

REMOTE WORK AND THE FUTURE OF DISABILITY ACCOMMODATIONS

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When the Americans with Disabilities Act was originally enacted in 1990, and later amended in 2008, technology had not yet advanced to where it is today. In the past decade, sophisticated computer applications and programs have become commonplace. These advances in technology, have enabled millions of employees to work from home since the onset of the Covid-19 pandemic in March 2020. During the pandemic, more than half of the national labor force worked remotely. By most estimates, a significant percentage of the workforce will continue to work remotely, at least part time, even after the pandemic ends. This Article argues that people with disabilities, like their nondisabled colleagues, should enjoy the benefits of our new remote workplace culture.

For employees with disabilities, Title I of the Americans with Disabilities (ADA) protects their right to accommodations in the workplace. Over the years, courts have been called upon to resolve disputes between disabled employees and their employers regarding whether or not an employee's request to work remotely is a "reasonable accommodation" under Title I. An examination of the cases from every federal circuit court of appeals over the last decade reveals that most courts rule in favor of employers. However, due to recent changes in the workplace as a result of the Covid-19 pandemic, including greater reliance on communication technologies, the author argues that more courts should recognize remote work as a reasonable workplace accommodation for qualified employees. While it is true that not all employees—with or without disabilities—want to work from home, and not all jobs can be done remotely, increasing

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opportunities for remote work as a reasonable accommodation furthers the goal of the ADA to promote employment and economic self-sufficiency of disabled people. Remote work opportunities also may challenge the ongoing and systemic ableism that exists within many workplaces today. Further, while discussions of the future of remote work have been a “hot topic” during the pandemic, this Article is the first to systemically review and analyze the state of remote work as a disability accommodation under the ADA. This Article incorporates legal analysis and social science evidence in support of its argument for remote work as a reasonable accommodation. This Article concludes with recommendations for changes to the applicable EEOC regulations which would clarify that remote work or “telework,” the term used in the current regulations, is a reasonable accommodation for qualified employees under Title I of the ADA. Such changes are necessary to re-envision remote work as the future of disability accommodations under the ADA.

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INTRODUCTION

The Covid-19 pandemic has wreaked havoc throughout the world, with millions of people dead, and hundreds of thousands of employees either losing their jobs or being sent home to work.¹ Prior to the pandemic, some workplaces began to experiment with remote work.² However during the pandemic, the number of remote workers in the United States increased exponentially.³ As of April 2020, sixty-six percent of the United States labor force was working remotely, at least part-time, with approximately forty-two percent of the work force working remotely full-time, as of June 2020.⁴ As of May

¹ See generally *Coronavirus Resource Center*, JOHNS HOPKINS UNIV. & MED., <https://coronavirus.jhu.edu/> [<https://perma.cc/Y4FG-S4J6>] (last visited Feb. 20, 2022) (displaying the most current count of deaths in the United States due to Covid-19); *Tracking the Covid-19 Economy's Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POLY PRIORITIES, <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and> [<https://perma.cc/XKS9-RRYM>] (last updated Feb. 10, 2022) (discussing the effect of the Covid-19 pandemic on food, housing, and employment); Ruth Simon, *Covid-19's Toll on U.S. Business? 200,000 Extra Closures in Pandemic's First Year*, WALL ST. J. (Apr. 16, 2021), <https://www.wsj.com/articles/covid-19s-toll-on-u-s-business-200-000-extra-closures-in-pandemics-first-year-11618580619> [<https://perma.cc/2N4N-QHLT>] (describing the extent of business failures within the United States).

² Prior to the pandemic, "flexible work" arrangements were "seen as a perk." A 2018 survey found that only approximately three percent of U.S. employees worked from home more than half of the time. Cal Newport, *Why Remote Work Is So Hard—and How it Can Be Fixed*, NEW YORKER (May 26, 2020), <https://www.newyorker.com/culture/annals-of-inquiry/can-remote-work-be-fixed> [<https://perma.cc/4NBP-QD3L>].

³ See *66% of U.S. Employees Are Working Remotely at Least Part-Time During the Covid-19 Pandemic*, CISION PR NEWSWIRE (Apr. 16, 2020), <https://www.prnewswire.com/news-releases/66-of-us-employees-are-working-remotely-at-least-part-time-during-the-covid-19-pandemic-301041859.html> [<https://perma.cc/5EF8-CVVY>]. "From 1997 to 2010, the number of people who worked at least [one] day a week at home increased by about 4.2 million, or from 7.0 percent of all employed people to 9.5 percent." PETER J. MATEYKA, MELANIE A. RAPINO & LIANA CHRISTIN LANDIVAR, U.S. DEP'T COMMERCE, HOUSEHOLD ECONOMIC STUDIES, P70-132, HOME-BASED WORKERS IN THE UNITED STATES: 2010, at 3 (2012), <https://www2.census.gov/library/publications/2012/demo/p70-132.pdf> [<https://perma.cc/FN43-M6RU>]. As of March 13, 2020, about thirty-one percent of Americans were working remotely "specifically out of concern about the coronavirus," increasing to sixty-three percent by April 20th. Adam Hickman & Lydia Saad, *Reviewing Remote Work in the U.S. Under Covid-19*, GALLUP (May 22, 2020), <https://news.gallup.com/poll/311375/reviewing-remote-work-covid.aspx> [<https://perma.cc/ZTE6-3ZC6>].

⁴ By April 2020, sixty-six percent of U.S. employees were teleworking at least part-time. *66% of U.S. Employees Are Working Remotely at Least Part-Time During the Covid-19 Pandemic*, supra note 3. As of June 2020, forty-two percent of U.S. workers were working from home full-time, accounting for more than two-thirds

2021, nine out of ten companies reported their plans to offer remote work as an option, after it becomes safe to return to the workplace.⁵ Thus even after the pandemic ends, it is estimated that 25-30 percent of the U.S. workforce will be working from home at least one day a week.⁶

of economic activity. Nicholas Bloom, *How Working from Home Works Out*, STANFORD INST. FOR ECON. POLY RSCH. (June 2020) <https://siepr.stanford.edu/publications/policy-brief/how-working-home-works-out> [<https://perma.cc/3L68-KHWZ>]. Previously, according to a 2019 survey conducted by the Society for Human Resource Management, almost seventy percent of employers allow teleworking on at least an ad-hoc basis, and approximately a quarter allow it full-time. SOC'Y FOR HUM. RES. MGMT., *LEAVE AND FLEXIBLE WORKING: SHRM EMPLOYEE BENEFITS 2019*, at 8 (2019), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/SHRM%20Employee%20Benefits%202019%20Leave%20and%20Flexible%20Working.pdf> [<https://perma.cc/6LPR-FW45>]. Another 2019 survey found that “[f]orty percent more U.S. employers offer[] flexible workplace options than did five years ago.” *Telecommuting Trend Data*, GLOB. WORKPLACE ANALYTICS, <https://globalworkplaceanalytics.com/telecommuting-statistics> [<https://perma.cc/U3LB-TJRM>] (last updated June 22, 2021).

⁵ Andrea Alexander, Rich Cracknell, Aaron De Smet, Meredith Langstaff, Mihir Mysore & Dan Ravid, *What Executives Are Saying About the Future of Hybrid Work*, MCKINSEY & Co. (May 17, 2021), <https://www.mckinsey.com/business-functions/organization/our-insights/what-executives-are-saying-about-the-future-of-hybrid-work> [<https://perma.cc/Z8HV-MBC7>]; see also Erin Woo, *Work at Home or the Office? Either Way, There's a Start-Up for That*, N.Y. TIMES (Aug. 5, 2021), <https://www.nytimes.com/2021/07/06/technology/hybrid-work-start-ups.html?referringSource=ArticleShare> [<https://perma.cc/4XNQ-4F2M>] (discussing the boom in businesses providing hybrid work options); Morgan Smith, *Twitter, Reddit and 8 Other Companies Offering Permanent Remote or Hybrid Work—and Hiring Right Now*, CNBC (Apr. 13, 2022) <https://www.cnbc.com/2022/04/13/10-companies-that-switched-to-permanent-hybrid-or-remote-work-and-hiring-right-now.html> [<https://perma.cc/68P7-R98M>] (discussing worker demand for remote or hybrid jobs and companies adopting permanent flexible remote work policies).

⁶ See article cited *infra* note 14; see also *Work-at-Home After Covid-19—Our Forecast*, GLOB. WORKPLACE ANALYTICS, <https://globalworkplaceanalytics.com/work-at-home-after-covid-19-our-forecast> [<https://perma.cc/F2KE-PEBV>] (last visited Feb. 22, 2022) (“forecast[ing] that 25-30% of the U.S. workforce will be working-from-home one or more days a week after the pandemic”); Henry Ren, *In 10 Years, ‘Remote Work’ Will Simply be ‘Work.’* BLOOMBERG BUS. ECON. (Feb. 15, 2022), https://www.bloomberg.com/news/articles/2022-02-15/in-10-years-remote-work-will-simply-be-work?utm_campaign=instagram-bio-link&utm_medium=social&utm_source=instagram&utm_content=business [<https://perma.cc/XR86-77WK>] (interviewing a Harvard Business School professor predicting the ongoing normalization of remote work); Te-Ping Chen, *This CEO Lets His Employees Work Whenever They Want—From Wherever They Want*, WALL ST. J. (Feb. 4, 2022), https://www.wsj.com/articles/the-next-wave-in-remote-work-flexibility-in-location-and-hours-11643993475?mod=E2fb&fbclid=IWAR0ybxnvsCBtsMKRMwXTfv7gHmt3cLXzuSTXnE8X8aYF5FsnI5E3J4PduBI_aem_AXJ7c2VnDZGdav4wRefhCWqv5hJnCJqQrztDr9rLnQbbOufCGMqHi0sYbMIPdyuyvCVXsXNsxUPc0bhCN6nFaaQ5H2egN0pqHYpAATFfnPSiFr2SfGQ_1zfPb9hPHcGhC [<https://perma.cc/AKD4-VPYE>] (interviewing a CEO embracing a fully remote and asynchronous work model); Danielle Abril, *Future of Work: ‘The Office as We Know it is Over,’ Airbnb CEO Says*, WASH. POST (May 18, 2022), <https://>

Among the potential beneficiaries of remote work are people with disabilities, including those who are unable to get to work because of lack of accessible transportation, or for whom workplaces are inaccessible. Remote work furthers the goal of the Americans with Disabilities Act (ADA) by increasing employment opportunities and economic self-sufficiency for people with disabilities. As Thomas Friedman has observed, “As more work becomes modular, digitized and disconnected from an office or factory, many more diverse groups of people—those living in rural areas, minorities, stay-at-home moms and dads and those with disabilities—will be able to compete for it from their homes.”⁷

While discussions of the future of remote work have been a “hot topic” during the pandemic, this Article is the first to systemically review and analyze the state of remote work as a disability accommodation under the ADA.⁸ This Article

www.washingtonpost.com/technology/2022/05/18/airbnb-remote-work/ [<https://perma.cc/5577-WUZZ>] (interviewing Airbnb’s CEO on the benefits and attraction of the company’s new flexible remote work policy).

⁷ Thomas L. Friedman, *After the Pandemic, a Revolution in Education and Work Awaits*, N.Y. TIMES (Oct. 20, 2020), <https://www.nytimes.com/2020/10/20/opinion/covid-education-work.html> [<https://perma.cc/7DYQ-G24R>].

⁸ The research for this article was completed in 2020, posted on SSRN in August 2021, and published in fall/winter 2022. In the interim, other scholars and students published articles on related topics, but none focus on the specific issues discussed here. See, e.g., Kate Strickland, *Remote Work as a Reasonable Accommodation: Implications from the Covid-19 Pandemic*, HARV. C.R.-C.L. L. REV. (Nov. 4, 2021), <https://harvardcrcl.org/remote-work-as-a-reasonable-accommodation-implications-from-the-covid-19-pandemic/> [<https://perma.cc/MVN5-WVYV>] (discussing *Moncrief v. ISS Facility Services* as a signal that the Equal Employment Opportunity Commission (EEOC) may be more intensely scrutinizing denial of telework as a reasonable accommodation); Nicole Buonocore Porter, *Working While Mothering During the Pandemic and Beyond*, 78 WASH. & LEE L. REV. ONLINE 1 (2021) (exploring remote work as a reasonable accommodation for working mothers before, during, and after the pandemic); Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J. L. & POL’Y 203 (2021) (discussing the impact of the pandemic on the “full-time face-time norm” previously used by judges to deny telework and flexible working arrangement accommodations); Stacy A. Hickox & Chenwei Liao, *Remote Work as an Accommodation for Employees with Disabilities*, 38 HOFSTRA LAB. & EMP. L.J. 25 (2020) (empirically evaluating court claims seeking remote work as an accommodation and identifying four factors to evaluate the reasonableness of such arrangements); D’Andra Millsap Shu, *Remote Work Disability Accommodations in the Post-Pandemic Workplace: The Need for Evidence-Driven Analysis*, 95 TEMP. L. REV. (forthcoming Feb. 2023) (identifying the evidentiary practices courts use to undermine accommodation claims for remote work and evaluating changing patterns in such practices in light of the Covid-19 pandemic). Examples of the student notes include Baylee Kalmbach, Comment, *A Covid Silver Lining? How Telework May Be a Reasonable Accommodation After All*, 90 U. CIN. L. REV. 1294 (2022); Caroline Headrick, Note, *Remote Work “Reasonable”? Why the Covid-19 Pandemic Calls for a Reinterpretation of the “Reasonable Accommodation” Standard, and How*

incorporates legal analysis and social science evidence in support of the argument that remote work should be recognized as a reasonable accommodation for qualified disabled employees under Title I of the ADA, especially considering the popularity of remote work created by the pandemic.

Part I of the Article provides a comprehensive analysis of the statutory provisions relevant to the rights of disabled employees to reasonable accommodations, including the right to remote work or “telework” under Title I. Part II proceeds to examine the applicable Equal Employment Opportunity Commission (EEOC) Guidances and regulations on remote work, including the most recent EEOC statement on the impact of Covid-19.⁹ The Article then proceeds in Part III to present an analysis of the more than two dozen cases over the past decade from every federal circuit court of appeals that has addressed the question of whether and under what circumstances an employee is entitled to work remotely as an accommodation under Title I. Included here are the most recent cases from federal courts upholding the right to remote work. Because neither the law nor the applicable regulations clearly define when remote work should be permitted, courts are left to decide these cases with little regulatory guidance. As a result, most courts simply defer to the employers’ decisions to deny remote work requests. However, a review of these cases indicates their lack of consistency regarding what evidence is required; it also reveals the ableism by employers as well as the courts that is embedded within many of these decisions.

Part IV addresses specifically the role of ableism within the contemporary workplace from a Critical Disability Studies

Companies Can Respond, 40 MINN. J. L. & INEQ. 211 (2022); Katie Deutsch, Comment, *The Future of Teleworking Accommodations under the ADA Post-Covid-19*, 70 U. KAN. L. REV. 105 (2021); and Rebecca Gillette, Note, *The New Normal? Rethinking Telework Accommodations in a Post Covid-19 World*, 9 BELMONT L. REV. 231 (2021).

⁹ *What You Should Know About Covid-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [https://perma.cc/QZ28-CMMR] (last updated July 12, 2022) [hereinafter *What You Should Know About Covid-19 and the ADA*]; U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2003-1, WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION (Feb. 3, 2003), <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation> [https://perma.cc/4BJJ-NEL8]; U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2016-1, EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT (2016), <https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act> [https://perma.cc/CEF2-5464].

perspective. For disabled people, ableism denies them their right to be treated equally in the workplace. In light of research on the prevalence of ableism in the workplace, together with the potential benefits of remote work, Part V of the Article concludes with a Call to Action to the EEOC to amend the current Title I regulations to provide greater clarity to employers as well as the courts regarding an employee's right to remote work as an accommodation. This much-needed clarity also will benefit employees who currently qualify as individuals with disabilities under the ADA as well as the increasing number of people who will become disabled as a result of the long-term health effects of Covid-19.¹⁰ The Article concludes that the proposed changes to the regulations are necessary to re-envision remote work as the future of disability accommodations under the ADA.

I

THE RIGHT TO REMOTE WORK AS A REASONABLE ACCOMMODATION UNDER TITLE I OF THE ADA

A. Remote Work as a Reasonable Accommodation

The Americans with Disabilities Act was enacted in 1990 to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹¹ In 2008, the law was amended to ensure a

¹⁰ See *Covid-19 (Coronavirus): Long-Term Effects*, MAYO CLINIC (June 28, 2022), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351> [<https://perma.cc/GK6J-B8JN>]; Richard C. Becker, *Anticipating the Long-Term Cardiovascular Effects of Covid-19*, 50 J. THROMBOSIS & THROMBOLYSIS 512 (2020); T. Y. M. Leung et al., *Short- and Potential Long-Term Adverse Health Outcomes of Covid-19: A Rapid Review*, 9 EMERGING MICROBES & INFECTIONS 2190 (2020); Carlos del Rio, Lauren F. Collins & Preeti Malani, *Long-Term Health Consequences of Covid-19*, 324 JAMA 1723 (2020).

¹¹ 42 U.S.C. § 12101(b)(1); *Introduction to the Americans with Disabilities Act*, U.S. DEPT OF JUST. C.R. DIV., <https://beta.ada.gov/topics/intro-to-ada/> [<https://perma.cc/JZ55-ZFHW>] (last visited Jan. 12, 2022). In 2008, Congress amended the ADA and stated that the purposes of the amendments were

(1) to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA; (2) to reject the [holdings of] the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases . . . [and] (6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations . . . to be consistent with [the 2008 amendments].

42 U.S.C. § 12101 note (Findings and Purposes).

broad interpretation of the definition of disability, and, generally, to extend the scope of the law's coverage by providing "clear, strong, consistent, enforceable standards addressing discrimination."¹² Yet when the ADA was originally enacted in 1990, and even when it was substantially amended in 2008, technology had not yet advanced to where it is today. No one could have imagined the extent to which digital technology, such as smartphones, Zoom, and videoconferencing, would penetrate all aspects of our daily lives, as it does today. As the Sixth Circuit has observed, "[T]echnologies that most people could not have conceived of in the 1990s are now commonplace."¹³

While not all jobs can be done remotely and not all employees—with or without disabilities—want to work remotely, a recent Harvard study found that about eighty-one percent of employees surveyed said they either don't want to return to the office after the pandemic, or that they would prefer a hybrid schedule, working two or three days a week from home.¹⁴ Already, more than seventy percent of employers

¹² 42 U.S.C. § 12101(b)(3). The ADA won broad bipartisan support in large part because its goal was limited, focusing on eliminating obstacles that prevent people with disabilities from becoming productive members of society rather than addressing underlying inequalities. For a critique of the ADA regarding its limited role in addressing discrimination in employment rather than inequality, more generally, see Arlene S. Kanter, *A Comparative View of Equality Under the UN Convention on the Rights of People with Disabilities and the Disability Laws of the United States and Canada*, 32 WINDSOR Y.B. ACCESS JUST. 65, 77–87 (2015); see also Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities*, 63 DRAKE L. REV. 819, 819 (2015) [hereinafter Kanter, *Americans with Disabilities Act at 25 Years*] (arguing that the ADA is not intended to achieve the goal of equality for people with disabilities); SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 112–13 (2009) (exploring the history of the ADA along with the role of activists and the Supreme Court to understand why the disability rights movement was not as effective as it should have been).

¹³ EEOC v. Ford Motor Co., 752 F.3d 634, 642 (6th Cir. 2014).

¹⁴ Terry Collins, *Covid-19 Impact: Work from Home More Appealing Than Return to 'Business as Usual,' Harvard Survey Shows*, USA TODAY (Mar. 25, 2021), <https://www.usatoday.com/story/tech/2021/03/25/covid-remote-work-office-return-survey-zoom-meeting-fatigue/6989446002/> [<https://perma.cc/P42S-9TJY>]. Even after the pandemic passes, employees may still suffer from the largely unknown, long-term effects of Covid-19. See *supra* note 10.

Another recent Gallup survey found sixty percent of Americans would prefer to work remotely "as much as possible" when restrictions are lifted, with forty percent saying they preferred to return to the workplace. Maria Cramer & Mihir Zaveri, *What if You Don't Want to Go Back to the Office?*, N.Y. TIMES, <https://www.nytimes.com/2020/05/05/business/pandemic-work-from-home-coronavirus.html?searchResultPosition=61> [<https://perma.cc/7ATK-GQR8>] (last updated May 31, 2020). Another 2019 survey found that eighty-two percent of workers prefer to work from home at least some of the time. *Telecommuting Trend Data*, GLOB. WORKPLACE ANALYTICS, *supra* note 4. Another 2020 survey by Stanford

now offer remote work as an option for their employees.¹⁵ As the risks of Covid-19 subside, and more employees are required to return to the workplace, the number of employees seeking to work remotely will likely increase.¹⁶ In the meantime, employers as well as courts, will be asked to consider when, and under what circumstances, remote work

economist Nicholas Bloom found that in general, employees would prefer to work from home 2.5 days a week. Christopher Shea, *The Great Pandemic Work-From-Home Experiment was a Remarkable Success*, WASH. POST (Oct. 14, 2021), https://www.washingtonpost.com/outlook/the-great-pandemic-work-from-home-experiment-was-a-remarkable-success/2021/10/14/c21123d0-2c64-11ec-985d-3150f7e106b2_story.html [https://perma.cc/5PXR-RJKC].

¹⁵ Robert Iafolla, *Work at Home Gets Skeptical Eye From Courts as Disability Issue*, BLOOMBERG L. (Feb. 21, 2019), <https://news.bloomberglaw.com/daily-labor-report/work-at-home-gets-skeptical-eye-from-courts-as-disability-issue> [https://perma.cc/KAG8-MLLR] (reporting on a study by WorlDatWork that found seventy-eight percent of respondents allow telework on an ad-hoc basis and fifty-seven percent full time). A recent survey found that nearly three out of four private companies may permanently transition at least five percent of their on-site workforce to remote work. See Press Release, Gartner, *Gartner CFO Survey Reveals 74% Intend to Shift Some Employees to Remote Work Permanently* (Apr. 3, 2020), <https://www.gartner.com/en/newsroom/press-releases/2020-04-03-gartner-cfo-surey-reveals-74-percent-of-organizations-to-shift-some-employees-to-remote-work-permanently2> [https://perma.cc/4DHG-FDHA]; see also Jonathan I. Dingel & Brent Neiman, *How Many Jobs Can Be Done at Home?* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26948, 2020) (estimating at least thirty-seven percent of jobs can be performed remotely).

¹⁶ Remote work options may save industries particularly hit hard by the pandemic, including higher education. See Lindsay Ellis, *'A Mass Exodus': Inflexible Remote-Work Policies Could Bring Major Staff Turnover*, CHRON. HIGHER EDUC. (June 17, 2021), <https://www.chronicle.com/article/a-mass-exodus-inflexible-remote-work-policies-may-bring-major-staff-turnover-for-colleges> [https://perma.cc/BDT4-JR46]; see also Bryan Robinson, *Future of Work: What the Post-Pandemic Workplace Holds For Remote Workers' Careers*, FORBES (May 2, 2021), <https://www.forbes.com/sites/bryanrobinson/2021/05/02/future-of-work-what-the-post-pandemic-workplace-holds-for-remote-workers-careers/?sh=4b2fe54f7f5b> [https://perma.cc/BJ4B-R2TP] (discussing how large companies are "hedging their bets on long-term hybrid work models to satisfy employee demands for flexibility, but prioritizing mental health and wellness will also be critical to appease new workforce priorities in the office of the future"); Katherine Guyot & Isabel V. Sawhill, *Telecommuting Will Likely Continue Long After the Pandemic*, BROOKINGS (Apr. 6, 2020), <https://www.brookings.edu/blog/up-front/2020/04/06/telecommuting-will-likely-continue-long-after-the-pandemic/> [https://perma.cc/WMB9-QSSG] (observing that employers who have already invested in making tele-work possible will continue to use their investments into the future); C. Todd Lopez, *For Some, Teleworking May Continue as a Post-Covid-19 Option*, U.S. DEPT OF DEF. (May 21, 2020), <https://www.defense.gov/Explore/News/Article/Article/2194233/for-some-teleworking-may-continue-as-post-covid-19-option/> [https://perma.cc/27EP-NVAY] (discussing how the tools and infrastructure put in place to facilitate remote work will likely remain in place after the pandemic).

will be permitted as a reasonable accommodation under the ADA.¹⁷

Under Title I of the ADA, employers are required to provide reasonable accommodations to qualified employees.¹⁸ According to the 2003 EEOC Guidance, remote work is an example of a modification of a workplace rule that may be considered a reasonable accommodation.¹⁹ However, an analysis of more than two dozen cases decided by every circuit court of appeals over the past decade reveals that most courts uphold the employers' decision to deny remote work requests with little, if any, proof of the unreasonableness of remote work in the particular case. Typically, courts defer to the employers' judgement that physical presence in the workplace is an "essential function" of the employee's job that cannot be waived, even as an accommodation for a qualified employee.

Nonetheless, several court decisions have rejected the employers' decisions and have found that remote work is or could be a reasonable accommodation. These courts have either denied the employers' motions for summary judgment (allowing the case to proceed to trial or settlement) or upheld the right of the employees to work remotely as an accommodation. As one court observed, because of advances in technology in the workplace, it will be "rare that any particular type of accommodation will be categorically unreasonable as a matter of law."²⁰

Although the term "reasonable accommodation" is not defined in the law, employers have an affirmative obligation to

¹⁷ See George A. Reeves III & Ben Carney, *EEOC Files First Pandemic-Related Remote-Work Bias Suit*, SHRM (Sept. 17, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eec-files-first-pandemic-related-remote-work-bias-suit.aspx> [<https://perma.cc/29XJ-VD42>] (discussing how the EEOC filed its first case in September 2021 involving remote work after a manager for ISS Facility Services was denied a remote work accommodation request despite having worked remotely from home during the pandemic).

¹⁸ Title I of the ADA prohibits discrimination on the basis of disability in the workplace "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." 42 U.S.C. § 12112(a). An employer's failure to provide a requested accommodation, itself, may constitute discrimination under the law. *Id.*

¹⁹ See U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2003-1, *supra* note 9; see also Kristen M. Ludgate, Note, *Telecommuting and the Americans with Disabilities Act: Is Working at Home a Reasonable Accommodation?*, 81 MINN. L. REV. 1309, 1322–23 (1997) (considering whether and when telecommuting is a reasonable accommodation under the ADA). The United States Supreme Court has not yet weighed in on this issue.

²⁰ *Solomon v. Vilsack*, 763 F.3d 1, 10 (D.C. Cir. 2014).

provide accommodations that would not eliminate an “essential function” of the position.²¹ An essential function is defined as “the fundamental job dut[y] of the employment position the individual with a disability holds or desires.”²² If the function is fundamental to the position, it is essential; if it is marginal or can be waived, it is not essential.²³ Evidence as to whether a particular function is essential, such as physical presence at the workplace, is based on a variety of factors, including the employer’s judgment.²⁴ However, the employer’s judgment is only one of seven factors. Nowhere in the law or the regulations does it state that the employer’s judgment is controlling.²⁵ As one court acknowledged, “The ADA does not

²¹ 29 C.F.R. § 1630.2(o)(1)(ii) (2020). The employer is required to provide the requested accommodations after an interactive process to identify the reasonableness of the accommodations and to enable the employee to show that they can meet the “essential functions of that position” with or without an accommodation. *Id.*; see Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKLEY J. EMP. & Lab. L. 59, 83–84 (2008); see also 29 C.F.R. § 1630.9 (defining what it means to not make “reasonable accommodations”); 29 C.F.R. § 1630.2(o)(3) (calling for an “informal, interactive process with the individual with a disability in need of the accommodation” to “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations”).

²² 29 C.F.R. § 1630.2(n)(1).

²³ An essential function is one without which the position would not exist, or one which a limited number of employees are available to perform, and/or one that is “highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.” 29 C.F.R. § 1630.2(n)(2)(iii). The definition of “qualified person” provides insight as to what is and is not an essential function of a job. 29 C.F.R. § 1630.2(m). Namely, if the employer prepared a written job description for an advertisement, that “description shall be considered evidence of the essential functions of the job”. See 42 U.S.C. § 12111(8).

²⁴ 42 U.S.C. § 12111(8). The employer’s judgment is just one of several factors. Other factors include written job descriptions; the amount of time spent performing that function; the consequences of not performing that function; the terms of a collective bargaining agreement; and the experience of current and past incumbents in that or similar jobs. 29 C.F.R. § 1630.2(n)(3)(i)–(vii). The plaintiff bears the initial burden of establishing that she is a qualified individual who can perform the essential functions of the position with or without one or more accommodations. *Taylor-Novotny v. Health All. Med. Plans, Inc.*, 772 F.3d 478, 493 (7th Cir. 2014); 42 U.S.C. § 12112; 29 C.F.R. § 1630.2(n). The essential-function inquiry is generally considered a factual question, not a question of law. See, e.g., *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565 (7th Cir. 2019) (affirming summary judgment for employer who rescinded remote work approval for an employee after a company merger that changed the job functions of all remote employees); *Brown v. Smith*, 827 F.3d 609, 612 (7th Cir. 2016) (“The essential-function issue is a factual question that was properly put before the jury . . .”).

²⁵ 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n)(3)(i)–(vii). The ADA states only that “consideration shall be given to the employer’s judgment as to what functions of a job are essential.” 42 U.S.C. § 12111(8). Noticeably absent is the word “deference.” The relevant EEOC regulations provide courts with a non-exhaustive

give employers unfettered discretion to decide what is reasonable.”²⁶ Nonetheless, as explained more fully below, most courts simply defer to employers’ decisions denying remote work requests on the grounds that physical presence in the workplace is an essential function that cannot be waived, or that the employee is no longer qualified for the job if the individual does not agree to work on site.²⁷

B. The Employer’s Defenses of Undue Hardship and Direct Threat

Not all employees with disabilities need accommodations to perform the essential functions of the job, and not all employees who need accommodations request them.²⁸ But once an employee requests an accommodation to perform the essential functions of a given position, the employer is required to engage in an “interactive process” with the employee to consider the reasonableness of the requested accom-

list of seven factors to help guide their consideration of the issue. 29 C.F.R. § 1630.2(n)(3). “Whether a particular function is essential is a factual determination that must be made on a [case-by-case] basis.” 29 C.F.R. pt. 1630 app. § 1630.2(n). Several circuits treat the employer’s judgment as just one factor to consider in assessing whether a particular function is essential. See *Rorrer v. City of Stow*, 743 F.3d 1025, 1042 (6th Cir. 2014) (“[T]he court should give ‘consideration’ to the employer’s determination, not ‘deference’”); *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 844–46 (6th Cir. 2018) (reversing the district court decision and remanding the case for trial after finding that full-time presence at work is not an essential function of a job simply because an employer says that it is); see also cases cited *infra* note 115.

²⁶ *Miller v. Ill. Dep’t of Transp.*, 643 F.3d 190, 199 (7th Cir. 2011). With respect to current employees, an accommodation is generally considered “any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to . . . perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.” *The ADA: Your Responsibilities as an Employer*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/publications/ada-your-responsibilities-employer#:~:text=Reasonable%20accommodation%20is%20any%20change,equal%20to%20those%20enjoyed%20by> [<https://perma.cc/S9BH-TP8D>] (last visited Sept. 18, 2022).

²⁷ 42 U.S.C. § 12111(8); 29 C.F.R. pt. 1630 app. § 1630.2(n); see, e.g., *Mason v. Avaya Commc’ns., Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004) (noting that a court should not question employer’s business judgment); *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1191 (10th Cir. 2003) (“Provided that any necessary job specification is job-related, uniformly enforced, and consistent with business necessity, the employer has a right to establish what a job is and what is required to perform it.”); see also cases cited *infra* note 96 (remote work cases decided in favor of the employer). *But see* cases cited in *infra* note 124 (remote work cases decided in favor of the employee).

²⁸ *Reasonable Accommodations*, EMP. ASSISTANCE & RES. NETWORK ON DISABILITY INCLUSION, <https://askearn.org/topics/laws-regulations/americans-with-disabilities-act-ada/reasonable-accommodations/> [<https://perma.cc/V3SM-RBN2>] (last visited Sept. 18, 2022).

modation.²⁹ However, little guidance is provided to employers in the law or the regulations, regarding the meaning and scope of the term “reasonable accommodation.”³⁰

According to the statute, an employer is not required to provide an accommodation that causes an “undue hardship” on the operation of the employer’s business, or one that poses a “direct threat”³¹ to the employee or others at the workplace.³² To demonstrate that an accommodation poses an undue hardship, “an employer would have to show that the cost [of the accommodation] is undue as compared to the employer’s budget.”³³ Because the cost of most accommodations in most cases is *de minimis*,³⁴ one would assume that most employers

²⁹ 29 C.F.R. § 1630.2(o)(3). The specific accommodations listed in the law as reasonable are the following:

- (i) [m]aking existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (ii) job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations.

29 C.F.R. § 1630.2(o)(2)(i)–(ii).

³⁰ See, e.g., Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1122–23 (2010); Mary Hancock, ‘Working from Home’ or ‘Shirking from Home’: *McMillan v. City of New York’s Effect on the ADA*, 16 DUG. BUS. L.J. 151, 159 (2013); Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 532 (2013); Joan T. A. Gabel & Nancy Mansfield, *On the Increasing Presence of Remote Employees: An Analysis of the Internet’s Impact on Employment Law as it Relates to Teleworkers*, 2001 U. ILL. J.L. TECH. & POL’Y 233, 255 (2001) (all of which are discussing this limited guidance and its consequences for interpretation).

³¹ 42 U.S.C. §§ 12112(b)(5)(A), 12182(b)(3); see *Bragdon v. Abbott*, 524 U.S. 624, 648–49 (1998) (considering the interpretation of a “direct threat”).

³² Failure to provide a “reasonable accommodation” is unlawful *unless* the accommodation would pose an “undue hardship” on the operation of the business or a “direct threat” to other employees, and in some cases, the employees themselves. 29 C.F.R. § 1630.9(a); 42 U.S.C. § 12113(b). The legal scholar Mark Weber has observed that reasonable accommodation and undue hardship are “two sides of the same coin” since an accommodation is unreasonable only if it would pose an undue hardship on the employer. Weber, *supra* note 30, at 1119. As Weber writes: “The statutory definition of ‘reasonable accommodation’ does not include any quantitative, financial, or other limitations regarding the extent of the obligation to make changes to a job or work environment.” *Id.* at 1142 (quoting EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, 1999 WL 33305876, at *3 (1999)). However, Nicole Porter disagrees, arguing that “some accommodations are ‘unreasonable’ even though they do not cause an undue hardship to the employer.” See Porter, *supra* note 30, at 545–46.

³³ 29 C.F.R. pt. 1630 app. § 1630.15(d); see 42 U.S.C. § 12112(b)(5)(A).

³⁴ *Benefits and Costs of Accommodation*, JOB ACCOMMODATION NETWORK, <https://askjan.org/topics/costs.cfm> [<https://perma.cc/NE8Q-SXXZ>] (last updated Oct. 21, 2020); see also D.J. Hendricks, Linda C. Batiste, Anne Hirsh, Helen A. Schartz & Peter Blanck, *Cost and Effectiveness of Accommodations in the*

are unable to prove that an accommodation would pose an undue hardship on the operation of their business. Moreover, the ADA does not require the employer to provide any or all the accommodations that the employee requests so long as the employer provides an “effective” accommodation as an alternative.³⁵ Thus, remote work, like any other reasonable accommodation, should be provided if it does not impose an “undue hardship on the” employer.³⁶

A second reason why an employer may refuse to provide a requested accommodation is if the accommodation would “pose a direct threat to the health or safety” of the employee or “other individuals in the workplace.”³⁷ Once the employer identifies a direct threat, the employer must determine whether a

Workplace: Preliminary Results of a Nationwide Study, 25 DISABILITY STUD. 9. (2005) (noting that “[t]he majority of accommodations implemented by those who contacted JAN for assistance were made at little or no cost, and certainly at less cost than employee turnover”).

³⁵ See 29 C.F.R. pt. 1630 app § 1630.9; see U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATIONS AND UNDUE HARDSHIP UNDER THE ADA (2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#N_35 [<https://perma.cc/Z6QR-7UV5>]; see also *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002) (explaining that “the word ‘reasonable’ does not mean ‘effective.’ It is the word ‘accommodation,’ not the word ‘reasonable,’ that conveys the need for effectiveness.”); *Sessoms v. Trs. of Univ. of Pa.*, 739 F.App’x 84, 87 (3d Cir. 2018) (noting, for example, that “[r]easonable accommodation does not entitle an employee to a supervisor ideally suited to her needs”).

³⁶ 42 U.S.C. § 12112(b)(5)(A). An “undue hardship” is one which involves a “significant difficulty or expense,” when considered in light of a number of factors. 29 C.F.R. § 1630.2(p)(1). These factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer’s operation. 42 U.S.C. § 12111(10)(A)–(B); see also 29 C.F.R. § 1630.2(p) (listing these same factors). A simple comparison of the accommodation’s cost to the salary of the employee is not adequate, however. The EEOC Guidance requires that the employer’s overall resources must be considered in determining the presence of an undue hardship. 29 C.F.R. § 1630.2(p)(2)(i). Government and other benefits, such as tax credits and rehabilitation agency grants, must be subtracted before the employer’s costs are calculated. Further, an employer must pay for the portion of an accommodation that would not cause an undue hardship if other funding sources were available to pay for the remainder. 29 C.F.R. § 1630.2(p)(2)(i); see also *Kvorjak v. Maine*, 259 F.3d 48, 58 (1st Cir. 2001) (noting that although the majority upheld the denial of the request to work at home, the dissent found the employer had never presented any evidence of how the accommodation would be harmful to its business).

³⁷ 42 U.S.C. § 12113(b); see 29 C.F.R. § 1630.2(r). “*Direct Threat*” is defined as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. § 1630.2(r). Although the statute refers only to a direct threat to others, the regulations apply the direct threat to the individual as well. The Supreme Court has held that a direct threat may be to either or both the individual and others. See *Chevron U.S.A., Inc., v. Echazabal*, 536 U.S. 73, 78–79 (2002).

reasonable accommodation would either eliminate the risk or reduce it to an acceptable level.³⁸ If that is not possible, the employer is permitted to discharge the employee (or refuse to hire the job applicant) who poses a direct threat.³⁹

The EEOC has determined that the Covid-19 virus presents a direct threat, based on the CDC's recommendation.⁴⁰ In order to eliminate the direct threat posed by Covid-19, employers sent their "non-essential" employees home to work during the pandemic. In addition, any employee with Covid-19—with or without a disability—could be prevented from entering the workplace or removed from the workplace until the employee recovered from Covid-19 or until the employee presented proof of a negative Covid-19 test, indicating the employee was no longer contagious and therefore no longer posing a "direct threat."⁴¹

The direct threat standard also may apply in the context of safety requirements that "screen out or tend to screen out an individual with a disability or a class of individuals with disabilities."⁴² In order to impose safety requirements at a workplace, the employer must demonstrate that any such requirement, including Covid-19 precautions, meets the "direct threat" standard. Applying this standard to the current pandemic, employers may administer Covid-19 testing to employees before they enter the workplace. Based on the results of those tests, the employer may exclude from the workplace any employee who tests positive or who has symptoms associated with Covid-19, since their presence at the workplace would pose a direct threat to the health or safety of others.⁴³ However, for those employees who are working remotely, the employer would not be permitted to require any medical testing or Covid-related inquiries since remote workers

³⁸ 29 C.F.R. § 1630.2(r).

³⁹ *Id.*; see Lisa Guerin, *The Direct Threat Defense Under the ADA*, NOLO, <https://www.nolo.com/legal-encyclopedia/the-direct-threat-defense-under-the-ada.html> [<https://perma.cc/9D9C-Z6S7>] (last visited Sept. 19, 2022).

⁴⁰ *What You Should Know About Covid-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 9.

⁴¹ *Id.*

⁴² 29 C.F.R. pt. 1630 app. § 1630.15(b) and (c). Such testing must also be "job-related . . . [and] consistent with business necessity." *Id.*

⁴³ See *Transcript of March 27, 2020 Outreach Webinar*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q1> [<https://perma.cc/UVR4-YL73>] (last visited Sept. 19, 2022); *What You Should Know About Covid-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 9.

would not be entering the workplace and would therefore pose no threat to their co-workers.⁴⁴

In sum, Title I of the ADA protects the right of qualified employees to perform the essential functions of their jobs, with or without a reasonable accommodation. The law permits employers to deny requests for accommodations that create an “undue hardship” on the employer’s business or pose a “direct threat” to the employee or other workers. Although most courts have rejected a legal presumption against remote work,⁴⁵ courts generally defer to the judgment of employers denying requests to work remotely, citing physical presence at the workplace as an essential job function of the job, regardless of whether the employer can show that remote work causes an undue hardship on the business.⁴⁶ But deference to an

⁴⁴ The ADA requires employers to keep all medical information about employees confidential, including Covid-19 test results, and store them separately from regular personnel files. U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2000-4, ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE ADA (2000), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees> [<https://perma.cc/5D3W-W9MX>]; see H.R. REP. NO. 101-485, pt. 2, at 75 (1990) (“As long as the programs are voluntary and the medical records are maintained in a confidential manner and not used for the purpose of limiting health insurance eligibility or of preventing occupational advancement, these activities would fall within the purview of accepted activities.”).

⁴⁵ The United States Supreme Court has generally eschewed *per se* rules under the Americans with Disabilities Act. 42 U.S.C. § 12101-12213 (listing rules of construction regarding discrimination in general, in public transportation, in places of public accommodation, and in other contexts). The United States Court of Appeals for the Tenth Circuit has expressed the view that the determination of whether or not a request for an at-home accommodation is reasonable must be made on a case-by-case basis. *Mason v. Avaya Commc’ns, Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004). *But see Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 544-45 (7th Cir. 1995) (applying a legal presumption in favor of physical presence as an essential function of most jobs).

⁴⁶ *Compare* *Langon v. Dep’t of Health & Hum. Servs.*, 959 F.2d 1053, 1060 (D.C. Cir. 1992) (overcoming this presumption for a dispute pertaining to the Rehabilitation Act) *and Anzalone v. Allstate Ins. Co.*, No. 93-2248, 1995 U.S. Dist. LEXIS 588, at *15-16 (E.D. La. Jan. 19, 1995) (overcoming this presumption in cases where similarly situated workers were allowed to work from home) *and Carr v. Reno*, 23 F.3d 525, 530 (DC. Cir. 1994) (overcoming this presumption where the employee asked for a “work when able” schedule for a time-sensitive job), *with Vande Zande*, 44 F.3d at 545 (applying a legal presumption in favor of physical presence as an essential function of most jobs). Other courts that rejected working at home as a reasonable accommodation have focused on evidence that personal contact, interaction, and coordination at the workplace are needed for a specific position. See, e.g., *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555, 1564 (N.D. Ga. 1995), *aff’d*, 86 F.3d 1171, 1171 (11th Cir. 1996) (sales); *Misek-Falkoff v. IBM Corp.*, 854 F. Supp. 215, 227-28 (S.D.N.Y. 1994), *aff’d*, 60 F.3d 811, 811 (2d Cir. 1995) (software designing); *Brown v. Humana Ins. Co.*, 942 F. Supp. 2d 723, 732, at ¶ 9 (W.D. Ky. 2013) (project management).

employer's judgment regarding physical presence may no longer be appropriate. During the Covid-19 pandemic, most employers required their non-essential employees to leave the workplace and work remotely. As such, employers may be hard-pressed to now argue that physical presence is an essential function of their employees' jobs.⁴⁷ Moreover, as employees became used to working remotely during the pandemic, employers are finding it increasingly difficult to require their entire workforce to return to the workplace full time. A June 2022 study found that when employees have a chance to work remotely, eighty-seven percent will take it.⁴⁸ In fact, another study found that more than half of adults surveyed would "consider quitting if [their] employer tried to get [them] to return to the office before [they] felt safe."⁴⁹

II

THE EEOC ON REMOTE WORK AS A REASONABLE ACCOMMODATION UNDER TITLE I OF THE ADA

Remote work is not mentioned specifically in the ADA nor in its implementing regulations.⁵⁰ Title I's implementing regulations refer only to "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed."⁵¹

⁴⁷ *Compare* Laguerre v. Nat'l Grid USA, No. 20-3901-cv, 2022 U.S. App. LEXIS 6328, at *10–11 (2d. Cir. Mar. 11, 2022) (court upheld employee's right to work remotely but noted that the district court reasonably concluded that the employer's *post*-pandemic actions were not relevant to the reasonableness of the plaintiff's *pre*-pandemic request), *with* Montague v. U.S. Postal Serv., No. H-20-4329, 2022 U.S. Dist. LEXIS 1467, at *2, *4–5 (S.D. Tex. Jan. 4, 2022) (finding teleworking unreasonable, rejecting any comparison to the pandemic, which, according to the court was "a drastic change in circumstance completely outside the scope of this case").

⁴⁸ *Americans Are Embracing Flexible Work—And They Want More Of It*, MCKINSEY & CO. (June 23, 2022), <https://www.mckinsey.com/industries/real-estate/our-insights/americans-are-embracing-flexible-work-and-they-want-more-of-it> [<https://perma.cc/4C89-V86Y>].

⁴⁹ Peyton Shelburne, Justine Coleman & Lydia Rose Rappoport-Hankins, *Tracking the Return to Normal: Work & Offices*, MORNING CONSULT <https://morningconsult.com/return-to-work/> [<https://perma.cc/28AT-VY4J>] (last updated June 22, 2022); *see also supra* text at note 14 and articles cited therein.

⁵⁰ *See* 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(1)(ii), (2)(ii) (stating that "reasonable accommodation[s]" include "[m]odifications or adjustments to the . . . manner or circumstances under which the position held or desired is customarily performed, that enable a [] [qualified] individual with a disability [] to perform the essential functions of that position").

⁵¹ 29 C.F.R. § 1630.2(o)(1)(ii). The regulations define reasonable accommodations to include "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who

However, in 2003, the EEOC recognized that remote work, or “telework,” may be considered a reasonable accommodation, but without any additional information to guide the courts.⁵²

In 2003, the EEOC revised its Guidances of 1999 and 2002 and clarified that disabled employees may qualify for a modification of a workplace policy requiring work on site, stating: “[c]hanging the location where work is performed may fall under the ADA’s reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework.”⁵³

Once an employee requests to work remotely, the Guidance spells out the process that should be followed: The “employer and employee first need to identify and review all of the essential job functions,” and then consider if “working at home may be the only effective option for an employee with a

is qualified to perform the essential functions of that position.” *Id.* The regulations continue to state that the manner in which the job is performed may include “[j]ob restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.” 29 C.F.R. § 1630.2(o)(2)(ii).

⁵² See U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2003-1, *supra* note 9; see also *Telework*, JOB ACCOMMODATION NETWORK, <https://askjan.org/topics/telework.cfm#:~:text=the%20Equal%20Employment%20Opportunity%20Commission,of%20modifying%20a%20workplace%20policy> [<https://perma.cc/79NG-JWKL>] (last visited Sept. 19, 2022).

⁵³ U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2003-1, *supra* note 9; compare U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2003-1, *supra* note 35, at ¶ 34, with U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2003-1, *supra* note 9 (noting the change from the language in the 2002 Guidance to the quoted language). The 2002 Guidance provided the following:

An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship. Whether this accommodation is effective will depend on whether the essential functions of the position can be performed at home. There are certain jobs in which the essential functions can only be performed at the work site—e.g., food server, cashier in a store. For such jobs, allowing an employee to work at home is not effective because it does not enable an employee to perform his/her essential functions. Certain considerations may be critical in determining whether a job can be effectively performed at home, including (but not limited to) the employer’s ability to adequately supervise the employee and the employee’s need to work with certain equipment or tools that cannot be replicated at home. In contrast, employees may be able to perform the essential functions of certain types of jobs at home (e.g., telemarketer, proofreader). For these types of jobs, an employer may deny a request to work at home if it can show that another accommodation would be effective or if working at home will cause undue hardship.

U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2003-1, *supra* note 35, at ¶ 34.

disability.”⁵⁴ The EEOC Guidance states that physical presence is not always an “essential function[],” reasoning that physical presence is not a duty that an employee must perform.⁵⁵ Moreover, the Guidance envisions situations in which an employee’s time and tasks can be divided, with some tasks performed in the office and others at home, or at another location.⁵⁶ The Guidance continues as follows:

For some jobs, the essential duties can only be performed in the workplace. For example, food servers, cashiers, and truck drivers cannot perform their essential duties from home. But, in many other jobs some or all of the duties can be performed at home.⁵⁷

The EEOC then identifies several factors that the employer (or a court) should consider in determining the feasibility of a request to work from home, including:

[T]he employer’s ability to supervise the employee adequately and whether any duties require use of certain equipment or tools that cannot be replicated at home. Other critical considerations include whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace. An employer should not, however, deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees. Frequently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.⁵⁸

Moreover, in September 2020, the EEOC issued responses to questions about the impact of Covid-19 on employee rights under the ADA.⁵⁹ In this statement, the EEOC referred to telework, or remote work, as follows: “As a practical matter, and in light of the circumstances that led to the need for telework, employers and employees should both be creative

⁵⁴ U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2003-1, *supra* note 9.

⁵⁵ *Id.*

⁵⁶ *Id.* “If the employer determines that some job duties must be performed in the workplace, then the employer and employee need to decide whether working part-time at home and part-time in the workplace will meet both of their needs.” *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *What You Should Know About Covid-19 and the ADA the Rehabilitation Act, and Other EEO Laws*, *supra* note 9.

and flexible about what can be done when an employee needs a reasonable accommodation for telework at home.”⁶⁰ Later, on July 12, 2022, the EEOC updated these regulations, again confirming that a disabled employee is entitled to an interactive process to determine if working remotely would cause an undue hardship on the employer.⁶¹

Although the EEOC Guidances have no force of law nor the persuasive impact of agency regulations, they do provide the relevant factors courts should consider when deciding remote work cases. However, few courts actually apply the Guidances as intended, as explained below.

Since the EEOC adopted its Guidances, most circuit courts have affirmed decisions of district courts denying remote work requests, but few actually cite to the relevant Guidances.⁶²

⁶⁰ *Id.* The EEOC has recognized “temporary telework experience could be relevant to considering the renewed request.” *Id.* Therefore, if an employee was able to successfully perform the essential job functions without causing an undue hardship on the employer’s business during the pandemic, the same case may be made for the post-pandemic workplace. *See id.*

⁶¹ *Id.*

⁶² *First Circuit:* Trahan v. Wayfair Me., LLC, 957 F.3d 54, 57, 59 (1st Cir. 2020) (affirming summary judgment for employer who discharged a military veteran who suffered from PTSD and whose outbursts violated workplace conduct rules and who sought to work from home after she was discharged at a time when the employer did not have the technological capability to support workers at home); Mulloy v. Acushnet Co., 460 F.3d 141, 143–44 (1st Cir. 2006) (affirming summary judgment for employer who discharged employee engineer with asthma who developed reaction to chemicals at worksite and who requested and was transferred to a remote worksite but was discharged after he was unable to return to the plant to use equipment required to perform essential functions of his job); Kvorjak v. Maine, 259 F.3d 48, 58 (1st Cir. 2001) (Schwarzer, J., dissenting) (noting that although the majority upheld the denial of the request to work at home, the dissent found the employer had never presented any evidence of how the accommodation would be harmful to its business). *Second Circuit:* *See* Frantti v. New York, 850 F. App’x 17, 20 (2d Cir. 2021) (affirming summary judgment for employer who denied permission to employee to work remotely because the employee inquired about working remotely but never formally requested remote work as an accommodation for his disability); Vitti v. Macy’s Inc., 758 F. App’x 153, 157 (2d Cir. 2018) (affirming summary judgment for the employer, holding that regular and reliable attendance is an essential function). *Third Circuit:* *See* Keyhani v. Trs. of the Univ. of Pa., 812 F. App’x 88, 90–91 (3d Cir. 2020) (affirming summary judgment for employer who granted request of program manager for a reduced work schedule which her doctor had recommended rather than her request to work from home as a reasonable accommodation); Kiburz v. England, 361 F. App’x 326, 333 (3d Cir. 2010) (affirming summary judgment for the Navy who denied an information technology specialist’s request to work from home as unreasonable since he could not complete essential functions of his job including providing support, working with colleagues, and attending meetings and trainings from home). *Fourth Circuit:* *See* Smith v. CSRA, 12 F.4th 396, 412 (4th Cir. 2021) (affirming summary judgement for employer who denied a remote work request because the independent contractor is not considered a covered employee under Title I). *Fifth Circuit:* *See* Trautman v. Time Warner Cable Tex., LLC, 756 F. App’x

421, 430–31 (5th Cir. 2018) (affirming summary judgment for the employer dismissing employee who refused option to work from home after 4 p.m. rather than 2 p.m., as she had requested. The Court referred to employee as “aggressive” in the face of employer’s flexibility and wrote that “[n]either the ADA nor the 2008 amendments to the ADA permits an employee to leave work early and then sue her employer for being unreasonable[]”). *Sixth Circuit: See* Tchankpa v. Ascena Retail Grp., Inc., 951 F.3d 805, 809 (6th Cir. 2020) (affirming summary judgment for employer by finding that former employee failed to show employer violated the ADA by not allowing him to work from home as an accommodation for a shoulder injury for which he provided no medical documentation and since he resigned before parties agreed on accommodation). *Seventh Circuit: See* Yochim v. Carson, 935 F.3d 586, 591 (7th Cir. 2019) (affirming summary judgment for employer who had denied employee’s accommodation request for full-time telework under the Rehabilitation Act since the agency required the employee to be in the office for training and collaboration with coworkers); *Fisher v. Vizioncore, Inc.*, 429 F. App’x 613, 614–15 (7th Cir. 2011) (affirming summary judgment for employer on the grounds that the employee’s request to “work[] from home on demand without any notice to [the employer],” in the words of the district court, was “unreasonable”); *Mobley v. Allstate Ins. Co.*, 531 F.3d 539, 546–48 (7th Cir. 2008) (finding employer reasonably accommodated employee and was not required to grant her request to work from home one or two times each week, noting that “as a general matter, working at home is not a reasonable accommodation”); *Rauen v. U.S. Tobacco Mfg. Ltd. P’ship*, 319 F.3d 891, 892–96 (7th Cir. 2003) (affirming summary judgment for employer who had denied request of software engineer, who had undergone cancer treatment, to work from home when she decided she was not needed in the office as unreasonable.). *Eighth Circuit: See* Lipp v. Cargill Meat Sols. Corp., 911 F.3d 537, 544–46 (8th Cir. 2018) (affirming summary judgment for employer who denied a remote work request, holding that “regular and reliable attendance is a necessary element of most jobs,” and noting employee’s 195 violations of the employer’s attendance policy). *Ninth Circuit: See* Ogden v. Pub. Util. Dist. No. 2 of Grant Cnty., 722 F. App’x 707, 708–09 (9th Cir. 2018) (affirming summary judgment for employer on the basis that employee’s “extensive absences meant that she could not perform an essential function of a supervisor’s job: being present at work to supervise”); *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1235, 1237–38 (9th Cir. 2012) (affirming summary judgment to hospital that denied remote work request to neonatal nurse who was required to personally interact with patients and use certain medical equipment, noting that attendance as an essential function is a “common-sense idea”). *Tenth Circuit: See* Brown v. Austin, 13 F.4th 1079, 1083, 1085, 1090 (10th Cir. 2021) (upholding summary judgement for employer who denied employee’s request to telework two days a week since employee’s job as a healthcare fraud specialist required access to case files, which were on paper and digitizing them would have been “time consuming”); *Bethscheider v. Webstar Energy*, 820 F. App’x 749, 752–53 (10th Cir. 2020) (affirming grant of summary judgment to employer who concluded that employee’s requested accommodations, including to work from home intermittently whenever she experienced migraines, was unreasonable as a matter of law); *Valdez v. McGill*, 462 F. App’x 814, 818–19 (10th Cir. 2012) (affirming grant of summary judgment for employer who denied employee’s request to work from home on the grounds that the employee had acknowledged that working from home would “limit his ability to perform many aspects of his job”); *Mason v. Avaya Commc’ns., Inc.*, 357 F.3d 1114, 1120, 1122, 1124–25 (10th Cir. 2004) (affirming district court’s grant of summary judgment for employer who denied employee’s request to work at home as unreasonable because her work required supervision and teamwork at the workplace). *Eleventh Circuit: See* Everett v. Grady Mem’l Hosp. Corp., 703 F. App’x 938, 940, 946 (11th Cir. 2017) (affirming summary judgment for hospital that denied request of

Instead, these courts simply defer to an employer's judgment that remote work is not reasonable because, in their view, physical presence is an essential function of the job that cannot be waived, even for qualified disabled employees.⁶³ These courts apparently accepted the employers' views regarding the need for on-site teamwork, supervision, and personal interaction, although no evidence to support such claims was offered in most of these cases.⁶⁴

As advances in data protection, videoconferencing, and other forms of digital collaboration have become more sophisticated, courts may no longer find as persuasive employers' claims that teamwork, supervision, and personal interaction are essential functions of a job that must be performed at the workplace.⁶⁵ Today, for example, Zoom and GoToMeeting seamlessly facilitate meetings among co-workers, even in different cities around the world.⁶⁶ Google Calendar permits the sharing of schedules and appointments among

program manager for car seat distribution program to work from home during her pregnancy because her job involved "teaching, supervising, and meeting with patients" as essential functions that she could not do from home); *Abram v. Fulton Cnty. Gov't*, 598 F. App'x 672, 678 (11th Cir. 2015) (affirming summary judgment for the city who had denied a former employee's request to work from home as unreasonable because physical presence at the front desk was an essential function of her front desk receptionist position); *Ryerson v. Jefferson Cnty. Comm'n*, No. 20-14684, 2021 U.S. App. LEXIS 24527, at *4-7 (11th Cir. Aug. 17, 2021) (affirming summary judgement for an employer who denied telework to an auditor because the county required all work be done on site due to the sensitive nature of the financial records involved).

⁶³ See, e.g., *EEOC v. Ford Motor Co.*, 782 F.3d 753, 761, 763 (6th Cir. 2015) (holding that despite an employee's disability, "regular and predictable on-site attendance was essential for [employee's] position," due to the position's requirements of "teamwork" and "on-site availability to participate in . . . face-to-face interactions"). See cases cited *infra* note 96.

⁶⁴ As the Fifth Circuit held in *Credeur v. Louisiana*, "[t]eleworking may not be feasible, for example, if the job requires 'face-to-face interaction and coordination of work with other employees', 'in-person interaction with outside colleagues, clients, or customers', or 'immediate access to documents or other information located only in the workplace.'" 860 F.3d 785, 793 (5th Cir. 2017); see also 29 C.F.R. § 1630.2(n)(3)(i) ("Evidence of whether a particular function is essential includes, but is not limited to . . . [t]he employer's judgment as to which functions are essential . . .").

⁶⁵ See *Ford Motor Co.*, 782 F.3d at 776 (Moore, J., dissenting) ("Technology has undoubtedly advanced since 1995 in facilitating teamwork through fast and effective electronic communication such that it should no longer be assumed that teamwork must be done in-person.").

⁶⁶ See *About Us*, ZOOM, https://explore.zoom.us/about?_ga=2.175649186.1430196633.1607726900-272370128.1584024660 [https://perma.cc/R6GL-XARW] (last visited Sept. 19, 2022); *Video Conferencing*, GOTOMEETING, <https://www.gotomeeting.com/video-conferencing> [https://perma.cc/EX69-9VL3] (last visited Sept. 19, 2022).

employees and their bosses.⁶⁷ In addition, Slack and other similar communication programs offer instant messaging between team members throughout the workday and throughout the world.⁶⁸

In the past, it was considered generally accepted that supervision involved face to face communication and that “[m]ost jobs . . . involve team work under supervision rather than solitary unsupervised work.”⁶⁹ However, the nature of supervision has changed. Today, supervision can be done remotely, as computer programs and software have been developed to enable employers to know when an employee is working and logged onto their respective computers, regardless of where they may work.⁷⁰ Moreover, although controversial, webcams and other surveillance software have been developed to allow employers to literally keep an eye on employees who

⁶⁷ See *What Can You Do with Calendar?*, GOOGLE, https://support.google.com/a/users/answer/9302892?hl=EN&ref_topic=9282962 [<https://perma.cc/H7UU-AZ6V>] (last visited Nov. 10, 2022).

⁶⁸ See *Messaging*, SLACK, <https://slack.com/team-chat> [<https://perma.cc/ZJ3V-FMU3>] (last visited Sept. 19, 2022).

⁶⁹ *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995). In addition to *Vande Zande*, other courts have denied requests to work remotely citing the problem of lack of supervision. See, e.g., *Mason v. Anaya Commc’ns, Inc.*, 357 F.3d 1114, 1120, 1122 (10th Cir. 2004) (referring to Chief Judge Posner’s statement in his *Vande Zande* opinion regarding the need for supervision reasoning as a basis for finding that physical presence is an “essential function” of the plaintiff’s position); see also *Leahr v. Metro. Pier & Exposition Auth.*, No. 96 C 1388, 1997 U.S. Dist. LEXIS 10601, at *12 (N.D. Ill. July 16, 1997) (quoting language from Chief Judge Posner regarding supervision as a basis for finding that the present work-at-home arrangement was not a reasonable accommodation).

⁷⁰ For example, Google Docs enables an employer to oversee an employee’s work on a document in real time and websites such as GoToMyPC or LogMeIn may allow employers to remotely access employee’s computers while they are working at home. See *About Google Docs*, GOOGLE, <https://www.google.com/docs/about/> [<https://perma.cc/DZ9D-UGET>] (last visited Sept. 19, 2022); *Plans and Pricing*, GoToMyPC, <https://get.gotomypc.com/corporate-plans> [<https://perma.cc/KDB3-NM4U>] (last visited Sept. 19, 2022); *LogMeIn*, LOGMEIN, <https://www.logmein.com/#> [<https://perma.cc/Q5FM-5CJ9>] (last visited Sept. 19, 2022). Another example is Hubstaff, which tracks remote employees’ computer activity for productivity purposes. See Bobby Allyn, *Your Boss Is Watching You: Work-From-Home Boom Leads to More Surveillance*, NPR (May 13, 2020), <https://www.npr.org/2020/05/13/854014403/your-boss-is-watching-you-work-from-home-boom-leads-to-more-surveillance> [<https://perma.cc/8CLQ-AKRP>]. In addition, although the need for onsite supervision has been offered as a reason to deny employees with disabilities’ requests for remote work, such concerns can be addressed by technology, as discussed above, as well as adequate training of supervisors. See Gayle Cinquegrani, *Virtual Jobs Benefit Employers as Well as Workers*, BLOOMBERG L. (June 13, 2016), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X3HQM2MS000000?bna_news_filter=daily-labor-report#jcite [<https://perma.cc/Z7XP-4EMX>].

are working away from the office.⁷¹ Yet few courts are willing to probe behind employers' statements regarding the need to provide in person supervision.

The following section of this Article provides a comprehensive review of the most recent cases from every federal circuit involving remote work requests by disabled employees under Title I of the ADA.

III

THE SPLIT AMONG & WITHIN CIRCUITS ON THE RIGHT TO REMOTE WORK

A. Circuit Court of Appeals Decisions Denying Requests to Work from Home

In the past decade, every circuit court has decided at least one "remote work" case under Title I of the ADA.⁷² Although most courts have ruled in favor of the employer, several recent cases have ruled in favor of employees seeking to work remotely, even over the objections of the employer.⁷³

One of the early cases upholding an employer's denial of an employee's request to work from home as a reasonable accommodation is *Vande Zande v. Wisconsin*.⁷⁴ In this often-cited case, Judge Posner of the Seventh Circuit Court of Appeals upheld the lower court's decision in favor of the employer, the State of Wisconsin.⁷⁵

The plaintiff in the case, Ms. Vande Zande, used a wheelchair and suffered from pressure ulcers.⁷⁶ During one eight week-long episode, she requested to work from home.⁷⁷ After her request to work from home, as well as requests for other workplace-related accommodations were denied, she sued.⁷⁸

⁷¹ Although other issues may warrant against webcam use, they are used by employers who wish to observe their employees working at home. See Allyn, *supra* note 70.

⁷² It appears that every circuit has decided at least one remote work case under the ADA in the past decade. See cases cited *infra* notes 96 and 124.

⁷³ See cases cited *infra* note 124.

⁷⁴ 44 F.3d at 544.

⁷⁵ *Id.* at 543-46.

⁷⁶ *Id.* at 542-43.

⁷⁷ *Id.* at 544.

⁷⁸ *Id.* at 544-45. The court found that the State would suffer undue hardship if Ms. Vande Zande were allowed to work from home. *Id.* at 545. Ms. Vande Zande had also requested workplace-related accommodations, including a request to lower the sink in the employee kitchen. *Id.* Lowering the sink would have cost \$150, hardly an "undue hardship" for the State of Wisconsin. *Id.* at 546. In response to her request regarding the sink, the court wrote:

Affirming the district court's summary judgment for the State of Wisconsin, the Seventh Circuit concluded that "[m]ost jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance."⁷⁹ While this may be true in some cases, it did not respond to Ms. Vande Zande's request to perform her specific job duties at home, nor did the employer, the State of Wisconsin, present any evidence to establish that her working at home would cause an undue hardship.⁸⁰ Although there was evidence presented regarding Ms. Vande Zande's unsatisfactory job performance at the office, there was no evidence indicating that Ms. Vande Zande was unable to perform the essential functions of her job at home.⁸¹

By upholding the employer's refusal to grant Ms. Vande Zande's remote work request, the court essentially created a legal presumption in favor of physical presence as an essential function of most, if not all, jobs. As the court stated, only in a "very extraordinary case" could an employee create a triable issue of an employer's refusal to allow the employee to work at

But we do not think an employer has a duty to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and nondisabled workers. The creation of such a duty would be the inevitable consequence of deeming a failure to achieve identical conditions "stigmatizing." That is merely an epithet. We conclude that access to a particular sink, when access to an equivalent sink, conveniently located, is provided, is not a legal duty of an employer. The duty of reasonable accommodation is satisfied when the employer does what is necessary to enable the disabled worker to work in reasonable comfort.

Id. at 546. The court's summary dismissal of her claim of stigma and its impact on the work lives of people with disabilities is discussed *infra* Part IV.

⁷⁹ *Id.* at 544; see, e.g., Jennifer Tennant, *The Reasonableness of Working from Home in the Digital Age*, 5 REV. DISABILITY STUD. 10, 11 (2009) (noting that some people believe that working in an office space provides constant supervision that is necessary for some employees and leads to a greater exchange of ideas and thus greater productivity).

⁸⁰ See *Vande Zande*, 44 F.3d at 544–45.

⁸¹ See *id.* (noting that Ms. Vande Zande was able to complete all but 16.5 hours of work at home and her supervisor had enough work to keep her at full-time status). Despite the definition of undue hardship in the regulations that look to the overall financial resources of a defendant, Judge Posner apparently believes that even large or wealthy defendant who would not be able to show an undue hardship, should, in his words, "not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee." *Id.* at 542–43. Of course, what may be trivial to a judge may be of enormous consequence to a person with a disability.

home.⁸² The court also acknowledged, however, that while it required physical presence at the workplace in this case, “[t]his will no doubt change as communications technology advances.”⁸³

Other courts have rejected the *Vande Zande* holding, finding sufficient triable issues to deny the employers’ motions for summary judgment.⁸⁴ An example of such a case is a leading case from the Sixth Circuit, *EEOC v. Ford Motor Company*.⁸⁵ In this case, the Sixth Circuit refused to apply *Vande Zande*’s legal presumption in favor of physical presence in the workplace. Nonetheless, the court affirmed the employer’s decision to deny the plaintiff’s request to work from home, for the reasons discussed in the following paragraphs.⁸⁶

In the *Ford* case, the EEOC brought suit on behalf of Ms. Harris, a resale buyer for Ford Motor Company, who had requested to work remotely for up to four days per week, as an accommodation for a medical condition that caused her intermittent gastrointestinal symptoms.⁸⁷ Ms. Harris had received permission to work remotely in the past, as had other Ford employees.⁸⁸ Nonetheless, the Sixth Circuit deferred to the employer’s view that because Ms. Harris could be required to interact with clients “face-to-face,” requiring “good, old-fashioned interpersonal skills,” her request to work remotely should be denied.⁸⁹

Ford claimed that Ms. Harris’s job required a high level of interactivity and teamwork and that “regular and predictable attendance in the workplace” was “essential to being a fully

⁸² *Id.* at 545.

⁸³ *Id.* at 544.

⁸⁴ 29 C.F.R. pt. 1630 app. § 1630.2(n) (“Whether a particular function is essential is a factual determination that must be made on a case by case basis.”).

⁸⁵ 782 F.3d 753, 765–66 (6th Cir. 2015).

⁸⁶ *Id.* at 770. Other cases before and after *Vande Zande* took a fact-specific approach to requests by employees to work at home. See *Langon v. Dep’t of Health & Hum. Servs.*, 959 F.2d 1053, 1054 (D.C. Cir. 1992) (denying summary judgment where employer failed to offer sufficient evidence that working from home produced an undue hardship in this case); *Hernandez v. City of Hartford*, 959 F. Supp. 125, 132 (D. Conn. 1997) (rejecting *Vande Zande*’s per se rule regarding requests to work from home and finding employee had raised an issue of fact as to whether working from home would cause an undue hardship on the employer); see also *Mason v. Avaya Commc’ns, Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004) (acknowledging that summary adjudication is not appropriate if the employee presents sufficient evidence to show the essential functions of the job can be performed at home, regardless of the fact that the court found that working from home was not reasonable accommodation in this case).

⁸⁷ *Ford Motor Co.*, 782 F.3d at 758–60.

⁸⁸ *Id.* at 759, 763.

⁸⁹ *Id.* at 758, 763.

functioning member of the resale team.”⁹⁰ However, on Ms. Harris’s behalf, the EEOC presented evidence that directly contradicted Ford’s claim about the importance of attendance in the office, including the fact that Ms. Harris performed ninety-five percent of her job on the phone or through email, even when she was in the office, as well as the fact that Ford allowed other employees with the same position to telework.⁹¹

The primary complaint Ford seemed to have against Ms. Harris was not that she could not perform the essential functions of her job at home but that her work at the office was unsatisfactory. According to Ford, because of Ms. Harris’s “chronic attendance issues,”⁹² she was “in the bottom 10% of her peers,” and her work was “subpar,” “sporadic and unpredictable.”⁹³ Deferring to Ford’s assessment of Ms. Harris, the Sixth Circuit affirmed the district court’s finding that “[r]egular and predictable on-site attendance was essential for Harris’s position, and [her] repeated absences made her unable to perform the essential functions of a resale buyer.”⁹⁴ In upholding the company’s policy of requiring “regular and predictable on-site attendance essential to Harris’s highly interactive job,” the Sixth Circuit court concluded that the company was not required to accept “a job schedule of [the plaintiff’s] choosing.”⁹⁵ Yet nowhere did the employer, the district court, or the court of appeals refute the argument that Ms. Harris could perform the essential functions of her job working from home. Indeed, had she been allowed to work from home, she may have been more productive since she would not have had to take days off from work to accommodate her intermittent gastrointestinal symptoms. Instead, she could have arranged her workday to deal with these symptoms, as needed, and in the privacy of her own home.

⁹⁰ *Id.* at 758 (quoting from the record R. 60–2 at ¶ 11). The dissenting judge notes that Ford gave only one reason for why physical presence is an essential function—that the resale buyer position requires a great deal of “face-to-face teamwork.” *Id.* at 775–76 (Moore, J., dissenting).

⁹¹ *Id.* at 772 (Moore, J., dissenting). Based on these disputed facts, the dissent would have denied summary judgment to Ford and allowed the case to proceed to trial. *Id.* at 770–86 (Moore, J., dissenting).

⁹² *Id.* at 758. Ford argued that she “repeatedly missed work entirely . . . [a]nd when she didn’t miss work, she would often come in late and leave early.” *Id.* As a result, according to Ford, her co-workers had to “pick up [her] slack,” causing her co-workers “stress and frustration.” *Id.* Based on these facts, the company denied her request to work remotely although none of these facts related to her potential to do the work satisfactorily at home.

⁹³ *Id.*

⁹⁴ *Id.* at 763.

⁹⁵ *Id.* at 757.

Although the deciding factor in both the *Vande Zande* and *Ford* cases seems to be that remote work imposes an undue hardship on the employer, neither court fully explored the actual hardship alleged. Instead, the hardship seemed to be nothing more than the employers' antipathy or at least distrust of their employees. As a result, both Ms. Vande Zande and Ms. Harris lost their cases and their jobs, not because the evidence established that they could not perform the essential functions of their jobs at home, but because their employers were not willing to give them that chance.

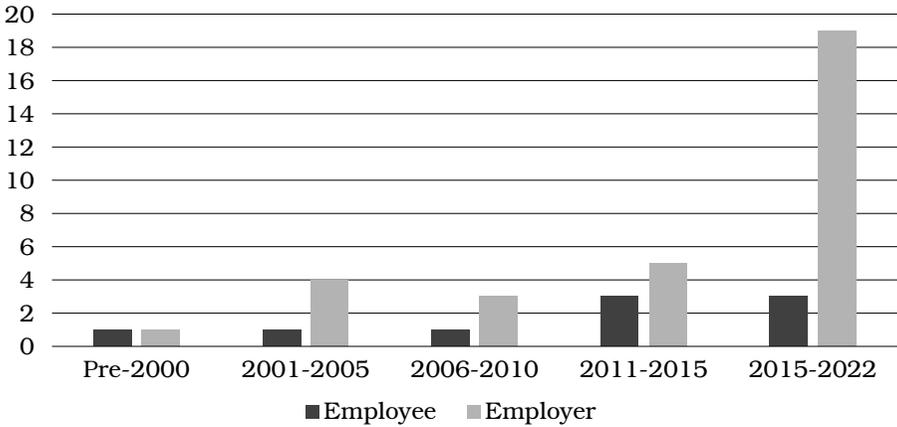
Since the *Vande Zande* and *Ford* decisions, every other circuit has weighed in on the issue of remote work as an accommodation under the ADA. These subsequent cases reflect a split among and even within the circuits. As the following tables show, most circuit courts have ruled in favor of employers who denied requests by their employees to work remotely.⁹⁶

⁹⁶ Every circuit court of appeals has decided a remote work case under Title I in the past decade. These are the cases that were decided in favor of the employer, by circuit: *First Circuit*: Trahan v. Wayfair Me., LLC, 957 F.3d 54, 57, 59 (1st Cir. 2020) (affirming summary judgment for employer who discharged a military veteran who suffered from PTSD and whose outbursts violated workplace conduct rules and who sought to work from home after she was discharged at a time when the employer did not have the technological capability to support workers at home); Mulloy v. Acushnet Co., 460 F.3d 141, 143–44 (1st Cir. 2006) (affirming summary judgment for employer who discharged employee engineer with asthma who developed reaction to chemicals at worksite and who requested and was transferred to a remote worksite but was discharged after he was unable to return to the plant to use equipment required to perform essential functions of his job); Kvorjak v. Maine, 259 F.3d 48, 58 (1st Cir. 2001) (Schwarzer, J., dissenting) (noting that although the majority upheld the denial of the request to work at home, the dissent found the employer had never presented any evidence of how the accommodation would be harmful to its business). *Second Circuit*: Frantti v. New York, 850 F. App'x 17, 20 (2d Cir. 2021) (affirming summary judgment for employer who denied permission to employee to work remotely because the employee inquired about working remotely but never formally requested remote work as an accommodation for his disability); Vitti v. Macy's Inc., 758 F. App'x 153, 157 (2d Cir. 2018) (affirming summary judgment for the employer, holding that regular and reliable attendance is an essential function). *Third Circuit*: Cobb v. Phila. Gas Works, 118 F. App'x 584, 585–86 (3d Cir. 2004) (affirming summary judgment for employer who refused to allow employee, who was diagnosed with cardiomyopathy, to work from home because her work as a supervisor required her to work in the office); Keyhani v. Trs. of the Univ. of Pa., 812 F. App'x 88, 90 (3d Cir. 2020) (affirming summary judgment for employer who granted request of program manager for a reduced work schedule, which her doctor had recommended, rather than her request to work from home as a reasonable accommodation); Kiburz v. England, 361 F. App'x 326, 333 (3d Cir. 2010) (affirming summary judgment for the Navy who denied an information technology specialist's request to work from home as unreasonable since he could not complete essential functions of his job, including providing support, working with colleagues, and attending meetings and trainings from home). *Fourth Circuit*:

Smith v. CSRA, 12 F.4th 396, 412 (4th Cir. 2021) (affirming summary judgement for employer who denied a remote work request because the independent contractor is not considered a covered employee under Title I). *Fifth Circuit*: Credeur v. Louisiana, 860 F.3d 785, 793–95 (5th Cir. 2017) (affirming summary judgment for employer who denied employee’s request to work from home because of the interactive aspects of the employee’s job as a litigation attorney and the fact that no other litigation attorneys were permitted to work from home on a long-term basis); Trautman v. Time Warner Cable Tex., LLC, 756 F. App’x 421, 430–31 (5th Cir. 2018) (affirming summary judgment for the employer dismissing employee who was dismissed after refusing option to work from home after 4 p.m. rather than 2 p.m., as she had requested. Court referred to employee’s request as “aggressive” in the face of employer’s flexibility and wrote that “[n]either the ADA nor the 2008 amendments to the ADA permits an employee to leave work early and then sue her employer for being unreasonable[.]”); Appel v. Inspire Pharms., Inc., 428 F. App’x 279, 281–82 (5th Cir. 2011) (affirming summary judgement for employer who refused to allow a pregnant employee to work from home because the employee would be unable to complete her managerial duties away from the office). *Sixth Circuit*: Tchankpa v. Ascena Retail Grp., Inc., 951 F.3d 805, 809 (6th Cir. 2020) (affirming summary judgment for employer by finding that former employee failed to show employer violated the ADA by not allowing him to work from home as an accommodation for a shoulder injury for which he initially provided no medical documentation and since he resigned before parties agreed on accommodation); Popeck v. Rawlings Co., 791 F. App’x 535, 537, 539–40 (6th Cir. 2019) (affirming summary judgement for employer who fired an auditor, diagnosed with IBS, who regularly missed work due to her disability, on the grounds that all work had to be done on-site, making in-person attendance an essential function); EEOC v. Ford Motor Co., 782 F.3d 753, 763 (6th Cir. 2015) (rejecting *Vande Zande’s* presumption against remote work as a reasonable accommodation, but affirming summary judgment for the employer because employee’s excessive absences made her unable to perform an essential function of her job). *Seventh Circuit*: Yochim v. Carson, 935 F.3d 586, 591 (7th Cir. 2019) (affirming summary judgment for employer who had denied employee’s accommodation request for full-time telework under the Rehabilitation Act since the agency required the employee to be in the office for training and collaboration with coworkers); Bilinsky v. Am. Airlines, Inc., 928 F.3d 565, 574 (7th Cir. 2019) (affirming summary judgment for employer who rescinded remote work approval for an employee after a company merger that changed the job functions of all remote employees); Fisher v. Vizioncore, Inc., 429 F. App’x 613, 614–15 (7th Cir. 2011) (affirming summary judgment for employer on the grounds that the employee’s request to “work[.] from home on demand without any notice to [the employer],” in the words of the district court, was “unreasonable”); Mobley v. Allstate Ins. Co., 531 F.3d 539, 546–48 (7th Cir. 2008) (finding employer reasonably accommodated employee and was not required to grant her request to work from home one or two times each week, noting that “as a general matter, working at home is not a reasonable accommodation”); Rauen v. U.S. Tobacco Mfg. Ltd. P’ship, 319 F.3d 891, 892–96 (7th Cir. 2003) (affirming summary judgment for employer who had denied request of software engineer, who had undergone cancer treatment, to work from home when she decided she was not needed in the office as unreasonable). *Eighth Circuit*: Brunckhorst v. Oak Park Heights, 914 F.3d 1177, 1180, 1182–83 (8th Cir. 2019) (affirming grant of summary judgment to employer who denied remote work request of Senior Accountant who had recovered after many surgeries and months in nursing care facilities after contracting a life-threatening disease. Court deferred to employer that he could not perform the essential functions of his job at home and in light of his testimony that it “would have been easier” to work from home”); Lipp v. Cargill Meat Sols. Corp., 911 F.3d 537, 544–46 (8th Cir. 2018) (affirming summary

judgment for employer who denied a remote work request, holding that “regular and reliable attendance is a necessary element of most jobs,” and noting employee’s 195 violations of the employer’s attendance policy). *Ninth Circuit*: *Ogden v. Pub. Util. Dist. No. 2 of Grant Cnty.*, 722 F. App’x 707, 708–09 (9th Cir. 2018) (affirming summary judgment for employer on the basis that employee’s “extensive absences meant that she could not perform an essential function of a supervisor’s job: being present at work to supervise”); *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1235, 1237–38 (9th Cir. 2012) (affirming summary judgment to hospital that denied remote work request to neonatal nurse who was required to personally interact with patients and use certain medical equipment, noting that attendance as an essential function is a “common-sense idea”). *Tenth Circuit*: *Brown v. Austin*, 13 F.4th 1079, 1083, 1085, 1090 (10th Cir. 2021) (upholding summary judgment for employer who denied employee’s request to telework two days a week since employee’s job as a healthcare fraud specialist required access to case files, which were on paper and digitizing them would have been “time-consuming”); *Bethscheider v. Webstar Energy*, 820 F. App’x 749, 752–53 (10th Cir. 2020) (affirming grant of summary judgment to employer who concluded that employee’s requested accommodations, including to work from home intermittently whenever she experienced migraines, was unreasonable as a matter of law); *Valdez v. McGill*, 462 F. App’x 814, 818–19 (10th Cir. 2012) (affirming grant of summary judgment for employer who denied employee’s request to work from home on the grounds that the employee had acknowledged that working from home would “limit his ability to perform many aspects of his job”); *Mason v. Avaya Commc’ns, Inc.*, 357 F.3d 1114, 1120, 1122, 1124–25 (10th Cir. 2004) (affirming district court’s grant of summary judgment for employer who denied employee’s request to work at home as unreasonable because her work required supervision and teamwork at the workplace); *Spielman v. Blue Cross & Blue Shield of Kan., Inc.*, 33 F. App’x 439, 444–45 (10th Cir. 2002) (affirming summary judgment to employer who denied employee with a poor performance record a request to work from home). *Eleventh Circuit*: *Everett v. Grady Mem’l Hosp. Corp.*, 703 F. App’x 938, 940, 946 (11th Cir. 2017) (affirming summary judgment for hospital that denied request of program manager for car seat distribution program to work from home during her pregnancy because her job involved “teaching, supervising, and meeting with patients” as essential functions that she could not do from home); *Abram v. Fulton Cnty. Gov’t*, 598 F. App’x 672, 678 (11th Cir. 2015) (affirming summary judgment for the city who had denied a former employee’s request to work from home as unreasonable because physical presence at the front desk was an essential function of her front desk receptionist position); *Ryerson v. Jefferson Cnty. Comm’n*, No. 20-14684, 2021 U.S. App. LEXIS 24527, *4–7 (11th Cir. Aug. 17, 2021) (affirming summary judgment for an employer who denied telework to an auditor because the county required all work be done on site due to the sensitive nature of the financial records involved).

NO. OF CIRCUIT COURTS CASES FOR EMPLOYER/EMPLOYEE BY YEAR 1992-2022



Employee:

Pre-2000: **1:** Langon v. Dept. of Health and Human Services
 2001-2005: **1:** Humphrey v. Memorial Hospital
 2006-2010: **1:** Woodruff v. Peters
 2011-2015: **3:** DeRosa v. Nat'l Envelope Corp., Nixon-Tinkelman v. N.Y.C. Dept of Health and Mental Hygeine, McMillian v. City of New York
 2016-2022: **3:** Laguere v. Nat'l Grid USA, Mosby-Meachem v. Memphis Light, Gas & Water Div. Hostettler v. College of Wooster

Employer:

Pre-2000: **1:** Vande-Zande v. Wis. Dept of Admin
 2001-2005: **4:** Kvorjak v. Maine, Rauen v. United States Tobacco Mgmt., Mason v. Avaya Communications, Cobb v. Phil. Gas Works.
 2006-2010: **3:** Mulloy v. Acushnet Co., Kiburz v. England, Mobley v. Allstate Ins.
 2011-2015: **5:** EEOC v. Ford Motor Co., Schmidt v. Solis, Sampter v. Providence St. Vincent Med. Ctr., Valdez v. McGill, Abram v. Fulton Cnty Gov.
 2016-2022: **19:** Trahan v. Wayfair, Frantti v. New York, Vitti v. Macy's, Keyhani v. Trustee's for the Univ. of Pa., Smith v. CSRA, Crueder v. Louisiana, Trautman v. Time Warner Cable, Tchankpa v. Ascena Retail Group Inc., Yochim v. Carson, Bilinsky v. Am. Airlines, Fishers v. Vizioncare, Inc., Brunkchorst v. City of Oak Park Heights, Lipp v. Carghill Meals Sols Corp., Ogden v. Pub. Util. Dist., Brown v. Austin, Bethschedier v. Westar Energy, Spielman v. Blue Cross and Blue Shield of Kansas, Everett v. Gready Memorial Hospital, Ryerson v. Jefferson

However, some courts have acknowledged that due to advances in technology and the changing nature of certain jobs, remote work should be considered a reasonable accommodation, especially in light of the prevalence of remote work during the pandemic.⁹⁷ As discussed more fully in the following sections, some courts are now willing to reject the employers' judgment regarding the requirement of physical presence in the workplace, or at least require a determination

⁹⁷ As the Seventh Circuit court wrote recently, "Technological development and the expansion of telecommuting in the twenty-four years since *Vande Zande* likely mean that such an accommodation is not quite as extraordinary as it was then. That inquiry is context-specific; a work-from-home arrangement might be reasonable for a software engineer but not for a construction worker." *Bilinsky*, 928 F.3d at 573.

by a jury on the question of whether or not an employee could meet the essential functions of the particular job at issue by working from home.⁹⁸ In fact, in three of the first Covid-19-related remote work cases, the courts ruled in favor of the employees over the employers' objections to remote work arrangements.⁹⁹

B. Circuit Court Decisions Affirming the Right to Work from Home

Since *Vande Zande* and *Ford*, some circuit courts have begun to either reverse district courts' grant of summary judgment to the employer or uphold decisions in favor of employees seeking to work remotely as a reasonable accommodation.¹⁰⁰ These cases include a post-*Ford* Sixth

⁹⁸ See, e.g., *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 603 (6th Cir. 2018) (finding that a "jury could reasonably conclude that" the plaintiff "was otherwise qualified to perform her job from home" despite the fact that the employer supplied "some evidence showing that in-person attendance was an essential function" of the plaintiff's job); see also cases cited *infra* note 115 (finding that remote work could be a reasonable accommodation, despite the employers' objections); *Conaway v. Detroit Pub. Sch. Cmty. Dist.*, No. 21-CV-12253, 2021 U.S. Dist. LEXIS 241862, at *2 (E.D. Mich. Dec. 17, 2021) (denying preliminary injunction finding the school's offer of two days of remote teaching instead of five, which the employee had requested, reasonable).

⁹⁹ For example, in *Laguerre v. Nat'l Grid USA*, the Second Circuit Court of Appeals overturned summary judgment for the employer, upholding the right of the employee to work from home. The court found that the employee, who was diagnosed with lupus, was qualified to perform her job, and that remote work was a plausible accommodation, even if the company would have to purchase additional technology. *Laguerre v. Nat'l Grid USA*, No. 20-3901-cv, 2022 U.S. App. LEXIS 6328, at *6 (2d Cir. Mar. 11, 2022); see also *Peebles v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 59–60 (D. Mass. 2020) (granting preliminary injunction to employee with asthma who was denied telework as a reasonable accommodation during Covid-19 after he showed he could perform essential functions of the job at home); *Silver v. City of Alexandria*, 470 F. Supp. 3d 616, 623, 625 (W.D. La. 2020) (granting preliminary injunction to employee after his request to work remotely was denied during Covid-19 since he presented sufficient evidence to show he was able to participate virtually in required meetings).

¹⁰⁰ The circuit courts of appeals in the Second, Sixth, Ninth, and D.C. Circuits have recently decided cases in favor of employees seeking to work remotely. Here are these cases, by circuit: *Second Circuit*: *McMillan v. City of New York*, 711 F.3d 120, 123 (2d Cir. 2013) (vacating and remanding summary judgment for the employer because the district court had not conducted a sufficiently detailed analysis of the facts to determine that a specific arrival time at work was an essential function of the employee's position); *Nixon-Tinkelman v. N.Y. City Dep't of Health & Mental Hygiene*, 434 F. App'x 17, 19–20 (2d Cir. 2011) (vacating and remanding summary judgment for employer, holding that the district court erred in holding that "commuting falls outside the scope of plaintiff's job" and thus outside the scope of the ADA; the Court held that in certain circumstances, employers may be obligated to assist with an employer's commute, and remanded to determine whether doing so was reasonable in this circumstance (internal

Circuit case¹⁰¹ as well as cases in the Second,¹⁰² Ninth,¹⁰³ and D.C.¹⁰⁴ circuits. The U.S. Supreme Court has not yet considered this issue.¹⁰⁵

quotations omitted)); *DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 104–05 (2d Cir. 2010) (vacating and remanding summary judgment for the employer, ruling that the employer had provided, then rescinded, a reasonable accommodation by allowing employee to work from home, which was “necessary to maintaining his job,” and that the employee’s admission that he limited his computer and telephone usage did not preclude him from arguing he could fulfill the essential functions of his position); *see also Laguerre*, 2022 U.S. App. LEXIS 6328, at *8–10 (vacating summary judgement for employer, finding employee qualified and that remote work can be a reasonable accommodation but remanded to determine if accommodation requiring employer to purchase new technology constitutes an undue hardship). *Sixth Circuit: Mosby-Meachem*, 883 F.3d at 599 (affirming jury verdict for employee, holding that sufficient evidence was presented for a reasonable jury to conclude that employee could perform all of the essential functions of her job remotely for ten weeks while she was on bed rest for pregnancy complications, despite employer’s conflicting evidence in support of attendance as an essential function of her job); *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 856, 859 (6th Cir. 2018) (reversing district court decision and remanding the case for trial after finding full-time presence at work is not an essential function of a job simply because an employer says it is). *Ninth Circuit: Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1137 (9th Cir. 2001) (reversing and remanding district court’s grant of summary judgment for the employer, holding that there was a triable issue of fact as to whether the employee would have been able to perform the essential functions of her job at home, and rejecting the employer’s argument that the employee was not entitled to work from home because of her record of tardiness and absenteeism). *D.C. Circuit: Woodruff v. Peters*, 482 F.3d 521, 523 (D.C. Cir. 2007) (reversing district court’s summary judgment in favor of an employer who had denied the employee’s request to work from home after granting the same request of another employee in the same division); *Langon v. Dep’t of Health & Hum. Servs.*, 959 F.2d 1053, 1060–61 (D.C. Cir. 1992) (reversing summary judgment, holding that there were genuine factual disputes about whether the employee could perform the essential functions of her job from home, which she requested because her multiple sclerosis had gotten worse and previous accommodations were no longer sufficient. There was also a factual dispute as to whether allowing her to work from home would pose an undue hardship on the employer).

¹⁰¹ *Mosby-Meachem*, 883 F.3d at 599.

¹⁰² *See McMillan*, 711 F.3d at 123; *see also Nixon-Tinkelman*, 434 F. App’x at 20 (vacating district court’s summary judgment in favor of employer); *Nixon-Tinkelman v. N.Y. City Dep’t of Health & Mental Hygiene*, No. 08 cv. 4509, 2012 U.S. Dist. LEXIS 91403, *5–6 (S.D.N.Y. June 26, 2012) (on remand, finding that working from home could be a reasonable accommodation to be determined at trial); *Laguerre*, 2022 U.S. App. LEXIS 6328, at *8–10 (vacating summary judgement for employer finding employee qualified and that remote work can be a reasonable accommodation but remanded to determine if accommodation requiring employer to purchase new technology constitutes an undue hardship).

¹⁰³ *Humphrey*, 239 F.3d at 1130.

¹⁰⁴ *Woodruff*, 482 F.3d at 523.

¹⁰⁵ Upon my review of the more than two dozen circuit courts of appeals cases that addressed the issue of remote work over the past decade, I found differing views among and within circuits. But these differing views do not necessarily appear to create a split in the circuits that would warrant review by the U.S. Supreme Court at this time. The cases turn on factual issues regarding a particular employee and not necessarily the relevant legal standard to be applied.

For example, two years after its decision in *Ford*, the Sixth Circuit decided *Mosby-Meachem v. Memphis Light, Gas and Water Division*, in which the same court upheld the right of an employee to work from home as an accommodation.¹⁰⁶ In *Mosby-Meachem*, the employer presented the job description as evidence that in-person attendance was an essential function of the employee's job as an attorney.¹⁰⁷ However, the Sixth Circuit rejected the employer's view and found that the employee had presented sufficient evidence to support the jury's verdict that she could perform all of the essential functions of her job remotely for the ten weeks while she was on bed rest related to her pregnancy.¹⁰⁸ The court distinguished this case from *Ford*, stating that "in *Ford*, we observed that in-person attendance is an essential function of 'most jobs,' but we expressly did not preclude teleworking in all cases ('[E]mployers [must] make reasonable accommodations for its employees, including allowing telecommuting under the proper circumstances.')"¹⁰⁹

However, given the number of cases and their different holdings, the issue of the right to remote work under the ADA does call for action. Some may call for amending Title I of the ADA to clarify that remote work is a reasonable accommodation. However, efforts to amend the ADA are not currently underway. Therefore, I call for amending the relevant EEOC regulations. As I explain below, given the advances in technology and the fact that hundreds of thousands of workers—with and without disabilities—are now working remotely, the EEOC should amend its regulations to increase opportunities for remote work by disabled employees. See *infra* Part V.

¹⁰⁶ 883 F.3d at 603–05 (6th Cir. 2018). The same year as the *Mosby-Meachem* decision, the Sixth Circuit decided *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 848 (6th Cir. 2018). In this case, the court followed *Mosby-Meachem* and distinguished from *Ford*. The court concluded the district court had based its holding on an incorrect legal conclusion because full-time work was an essential function of the employee's position and because the plaintiff could not work full time because of her disability, she was not a qualified individual under the ADA. *Id.* at 856. The circuit court remanded the case to resolve the factual dispute of whether the plaintiff could meet the essential functions of her job by working remotely for ten weeks. *Id.* at 859.

¹⁰⁷ 883 F.3d at 603–05.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 605 (quoting EEOC v. Ford Motor Co., 782 F.3d 753, 762–655 (6th Cir. 2015)) (citation omitted). The court distinguished *Ford* on the grounds that while the employer was correct that there was some evidence showing that in-person attendance was an essential function of Mosby-Meachem's job, the evidence she presented at trial, including testimony from coworkers, supported a jury's finding that she was otherwise qualified to perform her job from home for ten weeks without being physically present in the office. *Id.* at 603–05. The court went on to note that "determining what constitutes an essential function 'is highly fact specific.'" *Id.* at 605 (quoting *Hoskins v. Oakland Cnty. Sheriff's Dep't*, 227 F.3d 719, 726 (6th Cir. 2000)). Accordingly:

because the *Ford* . . . case[] le[ft] open the possibility of teleworking as a reasonable accommodation, particularly for a finite period of

Unlike most circuit court cases that are resolved by affirming a district court's grant of summary judgment for the employer, the *Mosby-Meachem* court carefully examined the evidence that supported the jury's finding that physical presence in the office was not an essential function of this attorney's job. The court concluded that while the employer is

correct that there is some evidence showing that in-person attendance was an essential function of Mosby-Meachem's job, Mosby-Meachem proffered other evidence at trial, including testimony from coworkers, from which a jury could reasonably conclude that she was otherwise qualified to perform her job from home for ten weeks without being physically present in the office.¹¹⁰

Perhaps the most significant difference between Ms. Mosby-Meachem and Ms. Harris, however, was that Ms. Mosby-Meachem requested permission to work from home for a limited ten-week period, as opposed to Ms. Harris' request to work off-site indefinitely and on an indeterminate schedule.¹¹¹

In addition to the Sixth Circuit, the Second Circuit has decided at least three cases in favor of employees who sought to work remotely.¹¹² For example, in *McMillan v. City of New*

time, a jury could have reasonably concluded from the evidence presented at trial that Mosby-Meachem could perform all the essential functions of her job remotely for ten weeks.

Id.

¹¹⁰ *Id.* at 603. The court noted that the job description was not up to date, and that in the eight years Ms. Mosby-Meachem had worked as an attorney at the firm, she had never tried a case in court. *Id.* at 604.

¹¹¹ *Ford Motor Co.*, 782 F.3d. at 759. In support of this decision, the court cited the Code of Federal Regulations Section 1630.2 which states, "[e]vidence of whether a particular function is essential includes . . . [t]he amount of time spent on the job performing the function." 29 C.F.R. § 1630.2(n)(3)(iii). The Sixth Circuit distinguished *Ford* further by stating that

[i]n *Ford*, we granted summary judgment to the employer, finding that 'regular and predictable attendance' at work on-site was an essential function of the plaintiff's employment. The plaintiff in *Ford*, however, had an extensive history of poor performance and high absenteeism, some of which stemmed from her Irritable Bowel Syndrome, requiring other employees to cover for her. Ford attempted to accommodate the plaintiff, but her poor performance and absenteeism eventually led to her termination. Here, unlike the plaintiff in *Ford*, Mosby-Meachem had performed her duties remotely in the past without any attendance issues or decline in work product. Further, Mosby-Meachem's requested accommodation—teleworking for a limited ten-week period—was significantly different from that of the plaintiff in *Ford*, who sought to work off-site up to four days a week indefinitely and on an indeterminate schedule.

Mosby-Meachem, 883 F.3d at 604–05 (internal citations omitted).

¹¹² See *McMillan v. City of New York*, 711 F.3d 120, 123, 126 (2d Cir. 2013) (considering that physical presence at a specific time may not have been essential

York, the Second Circuit Court of Appeals vacated and remanded summary judgment for the City of New York. According to the Second Circuit, the district court had not conducted “a sufficiently detailed analysis of the facts” to determine that a specific arrival time at work was an essential function of the employee’s position.¹¹³ Although the *McMillan* court recognized that remote work may not always be appropriate, it refused to agree with the *Vande Zande* court that physical presence is an essential function for “virtually all” jobs.¹¹⁴ In two additional cases, *DeRosa v. National Envelope Corp.* and *Nixon-Tinkelman v. N.Y.C. Department of Health & Mental Hygiene*, the Second Circuit held that working from home could be a reasonable accommodation, notwithstanding the employers’ objections.¹¹⁵

Similarly, the Ninth Circuit refused to defer to the employer’s judgment regarding physical presence as an essential function in *Humphrey v. Memorial Hospital Association*.¹¹⁶ In this case, Ms. Humphrey had experienced

to the performance of the employee’s job); *DeRosa v. Nat’l Envelope Corp.*, 595 F.3d 99, 104 (2d Cir. 2010) (suggesting that employer had provided a reasonable accommodation by allowing employee to work from home, which was “necessary to maintaining his job”); *Nixon-Tinkelman v. N.Y.C. Dep’t Health & Mental Hygiene*, 434 F. App’x 17, 20 (2d Cir. 2011) (contending that the employer may have been able to reasonably accommodate the employee by allowing her to work remotely). In *Nixon-Tinkelman*, on appeal, the court summarily upheld the district court’s conclusion that the employer did not fail to accommodate the employee’s hearing loss by failing to provide her with a special telephone or device for the thirteen months in question. *Id.* at 19. However, the court also remanded the case to determine whether the employer should be required to provide commuting accommodation, because according to the Second Circuit, “[I]n certain circumstances, an employer may have an obligation to assist in an employee’s commute,” for example by permitting her to “work from home[or] providing a car, or providing a parking permit.” *Id.* at 19–20. On reman, summary judgment granted, in part and summary judgment denied, in part. *Nixon-Tinkelman v. N.Y. City Dep’t of Health & Mental Hygiene*, No. 08 cv. 4509, 2012 U.S. Dist. LEXIS 91403, at *4 (S.D.N.Y. June 26, 2012). Request denied but no reversal on request to work from home. *Id.* at *11; *see also Hernandez v. City of Hartford*, 959 F. Supp. 125, 127–28 (D. Conn. 1997) (denying summary judgment in case involving an employee’s request to work from home during her high-risk pregnancy).

¹¹³ *McMillan*, 711 F.3d at 123; *see also Nixon-Tinkelman*, 434 F. App’x at 19 (explaining that the Second Circuit has consistently held that “in certain circumstances, an employer may have an obligation to assist in an employee’s commute”); *Lyons v. Legal Aid Soc’y*, 68 F.3d 1512, 1517 (2d Cir. 1995); *accord DeRosa v. Nat’l Envelope Corp.*, 595 F.3d 99, 104 (2d Cir. 2010) (suggesting that employer had provided a reasonable accommodation by allowing employee to work from home, which was “necessary to maintaining his job”).

¹¹⁴ The *McMillan* court found that when physical presence is not necessary to a position’s essential functions, an off-site accommodation may be reasonable. *McMillan*, 711 F.3d at 126.

¹¹⁵ *Nixon-Tinkelman*, 434 F. App’x at 20; *DeRosa*, 595 F.3d at 104.

¹¹⁶ 239 F.3d 1128, 1136–37 (9th Cir. 2001).

trouble getting to work on time because she was diagnosed with obsessive compulsive disorder, which required her to engage in a variety of rituals prior to leaving for work.¹¹⁷ There was no dispute in the record, however, that once she was at work, she satisfactorily performed her job as a typist and medical transcriptionist.¹¹⁸ The Ninth Circuit held that summary judgment for the employer was inappropriate because there was “at least a triable issue of fact as to whether Humphrey would have been able to perform the essential duties of her job with the accommodation of a work-at-home position.”¹¹⁹ The court rejected the employer’s claim that Ms. Humphrey was not entitled to work from home because of her prior record of tardiness and absenteeism.¹²⁰ Unlike the Sixth Circuit in *Ford*, which did not consider whether Ms. Harris’s absenteeism was related to her disability, the *Humphrey* Court held that “[i]t 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.”¹²¹ Thus, according to the Ninth Circuit, an employee’s prior work history, even an unsatisfactory one, is not an appropriate basis to deny a request to work from home as an accommodation.

In addition to the Sixth, Second, and Ninth Circuits, the D.C. Circuit has recognized that working from home may be an appropriate accommodation. In *Woodruff v. Peters*, the D.C. Circuit reversed the district court’s summary judgment in favor of an employer who denied the employee’s request to work from home after granting the same request of another employee in the same division.¹²² According to the D.C. Circuit Court’s decision in *Woodruff*, the employer’s prior approval “cast[] doubt on the suggestion that the accommodations would impose undue hardship . . . , or that even with such

¹¹⁷ *Id.* at 1130.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1136. Here, the court acknowledged that “[c]ourts have taken differing approaches toward working at home as an accommodation.” *Id.* at 1136 n.15. “Compare *Vande Zande v. Wis. Dept. of Admin.*, 44 F.3d 538, 544–45 (7th Cir. 1995) (holding that an employer is not required to allow disabled workers to work at home except in extraordinary circumstances), with *Langon v. Dep’t of Health & Hum. Servs.*, 959 F.2d 1053, 1060–61 (D.C. Cir.1992) (holding that an employer must consider requested accommodation of working at home), cited with approval in *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993).” *Id.* “We see no reason not to follow the approach taken by the EEOC in its Enforcement Guidance.” *Id.*

¹²⁰ *Id.* at 1139–40.

¹²¹ *Id.* at 1137.

¹²² 482 F.3d 521, 528 (D.C. Cir. 2007).

accommodations [the employee] would be unable to perform . . . his job.”¹²³

In addition to these circuit court cases, district courts¹²⁴ as

¹²³ *Id.*

¹²⁴ The following are district court cases from several circuits that have ruled for the employee. *D.C. Circuit:* Owens-Hart v. Howard Univ., 220 F. Supp. 3d 81, 95–96 (D.D.C. 2016) (denying summary judgment in case involving an art professor’s request to work from home because her asthma made it difficult to work in an unventilated ceramic studio); Schmidt v. Solis, 891 F. Supp. 2d 72, 92 (D.D.C. 2012) (concluding employee prevailed on claim of failure to accommodate where employer denied employee with endometriosis the ability to work from home); *First Circuit:* Peoples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56, 59–60 (D. Mass. 2020) (granting preliminary injunction to employee with asthma who was denied telework request as a reasonable accommodation during Covid-19 after he showed he could perform essential functions of the job at home); Goodrich v. WellPoint, Inc., No. 2:14-cv-00037-JDL, 2015 U.S. Dist. LEXIS 102218, at *10–12 (D. Me. Aug. 5, 2015) (denying summary judgment, holding that there was a dispute of material fact as to whether the employee was able to perform the essential functions of his job, and therefore whether he was a “qualified individual,” and rejecting employer’s argument that working from home was an unreasonable accommodation due to a company policy requiring employees to establish competence with the computer system before working from home). *Second Circuit:* Arazi v. Cohen Brothers Realty Corp., No. 1:20—cv-8837-GHW, 2022 U.S. Dist. LEXIS 56549, at *21 (S.D.N.Y. Mar. 28, 2022) (calling “nonsensical” employer’s argument that employee requested to work remotely not as an accommodation for her multiple sclerosis, but instead sought an accommodation for “the fear of being at risk of developing a severe form of Covid-19.”); Coleman v. New York City Dep’t of Health & Mental Hygiene, No. 20cv10503 (DLC), 2022 U.S. Dist. LEXIS 42016, at *1–4 (S.D.N.Y. Mar. 9, 2022) (denying motion to dismiss in case where plaintiff had worked successfully remotely); Campbell v. Ipsoft Inc., No. 18cv10684 (DF) 2021 U.S. Dist. LEXIS 178038, at *69 (S.D.N.Y. Sept. 17, 2021) (denying employer’s motion for summary judgement finding that employee’s disability-related claims presented a “genuine[] disputed issue[] of fact as to whether the substantial revocation of [employee]’s work-from-home schedule represented the denial of a reasonable accommodation”); Goonan v. Fed. Reserve. Bank of N.Y., 916 F. Supp. 2d 470, 482–83 (S.D.N.Y. 2013) (denying summary judgement to employer where employee’s request to work remotely was considered not unreasonable); Hernandez v. City of Hartford, 959 F. Supp. 125, 132 (D. Conn. 1997) (rejecting *Vande Zande’s* per se rule in case involving an employee experiencing a high-risk pregnancy and finding employee had raised an issue of fact as to whether working from home would cause an undue hardship on the employer). *Third Circuit:* O’Malley v. Dowd Mktg., Inc., No. 3-17-cv-1419, 2018 U.S. Dist. LEXIS 195938, at *24–26 (M.D. Pa. Nov. 15, 2018) (denying employer’s motion to dismiss, holding that employee had stated a claim for failure to accommodate when he requested to work from home because he was in severe pain, and the employer had allowed him to do so for three years before revoking the accommodation and failing to provide an alternate accommodation); Fischer v. Pepper Hamilton LLP, No. 15-02413, 2016 U.S. Dist. LEXIS 10603, at *37–38 (E.D. Pa. Jan. 29, 2016) (denying summary judgment because issues of material fact existed as to whether regular and predictable on-site attendance or working full-time were essential functions of the employee’s job as a project attorney, and therefore also as to whether he was a “qualified individual” under the ADA); Bisker v. GGS Info. Servs., Inc., No. 1:CV-07-1465, 2010 U.S. Dist. LEXIS 53879, at *10 (M.D. Pa. June 2, 2010) (denying summary judgment, rejecting a per se rule against working from home as a reasonable

accommodation, and holding that the evidence suggested that allowing the employee to work from home would not be exceedingly costly and may allow her to perform her essential job functions); *Pinegar v. Shinseki*, 665 F. Supp. 2d 487, 502–03 (M.D. Pa. 2009) (denying summary judgment, holding that whether working from home is a reasonable accommodation is a question of fact that could not be decided as a matter of law given disputes regarding the essential functions of the employee’s job and whether she could perform them from home); *Freeman v. Chertoff*, 604 F. Supp. 2d. 726, 733–34 (D.N.J. 2009) (denying summary judgment for defendant and holding that a jury should determine the essential function of plaintiff’s position since multiple employees testified physical presence was not necessary on the job). *Fourth Circuit*: *Merrill v. McCarthy*, 184 F. Supp. 3d 221, 238–40 (E.D.N.C. 2016) (denying summary judgment to both parties, holding that several issues of material fact existed regarding the reasonableness of the employee’s requested accommodation telework, and holding that the employee’s claim was not defeated by the finding that she could perform the essential functions of her job without the employer’s grant of her request to work from home); *Parker v. Children’s Nat’l Med. Ctr., Inc.*, No. ELH-20-3523, 2021 U.S. Dist. LEXIS 235885, at *24–25 (D. Md. Dec. 9, 2021) (denying employer’s motion to dismiss, holding plaintiff had evidence to present to a jury for a failure to accommodate claim after defendant refused to allow plaintiff to work from home during a high-risk pregnancy); *White v. Howard Cmty. Coll.*, No. SAG-21-2274, 2021 U.S. Dist. LEXIS 244179, at *1–4 (D. Md. Dec 22, 2021) (refusing to dismiss lawsuit against an employer who refused to permit telework by an employee who needed a heart transplant). *Fifth Circuit*: *Silver v. City of Alexandria*, 470 F. Supp. 3d 616, 624–25 (W.D. La. 2020) (granting injunction to employee denied request to telework during Covid-19 since he presented sufficient evidence to show he was able to participate virtually in required meetings); *Anzalone v. Allstate Ins. Co.*, No. 93-2248, 1995 U.S. Dist. LEXIS 1272, at *5–6 (E.D. La. Jan. 30, 1995) (denying employer’s motion for judgment as a matter of law, holding that the employee had presented sufficient evidence of his ability to perform the essential functions of his job to go to the jury). *Sixth Circuit*: *Russo v. Moore Ingram Johnson & Steele, LLP*, No. 3:20-cv-00820, 2022 U.S. Dist. LEXIS 97574, at *14–15 (M.D. Tenn. June 1, 2022) (denying employer’s motion to dismiss in favor of employee with family history of Guillain-Barre syndrome and severe anxiety who sought to work remotely to avoid risks of Covid-19); *Kelly v. First Data Corp.*, No. 1:19-cv-372, 2020 U.S. Dist. LEXIS 13239, at *46–47 (S.D. Ohio Jan. 27, 2020) (denying employer’s motion to dismiss, holding that employee’s complaint sufficiently pled that the employer had knowledge of employee’s post-partum conditions and unreasonably denied her request to work from home, and rejecting the argument that working from home is not a reasonable accommodation); *Masters v. Class Appraisal, Inc.*, No. 2:17-cv-11283-LJM-EAS, 2019 U.S. Dist. LEXIS 161487, at *22–24 (E.D. Mich. Sept. 23, 2019) (denying employer’s motion for summary judgment, rejecting the argument that allowing the employee to work from home due to her multiple sclerosis would pose an undue hardship by compromising data security, and holding that a reasonable jury could find that the she was just as productive working at home as in the office). *Seventh Circuit*: *Gentile v. Cnty. of DuPage*, No. 21-cv-673, 583 F. Supp. 3d 1167, 1174, (N.D. Ill. 2022) (denying a motion to dismiss based on the pandemic history but noting that employer could still prove that the jobs done remotely were not comparable); *Bixby v. JP Morgan Chase Bank, N.A.*, No. 10 C 405, 2012 U.S. Dist. LEXIS 32974, at *28–30 (N.D. Ill. Mar. 8, 2012) (denying summary judgment, holding that a reasonable jury could find that working from home was a reasonable accommodation, noting that the employer had previously allowed employees in the same position to work from home on a full-time, permanent basis, and discussing the various advances in technology since *Vande Zande* was decided). *Eleventh Circuit*: *Wright v. Blackman*, No. 21-14244-CV-MIDDLEBROOKS, 2022

well as state courts¹²⁵ have also ruled in favor of employees seeking to work remotely. One can assume that such cases will increase as the risk of Covid-19 abates, and more employers require their employees to return to the workplace or risk being fired.

C. What the Case Law Shows: Times are Changing

The preceding discussion confirms the highly fact specific inquiry required in remote work cases under Title I of the ADA. It also confirms that the way in which employers and courts view disability may directly affect their decisions.¹²⁶ Cases involving an employee's request to work remotely should require a careful balancing of the needs of an employer and the rights of an employee. However, a review of the recent cases from nearly every circuit reveals a lack of consistency regarding how courts proceed with such claims. Moreover, in light of recent technological advances which allow employees to maintain efficiency and productivity while working remotely, the legal reasoning of these cases is now called into question. In fact, what is most striking about the developing case law in this area is how little evidence is presented by the employers, or required by courts, to support the employer's claim that remote work would cause an "undue hardship" on the operation of the employer's business. One commentator has gone so far as to suggest that "the hardship is nothing more than inherent

U.S. Dist. LEXIS 21413, at *21-22 (S.D. Fla. Feb. 4, 2022) (finding sufficient evidence to support a telework accommodation, based in part on the employer's remote-work policies during the pandemic).

¹²⁵ See, e.g., *Dobyns v. Univ. of La. Sys.*, 275 So. 3d 911, 927 (La. Ct. App. 2019) (affirming jury verdict awarding damages to a professor who was denied requested accommodations for her severe allergic reactions to environmental allergens, including alternate scheduling that allowed for distance teaching during winter months without taking sick leave); *Withem v. Ron Rogers & Assocs.*, No. B204034, 2008 Cal. App. Unpub. LEXIS 10209, at *33-34 (Cal. Ct. App. Dec. 18, 2008) (ordered not published) (denying employer's motion for summary judgment, holding that employee had raised a triable issue of fact as to whether permitting her to work from home one day a week would cause undue hardship to the employer. Employee presented evidence including instances of the employer allowing other employees to work from home, and the fact that allowing her to work from home would impose no additional cost on the employer.).

¹²⁶ See Lindsey Brown, *The Role of Medical Experts in Shaping Disability Law*, in ARGUING ABOUT DISABILITY: PHILOSOPHICAL PERSPECTIVES 169, 171 (Kristjana Kristiansen, Simo Vehmas & Tom Shakespeare eds., 2009). "Commentators suggest that the dominant culture tends to reflect the interests of those within particular social groups who have the power to define situations and the necessary resources to ensure that their own definitions are accepted as true" *Id.*

distrust of employees.”¹²⁷ Indeed, most such cases focus more on the employee’s attendance and performance record at the workplace rather than on any alleged hardship that would occur if the employee were permitted to work from home.¹²⁸

It also appears that some facts are more persuasive to courts than others. In those cases in which the employee has a long history of requesting accommodations,¹²⁹ a poor attendance record,¹³⁰ a poor job performance record,¹³¹ or when the employee’s job, according to the employer, requires personal contact with customers,¹³² fellow workers (the “team”),¹³³ or a supervisor,¹³⁴ courts are more inclined to rule

¹²⁷ Brianne M. Sullenger, Comment, *Telecommuting: A Reasonable Accommodation Under the Americans with Disabilities Act as Technology Advances*, 19 REGENT U. L. REV. 537, 555 (2007).

¹²⁸ See cases cited *supra* note 98.

¹²⁹ See, e.g., *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995) (noting that the employee acknowledged that the employer “made numerous accommodations relating to the [employee’s] disability”); see also *EEOC v. Yellow Freight Sys.*, 253 F.3d 943, 947–48 (7th Cir. 2001) (holding a dockworker who had a poor attendance record due to his diagnosis of HIV and terminal cancer was unable to meet the essential functions of the job).

¹³⁰ The Sixth Circuit’s decision in *Ford* aligns with several other decisions that have found individuals with poor attendance records at the workplace do not qualify as disabled under Title I and therefore are not entitled to any reasonable accommodations. See, e.g., *Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537, 545 (8th Cir. 2018) (recognizing that absences can be excessive even with the permission of the employer); *Vitti v. Macy’s Inc.*, 758 F. App’x 153, 157 (2d Cir. 2018) (affirming regular and reliable attendance as an essential function in a case where employer terminated employee after she accumulated numerous violations of the employer’s attendance policy); see also *Tyndall v. Nat’l Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994) (finding that a teacher with excessive absences was unable to meet the essential job requirements although remote work was not at issue here).

¹³¹ See, e.g., *EEOC v. Ford Motor Co.*, 782 F.3d 753, 770 (6th Cir. 2015) (affirming the district court’s decision granting summary judgment because “[n]o reasonable jury could find that [the employer]—a for-profit corporation—would continue to pay an employee who failed to do her job well in the past, and who, by her own admission, could not perform the essential elements of her job in the future”); *Spielman v. Blue Cross & Blue Shield of Kan., Inc.*, 33 F. App’x 439, 444 (10th Cir. 2002) (affirming, on appeal, the district court’s decision that employee did not meet the criteria for working at home under the employer’s policy because there were substantial difficulties with the employee’s work performance over an extended period of time and therefore, a reasonable factfinder could not have concluded that working at home was reasonable accommodation).

¹³² See, e.g., *Abram v. Fulton Cnty. Gov’t*, 598 F. App’x 672, 677 (11th Cir. 2015) (affirming the district court’s decision granting summary judgment because a reasonable jury would “find that [the employee’s] physical presence at the front desk was an essential function of her position”).

¹³³ See, e.g., *Ford Motor Co.*, 782 F.3d at 762 (noting that jobs involving teamwork are more likely to “require regular and predictable on-site attendance from all employees”).

¹³⁴ See, e.g., *Vande Zande*, 44 F.3d at 544 (“Most jobs in organizations . . . involve team work under supervision . . . and team work under

for employers—notwithstanding the lack of proof on these issues in most cases.¹³⁵ Although at least one court has held that prior job performance or the employee's attendance record at the workplace has no bearing on the reasonableness of a request to work from home, most courts have relied on the employer's assessment of the employee's workplace performance as a basis to deny remote work requests.¹³⁶

On the other hand, the courts that rule in favor of employees seem less concerned about the employee's prior employment record and more persuaded by equity arguments. For example, these courts seem persuaded by such facts as that the employer had permitted other employees to work from home in the past,¹³⁷ or that the requested remote work arrangement would be temporary, and time limited, as opposed to permanent, intermittent, or indefinite.¹³⁸

The various courts' inconsistent approaches are troubling. The issue for the courts to decide in remote work cases should not be whether or not the employee has a stellar record at the workplace. Instead, the issue for the court is whether or not the employee can perform the essential functions of the job remotely without causing an undue hardship on the employer. Once the employee presents sufficient evidence to show their ability to perform the essential functions of the job remotely, the employer should be required to rebut that evidence by showing (1) that the essential functions of the job can *only* be done at the workplace; (2) that remote work would cause a specific undue hardship on the employer; or (3) that remote

supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance.”).

¹³⁵ See, e.g., *Kvorjak v. Maine*, 259 F.3d 48, 55 (1st Cir. 2001) (“In the absence of evidence of discriminatory animus, courts generally give ‘substantial weight’ to the employer’s judgment as to what functions are essential.”).

¹³⁶ E.g., *id.* at 58; *Spielman*, 33 F. App’x at 444; *Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537, 544 (8th Cir. 2018).

¹³⁷ See e.g., *McMillan v. City of New York*, 711 F.3d 120, 126 (2d Cir. 2013) (noting the City’s flex-time policy “implies that punctuality and presence at precise times may not be essential”); *DeRosa v. Nat’l Envelope Corp.*, 595 F.3d 99, 102 (2d Cir. 2010) (discussing how the employee’s disability had been accommodated through remote work in the past); *Woodruff v. Peters*, 482 F.3d 521, 527 (D.C. Cir. 2007) (noting that the employer’s handbook anticipated that employees could work remotely up to five days a week and that another employee in the plaintiff’s division led a team in Washington, D.C. while working remotely from Florida).

¹³⁸ *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 604 (6th Cir. 2018) (affirming jury verdict for employee, holding that sufficient evidence was presented for a reasonable jury to conclude that employee could perform all the essential functions of her job remotely for ten weeks while she was on bed rest for pregnancy complications).

work would pose a danger to others at the workplace or the employee. To meet this burden, the employer should be required to show which specific task(s) cannot be performed remotely and what specific hardships, if any, the employer would suffer if the employee were permitted to work remotely.¹³⁹

If an employer meets this burden and can show by clear and convincing evidence that allowing an employee to work from home would cause an undue hardship, the employer's decision to deny a remote work request should be affirmed by the court. However, absent such proof (as was the case in most of the decisions reviewed for this article), working from home should be permitted as a modification of a workplace rule, as permitted by Title I's EEOC Guidance.¹⁴⁰

Currently, courts may feel free to defer to employers' decisions about remote work because there is no rule preventing them from doing so. Although the regulations state that an employer's judgment is not controlling, as discussed above, nowhere in the regulations nor the Guidance does the EEOC state that an employee's prior work history or attendance record at the workplace should not be considered since it is not necessarily relevant to an employee's ability to perform the essential functions of the job away from the workplace. Other factors, especially the feasibility of working at a remote location, should be the primary inquiry.¹⁴¹

Moreover, since most cases have been resolved by district courts in favor of employers on their motions for summary judgment, appellate courts have not had an opportunity to review any evidence regarding the feasibility of remote work for the particular employees. To deny an employee the right to work remotely as an accommodation without providing the employee a chance to show whether or not they can perform the essential functions of the job remotely is an example of an adverse employment action that Title I was designed to prevent.

In those cases, in which the employer argues successfully that the employee who seeks to work from home is no longer qualified for the job at the workplace, the employee has no right to request any accommodations, including a modification of

¹³⁹ See, e.g., *Laguerre v. Nat'l Grid USA*, No. 20-3901-cv, 2022 U.S. App. LEXIS 6328, at *9-10 (2d. Cir. Mar. 11, 2022) (court remanded the case for trial to determine if cost of a reasonable accommodation would exceed its benefits).

¹⁴⁰ See *supra* note 52 and corresponding text.

¹⁴¹ See U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2003-1, *supra* note 9.

workplace policies. As a result, what we see in many of these remote work cases is the appellate courts' willingness to condone the employers' mistaken reliance on Title I's qualification standard to deny employees' requests to work remotely.

In sum, there has been an increasing number of cases brought by disabled employees requesting to work remotely as an accommodation. That number will likely continue to increase as workplaces adjust to new post Covid-19 norms. Accordingly, the EEOC should provide additional guidance to the courts on how to resolve these cases. But as the EEOC considers next steps, it should also consider the impact of disability prejudice or ableism in the workplace that may explain, at least in part, why some employers resist providing remote work as an accommodation to their disabled.

IV

ABLEISM IN THE WORKPLACE AND ITS IMPACT ON THE RIGHT TO WORK FROM HOME

When President George Bush signed the original version of the ADA in 1990, he declared: "Together, we must remove the physical barriers we have created and the social barriers that we have accepted. For ours will never be a truly prosperous nation until all within it prosper."¹⁴² This statement is consistent with the social model of disability, which places the responsibility for removing barriers to inclusion of people with disabilities on society.¹⁴³

The social model of disability rejects the medical model of disability that views disability as an inherent "problem" in the individual—requiring a cure, medical treatment, or charity.¹⁴⁴ By contrast, the social model views disability primarily as the result of socio-cultural dynamics that occur in interactions between people with disabilities and the societies in which they live.¹⁴⁵ As embraced by Critical Disability Studies, this "social construction" of disability views disability not as a functional impairment that may limit a person's activities, but as a label

¹⁴² President George H. W. Bush, Remarks at the Signing of the Americans with Disabilities Act (July 26, 1990), https://www.ada.gov/ghw_bush_ada_remarks.html [<https://perma.cc/JPH4-HAH6>]; 42 U.S.C. § 12101.

¹⁴³ Arlene S. Kanter, *The Law: What's Disability Studies Got to Do With it or An Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 427 (2011).

¹⁴⁴ See Tom Shakespeare, *Social Models of Disability and Other Life Strategies*, 6 SCANDINAVIAN J. DISABILITY RSCH. 8, 11–12 (2004); Kanter, *supra* note 143, at 419.

¹⁴⁵ Kanter, *supra* note 143, at 427.

that society attaches to people who are considered different from an idealized view of the “able-bodied” person, because of how they may talk, move, walk, see, hear, speak, or think.¹⁴⁶ Critical Disability Studies provides a theory with which to challenge cultural norms that result in the creation of legal, physical, and attitudinal barriers to inclusion of disabled people in society.¹⁴⁷ The real lived experience, illness, pain, and need for treatment of disabled people should not be ignored under the social model. However, the obligation of society is not to “fix” people with disabilities so that they can better fit into existing systems, but rather to “fix” society, to be more inclusive, accessible, and usable by disabled people.¹⁴⁸ Accomplishing this goal requires a re-examination of our assumptions about the universality of the concept of the norm.¹⁴⁹ In sum, Critical Disability Studies challenges the categorization of who is “normal” and who is not.¹⁵⁰

Within the law, people with disabilities are seen as “the other,” or not “normal.” Viewing people with disabilities in this way confers upon them minority group status, which offers protection based on their shared history of discrimination and marginalization. But it also reinforces their exceptionalism,

¹⁴⁶ *Id.* at 410.

¹⁴⁷ *Id.* at 427–28.

¹⁴⁸ Prior to this point in the article, I referred to “people with disabilities” to conform to “people first” language in which the disability is secondary to the person’s primary identity as a person, focusing on the person, not the disability. However, in the U.K. and more recently in the U.S., scholars and self-advocates are opting to use “identity first language,” which refers to the “disabled person” (as opposed to “person with a disability”) to illustrate their pride in their primary identity of disability. Use of this language does not mean the person views disability as their *entire* identity, but rather it is an essential part of their identity. See, e.g., *Language Guide*, SYRACUSE UNIV. DISABILITY CULTURE CTR., <https://experience.syracuse.edu/dcc/resources/language-guide/> [<https://perma.cc/L8P3-EN48>] (last visited Sept. 19, 2022) (defining people-first and identity-first language); Nick Watson, *Well, I Know This is Going to Sound Very Strange to You, But I Don't See Myself as a Disabled Person: Identity and Disability*, 17 *DISABILITY & SOC'Y* 509, 513 (2002) (discussing language and disability identity); Brittany Wong, *It's Perfectly OK to Call a Disabled Person "Disabled," and Here's Why*, HUFFINGTON POST, https://www.huffpost.com/entry/what-to-call-disabled-person_1_5d02c521e4b0304a120c7549 [<https://perma.cc/2MPK-TUHU>] (last updated Sept. 16, 2021) (describing the “cultural divide” between person-first and identity-first language).

¹⁴⁹ Kanter, *supra* note 143, at 418–19. As the Disability Studies scholar Lennard Davis has observed, the term “normal” evolved as a category during the mid-19th century’s occupation with human sciences and the rise of statistics. Prior to that time, the standard was a “divine body, then, this ideal body, [which] is not attainable by a human.” Lennard J. Davis, *Introduction: Normality, Power, and Culture*, in *THE DISABILITY STUDIES READER* 1, 2 (Lennard J. Davis ed., 4th ed. 2013).

¹⁵⁰ Kanter, *supra* note 143, at 418–19.

requiring them to prove how they are different from the able-bodied norm in order to receive the accommodations they may need to function like everyone else (without disabilities) in and out of the workplace.¹⁵¹

A Critical Disability Studies approach to the issue of working from home requires us to focus less on the abilities or impairments of the employee and more on the role of the employer in eliminating barriers in order to promote the full inclusion and equality of people with disabilities in the workforce. The way in which the remote work case law is developing, however, allows employers to create workplace barriers by denying remote work requests by disabled people. Denying an employee's request for remote work may perpetuate ableism in the workplace, as discussed more fully in the following paragraphs.

A. Ableism in the Workplace

Ableism can be defined as “a system of beliefs and actions based on the idea that certain abilities or ways of being are superior to others.”¹⁵² In the workplace, ableism denies disabled employees the right to be treated equally and may

¹⁵¹ See *id.* at 422.

¹⁵² Katherine Perez, *A Critical Race and Disability Legal Studies Approach to Immigration Law and Policy*, UCLA L. REV. (Feb. 2, 2019), <https://www.uclalawreview.org/a-critical-race-and-disability-legal-studies-approach-to-immigration-law-and-policy/> [https://perma.cc/7T7A-KKCC]; see also MICHELLE R. NARIO-REDMOND, ABLEISM: THE CAUSES AND CONSEQUENCES OF DISABILITY PREJUDICE 6 (2020) (“[A]bleism is simply defined as prejudice and discrimination toward individuals simply because they are classified as disabled – regardless of whether their impairments are physical or mental, visible or invisible.”). See generally DAN GOODLEY, DIS/ABILITY STUDIES: THEORIZING DISABLISM AND ABLEISM 61 (2014) (discussing normative pressures on disabled and abled bodies). “Ableism is a set of beliefs, processes and practices that produce – based on abilities one exhibits or values – a particular understanding of oneself, one’s body and one’s relationship with others of humanity, other species and the environment, and includes how one is judged by others.” Gregor Wolbring, *The Politics of Ableism*, 51 DEVELOPMENT 252, 252–53 (2008)). Congress, itself, acknowledged the prevalence of ableism in society when it enacted the original version of the ADA, finding:

individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(7), 104 Stat. 327, 329 (codified at 42 U.S.C. §§ 12101-12213). In the subsequent ADA Amendments Act, this paragraph along with several others in the Findings section were replaced with new language. See 42 U.S.C. § 12101(a).

even create an unsafe environment for them. A recent study documented the extent to which “workplaces are still not safe for workers with disabilities”¹⁵³ and found that more than three quarters of employees have not fully disclosed their disabilities to their colleagues.¹⁵⁴

Ableism is also evident throughout the process an employee must follow to request remote work as an accommodation. In order to request remote work as an accommodation, an employee must first establish they are worthy of special treatment because of some “problem” or medically diagnosed condition they have had since birth or acquired as an adult.¹⁵⁵ Indeed, by its very terms, the ADA’s definition of an “individual with a disability” locates the “problem” of discrimination within the person, who is described as “substantially limit[ed]” in the performance of one or more “major life activit[ies].”¹⁵⁶ This language in the law “conjure[s] up stereotypical images of [people with disabilities] who are broken, weak, unable to function, and deserving of pity.”¹⁵⁷ As the legal scholar Laura Rovner has observed, these negative attitudes about disabled people are “‘hard wired’ into [law].”¹⁵⁸

Further, once the employee with a disability qualifies for protection under Title I, the individual must establish that they possess the necessary job qualifications to do the job. But even having the necessary job qualifications is not enough. The disabled employee will continue to be viewed as unable to do the job like “everyone else” (non-disabled people) unless or until some “special” accommodations, adjustments, or modifications are made to the “normal” working rules, responsibilities, and conditions of employment. It is worth noting that “special” arrangements are made regularly for people without disabilities, through collective bargaining agreements as well as systems of nepotism and privately

¹⁵³ Darren Walker & Rebecca Cokley, ‘You Get Proud by Practicing’: The Path to Disability Inclusion in Philanthropy, COUNCIL ON FOUNDS. (Sept. 7, 2021), <https://www.cof.org/blogs/amplify/2021-09-07/you-get-proud-practicing-path-disability-inclusion-philanthropy> [<https://perma.cc/B27V-SR5Q>].

¹⁵⁴ Laurie Henneborn, *Make it Safe for Employees to Disclose Their Disabilities*, HARV. BUS. REV. (June 28, 2021), <https://hbr.org/2021/06/make-it-safe-for-employees-to-disclose-their-disabilities> [<https://perma.cc/JS5K-XTMM>].

¹⁵⁵ See U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2003-1, *supra* note 9.

¹⁵⁶ 29 C.F.R. § 1630.2(g); Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 250 (2001).

¹⁵⁷ Rovner, *supra* note 156, at 250.

¹⁵⁸ *Id.* As Rovner writes, “[T]he statutory language and structure of proof of the disability rights laws themselves have cultural stereotypes about the identities of disabled people essentially ‘hard wired’ into them.” *Id.*

negotiated agreements.¹⁵⁹ But it is the changes in the workplace that people with disabilities may need in order to participate on equal footing with their nondisabled co-workers that require scrutiny under federal law. As one scholar has observed:

The 'normal' worker is supposed to be energetic, have high concentration abilities, be alert to adapt to changing conditions, and be able to withstand physical, mental or interactive stress in good humor. Workers who fail to measure up to one or more of these standards are . . . considered lazy, slackers, uncooperative or otherwise inadequate.¹⁶⁰

Although many workers with disabilities do not require any accommodations, for those who do, they may be viewed as “less than,” as outsiders, or even “whiners.”¹⁶¹ Such “ableist” views of people with disabilities have serious consequences in the workplace on the employee as well as on the employer. Although there is little research about the incidence of disability-related harassment or hostile work environments, such claims are now cognizable under the ADA, and seem to be increasing.¹⁶²

¹⁵⁹ The Supreme Court has ruled that seniority systems negotiated through collective bargaining supersede an entitlement to a certain position by an aggrieved plaintiff under the ADA. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 393–94 (2002). On the consequences of cronyism and nepotism in the workplace, see, for example, Jone L. Pearce, *Cronyism and Nepotism Are Bad for Everyone: The Research Evidence*, 8 *INDUS. & ORGANIZATIONAL PSYCH.* 41, 42–43 (2015) (explaining that nepotism and cronyism worsen relationships between work colleagues); Margaret Y. Padgett, Robert J. Padgett & Kathryn A. Morris, *Perceptions of Nepotism Beneficiaries: The Hidden Price of Using a Family Connection to Obtain a Job*, 30 *J. BUS. PSYCH.* 283, 291 (2014) (using empirical data to show how workers negatively perceive nepotism beneficiaries).

¹⁶⁰ Susan Wendell, *Unhealthy Disabled: Treating Chronic Illnesses as Disabilities*, in *THE DISABILITY STUDIES READER* 160, 168 (Lennard J. Davis ed., 5th ed. 2017).

¹⁶¹ See LENNARD J. DAVIS, *ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS* 248 (2015).

¹⁶² See, e.g., *Fox v. Costco Wholesale Corp.*, 918 F.3d 65, 69 (2d Cir. 2019) (upholding that hostile work environment claims are cognizable under the ADA); *Murphy v. Beavex, Inc.*, 544 F. Supp. 2d 139, 146 (D. Conn. 2008) (noting that an employee referred to as “Stupid Employee of the Month” chose to leave his job because his co-workers and supervisor’s behavior created an unwelcoming and hostile environment); *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 172 (4th Cir. 2001) (upholding a hostile work environment claim under the ADA); see also *Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/youth/disability-discrimination-0> [<https://perma.cc/XBZ7-UXCE>] (last visited Nov. 12, 2022) (discussing prohibition on hostile workplace activities); *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/harassment> [<https://perma.cc/LEN9-G3SN>] (last visited Nov. 12, 2022)

Ableist views about disability also may deter employers from hiring people with disabilities, who are considered “so much trouble.”¹⁶³ A 2003 study found the greatest barrier to people with disabilities finding employment is not their lack of skills or qualifications, but the discrimination and prejudice of employers who are reluctant to hire them.¹⁶⁴ A subsequent study in 2010 found that nearly half of the people with disabilities surveyed reported that they had encountered discrimination in the workplace due to their disability and that they were paid less than workers with similar skills or not hired at all.¹⁶⁵

For people with psychiatric disabilities, the situation is even worse. As one court has written:

Americans with disabilities often faced barriers to joining and succeeding in the workforce . . . includ[ing] attitudinal barriers resulting from unfounded stereotypes and prejudice. People with psychiatric disabilities have suffered as a result

(“Harassment is a form of employment discrimination that violates . . . the Americans with Disabilities Act of 1990, (ADA).”); LaWanda Cook, Sarah von Schrader, Valerie Malzer & Jennifer Mimno, *Unwelcoming Workplaces: Bullying and Harassment of Employees with Disabilities*, in *EMPLOYMENT AND DISABILITY: ISSUES, INNOVATIONS, AND OPPORTUNITIES* 129, 137–40 (Susanne M. Bruyère ed., 2019) (noting that charges under the ADA for harassment are increasing annually); Jeff Clabaugh, *Disability Discrimination Complaints Now Top Race Discrimination*, WTOP NEWS (Mar. 9, 2020), <https://wtop.com/business-finance/2020/03/disability-discrimination-complaints-now-top-race-discrimination/> [<https://perma.cc/S9WT-2RKT>] (noting that disability discrimination claims exceeded race discrimination claims in 2019 for the first time). See generally MARK C. WEBER, *DISABILITY HARASSMENT* (2007) (discussing harassment of persons with disabilities and legal remedies and policy reforms to address this issue).

¹⁶³ DAVIS, *supra* note 161, at 248.

¹⁶⁴ K.A. DIXON, DOUG KRUSE & CARL E. VAN HORN, JOHN J. HEIDRICH CTR. FOR WORKFORCE DEV., RUTGERS UNIV., *WORK TRENDS: RESTRICTED ACCESS: A SURVEY OF EMPLOYERS ABOUT PEOPLE WITH DISABILITIES AND LOWERING BARRIERS TO WORK* 13 (2003); see also Michele A. Paludi, Eros R. DeSouza & Deandra E. Dodd, *Disability Discrimination*, in 1 PRAEGER HANDBOOK ON UNDERSTANDING AND PREVENTING WORKPLACE DISCRIMINATION 17, 17–44 (Michele A. Paludi, Carmen A. Paludi, Jr. & Eros R. DeSouza, eds., 2011) (detailing discrimination against disabled persons in the workplace); Lily Run Ren, Ramona L. Paetzold & Adrienne Colella, *A Meta-Analysis of Experimental Studies on the Effects of Disability on Human Resource Judgments*, 18 HUM. RES. MGMT. REV. 191, 199 (2008) (discussing that people with disabilities face employment hurdles because of “stigmatized views [about] disability”).

¹⁶⁵ KESSLER FOUNDATION AND NATIONAL ORGANIZATION ON DISABILITY, *THE ADA, 20 YEARS LATER: SURVEY OF EMPLOYMENT OF AMERICANS WITH DISABILITIES* 11, 43–44, 56 (2010), <http://www.advancingstates.org/sites/nasuad/files/hcbs/files/195/9739/surveyresults.pdf> [<https://perma.cc/ZMQ4-4YR4>]. Another 2010 survey of employer attitudes towards disabled workers found that that negative attitudes of co-workers are a reason most employers don’t hire people with disabilities. H. Stephen Kaye, Lita H. Jans & Erica C. Jones, *Why Don’t Employers Hire and Retain Workers with Disabilities?*, 21 J. OCCUPATIONAL REHAB. 526, 529 (2011).

of such attitudinal barriers, with an employment rate dramatically lower than people without disabilities and far lower than people with other types of disabilities.¹⁶⁶

Disability prejudice or ableism is evident not merely as “a unitary negative attitude,”¹⁶⁷ but it also appears in the form of paternalism, benevolence, pity, and ambivalence. It can be “expressed unintentionally or deliberately in individual beliefs, emotions, behaviors, and institutional practices that result in the prejudicial treatment of people on the basis of disability.”¹⁶⁸ As one scholar observed, discrimination against people with disabilities is not something that only “unkind people do.”¹⁶⁹ It is carried out “under the influence of much bigger social and cultural norms.”¹⁷⁰

Ableism is also reflected in what appears to be differing levels of acceptance between and among people with disabilities. The severity or degree of impairment of a person has been found to explain differences in treatment or “preferability” of disabled people by nondisabled people.¹⁷¹ Studies show that people with obvious disabling conditions are less “preferred” by others than those with hidden conditions, except for people with nonvisible psychological conditions, who are most always least “preferred.”¹⁷² This ranking of the

¹⁶⁶ *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 834 (7th Cir. 2005).

¹⁶⁷ NARIO-REDMOND, *supra* note 152, at 336.

¹⁶⁸ *Id.*

¹⁶⁹ DAVIS, *supra* note 161, at 250.

¹⁷⁰ *Id.*; see also JODY HEYMANN, MICHAEL ASHLEY STEIN & GONZALO MORENO, *DISABILITY & EQUITY AT WORK* 1–14 (2014) (discussing the importance of labor market inclusion of persons with disabilities to social integration, economic sufficiency, realization of rights, and other aspects of life).

¹⁷¹ See NARIO-REDMOND, *supra* note 152, at 171. Impairments that are considered more severe are often viewed more negatively than impairments that are considered curable and not contagious. *Id.* at 171–72; see Carrie L. Saetermoe, Dorothy Scattone & Kevin H. Kim, *Ethnicity and the Stigma of Disabilities*, 16 *PSYCH. & HEALTH* 699, 700–01 (2001).

¹⁷² NARIO-REDMOND, *supra* note 152, at 171; see Erin Martz, *Invisibility of Disability and Work Experience as Predictors of Employment Among Community College Students with Disabilities*, 18 *J. VOCATIONAL REHAB.* 153, 153 (2003); Adrian Thomas, *Stability of Tringo's Hierarchy of Preference Toward Disability Groups: 30 Years Later*, 86 *PSYCH. REPS.* 1155, 1155–56 (2000). The research of these authors suggests that people with psychological disabilities are considered less preferred in part because they are considered responsible for their own conditions and even dangerous. See NARIO-REDMOND, *supra* note 152, at 171. However, studies show that people with mental health issues are not more violent and are, in fact, more often the victims rather than the perpetrators of crime. See Hanna Kozłowska, *In the US, People with Disabilities Are Three Times as Likely to Be Victims of Serious Violence*, QUARTZ (July 14, 2017), <https://qz.com/1029694/people-with-disabilities-in-the-us-are-three-times-as-likely-to-be-victims-of-serious-violent-crimes/> [<https://perma.cc/ZT9X-H66K>] (stating that the rate of “violent victimization” for people with disabilities is 32.3 per 1000 people,

“preferability” of various disabilities shows the continuing presence of stigma and prejudice in society, even with the passage of the ADA, more than thirty years ago.

In the workplace, ableism not only exists but may be on the rise. In 1996, the EEOC resolved approximately 2,700 charges of workplace discrimination based on mental health conditions, alone; by 2016, the EEOC resolved nearly 5,000 charges of discrimination for people with mental health conditions who were denied employment and reasonable accommodations.¹⁷³ In addition to discriminatory workplace practices, ableism can take the form of resistance from co-workers because of what has been termed, the “politics of resentment”:¹⁷⁴

Most workers feel put-upon and frustrated by their working conditions and the demands of their employers on their time

compared to 12.7 per 1000 for people without disabilities); Margaret Nixon, *People with Disability Are More Likely to Be Victims of Crime—Here’s Why*, CONVERSATION (Feb. 21, 2019), <https://theconversation.com/people-with-disability-are-more-likely-to-be-victims-of-crime-heres-why-111999> [https://perma.cc/S86B-VCTH] (discussing the finding that up to ninety percent of women with disabilities have been subjected to sexual abuse).

¹⁷³ Press Release, U.S. Equal Employment Comm’n, EEOC Issues Publication on the Rights of Job Applicants and Employees with Mental Health Conditions (Dec. 12, 2016), <https://www.eeoc.gov/newsroom/eeoc-issues-publication-rights-job-applicants-and-employees-mental-health-conditions> [https://perma.cc/RPH7-8BJ5]; see also Jennifer Mathis, Lewis Bossing & Sara Frank, *Mental Health Discrimination and Protections at Work: Part 1*, LAW360, (Sept. 29, 2021), <http://www.law360.com/employment-authority/articles/1424847/mental-health-discrimination-and-protections-at-work-part-1> [https://perma.cc/Y792-7JND] (noting the significant increase in charges of discrimination based on mental health resolved by the EEOC from 2,700 in 1990 to 5,000 in 2016).

¹⁷⁴ Iris Marion Young, *Disability and the Definition of Work*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 171 (2000); see also Jeffrey R. Dudas, *In the Name of Equal Rights: “Special” Rights and the Politics of Resentment in Post-Civil Rights America*, 39 LAW & SOC’Y REV. 723, 723 (2005) (using the term “politics of resentment” to discuss the phenomenon of conservative legal activism spurred by “resentment over the increased political participation of historically marginalized Americans.”). In 2010, the legal scholar, Nicole Buonocore Porter, coined the phrase “special-treatment stigma” for the resentment that nondisabled people may experience when others receive special treatment or accommodations for their disability. See Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of “Real” Workers*, 58 U. KAN. L. REV. 355, 383 (2010); see also Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213, 234 (2016). An example of such “special-treatment stigma” may be seen in the testimony of two co-workers of the plaintiff in *Mosby-Meachem*. Her former colleagues testified against the plaintiff on the issue of her absence from the office, claiming it was a problem, especially during an emergency. *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 604 (6th Cir. 2018). Plaintiff’s evidence showed, however, that no such emergency had ever occurred. See *id.* at 603.

and energy Rarely do they get a sympathetic ear to voice their frustrations, however, and the only agents they are allowed to blame for their difficulties are themselves. It is little wonder that they may resent people that the law requires employers to accommodate in order to enable them to better to fit the work situation A politics of resentment motivates some people to draw the line as far down the extreme end of the continuum as possible so that almost everyone will be legally expected to conform to the *normal* workplace demands¹⁷⁵

When co-workers learn about accommodations, they may become jealous and think people with disabilities are faking or trying to get away with something.¹⁷⁶ Although the extent to which accusations of faking and victim-blaming may vary with respect to certain disabilities and different work settings, many disabled employees report such ableist attitudes limit their career growth and result in a lower quality of their work lives.¹⁷⁷

On the other hand, many employers, when asked, express a willingness to hire disabled workers.¹⁷⁸ This should not be surprising since research shows that disabled employees are more reliable and have better attendance than nondisabled employees.¹⁷⁹ For example, one four year study found that companies with disabled employees had higher profits and

¹⁷⁵ Young, *supra* note 174, at 171.

¹⁷⁶ The legal scholar Doron Dorfman suggests that the recognition of disability rights and accommodations has generated jealousy and suspicion about abuse of these rights by “fakers” who pretend to be disabled in order to get an advantage of such “special treatment.” See Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC’Y REV. 1051, 1061 (2019); see also Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 594–95 (2020) (using quantitative and qualitative data to discuss “the psychological mechanism of the fear of the disability con”).

¹⁷⁷ See Ren, Paetzold & Colella, *supra* note 164, at 199; see Adrienne Colella & Arup Varma, *Disability-Job Fit Stereotypes and the Evaluation of Persons with Disabilities at Work*, 9 J. OF OCCUPATIONAL REHAB. 79, 93 (1999). Some workers who receive permission to work remotely may be ostracized by their co-workers because they are perceived as receiving favorable treatment. See Shelley Kaplan, Sally Weiss, Nathan W. Moon & Paul Baker, *A Framework for Providing Telecommuting as a Reasonable Accommodation: Some Considerations on a Comparative Case Study*, 27 WORK 431, 438 (noting that remote work may be seen by co-workers as “special treatment”).

¹⁷⁸ NARIO-REDMOND, *supra* note 152, at 174.

¹⁷⁹ See, e.g., Joe Graffam, Alison Shinkfield, Kaye Smith & Udo Polzin, *Factors that Influence Employer Decisions in Hiring and Retaining an Employee with a Disability*, 17 J. VOCATIONAL REHAB. 175, 176 (2002) (finding in a survey of 65 supervisors that they rated employees with learning disabilities better than the general workforce in metrics such as punctuality and attendance).

bottom line income than those that did not hire disabled workers.¹⁸⁰ Moreover, despite the documented advantages of hiring disabled people, employer expectations seem to exceed their actual hiring practices, particularly when the issue of costs of accommodations is considered.¹⁸¹ Studies also have shown that employers are less willing to hire disabled people, if they believe accommodations will be expensive or if they assume disabled people present greater risks than nondisabled workers.¹⁸² Such views are directly contradicted, however, by research that has demonstrated the low cost of accommodations for employers.¹⁸³

Further, although the costs of accommodations to employers may be low, the costs to employees may be high. Research has shown that disabled employees generally receive lower pay, even after accounting for education and job experience.¹⁸⁴ They also are more likely to be fired than nondisabled employees.¹⁸⁵

Moreover, in response to ableist attitudes, some disabled employees internalize these attitudes and try to “pass.”¹⁸⁶ For

¹⁸⁰ ACCENTURE, GETTING TO EQUAL: THE DISABILITY INCLUSION ADVANTAGE 6 (2018), https://www.accenture.com/_acnmedia/PDF-89/Accenture-Disability-Inclusion-Research-Report.pdf [<https://perma.cc/5V9H-B4ME>].

¹⁸¹ Dean B. McFarlin, James Song & Michelle Sonntag, *Integrating the Disabled into Work Force: A Survey of Fortune 500 Company Attitudes and Practices*, 4 EMP. RESPS. & RTS. J. 107, 119 (1991), cited in NARIO-REDMOND, *supra* note 152, at 174. There is no shortage of empirical studies investigating employer attitudes regarding the employment of people with disabilities. One paper found sixty-seven different studies (including eleven unpublished dissertations) had been conducted between 1990 and 2000. See Mark L. Lengnick-Hall, Philip M. Gaunt & Adrienne A. R. Brooks, *Why Employers Don't Hire People with Disabilities: A Survey of the Literature*, CPRF, <https://www.cprf.org/studies/why-employers-dont-hire-people-with-disabilities-a-survey-of-the-literature/#abstract> [<https://perma.cc/ND2N-STFU>] (last visited Sept. 19, 2022).

¹⁸² Silvia Bonaccio, Catherine E. Connelly, Iran R. Gellatly, Arif Jetha & Kathleen A. Martin Ginis, *The Participation of People with Disabilities in the Workplace Across the Employment Cycle: Employer Concerns and Research Evidence*, 3 J. BUS. PSYCHOL. 135, 147–48, 152–53 (2020).

¹⁸³ *Id.* at 147–48. See also a 2020 study by the Job Accommodations Network which found that fifty-six percent of more than 1000 employers surveyed said there was no cost in providing the accommodations needed by their employees; thirty-nine percent reported a one-time cost; and only four percent said the accommodation costs were ongoing. The median one-time expenditure was \$500. “When asked how much they paid for an accommodation beyond what they would have paid for an employee without a disability who was in the same position, the median answer given by employers was \$20.” JOB ACCOMMODATION, *supra* note 34.

¹⁸⁴ See Sophie Mitra & Douglas Kruse, *Are Workers with Disabilities More Likely to Be Displaced?*, 27 INT'L J. HUM. RES. MGMT. 1550, 1550 (2016).

¹⁸⁵ *Id.*

¹⁸⁶ For a discussion about disability “passing,” see, for example, Jeffrey A. Brune, *The Multiple Layers of Disability Passing in Life, Literature, and Public Discourse*, in DISABILITY AND PASSING: BLURRING THE LINES OF IDENTITY 36, 44–45

disabled people, passing at work may mean not asking for accommodations or any “special treatment” for fear of being regarded as less able and not “normal.” Then, as the pressures to conform within the workplace intensify, feelings of shame, unworthiness, and inferiority may result.¹⁸⁷ It is no wonder that many disabled employees have lower job satisfaction than their nondisabled co-workers.¹⁸⁸

At least some of the effects of ableism in the workplace may be lessened with more flexible work arrangements, including the opportunity to work remotely at a location away from an unaccommodating, ableist, harassing, or hostile workplace. Further, in response to employers’ (often unwarranted) concerns about the costs of accommodations, employers may be more willing to hire disabled employees to work remotely if they believe they would not have to pay for workplace accommodations. Some research has suggested that the current pandemic and resulting increase in remote workers is a “massive test of employers’ ability and willingness to accommodate workers.”¹⁸⁹ In addition, for employers, hiring people with disabilities offers benefits. A recent national poll revealed that ninety-two percent of consumers favored companies that hire people with disabilities, and eighty-seven percent of consumers preferred doing business with them.¹⁹⁰

(Jeffrey A. Brune & Daniel J. Wilson eds., 2013) (describing how disability passing requires deliberated, careful knowledge of the habits and appearances of those without disabilities); FIONA KUMARI CAMPBELL, *CONTOURS OF ABLEISM: THE PRODUCTION OF DISABILITY AND ABLEDNESS* 25, 44 (2009) (commenting on the need of those with disabilities to constantly perform an appearance of “passing” as a countermeasure against a pervasive ableist culture).

¹⁸⁷ DAVIS, *supra* note 161, at 249.

¹⁸⁸ See Lisa Schur, Douglas Kruse, Joseph Blasi & Peter Blanck, *Is Disability Disabling in All Workplaces? Workplace Disparities and Corporate Culture*, 48 *INDUS. RELS.* 381, 394–97 (2009).

¹⁸⁹ Lisa Schur & Douglas L. Kruse, *Coronavirus Could Revolutionize Work Opportunities for People with Disabilities*, *CONVERSATION* (May 5, 2020), <https://theconversation.com/coronavirus-could-revolutionize-work-opportunities-for-people-with-disabilities-137462> [<https://perma.cc/HS8Z-4JFM>]; see also Jennifer D. Brooks, *Just a Little Respect: Differences in Job Satisfaction Among Individuals With and Without Disabilities*, 100 *SOC. SCI. Q.* 379, 386–87 (2019) (discussing how workers with disability experience less job satisfaction, in part due to perceived lower levels of respect); Sharanjit Uppal, *Disability, Workplace Characteristics and Job Satisfaction*, 26 *INT’L J. MANPOWER* 336, 336–37 (2005) (conducting a survey and finding individuals with disabilities report lower levels of job satisfaction and hypothesizing that this phenomenon is linked to harassment, discrimination, and lower incomes).

¹⁹⁰ Gary N. Siperstein, Neil Romano, Amanda Mohler & Robin Parker, *A National Survey of Consumer Attitudes Towards Companies that Hire People with Disabilities*, 24 *J. VOCATIONAL REHAB.* 3, 6–7 (2006). The study reveals that disability favorability rating among companies was second only to those

Finally, to the extent that what most influences perceptions about disability are direct experiences with disabled people, bringing more people with disabilities into the workforce—even remotely—should be promoted as a way to challenge existing stereotypes and reduce or eliminate ableism in the workplace.¹⁹¹

B. The Advantages of Remote Work

Providing disabled employees the opportunity to work remotely may not only counter ableism in the workplace, but it also may generate new employment opportunities for disabled people.¹⁹² Prior to the Covid-19 pandemic, many industries had already introduced remote work. In 2017–2018, as many as fifteen percent of employees worked from home everyday, and twenty-five percent of employees worked from home intermittently.¹⁹³ Further, as of 2019, nearly seventy percent of employers allowed teleworking on an ad hoc basis, forty-two percent of employers allowed it part-time, and twenty-seven allowed it full-time.¹⁹⁴ In response to these trends, one CEO observed that “[t]eleworking continues to be popular and it’s only trending in an upward direction.”¹⁹⁵

By the time the pandemic became widespread in March 2020, millions of non-essential workers were sent home to work. As more employees began working remotely, people with

companies that provided health insurance and protected the environment. *Id.* at 6.

¹⁹¹ Research has found that what most influences perceptions about disability are personal relationships and direct experiences with disabled people. *Id.* at 7; NARIO-REDMOND, *supra* note 152, at 272–73; Brigida Hernandez, Christopher Keys, Fabricio Balcazar & Charles Drum, *Construction and Validation of the Disability Rights Attitude Scale: Assessing Attitudes Toward the Americans with Disabilities Act (ADA)*, 43 REHAB. PSYCH. 203, 215 (1998).

¹⁹² ADA, *supra* note 11; see Ben Casselman, *For Disabled Workers, a Tight Labor Market Opens New Doors*, N.Y. TIMES (Oct. 25, 2022), <https://www.nytimes.com/2022/10/25/business/economy/labor-disabilities.html?smid=em-share> [<https://perma.cc/YCW6-3D45>]; see also *infra* note 262.

¹⁹³ Press Release, U.S. Bureau of Lab. Stat., *Job Flexibilities and Work Schedules News Release* (Sep. 24, 2019), <https://www.bls.gov/news.release/flex2.htm> [<https://perma.cc/94PL-FZMN>].

¹⁹⁴ See LEAVE AND FLEXIBLE WORKING: SHRM EMPLOYEE BENEFITS 2019, *supra* note 4, at 8; see also *Telecommuting Trend Data*, *supra* note 4 (noting “5.7 million employees (4.1% of the U.S. employee workforce) telecommuted half-time or more before the pandemic” and “[r]egular telecommuting grew 216% between 2005 and 2019”); Iafolla, *supra* note 15 (stating that “[t]he human resource management association WorldatWork found . . . in its 2018 survey [that] . . . 78 percent of respondents allow[] telework on an ad hoc basis and 57 percent full-time,” referencing the Society for Human Resource Management (SHRM) 2018 survey results showing that 70% of employers offered teleworking options).

¹⁹⁵ Iafolla, *supra* note 15.

disabilities were put on equal footing with people without disabilities.¹⁹⁶ Like people with disabilities who face many challenges in their daily lives, people without disabilities faced similar challenges during the pandemic, many for the first time. Nondisabled people were unable to get to work or go to school, visit family and friends, or shop for the goods and services they needed. As one disabled commentator has written, “Lockdown life is partly open and normal life is partly closed, depending on who you are.”¹⁹⁷

Another unintended consequence of remote work is that people with disabilities can become resources to support their nondisabled employers. As one disabled activist wrote during the pandemic:

We know how to stay in touch remotely, be socially connected while physically distant, make limited resources work in tight situations, make plans *and* adjust on the spot, build care webs that support each other, and work through challenging circumstances. . . . We can help you [the employer] innovate, survive, and thrive.¹⁹⁸

1. *Increased Productivity and Job Satisfaction*

Among the many benefits of working from home for employees with and without disabilities, are increased productivity, job satisfaction, and cost and time savings.

¹⁹⁶ See Christine Schuster, *Pandemic Shows Value of Remote Work for Disabled Employees*, U.S. NEWS & WORLD REP. (Sept. 27, 2021), <https://www.usnews.com/news/best-states/minnesota/articles/2021-09-27/pandemic-shows-value-of-remote-work-for-disabled-employees> [<https://perma.cc/468B-P8PU>] (describing how “remote work and virtual accommodations” during the pandemic “helped level the playing field” for government employees with disabilities).

¹⁹⁷ Adam M. Samaha, *Opening and Reopening: Dealing with Disability in the Post-Pandemic World*, SLATE (July 6, 2021), <https://slate.com/technology/2021/07/pandemic-disability-reopening-essay.html> [<https://perma.cc/T6U8-4N8G>]. The pandemic has exposed the challenges faced by people with disabilities, not because of their impairments, but because of the inaccessibility of the environment. Some writers suggest, therefore, that the pandemic has proven the social model of disability, that focuses on how society disables people often more than their impairment. As one writer explains, “In one swoop, a whole group of people were placed at an immediate disadvantage without having done anything to deserve it.” Nancy Doyle, *We Have Been Disabled: How the Pandemic Has Proven the Social Model of Disability*, FORBES (Apr. 29, 2020), <https://www.forbes.com/sites/drnancydoyle/2020/04/29/we-have-been-disabled-how-the-pandemic-has-proven-the-social-model-of-disability/?sh=1c63ffb2b1d4> [<https://perma.cc/D23Y-9HF5>].

¹⁹⁸ *How a Post Covid-19 Workplace Can Embrace Accessibility — For Everyone*, GUARDIAN, <https://www.guardianlife.com/coronavirus/how-can-workplaces-support-people-with-disabilities> [<https://perma.cc/X7Y8-6TYJ>] (last visited Jan. 13, 2021).

Although some courts have presumed that employee productivity decreases when an employee works remotely because employers cannot witness productivity firsthand, studies have shown that working remotely can actually increase employee productivity.¹⁹⁹ American Express reports that teleworkers handled twenty-six percent more calls and produced forty-three percent more business from their home offices than did office-based workers.²⁰⁰ Another study by British Telecom estimated a twenty percent increase in productivity due to telecommuting.²⁰¹ Other companies have found similar results, with increased sales and reduction in consumer complaints regarding home-based employees.²⁰² In addition, a 2019 study of United States Patent and Trademark Office by a research team at Harvard Business School found that the recent pandemic-related transition from work to home “resulted in a 4.4% increase in output” as well as “an increase

¹⁹⁹ See Sullenger, *supra* note 127, at 557 (“Courts presume that working from home will result in no supervision and a decrease in the quality of work produced by employees. On the contrary, reports consistently have shown that companies that have implemented telework programs experience increased productivity.”); see also Nicholas Bloom, *To Raise Productivity, Let More Employees Work from Home*, HARV. BUS. REV. (Jan.–Feb. 2014), <https://hbr.org/2014/01/to-raise-productivity-let-more-employees-work-from-home> [<https://perma.cc/7LQS-KD7E>] (finding that, at travel website call center, employee productivity was higher for employees who worked from home compared with employees who commuted to workplace with same equipment); Shea, *supra* note 14 (reporting results of a study finding that, of 2,500 randomly surveyed workers between the ages of 20–65 making at least \$20,000 a year, forty percent reported being more efficient at home and forty-five percent reported being equally efficient). Despite research showing that telecommuting increases employee productivity, some courts believe that productivity is reduced. See *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995) (“An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced.”); see also Brodie Boland, Aaron De Smet, Rob Palter & Aditya Sanghvi, *Reimagining the Office and Work Life After Covid-19*, MCKINSEY & CO. (June 8, 2020), <https://www.mckinsey.com/business-functions/organization/our-insights/reimagining-the-office-and-work-life-after-covid-19> [<https://perma.cc/9RKT-GNWS>] (reporting that forty-one percent of people surveyed said that they were more productive while working from home and twenty-eight percent said they were equally productive).

²⁰⁰ Nicole Farideh Church, *Gauging Perceived Benefits from ‘Working from Home’ as a Job Benefit*, 3 INT’L J. BUS. & ECON. DEV. 81, 82 (2015) (citing Kenneth Rapoza, *One in Five Americans Work from Home, Numbers Seen Rising Over 60%*, FORBES (Feb. 18, 2013), <https://www.forbes.com/sites/kenrapoza/2013/02/18/one-in-five-americans-work-from-home-numbers-seen-rising-over-60/?sh=185654fc25c1> [<https://perma.cc/UB59-FUBD>]).

²⁰¹ *Id.*

²⁰² *Id.* (“Alpine Access, one of the nation’s largest all-virtual employers, attributes a 30% increase in sales and 90% reduction in customer complaints to its home-based agents.”).

in observable effort.”²⁰³ This increased productivity, however, may also come at the cost of greater burn-out, as some workers are less able to “switch[] off.”²⁰⁴

Most studies, however, have found that remote work results in greater job satisfaction and an improved work-life balance.²⁰⁵ One study found that employees who work at home reported much higher job satisfaction, and that their attrition rate dropped by half.²⁰⁶ A second study found that eighty percent of people surveyed enjoyed working from home, and forty-one percent reported greater productivity.²⁰⁷ Similarly, a third study found that twenty-five percent of telecommuters reported lower stress levels since working from home, seventy-three percent said they ate healthier, seventy-six percent were more loyal to their company, and eighty percent reported a better work-life balance.²⁰⁸ A better work-home balance was also reported by remote workers in another study by Microsoft.²⁰⁹

²⁰³ Prithwiraj (Raj) Choudhury, Cirrus Foroughi & Barbara Larson, *Work-from-Anywhere: The Productivity Effects of Geographic Flexibility*, 42 STRATEGIC MGMT. J. 655, 655 (2020); see also Cal Newport, *How to Achieve Sustainable Remote Work*, NEW YORKER (July 9, 2021), <https://www.newyorker.com/culture/cultural-comment/how-to-achieve-sustainable-remote-work> [<https://perma.cc/RQ3H-T5XK>] (describing a 2005–2007 Best Buy pilot program in which participating employees who were given complete control over when and where they worked reported higher productivity).

²⁰⁴ Alan Felstead & Golo Henseke, *Assessing the Growth of Remote Working and Its Consequences for Effort, Well-Being, and Work-Life Balance*, 32 NEW TECH., WORK & EMP. 195, 207 (2017).

²⁰⁵ Sullenger, *supra* note 127, at 547 (“Employees who telecommute often experience greater job satisfaction and improved balance between work and family life.”); Nicholas Bloom, James Liang, John Roberts & Zhichun Jenny Ying, *Does Working from Home Work? Evidence from a Chinese Experiment*, 130 Q.J. ECON. 165, 169–70 (2015) (employees with same equipment at home had higher levels of productivity and satisfaction than those working in office); Boland, De Smet, Palter & Sanghvi, *supra* note 199.

²⁰⁶ Bloom, Liang, Roberts & Ying, *supra* note 205, at 169–70.

²⁰⁷ Boland, De Smet, Palter & Sanghvi, *supra* note 199.

²⁰⁸ *There’s No Place Like a Home Office: Staples Survey Shows Telecommuters Are Happier and Healthier, with 25% Less Stress When Working from Home*, BUSINESSWIRE (July 19, 2011), <https://www.businesswire.com/news/home/20110719005318/en/There%E2%80%99s-No-Place-Like-a-Home-Office-Staples-Survey-Shows-Telecommuters-are-Happier-and-Healthier-With-25-Less-Stress-When-Working-from-Home> [<https://perma.cc/8JBS-5FST>].

²⁰⁹ See Kevin Kruse, *Top 10 Benefits of Working from Home (Survey Results)*, FORBES (Dec. 18, 2012), <https://www.forbes.com/sites/kevinkruse/2012/12/18/benefits-working-from-home/?sh=6c5220de1d4c> [<https://perma.cc/4RS6-5BT5>].

2. Cost Savings

Employees with and without disabilities who work remotely can also save money. Working from home, in particular, saves the cost of transportation to and from home, and expenses related to purchasing work clothes, grooming, accessories, and other expenses related to working in an office. In one recent study by Telework, employees who worked at home saved \$1,600 to \$6,800 annually.²¹⁰ In another study, thirty-six percent of employees reported they would be willing to trade a salary increase for the ability to work from home, and ten percent of the company's technology professionals indicated their willingness to take a ten percent pay-cut for the ability to work from home.²¹¹

By expanding their remote workforce, employers, too, may benefit. In several recent studies, employers enjoyed cost savings in office overhead, lower employee absenteeism, improved employee morale, and increases in employee recruitment and retention.²¹² One of these studies found an annual savings of approximately \$2,000 per employee who worked from home, as a result of savings in office space, improved employee performance, and reduced turnover.²¹³ Another study estimated that with remote employees working half of the time from home, employers save more than \$10,000 per employee annually, as a result of "increased productivity, reduced facility costs, lowered absenteeism, and reduced turnover."²¹⁴

By all estimates, such cost savings will likely continue, even after the pandemic ends. A recent survey of 317 Chief Financial Officers and Finance leaders reported that seventy-four percent of private companies in the United States will move at least five percent of their pre-Covid-19 on-site workforce to permanent remote positions after the pandemic.²¹⁵ Further, of the many offices that were closed when the pandemic began, some will remain closed, with

²¹⁰ Church, *supra* note 200, at 83.

²¹¹ *Id.* (referring to research conducted by Global Workplace Analytics).

²¹² See e.g., Bloom, Liang, Roberts & Ying, *supra* note 205, at 170 (reporting on the results of the first randomized study of working from home of 16,000 employees of the NASDAQ-listed Chinese firm Ctrip); see also Hancock, *supra* note 30, at 165 (enumerating the financial benefits of telecommuting to employers).

²¹³ Bloom, Liang, Roberts & Ying, *supra* note 205, at 170 (also finding a twenty to thirty percent increase in productivity).

²¹⁴ Rapoza, *supra* note 200.

²¹⁵ Gartner, *supra* note 15.

employees working from home or leaving the city to find new homes, in areas with lower housing costs.²¹⁶ For example, Facebook has announced it will adjust its employees' salaries according to the cost of living in the city where they live.²¹⁷ Airbnb recently announced its new policy of allowing its employees to work from anywhere. With this new policy, the CEO stated working from an office is "an anachronistic form factor from the pre-digital age," and companies that require workers to go back to the office are going to have difficulty hiring and retaining workers, and keeping up morale.²¹⁸

²¹⁶ See e.g., Jim Wilson, *San Francisco Tech Firm Closing All Offices, Going Remote*, HUM. RES. DIR. (May 27, 2022) <https://www.hcamag.com/us/specialization/employee-engagement/san-francisco-tech-firm-closing-all-offices-going-remote/407702> [<https://perma.cc/UXR5-UZFJ>] (discussing how TaskRabbit is closing all of its global offices and going fully remote after surveying nearly 200,00 workers and found the majority of workers prefer to work from home. TaskRabbit will continue to host monthly get-togethers for employees, and will allow employees two wellness weeks a year.); Abril, *supra* note 6 (discussing new policy of Airbnb to live and work from anywhere in the country without a pay cut, and allowing workers to work in more than 170 countries for up to 90 days); Sarah Parvini, *Californians Aren't Leaving the State En Masse—But They Are Leaving San Francisco, Study Says*, L.A. TIMES (Mar. 4, 2021), <https://www.latimes.com/california/story/2021-03-04/california-exodus-san-francisco-migration> [<https://perma.cc/X9DX-9PLQ>] (discussing how tech companies in San Francisco going remote may have led employees to move to more affordable counties nearby); Cal Newport, *Is Going Back to the Office a Broken Way of Working?*, NEW YORKER (Sept. 27, 2021), <https://www.newyorker.com/culture/office-space/is-going-to-the-office-a-broken-way-of-working> [<https://perma.cc/H8UY-EM4F>] (questioning whether the transition from the office model to the remote work model is already underway).

²¹⁷ Karen Gilchrist, *From Facebook to Reddit, How Silicon Valley Salary Adjustments Could Redefine Remote Worker Earnings*, CNBC (Nov. 5, 2020), <https://www.cnbc.com/2020/11/05/how-silicon-valley-facebook-salary-cuts-are-shaping-remote-worker-pay.html> [<https://perma.cc/2Y7B-CD42>]. Employers may save costs through lower salaries for employees who leave expensive coastal sites to work elsewhere remotely, as well as a projected 10 to 15 percent drop in the need for office space. Noah Buhayar, *The Work-from-Home Boom is Here to Stay. Get Ready for Pay Cuts*, BLOOMBERG BUSINESSWEEK (Dec. 17, 2020), <https://www.bloomberg.com/news/features/2020-12-17/work-from-home-tech-companies-cut-pay-of-workers-moving-out-of-big-cities> [<https://perma.cc/DAS5-VMCF>]. Even at lower salaries, however, research has shown that workers may choose to work at home. See Tennant, *supra* note 79, at 17–18.

²¹⁸ Abril, *supra* note 6; see also Danielle Abril, *Yelp Shuts Some Offices Doubling Down on Remote; CEO Calls Hybrid "Hell,"* WASH. POST, <https://www.washingtonpost.com/technology/2022/06/22/yelp-shutters-offices/> [<https://perma.cc/3TY8-GZJQ>] (last updated June 23, 2022) (Yelp CEO and Founder called hybrid "the worst of both worlds," stating that workers want to work from home and companies benefit from allowing them to do so. Yelp allows its 4,400 workers to work anywhere and has turned their San Francisco office into a "hotel office" where workers reserve their desk space for the day. Yelp plans to use the money they are saving from office space to reinvest in hiring, benefits for employees, and the company itself.); Smith, *supra* note 5 (reporting on decisions by 10 major companies to allow employees to work remotely and research from

Employers also may save on the costs of workplace accommodations. Workplace accommodations, such as rearranging offices, providing accessible restrooms, and parking areas, or adjusting work schedules and assignments to accommodate employees with a disability may no longer be necessary for employees who work remotely. Having said that, employers will still be legally obligated to provide reasonable accommodations for their remote workforce. Nonetheless, the costs of accommodations for remote workers will likely be less than those provided at the workplace, involving primarily the purchase of ergonomic furniture, specialized computer equipment, or accessible software.²¹⁹ Further, employers are not required to provide accommodations that are not job related and only for the “personal benefit” of employees regardless of whether they work on site or remotely.²²⁰

In addition, permitting disabled employees to work from home may cut down on sick days, which can be costly to both the employer and the employee. If an employee can address their personal and medical needs at home without having to take sick days, they and their employers will benefit.²²¹ In fact,

Microsoft which surveyed 31,102 workers and found 52% were considering full-time remote or hybrid jobs this year).

²¹⁹ Since widespread remote work for people with and without disabilities is relatively new, the types and costs of accommodations that will be required to support this workforce is not yet known. Will employers be required to renovate private homes to make them accessible as workplaces? Will employers be required to provide accessible entrances to buildings that are now exempt under the Fair Housing Amendments Act? Such questions will likely arise as more employees with disabilities seek to work remotely at home in the coming years.

²²⁰ 29 C.F.R. pt. 1630 app. § 1630.9. Employers are required to provide accommodations that are job related but not those that are for personal use only. *Compare* Giles v. NBC Universal, Inc., No. 10 Civ. 7461 (DAB), 2011 U.S. Dist. LEXIS 106171, at *16 (S.D.N.Y. Sept. 20, 2011) (upholding employer’s denial of a modified work schedule because leaving early was for the employee’s personal benefit and would not make him a better employee, and was therefore not job-related), *and* Regan v. Faurecia Auto. Seating, Inc., No. 10-10967, 2011 U.S. Dist. LEXIS 22664, at *22 (E.D. Mich. Mar. 7, 2011) (finding that employee’s request to modify her work schedule to improve her commute was not job-related), *with* Liss v. Nassau Cnty., 425 F. Supp. 2d 335, 341 (E.D.N.Y. 2006) (denying employer’s motion to dismiss where plaintiff needed to wear a “cooling jacket” to avoid hot temperatures following a workplace injury and employer produced no evidence showing plaintiff needed the jacket other than for employment purposes), *and* Lyons v. Legal Aid Soc’y, 68 F.3d 1512, 1517 (2d Cir. 1995) (reversing dismissal of complaint stating that employer should pay for parking near work because it was an essential prerequisite for employee to reach and perform her job).

²²¹ Remote work may provide the flexibility and privacy needed to address certain medical issues that cannot be addressed in the workplace. See *supra* Section III.A (discussing Ms. Harris’ ability to treat symptoms at home more easily if working remotely); see also *supra* note 120 and accompanying text (discussing the consequences of poor work attendance on employee accommodations);

studies have found that employees who work from home are able to return to work (at home) after an illness more quickly than those who must return to work in an office.²²² Similarly, for employees with chronic diseases that flare up periodically and even unpredictably, they may not need to take a full day off from work if they can arrange their work schedule around intermittent flare ups by working in the evenings or on weekends. Such flexibility is not possible in jobs that require physical presence at a workplace during “normal” working hours.

3. *Benefits to Nondisabled Employees and Society*

In addition to the benefits to employees with disabilities and their employers, remote work also offers benefits to nondisabled employees, and society generally. Legal scholar Elizabeth Emens has argued persuasively that one of the shortcomings of ADA caselaw has been the failure of courts to consider the positive effect of accommodations on other workers.²²³ By granting more remote work requests as reasonable accommodations, employers may be more willing to grant similar requests to nondisabled workers. Then, once employees with and without disabilities work remotely, remote work is no longer what only disabled people do or do not do. Remote work becomes normalized, and disabled employees who work remotely are not seen as “the other.” Families of people with disabilities may also benefit by workplace rules that permit remote work since the ability to work remotely has been found to be an important way to support families with children with disabilities.²²⁴

Church, *supra* note 200 at 83 (explaining that remote work allows employees to take fewer sick days because they can address those issues without taking an entire day off from work).

²²² Church, *supra* note 200, at 83.

²²³ See Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PENN. L. REV. 839, 867–68 (2008).

²²⁴ Tammy D. Allen, Timothy D. Golden & Kristen M. Shockley, *How Effective Is Telecommuting? Assessing the Status of Our Scientific Findings*, 16 PSYCH. SCI. PUB. INT. 40, 60 (2015); see also Natalie Clarkson, *How Remote Work is Helping Parents, Carers, and Disabled People*, VIRGIN (Oct. 13, 2021), <https://www.virgin.com/about-virgin/latest/how-remote-working-is-helping-parents-carers-and-disabled-people> [<https://perma.cc/M7D7-QT46>] (discussing how remote work has permitted caregivers to rejoin the workforce); Geri Stengel, *Working from Home Opens the Doors to Employing People with Disabilities*, FORBES (Apr. 20, 2020), <https://www.forbes.com/sites/geristengel/2020/04/20/working-from-home-opens-the-door-to-employing-people-with-disabilities/?sh=68e2468314bf> [<https://perma.cc/6SCQ-VEXB>] (noting remote work is beneficial for parents and caregivers as well); Joseph A. Vandello, Vanessa E. Hettinger, Jennifer K. Bosson & Jasmine Siddiqi, *When Equal Isn't Really Equal*:

Finally, remote work offers benefits to society as a whole. As the number of commuters will decrease, there will be less traffic, congestion, and air pollution, through the reduction of carbon dioxide and other particles emitted by commuters in their cars and on buses.²²⁵ A reduction in traffic could also result in improved road conditions and savings on road repair, which will result in cost savings to states and localities. The full impact of an increase in remote workers with and without disabilities on the overall economy requires further study.

C. The Disadvantages of Remote Work

Despite the many advantages of remote work, it is not an option for all employees nor is it possible for all types of jobs. Only non-essential employees who can perform all of their job duties away from the office will have that option. Among them, only those who have the space, quiet, high-speed internet connection, and self-discipline will be able to successfully work remotely. Some employees may choose not to work remotely because they will miss the social interaction that an office provides, including those disabled employees who already experience social isolation.²²⁶ Other employees may find it difficult to strike the proper balance between work and personal life, resulting in working more and longer hours in their home offices.²²⁷ And for those workers who were forced to work from home under the most challenging of conditions during the pandemic, some may want to return to their offices as soon as possible.²²⁸

The Masculine Dilemma of Seeking Work Flexibility, 69 J. SOC. ISSUES 303, 314 (2013) (using quantitative data to analyze the stigma around men using flexible work arrangements for family reasons).

²²⁵ Sullenger, *supra* note 127, at 547; see also Ludgate, *supra* note 19, at 1322 (highlighting reduced air pollution as one of telecommuting's public policy benefits).

²²⁶ See e.g., Paul M. A. Baker, Nathan W. Moon & Andrew C. Ward, *Virtual Exclusion and Telework: Barriers and Opportunities of Technocentric Workplace Accommodation Policy*, 27 WORK 421, 422 (2006) (describing how historically, people with disabilities have had difficulty finding work that allows active, in-person participation, resulting in people with disabilities becoming marginalized).

²²⁷ Church, *supra* note 200, at 84 (citing Joyce E. A. Russell, *Career Coach: The Pros and Cons of Telecommuting*, WASH. POST (Mar. 24, 2013), https://www.washingtonpost.com/business/capitalbusiness/career-coach-the-pros-and-cons-of-telecommuting/2013/03/22/fee86bfa-9196-11e2-bdea-e32ad90da239_story.html [<https://perma.cc/HZ53-KFTH>]).

²²⁸ See Adam Gorlick, *Productivity Pitfalls of Working from Home in the Age of Covid-19*, STAN. INST. ECON. POL'Y RSCH. (Mar. 30, 2020), <https://siepr.stanford.edu/news/productivity-pitfalls-working-home-age-covid-19> [<https://perma.cc/5HUI-ESHQ>]; see also Newport, *supra* note 2 (noting that "there may be many people who will always prefer to work from work").

Working remotely may also hurt an employee's career trajectory. The accomplishments of employees who work at the workplace alongside their supervisors are more visible, potentially resulting in more favorable evaluations and promotion opportunities.²²⁹ However, one researcher found that remote workers can minimize the negative effect of being less visible to their supervisors, by increasing communication with them.²³⁰

Even if remote work is an option for more employees, it may not be desirable for other reasons. For example, although millions of teachers and professors moved to Zoom teaching from home during the pandemic, the efficacy and desirability of online learning remains debatable, not to mention the loss of revenue for higher education institutions during the pandemic.²³¹ Moreover, and most importantly, unless and until all new technologies, computer programs, or software applications are fully accessible and usable for people with different disabilities, the benefits of remote work will remain illusory for a large percentage of disabled employees.

There are also risks to employers by expanding the remote workforce. Not only may employers incur real estate losses for

²²⁹ See Church, *supra* note 200, at 81.

²³⁰ *Id.* at 84 (citing Rebecca Healy, *The Joys and Woes of Working from Home*, U.S. NEWS & WORLD REP. (Mar. 21, 2013), <https://money.usnews.com/money/blogs/outside-voices-careers/2013/03/21/4-joys-and-4-woes-of-working-from-home> [<https://perma.cc/6876-9YCK>]).

²³¹ See e.g., Arlene S. Kanter, *Can Faculty Be Forced Back on Campus?*, CHRON. HIGHER EDUC. (June 15, 2020), https://www.chronicle.com/article/can-faculty-be-forced-back-on-campus?emailConfirmed=true&supportSignUp=true&supportForgotPassword=true&email=dbastrzyk%40gmail.com&success=true&code=success&bc_nonce=ximer6ju2ebqlyhclz722&cid [<https://perma.cc/3H79-TFWF>] ("Allowing faculty to work from home impacts student learning and the development of personal relationships."); Colleen Flaherty, *Working from Home During Covid-19 Proves Challenging for Faculty Members*, INSIDE HIGHER EDUC. (Mar. 24, 2020), <https://www.insidehighered.com/news/2020/03/24/working-home-during-covid-19-proves-challenging-faculty-members> [<https://perma.cc/9UPT-JNAZ>] (Working from home may entail caregiving disruptions.); see also Ginia Bellafante, *Are We Losing a Generation of Children to Remote Learning?*, N.Y. TIMES, <https://www.nytimes.com/2020/11/06/nyregion/nyc-remote-learning.html> [<https://perma.cc/K67N-6PVA>] (last updated Nov. 9, 2020) (stressing the importance of the physical classroom); Sarah Schwartz, *Survey: Teachers and Students Are Struggling with Online Learning*, EDUC. WK. (Nov. 16, 2020), <https://www.edweek.org/teaching-learning/survey-teachers-and-students-are-struggling-with-online-learning/2020/11> [<https://perma.cc/HKA3-628E>] (noting that all-remote environments have resulted in higher student absenteeism, less student work completion, and slower pace of learning); Anya Kamenetz, *5 Things We've Learned About Virtual School in 2020*, NPR (Dec. 4, 2020), <https://www.npr.org/2020/12/04/938050723/5-things-weve-learned-about-virtual-school-in-2020> [<https://perma.cc/U5L6-65L5>] (discussing the difficulties of getting students connected technologically and emotionally).

the space they no longer need, but they may also experience greater challenges managing their workforce as well as meeting an increased demand for equipment and technology among their remote workers.²³² Some employers also object to remote work due to their inability to personally supervise their workforce.²³³ For example, a 2020 longitudinal study of remote workers around the world, found that many managers expressed concern about managing a team of remote workers and that the performance of remote workers would be “lower” than those who work in an office setting. They also expressed concern that remote workers were less likely to “stay motivated in the long term.”²³⁴

Other employers object to remote work due to the confidential nature of their work and the potential breaches of security with workers’ remote access to confidential information.²³⁵ On the other hand, there are now encryption protection programs and firewall software that offer security for most computer systems (although no system is ever fully secure).²³⁶

Questions also remain regarding the employer’s liability for accidents at home under workers compensation laws.²³⁷ As one commentator has observed, “While no legislation specifically addresses the issue, the assumption is that employees working remotely are entitled to workers’ compensation benefits so long as the injury arises out of and in the course of employment.”²³⁸ There are other issues, too, for remote workers regarding the regulation of their wages, working hours, and working conditions under the Fair Labor Standards Act (FLSA), although employers will still need to

²³² See Dawn R. Swink, *Telecommuter Law: A New Frontier in Legal Liability* 38 AM. BUS. L.J. 857, 863, 874 (2001) (exploring the growing presence of “home-based employees” due to advances in information technology that are shifting the focus away from centralized workplaces and the resultant effect on employer liability).

²³³ See Newport, *supra* note 203.

²³⁴ See *id.*

²³⁵ See, e.g., Ford v. Synovus Bank, No. 4:18-CV-8 (CDL), 2018 U.S. Dist. LEXIS 210152, at *1, *13 (M.D. Ga. Dec. 13, 2018) (affirming the employer’s denial of request to work from home based on risk of jeopardizing security of confidential customer financial information).

²³⁶ See Mark J. Maier, *Backdoor Liability from Internet Telecommuters*, 6 COMPUTER L. REV. & TECH. J. 27, 45 (2001).

²³⁷ For a comprehensive summary of cases (through 2000) involving liability of employers for injuries of employees working at home, see generally Swink, *supra* note 232, at 873–90 (summarizing past cases).

²³⁸ Joan T. A. Gabel & Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 343 (2003).

comply with FLSA regulations that require them to monitor their remote employees' hours.²³⁹ In addition, the Occupational Safety and Health Administration will continue to require employers to ensure that all employees work in safe conditions, regardless of whether their work is performed at the workplace or remotely.²⁴⁰

V

A CALL FOR EEOC ACTION

Although remote work is not for everyone nor appropriate for every job, it has many benefits and is now preferred by many employees and employers.²⁴¹ For disabled employees, remote work has the potential to create new and much-needed employment opportunities for those who may be qualified for a job but unable to travel to or maintain a consistent physical presence at a workplace. Undoubtedly the ADA is considered a major legislative accomplishment on behalf of people with disabilities; however, it has not yet resulted in a dramatic increase in the rate of employment for people with disabilities.²⁴² Even now, thirty years after the enactment of the ADA, a disproportionate number of disabled people remain unemployed and underemployed.²⁴³ As of 2019, only 30.9% of

²³⁹ 29 U.S.C. § 201–19.

²⁴⁰ See 29 U.S.C. § 651(b). In the first OSHA advisory letter in 1999 on the potential liability of employers for home workplaces, it stated that employers would be responsible for federal health and safety violations that occur in the home. See Letter from Richard E. Fairfax, Director, OSHA, to T. Trahan (Nov. 15, 1999), <https://www.osha.gov/laws-regs/standardinterpretations/1999-11-15> [<https://perma.cc/X2SY-ASTQ>]. Although the letter was later rescinded, OSHA still maintains that employers must ensure all employees work in “safe and healthful working conditions” even at home. See OCCUPATIONAL SAFETY & HEALTH ADMIN., INSTRUCTION CPL 2-0.125, HOME-BASED WORKSITES (2000), <https://www.osha.gov/enforcement/directives/cpl-02-00-125> [<https://perma.cc/35PZ-GNEX>]; see also Swink, *supra* note 232, at 871 (arguing “that employers should have a responsibility to protect their [employees who work from home]”).

²⁴¹ See *supra* notes 192–225 and accompanying text.

²⁴² See *e.g.*, Kanter, *Americans with Disabilities Act at 25 Years*, *supra* note 12, at 822 (noting that despite the ADA’s many accomplishments, disabled people continue to face many obstacles); see also Arlene S. Kanter, *Let’s Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities*, 35 *TOURO L. REV.* 301, 302 (2019) (noting that even with the ADA, disability rights in the US would be advanced by ratification of the Convention on the Rights of People with Disabilities).

²⁴³ See John E. Matejkovic & Margaret E. Matejkovic, *What is Reasonable Accommodation Under the ADA? Not an Easy Answer; Rather a Plethora of Questions.*, 28 *MISS. COLL. L. REV.* 67, 68 (2009). To understand the complexity of measuring the employment rate of people with disabilities before and after the enactment of the ADA, see Burt S. Barnow, *The Employment Rate of People with Disabilities*, *U.S. BUREAU LAB. STAT. MONTHLY LAB. REV.*, Nov. 2008, at 44, 47–49,

disabled people ages sixteen–sixty-four were employed, in contrast to 74.6% of people without disabilities.²⁴⁴

It is still too early to know if remote work will substantially increase job opportunities for people with disabilities; however, the research is pointing in that direction.²⁴⁵ It is, therefore, time for the EEOC to respond to the increased popularity of remote work by proposing changes to the relevant Title I regulations. These changes should clarify that disabled

<https://www.bls.gov/opub/mlr/2008/11/art3full.pdf> [<https://perma.cc/S9GC-QC7T>]. Based on statistics from the U.S. Bureau of Labor Statistics, in 1990, of the approximately 5,521,148 people with disabilities in the U.S., more than half worked. See Tennant, *supra* note 79, at 14. By 2000, the number of employees with disabilities had increased by approximately 111%. Therefore, over 3 million more disabled people were employed in 2000 than in 1990. As of December 2008, 5,436,000 people with disabilities ages sixteen to sixty-four were employed. *Employment Status and Disability Status, December 2008*, U.S. BUREAU LAB. STAT., https://www.bls.gov/cps/cpsdisability_122008.htm# [<https://perma.cc/DU5Z-3W7G>] (last updated Feb. 6, 2009). By 2016, people with disabilities were employed at an average of only 18%, while people without disabilities were employed at an average of 65%. See NAT'L COUNCIL ON DISABILITY, 2020 PROGRESS REPORT ON NATIONAL DISABILITY POLICY: INCREASING DISABILITY EMPLOYMENT 2 (2020), https://ncd.gov/sites/default/files/NCD_Progress_Report_508_0.pdf [<https://perma.cc/P9DC-7XK4>]. In 2017, 29.3% of people with disabilities ages sixteen to sixty-four were employed, compared to 73.5% of people without disabilities in the same age groups. Press Release, U.S. Bureau Lab. Stat., Persons with a Disability: Labor Force Characteristics—2017 (June 21, 2018), <https://evawintl.org/wp-content/uploads/disabl.pdf> [<https://perma.cc/CC55-VKSJ>] (reporting employment statistics for 2017). In 2018, 30.4% of people with disabilities ages sixteen–sixty-four were employed, compared to 74% of their nondisabled peers. Press Release, U.S. Bureau Lab. Stat., Persons with a Disability: Labor Force Characteristics—2018 (Feb. 26, 2019), https://www.bls.gov/news.release/archives/disabl_02262019.pdf [<https://perma.cc/8F95-82P3>] (reporting employment statistics for 2018). Based on these numbers, it appears that since the ADA was amended in 2008, the number of people with disabilities employed has increased, but not dramatically in relation to the nondisabled population.

²⁴⁴ Press Release, U.S. Bureau Lab. Stat., Persons with a Disability: Labor Force Characteristics—2019 (Feb. 26, 2020), https://www.bls.gov/news.release/archives/disabl_02262020.pdf [<https://perma.cc/4NDD-84P5>] (reporting employment statistics for 2019). For people with psychiatric disabilities, the unemployment rate is closer to 80%. See Mathis, Bossing & Frank, *supra* note 173 (noting that employees with mental disabilities face additional barriers to employment).

²⁴⁵ See Walker & Cokley, *supra* note 153 (“With more remote offerings, flexibility, and accommodations, we face a generational opportunity to codify accessibility and inclusion in institutions that have been exclusive for far too long.”); see also Iafolla, *supra* note 15 (analyzing the viability of telework as a workplace accommodation); *Telecommuting Trend Data*, *supra* note 4 (discussing the prevalence of telework for disabled workers); Gartner, *supra* note 15 (announcing an intent to allow telework permanently post-Covid-19); Guyot & Sawhill, *supra* note 16 (reporting telework trends); Boland, De Smet, Palter & Sanghvi, *supra* note 199 (reimagining work life and the role of offices); Bloom, Liang, Roberts & Ying, *supra* note 205, at 170 (detailing the impact of telework options).

employees have a right to work remotely as a reasonable accommodation in appropriate cases, especially since so many workers had already performed their jobs remotely during the pandemic. If an employee's disability prevents them from successfully performing their job at the workplace, and if the essential parts of their job can be performed remotely without causing undue hardship on the employer's business, as shown by clear and convincing evidence, disabled employees should have the right and opportunity to work remotely. Indeed, the EEOC recently filed its first case on behalf of an employee with a pulmonary condition that placed her at a greater risk of contracting Covid-19 against an employer who refused to allow her to continue working from home after employees were called back to the office once the risks of the pandemic abated.²⁴⁶

The EEOC should and can do more than address this issue, one case at a time. In the following paragraphs, I propose specific suggestions for amending the relevant EEOC regulations to include remote work as a preferred accommodation in appropriate cases.²⁴⁷

First, although "telework" is mentioned in recent EEOC Guidances, the EEOC should amend the Title I regulations to specifically list remote work as a reasonable accommodation,

²⁴⁶ Complaint at 4–6, *EEOC v. ISS Facility Servs., Inc.*, (No. 1:21-cv-03708-SCJ-RDC) (N.D. Ga. filed Sept. 7, 2021); see Press Release, U.S. Equal Emp. Opportunity Comm'n, *EEOC Sues ISS Facility Services for Disability Discrimination* (Sept. 7, 2021). In this case, the EEOC alleged not only disability discrimination against the employer for failure to provide remote work as an accommodation and termination in the context of the Covid-19 pandemic but also that the company's employment practices were intentional and designed "to deprive [her] of equal employment opportunities and otherwise adversely affect her status as an employee because of her disability." Complaint at 7, *ISS Facility Servs., Inc.* (No. 1:21-CV-03708-SCJ-RDC). As of October 2021, the first cases decided by district courts since Covid-19 on behalf of employees seeking to continue working remotely were decided in favor of the employees. See e.g., *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 60, 66 (D. Mass. 2020) (granting a preliminary injunction to an employee with asthma whose telework request was denied upon showing she could perform all the essential duties of the position and other job-related tasks from home); *Silver v. City of Alexandria*, 470 F. Supp. 3d 616, 618, 625 (W.D. La. 2020) (granting a preliminary injunction to a City Council member with heart disease upon showing he could participate in all Council meetings virtually). But see *Clouser v. Hanover Foods Corp.*, No. 1:21-CV-1148, 2022 U.S. Dist. LEXIS 79463, at *15 (M.D. Pa. May 2, 2022) (granting summary judgement to employer on the grounds that employee with an anxiety disorder had not met the definition of disability under Title I).

²⁴⁷ One consequence of construing the ADA to require employers to increase opportunities for remote work is that some employers may choose instead to limit their telecommuting policies which may result in fewer employees, with and without disabilities, receiving permission to work remotely. See *EEOC v. Ford Motor Co.*, 782 F.3d 753, 765 (6th Cir. 2015).

and one that can be denied only if the employer can show that essential functions of the particular job cannot be performed at home. In such cases, the employer should also be required to permit remote work unless it would cause an undue hardship on the operation of the business, by clear and convincing evidence. The employee's prior work history and attendance record at the workplace should not be considered as a justification for denying a request to work remotely. By including remote work as an example of a reasonable accommodation and placing the burden on the employer to show specific hardships, plaintiffs would not be forced to defend their work record at the workplace, as courts now require. In many cases, on-site work performance appears to have little, if anything, to do with an employee's ability to compete the essential functions of their jobs away from the workplace. Thus, courts should not consider the employee's record at the workplace determinative. Instead, courts should consider only the ability of the employee to do their job or the essential parts of their job remotely, and what impact, if any, such remote work would have on the employer's business, not in some general sense, but in the particular case.

Second, the EEOC should add an eighth factor to its list of seven factors related to essential job functions. The current list of seven factors relate to the workplace, but only from the employer's viewpoint. The first two factors restate the statutory considerations and pertain only to the employer's judgment.²⁴⁸ The remaining five factors relate to the employer's policies and practices regarding whether a particular job function is essential, or not.²⁴⁹ None of these factors elicit information from the employee. The newly proposed "eighth" factor would be the employee's judgement regarding the feasibility of performing the essential functions of the job remotely. As discussed above, courts typically defer to employer's judgment about whether or not physical presence at the workplace is an essential function. Such deference may be understandable since workplace rules are typically the employer's prerogative. But with respect to working remotely, an employee's judgment about the benefits, difficulties, or specifics of how the employee would perform their job remotely is particularly relevant and should be considered. At least one court has recognized "that employees can be good sources of information regarding their day-to-day activities and the

²⁴⁸ 29 C.F.R. § 1630.2(n)(3)(i)-(ii).

²⁴⁹ 29 C.F.R. § 1630.2(n)(3)(iii)-(vii).

prerequisites for success on the job.”²⁵⁰ Yet none of the seven factors included in the regulations regarding whether an employee can perform the essential functions of their job remotely, refer to information that the employee may offer in support of a request to work remotely. In fact, it is the employee, not the employer, who would have greater and easier access to such information.

In support of their deference to the employer’s judgment regarding physical presence as an essential function of a particular job, courts have cited the principles of statutory construction, specifically the canon of *ejusdem generis*.²⁵¹ This canon states that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed specifically. Here, the canon is used to argue that because all of the factors of essential functions relate to information accessible by the employer, information from the employee should not be considered. Thus, if the EEOC were to add as a factor the employee’s judgment about the feasibility of working remotely, it would violate the canon of *ejusdem generis* because the employee’s judgment is “unlike any other items on the list,” which relate only to the employer.²⁵² However, by not including as a factor the employee’s judgment with respect to how they may perform the essential functions of the job remotely, decisions about remote work silence the person most affected, and may perpetuate a negative view of disabled people as unworthy of belief or trust. On the other hand, by giving voice to the employee’s judgment regarding the feasibility of remote work as an additional factor to consider in determining

²⁵⁰ *Credeur v. Louisiana*, 860 F.3d 785, 793–94 (5th Cir. 2017) (noting that unlike the employer’s judgment, which is explicitly mentioned in the statute and EEOC regulations, “[n]either the statute nor regulations nor EEOC guidance instructs courts to credit the employee’s opinion about what functions are essential.’ . . . Principles of statutory construction suggest that the *employee’s* personal judgment, which is unlike any other item on this list, is not the kind of evidence that a court should consider.”). *But see Brunckhorst v. Oak Park Heights*, 914 F.3d 1177, 1182–83 (8th Cir. 2019) (noting that a request to work from home was found not to be a reasonable accommodation in light of employee’s testimony that he could work at City Hall but it “would have been easier” for him to work from home).

²⁵¹ *See Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534 (5th Cir. 2016) (“[T]he canon of *ejusdem generis* instructs that ‘when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.’”), *cert. denied*, 138 S.Ct. 55 (2017). Of course, “courts should not give blind deference to an employer’s judgment, but should instead evaluate the employer’s words alongside its policies and practices.” *Credeur*, 860 F.3d at 794.

²⁵² *Credeur*, 860 F.3d at 794.

whether an employee can perform the essential functions of their job remotely, as I propose, the regulations would more closely align with a core purpose of the ADA to remove the stigma of disability.

Third, to be even more clear that remote work may be a preferred accommodation in appropriate cases, the EEOC could draw on the fundamental alteration defense under Titles II and III of the ADA.²⁵³ Under Title II, public entities are required to make reasonable modifications unless they would “fundamentally alter the nature of a service, program, or activity.”²⁵⁴ Similarly, under Title III, privately owned places of public accommodations are required to make requested modifications unless they would “fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden.”²⁵⁵ Although the fundamental alteration defense is not included in Title I, the EEOC may amend the Title I regulations to include a fundamental alteration defense. If the nature of the work performed remotely would change so fundamentally the specific job at issue, then the request to work remotely could be denied. On the other hand, if there would be no fundamental alteration in the nature of the work or the specific tasks involved by performing the job remotely, the employee’s remote work request should be granted.

Fourth, the EEOC should clarify that any workplace policy requiring physical presence as an essential function may violate Title I of the ADA as an unlawful qualification standard. The ADA prohibits any qualification standard or other selection criteria “that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities.”²⁵⁶ To avoid such discriminatory action, an employer should be

²⁵³ 28 C.F.R. § 35.130(b)(7)(i); 28 C.F.R. § 35.164; *see also* U.S. DEP’T JUST., STATEMENT OF THE DEPARTMENT OF JUSTICE ON ENFORCEMENT OF THE INTEGRATION MANDATE OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND *Olmstead v. L.C.*, https://www.ada.gov/olmstead/q&a_olmstead.htm [<https://perma.cc/Y7W8-4FGM>] (last updated Feb. 25, 2020) (describing the fundamental alteration defense).

²⁵⁴ 28 C.F.R. § 35.130(b)(7)(i); 28 C.F.R. § 35.164; *see also* *Olmstead v. L.C.*, 527 U.S. 581, 604–07 (1999) (applying and clarifying the fundamental alteration defense under Title II).

²⁵⁵ 28 C.F.R. § 36.303(a).

²⁵⁶ 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.10(a). Such qualification standards, tests, or other selection criteria “that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability” are prohibited unless “the standard, test, or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity.” 29 C.F.R. § 1630.10(a).

required to prove not only that physical presence requirement is an essential function of the job but also that a policy requiring physical presence does not have a discriminatory impact on employees or potential employees with disabilities.²⁵⁷ Since workplace policies that do not permit remote work necessarily screen out and adversely affect employees with disabilities who cannot meet the physical presence requirement of a job because of their disability, clarification by the EEOC that such policies violate Title I is long overdue. The EEOC should make clear that employers must show why working remotely by a particular employee, at a particular job, is not feasible at the requested location, during the requested timeframe. To meet this burden, the employer would be required to show that a prohibition on remote work is not illegally screening out or tending to screen out an employee or potential employee with a disability. The only way the employer could meet that burden would be to show, with clear and convincing evidence, that a particular employee cannot perform the essential functions of a particular job remotely, and that requiring physical presence in the workplace for this particular employee is job related and consistent with business necessity.

In addition, employees with disabilities who seek to work remotely may continue to sue their employers to show they can perform the essential functions of their job remotely, even if a job description says physical presence is required, and even if other workers perform the same job responsibilities at the workplace. Some circuits will be more responsive to such claims than others.²⁵⁸ Moreover, such lawsuits may protect employees whose employers become deluged with requests to work remotely and seek to deny such requests, claiming that to grant *all* such requests would cause an undue hardship on the operation of their business. Such concerns about the aggregated costs to the employer are misplaced, however. Title I of the ADA requires employers to grant reasonable

²⁵⁷ If the qualification standard, employment test, or other selection criterion is shown to be job related and consistent with business necessity, an employer still must consider whether there is a reasonable accommodation that will enable an otherwise qualified individual with a disability to satisfy it. 29 C.F.R. § 1630.10(a); 29 C.F.R. § 1630.15(b). With regard to health and safety standards that screen out qualified individuals because of disability, an employer must demonstrate that the requirement, as applied to an individual, satisfies the "direct threat" standard. See 29 C.F.R. § 1630.2(r).

²⁵⁸ Given my review of the more than two dozen recent cases that addressed a request to work remotely, it appears that the Second, Sixth, Ninth, and D.C. Circuits are most hospitable to claims by employees seeking to work remotely.

accommodations through an “interactive process.”²⁵⁹ This process requires a determination of reasonableness based on a case-by-case basis, focusing on the individual employee’s unique circumstances, not a decision based on the impact on the entire workforce.²⁶⁰ Therefore, incumbent as well as future disabled employees should not be dissuaded from requesting to work remotely, even if an employer denies such requests out of concern about the potential aggregate effect of multiple remote work requests. Although the employer is permitted to choose among requested accommodations for an individual employee, the employer is not permitted to deny one employee’s request for an accommodation because of concerns about the potential costs of similar requests by other employees.²⁶¹

A fifth and final way in which the EEOC should clarify that remote work may be an appropriate or even a necessary accommodation for some employees is to remind employers that they should specify and regularly update their workplace policies and written job descriptions, including when physical presence in the workplace is required for certain jobs.²⁶² Employers have the right to decide who to hire, and how to organize and manage their workplaces, but not to discriminate. Workplace policies and job descriptions therefore must be based on facts about specific jobs, not generalized descriptions of many jobs; nor may they be based on speculation, unfounded assumptions, or stereotypes.²⁶³ With more

²⁵⁹ 29 C.F.R. § 1630.2(o)(3).

²⁶⁰ *Id.*

²⁶¹ *Id.* See U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2003-1, *supra* note 35, at ¶ 9 (“If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective (i.e., it would remove a workplace barrier, thereby providing the individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment). Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide.”).

²⁶² While employers are not required to develop or maintain job descriptions and are free to change job descriptions at any time, the EEOC recommends that job descriptions should accurately reflect current job requirements and duties, including the essential functions of the job. See 29 C.F.R. § 1630.2(n)(3)(ii); *The ADA: Your Responsibilities as an Employer*, *supra* note 26. For a discussion of discriminatory job listings, see David M. Perry, *Job Discrimination in Plain Print*, AL JAZEERA (Feb. 10, 2016), <http://america.aljazeera.com/opinions/2016/2/job-discrimination-in-plain-print.html> [<https://perma.cc/U2SX-CRSY>].

²⁶³ In another context, the U.S. Supreme Court outlawed the danger of stereotypes of people with disabilities. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 465 (1985) (The zoning ordinance at issue was based upon “impermissible assumptions or outmoded and perhaps invidious stereotypes” of people with disabilities.).

carefully tailored job descriptions, applicants and incumbents who seek to work remotely would know at the outset that requests to work remotely would be disfavored and may choose to work elsewhere. However, employers who sent their workforce home to work during the pandemic will have difficulty claiming that jobs that were done remotely during the pandemic can be performed now only at the workplace.

CONCLUSION

Prior to the recent Covid-19 pandemic, employers considered their workplaces to be “critical to productivity, culture, and winning the war for talent.”²⁶⁴ Companies competed in major urban centers for prime office space to promote collaboration and productivity in open-office designs that were hailed as the “workplace of tomorrow.”²⁶⁵ The recent Covid-19 pandemic changed all that.

The pandemic has taken an enormous toll on the nation and the world.²⁶⁶ For people with disabilities, the pandemic has been especially tragic. Disabled people are at least three times more likely to die of Covid-19 than people without disabilities.²⁶⁷ Further, the social isolation caused by the

²⁶⁴ Boland, De Smet, Palter & Sanghvi, *supra* note 199.

²⁶⁵ *Id.* WeWork is a prime example. See *Adapt with the Workplace of Tomorrow*, WEWORK, https://www.wework.com/tomorrow/get-started?utm_campaign=8659562350&utm_term=85927567166&utm_content=435231417077&utm_source=ads-google&utm_medium=cpc&gclid=cjwKCAiAq8f-BRBtEiwAGr3DgZc8yaVb9jfxNYkHrBtkYLF5OKIRK1QHziAiVG-wqXMI8uz490k3xoCsIAQAvD_BwE&gclid=aw.ds [<https://perma.cc/VCF7-YQ2N>] (last visited Jan. 14, 2022).

²⁶⁶ See Farhad Manjoo, *The Hidden ‘Fourth Wave’ of the Pandemic*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/opinion/coronavirus-mental-health.html?referringSource=articleShare&fbclid=IWAR2agkbQQYqTetIM7YN-JN8dH7HsVImMw3h7TnXhBwwGOx4t1VW8ZOLogA8> [<https://perma.cc/BN2F-UBHZ>] (citing Megan Brenan, *Americans’ Mental Health Ratings Sink to New Low*, GALLUP (Dec. 7, 2020), <https://news.gallup.com/poll/327311/americans-mental-health-ratings-sink-new-low.aspx> [<https://perma.cc/527X-5YJ2>]).

²⁶⁷ See Roni Caryn Rabin, *Developmental Disabilities Heighten Risk of Covid Death*, N.Y. TIMES, <https://www.nytimes.com/2020/11/10/health/covid-developmental-disabilities.html#:~:text=the%20main%20story-,Developmental%20Disabilities%20Heighten%20Risk%20of%20Covid%20Death,conditions%2C%20a%20new%20analysis%20found> [<https://perma.cc/R4HZ-7AU7>] (last updated Nov. 11, 2020) (citing RISK FACTORS FOR COVID-19 MORTALITY AMONG PRIVATELY INSURED PATIENTS: A CLAIMS DATA ANALYSIS, FAIR HEALTH 12 (2020), <https://s3.amazonaws.com/media2.fairhealth.org/whitepaper/asset/Risk%20Factors%20for%20COVID-19%20Mortality%20among%20Privately%20Insured%20Patients%20-%20A%20Claims%20Data%20Analysis%20-%20A%20FAIR%20Health%20White%20Paper.pdf> [<https://perma.cc/9UWY-SXAN>]) (arguing that “[p]eople with intellectual disabilities and developmental disorders are three times more likely to die if they have Covid-19”); see also Mary Van Beusekom,

pandemic has had a disproportionate impact on people with disabilities, resulting in an increase in suicides and increased demand for mental health services.²⁶⁸ Amidst this tragedy, however, advances in technology have facilitated opportunities for more people—with and without disabilities—to talk, meet,

Intellectual Disability, Obesity Tied to Covid-19 Hospitalization, Death, CIDRAP (Mar. 8, 2021), <https://www.cidrap.umn.edu/news-perspective/2021/03/intellectual-disability-obesity-tied-covid-19-hospitalization-death> [<https://perma.cc/9QPA-H9GT>] (noting that a study found that persons with intellectual disabilities were more likely to be hospitalized, require intensive care unit admission, and die after contracting the coronavirus infection); Robert Preidt, *People with Intellectual Disabilities at High Risk for Fatal Covid-19*, U.S. NEWS & WORLD REP. (Mar. 15, 2021), <https://www.usnews.com/news/health-news/articles/2021-03-15/people-with-intellectual-disabilities-at-high-risk-for-fatal-covid-19> [<https://perma.cc/22M6-YSY5>] (stating that people with intellectual disabilities were “2.5 times more likely to contract Covid-19, were about 2.7 times more likely to be admitted to the hospital and 5.9 times more likely to die from Covid-19”); Press Release, U.S. Dep’t Health & Hum. Servs., HHS to Expand Access to Covid-19 Vaccines for Older Adults and People with Disabilities (Mar. 29, 2021), <https://www.hhs.gov/about/news/2021/03/29/hhs-to-expand-access-to-covid-19-vaccines-for-older-adults-and-people-with-disabilities.html> [<https://perma.cc/FB69-69HT>] (finding that “intellectual disability is the greatest risk factor after age”); Wendy Ross, *The Terrible Toll of Covid-19 on People with Intellectual Disabilities*, AAMC (Apr. 20, 2021), <https://www.aamc.org/news-insights/terrible-toll-covid-19-people-intellectual-disabilities> [<https://perma.cc/AR66-YZF5>] (asserting that “[p]atients with intellectual disabilities are six times more likely to die from Covid-19 than other people”); Margaret A. Turk, Scott D. Landes, Margaret K. Formica & Katherine D. Goss, *Intellectual and Developmental Disability and Covid-19 Case-Fatality Trends: TriNetX Analysis*, 13 DISABILITY & HEALTH J. 1, 3 (2020) (providing statistics about COVID-19 fatality rates); A. Blythe Ryerson et al., *Disparities in Covid-19 Vaccination Status, Intent, and Perceived Access for Noninstitutionalized Adults, by Disabilities Status—National Immunization Survey Adult COVID Module, United States, May 30–June 26, 2021*, 70 CTRS. FOR DISEASE CONTROL & PREVENTION MORBIDITY & MORTALITY WKLY. REP. 1365 (2021) (arguing that “health and social inequalities have placed persons with disabilities at increased risk for Covid-19-related illnesses and death”).

²⁶⁸ See David Gunnell et al., *Suicide Risk and Prevention During the Covid-19 Pandemic*, 7 LANCET PSYCHIATRY 468, 468–69 (2020) (claiming that suicide rates will likely rise due to the long-term effects of the pandemic, particularly for vulnerable groups); Mark A. Reger, Ian H. Stanley & Thomas E. Joiner, *Suicide Mortality and Coronavirus Disease 2019—A Perfect Storm?*, 77 JAMA PSYCHIATRY 1093, 1093–94 (2020) (claiming that social distancing may increase suicide rates due to the impact of social isolation); Nellie Galindo, *Suicide and Covid-19: Who is Most at Risk During the Pandemic?*, RELIAS (Sept. 23, 2020), <https://www.relias.com/blog/suicide-covid-19-who-most-at-risk-during-pandemic> [<https://perma.cc/FWU8-UB7Z>] (reporting that “the amount of adults expressing suicidal ideation” has significantly increased from pre-pandemic levels); Mark E. Czeisler et al., *Mental Health, Substance Use, and Suicidal Ideation During the Covid-19 Pandemic—United States, June 24–30, 2020*, 69 CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP. 1049, 1049 (2020) (finding that as of June 2020, the CDC found forty-one percent of U.S. adults were struggling with mental health concerns and that eleven percent of its respondents reported having seriously considered suicide in the thirty days prior to completing the survey, which was more than twice as many respondents as a similar reports just two years earlier).

and work remotely. Today, nearly half of the nation's labor force works remotely.²⁶⁹ As one team of researchers acknowledged, "The COVID pandemic has challenged and changed our relationships with work and how many of us do our jobs. There's no real going back, and that means policymakers and business leaders need to plan and prepare so workers and firms are not sidelined by otherwise avoidable problems."²⁷⁰

With a thoughtful approach to a post-pandemic world, working from home offers many benefits and "can be a change for good."²⁷¹ Indeed, many employees have expressed their preference to work remotely, even after the reopening of their workplaces.²⁷² As one study found, eighty percent of people enjoy working from home and many businesses and organizations see remote work as a way to "access new pools of talent with fewer locational constraints, adopt innovative

²⁶⁹ See CISION PR NEWSWIRE, *supra* note 3; see also Bloom, *supra* note 4.

²⁷⁰ Bloom, *supra* note 4. Many companies are already planning to provide employees opportunities for hybrid work post-pandemic. Google's "flexible workweek" calls for employees to spend at least three days a week in the office. Daisuke Wakabayashi, *Google Delays Return to Office and Eyes 'Flexible Work Week'*, N.Y. TIMES, <https://www.nytimes.com/2020/12/14/technology/google-delays-return-to-office-and-eyes-flexible-work-week.html> [https://perma.cc/9Z92-7GGP] (last updated Mar. 23, 2021). Microsoft's "hybrid workplace" allows employees to spend up to half their time working remotely. See Lauren Hirsch, *Microsoft to Ease Workers Back to the Office Starting Next Week*, N.Y. TIMES, <https://www.nytimes.com/2021/03/22/business/microsoft-back-to-the-office.html> [https://perma.cc/2TR4-GMBZ] (last updated Mar. 23, 2021). And Ford Motor Company's "flexible hybrid work model" allows employees to decide, with their managers, how much time they will spend in the office. See Keith Naughton, *Ford to Let 30,000 Employees Remain at Home Post-Pandemic*, BLOOMBERG NEWS (Mar. 17, 2021), <https://www.bloomberg.com/news/articles/2021-03-17/ford-to-let-30-000-employees-remain-home-workers-post-pandemic?sref=0w5HLLb3> [https://perma.cc/HZ5Q-WTDD]; see also *How to Navigate the Postpandemic Office*, N.Y. TIMES, <https://www.nytimes.com/2021/04/24/business/dealbook/hybrid-workplace-guide.html> [https://perma.cc/9HTX-7EV8] (last updated Apr. 26, 2021) (discussing Ford and Google's flexible remote approaches to the post-pandemic workplace); Newport, *supra* note 203 (discussing the advantages of a remote work approach).

²⁷¹ See Anna Convery-Pelletier, *The Future of Work: The Hybrid Workforce*, FORBES (Nov. 11, 2020), <https://www.forbes.com/sites/forbescommunicationscouncil/2020/11/11/the-future-of-work-the-hybrid-workforce/?sh=3eb85c7d362a> [https://perma.cc/X4SL-YQAH].

²⁷² Gallup reported that as of January 2021, most workers are not ready to return to work in the office, but only twenty-three percent of workers who were working remotely wanted to continue if given the choice when workplaces and schools reopen. Lydia Saad & Adam Hickman, *Majority of U.S. Workers Continue to Punch in Virtually*, GALLUP (Feb. 12, 2021), <https://news.gallup.com/poll/329501/majority-workers-continue-punch-virtually.aspx> [https://perma.cc/EGC4-5WSR].

processes to boost productivity, create an even stronger culture, and significantly reduce real-estate costs.”²⁷³

These changes in the national labor force present an opportunity for people with as well as without disabilities. Remote work has the potential to facilitate the development of greater employment opportunities for disabled people, in particular, who have had difficulty finding or keeping jobs due to inaccessible workplaces, transportation difficulties, or other challenges related to workplace culture and the lack of accommodations.²⁷⁴ Disabled people, therefore, may be the “greatest beneficiaries of this information technology revolution.”²⁷⁵ As such, remote work furthers the primary goal of the ADA to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency.”²⁷⁶

The increased availability of remote work also has the potential to raise awareness about disability prejudice and

²⁷³ Boland, De Smet, Palter & Sanghvi, *supra* note 199.

²⁷⁴ As one disability activist writes, “[S]urprising, too, is that my situation makes stay-at-home orders tolerable, maybe even a relief. Compliance with those rules reduced both mobility and visibility. So in my line of work, lockdown meant researching, writing, and teaching from home without subway commutes.” Samaha, *supra* note 197.

²⁷⁵ *Section 508 of the Rehabilitation Act: Accessibility for People with Disabilities in the Information Age (Results of 2001 Survey) Report Index*, U.S. DEPT OF JUST., § I.A.I., <https://www.justice.gov/crt/b-department-justices-survey-past-and-present-1-1999-2000-interim-self-evaluations-and-report> [<https://perma.cc/NA3P-G8QN>] (last updated Aug. 6, 2015).

²⁷⁶ 42 U.S.C. § 12101(a)(8). The Purpose of the ADA, as amended in 2008, is: (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this [Act] on behalf of individuals with disabilities.

42 U.S.C. § 12101(b)(1)-(3). The purpose of Title I, therefore, is to eliminate discrimination in the workplace so that people with disabilities would no longer be dependent on the government for assistance. This view of the ADA as a law that would essentially save the government money is seen in the original preamble to the ADA in which Congress found that discrimination against people with disabilities costs the United States several billion dollars in “unnecessary expenses resulting from dependency and nonproductivity.” 42 U.S.C. § 12101(a)(9) (1990). This Finding was also included in the 2008 amendments to the ADA, acknowledging the:

continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. § 12101(a)(8) (2008).

ableism that continues to permeate many workplaces today.²⁷⁷ The way to combat ableism and prejudice is not, of course, to remove people with disabilities from our workplaces. Our sordid history of placing people with disabilities “out of sight and out of mind,” must never be repeated.²⁷⁸ But authorizing remote work as an option for those employees with disabilities who request it may provide disabled employees greater autonomy and control over their work lives. As one commentator observed, “The telecommuting option removes both tangible and intangible workplace barriers that previously hindered a disabled person’s overall success at work, which aligns with the underlying purpose of the ADA to correct society’s previous failure to remove societal and institutional barriers.”²⁷⁹

To further the goal of the ADA, the EEOC should clarify in its regulations that remote work is a reasonable accommodation in many more workplaces, for many more types of jobs, and for many more workers than were thought eligible prior to the Covid-19 pandemic. The increase in remote work brought about by the pandemic, as well as advances in technologies has already begun to change the nature of work, as well as our relationships with co-workers and supervisors. Further, employers who once claimed that physical presence is always or usually an essential function of a job, or that allowing an employee to work from home would cause an undue hardship, must now confront our new post-pandemic workplace reality.

²⁷⁷ See, e.g., Priyanka Anand & Purvi Sekak, *The Role of Workplace Accommodations in the Employment of People with Disabilities*, 6 IZA J. LAB. POL’Y 1, 1, 10 (2017) (arguing that some of the employment barriers faced by people with disabilities are due to lack of accessibility in modern workplaces); see also Mukta Kulkarni & Mark L. Lengnick-Hall, *Obstacles to Success in the Workplace for People with Disabilities: A Review and Research Agenda*, 13 HUM. RES. DEV. REV. 158, 160–63 (2014) (discussing obstacles faced by people with disabilities in the workplace).

²⁷⁸ See, e.g., Arlene S. Kanter, *Homeless Mentally Ill People: No Longer Out of Sight and Out of Mind*, 3 N.Y.L.S. J. HUM. RTS. 331, 331–32 (1986) (discussing the expansion of homeless populations forcing society to confront homelessness); Arlene S. Kanter, *Abandoned But Not Forgotten: The Illegal Confinement of Elderly People in State Psychiatric Institutions*, 19 N.Y.U. REV. L. & SOC. CHANGE 273, 278–83 (1991) (reviewing the history of over-institutionalization of elderly people); Arlene S. Kanter, *A Home of One’s Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925, 927–28 (1994) (discussing efforts to integrate mentally disabled people into communities and housing discrimination faced by the mentally disabled).

²⁷⁹ Hancock, *supra* note 30, at 166.

During the Covid-19 pandemic, remote work options became more viable at more workplaces and for more workers. Indeed, the United States Office of Personnel Budget recently acknowledged the success of remote work during the pandemic and issued a directive encouraging all federal agencies “to strategically leverage workplace flexibilities such as telework, remote work, and alternative/flexible work schedules as tools to help attract, recruit, and retain the best possible workforce.”²⁸⁰

As the number of employees who request to work remotely will continue to rise after the pandemic subsides, the number of remote workers with and without disabilities will likely increase.²⁸¹ In addition, as our population ages, more of us will qualify as disabled, together with the increase in the numbers of people who qualify as disabled under the ADA as a result of the long term health effects of the virus.²⁸² It is already estimated that more than one in four of today’s twenty-year-olds will experience a disability before they retire.²⁸³ Accordingly, the number of employees who may need workplace accommodations will continue to increase in the years ahead. The EEOC would be wise to acknowledge our

²⁸⁰ In November 2021, the United States Office of Personnel Budget issued a document titled, *2021 Guide to Telework and Remote Work in the Federal Government: Leveraging Telework and Remote Work in the Federal Government to Better Meet Our Human Capital Needs and Improve Mission Delivery*. U.S. OFF. PERS. MGMT., 2021 GUIDE TO TELEWORK AND REMOTE WORK IN THE FEDERAL GOVERNMENT: LEVERAGING TELEWORK AND REMOTE WORK IN THE FEDERAL GOVERNMENT TO BETTER MEET OUR HUMAN CAPITAL NEEDS AND IMPROVE MISSION DELIVERY (2021), <https://www.telework.gov/guidance-legislation/telework-guidance/telework-guide/guide-to-telework-in-the-federal-government.pdf> [<https://perma.cc/A6B4-JTK6>]. This Guide implements the Telework Enhancement Act of 2010 that originally authorized “telework” for employees of executive branch departments and federal agencies. The 2021 Guide recognizes the recent changes to the workplace a result of the Covid-19 pandemic and that federal employees demonstrated their ability to perform the functions of their job remotely during the pandemic. Accordingly, the Office of Personal Management now encourages “agencies to strategically leverage workplace flexibilities such as telework, remote work, and alternative/flexible work schedules as tools to help attract, recruit, and retain the best possible workforce.” *Id.* at 1.

²⁸¹ One study predicts that the number of employees working from home will triple in relation to the pre-pandemic workforce. See David Altig et al., *Firms Expect Working from Home to Triple*, FED. RSRV. BANK ATLANTA (May 28, 2020), <https://www.frbatlanta.org/blogs/macroblog/2020/05/28/firms-expect-working-from-home-to-triple> [<https://perma.cc/Z6YC-4CGZ>] (survey reveals that compared to before the pandemic, the share of working days spent at home by full-time workers will triple after the pandemic).

²⁸² *Covid-19 (Coronavirus): Long-Term Effects*, *supra* note 10; Becker, *supra* note 10; Leung et al., *supra* note 10; Rio, Collins & Malani, *supra* note 10.

²⁸³ *Facts*, SOC. SEC. ADMIN., <https://www.ssa.gov/disabilityfacts/facts.html> [<https://perma.cc/C3VK-CGC3>] (last visited Sept. 19, 2022).

current economic and public health realities and revise the Title I regulations to provide greater clarity to employees, employers, as well as the courts, that remote work is a reasonable and even necessary accommodation for many current and future employees with disabilities.