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REMOTE WORK AS AN ACCOMMODATION FOR EMPLOYEES WITH DISABILITIES

Stacy A. Hickox & Chenwei Liao

ABSTRACT

Remote work allows employees to work despite geographic and family limitations, and has proved essential during the COVID-19 pandemic.1 For employees with disabilities, remote work can mean the difference between working and being unemployed, because they may need to work from home because of their limitations.2 A review of 125 court claims seeking remote work as an accommodation shows that employers have resisted providing remote work arrangements to employees with disabilities for four main reasons, often preventing remote work even where physical presence is not essential for performance of the job duties.3 This paper proposes a new approach to remote work as an accommodation based on Stone & Colella’s model,4 while explicating four factors that may influence its success, including the attributes of employees with disabilities, co-workers and supervisors, as well as organizational characteristics.5 If the feasibility of remote work as an accommodation were analyzed in light of these four factors, utilizing the wealth of research on what makes remote work successful, employees with disabilities would have more equitable access to work that can be performed at home.6

5. See infra Part II.
6. See infra Parts II-III.
INTRODUCTION

Employees with disabilities continue to be denied the opportunity to work remotely despite their right to be accommodated under the Americans with Disabilities Act (hereinafter “ADA”). Conversely, the COVID-19 pandemic has provided ample evidence of the feasibility of more flexible and non-standard work arrangements, including remote work. Companies like Facebook report that remote workers perform “better than expected,” leading to an expansion of permanent remote work for its employees. Whether by choice or necessity, today’s employers are becoming more and more creative in offering different forms of work arrangements, and remote work is generally considered part of a business strategy as well as an employee benefit. But will a shift in employer attitudes and the experiences of the COVID-19 pandemic lead to wider acceptance of remote work as a reasonable accommodation for people with disabilities? Such a shift would be a significant step in promoting “disability rights as a matter of justice,” and removing the “structures that continue to segregate and stigmatize” them.

This paper explores the availability of remote work, otherwise known as telework, telecommuting, or virtual work, all of which refer to

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a work arrangement where the employee performs work duties at a location other than the property maintained by her employing organization.\textsuperscript{14} Remote work also can be defined as work "involving an absence from the traditional office for a portion of the work week, while interacting through communication technology."\textsuperscript{15} Allowance of remote work became increasingly common even before the COVID-19 pandemic because of advances in technology\textsuperscript{16} and the preferences of employees.\textsuperscript{17} In sharp contrast, this review of litigation under the ADA shows the reluctance of courts to require that employers allow remote work by employees with disabilities, despite its numerous advantages for them and for the employer.\textsuperscript{18}

Despite its increasing availability, especially during the COVID-19 pandemic, some employers continue to have concerns about allowing employees to work remotely.\textsuperscript{19} This concern has impacted courts' willingness to require remote work as an accommodation under the ADA, even when technological advancements, training, and changes in management techniques can address at least some of those concerns.\textsuperscript{20} Despite the requirement under the ADA to provide remote work as an accommodation\textsuperscript{21} and its potential benefit to people with disabilities, many courts have been unwilling to order remote work as a reasonable accommodation.\textsuperscript{22} Courts have failed to consider the research on the viability of remote work for all employees in determining whether remote work is a reasonable accommodation under the ADA.\textsuperscript{23} This oversight is

\begin{itemize}
\item[16.] Id. at 1452.
\item[17.] Barbara A.W. Eversole et al., \textit{Creating a Flexible Organizational Culture to Attract and Retain Talented Workers Across Generations}, 14 ADVANCES DEVELOPING HUM. RES. 607, 613 (2012).
\item[18.] See infra Table 2.
\item[21.] Basas, supra note 19, at 68-69.
\item[22.] Sullenger, supra note 20, at 537, 549.
\item[23.] See Meghan Virick et al., \textit{Moderators of the Curvilinear Relation Between Extent of Telecommuting and Job and Life Satisfaction: The Role of Performance Outcome Orientation and Worker Type}, 63 HUM. RELS. 137, 142, 150-151 (2010) (discussing life satisfaction and job and employee characteristics without acknowledging the significance of remote work for employees with disabilities); Linn Van Dyne et al., \textit{Less Need to Be There: Cross-Level Effects of Work Practices that}
particularly concerning given the important role that remote work arrangements can play in the participation of people with disabilities in the workforce.

 Courts’ failure to consider remote work research illustrates a broader concern regarding accommodation analysis under the ADA. Despite its importance in allowing work for a large percentage of people with disabilities who cannot work at their workplace, both employers and the courts have failed to give appropriate consideration to remote work as one of the most commonly sought and often denied accommodations. Therefore, the first goal of the current study is to investigate the current status of remote work opportunities for employees with disabilities. To that end, we review 125 court cases interpreting the ADA that address requests for remote work as an accommodation for people with disabilities. Such an approach provides a unique perspective on the treatment of employees with disabilities in the workplace.

Prior research on remote work arrangements has focused on related concerns for all workers. Additionally, there was insufficient attention given to how remote work could be made more accessible and effective for employees with disabilities as a reasonable accommodation. Further, disability research and literature have inadequately considered how courts have been reluctant to require remote work as an accommodation for employees with disabilities. As suggested by Peters and Heusinkveld,

Support Work-Life Flexibility and Enhance Group Processes and Group-Level OCB, 60 HUM. RELS. 1123, 1124-25, 1128-30 (2007) (attributing increases in remote work to technological advances, competitive pressures and employees’ desire for more flexibility, without acknowledging the importance of remote work for employees with disabilities); see also Kristen M. Ludgate, Note, Telecommuting and the Americans with Disabilities Act: Is Working at Home a Reasonable Accommodation?, 81 MINN. L. REV. 1309, 1324, 1326-27 (1997) (illustrating examples of courts not considering research on remote work).

26. See Mark L. Lengnick-Hall et al., Overlooked and Underutilized: People with Disabilities are an Untapped Human Resource, 47 HUM. RES. MGMT. 257, 258, 260-61, 263 (2008) (conveying that employers give attention to competence, skill, safety, morale of the company, and qualifications without considering remote work opportunities); Ludgate, supra note 23, at 1324, 1326-27.
27. See infra Appendix A.
30. Id. at 422 (focusing on structural, economic, and technological barriers with little attention to ADA requirements).
31. See id. at 423, 425.
it is important to consider how regulations affect managers' attitudes towards remote work.\textsuperscript{32} This review of court decisions indicates that employers have resisted a request for remote work as an accommodation under the ADA, notwithstanding both research and past practice supporting its effectiveness as a work arrangement for employees without disabilities.\textsuperscript{33} This reluctance may reflect employers' underlying assessment of the legitimacy of a request for any accommodation.\textsuperscript{34}

Looking forward, this paper develops a new approach that can guide both employers and reviewing courts in determining the reasonableness of remote work as an accommodation under the ADA. This approach focuses on (1) the prevalence and success of remote work arrangements for people with disabilities, (2) the effect of remote work arrangements on people with disabilities, and (3) the effect of remote work arrangements on observers (coworkers and supervisors).\textsuperscript{35} Under this framework, we examine four categories of factors: organizational characteristics, attributes of employees with disabilities, attributes of coworkers, and attributes of supervisors.\textsuperscript{36}

This paper makes several major contributions. First, we conduct an extensive review of court cases reviewing employers' denial of remote work as an accommodation.\textsuperscript{37} Such an analysis serves as an indicator of how often employers resist providing remote work under the ADA's requirements, and how courts typically defer to employers' determinations of whether remote work is reasonable or whether it imposes a hardship on the employer.\textsuperscript{38} This deference results in employers' failure to utilize talents from people with disabilities in the workforce who cannot attend full-time work.\textsuperscript{39} This review also outlines the reasons that courts have accepted to justify the denial of remote work as an accommodation.\textsuperscript{40}

\textsuperscript{32} Pascale Peters & Stefan Heusinkveld, Institutional Explanations for Managers' Attitudes Towards Telehomeworking, 63 HUM. RELS. 107, 127 (2010).

\textsuperscript{33} See infra Table 2.

\textsuperscript{34} See Linda L. Putnam et al., Examining the Tensions in Workplace Flexibility and Exploring Options for New Directions, 67 HUM. RELS. 413, 424 (2014).

\textsuperscript{35} See infra Part II.

\textsuperscript{36} See infra Part II.

\textsuperscript{37} See infra Table II.


\textsuperscript{39} See Jane Anderson et al., Telecommuting: Meeting the Needs of Businesses and Employees with Disabilities, 16 J. VOCATIONAL REHAB. 97, 97 (2001) (stating that workers with disabilities seeking telework represent a hidden labor pool).

\textsuperscript{40} See infra Table 2.
We then review those reasons in light of the current research regarding the viability of remote work for all employees, with special attention to the specific concerns related to employees with disabilities. This research establishes how remote work arrangements can be successful, and measures the impact of such arrangements on the beneficiary employee as well as coworkers, supervisors, and the employer overall. This integration of work arrangements literature with legal research provides a unique interdisciplinary perspective on a special group of employees that traditionally have been overlooked. Highlighting the potential of remote work as an accommodation should lead to greater opportunities for people with disabilities to participate in the workforce, even if it that participation is from home.

I. PREVALENCE & EFFECTIVENESS OF REMOTE WORK

The prevalence and potential benefits of remote work make it a reasonable accommodation for employees with disabilities. Remote work was somewhat common before the COVID-19 pandemic came to the United States, but it has since become commonplace. Experiences of employers both before and after that shift demonstrate that despite some potential areas of concern, and the obvious impossibility of some


42. See Anderson et al., supra note 39, at 99 (stating that telework forces increase to the quality of communication with supervisors); 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. RSCH. 336, 353, 355 (2010) (expressing that teleworkers benefit from remote work due to more flexibility and better work-life balance).

43. See Lengnick-Hall et al., supra note 26, at 256 (stating that an untapped labor pool includes individuals with disabilities).

44. FRANK STEEMERS ET AL., THE CONFERENCE BD., FROM IMMEDIATE RESPONSES TO PLANNING FOR THE REIMAGINED WORKPLACE: HUMAN CAPITAL RESPONSES TO COVID-19 (2020) (stating that significant changes to the workforce following COVID-19 include flexibility and remote work policies).

45. See Latest Work-At-Home/Telecommuting/Mobile Work/Remote Work Statistics, supra note 41 (demonstrating the prevalence of remote work by reporting that remote work “has grown 173% since 2005”).

jobs being performed remotely, remote workers can be effective and productive in many positions.\(^\text{47}\)

A. Prevalence of Remote Work

Even before COVID-19, more than a majority of all employers in the United States allowed some type of remote working by their employees. However, the majority did not allow full-time remote work.\(^\text{48}\) From 2016 to 2017, it was estimated that between 37% and 43% of all workers in the United States were working remotely at least occasionally.\(^\text{49}\) In 2019, the Department of Labor (hereinafter “DOL”) found that an average of more than twenty-six million workers worked at home for at least part of an average day, representing 23.7% of those who worked.\(^\text{50}\) After the COVID-19 pandemic hit the United States, remote work arrangements increased significantly, becoming the “new normal.”\(^\text{51}\) For example, the DOL found in April 2020 that more than eight million people reported having a job but were not “at work” for reasons other than illness, childcare, weather, maternity leave, school, or military service, compared to 554,000 in that category in April 2019.\(^\text{52}\)

Before the COVID-19 pandemic, 69% of employers were offering at least part time remote work to at least some of their employees, including 27% of employers offering full-time remote work to some, and 7% of all employers offering full-time remote work to all employees.\(^\text{53}\) Before COVID-19, it was estimated that at least seventy-five million (56%) of U.S. employees held positions that could be performed at least in part

\(^{47}\) See STEEMERS ET AL., supra note 44, at 10 (discussing a study where nearly a quarter of respondents reported increased productivity).


\(^{52}\) Id.

remotely. Remote work has also increased significantly among federal workers as a result of the 2010 Remote Work Enhancement Act. During the COVID-19 pandemic, remote work has been adopted by virtually all employers. Looking into the future, 77% of surveyed employers expect an increase in remote work, even twelve months after COVID-19, and that percentage jumps to 83% for organizations with mainly professional and office work.

Not surprisingly, the prevalence of remote work varies by profession and level. Part-time remote work is practiced by more than 20% of employees in managerial, professional, and sales occupations, compared to rates of less than 10% in transportation, production, construction, or maintenance occupations. The percentage of remote workers with at least some college education is 66%, compared to the 9.2% of workers with at least a high school diploma. Similarly, the estimated percentage of workers whose duties allow them to work from home varies greatly by income percentile, with only 9.2% of the lowest quartile able to work remotely, while an estimated 61.5% of the top quartile are able to do so. Industry affects time spent working at home as well, with workers in healthcare, architecture, and engineering much less likely to work at home than those in education, training, arts, design, entertainment, sports, and media.

Employees have expressed a clear preference for the option to work remotely. This is displayed through research stating that 80% of U.S. employees would turn down a job that does not offer flexible work

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55. U.S. OFF. OF PERS. MGMT., 2013 STATUS OF TELEWORK IN THE FEDERAL GOVERNMENT 43 (2014) (reporting that 21% of eligible federal employees worked remotely, and 32% worked remotely three or more days per week by 2012).
56. STEEMERS ET AL., supra note 44, at 8 (reporting that 83% of "professional and office" employers expect "an increase in full-time employees working primarily from home").
57. Id. at 2, 8.
58. Id. at 8.
60. Economic News Release: Table J. Workers who could work at home, did work at home, and were paid for work at home, by selected characteristics, averages for the period 2017-2018, U.S. BUREAU LAB. STAT. (May 2018).
61. Id.
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arrangements. Further, 99% of one survey’s respondents stated a desire to “work remotely at least some of the time for the rest of their careers.” A 2016 survey revealed that 35% of employees would even “change jobs for the opportunity to work remotely” on a full-time basis, and 50% of millennials would change jobs to work remotely even on a part-time basis.

The opportunity to work remotely offers significant benefits for employees both with and without disabilities. For employees with disabilities, remote work can mean the difference between working and unemployment when physical or mental illness prevents their physical presence in the workplace. Thus, remote work holds the potential for allowing many employees with disabilities to participate and be productive in the workplace. Importantly, the opportunity to work remotely “removes both tangible and intangible workplace barriers that previously hindered” successful work by people with disabilities. These benefits are explored in greater depth in the subsequent section on remote work as an accommodation.

For all employees, research suggests a positive relationship between remote work and job satisfaction because the opportunity to work remotely promotes “individuals autonomy and flexibility.” Satisfaction may be most enhanced by moderate levels of remote work.

66. See Anderson et al., supra note 39, at 98-99.
67. See Sullenger, supra note 20, at 547 (“Telecommuting is yet another way persons with disabilities can benefit from... technology.”); Porter, supra note 2, at 107 (describing how accommodating people with disabilities allows them to remain employed).
68. Baker et al., supra note 29, at 422 (arguing that telework increases the range of jobs available to people with disabilities and removes boundaries related to workplace environments).
70. See infra Part I.B.
72. Morganson et al., supra note 14, at 582.
73. See Timothy D. Golden & John F. Veiga, The Impact of Extent of Telecommuting on Job Satisfaction: Resolving Inconsistent Findings, 31 J. MGMT. 301, 313-14 (2005); Virick et al., supra
at least for some employees, given the potential feelings of social isolation accompanying remote work.\textsuperscript{74} Some suggest that reliance on technology for communication with coworkers and supervisors may result in lower quality of communication,\textsuperscript{75} but the autonomy gained and the reduction of stress from interruptions and office politics associated with remote work may well compensate for any negative impact on communication.\textsuperscript{76} Improved work-life balance through remote work arrangements also improve job satisfaction, at least until workers find it too difficult to maintain boundaries between the two.\textsuperscript{77}

These estimates and studies demonstrate the prevalence and some benefits of remote work arrangements, and how they have significantly expanded during the COVID-19 pandemic.\textsuperscript{78} While these arrangements are not possible in some industries or professions, a significant amount of work can be performed at home. This raises the concern of how effective remote work arrangement can be.

\section*{B. Effectiveness of Remote Work}

Remote work continued to increase in use even before the COVID-19 pandemic because of the flexibility it offers to employees; employers continue to allow its use because of the advantages it offers.\textsuperscript{79} Overall, virtual work arrangements allow for flexibility and collaboration without the expense, time, and environmental impact connected with travel and commuting.\textsuperscript{80}

The connection between access to remote work and satisfaction can influence employee choices.\textsuperscript{81} As companies like Facebook have recognized, allowance of remote work broadens recruitment options, retains valuable employees, reduces climate impact, and expands

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\textsuperscript{74} Morganson et al., supra note 14, at 582.
\textsuperscript{75} See Fonner & Roloff, supra note 42, at 341-42.
\textsuperscript{76} Id. at 337, 340-41, 345-47, 353.
\textsuperscript{77} Id. at 339-40, 345.
\textsuperscript{78} Latest Work-At-Home/Telecommuting/Mobile Work/Remote Work Statistics, supra note 41.
\textsuperscript{79} Id.
\textsuperscript{81} See Eversole et al., supra note 17, at 612-13 (describing how new generations want more flexibility, including the option to work from home).
Remote workers may stay with an employer because the ability to work remotely is viewed as a privilege, which in turn can make the remote worker feel indebted to the organization, particularly among employees who value flexibility and work-life balance. As COVID-19 restrictions are loosened, any retraction of the ability to work remotely may negatively affect retention and productivity. The reduction in employee work exhaustion can also increase employee organizational commitment and decrease the likelihood of turnover. An expert has observed that remote workers may also “gain additional emotional and mental resources to better achieve work objectives.”

In addition to these employee benefits, employers benefit in several ways from the allowance of remote work. These benefits include reduction of overhead costs, even after accounting for the technological costs, as well as lowering absenteeism, and improving employee morale. Offering the opportunity to work remotely can attract and retain talented employees, particularly talent in need of flexibility, including people with disabilities. The best talent is attracted by remote work because of

82. Conger, supra note 9.
87. Id. at 185.
89. Swink, supra note 80, at 862.
92. See Kevin Hindle et al., Optimizing Employee Ability in Small Firms: Employing People with a Disability, 17 SMALL ENTER. RSCH. 207, 209, 211-12 (2010) (Illustrating that accommodating and employing people with disabilities allows employers to recruit from the largest pool of skills).
the employee preferences outlined above, and because geographic separation becomes less of an inconvenience or deal-breaker for potential candidates, thus expanding the hiring pool. Similarly, retention is closely tied to employee satisfaction, and organizations that allow remote work have reported significantly greater retention of highly qualified staff.

The above-noted higher levels of personal connection and commitment to the organization, as well as greater perception of organizational support, enhance other positive attributes such as motivation and organizational citizenship behavior among all employees. These attitudes reduce intent to leave the organization and actual turnover. For example, federal employees allowed to remote work reported significantly greater satisfaction with their jobs than employees who could not do so. Virtual work arrangements may also provide an opportunity to lessen the influence of unconscious bias, benefitting people whose physical disability might remain undetected in a virtual working world.

In addition to satisfaction and retention, significant research has documented performance and productivity gains from allowing remote work by employees in appropriate positions. An executive at Xerox,

94. Illegems & Verbeke, supra note 90, at 321; Major et al., supra note 91, at 69; Gus Manoocchehi & Theresa Pinkerton, Managing Telecommuters: Opportunities and Challenges, 21 AM. BUS. REV. 9, 10 (2003); WEF White Paper, supra note 49, at 6 (noting that remote work is used to increase worker retention).
96. Allen et al., supra note 71, at 49; Gajendran & Harrison, supra note 71, at 1533.
97. Liang Li et al., Leader-Member Exchange, Sales Performance, Job Satisfaction, and Organizational Commitment Affect Turnover Intention, 46 SOC. BEHAV. & PERSONALITY 1909, 1909-10 (2018).
99. Cherry, supra note 80, at 977-78, 982.
100. Allen et al., supra note 71, at 49; Jerome H. Collins & Joseph Moschler, The Benefits and Limitations of Telecommuting, 16 DEF. ACQUISITION REV. J. 55, 58 (2009); Igbaria & Guimaraes,
for example, explained that "employees are so much more productive when they work virtually." Recently, a remote work study conducted by Stanford University found a 13% performance increase among remote workers, and an earlier study involving the Telecommuting Pilot Program measured productivity increases of 10% to 30%. Significantly, the study found that remote work arrangements enhanced performance among employees who rank low on the leader-member exchange scale, and did not negatively affect performance among employees with high leader-member exchange. Reasons for productivity gains include fewer distractions or interruptions, a quiet work environment, removal of commuting time, less influence of office politics, and a more comfortable work environment. Productivity is also positively impacted by the reduction of absenteeism associated with remote work arrangements.

It remains to be seen whether the widespread allowance of remote work during the COVID-19 pandemic will convince employers that remote work is a reasonable accommodation that may even provide the employer with some of the benefits described above. Regardless of a


103. Cal. Dep't of Gen. Servs., Telecommuting Pilot Project Final Report 75-76 (1990); Bloom et al., supra note 102, at 3 (stating that employees with same equipment at home had higher levels of productivity and satisfaction then those working in office); Ravi S. Gajendran et al., Are Telecommuters Remotely Good Citizens? Unpacking Telecommuting's Effects on Performance Via I-Deals and Job Resources, 68 Pers. Psych. 353, 368, 379, 382 (2015) (finding that teleworkers show extra effort and good citizenship behavior).

104. Gajendran et al., supra note 103, at 382 (defining leader-member exchange as the quality of the relationship between a leader and a follower).


106. Swink, supra note 80, at 862.

change in employers’ perceptions, this research helps explain why so many employers now offer at least some of their employees the opportunity to remote work. The benefits of remote work for all employees demonstrate that remote work can be a reasonable accommodation under the ADA.

II. REMOTE WORK AS A REASONABLE ACCOMMODATION

The ADA was adopted to provide equal employment opportunities for people with disabilities, in part by requiring employers to provide a "reasonable accommodation for job applicants or employees with disabilities." The benefits of remote work raise the question of whether providing a remote work arrangement for employees with "a physical or mental impairment that substantially limits one or more major life activities" falls under employers’ obligation to provide reasonable accommodation under the ADA. Accommodations provide opportunities for people with disabilities to enter or remain in the workforce, given their relative disadvantage in receiving equal work opportunities. For individuals with disabilities, an accommodation such as remote work may go beyond convenience; in fact, such an accommodation may be necessary for individuals with disabilities to work in an able-bodied world.

A. Importance of Accommodation

Employees with disabilities “often experience numerous problems in their attempts to gain and maintain employment.” Reasonable accommodations required by the ADA level “uneven playing fields that

(stating that flexible arrangements can “decrease turnover and retraining costs, lower absenteeism, increase productivity, enhance recruiting, and lower overhead costs”).

108. See id. at 353.
109. Id.
110. Stone & Colella, supra note 4, at 371.
111. Id. at 354.
114. Elizabeth S. Bromet & Bruce Growick, Telework: A New Frontier in Vocational Rehabilitation, 32 J. APPLIED REHAB. COUNSELING 19, 23 (2001) (explaining the necessity of finding innovative work methods, such as remote work, to increase employment rates of individuals with disabilities).
115. Stone & Colella, supra note 4, at 352.
historically have been presumed unbiased, but operate from baselines that reflect cultural prejudice and result in workplace exclusion."116 Although some may characterize accommodations as "preferential treatment" if nondisabled employees are not similarly accommodated,117 remote work as an accommodation can provide necessary flexibility for employees with disabilities who might otherwise be unable to work.118 Moreover, the undue hardship defense allows employers to avoid accommodations such as remote work that would impose too much of a burden on a particular employer.119 Given the widespread allowance of remote work during the COVID-19 pandemic, employers, coworkers, and the general public may be less inclined to view work from home as undeserved special treatment when provided as an accommodation.120

The ADA has the potential to restructure employment norms,121 as it recognizes that "in order to treat some persons equally, we must treat them differently."122 The Supreme Court has recognized that the ADA requires accommodations to afford people with disabilities the same workplace opportunities enjoyed by other able-bodied employees.123 Despite this purpose, the ADA has been criticized for failing to effectuate broad changes in work structures or norms.124 This article provides clarity regarding the reasonableness and potential undue hardship on employers arising from allowance of remote work as an accommodation, and encourages courts to rely on objective information to determine whether

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117. Travis, supra note 107, at 312, 316; Cheryl L. Anderson, Ideological Dissonance, Disability Backlash, and the ADA Amendments Act, 55 WAYNE L. REV. 1267, 1282-83 (2009) (explaining that the ADA raises concerns about "special rights").
118. Anderson et al., supra note 39, at 97; Sullenger, supra note 20, at 537; Michael D. West & Jane Anderson, Telework and Employees with Disabilities: Accommodation and Funding Options, 23 J. VOCATIONAL REHABIL. 115, 115 (2005); John C. Bricout, Using Telework to Enhance Return to Work Outcomes for Individuals with Spinal Cord Injuries, 19 NEUROREHAB. 147, 150 (2004).
119. Travis, supra note 107, at 324-25.
120. Stengel, supra note 12.
124. Arnov-Richman, supra note 121, at 362.
remote work arrangements are a reasonable means of providing more equitable access to work for people with disabilities.\textsuperscript{125} A remote work arrangement may enable work by an otherwise unemployed person with a disability that includes "environmental sensitivities, episodic symptoms, mobility impairments, and/or chronic pain or fatigue conditions."\textsuperscript{126} As one court explained, remote work need not be "medically necessary" to be reasonable if that accommodation would allow an employee to enjoy "equal benefits and privileges as other employees" who work for that employer.\textsuperscript{127} At the same time, remote work should not be utilized to isolate an employee with a disability who could be accommodated to work in the organization's workspace.\textsuperscript{128}

In determining whether a person is qualified for a position with a reasonable accommodation, "the applicant's or employee's skills are to be considered independent of preconceived attitudes about the relation of disability to current job qualifications."\textsuperscript{129} Early studies showed that low cost accommodations resulted in "increased work productivity, injury prevention, reduced workers' compensation costs and workplace effectiveness and efficiency."\textsuperscript{130} Despite this obligation under the ADA, an accommodation is only required if it allows for performance of the essential functions of his or her employment position.\textsuperscript{131} An employer must provide at least one such reasonable accommodation unless the accommodation "would impose an undue hardship on the operation" of the employer.\textsuperscript{132} Accommodations can be used to support the employee's status as a "qualified individual,"\textsuperscript{133} but both reasonableness and undue hardship should be assessed based on "the needs and disability of the employee and the resources and expectations of the employer."\textsuperscript{134} Thus, remote work is one type of accommodation that may be required under the ADA, but only if the employee can still complete his or her essential duties without

\textsuperscript{125} See infra Part II.
\textsuperscript{126} Allen et al., supra note 71, at 57.
\textsuperscript{128} See Baker et al., supra note 29, at 427 (noting that offering remote work could conflict with goals of social inclusivity).
\textsuperscript{130} Id. at 377.
\textsuperscript{131} AMERICANS WITH DISABILITIES ACT, 42 U.S.C. § 12111(8) (2012).
\textsuperscript{132} Id. § 12112(b)(5)(A).
\textsuperscript{133} See Woodruff v. Peters, 482 F.3d 521, 527 (D.C. Cir. 2007).
\textsuperscript{134} Basas, supra note 19, at 68.
imposing an undue hardship on the employer.\textsuperscript{135} Courts have been inconsistent in determining whether remote work arrangements are a reasonable accommodation,\textsuperscript{136} perhaps because of the ADA’s ambiguity regarding the duty to accommodate.\textsuperscript{137} Courts’ reluctance to interpret the duty to accommodate broadly may also stem from a more sinister reluctance to require affirmative changes by employers,\textsuperscript{138} or a “failure to comprehend and therefore accept the conceptual premises underpinning” the ADA,\textsuperscript{139} as outlined above.\textsuperscript{140}

An employee can demonstrate the reasonableness of remote work as an accommodation by showing that other employers in the industry provide similar accommodations or “some of the more obvious and visible circumstances” of the employer indicate that the accommodation is “facially practicable.”\textsuperscript{141} Thus, the widespread prevalence and documented benefits of remote work outlined above, and its significant expansion during the COVID-19 pandemic, should support its reasonableness as an accommodation.\textsuperscript{142} Instead, courts have deferred to an individual employer’s determination as to whether physical presence is necessary for performance of the requestor’s job duties.\textsuperscript{143} This deference results in great variation of outcomes for employees seeking remote work as an accommodation.\textsuperscript{144} In the section below, we will

\textsuperscript{135} See infra text accompanying notes 136-37.
\textsuperscript{136} Baker et al., supra note 29, at 425; Jeannette Cox, Reasonable Accommodations and the ADA Amendments’ Overlooked Potential, 24 GEO. MASON L. REV. 147, 147 (2016) (“[C]ourts widely differ in their perspectives about whether the ADA requires employers to permit employees with disabilities to work from home.”); Shelley Kaplan et al., A Framework for Providing Telecommuting as a Reasonable Accommodation: Some Considerations on a Comparative Case Study, 27 WORK 431, 432-33, 436 (2006) (noting the “sharp difference of opinion” among circuit courts).
\textsuperscript{137} See Jennifer Bennett Shinall, Anticipating Accommodation, 105 IOWA L. REV. 621, 630-37 (2020) (discussing the lack of clarity regarding the duty to accommodate); John M. Floyd, Americans with Disabilities Act: Impact Upon Workers’ Compensation—Friend or Foe? A Primer for the Corporate Insurance Department and Outside Counsel, 17 AM. J. TRIAL ADVOC. 637, 647-48 (1994) (describing the duty to accommodate as “[o]ne of the most vague provisions” of the ADA).
\textsuperscript{138} SUSAN GLUCK MEZEY, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT 45 (2005).
\textsuperscript{139} Matthew Diller, Judicial Backlash, the ADA, and the Civil Rights Model, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 62, 65 (Linda H. Krieger ed., 2003).
\textsuperscript{140} See supra Part I.A.
\textsuperscript{142} See supra Part I.
\textsuperscript{143} See EEOC v. Ford Motor Co., 782 F.3d 753, 762-63 (6th Cir. 2015).
\textsuperscript{144} See infra Table 2.
review and analyze court cases regarding remote work accommodation for employees with disabilities.145

B. Judicial Treatment of Remote Work as an Accommodation

This study examines the reasoning behind the courts’ decisions as to whether remote work is a reasonable accommodation since the ADA’s adoption.146 While these 125 decisions do not capture the outcomes of all the more than 24,000 charges filed with the EEOC under the ADA each year,147 they provide insight into judicial approaches to remote work as an accommodation, which may represent as much as 23% of employees seeking accommodations.148

Judicial analysis of remote work as an accommodation most notably began with a 1995 decision which denied the claim of a state employee who was a paraplegic and requested to continue working at home as an accommodation, after she had been allowed to do so for several weeks.149 The claim centered on the state employer’s failure to provide the employee with a new computer and sufficient work to obviate her need to use sick time while at home.150 The court concluded that the state need not provide her with a computer because the previously granted opportunity to work at home combined with her use of a small amount of sick time was a sufficient accommodation.151 This conclusion was based on the court’s generalization that “an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home,” at least in situations “where their productivity inevitably would be greatly reduced.”152

For the past twenty five years, numerous ADA decisions153 have relied on this court’s reasoning to support employers’ denials of remote work as an accommodation, based on the court’s broad proclamation that “[m]ost jobs in organizations public or private involve team work under

145. See infra Part II.B.
146. See infra Table 2.
149. Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 544-545 (7th Cir. 1995).
150. Id.
151. Id. at 544.
152. Id. at 544-45.
153. Lexis Nexis shows 585 citations to this decision in other decisions.
supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee’s performance.”154 This statement goes well beyond the facts of that particular employee’s circumstances under which she had worked at home successfully for several weeks.155 Many courts have unquestioningly applied this reasoning despite the significant developments in technology after that decision was issued,156 disregarding the court’s recognition that the duty to accommodate by allowing remote work “will no doubt change as communications technology advances.”157

Despite its broad reasoning, the Vande Zande court recognized the possibility of “a very extraordinary case” where an employee could show that remote work may be reasonable.158 Similarly, a decision in the previous year noted the possibility of an “unusual case where an employee can effectively perform all work-related duties at home.”159 Expanding on this reasoning, some subsequent courts have recognized that remote work could be a reasonable accommodation where “the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer.”160 By characterizing remote work as “unusual,” courts have reached seemingly inconsistent and at best confusing conclusions regarding whether physical presence at work is an essential function of the job held by the employee seeking remote work as an accommodation.161

In an attempt to understand how the judiciary resolves requests for remote work as an accommodation, this paper includes an extensive review of 125 court decisions which met the following criteria: (1) claim made by a U.S. employee with a disability, as defined by the ADA, and (2) the reasonableness and/or undue hardship of remote work as an accommodation was addressed and resolved by judgment in a federal district and/or appellate court. The decisions were selected from ADA decisions regarding accommodations reported in Bloomberg BNA’s Labor & Employment Law Resources Center and/or LEXISNEXIS Academic since the ADA’s effective date in 1992. Those decisions were

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154. Vande Zande, 44 F.3d at 544.
155. Id. at 544.
156. See Johnson, supra note 39, at 1244.
157. Vande Zande, 44 F.3d at 544.
158. Id. at 545.
160. Humphrey v. Mem’l Hosps. Ass’n, 239 F.3d 1128, 1136 (9th Cir. 2001); EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943, 948-49 (7th Cir. 2001).
161. Hancock, supra note 69, at 159-60.
then searched in Shepard’s Citations Service to find other subsequent federal decisions that have cited those decisions and also concerned remote work as an accommodation.

**TABLE 1. Number of court decisions per year with outcome**

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of decisions</th>
<th>% in favor plaintiff employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>3</td>
<td>0%</td>
</tr>
<tr>
<td>1996</td>
<td>1</td>
<td>100%</td>
</tr>
<tr>
<td>1997</td>
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<td>29%</td>
</tr>
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<td>1998</td>
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<td>0%</td>
</tr>
<tr>
<td>1999</td>
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<td>0%</td>
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<td>2000</td>
<td>5</td>
<td>0%</td>
</tr>
<tr>
<td>2001</td>
<td>5</td>
<td>20%</td>
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<tr>
<td>2002</td>
<td>4</td>
<td>25%</td>
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<td>1</td>
<td>0%</td>
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<td>2004</td>
<td>3</td>
<td>33%</td>
</tr>
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<td>2005</td>
<td>5</td>
<td>60%</td>
</tr>
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<td>2006</td>
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<td>0%</td>
</tr>
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<td>2007</td>
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<td>100%</td>
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</tr>
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<td>2012</td>
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</tr>
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<td>2013</td>
<td>7</td>
<td>57%</td>
</tr>
<tr>
<td>2014</td>
<td>8</td>
<td>38%</td>
</tr>
</tbody>
</table>
By searching these sources for all federal court decisions involving remote work as a requested accommodation, we located 125 claims resolved in federal courts decided between 1995 and 2020, all of which turned on the reasonableness and/or hardship of providing remote work as an accommodation. This selection of decisions admittedly includes some bias, in that the court decisions only include situations where the employer has refused to accommodate an employee, the employee has chosen to file a charge under the ADA, and the parties have failed to resolve the claim prior to its adjudication. The selection bias may result in the inclusion of claims for accommodation that are more ambiguous than those involving a clear right to accommodation or a situation where remote work is obviously unworkable.

We attempted to categorize the characteristics of the claimants in these decisions. Of the cases identifying a profession, claimants included 65 employees in the service industry, 25 supervisors or managers, 18 employees in engineering or IT, and 10 in sales; levels included 97 professionals, 18 skilled employees, 15 semi-skilled employees, and no unskilled employees. Where indicated, average service with the employer was 9.3 years. In the subsequent sections, we analyze in

162. See infra Appendix A.
163. See, e.g., Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1116 (10th Cir. 2004); Dvorak v. Mostardi Platt Assocs., 289 F.3d 479, 481 (7th Cir. 2002); Phelps v. Optima Health, Inc., 251 F.3d 21, 23 (1st Cir. 2001); Hoskins v. Oakland Cty. Sheriff's Dep't, 227 F.3d 719, 723 (6th Cir. 2000); Gonzales v. City of New Braunfels, 176 F.3d 834, 836-37 (5th Cir. 1999).
164. See infra Appendix A.
165. See infra Appendix A.
depth the different reasons provided by employers and the courts in denying remote work for these employees in a variety of settings.166

1. Essential Presence at Work

The reasonableness of remote work often turns on the employer’s definition of the essential duties of a particular position.167 An “essential function” is a fundamental job duty of the position, and excuse from performing an essential job function typically is seen as an unreasonable accommodation.168 In contrast, an accommodation can be reasonable despite a consequent inability to perform “marginal” tasks of the job.169 Courts generally give considerable weight to an employer’s judgment as to what functions are essential.170 To determine reasonableness, the ultimate question is whether the accommodation would “fundamentally alter that position.”171

In analyzing the reasonableness of remote work as an accommodation, courts continue to expand the scope of what duties are essential to situations where employees’ physical presence is not obviously necessary, including positions deemed by the employer to require physical presence.172 In contrast to jobs which obviously require presence, such as a nurse who must administer care, courts have long cautioned against making uninformed or “intuitional” decisions about whether an employee’s physical presence is essential.173 Without some

166. See infra Parts II.B.1-B.5.
168. See, e.g., Mason, 357 F.3d at 1122; Phelps, 251 F.3d at 26; Dvorak, 289 F.3d at 484-85; Hoskins, 227 F.3d at 729-31; Gonzales, 176 F.3d at 838; Martinson, 104 F.3d at 687.
171. Credeur v. Louisiana, 860 F.3d 785, 792 (5th Cir. 2017); Bilinsky v. Am. Airlines, Inc., 928 F.3d 565, 569 (7th Cir. 2019); Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630 app. at 412.
172. See, e.g., EEOC v. Ford Motor Co., 782 F.3d 753, 761 (6th Cir. 2015) (en banc) (“[The] general rule [is] that, with few exceptions, ‘an employee who does not come to work cannot perform any of his job functions, essential or otherwise.’”) (citing EEOC v. Yellow Freight Sys., 253 F.3d 943, 948 (7th Cir. 2001)); Cisneros v. Wilson, 226 F.3d 1113, 1129 (10th Cir. 2000) (noting that attendance is generally “an ‘essential’ function of any job”).
173. See, e.g., McMillan v. City of New York, 711 F.3d 120, 126 (2d Cir. 2013) (showing that courts should not assume that a flextime schedule is unreasonable); Borkowski v. Valley Cir. 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.”).
limits on what is deemed essential, employers could assert that the absence of any need for an accommodation is essential for a job. Thus, an employer should not be able to “turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description.” At least one expert has warned that such deference to an employer’s definition of what is essential for a job is “inconsistent with ADA’s statutory language and regulations.” Thus, some courts caution that employers are not entitled to “blind deference” or “unfettered discretion” in deciding what accommodations are reasonable. Under this approach, an employee’s physical presence at work is not essential “simply because an employer says that it is.”

Despite these warnings, courts consistently held that in making determinations about the essential nature of a job duty, including physical presence at work, courts should not “second guess an employer’s business judgment” by acting as a “super personnel department.” Similarly, an Equal Employment Opportunity Commission (hereinafter “EEOC”) Fact Sheet states that “the inquiry into essential functions is not intended to second guess an employer’s business judgment with regard to production standards.” Following this guidance, courts typically consider the employer’s judgment and job descriptions, as well as the time spent performing the function, the experience of incumbents in that position, and the consequences of not requiring the function.

In applying this approach, courts often find that remote work is not a reasonable accommodation based on courts’ deference to an employer’s

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174. See Travis, supra note 167, at 1701-03 (“[B]roadly defining a job’s essential functions … help[s] employers use [such functions as] a disqualification strategy later in court.”).

175. Davidson v. Am. Online, Inc., 337 F.3d 1179, 1191 (10th Cir. 2003) (quoting Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1071 (9th Cir. 2000)).

176. Travis, supra note 167, at 1716; Nicole Buonocore Porter, The New ADA Backlash, 82 Tenn. L. Rev. 1, 54 (2014) (showing that an employer’s judgment as to what are considered essential functions should only be one factor in the determination).

177. Ford Motor Co., 782 F.3d at 765.

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


180. Mason v. Avaya Commc’ns, 357 F.3d 1114, 1122 (10th Cir. 2004).


determination that physical presence at work is essential. In doing so, courts rely heavily on information from the employer, including representations of workplace norms, characterized as essential job functions, which assume that work must be completed at the employer’s worksite. In contrast, the opinion or perspective of the employee seeking an accommodation will not be sufficient to establish that physical presence at work is not essential.

In line with this guidance, courts often have deferred to an employer’s determination that physical presence is essential, and therefore remote work is not a reasonable accommodation. In an influential decision, the Sixth Circuit relied heavily on Ford’s “business judgment” in determining that remote work was not a reasonable accommodation. Consequently, an employee seeking to remote work may be unable to establish that she can be productive, communicate, and be supervised effectively, simply because the employer proclaims that physical presence at work is essential.

Given this deference to employers’ determinations regarding the viability of remote work as an accommodation, courts have consistently held that an employee’s regular, in-person attendance at work is essential for “most jobs, especially the interactive ones.” Judgments about the necessity of an employee’s physical presence often conflate with the reasonableness of allowing an irregular schedule, regardless of the location. Courts often point to the sporadic and unpredictable nature of

183. See, e.g., Kiburz v. England, 361 F. App’x 326, 333-35 (3d Cir. 2010) (showing that some employers deem physical presence an essential duty of employment).
184. Travis, supra note 167, at 1711-12.
185. Id. at 1715.
186. Credeur v. Louisiana, 860 F.3d 785, 794 (5th Cir. 2017); EEOC v. Ford Motor Co., 782 F.3d 753, 764 (6th Cir. 2015).
188. Id. at 762.
189. Id.
190. Id. at 762-63.
191. See, e.g., Williams v. AT&T Mobility Servs. LLC, 847 F.3d 384, 392-93 (6th Cir. 2017) (showing that a call center employee was unqualified because of attendance issues); EEOC v. Yellow Freight Sys., 253 F.3d 943, 949-59 (7th Cir. 2001) (showing a dockworker with excessive absenteeism was not qualified); Nesser v. Trans World Airlines, 160 F.3d 442, 445 (8th Cir. 1998) (showing an airline customer service agent that was unable to attend work regularly was not qualified); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1047 (6th Cir. 1998) (showing that an employee was not qualified because of a year-long medical leave of absence with an uncertain date of return); Nowak v. St. Rita High Sch., 142 F.3d 999, 1003-04 (7th Cir. 1998) (showing that a teacher after missing 65.5 school days and three exam days was not qualified).
an employee’s absences in finding that she is unqualified.\textsuperscript{192} However, these decisions should not be applied to remote workers who adhere to a regular schedule, without evidence of an irregular or unreliable schedule,\textsuperscript{193} because regular availability can still be achieved via remote work.\textsuperscript{194} Thus, courts should recognize that remote workers do not raise the same concerns as employees with sporadic absences when they are available consistently during regular working hours.\textsuperscript{195}

Remote work may also be denied as an accommodation if the employer offers some other reasonable accommodation that will address the limitations caused by an employee’s impairment.\textsuperscript{196} In fact, courts regularly recognize that “[a]n employer is not obligated to provide an employee the accommodation [s]he requests or prefers.”\textsuperscript{197} Rather, “the employer need only provide some reasonable accommodation.”\textsuperscript{198} Consequently, if an employer offers sick or disability leave to an employee who cannot attend work, the employer may avoid allowance of a remote work arrangement as an alternative, even if the employee could perform her work at home.\textsuperscript{199} Ironically, when an employer required an employee to choose remote work as a reasonable accommodation, a court readily held that remote work was not unreasonable because of the isolation, and would not deny her “equal privileges and benefits of employment” enjoyed by other employees.\textsuperscript{200}

Because courts typically make determinations about the reasonableness of excusing an employee’s physical presence at work in response to a motion for summary judgment by an employer, employees seeking accommodation carry the burden of proof regarding the reasonableness of the accommodation.\textsuperscript{201} A review of ADA decisions

\textsuperscript{193} Ludgate, supra note 23, at 1331-33 (1997).
\textsuperscript{194} EEOC v. Ford Motor Co., 752 F.3d 634, 644 (6th Cir. 2014) (“[T]elecommuting does not raise the same concerns as flex-time scheduling because an employer can still rely on an employee to be working during scheduled hours.”).
\textsuperscript{195} Id.
\textsuperscript{196} Shaun Abreu, Note, Navigating Choppy Waters: Reasonable Accommodations in Standardized Testing and the Workplace for Individuals with ADHD, 22 QUINNIPIAK HEALTH L.J. 1, 36 (2018).
\textsuperscript{197} Mobley v. Allstate Ins. Co., 531 F.3d 539, 546 (7th Cir. 2008) (quoting Gile v. United Airlines, 95 F.3d 492, 499 (7th Cir. 1996)).
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{201} Travis, supra note 167, at 1708.
following the 2009 amendments shows that employers raised the issue of the qualifications of people with disabilities in 47.1% of the motions for summary judgment, and district courts granted employers’ motions on those grounds in 69.7% of those cases.\(^{202}\) Similarly, our review shows that employees were only successful in defeating a motion for summary judgment or a judgment notwithstanding a verdict in 33% of the 125 claims reviewed.\(^{203}\) Thus, employees often are denied the opportunity to prove the reasonableness of an accommodation request at trial, even though courts recognize that the determination of essential functions is necessarily a factual question rather than a question of law.\(^{204}\)

In contrast to these employer-friendly outcomes, a small number of courts have refused to make a factual determination that remote work is unreasonable on a motion for summary judgment, at least where the employee seeking that accommodation offers some evidence that working from home has been effective or is possible.\(^{205}\) For example, the Sixth Circuit rejected a motion for judgment in favor of a public employer after a jury verdict in favor of an attorney seeking to work remotely as an accommodation because of the factual issues related to whether she could perform her essential job duties from home.\(^{206}\) Similarly, a district court opined that a “nearly per se” rule that remote work is unreasonable “flies in the face of the requirement of a case-by-case, fact-specific inquiry.”\(^{207}\) These minority decisions are significant in that they recognize that employers’ “characterization of essential job functions do not always carry the day,” particularly where the employee has demonstrated her ability to perform her duties at home.\(^{208}\)

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203. See infra Appendix A.
204. Brown v. Smith, 827 F.3d 609, 613 (7th Cir. 2016); Rorrer v. City of Stow, 743 F.3d 1025, 1043 (6th Cir. 2014) (“Determining whether a function is essential ‘is a question of fact that is typically not suitable for resolution on a motion for summary judgment.”’) (quoting Keith v. Cnty. of Oakland, 703 F.3d 918, 926 (6th Cir. 2013)).
TABLE 2. Court’s basis for denial of claims for remote work as accommodation

<table>
<thead>
<tr>
<th>Basis for Denial</th>
<th>No. of claims</th>
<th>No. of claims upheld</th>
<th>% of claims upheld</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employer policy (all employees)</td>
<td>9</td>
<td>2</td>
<td>22.20%</td>
</tr>
<tr>
<td>Employer policy (position)</td>
<td>35</td>
<td>4</td>
<td>11.4%</td>
</tr>
<tr>
<td>Employer practice – employees with disabilities</td>
<td>9</td>
<td>4</td>
<td>44.4%</td>
</tr>
<tr>
<td>Employer practice – employees without disability</td>
<td>18</td>
<td>8</td>
<td>44.4%</td>
</tr>
<tr>
<td>Work with coworkers, team</td>
<td>44</td>
<td>11</td>
<td>25.0%</td>
</tr>
<tr>
<td>Security/confidentiality</td>
<td>9</td>
<td>2</td>
<td>22.2%</td>
</tr>
<tr>
<td>Physical presence required (job duties)</td>
<td>106</td>
<td>35</td>
<td>33.0%</td>
</tr>
<tr>
<td>Physical presence (events)</td>
<td>36</td>
<td>8</td>
<td>20.5%</td>
</tr>
<tr>
<td>Physical presence (documents, equipment)</td>
<td>20</td>
<td>3</td>
<td>15%</td>
</tr>
<tr>
<td>Need for supervision (general)</td>
<td>13</td>
<td>3</td>
<td>23.1%</td>
</tr>
<tr>
<td>Need for supervision (this employee)</td>
<td>8</td>
<td>3</td>
<td>37.5%</td>
</tr>
<tr>
<td>Technology</td>
<td>11</td>
<td>3</td>
<td>27.3%</td>
</tr>
</tbody>
</table>

209. Note that more than one reason may apply to each decision.
Table 2 provides an overview of courts’ basis for denial of claims for remote work as an accommodation. This analysis demonstrates that the most common reasons for upholding an employer’s denial of remote work as an accommodation include the need for physical presence to perform work duties and/or attend events, as well as the need to work in a team or with co-workers, but also included the need for supervision, employer policies and/or practices, the availability of requisite technology, and the burden on other employees. Security or confidentiality concerns, or technology needs were far less common reasons for the denial of an accommodation.

The success rate for employees seeking remote work as an accommodation varies considerably depending on the reasons provided for the denial of that arrangement. Employees were much more successful in defeating claims by challenging the employer’s assertion that the employee’s physical presence was essential, with 33% of plaintiffs able to defeat a motion for summary judgment or a challenge to a jury verdict despite this allegation. In contrast, a more specific defense that their presence was necessary at specific events, to access equipment or documents, or to work in a team or with coworkers resulted in a much lower success rate for employees seeking to work remotely. Employers were more successful when relying on a policy against remote work, whereas employees tended to be more successful despite an employer’s reliance on its past practice.

Below we summarize four main factors in decisions pertaining to employees’ requests for remote work arrangements as an accommodation, illustrated with examples from the above-referenced review of decisions. The main factors considered were the ability to perform

<table>
<thead>
<tr>
<th>Security/Confidentiality</th>
<th>9</th>
<th>2</th>
<th>22.2%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burden on other employees</td>
<td>20</td>
<td>3</td>
<td>15.0%</td>
</tr>
</tbody>
</table>

210. See supra Table 2.
211. See supra Table 2.
212. See supra Table 2.
213. See supra Table 2.
214. See supra Table 2.
215. See supra Table 2.
216. See supra Table 2.
217. See infra Parts II.B.2-B.4.
actual duties, communications with co-workers, team members and clients, the need for supervision, and employer policies and practices.\textsuperscript{218} Under each of these categories, the general trend of the courts has been to overestimate the costs associated with remote work as an accommodation, and to underestimate its feasibility.\textsuperscript{219}

2. Ability to Perform Duties Remotely

The employee seeking to work remotely as a reasonable accommodation must establish that his or her essential job duties can be performed offsite.\textsuperscript{220} The need to use certain equipment or tools only available at work, or to provide direct service to clients or customers, obviously renders some remote work unreasonable.\textsuperscript{221} For example, a neonatal nurse clearly could not perform her essential job duties remotely.\textsuperscript{222} For many other positions, however, there is at least a functional possibility of performing the work remotely. In those situations, some courts shift the burden to the employer to show that the accommodation would impose an undue hardship.\textsuperscript{223} A broad range of jobs have been defined as requiring physical presence at work, even without a clear need for that employee’s physical presence. For example, courts have refused to require remote work as an accommodation for county and state administrative employees,\textsuperscript{224} an insurance company

\textsuperscript{218} See infra Parts II.B.2-B.4.
\textsuperscript{219} Sullenger, supra note 20, at 555-56.
\textsuperscript{220} Humphrey v. Mem’l Hosp. Ass’n, 239 F.3d 1128, 1136 (9th Cir. 2001) (“Working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer.”).
\textsuperscript{221} See 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, 59-60, 65 (2019) (“The close coordination and frequent exchange of information required for work that is highly interdependent is therefore likely to be more difficult and lack important nuances about the tasks, and as a result . . . are prone to suffer in their ability to carry out their jobs.”); Darrell M. Crosgrove et al., The Americans with Disabilities Act, Telecommuting, and Reasonable Accommodations, 12 J. LEADERSHIP, ACCOUNTABILITY & ETHICS 42, 48 (2015) (showing that remote work may be inappropriate where “equipment, tools, or resources” cannot be replicated at home).
\textsuperscript{222} Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1238 (9th Cir. 2012).
\textsuperscript{223} See Cehrs v. Northeast Ohio Alzheimer’s Research Ctr., 155 F.3d 775, 782 (6th Cir. 1998) (“If an employer cannot show that an accommodation unduly burdens it, then there is no reason to deny the employee the accommodation.”); Langon v. Dep’t of Health & Human Servs., 959 F.2d 1053, 1060 (D.C. Cir. 1992) (explaining that the employer failed to offer sufficient evidence that the employee’s working from home produced an undue hardship).
\textsuperscript{224} Robert v. Bd. of Cty. Comm’rs of Brown Cty., 691 F.3d 1211, 1216 (10th Cir. 2012); Kvorjak v. Maine, 259 F.3d 48, 56-57 (1st Cir. 2001).
supervisor who monitors claims representatives’ calls, and an analyst at a state administrative agency. In rejecting these claims, courts often defer to employers’ determinations that the job duties must be performed at work, even if the need for the employee’s physical presence is not obvious.

The analysis of 125 ADA decisions shows the significant influence of an employer’s position that the employee cannot perform the essential job duties from a remote location. Employers argued in 106 of those 125 decisions that the employee’s presence was necessary for the performance of their job duties, with 36 employers arguing that the employee also needed to be present for specific events, and another four employers only alleging that the employee needed access to secure or confidential documents. It is interesting to note that in 60 of those 106 cases (56.6%), employees were able to at least cast some factual doubt as to whether their physical presence was necessary, but the employer was still allowed to deny remote work for other reasons in 33 of those 60 cases. Where physical presence was shown by the employer to be necessary for one of these reasons, the employer was successful in 49 out of 58 claims (84.5%). Clearly, the specific duties of the employee seeking to work remotely have a significant influence on a court’s approval of a remote work arrangement as an accommodation. At the same time, numerous employees who were denied remote work as an accommodation were still able to establish at least a question of fact as to whether their physical presence was necessary, contradicting the employer’s assertions on that fact.

Presence may be essential when equipment or software used for the work is only available at work, or when the confidentiality of information cannot be preserved at the employee’s home. In contrast, remote work may be reasonable if other employees have access to the confidential information that the employee with a disability seeks to access.

227. Id.
228. See infra Appendix A.
229. See infra Appendix A.
230. See infra Appendix A.
231. See infra Appendix A.
232. See infra Appendix A.
remotely, or if such access is not actually required to perform the job duties in question. Advances in technology over the past twenty years mean that many tasks can be performed remotely without compromising such confidentiality or reducing work quality. Reliance on such advances in technology has been evident during the COVID-19 pandemic.

Advances in technology may undermine an employer’s denial of remote work as an accommodation, but the unavailability or cost of requisite technology still can render remote work unreasonable as an accommodation. For example, the unavailability of requisite technology resulted in the denial of a claim by a marketing services coordinator with petrochemical sensitivity and fibromyalgia. A remote worker’s reliance on technology can create the need for additional personnel to operate that technology, which could render that accommodation unreasonable or an undue hardship, where reasonableness typically excludes the hiring of additional employees, as in the claim of an electrical engineer with occupational asthma.

Even when available, an employer’s reluctance to use available technology related to remote work may help justify the denial of remote work as an accommodation. Ford, for example, argued that its employee’s request to remote work was unreasonable in part because her physical presence “was critical to the group dynamic of the resale-buyer team.” Initially, the Sixth Circuit noted that “advancing technology has diminished the necessity of in-person contact to facilitate group conversations.” Yet on rehearing, the court held that abstract notions about advances in technology were insufficient to defeat Ford’s motion for summary judgment when the record failed to show “that a great

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234. See Spector v. District of Columbia, No. 1:17-cv-01884, 2020 U.S. Dist. LEXIS 34364, at *6-7, 28 (D.D.C. Feb. 28, 2020) (alleging that other employees were able to access the required computer system remotely).


236. See Johnson, supra note 39, at 1257 (“Advances over the past twenty years rendered many tasks Internet-based to the extent that performing them remotely could not possibly reduce the quality of the work.”).


238. See Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 544-45 (7th Cir. 1995) (noting that advances in technology may change the viability of remote work as a reasonable accommodation).

239. See Heaser v. Toro Co., 247 F.3d 826, 829, 832 (8th Cir. 2001).

240. See Mulloy v. Acushnet Co., 460 F.3d 141, 143, 149 (1st Cir. 2006).


242. Id. at 642.
technological shift has made this highly interactive job one that can be effectively performed at home,” in part because of Ford’s fairly limited conferencing technologies.\(^{243}\) As noted briefly by the dissent, this reasoning ignores an employer’s potential responsibility to update its technological capacity as an accommodation for an employee seeking to work remotely.\(^{244}\)

Regardless of technology concerns, people with disabilities who seek remote work as an accommodation face the burden of proving their ability to meet an employer’s performance expectations by working remotely.\(^{245}\) For example, even the successful performance at home over several years by a salesperson with a degenerative eye condition did not establish its reasonableness going forward.\(^{246}\) The employee seeking to work remotely must do more than challenge her supervisor’s opinion that she is not performing well.\(^{247}\) For example, an employer’s honest belief that a remote worker is not communicating effectively with customers may be sufficient to show that she is not otherwise qualified for her job.\(^{248}\) Conversely, an employee’s history of meeting the employer’s performance expectations while remote working could support her position that remote work is a reasonable accommodation,\(^{249}\) but only if the employer lacks even a reasonable belief that her performance is inadequate.

If technology is available without any undue burden, and performance is not an issue, an employee with a disability could show that she can adequately perform her duties remotely. For example, physical presence at work in the United States obviously was not required for a parts lister with multiple sclerosis who oversaw work being performed in India.\(^{250}\) These limited decisions open the door for employees with disabilities to establish that physical presence is not an essential job duty and their absence can be overcome with available technology. This approach comports with the 1995 prediction that as communications

\(^{243}\) EEOC v. Ford Motor Co., 782 F.3d 753, 765 (6th Cir. 2015).
\(^{244}\) Id. at 776 (Moore, J., dissenting).
\(^{245}\) See id. at 763.
\(^{248}\) Id. at *17-19.
\(^{249}\) See, e.g., Schmidt v. Solis, 891 F. Supp. 2d 72, 89, 92 (D.D.C. 2012) (showing that the employee met or exceeded performance expectations while remotely working).
technology advances, remote work becomes a more reasonable option for employees with disabilities.251

3. Employer Policies and Practices

Like their deference to an employer’s determination that physical presence is essential for a particular job, courts often defer to broader employer policies and practices in finding that remote work is unreasonable or imposes an undue burden.252 For example, an employer’s policy justified the denial of a request to work remotely, even though the employee’s supervisor had acknowledged that remote work could be reasonable, at least on a short term basis.253 Employers’ policies and past practices have justified the denial of remote work as an accommodation even if the duties can be performed remotely.

The review of 125 ADA decisions shows that an employer’s policy regarding remote work was raised as a defense by nine employers with respect to any remote work and by thirty-five employers with respect to the position occupied by the employee seeking accommodation.254 Employers were successful in five out of nine cases (55.5%) based on the employer’s establishment of a broad policy against remote work, and in 28 out of 35 decisions (80%) based the establishment of a policy affecting the specific position of the employee seeking to work remotely as an accommodation.255 Most employees’ successes in defeating this argument by their employers rested on contradictory evidence regarding the employer’s actual policy.256 Compared to employers arguing that a specific position requires physical presence without a supporting policy, as described in the previous section, the adoption of a formal policy regarding remote work by employees in a specific position appears to better support the denial of remote work as an accommodation.257

This review demonstrates how employer policies support employers’ denial of remote work as an accommodation. For example, a court upheld the denial of remote work as an accommodation for an employee with a

251. Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 544 (7th Cir. 1995).
252. Credeur v. Louisiana, 860 F.3d 785, 794 (5th Cir. 2017); see generally Black v. Wayne Ctr., 225 F.3d 658 (6th Cir. 2000) (demonstrating the court’s deference to employer policies).
253. Credeur, 860 F.3d at 794-95.
254. See infra Appendix A.
255. See infra Appendix A.
256. See, e.g., Kvorjak v. Maine, 259 F.3d 48, 55 (1st Cir. 2001) (“Appellant focuses on the adjudicator function and there is at least a factual dispute as to whether it can be performed by him at his home.”).
257. See Kaplan et al., supra note 136 at 440.
neurological disorder who lacked the requisite amount of time in her position to qualify for remote work under her employer’s policy. No individualized analysis was applied to that specific employee’s ability to work effectively from home. Similarly, consistently applied performance standards in an employer’s policy justified the denial of remote work as an accommodation for an employee with scleroderma and esophageal dysmotility. These courts did not consider whether an exception to the employers’ policies would have been reasonable or would create an undue hardship on those employers. These decisions suggest that an employer’s adoption of a policy allowing remote work during the COVID-19 pandemic may support requests to work remotely by employees in similar positions. At the same time, an employer with a carefully defined policy may be able to avoid providing remote work as an accommodation if the position or the characteristics of the employee seeking an accommodation can be distinguished.

Despite this deference to employer policies prohibiting remote work, an employer’s past allowance of remote work does not necessarily mean that remote work will be deemed reasonable as a future accommodation. Courts have readily distinguished requests for remote work as an accommodation by a litigation attorney, an auditor, a gas supply foreman, and a state administrator, from previous instances in which those employers had allowed previous remote work on a temporary basis or by employees with different duties. Even excusing a county employee’s physical presence in the past did not necessarily show that his presence was not essential, based on the court’s logic that a requirement to accommodate would “punish” the employer for allowing remote work in the past.

The review of 125 ADA decisions shows that past practice regarding employees with disabilities was considered in nine cases, and employers were successful in three of those nine claims by showing the absence of a

259. See generally id. (showing no analysis of whether the plaintiff could fulfill job duties from home).
261. See id.; see also Trout, 151 F. App’x at 390.
262. See generally Gómez-González v. Rural Opportunities, Inc., 626 F.3d 654, 664-65 (1st Cir. 2010) (describing that past accommodation was identical, but denied in this instance).
past practice allowing similar remote work arrangements for other employees with disabilities.265 An employer’s past practice regarding allowing remote work by employees without disabilities was raised in a total of eighteen cases, and the employer was successful in defeating seven out of those eighteen claims (38.8%) by showing that those other employees were not allowed to work remotely or were not similarly situated compared to the employee seeking an accommodation.266 Conversely, some employees were successful in defeating a motion for summary judgment if the employer had allowed remote work by similarly situated employees either with or without disabilities in the past. In one case, for example, a medical transcriptionist with obsessive compulsive disorder raised questions of fact regarding the reasonableness of remote work as an accommodation where the employer allowed others in the same position to work from home.267

An employer’s past practice of allowing remote work for the employee with a disability or other employees will not necessarily bind the employer to allow remote work as an accommodation, especially where the employee with a disability seeks more frequent or unscheduled remote work, compared to the other employees.268 According to that court, requiring an accommodation based on past “good deeds” of the employer would discourage employers from allowing remote work in general.269 Along the same lines of reasoning, an airline employee, who had successfully worked remotely for years, lost on a motion for summary judgment based on the airline’s assertion that her job had changed, so as to make remote work unreasonable.270

Past practice of an employer will become even more of a salient issue given the allowance of remote work during the COVID-19 pandemic.271 If an employer has allowed other, similarly situated employees to work remotely, the employee with a disability may find it easier to establish the reasonableness of remote work as an accommodation.272 These decisions

265. See infra Appendix A.
266. See infra Appendix A.
268. EEOC v. Ford Motor Co., 782 F.3d 753, 761, 765 (6th Cir. 2015).
269. Id. at 765.
271. See generally id. at 573 (explaining that changes in circumstance will allow employers to rescind or alter accommodations).
represent an opportunity for employees with disabilities to demonstrate the viability of remote work as an accommodation, particularly where the employer has allowed remote work by other similarly situated employees without disabilities. At the same time, an employer’s practice of allowing remote work during the COVID-19 pandemic may not support a request for remote work as an accommodation if the position or the characteristics of the employee seeking an accommodation can be distinguished.

4. Communication with Coworkers, Team Members, and Clients

The need for in-person communication has justified denial of remote work as an accommodation, often based on employers’ assertions or assumptions that “most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation.”273 Similarly, the EEOC has opined that remote work may be unreasonable for jobs which require “face-to-face interaction and coordination of work with other employees,” or “in-person interaction with outside colleagues, clients, or customers.”274

Courts have been quick to adopt employers’ assertions that remote work impacts how employees communicate.275 Both employers and courts regularly rely on the dicta in the Seventh Circuit’s 1995 opinion that “team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee’s performance.”276 For example, one employer claimed that face-to-face contact with customers lead to higher sales, even where the salesperson’s impairment only temporarily prevented his presence at work.277

Of the 125 ADA decisions analyzed, forty-four of those decisions indicated that employers relied on the need for communication between

273. *Ford Motor Co.*, 782 F.3d at 761 (citing Rauen v. U.S. Tobacco Mfg. L.P., 319 F.3d 891, 896 (7th Cir. 2003)).


the employee seeking an accommodation and coworkers, team members, and or clients.278 The employer was successful in defeating thirty-three (75%) of the forty-four decisions.279 Related to these influential considerations, courts in eleven cases considered whether effective technology was available to allow for remote work, deciding in the employers’ favor in eight of those eleven cases (72%).280 Similarly, consideration of the burden on coworkers posed by a remote work arrangement was considered in twenty cases, and influenced a judgment in favor of the employer in seventeen of those twenty cases (85%).281

Employers receive considerable deference in deeming that physical presence at work is necessary for communication with co-workers, team members, or clients. In one example, a court concluded that an employee of the Environmental Protection Agency (hereinafter “EPA”) with serious allergies could not work remotely and still effectively perform her duties, which included coordination with coworkers, because requiring coworkers to come to her home, only after changing their clothing and washing, would place an undue burden on the employer.282 Similarly, the discontinuation of a remote work accommodation for an American Airlines employee was allowed based on the employer’s assertion that her job had “evolved” to require “frequent face-to-face meetings with team members on short notice to coordinate work.”283

Both of these courts failed to challenge the employers’ positions that communication with coworkers could only take place in person.284 Other courts have been more receptive to such challenges. For example, a bank failed to show that a project manager was unable to facilitate meetings, work with other people, and coordinate his projects effectively, where teleconferencing and e-mail were available to do so.285 As a different court noted, regarding a Vice President of Operations, a request to work from home should not be denied “solely because a job involves some contact and coordination with other employees,” particularly where “meetings can be conducted effectively by telephone and information can

278. See infra Appendix A.
279. See infra Appendix A.
280. See infra Appendix A.
281. See infra Appendix A.
284. Id. at 573-74; Morris, 994 F. Supp. 2d at 48-49.
be exchanged quickly through e-mail."\textsuperscript{286} Outside of these rare exceptions, courts regularly defer to an employer's determination as whether physical presence at work is essential for communications between the employee with a disability and others.\textsuperscript{287}

5. Need for Supervision

Employers regularly assert that the need for in-person supervision is an essential job requirement that prevents remote work as a reasonable accommodation.\textsuperscript{288} In turn, courts regularly rely on supervisors' opinions that they do not trust their subordinates to work remotely.\textsuperscript{289} This position is supported by the EEOC's Fact Sheet identifying "the employer's ability to supervise the employee adequately" as an important factor in determining whether remote work is a reasonable accommodation.\textsuperscript{290} As noted by the Fifth Circuit Court of Appeals, "[d]irect employee supervision is easiest when the employee shows up regularly at work. It is much harder to do remotely, particularly when the employee never comes to the office at all."\textsuperscript{291} This reasoning supported one court's decision that remote work was an unreasonable accommodation for a debt collector, whose calls required legal compliance and monitoring by a supervisor.\textsuperscript{292}

Our analysis of 125 ADA decisions shows that the employer argued the significance of the need for supervision of employees seeking an accommodation in twenty-one cases, including thirteen arguing that the employer needed to exercise in-person supervision generally, and eight arguing that specific employees seeking accommodation needed in person supervision.\textsuperscript{293} The employer was successful in gaining dismissal of nine of the thirteen (69%), asserting a general need to supervise, and in five out of eight cases (62.5%) alleging a need to supervise the employee with a disability.\textsuperscript{294} Conversely, employees raised questions of fact

\textsuperscript{287} EEOC v. Ford Motor Co., 782 F.3d 753, 761 (6th Cir. 2015).
\textsuperscript{288} See, e.g., Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1121 (10th Cir. 2004) (showing the employer established that it could not supervise employee remotely).
\textsuperscript{290} Credeur v. Louisiana, 860 F.3d 785, 793 (5th Cir. 2017).
\textsuperscript{292} See infra Appendix A.
\textsuperscript{293} See infra Appendix A.
regarding the reasonableness of remote work as an accommodation if they could show past success in working at home or a lack of support for the employer’s concerns regarding supervision.295 While not the most common reason for denial of remote work as an accommodation, courts seem fairly willing to accept an employer’s assertion that presence at work is necessary for effective supervision.296

The denial of remote work by Avaya Communications, Inc., (hereinafter “Avaya”) a company which sells a variety of communications technology, demonstrates the influence of an employer’s argument that an employee must be physically present to be supervised.297 In Mason v. Avaya Communications, Inc., the court held that Avaya could deny the request of a service coordinator with post-traumatic stress disorder to work remotely because its technology could only monitor that the employee was logged into her home computer, not what she was doing when using her computer.298 Thus, the court willingly assumed that the employee’s physical presence at work was essential to Avaya’s review of her productivity.299 The court also seemed to be influenced by the fact that the position was a “low level hourly position” that was “administrative in nature.”300

Like Avaya, Delta Air Lines was not required to allow remote work by a reservations sales agent with a chemical sensitivity because it provided “extensive in-person and on the job training, monitoring, evaluating and counseling that are essential,” and physical presence was “necessary to ensure that this critical sales position is performed properly.”301 The court concluded, without any additional evidentiary basis, that “[s]upervisors could not properly monitor and evaluate the performance of an off-site sales agent.”302 Both the Mason and Whillock v. Delta Air Lines, Inc. decisions ignore the possibility that completion of tasks, sales figures, or other objective information would be an adequate representation of the employees’ performance.303 These decisions demonstrate the significant influence of employers’ claims that physical presence is necessary for effective supervision.

295. See, e.g., Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 544 (7th Cir. 1995).
296. See, e.g., Mason v. Avaya Commc’ns, Inc., 357 F.3d 1114, 1121 (10th Cir. 2004).
297. Id.
298. Id.
299. Id.
300. Id. at 1120.
302. Id. at 1564.
Even if an employer concedes that some employees can be supervised remotely, an employee's past performance may negatively impact the reasonableness of a request to remote work without direct supervision. For example, remote work was unreasonable for two different attorneys because one was unable to "adequately account for her time," and the second attorney had past attendance issues, including a lack of accountability while working remotely.

The employer's concerns regarding the performance of the person seeking remote work as an accommodation may not always undermine its reasonableness as an accommodation. In one case, for example, an employer failed to justify its limitation of remote work to those employees who were not involved in a disciplinary process, at least where that past discipline was connected with the disability of the employee seeking accommodation. Using a different line of reasoning, another court disregarded an employer's argument that remote work would be unreasonable for an employee with past performance or attendance issues, at least where the employer that presented no evidence that remote working would negatively affect performance. Similarly, a second court relied on the employee's testimony that working from home would enable her to work more than without the accommodation, because conditions at home would not aggravate her migraines. These decisions recognize that supervisors may be able to use alternative means of evaluating remote workers' performance to render such an arrangement reasonable as an accommodation.

Overall, these decisions demonstrate the difficulty faced by employees with disabilities to obtain remote work as an accommodation. An employer's determination that physical presence is essential, a policy against remote work, or the need for in-person

304. Credeur v. Louisiana, 860 F.3d 785, 795 (5th Cir. 2017); see also McIntyre v. Archuleta, No. 2:14-cv-00327, 2015 U.S. Dist. LEXIS 98841 at *21-22 (W.D. Pa. July 29, 2015) (explaining that remote work was unreasonable where performance was "minimally successful," requiring "extensive supervisory control").


306. See Humphrey v. Mem'l Hosp. Ass'n, 239 F.3d 1128, 1132, 1137 (9th Cir. 2001) (working at home could be a reasonable accommodation for medical transcriptionist when the essential job function can be performed at home).


communication or supervision of the employee with a disability can justify the denial of remote work as an accommodation.\textsuperscript{310} Many of these courts fail to recognize that continuous advances in technology and the demonstrated success of remote workers without disabilities could establish the reasonableness of remote work as an accommodation.\textsuperscript{311} Moreover, a lack of individualized attention to the situation of the specific employee seeking to work remotely undermines remote work’s potential for enabling more people with disabilities to enter or remain as productive contributors in the work force.\textsuperscript{312}

III. A NEW APPROACH TO REMOTE WORK FOR EMPLOYEES WITH DISABILITIES

This review of court decisions resolving claims for remote work as an accommodation shows that courts continue to allow employers to deny remote work accommodation requests by employees with disabilities, despite the general trend allowing virtual work arrangements for all employees.\textsuperscript{313} While some of the denials in these judicial opinions are based on the demonstrated need for the employee’s physical presence at work, others rely heavily on the need for in-person interaction with a team, coworkers, or supervision, in addition to employers’ policies or practices.\textsuperscript{314} The reasons for denial of accommodation outlined above reveal the challenges in relying on the ADA alone to secure remote work as an accommodation. “Second generation discrimination,” like these denials of accommodation requests, requires a proactive problem-solving approach, rather than just a regulatory system.\textsuperscript{315} Thus, we propose a new approach to address the reasons why employees with disabilities often are denied remote work as an accommodation.

\textsuperscript{310} EEOC v. Ford Motor Co., 782 F.3d 753, 762 (6th Cir. 2015).
\textsuperscript{312} Stone & Colella, supra note 4, at 357.
\textsuperscript{313} See, e.g., Bilinsky, 928 F.3d at 573; Bixby, 2012 U.S. Dist. LEXIS 32974, at *28-29; Credeur, 860 F.3d at 793-94; EEOC v. Ford Motor Co., 782 F.3d 753, 763-64 (6th Cir. 2015); Hostettler v. Coll. of Wooster, 895 F.3d 844, 857 (6th Cir. 2018); Mason v. Avaya Comm’ns, Inc., 357 F.3d 1114, 1121 (10th Cir. 2004); Moeley v. Allstate Ins. Co., 531 F.3d 539, 547-48 (7th Cir. 2008); Mulloy v. Acushnet Co., 460 F.3d 141, 149 (1st Cir. 2006); Smith v. Ameritech, 129 F.3d 857, 867 (6th Cir. 1997); Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 544-45 (7th Cir. 1995).
\textsuperscript{314} See cases cited supra note 313.
The widespread reliance on remote workers during the COVID-19 pandemic demonstrates that many workers are "capable of maintaining their output" while working remotely. To make determinations regarding whether remote work would be a reasonable accommodation for people with disabilities, both employers and courts reviewing ADA claims should follow the guidance from Stone and Colella in 1996, as well as subsequent research showing the viability of remote work arrangements. This research provides a wealth of information regarding the organizational characteristics, attributes of employees with disabilities, attributes of coworkers, and attributes of supervisors on (1) the success of remote work arrangements for employees with disabilities, (2) the effect of remote work arrangements on employees with disabilities, and (3) the effect of remote work arrangements on observers (coworkers, supervisors). This application of Stone and Colella's model considers factors that operate at multiple levels within organizations (e.g., organizational, team/supervisor, and individual levels). Unless a job absolutely cannot be performed without the employee being present on the work site, these multilevel factors should be considered in determining the reasonableness of remote work for the employees with disabilities.

A. Organizational Characteristics

At the organizational level, several characteristics may impact the effect and success of remote work arrangements. The relevant characteristics include the availability of technology, a culture that promotes its success, and the creation of a policy regarding remote work, including a remote working agreement. Beyond technology and other

317. See generally Stone & Colella, supra note 4 (providing a model for treatment of disabled individuals in organizations).
318. Id. at 352.
319. Id. at 354 ("[T]he primary purposes of the model are to (a) provide a framework for understanding the factors that influence the way disabled individuals are treated in organizations, (b) generate increased interest in disability issues among organizational researchers, and (c) provide a useful guide for conducting future research on the treatment of persons with disabilities in work-related settings.").
320. Id. at 379 (explaining that expected contact and expected outcomes are two factors that influence observers' job-related expectancies).
supports, an organization’s characteristics will affect the success of remote workers in general as well as the acceptance of remote work as an accommodation for employees with disabilities.\(^{322}\)

Resources may be needed to make remote work successful, including the appropriate technology to provide opportunity for essential virtual communication.\(^{323}\) Training and coaching in the use of that technology and keeping remote workers engaged overall can also be important to a remote worker’s success.\(^{324}\) For example, the Telework Enhancement Act of 2010,\(^{325}\) supports remote work by federal employees and requires that any remote workers complete training, including technology security.\(^{326}\)

Beyond resources, organizations should consider the “fit” between an organization’s characteristics and the adoption of remote work, including structural factors, competitiveness of the work environment, and corporate culture.\(^{327}\) As described earlier, certain professions and levels of employees may be better suited for remote work.\(^{328}\) In addition, institutional environments as well as behavior of peer institutions shape managers’ beliefs and attitudes about remote work, perhaps more than internal “fit” factors.\(^{329}\)

In making an assessment of whether remote work is feasible as an accommodation, employers should commit to a thorough job analysis to


\(^{324}\) Mason Stevenson, How to Engage the Remote Workforce, HR EXCHANGE NETWORK (Jan. 6, 2020), https://www.hrexchangenetwork.com/hr-tech/news/how-to-engage-the-remote-workforce?utm_campaign=HIRIQ-NL-01.07.2020&utm_medium=email&utm_source=internalemail&MAC=HRIQ%7C-ORRDBSW&elqContactId=22522410&disc=&elqCampId=67158&utm_content=HRIQ%20Newsletter%2001.07.20_B; see also Lauren M. Sobaski, Leaving The Mothership: Tips For Launching A Telecommuting Worker, FISHER PHILLIPS (Apr. 2, 2018), https://www.fisherphillips.com/resources-newsletters-article-leaving-the-mothership-tips-for-launching-a?click_source=sitepilot06129931aGlja294c0BBe3UuZWR1 (“Finally, provide training for your management staff so they have the tools needed to effectively manage a remote workforce.”).


\(^{326}\) Telework Employees: Telework Basics, supra note 321.

\(^{327}\) Peters & Heusinkveld, supra note 32, at 108, 110, 127.

\(^{328}\) See supra notes 60-64 and accompanying text.

\(^{329}\) Peters & Heusinkveld, supra note 32, at 110, 127.
determine whether job duties can be performed remotely.\(^{330}\) This assessment should be open to the possibility that the remote work may be appropriate for at least a portion of the employee’s hours, even if some duties require physical presence at work.\(^{331}\) This analysis will also assist in determining whether the remote employee still needs to work a set schedule to be effective.\(^{332}\) Employers should not confuse remote work with working an unreliable schedule, particularly where a remote work arrangement may result in greater reliability and attendance for employees with disabilities.\(^{333}\)

Second, organizational culture, “the set of shared, taken-for-granted implicit assumptions that a group holds and that determines how it perceives, thinks about and reacts to its various environments,”\(^{334}\) can greatly impact the success of remote work by all, including employees with disabilities. An organization’s culture is more important in a virtual work environment, so the organization needs to intentionally convert that culture to a remote working situation to prevent workers’ isolation and increase employee engagement.\(^{335}\) Moreover, a culture of inclusiveness is required to support remote work policies.\(^{336}\)

Third, the viability of remote work arrangements will be enhanced by clear policies and formalized procedures for employees with disabilities to make requests for workplace accommodations, and for all employees to request a remote work arrangement.\(^{337}\) An organization’s policy on remote work should provide objective criteria regarding the conduct and performance of remote workers, as well as the criteria for being allowed to work remotely.\(^{338}\) Despite the need for clear policies, an employer must also be flexible in providing the opportunity for remote work as an accommodation if the interactive process with the employee with a disability reveals the reasonableness of that accommodation, even

\(^{330}\) Telework Managers: Results-Oriented Management, supra note 322.

\(^{331}\) Id. ("It is important to note that performance standards for teleworking employees must be the same as performance standards for non-teleworking employees.").


\(^{333}\) Id.


\(^{337}\) Kaplan et al., supra note 136, at 437, 439-40.

\(^{338}\) Sobaski, supra note 324.
if that arrangement might otherwise conflict with standard employer policy.\textsuperscript{339}

An employer’s policy regarding remote work should provide for an individualized remote work agreement. A remote work agreement, whether for an employee with a disability or not, should specify the remote employee’s agreement to adhere to the employer’s policies, or explain any variations in policy that have been agreed upon.\textsuperscript{340} This agreement should address specific issues related to the individual remote worker, including the location of their work, a work schedule, a description of the equipment to be used, and a safety checklist.\textsuperscript{341} The employer and the remote employee should agree to specific hours that the remote worker will be available to interact with coworkers, clients, or others.\textsuperscript{342} Such an agreement can also include arrangements for support of the remote worker by co-workers, when necessary, and specific expectations regarding communication with both supervision and co-workers.\textsuperscript{343} The agreement should also address the protection of sensitive data.\textsuperscript{344} An explanation of how the remote worker’s performance will be evaluated should also be included.\textsuperscript{345} Lastly, the agreement should specify the conditions under which the remote work arrangement may be ended, even if provided as a reasonable accommodation, such as a measurable decline in performance.\textsuperscript{346}

As discussed in the court decision review section, lack of supportive employer policies and practices were one of the major reasons why remote work was not required as an accommodation. As this analysis shows,

\textsuperscript{339} See Kaplan et al., supra note 136, at 439-40 (arguing that despite the need for clear policies, accommodation decisions must be made on case-by-case basis).

\textsuperscript{340} Id. at 439-44; see also Martin Berman-Gorvine, Telecommuting Can Work, With Proper Preparation, BLOOMBERG L.: DAILY LAB. REP. (July 14, 2017), https://www.bloomberglaw.com/document/XAEGPM7C0000007bna_news_filter=daily-labor-report\&jsession=BNA%252000000015d2d43d0d1a1fd2fbb1250000#jcite (noting the need for a “well-drafted telecommuting policy”).

\textsuperscript{341} Telework Employees: Telework Basics, supra note 321.


\textsuperscript{343} See Greer & Payne, supra note 342, at 91 (noting the importance of communication while working remotely); Telework Employees: Telework Basics, supra note 321, at 101.


\textsuperscript{345} Allen et al., supra note 71, at 59.

\textsuperscript{346} See Brenda A. Lautsch & Ellen Ernst Kossek, Managing a Blended Workforce: Telecommuters and Non-Telecommuters, 40 ORGANIZATIONAL DYNAMICS 10, 12 (2011).
organizational characteristics influence (1) the success of remote work arrangements for employees with disabilities,347 (2) the effect of remote work arrangements on employees with disabilities,348 and (3) the effect of remote work arrangements on observers (coworkers, supervisors).349 Remote work is more likely to have a positive impact on both employees with disabilities and observers (supervisors and coworkers) when (1) organizations have technology that enables conducting work virtually,350 (2) organizations have norms and values that endorse accommodations to people who have legitimate needs,351 and (3) organizations have established policies and practices that clearly spell out procedures to request accommodations and/or remote work arrangements.352

B. Attributes of Employees with Disabilities

The individualized analysis required by the ADA353 fits well with the conduct of a “fit assessment” before allowing employees to work remotely. This assessment includes measuring an employee’s overall preference for face-to-face interaction with peers and supervisors,354 as well as screening for qualities that will promote successful remote work.355 At the same time, employers should not assume that employees with disabilities lack the characteristics related to successful remote work.356 Employers should also exercise caution in restricting remote work arrangements based on an employee’s job tenure or past performance.357

347. Stone & Colella, supra note 4, at 352.
348. Id. at 354.
349. Id. at 379.
350. See Johnson, supra note 39, at 1257 (noting that advances in technology over the last twenty years allow tasks to be performed remotely without reducing the work quality).
351. See Kaplan et al., supra note 136, at 436.
352. Id. at 437.
353. U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA (2002) (“An accommodation . . . must be effective in meeting the needs of the individual.”).
354. Shana Lebowitz, Why working from home won’t become the norm anytime soon, BUS. INSIDER (June 9, 2015), http://www.businessinsider.com/working-from-home-wont-become-the-norm-2015-6 (theorizing that physical workplaces will not be eradicated because employees desire face-to-face interaction).
355. Cinquegrani, supra note 11 (“TeleTech does ‘a fit assessment’ to see if an applicant is a good candidate for working remotely.”).
356. Anderson et al., supra note 39, at 97.
357. See Ozgur Turetken et al., An Empirical Investigation of the Impact of Individual and Work Characteristics on Telecommuting Success, 54 IEEE TRANSACTIONS ON PRO. COMM’N 56, 61
An employer can begin with an employee’s self-assessment of their ability to work remotely, including the logistical feasibility of working at home as well as personal “work habits that support independent task performance,” including the ability both to work under minimal supervision and communicate remotely, as well as time management skills.\textsuperscript{358} Likewise, management can assess the fit between employees and the level of their engagement in remote work.\textsuperscript{359} For example, job satisfaction is higher among remote workers with a greater desire for order and autonomy,\textsuperscript{360} as well as remote workers with better communication skills.\textsuperscript{361} However, there is a lack of evidence that an employee’s lack of communication skills has a negative impact on their performance and productivity.\textsuperscript{362} On a more individual level, employers may want to look for qualities such as resilience, time management skills, and independent decision-making ability, in addition to comfort with using technology.\textsuperscript{363} Self-efficacy has also been linked with successful remote work arrangements.\textsuperscript{364}

In addition, employers should consider personality characteristics of “extraversion, openness, agreeableness, and conscientiousness,” which have been linked to job satisfaction among remote workers.\textsuperscript{365} In addition, different methods of communication may be more satisfying for employees with particular personality traits.\textsuperscript{366}

In contrast with consideration of these employee characteristics, employers must guard against denying remote work as an accommodation based on stereotypes regarding employees with disabilities. Stereotypes are beliefs about certain groups’ characteristics and behaviors and serve

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\bibitem{360} Virick et al., supra note 23, at 151.
\bibitem{361} Allen et al., supra note 71, at 48.
\bibitem{362} Turetken et al., supra note 357, at 64.
\bibitem{363} Id.
\bibitem{364} Cinquegrani, supra note 11, at 3.
\bibitem{365} Sumita Raghuram et al., Adjustment to Telecommuting: Role of Self-Efficacy and Structuring, 2000 ACAD. MGMT. PROCS. C1, C4 (2000) (“We have proposed that telecommuters who work more days from their homes will demonstrate a stronger relationship between self-efficacy and adjustment to telecommuting.”).
\end{thebibliography}
as cognitive shortcuts. An employer’s decision-maker, who may well hold stereotypes against employees with disabilities, may regard them as less capable, and may attribute them with negative characteristics, such as being “aloof-introverted, lazy-submissive, and ingenuous-unassuming.” Negative characteristics are most likely to be attributed to certain disabilities associated with negative behaviors, as well as employees with intellectual disabilities and mental illnesses because of misperceptions and biases as well as uncertainty and concerns regarding their impact on productivity, safety, liability, and even the employer’s public image. If employers assume that an employee with a disability has such characteristics, employers may have more concerns about effective communication with them when working virtually. However, if employees with disabilities are given the opportunity to demonstrate personality and employability characteristics that are compatible with remote work, employers’ concerns may prove to be unfounded.

Employers must also be aware that stigmatization may be exacerbated by a remote working arrangement, given the importance of personal contact in reducing the impact of stigmatization. Thus, an employee’s disability should not negatively influence the availability of a remote work arrangement absent objective, individualized evidence that the employee is unsuitable for remote work.

Regardless of disability, some employers may limit access to remote work arrangements to employees with longer job tenure. Research does suggest a connection between an employee’s tenure and an understanding of an organization’s culture, which can be important to the success of

368. Stone & Colella, supra note 4, at 353.
371. See Stone & Colella, supra note 4, at 358.
373. See Unger et al., supra note 372, at 146; Emens, supra note 372, at 463-464, 475; Baker et al., supra note 29, at 423.
374. Baker et al., supra note 29, at 422.
376. Turetken et al., supra note 357, at 58 (hypothesizing that telecommuters with longer tenure at an organization will report higher satisfaction with telecommuting); see also Jane E. Humble et al.,
remote work.\textsuperscript{377} However, some research shows that job tenure only affects satisfaction among remote workers, rather than their overall success.\textsuperscript{378} These findings suggest that employees with disabilities who are new to an organization should not necessarily be denied remote work as an accommodation.

In addition to the nature of disability and tenure, prior performance levels of employees with disabilities may also be influential.\textsuperscript{379} For example, the Telework Enhancement Act of 2010 specifies that a federal employee is ineligible for remote work if she has been disciplined for absenteeism in the past year, if the employee has engaged in certain ethical violations, or if the "performance of that employee does not comply with the terms of the written agreement between the agency manager and that employee."\textsuperscript{380} As shown in the court decision review section, the ability to perform essential duties is one of the four major concerns that the employer has with regard to remote work for employees with disabilities.\textsuperscript{381} Employers should also be aware that negative assumptions about people with disabilities may be tempered by higher education or professional skills,\textsuperscript{382} so greater individualized attention should be afforded to lower level workers seeking remote work arrangements. Thus, employers should not deny remote work for employees with disabilities because of concerns about productivity loss, if the denial is based on stereotypes rather than actual past performance.

Employers may deny remote work as an accommodation for a particular employee with a disability who has shown performance

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Benefits of Telecommuting for Engineers and Other High-Tech Professionals, 37 INDUS. MGMT. 15, 18-19 (1995) (showing that remote workers with "substantial professional experience" are more successful).
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377. Turetken et al., supra note 357, at 58; Wiesenfeld et al., supra note 95, at 215.
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378. Turetken et al., supra note 357, at 61; see also France Bélanger, Workers' Propensity to Telecommute: An Empirical Study, 35 INFO. & MGMT. 139, 145 (1999) (showing no significant difference in job tenure, satisfaction, and success between remote and other workers).
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deficiencies in the past. However, if the employee’s past performance or attendance deficiencies arose from the employer’s reluctance to accommodate that employee, then those concerns should not be relied upon to deny remote work as an accommodation.\textsuperscript{383} As one court noted, “[i]t would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated.”\textsuperscript{384} Thus, employers should ensure that an employee’s past performance provides an accurate picture of their potential for success as a remote worker.

This analysis demonstrates that attributes of employees with disabilities influence (1) prevalence and success of remote work arrangements for employees with disabilities, (2) the effect of remote work arrangements on employees with disabilities, and (3) the effect of remote work arrangements on observers (e.g., coworkers and supervisors).\textsuperscript{385} Remote work is more likely to have a positive impact on attitudes and behaviors of both employees with disabilities and observers when (1) the nature of the disability prevents one from working in the office and requires remote work,\textsuperscript{386} (2) employees with disabilities have high levels of prior performance,\textsuperscript{387} (3) employees with disabilities have characteristics conducive to remote work,\textsuperscript{388} and (4) employees with disabilities are associated with high status or social power.\textsuperscript{389}

\textbf{C. Attributes of and Interactions with Coworkers}

The commitment and organizational identification of remote workers depend largely on the quality of their relationships with coworkers and supervisors, the amount of social support they receive, and coworker inclusionary behaviors.\textsuperscript{390} At the same time, remote work can have a significant impact on coworkers who work onsite, including effects on

\textsuperscript{383} Humphrey v. Mem’l Hosps. Ass’n, 239 F.3d 1128, 1137 (9th Cir. 2001).
\textsuperscript{384} Id.
\textsuperscript{385} See supra notes 318-320 and accompanying text.
\textsuperscript{387} See, e.g., Brewer & Miller, supra note 379, at 295; Stone & Colella, supra note 4, at 352-53.
\textsuperscript{388} See, e.g., Cinquegrani, supra note 11; \textsc{Telework Employees: Telework Basics, supra note 321; Raghuram et al., supra note 364, at C4; Smith et al., supra note 365, at 53-55.}
\textsuperscript{389} See, e.g., Holmes & River, supra note 382, at 232-33, 238 (showing the effects that result when disabled employees are not associated with status or social interaction).
\textsuperscript{390} Allen et al., supra note 71, at 48.
collaboration and willingness to share job knowledge, as well as increasing workload and reducing flexibility in conducting work activities. Coworkers of remote workers tend to have lower job satisfaction as remote work becomes more prevalent and extensive, reducing face-to-face interactions, with greater impact on coworkers with relatively less job autonomy. In addition, remote work as an accommodation may be viewed as favoritism by other employees. This perception can be addressed by reframing remote work as a right rather than a privilege.

At the same time, attributes of coworkers may influence the treatment of employees with disabilities. Indeed, the third party is an important group that plays a part in the creation and maintenance of special work arrangements. When supervisors consider such idiosyncratic work arrangements for employees with disabilities, they tend to factor in the potential reactions from coworkers, who may be directly influenced by this arrangement, as outlined above.

Coworkers who have a low level of tolerance for ambiguity, which can be increased by the allowance of remote work, may react negatively to such arrangements. They might blame the employee with a disability for bringing change that adds inconvenience and complexity to work. Such negative reactions, especially among more aggressive coworkers who express their feelings, may cause difficulty in teamwork and collaboration.

391. Timothy Golden, Co-Workers Who Telework and the Impact on Those in the Office: Understanding the Implications of Virtual Work for Co-Worker Satisfaction and Turnover Intentions, 60 HUM. RELS. 1641, 1643-44, 1653-61 (2007); see also Bailey & Kurland, supra note 62, at 393 (explaining that coworkers of remote workers may face increased burden and interruptions).

392. See Golden, supra note 391, at 1641, 1643-44, 1653.

393. Kathy Charmaz, Disclosing Illness and Disability in the Workplace, 3 J. INT’L EDUC. BUS. 6, 12 (2010); Putnam et al., supra note 34, at 426; see also, Kaplan et al., supra note 136, at 438 (explaining that remote work arrangements may be seen by coworkers as “special treatment”).

394. Putnam et al., supra note 34, at 415.


396. ROUSSEAU, supra note 10, at 111.


398. See Copeland et al., supra note 397, at 428, 430, 431 (finding that certain co-workers do not want to work with disabled co-workers if their performance reward will be dependant on the performance of the worker with a disability).
Coworkers’ previous positive contact with employees with disabilities may also be a relevant attribute. Past experience in hiring or working with persons with disabilities can result in positive attitudes about the attributes of other employees with disabilities,399 by challenging the stereotypical thoughts that people have toward individuals with disabilities.400 In addition, positive previous contact may elicit an effect that changes one’s motivation and cognitive information process.401 This effect demonstrates the danger of employers’ past denial of accommodations, which could have prevented those past positive effects of interaction with people with disabilities. Even if remote work generates complexity and adds burden to teamwork, experience under COVID-19 restrictions shows that coworkers with positive previous contact and closer ties with remote workers may view the arrangement more positively.402

In addition to eliciting negative reactions from coworkers, remote work can negatively affect the productivity of a group in which any remote worker resides, due to structural issues such as coordination problems and difficulty with communication, as well as reduced group-level motivation.403 These effects can be addressed through team-centered coordination, synchronized interaction, collaborative time management and group coordination, redefining norms for flexibility, work contribution and group motivation, as well as proactive availability of the remote worker.404 Formalization of team member interactions, including role clarification and established team boundaries to facilitate knowledge sharing, can build identity and cohesion among team members, as evidenced by research on the effectiveness of global teams.405

At the same time, employers should consider providing the means for more informal remote communications, such as the use of screen avatars, to encourage casual conversation and brainstorming, which have

399. Id. at 427, 432-33 (demonstrating positive trend between high level of experience working with disabled employees and positive attitudes towards them).
400. Corrigan et al., supra note 397, at 185.
401. Copeland et al., supra note 397, at 432, 433.
404. Id. at 1125, 1128, 1144-46.
proved successful during the COVID-19 pandemic. Promoting informal communication, such as remote coffee chats between coworkers, can enhance employees’ enjoyment from their job, performance, investment in the employer, and service to others within the organization. More frequent interaction and building a sense of “shared identity” can also enhance communication with remote workers by increasing the “perceived proximity” between them and their coworkers.

Regarding communication with remote workers, information exchange should be streamlined, “carefully designed and delivered purposefully,” and tailored to employees’ needs. With regard to team communications, team members should include remote workers in conversations which are relevant to them, using the range of technologies that are available. Communication with remote coworkers can be enhanced by choosing the appropriate method of communication based on the context.

Providing for at least some face-to-face communications between remote workers and coworkers can help to limit negative coworker reaction to remote work. This recommendation is supported by some virtual team research showing that the use of computer-mediated communication for more than 90% of the team’s communications can negatively affect task and non-task effectiveness of the team, and reduce

406. See Thompson, supra note 402 (explaining success of allowing employees to use screen avatars).
409. Ying Zhu et al., Information Adequacy and Job Satisfaction During Merger and Acquisition, 18 MGMT. COMM’N Q. 241, 263-64 (2004).
410. Fonner & Roloff, supra note 42, at 356.
411. See Stevenson, supra note 324; see also Turetken et al., supra note 357, at 61 (“[R]icher communication media indeed lead to more successful telecommuting . . . .”).
413. See Golden, supra note 391, at 1641, 1643-44, 1653-61.
both members' commitment to the team and positive affect with the team, although it can enhance divergent thinking and idea generation.\textsuperscript{414}

Based on this analysis, it can be surmised that the attributes of coworkers influence (1) the prevalence and success of remote work arrangements for employees with disabilities, (2) the effect of remote work arrangements on employees with disabilities, and (3) the effect of remote work arrangements on observers (coworkers, supervisors, etc.). Remote work is more likely to have a positive impact on attitudes and behaviors of both employees with disabilities and observers when (1) coworkers are more tolerant for ambiguity, (2) coworkers are less aggressive, and (3) coworkers have had positive contact with people with disabilities. In addition, techniques used to enhance communications among remote teams more generally can overcome some of the potential concerns associated with remote work by people with disabilities.\textsuperscript{415}

\textit{D. Attributes of Supervisors}

Supervisors play a major role in employees with disabilities' receipt of remote work arrangements and the success of such arrangements.\textsuperscript{416} Challenges include the promotion of communication between a supervisor and the remote worker, and the effective evaluation of the performance and productivity of remote workers.\textsuperscript{417} The challenges associated with remote working may be exacerbated by supervisor resistance or inability to manage remote work arrangements, leading to denial of those arrangements as accommodations.\textsuperscript{418} This resistance can be addressed by an adoption of the principles of servant leadership.\textsuperscript{419}

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\item \textsuperscript{415} See Hesse, \textit{supra} note 25, at 332-333.
\item \textsuperscript{416} See Lautsch & Kossek, \textit{supra} note 346, at 10-11.
\item \textsuperscript{417} See Lautsch et al., \textit{supra} note 336, at 811, 817.
\item \textsuperscript{418} See Seth Kaplan et al., \textit{Unpackaging Manager Mistrust in Allowing Telework: Comparing and Integrating Theoretical Perspectives}, 33 J. BUS. & PSYCH. 365, 366 (2018); see also Pascale Peters et al., \textit{May I Work from Home? Views of the Employment Relationship Reflected in Line Managers’ Telework Attitudes in Six Financial-Sector Organizations}, 29 EQUAL., DIVERSITY & INCLUSION 517, 518-21, 528-29 (2010) ("[S]ome line managers working in organizations that have implemented formal policies express very negative attitudes" and view telework as an idiosyncratic deal).
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Overall, “[m]anagers need to obtain the skillset needed to supervis[e] a virtual worker.” 420 Supervisors and managers need to prioritize the strengthening of personal relationships with remote workers so as to engage them more effectively. 421 Employers allowing remote work have long recognized that a supervisor “must establish and maintain the kind of smooth communication that allows effective oversight of the worker and the job being performed.” 422 Managers should develop soft skills to “bolster communication and increase levels of trust.” 423

More frequent, transparent, and effective contact between supervisors and remote workers improves processes between members of a team including remote workers. 424 Remote teamwork can be enhanced by managers who ensure communication regarding schedules and expectations, and make an effort to develop a positive culture, as well as positive relationships between team members. 425 Documentation of instructions, feedback, and even the organizational culture can reduce confusion. 426 Satisfaction among remote workers can be enhanced by circumstances linked to overall job satisfaction, such as feedback and positive relationships with supervisors as well as coworkers. 427 For example, companies which offer remote work arrangements offer in-depth training to both managers and employees, with a focus on how to manage remote employees. 428

The lack of face-to-face communication between supervisors and remote workers can be a challenge 429 because of its impact on the sharing

420. Waters, supra note 275, at 36.
421. See Stevenson, supra note 324.
423. Thomas, supra note 335.
424. See Stevenson, supra note 324 (“It’s important to make regular contact with remote workers to keep them in the loop . . . .”); see also Lautsch et al., supra note 336, at 811; see also Abel & Popiela, supra note 407.
428. Id. at 59.
429. Greer & Payne, supra note 342, at 98.
of information, ideas, and socio-emotional cues.\textsuperscript{430} Barriers to communication that negatively affect the supervisor-subordinate relationship can then decrease job satisfaction.\textsuperscript{431} As advised by Gitlab, self-described as the largest remote-worker employer, successful management of remote workers is like successful management of any company: “[i]t comes down to trust, communication, and company-wide support of shared goals.”\textsuperscript{432} Supervisors should maintain frequent communication with remote workers, to address potential isolation and to integrate them into their work group, and to allow for exchange of relevant information including problem-solving and coordination of work.\textsuperscript{433} Supervisors should also inquire about and respect team members’ preferences about methods and timing of communication.\textsuperscript{434}

Regarding the performance and productivity of subordinates, supervisors and managers may lack trust that remote employees will perform effectively.\textsuperscript{435} Supervisors should rethink the adage that in-person monitoring of subordinates equates with higher productivity.\textsuperscript{436} Remote workers should be held to the same productivity standards and monitored at the same intensity level as in-office workers to avoid even the perception of unequal treatment.\textsuperscript{437} At the same time, performance should be measured based on clearly defined, objective, and measurable results rather than physical presence.\textsuperscript{438}

For remote work to be successful, managers must learn to be good managers, including to “set guidelines and milestones for remote workers, specifying what has to happen by when.”\textsuperscript{439} In addition, managers should provide “[c]ommon objectives and goals that are clearly and consistently

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\textsuperscript{431} Golden & Fromen, supra note 15, at 1451, 1454, 1457.

\textsuperscript{432} Darren Murph et al., What Not to Do When Implementing Remote: Don’t Replicate the In-Office Experience Remotely, GITLAB, https://about.gitlab.com/company/culture/all-remote/what-not-to-do/ (last visited Dec. 6, 2020).

\textsuperscript{433} Lautsch & Kossek, supra note 346, at 13-14.

\textsuperscript{434} Abel & Popiel, supra note 407.

\textsuperscript{435} See Kaplan et al., supra note 418, at 366, 373 (reflecting a “lack of trust regarding employees’ ability and/or willingness to achieve the same levels of performance that they could attain while collocated with the manager in the traditional office space”); Peters et al., supra note 418, at 525 (reflecting trust as a condition for telework allowance).

\textsuperscript{436} Thomas, supra note 335.

\textsuperscript{437} Lautsch & Kossek, supra note 346, at 13; Telework Managers: Results-Oriented Management, supra note 321.

\textsuperscript{438} Lautsch & Kossek, supra note 346, at 13; Telework Managers: Results-Oriented Management, supra note 322.

\textsuperscript{439} Waters, supra note 275, at 36.
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shared” and should have “clear guidelines for when and how tasks are going to be completed,” making it easier to measure the performance of remote workers. In addition, computer monitoring programs can assist with the accountability of remote workers.

Managers may provide remote workers with less routine feedback on performance from their direct supervisor, which could impede improvements in their performance, and create role ambiguity. Some may recommend more intense supervision of remote workers, where more frequent contact may help to integrate remote workers and increase their helping behaviors, but the level of interaction should be tailored to employees’ needs. One study found that where performance outcome orientation is high, all employees experience higher job satisfaction, whereas when performance outcome orientation is low, satisfaction is highest for employees engaged in a moderate amount of remote work. It is also important for remote workers to be recognized for their successes to indicate their value to the employer.

Given the concerns about the supervision and control of remote workers, supervisors and managers often need training to supervise remote workers, including promoting the communication strategies discussed above, which “make them feel like a part of the corporate family.” Indeed, our review of court decisions shows that the need for

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440. Id. at 36.
441. Allen et al., supra note 71, at 50; Turetken et al., supra note 357, at 59; Ford & McLaughlin, supra note 422, at 68. See also Frequently Asked Questions, U.S. OFF. OF PERS. MGMT., https://web.archive.org/web/20080125164521/http://www.telework.gov/faqqs.asp (last visited Dec. 6, 2020) (explaining that tools for effective remote supervision can include “project schedules, key milestones, regular status reports, and team reviews”).
443. Allen et al., supra note 95, at 146.
446. See, e.g., Abel & Popiel, supra note 407 (“Providing real-time feedback to establish trust and allow for open, honest dialogue and problem solving.”).
447. See Lautsch et al., supra note 336, at 811.
449. Virick et al., supra note 23, at 138, 150, 151 (performance outcome orientation is defined as the “degree to which objective criteria are used in employee evaluation”).
450. Stevenson, supra note 105.
452. Gajendran & Harrison, supra note 71, at 1526-27.
453. Sobaski, supra note 324.
supervision has been used often as a reason to deny employees with disabilities’ requests for remote work. Employers allowing remote work have found that training supervisors regarding supervision of remote workers can overcome these concerns by making them more effective.

The above-mentioned challenges behoove effective supervisors in a remote working context to be considerate and prioritize followers’ needs first. In addition to the training of supervisors and managers, the adoption of principles of servant leadership can promote the success of remote work arrangements. First, servant leadership can ensure that supervisors are attentive to followers’ needs, desires, goals, abilities, and potential and assume the responsibility to bring out the best in their followers. Second, servant leaders possess task knowledge and problem solving skills to help followers and are sensitive to followers’ difficulties at work and personal setbacks. Third, they put their followers first, help followers grow and succeed, and are empowering. Supervisors’ provision of social support for remote workers can enhance their organizational identification. Therefore, servant leaders are willing to listen to followers’ needs regarding the customization of follower work arrangements, providing them with flexible work schedules, special task assignments, and career development opportunities. More importantly, when considering the viability of remote work arrangements, servant leadership enhances followers’ organizational commitment, community citizenship behavior, and in-role performance, as well as promotes high levels of engagement. As one expert remote manager stated, management of a remote team requires managers to “learn to be a feedback-loving servant leader.”

456. Cinquegrani, supra note 11.
457. Robert C. Liden et al., Servant Leadership: Development of a Multidimensional Measure and Multi-Level Assessment, 19 LEADERSHIP Q. 161, 162 (2008); see also van Dierendonck, supra note 419, at 1232.
458. Liden et al., supra note 457, at 162-63.
459. Id.
460. Wiesenfeld et al., supra note 95, at 222-23.
461. Id. at 215, 222-23, 225.
462. van Dierendonck, supra note 419, at 1247-49; Liden et al., supra note 457, at 174.
463. Rice, supra note 426.
These attributes make servant leadership a particularly conducive style when working with employees with disabilities. Because of their disabilities, these employees desire someone to understand their special needs and help customize goals around their abilities and potential. Indeed, servant leaders act on their knowledge of followers and adjust their leader behavior accordingly. Servant leaders are more likely to realize that remote work is a necessity rather than a convenience for employees with disabilities.

Because servant leaders create a culture within their work unit so that coworkers emulate and embrace the value of serving others, coworkers are more likely to support remote work arrangements for employees with disabilities and help those employees achieve productivity through virtual work.

Thus, the above-described attributes of supervisors influence (1) the prevalence and success of remote work arrangements for employees with disabilities, (2) the effect of remote work arrangements on employees with disabilities, and (3) the effect of remote work arrangements on observers (coworkers, supervisors). Employees with disabilities are more likely to obtain remote work arrangements and remote work is more likely to have a positive impact on attitudes and behaviors of both employees with disabilities and observers when (1) supervisors affirmatively promote communication and team building, (2) measure performance objectively, and (3) adopt a servant leadership style.

CONCLUSION

This review of the current practice of remote work arrangements for employees with disabilities supports a new framework to guide future decision-making on remote work as an accommodation for employees with disabilities. This analysis of court decisions regarding remote work as an accommodation shows that employers are still reluctant to allow employees with disabilities to work remotely, even where remote work would be possible. Indeed, forty to forty-two percent of federal employees reported resistance from top management; similarly, resistance

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464. See van Dierendonck, *supra* note 419, at 1230-31 (explaining that the ultimate goal of servant leaders is serving followers and fostering positive relationships).


466. Liden et al., *supra* note 457, at 162.
from immediate supervisors is one of the most commonly reported obstacles to a remote work arrangement.467

Employers’ definition of essential job duties and policies regarding remote work receive considerable deference from the courts reviewing accommodation claims, emphasizing the negative aspects of remote work rather than considering its benefits for employees with disabilities.468 Moreover, these broad prohibitions of remote work ignore the widespread possibilities of remote work across a range of industries. This review of court decisions demonstrates that many courts, and at least some employers, often are not engaging in an individualized analysis of whether remote work would be a reasonable accommodation for an employee with a disability.469 Instead, employer policies and practices regarding remote work are dictating whether remote work is deemed reasonable for a particular employee. This failure to engage in individualized analysis not only ignores the ADA’s mandate,470 but also fails to recognize the research regarding remote work, which shows its benefits in many work situations.

Employers who deny remote work as an accommodation for employees with disabilities and court decisions that uphold those denials fail to recognize that remote workers with disabilities can be highly effective and efficient.471 Because remote workers display higher job satisfaction and turnover less frequently,472 providing remote work as an accommodation for an employee with a disability can have the same effect.473 Thus, both employers and courts should consider the efficiency, productivity, and satisfaction of remote workers with disabilities in determining whether remote work is a reasonable accommodation. This consideration should include relevant factors at the organizational, team/supervisor, and individual (employees with disabilities and coworkers) levels. In theory, these factors not only influence the

468. See WEF White Paper, supra note 49.
469. See infra Appendix A.
471. See Blanck & Marti, supra note 129, at 359.
472. See Allen et al., supra note 71, at 47-48; Vega et al., supra note 71, at 316; Gajendran & Harrison, supra note 71; Morganson et al., supra note 14; Virick et al., supra note 23; Golden, supra note 86, at 182-83.
473. Travis, supra note 107, at 352-53 (showing that flexible work arrangements can reduce “turnover and retraining costs, lower absenteeism, increase productivity, enhance recruiting, and lower overhead costs”).

https://scholarlycommons.law.hofstra.edu/hlelj/vol38/iss1/3
prevalence and success of remote work for employees with disabilities, but impact the effect of such work arrangements on both employees with disabilities and their coworkers.

This review of court decisions reveals that despite the increasing popularity of remote work at the workplace and the ADA’s requirement for employers to provide reasonable accommodations, employees with disabilities still face a difficult time in obtaining remote work arrangements.474 Such findings are in sharp contrast to the research evidence demonstrating potential benefits of employee remote working.475 Acknowledging the importance of employees with disabilities in the workforce, this proposed theoretical framework should encourage a broader view of the viability of remote work for employees with disabilities. Under this approach both employers and courts reviewing ADA claims can better determine when remote work is a reasonable accommodation under the ADA. Such a broader approach will provide greater access to remote work so as to expand the ability of people with disabilities to participate productively in the labor market.


475. WEF White Paper, supra note 49; Bloom et al., supra note 102; O’Toole, supra note 102.
APPENDIX A

LIST OF COURT CASES ANALYZED

Abram v. Fulton Cnty. Gov't, 598 F. App'x 672 (11th Cir. 2015)
Amsel v. Texas Water Dev. Bd., 464 F. App'x 395 (5th Cir. 2012)
Appel v. Inspire Pharms., Inc., 428 F. App'x 279 (5th Cir. 2011)
Bilinsky v. Am. Airlines, Inc., 928 F.3d 565 (7th Cir. 2019)
Credeur v. Louisiana, 860 F.3d 785 (5th Cir. 2017)
DeRosa v. Nat’l Envelope Corp., 595 F.3d 99 (2d Cir. 2010)
EEOC v. Ford Motor Co., 782 F.3d 753 (6th Cir. 2015)
Ellis v. Ethicon, Inc., 529 F. App’x 310 (3d Cir. 2013)
Fisher v. Vizioncore, Inc., 429 F. App’x 613 (7th Cir. 2011)
Gómez-González v. Rural Opportunities, Inc., 626 F.3d 654 (1st Cir. 2010)
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