

LESSONS LEARNED? COVID’S CONTINUED IMPACT ON REMOTE WORK DISABILITY ACCOMMODATIONS

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One bright spot in the devastation of the COVID-19 pandemic is broader acceptance of remote work. Although disabled people are still underemployed compared to the rest of the population, they are currently working at record levels—due directly to remote work allowing more of them to enter the labor force. But significantly more disabled workers need to work remotely and are unable to secure that accommodation. Eager to “return to normal” and do away with remote work, many employers are denying remote work requests, even from disabled workers who cannot otherwise do their jobs. Historically, employers have been able to deny remote work accommodation requests with near impunity from courts, which overwhelmingly sided with employers. Courts often did so based on faulty evidentiary practices, such as assuming that only exceedingly rarely could any job be done at home. But COVID laid that assumption bare.

Commentators and scholars speculate that COVID’s mass remote work experiment will surely change how courts assess claims based on denying remote work accommodation requests. But is that speculation accurate? This Article presents data to answer that question. It provides empirical analysis based on all 151 federal remote work accommodation cases from 2023 and 2024. In some small respects, courts have changed their ways, but far too many are still making the same mistakes in analyzing these claims—even with all COVID has taught us. Many courts, it seems, have not learned any lessons.

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INTRODUCTION

The COVID-19 pandemic ravaged our country on so many levels. But amidst the devastation, many have found a silver lining: more employment opportunities for people with disabilities.¹ Due directly to increased remote work,² the post-COVID employment rate for disabled workers is at historically high levels.³ But there is still a huge unmet demand for remote work as a disability accommodation.⁴ Equal Employment Opportunity Commission (EEOC) claims and lawsuits involving denied remote work accommodations have skyrocketed.⁵ Some employers are nostalgic for the pre-COVID days when most people worked in the office, and some are implementing harsh return-to-work

1. See Lisa A. Schur, Mason Ameri & Douglas Kruse, *Telework After COVID: A “Silver Lining” for Workers with Disabilities?*, 30 J. OCCUPATIONAL REHAB. 521, 521 (2020), <https://doi.org/10.1007/s10926-020-09936-5>. There are differences of opinion within the disability community about whether to use disability-first or people-first language. To respect both points of view, I have chosen to use both conventions. For a discussion regarding this terminology, see *Person-first and Destigmatizing Language*, NAT’L INSTS. OF HEALTH, <https://www.nih.gov/nih-style-guide/person-first-destigmatizing-language> [<https://perma.cc/MM7E-MUF3>] (last visited Jan. 22, 2026).

2. See *infra* notes 55–56 and accompanying text. I use terms like “remote work” and “work from home” to indicate an employee performing a job function in a location other than the employer’s physical workspace. I also use these terms to include both full and partial working from home (hybrid arrangements) unless I specifically indicate otherwise. Scholars and researchers use many other terms to describe various remote work arrangements, including telework and virtual work. For discussion about the various terminology as it is used in the research literature, see Tammy D. Allen, Timothy D. Golden & Kristen M. Shockley, *How Effective Is Telecommuting? Assessing the Status of Our Scientific Findings*, 16 PSYCH. SCI. PUB. INT. 40, 42–43 (2015). Also, please note that much of the literature (and therefore article titles and quotations in this Article) uses “WFH” to abbreviate “work from home” or “working from home” and “RTO” to abbreviate “return to office.”

3. See *infra* note 51 and accompanying text.

4. See *infra* notes 75–78 and accompanying text.

5. See *infra* note 79 and accompanying text.

policies that make no room for even disability accommodations.⁶ Often, these policies aren't based on any evidence of some harm from remote work—more of a feeling that everything is just better in person.⁷

Many people seem to have a sense that our collective COVID experience of working from home *must* be softening courts' treatment of remote work accommodation claims.⁸ After all, courts had been quite hostile to these claims for decades, based in large part on the presumption that working away from the office simply was not feasible for most jobs.⁹ And COVID showed that a broad swath of jobs that people thought could not be done from home, in fact, could be and could be done well.¹⁰ So courts must have learned some lessons from COVID's mass remote work experiment and be taking that into account in evaluating remote work claims—right?

In previous work, I examined all federal remote work accommodation cases from April 2020 through December 2022 to test that claim.¹¹ In cases where courts evaluated the merits of the claim, workers won 49.2% of the time.¹² That seemed significant, given that

6. See *infra* notes 23–26 and accompanying text.

7. See Matthew Boyle & Kiel Porter, *3M Ends Remote-Friendly Policy by Asking Bosses Back Three Days*, BL (Oct. 21, 2024, at 10:29 CT), <https://news.bloomberglaw.com/in-house-counsel/3m-ends-remote-friendly-policy-by-asking-bosses-back-three-days>; see also Rose Horowitz, *Revenge of the Office*, ATLANTIC (Oct. 2, 2024), <https://www.theatlantic.com/ideas/archive/2024/10/remote-work-amazon-executives/680108/> [<https://perma.cc/RR2Q-5VLZ>] (referring to “executive nostalgia”).

8. See, e.g., Vin Gurrieri, *How the Pandemic Telework Boom Affects ADA Obligations*, LAW360 (July 26, 2023, at 15:01 ET), www.law360.com/employment-authority/discrimination/articles/1703444 (discussing hopes that employee's COVID experiences will sway courts); Robert Iafolla, *Covid's Remote Work Experience Is Slowly Changing Disability Law*, DAILY LAB. REP. (BL) (July 6, 2023, at 04:20 CT), <https://news.bloomberglaw.com/daily-labor-report/covids-remote-work-experience-is-slowly-changing-disability-law> (“[A]s new lawsuits come in, they're more likely to be assessed through a post-pandemic lens.”); Tiffany Stacy & Rebecca A. Magee, *Fifth Circuit Weighs in for the First Time Since COVID-19 as to When Remote Work Can Be Reasonable Accommodation*, OGLETREE DEAKINS (July 12, 2023), <https://ogletree.com/insights-resources/blog-posts/fifth-circuit-weighs-in-for-the-first-time-since-covid-19-as-to-when-remote-work-can-be-reasonable-accommodation/> [<https://perma.cc/4DRU-TFDW>] (stating that the continued viability of the general consensus that most jobs must be done in person “has been in question, given the ability of thousands of employees to work remotely during the COVID-19 pandemic”).

9. See D'Andra Millsap Shu, *Remote Work Disability Accommodations in the Post-Pandemic Workplace: The Need for Evidence-Driven Analysis*, 95 TEMP. L. REV. 201, 214–32 (2023). For research from other authors corroborating this hostility, see Stacy A. Hickox & Chenwei Liao, *Remote Work as an Accommodation for Employees with Disabilities*, 38 HOFSTRA LAB. & EMP. L.J. 25, 25–29, 33 (2020), and Arlene S. Kanter, *Remote Work and the Future of Disability Accommodations*, 107 CORN. L. REV. 1927, 1931–32 (2022).

10. See *infra* notes 45–46 and accompanying text.

11. See Shu, *supra* note 9, at 202.

12. *Id.* at 245–46.

employers statistically overwhelmingly win in disability discrimination cases—up to 70% of the time.¹³ But many courts were still relying on improper evidentiary practices, such as the presumption that remote work was not feasible in most cases, to deny workers a fair chance at presenting their claims.¹⁴

I have now undertaken an even deeper analysis of all federal remote work accommodation cases for the next two years, 2023 and 2024, to consider whether courts' treatment of these cases has changed. Some of the results back up the intuitive feeling that courts must be getting friendlier for workers, but most aspects are markedly negative. The overall litigation success rate for workers plummeted ten percentage points from my first dataset to 39.1%.¹⁵ Workers did especially poorly in appeals and in summary judgment proceedings, but fortunately, won 57.1% of motions to dismiss.¹⁶ On the bright side, several courts moved away from presuming that remote work is unworkable and made careful, case-by-case assessments (as they always should have), but far too many still analyzed these cases in the same old way. Through this presumption against remote work and other evidentiary practices that unfairly prioritize the employer, courts are allowing employers to lean into a desire to do away with remote work—to “return to normal”—without considering if “normal” is even desirable or if the employer's priority must give way to the needs of a disabled worker.

In this Article, I provide empirical data from the 151 federal cases addressing the merits of remote work disability accommodation claims in 2023 and 2024. I analyze in depth how courts treated these claims and show how, in many cases, courts continued to make the same mistakes as before COVID. They haven't learned enough lessons from the COVID experience.

This Article proceeds in three parts. Part I provides information about the remote work boom and how it has impacted workers with disabilities. Next, Part II recaps my prior work on the history of remote work as a disability accommodation and how courts treated these requests in the period during and immediately after the pandemic. Part III presents my methodology, data, and analysis of federal remote work disability accommodation cases from 2023 and 2024. Finally, this Article concludes with some reflections about this data and the future of remote work accommodations.

13. *Id.* at 246–47.

14. Shu, *supra* note 9, at 247–52.

15. *See infra* notes 163–164.

16. *See discussion infra* Section III.B.

I. THE PANDEMIC, REMOTE WORK, AND DISABILITY EMPLOYMENT

Remote work is widespread today, but, of course, it wasn't always that way. Before the pandemic, remote work was slowly increasing, with some notable starts and stops from companies such as Yahoo and Best Buy experimenting with broader implementation.¹⁷ But the pandemic turbocharged remote work. Virtually overnight, remote work went from about 5% of days worked to 60% in May 2020.¹⁸

The pandemic may be in the rearview, but remote work is not. Although remote work has decreased from the pandemic highs, it is still quite common. In early 2025, about a quarter of paid working days were remote.¹⁹ By far, the most common arrangement is hybrid—a mixture of on- and off-site work—with approximately 70% of U.S. companies using some sort of hybrid model.²⁰ Hybrid is now, quite simply, “the new normal.”²¹

17. David Streitfeld, *The Long, Unhappy History of Working from Home*, N.Y. TIMES (Jan. 4, 2021), <https://www.nytimes.com/2020/06/29/technology/working-from-home-failure.html>; see also Shu, *supra* note 9, at 206–07 (“Many companies experimented with remote work programs but then pulled back.”).

18. Jose Maria Barrero, Nicholas Bloom & Steven J. Davis, *Why Working from Home Will Stick 2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28731, 2021), <https://www.nber.org/papers/w28731> [hereinafter Barrero, Bloom & Davis, *Stick*]; see also José María Barrero, Nicholas Bloom & Steven J. Davis, *The Evolution of Work from Home 1*, 28 (Becker Friedman Inst., Univ. Chi., Working Paper No. 2023-116, 2023), https://bfi.uchicago.edu/wp-content/uploads/2023/09/BFI_WP_2023-116.pdf [hereinafter Barrero, Bloom & Davis, *Evolution*] (discussing the massive increase in remote work from 2019 to 2023).

19. Shelby R. Buckman, Jose Maria Barrero, Nicholas Bloom & Steven J. Davis, *Measuring Work from Home 18* (Nat'l Bureau of Econ. Rsch., Working Paper No. 33508, 2025), <https://www.nber.org/papers/w33508> (“After reviewing multiple data sources, we conclude that about one quarter of all paid workdays were WFH days in 2023 to 2025 among U.S. workers aged 20-64.”).

20. See Robert Iafolla, *Pandemic-Based Workplace Restructuring Persists, Employers Say*, DAILY LAB. REP. (BL) (May 8, 2024, at 02:02 CT), <https://news.bloomberglaw.com/daily-labor-report/pandemic-based-workplace-restructuring-persists-employers-say>; Jessica Stillman, *New Data Shows Workers Are Mostly Ignoring Return-to-Office Orders*, INC. (July 10, 2025), <https://www.inc.com/jessica-stillman/new-data-shows-workers-are-mostly-ignoring-return-to-office-orders/> 91202144; see also Heather Long, *Who Will Follow Amazon Back into the Office?*, WASH. POST (Sep. 30, 2024), <https://www.washingtonpost.com/opinions/2024/09/30/remote-work-amazon-office-jobs/> (“The vast majority of Fortune 100 companies have hybrid work arrangements.”).

21. Sarah Kessler, *Getting Rid of Remote Work Will Take More than a Downturn*, N.Y. TIMES (Jan. 7, 2023), <https://www.nytimes.com/2023/01/07/business/dealbook/remote-work-downturn.html>; see also Ryan Pendell, *Hybrid Work in Retreat? Barely.*, GALLUP (Sep. 3, 2025), <https://www.gallup.com/workplace/694361/hybrid-work-retreat-barely.aspx> [<https://perma.cc/C2VM-EZRX>] (“Work location trends have remained stable since 2022, reflecting the durability of the hybrid work model.”).

Although some companies continue to embrace remote work,²² in many others, workers and management are engaged in a fierce tug-of-war, with management eager to “return to normal” and end remote work but employees demanding to continue working remotely, at least to some degree.²³ It turns out that employees are really attached to remote work and are willing, on average, to take an 8 to 25% pay cut to keep it.²⁴ Several companies have loudly announced an end to remote work,²⁵ but some of them, such as Amazon and H&R Block, had to backtrack because of logistical issues (like not having enough space) or employee backlash.²⁶ The federal government has also been pushing for workers to return to the office²⁷ and is facing similar issues, such as a backlog of

22. See Katherine Fung, *Tech Companies Double Down on Remote Work as American Returns to the Office*, NEWSWEEK (June 20, 2025, at 10:17 ET), <https://www.newsweek.com/tech-companies-double-down-remote-work-american-returns-office-2084674> (discussing strong remote work policies at Pinterest and Airbnb).

23. See Horowitch, *supra* note 7; Charlie Wells, *Return-to-Work Policies Devolve into a Toxic Cultural Flashpoint*, DAILY LAB. REP. (BL) (Mar. 2, 2024, at 07:00 CT), <https://news.bloomberglaw.com/daily-labor-report/return-to-work-policies-devolve-into-a-toxic-cultural-flashpoint>.

24. See Barrero, Bloom & Davis, *Evolution*, *supra* note 18, at 11 (“On average, Americans value the option to work from home two or three days a week at eight percent of pay.”); Zoe B. Cullen, Bobak Pakzad-Hurson & Ricardo Perez-Truglia, *Home Sweet Home: How Much Do Employees Value Remote Work? 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 33383, 2025), <https://www.nber.org/papers/w33383> (“Our findings indicate that, on average, individuals are willing to forgo approximately 25% of total compensation for a job that is otherwise identical but offers partially- or fully-remote work instead of being fully in-person.”).

25. Matt Morris & Jeff Nowak, *Employers Need to Understand Remote Work as an ADA Accommodation*, U.S.L.W. (BL) (Mar. 4, 2025, at 03:30 CT), <https://news.bloomberglaw.com/us-law-week/employers-need-to-understand-remote-work-as-an-ada-accommodation> (“Amazon made waves when it announced workers were expected to be in five days a week, with a variety of other companies following suit: JPMorgan, AT&T, Dell, Sweetgreen, and Boeing, among many others.”); see also Beth Kowitz, *Jamie Dimon Takes JPMorgan Backward on Hybrid Work*, DAILY LAB. REP. (BL) (Feb. 19, 2025, at 07:30 CT), <https://news.bloomberglaw.com/daily-labor-report/jamie-dimon-takes-jpmorgan-backward-on-hybrid-work-beth-kowitz> [<https://perma.cc/VZ5Q-7YCK>] (discussing JPMorgan’s CEO’s “profanity-laced screed against hybrid work”).

26. See Kessler, *supra* note 21; Spencer Soper, Matt Day & John Gittelsohn, *Amazon Delays RTO Mandate for Thousands of Workers Due to Space*, DAILY LAB. REP. (BL) (Dec. 18, 2024, at 10:38 CT), <https://news.bloomberglaw.com/esg/amazon-delays-rto-mandate-for-thousands-of-workers-due-to-space>; Rachel Wells, *The Year in Remote Work—2024’s Biggest Shifts*, FORBES (Nov. 8, 2024, at 12:00 ET), <https://www.forbes.com/sites/rachelwells/2024/11/08/the-year-in-remote-work-2024s-biggest-shifts/>.

27. In January 2025, President Trump issued a memorandum directing that federal agency and department heads “take all necessary steps to terminate remote work arrangements and require employees to return to work in-person at their respective duty stations on a full-time basis,” subject to “exemptions they deem necessary.” *Return to*

thousands of new remote work accommodation requests in the Treasury Department.²⁸

After seemingly stabilizing in 2023,²⁹ remote work numbers have begun to ebb and flow based on this culture war over remote work.³⁰ The ultimate outcome remains to be seen, but what is clear is that remote work will never return to pre-pandemic levels.³¹

A growing volume of data exists regarding the potential benefits and downsides of remote work.³² Many studies focus on productivity, and though the results are mixed,³³ a substantial body of work shows that

In-Person Work, WHITE HOUSE (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/return-to-in-person-work/> [https://perma.cc/4L9W-66X5]. This caused widespread fear, leaving federal workers with remote work accommodations uncertain of their status. Terry Collins, “Will I Have a Job?” *Federal Workers Full of Uncertainty, Fear Over Trump Plans*, USA TODAY (Jan. 19, 2025), <https://www.usatoday.com/story/money/2025/01/19/trump-plans-federal-workers-job-uncertainty/77048619007/>.

28. Ian Kullgren, *Treasury Warns 6,500 Telework Request Backlog Risks High Costs*, DAILY LAB. REP. (BL) (June 11, 2025, at 15:42 CT), <https://news.bloomberglaw.com/daily-labor-report/treasury-warns-backlog-of-telework-requests-may-prove-costly>; see also Jory Heckman, *CDC Tells Staff Telework Reasonable Accommodations ‘Will Be Repealed,’ as HHS Sets Stricter Rules*, FED. NEWS NETWORK (Dec. 4, 2025, at 18:34 CT), <https://federalnewsnetwork.com/workforce/2025/12/cdc-tells-staff-telework-reasonable-accommodations-will-be-repealed-as-hhs-set-stricter-rules/> [https://perma.cc/97L3-L659] (reporting on new Department of Health and Human Services restrictions on approving remote work accommodations, creating backlog). State governments are not immune from this problem either. The Texas governor banned and then reinstated remote work for state workers within a three-month span over logistics concerns and data showing that remote work for state workers had improved productivity and reduced employee turnover. See Gleb Tsipursky, *The Great State Government Return-to-Office U-Turn*, HILL July 22, 2025, at 09:00 ET), <https://thehill.com/opinion/campaign/5412153-remote-work-reversals-state-government/>.

29. Buckman, Barrero, Bloom & Davis, *supra* note 19, at 16.

30. See Nicholas Bloom, Jose Maria Barrero, Steven Davis, Brent Meyer & Emil Mihaylov, *Survey: Remote Work Isn’t Going Away—and Executives Know It*, HARV. BUS. REV. (Aug. 28, 2023), <https://hbr.org/2023/08/survey-remote-work-isnt-going-away-and-executives-know-it> [https://perma.cc/A28T-754T]; Bryan Robinson, *Hybrid and Remote Work Still on the Rise, Despite Misconceptions, Study Shows*, FORBES (Sep. 26, 2024), <https://www.forbes.com/sites/bryanrobinson/2024/09/26/hybrid-and-remote-work-still-on-the-rise-despite-misconceptions-study-shows/>.

31. Barrero, Bloom & Davis, *Evolution*, *supra* note 18, at 1–2; see also Mason Ameri & Terri R. Kurtzberg, *Leveling the Playing Field Through Remote Work*, MIT SLOAN MGMT. REV. (Feb. 15, 2022), <https://sloanreview.mit.edu/article/leveling-the-playing-field-through-remote-work/> [https://perma.cc/V92A-9UAV] (“Now that the dam’s been cracked, there’s no patching that hole.”).

32. For more discussion of this topic, see Shu, *supra* note 9, at 208–09.

33. See Barrero, Bloom & Davis, *Evolution*, *supra* note 18, at 13–14; Emma Goldberg, *Here’s What We Do and Don’t Know About the Effects of Remote Work*, N.Y. TIMES (Oct. 17, 2023), <https://www.nytimes.com/2023/10/10/business/remote-work-effects.html>; Sabrina Wulff Pablonia & Jill Janocha Redmond, *The Rise in Remote*

remote work does not hurt and may in fact improve productivity,³⁴ especially well-managed hybrid work.³⁵ Employees save time on grooming and commuting and put a substantial amount of that time back into work.³⁶ Many workers are happier working from home, and that happiness translates into loyalty and good work.³⁷ Of course, these benefits vary greatly by person, as some do not have the personality or type of job that is conducive to working off-site.³⁸ Some of the most-often-cited potential negative impacts of remote work are undermining corporate culture,³⁹ collaboration and innovation,⁴⁰ and mentoring of new workers.⁴¹ Personal and mentoring relationships are thought to be easier

Work Since the Pandemic and Its Impact on Productivity, U.S. BUREAU OF LAB. STAT.: BEYOND THE NUMBERS (Oct. 31, 2024), <https://www.bls.gov/opub/btn/volume-13/remote-work-productivity.htm> [<https://perma.cc/6DQU-8ELA>].

34. See Laura Curtis, *Remote Work Doesn't Seem to Affect Productivity, Fed Study Finds*, DAILY LAB. REP. (BL) (Jan. 16, 2024, at 12:00 CT), <https://news.bloomberglaw.com/daily-labor-report/remote-work-doesnt-seem-to-affect-productivity-fed-study-finds>; Pabilonia & Redmond, *supra* note 33.

35. See Barrero, Bloom & Davis, *Evolution*, *supra* note 18, at 18–19; Nicholas Bloom, Jose Maria Barrero, Steven Davis, Brent Meyer & Emil Mihaylov, *Research: Where Managers and Employees Disagree About Remote Work*, HARV. BUS. REV. (Jan. 5, 2023), <https://hbr.org/2023/01/research-where-managers-and-employees-disagree-about-remote-work>.

36. Cevat Giray Aksoy et al., *Time Savings When Working from Home* 1, 4 (Becker Friedman Inst., Univ. Chi., Working Paper No. 2023-03, 2023), https://bfi.uchicago.edu/wp-content/uploads/2023/01/BFI_WP_2023-03.pdf; Barrero, Bloom & Davis, *Evolution*, *supra* note 18, at 14–15.

37. Barrero, Bloom & Davis, *Evolution*, *supra* note 18, at 19; Matthew Boyle, *Remote Work Companies See Faster Revenue Growth, Survey Finds*, BL: INS. (Nov. 14, 2023, at 06:00 CT), <https://news.bloomberglaw.com/insurance/remote-work-companies-see-faster-revenue-growth-survey-finds>. Other benefits of working from home include better quality of life, strengthening local communities, and reduced congestion and pollution. Aksoy et al., *supra* note 36, at 5–6; Allen, Golden & Shockley, *supra* note 2, at 46–58.

38. See Nicolas Gavoille & Mihails Hazans, *Personality Traits, Remote Work and Productivity* 1, 3 (IZA Inst. of Lab. Econ., Discussion Paper Series No. 15486, 2022), <https://docs.iza.org/dp15486.pdf> [<https://perma.cc/N2KG-5RTC>]; Pabilonia & Redmond, *supra* note 33.

39. Horowitch, *supra* note 7; Derek Thompson, *The Biggest Problem with Remote Work*, ATLANTIC (July 11, 2022), <https://www.theatlantic.com/newsletters/archive/2022/07/remote-work-wfh-debate-management/670482/>.

40. Barrero, Bloom & Davis, *Evolution*, *supra* note 18, at 16–17, 20; Horowitch, *supra* note 7; Thompson, *supra* note 39.

41. See Barrero, Bloom & Davis, *Evolution*, *supra* note 18, at 17; Natalia Emanuel, Emma Harrington & Amanda Pallais, *The Power of Proximity to Coworkers* 2–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31880, 2023), <https://www.nber.org/papers/w31880>; Emma Goldberg & Ben Casselman, *What Young Workers Miss Without the 'Power of Proximity'*, N.Y. TIMES (Apr. 24, 2023), <https://www.nytimes.com/2023/04/24/business/remote-work-feedback.html>.

to develop and maintain face-to-face.⁴² And remote workers may be easier to pass over for promotion and are often the first targeted for termination when times get tough.⁴³ Many of these downsides are not inevitable—they can be mitigated through technology and thoughtful corporate strategies.⁴⁴ Motivation is key. That’s why so many jobs no one thought could be done at home were, in fact, done and done well during COVID.⁴⁵ “[H]eaven and earth got moved to make remote work work.”⁴⁶

One fact is beyond debate—the remote work boom has disproportionately benefited workers with disabilities. Historically, the employment rate for disabled people has been abysmally low.⁴⁷ Before 2020, the employment rate for the population as a whole was around 80% but only 32% for those with a disability.⁴⁸ This “disability employment

42. Emanuel, Harrington & Pallais, *supra* note 41, at 5, 35; James Campell Quick, *The Art of Leadership*, in IMAGINING THE POST-COVID WORKPLACE: CHALLENGES AND OPPORTUNITIES 93, 97 (Neal M. Ashkanasy, Cary L. Cooper & Julian Barling eds., 2025).

43. Khorri Atkinson, *Employers Risk Bias Suits in Targeting Remote Staff for Layoffs*, DAILY LAB. REP. (BL) (Feb. 16, 2024, at 04:15 CT), <https://news.bloomberglaw.com/daily-labor-report/employers-risk-bias-suits-in-targeting-remote-staff-for-layoffs>; Wayne F. Cascio, *Hybrid Work Arrangements*, in IMAGINING THE POST-COVID WORKPLACE: CHALLENGES AND OPPORTUNITIES, *supra* note 42, at 185, 188–89; Charlie Wells & Claire Ballentine, *Who Is Most Likely to Get Fired? Remote Workers, Middle Managers*, DAILY LAB. REP. (BL) (Jan. 30, 2024, at 10:45 CT), <https://news.bloomberglaw.com/daily-labor-report/who-is-most-likely-to-get-fired-remote-workers-middle-managers> [<https://perma.cc/W5LD-F9AY>].

44. See Barrero, Bloom & Davis, *Evolution*, *supra* note 18, at 21–22; Cascio, *supra* note 43, at 196.

45. See Barrero, Bloom & Davis, *Evolution*, *supra* note 18, at 3 (“Work from home is now common in many jobs once seen as unsuited to remote work.”); Iafolla, *supra* note 20 (quoting an employment lawyer who said that “[t]here’s been a proof of concept that certain work can be done outside of the workplace”); Ari Ne’eman & Nicole Maestas, *How Has COVID-19 Impacted Disability Employment?*, 16 DISABILITY & HEALTH J. 101429, Apr. 2023, at 7 (stating that the frequency and relative ease of COVID-era remote work “suggest[s] that telework may be feasible under more circumstances than previously thought”); see also *infra* notes 133–134 and accompanying text (further discussing COVID-era remote work success).

46. Ameri & Kurtzberg, *supra* note 31.

47. Octavio M. Aguilar, *The Impact of Work from Home on Disability Employment and Productivity 2* (Jan. 7, 2026) (unpublished manuscript), <https://ssrn.com/abstract=5139253>; Nicholas Bloom, Gordan B. Dahl & Dan-Olof Rooth, *Work from Home and Disability Employment 1* (Nat’l Bureau of Econ. Rsch., Working Paper No. 32943, 2025), <https://www.nber.org/papers/w32943>.

48. Bloom, Dahl & Rooth, *supra* note 47, at 1. This number is most likely an underestimate because it (and similar data) relies on a much narrower definition of disability than found in federal disability law. Compare *id.* at 4 (defining “disability” to include only “difficulty” in the categories of hearing, vision, cognitive ability, ambulation, self-care, and independent living), with 42 U.S.C. § 12102(1)(A) (defining “disability” to include “a physical or mental impairment that substantially limits one or more major life activities”).

gap” is not new; it has been that way for decades.⁴⁹ At the beginning of the pandemic, the gap widened further, due largely to disabled workers being concentrated in jobs not suitable for remote work.⁵⁰

But then something remarkable happened. In 2022, the disability employment rate soared to an all-time high.⁵¹ And it has continued to rise.⁵² Through 2024, disability employment rose 12.4%, while the non-disability employment rate stayed basically the same.⁵³ Research directly links this rise in employment to remote work.⁵⁴ For example, a prominent study led by Stanford economist Nicholas Bloom found that 68–85% of

49. *Trends in Disability Employment Over Time*, U.S. DEP’T OF LAB. (Oct. 2024), https://www.dol.gov/sites/dolgov/files/ETA/opder/DASP/Trendlines/posts/2024_10/Trendlines_October_2024.html.

50. See Mason Ameri, Douglas Kruse, So Ri Park, Yana Rodgers & Lisa Schur, *Telework During the Pandemic: Patterns, Challenges, and Opportunities for People with Disabilities*, 16 DISABILITY & HEALTH J. 101406, Apr. 2023, at 3–4, 8; Jennifer Bennett Shinall, *Without Accommodation*, 97 IND. L.J. 1147, 1151–52 (2022).

51. See Aguilar, *supra* note 47, at 2; Ella Ceron & Bloomberg, *Remote Work Helps Push Disabled Employment to a Record High of 21%. But the Gain Is Imperiled by Return to the Office Mandates*, FORTUNE (Feb. 24, 2023, at 19:06 ET), <https://fortune.com/2023/02/24/remote-work-disabled-employment-record-high-remote-work-office-mandates/>.

52. See *Persons with a Disability: Labor Force Characteristics Summary*, U.S. BUREAU OF LAB. STAT.: ECON. NEWS RELEASE (Feb. 25, 2025), <https://www.bls.gov/news.release/disabl.nr0.htm> [https://perma.cc/B58R-BL5M] [hereinafter BLS Disability Stats.]; *Labor Force Snapshot: People with Disabilities in the U.S. Labor Force*, SHRM (Oct. 16, 2025), <https://www.shrm.org/topics-tools/research/labor-force-snapshot-people-with-disabilities-in-the-us-labor-force> [hereinafter SHRM Disability Study] (“Labor force participation among people with disabilities has reached historically high levels following the COVID-19 pandemic, with the 12-month average labor force participation rate reaching 24.5% as of July 2025.”); see also Laura Bliss & Mark Glassman, *Remote Work Is a Lasting Boon for People with Disabilities*, DAILY LAB. REP. (BL) (June 20, 2024, at 12:03 CT), <https://news.bloomberglaw.com/daily-labor-report/remote-work-is-a-lasting-boon-for-people-with-disabilities> (“Among the greatest beneficiaries from the rise of remote work are people with disabilities, who’ve entered the US workforce at record levels over the past three years.”).

53. Bloom, Dahl & Rooth, *supra* note 47, at 6.

54. *Id.* at 3; see also Siyan Liu & Laura D. Quinby, *Has Remote Work Improved Employment Outcomes for Older People with Disabilities?* 1 (Ctr. for Ret. Rsch. at Bost. Coll., Working Paper No. 2024-12, 2024), https://crr.bc.edu/wp-content/uploads/2024/09/wp_2024-12.pdf [https://perma.cc/MZ25-VLSA] (“[N]early all of the post-pandemic employment gain for older people with disabilities has been in teleworkable occupations.”); Ne’eman & Maestas, *supra* note 45, at 7 (noting that the disability employment growth is due in part to “the structural shifts in the workforce brought about by COVID-19, in particular the shift towards telework”); SHRM Disability Study, *supra* note 52, at 8 (“The expansion of remote work and flexible work arrangements has played a major role in enabling greater labor force participation for people with disabilities, making employment more accessible.”).

the increase in disability employment is attributable to remote work,⁵⁵ which drew disabled workers into the workforce.⁵⁶

Even with these impressive gains, a substantial employment gap remains.⁵⁷ Across all age groups, disabled people are much less likely to be employed—the unemployment rate for disabled people is about twice that for non-disabled people.⁵⁸ Disabled workers are disproportionately concentrated in lower paying jobs⁵⁹ and earn about 15% less than non-disabled workers.⁶⁰ What’s more, economic fears and the push for return to the office threaten the recent employment gains from remote work.⁶¹

Remote work offers distinct advantages for many people with disabilities who want to work.⁶² Obvious examples include people with mobility impairments that make getting to and navigating within a workplace difficult and those who rely on specialized home equipment to communicate with others or address their medical needs.⁶³ Studies show that remote work specifically for disabled workers allows them to be more productive and to work more hours per week.⁶⁴

55. Bloom, Dahl & Rooth, *supra* note 47, at 3.

56. *Id.* at 3, 6, 13; Liu & Quinby, *supra* note 54, at 1.

57. Don Lee, *Surge in Remote Working Due to COVID Fuels Record Employment for People with Disabilities*, L.A. TIMES (Dec. 15, 2022, at 04:00 PT), <https://www.latimes.com/politics/story/2022-12-15/long-left-out-of-job-market-people-with-disabilities-reap-benefits-of-covid-19s-teleworking-boom> [https://perma.cc/KPG8-4TWJ]

58. BLS Disability Stats., *supra* note 52; Lisa Schur, Mason Ameri, Douglas Kruse & Peter Blanck, *Introduction to Special Issue: The New Frontier of Disability Employment on the 50th Anniversary of the Rehabilitation Act*, 34 J. OCCUPATIONAL REHAB. 279, 279 (2024).

59. Bliss & Glassman, *supra* note 52.

60. Schur, Ameri, Kruse & Blanck, *supra* note 58, at 279.

61. *See* Ceron & Bloomberg, *supra* note 51; Lee, *supra* note 57.

62. For more discussion on the pros and cons of remote work for people with disabilities, see Shu, *supra* note 9, at 210–14, and Nicole Buonocore Porter, *Subordination Through Schedules*, 55 ARIZ. ST. L.J. 1293, 1323–27 (2023). For a collection of articles researching issues regarding remote work for individuals with disabilities, see Marcelle de la Roche & Vladimir Simovic, *Remote Work Opportunities for the Persons with Disabilities: A Literature Review*, 56 ECON. ANALYSIS 28, 29, 32–33 (2023).

63. *See* Gus Alexiou, *Why Remote Working Isn’t Always the Answer for Employees with Disabilities*, FORBES (Jan. 15, 2023, at 04:00 ET), <https://www.forbes.com/sites/gusalexiou/2023/01/15/why-remote-working-isnt-always-the-answer-for-employees-with-disabilities/>; Ameri, Kruse, Park, Rodgers & Schur, *supra* note 50, at 1–2, 7.

64. *See* Cassandra Marks & Hannah Rubinton, *The Labor Effects of Work from Home on Workers with a Disability*, FED. RSRV. BANK OF ST. LOUIS: ON THE ECON. BLOG (Feb. 27, 2024), <https://www.stlouisfed.org/on-the-economy/2024/feb/labor-effects-work-from-home-workers-disability> [https://perma.cc/M8NH-D22Y] (demonstrating that pre-pandemic, workers “with a disability worked about 2.5 hours less per week” than non-disabled workers but that post-COVID remote work has closed this gap).

Of course, not all jobs are suitable for remote work, and not all disabled workers want or are able to work remotely.⁶⁵ For example, the isolation of being at home might exacerbate a mental impairment,⁶⁶ and some workers might have trouble using the technology necessary to do their job remotely.⁶⁷ A major challenge for disabled employees working remotely is the stigma and isolation that might occur if remote work prevents them from integrating into the workplace.⁶⁸ The concern is even greater if disabled workers who would rather be part of an office environment are forced into remote work.⁶⁹

65. See Ameri, Kruse, Park, Rodgers & Schur, *supra* note 50, at 2.

66. Alexiou, *supra* note 63; *Supporting Employees with Mental Health & Cognitive Conditions While Teleworking*, JOB ACCOMMODATION NETWORK, <https://askjan.org/articles/Supporting-Employees-with-Mental-Health-and-Cognitive-Conditions-while-Teleworking.cfm> [https://perma.cc/UA3J-ZMAM] (last visited Jan. 31, 2026).

67. Alexiou, *supra* note 63; Maitraye Das, John Tang, Kathryn E. Ringland & Anne Marie Piper, *Towards Accessible Remote Work: Understanding Work-from-Home Practices of Neurodivergent Professionals*, 5 PROCS. OF THE ACM ON HUM.-COMPUT. INTERACTION 1, 23–24 (2021), <https://dl.acm.org/doi/10.1145/3449282>.

68. See Alexiou, *supra* note 63; Ameri, Kruse, Park, Rodgers & Schur, *supra* note 50, at 2; Betsy Lake & David W. Maidment, “Is This a New Dawn for Accessibility?” *A Qualitative Interview Study Assessing Remote Working Experiences in Adults with Physical Disabilities Post COVID-19*, 76 WORK 437, 449 (2023); Yana van der Meulen Rodgers et al., *Work from Home and Job Satisfaction: Differences by Disability Status Among Healthcare Workers*, 19 DISABILITY & HEALTH J. 101931, Jan. 2026, at 1, 6; see also Katie L. Badura, Terry C. Blum & Mary Eve P. Speech, *Overlooked Employees: Understanding the Experiences of Disability Status and Remote Working in the Wake of COVID-19*, 75 CONSULTING PSYCH. J. 240, 240 (2023) (concluding that employees with disabilities received less help in their jobs when working remotely). For a broader discussion of stigma related to disability accommodations, see generally Katherine Macfarlane, *Accommodation Discrimination*, 72 AM. U. L. REV. 1971 (2023), and Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213 (2016). For an analysis of how decisions to grant or deny remote work outside of the disability context can exacerbate racial disparities, see Natalia Ramírez Lee, *Flexible Work, Rigid Discrimination*, MINN. L. REV. (forthcoming), <https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1009&context=crej>.

69. The issue of forced remote work arose in a 2024 case, *Ali v. Regan*, 111 F.4th 1264, 1267 (D.C. Cir. 2024), when the EPA offered a long-term worker, a career economist, who needed new accommodations only “a take-it-or-leave-it accommodation of 100% telework.” The worker did not want to work from home for several reasons, including that his home environment was not suitable and that he would be deprived of the opportunities that can come from in-person interactions. *Id.* at 1272–73. The court reversed summary judgment for the employer, holding that offering remote work as the only possible accommodation is not reasonable as a matter of law and is instead a jury issue. *Id.* at 1277, 1282–83. The court found the worker’s desire to be part of the office environment particularly salient:

Forcing an employee who was hired for an in-person position and who had successfully worked in-person for almost fifteen years to switch to full-time telework as a condition of accommodating his disability may materially alter

These risks, like those of remote work generally,⁷⁰ can be mitigated with thoughtful employment practices, such as specialized assistance for using the necessary technology and deliberate efforts to ensure that remote workers are not out of mind just because they are out of sight.⁷¹ And any potential drawbacks must be considered in the context of the alternative, which might be that the worker can't otherwise work at all.⁷² The post-COVID employment statistics undeniably show that there's a demand for remote work from people with disabilities⁷³ and that remote work is what's allowing some of them to work.⁷⁴

that employee's conditions of employment and prospects for equal work and advancement. These concerns sit at the heart of the [statute]'s aim of *integrating* disabled employees into the workplace and eliminating segregation and the stigma it creates.

Id. at 1278–79 (“Unjustified isolation . . . is properly regarded as discrimination based on disability.” (quoting *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999))). The court recognized that remote work can be a reasonable accommodation in some cases, and it might be the only possible accommodation in a particular situation, but that must be thoroughly analyzed. *Id.* at 1280. And, of course, “[o]ffering a willing employee a remote-work option is very different from forcing remote work on an unwilling employee as the sole option for accommodating that employee's disability.” *Id.* at 1279.

This issue of forced remote work has come up in other cases as well. *See, e.g., Bunnell v. Lewis Brisbois Bisgaard & Smith LLP*, No. C22-0265, 2024 WL 4818504, at *1–3 (W.D. Wash. Nov. 18, 2024) (legal secretary voluntarily worked in person during the pandemic and was eventually forced to work at home; alleges this caused severe anxiety and performance problems); *Ypsilantis v. Yellen*, No. 22-cv-61514, 2023 WL 7524107, at *2–3 (S.D. Fla. Nov. 14, 2023) (IRS agent forced to work remotely; needed specialized office equipment that he did not have room for at home and had no suitable space for working at home with his homeschooled child); *Conard v. Chanel, Inc.*, No. 22-CV-3784, 2023 WL 7295166, at *8 (N.D. Ga. July 13, 2023) (alleging that being forced to work remotely because of non-compliance with vaccine mandate is an adverse employment action); *cf. L.E. ex rel. Cavorley v. Superintendent Cobb Cnty. Sch. Dist.*, 55 F.4th 1296, 1299, 1303 (11th Cir. 2022) (discussing potential *Olmstead* violation in the education context where disabled children were forced into remote instruction after schools lifted COVID safeguards). For more discussion of the *Ali* case, see *infra* notes 320–323 and accompanying text.

70. *See supra* note 44 and accompanying text.

71. *See* Das, Tang, Ringland & Piper, *supra* note 67, at 24; Lake & Maidment, *supra* note 68, at 449; Rodgers et al., *supra* note 68, at 6.

72. Ameri, Kruse, Park, Rodgers & Schur, *supra* note 50, at 2; Porter, *supra* note 62, at 1327.

73. *See* SHRM Disability Study, *supra* note 52, at 18 (finding that people with disabilities were more likely to work fully remotely than people without disabilities and that “[t]he 12-month average share of people with disabilities that work fully remote schedules grew from 11.3% in September 2023 to 13.1% in July 2025”).

74. *See* Bloom, Dahl & Rooth, *supra* note 47, at 3, 6; *see also supra* notes 30–39 and accompanying text (discussing data showing increase in disability employment rate due to remote work). For more discussion of this point, see Shu, *supra* note 9, at 213.

Disability accommodation requests, including for remote work,⁷⁵ are on the rise overall,⁷⁶ and in 2024, remote work was the most requested accommodation.⁷⁷ Many of these requests are being granted—as the disability employment data proves—but far too many are being denied. Some employers have simply had it with remote work and want everyone back on-site.⁷⁸ Disability discrimination complaints and lawsuits over remote work have spiked and will likely continue to rise.⁷⁹ This is exactly what happened when Elon Musk rescinded remote work policies for some of his companies in 2022.⁸⁰ And Amazon workers are accusing Amazon of intentionally making it exceedingly difficult for disabled workers to obtain remote work accommodations by using an overly complex approval process and artificial intelligence to help manage requests.⁸¹ Both 2023 and 2024 each have seen more court opinions addressing the substance of remote work accommodation claims

75. Iafolla, *supra* note 8; Jennifer Lada, Sara Schretenthaler Staha & D'Andre Chapman, *Rising ADA Lawsuits Over Remote Work Accommodations: Updating WFH Policies to Reflect Recent Legal Developments*, HR DAILY ADVISOR (Aug. 14, 2024), <https://hrdailyadvisor.blr.com/2024/08/13/rising-ada-lawsuits-over-remote-work-accommodations-updating-wfh-policies-to-reflect/>.

76. ABSENCESOFT, *THE 2025 STATE OF LEAVE AND ACCOMMODATIONS* 19, 23, (2025), <https://absencesoft.com/resources/the-2025-state-of-leave-and-accommodations/>; Iafolla, *supra* note 8.

77. ABSENCESOFT, *supra* note 76, at 20; Morris & Nowak, *supra* note 25; *see also* Rebecca Klar & Khorri Atkinson, ‘ADA Generation’ Fuels Rise in Neurodiverse Employee Bias Claims, DAILY LAB. REP. (BL) (Jan. 13, 2025, at 04:30 CT), <https://news.bloomberglaw.com/daily-labor-report/ada-generation-fuels-rise-in-neurodiverse-employee-bias-claims> [<https://perma.cc/8XBK-CZSY>] (reporting that since COVID, “[r]emote work has since been the most commonly requested accommodation for neurodivergent employees . . . because it provides control over their work environment”).

78. *See supra* note 25 and accompanying text. For a discussion of specific cases involving employers denying remote work requests based on blanket policies, *see infra* Section III.C.3.

79. Iafolla, *supra* note 8; Lada, Staha & Chapman, *supra* note 75; Atkinson, *supra* note 43.

80. *See* Class Action Complaint & Jury Demand at 5–6, 10, *Borodaenko v. Twitter, Inc.*, No. 22-cv-7226 (N.D. Cal. Nov. 16, 2022), ECF No. 1; *see also* Shu, *supra* note 9, at 235 (discussing the *Borodaenko* suit). This lawsuit continued with Mr. Borodaenko’s individual failure-to-accommodate claim against Twitter (the class allegations were dismissed). *See* Fourth Amended Complaint & Jury Demand at 7, *Borodaenko v. Twitter, Inc.*, No. 22-cv-7226 (N.D. Cal. Apr. 22, 2025), ECF No. 108; *Borodaenko v. Twitter, Inc.*, No. 22-cv-7226, 2024 WL 3908104, at *4–6 (N.D. Cal. Aug. 21, 2024). The suit settled in August 2025. Notice of Settlement and Motion to Stay at 2, *Borodaenko v. Twitter, Inc.*, No. 22-cv-7226 (N.D. Cal. Aug. 26, 2025), ECF No. 121.

81. *See* Spencer Soper & Matt Day, *Amazon’s Return-to-Office Mandate Sparks Disability Complaints*, DAILY LAB. REP. (BL) (June 12, 2025, at 11:58 CT), <https://news.bloomberglaw.com/daily-labor-report/amazons-return-to-office-mandate-sparks-disability-complaints> [<https://perma.cc/2L3S-EFYF>].

than the total combined cases from April 2020 through the end of 2022.⁸² How are courts addressing these remote work accommodation claims?

II. REMOTE WORK'S BELEAGUERED HISTORY AS A DISABILITY ACCOMMODATION

Before analyzing how courts are handling this wave of remote work accommodation claims, it's necessary to provide some context about how disability law works and then about how courts have addressed these claims in the past and immediately after the pandemic started.

A. *The Americans with Disabilities Act*

The Americans with Disabilities Act (ADA) prohibits disability discrimination by covered employers.⁸³ The ADA is special because, in addition to prohibiting intentional discrimination as other employment discrimination statutes do, it also requires that employers take affirmative steps to reasonably accommodate qualified individuals unless they can prove that doing so would create an undue hardship.⁸⁴ The statute does not define what constitutes a reasonable accommodation, but it gives

82. See *infra* notes 161–162 and accompanying text.

83. 42 U.S.C. §§ 12111(2), (5)(A), 12112(a). The ADA was an outgrowth of the Rehabilitation Act of 1973, which prohibits disability discrimination in employment against federal employees and contractors and by recipients of federal financial assistance. See 29 U.S.C. §§ 790–796; LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES & THE LAW* § 4:6 (5th ed. 2025). For all purposes relevant to this discussion, the relevant ADA and Rehabilitation Act law is the same. See *Brown v. Austin*, 13 F.4th 1079, 1084 n.3 (10th Cir. 2021); see also *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002) (using Rehabilitation Act precedent in an ADA case). For simplicity, I will refer only to the ADA and will cite both ADA and Rehabilitation Act cases interchangeably. My goal here is to provide a very brief overview of the key provisions. For a more detailed discussion of the ADA's requirements, see Shu, *supra* note 9, at 214–18.

84. 42 U.S.C. § 12112(b)(5)(A); RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT* 10–11 (2005); see also *US Airways*, 535 U.S. at 397 (explaining that the ADA accommodation provision requires employers to treat disabled employees “preferentially” to ensure they have the same workplace opportunities); Nicole Buonocore Porter, *Disability Law After the Demise of Deference 9* (Dec. 4, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5863784 (discussing why the ADA's reasonable accommodation mandate is special). Title VII of the Civil Rights Act of 1964 requires employers to accommodate religious practices in certain circumstances, but the standard is not the same as the ADA standard and thus has no bearing in this discussion. See 42 U.S.C. § 2000e(j) (religious accommodation requirement); *Groff v. DeJoy*, 600 U.S. 447, 471 (2023) (noting that the body of ADA caselaw does not automatically apply to religious accommodation claims). The Pregnant Workers Fairness Act, passed in 2022, also requires reasonable accommodation of pregnant workers in some circumstances, the contours of which are still being determined. See 42 U.S.C. § 2000gg-1; Madeleine Gyory, *The Reasonable Pregnant Worker*, 113 CALIF. L. REV. 1995, 1997 (2025).

examples such as job restructuring and modified work schedules.⁸⁵ The scope of possible accommodations is infinite as long as the accommodation is both reasonable and doesn't cause an undue hardship.⁸⁶

The duty to provide reasonable accommodations applies to a “qualified individual with a disability.”⁸⁷ A “qualified individual” is defined “an individual who, with or without reasonable accommodation, can perform the essential functions” of the job.⁸⁸ The ADA does not define what makes a job function essential, but the EEOC implementing regulations specify that an essential function “means the fundamental job duties of the employment position.”⁸⁹ The statute lists two factors to be “considered” in determining if a function is essential: “the employer’s judgment” and a written job description prepared in advance.⁹⁰ The regulations provide other relevant factors, including but not limited to the amount of time spent on the function, the consequences of not performing it, and the work experience of current or past employees in the same or similar job.⁹¹

Employers must make all of these assessments—including whether an accommodation is reasonable, what functions are essential, and whether the employee can perform those functions—on a case-by-case basis by carefully analyzing the employee’s unique circumstances and engaging in an interactive process.⁹²

85. 42 U.S.C. § 12111(9); *see also* PETER BLANCK, ADVANCED INTRODUCTION TO U.S. DISABILITY LAW 112–25 (2023) (discussing types of accommodations).

86. *See* BLANCK, *supra* note 85, at 110–11. The statute defines “undue hardship” as “an action requiring significant difficulty or expense” when considered in light of the nature and cost of the accommodation, various financial considerations (including the overall financial resources of the covered entity), and the employer’s operations. 42 U.S.C. § 12111(10).

87. 42 U.S.C. § 12112(b)(5)(A).

88. § 12111(8). The statute does define what constitutes a disability, but that is not the focus of this Article.

89. 29 C.F.R. § 1630.2(n)(1) (2025). All regulations are subject to challenge in light of the Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo*, which overruled the bedrock decision regarding deference to agency regulations. *See* 603 U.S. 369, 411–12 (2024). However, disability rights advocates have made a strong case for why the disability rights regulations are on solid legal footing and thus “will remain authoritative and enforceable” because “Congress has explicitly delegated to regulatory agencies the task of defining the conduct that constitutes” disability discrimination. Amy Robertson, *Key Disability Rights Regulations Will Remain Authoritative in the Wake of Loper Bright: A Toolkit for Litigation*, 6 DISABILITY L.J. 43, 45, 47 (2025). If these regulations are successfully challenged, the results could be catastrophic. *See generally* Porter, *supra* note 84 (analyzing potential consequences if the regulations are struck down).

90. 42 U.S.C. § 12111(8).

91. 29 C.F.R. § 1630.2(n)(3) (2025).

92. *See* 29 C.F.R. §§ 1630.2(j)(1)(iv), 1630.2(o)(3) (2025); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) (“[A]n individualized inquiry must be made to

Neither the statute nor the EEOC's regulations directly address remote work. The EEOC has, however, issued various interpretative guidance documents which specify that remote work can be a reasonable accommodation in some circumstances, even if an employer does not generally allow remote work.⁹³ In March 2020, the EEOC issued COVID-specific disability guidance on many topics, including remote work.⁹⁴ The COVID Guidance makes two key points. First, if an employer excused performing an essential job function during pandemic remote work, it need not continue to excuse it as an ADA accommodation because the ADA never requires an employer to eliminate an essential job function.⁹⁵ Second, an employee's COVID-era remote work "could serve as a trial period" to show whether that employee could perform all essential functions remotely.⁹⁶

determine whether a specific modification for a particular person's disability would be reasonable under the circumstances."); BLANCK, *supra* note 85, at 110–11.

93. See *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>; *Work at Home/Telework as a Reasonable Accommodation*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Feb. 3, 2003), <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation>.

94. *What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEOC Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 15, 2023), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [hereinafter EEOC COVID Guidance]. The EEOC first issued this guidance in March 2020 and updated it periodically through May 2023. *Id.*

95. EEOC COVID Guidance, *supra* note 94, ¶ D.15.

96. *Id.* ¶ D.16. For more discussion of the EEOC COVID Guidance, see Shu, *supra* note 9, at 238–39. In February 2026, the EEOC issued an FAQ in response to the Presidential memorandum (*supra* note 27) directing federal employers to institute general return-to-work policies. *Frequently Asked Questions from the Federal Sector about Telework Accommodations for Disabilities*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/FAQ-federal-sector-telework-accommodations-disabilities> [<https://perma.cc/AZ5P-ADZ7>] (last visited Feb. 28, 2026). This document reiterates the EEOC COVID Guidance statement about employers not necessarily being required to continue COVID-era remote work but not the statement about the trial-period relevance of the employee's work. See *id.* ¶ 10. Some aspects of this new guidance are useful to workers, such as noting that "[a]gencies should not take a blanket approach" to rescinding existing telework accommodations. *Id.* ¶ 4. But many other provisions are deeply troublesome, including invoking the presumption against remote work. *Id.* ¶ 10. For a detailed breakdown of the entire FAQ, see William Goren, *Attorneys Representing Federal Employees with Disabilities Need to Prepare for a Lot More Business*, UNDERSTANDING THE ADA (Feb. 16, 2026), <https://www.understandingtheada.com/blog/2026/02/16/eeoc-opm-faq-frequently-asked-questions-remote-work/> [<https://perma.cc/7MNQ-326F>].

B. Court Treatment Pre-COVID

When the ADA was passed in 1990, one of its primary goals was addressing the abysmal employment rate of disabled people.⁹⁷ Hopes were high that remote work would be an accommodation that would create work opportunities.⁹⁸ But that didn't happen. Employers were reluctant to grant this accommodation, and when workers challenged these decisions, courts overwhelmingly sided with employers.⁹⁹

In my previous work, I studied these cases and identified four faulty evidentiary practices that were at the core of many of these decisions.¹⁰⁰ I analyzed in detail why each one was incorrect under the ADA and unfairly prejudiced workers. My new work is based on the foundation established there. I won't repeat that detailed analysis here, but I will summarize the four practices because they inform my later analysis.

First is the presumption against remote work.¹⁰¹ This presumption is worded in various ways, but typically, courts state that "most" jobs can't be performed at home and that it would take an "extraordinary" or "unusual" case to create a fact issue on an employer's denial of remote work.¹⁰² The most influential case is the Seventh Circuit's 1995 decision in *Vande Zande v. Wisconsin Department of Administration*.¹⁰³ There, Judge Richard Posner, though acknowledging that technology might one day change this assessment, summarily concluded that generally, "[a]n employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced," and it would take "a very extraordinary case" to show otherwise.¹⁰⁴

Vande Zande has profoundly shaped remote work accommodations law. Nearly 100 courts have cited *Vande Zande* as justification for applying this presumption,¹⁰⁵ and many more have used the same type of

97. See 42 U.S.C. § 12101(a)(3), (7); COLKER, *supra* note 84, at 19–20; Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 4–6 (2005).

98. See Shu, *supra* note 9, at 210; Allen, Golden & Shockley, *supra* note 2, at 42; Maggie Gram, *For Many Caregivers and People with Disabilities, WFH Was Never Just a Perk*, N.Y. TIMES (July 13, 2021), <https://www.nytimes.com/2020/05/27/at-home/work-from-home-history.html>.

99. See Shu, *supra* note 9, at 214, 218–32; Hickox & Liao, *supra* note 9, at 42–65; Iafolla, *supra* note 8.

100. Shu, *supra* note 9, at 214, 218–32.

101. For a detailed discussion of the presumption against remote work, see *id.* at 219–22.

102. See, e.g., *Credeur v. La. ex rel. Off. of Att'y Gen.*, 860 F.3d 785, 793–94 (5th Cir. 2017); *EEOC v. Ford Motor Co.*, 782 F.3d 753, 761–63 (6th Cir. 2015) (en banc); *Mulloy v. Acushnet Co.*, 460 F.3d 141, 150 & n.5 (1st Cir. 2006).

103. 44 F.3d 538 (7th Cir. 1995).

104. *Id.* at 544–45.

105. Shu, *supra* note 9, at 219–20.

language without citing the case.¹⁰⁶ Some courts have noted technological changes that undermine Judge Posner’s premise and have rejected the presumption,¹⁰⁷ but many—including very recent cases—continue to apply it to dispose of cases, sometimes with little or no evidence or analysis.¹⁰⁸

Nothing in the text of the ADA or the regulations establishes any sort of presumption about a specific accommodation being presumptively unreasonable,¹⁰⁹ and presumptions like this violate the fundamental tenet that each disability case must be evaluated individually.¹¹⁰ In fact, Judge Posner did just that in creating this devastating rule because he never even assessed the specifics of Ms. Vande Zande’s case.¹¹¹ Her remote work case may not have been meritorious, but Judge Posner did not even look to see.

Second is overdeferring to employer judgment.¹¹² Courts often afford virtually dispositive weight to an employer’s opinion on matters such as whether a particular worker’s job function is essential and whether it can be done remotely. Employer judgment includes evidence such as supervisor statements and job descriptions. Court after court uses language such as the employer’s judgment is entitled to “substantial weight” or is given the “greatest weight.”¹¹³ They say that courts do not sit as a “super personnel department” and should not “second guess” an

106. See, e.g., *Tchankpa v. Ascena Retail Grp., Inc.*, 951 F.3d 805, 812–13 (6th Cir. 2020); *Vitti v. Macy’s Inc.*, 758 F. App’x 153, 157 (2d Cir. 2018).

107. See *Ford*, 782 F.3d at 776 (Moore, J., dissenting); *Bixby v. JP Morgan Chase Bank, N.A.*, No. 10-C-405, 2012 WL 832889, at *10 (N.D. Ill. Mar. 8, 2012). Even the Seventh Circuit has recognized that technology has weakened its rationale in *Vande Zande*. See *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565, 573 (7th Cir. 2019) (“Technological development and the expansion of telecommuting in the twenty-four years since *Vande Zande* likely mean that such an accommodation is not quite as extraordinary as it was then.”). For additional cases rejecting or criticizing the presumption, see Shu, *supra* note 9, at 220–21, 247, and *infra* Section III.C.1.

108. See, e.g., *Credeur v. La. ex rel. Off. of Att’y Gen.*, 860 F.3d 785, 793 (5th Cir. 2017); *Ford*, 782 F.3d at 762–63. For additional cases applying the presumption, see Shu, *supra* note 9, at 220–22, 248, and *infra* Section III.C.1.

109. See 42 U.S.C. §§ 12101–12213; 29 C.F.R. § 1630.2 (2025).

110. See *supra* note 92 and accompanying text; *Hernandez v. City of Hartford*, 959 F. Supp. 125, 132 (D. Conn. 1997) (stating that “*Vande Zande* is not persuasive” because its “nearly *per se* rule regarding ‘at home’ work flies in the face of the requirement of a case-by-case, fact-specific inquiry”).

111. See *Vande Zande v. State of Wis. Dep’t of Admin.*, 44 F.3d 538, 544–45 (7th Cir. 1995); Hickox & Liao, *supra* note 9, at 43; Kanter, *supra* note 9, at 1951.

112. For a detailed discussion of overdeferring to employer judgment, see Shu, *supra* note 9, at 222–25, and Porter, *supra* note 84, at 33–43.

113. See, e.g., *Kassa v. Synovus Fin. Corp.*, 800 F. App’x 804, 809 (11th Cir. 2020); *Credeur*, 860 F.3d at 792. For additional cases, see Shu, *supra* note 9, at 222, 249, and *infra* Section III.C.2.

employer's judgment about how to run its business.¹¹⁴ Some even go so far as to say that the employer's opinion on these matters constitutes a presumption.¹¹⁵

This overt overdeference is hugely consequential because under the ADA, if a job function is essential and the employee cannot perform that function off-site, then the worker asserting a right to remote work loses as a matter of law.¹¹⁶ When courts give such outsized weight to the employer's judgment, the worker has virtually no chance of winning.

As with the presumption against remote work, this extreme deference to employer judgment is atextual and wrongheaded. It violates the principle of considering each case individually. The statute states only that the employer's judgment should be given "consideration,"¹¹⁷ not that it deserves *more* consideration than any other type of relevant evidence.¹¹⁸ And the regulations make clear that all relevant evidence—including the time spent performing the job, past experience, and the consequences of not performing the function—merit equal consideration.¹¹⁹ Yet, courts often do not mention these other factors or will recite them without applying them and dispose of the case based on the employer's overemphasized judgment that the worker cannot perform some supposedly essential duty at home.¹²⁰

Third is relying on blanket policies and preferences.¹²¹ In these cases, courts allow employers to rely on uniform policies and practices against remote work or governing how remote work operates rather than assessing an employee's ability to actually do the work remotely. Employers use broad-based policies that apply to large swaths of employees rather than just to the particular plaintiff. These policies

114. See, e.g., *Credeur*, 860 F.3d at 792; *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1119, 1121–22 (10th Cir. 2004); *Basith v. Cook Cnty.*, 241 F.3d 919, 928 (7th Cir. 2001). For additional cases, see Shu, *supra* note 9, at 222, 249.

115. See, e.g., *Fisher v. Vizioncore, Inc.*, 429 F. App'x 613, 615–16 (7th Cir. 2011); *Mannix v. Dental Experts, LLC*, No. 17-cv-5422, 2020 WL 1076050, at *10, *11 (N.D. Ill. Mar. 6, 2020).

116. An employee who cannot perform the essential functions of the job is not "qualified" and thus not protected under the statute. See 42 U.S.C. § 12111(8); *Credeur*, 860 F.3d at 792; *EEOC v. Ford Motor Co.*, 782 F.3d 753, 761, 766 (6th Cir. 2015) (en banc).

117. 42 U.S.C. § 12111(8).

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

119. See 29 C.F.R. § 1630.2(n)(3) (2025).

120. See, e.g., *Fisher*, 429 F. App'x at 615–16; *Vitti v. Macy's Inc.*, 758 F. App'x 153, 157 (2d Cir. 2018); *Morris-Huse v. GEICO*, 748 F. App'x 264, 266–68 (11th Cir. 2018). For additional cases, see Shu, *supra* note 9, at 224.

121. For a detailed discussion of relying on blanket policies and preferences, see Shu, *supra* note 9, at 225–27.

might, for example, prohibit remote work altogether or impose prerequisites such as length of service.¹²² Courts often sanction these practices, saying an employer is not required to change its operating procedures, without ever considering whether remote work is even feasible.¹²³ In addition to running contrary to the notion of individualized assessment, this practice fundamentally misunderstands the nature of reasonable accommodations. An accommodation is a change or modification.¹²⁴ The entire point of an accommodation is to alter something about how an employer normally operates. Allowing employers to rely on across-the-board practices without regard to a worker's circumstances short-circuits the entire analysis.¹²⁵

Fourth is refusing to properly consider employee evidence.¹²⁶ As a general matter, when courts discuss workers' evidence in employment discrimination cases, they tend to undervalue or even wholly disregard it; this is usually based on the grounds that the evidence is "self-serving" or "unsupported," demonstrating an inherent distrust of employee testimony—all the while not applying this same standard to evidence from supervisors and managers.¹²⁷ In disability cases, numerous scholars have written about how many courts tend not to believe plaintiffs' evidence about, for example, their condition and their resulting limitations.¹²⁸ This

122. See, e.g., *Credeur v. La. ex rel. Off. of Att'y Gen.*, 860 F.3d 785, 794 (5th Cir. 2017); *Spielman v. Blue Cross & Blue Shield of Kan., Inc.*, 33 F. App'x 439, 442 (10th Cir. 2002); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1132, 1137 (9th Cir. 2001). For additional cases, see Shu, *supra* note 9, at 225, and *infra* Section III.C.3.

123. See, e.g., *Yochim v. Carson*, 935 F.3d 586, 592 (7th Cir. 2019); *Heaser v. Toro Co.*, 247 F.3d 826, 832 (8th Cir. 2001); *Black v. Wayne Ctr.*, Nos. 99-1225, 99-1249, 2000 WL 1033026, at *4 (6th Cir. July 17, 2000). For additional cases, see Shu, *supra* note 9, at 226, 249.

124. See 29 C.F.R. app. § 1630.2(o) (2026).

125. See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) ("Were that not so, the 'reasonable accommodation' provision could not accomplish its intended objective."); *Holly v. Clairson Indus.*, 492 F.3d 1247, 1263 (11th Cir. 2007) ("Allowing uniformly-applied, disability-neutral policies to trump the ADA requirement of reasonable accommodations would utterly eviscerate that ADA requirement."). For additional cases, see Shu, *supra* note 9, at 225–26.

126. For a detailed discussion of courts refusing to properly consider employee evidence, see Shu, *supra* note 9, at 227–30.

127. See Sandra F. Sperino, *Evidentiary Inequality*, 101 B.U. L. REV. 2105, 2107 (2021) ("Federal employment discrimination law is rife with evidentiary inequality. . . . Courts exclude evidence that workers offer and downplay the significance of even admissible evidence, while allowing employers great latitude in what evidence to admit and great deference as to what that evidence establishes.").

128. See, e.g., Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59, 61 (2021); Nicole Buonocore Porter, *Troubling Trends: ADA Definition-of-Disability Cases 2019–2023*, 52 PEPP. L. REV. 455, 494–97 (2025); see also Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights*

phenomenon of devaluing the plaintiff's evidence shows up in remote work cases, both with courts showing hostility generally to worker evidence¹²⁹ and sometimes with rationales specific to the remote work context. For example, courts often expressly refuse to consider employee evidence about what an employee's job is, what duties are essential, and whether those duties can be performed at home.¹³⁰ As the Eighth Circuit put it, a worker's "specific personal experience is of no consequence in the essential functions equation."¹³¹ So, in addition to courts applying presumptions and overvaluing employer evidence and practices, courts devalue or completely ignore employee evidence. The inequity is glaring.

When these evidentiary principles are used, either individually or in combination, the results are devastating. Employees overwhelmingly lose. I will explain this in more detail in regard to the cases from 2023 and 2024, where courts still applied them,¹³² but before that, it is important to see how courts were treating remote work claims at the start of the pandemic.

C. Court Treatment in the Early Pandemic Era: April 2020–2022

The pandemic created a mass, forced experiment in working remotely, and this experiment generated data. This data further undermines the already faulty underpinnings of the four evidentiary practices. Instead of "most jobs" being unable to be done remotely, it turns out that 37–45% can be done fully remotely, and obviously many more can be done in a hybrid format.¹³³ Abundant success stories and

Discourse, 53 L. & SOC'Y REV. 1051, 1053, 1060 (2019) (more broadly discussing the problem of not believing disabled people).

129. See, e.g., *Credeur v. La. ex rel. Off. of Att'y Gen.*, 860 F.3d 785, 793 (5th Cir. 2017); *Mulloy v. Acushnet Co.*, 460 F.3d 141, 150 (1st Cir. 2006); *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1121 (10th Cir. 2004). For additional cases, see Shu, *supra* note 9, at 227–28, 250, and *infra* Section III.C.4.

130. See, e.g., *Credeur*, 860 F.3d at 793–94; *EEOC v. Ford Motor Co.*, 782 F.3d 753, 763–64 (6th Cir. 2015) (en banc); *Dropinski v. Douglas County*, 298 F.3d 704, 708–09 (8th Cir. 2002). For additional cases, see Shu, *supra* note 9, at 228, 250.

131. *Dropinski*, 298 F.3d at 709. For cases following *Dropinski*, see Shu, *supra* note 9, at 229.

132. See *supra* Section III.C.5.

133. See Matthew Dey, Harley Frazis, Mark A. Loewenstein & Hugette Sun, *Ability to Work from Home: Evidence from Two Surveys and Implications for the Labor Market in the COVID-19 Pandemic*, U.S. BUREAU OF LAB. STAT.: MONTHLY LAB. REV. (June 2020), <https://www.bls.gov/opub/mlr/2020/article/ability-to-work-from-home.htm> [<https://perma.cc/Z6WC-2FXT>] (analyzing two sets of data to conclude that "about 45 percent of U.S. employment is in occupations in which telework is feasible"); JONATHAN I. DINGEL & BRENT NELMAN, BECKER FRIEDMAN INST. FOR ECON. AT UNIV. OF CHL., HOW MANY JOBS CAN BE DONE AT HOME? 2 (2020), https://bfi.uchicago.edu/wp-content/uploads/BFI_White-Paper_Dingel_Neiman_3.2020.pdf

other data show that pandemic remote work *worked* in many instances.¹³⁴ Employers' prior judgment that they could not supervise remote workers or that certain jobs simply could not be done outside the office turned out to be flat wrong. Blanket policies against remote work had to be abandoned—and with tremendous success in many instances. Employees relied on their own experiences and know-how to figure out how to do their jobs from home. To be sure, not every pandemic remote work situation was ideal or successful,¹³⁵ but a plethora were—which one might have thought impossible based on the rhetoric from employers and courts pre-pandemic. Successful remote work wasn't "very extraordinary" after all.¹³⁶ It was routine.

In my previous work, I assessed if this newfound knowledge affected how courts handled remote work accommodation cases. I reviewed all federal cases I could locate appearing on Westlaw from April 2020 through the end of 2022 in which the court analyzed the merits of a remote work accommodation claim. I included both cases with all facts occurring before March 2020 (pre-COVID fact cases) and cases with any facts arising in March 2020 or later (post-COVID fact cases). It seemed logical to include both because courts might speak about and view remote work differently in early 2020 than they had only a few months before, even if the substance of the case did not involve post-

[<https://perma.cc/PP3M-W5KJ>] (studying data to conclude that 37% of American jobs "can be performed entirely at home").

134. See, e.g., Ameri & Kurtzberg, *supra* note 31, at 1; Erin Mulvaney, *Office Culture War Escalates as Workers Balk at Return Mandates*, DAILY LAB. REP. (BL) (July 19, 2021, at 04:31 CT), <https://news.bloomberglaw.com/daily-labor-report/office-culture-war-escalates-as-workers-balk-at-return-mandates> [<https://perma.cc/RP3V-2HG9>]. For more discussion on this point, see Shu, *supra* note 9, at 233–34, and *supra* notes 45–46 and accompanying text.

135. See, e.g., Barrero, Bloom & Davis, *Stick*, *supra* note 18, at 1, 3–4; NICHOLAS BLOOM, STAN. INST. FOR ECON. POL'Y RSCH., HOW WORKING FROM HOME WORKS OUT 5 (June 2020), <https://siepr.stanford.edu/publications/policy-brief/how-working-home-works-out> [<https://perma.cc/8Y9M-N5QV>]; Arthur C. Brooks, *The Hidden Toll of Remote Work*, ATLANTIC (Apr. 1, 2021, at 10:00 ET), <https://www.theatlantic.com/family/archive/2021/04/zoom-remote-work-loneliness-happiness/618473/> [<https://perma.cc/3PSA-EVZG>]; Schur, Ameri & Kruse, *supra* note 1, at 523.

136. *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995).

COVID facts.¹³⁷ There were 65 total cases in this first dataset.¹³⁸ I studied all these cases and reached the overall conclusion that results were mixed but that there were some hopeful signs for workers.

I first assessed the win/loss rate in these cases. I viewed a win as surviving a dispositive proceeding to litigate another day, regardless of the ultimate outcome. Of the 65 cases, plaintiffs prevailed 32 times, which is 49.2%.¹³⁹ That number is encouraging, given previous data that employers win disability discrimination summary judgment motions around 70% of the time.¹⁴⁰

I also observed that each of the four evidentiary practices previously identified¹⁴¹ was still being used.¹⁴² No court made any sweeping pronouncement about how COVID remote work experiences should change the law in any way.¹⁴³ In fact, courts seemed reluctant to talk about COVID at all, even in post-COVID fact cases.¹⁴⁴ The presumption against remote work was applied 5 times.¹⁴⁵ In the 20 cases where the court discussed employer judgment, it overdeferred 12 times (60%).¹⁴⁶ Fifteen cases involved blanket policies and preferences, and the court allowed the employer to rely on them 10 times (66.7%).¹⁴⁷ The employee evidence cases were especially interesting. Many courts devalued employee evidence while others did not,¹⁴⁸ but the analysis was different when COVID-related evidence was involved. In the 3 cases where employees wanted to use their own COVID remote work experiences, the court considered the evidence.¹⁴⁹ However, in 5 of the 6 cases in

137. Of course, the legality of an employer's actions must be assessed based on the time the action was taken. Even so, actions taken after the fact can be relevant to demonstrating, for example, the feasibility or cost of that action. *See Kruly v. Akoustis Techs., Inc.*, No. 21-CV-6181, 2023 WL 3995467, at *9 (W.D.N.Y. June 14, 2023) (denying summary judgment in a pre-COVID fact case based on evidence of changes made during COVID that raised the fact issue of whether the employer could have made those changes earlier for the plaintiff). *But see Trahan v. Wayfair Me., LLC*, 957 F.3d 54, 66–67 (1st Cir. 2020) (allowing the employer to deny remote work based on then-existing capabilities without examining whether it could have made reasonable changes to facilitate remote work, which the employer in fact did one month later).

138. *See* Shu, *supra* note 9, at 243–45.

139. *Id.* at 245–47.

140. *See id.* at 247; Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH & LEE L. REV. 2027, 2027, 2055 (2013).

141. *See supra* Section II.B.

142. Shu, *supra* note 9, at 247–52.

143. *See id.* at 244–45.

144. *Id.*

145. *Id.* at 248.

146. *Id.* at 249.

147. *Id.* at 249 n.360.

148. *Id.* at 250.

149. *Id.*

which employees wanted to use other COVID-related evidence, such as the remote work experience of co-workers, the court refused to allow it.¹⁵⁰

Finally, I looked for trends in the circuit courts. The first dataset contained very few appellate cases, but based on this limited data, I noted that four circuits continued their pro-employer leanings,¹⁵¹ two circuits had mixed results,¹⁵² and only one circuit (the Second Circuit) showed potential signs of shifting more towards employees.¹⁵³

Thus, there were some positive signs, including the employee success rate, courts allowing employees to use evidence of their own COVID experiences, and a potential shift towards pro-employee reasoning in the Second Circuit. But still, employees were losing a lot on illegitimate bases, particularly relating to the four evidentiary practices.

III. RESULTS: REMOTE WORK ACCOMMODATION CASES, 2023–2024

I now present data to examine whether courts in 2023 and 2024 learned any COVID lessons and changed their treatment of remote work accommodation cases. First I will explain my methodology and preview that dataset. Then I will discuss overall litigation trends and win/loss statistics using various metrics. I will then show how courts have continued to use each of the four evidentiary practices and highlight any COVID-specific results. I will conclude this Section with some observations about circuit court-level trends.

A. Methodology and Dataset

My objective was to collect not a sampling but every relevant federal remote work accommodation case decided in 2023 or 2024 to include in my dataset.¹⁵⁴ I ran at least a dozen different searches, using both Boolean and natural language, covering a broad range of synonyms and scenarios involving remote work in the disability context. I KeyCited the appellate cases and a large sampling of other cases I deemed major to cross-check

150. *Id.* at 251–52.

151. *See id.* at 252–53 (First, Fourth, Fifth, and Tenth Circuits).

152. *Id.* at 253–54 (Eighth and Eleventh Circuits).

153. *See id.* at 254.

154. It is likely impossible to have found every case, but even so, the dataset is large enough to draw meaningful conclusions, even if I missed some cases.

my work.¹⁵⁵ I limited my searches to Westlaw cases, whether published or unpublished,¹⁵⁶ that appeared in the database as of May 22, 2025.

Substantively, I included cases decided under the ADA, the Rehabilitation Act,¹⁵⁷ or a state or local disability law where the court applied federal disability precedents.¹⁵⁸ I excluded any case that factually dealt with a remote work accommodation situation but where the court did not rule on the merits of that claim. So, for example, I excluded cases decided on failure to exhaust administrative remedies, the plaintiff suing the wrong party, the plaintiff's disability status, or failure to engage in the interactive process.

I separately counted each discrete potentially dispositive ruling in a case, as long as the ruling was on the substantive issue and within the time frame. This means one piece of litigation may have been counted multiple times, such as for a motion to dismiss ruling, then a summary judgment ruling, and possibly even an appeal. I think this is the most useful method because each potentially dispositive decision that results in a written opinion adds to the body of law and shows judicial decision-making at that time. I also counted magistrate judge recommendations as separate entries because they too show judicial decision-making in a particular case and are highly influential, even if not dispositive, and are thus important to include in the analysis.¹⁵⁹

I screened thousands of cases and ultimately arrived at a dataset of 151 cases that met my criteria. Eighteen were courts of appeals cases, and the remaining 133 were from district courts. There were 68 cases in 2023 and 83 in 2024. Forty cases involved facts arising only before the pandemic (*i.e.*, before March 2020); 24 of those cases were from 2023,

155. KeyCite is a Westlaw research tool that allows researchers to see a case's current validity and history and find related citing references based on the issues. *KeyCite*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/products/westlaw/keycite> [<https://perma.cc/2UJC-QX67>] (last visited Jan. 25, 2026).

156. Including these unpublished cases is vital to seeing what courts on the ground are actually doing, particularly given that only 13 of the 151 cases (8.6%) are published. *See* Porter, *supra* note 128, at 468 n.82 (adopting the same methodology for similar reasons).

157. *See supra* note 83 (explaining how the Rehabilitation Act and ADA use the same relevant legal standards).

158. It is common for courts to apply federal disability law in analyzing state disability law claims. *See, e.g., Galette v. Ave. 365 Lending Servs. LLC*, No. 22-2778, 2024 WL 247044, at *6 n.7 (E.D. Pa. Jan. 23, 2024), *aff'd*, No. 24-1221, 2025 WL 429973 (3d Cir. Feb. 7, 2025); *Dominguez v. Bd. of Educ. of Yonkers City Sch. Dist.*, No. 23 Civ. 2460, 2024 WL 3427217, at *6 (S.D.N.Y. July 16, 2024) (granting motion to dismiss).

159. *See* Edward S. Adams, Edward R. Adams & William C. Price Jr., *An Empirical Constitutional Crisis: When Magistrate Judges Exercise De Facto Article III Power*, 2023 MICH ST. L. REV. 195, 195; Christina L. Boyd, Tracey E. George & Albert H. Yoon, *The Emerging Authority of Magistrate Judges Within US District Courts*, 10 J.L. & CTS. 37, 45, 56-58 (2022).

and 16 were in 2024. There were 109 post-COVID fact cases (44 in 2023, and 65 in 2024). In 2 cases, it was unclear whether the facts were pre- or post-COVID.

I coded all the cases as follows: ruling type (motion to dismiss, summary judgment, appeal, or other), prevailing party, whether the facts occurred pre- or post-COVID, whether the remote work request linked to COVID, whether COVID was discussed, use of each of the four evidentiary practices (used, rejected, silent, or not applicable), and whether any employee evidence related to COVID (the employee's own work experiences, co-worker experiences, or a combination).¹⁶⁰

The following table shows the basic dataset:

Table 1. Dataset, 2023–2024

	2023	2024	Total
Appellate Court Decisions	7	11	18
-Pre-COVID Facts	5	5	10
-Post-COVID Facts	2	5	7
-Unclear Pre/Post Facts	0	1	1
District Court Decisions	61	72	133
-Pre-COVID Facts	19	11	30
-Post-COVID Facts	42	60	102
-Unclear Pre/Post Facts	0	1	1
TOTALS	68	83	151

B. Litigation Trends and Success Rates

The data supports one point that others have been making: The number of remote work accommodation cases is sharply increasing.¹⁶¹ In my previous dataset, which covered April 2020 through December 2022, there were 65 cases analyzing the merits of the remote work claim.¹⁶² In 2023, there were 68, and in 2024, there were 83. That means each of the years 2023 and 2024 individually had more cases than the nearly three years combined of my first dataset.

160. Some aspects of the coding, such as whether the case involved pre- or post-COVID facts, was very straightforward. Others inherently involved some amount of judgment, but I attempted to keep the coding as objective as possible. For example, when assessing whether a court overdeferred to employer judgment, I based that on the court's express written indications, such as using words like "greatest weight" or ignoring any factor other than what the employer said. In any case in which the court did not use explicit language invoking the evidentiary practice, I coded that as "n/a" rather than trying to discern a court's unstated mode of analysis.

161. See *supra* notes 79–80 and accompanying text.

162. Shu, *supra* note 9, at 243, 245.

Only 40 of the cases involved pre-COVID facts (24 in 2023 and 16 in 2024), and 109 involved post-COVID facts (44 in 2023 and 65 in 2024); 2 cases were too unclear to determine whether they involved pre- or post-COVID facts. The number of post-COVID fact cases is obviously increasing, but a significant number of pre-COVID fact cases are still making their way through the system (26.8% of the cases in the dataset involved pre-COVID facts).

The overall litigation success rate changed too. In my prior research, workers won 49.2% of the time.¹⁶³ And by winning, I mean surviving on that day to continue litigating (regardless of the ultimate outcome of the case). That number crashed 10 percentage points to an average of 39.1% for 2023 and 2024 combined. The rate is almost the same for each of the two years, 39.7% for 2023 and 38.6% for 2024.¹⁶⁴

Focusing on the type of proceeding yields some interesting comparison points. Employers overwhelmingly won on appeal. Of the 7 appellate cases in 2023, the employer won 6, and the employer prevailed in all of the 11 appellate cases in 2024, for an overall employer win rate of 94.4%. In the district courts, workers won overall more often than on appeal, but the employers still came out ahead. In 2023, workers won 42.6% of cases, and in 2024, it was slightly better at 44.4%, for an average of 43.6%. This is closer to the overall number from the previous dataset (49.2% overall employee wins),¹⁶⁵ but it is still a decrease.

The comparison in success rates between motions to dismiss and motions for summary judgment is also illuminating. Plaintiffs won on summary judgment only 36.7% of the time but had the advantage on motions to dismiss, winning 57.1% of the time. Seeing a disability discrimination statistic with the worker on the winning side is encouraging. This trend could be a signal that courts are becoming a bit more willing to give workers a chance to prove their case. It could be argued that a victory at the dismissal stage is hollow if, statistically

163. *Id.* at 245–46.

164. Obviously, studies can have different results depending on how the dataset is constructed. For example, in 2023, Bloomberg looked at employer success rates in remote work cases. Bloomberg's data analysis showed employers winning less over two comparison periods: (1) February 2017–February 2019 (70%) compared to June 2021–June 2023 (60%) and (2) June 2021–June 2022 (77%) compared to June 2022–June 2023 (42%). See Iafolla, *supra* note 8. Bloomberg's dataset for June 2021–June 2023 contained 64 cases, whereas my dataset for all of 2023 and 2024 contained 151 cases. That is consistent with the sharp rise in the number of remote work accommodation cases. Factors such as differences in time frames covered, the volume of cases in the dataset, and including multiple decisions in the same litigation help explain the results I reach as compared to Bloomberg.

165. See Shu, *supra* note 9, at 245–46.

speaking, the worker might lose on summary judgment.¹⁶⁶ But that ignores the value in individual cases of surviving dismissal, which increases the settlement value of the case.¹⁶⁷ Indeed, of the 20 cases in the dataset where the worker survived a motion to dismiss, 10 of them settled; only in 4 cases did the employer go on to win a summary judgment.

One big point of contention in the motion to dismiss cases is whether allegations of previous remote work during the pandemic are sufficient to survive dismissal. Courts are split on this issue. The Southern District of New York dismissed a maintenance and labor supervisor's claim, even though he pleaded that he had been doing his job successfully remotely for 14 months and that other supervisors were allowed to work remotely.¹⁶⁸ The court reasoned that this time frame "is largely coterminous with the first phase of the pandemic" but that the plaintiff did not address whether circumstances were still the same.¹⁶⁹ The Second Circuit affirmed, stating that his pleading about his prior successful remote work was insufficient because circumstances "might have changed."¹⁷⁰ By contrast, the Northern District of Georgia held that the plaintiff's allegations, including her pandemic remote work and her favorable performance reviews during that time, were sufficient to avoid summary judgment.¹⁷¹ This is the first of many examples where COVID evidence sometimes helped but at other times hurt the worker in these cases.

One last point involves the comparison of trends on summary judgment and motion to dismiss rulings. Though in both years the employer still won more on summary judgment, the trend is going against the employer. In 2023, employers won on summary judgment 67.4% of the time but dropped to 59.6% in 2024. For motions to dismiss, the trend

166. See, e.g., *Cetin v. Kan. City Kan. Cmty. Coll.*, No. 23-2219, 2023 WL 8715804, at *1 (D. Kan. Dec. 18, 2023) (denying motion to dismiss); *Cetin v. Kan. City Kan. Cmty. Coll.*, No. 23-2219, 2024 WL 4605133, at *7-8 (D. Kan. Oct. 29, 2024) (granting summary judgment).

167. See Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689, 692-63 (2012).

168. *Stanley v. City Univ. of N.Y.*, No. 18 Civ. 4844, 2023 WL 2714181, at *1, *7 (S.D.N.Y. Mar. 30, 2023), *aff'd sub nom.*, *Stanley v. Phelon*, No. 23-731-cv, 2024 WL 1453872 (2d Cir. Apr. 4, 2024).

169. *Id.* at *20.

170. *Stanley*, 2024 WL 1453872, at *5. Other courts have reached similar results. See, e.g., *Gagnon v. Bd. of Educ. of Montgomery Cnty.*, 760 F. Supp. 3d 359, 372-73 (D. Md. 2024); *Cangro v. N.Y.C. Dep't of Fin.*, No. 23-CV-10097, 2024 WL 3833971, at *6 (S.D.N.Y. Aug. 14, 2024).

171. *McLaurin v. Ga. Dep't of Nat. Res.*, 739 F. Supp. 3d 1254, 1276-77, 1296-1300 (N.D. Ga. 2024). These courts have held similarly: *Crosby v. Stew Leonard's Yonkers LLC*, 695 F. Supp. 3d 551, 569-70 (S.D.N.Y. 2023); *Horton v. Narbaitz*, No. 22-cv-03174, 2023 WL 2563078, at *8 (N.D. Cal. Mar. 16, 2023).

is going against workers, who won 66.7% of the time in 2023 but only 50% in 2024. These trends are interesting but difficult to draw any clear conclusion from, especially because they go in opposite directions.¹⁷²

In sum, with the steep rise in the number of these cases, it's especially disappointing to see the overall worker success rate declining—and so sharply—even if it's still better than the historic average success rates in employment disability discrimination cases generally.¹⁷³ And workers still disproportionately lost on summary judgment and especially on appeal. But there are bright spots in that workers did much better on motions to dismiss, even though that success rate is decreasing, and they won more summary judgment proceedings in 2024 than in 2023.¹⁷⁴

The following table shows the global win/loss statistics in the new dataset:

Table 2. Global Win/Loss Statistics, 2023–2024

	2023	2024	Total
Employer Won	41 (60.3%)	51 (61.4%)	92 (60.9%)
-Appeal	6 (85.7%)	11 (100%)	17 (94.4%)
-District Court	35 (57.4%)	40 (55.6%)	75 (56.4)
*Motion to Dismiss	6 (33.3%)	12 (50%)	18 (42.9%)
*Summary Judgment	29 (67.4%)	28 (59.6%)	57 (63.3%)
*Other	0	0	0

172. The summary judgment trends might also change even more if lower courts follow Justice Thomas's lead from his concurrence in *Ames v. Ohio Department of Youth Services*, where he encouraged courts to abandon the *McDonnell Douglas* framework in summary judgment proceedings. 145 S. Ct. 1540, 1553–55 (2025) (Thomas, J., concurring). This could result in more workers surviving summary judgment motions. See William Goren, *The Case for Why McDonnell Douglas as a Summary Judgment Tool Makes No Sense*, UNDERSTANDING THE ADA (June 15, 2025), <https://www.understandingtheada.com/blog/2025/06/15/mcdonnell-douglas-as-a-summary-judgment-tool-makes-no-sense/> [<https://perma.cc/5JM7-4JLL>]; see also Katie Eyer, Sandra Sperino & Deborah Widiss, *Antidiscrimination Advocates Should Welcome Thomas's Overture*, BL (June 16, 2025, at 03:30 CT), <https://news.bloomberglaw.com/us-law-week/antidiscrimination-advocates-should-welcome-thomass-overture> [<https://perma.cc/6ZHL-5VTU>] (“Thomas’s concurrence invites litigants to argue that *McDonnell Douglas* should be abandoned, or at least that the Supreme Court should clarify that it’s one way of proving a case but not the only way of proving a case. Lawyers who want to ensure victims of discrimination can have their day in court should accept the overture.”).

173. See *supra* note 140 and accompanying text.

174. There are inherent limitations to drawing inferences based only on raw win/loss statistics. For example, strong cases may settle early, leaving only the weaker cases to be adjudicated. It’s impossible to generate data that accounts for all such variables. Even so, legal analysis based on win/loss rates is common, and there is value in the presenting the available data, particularly when the same metric is compared over time.

Worker Won	27 (39.7%)	32 (38.6%)	59 (39.1%)
-Appeal	1 (14.3%)	0	1 (5.6%)
-District Court	26 (42.6%)	32 (44.4%)	58 (43.6%)
*Motion to Dismiss	12 (66.7%)	12 (50%)	24 (57.1%)
*Summary Judgment	14 (32.6%)	19 (40.4%)	33 (36.7%)
*Other	0	1 (100%)	1 (100%)

C. The Four Evidentiary Practices

Courts continued to apply each of the four evidentiary practices in 2023 and 2024. I will discuss each of these and will highlight any COVID-specific points of interest.

1. Presuming Remote Work Is Improper

Previously, in the first dataset (April 2020–2022), 5 courts applied the presumption, and none rejected or criticized it.¹⁷⁵ That has changed. In the current dataset, many more courts applied the presumption, based both on raw numbers and percentages. Twenty courts (10 each year) applied the presumption, which means it was used in 13.2% of the cases. That compares to 7.7% previously (5 of 65).¹⁷⁶ That is also more than the number of new courts that rejected or criticized the presumption, which was 14 (9.3%). So although it's notable that some new courts actually rejected the presumption, it's rather stunning that even more of them continued to apply it, especially given that it's demonstrably false that only extraordinary jobs can be performed at least partially remotely.

Despite the sharp increase in courts applying the presumption, there are hopeful signs. The percentage of cases applying the presumption dropped a little, from 14.7% in 2023 to 12% in 2024. That also tracks with analyzing pre- and post-COVID fact cases: courts applied the presumption in 15% of pre-COVID fact cases but only 12.8% of post-COVID fact cases—and all the rejections came in post-COVID fact cases. Given that pre-COVID fact cases will inevitably fade away and courts seem to be a bit friendlier to workers in the post-COVID fact cases when dealing with the presumption, hopefully the trends in that direction will continue.

The Seventh Circuit has two particularly noteworthy decisions rejecting the presumption. In 2023 in *Kinney v. St. Mary's Health, Inc.*,

175. See Shu, *supra* note 9, at 247–48.

176. See *id.* at 245, 248.

¹⁷⁷ the director of imaging services for a hospital worked remotely during the pandemic and then had a return-to-work dispute with her employer because in-person work, which would have required her to be masked, exacerbated her anxiety.¹⁷⁸ In analyzing her case, the court did two key things.

First, the court addressed how the issue should be framed. The parties and district court had framed this issue as whether in-person work was an essential job function, which the court said made sense in light of its many precedents against remote work.¹⁷⁹ But the Seventh Circuit held that this framing was not useful because it “can invite too much reliance on generalities about the obvious benefits of physical presence in a workplace, losing sight of a specific job and specific arrangements and accommodations.”¹⁸⁰ Instead, a more helpful frame was “whether essential functions of the job must be performed in person, such that allowing the employee to perform those functions from home would not be a reasonable accommodation.”¹⁸¹ That change in perspective would allow the analysis “to focus on the specific job and its essential functions and specific possible accommodations.”¹⁸² Disability scholars have long made this point, advocating for courts to focus on particular job tasks as opposed to when and where those tasks are performed.¹⁸³

The second major point from *Kinney*: the court rejected the presumption against remote work and did so based in part on lessons learned from COVID. The court examined its prior precedents, including *Vande Zande*, which had “disfavored” remote work.¹⁸⁴ These cases had allowed employers to “rely on an automatic presumption [that] working from home is unreasonable.”¹⁸⁵ But “technological advances have made working from home more feasible,” a fact the court had acknowledged in a case a few months before the pandemic.¹⁸⁶ “The many lessons learned about working from home effectively during the pandemic have

177. 76 F.4th 635 (7th Cir. 2023).

178. *Id.* at 639–41.

179. *Id.* at 643.

180. *Id.*

181. *Id.*

182. *Id.*

183. See, e.g., NICOLE BUONOCORE PORTER, *THE WORKPLACE REIMAGINED: ACCOMMODATING OUR BODIES AND OUR LIVES* 162 (2023); Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Act Amendments Act*, 2015 MICH. ST. L. REV. 1689, 1715–16.

184. *Kinney*, 76 F.4th at 644. For more discussion of *Vande Zande*, see *supra* notes 103–108 and accompanying text.

185. See *Kinney*, 76 F.4th at 644.

186. *Id.* (citing *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565, 573 (7th Cir. 2019)).

reinforced that point.”¹⁸⁷ Now, “[d]etermining whether a specific job has essential functions that require in-person work has become much more of a case-specific inquiry.”¹⁸⁸ Though it’s commendable that the court came to this realization, it was never appropriate for the court to have been doing anything other than looking at the specific functions of a particular job on an individualized basis.¹⁸⁹

A few months later, in *Smithson v. Austin*,¹⁹⁰ the Seventh Circuit confirmed that its prior cases “held that working at home is not a reasonable accommodation as a general matter” but that pandemic-induced technological developments “change the calculus for this assessment.”¹⁹¹ The court reaffirmed what it held in *Kinney*: “In the post-COVID pandemic economy and with the advent of new technologies making working from home more feasible, we must now assess whether in-person attendance is essential on a context-specific basis.”¹⁹²

Despite the court rejecting the presumption, the worker lost in both cases, with the court affirming summary judgment for the employer. In *Kinney*, the court agreed with the employer that essential aspects of the worker’s job required on-site monitoring that could not be done remotely.¹⁹³ And in *Smithson*, the court ruled against a teacher who wanted to have a two-hour planning period at home each morning to accommodate her medical issues, in part because some duties she needed to perform during that time sometimes required face-to-face interaction.¹⁹⁴ I am not saying that these workers necessarily should have won their cases; the point of eliminating the presumption (and the other faulty evidentiary practices) is to level the playing field and give the workers a fair chance to prove their case.

The Seventh Circuit seems to want to lead the pack in backing away from the presumption post-COVID, which is fitting, given that it paved the way for it in *Vande Zande*.¹⁹⁵ But *Smithson* undoes much of the good *Kinney* attempts to do when it endorsed universal in-person attendance requirements, which will be discussed in the subsection on blanket policies and preferences.¹⁹⁶ Also, no other circuit court has followed suit, but then again, none of them have rejected the *Kinney/Smithson* analysis,

187. *Id.*

188. *Id.*

189. *See supra* notes 92, 109–110 and accompanying text.

190. 86 F.4th 815 (7th Cir. 2023).

191. *Id.* at 822.

192. *Id.*

193. *Kinney*, 76 F.4th at 645.

194. *Smithson*, 86 F.4th at 821.

195. *See supra* notes 103–111 and accompanying text.

196. *See infra* notes 229–230 and accompanying text.

and there are very few appellate court decisions overall, so the impact of these two cases remains to be seen.¹⁹⁷

The Fifth Circuit's decision in *Montague v. United States Postal Service*¹⁹⁸ is an intriguing example of applying the presumption.¹⁹⁹ A public relations worker's nerve condition often flared in the mornings, which prevented her from driving then, but she was able to drive in the afternoons. Thus, she requested the accommodation of working from home in the morning and working in person in the afternoon. The employer refused, and the district court granted summary judgment for the employer when she challenged this decision.²⁰⁰ On appeal, the Fifth Circuit quoted its 2017 decision in *Credeur v. Louisiana ex rel. Office of the Attorney General*²⁰¹ regarding the "general consensus among courts . . . that regular work-site attendance is an essential function of most jobs."²⁰² But surprisingly, the court ruled for the worker, reversing summary judgment for the employer because "a jury could conclude that the accommodation sought by Montague is consistent with that principle:

197. In addition to *Kinney* and *Smithson*, these district courts in the new dataset also rejected the presumption: *Russo v. Nat'l Grid, U.S.A.*, No. 23-cv-03954, 2024 WL 5186728, at *8 (E.D.N.Y. Dec. 20, 2024); *Schwartz v. Middletown City Sch. Dist.*, No. 23-CV-1248, 2024 WL 1257095, at *5 (S.D.N.Y. Mar. 25, 2024); *Cowell v. Ill. Dep't of Hum. Servs.*, No. 21-CV-00478, 2024 WL 551891, at *10 (S.D. Ill. Feb. 12, 2024); *Dundee v. Univ. Hosp. Health Sys., Inc.*, No. 22-cv-1351, 2023 WL 6540948, at *6 (N.D. Ohio Oct. 6, 2023), *aff'd sub nom.*, *Dundee v. Geauga Med. Ctr.*, No. 23-3906, 2024 WL 4765162 (6th Cir. May 29, 2024) (not mentioning presumption); *Crosby v. Stew Leonard's Yonkers LLC*, 695 F. Supp. 3d 551, 570 (S.D.N.Y. 2023); *Hurt v. Sch. Dist. No. 1 in the Cnty. of Denv.*, 664 F. Supp. 3d 1227, 1236 (D. Colo. Mar. 27, 2023), *appeal dismissed per stipulation*, No. 23-1136, 2023 WL 7215340 (10th Cir. June 1, 2023).

198. No. 22-20113, 2023 WL 4235552 (5th Cir. June 28, 2023).

199. *Id.* at *4. These are some of the other new courts that also applied the presumption: *Geter v. Schneider Nat'l Carriers, Inc.*, No. 22-11285, 2023 WL 7321610, at *12 (11th Cir. Nov. 7, 2023); *Rogers v. Unified Gov't of Wyandotte Cnty./Kan. City*, No. 23-2143, 2024 WL 4512411, at *12 (D. Kan. Oct. 17, 2024) (quoting *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995)); *Jones v. City of Dallas*, No. 22-cv-1477, 2024 WL 3207030, at *12 (N.D. Tex. June 6, 2024) (citing *Vande Zande*, 44 F.3d at 544), *report and recommendation adopted*, No. 22-cv-1477, 2024 WL 3718064 (N.D. Tex. Aug. 7, 2024), *aff'd on other grounds*, No. 24-10803, 2025 WL 2491127 (5th Cir. Aug. 29, 2025); *Duffee v. T-Mobile USA Inc.*, No. 23-cv-00536, 2023 WL 6391376, at *5 (D.N.M. Oct. 2, 2023), *appeal dismissed per stipulation*, No. 23-2176, 2024 WL 1885567 (10th Cir. Jan. 5, 2024); *Monk v. DeJoy*, No. 22-cv-03403, 2023 WL 2870363, at *6 (N.D. Cal. Apr. 10, 2023).

200. *Montague*, 2023 WL 4235552, at *1.

201. 860 F.3d 785 (5th Cir. 2017).

202. *Montague*, 2023 WL 4235552, at *4 (quoting *Credeur*, 860 F.3d at 793). *Credeur* is cited frequently in the Fifth Circuit and beyond and is a prime example of the Fifth Circuit's general pro-employer stance in which it applied all four of the evidentiary principles. See Shu, *supra* note 9, at 231; see also *infra* notes 332–338 and accompanying text (discussing *Credeur*).

She sought to work from home in the morning—and at her worksite every afternoon.”²⁰³ This reasoning suggests that an accommodation request for a full-time or less consistent remote work schedule might not have created a fact issue, thus making this precedent of questionable help for many future workers.

Most cases applying the presumption don’t turn out like *Montague* with the plaintiff prevailing, nor do the ones rejecting the presumption usually end like *Kinney* and *Smithson* where the employer still won. Using or rejecting the presumption is, unsurprisingly, highly outcome predictive. When courts in the 2023–2024 dataset used the presumption, the employer won 85% of the time; when courts rejected or criticized the presumption, the worker won 64.3% of the time. As in the first dataset, by far most courts did not mention the presumption at all (77.5%).²⁰⁴ Perhaps this is a silent protest, but then again, employers won nearly 60% of the time when courts ignored the presumption, so maybe not. Perhaps the presumption is so baked into the law that it can infect decisions, even if unstated. And when courts did raise the presumption, they were most likely to use the presumption rather than to criticize or reject it.

Overall, a disturbing number of courts are still applying the presumption, but the trend from 2023 to 2024 suggests that might be on the decline, especially in post-COVID fact cases. Declining use of the presumption is good news for workers because either applying or rejecting the presumption is closely tied to case outcomes. The Seventh Circuit seems to be taking the lead in trying to eliminate the presumption based on lessons learned from COVID, but it is sending mixed messages in the process.

The following table shows the relevant data regarding the presumption against remote work in the new dataset:

Table 3: Presumption Against Remote Work, 2023–2024

	2023	2024	Total
Presumption Used	10	10	20
-Pre-COVID Facts	3	3	6
*Employer Won	2	3	5
*Worker Won	1	0	1
-Post-COVID Facts	7	7	14
*Employer Won	6	6	12
*Worker Won	1	1	2

203. *Montague*, 2023 WL 4235552, at *4.

204. *See Shu*, *supra* note 9, at 247–48.

Presumption Rejected	5	3	8
-Pre-COVID Facts	0	0	0
*Employer Won	0	0	0
*Worker Won	0	0	0
-Post-COVID Facts	5	3	8
*Employer Won	4	0	4
*Worker Won	1	3	4
Presumption Criticized	3	3	6
-Pre-COVID Facts	2	1	3
*Employer Won	1	0	1
*Worker Won	1	1	2
-Post-COVID Facts	1	2	3
*Employer Won	0	0	0
*Worker Won	1	2	3
Presumption Not Mentioned	50	67	117
-Pre-COVID Facts	19	12	31
*Employer Won	15	10	25
*Worker Won	4	2	6
-Post-COVID Facts	31	53	84
*Employer Won	14	30	44
*Worker Won	17	23	40
-Unclear if Pre/ Post COVID Facts	0	2	2
*Employer Won	0	1	1
*Worker Won	0	1	1

2. Overdeferring to Employer Judgment

As with the presumption, most courts in the 2023–2024 dataset were silent on the weight to be given to employer judgment in making important determinations such as what job functions are essential and whether they can be performed away from the office, though more courts discussed this point than the presumption (58.3% were silent on employer judgment, compared to 77.5% for the presumption).

Courts in this dataset discussed employer judgment and business decisions in 63 cases, and they gave too much deference to the employer 34 times, which is 54% of the time. That compares to 60% in the previous dataset,²⁰⁵ so based purely on those percentages, overdeference is trending in favor of workers. Digging deeper into the statics, however,

205. See Shu, *supra* note 9, at 249.

tells a much different story. Looking only at the percentage of cases where courts discussed this issue, overdeference shot up from 46.2% in 2023 to 59.5% in 2024. In post-COVID fact cases specifically—which are proportionately on the rise—that jump is even more stark: from 38.9% overdeference in 2023 to 62.1% in 2024.

This surge in deference to employers does not bode well for workers. As with the presumption, the level of deference is highly consequential. When courts overdeferred, the employer won 70.6% of the time, as compared to 44.8% when courts did not. As with the presumption, courts didn't raise the issue of employer judgment in the majority of cases (raised in 41.7% of the cases), but when they did, they were most likely to overdefer as a justification for ruling against the worker.

Courts that gave too much latitude to employers did so with familiar tactics. Some used the “considerable deference” or “substantial weight” language.²⁰⁶ Others omitted the other factors that should be considered,²⁰⁷ or gave them lip service, or acknowledged the notion that employer judgment is not controlling but then ignored the other factors and, in fact, only considered the employer's perspective.²⁰⁸ Some said employers' judgment should not be “second guess[ed]”²⁰⁹ or went so far as to say that the employer's view on essential job functions is “presume[d]” to be correct unless the plaintiff can come up with “sufficient” evidence otherwise²¹⁰—and this is on summary judgment, when the facts should be

206. See, e.g., *George v. Molson Coors Beverage Co.*, No. 22-7111, 2023 WL 2661588, at *2 (D.C. Cir. Mar. 28, 2023); *Dominguez v. Bd. of Educ. of Yonkers City Sch. Dist.*, No. 23 Civ. 2460, 2024 WL 3427217, at *5 (S.D.N.Y. July 16, 2024); *McLaurin v. Ga. Dep't of Nat. Res.*, 739 F. Supp. 3d 1254, 1295 (N.D. Ga. 2024).

207. See, e.g., *Galette v. Ave. 365 Lending Servs. LLC*, No. 22-2778, 2024 WL 247044, at *7 (E.D. Pa. Jan. 23, 2025), *aff'd*, No. 24-1221, 2025 WL 429973 (3d Cir. Feb. 7, 2025); *Jordan v. Sch. Bd. of Norfolk*, No. 22-cv-167, 2023 WL 5807844, at *8 (E.D. Va. Sep. 7, 2023). For a discussion of the other factors that should be considered in the essential job function analysis, see *supra* notes 89–91 and accompanying text.

208. See, e.g., *Smithson v. Austin*, 86 F.4th 815, 820–21 (7th Cir. 2023); *Williams v. Hollandale Sch. Dist.*, No. 22-CV-102, 2023 WL 8440261, at *8–9 (N.D. Miss. Dec. 5, 2023); *Okafor v. Infuserve Am., Inc.*, No. 21-cv-2007, 2023 WL 3563600, at *9, *14 (M.D. Fla. Mar. 6, 2023).

209. See, e.g., *Rogers v. Unified Gov't of Wyandotte Cnty./Kan. City*, No. 23-2143, 2024 WL 4512411, at *13 (D. Kan. Oct. 17, 2024); *Waldrop v. Gwinnett Cnty. Sch. Dist.*, No. 22-cv-2563, 2023 WL 9688352, at *5 (N.D. Ga. May 24, 2023), *report and recommendation adopted on other grounds*, No. 22-cv-02563, 2024 WL 1333041 (N.D. Ga. Mar. 27, 2024).

210. See *Vander Plaats v. Crisis Prevention Inst., Inc.*, 746 F. Supp. 3d 586, 593 (E.D. Wis. 2024); see also *Gibson v. Gables Residential Servs., Inc.*, No. 21-cv-2952, 2024 WL 1239667, at *5 (D.D.C. Mar. 22, 2024) (holding that plaintiff's “say-so” that “she could have done her job remotely” does not create a fact issue, “particularly in light of [the employer]'s contrary position”), *appeal dismissed*, No. 24-7086, 2024

viewed in the light most favorable to the plaintiff.²¹¹ For many courts, what the employer says is the beginning and end of the analysis.²¹²

Other courts did, however, get it right. Some listed out all the factors and appeared to treat them all equally, with no special attention given to employer judgment.²¹³ After listing all the factors, one court said that none are dispositive and that courts must “avoid deciding cases based on ‘unthinking reliance on intuition about the methods by which jobs are to be performed.’”²¹⁴ Still other courts specifically noted that the employer’s judgment is to be “considered” but not given complete deference.²¹⁵ To view it otherwise would be “antithetical to the purpose of the ADA” and “would allow employers to negate” the reasonable accommodation requirement.²¹⁶

Too many courts are still overdeferring to employer judgment, and that trend seems to be increasing, especially when viewing the data through the lens of cases with post-COVID facts. Perhaps courts are increasingly giving employers the benefit of the doubt in COVID-related situations. In any event, applying this evidentiary practice, as with the others, continues to disproportionately harm workers.

WL 4248473 (D.C. Cir. Sep. 17, 2024); *Hart v. Okla. Dep’t of Transp.*, No. CIV-21-625, 2023 WL 2905580, at *7 (W.D. Okla. Mar. 28, 2023) (placing “burden” on plaintiff, in response to employer evidence that a function is essential, to dispute that evidence or “otherwise show that the function or requirement is nonessential”), *appeal dismissed per stipulation*, No. 23-6055, 2023 WL 6876450 (10th Cir. Oct. 18, 2023).

211. See FED. R. CIV. P. 56. In only one case where the court used this second guessing or presumption-type language did the employee win. See *Roberts v. McDonough*, No. 21 C 865, 2023 WL 3763532, at *1, *4 (N.D. Ill. May 31, 2023).

212. See, e.g., *Downey v. N.Y. State Off. for People with Developmental Disabilities*, No. 24-CV-168, 2024 WL 4581555, at *7 (N.D.N.Y. Oct. 25, 2024) (“The Court defers to Defendant’s judgment [of] how best to perform the job’s essential functions.”).

213. See, e.g., *Montague v. U.S. Postal Serv.*, No. 22-20113, 2023 WL 4235552, at *2 (5th Cir. June 28, 2023); *Gardner v. Kutztown Univ.*, No. 22-1034, 2024 WL 1321068, at *23–24 (E.D. Pa. Mar. 27, 2024), *appeal docketed*, No. 25-1295 (3d Cir. Feb. 21, 2025); *Lewis v. T-Mobile USA, Inc.*, No. 21-cv-00224, 2023 WL 315695, at *7 (D. Me. Jan. 19, 2023).

214. *Thompson v. State Farm Mut. Auto. Ins. Co.*, No. 22-cv-8375, 2024 WL 922820, at *2 (S.D.N.Y. Mar. 4, 2024) (quoting *McMillan v. City of New York*, 711 F.3d 120, 126 (2d Cir. 2013)).

215. See, e.g., *McKinney v. Macomb County*, No. 23-1625, 2024 WL 2312574, at *4 (6th Cir. May 22, 2024); *Kinney v. St. Mary’s Health, Inc.*, 76 F.4th 635, 644 (7th Cir. 2023); *Donley v. McDonough*, No. 20 C 2710, 2024 WL 2132395, at *14–15 (N.D. Ill. May 13, 2024).

216. *Dundee v. Univ. Hosp. Health Sys., Inc.*, No. 22-cv-1351, 2023 WL 6540948, at *6 (N.D. Ohio Oct. 6, 2023) (quoting *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 857 (6th Cir. 2018)), *aff’d sub nom.*, *Dundee v. Geauga Med. Ctr.*, No. 23-3906, 2024 WL 4765162 (6th Cir. May 29, 2024); see also *Tornabene v. City of Blackfoot*, No. 22-cv-00180, 2024 WL 4145753, at *5 (D. Idaho Sep. 11, 2024) (“An employer may not turn every condition of employment into an essential function by including it in a job description.”).

The following table shows the relevant data regarding overdeferring to employer judgment in the new dataset:

Table 4. Overdeferring to Employer Judgment, 2023–2024

	2023	2024	Total
Court Overdeferred	12	22	34
-Pre-COVID Facts	5	4	9
*Employer Won	4	4	8
*Worker Won	1	0	1
-Post-COVID Facts	7	18	25
*Employer Won	6	10	16
*Worker Won	1	8	9
Court Did Not Overdefer	14	15	29
-Pre-COVID Facts	3	3	6
*Employer Won	1	3	4
*Worker Won	2	0	2
-Post-COVID Facts	11	11	22
*Employer Won	4	5	9
*Worker Won	7	6	13
-Unclear if Pre/ Post COVID Facts	0	1	1
*Worker Won	0	1	1
Employer Judgment Not Mentioned	42	46	88
-Pre-COVID Facts	16	9	25
*Employer Won	12	7	19
*Worker Won	4	2	6
-Post-COVID Facts	26	36	62
*Employer Won	14	21	35
*Worker Won	12	15	27
-Unclear if Pre/ Post COVID Facts	0	1	1
*Employer Won	0	1	1

3. Relying on Blanket Policies and Preferences

In my earlier research, 15 cases involved blanket policies, and courts allowed the employer to rely on them 10 times, or 66.7% of the time.²¹⁷ That percentage trended down in the current dataset. Of the 37 cases that dealt with these uniform policies, courts allowed them in 17

217. See Shu, *supra* note 9, at 249 n.360.

(45.9%). That means courts still allowed employers to rely on categorical policies more than they should (which is never), but at least it's trending in the right direction. That trend becomes even more apparent when looking deeper, at two levels. First, comparing 2023 to 2024 shows that in cases involving blanket policies, the number of courts that permitted employers to rely on them plummeted 18 percentage points (from 57.1% to 39.1%). Second, in considering the courts' rulings in only post-COVID fact cases where blanket policies were at issue, they allowed them 44.4% of the time in 2023 but only 31.6% in 2024, which is a drop of 12.8 percentage points. Courts were much more likely to allow these blanket policies in pre-COVID fact cases (77.8% of the time when a blanket policy was at issue), but those type of cases will inevitably eventually disappear.

Unsurprisingly, many of these cases involve COVID return-to-office scenarios, in particular, adamant employers that are fed up with remote work and are denying all, or nearly all, accommodation requests. They don't assess individual circumstances but instead take a hardline approach based on factors such as politics, corporate culture, or just being ready for everything to "return to normal."²¹⁸

Courts split on handling these strict return-to-office cases. Some allowed employers to deny remote work requests based on these absolute policies and did so without much analysis other than pointing to how

218. See, e.g., *Cetin v. Kan. City Kan. Cmty. Coll.*, No. 23-2219, 2024 WL 4605133, at *3 (D. Kan. Oct. 29, 2024) ("Defendant informed plaintiff that employees' ability to work from home 100 per cent of the time had ended."); *Dominguez v. Bd. of Educ. of Yonkers City Sch. Dist.*, No. 23 Civ. 2460, 2024 WL 3427217, at *2 (S.D.N.Y. July 16, 2024) ("[I]t was the District's policy to refuse telework as an accommodation for disabled persons."); *McLaurin v. Ga. Dep't of Nat. Res.*, 739 F. Supp. 3d 1254, 1275-76, 1299 (N.D. Ga. 2024) (allegations that return-to-work decisions were based on political pressure); *Gardner*, 2024 WL 1321068, at *31 ("The University . . . adopt[ed] an inflexible blanket policy that would not permit remote teaching to any high-risk faculty member . . . no matter what the individual's physical or mental circumstances were."); *Spratley v. KidsPeace Corp.*, No. 22-cv-02411, 2023 WL 3007933, at *5 (E.D. Pa. Apr. 19, 2023) ("[T]here is a new executive vice president who is not approving accommodations of any kind and . . . they are requiring people to come in person.").

Such an approach may be even more difficult to justify in the future if courts in disability cases apply an objective standard in determining whether an accommodation is unduly burdensome. See *Kluge v. Brownsburg Cmty. Sch. Corp.*, 150 F.4th 792, 808 (7th Cir. 2025) ("[R]eligious-accommodation cases require an employer to demonstrate an objective undue hardship on its business, not one just subjectively perceived."); William Goren, *Kluge Latest Decision and [Its] Potentially Huge Impact on ADA Failure to Accommodate Cases*, UNDERSTANDING THE ADA (Aug. 19, 2025), <https://www.understandingtheada.com/blog/2025/08/19/kluge-ada-impact-failure-to-accommodate-cases/> [<https://perma.cc/V267-YWUZ>] (stating that *Kluge's* reasoning should apply in ADA cases and that it could be especially useful in remote work accommodations cases, where he sees employers' reasons for cutting back on remote work often to be "quite subjective rather than objective").

much employers prioritize in-person work.²¹⁹ These cases also typically involved courts overdeferring to employer judgment—the employer’s strong preference for everyone to be in the office seemed to outweigh all other concerns.²²⁰

Courts also went the other way and blocked employers from relying on these across-the-board policies,²²¹ which undermine the entire point of individually assessing a worker’s case to see if a change to that existing policy is warranted as a reasonable accommodation.²²² This came up in a set of cases involving a university’s blanket policy against online teaching. The professors won summary judgment—*i.e.*, the court denied the employer’s motions and granted the plaintiffs’ cross motions—and the court explained the decision as follows:

This case represents the second time the Court has had to intervene to prevent the Defendants from enforcing what amounts to be clearly a blanket policy that any request by a tenured faculty member at KU to change . . . from in-person to remote would be considered a substantial alteration to the course offerings. (A third such case recently settled). KU’s actions in formulating an unwritten policy and excluding any consideration of a faculty member’s individual circumstances before denying that faculty member’s request for a remote accommodation, especially during a nationwide pandemic, clearly violated KU’s own written policy concerning requests for accommodation . . . as well as the [Rehabilitation Act]. While the Court understands [the university president]’s desire to reopen KU in the Fall Semester 2021 to strictly in-person instruction, [his] steadfast refusal to consider the individual

219. See, e.g., *Downey v. N.Y. State Off. for People with Developmental Disabilities*, No. 24-CV-168, 2024 WL 4581555, at *7 (N.D.N.Y. Oct. 25, 2024); *Waldrop v. Gwinnett Cnty. Sch. Dist.*, No. 22-cv-2563, 2023 WL 9688352, at *7 (N.D. Ga. May 24, 2023), *report and recommendation adopted on other grounds*, No. 22-cv-02563, 2024 WL 1333041, at *4 (N.D. Ga. Mar. 27, 2024).

220. See, e.g., *Downey*, 2024 WL 4581555, at *7; *Waldrop*, 2023 WL 9688352, at *7.

221. See, e.g., *Cetin*, 2024 WL 4605133, at *2–3, *6; *McLaurin*, 739 F. Supp. 3d at 1296, 1299–1300; *Gardner*, 2024 WL 1321068, at *1, *27–28, *31; *Oross v. Kutztown Univ.*, No. 21-5032, 2023 WL 4748186, at *21, *27 (E.D. Pa. July 25, 2023); *Spratley*, 2023 WL 3007933, at *5, *14–15.

222. See *supra* notes 121–125 and accompanying text; see also Katherine Macfarlane & Irina Manta, *A Categorical No to Categorical Accommodation Denials Related to COVID-19?*, PETRIE-FLOM CTR.: BILL OF HEALTH (Sep. 11, 2023), <https://petrieflom.law.harvard.edu/2023/09/11/a-categorical-no-to-categorical-accommodation-denials-related-to-covid-19/> [<https://perma.cc/R79V-Y79H>] (“[A]cross-the-board policies that do not contemplate accommodation-based exceptions and fail to assess accommodation requests on an individual basis do not comply with federal disability law.”).

circumstances of tenured faculty members . . . and instead enforce a blanket no-exceptions policy against them violates federal disability law.²²³

Not all of these categorical policies cases involved post-COVID return-to-work scenarios. Some were based generally on company preferences, eligibility requirements, or long-standing (as in pre-COVID) corporate culture.²²⁴ As with the COVID policy cases, many courts treated these preferences as the ultimate factor in the analysis,²²⁵ usually explicitly overdeferring to employer judgment in the process of upholding them.²²⁶ Conversely, courts rejecting the categorical approach emphasized the need for flexibility and individualized assessment.²²⁷ As one court stated, “[a]llowing uniformly-applied, disability-neutral policies to trump the ADA requirement of reasonable accommodations would utterly eviscerate that ADA requirement.”²²⁸

As I alluded to earlier, the Seventh Circuit’s approach to blanket policies is muddled.²²⁹ Recall that in two key cases, *Kinney* and *Smithson*, the Seventh Circuit rejected the presumption against remote work based on lessons learned from COVID, with *Kinney* specifying that “employers cannot rely on an automatic presumption [that] working from home is unreasonable” and instead must make case-by-case assessments.²³⁰ In *Smithson*, however, the court went on to say that “an employer may require attendance at the job site as an essential

223. *Gardner*, 2024 WL 1321068, at *32; *accord Oross*, 2023 WL 4748186, at *27. For more discussion of the *Oross* case, see Macfarlane & Manta, *supra* note 222.

224. *See, e.g., Smithson v. Austin*, 86 F.4th 815, 820 (7th Cir. 2023); *Geter v. Schneider Nat’l Carriers, Inc.*, No. 22-11285, 2023 WL 7321610, at *3, *12 (11th Cir. Nov. 7, 2023); *Jones v. City of Dallas*, No. 22-cv-1477, 2024 WL 3207030, at *12–13 (N.D. Tex. June 6, 2024), *report and recommendation adopted*, No. 22-cv-1477, 2024 WL 3718064 (N.D. Tex. Aug. 7, 2024), *aff’d on other grounds*, No. 24-10803, 2025 WL 2491127 (5th Cir. Aug. 29, 2025); *Fields v. Bd. of Trs. of Ga. Mil. Coll.*, No. 22-cv-74, 2024 WL 375387, at *2–3 (M.D. Ga. Jan. 31, 2024).

225. *See, e.g., Smithson*, 86 F.4th at 820; *Rogers v. Unified Gov’t of Wyandotte Cnty./Kan. City*, No. 23-2143, 2024 WL 4512411, at *13 (D. Kan. Oct. 17, 2024); *Jones*, 2024 WL 3207030, at *12–13; *Williams v. Hollandale Sch. Dist.*, No. 22-CV-102, 2023 WL 8440261, at *8–9 (N.D. Miss. Dec. 5, 2023); *Duffee v. T-Mobile USA Inc.*, No. 23-cv-00536, 2023 WL 6391376, at *5 (D.N.M. Oct. 2, 2023), *appeal dismissed per stipulation*, No. 23-2176, 2024 WL 1885567 (10th Cir. Jan. 5, 2024).

226. *See, e.g., Smithson*, 86 F.4th at 820–22; *Rogers*, 2024 WL 4512411, at *12–13; *Jones*, 2024 WL 3207030, at *12–13.

227. *See, e.g., EEOC v. Total Sys. Servs., LLC*, No. 23-cv-01311, 2024 WL 4471319, at *7–8 (N.D. Ga. Sep. 24, 2024); *Wolowitz v. Seacrest Servs., Inc.*, No. 24-80245-CIV, 2024 WL 3509604, at *1 (S.D. Fla. July 23, 2024).

228. *Fields*, 2024 WL 375387, at *9.

229. *See supra* notes 177–196 and accompanying text.

230. *Kinney v. St. Mary’s Health, Inc.*, 76 F.4th 635, 643–44 (7th Cir. 2023); *accord Smithson*, 86 F.4th at 822. For more discussion of *Kinney* and *Smithson*, see *supra* notes 177–197 and accompanying text.

requirement of the job.”²³¹ It’s difficult to see how *carte blanche* to designate on-site attendance as an essential function is consistent with the idea that employers cannot presume that working off-site is unreasonable. The *Smithson* holding also seems to undercut *Kinney*’s reframing of the issue to separate job tasks from where those tasks are performed.²³² How courts will square these two cases remains to be seen.²³³

Even more so than with the other evidentiary practices, allowing blanket policies is catastrophic. When courts in the 2023–2024 dataset upheld the employer’s uniform approach, the employer won every single time, whereas when courts rejected those policies, the worker won 85% of the time. Fortunately for workers, the trend is in the right direction, with courts upholding categorical policies less often, but it’s still happening in a significant portion of cases, particularly involving stringent post-COVID policies. Although the urge to leave COVID-era disruptions in the rear view is understandable, it’s not a valid—or legal—excuse to routinely deny all requests for remote work accommodations.

The following table shows relevant data regarding the cases in the dataset in which a blanket policy was at issue:

Table 5. Relying on Blanket Policies, 2023–2024

	2023	2024	Total
Court Upheld Blanket Policy Use	8	9	17
-Pre-COVID Facts	4	3	7
*Employer Won	4	3	7
*Worker Won	0	0	0
-Post-COVID Facts	4	6	10
*Employer Won	4	6	10
*Worker Won	0	0	0
Court Did Not Uphold Blanket Policy Use	6	14	20
-Pre-COVID Facts	1	1	2
*Employer Won	1	1	2
*Worker Won	0	0	0
-Post-COVID Facts	5	13	18

231. *Smithson*, 86 F.4th at 820; *accord id.* at 821 (stating that “her employer is allowed to designate in-person attendance as an essential function”).

232. *See Kinney*, 76 F.4th at 643; *supra* notes 177–183 and accompanying text.

233. One court first quoted *Smithson*’s statement that employers can require on-site attendance as an essential job function, followed by this sentence: “That said, ‘[d]etermining whether a specific job has essential functions that require in-person work’ is a case-specific inquiry.” *Donley v. McDonough*, No. 20 C 2710, 2024 WL 2132395, at *5 (N.D. Ill. May 13, 2024) (alteration in original) (quoting *Kinney*, 76 F.4th at 644). It’s not clear how the case-specific inquiry *Kinney* mandates is consistent with the seemingly absolute statements in *Smithson* that an employer can designate in-person attendance as essential for any job.

*Employer Won	0	1	1
*Worker Won	5	12	17

4. Refusing to Properly Consider Employee Evidence

In this current dataset, 89 cases involved courts evaluating an employee’s evidence on topics such as job responsibilities, how to perform them, and the work experience of that worker as well as co-workers. Courts split almost down the middle as to whether they properly considered such evidence (44, or 49.4%) or devalued it (45, or 50.6%). That’s worse than in the earlier dataset, where courts devalued this evidence 40% of the time (10 times out of the total 25 cases that evaluated employee evidence).²³⁴

In many of the cases in which the court did not devalue the evidence, there isn’t any analysis for why—the court just did its job and considered the plaintiff’s evidence (along with the employer’s).²³⁵ One court, though, in rejecting the defendant’s argument that the plaintiff could not rely on her “own self-serving allegation,” simply said, “[w]hy not?”²³⁶

Why not, indeed. Litigants on both sides say things to serve themselves; that’s the entire point of litigation. The courts that devalued this evidence relied on familiar, flawed reasons such as that a worker’s opinion is inherently unworthy of consideration or that it lacks support—even when the worker seemed to offer quite a bit of support.²³⁷ Many courts most certainly were not appropriately crediting the worker’s allegations (in the motion to dismiss context)²³⁸ or viewing the evidence

234. See Shu, *supra* note 9, at 250–52.

235. See, e.g., *Montague v. U.S. Postal Serv.*, No. 22-20113, 2023 WL 4235552, at *3 (5th Cir. June 28, 2023); *Porter v. Dep’t of Veterans Affs.*, No. 23-CV-00002, 2024 WL 3402857, at *4 (E.D. Ark. July 12, 2024), *aff’d*, No. 24-2650, 2025 WL 274633 (8th Cir. Jan. 23, 2025); *EEOC v. Total Sys. Servs., LLC*, No. 23-CV-1311, 2024 WL 4471320, at *11–12 (N.D. Ga. July 1, 2024), *report and recommendation adopted*, No. 23-cv-01311, 2024 WL 4471319 (N.D. Ga. Sep. 24, 2024).

236. *Zeuner v. McDonough*, No. 22-2381, 2023 WL 3868357, at *6 (E.D. Pa. June 7, 2023).

237. See, e.g., *McKinney v. Macomb County*, No. 23-1625, 2024 WL 2312574, at *5 (6th Cir. May 22, 2024); *Gibson v. Gables Residential Servs., Inc.*, No. 21-cv-2952, 2024 WL 1239667, at *5 (D.D.C. Mar. 22, 2024), *appeal dismissed*, No. 24-7086, 2024 WL 4248473 (D.C. Cir. Sep. 17, 2024); *Williams v. Hollandale Sch. Dist.*, No. 22-CV-102, 2023 WL 8440261, at *9 (N.D. Miss. Dec. 5, 2023).

238. See, e.g., *Bodie-Jernigan v. Sch. Bd. of Broward Cnty.*, No. 22-CV-60745, 2024 WL 3806880, at *2 (S.D. Fla. July 30, 2024), *aff’d*, No. 24-12593, 2025 WL 2741931 (11th Cir. Sep. 26, 2025).

in the light most favorable to the plaintiff (for summary judgment).²³⁹ In one particularly egregious case, a teacher's complaint explained how she could do her job using various specific digital platforms, and the court, without citing any evidence or authority, dismissed her complaint based on the court's unsubstantiated opinion that a teacher in her circumstances cannot adequately teach remotely and that remote instruction does not provide equal educational benefits.²⁴⁰

In the earlier dataset, very few cases involved evidence about COVID. Of the 65 cases there, only 9 involved any COVID evidence, which is 13.8%.²⁴¹ In this current dataset though, COVID-evidence cases skyrocketed, with nearly 40% of all cases (60 of the 151 total) involving evidence of either the worker's own COVID experience, the experience of co-workers, or a combination of both. These courts disregarded COVID-related evidence at a lower rate (46.7%) compared to the rate of disregarding employee evidence overall (50.6%). Further breaking down this evidence shows an interesting distinction. When the COVID evidence involved the worker's own experiences (either alone or in combination with experiences from co-workers), courts disregarded it at 42.9%. But when the evidence involved only co-worker experiences, the disregard rate jumped to 63.6%. So courts valued workers' own COVID experiences over the experiences of co-workers, though still disregarding even that evidence at more than 40%. This is consistent with findings from my earlier research, where courts valued employee COVID evidence more than co-worker COVID evidence.

When courts fully considered employee COVID evidence involving their own work experiences, it was usually pretty routine, with the court reciting that and any other relevant evidence and finding it sufficient to state a claim or create a fact issue.²⁴² A few courts gave COVID-specific

239. See, e.g., *McKinney*, 2024 WL 2312574, at *5; *Kingsolver v. Garland*, No. 23-CV-58, 2024 WL 5248254, at *10 & n.13 (S.D. Ga. Dec. 30, 2024), *appeal docketed*, No. 25-10656 (11th Cir. Feb. 28, 2025); *Fitzgerald v. Blinken*, No. 17-2398, 2024 WL 2803315, at *9-10 (D.D.C. May 31, 2024), *appeal dismissed per stipulation*, No. 24-5177, 2025 WL 1122353 (D.C. Cir. Apr. 11, 2025).

240. *Bodie-Jernigan*, 2024 WL 3806880, at *2.

241. See Shu, *supra* note 9, at 244-45, 250-51.

242. See, e.g., *Dobson v. Mid-Am. Conversion Servs., LLC*, No. 22-CV-210, 2024 WL 4729867, at *4-5 (E.D. Ky. Nov. 8, 2024); *Sexton v. Cmty. Life Team, Inc.*, No. 22-CV-02018, 2024 WL 4311484, at *6-7 (M.D. Pa. Sep. 26, 2024); *Greene v. Bd. of Regents of Univ. Sys. of Ga.*, No. 22-cv-04309, 2024 WL 3912696, at *6-8 (N.D. Ga. May 20, 2024), *report and recommendation adopted as modified on other grounds*, 742 F. Supp. 3d 1271, 1293-97 (N.D. Ga. 2024); *Crosby v. Stew Leonard's Yonkers LLC*, 695 F. Supp. 3d 551, 569-70 (S.D.N.Y. 2023). Some courts did the same thing when evaluating pre-COVID remote work experience. See, e.g., *Porter v. Dep't of Veterans Affs.*, No. 23-CV-00002, 2024 WL 3402857, at *4 (E.D. Ark. July 12, 2024), *aff'd*, No. 24-2650, 2025 WL 274633 (8th Cir. Jan. 23, 2025); *Kayode v. Garland*, No. 22-cv-03802, 2023 WL 8083638, at *5 (D.D.C. Nov. 21, 2023); *Spratley*

rationales. One court relied on the EEOC COVID Guidance in noting that temporary remote work, even during the pandemic, can be relevant in assessing the reasonableness of a remote accommodation.²⁴³ Another court described the worker’s COVID remote work experience and then noted that the employer’s “apparent contention that in-person attendance was *always* an essential function of [the plaintiff]’s position is difficult to square with the two years [he] spent working remotely.”²⁴⁴ In another case, the employer made general statements about difficulties the company had during remote work, but the court emphasized that the plaintiffs specifically had no “performance issues even during the height of the pandemic while working remotely.”²⁴⁵

As for the courts that devalued workers’ COVID-specific experience evidence, many relied on the same flawed rationales as for disregarding worker evidence in general, such as that the worker’s assessment is irrelevant or is unsupported.²⁴⁶ Others focused on reasons related

v. KidsPeace Corp., No. 22-cv-02411, 2023 WL 3007933, at *14 (E.D. Pa. Apr. 19, 2023).

243. *Lewis v. T-Mobile USA, Inc.*, No. 21-cv-00224, 2023 WL 315695, at *7 & n.9 (D. Me. Jan. 19, 2023); *see also Tornabene v. City of Blackfoot*, No. 22-cv-00180, 2024 WL 4145753, at *7 (D. Idaho Sep. 11, 2024) (stating that the EEOC COVID Guidance supports that telework can be a reasonable accommodation for long COVID).

244. *Rattie v. Balfour Beatty Infrastructure, Inc.*, No. 22-cv-05061, 2023 WL 8115047, at *4 (N.D. Cal. Nov. 22, 2023) (citation omitted); *see also Gardner v. Kutztown Univ.*, No. 22-1034, 2024 WL 1321068, at *24 (E.D. Pa. Mar. 27, 2024) (reciting professor’s prior remote work, both before and after COVID, and concluding this evidence “belie[s] the University’s claim that teaching in-person is an essential function of Plaintiff’s job”), *appeal docketed*, No. 25-1295 (3d Cir. Feb. 21, 2025); *Gross v. Kutztown Univ.*, No. 21-5032, 2023 WL 4748186, at *19 (E.D. Pa. July 25, 2023) (similar).

245. *Russo v. Nat’l Grid, U.S.A.*, No. 23-cv-03954, 2024 WL 5186728, at *8 (E.D.N.Y. Dec. 20, 2024). Two courts that devalued similar evidence viewed performing successfully during the stress of the pandemic’s onset as somehow cutting against the worker. *See Dominguez v. Bd. of Educ. of Yonkers City Sch. Dist.*, No. 23 Civ 2460, 2024 WL 3427217, at *6 (S.D.N.Y. July 16, 2024) (“[T]hat Plaintiff could perform his essential job functions while working remotely during the first phase of the COVID-19 pandemic—when leaders, officials, and institutions were in lockdown and just beginning to understand the nature of the outbreak—does not support his assertion that he could continue to perform his essential job functions months or even a year thereafter.”); *accord Metzler v. Kenmore-Town of Tonawanda Union Free Sch. Dist.*, No. 22-CV-959S, 2024 WL 3621480, at *5 (W.D.N.Y. July 31, 2024) (quoting *Dominguez*, 2024 WL 3427217, at *6).

246. *See, e.g., Williams v. Md. Dep’t of Health*, No. 22-1074, 2024 WL 2746979, at *1, *3 (4th Cir. May 29, 2024); *Rogers v. Unified Gov’t of Wyandotte Cnty./Kan. City*, No. 23-2143, 2024 WL 4512411, at *13 (D. Kan. Oct. 17, 2024); *Jones v. Fairfax Cnty. Sch. Bd.*, No. 23-cv-00359, 2024 WL 1704664, at *2, *8 (E.D. Va. Apr. 19, 2024), *aff’d*, No. 24-1444, 2025 WL 2813607 (4th Cir. Oct. 3, 2025); *Parker v. Wormuth*, No. 21-3708, 2023 WL 9231026, at *10 (D.S.C. July 13, 2023), *report and recommendation adopted*, No. 21-cv-3708, 2024 WL 1270757, at *4-5 (D.S.C. Mar. 26, 2024), *aff’d*, No. 24-1361, 2024 WL 3983962 (4th Cir. Aug. 29,

specifically to COVID. Some took the approach that anything that happened in the pandemic is per se irrelevant, as if merely stating “that was during Covid” automatically negates any probative value the evidence might have.²⁴⁷ A few speculated that circumstances *might* be different now than when the worker previously worked remotely and used that as a basis to disregard the evidence—even with no indication that anything relevant was, in fact, different.²⁴⁸ Some seem to have created a heightened pleading standard, requiring workers relying on their COVID work experience to specifically plead that circumstances are still the same as when they previously worked remotely.²⁴⁹

Some courts justified their COVID-related rationale in these cases using the EEOC COVID Guidance,²⁵⁰ which when read in full context, in no way supports their conclusions. The Guidance does say that employers are not necessarily bound by emergency actions they took during this unprecedented time, but it also says that COVID-era remote work could be relevant to assessing reasonableness.²⁵¹ It does not speak in absolutes. In other words, all relevant evidence should be considered in evaluating each case individually rather than what these courts are doing, which is altogether disregarding the evidence. The *Kinney* court got it right when it said that “[t]he fact that many employees were able to work remotely temporarily when forced to do so by a global health crisis does not mean that those jobs do not have essential functions that require in-person work over the medium to long term,” and so

2024). *Williams* is particularly egregious—the court said his “self-serving statements” didn’t count as evidence and yet affirmed summary judgment for the employer that was granted pre-discovery, so the plaintiff, an administrative aide, didn’t even have a chance to obtain more evidence. *Williams*, 2024 WL 2746979, at *2–3.

247. See, e.g., *Downey v. N.Y. State Off. for People with Developmental Disabilities*, No. 24-CV-168, 2024 WL 4581555, at *7 (N.D.N.Y. Oct. 25, 2024); *Vander Plaats v. Crisis Prevention Inst., Inc.*, 746 F. Supp. 3d 586, 593 (E.D. Wis. 2024); *Dominguez*, 2024 WL 3427217, at *6; *Jenkins v. Amedisys Holdings, LLC*, No. 22-cv-1021-P, 2023 WL 2938250, at *4 (N.D. Tex. Apr. 13, 2023).

248. See, e.g., *Stanley v. Phelon*, No. 23-731-cv, 2024 WL 1453872, at *5 (2d Cir. Apr. 4, 2024); *Jordan v. Sch. Bd. of Norfolk*, No. 22-cv-167, 2023 WL 5807844, at *10–11 (E.D. Va. Sep. 7, 2023).

249. See, e.g., *Gagnon v. Bd. of Educ. of Montgomery Cnty.*, 760 F. Supp. 3d 359, 372 (D. Md. 2024); *Cangro v. N.Y. City Dep’t of Fin.*, No. 23-CV-10097, 2024 WL 3833971, at *6 (S.D.N.Y. Aug. 14, 2024); *Stanley v. City Univ. of N.Y.*, No. 18 Civ. 4844, 2023 WL 2714181, at *20 (S.D.N.Y. Mar. 30, 2023), *aff’d sub nom.*, *Stanley v. Phelon*, No. 23-731-cv, 2024 WL 1453872 (2d Cir. Apr. 4, 2024).

250. See, e.g., *Downey*, 2024 WL 4581555, at *7; *Ray v. Columbia Brazoria Indep. Sch. Dist.*, No. 23-CV-00145, 2024 WL 1252362, at *5 (S.D. Tex. Mar. 22, 2024).

251. See EEOC COVID Guidance, *supra* note 94, ¶¶ D.15, D.16. For more discussion of the EEOC COVID Guidance, see *supra* notes 94–96 and accompanying text.

“[d]etermining whether a specific job has essential functions that require in-person work” should be evaluated case specifically.²⁵²

In the cases where workers weren’t relying on their own COVID work experience but instead using only co-worker experiences—which, recall, courts rejected much more frequently than evidence about the worker’s own experience—courts analyzed those in basically the same way as the other COVID-evidence cases, just at a higher rate. For example, two courts that properly considered the evidence simply recited it as a reason to rule in the plaintiff’s favor.²⁵³ As for courts going the other way, some used general language about how COVID circumstances don’t demonstrate that a function isn’t currently essential or that remote work is feasible.²⁵⁴ One court said the worker’s COVID evidence about what other workers did was “irrelevant” because it happened after the plaintiff was fired and during a public health emergency.²⁵⁵ It might end up that this evidence isn’t helpful, but it goes too far to say that it’s inherently irrelevant simply because it happened after the plaintiff was fired.²⁵⁶ Another court went so far as to deem admitted a summary judgment fact (from the defendant’s statement of undisputed material facts) about an office support worker’s inability to perform her job at home when she attempted to dispute it based on the COVID work experience of someone else, stating that “[t]he circumstances surrounding the pandemic are extraordinary and are not indicative of the job requirements as they existed at the time of plaintiff’s request in a way that creates a factual dispute.”²⁵⁷

As with allowing employers to rely on blanket policies, when courts devalue workers’ evidence, it’s almost guaranteed that employers will win. When looking at the overall win/loss rate in these cases, employers won 97.8% of the time when courts devalued this evidence. That number is about the same when the evidence is about COVID experiences

252. *Kinney v. St. Mary’s Health, Inc.*, 76 F.4th 635, 644 (7th Cir. 2023).

253. *See Kruly v. Akoustis Techs., Inc.*, No. 21-CV-6181, 2023 WL 3995467, at *9 (W.D.N.Y. June 14, 2023); *Horton v. Narbaitz*, No. 22-cv-03174, 2023 WL 2563078, at *8 (N.D. Cal. Mar. 16, 2023).

254. *See Geter v. Schneider Nat’l Carriers, Inc.*, No. 22-11285, 2023 WL 7321610, at *13 (11th Cir. Nov. 7, 2023); *Thompson v. State Farm Mut. Auto. Ins. Co.*, No. 22-cv-8375, 2024 WL 922820, at *2 (S.D.N.Y. Mar. 4, 2024); *Ahles v. Yellen*, No. 20-CV-951S, 2023 WL 3645486, at *5 (W.D.N.Y. May 25, 2023) (citing EEOC COVID Guidance, *supra* note 94).

255. *Jones v. City of Dallas*, No. 22-cv-1477, 2024 WL 3207030, at *13 (N.D. Tex. June 6, 2024), *report and recommendation adopted*, No. 22-CV-1147, 2024 WL 3718064 (N.D. Tex. Aug. 7, 2024), *aff’d on other grounds*, No. 24-10803, 2025 WL 2491127 (5th Cir. Aug. 29, 2025).

256. *See supra* note 137.

257. *Hurt v. Sch. Dist. No. 1*, 664 F. Supp. 3d 1227, 1232 n.5 (D. Colo. 2023), *appeal dismissed per stipulation*, No. 23-1136, 2023 WL 7215340 (10th Cir. June 1, 2023).

generally (96.4%) but even higher when the COVID evidence is about the worker's own experiences—when courts disregarded or gave that evidence short shrift, employers won every time.

This discussion has shown that courts increasingly disregarded employee evidence in remote work accommodation cases as a whole. As to be expected with the spike in post-COVID fact cases, there is a corresponding jump in cases where employees are using COVID-related evidence to plead and prove their case. Courts often disregarded this evidence as well, using familiar techniques as well as some particular to the COVID context. Courts disregarded evidence regarding co-workers' COVID experiences the most, as in they allowed the plaintiff to use their own COVID experience more often but still devalued it nearly 43% of the time. COVID evidence is crucial to workers' cases—indeed, it can be outcome determinative in that every time a court disregarded the worker's own COVID experience, the worker lost.

The following table shows relevant data regarding the cases in the dataset in which employee evidence was at issue:

Table 6. Devaluing Employee Evidence, 2023–2024

	2023	2024	Total
Court Devalued Employee Evidence	21	24	45
-COVID Evidence Involved	13	15	28
*Only Worker Experience	6	12	18
•Employer Won	6	12	18
•Worker Won	0	0	0
*Only Co-Worker Experience	3	3	6
•Employer Won	3	2	5
•Worker Won	0	1	1
*Worker & Co-Worker Experience	4	0	4
•Employer Won	0	4	4
•Worker Won	0	0	0
-Non-COVID Evidence Only	8	8	16
*Employer Won	8	8	16
*Worker Won	0	0	0
-Unclear if COVID Evidence	0	1	1
*Employer Won	0	1	1

Court Did Not Devalue Employee Evidence	21	23	44
-COVID Evidence Involved	15	17	32
*Only Worker Experience	10	10	20
•Employer Won	3	2	5
•Worker Won	7	8	15
*Only Co-Worker Experience	3	1	4
•Employer Won	0	1	1
•Worker Won	3	0	3
*Worker & Co-Worker Experience	2	6	8
•Employer Won	0	0	0
•Worker Won	2	6	8
-Non-COVID Evidence Only	6	6	12
*Employer Won	0	1	1
*Worker Won	6	5	11

5. Considering the Four Practices as a Whole

Though not applied in the majority of cases, courts used the four evidentiary practices frequently. In the 2023–2024 dataset, courts used the practices as follows (from highest to lowest):

- 45 times: devalued employee evidence
- 34 times: overdeferred to employer judgment
- 20 times: used the presumption against remote work
- 17 times: allowed employers to rely on blanket policies

Using these evidentiary practices is strongly outcome predictive. These are the employer win rates when courts used each of the practices:

- 100%: allowed employers to rely on blanket policies
- 97.8%: devalued employee evidence (100% if the devalued evidence was the worker’s own COVID experiences)
- 85%: used the presumption against remote work
- 70.6%: overdeferred to employer judgment

Using one of these evidentiary practices pretty much dooms the worker, but in combination, the results are even more devastating. Looking at the practices overall, using any one of them resulted in an employer win in 71.4% of cases. Using two brought that rate up to 93.8%. And when three or all four were used, employers won every case.

A couple of examples show this quadruple whammy in practice. Jill Ann Rogers was a purchasing agent with multiple sclerosis, requiring

chemotherapy treatments.²⁵⁸ These treatments compromised her immune system, so she requested temporary remote work around the chemotherapy treatments that occurred after the pandemic started.²⁵⁹ After the second round of temporary remote work, Rogers asked that she be allowed to work remotely indefinitely.²⁶⁰ The employer refused on the grounds that it did not allow indefinite remote work (and had never allowed any remote work before COVID).²⁶¹ In granting summary judgment for the employer, the court first quoted *Vande Zande* in applying the presumption against remote work and said that courts generally defer to the employer's judgment on what functions are essential.²⁶² The court accepted the employer's assertion that physical presence is an essential function of "all its positions" and discounted Rogers's previous remote work experience because it was provided "as an accommodation"—as if that somehow made her experience irrelevant to whether her job could be done remotely.²⁶³ The employer gave very little detail about why the job needed to be done in person or about any problems with her remote work and acknowledged that the job description did not state that physical presence was required.²⁶⁴ Nevertheless, the court said that Rogers failed to create a fact issue because it would not "second guess" the employer's judgment based only on her assessment of her job and her remote work experience.²⁶⁵

Similarly, a court granted summary judgment against Ann Waldrop, who had a rare genetic condition that made her extremely vulnerable to infection and had requested to continue performing her human resources coordinator job remotely.²⁶⁶ The employer refused based on its "longstanding 'business philosophy'" for employees to work in person.²⁶⁷ The court applied the presumption and gave "substantial weight" to the

258. *Rogers v. Unified Gov't of Wyandotte Cnty./Kan. City*, No. 23-2143, 2024 WL 4512411, at *2, *4 (D. Kan. Oct. 17, 2024).

259. *Id.* at *4.

260. *Id.* at *4-5.

261. *See id.*

262. *See id.* at *12.

263. *See id.* at *13. Two other courts used converse but still bizarre reasoning, concluding that the plaintiff's evidence of prior remote work during COVID did not count for anything because it *wasn't* a disability accommodation. *See Ahles v. Yellen*, No. 20-CV-951S, 2023 WL 3645486, at *5 (W.D.N.Y. May 25, 2023); *Jenkins v. Amedisys Holdings, LLC*, No. 22-cv-1021-P, 2023 WL 2938250, at *4 (N.D. Tex. Apr. 13, 2023).

264. *Rogers*, 2024 WL 4512411, at *13.

265. *Id.*

266. *Waldrop v. Gwinnett Cnty. Sch. Dist.*, No. 22-cv-2563, 2023 WL 9688352, at *1-2 (N.D. Ga. May 24, 2023), *report and recommendation adopted on other grounds*, No. 22-cv-02563, 2024 WL 1333041 (N.D. Ga. Mar. 27, 2024).

267. *See id.* at *6; *see also id.* at *3 (denial of plaintiff's request not based on her job but on defendant's "culture").

employer's preference.²⁶⁸ Waldrop provided detailed information about how she did her work at home, including having the necessary equipment and security clearance, and how she was praised for her prior remote work.²⁶⁹ The court ignored all of this and said she had nothing more than her "own assessment" that she could do her job remotely.²⁷⁰ The court pointed to a few duties that Waldrop admitted must be performed in person, but the court did not analyze whether those duties were in fact essential,²⁷¹ noting instead that her employer was not bound to continue her temporary remote work from the COVID emergency.²⁷²

The analysis in both cases is untenable under a proper interpretation of ADA law—even before the pandemic, but much more so based on what we have learned during COVID.

D. Circuit Court-Level Changes

Because the circuit courts are so influential in developing the law, it's valuable to assess whether any trends have emerged on a circuit-specific basis. In most circuits, it is either too soon to tell or the courts have continued their pre-COVID ways.

As discussed earlier, the Seventh Circuit is the only circuit court to have openly opposed the presumption against remote work based on COVID knowledge.²⁷³ First, in *Kinney*, the court criticized the presumption because technological advances make working from home

268. *Id.* at *5, *7.

269. *Id.* at *7.

270. *Id.* at *8.

271. *Id.* I have seen many other courts making this same error—merely referencing job functions that the worker allegedly could not perform remotely as if all job functions matter, not just the essential ones. *See, e.g., Kelso v. Vilsack*, No. 19-3864, 2024 WL 5159101, at *11 (D.D.C. Dec. 18, 2024). A court might call a function essential and might even list out the rules for determining what is essential but then fail to apply those rules to analyze, even slightly, why a function is essential. *See, e.g., Smithson v. Austin*, 86 F.4th 815, 821 (7th Cir. 2023); *Rutledge v. Vengroff Williams, Inc.*, No. 22-cv-1782, 2023 WL 5607586, at *8 (M.D. Fla. Aug. 30, 2023). Some even castigate the plaintiff for arguing that a function only takes a small percentage of their time, not seeming to recognize that the time spent performing the function is one of the factors to consider in the essential job function analysis. *See Jones v. Fairfax Cnty. Sch. Bd.*, No. 23-cv-00359, 2024 WL 1704664, at *7, *9 (E.D. Va. Apr. 19, 2024), *aff'd*, No. 24-1444, 2025 WL 2813607 (4th Cir. Oct. 3, 2025); *Gibson v. Gables Residential Servs., Inc.*, No. 21-cv-2952, 2024 WL 1239667, at *4-5 (D.D.C. Mar. 22, 2024), *appeal dismissed*, No. 24-7086, 2024 WL 4248473 (D.C. Cir. Sep. 17, 2024); *see also* 29 C.F.R. § 1630.2(n)(3)(iii) (2025). One court called out this practice of skipping the essential function analysis, correctly noting that this "jumps the gun." *Thompson v. State Farm Mut. Auto. Ins. Co.*, No. 22-cv-8375, 2024 WL 922820, at *2 (S.D.N.Y. Mar. 4, 2024).

272. *Waldrop*, 2023 WL 9688352, at *8.

273. *See supra* notes 177-197 and accompanying text.

much more feasible, and “[t]he many lessons learned about working from home effectively during the pandemic have reinforced that point.”²⁷⁴ The focus, the court said, should be on an individual assessment in each case, not an automatic presumption against remote work.²⁷⁵ Then, in *Smithson*, the court further emphasized the point, stating that “[i]n the post-COVID pandemic economy and with the advent of new technologies making working from home more feasible, we must now assess whether in-person attendance is essential on a context-specific basis.”²⁷⁶ However, as previously explained, this may not be the big win for workers that an initial impression would suggest. That is because *Smithson* also stated that employers are generally allowed “to designate in-person attendance as an essential function.”²⁷⁷ The court does not address the obvious disconnect between saying, on the one hand, that there is no longer a presumption that remote work is unreasonable, and, on the other, that employers can just designate on-site work as an essential job function—which would make any accommodation to work off-site unreasonable as a matter of law.²⁷⁸ It remains to be seen how courts will reconcile this tension or whether one position will catch on more than the other.²⁷⁹ Generally, in the district courts in the Seventh Circuit, results were equally divided between employers and employees in the 8 new cases.²⁸⁰

274. *Kinney v. St. Mary’s Health, Inc.*, 76 F.4th 635, 644 (7th Cir. 2023).

275. *Id.*

276. *Smithson v. Austin*, 86 F.4th 815, 822 (7th Cir. 2023); *see also EEOC v. Charter Commc’ns, LLC*, 75 F.4th 729, 732 (7th Cir. 2023) (“During the Covid-19 pandemic, of course, many employers and tens of millions of employees found ways to accomplish work without having many employees physically present at the workplace.”).

277. *Smithson*, 86 F.4th at 821.

278. *Id.* at 820–22; *see also supra* notes 229–232 and accompanying text (discussing *Kinney* and *Smithson*).

279. In a post-*Smithson* case not involving remote work, the Seventh Circuit stated that “[w]hile regular attendance is not an essential function of every job, an employer may treat regular attendance as an essential job requirement and need not accommodate unreliable attendance.” *Arroyo v. Volvo Grp. N. Am., LLC*, 93 F.4th 1066, 1069 (7th Cir. 2024) (citation omitted). The court seems to be saying both that attendance isn’t necessarily essential but that an employer can make it so by designation, which is functionally no different than the presumption. Strangely, this case cites neither *Kinney* nor *Smithson*, and it adds nothing to resolve the striking inconsistency between them.

280. *Compare Cowell v. Ill. Dep’t of Hum. Servs.*, No. 21-CV-00478, 2024 WL 551891, at *9–11 (S.D. Ill. Feb. 12, 2024) (rejecting the presumption (based on *Kinney* and *Smithson*), not overdeferring to employer judgment, not allowing a blanket policy, and fully considering the employee’s evidence in denying summary judgment against a mental health center patient discharge coordinator), *and Roberts v. McDonough*, No. 21 C 865, 2023 WL 3763532, at *4 (N.D. Ill. May 31, 2023) (denying summary judgment because the worker, a contract specialist for the VA, refuted the employer’s understanding of whether regular attendance is an essential job function by showing that she did her job well, even with frequent absences), *with Vander Plaats v.*

Nothing quite so dramatic is happening in the other circuits. Only two other circuits show a potential shift in their ruling patterns: the Sixth and Eleventh Circuits. In the Sixth Circuit, the cases were mixed pre-COVID. There were some notable employee wins²⁸¹ but also some very troubling cases, particularly the en banc decision in *EEOC v. Ford Motor Co.*,²⁸² which applied the presumption, overvalued the employer's judgment, and discounted all of the worker's substantial evidence in affirming summary judgment.²⁸³ Post-COVID, signs are worse for workers. In *Tchankpa v. Ascena Retail Group, Inc.*,²⁸⁴ which I discussed in my previous research, the court applied the presumption against remote work and also said that the ADA does not obligate employers to change their policies and practices.²⁸⁵ In this current dataset, the Sixth Circuit decided two more cases, and the employer won both.²⁸⁶ The outcome in these cases is probably correct,²⁸⁷ but some of the analysis is worrisome. In one case, the court found there was no fact issue about

Crisis Prevention Inst., Inc., 746 F. Supp. 3d 586, 594 (E.D. Wis. 2024) (granting summary judgment after “presum[ing]” that the employer’s understanding of whether the relevant job function was essential was correct because the worker, a crisis prevention trainer, did not offer “sufficient evidence” to the contrary).

281. See *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 857 (6th Cir. 2018) (“[F]ull-time presence at work is not an essential function of a job simply because an employer says that it is” because “otherwise, employers could refuse *any* accommodation that left an employee at work for fewer than 40 hours per week,” which would be “antithetical to the purpose of the ADA.”); *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 599, 604–05 (6th Cir. 2018) (finding a fact issue on whether ten weeks of remote work for pregnant in-house attorney on bedrest was reasonable, based on her evidence of her past successful remote work and that she rarely performed the tasks in her job description that could not be done from home).

282. 782 F.3d 753 (6th Cir. 2015) (en banc).

283. *Id.* at 761–66; see also *Black v. Wayne Ctr.*, Nos. 99-1225, 99-1249, 2000 WL 1033026, at *4 (6th Cir. July 17, 2000) (reversing jury verdict for a social worker, stating that “[t]he problem with allowing Black to work at home is that it is not the company’s policy to allow employees to work at home”). For more discussion of the *Ford* case, see Shu, *supra* note 9, at 231–32.

284. 951 F.3d 805 (6th Cir. 2020).

285. *Id.* at 809, 813 (“The ADA is not a weapon that employees can wield to pressure employers into granting unnecessary accommodations or reconfiguring their business operations. Instead, it protects disabled employees from disability-related mistreatment—no more, no less.”).

286. *Dundee v. Geauga Med. Ctr.*, No. 23-3906, 2024 WL 4765162, at *1 (6th Cir. May 29, 2024); *McKinney v. Macomb County*, No. 23-1625, 2024 WL 2312574, at *1 (6th Cir. May 22, 2024).

287. In *Dundee*, the employer showed that the plaintiff, a pharmacist who worked his shift alone, could not work from home because a state regulatory statute required a pharmacist to be physically present at all times. *Dundee*, 2024 WL 4765162, at *1, *4–6. In *McKinney*, the plaintiff’s doctor said there was no time that she was well enough to work in her mental health support coordinator position, even with her requested accommodations. *McKinney*, 2024 WL 2312574, at *6. Both seem to be sufficient reasons to deny remote work accommodations.

whether the worker could successfully perform her job partially at home.²⁸⁸ The court pointed to past performance problems—problems related to her mental health disabilities—and said there was no evidence that remote work would alleviate those problems.²⁸⁹ Although the worker explained how working at home would have allowed her to silo her work and focus better with fewer distractions, the court did not value this evidence and just said that her past performance “suggests” that remote work would not address these struggles.²⁹⁰ That determination seems more appropriate for a jury to make. The district courts in the Sixth Circuit are decidedly pro-employer, with employers winning 75% of the time in the current dataset (6 of the 8 cases).²⁹¹ It seems, overall, that conditions are getting worse for workers in the Sixth Circuit.

The story is similar in the Eleventh Circuit. Before COVID, cases went both ways. Some cases overly emphasized the role of employer judgment in determining essential job functions and assessing remote work accommodations,²⁹² while others took a more balanced approach.²⁹³ In its first post-pandemic case in 2021, the court again overvalued the employer’s judgment.²⁹⁴ It did that and more in its 2023 decision in *Geter v. Schneider National Carriers, Inc.*²⁹⁵ There, the court applied all four of the evidentiary practices in ruling against the worker.²⁹⁶ That case involved some tough circumstances about whether temporary pandemic-era changes that arguably placed company property at risk must be continued,²⁹⁷ so I’m not necessarily saying that the court reached the wrong result, but its analysis is deeply flawed. Even though the Eleventh Circuit itself is leaning more towards employers, the many district court

288. See *McKinney*, 2024 WL 2312574, at *5.

289. *Id.* at *1, *5.

290. *Id.* at *5.

291. Compare *Kellar v. Yunion, Inc.*, No. 21-12133, 2024 WL 760877, at *8-9 (E.D. Mich. Feb. 23, 2024) (deferring to the employer’s judgment that client file management duties must be performed on-site, even though on-site interns were available to help the plaintiff perform certain tasks at home), *aff’d*, 157 F.4th 855 (6th Cir. 2025), with *Dobson v. Mid-Am. Conversion Servs., LLC*, No. 22-CV-210, 2024 WL 4729867, at *4 (E.D. Ky. Nov. 8, 2024) (finding a fact issue on whether the job could be performed remotely because the plaintiff had been doing full-time telework for 19 months before being fired and the employer posted a job for her replacement as 100% remote).

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

293. See *Everett v. Grady Mem’l Hosp. Corp.*, 703 F. App’x 938, 943 (11th Cir. 2017); *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1257-59, 1262-63 (11th Cir. 2007).

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

295. No. 22-11285, 2023 WL 7321610 (11th Cir. Nov. 7, 2023).

296. See *id.* at *9, *12-13.

297. See *id.* at *5, *13.

decisions in the new dataset were nearly evenly split between employers and workers (workers won 13 of 25 times).²⁹⁸

In two circuits, little if anything new is happening. The Third Circuit has no post-COVID remote work cases, though it has quite a few district court decisions; plaintiffs are doing well in those, winning 10 of the 12 new cases.²⁹⁹ The Eighth Circuit has no cases in this current dataset; it had one in the previous dataset that went against the pre-COVID trend by ruling in favor of a hospital’s patient access supervisor and turning the tables on the employer, noting that its evidence against remote work consisted of only “brief, conclusory, and unsubstantiated opinions.”³⁰⁰ I noted before that it remained to be seen whether that case was an outlier or signaled a new trend,³⁰¹ and that still holds true, given that there are no Eighth Circuit remote work opinions since 2022. There was only one new district court decision, and the employer ultimately prevailed, even though the court held that there was a fact issue as to whether remote work was reasonable for the supervising contract specialist.³⁰²

298. Compare *Greene v. Bd. of Regents of Univ. Sys. of Ga.*, No. 22-cv-04309, 2024 WL 3912696, at *1–2, *8–9 (N.D. Ga. May 20, 2024) (denying university’s summary judgment motion regarding professor’s remote work request based on needing to live out of state due to atmospheric mold when he taught online before and during COVID and always returned to campus briefly as needed for in-person activities, even though the school had a strong preference for in-person instruction), *report and recommendation adopted as modified*, 742 F. Supp. 3d 1271 (N.D. Ga. 2024), and *Fields v. Bd. of Trs. of Ga. Mil. Coll.*, No. 22-cv-74, 2024 WL 375387, at *9 (M.D. Ga. Jan. 31, 2024) (finding a fact issue as to whether college science professor’s request to teach in the online program was reasonable, noting that “[a]llowing uniformly-applied, disability-neutral policies to trump the ADA requirement of reasonable accommodations would utterly eviscerate that ADA requirement” (quoting *Holly*, 492 F.3d at 1263)), with *Waldrop v. Gwinnett Cnty. Sch. Dist.*, No. 22-cv-2563, 2023 WL 9688352, at *3, *5–8 (N.D. Ga. May 24, 2023) (applying all four evidentiary practices and deferring to the employer’s “longstanding ‘business philosophy’” that all employees work in person in a case involving a human resources coordinator), *report and recommendation adopted on other grounds*, No. 22-cv-02563, 2024 WL 1333041 (N.D. Ga. Mar. 27, 2024).

299. Some notable victories include a pair of cases against Kutztown University challenging a blanket return-to-campus policy and denial of remote work accommodation requests from many professors. See *Gardner v. Kutztown Univ.*, No. 22-1034, 2024 WL 1321068, at *1, *27–28, *31 (E.D. Pa. Mar. 27, 2024), *appeal docketed*, No. 25-1295 (3d Cir. Feb. 21, 2025); *Oross v. Kutztown Univ.*, No. 21-5032, 2023 WL 4748186, at *21–23, *26–27 (E.D. Pa. July 25, 2023). But see *Galette v. Ave. 365 Lending Servs. LLC*, No. 22-2778, 2024 WL 247044, at *9–10 (E.D. Pa. Jan. 23, 2024) (granting summary judgment based on the title company’s assessment of the essential tasks of a funding specialist, even with the plaintiff’s evidence that she rarely did those tasks and had been successfully performing her job remotely for two years), *aff’d*, No. 24-1221, 2025 WL 429973 (3d Cir. Feb. 7, 2025).

300. *Mobley v. St. Luke’s Health Sys., Inc.*, 53 F.4th 452, 456 (8th Cir. 2022).

301. See Shu, *supra* note 9, at 253–54.

302. See *Porter v. Dep’t of Veterans Affs.*, No. 23-CV-00002, 2024 WL 3402857, at *4 (E.D. Ark. July 12, 2024), *aff’d*, No. 24-2650, 2025 WL 274633 (8th Cir. Jan. 23, 2025).

Results remain unclear in the Second Circuit as well. The Second Circuit, like many other circuits pre-COVID, had mixed case law. One 2018 case in particular, *Vitti v. Macy's Inc.*,³⁰³ was hostile to the worker, stating that “regularly attending work is an essential function of virtually every job.”³⁰⁴ In my prior dataset, the Second Circuit decided 2 cases, and neither mentioned the presumption, despite *Vitti*.³⁰⁵ That was a good sign. However, one case, *Laguerre v. National Grid USA*,³⁰⁶ pointed both ways: It did not apply the presumption, rejected a blanket policy, and thoroughly examined the evidence the plaintiff (a customer service representative) presented, but it affirmed the district court’s denial of her discovery request to obtain additional evidence regarding COVID-related remote work.³⁰⁷ I concluded before that even though the signals were unclear, given the many positive aspects of *Laguerre* and the post-COVID courts not applying *Vitti*, the Second Circuit might be shifting more towards the plaintiff side.³⁰⁸ But the one Second Circuit case in the new dataset suggests otherwise. The court found that granting a motion to dismiss was proper, even though the plaintiff pleaded that he had worked remotely successfully at the beginning of the pandemic, because circumstances “might have changed.”³⁰⁹ Though not citing *Laguerre*, this decision is consistent with *Laguerre*’s critical stance on COVID-related remote work evidence. These mixed results from the Second Circuit are reflected in the district court decisions, where the 17 decisions are roughly evenly split between employer (9) and employee (8) victories.³¹⁰

303. 758 F. App’x 153 (2d Cir. 2018).

304. *Id.* at 157 (internal quotation marks and brackets omitted). For more discussion of relevant pre-pandemic Second Circuit law, see Shu, *supra* note 9, at 254.

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

306. No. 20-3901-cv, 2022 WL 728819 (2d Cir. Mar. 11, 2022).

307. *Id.* at *1-5.

308. See Shu, *supra* note 9, at 254.

309. *Stanley v. Phelon*, No. 23-731-cv, 2024 WL 1453872, at *5 (2d Cir. Apr. 4, 2024). For more discussion of motions to dismiss involving similar evidence, see *supra* notes 168-171 and accompanying text.

310. Compare *Metzler v. Kenmore-Town of Tonawanda Union Free Sch. Dist.*, No. 22-CV-959S, 2024 WL 3621480, at *5 (W.D.N.Y. July 31, 2024) (granting motion to dismiss because plaintiff’s allegation that she completed her school registration clerk duties successfully remotely during the first part of the pandemic was insufficient), and *Dominguez v. Bd. of Educ. of Yonkers City Sch. Dist.*, No. 23 Civ 2460, 2024 WL 3427217, at *1, *6 (S.D.N.Y. July 16, 2024) (same for English language teacher), with *Kruly v. Akoustis Techs., Inc.*, No. 21-CV-6181, 2023 WL 3995467, at *9 (W.D.N.Y. June 14, 2023) (denying summary judgment in a pre-COVID fact case based on evidence of changes made during COVID that raised the fact issue of whether the employer could have made those changes earlier for the plaintiff, an accounts payable specialist), and *Heiden v. N.Y. City Health & Hosps. Corp.*, No. 20-cv-10288, 2023 WL 171888, at

The remaining six circuits have continued their pre-COVID patterns. For the D.C. Circuit, that pattern is generally in favor of workers. Before COVID, several D.C. Circuit cases rejected blanket policies and fully considered worker evidence in remote work cases.³¹¹ One case, however, *Carr v. Reno*,³¹² has language about how the ability to perform essential functions from home would be the “unusual case.”³¹³ Courts have latched onto that presumption language.³¹⁴ However, in 2014, in *Solomon v. Vilsack*,³¹⁵ the D.C. Circuit clarified *Carr*.³¹⁶ *Carr* also said that it would be “unusual” to properly resolve such a dispute on summary judgment, and thus, according to *Solomon*, *Carr* “could not have been the genesis of a sweeping and categorical legal rule against substantial flexibility in work hours.”³¹⁷ Rather, a “‘penetrating factual analysis’ is required.”³¹⁸ The first dataset contained no D.C. Circuit cases; there is only one in the new dataset, and the court overdeferred to employer judgment.³¹⁹ But more can be gleaned about the D.C. Circuit’s current position on remote work from a case not in the dataset, *Ali v. Regan*.³²⁰ *Ali* involved a situation where the worker did not want to work remotely but his employer offered that as the one and only possible accommodation.³²¹ The court noted that “remote work may well be a reasonable accommodation in many cases,” but that “the reasonableness of telework cannot be presumed,” regardless of who proposes it.³²² Rather, it should be a case-specific inquiry.³²³ That’s worker-friendly

*33 (S.D.N.Y. Jan. 11, 2023) (denying summary judgment based on evidence that new remote workstations made a radiologist’s work feasible and that the one task he could not do remotely was only 3% of his job).

311. See, e.g., *Solomon v. Vilsack*, 763 F.3d 1, 11 (D.C. Cir. 2014); *Woodruff v. Peters*, 482 F.3d 521, 528 (D.C. Cir. 2007); *Langon v. Dep’t of Health & Hum. Servs.*, 959 F.2d 1053, 1060–61 (D.C. Cir. 1992) (cited in *Vande Zande v. State of Wis. Dep’t of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995) as an example of the minority view that remote work can be reasonable).

312. 23 F.3d 525 (D.C. Cir. 1994).

313. *Id.* at 530.

314. See, e.g., *Morris v. Jackson*, 994 F. Supp. 2d 38, 47 (D.D.C. 2013); *Ward v. Shinseki*, No. 10-cv-1414, 2012 WL 5839711, at *9 (D.D.C. Nov. 19, 2012).

315. 763 F.3d 1 (D.C. Cir. 2014).

316. *Id.* at 11.

317. *Id.* (citing *Carr*, 23 F.3d at 531).

318. *Id.* at 10 (quoting *McMillan v. City of New York*, 711 F.3d 120, 126 (2d Cir. 2013)).

319. See *George v. Molson Coors Beverage Co. USA*, No. 22-7111, 2023 WL 2661588, at *2 (D.C. Cir. Mar. 28, 2023).

320. 111 F.4th 1264 (D.C. Cir. 2024).

321. *Id.* at 1267, 1272–73.

322. *Id.* at 1279–80.

323. *Id.* at 1280. The court reversed summary judgment for the employer, finding that a jury could determine that attempting to force an unwilling worker to work

language, much more along the lines of *Solomon* than *Carr*. On the district court level, employers and workers each won 4 of the 8 new cases.³²⁴

That leaves the First, Fourth, Fifth, Ninth, and Tenth Circuits, which have always been friendliest to employers and have continued that trend.

- First Circuit: One case in the first dataset was generally in line with the court’s earlier pro-employer practices.³²⁵ The only case in the new dataset came out in the employer’s favor, though it is a fairly unremarkable case.³²⁶ There was only one district court case, which the plaintiff won.³²⁷
- Fourth Circuit: Like the First Circuit, the Fourth had 1 case in the first dataset that was generally consistent with its pre-COVID cases in favor of employers.³²⁸

remotely without exploring other options was unreasonable. *See id.* at 1282–83. For more discussion of *Ali*, see *supra* note 69.

324. Compare *Gibson v. Gables Residential Servs., Inc.*, No. 21-cv-2952, 2024 WL 1239667, at *4–5 (D.D.C. Mar. 22, 2024) (ignoring the plaintiff’s evidence that she only infrequently performed the relevant task in her real estate assistant community manager role and not analyzing whether that task was actually essential), *appeal dismissed*, No. 24-7086, 2024 WL 4248473 (D.C. Cir. Sep. 17, 2024), with *Kayode v. Garland*, No. 22-cv-03802, 2023 WL 8083638, at *5 (D.D.C. Nov. 21, 2023) (denying motion to dismiss based on the worker’s allegations that remote work would allow her to perform the essential functions of her job as a DOJ special agent, especially since she had done so previously).

325. Compare *Mulloy v. Acushnet Co.*, 460 F.3d 141, 150 (1st Cir. 2006) (applying the presumption, giving “substantial weight” to employer judgment, and ignoring plaintiff’s evidence as “self-serving”), and *Kvorjak v. Maine*, 259 F.3d 48, 55 (1st Cir. 2001) (giving “substantial weight to the employer’s judgment as to what functions are essential” (internal quotation marks omitted)), with *Trahan v. Wayfair Me., LLC*, 957 F.3d 54, 66–67 (1st Cir. 2020) (allowing the employer to deny remote work based on its capabilities existing at the time, even though the employer made the changes the plaintiff would have needed for remote work one month later).

326. See *Dixon-Tribou v. McDonough*, 86 F.4th 453, 455–56 (1st Cir. 2023) (affirming summary judgment against a VA nurse with multiple sclerosis who requested full-time remote work to help control her work environment’s temperature and was fired for working in a community garden during work hours).

327. See *Lewis v. T-Mobile USA, Inc.*, No. 21-cv-00224, 2023 WL 315695, at *7 (D. Me. Jan. 19, 2023) (recommending that summary judgment be denied based on the call center supervisor’s evidence that his team won a performance award during his previous remote work period and that others did the same job remotely).

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

That continued in the new dataset, with employers winning all 4 appeals.³²⁹ In one case, the court affirmed summary judgment after determining that the plaintiff had no evidence to corroborate his “self-serving statements” to support his remote work claim—while simultaneously affirming the denial of his request to conduct discovery (the summary judgment motion was granted before any discovery).³³⁰ The Fourth Circuit’s pro-employer stance is reflected in the numerous district court decisions, where employers won in 20 of the 22 cases in the new dataset. In one of these cases, which the Fourth Circuit affirmed, the court categorically stated that an employer “is not required to grant a remote work accommodation.”³³¹

- Fifth Circuit: The Fifth Circuit was staunchly pro-employer before the pandemic. *Credeur* is a prime example. The court applied all four evidentiary practices in ruling against the worker.³³² The single case in the first dataset relied on an employer’s standard telework policy.³³³ Of the 2 appeals in the new

329. Two of these appeals were summary affirmances of district court summary judgment orders. *See Parker v. Wormuth*, No. 24-1361, 2024 WL 3983962, at *1 (4th Cir. Aug. 29, 2024); *Katz v. Garland*, No. 23-1528, 2024 WL 399099, at *1 (4th Cir. Feb. 2, 2024). The other two also affirmed a summary judgment order, but the court issued a full opinion. *See Crews-Sanchez v. Frito-Lay, Inc.*, No. 22-1831, 2024 WL 469306, at *1, *3 (4th Cir. Feb. 7, 2024); *Williams v. Md. Dep’t of Health*, No. 22-1074, 2024 WL 2746979, at *1 (4th Cir. May 29, 2024); *see also McKinney v. Cleveland Cnty. Bd. of Educ.*, No. 22-1697, 2023 WL 4637115, at *1, *4–5 (4th Cir. July 20, 2023) (quoting *Tyndall*, 31 F.3d at 213, that the ability to perform all work-related duties at home is “the unusual case” in a case about absenteeism).

330. *Williams*, 2024 WL 2746979, at *2–3.

331. *Katz v. Garland*, No. 20-cv-554, 2023 WL 11990807, at *8 (E.D. Va. Mar. 16, 2023) (citing *Smith*, 12 F.4th at 415), *aff’d*, No. 23-1528, 2024 WL 399099 (4th Cir. Feb. 2, 2024); *see also Parker v. Wormuth*, No. 21-3708, 2023 WL 9231026, at *10 (D.S.C. July 13, 2023) (applying the presumption, ignoring the plaintiff’s evidence, and failing to analyze if the relevant job duty of the administrative assistant was essential), *report and recommendation adopted*, No. 21-cv-3708, 2024 WL 1270757 (D.S.C. Mar. 26, 2024), *aff’d*, No. 24-1361, 2024 WL 3983962 (4th Cir. Aug. 29, 2024). *But see Sharpe v. Garland*, No. 23cv1219, 2024 WL 329945, at *4–5 (E.D. Va. Jan. 29, 2024) (denying motion to dismiss based on the plaintiff’s evidence that most of her work as a DEA property manager was computer-based and involved managing property worldwide and that she had received successful performance reviews without coming into the office).

332. *See Credeur v. La. ex rel. Off. Att’y Gen.*, 860 F.3d 785, 792–95 (5th Cir. 2017). For more discussion of *Credeur*, see Shu, *supra* note 9, at 231.

333. *See Houston v. Tex. Dep’t of Agric.*, 17 F.4th 576, 580, 585 (5th Cir. 2021); *see also Weber v. BNSF Ry. Co.*, 989 F.3d 320, 325 (5th Cir. 2021) (involving

dataset, the employer and employee each won once.³³⁴ As previously discussed, the *Montague* decision is particularly significant.³³⁵ The court reaffirmed *Credeur*'s statement of the presumption: the “general consensus among courts . . . that regular work-site attendance is an essential function of most jobs.”³³⁶ The employee won in *Montague*, but only because her requested accommodation—working from home every morning and working in the office every afternoon—was “consistent with that principle.”³³⁷ This suggests that less frequent office appearances would not meet the standard. And the court did nothing to undermine the strong language from *Credeur*, which district courts routinely apply in ruling against workers.³³⁸ Thus, notwithstanding the plaintiff victory in *Montague*, the Fifth Circuit is still decidedly employer friendly, including in the district courts, where the employer won 7 of the 8 new cases.

- Ninth Circuit: The Ninth Circuit's most significant pre-COVID case was not about remote work but was in the context of attendance requirements. The court in *Samper v. Providence St. Vincent Medical Center*³³⁹ said that it is “the unusual case where an employee can effectively perform all work-related duties at home.”³⁴⁰

on-site attendance issues unrelated to a remote work request where the court applied the presumption of in-person attendance and gave outsized deference to the employer's judgment).

334. Compare *Turner v. Bd. of Supervisors of Univ. of La. Sys.*, No. 22-30615, 2023 WL 5092758, at *3 (5th Cir. Aug. 9, 2023) (affirming summary judgment for a university because the proposed accommodation would have required reassigning other employees to cover an essential job function of a college professor), with *Montague v. U.S. Postal Serv.*, No. 22-20113, 2023 WL 4235552, at *4-5 (5th Cir. June 28, 2023) (reversing summary judgment for the employer because the public relations worker's proposed accommodation would have had her coming to the office for part of every day).

335. See *supra* notes 198-203 and accompanying text.

336. *Montague*, 2023 WL 4235552, at *4 (alteration in original) (quoting *Credeur*, 860 F.3d at 793).

337. *Id.* at *4-5.

338. See, e.g., *Jones v. City of Dallas*, No. 22-cv-1477, 2024 WL 3207030, at *12, *15 (N.D. Tex. June 6, 2024), report and recommendation adopted, 22-CV-1477, 2024 WL 3718064 (N.D. Tex. Aug. 7, 2024), *aff'd on other grounds*, No. 24-10803, 2025 WL 2491127 (5th Cir. Aug. 29, 2025); *Ray v. Columbia Brazoria Indep. Sch. Dist.*, No. 23-CV-00145, 2024 WL 1252362, at *4, *11 (S.D. Tex. Mar. 22, 2024); *Williams v. Hollandale Sch. Dist.*, No. 22-CV-102, 2023 WL 8440261, at *8-9, *12 (N.D. Miss. Dec. 5, 2023).

339. 675 F.3d 1233 (9th Cir. 2012).

340. *Id.* at 1239.

Though it was careful to emphasize that “on-site presence is not required for all jobs,”³⁴¹ pre-COVID courts routinely relied on *Samper* to rule against workers, finding their cases not to be “unusual.”³⁴² The 3 Ninth Circuit appeals in the new dataset went in favor of the employer—apparently none of them were unusual either.³⁴³ Though workers lost all appeals, in the district courts, they won 9 of the 13 new cases.³⁴⁴

- Tenth Circuit: Before the pandemic, the Tenth Circuit leaned towards employers.³⁴⁵ That continued in the previous dataset, with 3 cases that, between them, applied all four evidentiary practices.³⁴⁶ In this current dataset, the employer won the single appeal because it required 40 hours of physical attendance per week for

341. *Id.* (emphasis omitted).

342. *See, e.g., Neufeld v. Winco Holdings, Inc.*, 669 F. App’x 659, 660–61 (9th Cir. 2017); *Lane v. Clark County*, 604 F. App’x 632, 632 (9th Cir. 2015) (mem.); *Canupp v. Child. ’s Receiving Home of Sacramento*, 181 F. Supp. 3d 767, 778–79 (E.D. Cal. 2016).

343. *See Walker v. Nat’l Tech. & Eng’g Sols. of Sandia, LLC*, No. 23-16159, 2024 WL 4164135, at *1 (9th Cir. Sep. 12, 2024); *Tom v. O’Malley*, No. 22-16977, 2024 WL 1926522, at *1 (9th Cir. May 2, 2024), *cert. denied*, 145 S. Ct. 772 (2024); *Rehfeldt v. U.S. Dep’t of Homeland Sec.*, No. 23-15240, 2024 WL 1281138, at *1 (9th Cir. Mar. 26, 2024).

344. *See, e.g., Tornabene v. City of Blackfoot*, No. 22-cv-00180, 2024 WL 4145753, at *1–2, *5–7 (D. Idaho Sep. 11, 2024) (finding a fact issue on a human resources director’s request to continue her remote work accommodation; rejecting a blanket policy and not overdeferring to the employer, stating that “presence at work is not an essential function of the job simply because an employer says it is” (quoting *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 857 (6th Cir. 2018))); *Rattie v. Balfour Beatty Infrastructure, Inc.*, No. 22-cv-05061, 2023 WL 8115047, at *4–5 (N.D. Cal. Nov. 22, 2023) (“True, it was the judgment of Rattie’s managers that in-person attendance was an essential function of his role. That said, a trier of fact could conclude remote work was an available reasonable accommodation in part because Rattie had worked remotely for the preceding two years.” (citations omitted)). *But see Monk v. DeJoy*, No. 22-cv-03403, 2023 WL 2870363, at *6–7 (N.D. Cal. Apr. 10, 2023) (relying on *Samper* to deny a remote work accommodation claim based on the need for teamwork).

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

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

its human resources director.³⁴⁷ Results are more balanced in the district courts, with employers winning only 6 of the 10 new cases.³⁴⁸

Overall, most of the circuit courts have changed little, if at all, as compared to their pre-COVID approaches in remote work accommodation cases. The Seventh Circuit is trying, kind of, but it will take time to see how the Seventh Circuit itself settles and whether other circuit courts adopt the approach to reject the presumption based in part on lessons learned from COVID.

CONCLUSION

COVID has much to teach us about remote work: That it's much more feasible than courts and employers previously thought. That existing technology and the new technology that blossomed can make remote work virtually seamless in some instances. That employers' judgments that remote work just couldn't be done were wrong, and their blanket policies justifying bans were unfounded. That workers have legitimate insight into how to do their jobs at home.

There are hopeful signs of at least some judicial changes in response to these lessons. Workers did well on surviving motions to dismiss, which can have a huge impact in litigation on the ground. On the presumption against remote work, the application rate slowed from 2023 to 2024, especially in post-COVID fact cases, and the Seventh Circuit is trying to take a stand against it. One other bright spot is that courts did not permit employers to rely on categorical policies and practices quite as much, even more so in post-COVID fact cases.

347. See *Freeman v. City of Cheyenne*, No. 23-8022, 2024 WL 464069, at *7 (10th Cir. Feb. 7, 2024).

348. Compare *Cetin v. Kan. City Kan. Cmty. Coll.*, No. 23-2219, 2024 WL 4605133, at *6–8 (D. Kan. Oct. 29, 2024) (finding a fact issue on whether teaching in person was essential but granting summary judgment because the college allowed the plaintiff to teach via Zoom from her office and provided other accommodations), and *Rogers v. Unified Gov't of Wyandotte Cnty./Kan. City*, No. 23-2143, 2024 WL 4512411, at *12, *18 (D. Kan. Oct. 17, 2024) (applying all four evidentiary practices and granting summary judgment for the employer against a purchasing agent), with *Bley v. Indep. Sch. Dist. No. 1-002 of Okla. Cnty.*, No. CIV-21-1026-R, 2023 WL 3333082, at *7 (W.D. Okla. May 9, 2023) (denying the school's motion for summary judgment based on a teacher's evidence that no students were present in the classroom so it didn't matter if she was, she had taught virtual classes from home before, and the school initially approved her request), and *Brunner v. GN Bank, N.A.*, No. 21-cv-022420, 2023 WL 2474683, at *2, *13, *18 (D. Kan. Mar. 13, 2023) (denying a bank's summary judgment motion, even though the bank argued that working from home would eliminate an essential job function of a customer relationship specialist, because it provided only a conclusory statement in support).

That list is pretty short. The big picture is disappointing, to put it mildly. The plaintiff success rate in these cases plunged 10 percentage points from my prior research, down to only 39.1%. Results were particularly negative in summary judgment proceedings and appeals. Even though the rate slowed between 2023 and 2024, more courts continued to apply the presumption, and fewer courts rejected it than applied it. Only one circuit court, the Seventh Circuit, has tried to take a stand against the presumption, and even that's shaky. Overdeferring to employer judgment shot up between 2023 and 2024, especially in post-COVID fact cases. Although the rate of allowing blanket policies is on the decline, the Seventh Circuit seemed to boldly endorse absolute on-site attendance requirements while incongruously saying there's no presumption against remote work. Courts devalued employee evidence at a higher rate. When looking at COVID-specific evidence, courts at least allowed workers to use evidence about their own experiences more often than evidence about co-workers' experiences, but they still devalued even this evidence more than 40% of the time. Courts continued to apply all four evidentiary practices—all of which are legally incorrect even without considering COVID lessons—to the near-certain detriment of workers, particularly when they sanctioned one-size-fits-all policies or disregarded the worker's own COVID-related evidence. Hardly any circuit courts are changing their practices as of yet, which is consistent with the overall plaintiff success rate in these cases taking a nosedive.

It turns out that the general sense that courts must be changing for the better in light of COVID is dubious at best. In many instances, rather than evolving based on what we have learned from the pandemic, courts are simply going along with employers who want to forget that COVID ever happened—to return to the good old days when everyone came into the office every day. In their reluctance to be too tough on employers who might have had to make unsustainable compromises during the pandemic, courts often seem to be overcorrecting by discounting or flat-out denying any possible role for COVID experiences.

Remote work is not perfect. It's not always feasible, and it's not right for everyone. It won't solve all employment problems for disabled people. But it is a key tool for improving employment outcomes—and the corresponding quality of life—for the disability community as a whole. Remote work accommodation cases aren't going away and are, in fact, rapidly rising. Rather than standing in the way, courts should lead the way in evaluating these cases fairly, on an individual basis, based on lessons learned from COVID.