

Requests for Remote Work Accommodations Require Individualized Assessments

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As more employers are requiring their employees return to the workplace, a recent decision from the U.S. District Court for the Eastern District of Pennsylvania, *Oross v. Kutztown University*, suggests that employers should reconsider any policy that would categorically deny employee requests for remote work. Though employers may attempt to justify such policies on the bases that in-person employee attendance is an essential function of the position, or that an accommodation to work remotely would fundamentally alter the nature or operation of the business and thereby constitute an undue burden, the *Kutztown University* decision demonstrates that at least one court would disagree with such a bright line approach.

In *Kutztown University*, an associate professor who had recently undergone a heart transplant sued the university after it denied his request to teach and hold office hours remotely during the Fall 2021 semester. The professor's transplant required him to take immunosuppressive medications to reduce his risk of organ rejection and subsequent loss of good heart function, rendering him particularly vulnerable to contracting COVID-19. In denying the request, the university relied on its determination that the ability to teach in-person was an essential function of the position and converting classes from in-person to online would be a fundamental alteration of the university's course offering to students. Although the university said that it had performed an individualized assessment before concluding that the professor's request for remote work would create an undue hardship on the university, the court found otherwise. In reaching this conclusion, the court noted that the university denied all other requests by its faculty members for remote teaching accommodations.

The professor claimed that the university's denial of his request for remote work constituted intentional disability discrimination, failure to accommodate, and interference with his rights under the Rehabilitation Act of 1973 (the Rehabilitation Act), an analog of the Americans with Disabilities Act (ADA) and analyzed under the same standards as the ADA. Following discovery, the professor and moved for summary judgment on those claims, amongst others.

In response, the university argued that: (1) the professor was not a "qualified individual" because he was only willing to teach remotely and teaching in-person was an essential function of the role; and (2) even if the professor was a qualified individual, granting his request would fundamentally alter the nature or operation of the university and thereby impose an undue burden.

The court found the university's arguments unavailing and granted the professor's motion for summary judgment.

The court's key factual findings are outlined below:

- **There Was Insufficient Evidence That In-Person Teaching Was an Essential Function.** The court noted a lack of written evidence that in-person teaching was an essential function of the role. Indeed, nothing in the union agreement, job description, or course description stated that in-person teaching was an essential function. As a result, although the determination of whether a job duty is an essential function is typically a question for the jury, the court concluded that there were no factual issues for the jury to resolve, and that, as a matter of law, in-person instruction was not an essential function.
- **Prior and Contemporaneous Remote Teaching at the University Weighed Against Finding That In-Person Teaching Was an Essential Function.** The court found that the university's position that in-person teaching was an essential function, was further undermined by the fact that the university offered online courses before the COVID-19 pandemic, allowed the professor to teach classes remotely before the pandemic, and offered several courses through remote teaching during the Fall 2021 semester at issue. The court's approach of weighing the university's prior/contemporaneous allowance of remote teaching is consistent with current [EEOC guidance](#), which notes that previous and/or temporary telework experience is relevant in determining whether in-person performance is an essential function.
- **There Was Insufficient Evidence That Allowing Remote Instruction Would Fundamentally Alter the Nature or Operations of the University and Thereby Impose an Undue Burden.** Having concluded that the professor was a "qualified individual" under the Rehabilitation Act, the court next analyzed whether the university had established that granting the accommodation would have imposed an undue burden on the university. In finding the university had failed to make the requisite showing, the court noted that there was no evidence that allowing remote instruction would involve significant difficulty or expense. The court also expressed doubts that the university could make such a showing, noting that the university had an infrastructure in place to support remote teaching as evidenced by its remote learning offerings during the pandemic and the Fall 2021 semester at issue. The court also found that allowing the professor to teach his four courses remotely, while the vast majority of the university's courses continued to be taught in-person, "would not have fundamentally altered the university's pedagogical model." Finally, the court also held that "student preferences [for in-person instruction] simply do not qualify as undue burden under the [Rehabilitation Act] and, in any event, must yield to the requirements of [the Act]."
- **An Inflexible Policy Which Denied Requests for Remote Work Constituted Both a Failure to Accommodate and Interference with the Professor's Rights Under the Rehabilitation Act.** The court summarily concluded that the university had effectively applied an inflexible policy that would "not permit remote teaching to any high-risk faculty member for the Fall 2021 Semester no matter what the individual's circumstances were" and, for that reason, the professor was entitled to summary judgment on his failure to accommodate and interference claims.^[1]

The *Kutztown University* decision sets forth some helpful principles for employers to follow to ensure that their good faith desire to have employees return to the workplace does not conflict with employee rights that may exist

under federal law, including the Rehabilitation Act and the ADA. When drafting return to work policies, keep in mind the need to be flexible and to engage in an individualized assessment of all requests for exemptions or accommodations to the policy. *Kutztown University* reminds us that a one-size-fits all approach to a return-to-work policy will be subject to challenges.

If you are considering a return to the workplace policy and have questions or need assistance, members of the Troutman Pepper Labor and Employment and Higher Education Groups have experience in this area and are available to help.

[1] The ADA contains a similar provision prohibiting interference with qualified individuals' rights under that statute. See § 42 U.S.C. 12203(b) ("It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.").

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