THE POST-PANDEMIC CONVERGENCE: RECONCILING THE ANALYSIS OF REMOTE WORK AS A REASONABLE ACCOMMODATION UNDER THE ADA

The Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations to individuals with disabilities under certain circumstances. But how courts decipher those circumstances and interpret what is reasonable is a moving target. In remote work cases, however, that target may now be clearer than ever before.

The World Health Organization's declaration that the COVID-19 pandemic was over in May 2023 did not return the world to the pre-pandemic status quo. Millions of employees had lost their jobs, businesses, loved ones, or their lives, and those who were more fortunate did not escape untouched—at a minimum, they lost the ability to return to society as it was. For better or worse, the COVID-19 pandemic ushered in a new wave of technological and sociological innovations that rewired many aspects of our lives, our jobs and livelihoods not excepted. For example, the social distancing requirements necessitated an unprecedented increase in remote work, leaving employers and employees uncertain about the long-term consequences once the pandemic was in the rearview mirror.

This paper will examine one such potential consequence—whether courts have now reconciled their differing approaches to analyzing remote work as a reasonable accommodation under the ADA. Part I will provide an overview of the ADA's purpose, statutory framework, and relevant requirements. Part II will examine the initial split between federal circuits into restrictive, employer-friendly approaches and expansive, fact-based approaches. Part III will then discuss whether the circuit courts have since unified these approaches in light of today's post-pandemic realities. Finally, Part IV will conclude by highlighting the increased importance of defining and analyzing employees' essential functions in remote-work cases.

I. ADA PURPOSE, STATUTORY FRAMEWORK, AND REQUIREMENTS

Responding to society's tendency to "isolate and segregate individuals with disabilities," Congress enacted the ADA in 1990 to "remedy the widespread discrimination against disabled individuals."[1] The express purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] To this end, the ADA "forbids discrimination against disabled individuals in major areas of public life, among them employment."[3]

Title I of the ADA addresses discrimination against disabled individuals in the employment context.[4] Under the ADA, discrimination is defined to include not only affirmative acts of discrimination, but also the failure to reasonably accommodate known physical or mental limitations of an otherwise qualified individual with a disability, unless the accommodation would cause an undue hardship upon the employer.[5] Accordingly, there are three limitations on an employer's obligation to provide an accommodation: (1) the employee must be a qualified individual, and the accommodation must (2) be reasonable, and (3) not cause the employer an undue hardship.[6]

A. Qualified Individual

A qualified individual is an individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or

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[1] PGA Tour, Inc. v. Martin, 532 U.S. 661, 674–75 (2001).
[2] 42 U.S.C § 12101(b)(1).
[3] PGA Tour, 532 U.S. at 675.
[4] 42 U.S.C. §§ 12111–12117.
[5] 42 U.S.C § 12112(b)(5)(A).
[6] *Id*.

desires."[7] The ADA's definition of qualified individual states that "consideration shall be given to the employer's judgment as to what functions of a job are essential," and that written job descriptions will be considered as evidence.[8] The ADA does not otherwise define the term "essential function." However, the Equal Employment Opportunity Commission (EEOC) has provided relevant guidance.[9] While non-binding, courts consider the EEOC's guidance to be "very persuasive authority" when interpreting the ADA.[10]

The EEOC defines "essential functions" as the "fundamental job duties" of a position rather than the "marginal functions."[11] Factors to consider in determining whether a job function is essential include the employer's judgment, written job descriptions, the amount of time spent performing the function, the consequences of not requiring the employee to perform the function, the terms of a collective bargaining agreement, the experience of past employees, and the experience of employees in similar jobs. Importantly, an employer is never required to eliminate or delegate a position's essential functions.[12] As addressed in Part II, however, courts have differed significantly in their analysis of whether a function is essential and, if it is, whether an employee's proposed accommodation to perform that function is reasonable.

B. Reasonable Accommodation

As with essential functions, the ADA does not expressly define reasonable accommodations. It does, however, provide several examples, including making existing

[7] 42 U.S.C. § 12111(8).
[8] *Id.*
[9] 29 C.F.R. § 1630.2(n).
[10] Kroll v. White Lake Ambulance Auth., 691 F.3d 809, 815 (6th Cir. 2012).
[11] 29 C.F.R. § 1630.2(n).
[12] Cooper v. Dolgencorp, LLC, 93 F.4th 360, 372 (6th Cir. 2024) ("[A] reasonable accommodation does not require employers to eliminate or reallocate an essential job function.").

facilities readily accessible and usable, restructuring or reassigning jobs, modifying schedules, and adjusting examinations, training materials, or policies.[13] Unfortunately, the ADA's regulations do not offer much additional guidance for determining reasonableness.

Defining the term "accommodation" as various "modifications or adjustments" that make existing infrastructure and policies more accessible,[14] the regulations then list additional examples of what reasonable accommodations could be, without attempting to define the full term.[15] Crucially, however, the regulations require employers and employees to engage in an "informal, interactive process" to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[16]

Courts have held that an employer's duty to engage in the interactive process is triggered when the employee notifies the employer of their request for a reasonable accommodation.[17] This duty is also supported by the EEOC's interpretive guidelines, which state that an employer "*must* make a reasonable effort to determine the appropriate accommodation" once a qualified individual makes a request.[18] Notably, this guidance revised the ADA's *may* to *must*, which is consistent with how courts interpret the provision.

Once the interactive process has begun, both the employer and employee have a responsibility to act in good faith.[19] Obstructing or delaying the process and failing to initiate or

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[13] 42 U.S.C. 12111((9).
[14] 29 C.F.R. § 1630.2(o)(1).
[15] 29 C.F.R. § 1630.2(o)(2).
[16] 29 C.F.R. § 1630.2(o)(3).
[17] Snapp v. United Transportation Union, 889 F.3d 1088, 1095 (9th Cir. 2018); *see also* Beck v. Univ. of Wisconsin Bd. of Regents, 75 F.3d 1130, 1134 (7th Cir. 1996) (describing the duty as "dictated by common sense lest a disabled employee keep his disability a secret and sue later for failure to accommodate").
[18] 29 C.F.R. Pt. 1630, App. § 1630.9 (emphasis added).
[19] *Beck*, 75 F.3d at 1135.

respond to communications can constitute acts of bad faith, and courts should "attempt to isolate the cause of the breakdown and then assign responsibility."[20] Some courts have held that an employer's failure to engage in the interactive process is a violation of the ADA.[21] Other courts have held that such an employer will only face liability "*if a reasonable accommodation would have been possible*," therefore allowing "no stand-alone claim for failing to engage in the interactive process."[22]

While the interactive process is intended to encourage the production of a reasonable accommodation, the requirements with respect to the process shed little light on what such an accommodation might be. Ultimately, the "reasonableness of a requested accommodation is a question of fact" to be determined on a case-by-case basis.[23] Courts, however, construe the word "reasonable" as qualifying "accommodation," meaning that the cost of the accommodation must be reasonably proportionate to the benefit.[24] Courts also apply this concept of proportionality to considerations of the employer's undue hardship.

C. Undue Hardship

The ADA defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of" several listed factors.[25] These factors include, among

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[20] *Id*.
[21] Cutrera v. Bd. of Sup'rs of La. State Univ., 429 F.3d 108, 112 (5th Cir. 2005).
[22] *Snapp*, 889 F.3d at 1095 (emphasis in the original).
[23] Haschmann v. Time Warner Ent. Co., 151 F.3d 591, 601 (7th Cir. 1998).
[24] Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995) ("It would not follow that the costs and benefits of altering a workplace to enable a disabled person to work would always have to be quantified, or even that an accommodation would have to be deemed unreasonable if the cost exceeded the benefit however slightly. But, at the very least, the cost could not be disproportionate to the benefit.").
[25] 42 U.S.C. § 12111(10)(A).

others, the nature and cost of the accommodation, the financial resources of the facility involved in providing the accommodation, the employer's overall financial resources, and the type and function of the employer's operation and workforce.[26]

Undue hardship is an affirmative defense for which the employer bears the burden of production.[27] Once an employee has made a prima facie showing that they are a qualified individual and that their proposed accommodation is reasonable, the employer "has an opportunity to prove that . . . the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health."[28] Accordingly, as is the case with "reasonable," "undue" is a "relational term; as such, it looks not merely to the costs that the employer is asked to assume, but also the benefits to others that will result."[29] Notably, considerations of undue hardship are not limited to financial consequences; the employer's burden can also be met by demonstrating operational or safety concerns.[30]

However, in light of the Supreme Court's 2023 decision in *Groff v. DeJoy*, an employer relying on financial considerations must provide evidence that the accommodation would result in a "substantial burden" within the overall context of the employer's business.[31] In *Groff*, the Supreme Court disposed of the previously embraced "more than a *de minimis* cost" test, noting that "a hardship is more than a burden," and adding "undue" means that the burden must be

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[26] 42 U.S.C. § 12111(10)(B).
[27] Smith v. Midland Brake, Inc., a Div. of Echlin, Inc., 180 F.3d 1154, 1179 (10th Cir. 1999).
[28] *Vande Zande*, 44 F.3d at 543.
[29] Stone v. City of Mount Vernon, 118 F.3d 92, 98 (2d Cir. 1997); *Vande Zande*, 44 F.3d at 543 ("We must ask, 'undue' in relation to what? Presumably (given the statutory definition and the legislative history) in relation to the benefits of the accommodation to the disabled worker as well as to the employer's resources.").
[30] 42 U.S.C. § 12111(10)(B).
[31] 600 U.S. 447, 468 (2023).

"excessive" or "unjustifiable."[32] While the Supreme Court clarified the employer's required showing , it also noted that the analysis remains a "fact-specific inquiry" to be decided on a case-by-case basis.[33]

Consequently, the ADA requires employers to provide reasonable accommodations to employees who, with or without a reasonable accommodation, can perform the essential functions of their positions, unless doing so would cause the employer an undue hardship. The employee bears the burden of proposing an accommodation and demonstrating that it is facially reasonable, thereby triggering the employer's obligation to engage in an interactive process with the employee to assess the proposed accommodation and potential alternatives. However, the employer is not required to provide even a reasonable accommodation if it can prove that doing so would constitute an undue hardship. Ultimately, determining a position's essential functions, the reasonableness of a proposed accommodation, and whether the accommodation presents an undue hardship are fact-specific inquiries. As illustrated in Part II, courts have not uniformly undertaken these inquiries.

II. THE CIRCUIT SPLIT: RESTRICTIVE PRESUMPTION V. EXPANSIVE ANALYSIS

In the early years following the ADA's enactment of the ADA, a split emerged between the federal circuits regarding the proper approach to determining whether remote work could be a reasonable accommodation.[34] Specifically, courts diverged when it came to analyzing a

[32] *Id*. at 468–69.
[33] *Id*. at 468.
[34] *See Vande Zande*, 44 F.3d at 544–45 (7th Cir. 1995) (describing the "majority view" in contrast to the D.C. Circuit's approach); Arlene S. Kanter, *Remote Work and the Future of Disability Accommodations,* 107 CORNELL LAW REVIEW 1927, 1950 (2022) (describing the split as being between courts that rule for the employer or employee rather than a difference in analysis).

position's essential functions. The majority of circuits held that physical attendance was presumed to be an essential function and gave significant deference to the employer, either explicitly or effectively.[35] In contrast, a minority of circuits favored an individualized, fact-intensive approach which afforded less weight to the employer's assertions.[36] This Part will analyze each approach in turn.

A. Restrictive (Majority) Approach: Presumption of Physical Attendance

The restrictive approach to remote work as a reasonable accommodation emerged during a time when remote work was seen as an exception to the norm rather than as a standard part of American work culture.[37] In the 1990s, working from home "meant phone calls and floppy disks," a far cry from the suite of "remote-collaboration" tools that would eventually make remote work as accessible and convenient as it is today.[38] Accordingly, understanding the technological context of the time is necessary to appreciate the assumptions that led to the majority's restrictive approach to remote work cases.

This approach is best exemplified by *Vande Zande v. State of Wisconsin Department of Administration*.[39] In *Vande Zande*, the employee was a program assistant who used a wheelchair

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[35] *See* E.E.O.C. v. Ford Motor Co., 782 F.3d 753, 762–63 (6th Cir. 2015) (stating that "[r]egular, *in-person* attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones") (emphasis added).
[36] *See* Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1135 (9th Cir. 2001) (discussing the need to analyze whether the employee could perform the essential functions of her job remotely even though the employer stated that "regular and predictable attendance is an essential function of the position").
[37] *See* Jose Maria Barrero, Nicholas Bloom & Steven J. Davis, *The Evolution of Work from Home* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31686, 2023) (stating that 28 percent of paid workdays among Americans were worked at home in 2023, which is 10 times the estimated rate in the 1990s).
[38] *Id.*
[39] 44 F.3d 538 (7th Cir. 1995).

due to her paralysis, resulting in recurring pressure ulcers.[40] The case centered around the employee's request to work from home during an eight-week period of pressure ulcer treatment, which the employer granted while noting that there was likely not enough work available to be completed remotely for her to work full-time.[41] Ultimately, the employee worked all but 16.5 hours, for which she was required to take sick leave.[42] As a result, the employee filed suit against the employer, arguing that the ADA required the employer to excuse the 16.5 hours as a reasonable accommodation.[43]

In affirming the district court's granting of summary judgment for the employer, the Seventh Circuit stated that no jury could "be permitted to stretch the concept of 'reasonable accommodation' so far."[44] The court then described how most jobs "cannot be performed at home without a substantial reduction in the quality of the employee's performance," and held that, generally, "an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home."[45] The court further emphasized this position by stating that "it would take a *very extraordinary case* for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home."[46]

Thus, while the court did not explicitly declare physical attendance to be an essential function of most jobs, it effectively established a legal presumption to that effect by framing

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[40] *Id*. at 543.
[41] *Id*. at 544.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id*.
[46] *Id.* at 545 (emphasis added).

remote work as an exceptional arrangement requiring a "very extraordinary" justification.[47] This presumption placed a heightened burden on employees to prove that their circumstances were sufficiently unusual to warrant a significant deviation from traditional workplace expectations. In practice, this meant that employees requesting the ability to work remotely faced an uphill battle rather than a level playing field in presenting the particular facts of their unique situations.

The court also addressed a concern that would later become increasingly significant in the post-pandemic era: whether an employer who voluntarily offers remote work inadvertently concedes that doing so can be required as a reasonable accommodation in the future.[48] The court declined to impose this consequence, stating that if an employer "bends over backward" to accommodate employees by allowing them to work remotely when the employer was not required to, then the employer should not be "punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation."[49] As discussed in Part V, courts appear to be applying similar reasoning today in addressing the long-term consequences of employers' actions during the COVID-19 pandemic.

Significantly, the Seventh Circuit acknowledged that its observation that remote work generally reduces the quality of an employee's work would "no doubt change as communications technology advances."[50] Indeed, the state of those technological advancements and the extent to which they affect the analysis of remote work as a reasonable accommodation would become a central and evolving issue in many cases over the following decades.

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[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 544.

One such case is *EEOC v. Ford Motor Co.*, in which an employee "with irritable bowel syndrome takes center stage."[51] In *Ford*, the employee was a resale buyer with an initially strong job performance.[52] However, her performance sharply declined over a period of years, due in part to her "sporadic and unpredictable" schedule and "chronic attendance issues."[53] While the opinion includes a lengthy discussion of the employee's attendance issues, it spends little time addressing the link between those issues and the employee's condition, which caused severe and unpredictable flare-ups.[54] Nevertheless, the employee requested permission to work remotely up to four days per week on a flexible schedule, arguing that she already performed roughly 95% of her job on the phone or through email.[55]

The employer denied this request, and the EEOC filed suit on the employee's behalf for failing to reasonably accommodate the employee's disability.[56] The district court granted the employer's motion for summary judgment, finding that "'working from home up to four days per week is not [a] reasonable' accommodation under the ADA."[57] After a divided Sixth Circuit panel reversed, the court ultimately granted an en banc review.[58]

Sitting en banc, the Sixth Circuit ruled in favor of the employer, holding that "regular and predictable on-site job attendance [was] an essential function (and a prerequisite to perform other

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[51] 782 F.3d 753, 758 (6th Cir. 2015).
[52] *Id.* at 758.
[53] *Id.*
[54] *See id.* (stating that the employee's condition "of course contributed to the situation," but also relying heavily on the employee's attendance issues in concluding that she was not a qualified individual); *id.* (describing the nature of her condition as "sometimes so bad that 'it' could 'start[] pouring out of [her]' at work" and that she "occasionally couldn't even make the one-hour drive to work without having an accident").
[55] *Id.* at 772 (Moore, J., dissenting).
[56] *Id.* at 760.
[57] *Id.*
[58] *Id.*

essential functions) of [the employee]'s resale-buyer job."[59] The court noted the "general rule" that regular, on-site attendance is essential to most jobs, stating that "all seven" of the EEOC's essential-function inquiry factors typically point towards the same conclusion.[60] Furthermore, the court stated that this rule was supported by "common sense," and that, at least for interactive jobs, most non-lawyers would regard on-site attendance as "'the basic, most fundamental' 'activity' of their job."[61]

However, as the dissent pointed out, "the majority's insistence that the 'general rule' is that physical attendance at the worksite is an essential function of most jobs does not advance the analysis in this case."[62] Instead, having effectively established this presumption, the court readily concluded that the employee could not perform the essential functions of her position from home by relying on the employer's judgment and without conducting a thorough analysis of the facts.[63] The court justified its conclusion by citing the employee's absences—without discussing the role of her condition in causing the absences—as well as her testimony, in which she conceded that four of her position's essential functions could not be performed from home.[64] Yet the majority mischaracterized the employee's statement by omitting her arguments that those functions did

[59] *Id.* at 761.
[60] *Id.*
[61] *Id.* at 762.
[62] *Id*. at 775 (Moore, J., dissenting).
[63] *See id.* at 763–64 (giving deference to the employer while stating that "[n]either the [ADA] nor regulations nor EEOC guidance instructs courts to credit the employee's opinion about what functions are essential").
[64] *Id.* (stating that the employee's experience and admissions "[s]eal[ed] the deal").

not arise every day and could be postponed until she was next in the office, which should be at least once per week.[65]

Notably, the majority did review the record in assessing the EEOC's argument that technological advancements have enabled employees to perform at least some essential functions at home.[66] The court stated that "technology changing *in the abstract* is not technology changing *on this record*," and found no evidence in the record to suggest that a "great technological shift has made this highly interactive job one that can be effectively performed at home."[67] Furthermore, the court dismissed the employee's testimony regarding her use of email and the computer by stating that these technologies "were equally available when courts around the country uniformly held that on-site attendance is essential for interactive jobs."[68] However, this dismissal omits any discussion of the extent to which the employee's job was performed through this technology, and whether positions once supplemented by these technologies may now rely on them almost exclusively.

Thus, *Vande Zande* and *Ford* illustrate the core features of the restrictive approach: a strong presumption in favor of physical attendance, substantial deference to employers' judgments regarding essential functions, skepticism towards the effectiveness of remote work, and a tendency to omit a thorough factual analysis. While this approach provided predictability for employers, it also undermined the ADA's individualized focus by relying on general assumptions rather than unique circumstances.

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[65] *See id*. at 772 (Moore, J., dissenting) (stating that "the majority is actively looking for ways to read omissions—not even actual statements—in her testimony in the light *least* favorable to her") (emphasis in original).
[66] *Id.* at 765.
[67] *Id.* (emphasis in original).
[68] *Id.*

B. Expansive (Minority) Approach: Penetrating Factual Analysis

In contrast to the restrictive approach adopted by the majority of federal circuits, the minority approach emphasized the ADA's requirement for individualized assessment and limited the persuasiveness of general assumptions about physical attendance. Courts following this approach, primarily in the Second, Ninth, and D.C. Circuits, recognized that workplace arrangements varied widely across industries and positions and insisted that determinations of essential functions be reviewed on a case-by-case basis.[69] Under this expansive approach, courts conduct a "penetrating factual analysis" of the employee's job duties, the employer's policies and practices, and the feasibility of remote work as a reasonable accommodation in the specific context at issue.

One of the clearest examples of the expansive approach is *McMillan v. City of New York*, which "highlights the importance of conducting a fact-specific analysis in ADA claims."[70] The employee in *McMillan* took medication for schizophrenia which made him drowsy and sluggish in the morning, causing frequent tardiness.[71] While his tardiness was "explicitly or tacitly approved" for at least ten years, the employer eventually stopped approving the late arrivals.[72] The employee requested a later and flexible start time as a reasonable accommodation which the employer denied, arguing that consistent timely arrival was an essential function of the employee's position.[73]

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[69] Kanter, *supra* note 34, at 1958–59.
[70] 711 F.3d 120, 123 (2d Cir. 2013).
[71] *Id.* ("it is undisputed that [the employee's] inability to arrive at work by a specific time is the result of the treatment for his disability").
[72] *Id.* at 123–24.
[73] *Id.* at 124–25.

The district court agreed and granted summary judgment in favor of the employer, noting that "physical presence is 'an essential requirement of *virtually all* employment,'" and that the court was "required to give considerable deference to the employer's judgment and its general policies."[74] On appeal, however, the Second Circuit reversed, stating that the district court "did not conduct a sufficiently detailed analysis of the facts."[75]

The Second Circuit emphasized that while the district court's general conclusions about physical presence "would be unremarkable in most situations," the facts of the case suggest that arriving on time or at any consistent time "may not have been an *essential* requirement of [the employee's] particular job."[76] These facts include the employer's explicit and implicit approval of the employee's past tardiness and the employer's policy of allowing employees to arrive and leave within one-hour windows, implying that "punctuality and presence at precise times may not be essential."[77] Accordingly, the court noted that while physical presence and timely arrival are "normally an essential function, a court must still conduct a fact-specific inquiry."[78]

Although *McMillan* involved a request for a flexible schedule rather than remote work, the court's reasoning exemplifies the minority's individualized, fact-based approach. This approach rejects the notion that attendance requirements are presumptively essential and instead requires courts to evaluate the actual necessity of physical presence in light of the employee's responsibilities and the employer's practices. The Second Circuit also showed that the facts of a

[74] *Id.* at 125, 126 (emphasis added).
[75] *Id.* at 123.
[76] *Id.* at 126 (emphasis in original).
[77] *Id.*
[78] *Id.*

given case may be strong enough to overcome both the general presumption in favor of physical attendance as well as an employer's assertions that physical attendance is an essential function.

The Ninth Circuit's decision in *Humphrey v. Memorial Hospitals Association* provides a direct application of this expansive approach to a remote work case.[79] The employee in *Humphrey* suffered from obsessive-compulsive disorder and attention deficit disorder, causing her to engage in "a series of obsessive rituals that hindered her ability to arrive at work on time."[80] The employee began working under a flexible start time, but after continuing to miss work, the employee requested permission to work from home.[81] However, while other employees in the same position were allowed to do work remotely, the employer denied the employee's request due to her "disciplinary warnings for tardiness and absenteeism."[82] The employee continued to struggle with her attendance and was ultimately terminated, leading her to sue her employer for violating the ADA by failing to reasonably accommodate her disability.[83]

In reversing the district court's grant of summary judgment in favor of the employer, the Ninth Circuit stated that there was "at least a triable issue of fact as to whether [the employee] would have been able to perform the essential duties of her job with the accommodation of a work-at-home position."[84] The court noted that while "regular and predictable *performance* of the job" is undisputedly an essential function of the job, the record demonstrates that "*physical attendance* at the [employer's] offices is not."[85] Specifically, the court relied heavily on the fact

[79] 239 F.3d 1128 (9th Cir. 2001).
[80] *Id.* at 1130.
[81] *Id*. at 1131.
[82] *Id.* at 1132.
[83] *Id.* at 1133.
[84] *Id.* at 1136.
[85] *Id.* at 1136–37.

that other employees in identical positions were permitted to work from home, and rejected the notion that the employee's disability-related performance issues could be grounds for denying her a reasonable accommodation.[86]

This reasoning is in sharp contrast to that of *Ford*, in which the Sixth Circuit reasoned that the employee's repeated attendance issues—which the court acknowledged stemmed from the employee's disability—were sufficient justification for denying her permission to work remotely.[87] In contrast, the Second Circuit stated that it "would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated."[88] Consequently, the court effectively reinforced the importance of a penetrating factual analysis by demonstrating that a poor performance record is not self-determining—an analysis of the underlying causes of that performance is still required.

Accordingly, taken together, *McMillan* and *Humphrey* illustrate the individualized nature of the expansive minority approach. While this approach initially represented the view of only a few federal circuits, it foreshadowed the gradual shift toward fact-intensive analysis over the coming years which would eventually gain broad acceptance.

III. THE POST-PANDEMIC CONVERGENCE: RECONCILING THE CIRCUIT SPLIT

[86] *Id.* at 1137.
[87] *Ford Motor Co.*, 782 F.3d at 758.
[88] *McMillan*, 711 F.3d at 1137.

The World Health Organization declared the COVID-19 pandemic over on May 5, 2023.[89] Catalyzed by the pandemic and the resulting need for increased social distancing, "remote work increased dramatically across all major industries" during the pandemic.[90] Yet when the pandemic ended, this increase did not regress.[91] This "lasting shift" to increased remote work can be attributed in part to improvements in supporting products and technology, investments at home and within organizations, lessons learned from the pandemic, and "much greater social acceptance" of remote work.[92] Consequently, remote work is now "more accessible than ever."[93]

Accordingly, the general assumptions underlying the majority's approach, as outlined in Part II, are no longer as applicable as they once were.[94] For decades, courts grappled with remote work cases against the realities of the time, which largely consisted of significant barriers to remote work's efficacy and acceptability. The COVID-19 pandemic disrupted those assumptions and realities, and as a result, courts that previously adhered to the majority's restrictive approach appear to have emerged from the pandemic era with the recognition that an individualized, fact-intensive analysis is now necessary.[95] While the outcomes of remote-work cases are fact-

[89] ASM. Roknuzzaman et al., *The WHO has Declared COVID-19 is No Longer a Pandemic-Level Threat: A Perspective Evaluating Potential Public Health Impacts,* 17 CLIN. PATHOLOGY 1 (2024).
[90] Sabrina Wulff Pabilonia & Jill Janocha Redmond, *The Rise in Remote Work Since the Pandemic and Its Impact on Productivity*, 13 BEYOND THE NUMBERS, no. 8 (Oct. 2024).
[91] *See* Danyun Zhu et al., *Remote Work and Real Estate Prices*, 136 LABOUR ECON. 1, 5 (2025) (stating job postings for remote positions "more than quadrupled" from 2020 to 2023, and "broadly stabilized" at the 2023 level).
[92] Barrero, *supra* note 37, at 3.
[93] *The Rise of Remote Work: Challenges and Opportunities for Businesses*, PENN LPS ONLINE (July 11, 2023).
[94] *Supra* Part II.
[95] Kinney v. St. Mary's Health, Inc., 76 F.4th 635, 644 (7th Cir. 2023).

dependent and thus a verdict for the employee is by no means guaranteed, the reasoning employed by courts has become more consistent across the federal circuits.

A prime example of this shift to the minority's expansive approach is *Kinney v. St. Mary's Health*, a case decided by the Seventh Circuit in 2023, almost three decades after deciding *Vande Zande*.[96] In *Kinney*, the employee, an executive director of imaging services at a hospital, suffered from attention-deficit/hyperactivity disorder, anxiety, and post-traumatic stress disorder.[97] "Like many other employees across the world," the employee "began working remotely in March 2020 because of the COVID-19 pandemic."[98] However, when her coworkers returned to work after the pandemic ended, the employee requested permission to continue working solely from home due to her anxiety.[99] The employer denied her request, leading to the employee's resignation and suit against the employer for failure to reasonably accommodate her disability under the ADA.[100]

In affirming the district court's grant of summary judgment in favor of the employer, the Seventh Circuit held that "[n]o reasonable juror could find that [the employee] could perform certain essential functions of her job without being present" on-site.[101] However, *Kinney* is significant for its reasoning, not its result.

The Seventh Circuit acknowledged that it had "focused less on particular facts" in older cases, relying instead "more generally on why attending work in person is a 'basic

[96] *Id.*
[97] *Id.* at 640.
[98] *Id.* at 639.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 640.

requirement.'"[102] The court declined to follow this approach in *Kinney*, noting that doing so could "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."[103] Instead, the court suggested framing the issue as whether the 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."[104] Moreover, the court emphasized the individualized nature of the appropriate approach, stating that the analysis "needs to focus on the specific job and its essential functions and specific possible accommodations."[105]

Consistent with this newly adopted approach, the Seventh Circuit conducted a thorough analysis of the employee's essential functions and the possibility of performing them remotely.[106] While the court ultimately concluded that the employee's position required her to be physically present, it reached that conclusion only after considering evidence such as the employee's and other employees' testimonies, the employee's job description, and other facts in the record.[107] Markedly, the court appeared to give no significant weight to the employer's assertions of what constitutes an essential function, noting that "technological advances have made working from home more feasible, so that employers *cannot rely on an automatic presumption* [that] working from home is unreasonable."[108] Therefore, the Seventh Circuit's

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[102] *Id.* at 644 (noting that the Seventh Circuit had stated that, "as a general matter, working at home is not a reasonable accommodation" as recently as 2008).
[103] *Id.* at 633.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 644–46.
[107] *Id.*
[108] *See id.* at 644 (emphasis added) (noting also that the court had recognized these technological advances "a few months before" the pandemic, but that "[t]he many lessons learned about working from home effectively during the pandemic have reinforced that point").

reasoning in *Kinney* stands in sharp contrast to its reasoning in *Vande Zande*, representing the court's transition to the minority's expansive approach.

A similar transition is illustrated by *Kellar v. Yunion*, decided by the Sixth Circuit in 2025, precisely ten years after it decided *Ford*.[109] In *Kellar*, the employee was a case manager suffering from allergic rhinitis, vocal cord dysfunction, and possible allergic asthma.[110] When a pipe burst at the employer's building, the employer granted the employee's request to work remotely on a temporary basis while the building was tested for health hazards.[111] However, the employee was shifted from full-time to part-time work because "around 50% of her responsibilities were case file management," which had to be conducted on-site due to an ongoing audit requiring access to physical case files.[112] After ultimately parting with the employer for other reasons, the employee eventually filed suit for failure to reasonably accommodate her disability under the ADA.[113]

The Sixth Circuit affirmed the district court's grant of summary judgment in favor of the employer upon determining that the employee could not perform the essential functions of her job while working from home.[114] The court noted, however, that determining whether a job function is essential is "a question of fact that is typically not suitable for resolution on a motion for summary judgment."[115] While ultimately concluding that summary judgment was appropriate in *Kellar*, the Sixth Circuit did so only after isolating the employee's essential functions and

[109] 157 F.4th 855 (6th Cir. 2025).
[110] *Id.* at 865.
[111] *Id.*
[112] *Id.* at 866.
[113] *Id.* at 868.
[114] *Id.* at 877.
[115] *Id.* (emphasis omitted).

analyzing the record to determine whether performing those functions remotely was feasible, as the Seventh Circuit reasoned in *Kinney*.[116]

The Sixth Circuit did not outright acknowledge its embrace of an expansive approach or explicitly address its contrary precedent, but its reasoning in *Kellar* sufficiently illustrates this change. For instance, in *Ford*, the court rejected the employee's comparison to other employees who worked remotely because those employees averaged only one remote day per week, and thus the comparison did not support a request for working up to four days per week.[117] Yet in *Kellar*, the court found evidence that other employees "periodically work from home for short periods of time" to be sufficient to show that "an extended period of remote work amounts to a reasonable accommodation."[118] Furthermore, the court in *Kellar* spilled no ink on the general benefits of physical presence or the importance of deferring to the employer; instead, the court isolated the essential function allegedly requiring the employee's physical presence and conducted an independent analysis of whether that function could be performed remotely.[119]

Again, as in *Kinney*, *Kellar*'s significance lies in the court's shift in reasoning, regardless of whether the verdict favored the employer or the employee. While *Kinney* and *Kellar* are clear examples of this shift, they are not isolated examples.

Since the World Health Organization declared the COVID-19 pandemic over on May 5, 2023, federal courts of appeals have decided eleven cases across eight circuits regarding remote

[116] *Id.* at 888–89 (emphasizing the importance of maintaining the physical files due to the audit).
[117] *Ford Motor Co.*, 782 F.3d at 759.
[118] *Kellar*, 157 F.4th at 877.
[119] *Id.* at 877–89.

work as a reasonable accommodation under the ADA.[120] In those cases, ten decisions from seven circuits engaged in a penetrating factual analysis of the positions' essential functions, while only the Tenth Circuit relied primarily on general assumptions and employer deference.[121] Nevertheless, almost every case was decided in favor of the employer, with the sole exception being *Ali v. Regan*, in which the employee was actually challenging the employer's suggestion of remote work as a reasonable accommodation.[122] Consequently, all eleven cases rejected remote work as a reasonable accommodation, despite ten engaging in a detailed factual analysis.

Notably, these cases reject the notion that courts might presume that remote work would be a reasonable accommodation if it was permitted during the pandemic. Similar to the Seventh Circuit in *Vande Zande* and the Sixth Circuit in *Ford*, courts in the post-pandemic era have been

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[120] *See infra*, note 121. Determined as of May 1, 2026. There are other cases involving remote work under the ADA, but they were either decided on other grounds or otherwise do not materially address the issue.

[121] *See* Stanley v. Phelon, No. 23-731-CV, 2024 WL 1453872, at *5 (2d Cir. Apr. 4, 2024) (employee "[did] not describe the particulars of his responsibilities [] such that we could draw the inference that he could perform his job at home"); Galette v. Ave. 365 Lending Servs. LLC, No. 24-1221, 2025 WL 429973, at *3 (3d Cir. Feb. 7, 2025) (printing checks was an essential function which could not be performed remotely for security reasons); Hall Haggins v. Wilson Air Ctr., LLC, 163 F.4th 872, 878–88 (4th Cir. 2026) (accounting position required physical presence to maintain files, prepare checks, and process physical invoices); Ray v. Columbia Brazoria Indep. Sch. Dist., No. 24-20227, 2025 WL 1219191, at *3 (5th Cir. Apr. 28, 2025) (employee offered no evidence contradicting that physical presence was not an essential function of being a teacher); Dundee v. Geauga Med. Ctr., No. 23-3906, 2024 WL 4765162, at *4 (6th Cir. May 29, 2024) (discussing various requirements for pharmacists to be physically present, such as statutory staffing requirements and dispensing medications); McKinney v. Macomb Cnty., Michigan, No. 23-1625, 2024 WL 2312574, at *5–7 (6th Cir. May 22, 2024) (employee required constant supervision and presented no evidence that working from home would solve performance issues); *Kellar*, 157 F.4th at 877–79; *Kinney*, 76 F.4th at 644–46; Ali v. Regan, 111 F.4th 1264, 1278 (D.C. Cir. 2024) (considering employee's ability to print documents and effects on promotional or collaboration opportunities); *contra* Freeman v. City of Cheyenne, No. 23-8022, 2024 WL 464069, at *7 (10th Cir. Feb. 7, 2024) (stating that "it is undisputed that an essential function of the HR Director position was physical attendance for a minimum of forty hours per week" without further analysis).

[122] *Ali*, 111 F.4th at 1267.

reluctant to allow employers' prior allowance of remote work to create a presumption that such arrangements are feasible going forward.[123] Indeed, the EEOC's guidance endorses this position, stating that the fact that an employer "temporarily excused performance of one or more essential functions" or otherwise permitted remote work during the pandemic "does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship."[124]

Thus, the emerging consensus in post-pandemic case law is not that remote work has become presumptively reasonable, but rather that most courts now begin their analysis without a presumption to the contrary. In other words, as the Seventh Circuit noted in *Kinney*, the appropriate question has shifted from whether physical presence itself is an essential function to whether the essential functions could not be effectively performed remotely.[125] Yet, as the results of the post-pandemic case law illustrate, this shift does not guarantee—and may not even significantly improve the likelihood of—an employee's victory in court. On the other hand, while the verdicts have largely been in the employers' favor, employers must be aware of their heightened requirements now that they can no longer rely on general presumptions. Accordingly, understanding the implications of the newly embraced expansive approach and the increased importance it places on essential functions is crucial for both employees and employers.

IV. THE INCREASED IMPORTANCE OF ESSENTIAL FUNCTIONS IN REMOTE-WORK CASES

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[123] *See Vande Zande*, 44 F.3d at 545; *Ford Motor Co.*, 782 F.3d at 765; *Ray*, 2025 WL 1219191 at *3 (stating that the employer's "prior allowance of telework does not create a genuine dispute of material fact as to whether in-person instruction was an essential function of [the employee]'s position as a teacher").

[124] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (May 15, 2023).

[125] *Kinney*, 76 F.4th at 633.

Due to courts' embrace of an expansive approach in remote work cases and their increasing recognition that remote work is technologically feasible, operationally efficient, and socially accepted, arguments centered on reasonableness are less persuasive than they once were. Similarly, these technological and sociological changes, as well as the substantial burden requirement set forth in *Groff,* have eroded the potency and applicability of the undue hardship affirmative defense.[126] As a result, remote work cases increasingly turn on how the essential functions of a position are defined, framed, and supported by evidence.[127]

Going forward, employers and employees considering remote work as a reasonable accommodation under the ADA should first isolate and define the essential functions of the employee's position. They should then carefully consider whether each essential function can be performed effectively from a remote location, regardless of whether the function appears, on its face, to require the employee's physical presence. For instance, even if a job description lists "in-person training" as an essential function, the parties should analyze whether the "training" can be accomplished remotely without sacrificing quality or efficiency.

Next, if remote performance of all essential functions is feasible, the parties should determine whether the consequences of remote work would be reasonable in proportion to the benefit, whether the remote work would create a substantial burden for the employer sufficient to constitute an undue hardship, and whether other accommodations are available and more appropriate. But if any essential function cannot be performed remotely, the employee should abandon any hope of overcoming this hurdle in court. While employees can now expect a penetrating factual analysis of their unique situation, they cannot expect a favorable verdict

[126] *Groff*, 600 U.S. at 468.
[127] *Supra*, note 121.

based solely on general technological advancements, the widespread acceptance of remote work, or even their prior experience working remotely. Rather, the pertinent inquiry remains whether the employee can demonstrate that they can perform all essential functions of their position remotely. In the post-pandemic era, facts—not presumptions, nor trends—will carry the day.