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A COVID SILVER LINING? HOW TELEWORK MAY BE A REASONABLE ACCOMMODATION AFTER ALL

Baylee Kalmbach

I. INTRODUCTION

Since December 2019, the Coronavirus disease (“COVID-19”) has profoundly altered human life.¹ The dramatic effects of the pandemic have especially manifested around workplace procedures, workers’ rights and protections, and the laws that create and enforce such protections.² For instance, before the pandemic, 20% of employees whose job requirements allowed them to work from home did so, and this number more than tripled to 71% in December 2020 as a result of COVID-19 and stay-at-home mandates.³ Though these orders were initially intended to slow the spread of the disease, as the need to return to in-person interaction increases, conversations and procedures demanding protections for people with pre-existing impairments persist.⁴ In fact, the Equal Employment Opportunity Commission’s New York Deputy Director, Judy Keenan, reported that, “workers are filing more charges alleging their employers failed to accommodate their disabilities during the pandemic than any other allegation tied to COVID-19.”⁵ While workers are slowly being integrated back into the office and in-person job sites, the question remains whether employers need to allow employees with disabilities to telework in order to accommodate their impairments.

Under the Rehabilitation Act of 1973 and the Americans with Disabilities Act, employers are required to provide reasonable accommodations to qualified individuals with disabilities, unless those accommodations would cause undue hardship.⁶ In this context, an

1. *Coronavirus disease (COVID-19)*, WORLD HEALTH ORGANIZATION, https://www.who.int/health-topics/coronavirus#tab=tab_1 [<https://perma.cc/XZ67-QA62>] (last visited Dec. 2, 2021).

2. Tom Starner, *How COVID-19 has ‘fundamentally changed employment’*, HUMAN RESOURCE EXECUTIVE (Sept. 7, 2020), <https://hrxexecutive.com/how-covid-19-has-fundamentally-changed-employment/> [<https://perma.cc/QRP6-KDA8>].

3. Kim Parker, Juliana Menasze Horowitz & Rachel Minkin, *How the Coronavirus Outbreak Has –and Hasn’t – Changed the Way Americans Work*, PEW RESEARCH CENTER (Dec. 9, 2020), <https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/> [<https://perma.cc/675R-9N9Y>].

4. Chad Young, *COVID-19: Federal Disability-Specific and Other Related Guidance*, DISABILITY EMPLOYMENT POLICY: THE COUNCIL OF STATE GOVERNMENTS (Aug. 13, 2021), <https://seed.csg.org/covid-19-federal-disability-specific-other-related-guidance/> [<https://perma.cc/P3CE-FC5P>].

5. Braden Campbell, *Pandemic Fueling Disability Accommodation Claims*, LAW 360 (May 27, 2020, 10:21 PM), <https://www.law360.com/articles/1277246> [<https://perma.cc/Q987-4AZR>].

6. *The Rehabilitation Acts of 1973 and 1974, and the Americans with Disabilities Act of 1990*, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, <https://teamster.org/rehabilitation-acts-1973-and-1974->

accommodation is any modification in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal job opportunities.⁷ Pre-pandemic, courts were split on whether employers needed to allow employees to work from home in order to accommodate their disabilities.⁸ However, the majority of federal circuits tended to rule in favor of employers by declining to recognize telework as reasonable.⁹ In part, this is because when federal anti-discrimination laws were enacted, technology did not allow for remote work as an option for workers to successfully perform their essential job functions.¹⁰ Employers are not required to alter the main objectives of a disabled individual's employment solely because of her impairment; therefore, this line of ruling logically followed.¹¹

As modern technology has greatly advanced the availability for employees to work-from-home (and the COVID-19 pandemic *required* this of many workers) teleworking as a reasonable accommodation will be a critical theme in post-pandemic litigation.¹² As the courts revisit this issue, employers likely carry a heavy burden in proving that allowing their employees with disabilities to telework will impose undue hardship on their business and operations.¹³ Alternatively, because teleworking might require excusing these employees from performing the essential functions of their positions,¹⁴ courts could instead rule that teleworking is not a required accommodation, even post-pandemic.

This Comment examines whether employers are legally required to allow their disabled employees to telework as a reasonable accommodation in light of COVID-19 and the necessary and timely

and-american-disabilities-act-1990/ [https://perma.cc/G386-SUJ6] (last visited Dec. 1, 2021).

7. *Accommodations*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/odep/program-areas/employers/accommodations> [https://perma.cc/DL9E-4CHD] (last visited Dec. 1, 2021).

8. *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995). This case identified the pre-2008 ADA Amendments circuit split, with the majority view that "an employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced." *Id.* at 545.

9. *Id.* at 545.

10. *Id.* The court acknowledged that technology as it existed in 1995 generally did not allow employees to perform their jobs at home, but that advances in technology in the future will "no doubt change" cases in the future. *Id.* at 544.

11. *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, U.S. EQUAL EMP'T OPP. COMM'N (Oct. 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> - intro [https://perma.cc/Y5RV-NKTZ].

12. *See* Campbell, *supra* note 5.

13. Erin Woo, *Work at Home or the Office? Either Way, There's a Start-Up for That*, THE NEW YORK TIMES (Jul. 6, 2021), <https://www.nytimes.com/2021/07/06/technology/hybrid-work-startups.html?referringSource=articleShare> [https://perma.cc/2H9Q-23L7].

14. *See Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, *supra* note 11.

changes the pandemic caused for employment and anti-discrimination law practices. Section II of this Comment will discuss Title I of the Americans with Disabilities Act (“ADA”) and its enforcement by the Equal Employment Opportunity Commission (“EEOC”). Additionally, Section II will discuss the pre-pandemic circuit split on working from home as a reasonable accommodation as well as telework cases that were decided mid-pandemic.

Section III will argue why qualified disabled people should be entitled to the option of telework where practicable. It will address the types of disabilities that will be protected by offering telework accommodations as well as illustrate how the long-term effects of COVID-19 will be considered a disability under the ADA. Further, it will explore how the pandemic will impact the factors courts analyze when presented with failure to accommodate claims. Specifically, employers whose employees successfully teleworked during the pandemic will have a difficult time proving both that in-person attendance is an essential function and that telework imposes undue hardship. Section III will conclude by illustrating how the Equal Employment Opportunity Commission has responded to COVID-19, as well as outline the facts and predict the outcome of its first COVID-telework lawsuit.

II. BACKGROUND

Employers are required under various anti-discrimination provisions to provide their qualified disabled employees with reasonable accommodations.¹⁵ While these accommodations are statutorily required to aid these employees in performing the essential functions of their job, anti-discrimination statutes do not, “...endow all disabled persons with a job—or job—schedule of their choosing.”¹⁶ Furthermore, they will not require employers to endure undue hardship in exchange for providing an accommodation.¹⁷ In determining what accommodations are reasonable and due, employers and courts must balance these interests on a case-by-case basis.¹⁸

Part A of this Section will discuss Title I of the ADA and its enforcement by the EEOC. Part B will address the pre-pandemic circuit split of whether telework is or should be required as a reasonable accommodation. Part C will address how courts are deciding failure to accommodate claims based on telework denials mid-pandemic.

15. *See Accommodations*, *supra* note 7.

16. *EEOC v. Ford Motor Co.*, 782 F.3d 753, 762 (6th Cir. 2015).

17. *Id.*

18. *Reasonable Accommodations in the Workplace*, ADA NATIONAL NETWORK (Dec. 2021), <https://adata.org/factsheet/reasonable-accommodations-workplace> [https://perma.cc/JJ7D-ML4Q].

A. Disability Discrimination Laws and Enforcement

The Rehabilitation Act of 1973 and Title I of the ADA are the relevant statutes that protect qualified disabled people from employment discrimination.¹⁹ Although the Rehabilitation Act was the first legal provision that protected people with disabilities from discrimination on the basis of their impairments, courts today interpret and apply the ADA's standards for Rehabilitation Act disability discrimination claims.²⁰ As a result, this Comment will discuss only Title I of the ADA, though the Rehabilitation Act remains the applicable statute for federal employees.²¹ In this Part, Subsection 1 will cover Title I of the ADA, and Subsection 2 will discuss the EEOC.

1. Title I of The Americans with Disabilities Act

Recognizing that additional federal legislation was necessary to protect people with disabilities from societal and workplace discrimination, Congress enacted the ADA in 1990 “[t]o establish a clear and comprehensive prohibition of discrimination on the basis of disability.”²²

The ADA defines disability as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.”²³ Having a “record of” an impairment means that the person has previously been classified as having the impairment, even if not current.²⁴ “Being regarded as having such an impairment” means that, even if the person does not have an impairment, an entity or employer treats them as if they do.²⁵

Initially, courts paid special attention to the first prong of this definition and often limited protections for otherwise qualified disabled people

19. See *The Rehabilitation Acts of 1973 and 1974, and the Americans with Disabilities Act of 1990*, *supra* note 6.

20. *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264 (4th Cir. 1995).

21. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-799 (1973). Under Section 501 of the Rehabilitation Act, a federal government agency is legally required “to provide reasonable accommodation for individuals with disabilities unless it would cause undue hardship.” *Id.* Under Section 504, agencies that provide federal financial assistance have regulations for entities that receive federal aid, and these often include reasonable accommodations for employees with disabilities. *Id.* See also *A Guide to Disability Rights Laws*, ADA.GOV (Feb. 2020), <https://www.ada.gov/cguide.htm#anchor65610> [<https://perma.cc/EZ5B-E55E>].

22. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1990).

23. 42 U.S.C. § 12101(2).

24. *What Does a “Record” of a Disability Mean?*, ADA NATIONAL NETWORK (Nov. 2021), <https://adata.org/faq/what-does-record-disability-mean> [<https://perma.cc/AHP6-W5XV>].

25. *What Does “Regarded As” Having a Disability Mean?*, ADA NATIONAL NETWORK (Dec. 2021), <https://adata.org/faq/what-does-regarded-having-disability-mean> [<https://perma.cc/WWT5-NU2H>].

simply because they did not have conditions serious enough to establish true disabilities.²⁶ In finding that the Supreme Court improperly “narrowed the broad scope of protection intended to be afforded by the ADA,” Congress amended it in 2008.²⁷ Notably, the Americans with Disabilities Act Amendments Act (“ADAAA”) did not alter the actual text of the definition but rather statutorily commanded the courts to construe the definition broadly.²⁸ Today, the ADA still defines disability as an impairment that substantially limits one or more of someone’s major life activities and maintains the three prongs under this definition.²⁹

Title I of the ADA specifically prohibits most private employers, governments, labor organizations, employment agencies, and educational institutions from discriminating against people with disabilities in all employment-related activities.³⁰ Under its provisions, discrimination includes, “not making reasonable accommodations to the known physical or mental limitation of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business.”³¹ Within this requirement, employers may not deny opportunities for qualified disabled employees if that denial is based on the need to provide an accommodation.³²

To successfully allege a failure to accommodate claim, the plaintiff

26. For example, in *Sutton v. United Air Lines*, 527 U.S. 471, 488 (1999), despite meeting every qualification other than having a minimum uncorrected vision of 20/100, two twin sisters with severe myopia were denied pilot positions with United Air Lines. In determining whether the plaintiffs were “actually disabled” within the meaning of the ADA, the Supreme Court determined that because they alleged to have 20/20 vision *with* corrective measures, they were not substantially limited in a major life activity, and therefore were not offered protections under the ADA. *Id.*

27. Americans with Disabilities Act Amendments Act of 2008, 42 U.S.C. § 12101 et seq. (2008). Interestingly, the ADAAA replaced the language “with a disability because of the disability,” with “on the basis of disability.” *Id.* Because the 2008 Amendments were primarily to overrule the courts’ improper interpretation of the ADA, this change was likely to guide a shift in the plaintiff’s initial burden of proof. However, the post-2008 cases addressing ADA discrimination claims do not recognize this language change, and the plaintiff’s burden has largely remained the same.

28. *Id.*

29. *Id.* The ADAAA specifically states that “claims for denial of reasonable accommodation must be brought under one or both of the first two prongs of the definition of disability (i.e., an actual disability and/or a record of a disability),” implying that those “regarded as” a person with a disability are not entitled to reasonable accommodations. *Id.* Beyond this limitation, the amendments made clear that the determination should be less about who is afforded protection, and the inquiry should instead be whether covered entities have discriminated.

30. 42 U.S.C. § 12111. Corporations wholly owned by the government and membership clubs that are tax exempted are typically not subject to Title I’s provisions. *Id.*

31. 42 U.S.C. § 12112(5)(A).

32. 42 U.S.C. § 12112(5)(B). While the ADAAA made clear that courts should not consider mitigating measures after *Sutton*, including reasonable accommodations, in determining whether a person is disabled under the ADA, reasonable accommodations *are* considered when determining if an ADA plaintiff is a “qualified individual” under Title I’s provisions. *Id.* Importantly, “consideration shall be given to the employer’s judgment as to what functions of a job are essential.” 42 U.S.C. § 12111(8).

must first show that she is a qualified individual “who, with or without a reasonable accommodation, can perform the essential functions of the employment position that [she] holds or desires.”³³ The essential functions are determined almost entirely by the employer’s judgment, and the disabled employee will have to prove that she can perform them.³⁴ After this, she must be able to prove that her employer failed to provide her with a reasonable accommodation despite knowing of her disability and its limitations.³⁵ In addition to alleging her employer failed to provide an accommodation, she must illustrate that it is reasonable “ordinarily or in the run of cases.”³⁶ For example, this could include modifying equipment and work schedules, restructuring certain aspects of the job and job training, making facilities in the workplace accessible, and providing qualified interpreters.³⁷

If the plaintiff successfully proves that an accommodation is both ordinarily reasonable and appropriate for her situation, the employer must raise an affirmative defense with evidence tending to prove that the accommodation places undue hardship on its business and operations.³⁸ The ADA defines “undue hardship” as “an action requiring significant difficulty or expense,” and lists factors for employers and courts to consider when making this determination.³⁹ These factors include the nature and cost of the accommodation, the number of employees, the effect or impact of the accommodation on its operations, its overall financial resources, and the type, structure, and function of the covered entity and its facilities.⁴⁰ If the employer can prove that the accommodation imposes undue hardship, it will avoid liability for failing to accommodate.⁴¹

Importantly, qualified disabled people are not entitled to accommodations of their choosing.⁴² If the employer provides an accommodation that is reasonable and effective in addressing the employee’s impairment, an allegation that the employer failed to provide her with her *preferred* accommodation will likely fail to establish a prima

33. 42 U.S.C. § 12111(8). The Rehabilitation Act of 1973 has an analogous qualification standard. 29 U.S.C. § 791.

34. *Id.*

35. Neely v. PSEG Texas, LP, 735 F.3d 242, 247 (5th Cir. 2013).

36. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 403 (2002).

37. 42 U.S.C. § 12111(9).

38. 42 U.S.C. § 12112(b)(5)(A).

39. 42 U.S.C. § 12111(10).

40. *Id.*

41. *Id.*

42. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.9(d) (2011).

facie discrimination claim.⁴³ However, in addition to substantively requiring employers to provide reasonable accommodations, the ADA has a procedural aspect requiring employers to engage in an interactive process.⁴⁴ The interactive process involves the employer and employee engaging in back-and-forth communication to determine a viable accommodation.⁴⁵ If the plaintiff produces evidence that the employer failed to engage in this process, many circuit courts hold that this alone determines that the employer failed in proving undue hardship.⁴⁶

In sum, given the statutory command to interpret disability broadly, most impairments today constitute a protectable disability under the ADA.⁴⁷ Instead, modern failure to accommodate cases turn to whether disabled people are qualified for their positions, and if employers take reasonable actions to provide them with reasonable accommodations, absent undue hardship.⁴⁸

2. The Equal Employment Opportunity Commission

Beyond examining the intent and text of the ADA, courts presented with disability discrimination claims often turn to guidance from the EEOC, the federal agency in charge of investigating and enforcing the ADA.⁴⁹ Created by the Civil Rights Act of 1964, the EEOC not only investigates allegations of discrimination by covered employers but also issues regulations and guidelines to implement anti-discrimination provisions.⁵⁰

43. *Id.*

44. *Haneke v. Mid-Atlantic Capital Mgmt.*, 131 F. App'x 399, 400 (4th Cir. 2005).

45. Karen Dooley, *Engaging in the ADA Interactive Process*, HRX (Jan. 29, 2020), <https://www.tasb.org/services/hr-services/hrx/hr-laws/engaging-in-the-ada-interactive-process.aspx> [<https://perma.cc/RKU2-WHZJ>].

46. *Id.*

47. *See* 42 U.S.C. § 12101 et seq. (2008).

48. *Hoffman v. Carefirst of Fort Wayne, Inc.*, 737 F. Supp. 2d 976 (N.D. Ind. 2010).

49. *Employment Rights: Who has Them and Who Enforces Them*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/odep/publications/fact-sheets/employment-rights-who-has-them-and-who-enforces-them> [<https://perma.cc/SK7T-EHAY>] (last visited Dec. 1, 2021). The EEOC also oversees enforcing Section 501 of the Rehabilitation Act of 1973, but not Section 504. Section 504 is instead enforced by the U.S. Department of Justice. *Id.* Under Section 504, plaintiffs alleging discrimination do not have to seek remedy through the Federal government, and instead can file a private suit without complaining to the administrative agency first. *Id.*

50. *Overview*, U.S. EQUAL EMP'T OPP. COMM'N, <https://www.eeoc.gov/overview> [<https://perma.cc/SYR4-WGM7>] (last visited Dec. 1, 2021). Because Congress authorized the Commission to issue "legislative regulations" under Title I of the ADA, courts tend to defer to the EEOC's procedural, record keeping, and reporting-related regulations, assuming that they are reasonable. *See EEOC Regulations*, U.S. EQUAL EMP'T OPP. COMM'N, <https://www.eeoc.gov/eeoc-regulations> [<https://perma.cc/9KNE-N2KP>] (last visited Dec. 1, 2021). Also referred to as "subregulatory guidance," these documents can either look like compliance manuals, which advise the Commission's staff on its investigation procedures, enforcement guidance statements, which articulate the EEOC's stance and

For plaintiffs to get their ADA claims into court, they first must file a “charge of discrimination” against their employer alleging that it discriminated against them because of their disability.⁵¹ The EEOC will use its findings based on the type and extent of the alleged discrimination to determine whether an ADA violation has occurred or not.⁵² At the close of its investigation, instead of making a finding, the EEOC can issue a “Notice of Right to Sue” letter, allowing the individual to file suit in either state or federal court within 90 days.⁵³

Alternatively, if the EEOC decides that a charge of discrimination has enough merit to warrant action by the Commission, it has authority to file a lawsuit on behalf of the person or classes of people who filed the charge.⁵⁴ “When deciding whether to file a lawsuit, the EEOC considers factors such as the strength of the evidence, the issues in the case, and the wider impact the lawsuit could have on the EEOC’s efforts to combat workplace discrimination.”⁵⁵ It litigates a significantly small percentage of merits lawsuits as compared to the volumes of charges it receives annually.⁵⁶

Within its guidance documents, the EEOC makes clear that an employer will not be required to provide an accommodation if it would eliminate an essential function of the job, because this would necessarily mean that the disabled person is not a “qualified individual” under the ADA.⁵⁷ It describes the essential functions of the job as the “fundamental

policy behind key legal issues, or “management directives,” which inform the other federal agencies about the EEOC’s procedures for claims of employment discrimination. *Id.* On the flip side, regulations which are only meant to be “interpretive” in nature, “do not create any new legal rights or obligations and are followed by courts only to the extent they find EEOC’s positions to be persuasive.” See *What You Should Know: EEOC Regulations, Subregulatory Guidance and other Resource Documents*, U.S. EQUAL EMP’T OPP. COMM’N (May 5, 2016), <https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource> [<https://perma.cc/2EDF-SZUG>].

51. *Filing A Charge of Discrimination*, U.S. EQUAL EMP’T OPP. COMM’N, <https://www.eeoc.gov/filing-charge-discrimination> [<https://perma.cc/38R9-598Y>] (last visited Dec. 1, 2021).

52. *How to File an Americans with Disabilities Act Complaint with the U.S. Department of Justice*, ADA.gov: U.S. DEP’T OF J., CIV. RIGHTS DIV., https://www.ada.gov/filing_complaint.htm [<https://perma.cc/R5LB-R4EA>] (last visited Dec. 1, 2021). The EEOC will give notice to the employer and try to resolve the issue before potential litigation. *Id.* For instance, if both the employee/applicant and employer agree to mediation, the EEOC permits voluntary settlement. *Id.*

53. *Filing a Lawsuit*, U.S. EQUAL EMP’T OPP. COMM’N, <https://www.eeoc.gov/filing-lawsuit> (last visited Dec. 1, 2021). On average, the EEOC reports that an investigation period takes approximately 10 months. *What You Can Expect After You File a Charge*, U.S. EQUAL EMP’T OPP. COMM’N, <https://www.eeoc.gov/what-you-can-expect-after-you-file-charge> [<https://perma.cc/TM3E-FC33>] (last visited Dec. 1, 2021). Importantly, a plaintiff will not be permitted to successfully file their discrimination claim without utilizing the EEOC’s process first and may be barred from filing their suit after the 90-day period. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. See *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the*

job duties that [an employee] must be able to perform on [her] own or with the help of a reasonable accommodation.”⁵⁸ When determining if a function is essential, the EEOC considers the time and skills required for performance, the number of similarly situated employees available to perform it, the work experience of others in the job, and the consequences of non-performance, among other relevant evidence.⁵⁹ If a function is not essential, the employer cannot legally require the otherwise qualified disabled employee to perform it.⁶⁰ Importantly, employers alleged to have failed to provide a reasonable accommodation may produce a prior written job description detailing the functions it finds essential, and the EEOC will consider it when determining whether a reasonable basis for the discrimination claim exists.⁶¹

Additionally, the EEOC explains that an employer is not permitted to fail or refuse an accommodation based on unfounded fears, prejudice, or the fact that “a reasonable accommodation might have a negative impact on the morale of other employees.”⁶² Typically, other employees will only be considered in this determination when an accommodation will cause disruption to the overall operation of the business or prevent them from performing their jobs.⁶³ For example, if a disabled employee’s accommodation results in different assignments that are easily absorbed into other employees’ functions, the employer will not be able to show undue hardship without a significant disruption.⁶⁴ In contrast, if a disabled employee’s accommodation results in inadequate coverage and nonperformance of crucial responsibilities, the undue hardship defense could successfully excuse the employer from approving the specific request.⁶⁵

Although what is reasonable under the ADA’s accommodation requirement is typically fact-dependent on the individual circumstances

ADA, *supra* note 11.

58. *The ADA: Your Employment Rights as an Individual with a Disability*, U.S. EQUAL EMP’T OPP. COMM’N, <https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability> [https://perma.cc/29SC-J9YT] (last visited Dec. 1, 2021).

59. *The ADA: Your Responsibilities as an Employer*, U.S. EQUAL EMP’T OPP. COMM’N, <https://www.eeoc.gov/laws/guidance/ada-your-responsibilities-employer> [https://perma.cc/9LP8-H6WC] (last visited Dec. 1, 2021).

60. Aimee Delaney, *A Marginal Duty is Not an Essential Function: ADA Hazard for Employers Denying “Reasonable Accommodation”*, LINKEDIN (Oct. 13, 2015), <https://www.linkedin.com/pulse/marginal-duty-essential-function-ada-hazard-employers-aimee-delaney/> [https://perma.cc/E49N-8HJC].

61. *See The ADA: Your Responsibilities as an Employer*, *supra* note 59.

62. *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, *supra* note 11.

63. *Id.*

64. *Id.*

65. *Id.*

of each job and workplace, the EEOC has offered an abundance of enforcement guidance on the types of accommodations that are available to qualified disabled individuals.⁶⁶ Pre-ADA amendments, an EEOC guidance document indicated that “in some situations, working at home may be the only effective option for an employee with a disability.”⁶⁷ However, it stated that when the job requires face-to-face interaction, coordination, and other expectations like immediate access to certain documents, an employer *could* refuse a telecommute request as it would be per se unreasonable in altering the essential functions of the position.⁶⁸

Post-ADA Amendments, the EEOC issued Regulations to Implement the ADA in 2011.⁶⁹ The guidance described the ability to telework as a reasonable accommodation for people with conditions like diabetes, certain illnesses, and mental disabilities, indicating that “providing special equipment needed to work from home, will have costs, but might also result in cost savings” such as limiting expenses for commuting.⁷⁰

Even with long-term guidance from the EEOC suggesting that telework may be a reasonable accommodation, employees do not have a categorical right to any accommodation, and the same is true for telework.⁷¹ Nonetheless, because it has enforcement and regulatory power over the ADA, courts traditionally turn to the EEOC and its guidance documents for instruction in interpreting and adjudicating ADA claims.⁷²

B. Pre-Pandemic Circuit Split

Even before COVID-19 sparked worldwide conversations on initiatives for teleworking, working from home was a heavily litigated employment and disability rights issue.⁷³ Although before the pandemic

66. *Work at Home/Telework as a Reasonable Accommodation*, U.S. EQUAL EMP’T OPP. COMM’N (Feb. 3, 2003), <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation> [<https://perma.cc/DA4X-VQM2>]. The EEOC has always emphasized that employers should make reasonable accommodation determinations through an interactive process, not only because it is statutorily required, but also because it is good business practice to communicate with employees. See *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, *supra* note 11. It states that after an employee makes a request by informing the employer that she has a medical condition that interferes with her ability to do her job, they should work together to ensure that the employee is able to perform the essential functions and enjoy equal opportunities and benefits of her position. *Id.*

67. *Id.*

68. *Id.*

69. 29 C.F.R. § 1630.9(d) (2011).

70. *Id.*

71. Rae Vann, *Using the EEOC’s “Interactive Process” Framework to Address COVID-19 Reasonable Accommodation Requests*, JD SUPRA (Apr. 15, 2020), <https://www.jdsupra.com/legalnews/using-the-eeoc-s-interactive-process-25675/> [<https://perma.cc/8QR5-SYAG>].

72. EEOC v. Manufacturers and Traders Trust Co., 429 F. Supp. 3d 89, 110 (D. Md. 2019).

73. Robert Iafolla, *Work at Home Gets Skeptical Eye from Courts as Disability Issue*, BLOOMBERG LAW (Feb. 21, 2019), <https://news.bloomberglaw.com/daily-labor-report/work-at-home->

most courts held for employers in concluding that telework is not a reasonable accommodation, some courts have held that telework *could be* a reasonable accommodation in certain situations. Subsection 1 of this Part will explore the former, while Subsection 2 will address the latter.

1. Employer Not Required to Allow Employee to Telework as a Reasonable Accommodation

When presented with a failure to accommodate claim based on a denied telework request, most courts, such as the Fifth and Sixth Circuits, hold that while employers may offer telework, they are not required to, especially on a long-term basis or when it would alter a job's essential functions.⁷⁴

In 2015, the Sixth Circuit in *EEOC v. Ford Motor Co.* held that working from home in an interactive job setting is not a reasonable accommodation under the ADA.⁷⁵ The plaintiff in this case lived with irritable bowel syndrome and was employed by Ford as a resale buyer until September of 2009 when her request to work from home was denied, and she was terminated after a series of poor performance ratings.⁷⁶ Despite Ford's telecommuting policy indicating that working from home would be appropriate in her job type, it determined that her telework request was not reasonable as she previously proved unsuccessful in her performance while at home.⁷⁷ Because Ford proved that on-site job attendance was an essential function of the plaintiff's position, the court held that she was not a qualified individual under the ADA, and Ford was not required to alter or lower its standards.⁷⁸

The Fifth Circuit similarly deferred to the employer's judgment in *Credeur v. Louisiana*.⁷⁹ In this case, the plaintiff worked as an assistant attorney general for the Department of Justice ("DOJ") when she started to experience health problems in 2010.⁸⁰ Despite initially being able to work from home periodically, and several physicians' notes indicating that full-time in-person work was not manageable, the DOJ eventually decided that she could not continue telework due to her inefficient out-of-office productivity.⁸¹ Relying on the fact that a court "must give greatest

gets-skeptical-eye-from-courts-as-disability-issue [https://perma.cc/W8GR-76LJ].

74. See *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015); *Credeur v. Louisiana*, 860 F.3d 785 (5th Cir. 2017).

75. *Ford Motor Co.*, 782 F.3d at 765.

76. *Id.* at 774.

77. *Id.* at 759.

78. *Id.* at 761.

79. *Credeur v. Louisiana*, 860 F.3d 785, 791 (5th Cir. 2017).

80. *Id.* at 789.

81. *Id.* at 790.

weight to the ‘employer’s judgment,’” the Fifth Circuit declared that the DOJ’s practice and opinion that a litigation attorney’s main responsibilities must be performed in the office were determinative.⁸² In concluding that the accommodation was unreasonable, the court noted that, “[c]onstruing the ADA to require employers to offer the option of unlimited telecommuting to a disabled employee would have a chilling effect.”⁸³

These decisions reveal that while an employer may choose to initially offer telework on a limited basis, it does not have to continue that practice if an employee proves unsuccessful or unproductive while at home.⁸⁴ Instead, courts are highly deferential to the employer’s judgment when determining the functions and requirements of the position.⁸⁵ If physical interaction and participation are declared essential functions, most federal circuits will not require an employer to offer telework as a reasonable accommodation.⁸⁶

2. Employer *Might Be* Required to Offer Telework as a Reasonable Accommodation

While both courts above relied on the employer’s discretion in determining what functions are essential, the Second and Ninth Circuits have emphasized the ADA’s requirement of an interactive process when selecting a reasonable accommodation.⁸⁷ Since all accommodations are entirely fact-dependent, these courts hold that telework could be reasonable.⁸⁸

For instance, the Second Circuit “ha[s] implied...that permitting unsupervised work [including telework] might, in some cases, constitute a reasonable accommodation.”⁸⁹ For example, in *Nixon-Tinkelman v. N.Y.C. Department of Health & Mental Hygiene*, the plaintiff had cancer, asthma, was hard of hearing, and sought an accommodation for her daily commute to allow her to maintain her job.⁹⁰ Relying on its earlier decision

82. *Id.* at 792.

83. *Id.* at 795 (relying on guidance from the EEOC and cases from other circuits like *EEOC v. Ford Motor Co.*, the court emphasized that employers are not required to excuse employee from performing the essential functions of their jobs, and employees, even if qualified otherwise, are not entitled to an accommodation of their choosing).

84. See *EEOC v. Ford Motor Co.*, 782 F.3d 753, 759 (6th Cir. 2015); *Credeur*, 860 F.3d at 790.

85. See *Credeur*, 860 F.3d at 792.

86. See *Ford Motor Co.*, 782 F.3d 753; *Credeur*, 860 F.3d 785.

87. See *Nixon-Tinkelman v. N.Y.C. Dep’t of Health & Mental Hygiene*, 434 Fed. Appx. 17, 19 (2d Cir. 2011); *Humphrey v. Memorial Hospitals Ass’n*, 239 F.3d 1128, 1136 (9th Cir. 2001).

88. *Id.*

89. *McMillan v. City of New York*, 711 F.3d 120, 128 n.4 (2d Cir. 2013) (citing *Nixon-Tinkelman*, 434 Fed. Appx. at 20).

90. *Nixon-Tinkelman*, 434 Fed. Appx. at 19. The court illustrated how “a plaintiff can base a

in *DeRosa v. National Envelope Corporation* that suggested the “employer had provided a reasonable accommodation by allowing [the] employee to work from home,” the Second Circuit remanded the case for the trial court to consider whether allowing the plaintiff to work from home would be reasonable in accommodating her disability while enabling her to perform the essential functions of her job.⁹¹

Interestingly, the Ninth Circuit in 2001 determined that whether a medical transcriptionist living with obsessive compulsive disorder (OCD) could perform the essential functions of her job was a triable issue of fact.⁹² In *Humphrey v. Memorial Hospitals Association*, while the plaintiff’s performance was expected to be regular and predictable, the court found that the record made clear that physical job-site attendance was not an essential job duty, because the employer allowed several other medical transcriptionists to work from home.⁹³ After putting forth various arguments that the plaintiff was not actually disabled or a qualified individual within the meaning of the ADA, the court ultimately rejected the employer’s positions and further found it liable for not engaging in the interactive process.⁹⁴

As these opinions suggest, courts are less inclined to rely on an employer’s discretion when it fails to make a good faith effort to find an accommodation suitable for the employee’s disability while allowing her to perform her job successfully.⁹⁵ Furthermore, because reasonable accommodations are fact-specific determinations, employers who deny telework requests must be able to prove undue hardship or that in-person attendance is such an essential function of the position that disabled employees, even if qualified, cannot successfully do their jobs at home.⁹⁶

discrimination claim on an employer’s failure to make a reasonable accommodation,” under Section 504 of the Rehabilitation Act, in addition to claims under Section 501 and Title I of the ADA. *Id.* Since the plaintiff filed her failure to accommodate claim under Section 504 of the Rehabilitation Act, her charge would have been investigated by the Department of Justice, and she did not have to go through the agency before filing her claim. *Id.*

91. *Id.*

92. *Humphrey v. Memorial Hospitals Ass’n*, 239 F.3d 1128, 1136 (9th Cir. 2001). The court considered a failure to accommodate claim under the Rehabilitation Act, but directly noted that the Rehabilitation Act incorporated the ADA’s standard for disability discrimination claims. *Id.*

93. *Id.* at 1137.

94. *Id.* at 1140.

95. *Id.*

96. 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://perma.cc/2PLQ-H4WH].

C. During and Post-Pandemic

The pre-pandemic controversy of teleworking as a reasonable accommodation needs revisiting, especially considering COVID-19 and its impact on employer-employee relationships. In February 2021, one of the EEOC's chairs, Charlotte Burrows, described COVID-19 as not just a public health and economic crisis, but also as a civil rights crisis that impacts "older workers, individuals with disabilities, and other vulnerable workers."⁹⁷ The following paragraphs will address what that impact looks like and how courts responded at the end of 2020 and beginning of 2021.

In September 2020, the United States District Court for the District of Massachusetts determined that telework, for a limited period of time, is a reasonable accommodation under the ADA.⁹⁸ In *Peeples v. Clinical Support Options, Inc.*, the plaintiff lived with moderate asthma and teleworked at the beginning of the pandemic until June 2020 when she was expected to return to the office.⁹⁹ After a series of telework requests were denied, the plaintiff filed a failure to accommodate claim and requested a preliminary injunction that would require the employer to allow her to telework throughout the duration of the pandemic.¹⁰⁰ In analyzing whether the essential functions of the job could be performed remotely, the court determined that evidence of the plaintiff's successful telework during the initial four months of the pandemic was sufficient to prove that the request was reasonable under the circumstances.¹⁰¹ Additionally, the employer failed to produce evidence that it engaged in an interactive process before it denied the telework requests or that permitting the telework request would be an undue hardship.¹⁰² As a result, the court held that the plaintiff was entitled to work from home for at least sixty days.¹⁰³

Later in April of 2021, the U.S. District Court for the District of South Carolina in *Maffett v. City of Columbia* ruled on a pre-pandemic 2018 failure to accommodate claim when it denied a disabled employee's request to work out of the office.¹⁰⁴ In this case, the plaintiff was diagnosed with respiratory distress in 2017 and had trouble breathing and

97. EEOC Releases Fiscal Year 2020 Enforcement and Litigation Data, U.S. EQUAL EMP'T OPP. COMM'N (Feb. 26, 2021), <https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data> [https://perma.cc/F7DB-6H6R].

98. *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 66 (D. Mass. 2020).

99. *Id.* at 65.

100. *Id.* at 62.

101. *Id.* at 63.

102. *Id.* at 64.

103. *Id.* at 66.

104. *Maffett v. City of Columbia*, Civ. Action No. 3:19-cv-0832-MGL, U.S. Dist. LEXIS 178622, at *57 (Apr. 19, 2021).

working in the office.¹⁰⁵ According to her employer, 90% of her buyer job required using special equipment located in the employer's facility.¹⁰⁶ Despite acknowledging several air quality issues in the office, her request to work remotely was denied.¹⁰⁷ In its defense, her employer claimed that the plaintiff's duties allowed her to perform some of her processing duties from home, but the remaining aspects of her job would be pushed onto others.¹⁰⁸ Even though her employer failed to engage in the interactive process and later acknowledged that the plaintiff's department remained fully operational in its out-of-office work during the pandemic, the court determined that she failed to demonstrate the existence of a reasonable accommodation that would allow her to perform the essential functions of her job.¹⁰⁹ As a result, the court determined that her employer was not required to allow her to telework.¹¹⁰

These mid-pandemic cases reveal that because telework was a viable adjustment to the workplace during the early stages of COVID-19, evidence of its success will now be considered in the interactive process and reasonable accommodation suits.¹¹¹ Even so, not all disabled employees will have a categorical right to remote work after the pandemic ends.¹¹²

III. DISCUSSION

Reconciling the different opinions that address telework as a reasonable accommodation is difficult not only because of the split between the circuits but also within them.¹¹³ Pre-pandemic, the majority of these courts were likely correct in determining that employers were not required to allow their qualified disabled employees to telework, mostly because technology had not yet allowed remote work to be a profitable

105. *Id.* at *7.

106. *Id.* at *4.

107. *Id.* at *25.

108. *Id.* at *51.

109. *Id.* at *52 (relying on *Jacobs v. North Carolina Administrative Office of the Courts*, 780 F.3d 562 (4th Cir. 2015), courts have held that the interactive process is only triggered when the employee puts her employer on notice of an impairment that is limiting her ability to do her job).

110. *Id.* at *58.

111. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP'T OPP. COMM'N (Nov. 17, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [https://perma.cc/986A-UBT2].

112. *Id.*

113. For example, in *EEOC v. Ford Motor Co.*, the Sixth Circuit in 2015 sided with the employer in determining telework is not a reasonable accommodation. 782 F.3d 753 (6th Cir. 2015). In 2018, however, it determined that telework may be a reasonable accommodation. *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595 (6th Cir. 2018).

and efficient way for employers to operate their businesses.¹¹⁴ Today, the pandemic has required the workforce to assimilate to remote technology, and most have reported doing so successfully.¹¹⁵ Because of this, some employers will likely carry a heavy burden heading into post-pandemic litigation, while others like smaller businesses or those with more interactive job responsibilities may not.

Part A of this Section will argue why qualified disabled employees should most often have the option to telework. Part B will address the types of disabilities likely to request telework accommodations in relation to the pandemic. Part C will look at how the pandemic has changed failure to accommodate burdens of proof, employers' responsibilities, and the considerations courts will turn to in post-pandemic telework cases. Finally, Part D will discuss the EEOC's response to COVID-19's impact on ADA claims mid- and post- pandemic, as well as outline the facts of its first COVID-telework lawsuit filed in early September 2021.

A. Qualified Disabled Employees Should Be Entitled to Telework

Congress enacted the ADA to provide equal employment opportunities for people with disabilities,¹¹⁶ and offering remote work could directly serve this purpose. Employers who are able to offer telework without severe costs and disruptions should utilize its benefits not only to accommodate their qualified disabled employees but also because it is a wise business practice that helps recruit and maintain a diverse workforce.¹¹⁷

Like many facilities, office spaces were not created with disabled people in mind.¹¹⁸ Implementing remote work options can eliminate many institutional barriers disabled and other vulnerable workers face in order to maintain employment as well as give them the chance to enjoy equal job benefits and privileges as their nondisabled counterparts.¹¹⁹ As teleworkers have previously reported feeling undervalued, underutilized,

114. Katherin Guyot & Isabel V. Sawhill, *Telecommuting will likely continue long after the pandemic*, BROOKINGS (Apr. 6, 2020), <https://www.brookings.edu/blog/up-front/2020/04/06/telecommuting-will-likely-continue-long-after-the-pandemic/> [<https://perma.cc/F79H-5RJ9>].

115. *Id.*

116. 42 U.S.C. §§ 12101-12213.

117. Jason Richmond, *How Remote Work Can Enhance Workplace Diversity*, FORBES (July 28, 2020), <https://www.forbes.com/sites/forbesbusinesscouncil/2020/07/28/how-remote-work-can-enhance-workplace-diversity/?sh=f0a102de6a74> [<https://perma.cc/TLN5-93QG>].

118. Bernice Boucher & Kim Vanderland, *Is Your Office Designed for Inclusion?*, WORK DESIGN (Nov. 26, 2019), <https://www.workdesign.com/2016/09/office-designed-inclusion/> [<https://perma.cc/SZ35-8F35>].

119. Angela Lashbrook, *I struggled with office life. Now others are alive to benefits of remote working*, THE GUARDIAN (July 25, 2021), <https://www.theguardian.com/world/2021/jul/25/working-from-home-mental-health> [<https://perma.cc/5JCM-C7DT>].

and stigmatized, a widespread telework practice can normalize remote work for disabled people “without [others] doubting their competency the moment they realize they’re disabled.”¹²⁰

In a time where companies are placing emphasis on recruiting and maintaining a diverse workforce, disabled people are often excluded from the focus.¹²¹ By offering telework and similar accommodations, employers will be able to operate as entities that prioritize disabled bodies and minds, while taking substantial steps toward true diversity and inclusion.¹²² Further, studies show that the benefits of workplace diversity extend beyond its political implications, and “[b]ringing in people with different backgrounds and perspectives can lead to better decision-making, greater innovation, and higher engagement.”¹²³ For example, in a 2018 report, Accenture found leading companies that prioritize disability employment “achieved—on average—28 percent higher revenue, double the net income and 30 percent higher economic profit margins” over companies that do not.¹²⁴

In sum, even if employers are not required to allow their qualified disabled employees to telework, the ADA is a floor. Beyond offering it to obtain a diverse workforce, telework, where feasible, can be a wise business decision that saves costs through a reduction in office space and supplies.¹²⁵ Further, studies suggest that increased employee productivity while at home can earn employers more than work in the office.¹²⁶ Because the advantages of telework have shown to benefit companies with increased productivity as well as employee recruiting and retention mechanisms, employers who are able to offer telework without undue

120. Morgan Smith, *People with disabilities still face barriers finding work during the pandemic—here’s how companies can help*, CNBC (Oct. 29, 2021), <https://www.cnbc.com/2021/10/29/people-with-disabilities-still-face-barriers-finding-work-during-the-pandemic-heres-how-companies-can-help.html> [<https://perma.cc/GM72-WDJM>].

121. *Reframing the Conversation: ‘How is disability included in diversity?’*, U. OF UTAH: @THEU (Nov. 17, 2020), <https://attheu.utah.edu/facultystaff/reframing-the-conversation-how-is-disability-included-in-diversity/> [<https://perma.cc/BUX6-BAQL>].

122. Graham Shorr, *The Definitive Guide to Making Your Office Accessibility-Friendly*, SQUAREFOOT BLOG (Dec. 14, 2018), <https://www.squarefoot.com/blog/ada-office-accessibility/> [<https://perma.cc/YDK7-4N4W>].

123. Andra Picincu, *What Are the Advantages of a Diverse Workforce?*, SMALL BUSINESS-CHRON.COM (July 6, 2020), <https://smallbusiness.chron.com/advantages-diverse-workforce-18780.html> [<https://perma.cc/AEC4-VH6C>].

124. *Getting to Equal: The Disability Inclusion Advantage*, ACCENTURE (2018), https://www.accenture.com/_acnmedia/pdf-89/accenture-disability-inclusion-research-report.pdf [<https://perma.cc/PS78-6B87>]. Accenture is a company that provides business, technology, and operational strategies to other companies and employers. ACCENTURE, <https://www.accenture.com/us-en> (last visited Apr. 16, 2022).

125. *How Telecommuting Increases Business Profits*, Productive Leaders—Mary Kelly (Mar. 22, 2019), <https://productiveleaders.com/telecommuting-business-profits/> [<https://perma.cc/6RUD-6QC7>].

126. *Id.* For example, American Express found that its remote workers “took 26 percent more calls and increased their business output by 43 percent” when compared to their in-office counterparts. *Id.*

hardship should.¹²⁷

*B. The Types of Disabilities Needing ADA Protections
During COVID-19*

The ADAAA made clear that the inquiry should be less about whether someone has a disability and more about whether an employer has discriminated.¹²⁸ However, because qualified individuals with disabilities are entitled to accommodations that are not only per se reasonable, but also effective specifically to them, the approval or denial of a telework request could turn to the types of disabilities an employer is expected to accommodate.¹²⁹

Those with respiratory impairments like asthma or cystic fibrosis, or otherwise immunocompromised individuals such as those with diabetes or cancer, are the most obvious types of disabilities needing accommodations to protect themselves during the pandemic. In addition to these pre-existing impairments, the EEOC also recognizes the impact of “long COVID” as a disability under the ADA.¹³⁰ The Centers for Disease Control and Prevention defines this condition as “a wide range of new, returning, or ongoing health problems people can experience four or more weeks after first being infected with the virus.”¹³¹ For instance, if an employee who was infected with COVID-19 more than four weeks ago now has lung damage that causes difficulty breathing and performing other major life activities, that employee will be considered a person with a disability under the ADA and entitled to a reasonable accommodation.¹³²

The EEOC has also indicated that people with underlying mental health conditions exacerbated by the pandemic may be entitled to reasonable accommodations.¹³³ Specifically, the EEOC has recommended that an

127. See Lashbrook, *supra* note 119.

128. See 42 U.S.C. § 12101 et seq.

129. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 403 (2002).

130. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 111.

131. *Post-COVID Conditions*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Sept. 16, 2021), https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Flong-term-effects.html [https://perma.cc/B3UU-9KGG].

132. *Guidance on “Long COVID” as a Disability Under the ADA, Section 504, and Section 1557*, HHS.GOV (July 26, 2021), <https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html> [https://perma.cc/BE5G-HYFD].

133. *Id.* Interestingly, the EEOC has only addressed mental health and reasonable accommodations for those with *preexisting* conditions, and not those created by or realized during the pandemic. *Id.* However, because it has adopted the Departments of Health and Human Services and Justice’s analysis of “long COVID” as a disability, it’s recognition of “lingering emotional illness and other mental health

employer treat it as any other disability accommodation request, which includes asking the employee how the requested accommodation can allow her to keep working and determining if the condition is a true disability that substantially limits one or more major life activities.¹³⁴

While these are certainly the disabilities that are protected because of and during the pandemic, this informal list should not be exhaustive when addressing accommodation claims in the future. For instance, although those with mobility impairments do not necessarily demand a telework-accommodation related to the Coronavirus disease, they are still entitled to reasonable accommodations.¹³⁵ If the pandemic opens the availability for telework, those workers with physical impairments could have a clearer path to requesting that opportunity.

C. COVID-19 Has Likely Changed Reasonable Accommodation Determinations

In the early stages of the pandemic, most employers were forced into allowing their employees to telework.¹³⁶ In November 2021, almost two years after the start of the pandemic, new COVID-19 cases neared 90,000 a day in the United States.¹³⁷ With the pandemic and its ongoing state, many employees are requesting to continue, or return to, remote work.¹³⁸ In light of this public health crisis, employers, and eventually the courts, will have to decide whether working from home is a reasonable accommodation.

Subsection 1 of this Part will discuss ADA plaintiffs' burdens of proof in post-COVID-telework claims. Subsection 2 will address employers' responsibilities, burdens of proof, and the difference between large and small employers' undue hardship defenses.

conditions" as a "long COVID" impact arguably includes those mental impairments caused by the virus, but only if that person was previously infected by COVID-19. *Id.* While it is hard to imagine those with individuals requesting an accommodation due to a mental impairment caused by the uncertainties and challenges of the pandemic may not be entitled to one simply because of when the disability and accommodation request developed, with the lack of guidance from the EEOC on this issue, it is difficult to foresee how employers and courts will handle this type of request.

134. See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 111.

135. 42 U.S.C. §§ 12101-12213.

136. See Guyot & Sawhill, *supra* note 114.

137. David Mills, *Here's Where COVID-19 Cases Are Rising and Falling*, HEALTHLINE (Nov. 30, 2021), <https://www.healthline.com/health-news/here-are-the-states-where-covid-19-is-increasing-2> [<https://perma.cc/RW8P-C6NR>].

138. Madison Hoff, *41% of Remote Workers Never Want to Go Back to the Office—up From 29% in January*, INSIDER (Aug. 25, 2021, 12:23 PM), <https://www.businessinsider.com/how-many-workers-want-to-work-remotely-pwc-survey-2021-8> [<https://perma.cc/VR83-W65C>].

1. ADA Plaintiffs' Burden of Proof

Before the employer must prove in-person attendance is essential and/or teleworking is unduly burdensome, plaintiffs must show that, as qualified individuals under the ADA, telework is effective and reasonable in their positions, or, namely, that they can perform the essential functions of their jobs from home.¹³⁹ For those employees, evidence of successful telework in the early stages of the pandemic could be extremely convincing in proving that they can perform the essential functions of their positions from home, assuming that physical job-site attendance is not one of them.¹⁴⁰ On this point, it could also prove that in-person attendance, though thought to be essential before the pandemic, is not a necessary function after all.¹⁴¹

Non-disabled employees who simply fear exposure to the virus will not be entitled to an accommodation under the ADA and therefore cannot use a disabled employee's telework to show that they are entitled to similar treatment.¹⁴² However, an employer's allowance of those non-disabled employees, or other disabled employees, in similar positions to work remotely could evidence that physical job-site attendance is not an essential function.¹⁴³ While the courts often hesitate to interfere with an employer's discretion on which functions are truly essential, a preexisting allowance of some employees to work remotely will likely tend to show that the request is at least reasonable under the circumstances.¹⁴⁴ Additionally, it could also discredit the employer's argument that physical attendance is essential as well as weaken and possibly deprive it of an undue hardship defense.

2. Employers' Burden and Defenses

With modern technology and pandemic-telework proving feasible under the circumstances, some employers likely carry a heavy burden in defending themselves against failure to accommodate claims based on telework denials.¹⁴⁵ However, if they can prove that remote work is

139. *See generally* the burden-shifting framework orchestrated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792. *See also* 42 U.S.C. § 12111(8), describing an ADA plaintiff's burden of proof.

140. *See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 111.

141. *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 63 (D. Mass. 2020).

142. *See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 111.

143. *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001).

144. *Id.*

145. *Is Working from the Office an Essential Job Function?*, ROCKY MOUNTAIN ADA CENTER, <https://rockymountainada.org/resources/research/working-office-essential-job-function> [<https://perma.cc/73EW-VHDP>] (last visited Dec. 1, 2021).

unachievable, unduly burdensome, or that in-person attendance is an essential function of the job, they may avoid liability for failing to accommodate.¹⁴⁶

For employees whose jobs truly require hands-on-labor and in-person attendance, telework will likely be hard to prove as a reasonable accommodation because it would completely alter the position.¹⁴⁷ For instance, given that accommodations are fact- and context-specific inquiries, “a work-from-home arrangement might be reasonable for a software engineer but not for a construction worker.”¹⁴⁸ As the EEOC has indicated, employers are not required to change the position or the essential functions of it to accommodate a qualified individual’s disability.¹⁴⁹ As follows, a worker whose job requires physical labor or collaborative interaction will not be entitled to work from home, because physical attendance is both an essential function of the position and a prerequisite to other obligations expected in that type of work.¹⁵⁰

Importantly, if a function is not essential, employers cannot consider it when determining if an employee is a qualified individual under the ADA.¹⁵¹ As follows, if physical attendance is merely preferred and not a true essential function of the position, employers will have difficulty in defending themselves in telework failure to accommodate cases.¹⁵² Similarly, as discussed above, employers whose employees successfully worked remotely during the pandemic could also struggle in proving that in-person attendance is an essential function.¹⁵³ In fact, a performance-based study in 2020 found that “94% of surveyed employers report[ed] that company productivity ha[d] been the same (67%) or higher (27%) since employees started working from home during the pandemic.”¹⁵⁴ If

146. *Id.*

147. *Id.*

148. *Bilinsky v. American Airlines, Inc.*, 928 F.3d 565, 573 (7th Cir. 2019).

149. *Federal Laws Protect You Against Employment Discrimination During the COVID-19 Pandemic*, U.S. EQUAL EMP’T OPP. COMM’N, <https://www.eeoc.gov/federal-laws-protect-you-against-employment-discrimination-during-covid-19-pandemic> [<https://perma.cc/A4CE-T4NL>] (last visited Dec. 1, 2021). Still, with jobs where physical attendance is truly essential to the position, the employer is not relieved from finding an accommodation just because the specific request to telework is unachievable. *Id.* Once it is on notice that a qualified disabled employee needs an accommodation, the employer must engage in back-and-forth communication with that employee to find a reasonable and effective accommodation which allows her to do her job successfully. *Id.* In this guidance document, the EEOC recommends protective practices/equipment or scheduling changes as possible alternatives. *Id.*

150. *Maffett v. City of Columbia*, Civ. Action No. 3:19-cv-0832-MGL, U.S. Dist. LEXIS 178622, at *4 (Apr. 19, 2021).

151. *See Delaney*, *supra* note 60.

152. *Id.* *See also Humphrey v. Memorial Hospitals Ass’n*, 239 F.3d 1128, 1137 (9th Cir. 2001).

153. *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 63 (D. Mass. 2020).

154. Emily Courtney, *Remote Work Statistics: Navigating the New Normal*, FLEXJOBS, <https://www.flexjobs.com/blog/post/remote-work-statistics/> [<https://perma.cc/UWE2-GUKM>] (last visited Dec. 1, 2021).

an employer, alleged to have failed to accommodate, saw productivity remain or increase like the study suggests, it could struggle arguing that in-person attendance is essential.

Additionally, because modern technology is readily available and makes telework achievable, establishing an undue hardship defense will be challenging for many employers.¹⁵⁵ Here, the undue hardship defense is not concerned with any minor difficulty or expense an employer might face but instead relates to significant costs and extreme difficulties when providing a telework accommodation.¹⁵⁶ If telework only requires the employee to continue using the equipment already provided by the employer, undue hardship in terms of both difficulty and expense is likely immaterial.¹⁵⁷

Alternatively, if a telework accommodation requires an employer to provide the needed equipment to telework such as a desktop computer or laptop, keyboard, mouse, monitors, and so on, and the cost of such equipment outreaches the employer's financial resources, employers could successfully claim undue hardship.¹⁵⁸ Because accommodation determinations are focused on the resources and circumstances of the particular employer in relation to the cost or difficulty of providing telework, the undue hardship defense reveals the differences between small businesses and large employers.¹⁵⁹ While companies like Walmart and Google have the facilities, resources, and structures to offer accommodations like remote work, smaller businesses with limited financial resources to implement accommodations might experience increased hardship.¹⁶⁰ Consequently, smaller businesses have greater latitude in successfully raising the undue hardship defense if telework would truly cause financial strain or difficulty.¹⁶¹

Even if employers have means to allow their employees to telework that will not be extremely costly or difficult, undue hardship not only relates to monetary costs and accessibility but also the impact on other employees.¹⁶² For instance, if allowing a disabled employee to telework

155. See Woo, *supra* note 13.

156. 42 U.S.C. § 12111(10).

157. Benjamin Roussey, *Average Costs of Reasonable Accommodations in The Workplace*, ACCESSIBILITY.COM (May 18, 2021), <https://www.accessibility.com/blog/average-costs-of-reasonable-accommodations-in-the-workplace> [<https://perma.cc/93NC-QCMN>].

158. See 42 U.S.C. § 12111(10).

159. *How Undue Hardship Protects Small Businesses*, SHEGERIAN & ASSOCIATES (May 2, 2016), <https://www.shegerianlaw.com/how-undue-hardship-protects-small-businesses/> [<https://perma.cc/8L6W-3K3H>].

160. *Id.*

161. *Id.*

162. See *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, *supra* note 11.

would require an in-person employee to send documents that are only accessible in the office, this could either take time away from that employee's duties or require her to perform functions which were not essential prior to allowing the disabled employee to telework.¹⁶³ Importantly, however, a non-disabled employee's esteem will not be considered in assessing the impact on others when determining whether telework is reasonable.¹⁶⁴ Non-disabled employees are not entitled to reasonable accommodations, and their distaste for an employee's telework privilege is not an appropriate consideration when making the business decision.¹⁶⁵ The case law and EEOC guidelines on this are clear and should not change under mid- and post-pandemic conditions.¹⁶⁶

In sum, the pandemic will significantly impact the way courts handle failure to accommodate claims. Employers who experienced little to no impact on their business operations while working remotely will have difficulty successfully defending their refusal to allow qualified disabled employees the option to telework. Conversely, employers and business entities that will likely experience great hardship and difficulty in providing telework may not.

D. The EEOC's Response to COVID-19 Employment Practices

Because the pandemic has made a significant impact on employment and disability law practices, the EEOC has had to act in providing substantial guidance.¹⁶⁷ In September 2021, it filed its first ADA failure to accommodate claim in relation to COVID-19.¹⁶⁸ Subsection 1 of this Part will discuss COVID-19's impact on EEOC charges and its guidance documents. Subpart 2 will outline the basic facts of *EEOC v. ISS Facility Services*, and Subpart 3 will conclude by predicting its outcome.

1. EEOC Charges and Guidance Documents

In 2020 the EEOC received 67,448 charges of workplace discrimination. Of those charges, it resolved 165 and filed 93

163. *Id.*

164. *Kazmierski v. Bonafide Safe & Lock, Inc.*, 223 F. Supp. 3d 838, 852 (E.D. Wis. 2016).

165. *Id.*

166. *Id.* See also *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, *supra* note 11.

167. See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws*, *supra* note 111.

168. *EEOC Sues ISS Facility Services for Disability Discrimination*, U.S. EQUAL EMP'T OPP. COMM'N (Sept. 7, 2021), <https://www.eeoc.gov/newsroom/eeoc-sues-iss-facility-services-disability-discrimination> [<https://perma.cc/DM6V-ZW2Q>].

discrimination-based lawsuits.¹⁶⁹ Over a third of claimants (24,324) alleged some type of disability discrimination, making it the second largest category of charges in 2020.¹⁷⁰ Although the overall number of charges was the EEOC's lowest in over 20 years, employment attorneys are urging employers not to relax their workplace equality practices as they anticipate a significant rise in ADA claims because of COVID-19.¹⁷¹ In fact, ADA cases filed as of November 2021 exceeded the total number by November 2020.¹⁷²

In its most recent guidelines addressing reasonable accommodations in light of COVID-19, the EEOC declared remote work to be a reasonable accommodation.¹⁷³ However, it also emphasized that even if an employer offered telework during the pandemic, it is not necessarily required to continue offering it once the workplace reopens "if it requires continuing to excuse the employee from performing an essential function."¹⁷⁴ When determining whether the telework request is reasonable, the EEOC offers that the "temporary telework experience could be relevant to considering the new request."¹⁷⁵ For instance, as previously illustrated, if the employee was able to successfully perform her essential job functions without putting undue hardship on the employer's business and operations, it should consider this in post-pandemic telework decisions.¹⁷⁶

2. EEOC v. ISS Facility Services, Inc.

Since the EEOC litigates a small percentage of lawsuits compared to the charges it receives,¹⁷⁷ its first failure to accommodate claim in relation to the pandemic will be influential in how employers and courts will respond to accommodation requests mid- and post-pandemic.

In September 2021, the EEOC filed a complaint alleging that ISS Facility Services ("ISS") "discriminated against [the employee] when it denied her reasonable request for an accommodation and terminated her

169. See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws*, *supra* note 111.

170. *Id.*

171. EEOC Releases Latest Charges Statistics, OHAGAN MEYER (May 7, 2021), <https://ohaganmeyer.com/2021/05/07/eec-releases-latest-charges-statistics/> [<https://perma.cc/W9FQ-BTHD>].

172. Emily Halliday, *ANALYSIS: RTO, Covid Issues to Drive Ramp-Up in ADA Litigation*, BLOOMBERG LAW (Nov. 1, 2021), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-rto-covid-issues-to-drive-ramp-up-in-ada-litigation> [<https://perma.cc/TRY4-BYQW>].

173. See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO*, *supra* note 111.

174. *Id.*

175. *Id.*

176. *Id.*

177. See *Filing a Lawsuit*, *supra* note 53.

employment because of her disability.”¹⁷⁸ Here, the employee, Moncrief, living with chronic obstructive lung disease and hypertension, began having trouble breathing while at work in March of 2020.¹⁷⁹ After being diagnosed, a physician recommended she work from home.¹⁸⁰ With the pandemic’s newly commenced medical emergencies requiring many employees to work remotely at this time, Moncrief’s need for an accommodation was managed for the time being.¹⁸¹ It was not until June 1, 2020, when she had to formally request an ADA accommodation to telework.¹⁸² Despite others in the same position being permitted to continue to telework, her request was denied, and she was later terminated for poor performance.¹⁸³

The EEOC’s complaint alleged that these adverse employment decisions were made against Moncrief despite being a qualified individual who is able to perform the essential functions of her position.¹⁸⁴ In fact, it indicated that she increased employee training in the defendant’s facility by over 15% in the months leading up to her termination, and she was unaware of her employer’s dissatisfaction with her performance.¹⁸⁵ Besides the overall claim that ISS failed to accommodate Moncrief when it denied her the opportunity to telework, the EEOC alleged that ISS’s employment practices were intentional, done with malice and/or reckless indifference to her rights, and done “to deprive [her] of equal employment opportunities and otherwise adversely affect her status as an employee because of her disability.”¹⁸⁶

3. Predicted Outcome of *EEOC v. ISS Facility Services, Inc.*

The facts of *EEOC v. ISS Facility Services, Inc.* are similar to other cases where courts have determined telework may be a reasonable accommodation.¹⁸⁷ For example, given that ISS allowed other employees to continue to telework after the pandemic, the court could conclude that this practice indicates physical job site attendance is not an essential function like the Ninth Circuit did in *Humphrey v. Memorial Hospitals*

178. Complaint & Demand for Jury Trial, *EEOC v. ISS Facility Services, Inc.*, No. 1:21-CV-3708-SCJ-RDC (N.D. Ga. Sept. 7, 2021).

179. *Id.* at 13-14.

180. *Id.* at 16.

181. *Id.* at 17.

182. *Id.* at 18-19.

183. *Id.* at 20-23.

184. *Id.* at 13, 25.

185. *Id.* at 24.

186. *Id.* at 26-28.

187. See *Humphrey v. Memorial Hospitals Ass’n*, 239 F.3d 1128, 1136 (9th Cir. 2001); *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56 (D. Mass. 2020).

Association.¹⁸⁸ Additionally, Moncrief was permitted to telework during the pandemic and proved successful in performing the essential functions of her job at home.¹⁸⁹ Like in *Peeples v. Clinical Support Options, Inc.*, the court will likely give this evidence considerable weight when determining if the specific request to telework was reasonable.¹⁹⁰ Finally, because the EEOC alleged that Moncrief was a qualified employee who performed her job well, the facts indicating that ISS terminated her for allegedly baseless performance-related reasons are particularly concerning.¹⁹¹ Based on these considerations, coupled with the fact that ISS is a global company with considerable resources to offer accommodations,¹⁹² the court should find that ISS discriminated against Moncrief when it denied her request to telework and terminated her thereafter.

Given the rise in ADA charges the EEOC has seen in 2021,¹⁹³ it is likely that other courts will be faced with COVID-telework lawsuits like *EEOC v. ISS Facility Services, Inc.* Though remote work is a reasonable accommodation in the eyes of the EEOC, employers will not be required to excuse the essential functions of the position to offer it.¹⁹⁴ However, this is not without limitations, as successful COVID-telework will be an important consideration in these determinations, and ultimately, the outcome of these lawsuits.¹⁹⁵

IV. CONCLUSION

While telework has long been a critical theme in disability discrimination litigation, there is no bright-line rule on whether qualified disabled employees are entitled to work from home.¹⁹⁶ Some courts, like the Second and Ninth Circuits, have held that remote work is a fact-specific determination that should be evaluated, like all reasonable accommodations, through an interactive process.¹⁹⁷ However, the

188. *Humphrey*, 239 F.3d at 1137.

189. *See* Complaint & Demand for Jury Trial, *EEOC v. ISS Facility Services, Inc.*, No. 1:21-CV-3708-SCJ-RDC, at 25.

190. *See Peeples*, 487 F. Supp. 3d at 63.

191. *See* Complaint & Demand for Jury Trial, *EEOC v. ISS Facility Services, Inc.*, No. 1:21-CV-3708-SCJ-RDC, at 22-28.

192. *Revenue of ISS World worldwide 2009-2020*, STATISTA (June 1, 2021), <https://www.statista.com/statistics/330161/revenue-of-iss-world-worldwide/> [<https://perma.cc/RD5K-XPT9>].

193. *See* Halliday, *supra* note 172.

194. *See Peeples*, 487 F. Supp. 3d at 63.

195. *Id.*

196. *See* Iafolla, *supra* note 73.

197. *See* *Nixon-Tinkelman v. N.Y.C. Dep't of Health & Mental Hygiene*, 434 Fed. Appx. 17, 19 (2d Cir. 2011); *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001); *Peeples v.*

decisions from the Fifth and Sixth Circuits represent the majority view in holding that telework is not required as a reasonable accommodation when employers show that physical attendance is essential to the position.¹⁹⁸

The point of the ADA was to create equal employment opportunities for people with disabilities.¹⁹⁹ In part, this meant physically putting disabled people in the workplace and creating accommodations for them to remain there.²⁰⁰ This is true today, but the traditional meaning of “in the workplace” may not mean physical attendance anymore.²⁰¹ Given this reality, employers should use the forced pandemic-telework as a trial to see if allowing their qualified disabled employees to work remotely would truly disrupt their business and operations.²⁰² If physical attendance is not essential and telework would not impose significant difficulty or expenses, those qualified disabled employees who wish to work from home should have the right to do so. Ultimately, because the ways in which courts review accommodation requirements will likely change in light of COVID-19, this circuit split could flip in favor of determining telework is a reasonable accommodation.

Clinical Support Options, Inc., 487 F. Supp. 3d 56 (D. Mass. 2020).

198. See *EEOC v. Ford Motor Co.*, 782 F.3d 753, 759 (6th Cir. 2015); *Credeur v. Louisiana*, 860 F.3d 785 (5th Cir. 2017).

199. 42 U.S.C. §§ 12101-12213.

200. See *Accommodations*, *supra* note 7.

201. *Is Working from the Office an Essential Job Function?*, *supra* note 145.

202. See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO*, *supra* note 111.