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## ARTICLES

### REMOTE WORK DISABILITY ACCOMMODATIONS IN THE POST-PANDEMIC WORKPLACE: THE NEED FOR EVIDENCE-DRIVEN ANALYSIS

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*"Where we work matters."*<sup>1</sup>

*The wave of remote work that has swept the nation since the COVID-19 pandemic has upended traditional notions about how and where work is performed. Advocates for disabled workers have lobbied for remote work for decades because the standard American workplace is designed around the nondisabled worker. The ability to work remotely is crucial to many workers with disabilities; it often determines whether they can maintain a job. And yet, most employers have refused to embrace remote work as a disability accommodation. This knee-jerk resistance to remote work has often been based on assumptions, past practice, and a lack of imagination rather than a careful, evidence-based examination of what is feasible and reasonable in a particular situation. In litigation, courts typically side with employers, basing their holdings on evidentiary practices that inevitably elevate employers' concerns over those of employees.*

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1. Tristin K. Green, *I'll See You at Work: Spatial Features and Discrimination*, 55 U.C. DAVIS L. REV. 141, 143 (2021).

*This Article makes two unique contributions to the literature on remote work accommodations. First, it identifies and categorizes these sometimes subtle, but usually dispositive, evidentiary practices and analyzes how each is legally unsound. What the pandemic has taught us about remote work further erodes the bases for these practices, rendering them indefensible. Courts should abandon these evidentiary shenanigans. Second, this Article studies federal remote work accommodations decisions between April 2020 and December 2022. Results are mixed, but there are hopeful signs that some courts are changing practices in light of the mountain of data our pandemic-induced nationwide remote work experiment has generated. This change would be a welcome development for disabled plaintiffs that would help ensure they have a fair chance in court.*

#### TABLE OF CONTENTS

INTRODUCTION.....	203
I. THE HISTORY OF REMOTE WORK.....	206
II. THE PROMISE OF REMOTE WORK FOR DISABLED WORKERS .....	209
III. THE DISAPPOINTING REALITY OF REMOTE WORK FOR DISABLED WORKERS	214
<i>A. The Americans with Disabilities Act .....</i>	<i>214</i>
<i>B. Faulty Evidentiary Practices Courts Have Used in</i>	
<i>Rejecting Remote Work Accommodation Claims.....</i>	<i>218</i>
1. Presuming Remote Work Is Improper .....	219
2. Overdeferring to Employer Judgment .....	222
3. Relying on Blanket Policies and Preferences.....	225
4. Refusing to Properly Consider Employee Evidence.....	227
5. Combining These Practices Magnifies the Impact.....	231
IV. THE PANDEMIC’S IMPACT ON REMOTE WORK ACCOMMODATIONS .....	232
<i>A. What the Pandemic Has Taught Us About Remote Work.....</i>	<i>233</i>
<i>B. Courts Should Change Evidentiary Practices in Remote</i>	
<i>Work Litigation.....</i>	<i>240</i>
<i>C. Post-Pandemic Remote Work Litigation Trends .....</i>	<i>243</i>
1. Reluctance to Discuss COVID-19.....	244
2. Litigation Success Rates .....	245
3. The Four Evidentiary Practices .....	247
<i>a.) Presuming Remote Work Is Improper .....</i>	<i>247</i>
<i>b.) Overdeferring to Employer Judgment .....</i>	<i>249</i>
<i>c.) Relying on Blanket Policies and Preferences.....</i>	<i>249</i>
<i>d.) Refusing to Properly Consider Employee Evidence .....</i>	<i>250</i>
4. Changes at the Circuit-Court Level.....	252
CONCLUSION.....	255

## INTRODUCTION

The surge of remote work<sup>2</sup> that accompanied the COVID-19 pandemic has forever changed the American workplace and permanently altered our notions of how and where work is performed.<sup>3</sup> Workers with disabilities and disability rights advocates have been seeking more remote work accommodations for decades.<sup>4</sup> Though many workers of all types may desire or benefit from remote work, for many individuals with disabilities, the ability to work from home can determine whether they can work at all.<sup>5</sup>

But by and large, employers have opposed providing remote work accommodations that disabled workers have requested under the Americans with Disabilities Act (ADA).<sup>6</sup> Sometimes employers have good reasons for refusing remote work—a grocery stocker cannot fill shelves from home. But most employers have refused to embrace remote work as a disability accommodation based on nothing more than a gut reaction that remote work is infeasible—as opposed to actual evidence regarding the specifics of the situation.<sup>7</sup>

Not only have employers often fought against being required to provide remote work accommodations, but they have done so with the overwhelming backing of the

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2. I use terms like “remote work” and “work from home” to indicate an employee performing a job function in a location other than the employer’s physical workspace. I also use these terms to include both full-time and partial working from home (hybrid arrangements) unless I specifically indicate otherwise. Scholars and researchers use many other terms to describe various remote work arrangements, including telework, telecommuting, virtual work, and distance work. For discussion about the various terminology as it is used in the research literature, see 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, 42–43 (2015).

3. See Jen Geller, *Remote Work Will Be a Legacy of Pandemic; Job Losses May Not Be Over, Survey Finds*, CNBC (June 3, 2020, 10:25 AM), <https://www.cnbc.com/2020/06/03/remote-work-will-be-legacy-of-pandemic-conference-board-survey-finds.html> [<https://perma.cc/6MAL-QHXL>] (“Remote work may be the most influential legacy of the Covid-19 pandemic.”); FRANK STEEMERS, ROBIN ERICKSON, AMANDA POPIELA & GAD LEVANON, CONF. BD., FROM IMMEDIATE RESPONSES TO PLANNING FOR THE REIMAGINED WORKPLACE: HUMAN CAPITAL RESPONSES TO THE COVID-19 PANDEMIC 2 (Sara Churchville ed., 2020), <https://www.conference-board.org/pdffdownload.cfm?masterProductID=20874> [<https://perma.cc/M5XF-EPV6>].

4. See Lisa A. Schur, Mason Ameri & Douglas Kruse, *Telework After COVID: A “Silver Lining” for Workers with Disabilities?*, 30 J. OCCUPATIONAL REHAB. 521, 523 (2020), <https://link.springer.com/article/10.1007/s10926-020-09936-5> [<https://perma.cc/ZW5H-4ZYS>]; Zoë Beery, *When the World Shut Down, They Saw It Open*, N.Y. TIMES (Aug. 24, 2020), <https://www.nytimes.com/2020/08/24/style/disability-accessibility-coronavirus.html> [<https://perma.cc/5LTQ-4Z65>]; see also Morgan Smith, *People with Disabilities Still Face Barriers Finding Work During the Pandemic—Here’s How Companies Can Help*, CNBC (Nov. 1, 2021, 2:11 PM), <https://www.cnbc.com/2021/10/29/people-with-disabilities-still-face-barriers-finding-work-during-the-pandemicheres-how-companies-can-help.html> [<https://perma.cc/L7DC-FR22>].

5. Stacy A. Hickox & Chenwei Liao, *Remote Work as an Accommodation for Employees with Disabilities*, 38 HOFSTRA LAB. & EMP. L.J. 25, 33 (2020); see also *Work at Home/Telework as a Reasonable Accommodation*, EQUAL EMP. OPPORTUNITY COMM’N (Feb. 3, 2003), <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation> [<https://perma.cc/A69T-XAWA>] [hereinafter EEOC Telework Guidance] (noting that “in some situations, working at home may be the only effective option for an employee with a disability”).

6. 42 U.S.C. §§ 12101–12213; see *infra* notes 126–136 and accompanying text.

7. See *infra* note 127.

courts. As with most other employment discrimination claims,<sup>8</sup> remote work failure-to-accommodate claims under the ADA have a dismal success rate for employees and are routinely dismissed on summary judgment, if not earlier.<sup>9</sup> Courts take many different paths to reach this result, but careful scrutiny shows that many are rooted in evidentiary practices that allow employers to get away with denying remote work accommodations with practically no evidentiary support.<sup>10</sup> Some courts go even further, not only accepting vague and generic evidence from employers—or sometimes requiring none at all—but rejecting employee evidence about what their job requires or how it can be performed, stating that such evidence is “of no consequence in the . . . equation.”<sup>11</sup> Whether requiring little to no specific evidence from employers or brushing off employees’ evidence, courts’ evidence-based practices often leave disabled workers with no chance of even avoiding summary judgment, much less recovering or having a court require accommodations so they can work.

This analysis has always been flawed. Nothing in the ADA or the implementing regulations from the Equal Employment Opportunity Commission (EEOC) requires this evidentiary gamesmanship that so loads the dice against disabled workers. Our pandemic working experience, looking both at the individual employee level and more broadly at the overall American workplace, provides an opportunity to spotlight this issue because now, we have—in abundance—concrete evidence. We have been part of a multiyear, mass forced experiment in remote work, and that experiment has generated data. Employers have denied remote work opportunities because they simply could not imagine how it could work. But imagination is no longer required. For many industries and jobs, we now know exactly what working from home looks like. Sometimes it has worked well, and other times, not as much. But the point is, we now have empirical results based on more than just the employer’s preference. That knowledge should be brought to bear on future employment decisions and into the courtroom when employment practices are challenged.

Many scholars are writing about the future of remote work accommodations in a post-pandemic world.<sup>12</sup> This Article adds two important and original contributions by

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8. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 104 (2009); see also SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* 15–29 (2017).

9. See Hickox & Liao, *supra* note 5, at 44, 49–50; Robert Iafolla, *Work at Home Gets Skeptical Eye from Courts as Disability Issue*, BLOOMBERG L., DAILY LAB. REP. (Feb. 21, 2019, 6:15 AM), <https://news.bloomberglaw.com/daily-labor-report/work-at-home-gets-skeptical-eye-from-courts-as-disability-issue> [<https://perma.cc/ZHC4-NE9X>].

10. See *infra* Part III.B.

11. *Dropinski v. Douglas County*, 298 F.3d 704, 709 (8th Cir. 2002); see also *infra* Part III.B.4.

12. See generally Hickox & Liao, *supra* note 5; Arlene S. Kanter, *Remote Work and the Future of Disability Accommodations*, 107 CORNELL L. REV. 1927 (2022); Nicole Buonocore Porter, *Working While Mothering During the Pandemic and Beyond*, 78 WASH. & LEE L. REV. ONLINE 1 (Aug. 9, 2021), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol78/iss1/1> [<https://perma.cc/QHG8-FQW8>] [hereinafter Porter, *Working While Mothering*]; Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J. L. & POL. 203 (2021) [hereinafter Travis, *Post-Pandemic*]. Several students have also written about the future of remote work accommodations post-pandemic. See, e.g., Katie Deutsch, Comment, *The Future of Teleworking Accommodations under the ADA Post-COVID-19*, 70 U. KAN. L. REV. 105 (2021); Rebecca Gillette, Note, *The New Normal? Rethinking Telework Accommodations in a Post COVID-19 World*, 9 BELMONT L. REV. 231 (2021); Caroline Headrick, Note, *Remote Work “Reasonable”? Why*

(1) identifying, categorizing, and critiquing the evidentiary errors courts made pre-pandemic in work-from-home accommodations cases and (2) canvassing the post-pandemic litigation regarding remote work accommodations claims and assessing any trends.

Employers are struggling to define the post-pandemic workplace, with some more willing than others to continue remote work in some manner in response to the many employees who want to do so for a variety of reasons.<sup>13</sup> When the request is for a remote work accommodation based on a disability, the equation becomes even more complex. Even employers who are otherwise friendly to remote work might bristle at being forced to provide remote work as a disability accommodation rather than on their own terms and timeline. Many disabled workers who need remote work accommodations to safely or effectively work have had their requests denied, and lawsuits involving failure-to-accommodate claims are on the rise.<sup>14</sup>

How should courts analyze these claims? Much of the old approach is flawed and always has been; it was based on a set of implicit and explicit evidentiary rules that unfairly leaves many disabled workers with no chance to prevail when employers deny remote work accommodations.<sup>15</sup> The wealth of new post-pandemic data shows that around 37–45% of jobs can be performed fully remotely,<sup>16</sup> and many more could

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*the COVID-10 Pandemic Calls for a Reinterpretation of the “Reasonable Accommodation” Standard, and How Companies Can Respond*, 40 MINN. J. L. & INEQUALITY 211 (2022); Baylee Kalmbach, Comment, *A COVID Silver Lining? How Telework May Be a Reasonable Accommodation After All*, 90 U. CINN. L. REV. 1294 (2022).

13. See, e.g., Priya Anand, *Airbnb Says Employees Can Work Remotely Forever*, BLOOMBERG L., DAILY LAB. REP. (Apr. 28, 2022, 8:07 PM), <https://news.bloomberglaw.com/daily-labor-report/airbnb-says-employees-can-work-remotely-forever> [https://perma.cc/2AHJ-AKHX]; Mark Gurman, *Apple Workers Push Back on Office Return After Two Years at Home*, BLOOMBERG L., DAILY LAB. REP. (Apr. 4, 2022, 6:00 AM), <https://news.bloomberglaw.com/daily-labor-report/apple-workers-push-back-on-office-return-after-two-years-at-home> [https://perma.cc/W25P-Q363]; Ryan Mac, *Elon Musk to Workers: Spend 40 Hours in the Office, or Else*, N.Y. TIMES (June 1, 2022), <https://www.nytimes.com/2022/06/01/technology/elon-musk-tesla-spacex-office.html> [https://perma.cc/FP5T-FE36]; Anders Melin & Misyrlena Egkolfopoulou, *Employees Are Quitting Instead of Giving Up Working from Home*, BLOOMBERG L., DAILY LAB. REP. (June 1, 2021, 7:00 AM), <https://news.bloomberglaw.com/daily-labor-report/employees-are-quitting-instead-of-giving-up-working-from-home> [https://perma.cc/Y5S3-U97N]; Erin Mulvaney, *Office Culture War Escalates as Workers Balk at Return Mandates*, BLOOMBERG L., DAILY LAB. REP. (July 19, 2021, 5:31 AM) [hereinafter Mulvaney, *Office Culture War*], <https://news.bloomberglaw.com/daily-labor-report/office-culture-war-escalates-as-workers-balk-at-return-mandates> [https://perma.cc/5Y69-RHUY]; Keith Naughton, *Ford to Let 30,000 Employees Remain at Home Post-Pandemic*, BLOOMBERG L. NEWS (Mar. 17 2021, 10:18 AM), <https://www.bloomberg.com/news/articles/2021-03-17/ford-to-let-30-000-employees-remain-home-workers-post-pandemic?ref=https://perma.cc/7F6F-9D37>.

14. See *infra* notes 290–294 and accompanying text.

15. Unjustified explicit and implicit evidentiary rules wreak havoc in employment discrimination cases generally. Professor Sandra Sperino has analyzed this extensively. See Sandra F. Sperino, *Evidentiary Inequality*, 101 BOSTON U. L. REV. 2105 (2021).

16. See Matthew Dey, Harley Frazis, Mark A. Loewenstein & Hugette Sun, *Ability to Work from Home: Evidence from Two Surveys and Implications for the Labor Market in the COVID-19 Pandemic*, BUREAU LAB. STATISTICS, MONTHLY LAB. REV. (June 2020), <https://www.bls.gov/opub/mlr/2020/article/ability-to-work-from-home.htm> [https://perma.cc/6GAY-GS93] (analyzing two sets of data to conclude that “about 45 percent of U.S. employment is in occupations in which telework is feasible”); JONATHAN I. DINGEL & BRENT NELMAN, BECKER FRIEDMAN INST. FOR ECON., UNIV. CHI., *HOW MANY JOBS CAN BE DONE AT HOME?*, 1 (2020) [https://bfi.uchicago.edu/wp-content/uploads/BFI\\_White-Paper\\_Dingel\\_Neiman\\_3.2020.pdf](https://bfi.uchicago.edu/wp-content/uploads/BFI_White-Paper_Dingel_Neiman_3.2020.pdf)

certainly be performed with a combination of remote and on-site work. Far from requiring a “very extraordinary” set of circumstances,<sup>17</sup> remote work is now, in many instances, quite ordinary. Courts should abandon these evidentiary practices that so unfairly disadvantage disabled workers. Instead, courts should require actual evidence that specifically addresses reasonableness and hardship of remote work in any particular case and fully consider all relevant evidence, including evidence from employees.

This Article proceeds in four sections. Section I discusses the evolution of remote work in America, and Section II explains how remote work is particularly beneficial for disabled workers. Then in Section III, the Article identifies the evidence-based practices underlying why remote work accommodation claims have so often failed in court and analyzes why those practices are flawed. Finally, Section IV explores how the evidence we have gained from working at home during the pandemic should change how courts evaluate these claims and whether courts are, in fact, changing their approach to post-pandemic claims.

### I. THE HISTORY OF REMOTE WORK

Remote work exploded as the COVID-19 pandemic set in during March 2020.<sup>18</sup> By May 2020, 35.4% of employed people were working at home specifically due to the pandemic,<sup>19</sup> with more than 60% of full, paid work days being done remotely.<sup>20</sup> That compares sharply to pre-pandemic, when only about 5% of work days were worked from home.<sup>21</sup> Since spring 2020, the amount of work from home has fluctuated but trended downward, with many estimating that work from home rates will eventually stabilize at about 20% of full-time working days.<sup>22</sup> To evaluate the significance of these figures and assess how remote work accommodations will play out, it is helpful first to understand how remote work has developed and the debate surrounding it.

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[<https://perma.cc/Y7EL-229H>] (studying data to conclude that 37% of American jobs “can be performed entirely at home”).

17. See *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995).

18. *7.7 Percent of Workers Teleworked Due to COVID-19 in April 2022*, U.S. BUREAU LAB. STAT. ECON. DAILY (May 11, 2022), <https://www.bls.gov/opub/ted/2022/7-7-percent-of-workers-teleworked-due-to-covid-19-in-april-2022.htm> [<https://perma.cc/8SZV-X56W>].

19. *Id.*

20. Jose Maria Barrero, Nicholas Bloom & Steven J. Davis, *Why Working from Home Will Stick*, 2 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28737, 2021), <https://www.nber.org/papers/w28731> [<https://perma.cc/Y2XY-ZHSS>].

21. *Id.*; NICHOLAS BLOOM, STANFORD INST. FOR ECON. POL’Y RSCH., *HOW WORKING FROM HOME WORKS OUT*, 5 (2020), [https://drive.google.com/file/d/15nB9nscTj38bIADQYLIQWlZUBNPeDI5\\_/view](https://drive.google.com/file/d/15nB9nscTj38bIADQYLIQWlZUBNPeDI5_/view) [<https://perma.cc/9TRN-5LA9>].

22. See Barrero et al., *supra* note 20, at 30; Nicholas Bloom, Ruobing Han & James Liang, *How Hybrid Working from Home Works Out*, 2 (Nat’l Bureau of Econ. Rsch., Working Paper No. 30292, 2022), <https://www.nber.org/papers/w30292> [<https://perma.cc/BXN9-WQHD>]; see also NICHOLAS BLOOM, STANFORD INST. FOR ECON. POL’Y RSCH., *HYBRID IS THE FUTURE OF WORK*, 1 (2021), <https://drive.google.com/file/d/1U8NeVFONHO0rHQq6A4hytlm3I1wio0T/view> [<https://perma.cc/6FXU-MN2S>] (reporting that about 70% of businesses plan to continue with hybrid working arrangements).

The concept of remote work, first called telecommuting, emerged in the 1970s and 1980s in response to the oil crisis and as a way to curb air pollution by reducing traffic.<sup>23</sup> From there, interest in remote work evolved as an employee benefit, a way to help with work-life balance.<sup>24</sup> Technological advancements from personal computers to email to high-speed internet to conferencing and video calling platforms have made remote work increasingly feasible for many jobs.<sup>25</sup>

Many employers have experimented with work from home programs. The federal government, as the country's largest employer,<sup>26</sup> has a robust remote work program currently governed by the Telework Enhancement Act of 2010.<sup>27</sup> In 2019, 22% of all federal employees worked remotely in some capacity,<sup>28</sup> though President Trump rolled back some federal remote work programs.<sup>29</sup> The private sector has struggled substantially with remote work. Many companies experimented with remote work programs but then pulled back; Yahoo made headlines in 2013 after ending its program, and other big companies such as IBM, Hewlett-Packard, and Best Buy did so as well.<sup>30</sup> While the technology exists for much more, and certainly remote work rates were increasing even before the pandemic,<sup>31</sup> remote work was still fairly rare and viewed as a perk that was “the exception rather than the norm.”<sup>32</sup>

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23. See Allen et al., *supra* note 2, at 41; Nathan W. Moon, Maureen A. Linden, John C. Bricout & Paul M.A. Baker, *Telework Rationale and Implementation for People with Disabilities: Considerations for Employer Policymaking*, 48 WORK 105, 106 (2014).

24. See Allen et al., *supra* note 2, at 41; Moon et al., *supra* note 23, at 107.

25. See Allen et al., *supra* note 2, at 41; Cal Newport, *Is Going 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/228P-YQYN>].

26. *Federal Employers*, U.S. DEP'T OF LAB., OFF. OF DISABILITY EMP. POL'Y, <https://www.dol.gov/agencies/odep/program-areas/employers/federal-employment> [<https://perma.cc/VDU7-2C7E>] (last visited Feb. 1, 2023).

27. See 5 U.S.C. §§ 6501–6506; U.S. OFF. OF PERS. MGMT., *Telework Basics*, TELEWORK.GOV, <https://www.telework.gov/federal-community/telework-employees/telework-basics> [<https://perma.cc/J7KH-C8Q8>] (last visited Feb. 1, 2023); see also Gillette, *supra* note 12, at 253–55 (detailing the Act).

28. U.S. OFF. OF PERS. MGMT., *STATUS OF TELEWORK IN THE FEDERAL GOVERNMENT: REPORT TO CONGRESS, FISCAL YEAR 2019*, 5 (2021), <https://www.telework.gov/reports-studies/reports-to-congress/2020-report-to-congress.pdf> [<https://perma.cc/A8JS-FHW3>].

29. See Lisa Rein, *As Remote Work Rises at U.S. Companies, Trump Is Calling Federal Employees Back to the Office*, WASH. POST (Jan. 12, 2020), [https://www.washingtonpost.com/politics/as-remote-work-rises-at-us-companies-trump-is-calling-federal-employees-back-to-the-office/2020/01/12/37aad040-2d80-11ea-9b60-817cc18cf173\\_story.html](https://www.washingtonpost.com/politics/as-remote-work-rises-at-us-companies-trump-is-calling-federal-employees-back-to-the-office/2020/01/12/37aad040-2d80-11ea-9b60-817cc18cf173_story.html) [<https://perma.cc/TW4R-HLQ7>].

30. See Rebecca Greenfield, *The Rise and Fall of Working from Home*, BLOOMBERG L. (July 10, 2017, 12:44 PM), <https://news.bloomberglaw.com/bloomberg-law-news/the-rise-and-fall-of-working-from-home> [<https://perma.cc/V7FU-RB79>]; Newport, *supra* note 25; 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/C3WG-TYM2>]; David Streitfeld, *The Long, Unhappy History of Working from Home*, N.Y. TIMES (Jan. 4, 2021), <https://www.nytimes.com/2020/06/29/technology/working-from-home-failure.html> [<https://perma.cc/U8D6-4EWV>].

31. See Dey et al., *supra* note 16.

32. Newport, *supra* note 30; see also Greenfield, *supra* note 30; Robert Nichols & Caroline Melo, *Pandemic Telework May Undermine Employer ADA Defense*, LAW360 (Apr. 6, 2020, 4:55 PM), <https://www.law360.com/articles/1259855/pandemic-telework-may-undermine-employer-ada-defense> [<https://perma.cc/8BTP-WAYJ>].

Whether remote work is desirable or beneficial has been studied and debated for more than forty years.<sup>33</sup> Of course, not all jobs are suitable for remote work.<sup>34</sup> Working at home is much more feasible in professional and managerial jobs than for those involving production, construction, and service, which often require in-person interaction with either other people or with specialized equipment or machinery.<sup>35</sup> When considering remote work overall, there are a whole host of potential benefits and costs, not just to the individual employer and employees involved but to society overall.<sup>36</sup>

Even with these limitations, some general themes emerge. Many employees can work from home successfully.<sup>37</sup> Multiple studies show increases in productivity and efficiency, with resultant cost savings, for employers with remote work programs.<sup>38</sup> Moreover, studies show many remote employees are more satisfied with their jobs based on factors such as fewer distractions, reduced stress, less commuting, more flexibility, and better work-life balance.<sup>39</sup>

This is not, however, universally true. Remote workers might suffer from loneliness and isolation, particularly if they work exclusively remotely, and might have a more difficult time separating their work obligations from their home life.<sup>40</sup> And not everyone is cut out for remote work, which requires a certain type of motivation and self-regulation to work alone amid all the comforts and distractions of home.<sup>41</sup>

Even self-starters with firm work-home boundaries who enjoy working alone might suffer long-term consequences from remote work. Being away from the central workplace hub can make informal mentoring and training more difficult, and remote employees could miss out on opportunities that come from casual workplace

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33. See Allen et al., *supra* note 2, at 40; Schur et al., *supra* note 4. It can be difficult to generalize research results because study parameters vary so widely, including on such fundamental baselines of how much and what type of remote work a worker must do to be included in the study. See Allen et al., *supra* note 2, at 42–46; Timothy D. Golden & Ravi S. Gajendran, *Unpacking the Role of a Telecommuter's Job in Their Performance: Examining Job Complexity, Problem Solving, Interdependence, and Social Support*, 34 J. BUS. PSYCH. 55, 55–56 (2019).

34. See Allen et al., *supra* note 2, at 50.

35. See Dey et al., *supra* note 16; Schur et al., *supra* note 4, at 529.

36. For comprehensive discussions of the potential pros, cons, and tradeoffs of remote work, see Allen et al., *supra* note 2, at 46–58; *Costs and Benefits*, GLOBAL WORKPLACE ANALYTICS (last visited Feb. 1, 2023), <https://globalworkplaceanalytics.com/resources/costs-benefits> [https://perma.cc/KKY8-YUFH]; BRENT ORRELL & MATTHEW LEGER, AM. ENTER. INST., *THE TRADE-OFFS OF REMOTE WORK: BUILDING A MORE RESILIENT WORKPLACE FOR THE POST-COVID-19 WORLD 2* (2020), <https://www.aei.org/wp-content/uploads/2020/11/The-Trade-Offs-of-Remote-Work.pdf?x91208> [https://perma.cc/J9QT-8F9S].

37. See Allen et al., *supra* note 2, at 48–49.

38. See *id.*; Golden & Gajendran, *supra* note 33, at 55, 66; ORRELL & LEGER, *supra* note 36, at 3–4.

39. See Allen et al., *supra* note 2, at 47–48; Kathryn L. Fonner & Michael E. Roloff, *Why Teleworkers Are More Satisfied with Their Jobs than Are Office-Based Workers: When Less Contact Is Beneficial*, 38 J. APPLIED COMM. RES. 336, 336, 353–55 (2010); ORRELL & LEGER, *supra* note 36, at 7–8.

40. See Allen et al., *supra* note 2, at 47, 52; ORRELL & LEGER, *supra* note 36, at 6, 9.

41. See Allen et al., *supra* note 2, at 54–55; ORRELL & LEGER, *supra* note 36, at 6, 13.

interactions.<sup>42</sup> Remote workers sometimes feel social stigma and worry their careers will suffer because of weaker interpersonal relationships and fewer opportunities.<sup>43</sup>

Employer attitudes and support are crucial factors in the success of remote work.<sup>44</sup> Remote work is often most successful when the employer embraces it with detailed policies, training, and structures to support both the remote employees and their in-person coworkers and supervisors.<sup>45</sup> But many employers have resisted remote work because it fundamentally conflicts with their ingrained vision of the proper work structure.<sup>46</sup> Most workplace systems are built around the “full-time face-time” model.<sup>47</sup> Many supervisors believe they cannot supervise employees that they cannot see.<sup>48</sup> Managers often cannot envision teamwork, collaboration, and culture building without being in the same physical space.<sup>49</sup> These are the types of concerns that ended the remote work programs at Yahoo, Best Buy, and other big companies.<sup>50</sup>

Employees can thrive with remote work if they are partnered with supportive employers willing to think outside the box. Workers have increasingly demanded remote work, and some companies have gotten on board, but employer resistance has been substantial. This is where we were when the pandemic hit and changed everything. Before discussing the pandemic’s impact and the future of remote work, it is important to discuss remote work more specifically in the context of disabled workers.

## II. THE PROMISE OF REMOTE WORK FOR DISABLED WORKERS

For those who want to work, being able to do so is foundational. As Professor Mark Weber explained, “[w]orking occupies a large portion of life, and a job not only provides the means to support the working person and dependents, but also establishes an identity for the employee and a place for that person in society.”<sup>51</sup> But for individuals with disabilities, obtaining a job can be challenging. People with disabilities are consistently employed at about one-third to one-half of the rate as the rest of society.<sup>52</sup> This is in part

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42. See Allen et al., *supra* note 2, at 56; Rachel Feintzeig, *While Working Remotely, Here’s How to Get Noticed—and Promoted*, WALL ST. J. (Aug. 23, 2020), <https://www.wsj.com/articles/while-working-remotely-heres-how-to-get-noticedand-promoted-11598184001> [<https://perma.cc/NK26-TRSL>].

43. See Allen et al., *supra* note 2, at 52; Feintzeig, *supra* note 42; David McNaughton, Tracy Rackensperger, Dana Dorn & Natasha Wilson, “Home Is at Work and Work Is at Home”: *Telework and Individuals Who Use Augmentative and Alternative Communication*, 48 WORK 117, 118 (2014).

44. See Allen et al., *supra* note 2, at 55.

45. See *id.*; 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/8SZB-BR6V>].

46. See Golden & Gajendran, *supra* note 33, at 67.

47. See Travis, *Post-Pandemic*, *supra* note 12, at 204; Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 5–6 (2005) [hereinafter Travis, *Recapturing*].

48. See Allen et al., *supra* note 2, at 55; ORRELL & LEGER, *supra* note 36, at 6.

49. See Allen et al., *supra* note 2, at 55; ORRELL & LEGER, *supra* note 36, at 5.

50. See Allen et al., *supra* note 2, at 55; Newport, *supra* note 30.

51. MARK C. WEBER, UNDERSTANDING DISABILITY LAW 45 (3d ed. 2019).

52. See Mason Ameri & Terri R. Kurtzberg, *Leveling the Playing Field Through Remote Work*, MIT SLOAN MGMT. REV. (Feb. 15, 2022), <https://sloanreview.mit.edu/article/leveling-the-playing-field-through-remote-work/> [<https://perma.cc/D8V4-JBPL>]; *Table A-6. Employment Status of the Civilian Population by Sex*,

why the ADA was so significant—it provided the first wide-scale federal employment protection against disability discrimination.<sup>53</sup> One of its key goals is to integrate people with disabilities into the American workforce, in part by providing more opportunities for working outside of the traditional model.<sup>54</sup> The ADA generated high hopes for transforming the workplace,<sup>55</sup> and remote work has been an integral part of that thinking.<sup>56</sup>

It is easy to see why remote work has held such promise for promoting employment for disabled people. Of course, the general potential benefits of remote working apply to individuals with disabilities,<sup>57</sup> but working from home can be uniquely beneficial to them.<sup>58</sup> People with disabilities face many obstacles to employment, including transportation barriers and impairments that can make working in a traditional physical

*Age, and Disability Status, Not Seasonally Adjusted*, U.S. BUREAU LAB. STAT. (last updated Apr. 1, 2022), <https://www.bls.gov/news.release/empstat06.htm> [<https://perma.cc/2J3Z-BKV6>]; *Written Testimony of Brian East, Senior Attorney, Disability Rights Texas*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 28, 2021), <https://www.eeoc.gov/meetings/meeting-april-28-2021-workplace-civil-rights-implications-covid-19-pandemic/east> [<https://perma.cc/G5S5-97PN>] [hereinafter East].

53. See LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES & THE LAW* § 4:6, at 447 (4th ed. 2022); see also RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT* 19, 70 (2005). The Rehabilitation Act of 1973 also prohibits disability-based employment discrimination, but its scope is much smaller, covering only certain federal employees and recipients of federal financial assistance. See 29 U.S.C. §§ 790–796; ROTHSTEIN & IRZYK, *supra*, § 4:6, at 422–23. For the most part, the substantive employment-related provisions of the ADA and the Rehabilitation Act are analyzed identically. See *Brown v. Austin*, 13 F.4th 1079, 1084 n.3 (10th Cir. 2021); see also *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002). Thus, in this Article, I will generally refer to the ADA and will cite both Rehabilitation Act and ADA cases interchangeably.

54. See 42 U.S.C. § 12101(a)(3), (7); COLKER, *supra* note 53, at 19–20; Allen et al., *supra* note 2, at 42; Travis, *Recapturing*, *supra* note 47, at 4.

55. See COLKER, *supra* note 53, at 19; Travis, *Recapturing*, *supra* note 47, at 4–6; see also Jennifer Bennett Shinall, *Without Accommodation*, 97 IND. L. J. 1148, 1181 (2022).

56. See Allen et al., *supra* note 2, at 42; Maggie Gram, *For Many Caregivers and People with Disabilities, WFH Was Never Just a Perk*, N.Y. TIMES (July 13, 2021), <https://www.nytimes.com/2020/05/27/at-home/work-from-home-history.html> [<https://perma.cc/UV54-QEPE>]; see also Angela Lashbrook, *I Struggled with Office Life. Now Others Are Alive to Benefits of Remote Working*, GUARDIAN (July 25, 2021, 3:00 EDT), <https://www.theguardian.com/world/2021/jul/25/working-from-home-mental-health> [<https://perma.cc/49ZX-AMJA>].

57. See *supra* notes 36–39 and accompanying text.

58. Scholars, advocates, and journalists have long written about the value of remote work for disabled people who want to work. See, e.g., Allen et al., *supra* note 2, at 57; Jane Anderson, John C. Bricout & Michael D. West, *Telecommuting: Meeting the Needs of Businesses and Employees with Disabilities*, 16 J. VOCATIONAL REHAB. 97, 97 (2001); Gram, *supra* note 56; Bradford W. Hesse, *Using Telework to Accommodate the Needs of Employees with Disabilities*, 6 J. ORG. COMPUTING & ELEC. COM. 327, 329 (1996); JOB ACCOMMODATION NETWORK, ACCOMMODATION AND COMPLIANCE SERIES: TELEWORK 2 (2018), <https://askjan.org/publications/Topic-Downloads.cfm?pubid=287474> [<https://perma.cc/K8JL-MZ3D>] [hereinafter JAN]; Maureen Linden & Karen Milchus, *Teleworkers with Disabilities: Characteristics and Accommodation Use*, 47 WORK 473, 474 (2014); Schur et al., *supra* note 4; Geri Stengel, *Working from Home Opens the Door to Employing People with Disabilities*, FORBES (Apr. 20, 2020, 7:00 AM), <https://www.forbes.com/sites/geristengel/2020/04/20/working-from-home-opens-the-door-to-employing-people-with-disabilities> [<https://perma.cc/2AYF-ZXWC>].

workplace challenging.<sup>59</sup> Working from home could completely change the landscape of employment opportunities for certain people with disabilities, such as

- those living with mobility impairments, where their home is already optimized for movement, or where commuting to work is extremely cumbersome, lengthy, or potentially dangerous (assuming the workplace is even accessible),<sup>60</sup>
- those who need to remain close to medical equipment or caregivers, or those who do not have the resources or privacy at work to perform self-care,<sup>61</sup>
- those with a variety of impairments where preparing for, traveling to, or performing work in a traditional workplace causes fatigue or pain, undermining the employees' ability to work and significantly affecting their quality of life,<sup>62</sup>
- those living with mental health or cognitive conditions that make functioning outside of their homes or in an office setting difficult,<sup>63</sup>
- those living with allergies or environmental sensitivities that make it challenging to control exposure to harmful conditions outside the home,<sup>64</sup> and
- those whose symptoms are episodic or unpredictable and thus much more manageable in a home setting.<sup>65</sup>

These are but a few examples of how people with various types of physical and mental impairments could maintain a job if offered remote work—or without remote work, in some instances, may not be able to work at all.<sup>66</sup>

Of course, not all people with disabilities need or want to work remotely, even if they could do their job from home.<sup>67</sup> For some, working from home would worsen their situation. For example, the solitude of remote work can exacerbate certain mental health

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59. See ROTHSTEIN & IRZYK, *supra* note 53, § 4:1, at 420–21; Schur et al., *supra* note 4; see also Mark L. Lengnick-Hall, Philip M. Gaunt & Mukta Kulkarni, *Overlooked and Underutilized: People with Disabilities Are an Untapped Human Resource*, 47 HUMAN RESOURCE MANAGEMENT 255, 258 (2008).

60. See Anderson et al., *supra* note 58, at 98; Hesse, *supra* note 58, at 329–32; Jason Richmond, *How Remote Work Can Enhance Workplace Diversity*, FORBES (July 28, 2020, 8:30 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2020/07/28/how-remote-work-can-enhance-workplace-diversity> [<https://perma.cc/QC94-SDKX>]; Schur et al., *supra* note 4.

61. See Hesse, *supra* note 58, at 331–32; JAN, *supra* note 58, at 2; Linden & Milchus, *supra* note 58, at 474; Schur et al., *supra* note 4.

62. See Anderson et al., *supra* note 58, at 98; JAN, *supra* note 58, at 2; Lashbrook, *supra* note 56; Linden & Milchus, *supra* note 58, at 474; Schur et al., *supra* note 4.

63. See Anderson et al., *supra* note 58, at 98; JAN, *supra* note 58, at 2; Lashbrook, *supra* note 56; Linden & Milchus, *supra* note 58, at 474; Schur et al., *supra* note 4, at 522.

64. See Allen et al., *supra* note 2, at 57; Anderson et al., *supra* note 58, at 98; JAN, *supra* note 58, at 2.

65. See Allen et al., *supra* note 2, at 57; 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, 431 (2006).

66. See Elizabeth S. Bromet & Bruce Growick, *Telework: A New Frontier in Vocational Rehabilitation*, 32 JOURNAL OF APPLIED REHABILITATION COUNSELING 19, 19 (2001); Hesse, *supra* note 58, at 329–32, 339; Hickox & Liao, *supra* note 5, at 33.

67. See Moon et al., *supra* note 23, at 108.

conditions.<sup>68</sup> Other individuals may not have the technology needed for effective remote communication given their impairment.<sup>69</sup> But for those who are willing and able, remote work could dramatically improve employment opportunities for disabled workers. And employing more disabled workers is important, not just for those workers and their families, but for society generally. Disabled workers perform, on the whole, just as well as or better than nondisabled workers,<sup>70</sup> and employers can draw from a wider talent pool<sup>71</sup> and increase workplace diversity.<sup>72</sup> Society at large and the economy overall benefit from employing more people who want to work.<sup>73</sup>

Remote work for disabled workers, though, carries some unique potential downsides. Individuals with disabilities face significant social stigma, and some are worried that working from home could further stigmatize disabled workers by making them even less visible.<sup>74</sup> One of the ADA's primary goals is integrating disabled people into society<sup>75</sup>— including the workplace—and working at home, rather than physically alongside their peers, might seem contrary to the concept of integration.<sup>76</sup> Further, some workers might resent that workers with disabilities are allowed to work from home if not everyone has that opportunity, and employers might fear that allowing remote work for a disabled employee might open the floodgates to requests from others.<sup>77</sup>

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68. See Bromet & Growick, *supra* note 66, at 21; Hesse, *supra* note 58, at 337–38. Many are reporting new mental health concerns related to the isolation of working from home during the pandemic lockdown. See, e.g., AJ Horch, *Remote Workers Suffer from Loneliness and Isolationism as the Pandemic in the U.S. Drags On*, CNBC (Aug. 26, 2020, 9:06 AM), <https://www.cnbc.com/2020/08/25/remote-workers-suffer-from-isolationism-as-pandemic-in-us-drags-on.html> [<https://perma.cc/34BJ-JVRU>].

69. See Hesse, *supra* note 58, at 338; Adam M. Samaha, *Opening and Reopening: Dealing with Disability in the Post-Pandemic World*, SLATE (July 6, 2021, 9:30 AM), <https://slate.com/technology/2021/07/pandemic-disability-reopening-essay.html> [<https://perma.cc/8RVP-VS6E>].

70. See Alex C. Geisinger & Michael Ashley Stein, *Expressive Law and the Americans with Disabilities Act*, 114 MICH. L. REV. 1061, 1078 (2016); Kevin Hindle, Brian Gibson & Alison David, *Optimising Employee Ability in Small Firms: Employing People with a Disability*, 17 SMALL ENTER. RSCH. 207, 210–11 (2010); Lengnick-Hall et al., *supra* note 59, at 262–63.

71. Hindle et al., *supra* note 70, at 209; Lengnick-Hall et al., *supra* note 59, at 269.

72. See Richmond, *supra* note 60; Smith, *supra* note 4; Kalmbach, *supra* note 12, at 1309–10.

73. See Anderson et al., *supra* note 58, at 97; Kalmbach, *supra* note 12, at 1310; Lengnick-Hall et al., *supra* note 59, at 269.

74. See Allen et al., *supra* note 2, at 57; Anderson et al., *supra* note 58, at 101; 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, 424, 428 (2006).

75. See 42 U.S.C. § 12101(a)(2), (5); 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://www.ada.gov/ghw_bush_ada_remarks.html) [<https://perma.cc/RTG5-4RAS>] (“This act is powerful in its simplicity. It will ensure that people with disabilities are given the basic guarantees for which they have worked so long and hard: independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream.”); see also *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (holding that “unjustified institutional isolation of persons with disabilities is a form of discrimination” under Title II of the ADA).

76. See Baker et al., *supra* note 74, at 423; Bromet & Growick, *supra* note 66, at 21; Moon et al., *supra* note 23, at 107.

77. See Doron Dorfman, *Pandemic “Disability Cons”*, 49 J. L., MED. & ETHICS 401, 405–06 (2021) (discussing a backlash against remote work relating to teachers in Chicago based on a fear that some were faking being disabled to continue remote work); see also Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 557 (2020) (explaining how nondisabled people

Concerns such as these deserve careful consideration and creative solutions,<sup>78</sup> but they should not prevent qualified disabled people who want to work from home from doing so. First, having more disabled workers in the workforce can help fight this systemic ableism by exposing more people to disabled individuals, which will foster individual, personal connections and demonstrate that disabled people can work.<sup>79</sup> Even if the ADA originally envisioned a physical workforce integration, that does not mean that the benefits of integration cannot be achieved virtually. As Professor Arlene Kanter so eloquently explained: “[T]o 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.”<sup>80</sup>

For example, Andrew Johnson’s coworkers were surprised to learn he was blind.<sup>81</sup> He had been hired for a fully remote job, so his online colleagues first experienced him as a worker able to do his job before they found out about his blindness:

At previous jobs, he often felt that colleagues qualified his performance as “pretty good for a blind person” and didn’t engage with him as they would a nondisabled person. Now, he said he gets a sense of satisfaction when his co-workers are surprised to learn that, despite different parameters, “I’m clearly able to do the same work.”<sup>82</sup>

Second, for some disabled individuals, working remotely may be the *only* way they can actually work.<sup>83</sup> For others, working from home can help them maintain employment with less pain and more dignity.<sup>84</sup> For these people, and likely many others, remote work is a net positive that will allow them to be employed and substantially improve their quality of life overall.<sup>85</sup> Certainly, many disabled workers and the disability advocacy community view it that way, which is why they have been advocating for remote work accommodations for decades.<sup>86</sup>

Finally, concerns such as coworker morale are not a legitimate basis for denying a reasonable accommodation. The EEOC has been clear about that.<sup>87</sup> Even so, employers can address these concerns with policies and education that help manage coworker expectations and encourage them to see the value in accommodating disabled workers.<sup>88</sup> And, as discussed above, more disabled employees in the workforce can lead to more

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desire many accommodations afforded to disabled people and view accommodations as special rights that are prone to abuse).

78. See Baker et al., *supra* note 74, at 427; JAN, *supra* note 58, at 4–5.

79. See Anderson et al., *supra* note 58, at 97.

80. Kanter, *supra* note 12, at 1981.

81. Beery, *supra* note 4.

82. *Id.*; see also Smith, *supra* note 4 (discussing how many employees with disabilities reported experiencing less stigma in remote work environments because people do not realize they are disabled).

83. Hesse, *supra* note 58, at 339.

84. See Schur et al., *supra* note 4 (reporting study finding “that telework’s main benefits as a disability accommodation are the reduction of pain- and fatigue-related barriers to traditional employment”).

85. Stengel, *supra* note 58.

86. See Gram, *supra* note 56; Stengel, *supra* note 58; see also *supra* note 4 and accompanying text.

87. See 29 C.F.R. pt. 1630 app. § 1630.15(d), at 410 (2022) (noting that an undue hardship defense cannot be based on an accommodation having “a negative impact on the morale” of a disabled employee’s coworkers).

88. See *supra* note 80 and accompanying text.

coworker empathy for their needs and concerns.<sup>89</sup> Employers may also find that providing remote work as a disability accommodation works better than expected, thereby allaying concerns about also accommodating nondisabled employees.<sup>90</sup>

### III. THE DISAPPOINTING REALITY OF REMOTE WORK FOR DISABLED WORKERS

Despite high hopes and zealous advocacy, the ADA's promise of integrating individuals with disabilities into the workforce has not panned out. Even after significant amendments in 2008 that were intended to expand its impact, the ADA simply has not had a meaningful impact on the employment rate of individuals with disabilities,<sup>91</sup> who are still employed at roughly one-third the rate of their nondisabled peers.<sup>92</sup> Expressing disappointment at the workforce participation rates of disabled individuals, the chief sponsor of the ADA, former Senator Tom Harkin, notes, "I wish we had been stronger on the employment side."<sup>93</sup>

Scholars attribute this failure to many causes,<sup>94</sup> one being that the remote work revolution for disabled workers has not materialized.<sup>95</sup> Even though remote work is more prevalent now than when Congress passed the ADA in 1990,<sup>96</sup> only about 5% of work days were remote before the pandemic.<sup>97</sup> Generally, employers have resisted providing remote work as a disability accommodation, and courts have backed them up, in part by using several incorrect and unjust evidentiary practices.<sup>98</sup> This Section will identify, explain, and critique these evidentiary doctrines and explain how courts have used them to undermine remote work accommodations. But first, it will begin with an overview of the key relevant ADA provisions to set the stage for this analysis.

#### A. *The Americans with Disabilities Act*

Title I of the ADA prohibits employers with fifteen or more employees from discriminating based on disability.<sup>99</sup> This prohibition includes an employer's disparate

89. See *supra* note 80 and accompanying text.

90. See *supra* notes 70–73 and accompanying text.

91. Samuel R. Bagenstos, *Disability Rights and the Discourse of Justice*, 73 SMU L. REV. F. 26, 27 (2020); Shinall, *supra* note 55, at 1156 n.42, 1181; Erin Mulvaney, *Pandemic Exposes Ongoing Job Challenges for Disabled Workers*, BLOOMBERG L., DAILY LAB. REP. (July 24, 2020, 5:51 AM) [hereinafter Mulvaney, *Pandemic*], <https://news.bloomberglaw.com/daily-labor-report/pandemic-exposes-ongoing-job-challenges-for-disabled-workers> [<https://perma.cc/CNH4-RAWF>].

92. See *supra* note 52 and accompanying text.

93. Mulvaney, *Pandemic*, *supra* note 91.

94. See, e.g., Bagenstos, *supra* note 91, at 27; Geisinger & Stein, *supra* note 70, at 1072–77; Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 3–7 (2014) [hereinafter Porter, *The New ADA Backlash*]; see also S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 606–07 (2001) (collecting articles).

95. See Travis, *Recapturing*, *supra* note 47, at 5–6; see also Erin Mulvaney & Paige Smith, *Mass Telework Sparks Debate Over Lasting Work-From-Home Options*, BLOOMBERG L., DAILY LAB. REP. (July 14, 2020, 5:05 AM), <https://news.bloomberglaw.com/daily-labor-report/mass-telework-sparks-debate-over-lasting-work-from-home-options> [<https://perma.cc/NN8E-RGBV>]; Mulvaney, *Office Culture War*, *supra* note 13.

96. See Dey et al., *supra* note 16; Moon et al., *supra* note 23, at 105.

97. See *supra* note 21 and accompanying text.

98. See *infra* Part III.B.

99. 42 U.S.C. §§ 12111(5)(A), 12112(a).

treatment of a “qualified individual” with a disability.<sup>100</sup> The ADA goes further, defining discrimination to include “not making reasonable accommodations” to a qualified individual with a disability unless the employer “can demonstrate that the accommodation would impose an undue hardship.”<sup>101</sup> Thus, unlike most other civil rights employment statutes, the ADA requires an employer to take affirmative steps to reasonably accommodate qualified disabled workers.<sup>102</sup> This Article focuses on the reasonable accommodation duty and how a claim for denial of remote accommodations functions.<sup>103</sup>

The reasonable accommodation duty applies to qualified individuals with a disability.<sup>104</sup> The statute defines “qualified individual” as “an individual who, with or without reasonable accommodation, can perform the essential functions” of the job.<sup>105</sup> Crucially, this definition incorporates two key concepts: (1) essential job functions and (2) reasonable accommodations. An employee is not qualified if they cannot perform the essential functions of the job, and performance is assessed based on whether the employee can do this with or without a reasonable accommodation. These determinations should be based on an individualized inquiry and decided on a case-by-case basis.<sup>106</sup>

The ADA does not define what job functions are essential, but the EEOC does in its implementing regulations,<sup>107</sup> stating that an essential function “means the

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100. *Id.* § 12112(a).

101. *Id.* § 12112(b)(5)(A); *see also* 29 C.F.R. pt. 1630 app. § 1630.9, at 401 (2022) (“The obligation to make reasonable accommodation is a form of non-discrimination.”).

102. *See COLKER, supra* note 53, at 10–11; Malloy, *supra* note 94, at 608–09, 620–26; Shinall, *supra* note 91, at 1150, 1153–54; *see also* US Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002) (explaining that the ADA accommodation provision requires employers to treat disabled employees “preferentially” to ensure they have the same workplace opportunities). Title VII requires employers to accommodate religious practices in certain circumstances, but the standard is vastly different than the ADA and has no bearing on this discussion. *See* 42 U.S.C. § 2000e(j) (religious accommodation requirement); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (holding that employer need not provide religious accommodations that impose “more than a de minimis cost”); Shinall, *supra* note 55, at 1153–54 n.28 (comparing the religious and disability accommodations requirements).

103. *See* Punt v. Kelly Servs., 862 F.3d 1040, 1047–49 (10th Cir. 2017) (distinguishing between failure-to-accommodate and disability-based disparate treatment claims); Timmons v. Gen. Motors Corp., 469 F.3d 1122, 1125 (7th Cir. 2006) (same). I do not address many other potential issues under the statute, such as whether the employee at issue has a condition that qualifies as a disability.

104. 42 U.S.C. § 12112(b)(5)(A).

105. *Id.* § 12111(8).

106. 29 C.F.R. pt. 1630 app. § 1630.2(j)(1)(iv), at 383 (2022); Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender, and Age*, 1 U. PA. J. LAB. & EMP. L. 511, 516 (1998) (“The disability civil rights paradigm is distinguished from the traditional civil rights approach by the individualized and contextual analysis required by the ADA.”).

107. The ADA authorizes the EEOC to issue regulations for Title I. *See* 42 U.S.C. §§ 12116, 12205a. It is unclear whether the EEOC’s ADA regulations might be in jeopardy, given the Supreme Court’s recent hostility toward agency regulations. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2615–16 (2022) (holding that the EPA exceeded its statutory authority in issuing certain regulations under the Clean Air Act); *see also* Jeffrey W. Brecher, Brian P. Lundgren, Courtney M. Malveaux & Andrew F. Maunz, *U.S. Supreme Court’s Decision Curtailing Regulators May Raise “Major Questions” for Employers*, JACKSONLEWIS (July 13, 2022), <https://www.jacksonlewis.com/publication/us-supreme-court-s-decision-curtailling-regulators-may-raise-major-questions-employers> [<https://perma.cc/LLS5-LSNA>] (questioning whether *West Virginia v. EPA* might impact the EEOC).

fundamental job duties of the employment position” and “does not include the marginal functions of the position.”<sup>108</sup> The statute, though not defining essential functions, lists two factors to “consider[]”: “the employer’s judgment” and a written job description prepared in advance.<sup>109</sup> The EEOC fleshes out some other relevant factors in the regulations, including but not limited to the amount of time spent on the function, the consequences of not performing it, the work experience of current or past employees in the same or similar job, and the terms of a collective bargaining agreement.<sup>110</sup> The EEOC’s interpretive guidance makes clear that “all relevant evidence should be considered” and that other relevant evidence can be presented and should be given the same consideration as evidence on the list.<sup>111</sup>

Reasonable accommodation comes into play both in defining a specific type of discrimination and as part of the definition of qualified individual.<sup>112</sup> As with essential function, the statute does not define reasonable accommodation, but it gives some examples of what reasonable accommodation includes, which are “making existing facilities used by employees readily accessible to and usable” to disabled workers and other changes such as “job restructuring, part-time or modified work schedules, reassignment to a vacant position, . . . and other similar accommodations.”<sup>113</sup> The EEOC regulations add that reasonable accommodation includes adjustments to the work environment or job performance circumstances that enable a worker to perform the essential functions of the job, or other adjustments that enable the employee to enjoy equal privileges and benefits of employment.<sup>114</sup> The idea is that an accommodation “is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.”<sup>115</sup>

A final key statutory provision is the undue hardship defense. The reasonable accommodation duty is tempered by undue hardship; an employer is not required to provide a reasonable accommodation if it can “demonstrate that the accommodation would impose an undue hardship.”<sup>116</sup> The ADA defines undue hardship as “an action requiring significant difficulty or expense” based on certain factors, including “the nature and cost of the accommodation,” the financial resources of the facility and covered entity, and any operational impacts.<sup>117</sup> The regulations confirm this language and add that “the impact on the ability of other employees to perform their duties” is also relevant to undue hardship.<sup>118</sup>

The ADA does not specifically address either remote work as a reasonable accommodation or the ability of an employee to perform any essential job functions away

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108. 29 C.F.R. § 1630.2(n)(1) (2022).

109. 42 U.S.C. § 12111(8).

110. 29 C.F.R. § 1630.2(n)(3) (2022).

111. 29 C.F.R. pt. 1630 app. § 1630.2(n), at 394 (2022).

112. *See* 42 U.S.C. §§ 12111(8), 12112(b)(5)(A).

113. 42 U.S.C. § 12111(9).

114. 29 C.F.R. § 1630.2(o) (2022).

115. 29 C.F.R. pt. 1630 app. § 1630.2(o), at 395 (2022).

116. 42 U.S.C. § 12112(b)(5)(A).

117. *Id.* § 12111(10)(A)–(B).

118. 29 C.F.R. § 1630.2(p)(2)(v) (2022).

from the worksite, and the EEOC also does not mention remote work in its regulations.<sup>119</sup> But the EEOC has discussed remote work fairly extensively in its interpretive guidance.<sup>120</sup> In its 2002 enforcement guidance on the reasonable accommodation and undue hardship issues, the EEOC briefly addressed remote work, stating that working from home could be a reasonable accommodation if the accommodation would be effective in allowing the employee to perform the job's essential functions at home.<sup>121</sup> Then, in 2003, the EEOC issued a technical assistance document dedicated solely to the issue of working at home as a reasonable accommodation.<sup>122</sup> In it, the EEOC stated several important principles regarding remote work accommodation requests:

- “[A]llowing an employee to work at home may be a reasonable accommodation where the person’s disability prevents successfully performing the job on-site and the job, or parts of the job, can be performed at home without causing significant difficulty or expense.”
- If an employer has a remote work program, it must provide disabled workers the same opportunity to use the program and may need to modify some of its requirements.
- Even if the employer does not have a remote work program, allowing a specific employee to work from home still might be a reasonable accommodation. “Changing 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.”
- The employer need not excuse any essential job functions to allow an employee to work from home.
- The employer and employee should work together in an interactive process to assess the reasonableness of remote work in each particular situation.<sup>123</sup>

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119. Kanter, *supra* note 12, at 1943.

120. EEOC regulations are entitled to much more deference than its interpretive guidance. For a discussion on the EEOC’s roles in issuing regulations and guidance and how much deference courts should give to each, see Daniel P. O’Gorman, *Paying for the Sins of Their Clients: The EEOC’s Position that Staffing Firms Can Be Liable When Their Clients Terminate an Assigned Employee for a Discriminatory Reason*, 112 PENN ST. L. REV. 425, 457–58 (2007).

121. *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, EQUAL EMP. OPPORTUNITY COMM’N (Oct. 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> [<https://perma.cc/VD83-S89L>].

122. EEOC Telework Guidance, *supra* note 5.

123. *Id.*; see also *Reasonable Accommodations for Attorneys with Disabilities*, EQUAL EMP. OPPORTUNITY COMM’N (May 23, 2006), <https://www.eeoc.gov/laws/guidance/reasonable-accommodations-attorneys-disabilities> [<https://perma.cc/68NW-8WGC>] (stating that remote work can be a reasonable accommodation for an attorney with a disability); *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, EQUAL EMP. OPPORTUNITY COMM’N (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> [<https://perma.cc/6HB5-NMCZ>] (stating that telework can be a reasonable accommodation during a pandemic for employees with disabilities that put them at high risk of infection or complications).

The EEOC has not updated this guidance since issuing it in 2003, but it has addressed remote work accommodations in its COVID-19 guidance.<sup>124</sup> Part IV explains the COVID-19 guidance and the pandemic's impact on remote work accommodations.<sup>125</sup>

### *B. Faulty Evidentiary Practices Courts Have Used in Rejecting Remote Work Accommodation Claims*

Historically, employers have generally resisted being required to provide remote work as a reasonable accommodation.<sup>126</sup> They often have a knee-jerk response and deny these requests without even fully considering the merits.<sup>127</sup> The most common reasons given for denying remote work requests include that the company simply does not allow remote work, that the job cannot be done at home, that on-site presence is needed for reasons such as teamwork and communication, and that the employee cannot be adequately supervised remotely.<sup>128</sup> Employers do sometimes allow remote work, and to be sure, remote work may not be reasonable in a particular situation. And the ADA allows employers to implement an accommodation besides remote work if the alternative accommodation is reasonable.<sup>129</sup> But the overall historical pattern of routinely denying remote work accommodation requests without assessing them on a case-by-case basis is well established.<sup>130</sup>

When employees challenge employers' denials of remote work accommodations in court, the employees lose overwhelmingly.<sup>131</sup> Professors Stacy Hickox and Chenwei

124. *What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEOC Laws*, EQUAL EMP. OPPORTUNITY COMM'N (Mar. 14, 2022), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [<https://perma.cc/JC6V-M738>] [hereinafter EEOC COVID Guidance]. The EEOC first issued this guidance in March 2020 and has updated it periodically since. *Id.*

125. *See infra* notes 306–316 and accompanying text.

126. *See* Anne Cullen, *Employers Not Required to Allow Post-Virus Telework: EEOC*, LAW360 (Sept. 8, 2020, 4:09 PM), <https://www.law360.com/articles/1308173/employers-not-required-to-allow-post-virus-telework-eeoc> [<https://perma.cc/ZF8X-M3SA>]; Mulvaney & Smith, *supra* note 95; Porter, *Working While Mothering*, *supra* note 12, at 15–16.

127. *See* Leora Eisenstadt, *Commentary: Our Work-From-Home World Is Proving More Job Flexibility Is Possible*, CHI. TRIB. (May 8, 2020, 5:14 PM), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-coronavirus-remote-working-20200508-s3ehs5x4tzhw3ctxvta2v4hl3m-story.html> [<https://perma.cc/FC8H-FQMB>]; Mulvaney, *Office Culture War*, *supra* note 13; George A. Reeves III & Ben Carney, *EEOC Files First Pandemic-Related Remote-Work Bias Suit*, SOC'Y FOR HUM. RES. MGMT. (Sept. 17, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eeoc-files-first-pandemic-related-remote-work-bias-suit.aspx> [<https://perma.cc/NVH4-9CDX>].

128. *See* Hickox & Liao, *supra* note 5, at 52–53; Mulvaney & Smith, *supra* note 95; Brandy L. Wagstaff & Jacob Quasius, *The ADA, Telework, and the Post-Pandemic Workplace*, REGUL. REV. (Sept. 7, 2020), <https://www.theregreview.org/2020/09/07/wagstaff-quasius-ada-telework-post-pandemic-workplace/> [<https://perma.cc/N7GP-273Z>].

129. *See* Hickox & Liao, *supra* note 5, at 49; *see also* *Hankins v. Gap, Inc.*, 84 F.3d 797, 800 (6th Cir. 1996); 29 C.F.R. pt. 1630 app. § 1630.9, at 407 (2022).

130. *See supra* note 126 and accompanying text.

131. *See, e.g.*, Patrick Dorrian & Robert Iafolla, *Asthmatic Worker Gets Covid-Related Telework Order*, *For Now*, BLOOMBERG L., DAILY LAB. REP. (Sept. 17, 2020, 5:38 PM), <https://news.bloomberglaw.com/daily-labor-report/asthmatic-worker-gets-covid-related-stay-against-in-person-work> [<https://perma.cc/3RZV-TJLD>]; Eisenstadt, *supra* note 127; Porter, *Working While Mothering*, *supra* note 12, at 15; Iafolla, *supra* note 9; Erin Mulvaney, *Coronavirus Telework Tests Disability Accommodation Defense*,

Liao verified this well-known fact after studying 125 federal court claims going back to 1995.<sup>132</sup> Professor Arlene Kanter came to the same conclusion after examining more than two dozen federal appellate court decisions over the past decade.<sup>133</sup> In 2019, reporters at Bloomberg Law analyzed thirty decisions in the immediately preceding two years and found that employers won 70% of the time.<sup>134</sup>

Of course, employers do not win every remote work case, and there have been some notable employee victories in recent years.<sup>135</sup> On the whole, however, courts approve employers' conduct seemingly as routinely as employers deny employees' requests. And courts often do so while requiring the employer to provide little or no real evidence to support its allegations and overlooking or affirmatively devaluing the employee's evidence.<sup>136</sup> This is legally incorrect and unfairly puts the judicial thumb on the employer's side of the scale. This subpart studies the case law to reveal these explicit and sometimes hidden evidentiary practices and explains why these practices are wrong.

### 1. Presuming Remote Work Is Improper

One of the most prevalent and damaging evidentiary policies is likely the oldest: the presumption against remote work. This presumption states that because physical presence is required for nearly all jobs and that only in "very extraordinary" circumstances will remote work be feasible, remote work is presumably unreasonable.<sup>137</sup>

The most influential case in this area is the Seventh Circuit's 1995 decision in *Vande Zande v. Wisconsin Department of Administration*.<sup>138</sup> Lori Vande Zande was a program assistant whose job consisted of clerical and administrative tasks.<sup>139</sup> When her paraplegia caused a bout of pressure ulcers, she needed to stay home for several weeks for treatment and requested to work at home full-time during this time as a disability accommodation.<sup>140</sup> Judge Posner ruled that her employer was not required to provide this accommodation.<sup>141</sup> He started with a broad statement that "[m]ost jobs . . . involve team work under supervision" that "generally cannot be performed at home without a substantial reduction in the quality of the employee's performance."<sup>142</sup> Judge Posner thus

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BLOOMBERG L., DAILY LAB. REP. (Mar. 16, 2020, 5:48 PM), <https://news.bloomberglaw.com/daily-labor-report/coronavirus-telework-challenges-disability-accommodation-defense> [<https://perma.cc/RJ7P-6JKC>] [hereinafter Mulvaney, *Coronavirus*]; Wagstaff & Quasius, *supra* note 128.

132. See Hickox & Liao, *supra* note 5, at 25–29, 45.

133. See Kanter, *supra* note 12, at 1931–32.

134. See Iafolla, *supra* note 9. The statistics in this paragraph are based on rulings assessing the merits of the remote work accommodations claim, not related ADA issues, such as whether the employee had a disability.

135. See, e.g., *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 848, 857 (6th Cir. 2018); *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 599, 604–05 (6th Cir. 2018); *McMillan v. City of New York*, 711 F.3d 120, 123, 126–27 (2d Cir. 2013); see also Kanter, *supra* note 12, at 1958–66 (collecting and discussing cases).

136. See Kanter, *supra* note 12, at 1936, 1966.

137. See *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 544–45 (7th Cir. 1995); Kanter, *supra* note 12, at 1950–52; Travis, *Recapturing*, *supra* note 47, at 29.

138. 44 F.3d 538 (7th Cir. 1995).

139. *Id.* at 544.

140. *Id.* at 543–44.

141. *Id.* at 546.

142. *Id.* at 544.

stated a “general[]” rule, which allowed for the possibility of an exception, “but it would take a very extraordinary case for the employee to be able to create a triable issue of the employer’s failure to allow the employee to work at home.”<sup>143</sup> He also acknowledged that “[t]his will no doubt change as communications technology advances,” but generally, “[a]n employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced.”<sup>144</sup> Without analyzing any evidence about the specifics of Ms. Vande Zande’s job or whether her productivity in fact suffered when she actually performed some of her work from home, Judge Posner simply stated that the employer was not required to allow her to work remotely.<sup>145</sup>

Judge Posner created a presumption against remote working.<sup>146</sup> Court after court has followed his lead,<sup>147</sup> many with barely a line of analysis about the individual employee’s ability to perform the specific job at issue.<sup>148</sup> Courts have cited Judge Posner’s discussion about remote work accommodations being essentially unreasonable nearly one hundred times.<sup>149</sup> Many other courts, while not citing *Vande Zande*, have used similar language that essentially all jobs require a physical presence in the employer’s workspace.<sup>150</sup>

It is hard to overstate *Vande Zande*’s impact. Most courts upholding employers’ denial of remote work accommodations have relied on *Vande Zande*.<sup>151</sup>

Scholars have harshly criticized *Vande Zande*, and rightly so.<sup>152</sup> Even assuming Judge Posner was correct in 1995 that nearly no jobs could be performed remotely, crafting a legal presumption based on that supposed fact is inconsistent with the ADA. Nothing in the ADA’s text or regulations establishes a presumption against remote work.<sup>153</sup> What is more, a core ADA principle is that each case is to be evaluated

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143. *Id.* at 545.

144. *Id.* at 544–45.

145. *See id.*

146. *See Kanter, supra* note 12, at 1950–52; Travis, *Recapturing, supra* note 47, at 29.

147. *See, e.g., Credeur v. La. ex rel. Off. of Att’y Gen.*, 860 F.3d 785, 793 (5th Cir. 2017); *Mulloy v. Acushnet Co.*, 460 F.3d 141, 150 & n.5 (1st Cir. 2006); *Mason v. Avaya Commc’ns, Inc.*, 357 F.3d 1114, 1120 (10th Cir. 2004); *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555, 1565–66 (N.D. Ga. 1995), *aff’d*, 86 F.3d 1171 (11th Cir. 1996).

148. *See, e.g., Mobley v. Allstate Ins. Co.*, 531 F.3d 539, 547–48 (7th Cir. 2008); *Rauen v. U.S. Tobacco Mfg. Ltd. P’ship*, 319 F.3d 891, 897 (7th Cir. 2003); *Fulmer v. George Gervin Youth Ctr., Inc.*, No. 98-51154, 1999 WL 642761, at \*2 (5th Cir. July 19, 1999); *Mannix v. Dental Experts, LLC*, No. 17-cv-5422, 2020 WL 1076050, at \*11 (N.D. Ill. Mar. 6, 2020); *Brown v. Humana Ins. Co.*, 942 F. Supp. 2d 723, 732 (W.D. Ky. 2013); *Leahr v. Metro. Pier & Exposition Auth.*, No. 96 C 1388, 1997 WL 414104, at \*4 (N.D. Ill. July 17, 1997).

149. This is based on Westlaw’s KeyCite report of the relevant headnotes.

150. *See, e.g., Tchantka v. Ascena Retail Grp.*, 951 F.3d 805, 813 (6th Cir. 2020); *Vitti v. Macy’s Inc.*, 758 F. App’x 153, 157 (2d Cir. 2018); *EEOC v. Ford Motor Co.*, 782 F.3d 753, 762–63 (6th Cir. 2015) (en banc); *see also Tyndall v. Nat’l Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994) (pre-*Vande Zande* case stating that “most jobs” require in-person attendance and so it will be an “unusual case” where an employee can work from home).

151. *See Eisenstadt, supra* note 127; *see also Hickox & Liao, supra* note 5, at 42–43; *Kanter, supra* note 12, at 1950; Christopher J. Cole, *Remote Work in the Post-Pandemic World*, 26 HAW. BAR J. 4, 6 (2022).

152. *See, e.g., Eisenstadt, supra* note 127; *Hickox & Liao, supra* note 5, at 42–43; *Kanter, supra* note 12, at 1950–52, 1954; Travis, *Recapturing, supra* note 47, at 29–30.

153. *See* 42 U.S.C. §§ 12101–12213; 29 C.F.R. § 1630.2 (2022).

individually.<sup>154</sup> Presumptions are incompatible with individualized inquiries. Presuming that every job requires physical presence short-circuits the required case-by-case assessment and allows employers to get by with denying remote work accommodations based on little to no evidence.<sup>155</sup> Indeed, Judge Posner violated the ADA's individualized assessment requirement because he did not analyze the specifics of Ms. Vande Zande's job before determining that her employer was not required to allow her to work remotely.<sup>156</sup>

Because of this problem, some courts have refused to follow *Vande Zande* or otherwise use a presumption against remote work.<sup>157</sup> Besides, communication and other technology has obviously exploded since 1995.<sup>158</sup> Many courts relying on *Vande Zande* have quoted the first part of Judge Posner's statement—about all but the most very extraordinary jobs not being conducive to effective performance at home—and skipped over the admonition that “[t]his will no doubt change as communications technology advances.”<sup>159</sup> But some have recognized that technological breakthroughs have substantially undermined Judge Posner's rationale so that even if a presumption against remote work was justified in 1995 based on technological limitations, it is not today.<sup>160</sup>

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154. See *supra* note 106 and accompanying text.

155. See Travis, *Recapturing*, *supra* note 47, at 29; see also cases cited *supra* notes 147–148, 150; Cehrs v. Ne. Ohio Alzheimer's Rsch. Ctr., 155 F.3d 775, 782 (6th Cir. 1998) (stating that applying a presumption against unpaid indefinite leave as a reasonable accommodation “eviscerates the individualized attention” required in disability cases). Professor Kerri Lynn Stone explains how similar evidentiary shortcuts in Title VII cases result in judges curtailing or bypassing the individual assessment required in those cases. See Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 111 (2011); see also Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 117 (2012) (discussing “[o]ne-sided heuristics—rules of thumb that oversimplify, dismiss, and often demean proof of discrimination” in federal employment discrimination cases).

156. See *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 544–45 (7th Cir. 1995); *Hickox & Liao*, *supra* note 5, at 43; *Kanter*, *supra* note 12, at 1951.

157. See, e.g., *Hernandez v. City of Hartford*, 959 F. Supp. 125, 132 (D. Conn. 1997) (stating that *Vande Zande* is “not persuasive” because its “nearly *per se* rule regarding ‘at home’ work flies in the face of the requirement of a case-by-case, fact-specific inquiry”); see also *EEOC v. Ford Motor Co.*, 782 F.3d 753, 771 (6th Cir. 2015) (Moore, J., dissenting) (stating that the majority's reliance on a general rule against remote work amounts to a refusal “to engage in the fact-intensive, case-by-case determination” the ADA requires); *Bisker v. GGS Info. Servs., Inc.*, No. CIV. 1:CV-07-1465, 2010 WL 2265979, at \*3 (M.D. Pa. June 2, 2010) (refusing to adopt *Vande Zande*'s *per se* rule against remote work); *Kiburz v. England*, No. 1:04-CV-2247, 2008 WL 2780650, at \*7 & n.3 (M.D. Pa. July 16, 2008) (same), *aff'd*, 361 F. App'x 326 (3d Cir. 2010).

158. See *Eisenstadt*, *supra* note 127; *Kanter*, *supra* note 12, at 1934, 1948–49; Travis, *Post-Pandemic*, *supra* note 12, at 221.

159. See *Vande Zande*, 44 F.3d at 544; *Eisenstadt*, *supra* note 127; see, e.g., *Credeur v. La. ex rel. Off. of Att'y Gen.*, 860 F.3d 785, 793 (5th Cir. 2017); *Mobley v. Allstate Ins. Co.*, 531 F.3d 539, 548 (7th Cir. 2008); *Mulloy v. Acushnet Co.*, 460 F.3d 141, 150 n.5 (1st Cir. 2006); *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1120 (10th Cir. 2004); *Fulmer v. George Gervin Youth Ctr., Inc.*, No. 98-51154, 1999 WL 642761, at \*2 (5th Cir. July 19, 1999); *Leahr v. Metro. Pier & Exposition Auth.*, No. 96 C 1388, 1997 WL 414104, at \*4 (N.D. Ill. July 17, 1997).

160. See *Ford*, 782 F.3d at 776 (Moore, J., dissenting); *Bixby v. JP Morgan Chase Bank, N.A.*, No. 10 C 405, 2012 WL 832889, at \*10 (N.D. Ill. Mar. 8, 2012). Even the Seventh Circuit has recognized that technology has weakened its rationale in *Vande Zande*. See *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565, 573 (7th Cir. 2019) (“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.”); see also *Eisenstadt*, *supra* note 127 (“With millions of workers conducting all business through email, Zoom, Skype, Webex, FaceTime

Even so, very recent court opinions surprisingly continue to rely on the presumption that working at home is not possible for almost all jobs without accounting for any change in technology.<sup>161</sup> The presumption against remote work replaces actual evidence, to the unfair detriment of remote accommodations plaintiffs.

## 2. Overdeferring to Employer Judgment

A second evidentiary practice that severely disadvantages disabled workers in remote work accommodations litigation is extreme deference to the employer's judgment. Whether courts apply it as a standalone principle or in combination with the presumption against remote working, courts commonly make statements such as the employer's judgment is entitled to "substantial deference" or is given the "greatest weight" in determining the essential functions of a job or whether those functions can be performed remotely.<sup>162</sup> Because employers are entitled to run their businesses, courts say, employers' judgment on these matters should not be second-guessed.<sup>163</sup> "In cases arising under the ADA, we do not sit as a super personnel department that second guesses employers' business judgments."<sup>164</sup>

Even though this extreme deference to employer judgment may not sound as severe as the presumption against remote working, it plays out in essentially the same way. Employers commonly deny remote work accommodations because the employer has already judged that in-person work is preferable or that the job's essential functions must be performed in the office.<sup>165</sup> In these situations, if the employer's judgment is entitled to the most weight, the worker essentially has no chance to prevail. Some courts even go so far as to label the employer's judgment about essential job functions or where work must be done as a presumption<sup>166</sup> or state that an employer is entitled to summary judgment as long as it uniformly requires all workers in that job to be physically present.<sup>167</sup> As with the presumption against remote work, this extreme deference to employer judgment often circumvents any detailed evidentiary analysis of the particular

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and the plethora of other online options, it should be clear to courts that the gut reaction of rejecting telecommuting claims out of hand is no longer defensible.").

161. See, e.g., *Tchankpa v. Ascena Retail Grp.*, 951 F.3d 805, 813 (6th Cir. 2020); *Vitti v. Macy's Inc.*, 758 F. App'x 153, 157 (2d Cir. 2018); *Credeur*, 860 F.3d at 793; *Ford*, 782 F.3d at 762–63.

162. See *Kassa v. Synovus Fin. Corp.*, 800 F. App'x 804, 809 (11th Cir. 2020); *Vitti*, 758 F. App'x at 157; *Credeur*, 860 F.3d at 792; *Fisher v. Vizioncore, Inc.*, 429 F. App'x 613, 616 (7th Cir. 2011); *Mulloy v. Acushnet*, 460 F.3d 141, 147 (1st Cir. 2006); *Kvorjak v. Maine*, 259 F.3d 48, 55 (1st Cir. 2001); *McNair v. Dist. of Columbia*, 11 F. Supp. 3d 10, 15 (D.D.C. 2014); see also *Ford*, 782 F.3d at 765–66; *Hickox & Liao*, *supra* note 5, at 46, 61–62; *Kanter*, *supra* note 12, at 1936–38, 1948.

163. See, e.g., *Credeur*, 860 F.3d at 792; *Ford*, 782 F.3d at 762; *Mulloy*, 460 F.3d at 147–48; *Mason*, 357 F.3d at 1119, 1121–22; *Basith v. Cook County*, 241 F.3d 919, 928 (7th Cir. 2001); *Mannix v. Dental Experts, LLC*, No. 17-cv-5422, 2020 WL 1076050, at \*10 (N.D. Ill. Mar. 6, 2020).

164. *Mason*, 357 F.3d at 1122 (internal quotation marks omitted).

165. See *Hickox & Liao*, *supra* note 5, at 53–54.

166. See *Fisher*, 429 F. App'x at 616; *Mannix*, 2020 WL 1076050, at \*10, \*11; *accord Gratzl v. Off. of the Chief Judges of the 12th, 18th, 19th & 22nd Jud. Cir.*, 601 F.3d 674, 679 (7th Cir. 2010).

167. See, e.g., *Ford*, 782 F.3d at 765–66; *Mason*, 357 F.3d at 1119.

job at issue and results in employer victories based on little more than vague and conclusory employer assurances that attendance at work is important.<sup>168</sup>

*Fisher v. Vizioncore, Inc.* demonstrates this over-deference principle.<sup>169</sup> The plaintiff's injuries from a car accident caused periodic bouts of debilitating pain, and she wanted the flexibility to work from home.<sup>170</sup> Vizioncore hired her as a bookkeeper but fired her soon after for attendance issues.<sup>171</sup> The Seventh Circuit affirmed summary judgment for the employer after finding that attendance in the office was an essential job function.<sup>172</sup> In doing so, the court presumed that Vizioncore's judgment on this matter was correct, with the only supporting evidence being a line from the employee handbook stating that "[r]egular attendance is essential."<sup>173</sup> The court did not analyze the plaintiff's job functions or otherwise assess whether any of her work could be performed at home.<sup>174</sup>

This extreme deference to employer judgment is legally incorrect. As with the presumption against working from home,<sup>175</sup> this level of deference violates a foundational ADA principle: every case should be evaluated individually.<sup>176</sup> Relying on evidentiary policies that bypass the need for actual detailed evidence about the plaintiff's specific job and how it is performed is fundamentally inconsistent with this individualized assessment.

Further, excessive employer deference is inconsistent with the conception of essential job functions in the statute and regulations. The statute says that "consideration shall be given" to the employer's judgment and the written job description when assessing which job functions are essential.<sup>177</sup> It says "consideration"—not deference, much less dispositive weight.<sup>178</sup> If employer judgment were conclusive, "then an

168. See, e.g., *Credeur*, 860 F.3d at 794–95 (relying on employer's repeated assertions that litigation attorneys cannot work from home permanently without explaining in detail why); *Ford*, 782 F.3d at 771 (Moore, J., dissenting) (criticizing majority for relying on employer's judgment that face-to-face teamwork was essential without explaining exactly what needed to be done face-to-face); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994) (focusing on employer's concern about a 4:00 p.m. deadline without explaining why the plaintiff could not meet that deadline from home); *Kanter*, *supra* note 12, at 1936, 1948.

169. See *Fisher*, 429 F. App'x at 615–16.

170. See *id.* at 614.

171. *Id.* at 614–15.

172. See *id.*

173. *Id.* at 616.

174. See *id.* Ms. Fisher was not a perfect employee, having several issues with absences being taken without giving proper notice under the employer's policies. See *id.* at 615. Even so, that does not justify the court's overly simplistic analysis of the essential job functions issue.

175. See *supra* notes 154–1576 and accompanying text.

176. See *EEOC v. Ford Motor Co.*, 782 F.3d 753, 775 (6th Cir. 2015) (Moore, J., dissenting) (stating that overvaluing employer judgment "is in direct tension with the regulations' insistence that the inquiry is a fact-intensive, case-by-case determination"); see also *Solomon v. Vilsack*, 763 F.3d 1, 10 (D.C. Cir. 2014) (stating that a "penetrating factual analysis is required to determine whether a rigid on-site schedule is an essential function of the job in question" (internal quotation marks omitted)); *supra* note 106 and accompanying text.

177. 42 U.S.C. § 12111(8).

178. See *id.*; *Ford*, 782 F.3d at 775 (Moore, J., dissenting) ("Noticeably absent is the word 'deference.'"); *Gentile v. County of DuPage*, 583 F. Supp. 3d 1167, 1175 (N.D. Ill. 2022) ("But notice the word choice. The employer's view is entitled to 'consideration,' not dispositive weight.").

employer that did not wish to be *inconvenienced* by making a reasonable accommodation could, simply by asserting that the function is ‘essential,’ avoid the clear congressional mandate” to provide reasonable accommodations.<sup>179</sup>

Moreover, while the statute says employer judgment is a factor, it does not say it is the *only* factor.<sup>180</sup> The EEOC regulations provide other relevant factors, including the amount of time spent performing the function and the work experience of current and former employees in the same or similar jobs.<sup>181</sup> These additional considerations are obviously relevant, and nothing in the statute or regulations states that employer judgment is the most important consideration or that it somehow trumps the rules of evidence to nullify otherwise relevant evidence.<sup>182</sup> As the EEOC’s interpretive guidance makes clear,

[w]hether a particular function is essential is a factual determination that must be made on a case by case basis. In determining whether or not a particular function is essential, all relevant evidence should be considered. . . . Greater weight will not be granted to the types of evidence included on the list than to the types of evidence not listed.<sup>183</sup>

And yet, courts often overlook these other considerations, with some reciting them but then excluding them from the analysis<sup>184</sup> and others not even acknowledging their existence.<sup>185</sup> Some courts give lip service to the importance of not affording employers absolute deference but then functionally do exactly that.<sup>186</sup> Other courts, though, have correctly recognized that employer judgment is but one factor that should be considered, among others, when assessing the job’s essential requirements and whether they can be performed remotely.<sup>187</sup> As the Sixth Circuit explained, “[a]lthough the employer’s judgment receives some weight in this analysis, it is not the end-all—*especially* when an employee puts forth competing evidence.”<sup>188</sup> This is what all courts should do—engage

179. *Holly v. Clairson Indus.*, 492 F.3d 1247, 1258 (11th Cir. 2007); *see also Hostettler v. Coll. of Wooster*, 895 F.3d 844, 857 (6th Cir. 2018) (stating that “full-time presence at work is not an essential function of a job simply because an employer says that it is” because “otherwise, employers could refuse *any* accommodation that left an employee at work for fewer than 40 hours per week,” which would be “antithetical to the purpose of the ADA”).

180. *See* 42 U.S.C. § 12111(8).

181. 29 C.F.R. § 1630.2(n)(3) (2022); *see also supra* note 110 and accompanying text.

182. *Cf. Sperino*, *supra* note 15, at 2120 (discussing how other pro-employer evidentiary practices in employment discrimination cases are inconsistent with Federal Rule of Evidence 401 regarding relevant evidence).

183. 29 C.F.R. pt. 1630 app. § 1630.2(n), at 397 (2022) (emphasis added).

184. *See, e.g., Credeur v. La. ex rel. Off. of Att’y Gen.*, 860 F.3d 785, 792–95 (5th Cir. 2017); *Fisher v. Vizioncore, Inc.*, 429 F. App’x 613, 615–16 (7th Cir. 2011); *Ford*, 782 F.3d at 761–62.

185. *See, e.g., Vitti v. Macy’s Inc.*, 758 F. App’x 153, 157 (2d Cir. 2018); *Morris-Huse v. GEICO*, 748 F. App’x 264, 266 (11th Cir. 2018); *Knutson v. Schwan’s Home Serv., Inc.*, 711 F.3d 911, 915 (8th Cir. 2013).

186. *See Credeur*, 860 F.3d at 794; *Ford*, 782 F.3d at 765–66; *supra* note 168 and accompanying text.

187. *See, e.g., Hostettler v. Coll. of Wooster*, 895 F.3d 844, 855–57 (6th Cir. 2018); *Everett v. Grady Mem’l Hosp. Corp.*, 703 F. App’x 938, 943 (11th Cir. 2017); *Miller v. Ill. Dep’t of Transp.*, 643 F.3d 190, 198 (7th Cir. 2011); *Holly v. Clairson Indus.*, 492 F.3d 1247, 1258 (11th Cir. 2007); *see also Ford*, 782 F.3d at 775 (Moore, J., dissenting) (collecting cases).

188. *Hostettler*, 895 F.3d at 855 (citation omitted); *see also Miller*, 643 F.3d at 198 (“[T]he employer’s judgment is an important factor, but it is not controlling.”).

in a “penetrating factual analysis,”<sup>189</sup> based on evidence, rather than a cursory review based on unquestioning acceptance of vague statements from employers.

### 3. Relying on Blanket Policies and Preferences

Another common basis courts use in upholding remote work accommodation denials is relying on an employer’s general policies and preferences. Employers often use standard policies—such as a general prohibition on remote work or a remote work policy with specific eligibility criteria—to reject a disabled employee’s accommodation request to work from home.<sup>190</sup> The issue in these situations is *not* the employee’s ability to do the work remotely—rather, it is the employer’s preference that employees work on-site or its determination that the employee fails to meet a prerequisite such as length of service. As with the presumption against remote work and overly deferring to employer judgment, allowing employers to deny remote work accommodations based on such blanket policies or an employer’s general dislike of remote work negates the statutory requirement to examine the individual circumstances and to engage in an interactive process.<sup>191</sup> Evidence of the plaintiff’s job functions and the feasibility of or burdens associated with remotely performing them is irrelevant if the employer’s remote work policy is the beginning and end of the discussion.

The Sixth Circuit’s decision in *Black v. Wayne Center*<sup>192</sup> perfectly illustrates this. Barbara Black, a social worker, needed to do paperwork at home three to five hours per week as an accommodation for issues related to her multiple sclerosis.<sup>193</sup> Her employer refused because the employer did not allow any employees to work from home.<sup>194</sup> It was undisputed that she could have done her paperwork at home with no problems.<sup>195</sup> The Sixth Circuit reversed a jury verdict in her favor, stating that “[t]he problem with allowing Black to work at home is that it is not the company’s policy to allow employees to work at home.”<sup>196</sup>

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189. *Solomon v. Vilsack*, 763 F.3d 1, 10 (D.C. Cir. 2014) (internal quotation marks omitted); *McMillan v. City of New York*, 711 F.3d 120, 126 (2d Cir. 2013); *see also Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 140 (2d Cir. 1995) (“To avoid unfounded reliance on uninformed assumptions, the identification of the essential functions of a job requires a fact-specific inquiry into both the employer’s description of a job and how the job is actually performed in practice.”).

190. *See Credeur*, 860 F.3d at 794; *Spielman v. Blue Cross & Blue Shield of Kan., Inc.*, 33 F. App’x 439, 442 (10th Cir. 2002); *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1132, 1137 (9th Cir. 2001); *Black v. Wayne Ctr.*, Nos. 99-1225, 99-1249, 2000 WL 1033026, at \*4 (6th Cir. July 17, 2000).

191. *See, e.g., Credeur*, 860 F.3d at 794 (denying remote work accommodation based on vague statements that litigation attorneys cannot work at home long term); *Spielman*, 33 F. App’x at 444 (denying remote work because employee did not meet a performance statistic); *see also Rehms v. Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007) (denying accommodation based on “work culture”); *Trout v. Elec. Data Sys. Corp.*, 151 F. App’x 390, 393, 399 (6th Cir. 2005) (denying remote work accommodation because plaintiff had not met service length requirement).

192. Nos. 99-1225, 99-1249, 2000 WL 1033026 (6th Cir. July 17, 2000).

193. *Id.* at \*1.

194. *Id.* at \*2.

195. *Id.* at \*4.

196. *Id.* Black’s employer also provided an alternative accommodation, and employers are entitled to choose between effective accommodations. *See id.* However, the court analyzed this as an independent basis to uphold the employer’s action. *See id.* The court’s reasoning that remote work was not required because the company simply did not allow it is flawed, even if an alternative accommodation existed in this case.

Allowing employers to automatically rely on blanket policies and procedures represents a fundamental misunderstanding of the ADA's reasonable accommodation requirement. These courts say that employers are not obligated to change their policies and practices.<sup>197</sup> But that is the entire point of requiring reasonable accommodations: accommodations inherently require a change in current practice.<sup>198</sup> Employer preference and convenience are not the overriding concerns.<sup>199</sup> If remote work is reasonable, and there is no other reasonable accommodation, the employer's general preference for in-person work is beside the point. The ADA's reasonable accommodation requirement rejects the idea of mandatory uniformity.<sup>200</sup> As Justice Breyer explained in *US Airways, Inc. v. Barnett*,<sup>201</sup> "[b]y definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach."<sup>202</sup> Otherwise, allowing such policies to avoid the reasonable accommodation requirement would negate it entirely.<sup>203</sup>

In the remote work context, the EEOC has specifically stated that an employer who might not otherwise allow an employee to work from home in a particular situation might have to do so as a disability accommodation.<sup>204</sup> This is true even if an employer generally prohibits remote work, and an employer might be required to waive eligibility

197. See *Yochim v. Carson*, 935 F.3d 586, 592 (7th Cir. 2019) (affirming summary judgment for employer in part because its remote work policy "is subject to management's discretion" and thus "does not confer a legally protected entitlement upon an employee"); *Heaser v. Toro Co.*, 247 F.3d 826, 832 (8th Cir. 2001) ("Toro was not required to make an overall change in its manner of conducting business to accommodate Heaser."); *Black*, 2000 WL 1033026, at \*4 ("There was no need in this case to require Wayne Center to change its policy of onsite employment in order to satisfy a single employee's request to work at home."); see also *Tchankpa v. Ascena Retail Grp.*, 951 F.3d 805, 809 (6th Cir. 2020) ("The ADA is not a weapon that employees can wield to pressure employers into granting unnecessary accommodations or reconfiguring their business operations. Instead, it protects disabled employees from disability-related mistreatment—no more, no less.").

198. See 29 C.F.R. pt. 1630 app. § 1630.2(o), at 395 (2022) ("[A]n accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.").

199. See *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 857 (6th Cir. 2018) ("Wooster may have preferred that Hostettler be in the office 40 hours a week. And it may have been more efficient and easier on the department if she were. But those are not the concerns of the ADA . . ."); *Miller v. Ill. Dep't of Transp.*, 643 F.3d 190, 199 (7th Cir. 2011) ("The [ADA] requires an employer to rethink its preferred practices or established methods of operation."); *Holly v. Clairson Indus.*, 492 F.3d 1247, 1258 (11th Cir. 2007) (explaining that inconvenience is not an appropriate basis to deny an accommodation request); see also *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565, 574 (7th Cir. 2019) (Hamilton, J., dissenting) ("[T]he thrust of defendant's evidence is simply that the vice president of Bilinsky's department preferred to have all employees work at the Dallas headquarters five days a week. I assume that arrangement would be easiest for him and other managers, but that's not the standard under the ADA.").

200. See *Isbell v. John Crane, Inc.*, 30 F. Supp. 3d 725, 734 (N.D. Ill. 2014) ("[S]uch uniformity of treatment is precisely what the underlying purpose of the ADA rejects."); *Holly*, 492 F.3d at 1262 ("[T]he very purpose of reasonable accommodation laws is to require employers to treat disabled individuals differently in some circumstances . . .").

201. 535 U.S. 391 (2002).

202. *Id.* at 397.

203. See *id.* ("Were that not so, the 'reasonable accommodation' provision could not accomplish its intended objective."); *Holly*, 492 F.3d at 1263 ("Allowing uniformly-applied, disability-neutral policies to trump the ADA requirement of reasonable accommodations would utterly eviscerate that ADA requirement.").

204. See *supra* note 123 and accompanying text.

requirements, such as tenure.<sup>205</sup> Each situation must be evaluated individually based on the facts and circumstances presented, with the employer and employee engaging in a flexible, interactive process.<sup>206</sup>

Some courts have held employers to the appropriate standard, requiring them to at least consider changes in generally applicable policies when assessing reasonable accommodations.<sup>207</sup> This approach correctly “requires an employer to rethink its preferred or established methods of operation” to consider possible modifications, “even where established practices or methods seem to be the most efficient or serve otherwise legitimate purposes in the workplace.”<sup>208</sup> And in this process, evidence about the employee’s job and how it can be performed remotely will be front and center.

#### 4. Refusing to Properly Consider Employee Evidence

The plaintiff’s evidence is obviously important in any lawsuit, and that is certainly true in remote work accommodation litigation, where employees will need evidence such as what their job duties are, how they perform those duties, and how they could be performed from home. But many courts engage in various practices that undervalue or flat out disregard this type of evidence. So, in addition to the presumption against remote work, overly deferring to employer judgment, and relying on employer policies and preferences, these courts further tip the evidentiary scales against workers by gutting their evidence. This is not unique to remote work accommodations cases. Professor Sandra Sperino has extensively documented a similar phenomenon in the broader employment discrimination context.<sup>209</sup> But this bias against pro-employee evidence shows up repeatedly, and in sometimes unique ways, in remote work accommodations cases.

To start with, some courts in remote accommodations cases explicitly reject employee testimony, calling it, for example, “self-serving” or “unsupported” and hold that it cannot create a fact issue.<sup>210</sup> It is rather stunning to see courts just wholesale refusing to consider the plaintiff’s evidence and then granting summary judgment against

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205. See EEOC Telework Guidance, *supra* note 5.

206. See 29 C.F.R. § 1630.2(o)(3) (2022); 29 C.F.R. pt. 1630 app. § 1630.9, at 403 (2022); EEOC Telework Guidance, *supra* note 5.

207. See, e.g., *Holly*, 492 F.3d at 1257–61; *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1134–37 (9th Cir. 2001); *Alexander v. Boeing Co.*, No. C13-1369, 2014 WL 3734291, at \*8–10 (W.D. Wash. July 28, 2014).

208. *Miller v. Ill. Dep’t of Transp.*, 643 F.3d 190, 199 (7th Cir. 2011).

209. See Sperino, *supra* note 15, at 2107 (“Federal employment discrimination law is rife with evidentiary inequality. . . . Courts exclude evidence that workers offer and downplay the significance of even admissible evidence, while allowing employers great latitude in what evidence to admit and great deference as to what that evidence establishes.”); see also Stone, *supra* note 155, at 111 (discussing three evidence-based practices judges often use in denying plaintiffs relief in employment discrimination cases).

210. See, e.g., *Credeur v. La. ex rel. Off. of Att’y Gen.*, 860 F.3d 785, 793 (5th Cir. 2017) (“unsupported”); *EEOC v. Ford Motor Co.*, 782 F.3d 753, 763–64 (6th Cir. 2015) (en banc) (“unsupported”); *Appel v. Inspire Pharms., Inc.*, 428 F. App’x 279, 283 (5th Cir. 2011) (“base”); *Mulloy v. Acushnet Co.*, 460 F.3d 141, 150 (1st Cir. 2006) (“self-serving”); *Mason v. Avaya Commc’ns, Inc.*, 357 F.3d 1114, 1121 (10th Cir. 2004) (“self-serving”); *Heaser v. Toro Co.*, 247 F.3d 826, 832 (8th Cir. 2001) (“conjecture”); *Basith v. Cook County*, 241 F.3d 919, 928 (7th Cir. 2001) (“self-serving”). Courts use this self-serving rationale to limit employee testimony in other types of employment discrimination cases as well. See Sperino, *supra* note 15, at 2152.

them. These courts may not even describe the evidence or do so in such a clipped fashion that it is impossible to know what the plaintiff even said.<sup>211</sup> They seem to proceed from the assumption that employees are untrustworthy by nature and their testimony, regardless of the subject or details, is inherently undeserving of any consideration.<sup>212</sup>

At the same time, some judges have correctly called out this practice as improper and unfair.<sup>213</sup> Much of what parties testify in litigation is meant to help them or hurt the other side, and that is not a basis for disregarding the evidence.<sup>214</sup> Supervisor testimony is no less inherently self-interested than worker testimony.<sup>215</sup> The real issue is that sometimes evidence is conclusory,<sup>216</sup> for example, merely asserting that a function is or is not essential. The standard—for both employer and employee testimony—should be whether the evidence is detailed, specific, and based on personal knowledge.<sup>217</sup> And most of these cases involve summary judgments, where courts should be viewing the evidence in the light most favorable to the plaintiff instead of functionally determining that the worker is not trustworthy, but the employer is.<sup>218</sup>

211. See, e.g., *Credeur*, 860 F.3d at 794–95; *Appel*, 428 F. App'x at 283; see also Sperino, *supra* note 15, at 2110 (“Judges often fail to fully describe the plaintiff’s evidence and sometimes encapsulate it in a single word or phrase (for example, ‘conclusory’) . . .”). The *Ford* case is especially interesting in this regard because it is difficult to see just how much of the employee’s evidence the court failed to detail or consider without reading the dissent’s account. Compare *Ford*, 782 F.3d at 763–64, with *id.* at 772–73 (Moore, J., dissenting).

212. See *Ford*, 782 F.3d at 773 (Moore, J., dissenting) (“What appears to be driving the majority’s unwillingness to give any weight to Harris’s own testimony is an unstated belief that employee testimony is somehow inherently less credible than testimony from an employer.”); see also *Heaser*, 247 F.3d at 834 (Lay, J., dissenting) (“The majority opinion, however, appears to ignore the evidence presented by Heaser while giving sole credibility to the evidence presented by Toro.”).

213. See, e.g., *Ford*, 782 F.3d at 773 (Moore, J., dissenting); *Heaser*, 247 F.3d at 836 (Lay, J., dissenting); *Bixby v. JP Morgan Chase Bank, N.A.*, No. 10 C 405, 2012 WL 832889, at \*2 (N.D. Ill. Mar. 8, 2012). Even if not specifically addressing an issue with “self-serving” evidence, many courts have properly considered employee testimony in remote work accommodations cases. See, e.g., *Boltz v. United Process Controls*, No. 1:16-CV-703, 2017 WL 2153921, at \*9 (S.D. Ohio May 17, 2017); *Hampson v. State Farm Mut. Auto Ins. Co.*, No. 1:12-CV-00258, 2015 WL 12733387, at \*9–11 (N.D.N.Y. Mar. 26, 2015); *Alexander v. Boeing Co.*, No. C13-1369, 2014 WL 3734291, at \*8–10 (W.D. Wash. July 28, 2014).

214. See *Salazar v. Lubbock Cnty. Hosp. Dist.*, 982 F.3d 386, 392 (5th Cir. 2020) (Ho, J., concurring) (“There is nothing inherently wrong with self-serving statements. We fully expect litigants to present statements that serve their interests. Indeed, our adversarial legal system is premised on that notion.” (citations omitted)); *Kaba v. Stepp*, 458 F.3d 678, 681 (7th Cir. 2006) (“Most affidavits are self-serving, as is most testimony, and this does not permit a district judge to denigrate a plaintiff’s evidence when deciding whether a material dispute requires trial.” (internal quotation marks and alterations omitted)); *Bixby*, 2012 WL 832889, at \*2 (“Of course, most affidavits are self-serving, but that does not provide a basis to disregard them.”); see also *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007) (“[I]n our adversarial system, much of a proponent’s evidence is legitimately intended to wound the opponent.”).

215. See *Ford*, 782 F.3d at 773 (Moore, J., dissenting); see also *Heaser*, 247 F.3d at 836 (Lay, J., dissenting); *Bixby*, 2012 WL 832889, at \*2.

216. See *Salazar*, 982 F.3d at 392 (Ho, J., concurring) (“The problem arises when a statement is not just self-serving, but conclusory.”).

217. See *id.*; *Kaba*, 458 F.3d at 681; see also FED. R. CIV. P. 56(c)(4).

218. See *Ford*, 782 F.3d at 773 (Moore, J., dissenting); *Heaser*, 247 F.3d at 836 (Lay, J., dissenting); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (“[A]t the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”); Sperino, *supra* note 15, at 2109 (explaining that “[f]his evidentiary inequality

Courts' distrust and disregard of employee evidence is often applied to evidence regarding what the job is and how it is done, including how it might be performed outside of the office.<sup>219</sup> And it is not just a matter of giving defendants' evidence more weight—courts do that too. These courts explicitly refuse to even consider the worker's evidence.<sup>220</sup> In an oft-quoted passage, the Eighth Circuit stated that a worker's "specific personal experience is of no consequence in the essential functions equation."<sup>221</sup> In other words, *only* the employer's view matters.

The justifications for this practice are flimsy at best. Some courts disregard this evidence using the general self-serving evidence rationale.<sup>222</sup> Others, though, tie it more specifically to the accommodations context, stating "we do not 'allow employees to define the essential functions of their positions based solely on their personal viewpoint and experience.'"<sup>223</sup> Still others base their rationale on the statutory language and regulations, reasoning that neither specify that employee evidence should be considered and that they instead focus on employer-related items such as employer judgment and job descriptions.<sup>224</sup> Thus, as the Fifth Circuit explained, "[p]rinciples 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."<sup>225</sup> But this rationale neglects to consider that the list of considerations in the regulations is explicitly

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is especially problematic because it often occurs when judges are deciding an employer's motion for summary judgment" and should thus be making inferences against the employer).

219. See, e.g., *Credeur v. La. ex rel. Off. of Att'y Gen.*, 860 F.3d 785, 793–94 (5th Cir. 2017); *Ford*, 782 F.3d at 763–64; *Mulloy v. Acushnet Co.*, 460 F.3d 141, 151 (1st Cir. 2006); *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1121 (10th Cir. 2004); *Dropinski v. Douglas County*, 298 F.3d 704, 708 (8th Cir. 2002); *Basith v. Cook County*, 241 F.3d 919, 928 (7th Cir. 2001); see also *Hickox & Liao*, *supra* note 5, at 48 (discussing how courts credit employer evidence regarding essential job functions while concluding that "the opinion or perspective of the employee seeking an accommodation will not be sufficient to establish that physical presence at work is not essential"). Some courts have properly considered employee evidence of things like essential job functions and how the employee planned to work remotely. See, e.g., *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 604–05 (6th Cir. 2018); *Boltz v. United Process Controls*, No. 1:16-CV-703, 2017 WL 2153921, at \*9 (S.D. Ohio May 17, 2017); *Hampson v. State Farm Mut. Auto Ins. Co.*, No. 1:12-CV-00258, 2015 WL 12733387, at \*9–11 (N.D.N.Y. Mar. 26, 2015); *Pinegar v. Shinseki*, 665 F. Supp. 2d 487, 501–02 (M.D. Pa. 2009).

220. See, e.g., *Ford*, 782 F.3d at 764 (refusing to "credit the employee's opinion about what functions are essential"). This refusal echoes an analogous pattern Professor Sperino has catalogued where courts allow employers wide latitude in proving an employee's alleged poor behavior or performance, but severely curtail the employee's ability to testify about these same issues. See Sperino, *supra* note 15, at 2151.

221. *Dropinski*, 298 F.3d at 709; accord *Minnihan v. Mediacom Commc'ns Corp.*, 779 F.3d 803, 812 (8th Cir. 2015); *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 616 F. App'x 588, 592 (4th Cir. 2015); *Coates v. Discount Tire Co. of Neb., Inc.*, No. 8:20-CV-139, 2021 WL 4991526, at \*3 (D. Neb. Oct. 27, 2021); *Lundvall v. Land O'Lakes, Inc.*, No. C18-127, 2020 WL 806648, at \*8 (N.D. Iowa Feb. 18, 2020); see also *Credeur*, 860 F.3d at 794 (stating that and employee's personal judgment "is not the kind of evidence that a court should consider" in evaluating essential job functions).

222. See, e.g., *Credeur*, 860 F.3d at 793; *Ford*, 782 F.3d at 763–64; *Mulloy*, 460 F.3d at 150; *Mason*, 357 F.3d at 1121; *Basith*, 241 F.3d at 928.

223. *Ford*, 782 F.3d at 764 (quoting *Mason*, 357 F.3d at 1122).

224. See *Credeur*, 860 F.3d at 793–94; *Dropinski*, 298 F.3d at 709.

225. *Credeur*, 860 F.3d at 794.

nonexhaustive,<sup>226</sup> and the EEOC's interpretive guidance says that "all relevant evidence should be considered" and that "[g]reater weight will not be granted to the types of evidence included on the list than to the types of evidence not listed."<sup>227</sup> As a matter of statutory interpretation, as well as fundamental fairness and basic rules governing relevant evidence, an employee's evidence on these issues should be considered.<sup>228</sup>

A final area where courts devalue evidence from employees involves the impact of job descriptions.<sup>229</sup> This is distinct from the problem discussed above where courts overdefer to employer judgment, including pro-employer statements in job descriptions.<sup>230</sup> When job descriptions state that physical presence is required or have other language suggesting an in-person requirement, courts are quick to point to those provisions when upholding the denial of remote work accommodations.<sup>231</sup> But when the job description does not contain such language and plaintiffs attempt to use this absence to their advantage, courts often write off these job descriptions.<sup>232</sup> They ascribe the absence of this language no evidentiary value, stating that common sense dictates an employee must be physically present at work.<sup>233</sup> So a job description specifying in-person work helps the employer, but the lack of one does not help the employee.<sup>234</sup> This is fundamentally unfair, especially on summary judgment where the evidence should be viewed in the plaintiff's favor. Nothing in the rules of evidence or the ADA's language or regulations draws this distinction.<sup>235</sup> As with so many of these other evidentiary practices, heads the employer wins, tails the employee loses.

226. See 29 C.F.R. § 1630.2(n)(3) (2022) ("Evidence of whether a particular function is essential includes, but is not limited to . . .").

227. 29 C.F.R. pt. 1630 app. § 1630.2(n) (2022). The EEOC's COVID-19-specific guidance, which will be discussed below, specifies that employees' experiences of performing remote work during the pandemic should be considered in assessing post-pandemic requests to continue remote work. See EEOC COVID Guidance, *supra* note 124, ¶ D.16; see also *infra* notes 306–316 and accompanying text.

228. See *Ford*, 782 F.3d at 773 (Moore, J., dissenting); FED. R. EVID. 401; see also *Sperino*, *supra* note 15, at 2120, 2158.

229. See, e.g., *Abram v. Fulton Cnty. Gov't*, 598 F. App'x 672, 677 (11th Cir. 2015); *Mulloy v. Acushnet Co.*, 460 F.3d 141, 152 (1st Cir. 2006); *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1121–22 (10th Cir. 2004); see also *Lundvall v. Land O'Lakes, Inc.*, No. C18-127, 2020 WL 806648, at \*9–10 (N.D. Iowa Feb. 18, 2020) (job description omitting relevant job function did not create fact issue because "the job inherently require[d]" the task).

230. See *supra* Part III.B.2.

231. See, e.g., *Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537, 545 (8th Cir. 2018); *Dropinski v. Douglas County*, 298 F.3d 704, 708–09 (8th Cir. 2002). But see *Bisker v. GGS Info. Servs., Inc.*, No. CIV.1:CV-07-1465, 2010 WL 2265979, at \*4 (M.D. Pa. June 2, 2010) (denying summary judgment, based in part on face-to-face interaction and working a "normal five-day work week" not being in the job description during the relevant time).

232. See, e.g., *Mulloy*, 460 F.3d at 152; *Mason*, 357 F.3d at 1121–22; see also *Sperino*, *supra* note 15, at 2108 ("[C]ourts often treat employer evidence differently than they do similar evidence offered by plaintiffs.")

233. See, e.g., *Mulloy*, 460 F.3d at 152; *Mason*, 357 F.3d at 1121–22.

234. Similarly, courts in other employment discrimination cases often accept evidence from supervisors about a plaintiff's poor performance but reject supervisor evidence regarding good performance. See *Sperino*, *supra* note 15, at 2139.

235. *Cf. id.* at 2158.

### 5. Combining These Practices Magnifies the Impact

These four evidentiary practices are harmful independently, but courts often combine them, leaving employees virtually no chance to prevail. A few cases illustrate this impact.

The Fifth Circuit used all four in affirming summary judgment for the employer in *Credeur v. Louisiana ex rel. Office of the Attorney General*.<sup>236</sup> The plaintiff in that case was a government litigation attorney who went through several rounds of medical leave and periods of working from home for a few months due to recurrent health problems.<sup>237</sup> At the end of the final approved remote work period, she requested additional remote work accommodations, which were denied because “it is not possible for a litigation attorney to work from home on a long term basis.”<sup>238</sup> Her employer banned her from doing any additional work from home and required all work to be performed in the office, causing her work to fall behind.<sup>239</sup>

The district court granted summary judgment against Ms. Credeur on her accommodation claim, determining that on-site attendance was an essential job function that she was unable to perform.<sup>240</sup> In affirming, the Fifth Circuit recited the presumption against remote work and said that Ms. Credeur’s job could not “be the exception.”<sup>241</sup> In analyzing her job and its essential duties, the court said that the employer’s judgment is entitled to the “greatest weight” and that her evidence explaining her ability to work from home was “not the kind of evidence that a court should consider.”<sup>242</sup> The court repeatedly emphasized the vague employer policy that litigation attorneys cannot work remotely long-term and held it against Ms. Credeur that her work fell behind, even though she could have been working on her cases at home—as she had done repeatedly before—and, in fact, requested to do so specifically to catch up.<sup>243</sup>

To be sure, not all the evidence was in Ms. Credeur’s favor. Her supervisor said that her remote work had caused some strain on the department and that she had been unable to complete certain tasks.<sup>244</sup> But the combination of these evidentiary policies inflating the employer’s evidence and disregarding her very relevant evidence, rather than viewing all the evidence in her favor, deprived Ms. Credeur of the opportunity to even try to make a case.

*EEOC v. Ford Motor Co.*<sup>245</sup> paints a similar picture. An employee with irritable bowel syndrome requested a flexible work schedule to include, as allowed under Ford’s general telecommuting policy, up to four days of remote work per week as needed.<sup>246</sup>

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236. 860 F.3d 785, 792–95 (5th Cir. 2017).

237. *Id.* at 789–90.

238. *Id.* at 790.

239. *Id.* at 790–91.

240. *Id.*

241. *Id.* at 793 (quoting *Vande Zande*).

242. *Id.* at 792, 794.

243. *See id.* at 794–95.

244. *Id.*

245. 782 F.3d 753 (6th Cir. 2015).

246. *Id.* at 758–59.

The Sixth Circuit, en banc, affirmed summary judgment for the employer.<sup>247</sup> It cited the presumption against remote work and the need to defer to employer judgment, which here was that the employee's job required a great deal of face-to-face teamwork.<sup>248</sup> Ford, however, did not fully explain what aspects of teamwork needed to be done in person, and the plaintiff's testimony showed that 95% of her work involved computer or telephone work, even when in the office.<sup>249</sup> The court explicitly refused to allow the employee's "unsupported" testimony to create a fact issue because "we do not 'allow employees to define the essential functions of their positions based solely on their personal viewpoint and experience.'"<sup>250</sup> Even though the majority gave short shrift to the worker's evidence, the dissent explained that her testimony included details such as how much time she spent on various tasks, how often she performed them, and how she completed them.<sup>251</sup> The majority discounted her experience while simultaneously making all inferences in Ford's favor.<sup>252</sup> When courts stack these evidentiary principles, this multiplies the power of each one. The First Circuit was explicit about this math in *Mulloy v. Acushnet Co.*<sup>253</sup>:

In light of the substantial weight we must accord Acushnet's view of Mulloy's job requirements, together with the wealth of authority recognizing physical attendance as an essential function of most jobs, we agree with the district court that Mulloy's own self-serving testimony that he could perform the essential functions of his job from [off-site] is insufficient under Fed. R. Civ. P. 56(c) to create a genuine issue of material fact concerning the essential functions of his job.<sup>254</sup>

The impact is compounded when courts simultaneously use both pro-employer and anti-employee evidentiary practices, because that adds weight to the employer's side of the scale while removing weight from the employee's side. It is no wonder that employers overwhelmingly win these cases—up to 70% of the time.<sup>255</sup>

#### IV. THE PANDEMIC'S IMPACT ON REMOTE WORK ACCOMMODATIONS

The unprecedented boom in remote work during the pandemic has changed the American workplace.<sup>256</sup> How will that play out in the remote work accommodations context? This Section will examine what we have learned about remote work during the pandemic and explain how this newfound knowledge should force courts to reject these

247. *Id.* at 766.

248. *Id.* at 761–63; *see also id.* at 771 (Moore, J., dissenting).

249. *Id.* at 771–72 (Moore, J., dissenting).

250. *Id.* at 763–64 (majority opinion) (quoting *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1122 (10th Cir. 2004)).

251. *Id.* at 772–73 (Moore, J., dissenting).

252. *See id.* at 771. A Tenth Circuit case shows this same methodology, relying on the anti-remote-work presumption, giving heavy weight to employer judgment, disregarding plaintiff evidence as self-serving, and noting it was "entirely unremarkable" that the job description did not mention physical presence. *See Mason*, 357 F.3d at 1117, 1120–22.

253. 460 F.3d 141 (1st Cir. 2006).

254. *Id.* at 150 (internal quotation marks and alterations omitted).

255. *See supra* notes 131–134 and accompanying text.

256. *See supra* note 3 and accompanying text.

unfair evidentiary practices and reassess how to evaluate remote work accommodations claims. It will then study recent cases to see if any changes are yet evident.

#### A. What the Pandemic Has Taught Us About Remote Work

Though the amount of remote work now is lower than during its pandemic peak, remote work is not going away. It will likely settle long-term at around 20% of days worked overall.<sup>257</sup> Since March 2020, we have been part of a nationwide experiment in all things remote work. So what have we learned? What evidence has this experiment generated?

For one thing, remote work has been surprisingly successful.<sup>258</sup> Substantial data shows that, overall, workers have been as productive, if not more so, working from home.<sup>259</sup> Most workers saved commute time and put at least some of that time back into work, resulting in increased productivity.<sup>260</sup> Productivity gains have occurred on both the individual and team levels.<sup>261</sup> One study predicts an average of nearly 5% in long-term productivity gains compared to the pre-pandemic economy based purely on lasting remote work arrangements.<sup>262</sup> Most employees are also more satisfied, engaged, and creative while working from home, and customer satisfaction has increased.<sup>263</sup> These positive findings are consistent with past data on the overall value and benefits of remote work.<sup>264</sup>

On the whole, employees have embraced remote work.<sup>265</sup> Whether because they avoid a commute, can dress how they want to, or can better juggle work and other

257. See *supra* notes 19–22 and accompanying text.

258. See Ameri & Kurtzberg, *supra* note 52; Cole, *supra* note 151; Mulvaney, *Office Culture War*, *supra* note 13.

259. See, e.g., 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/people-and-organizational-performance/our-insights/what-executives-are-saying-about-the-future-of-hybrid-work> [<https://perma.cc/6X44-4SC6>]; Barrero et al., *supra* note 20, at 4, 17; Olga Khazan, *What Bosses Really Think of Remote Workers*, ATLANTIC (May 19, 2021), <https://www.theatlantic.com/politics/archive/2021/05/can-working-remotely-hurt-your-career/618922/> [<https://perma.cc/3NN5-YP2B>]; Bloom et al., *supra* note 22, at 1, 4; Brian Naylor, *For These Federal Employees, Telework Means Productivity Is Up, Their Backlog Is Down*, NPR (May 5, 2020, 5:00 AM), <https://www.npr.org/2020/05/05/850106772/for-these-federal-employees-telework-means-productivity-is-up-their-backlog-is-d> [<https://perma.cc/R6PD-VTNG>]; Naughton, *supra* note 13; Bryan Robinson, *Why Critics Say Elon Musk's Return-To-Office Ultimatum Is Dangerous*, FORBES (June 3, 2022), <https://www.forbes.com/sites/bryanrobinson/2022/06/03/why-critics-say-elon-musks-recent-return-to-office-ultimatum-is-dangerous/?sh=35e917e9351a> [<https://perma.cc/NK85-9TRV>]; Schur et al., *supra* note 4, at 523.

260. See Barrero et al., *supra* note 20, at 31; Bloom et al., *supra* note 22, at 2, 10; Joan C. Williams, *The Pandemic Has Exposed the Fallacy of the "Ideal Worker"*, HARV. BUS. REV. (May 11, 2020), <https://hbr.org/2020/05/the-pandemic-has-exposed-the-fallacy-of-the-ideal-worker> [<https://perma.cc/V677-U2HL>].

261. See Alexander et al., *supra* note 259.

262. See Barrero et al., *supra* note 20, at 2–4.

263. See Alexander et al., *supra* note 259; Bloom et al., *supra* note 22, at 3, 9; Schur et al., *supra* note 4, at 523, 532.

264. See *supra* Section I.

265. Barrero et al., *supra* note 20, at 13–14, 30; Terry Collins, *COVID-19 Impact: Work from Home More Appealing than Return to 'Business As Usual,' Harvard Survey Shows*, USA TODAY (Mar. 25, 2021),

responsibilities, many employees want to continue at least partial remote work permanently and are willing to change jobs if necessary on this basis alone.<sup>266</sup>

Many employers have seen the value of remote work, and they plan to continue it, whether large-scale or as part of a plan that combines remote and in-person work.<sup>267</sup> Employers invested in the technology to make remote work more feasible and rethought their workplace structures.<sup>268</sup> They see how employees want remote work options and are working productively away from the office.<sup>269</sup> They want to remain attractive employers to employees demanding remote work options.<sup>270</sup> So, many employers plan to integrate remote work permanently.

This is not universal. Some workers learned that although they initially enjoyed remote work, they tired of it and longed to return to the social interaction of office work.<sup>271</sup> They became lonely and felt isolated.<sup>272</sup> Others were forced to work in less-than-ideal situations, such as without adequate technology or a quiet work space.<sup>273</sup> Caretakers—especially mothers of young children—suffered substantial productivity declines when schools and daycares were closed,<sup>274</sup> assuming they could work at all.<sup>275</sup> And others learned that they did not have the self-discipline or temperament to work alone from home.<sup>276</sup> There is also the fear that if some employees return, those who do not might be penalized, either directly or indirectly.<sup>277</sup> This phenomenon is what some are calling the “Zoom ceiling.”<sup>278</sup>

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<https://www.usatoday.com/story/tech/2021/03/25/covid-remote-work-office-return-survey-zoom-meeting-fatigue/6989446002/> [<https://perma.cc/95K4-TRG9>].

266. See, e.g., Danielle Abril, *Yelp Shuts Some Offices Doubling Down on Remote; CEO Calls Hybrid “Hell”*, WASH. POST (June 23, 2022, 2:43 PM), <https://www.washingtonpost.com/technology/2022/06/22/yelp-shutters-offices/> [<https://perma.cc/7KGV-RHHE>]; Barrero et al., *supra* note 20, at 13–14, 30; Collins, *supra* note 265; Gurman, *supra* note 13; Melin & Egkolfopoulou, *supra* note 13; Mac, *supra* note 13; Newport, *supra* note 25; Bryan Robinson, *Future of Work: What the Post-Pandemic Workplace Holds for Remote Workers’ Careers*, FORBES (May 2, 2021, 9:58 AM), <https://www.forbes.com/sites/bryanrobinson/2021/05/02/future-of-work-what-the-post-pandemic-workplace-holds-for-remote-workers-careers/?sh=55205f367f5b> [<https://perma.cc/T2JJ-TL5U>].

267. See Abril, *supra* note 266; Anand *supra* note 13; Barrero et al., *supra* note 20, at 1; Bloom et al., *supra* note 22, at 2–4; Mulvaney, *Office Culture War*, *supra* note 13; Naughton, *supra* note 13; Robinson, *supra* note 259.

268. See Barrero et al., *supra* note 20, at 1, 3–4; Wagstaff & Quasius, *supra* note 128.

269. See Abril, *supra* note 266; Naughton, *supra* note 13; Schur et al., *supra* note 4, at 523.

270. See Abril, *supra* note 266; Mulvaney, *Office Culture War*, *supra* note 13; Naughton, *supra* note 13.

271. See BLOOM, *supra* note 21, at 6; Arthur C. Brooks, *The Hidden Toll of Remote Work*, ATLANTIC (Apr. 1, 2021), <https://www.theatlantic.com/family/archive/2021/04/zoom-remote-work-loneliness-happiness/618473/> [<https://perma.cc/ZV77-P5PT>]; Horch, *supra* note 68.

272. See BLOOM, *supra* note 21, at 6; Brooks, *supra* note 271; Horch, *supra* note 68.

273. See BLOOM, *supra* note 21, at 3, 5; Gram, *supra* note 56.

274. See Porter, *Working While Mothering*, *supra* note 12, at 1, 24; see also BLOOM, *supra* note 21, at 5.

275. Many women, as the predominant caretakers, ended up being forced to quit their jobs because they could not work without school or childcare options. See Porter, *Working While Mothering*, *supra* note 12, at 1; Shinall, *supra* note 55, at 1149; Alaina Harwood, Note, *Caregiver Discrimination in the Wake of the COVID-19 Pandemic*, 33 HASTINGS J. GENDER & L. 79, 85 (2022).

276. See Brooks, *supra* note 271.

277. See Khazan, *supra* note 259.

278. Marcel Schwantes, *The Zoom Ceiling: A New Barrier Holding Remote Workers Back (and What Leaders Can Do to Stop It)*, INC. (Dec. 8, 2021), <https://www.inc.com/marcel-schwantes/the-zoom-ceiling-new->

Some employers, too, have been eager to return to pre-pandemic work conditions. Initial productivity surges were followed by declines as some employees became weary of working from home,<sup>279</sup> and some employers found no productivity gains.<sup>280</sup> They worry about long-term impacts on office culture, creativity, and the mentorship of new workers if employees do not physically work together.<sup>281</sup> While small-group meetings might often work well when using platforms such as Zoom, Zoom fatigue is real, and larger meetings often suffer when held remotely.<sup>282</sup> For other employers, it is a matter of manager preference and overall strong feelings that employees should be in-person, full stop.<sup>283</sup> In June 2022, Elon Musk told his workers at Tesla and SpaceX that they must spend a minimum of forty hours per week in the office or be fired.<sup>284</sup> In November 2022, shortly after completing his purchase of Twitter, Musk reversed the company's previous permissive remote work policy, stating that "remote work is no longer allowed unless you have a specific exception" based on inability to travel or a "critical personal obligation."<sup>285</sup>

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barrier-holding-remote-workers-back-and-what-leaders-can-do-to-stop-it.html [https://perma.cc/4YAF-B5ZP]; see also Khazan, *supra* note 259 ("remote-work penalty"); 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-startups.html [https://perma.cc/M452-QCGE] (referring to perception of remote workers as "second-class citizens"). This is the most current iteration of a general issue with remote work—some managers stigmatize remote workers. See *supra* note 43 and accompanying text.

279. See BLOOM, *supra* note 21, at 6; ORRELL & LEGER, *supra* note 36, at 14; see also Brooks, *supra* note 271.

280. See Alexander et al., *supra* note 259; see also Brandon Vigliarolo, *Long-Term Remote Work Is Leading to a Global Drop in Productivity*, TECHREPUBLIC (July 28, 2020), https://www.techrepublic.com/article/long-term-remote-work-is-leading-to-a-global-drop-in-productivity/ [https://perma.cc/R443-3LE8].

281. See Julie Creswell, Gillian Friedman & Peter Eavis, *Return-to-Office Plans Are Set in Motion, but Virus Uncertainty Remains*, N.Y. TIMES (Mar. 23, 2021), https://www.nytimes.com/2021/03/03/business/return-to-work-coronavirus.html [https://perma.cc/G787-A483]; Mulvaney, *Office Culture War*, *supra* note 13; Clive Thompson, *What If Working From Home Goes on . . . Forever?*, N.Y. TIMES MAG. (June 9, 2020), https://www.nytimes.com/interactive/2020/06/09/magazine/remote-work-covid.html [https://perma.cc/86JX-4ZJ3]. Though these concerns are not new in the study of remote work, see *supra* notes 42–50 and accompanying text, many employers may be experiencing them for the first time.

282. See Brooks, *supra* note 271; Newport, *supra* note 30; Thompson, *supra* note 281.

283. See Alison Green, *All the Intrusive and Insulting Ways Bosses Are Smothering Their Remote Workers*, SLATE (Aug. 10, 2020, 5:45 AM), https://slate.com/human-interest/2020/08/work-from-home-remote-managers-micromanaging.html [https://perma.cc/R2SA-WQV4]; Melin & Egkolfopoulou, *supra* note 13; Mulvaney, *Office Culture War*, *supra* note 13.

284. Mac, *supra* note 13; Robinson, *supra* note 259.

285. Ian Johnston, Cristina Criddle & Hannah Murphy, *Elon Musk Bans Remote Work at Twitter*, FIN. TIMES (Nov. 10, 2022), https://www.ft.com/content/899bb401-1ab0-43aa-8ab1-102111b49568; see also Kurt Wagner, *Musk's First Email to Twitter Staff Ends Remote Work*, BLOOMBERG (Nov. 10, 2022, 4:49 AM), https://www.bloomberg.com/news/articles/2022-11-10/musk-s-first-email-to-twitter-staff-ends-remote-work?s-ref=10INAhZ9 [https://perma.cc/923J-SF32]. In response to mass employee departures, Musk backed off slightly, saying that managers could allow remote work for employees that they verify are making "an excellent contribution." Joseph Menn, Nitasha Tiku, Faiz Siddiqui & Cat Zakrzewski, *Hundreds Said to Have Opted to Leave Twitter Over Musk Ultimatum*, WASH. POST (Nov. 18, 2022, 1:18 PM), https://www.washingtonpost.com/technology/2022/11/17/twitter-musk-easing-rto-order/ [https://perma.cc/5NQN-DF9U]. One worker who alleges he asked for a remote work accommodation and was fired days later has sued Twitter for disability discrimination. See *Class Action Complaint & Jury Demand* at 5–6, 10, *Borodaenko v. Twitter, Inc.*, No. 3:22-cv-7226 (N.D. Cal. Nov. 16, 2022), ECF No. 1.

We have also learned that navigating the future of remote work is complicated.<sup>286</sup> Employers and employees have distinct interests that sometimes conflict. One of the biggest return-to-work challenges is employee requests to continue remote working.<sup>287</sup> Some resistance to returning to the office is based on factors such as personal preference or a general fear of contracting COVID-19.<sup>288</sup> But many employees are requesting to continue some form of remote work as a disability accommodation under the ADA.<sup>289</sup> Many employers are rejecting these requests, and with the stakes for employees being so high, those denials are more likely to lead to lawsuits.<sup>290</sup> Indeed, in 2021, the percentage of EEOC charges involving ADA claims was the highest ever,<sup>291</sup> and 2021 saw more federal employment-related ADA suits filed than ever before.<sup>292</sup> Many commentators are predicting a surge in ADA litigation relating to COVID-19 issues.<sup>293</sup> Disability Rights Texas, a disability protection and advocacy agency, reported to the EEOC in April

286. See Newport, *supra* note 45 (discussing the extremist positions by remote-work advocates and opponents and stating: “Both sides are right, and both are wrong.”).

287. See Emily N. Litzinger & Phillips L. McWilliams, *Employers Can Navigate a Successful Return to Office*, BLOOMBERG L., DAILY LAB. REP. (May 12, 2022, 4:00 AM), <https://news.bloomberglaw.com/daily-labor-report/employers-can-navigate-a-successful-return-to-office> [<https://perma.cc/GQU6-XGM8>]; Mulvaney, *Office Culture War*, *supra* note 13; Michelle Perez-Yanez, *Will Working from Home Be a Reasonable Accommodation Post-COVID?*, AM. BAR ASS’N (Nov. 23, 2020), [https://www.americanbar.org/groups/gpsolo/publications/gpsolo\\_ereport/2020/november-2020/will-working-home-be-reasonable-accommodation-post-covid/](https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2020/november-2020/will-working-home-be-reasonable-accommodation-post-covid/) [<https://perma.cc/GK9E-WE79>]; see also Menn et al., *supra* note 285 (discussing hundreds of signaled employee departures from Twitter based in part on Musk’s return-to-the-office order).

288. See Litzinger & McWilliams, *supra* note 287.

289. See East, *supra* note 52; Mulvaney, *Office Culture War*, *supra* note 13.

290. Dori Goldstein, *Analysis: Five Battles to Watch as Workers Return to the Office*, BLOOMBERG L., DAILY LAB. REP. (Nov. 1, 2021, 3:00 AM), <https://news.bloomberglaw.com/daily-labor-report/analysis-five-battles-to-watch-as-workers-return-to-the-office> [<https://perma.cc/F5DB-M89P>].

291. See *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021> [<https://perma.cc/8LUA-X6AH>] (last visited Feb. 1, 2023); see also Goldstein, *supra* note 290.

292. This is based on statistics from U.S. courts since 2005, the first year for which it included ADA employment claims as a separate category. See Table C-2A, U.S. District Courts—Civil Cases Commenced, by Nature of Suit, Judicial Business Tables for 2005-2021, <https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts> [<https://perma.cc/97UP-KC64>].

293. See East, *supra* note 52; Jessica Federico, *How Employers Can Avoid Covid-19 Litigation in the Return to the Workplace*, BLOOMBERG L., DAILY LAB. REP. (Aug. 10, 2021, 4:00 AM), <https://news.bloomberglaw.com/daily-labor-report/how-employers-can-avoid-covid-19-litigation-in-the-return-to-the-workplace> [<https://perma.cc/38LM-JPD6>]; Goldstein, *supra* note 290; Emily Halliday, *Analysis: RTO, Covid Issues to Drive Ramp-Up in ADA Litigation*, BLOOMBERG L. (Nov. 1, 2021, 3:02 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-rto-covid-issues-to-drive-ramp-up-in-ada-litigation> [<https://perma.cc/25AT-NMTB>]; Mulvaney, *Office Culture War*, *supra* note 13; Erin Mulvaney, *Thousands of Covid-Related EEOC Charges Cite Disability Bias (1)*, BLOOMBERG L., DAILY LAB. REP. (Mar. 10, 2022, 4:03 PM), <https://news.bloomberglaw.com/daily-labor-report/thousands-of-covid-related-eeoc-charges-allege-disability-bias> [<https://perma.cc/4W3G-WFEY>]; see also Press Release, U.S. EQUAL EMP. OPPORTUNITY COMM’N, *EEOC Examines Connections Between COVID-19 and Civil Rights* (Apr. 28, 2021), <https://www.eeoc.gov/newsroom/eeoc-examines-connections-between-covid-19-and-civil-rights> [<https://perma.cc/5HC2-5DHE>] (quoting EEOC chair Charlotte Burrows stating that COVID-19 has “created a civil rights crisis”).

2021 that 60% of its intake over the past year involved employers rejecting remote work requests.<sup>294</sup>

Conflicts over return-to-work related requests for remote work accommodations can be divided into two main scenarios: (1) those involving individuals with COVID-19-related risk factors, and (2) those involving non-COVID-19-related accommodation requests. In the first scenario, an underlying impairment might increase a worker's risk of being infected with COVID-19 or of suffering a severe outcome if infected. Examples include:

- A cancer survivor who worked remotely as an engineering manager for Twitter asked to continue to work remotely because of his increased risk from COVID-19.<sup>295</sup>
- An employee with asthma worked at home for four months before being ordered to return, and the worker's doctor advised continued remote work to avoid the risk of COVID-19 exposure based on Centers for Disease Control and Prevention guidance that individuals with asthma were at a greater risk of serious illness from contracting COVID-19.<sup>296</sup>
- An immunocompromised worker requested to continue the remote work he had performed for several months based on his doctor's recommendation to avoid the COVID-19-exposure risk associated with on-site work.<sup>297</sup>
- A college professor with severe lung and heart conditions was forced to return to teaching in person and alleged the university said it would deny all remote work requests for COVID-19-related disabilities.<sup>298</sup>

In the second group, workers have more standard disability accommodation requests and are asking to continue working from home, as they had done under their employers' COVID-19 policies. The following examples illustrate this point:

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294. See East, *supra* note 52.

295. See Class Action Complaint & Jury Demand, *Borodaenko*, *supra* note 285, at 6.

296. See *Peebles v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 59–60 (D. Mass. 2020).

297. See *Gentile v. County of DuPage*, 583 F. Supp. 3d 1167, 1169–70 (N.D. Ill. 2022).

298. See Erin Mulvaney, *University Accused of Denying Pandemic ADA Telework Requests*, BLOOMBERG L., DAILY LAB. REP. (July 12, 2021, 2:00 PM), <https://news.bloomberglaw.com/daily-labor-report/university-accused-of-denying-pandemic-ada-telework-requests> [<https://perma.cc/8YQ6-5NXP>]; see also *Goldman v. Sol Goldman Invs.*, No. 1:20-cv-06727, 2022 WL 4482296, at \*1 (S.D.N.Y. Sept. 27, 2022) (requesting extended at-home litigation practice due to COVID risk from medical conditions); *Williams v. Md. Dep't of Health*, No. 1:21-cv-01988, 2021 WL 6074290, at \*1 (D. Md. Dec. 22, 2021) (requesting extended remote work based on "underlying conditions that predisposed him to COVID-19 complications"), *appeal filed*, No. 22-1074 (4th Cir. Jan. 21, 2022); Amended Complaint at 6–9, *Barker v. N.H. Catholic Charities, Inc.*, No. 1:21-cv-00845 (D.N.H. Dec. 14, 2021), ECF No. 10 (requesting additional remote work based on being immunocompromised because of cancer); Complaint at 3, 5, *McCummings v. Marion Cnty. Sch. Dist.*, No. 4:21-cv-02965 (D.S.C. Sept. 15, 2021), ECF No. 1 (requesting to teach from home due to high COVID risk from health conditions); *Miller v. BrightKey, Inc.*, Civil No. JKB-21-0095, 2021 WL 3129635, at \*1 (D. Md. July 22, 2021) (requesting additional remote work accommodations based on COVID risks from diabetes and hypertension); Complaint at 4–6, *Jordan v. Crossroads Care Ctr. of Kenosha LLC*, No. 21-cv-368 (E.D. Wis. Mar. 23, 2021), ECF No. 1 (requesting extended remote work based on COVID risks due to a high risk pregnancy and gestational diabetes); First Amended Complaint at 1–2, *Thomas v. Bridgeport Bd. of Educ.*, No. 3:20-cv-01487, 2020 WL 12188900, at \*1–2 (D. Conn. Nov. 19, 2020) (requesting to continue to teach remotely due to COVID risk from central nervous system disorder).

- A social worker with agoraphobia and other impairments worked at home for several months during the pandemic and requested to continue doing so to accommodate her condition.<sup>299</sup>
- An employee was diagnosed with cancer after she had worked remotely during the pandemic and returned to the office.<sup>300</sup> The treatment left her with permanent complications, and she requested remote work as an accommodation.<sup>301</sup>
- A man with difficulty walking had surgery in late 2019 and remained on medical leave until June 2020.<sup>302</sup> After returning from leave, he worked from home due to COVID-19 for at least a month.<sup>303</sup> His employer then required him to return to the office, which caused pain from his difficulty walking.<sup>304</sup>

In all these cases, workers relied on evidence of their and others' experience working from home during the pandemic to support their claims that additional remote work is reasonable and not unduly burdensome.<sup>305</sup>

To help guide employers, the EEOC issued broad COVID-19 guidance presented in a question-and-answer format.<sup>306</sup> In September 2020, the EEOC answered two key questions regarding remote work accommodations.<sup>307</sup> The first question was whether an employer, after recalling employees to the worksite, was required to automatically grant a remote work accommodation to every employee with a disability.<sup>308</sup> The EEOC responded "No" and then explained a few points in detail:

- "If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation."<sup>309</sup>

299. See Complaint & Demand for Jury Trial at 2–4, *Loftus v. Sch. Bd. of Lee Cnty., Fla.*, No. 2:21-cv-261 (M.D. Fla. Mar. 26, 2021), ECF No. 1.

300. See *Wright v. Blackman*, No. 21-14244-CV, 2022 WL 602381, at \*1–2 (S.D. Fla. Feb. 7, 2022).

301. *Id.*

302. See *Coleman v. N.Y. City Dep't of Health & Mental Hygiene*, 20cv10503, 2022 WL 704304, at \*1, \*4 (S.D.N.Y. Mar. 9, 2022).

303. *Id.*

304. See *id.*; see also *Milteer v. Navarro County*, No. 3:21-CV-2941, 2022 WL 1321555, at \*1 (N.D. Tex. May 3, 2022) (worker who had surgery during pandemic requested remote work during his recovery and was denied, even though other employees worked remotely). For many other examples of disability-related discrimination complaints arising out of rejected remote work accommodations, see East, *supra* note 52.

305. See *Milteer*, 2022 WL 1321555, at \*1–2; *Coleman*, 2022 WL 704304, at \*1, \*4; *Wright*, 2022 WL 602381, at \*6–7; *Gentile v. County of DuPage*, 583 F. Supp. 3d 1167, 1169–70 (N.D. Ill. 2022); *Williams v. Md. Dep't of Health*, No. 1:21-cv-01988, 2021 WL 6074290, at \*1 (D. Md. Dec. 22, 2021), *appeal filed*, No. 22-1074 (4th Cir. Jan. 21, 2022); *Thomas v. Bridgeport Bd. of Educ.*, No. 3:20-cv-01487, 2020 WL 12188900, at \*2 (D. Conn. Nov. 19, 2020); *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 60 (D. Mass. 2020); Complaint & Demand for Jury Trial, *Loftus*, *supra* note 299, at 3–4; Complaint, *Jordan*, *supra* note 298, at 6.

306. EEOC COVID Guidance, *supra* note 124.

307. See *id.* ¶¶ D.15, D.16.

308. See *id.* ¶ D.15.

309. *Id.*

- “[I]f there is a disability-related limitation but the employer can effectively address the need with another . . . accommodation[,] . . . then the employer can choose that alternative to telework.”<sup>310</sup>
- If the employer’s COVID-19-related remote work arrangements have involved excusing an employee from an essential job function, the employer is not required to continue to excuse that because the ADA “never requires an employer to eliminate an essential function as an accommodation.”<sup>311</sup> Temporarily excusing the performance of an essential job function “does not mean that the employer permanently changed a job’s essential functions.”<sup>312</sup>

The second question the EEOC answered involves an employee who, pre-pandemic, had been denied a remote work accommodation because the employer determined that the employee could not perform the essential job functions remotely.<sup>313</sup> If the employer recalls workers to the office and then the employee renews the request for remote work accommodations, can the employer again refuse the request?<sup>314</sup> The answer here states that the employee’s pandemic remote work experience “could be relevant” in considering the new request.<sup>315</sup> “[T]he period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information.”<sup>316</sup>

The response to the EEOC’s COVID-19 guidance has been mixed. Though some have viewed it as a balanced approach,<sup>317</sup> others believe the EEOC did not go far enough.<sup>318</sup> Brian East, a senior attorney with Disability Rights Texas, put it this way: “Unfortunately, the wording and organization of the EEOC’s response on this topic could be read to suggest that continued telework is rarely required. In our experience, many stakeholders *did* read it that way.”<sup>319</sup> Or, as Law360 summarized, “the new [C]ommission guidance suggests the landscape won’t change.”<sup>320</sup>

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* ¶ D.16.

314. *Id.*

315. *Id.*

316. *Id.*

317. *See, e.g.,* Perez-Yanez, *supra* note 287.

318. *See, e.g.,* East, *supra* note 52; Kanter, *supra* note 12, at 1959 n.105, 1992–2000 (proposing changes to EEOC COVID Guidance); Wagstaff & Quasius, *supra* note 128.

319. East, *supra* note 52.

320. Cullen, *supra* note 126; *see also* Alicia H. Koepke, *Accommodating Mental Disabilities During and After the Pandemic*, 95 FLA. BAR J. 48, 50 (2021) (quoting EEOC guidance to somewhat allay employer concerns that the pandemic might change the “general consensus among courts that regular work-site attendance is an essential function of most jobs” (internal quotation marks and alterations omitted)); *Peterie v. Leidos, Inc.*, No. 3:21-cv-042, 2022 WL 4586433, at \*9 n.8 (S.D. Ohio Sept. 29, 2022) (rejecting plaintiff’s argument that employer’s COVID-19 remote work was evidence that her request for remote work was reasonable based solely on the EEOC’s statement that pandemic telework does not mean that remote work is always feasible). *But see* Perez-Yanez, *supra* note 287 (“The EEOC’s remarks place the burden on the employer to demonstrate that

The EEOC sent a stronger signal in September 2021. It sued an employer who refused to allow Ronisha Moncrief, an employee with chronic obstructive lung disease and hypertension, to continue partially working remotely after the office reopened, even though other employees continued remote work.<sup>321</sup> This is the first suit the EEOC filed involving a COVID-19-related request for remote work.<sup>322</sup> Commentators viewed this suit as an indicator that the EEOC will take special care to scrutinize employer's denials of remote work requests, especially when the employee worked from home during the pandemic.<sup>323</sup>

With post-pandemic remote work litigation on the rise, and considering what we have learned about remote work during the pandemic, how should courts evaluate these claims?

### *B. Courts Should Change Evidentiary Practices in Remote Work Litigation*

Much of the failure of remote work as a reasonable accommodation is rooted in evidentiary practices that routinely work to the disadvantage of employees—the presumption against remote work, outsized deference to employer judgment, reliance on blanket policies and preferences, and devalued or ignored employee evidence. As previously discussed, each of these practices is flawed on its own terms and, whether individually or in combination, has unjustly deprived most federal court plaintiffs a fair shake at having their day in court.<sup>324</sup>

But even if these prior evidentiary practices were correct at the time, they are indefensible after what we learned during the pandemic. Contrary to the presumption that almost no jobs can be done from home, we now know that over one-third can be performed entirely from home,<sup>325</sup> and many others can surely be performed partially from home. Employer judgment that employees generally cannot be trusted to work from home, that essential functions must be performed on-site, that employees cannot be supervised remotely, and that teamwork can only be accomplished face-to-face has turned out, in many cases, to be blatantly wrong.<sup>326</sup> Employers had to rejudge. Their blanket policies and preferences against working from home or for tightly regulating access to remote work programs went out the window. They had to figure out how to adjust them to meet the needs of their business and their workers. And workers now have

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continued telework impairs the employee from performing essential job functions and places an undue hardship on the company.”).

321. See Complaint at 4–6, *EEOC v. ISS Facility Servs., Inc.*, No. 1:21-cv-03708 (N.D. Ga. Sept. 7, 2021), ECF No. 1.

322. Press Release, EQUAL EMP. OPPORTUNITY COMM’N, *EEOC Sues ISS Facility Services for Disability Discrimination* (Sept. 7, 2021), <https://www.eeoc.gov/newsroom/eeoc-sues-iss-facility-services-disability-discrimination> [<https://perma.cc/WT6W-NWJC>].

323. See 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/82P7-9TKT>]; see also Reeves & Carney, *supra* note 127 (“As expected, the EEOC is now attempting to use an employer’s previous remote working arrangements during the COVID-19 pandemic as evidence that employees should have been permitted to continue to accomplish the essential functions of their employment in a remote capacity.”).

324. See *supra* Part III.B.

325. See *supra* note 16 and accompanying text.

326. See *supra* notes 44–50 and accompanying text.

a wealth of experience and knowledge to draw on.<sup>327</sup> They know how to make their jobs work from home and what is simply unworkable.<sup>328</sup> They know what helped them be productive and what interfered with their productivity, such as school closures or an obsolete computer.<sup>329</sup>

Much of the prior case law is based on generalities and assumptions, not on actual evidence relating to a specific employee's circumstances. The pandemic remote work experiment has generated mountains of data to challenge these big-picture assumptions about what is generally feasible in the workplace.<sup>330</sup> It has also provided small-scale evidence about specific companies, industries, jobs, and employees managing remote work. Courts themselves are workplaces that went online during the pandemic.<sup>331</sup> This newfound understanding of what is (and what is not) workable should go beyond the emergency of COVID-19. Employers and courts both should be forced to evaluate remote work requests in light of this evidence, rather than just categorically ignoring what happened during the COVID-19 pandemic as the product of an emergency with no relevance to ordinary circumstances.<sup>332</sup>

This is not to say that every remote work accommodation request should be granted. Employers might offer an alternative reasonable accommodation, which they are entitled to do. Some jobs simply cannot be performed off-site. And as the EEOC guidance recognizes, employers might have had to make temporary sacrifices to ensure worker safety and comply with lockdown orders.<sup>333</sup> Temporarily excusing an employee from performing an essential function that cannot be done at home does not lock the employer into excusing that duty forever—assuming that the function at issue is actually essential. But what if the pandemic remote work experience reveals that the duty was not essential after all and that the employer's judgment was wrong? For example, an employer might have insisted that in-person meetings between its sales agents and its customers were essential to maintain a productive sales relationship. However, after eighteen months of remote work, its employees' sales figures were higher than ever; not only did they not lose any customers, they gained five new ones. That would be evidence that the duty of conducting in-person sales meetings was not, in fact, essential.

The full range of relevant evidence should be discoverable and usable in assessing issues such as which functions are essential, which can be performed off-site, the overall reasonableness of the accommodation request, and whether the accommodation request

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327. See *supra* note 16 and accompanying text.

328. See *supra* note 16 and accompanying text.

329. See *infra* Part IV.A.

330. See Dorrian & Iafolla, *supra* note 131; Eisenstadt, *supra* note 127; Hickox & Liao, *supra* note 5, at 26; Travis, *Post-Pandemic*, *supra* note 12, at 229.

331. See Deutsch, *supra* note 12, at 123 (“[A]fter the pandemic, courts—whose own chambers likely had to rely on technologies like videoconferencing during the pandemic—should recognize that teleworking is more feasible than previously understood.”); Dorrian & Iafolla, *supra* note 131 (“Judges may be more empathetic to requests for telework accommodations based on their experiences during the pandemic . . .”).

332. See Eisenstadt, *supra* note 127; Porter, *Working While Mothering*, *supra* note 12, at 22–23; Travis, *Post-Pandemic*, *supra* note 12, at 203.

333. EEOC COVID Guidance, *supra* note 124, ¶ D.15.

would impose an undue hardship in terms of cost and logistics. Depending on the particular case, several relevant factors could be at play:

- Did this employee work from home during the pandemic?
- Did other employees with comparable relevant job duties work from home?
- How did the plaintiff and other comparable employees logistically carry out their job functions at home?
- How effective were they at performing these functions remotely? If the plaintiff had a less than ideal remote work experience during the pandemic, were there any extenuating circumstances that might differ in future remote work situations, such as illness, lack of childcare, or delays in procuring appropriate equipment?
- Did the employer excuse the plaintiff or other relevant employees from performing any job duties?
- When the office reopened, did the employer reinstate the excused duties? What impact, if any, did excusing certain duties have?
- Did the employer invest in technology or make other permanent changes for employees to work from home?
- Did the employer change its remote work policy after reopening?

This is all to say that the evidence should be assessed fully, case-by-case. It should be a nuanced determination of what is reasonable in each particular case, not generally. Presumptions against remote work should be gone. Employer judgment is not more important than any other consideration. Blanket policies and preferences do not exclude considering adjustments that might make an individual circumstance workable. Employees' evidence should be given full, equal consideration.

For too long, many employers have automatically denied work-from-home requests, and—in their haste to leave the pandemic behind—many continue to deny remote work accommodations. The pandemic experience and the evidence it generated should make it much harder for employers to get by with such reflexive responses.<sup>334</sup> Defense lawyers are cautioning employers to assess remote work accommodation

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334. See Eisenstadt, *supra* note 127; Kanter, *supra* note 12, at 1999–2000; Mulvaney, *Office Culture War*, *supra* note 13; Schur et al., *supra* note 4; Strickland, *supra* note 323.

requests carefully rather than issuing blanket denials as they have before.<sup>335</sup> By doing so, they are saying the quiet part out loud: that employers for too long have done just that.<sup>336</sup>

Courts, of course, play a vital role in forcing employers to appropriately justify any remote work accommodation denials. Commentators predict that courts will more closely scrutinize the details of remote work accommodation claims and that employees might start winning more often.<sup>337</sup> The point is not to privilege employees but to level the playing field so that plaintiffs have a fair chance.

### C. Post-Pandemic Remote Work Litigation Trends

It is one thing to say that courts should change their ways based on the evidence generated from the great work-at-home experiment. It is quite another thing to see if courts will actually do so. I looked at all federal court decisions I could find addressing off-site work accommodations issued between April 2020 and December 2022, whether those cases involved pre-pandemic or post-pandemic facts.<sup>338</sup> In this Part, I will base all analysis on the combined pool of cases that include both pre- and post-pandemic facts unless I specifically indicate otherwise. Though it is still early days considering the lifespan of lawsuits, some patterns appear to be emerging.

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335. See Jaelyn S. Clark, *Remote Work Accommodation Requests in a Post-COVID World: How “Essential” is the Office Anyway?*, BAILEY GLASSER LLP (Nov. 2, 2021), <https://www.baileyglasser.com/news-remote-work-accommodation-request-labor-employment-office> [<https://perma.cc/7T5S-VWCG>]; Alexander Bogdan, *Back to Business After COVID-19: Addressing Disability Accommodation Requests in New York*, FOX ROTHSCHILD LLP (Apr. 2020), <https://foxrothschild.gjassets.com/content/uploads/2020/04/Fox-Rothschild-Alert-April-2020-Back-to-Business-After-COVID-19-Addressing-Disability-Accommodation-Requests-in-New-York.pdf> [<https://perma.cc/T8UG-LTYN>]; Cecily Kaya, *In-Person, Predictable Attendance Was an Essential Job Function*, SOC’Y HUM. RES. MGMT. (June 29, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/court-report-in-person-predictable-attendance.aspx> [<https://perma.cc/7DFW-2NKM>]; Litzinger & McWilliams, *supra* note 287; Devjani H. Mishra, *Disability Accommodation and COVID-19: Ten Emerging Issues to Consider*, LITTLER (Apr. 28, 2022), <https://www.littler.com/publication-press/publication/disability-accommodation-and-covid-19-ten-emerging-is-sues-consider> [<https://perma.cc/SJE4-62LD>]; Nichols & Melo, *supra* note 32; Reeves & Carney, *supra* note 127; Erica N. Reib, *COVID-19 and Employment-Related Claims*, 94 WIS. LAW. 43, 45 (2021).

336. See Federico, *supra* note 293 (stating that employers should engage in the interactive process “before summarily denying the request” to work from home due to COVID risks); Mishra, *supra* note 335 (noting that it was “routine” for employers to argue that physical attendance was required for most jobs and that “it will be more difficult to rely on blanket assumptions” going forward); Mulvaney, *Office Culture War*, *supra* note 13 (quoting employer-side attorney: “There are employers that are eager to return to a new normal, but they can no longer knee jerk say no.” (emphasis added)); Reeves & Carney, *supra* note 127 (counseling employers that they “should no longer take a blanket approach to work-from-home requests”).

337. See, e.g., Clayton Halunen, *COVID-19—Is Working from Home a “Reasonable Accommodation” Under the Americans with Disabilities Act?*, HALUNEN L. (May 11, 2021), <https://www.halunenlaw.com/covid-19-is-working-from-home-a-reasonable-accommodation-under-the-americans-with-disabilities-act/> [<https://perma.cc/TNH4-GL3Q>]; Wagstaff & Quasius, *supra* note 128.

338. Of course, reviewing only written decisions can produce skewed results because, as Judge Gertner explained, federal practice favors “written decisions only when plaintiffs lose.” Gertner, *supra* note 155, at 114. Nevertheless, reviewing these decisions still provides valuable insights.

### 1. Reluctance to Discuss COVID-19

First, courts seem reluctant to discuss the COVID-19 pandemic. Of the sixty cases involving pre-COVID-19 case facts, fifty-two made no mention of COVID-19.<sup>339</sup> Even if not strictly relevant to the issues under consideration, discussing remote work

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339. See *Mobley v. St. Luke's Health Sys., Inc.*, 53 F.4th 452, 455–58 (8th Cir. 2022); *Sugg v. City of Sunrise*, No. 20-13884, 2022 WL 4296992, at \*7–10 (11th Cir. Sept. 19, 2022); *Houston v. Tex. Dep't of Agric.*, 17 F.4th 576, 584–85 (5th Cir. 2021); *Smith v. CSRA*, 12 F.4th 396, 414–15 (4th Cir. 2021); *Murphy v. County of Hanover*, No. 21-1471, 2021 WL 4704780 (4th Cir. Oct. 8, 2021); *Brown v. Austin*, 13 F.4th 1079 (10th Cir. 2021); *Lane v. Ball*, 854 F. App'x 111 (8th Cir. 2021); *Unrein v. PHC-Fort Morgan, Inc.*, 993 F.3d 873 (10th Cir. 2021); *Bethscheider v. Westar Energy*, 820 F. App'x 749 (10th Cir. 2020); *Trahan v. Wayfair Me., LLC*, 957 F.3d 54 (1st Cir. 2020); *Vogl v. Homeland at Home*, Civil Action No. 1:19-924, 2022 WL 5237275, at \*3 (M.D. Pa. Oct. 4, 2022); *Gonzalez v. Dhillon*, No. 20 C 2111, 2022 WL 4448740, at \*7–8 (N.D. Ill. Sept. 23, 2022); *Suarez v. Del Toro*, No. 22-cv-0021, 2022 WL 4112230, at \*12 (S.D. Cal. Sept. 8, 2022); *Johnson v. Cirrus Educ. Grp., Inc.*, Civil Action No. 5:20-cv-256, 2022 WL 4003871, at \*1, \*5–6 (M.D. Ga. Sept. 1, 2022); *Martin v. Austin*, Civ. No. 21-00284, 2022 WL 3043672, at \*11–13 (D. Haw. Aug. 2, 2022); *Lavy v. McDonough*, No. 2:21-cv-1590, 2022 WL 2805984, at \*1 (E.D. Cal. July 18, 2022); *Dixon-Tribou v. McDonough*, \_\_\_ F. Supp. 3d \_\_\_, No. 2:20-cv-00379, 2022 WL 2713518, at \*16–17 (D. Me. July 13, 2022), *appeal filed*, No. 22-1696 (1st Cir. Sept. 13, 2022); *Mullin v. Sec'y, U.S. Dep't Veterans Affs.*, No. 8:20-cv-2697, 2022 WL 2159721 (M.D. Fla. June 15, 2022); *Buckmaster v. Nat'l R.R. Passenger Corp.*, Civil Action No. 19-3202, 2022 WL 1081947 (D. Md. Apr. 11, 2022); *Wallace v. Wormuth*, No. 18-CV-6525, 2022 WL 993064, at \*11–13 (S.D.N.Y. Mar. 31, 2022); *King v. McDonough*, 596 F. Supp. 3d 206 (D. Mass. 2022); *Lee v. Saul*, 20 Civ. 2956, 2022 WL 873511, at \*7–9 (S.D.N.Y. Mar. 23, 2022), *appeal filed sub nom. Lee v. Kijakazi*, No. 22-1246, 2022 WL 873511 (2d Cir. Jun. 3, 2022); *Spanel v. Cent. Cmty. Coll.*, 8:18-CV-380, 2022 WL 310153 (D. Neb. Feb. 2, 2022), *appeal dismissed*, No. 22-1458, 2022 WL 3970925 (8th Cir. Mar. 17, 2022); *Mehta v. City of New York*, 1:19-cv-03857, 2022 WL 280460, at \*13 (E.D.N.Y. Jan. 31, 2022); *Brooks v. U.S. Dep't of Veterans Affs.*, No. 20-cv-23114, 2021 WL 5759345, at \*5–6 (S.D. Fla. Dec. 3, 2021); *Des Jardins v. Cmty. Action Alger Marquette*, No. 2:19-cv-252, 2021 WL 5054039, at \*4 (W.D. Mich. Sept. 23, 2021); *Campbell v. IPsoft*, 18cv10684, 2021 WL 4248861 (S.D.N.Y. Sept. 17, 2021); *Call v. Panchanathan*, Civil Action No. 1:20-cv-260, 2021 WL 4206423 (E.D. Va. Sept. 15, 2021), *appeal dismissed*, No. 21-2291, 2022 WL 1554985 (4th Cir. Apr. 26, 2022); *Davenport v. Del Toro*, Civil No. 1:16-CV-0494, 2021 WL 7906652 (M.D. Pa. Sept. 10, 2021); *Smith v. McCarthy*, Civil Action No. ELH-20-419, 2021 WL 4034193, at \*21–22 (D. Md. Sept. 3, 2021); *Perkins-Moore v. McDonough*, No. 4:19 CV 1892, 2021 WL 3885564, at \*3–4 (E.D. Mo. Aug. 31, 2021); *Katz v. U.S. Dep't of Just.*, Civil Action No. 1:20-cv-554, 2021 WL 3809034, at \*7 (E.D. Va. Aug. 26, 2021); *Haas v. Adtegrity.com, Inc.*, Case No. 1:21-cv-167, 2021 WL 4087798 (W.D. Mich. Aug. 23, 2021); *Snyder v. Neb. Med. Ctr.*, 8:20CV196, 2021 WL 3511142, at \*5–7 (D. Neb. Aug. 10, 2021); *Richardson v. Wolf*, No. 1:17-cv-1588, 2021 WL 3507741, at \*5–7 (D.D.C. July 23, 2021); *Plank v. Great Am. Fin. Res., Inc.*, No. 1:19-cv-935, 2021 WL 3089374 (S.D. Ohio July 22, 2021); *Kelso v. Perdue*, No. 19-cv-3864, 2021 WL 3507683 (D.D.C. July 12, 2021); *Stephens v. Big Spring Herald, Inc.*, No. 1:19-CV-123, 2021 WL 3030064, at \*9–10 (N.D. Tex. Mar. 29, 2021); *Brizzi v. Utica Mut. Ins. Co.*, 529 F. Supp. 3d 44, 54–56 (E.D.N.Y. 2021); *Ruddy v. Online Tech LLC*, 2:18-CV-12972, 2021 WL 807875 (E.D. Mich. Mar. 3, 2021); *EEOC v. K&L Auto Crushers, LLC*, Civil Action No. 6:20-CV-00455, 2021 WL 391313, at \*5–6 (E.D. Tex. Feb. 1, 2021); *Forslund v. Nat'l Tech. & Eng'g Sols. of Sandia, LLC*, 516 F. Supp. 3d 1285 (D.N.M. 2021); *Warwick v. Bd. of Cnty. Comm'rs*, Civil Action No. 19-cv-00299, 2021 WL 5547057 (D. Colo. Jan. 6, 2021); *Kande v. Dimensions Health Corp.*, No. GJH-18-2306, 2020 WL 7054771 (D. Md. Dec. 2, 2020); *Camacho v. McCarthy*, No. EDCV 15-2043, 2020 WL 8028848, at \*5 (C.D. Cal. Nov. 20, 2020); *Ryerson v. Jefferson Cnty. Comm'n*, Civil Action No. 2:18-CV-01439, 2020 WL 6701797, at \*1 (N.D. Ala. Nov. 13, 2020), *aff'd*, No. 20-14684, 2021 WL 3629906, at \*1–3 (11th Cir. Aug. 17, 2021); *Schlater v. Arthritis, Rheumatic & Back Disease Assocs.*, 1:18-cv-09778, 2020 WL 5793686, at \*8–12 (D.N.J. Sept. 29, 2020); *Freeman v. Learning Care Grp.*, No. 18-CV-13720, 2020 WL 4903780 (E.D. Mich. Aug. 20, 2020); *Urduy v. Tex. Mut. Ins. Co.*, No. 1:18-CV-1048, 2020 WL 9809988, at \*8 (W.D. Tex. July 16, 2020); *Contreras v. McCarthy*, No. 2:14-cv-01282, 2020 WL 3977873, at \*5–7 (E.D. Cal. July 13, 2020); *Burke v. DePuy Synthes Cos.*, Civil Action No. 18-cv-2068, 2020 WL 3542246 (E.D. Pa. June 30, 2020); *Phillips v. Harbor Venice Mgmt., LLC*, No. 8:19-cv-2379, 2020 WL 2735201, at \*5–6 (M.D. Fla. May 26, 2020).

accommodations while ignoring the unprecedented amount of remote work going on seems to be a bit of a disconnect. Two cases acknowledged the elephant in the room, making statements about “travel[ing] back to that pre-COVID-19 world”<sup>340</sup> and about how an employer “could not technically accommodate remote work—quaint as that may seem to us now during this extraordinary era of pandemic-necessitated remote work.”<sup>341</sup> Only one court seemed to hint that the pandemic might change things, noting “that remote work is a regular part of many different fields, a reality that has grown even more prevalent since the Covid-19 Pandemic.”<sup>342</sup>

The final five cases, though involving pre-pandemic case facts, specifically addressed pandemic-related evidentiary issues and will be discussed below.<sup>343</sup> Even in cases involving post-pandemic facts, courts may just mention COVID-19 in passing if at all.<sup>344</sup> As will be shown soon, many other cases involved COVID-19-specific issues requiring more discussion by the courts, but almost none of them make any attempt to analyze how the pandemic remote work experience might or might not affect the law.<sup>345</sup>

## 2. Litigation Success Rates

Second, employees appear to be winning more than pre-pandemic. In the sixty-five cases involving remote work accommodations where the court (1) decided a motion to dismiss or motion for summary judgment on the accommodation claim, (2) ruled on an injunction request, or (3) reviewed a remote work accommodation decision on appeal, employers prevailed thirty-three times,<sup>346</sup> and employees prevailed in the other

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340. *Brownlow v. Alfa Vision Ins. Co.*, 527 F. Supp. 3d 951, 953 (M.D. Tenn. 2021).

341. *Frantti v. New York*, 850 F. App'x 17, 20 (2d Cir. 2021).

342. *Turner v. Bd. of Supervisors of Univ. of La. Sys.*, No. 21-664, 2022 WL 4482642, at \*6 (E.D. La. Sept. 27, 2022); *see also* *Brackett v. Mayorkas*, Civil Action No. 17-988, 2021 WL 5711936, at \*1 (D.D.C. Dec. 2, 2021) (“Although the COVID-19 pandemic brought remote work to the fore, this employment suit is proof that workplace disputes about telecommuting arose long before the pandemic’s onset.”).

343. *See infra* notes 371–377 and accompanying text.

344. *See* *Gentile v. County of DuPage*, 583 F. Supp. 3d 1167, 1169 (N.D. Ill. 2022) (“When the COVID-19 pandemic hit, Gentile—like millions of people worldwide—started teleworking.”). Several courts mention COVID-19 factually as part of the case but do not discuss it in analyzing the case. *See* *Russo v. Moore Ingram Johnson & Steele, LLP*, No. 3:20-cv-00820, 2022 WL 1787102, at \*14–15 (M.D. Tenn. June 1, 2022); *Ratliff v. AT&T Servs., Inc.*, No. 20-2483, 2022 WL 579253, at \*7 (D. Kan. Feb. 25, 2022); *Mundy v. Bd. of Regents*, No. 20-cv-847, 2022 WL 103562, at \*4–5, \*7 (W.D. Wis. Jan. 11, 2022); *Burbach v. Arconic Corp.*, 561 F. Supp. 3d 508, 518–21 (W.D. Pa. Sept. 22, 2021); *Miller v. BrightKey, Inc.*, Civil No. 21-0095, 2021 WL 3129635, at \*1, \*9 (D. Md. July 22, 2021). One court completely ignored COVID-19. *See* *Lewis v. T-Mobile USA, Inc.*, 1:21-cv-00224, 2021 WL 6135558, at \*2–4 (D. Me. Dec. 29, 2021).

345. *See* *Coleman v. N.Y. City Dep’t of Health & Mental Hygiene*, 20cv10503, 2022 WL 704304, at \*4 n.3 (S.D.N.Y. Mar. 9, 2022) (“Whether the option to work from home . . . ha[s] survived as the pandemic recedes is not an issue that may be resolved on a motion to dismiss.”).

346. *See* *Mobley v. St. Luke’s Health Sys., Inc.*, 53 F.4th 452, 455–58 (8th Cir. 2022); *Turner*, 2022 WL 4482642, at \*6; *Houston v. Tex. Dep’t of Agric.*, 17 F.4th 576, 584–85 (5th Cir. 2021); *Brown v. Austin*, 13 F.4th 1079, 1083, 1087 (10th Cir. 2021); *Smith v. CSRA*, 12 F.4th 396, 414–15 (4th Cir. 2021); *Ryerson v. Jefferson Cnty. Comm’n*, No. 20-14684, 2021 WL 3629906, at \*1–3 (11th Cir. Aug. 17, 2021); *Lane v. Ball*, 854 F. App'x 111, 112–13 (8th Cir. 2021); *Unrein v. PHC-Fort Morgan, Inc.*, 993 F.3d 874, 877–79 (10th Cir. 2021); *Frantti*, 850 F. App'x at 18, 20; *Bethscheider v. Westar Energy*, 820 F. App'x 749, 750, 752–53 (10th Cir. 2020); *Trahan v. Wayfair Me., LLC*, 957 F.3d 54, 56, 64–67 (1st Cir. 2020); *Peterie v. Leidos, Inc.*, No. 3:21-cv-042, 2022 WL 4586433, at \*8–10 (S.D. Ohio Sept. 29, 2022); *Thomas v. Bridgeport Bd. of Educ.*, No. 3:20-cv-01487, 2022 WL 3646175, at \*1 (D. Conn. Aug. 24, 2022); *Dixon-Tribou v. McDonough*, \_\_\_ F. Supp.

thirty-two cases.<sup>347</sup> Prevailing here means the plaintiffs at least survived to continue litigating their case. Surviving thirty-two of sixty-five times is 49.2%, and that is not

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3d \_\_, No. 2:20-cv-00379, 2022 WL 2713518, at \*16–17 (D. Me. July 13, 2022), *appeal filed*, No. 22-1696 (1st Cir. Sept. 13, 2022); Buckmaster v. Nat'l R.R. Passenger Corp., No. RDB-19-3203, 2022 WL 1081947, at \*1, \*9–10 (D. Md. Apr. 11, 2022); King v. McDonough, 596 F. Supp. 3d 206, 212, 221–22 (D. Mass. 2022); Lee v. Saul, 20 Civ. No. 2956, 2022 WL 873511, at \*7–9 (S.D.N.Y. Mar. 23, 2022), *appeal filed sub nom.* Lee v. Kijakazi, No. 22-1246, 2022 WL 873511 (2d Cir. Jun. 3, 2022); Spanel v. Cent. Cmty. Coll., No. 18-CV-380, 2022 WL 310153, at \*22–26 (D. Neb. Feb. 2, 2022), *appeal dismissed*, No. 22-1458, 2022 WL 3970925 (8th Cir. Mar. 17, 2022); Mundy, 2022 WL 103562, at \*7; Montague v. U.S. Postal Serv., No. H-20-4329, 2022 WL 35825, at \*1–3 (S.D. Tex. Jan. 4, 2022); Williams v. Md. Dep't of Health, Civil Case No.: 1:21-cv-01988-JMC, 2021 WL 6074290, at \*1, \*4–7 (D. Md. Dec. 22, 2021), *appeal filed*, No. 22-1074 (4th Cir. Jan. 21, 2022); Geter v. Schneider Nat'l Carriers, Inc., No. 1:20-CV-1148, 2021 WL 8200818, at \*1, \*15–25 (N.D. Ga. Dec. 10, 2021); Brooks v. U.S. Dep't of Veterans Affs., No. 20-cv-23114, 2021 WL 5759345, at \*5–6 (S.D. Fla. Dec. 3, 2021); Des Jardins v. Cmty. Action Alger Marquette, No. 2:19-cv-252, 2021 WL 5054039, at \*4 (W.D. Mich. Sept. 23, 2021); Call v. Panchanathan, No. 20-cv-260, 2021 WL 4206423, at \*1, \*5–6 (E.D. Va. Sept. 15, 2021), *appeal dismissed*, No. 21-2291, 2022 WL 1554985 (4th Cir. Apr. 26, 2022); Snyder v. Neb. Med. Ctr., No. 8:20CV196, 2021 WL 3511142, at \*5–7 (D. Neb. Aug. 10, 2021); Richardson v. Wolf, No. 1:17-cv-1588, 2021 WL 3507741, at \*5–7 (D.D.C. July 23, 2021); Urdy v. Tex. Mut. Ins. Co., No. 1:18-CV-1048, 2020 WL 9809988, at \*8 (W.D. Tex. July 16, 2020); Contreras v. McCarthy, No. 2:14-cv-01282, 2020 WL 3977873, at \*5–7 (E.D. Cal. July 13, 2020); Kelso v. Perdue, No. 19-cv-3864, 2021 WL 3507683, at \*1, \*8–9 (D.D.C. July 12, 2021); Maffett v. City of Columbia, No. 3:19-832, 2021 WL 4596659, at \*1, \*17–20 (D.S.C. Apr. 19, 2021), *appeal filed*, No. 21-2164 (4th Cir. Oct. 18, 2021); Forslund v. Nat'l Tech. & Eng'g Sols. of Sandia, LLC, 516 F. Supp. 3d 1285, 1287, 1289–92 (D.N.M. 2021); Burke v. DePuy Synthes Cos., No. 18-cv-2068, 2020 WL 3542246, at \*1, \*7–11 (E.D. Pa. June 30, 2020). It is worth noting that in both *Mobley* and *Turner*, though the employer ultimately won, the court determined that there was a fact issue regarding whether the employee could perform the essential functions of the job at home. See *Mobley*, 53 F.4th at 457–58; *Turner*, 2022 WL 4482642, at \*6.

347. See *Laguette v. Nat'l Grid USA*, No. 20-3901-cv, 2022 WL 728819, at \*1–5 (2d Cir. Mar. 11, 2022); *Vogl v. Homeland at Home*, Civil Action No. 1:19-924, 2022 WL 5237275, at \*4 (M.D. Pa. Oct. 4, 2022); *Gonzalez v. Dhillon*, No. 20 C 2111, 2022 WL 4448740, at \*8 (N.D. Ill. Sept. 23, 2022); *Suarez v. Del Toro*, No. 22-cv-0021, 2022 WL 4112230, at \*1, \*5–7 (M.D. Pa. Sept. 8, 2022); *Martin v. Austin*, Civ. No. 21-00284, 2022 WL 3043672, at \*11–13 (D. Haw. Aug. 2, 2022); *Lavy v. McDonough*, No. 2:21-cv-1590, 2022 WL 2805984, at \*1 (E.D. Cal. July 18, 2022); *Russo v. Moore Ingram Johnson & Steele, LLP*, No. 3:20-cv-00820, 2022 WL 1787102, at \*14–15 (M.D. Tenn. June 1, 2022); *Coleman*, 2022 WL 704304, at \*1, \*4; *Arazi v. Cohen Bros. Realty Corp.*, No. 1:20-cv-8837, 2022 WL 912940, at \*1, \*6–8 (S.D.N.Y. Mar. 28, 2022); *Wright v. Blackman*, No. 21-14244-CV, 2022 WL 602381, at \*1, \*6–8 (S.D. Fla. Feb. 7, 2022); *Gentile*, 583 F. Supp. 3d at 1170, 1172–75; *Mehta v. City of New York*, 1:19-cv-03857, 2022 WL 280460, at \*13 (E.D.N.Y. Jan. 31, 2022); *Lewis v. T-Mobile USA, Inc.*, 1:21-cv-00224, 2021 WL 6135558, at \*2–4 (D. Me. Dec. 29, 2021); *Burbach v. Arconic Corp.*, 561 F. Supp. 3d 508, 518–21 (W.D. Pa. 2021); *Campbell v. IPsoft, Inc.*, No. 18cv10684, 2021 WL 4248861, at \*1, \*23–26 (S.D.N.Y. Sept. 17, 2021); *Smith v. McCarthy*, Civil Action No. ELH-20-419, 2021 WL 4034193, at \*21–22 (D. Md. Sept. 3, 2021); *Perkins-Moore v. McDonough*, No. 4:19 CV 1892, 2021 WL 3885564, at \*3–4 (E.D. Mo. Aug. 31, 2021); *Katz v. U.S. Dep't of Just.*, Civil Action No. 1:20-cv-554, 2021 WL 3809034, at \*7 (E.D. Va. Aug. 26, 2021); *Miller v. BrightKey, Inc.*, Civil No. JKB-21-0095, 2021 WL 3129635, at \*9 (D. Md. July 22, 2021); *Haas v. Adtegrity.com, Inc.*, No. 21-cv-167, 2021 WL 4087798, at \*1, \*4 (W.D. Mich. Aug. 23, 2021); *Plank v. Great Am. Fin. Res.*, No. 19-cv-935, 2021 WL 3089374, at \*1, \*4–7 (S.D. Ohio July 22, 2021); *Stephens v. Big Spring Herald, Inc.*, No. 1:19-CV-123, 2021 WL 3030064, at \*9–10 (N.D. Tex. Mar. 29, 2021); *Brizzi v. Utica Mut. Ins. Co.*, 529 F. Supp. 3d 44, 54–56 (E.D.N.Y. 2021); *Brownlow v. Alfa Vision Ins. Co.*, 527 F. Supp. 3d 951, 953, 956–59 (M.D. Tenn. 2021); *Ruddy v. Online Tech LLC*, No. 18-CV-12972, 2021 WL 807875, at \*1, \*3–5 (E.D. Mich. Mar. 3, 2021); *EEOC v. K&L Auto Crushers, LLC*, Civil Action No. 6:20-CV-00455, 2021 WL 391313, at \*5–6 (E.D. Tex. Feb. 1, 2021); *Kande v. Dimensions Health Corp.*, No. GJH-18-2306, 2020 WL 7054771, at \*1, \*9–12 (D. Md. Dec. 2, 2020); *Camacho v. McCarthy*, No. EDCV 15-2043, 2020 WL 8028848, at \*5–6 (C.D. Cal. Nov. 20, 2020); *Schlater v. Arthritis, Rheumatic & Back Disease Assocs.*, No. 1:18-cv-09778, 2020 WL 5793686, at \*8–12 (D.N.J. Sept. 29, 2020); *Freeman v. Learning Care Grp.*, No. 18-CV-13720, 2020 WL 4903780, at \*1, \*6–7

insignificant, given the overall very low success rate of employment discrimination cases generally and disability cases in particular.<sup>348</sup> For example, Professor Stephen Befort surveyed federal ADA cases over 3.5-year period and found that employers won in nearly 70% of the cases involving whether the plaintiff was a qualified individual under the statute.<sup>349</sup> It is still very early in the post-pandemic litigation process, and I am not suggesting that every employee deserved to win. Even with these caveats, a nearly 50% plaintiff success rate in these post-pandemic cases is notable.

### 3. The Four Evidentiary Practices

Third, the four evidentiary practices many courts have historically used in evaluating remote work accommodations claims are still alive.

#### a.) *Presuming Remote Work Is Improper*

The presumption against remote work, rooted in the myth that virtually no jobs can be performed from home, seems the most susceptible to attack post-pandemic, after so many of us did, in fact, do our jobs from home for months or years on end. And yet, I found no cases making this point. One court dipped a toe in the water. In *Turner v. Board of Supervisors of University of Louisiana System*,<sup>350</sup> Judge Barbier in the Eastern District of Louisiana quoted the Fifth Circuit's statement in *Credeur* about the "general consensus" that working regularly on-site "is an essential function of most jobs" but then noted that not all jobs require in-person attendance.<sup>351</sup> He then stated, "[t]his Court recognizes that remote work is a regular part of many different fields, a reality that has grown even more prevalent since the Covid-19 Pandemic."<sup>352</sup> He then tempered this statement with the caveat that "just because some employers allow remote work does not mean that all fields or workplaces are equally suited to this type of arrangement."<sup>353</sup>

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(E.D. Mich. Aug. 20, 2020); *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 59–64 (D. Mass. 2020); *Phillips v. Harbor Venice Mgmt., LLC*, No. 8:19-cv-2379-T-33TGW, 2020 WL 2735201, at \*5–6 (M.D. Fla. May 26, 2020); *see also* *Goldman v. Sol Goldman Invs.*, No. 1:20-cv-06727, 2022 WL 4482296, at \*5 (S.D.N.Y. Sept. 27, 2022) (granting summary judgment for employee, finding no fact issue on whether employer failed to engage in the interactive process and whether employer fired employee for requesting to work from home).

348. *See supra* notes 8–9 and accompanying text; Ruth Colker, *Speculation About Judicial Outcomes Under 2008 ADA Amendments: Cause for Concern*, 2010 UTAH L. REV. 1029, 1029–32; Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. POVERTY L. & POL'Y 383, 384–86 (2019).

349. *See* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2027, 2055 (2013); *see also* Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Act Amendments Act*, 2015 MICH. ST. L. REV. 1689, 1704–06 (discussing Professor Befort's research).

350. No. 21-664, 2022 WL 4482642 (E.D. La. Sept. 27, 2022).

351. *Id.* at \*6.

352. *Id.*

353. *Id.*

Walking this line, Judge Barbier found that a fact issue existed as to whether teaching in person was an essential function of the plaintiff's job.<sup>354</sup>

Despite Judge Barbier's attempt at nuance, many courts analyzed the remote work accommodation issue without mentioning anything resembling the presumption<sup>355</sup> or generally stated something along the lines that remote work can be a reasonable accommodation in some circumstances.<sup>356</sup> Five courts explicitly used the presumption in remote work accommodations cases.<sup>357</sup> And in June 2022—more than two years after the pandemic-spurred remote work revolution began—an Indiana district court quoted a 1994 case (from outside its circuit at that) emphasizing that only in “unusual case[s]” will employees be able to “effectively perform all work-related duties at home.”<sup>358</sup>

354. *See id.* Even though he found a fact issue on this point, Judge Barbier granted summary judgment for the employer after finding that the requested accommodation was unreasonable because it would have required reassigning other employees. *See id.*

355. *See, e.g.,* Mobley v. St. Luke's Health Sys., Inc., 53 F.4th 452, 455–58 (8th Cir. 2022); Laguerre v. Nat'l Grid USA, No. 20-3901-cv, 2022 WL 728819, at \*3–5 (2d Cir. Mar. 11, 2022); Brown v. Austin, 13 F.4th 1079, 1085–87 (10th Cir. 2021); Smith v. CSRA, 12 F.4th 396, 414–15 (4th Cir. 2021); Ryerson v. Jefferson Cnty. Comm'n, No. 20-14684, 2021 WL 3629906, at \*2–3 (11th Cir. Aug. 17, 2021); Frantti v. New York, 850 F. App'x 17, 20 (2d Cir. 2021); Vogl v. Homeland at Home, Civil Action No. 1:19-924, 2022 WL 5237275, at \*3 (M.D. Pa. Oct. 4, 2022); Gonzalez v. v. Dhillon, No. 20 C 2111, 2022 WL 4448740, at \*7 (N.D. Ill. Sept. 23, 2022); Suarez v. Del Toro, No. 22-cv-0021, 2022 WL 4112230, at \*12 (S.D. Cal. Sept. 8, 2022); Johnson v. Cirrus Educ. Grp., Inc., No. 20-cv-256, 2022 WL 4003871, at \*6 (M.D. Ga. Sept. 1, 2022); Thomas v. Bridgeport Bd. of Educ., No. 20-cv-01487, 2022 WL 3646175, at \*3–4 (D. Conn. Aug. 24, 2022); Lavy v. McDonough, No. 2:21-cv-1590, 2022 WL 2805984, at \*1 (E.D. Cal. July 18, 2022); Dixon-Tribou v. McDonough, \_\_\_ F. Supp. 3d \_\_\_, No. 2:20-cv-00379, 2022 WL 2713518, at \*16–17 (D. Me. July 13, 2022), *appeal filed*, No. 22-1696 (1st Cir. Sept. 13, 2022); Russo v. Moore Ingram Johnson & Steele, LLP, No. 20-cv-00820, 2022 WL 1787102, at \*14–15 (M.D. Tenn. June 1, 2022); Lee v. Saul, No. 20 Civ. 2956, 2022 WL 873511, at \*7–9 (S.D.N.Y. Mar. 23, 2022), *appeal filed sub nom.* Lee v. Kijakazi, No. 22-1246, 2022 WL 873511 (2d Cir. Jun. 3, 2022); Gentile v. County of DuPage, 583 F. Supp. 3d 1167, 1172–75 (N.D. Ill. 2022); Mehta v. City of New York, 1:19-cv-03857, 2022 WL 280460, at \*13 (E.D.N.Y. Jan. 31, 2022); Mundy v. Bd. of Regents, No. 20-cv-847, 2022 WL 103562, at \*7 (W.D. Wis. Jan. 11, 2022); Geter v. Schneider Nat'l Carriers, Inc., No. 20-CV-1148, 2021 WL 8200818, at \*15–18 (N.D. Ga. Dec. 10, 2021); Kelso v. Perdue, No. 19-cv-3864, 2021 WL 3507683, at \*9 (D.D.C. July 12, 2021); Freeman v. Learning Care Grp., No. 18-CV-13720, 2020 WL 4903780, at \*6–7 (E.D. Mich. Aug. 20, 2020); Burke v. DePuy Synthes Cos., No. 18-cv-2068, 2020 WL 3542246, at \*8–11 (E.D. Pa. June 30, 2020).

356. *See, e.g.,* Peterie v. Leidos, Inc., No. 3:21-cv-042, 2022 WL 4586433, at \*9 (S.D. Ohio Sept. 29, 2022); Martin v. Austin, Civ. No. 21-00284, 2022 WL 3043672, at \*7 (D. Haw. Aug. 2, 2022); Wallace v. Wormuth, No. 18-CV-6525, 2022 WL 993064, at \*13 n.11 (S.D.N.Y. Mar. 31, 2022); Haas v. Adtegrity.com, Inc., No. 21-cv-167, 2021 WL 4087798, at \*4 (W.D. Mich. Aug. 23, 2021); Plank v. Great Am. Fin. Res., Inc., No. 19-cv-935, 2021 WL 3089374, at \*5 (S.D. Ohio July 22, 2021); Brownlow v. Alfa Vision Ins. Co., 527 F. Supp. 3d 951, 958 (M.D. Tenn. 2021); Kande v. Dimensions Health Corp., No. GJH-18-2306, 2020 WL 7054771, at \*10 (D. Md. Dec. 2, 2020); Peebles v. Clinical Support Options, Inc., 487 F. Supp. 3d 56, 63 (D. Mass. 2020).

357. *See* Bethscheider v. Westar Energy, 820 F. App'x 749, 753 (10th Cir. 2020); Des Jardins v. Cmty. Action Alger Marquette, No. 2:19-cv-252, 2021 WL 5054039, at \*4 (W.D. Mich. Sept. 23, 2021); Call v. Panchanathan, Civil Action No. 1:20-cv-260, 2021 WL 4206423, at \*6 (E.D. Va. Sept. 15, 2021), *appeal dismissed*, No. 21-2291, 2022 WL 1554985 (4th Cir. Apr. 26, 2022); Snyder v. Neb. Med. Ctr., 8:20CV196, 2021 WL 3511142, at \*6 (D. Neb. Aug. 10, 2021); Forslund v. Nat'l Tech & Eng'g Sols. of Sandia, LLC, 516 F. Supp. 3d 1285, 1289 (D.N.M. 2021).

358. Neal v. Indianapolis Fire Dep't, No. 1:20-cv-02921, 2022 WL 2106143, at \*6 (S.D. Ind. June 10, 2022) (quoting Tyndall v. Nat'l Educ. Ctrs. Inc., 31 F.3d 209, 213 (4th Cir. 1994)) (case involving a non-remote work attendance issue); *see also* Weber v. BNSF Ry. Co., 989 F.3d 320, 325 (5th Cir. 2021) (using similar language, also in a non-remote work attendance case).

*b.) Overdeferring to Employer Judgment*

Many post-pandemic courts evaluating remote work accommodations are still affording extreme deference to employer judgment. In the twenty cases I found that mentioned the role of the employer’s judgment or business decisions, twelve continued to overvalue the employer’s perspective through methods such as focusing only on employer judgment and not citing the other factors, specifying that the employer’s judgment receives the greatest weight, or refusing to second-guess an employer’s judgment.<sup>359</sup> As with the remote work presumption cases, none of these cases call out any COVID-19 experiences as a basis to question the historical deference to employer judgment—which the pandemic demonstrated has been wrong in many instances.

*c.) Relying on Blanket Policies and Preferences*

Courts are mixed on the practice of allowing employers to rely on blanket policies and preferences regarding remote work.<sup>360</sup> The two cases I found involving COVID-19-specific analysis show both approaches. In *Geter v. Schneider National Carriers, Inc.*,<sup>361</sup> the court deferred to the employer’s preference that everyone return to the office.<sup>362</sup> By contrast, in *Peeples v. Clinical Support Options, Inc.*,<sup>363</sup> the court granted a temporary injunction requiring that an asthmatic employee be allowed to work

359. See *Brown*, 13 F.4th at 1086; *Ryerson v. Jefferson Cnty. Comm’n*, No. 20-14684, 2021 WL 3629906, at \*2 (11th Cir. Aug. 17, 2021); *Unrein v. PHC-Fort Morgan, Inc.*, 993 F.3d 873, 877 (10th Cir. 2021); *Bethscheider*, 820 F. App’x at 752; *Gonzalez*, 2022 WL 4448740, at \*7; *Thomas*, 2022 WL 3646175, at \*3; *Montague v. U.S. Postal Serv.*, H-20-4329, 2022 WL 35825, at \*1 (S.D. Tex. Jan. 4, 2022); *Williams v. Md. Dep’t of Health*, Civil Case No. 21-cv-01988, 2021 WL 6074290, at \*5 (D. Md. Dec. 22, 2021), *appeal filed*, No. 22-1074 (4th Cir. Jan. 21, 2022); *Geter*, 2021 WL 8200818, at \*15; *Des Jardins v. Cmty. Action Alger Marquette*, No. 2:19-cv-252, 2021 WL 5054039, at \*4 (W.D. Mich. Sept. 23, 2021); *Kelso*, 2021 WL 3507683, at \*5; *Forslund*, 516 F. Supp. 3d at 1289; *see also Weber*, 989 F.3d at 325 (using similar language in a non-remote work attendance case). Eight courts have made a point to say that employer judgment is not dispositive and can be outweighed or otherwise have not overvalued the employer’s opinion. *See Mobley v. St. Luke’s Health Sys., Inc.*, 53 F.4th 452, 456 (8th Cir. 2022); *Russo*, 2022 WL 1787102, at \*14; *Gentile*, 583 F. Supp. 3d at 1175; *Stephens v. Big Spring Herald, Inc.*, No. 1:19-CV-123, 2021 WL 3030064, at \*9 (N.D. Tex. Mar. 29, 2021); *Warwick v. Bd. of Cnty. Comm’rs*, No. 19-cv-00299, 2021 WL 5547057, at \*12 (D. Colo. Jan. 6, 2021); *Kande*, 2020 WL 7054771, at \*10; *Schlater v. Arthritis, Rheumatic & Back Disease Assocs.*, 1:18-cv-09778, 2020 WL 5793686, at \*8–9 (D.N.J. Sept. 29, 2020); *Freeman*, 2020 WL 4903780, at \*6.

360. These courts allowed employers to rely on established procedures and did not question whether those procedures should be changed as part of a reasonable accommodation: *Houston v. Tex. Dep’t of Agric.*, 17 F.4th 576, 580, 585 (5th Cir. 2021); *Brown*, 13 F.4th at 1085–86 & n.5; *Smith v. CSRA*, 12 F.4th 396, 415 (4th Cir. 2021); *Trahan v. Wayfair Me., LLC*, 957 F.3d 54, 66–67 (1st Cir. 2020); *Thomas*, 2022 WL 3646175, at \*4; *Spanel v. Cent. Cmty. Coll.*, 18-CV-380, 2022 WL 310153, at \*24 (D. Neb. Feb. 2, 2022), *appeal dismissed*, No. 22-1458, 2022 WL 3970925 (8th Cir. Mar. 17, 2022); *Geter*, 2021 WL 8200818, at \*18; *Brooks v. U.S. Dep’t of Veterans Affs.*, No. 20-cv-23114, 2021 WL 5759345, at \*6 (S.D. Fla. Dec. 3, 2021); *Forslund*, 516 F. Supp. 3d at 1289; *Urduy v. Tex. Mut. Ins. Co.*, No. 1:18-CV-1048, 2020 WL 9809988, at \*8 (W.D. Tex. July 16, 2020); *see also Pullins v. Conagra Brands, Inc.*, No. 2:19-cv-21, 2020 WL 3057861, at \*8–9 (S.D. Ohio June 9, 2020) (applying similar logic in an attendance case not involving remote work accommodations). These courts looked at possible changes to employer policies to accommodate remote work requests: *Mobley*, 53 F.4th at 456–57; *Laguerre*, 2022 WL 728819, at \*4; *Campbell v. IPsoft*, 18cv10684, 2021 WL 4248861, at \*5–6 (S.D.N.Y. Sept. 17, 2021); *Freeman*, 2020 WL 4903780, at \*6; *Peeples*, 487 F. Supp. 3d at 60–61.

361. No. 1:20-CV-1148, 2021 WL 8200818 (N.D. Ga. 2021).

362. *Id.* at \*18.

363. 487 F. Supp. 3d 56 (D. Mass. 2020).

from home, despite the manager's blanket policy that all employees must return to work.<sup>364</sup>

*d.) Refusing to Properly Consider Employee Evidence*

Several interesting observations emerge from examining how courts are treating employee evidence in these post-pandemic remote work accommodations cases. In cases with pre-pandemic facts where the relevant evidence was not COVID-19-specific, results are split. I located six cases where courts used familiar tactics of devaluing pro-employee evidence, such as saying it was self-serving or irrelevant or discounting the absence of on-site requirements in a job description,<sup>365</sup> and another ten cases where the court gave a much more robust treatment to the plaintiff's evidence.<sup>366</sup> Unsurprisingly, how the court treats the plaintiff's evidence seems to matter. In all cases where the court devalued employee evidence, it ruled against the employee,<sup>367</sup> but in eight of the ten cases in which it fully considered the evidence, the court ruled in the employee's favor.<sup>368</sup>

When the employee evidence is specific to COVID-19, courts' treatment seems to vary depending on the type of evidence at issue. In the three cases where the plaintiff relied on evidence of their own pandemic remote work, the court considered the evidence and ruled in the plaintiff's favor.<sup>369</sup> For example, in the *Peeples* decision, the order requiring remote work for an asthmatic employee was based in part on the plaintiff's successful remote work during the pandemic.<sup>370</sup>

364. *See id.* at 59–61, 64.

365. *See Brown*, 13 F.4th at 1086–87; *Lane v. Ball*, 854 F. App'x 111, 112–13 (8th Cir. 2021); *Bethscheider*, 820 F. App'x at 753; *Buckmaster v. Nat'l R.R. Passenger Corp.*, No. RDB-19-3202, 2022 WL 1081947, at \*10 (D. Md. Apr. 11, 2022); *Spanel*, 2022 WL 310153, at \*24 n.20; *Kelso*, 2021 WL 3507683, at \*9.

366. *See Gonzalez*, 2022 WL 4448740, at \*7–8; *Martin v. Austin*, Civ. No. 21-00284, 2022 WL 3043672, at \*11 (D. Haw. Aug. 2, 2022); *Campbell*, 2021 WL 4248861, at \*26; *Davenport v. Del Toro*, 16-CV-0494, 2021 WL 7906652, at \*12–13 (M.D. Pa. Sept. 10, 2021); *Stephens*, 2021 WL 3030064, at \*9–10; *Brownlow v. Alfa Vision Ins. Co.*, 527 F. Supp. 3d 951, 957 (M.D. Tenn. 2021); *Schlater*, 2020 WL 5793686, at \*8–9; *Kande*, 2020 WL 7054771, at \*9–12; *Freeman*, 2020 WL 4903780, at \*6–7; *Burke v. DePuy Synthes Cos.*, No. 18-cv-2068, 2020 WL 3542246, at \*9 (E.D. Pa. June 30, 2020), *appeal dismissed*, No. 20-2458, 2020 WL 8084460 (3d Cir. Oct. 26, 2020).

367. *See Brown*, 13 F.4th at 1086–87; *Lane*, 854 F. App'x at 112–13; *Bethscheider*, 820 F. App'x at 753; *Buckmaster*, 2022 WL 1081947, at \*10; *Spanel*, 2022 WL 310153, at \*24 n.20; *Kelso*, 2021 WL 3507683, at \*9.

368. *Compare Gonzalez*, 2022 WL 4448740, at \*7–8, *Martin*, 2022 WL 3043672, at \*11–13, *Campbell*, 2021 WL 4248861, at \*26, *Stephens*, 2021 WL 3030064, at \*9–10, *Brownlow*, 527 F. Supp. 3d at 957, *Schlater*, 2020 WL 5793686, at \*8–12, *Kande*, 2020 WL 7054771, at \*9–12, and *Freeman*, 2020 WL 4903780, at \*6–7, with *Davenport*, 2021 WL 7906652, at \*12–13, and *Burke*, 2020 WL 3542246, at \*9.

369. *See Coleman v. N.Y. City Dep't of Health & Mental Hygiene*, 20cv10503, 2022 WL 704304, at \*4 n.3 (S.D.N.Y. Mar. 9, 2022); *Wright v. Blackman*, No. 21-14244-CV, 2022 WL 602381, at \*1, \*6–7 (S.D. Fla. Feb. 7, 2022); *Peeples*, 487 F. Supp. 3d at 60, 63–64. *Coleman* was decided on a motion to dismiss, but the court noted that it was uncertain “[w]hether the option to work from home . . . ha[s] survived as the pandemic recedes.” *Coleman*, 2022 WL 704304, at \*4 n.3.

370. *See Peeples*, 487 F. Supp. 3d at 63–64. Employees relying on their pandemic remote work experience as evidence to support a further accommodation after the employer wants to discontinue remote work echoes the issue Professor Nicole Porter has studied and labeled as withdrawn accommodations. *See Nicole Buonocore Porter, Withdrawn Accommodations*, 63 DRAKE L. REV. 885, 885 (2015). A withdrawn accommodation “occurs when an employer has agreed to provide an accommodation to an employee with a

Six other decisions involved pre-pandemic case facts where employees wanted to use evidence about the employer's COVID-19 remote work to help support their claims, such as to show that remote work was, in fact, feasible.<sup>371</sup> These plaintiffs were not as successful in having their evidence considered or in obtaining favorable outcomes. In one case, the court considered that evidence along with a full range of other evidence and ruled against the employee.<sup>372</sup> But in five other cases, the court refused to consider the evidence at all. A South Carolina district court cited the EEOC's Covid Guidance about how employers are not automatically bound by pandemic-related remote work decisions and then stated that such evidence is "not relevant" to the determination of essential job functions before ruling against the employee.<sup>373</sup> Similarly, the Southern District of Ohio rejected the employee's argument that the employer's pandemic remote work behavior was relevant to her remote work accommodation request, based solely on the EEOC's guidance.<sup>374</sup> A Texas district court likewise refused to consider what the employer did during the COVID-19 pandemic, stating it is "completely outside the scope of this case"; the court gave short shrift to the worker's other evidence as well and granted summary judgment.<sup>375</sup> The Western District of North Carolina denied an employee's motion to compel discovery regarding the employer's pandemic-related remote work statistics, ruling it was "not relevant" to his claim for failure to grant his request to work from home.<sup>376</sup> In the final case, the Second Circuit affirmed a decision to deny discovery about the employer's COVID-19-related remote work practices but reversed the

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disability and then later withdraws the accommodation." *Id.* This can happen with remote work as well as many other types of accommodations, such as light duty or reduced hours. *See id.* at 903 n.135. She explains that withdrawn accommodations most frequently occur either when a new supervisor comes on the scene or when an employer realizes what it thought was a temporary accommodation might be turning into a permanent one. *Id.* at 885. Courts have been split on how much weight to give the previous accommodation in determining if the new accommodation request is reasonable or burdensome. *Id.* at 896. Some courts have said that evidence is relevant to determining whether the prior accommodation was reasonable or caused an undue hardship, and other courts give no deference to the previous accommodation, saying they do not want to punish what they deemed to be a generous employer going beyond the bounds of the ADA's requirements. *Id.* at 896–912.

371. In one case involving post-pandemic facts, the court denied the defendant's motion to dismiss based in part on the employee's allegations that all corporate employees were working remotely during the relevant time frame. *See Burbach v. Arconic Corp.*, 561 F. Supp. 3d 508, 521 (W.D. Pa. Sept. 22, 2021).

372. *See Geter v. Schneider Nat'l Carriers, Inc.*, No. 20-CV-1148, 2021 WL 8200818, at \*15–18 (N.D. Ga. Dec. 10, 2021). The magistrate judge gave no weight to the plaintiff's evidence that the job description did not specify on-site work, pointing out that the description said it was "not an exhaustive or comprehensive list." *Id.* at \*16. The district court judge rejected this analysis, stating that just because a job description "is not exhaustive does not give an employer carte blanche to retroactively expand a position's essential functions." *Geter v. Schneider Nat'l Carriers, Inc.*, Civil Action File No. 1:20-CV-1148, 2022 WL 12317069, at \*2 (N.D. Ga. Mar. 21, 2022). The district judge, however, adopted the magistrate judge's recommendation on other grounds and granted summary judgment. *See id.* at \*6, \*8.

373. *See Maffett v. City of Columbia*, C/A No. 3:19-832, 2021 WL 4596659, at \*19 (D.S.C. Apr. 19, 2021), *appeal filed*, No. 21-2164 (4th Cir. Oct. 18, 2021).

374. *See Peterie v. Leidos, Inc.*, No. 3:21-cv-042, 2022 WL 4586433, at \*9 n.8 (S.D. Ohio Sept. 29, 2022).

375. *See Montague v. U.S. Postal Serv.*, H-20-4329, 2022 WL 35825, at \*1–3 (S.D. Tex. Jan. 4, 2022).

376. *See Cannon v. Charter Commc'ns*, Civil Action No. 3:18-CV-657-FDW-DCK, 2021 WL 600953, at \*4 (W.D.N.C. Feb. 16, 2021). The plaintiff later lost a jury trial. *See Verdict Form, Cannon v. Charter Commc'ns, Inc.*, No. 3:18-CV-657 (W.D.N.C. Jan. 6, 2022), ECF No. 119.

summary judgment in favor of the employer after fully considering the worker's evidence.<sup>377</sup>

These pre-pandemic fact decisions limiting the relevance of COVID-19-related evidence and denying its discovery are troubling. Evidence about issues such as the employer's ability to shift to remote work, the impact of that shift, and how employees performed comparable job duties remotely could either undermine or support an employer's decision to deny similar remote work before the pandemic. Perhaps the evidence will indicate that remote work was cumbersome and unproductive or neglected an essential job function. But perhaps not. Of course, employer liability must be based on whether the employer discriminated at the time it made its decision. That an employer shifted to remote work during the pandemic does not mean an earlier decision denying remote work was illegal. Nevertheless, an employer's pandemic remote work experience is probative of the feasibility and reasonability of remote work at that company. To categorically refuse to even look at this evidence—or allow discovery regarding it—to assess its potential relevance in the case is overbroad and misguided.

#### 4. Changes at the Circuit-Court Level

My final observation based on analyzing these post-April 2020 remote work accommodations cases is that not much has changed at the circuit court level in how the courts use the four evidentiary practices. Studying circuit courts is, of course, important because their decisions have a much broader impact than a district court decision. There are only a few relevant circuit court decisions, so the dataset is very limited at this point. The First<sup>378</sup> and Fourth<sup>379</sup> Circuits each have one new case that is generally in line with earlier cases applying pro-employer evidentiary practices. The Fifth Circuit has a new case in which it unquestioningly relies on an employer's standard telework policy<sup>380</sup> and another case involving on-site attendance issues unrelated to a remote work request where the court applied the presumption of in-person attendance and gave outsized deference to the employer's judgment.<sup>381</sup> This is consistent with prior Fifth Circuit

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377. See *Laguerre v. Nat'l Grid USA*, No. 20-3901-cv, 2022 WL 728819, at \*3–5 (2d Cir. Mar. 11, 2022).

378. Compare *Trahan v. Wayfair Me., LLC*, 957 F.3d 54, 66–67 (1st Cir. 2020) (allowing employer to deny remote work based on then-existing capabilities without examining whether employer could have made reasonable changes to facilitate remote work, which the employer in fact did one month later), with *Mulloy v. Acushnet Co.*, 460 F.3d 141, 150 (1st Cir. 2006) (applying presumption, giving “substantial weight” to employer judgment, and ignoring plaintiff's evidence as “self-serving”), and *Kvorjak v. Maine*, 259 F.3d 48, 55 (1st Cir. 2001) (giving “substantial weight to the employer's judgment as to what functions are essential” (internal quotation marks omitted)).

379. Compare *Smith v. CSRA*, 12 F.4th 396, 415 (4th Cir. 2021) (relying on employer's standard contract terms to determine work location), with *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 616 F. App'x 588, 592 (4th Cir. 2015) (refusing to consider employee's experience in assessing essential job functions), and *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994) (applying the presumption against remote work).

380. See *Houston v. Tex. Dep't of Agric.*, 17 F.4th 576, 580, 585 (5th Cir. 2021).

381. See *Weber v. BNSF Ry. Co.*, 989 F.3d 320, 325 (5th Cir. 2021).

rulings.<sup>382</sup> The Tenth Circuit has three recent cases, and between them, the court applied all four evidentiary practices against employees,<sup>383</sup> consistent with earlier decisions.<sup>384</sup>

Results are murkier in the Eleventh and Eighth Circuits. Pre-pandemic, the Eleventh Circuit, like many other courts, sent conflicting signals in remote work accommodations cases.<sup>385</sup> Some cases overly emphasized the role of employer judgment in determining essential job functions and assessing remote work accommodations,<sup>386</sup> while others took a more balanced approach.<sup>387</sup> In its single relevant post-pandemic case, the Eleventh Circuit again placed a high importance on the employer's judgment,<sup>388</sup> which is consistent with some but not all of its prior holdings. The Eighth Circuit's pre-pandemic rulings have been very hostile to remote work, especially relating to the use of employee evidence. Its *Dropinski* decision contains the frequently repeated line that a worker's "specific personal experience is of no consequence in the essential functions equation."<sup>389</sup> It has also overly deferred to employer judgment,<sup>390</sup> especially relating to job descriptions,<sup>391</sup> and endorsed the use of blanket policies.<sup>392</sup> One post-pandemic case in 2021 ruled in the same vein as these earlier cases, discounting the plaintiff's evidence about another employee who worked remotely.<sup>393</sup> In November 2022 in *Mobley*, however, the Eighth Circuit found a fact issue on a reasonable accommodations claim, rejecting the employer's arguments regarding the management

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382. See *Credeur v. La. ex rel. Off. of Att'y Gen.*, 860 F.3d 785, 792–95 (5th Cir. 2017) (using the presumption against remote work, giving greatest weight to employer judgment, and using blanket employer policies); see also *Fulmer v. George Gervin Youth Ctr., Inc.*, No. 98-51154, 1999 WL 642761, at \*2 (5th Cir. July 19, 1999) (applying the presumption against remote work).

383. See *Brown v. Austin*, 13 F.4th 1079, 1085–87 (10th Cir. 2021) (not mentioning presumption but deferring to employer judgment, applying a blanket policy, and discounting worker's evidence); *Unrein v. PHC-Fort Morgan, Inc.*, 993 F.3d 873, 877 (10th Cir. 2021) (deferring to employer judgment); *Bethscheider v. Westar Energy*, 820 F. App'x 749, 752–53 (10th Cir. 2020) (applying presumption, deferring to employer judgment, and discounting plaintiff's evidence).

384. See *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1119–24 (10th Cir. 2004) (applying presumption, deferring to employer judgment, and discounting plaintiff's evidence); *Spielman v. Blue Cross & Blue Shield of Kan., Inc.*, 33 F. App'x 439, 442, 444 (10th Cir. 2002) (denying remote work accommodation based on performance metric qualification).

385. See *Kanter*, *supra* note 12, at 1959 n.105 (noting "differing views among and within circuits" regarding remote work accommodations).

386. See *Kassa v. Synovus Fin. Corp.*, 800 F. App'x 804, 809 (11th Cir. 2020); *Morris-Huse v. GEICO*, 748 F. App'x 264, 266 (11th Cir. 2018); *Abram v. Fulton Cnty. Gov't*, 598 F. App'x 672, 677 (11th Cir. 2015).

387. See *Everett v. Grady Mem'l Hosp. Corp.*, 703 F. App'x 938, 943 (11th Cir. 2017); *Holly v. Clairson Indus.*, 492 F.3d 1247, 1257, 1262-63 (11th Cir. 2007).

388. See *Ryerson v. Jefferson Cnty. Comm'n*, No. 20-14684, 2021 WL 3629906, at \*2 (11th Cir. Aug. 17, 2021).

389. *Dropinski v. Douglas County*, 298 F.3d 704, 709 (8th Cir. 2002); see also *supra* note 221 and accompanying text; *Heaser v. Toro Co.*, 247 F.3d 826, 832 (8th Cir. 2001); *Minnihan v. Mediacom Commc'ns Corp.*, 779 F.3d 803, 812 (8th Cir. 2015).

390. See *Knutson v. Schwan's Home Serv., Inc.*, 711 F.3d 911, 915 (8th Cir. 2013).

391. See *Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537, 545 (8th Cir. 2018); *Dropinski*, 298 F.3d at 708–09.

392. See *Rehrs v. Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007); *Heaser*, 247 F.3d at 832.

393. See *Lane v. Ball*, 854 F. App'x 111, 112–13 (8th Cir. 2021).

team's preference for in-office work over allegedly job-compromising remote work.<sup>394</sup> The court found the employer's evidence lacking, stating that the employer had presented only "brief, conclusory, and unsubstantiated opinions."<sup>395</sup> It thus remains to be seen if *Mobley* signals a change in the Eighth Circuit's approach or if it is merely an outlier.

Only the Second Circuit is currently showing more clear signs of change. Like the Eleventh Circuit, the Second Circuit's pre-pandemic case law was mixed. The court did not have a significant case regarding remote work specifically, but it analyzed analogous situations involving attendance issues or the need to be physically present at work. In one case, in a rare plaintiff victory, the court emphasized the need for a "penetrating factual analysis" to determine whether "[p]hysical presence at or by a specific time" was essential in that job.<sup>396</sup> However, in 2018 in *Vitti v. Macy's Inc.*,<sup>397</sup> the court was quite hostile to the plaintiff, reiterating the presumption that "regularly attending work is an essential function of virtually every job" and focusing on the "considerable deference" given to the employer's judgment while ignoring other factors relevant to the determination of essential functions.<sup>398</sup> In two post-pandemic decisions, the court has been similarly mixed but overall more positive towards the workers. In both cases, the court made no mention of the presumption against remote work.<sup>399</sup> And in one case, *Laguerre v. National Grid USA*,<sup>400</sup> the court rejected reliance on a blanket policy and thoroughly evaluated the plaintiff's evidence before reversing a summary judgment.<sup>401</sup> However, it refused to allow any discovery on COVID-19-related remote work.<sup>402</sup> So even though the court blocked discovery on the COVID-19 evidence in *Laguerre*, comparing the methods and results in *Laguerre* and *Vitti* suggests a possible shift in the court's approach in these cases.

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Reading the tea leaves is inherently uncertain work. Overall, courts seem reluctant to discuss the pandemic in remote work cases unless they must, and all four evidentiary practices previously discussed are still in use. Particularly troublesome are courts refusing to allow discovery on or to consider pandemic-related evidence. But there are positive signs too, with an increasing proportion of pro-employee outcomes, now nearing 50%. It is particularly encouraging to see courts considering specific plaintiffs' pandemic remote work experiences in evaluating their requests to continue working at home. Hopefully, more courts will similarly assess the law based on individual and collective

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394. *Mobley v. St. Luke's Health Sys., Inc.*, 53 F.4th 452, 456–57 (8th Cir. 2022). Though the court found a fact issue on this point, it ultimately affirmed summary judgment for the employer on another ground. *See id.* at 457–58.

395. *Id.* at 456.

396. *McMillan v. City of New York*, 711 F.3d 120, 123, 126 (2d Cir. 2013).

397. 758 F. App'x 153 (2d Cir. 2018).

398. *Id.* at 157 (internal quotation marks and alterations omitted).

399. *See Laguerre v. Nat'l Grid USA*, No. 20-3901-cv, 2022 WL 728819, at \*1–5 (2d Cir. Mar. 11, 2022); *Frantti v. New York*, 850 F. App'x 17, 19–20 (2d Cir. 2021).

400. No. 20-3901-cv, 2022 WL 728819.

401. *See Laguerre*, 2022 WL 728819, at \*1–5.

402. *See id.* at \*5.

pandemic experiences and will recognize the folly of continuing to rely on evidentiary practices that can no longer be justified (if they ever could at all).

#### CONCLUSION

Where we work is one of the most obvious influences on our daily lives,<sup>403</sup> and never has the where of working been in sharper focus than now. The wave of pandemic-induced remote work has revolutionized the structure of American work. It is vital that part of this reshaping accounts for the needs of individuals with disabilities who want to work.

Remote work has long held promise for individuals with disabilities. It is not a perfect solution, but for many, working from home makes working less painful, more dignified, and technologically feasible. For some, remote work provides the only path into the workforce.

And yet, most employers have reflexively resisted providing remote work as a reasonable accommodation, and courts have backed them up. But our pandemic remote work experiences have gutted the foundation of this lopsided law, which has been based partly on several evidentiary practices that always work against the employee. These practices were never on solid legal ground, and in light of the evidence we now have from the great pandemic remote-work experiment, they are indefensible.

We are at an inflection point. But will courts change? It is still early, and signs are mixed, but hopeful decisions are coming from some courts. Courts overall must do better. The matter is more urgent now than ever. The COVID-19 pandemic has created “a mass-disabling event that experts liken to HIV, polio or World War II, with millions suffering the long-term effects of infection.”<sup>404</sup> In addition to these long-COVID concerns, “[a]fter two years of trauma, an increasing number of employees are suffering from anxiety and other forms of mental health concerns.”<sup>405</sup> The labor pool of workers with disabilities is skyrocketing, and many of these workers will need accommodations too.

To be sure, more remote work accommodations will not remove all the roadblocks impeding equal employment opportunities for individuals with disabilities. Many scholars are writing about other needed changes, particularly in the post-pandemic world

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403. Green, *supra* note 1, at 141.

404. Francis Stead Sellers, *How Long Covid Could Change the Way We Think About Disability*, WASH. POST (June 6, 2022), <https://www.washingtonpost.com/health/2022/06/06/long-covid-disability-advocacy> [<https://perma.cc/FGE9-LPZW>]; see also Beery, *supra* note 4 (“The decisions that workplaces, cultural institutions and individual people make now won’t just affect people who currently have disabilities. They will also affect the growing number of recovered Covid-19 patients with lasting physical and neurological changes.”); Mary Yang, *Remote Work Opened Some Doors to Workers with Disabilities. But Others Remain Shut*, NPR (Oct. 21, 2022, 4:22 PM), <https://www.npr.org/2022/10/21/1130371456/remote-work-opened-some-doors-to-workers-with-disabilities-but-others-remain-shu> [<https://perma.cc/6WY7-WF5Z>] (explaining that more employers have been forced to provide accommodations largely because they “have been made to confront another new normal: an influx of workers experiencing lasting health issues associated with COVID-19”).

405. Litzinger & McWilliams, *supra* note 287; see also Mishra, *supra* note 335 (predicting an increase in mental health related ADA claims linked to the pandemic).

when so many of our assumptions about the workplace have been upended.<sup>406</sup> And courts that are hostile to disability claims may just find other ways to deny workers' claims. But following the evidence and using it to dismantle the evidentiary practices that have so thoroughly undermined past remote work accommodations efforts is an important step in helping the ADA fulfill its workplace potential.

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406. See, e.g., Jeannette Cox, *Work Hours and Disability Justice*, 111 GEO. L.J. 1, 1 (2022) (advocating for more part-time work as a disability accommodation); Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59, 59 (2021) (explaining how disability documentation requirements burden and delay accommodations and urging abandonment of medical proof of disability); Porter, *Working While Mothering*, *supra* note 12, at 26–28 (explaining the benefits of universal accommodations); Travis, *Post-Pandemic*, *supra* note 12, at 203 (encouraging judges to use lessons learned from the pandemic to reexamine the nature of work to expand employment opportunities under the ADA and Title VII); Jennifer Haskin Will, *The Case for the “No-Collar” Exemption: Eliminating Employer-Imposed Office Hours for Overworked, Remote-Ready Workers*, 16 U. ST. THOMAS J.L. & PUB. POL’Y (forthcoming 2023), <https://ssrn.com/abstract=3929549> [<https://perma.cc/3F7R-DPN3>] (arguing that white-collar workers engaged in cognitive labor should be released from the confines of the nine-to-five workday).