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Remote Work as an Accommodation under the ADA in a Post-COVID World

The COVID-19 pandemic has raised the issue of what role remote work is to play in the future, and how we should use it to ensure fairness and productivity for both employers and employees. This is especially important for people with certain disabilities for whom remote work may be a helpful and flexible option. Even as society gradually returns to in-person work, disability advocates and others will ensure that remote work will remain a topic of discussion as it has proven over the last 18 months to have immense benefits both for people with disabilities and those without disabilities.[1] Remote work, however, has already been established under the Americans with Disabilities Act (ADA) and through case law as an accommodation for employees with disabilities, albeit a much rarer case and one more likely to cause undue hardship to the employer depending on the job.[2] The question that remains is whether Covid will have an impact on normalizing regular remote work in the future as an accommodation for employees with disabilities under the ADA.

Under the ADA, an employee is considered qualified [1] for a position if they can “perform the essential functions” of the position, with or without reasonable accommodations as necessary.[3] Immense deference is given to the employer’s judgment as well as the written job description of what constitutes an essential function, [4] which creates a significant barrier for employees seeking accommodation to surmount. Furthermore, the burden is placed on the employee to prove that he or she can perform all of their essential job functions[2] [3] if given a reasonable accommodation.[5] Not surprisingly in 2017 and 2018 employers won 70% of the rulings[4] [5] on whether they could reject an employee’s request for remote work as an accommodation for their disability.[6] Remote work, which technology has made more practical and effective than ever, still faces resistance from employers who cling to traditional workplace norms that value in-person collaboration and supervision over the many benefits of remote work.[7] Many employers successfully cite job-specific reasoning for denying remote work access, such as the need for physical presence, team work, supervision, or security concerns, and are typically supported by the courts.[8] Other employers need only point to company-wide policies that either broadly prohibit remote work or restrict it to employees who have contributed a certain number of years,[9] totally ignoring the individualized needs, capabilities, and responsibilities of the employee and employer.[10] This one-size-fits-all approach undermines the purpose of the ADA and may be problematic in the adoption of remote work as an accommodation in the future.

COVID-19’s lingering effects have given rise to a condition scientists are calling “long-COVID” as a potential condition covered by the Americans with Disabilities Act, qualifying employees with the condition for reasonable

accommodation in the workplace. Long-COVID is characterized as the persistence of COVID-19 symptoms for months after the initial contraction, including “shortness of breath and respiratory problems, muscle aches, brain fog, anxiety, depression, fatigue .”[11] While courts have yet to rule on the inclusion of long-COVID as a covered disability, the ADA defines a disability as a “physical or mental impairment that substantially limits one or more major life activities” and includes sleeping, walking, breathing, concentrating, thinking, and working in its non-exhaustive list of such activities.[12] Additionally, the ADA Amendments Act clarified that courts should more broadly construe disabilities to include temporary or episodic ones in addition to just permanent ones[13]. Lastly, the ADA has been used to support remote work as a reasonable accommodation for mental conditions such as obsessive-compulsive disorder, depression and generalized anxiety disorder.[6] [7] [14] These factors, taken together, would indicate that the physical and mental effects of long-COVID have a significant chance of being characterized as a disability under the ADA and qualifying employees for some form of reasonable accommodation, which may include remote work.

COVID-19’s lasting impact on the intersection of disability and employment law is still too early to discern but understanding the current state of judicial attitudes towards remote work as an accommodation under the ADA gives insight to how they might develop in the future. [8] [9] The 2008 amendment to the ADA focused on broadening the scope of what constitutes a covered disability. However, our understanding of disability, alongside our technology and work culture, has evolved greatly over the past 13 years. Now that we have experienced remote work on a large scale and for a long period of time, perhaps it is time to amend the ADA once again, this time with the spotlight on inclusivity of accommodations, such as remote work, rather than on the inclusivity of the disabilities themselves.

[1] Tammy D. Allen et al., *How Effective is Telecommuting? Assessing the Status of Our Scientific Findings*, 16 *Psych. Sci. Pub. Int.* 40, 47 (2015); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 *Tenn. L. Rev.* 311, 352-53 (2009), (“[accommodations can] decrease turnover and retraining costs, lower absenteeism, increase productivity, enhance recruiting, and lower overhead costs.”)

[2] *Vande Zande v. Wisconsin Dep’t of Admin.*, 44 F.3d 538 (7th Cir. 1995) (recognizing the possibility of remote work as an accommodation in a “very extraordinary case”); *Tyndall v. Nat’l Educ. Ctrs., Inc* 31 F.3d 209 (4th Cir. 1994).

[3] 42 U.S.C. § 12112(a) (hereinafter “ADA”).

[4] *Id.*; see also *Summerville v. Trans World Airlines, Inc.*, 219 F.3d 855, 858 (8th Cir. 2000).

[5] Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Act Amendments Act*, 2015 *Mich. St. L. Rev.* 1689, 1701-03 (2015).

[6] Robert Iafolla, *Work at Home Gets Skeptical Eye From Courts as Disability Issue*, *Bloomberg L.* (Feb. 21, 2019), <https://news.bloomberglaw.com/daily-labor-report/work-at-home-gets-skeptical-eye-from-courts-as-disability-issue>.

[7] Benjamin D. Johnson, Comment, *There's No Place Like Work: How Modern Technology is Changing the*

Judiciary's Approach to Work-at-Home Arrangements as an ADA Accommodation, 49 U. Rich. L. Rev. 1229, 1257 (2015).

[8] Stacy A. Hickox & Chenwei Liao, *Remote Work as an Accommodation to Employees with Disabilities*, 38 Hofstra Lab. & Emp. L.J. 25, 52.

[9] *Trout v. Elec. Data Sys. Corp.*, 151 F. App'x 390, 391 (6th Cir. 2005).

[10] *Id.* See also *Spielman v. Blue Cross/Blue Shield of Kan., Inc.*, No. 98-4184-RDR, 2000 U.S. Dist. LEXIS 19037, at 4, 15 (D. Kan. Nov. 13, 2000).

[11] Lindy Washburn, *Millions suffer from 'long COVID.' U.S. disability law may protect them from discrimination*, NorthJersey.com, (Sept. 7, 2021),

<https://www.northjersey.com/story/news/coronavirus/2021/09/07/long-haul-covid-disability-entitled-ada-legal-protections/5682365001/>.

[12] *See supra* ADA.

[13] Lawrence P. Postol, *Temporary Disabilities - No Need To Worry About The ADA, Right? Think Again*, Seyfarth, (Feb. 6, 2014)

[14] *See id.*; *see also* *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001) (dealing with remote work as accommodation for employee with OCD); *supra* Vande Zande