable schedule was an essential job function of the clinical dietician position. The district court found that it was, and the hospital was not required to eliminate this requirement. Further, in listing the clinical dietician job functions, the district court explained that each was job-related, uniformly enforced, and consistent with business necessity. Accordingly, it held that Unrein's accommodation request for a flexible work schedule was not reasonable under the ADA.

The Tenth Circuit Weighs In

On appeal, the Tenth Circuit also focused its analysis on Unrein's essential job functions. It noted that essential functions of the clinical dietician position included working in close contact with patients and covering most of the hospital, and it cited the district court's opinion that "an essential job function of the Clinical Dietician position is physical presence at the hospital on a set and predictable schedule . . . to ensure quality patient care."[9] Given that Unrein's flexible schedule was unpredictable, and she could never guarantee when, if, or for how long she could be physically present at the hospital on a given day, the Tenth Circuit found that her request "therefore sought relief from physical presence at the hospital on a set and predictable schedule, which is an unreasonable accommodation as a matter of law."[10]

The Tenth Circuit also found that Unrein's requested accommodation was unreasonable as a matter of common sense. Chief Judge Tymkovich noted that Unrein's flexible schedule request sought an accommodation for her transposition barrier, a problem unrelated to an essential job function or a privilege of employment. Accordingly, the hospital had no legal obligation to accommodate her request.

The Tenth Circuit noted that an employer cannot control where an employee lives or how an employee arranges work transportation, nor is it required to accommodate employee transportation unless it is a job privilege. For example, if a non-disabled employee held the same clinical dietician position as Unrein and could no longer be physically present at the hospital on a set and predicable schedule due to car trouble, the hospital would have no obligation to provide such employee a flexible schedule. "Whether a transportation barrier is caused by a broken car or legal blindness and unreliable rides, the analysis of an employer's obligation should not change if transportation is unrelated to an essential job function and not a privilege of employment."[11]

Practitioner Takeaways

Employment practitioners faced with employee requests for accommodations to work outside of the office or to work flexible schedules can look to *Unrein* for guidance on whether physical presence at a place of employment on a set and predictable schedule is an essential job function. Specifically,

- employers should follow the example set by the hospital by working to accommodate disabled employees. Employers who can show their efforts to follow the ADA are often better able to defend against claims than those who summarily deny a request.
- employers should continue to engage employees in an interactive process to determine whether physical presence at the office is essential. This analysis requires review of all impacts, both positive and negative, of nontraditional schedules and/or a remote workforce. Counsel for employees can participate in this process by emphasizing the benefits of nontraditional work arrangements.
- employers should not feel pressed to eliminate essential job functions, which can include being physically present at work on a set, predictable schedule.

Conclusion

The ADA prohibits employment discrimination, but its accommodations requirements have limits. *Unrein* reinforces that ADA accommodations are reasonable when related to essential job functions but may not be required for conditions outside the workplace that may affect an employee's ability to perform a job. CL

John M. Husband is a partner in Holland & Hart, LLP's Labor & Employment practice group in Denver. He is a fellow of the College of Labor and Employment Lawyers and has a nationally recognized labor and employment practice.

Coordinating Editor: John Husband, jhusband@hollandhart.com

NOTES

1. *Unrein v. PHC—Fort Morgan, Inc.*, 993 F.3d 873 (10th Cir. 2021).
2. 42 USC § 12112(a).
3. *Hennagir v. Utah Dep't of Corrs.*, 587 F.3d 1255, 1261 (10th Cir. 2009).
4. 29 CFR § 1630.2(n)(1).
5. 29 CFR § 1630.2(n).
6. *Id.*
7. *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1191 (10th Cir. 2003). *See also* 42 USC § 12111(8).
8. *Mason v. Avaya Comm'ns Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004).
9. *Unrein*, 993 F.3d at 877.
10. *Id.*
11. *Id.* at 878.