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COVID-19-Related Reasonable Accommodations Claims

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I. Introduction

The coronavirus has transformed the way millions of Americans live and work. But while no one escaped the pandemic's impact, those with disabilities disproportionately bore the worst of its effects. In the spring of 2020, nearly one million workers with disabilities lost their jobs, "representing a 20-percent decline compared with the 14-percent decline experienced by workers without disabilities."[1]

* The assistance of Michael Schneekloth, a student at Harvard Law School, is gratefully acknowledged.

[1] Gina Livermore & Jody Schimmel Hyde, *Workers with Disabilities Face Unique Challenges in Weathering the COVID-19 Pandemic*, MATHEMATICA (May 28, 2020), https://www.mathematica.org/blogs/workers-with-disabilities-face-unique-challenges-in-weathering-the-covid-19-pandemic.

This paper addresses several ways in which COVID-19 has been relevant to reasonable accommodation claims.

II. COVID-19 as a Disability

As of March 2020, it was unclear whether merely contracting COVID-19 would qualify as a disability under the ADA.[2] One district court dismissed an ADA claim where the plaintiff alleged he was terminated based on the perception he may have been exposed to COVID-19.[3] The court reasoned that whether or not contracting COVID-19 may qualify as a disability, possible exposure is not "a physical or mental impairment that substantially limits one or more major life activities."[4]

On the other hand, in *Velez v. Girraphic LLC*, the court denied defendant's motion to dismiss and, in the alternative, for summary judgement, where a former employee alleged that he was terminated after he missed several days of work due to a respiratory infection, which may have been caused by COVID-19, and sued under the New York City Human Rights Law ("NYCHRL").[5] Velez had sought time off as reasonable accommodation, along with the ability to work from home one day. His requests were denied, allegedly because his employer was "angry at [him] for being ill and for being away from the office due to illness, as well as for Plaintiff's having tried to inform others in the company of the seriousness of C[OVID]-19 and the need for the company to take action."[6]

Girraphic raised a number of defenses that were rejected by the court. Girraphic contended that COVID-19 or suspected COVID-19 should not be considered a disability for "public policy" reasons. Unpersuaded, the court wrote, "Girraphic utterly fails to ground this argument in the text of the NYCHRL, which provides an expansive definition of 'disability' to include a 'physical . . . impairment,' defined as '[a]n

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[2] *Transcript of March 27, 2020 Outreach Webinar*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar (last accessed July 22, 2021).

[3] *See* Parker v. Cenlar FSB, No. 20-02175, 2021 WL 22828 (E.D. Pa. Jan. 04, 2021).

[4] *Id.* at *6 (citing 42 U.S.C. § 12102(2)(A)).

[5] Velez v. Girraphic LLC, No. 20 CIV. 5644 (JPC), 2021 WL 1873233 (S.D.N.Y. May 10, 2021).

[6] *Id.* at *6.

impairment of any system of the body.'"[7] Girraphic also contended that Velez's accommodation claims "must fail because 'COVID-19 was not yet a concern in New York City' and the Governor of New York had not yet declared a state of emergency."[8] The court wrote, "[t]his argument too is unavailing. Velez contends that he had a respiratory disease—which he admits might not have been COVID-19—and that he was terminated because of it. The prevalence of COVID-19 and the timing of the state of emergency are, frankly, irrelevant."[9]

Whether or not COVID-19 infection itself qualifies as a disability, some parties have argued that heightened risk of death or serious illness from the coronavirus due to an underlying condition qualifies as a disability under state employment laws. This possibility was considered in *Madrigal v. Performance Transp., LLC*, brought pursuant to California's Fair Employment and Housing Act.[10] The defendant argued against this reading of state employment law, citing administrative guidance that reads, "if the underlying medical condition [putting the employee at increased risk for severe illness from COVID-19] does not rise to the level of a disability, employers are not required to reasonably accommodate the employee."[11] Ultimately, the court did not decide the issue, finding that in any case the plaintiff did "allege an underlying medical condition (i.e., diabetes) that is itself a qualifying disability."[12]

III. Remote Work as a Reasonable Accommodation Pre- and Post-COVID-19

Pre-pandemic, only one-in-five workers who reported that their job responsibilities could mainly be done remotely in fact worked from home all or most

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[7] *Velez*, 2021 WL 1873233, at *6 (quoting N.Y.C. Admin. Code § 8-102).

[8] *Id.*

[9] *Id.*

[10] Madrigal v. Performance Transp., LLC, No. 21-cv-00021-VKD, 2021 U.S. Dist. LEXIS 126803 (N.D. Cal. July 7, 2021).

[11] *Id.* at *8 (alteration in original).

[12] *Id.* at *9.

of the time.[13] Last fall, 71% of those workers worked from home all or most of the time.[14] While many have since returned to the workplace, only 32% of workers are back in large office buildings, although numbers vary significantly by region.[15] Of the workers called to return to the workplace, many have sought, and continue to seek, reasonable accommodations under the ADA and state human rights laws due to the COVID-19 pandemic.

Most noteworthy, many workers have requested to work from home, an option variously referred to as teleworking, telecommunicating, or remote working. Historically, courts have been hostile to such requests. In 2003, the EEOC advised that whenever an employee's job required "face-to-face interaction and coordination of work with other employees … in-person interaction with outside colleagues, clients, or customers … [and] immediate access to documents or other information located only in the workplace," remote work would not be a reasonable accommodation.[16] In line with this guidance, courts rarely found remote work a reasonable accommodation.[17]

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[13] Kim Parker et al., *How the Coronavirus Outbreak Has – and Hasn't – Changed the Way Americans Work*, PEW RESEARCH CTR. (Dec. 9, 2020), https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work.

[14] *Id.*

[15] Eli Rosenberg, *Yes, the office is back. It just might never be the same.*, WASH POST (July 6, 2021 at 6:00 AM), https://www.washingtonpost.com/business/2021/07/06/return-to-work-offices/. Major metropolitan areas in Texas currently "lead" in the country, with roughly 49% of workers back to work in large office buildings in Dallas, Houston and Austin. San Francisco (19%) and New York (21%) currently have the lowest occupancy among surveyed cities.

[16] EEOC Guidance, EEOC-NVTA-2003-1, *Work at Home/Telework as a Reasonable Accommodation*, (Feb. 3, 2003), https://www.eeoc.gov/facts/telework.html.

[17] *See, e.g.*, EEOC v. Ford Motor Co., 782 F.3d 753 (6th Cir. 2015) (granting defendant summary judgment on ADA claim where plaintiff sought to telecommute); Credeur v. Louisiana, 860 F.3d 785, 793 (5th Cir. 2017) ("There is general consensus among courts, including ours, that regular work-site attendance is an essential function of most jobs"); Bilinsky v. Am. Airlines, Inc., 928 F.3d 565 (7th Cir. 2019) (same).

However, in the years leading up to the COVID-19 pandemic, there had been indications that judicial attitudes surrounding telework were shifting.[18]

Since the COVID-19 pandemic, courts and the EEOC have shown further receptivity to remote work accommodations, a trend likely to continue. In its Sept. 8, 2020 guidance, the EEOC suggested that "[t]he fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, 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."[19] However, in the same guidance, the EEOC stated that "the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information."[20]

Just this kind of trial period appears to have influenced the outcome of *Peeples v. Clinical Support Options, Inc.*[21] In *Peeples*, the plaintiff suffered from asthma, putting them (Peeples' preferred pronoun) at higher risk of of serious illness if they contracted COVID-19. Although they were allowed to work from home for the first four months of the pandemic, in June 2020, their employer asked them to return to the office, contending it needed managers in the building and supporting operations. Peeples requested that they be allowed to continue working from home and provided a letter

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[18] *See* Boltz v. United Process Controls, No. 1:16-CV-703, 2017 WL 2153921, at *9 (S.D. Ohio May 17, 2017) (finding evidence of prior remote work and extensive existing telework infrastructure precluded granting summary judgment for an employer on ADA failure to accommodate claim); Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595, 605 (6th Cir. 2018) (holding that a jury could have reasonably concluded that plaintiff could perform all the essential functions of her job remotely for ten weeks when she had performed her duties remotely in the past without any attendance issues or decline in work product).

[19] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last modified June 28, 2021).

[20] *Id.*

[21] Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56 (D. Mass. 2020).

from their allergist recommending telework, along with a supporting letter from Peeples' supervisor testifying that they could perform all essential job duties from home. The request, however, was denied without explanation. Peeples sued their employer and sought a preliminary injunction allowing them to telework for the duration of the COVID-19 pandemic, which was granted.

In determining whether plaintiff would suffer irreparable harm if the injunction were not issued, the court noted that pandemic conditions posed a unique risk of harm: "Plaintiff faces the loss of their employment at a time when the unemployment rate in Massachusetts was the highest in the country (an astounding 16.1%) in July. In the midst of the dire economic fallout from the pandemic, [their employer's] optimistic pronouncements about Plaintiff's employability are less than persuasive."[22]

While an employer may suggest alternative accommodations to working from home, these offers will not excuse them from seriously considering, and in some cases honoring, an employee's request to do so. The use of accrued time or personal leave of absence is not a reasonable alternative to a remote work accommodation. As the court in Peoples stated, "[i]t is difficult to see how a leave—which Plaintiff has not requested and which is generally an accommodation that should be considered when an employee needs time to recover from an impairment—would enable them to perform the essential functions of their job."[23]

Similarly, preexisting safety measures at a work site may not qualify as a reasonable alternative to a remote work accommodation. Although Peeples was provided at work with "KN95 face masks, hand sanitizer and wipes, an air purifier, and separate, private work space in . . . [an] area on the second floor which has less foot traffic than the first floor. . . A majority of these so-called accommodations are workplace safety rules rather than an individualized accommodation to address Plaintiff's disability."[24] Individual

[22] *Id.* at 65 (internal citations omitted).

[23] *Id.* at 64.

[24] *Id. But see* Chew v. Legislature of Idaho, 512 F. Supp. 3d 1124, 1128-32 (D. Idaho 2021) (denying TRO to state legislators seeking an accommodation under the ADA to remotely participate in the legislative session due to COVID-19 where legislators had not established that other protective measures, including the ability to wear masks, the availability of plexiglass, and priority in selecting seats were not reasonable).

circumstances must always be accounted for, especially when an employee has made a compelling case that other offered accommodations are insufficient.[25]

IV. Underlying Health Conditions Requiring Accommodation Due to COVID-19

Madrigal, the case discussed earlier, is instructive for another reason—it exemplifies one of many lawsuits in which plaintiffs with underlying health conditions, which did not require accommodation prior to COVID-19, argued they did require reasonable accommodation because of the pandemic. In *Madrigal*, a diabetic truck driver sought to work at his employer's warehouse to minimize contact with other persons.[26] Other arrangements that would have accommodated his asthma for the duration of the pandemic would have included instituting contactless delivery measures or assigning him long-haul routes which minimized interaction with customers.[27] After his employer allegedly refused his request, failed to engage in an interactive process, and fired plaintiff shortly thereafter, he sued for failure to accommodate and related claims under California's Fair Employment and Housing Act.[28] Plaintiff's claims have survived a motion to dismiss.[29]

Similarly, in *Bess v. D.C.*, a diabetic officer with the D.C. Department of Correctionion ("DOC") sought a reasonable accommodation to no longer be assigned to units housing inmates suspected positive for COVID-19.[30] The DOC refused her request, and Bess subsequently sued the DOC alleging, inter alia, that in refusing her

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[25] *Cf.*, Freeman v. Learning Care Grp., No. 18-CV-13720, 2020 WL 4903780, at *9 (E.D. Mich. Aug. 20, 2020), *reconsideration denied*, No. 18-CV-13720, 2020 WL 5258470 (E.D. Mich. Sept. 3, 2020) (denying summary judgment for employer where asthmatic employee request to work from home was denied, although the employer had offered plaintiff an air purifier, extra cleaning of her workspace, and a private office with new flooring; COVID-19 was not an issue).

[26] *Madgrigal*, 2021 U.S. Dist. LEXIS 126803, at *3.

[27] *Id.* at *4.

[28] *Id.* at *1, *4.

[29] *Id.*

[30] Bess v. D.C., No. CV 19-3152 (JEB), 2020 WL 4530581 (D.D.C. Aug. 6, 2020).

request the DOC violated the Rehabilitation Act.[31] Notwithstanding the DOC's argument that this claim was futile, the court determined that her allegations were sufficiently pleaded to survive a motion to dismiss and thus could be added to an amended complaint.[32]

The defendant tried an unusual defense in Heck v. Copper Cellar Corp.[33] The plaintiff alleged that her employer discriminated against her under ADA and the Tennessee Disability Act because of her asthma and increased risk of serious illness from COVID-19 and that her employer fired her rather than provide accommodation.[34] The defendant argued that the complaint failed because it did not meet the special filing requirements of the Tennessee COVID-19 recovery Act, which relates to claims for "loss, damage, injury, or death arising from COVID-19."[35] The court rejected the argument that the Tennessee Act could be read so broadly as to impose state procedural hurdles on a case properly brought in federal court.

Comparable litigation has arisen outside of the employment context. In Harry B Silver v. City of Alexandria, Silver, a 98-year-old city council member, asked to be allowed to participate in city council meetings by telephone or video conferencing.[36] His request was denied.[37] Due to his advanced age and multiple health conditions (including inoperable, aortic valve disease and systolic heart failure) he was at high risk for contracting COVID-19 and succumbing to the virus.[38] Accordingly, Silver was advised by his doctors to avoid contact with the public.[39] When his request for remote participation was refused, he sued.[40] The court issued a preliminary injunction allowing

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[31] *Id.*

[32] *Id.* at *4.

[33] Heck v. Copper Cellar Corp., No. 3:21-cv-158, 2021 WL 3409245 (E.D. Tenn. Aug. 4, 2021).

[34] *Id.* at *1.

[35] *Id.* (quoting Tenn. Code Ann. § 29-24-802(b)).

[36] Harry B Silver v. City of Alexandria, 470 F. Supp. 3d 616, 619 (W.D. La. 2020).

[37] *Id.*

[38] *Id.* at 618.

[39] *Id.*

[40] *Id.* at 619.

Silver to participate and vote in all meetings virtually.[41] The court found that Silver "easily" had a qualifying disability due to the COVID-19 pandemic and his "obvious co-morbidities." [42] The court advised that accommodations claims under such circumstances must look to the 'totality of the circumstances," social and personal, and that the "determination of a qualifying disability in [such a] case cannot be looked at in a vacuum."[43] The fact that Silver's disability was situational would not deprive him of the accommodations provided for by the ADA and the Rehabilitation Act.[44]

Similarly, in *Roque v. Seattle Hous. Auth.*, a plaintiff's preexisting medical condition required reasonable accommodations, which had not previously been sought, due to COVID-19. Tony Roque, whose C-6 paraplegia and other medical conditions required 24-hour care and assistance, requested that the defendant, who owns and operates his apartment, allow his caregiver to park in the apartment's garage.[45] According to the complaint, his care provider, Fatuma Mohamud, was the sole provider willing to assist him during the ongoing COVID-19 crisis.[46] However, Roque's request was denied on the grounds that his caregiver was neither a resident of the apartment nor herself disabled.[47] Roque sued the apartment operator, alleging discrimination due to his disability.[48] The court granted a TRO allowing Mohamud parking access, finding that Roque had submitted sufficient evidence to show he had a qualifying disability and that the defendant had "excluded his 'participation in' the use of the Raven Terrace garage because of his disability."[49] Moreover, plaintiff easily met the required burden of showing irreparable harm should the court fail to issue the TRO: "The declarations of Mr. Roque and his physician suggest a very real threat to [his] physical and emotional health if his caregivers and nurses are not able to provide

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[41] *Id.* at 625.

[42] *Id.* at 622.

[43] *Id.*

[44] *Id.*

[45] Roque v. Seattle Hous. Auth., No. 2:20-CV-00658-RAJ, 2020 WL 2114329, *1 (W.D. Wash. May 4, 2020).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at *2.

regular care. The risk of harm is immediate, continuing, and intensified by the current COVID-19 crisis."[50]

V. COVID-19 and Mental Health

While the COVID-19 pandemic has put many employees under significant stress, employees with preexisting mental health conditions, such as anxiety disorders, obsessive-compulsive disorder, or post-traumatic stress disorder, may have greater than usual "difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic."[51] If an employee's mental illness has been exacerbated due to the COVID-19 pandemic, she may be entitled to a reasonable accommodation, even where no accommodation was previously requested. Employers faced with these requests may, as with any accommodation request, seek medical documentation of an employee's disability, discuss with the employee how a requested accommodation will allow her to continue working, and explore as necessary alternative accommodation that would meet her needs.[52]

In some cases, employers have received accommodations requests from employees without previous history of mental illness but who have developed a qualifying disability due to the pandemic. In *Sanchez-Martinez v. Bandera Family Health Care*, a patient coordinator sought FMLA leave after being diagnosed with acute anxiety disorder that, according to her complaint, stemmed from an earlier exposure to the virus.[53] Shortly thereafter she was fired, allegedly in retaliation for the requested leave.[54] Similarly, in *Bickford v. Nutrien AG Solutions*, an administrative coordinator alleged she was wrongfully discharged after submitting a request for remote work.[55] The plaintiff

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[50] *Id.* at *3 (internal citation omitted).

[51] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last modified June 28, 2021).

[52] *Id.*

[53] Complaint at 7, Sanchez-Martinez v. Bandera Family Health Care, P.A., Docket No. 5:20-cv-00909 (W.D. Tex. Aug. 5, 2020).

[54] *Id.*

[55] Complaint at 4, Bickford v. Nutrien AG Solutions, Docket No. 2:20-cv-12915 (E.D. Mich. Oct 29, 2020).

said she began to experience severe anxiety and panic attacks "due in large part to health concerns related to the COVID-19 pandemic."[56] Defendant denied her request to work from home, allegedly out of concern that permitting her to do so would require allowing others to as well; defendant also denied her request for short-term disability. Her request for FMLA leave was approved, but while she was on leave, defendant allegedly failed to keep her job available to her, as required by the FLMA, and effectively terminated her employment.

A reoccurring pattern has emerged of anxiety exacerbated by employers' lax in-office protective measures or cavalier attitude in the face of the pandemic. Bickford complained of "her co-workers and [the defendant's] lack of safety and health precautions."[57] Sanchez-Martinez alleged that having learned of her anxiety, the owner of the hospital called her to his office, where he removed his mask and proceeded to cough in front of her, apparently as a joke.[58] In yet another accommodations case spurred by pandemic-induced anxiety, the plaintiff alleged her anxiety was worsened by her employer's policy not to require masks in office and firmwide emails sent by her employer mocking concern over COVID-19 and referring to COVID-19 as the "China Virus."[59] Employers would do well to remember that deliberate insensitivity to an employee's alleged disability may place them at additional risk of liability in a suit under state and federal accommodations law.

VI. Mask-Related Accommodation Claims

In addition to employee requests for reasonable accommodations due to concerns about contracting the COVID-19 virus, employees have occasionally requested exemption or relaxation of employer-mandated safety protocols. When employers have chosen not to make these accommodations, some aggrieved employees have filed lawsuits. One plaintiff alleged that wearing a mask made breathing difficult for her, inducing bouts of coughing and congestion.[60] According to her complaint, Hartfield's primary care physician told her she "may be developing" an unidentified condition that

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[56] *Id.* at 3.

[57] *Id.*

[58] Complaint at 4, *Sanchez-Martinez*.

[59] *See* Complaint at 4-5, Russo v. Moore Ingram Johnson & Steele, LLP, No. 3:21-cv-00535 (M.D. Tenn. July 15, 2021).

[60] *See Complaint, Hartfield v. ELC Beauty, LLC*, 1:21-CV-00255 (S.D. Ohio, April 14, 2021).

would make it difficult for her to wear a mask for extended periods of time and recommended that Hartfield speak with her employer about wearing alternative personal protective equipment.[61] On the basis of this recommendation, the plaintiff asked her employer that she be allowed to work without a mask.[62] After that offer was rejected, she asked for permission to work wearing a face shield instead. Hartfield's employer allegedly rejected this request as well and did not offer an alternative solution. Several months later, Hartfield's employment was terminated.[63]

Other mask cases intersect with mental health issues, as discussed in the last section. In *Dejesus v. Bucks-Mont Eye Associates, P.C.*, an ophthalmic assistant alleged that his employer failed to accommodate his disability, an anxiety disorder, in violation of the ADA state human rights law.[64] Dejesus claimed defendant's mandatory mask policy exacerbated his anxiety disorder, and he requested an accommodation which he said he would support with a doctor's note.[65] Dejesus was not given an opportunity to do so; instead, he was told not wearing a facemask "will not fly" and was terminated.[66]

Accepting these plaintiffs' representations as true, each employer failed to engage in an interactive process, as required by the ADA. On the other hand, it remains an open question how viable these plaintiffs' proposed accommodations really are. A more careful employer, less hasty to dismiss an employee's request as unworkable and more willing to identify, as needed, alternative accommodations that would address the issue, would be by no means required by the ADA to allow an employee to go mask-less. One employee's option to forego wearing a mask plainly puts others at the same worksite at risk, supporting the defense that there is a "direct threat" to the health and safety of others.[67] Alternative protective measures, such as face shields, which the plaintiff in *Hartfield v. ELC Beauty, LLC suggested would be an acceptable*

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[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] Complaint, Dejesus v. Bucks-Mont Eye Associates, P.C., Docket No. 2:20-cv-04422 (E.D. Pa. Sep. 9, 2020).

[65] *Id.*

[66] *Id.*

[67] *See* 42 U.S.C.A. § 12182(b)(3).

accommodation, reduce particle transmission but may be less effective overall than face masks at reducing transmission rates.[68]

While there have been no opinions yet in *Harfield* or *Dejesus*, accommodations requests made in the public sphere under Title III of the ADA indicate the range of possible outcomes. Plaintiffs in these cases have seen mixed results in the early stages of litigation. This reflects the highly fact-specific nature of these cases. In a case involving a young child with non-verbal autism who was unable to wear a face covering and denied entry to a retail store, even though he exhibited no symptoms of the COVID-19 virus, the plaintiff succeeded.[69]

Other plaintiffs have found their claims summarily dismissed. In *Giles v. Sprouts Farmers Mkt., Inc.*, plaintiff alleges she was denied entry to a grocery store after informing a store employee that she was unable to wear a face mask due to an unidentified disability.[70] However, the store's employee provided plaintiff with other options, including wearing a face shield or using curbside pickup services. The court dismissed plaintiff's ADA accommodation claim because she did not allege that her medical condition prevented her from being able to wear a *face shield*.[71]

And in *Hernandez v. El Pasoans Fighting Hunger*, plaintiff alleged he was discriminated against on the basis of his disability because defendant refused him entry

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[68] *Compare* Perencevich et al., *Moving Personal Protective Equipment Into the Community: Face Shields and Containment of COVID-19*, 323 JAMA 2252 (2020) (recommending face shields to reduce transmission in the community setting), *with* Verma et al., *Visualizing Droplet Dispersal for Face Shields and Masks with Exhalation Valves*, 32 PHYSICS OF FLUIDS (2020), https://doi.org/10.1063/5.0022968 (arguing that face shields provide insufficient protection against aerosolized droplets that may "move around the visor with relative ease").

[69] *See* Emanuel v. The Walt Disney Co., No. 5:20-CV-04639, 2021 WL 2454462 (E.D. Pa. June 16, 2021) (finding public accommodation discrimination claim sufficiently pleaded where seven-year-old with non-verbal autism was denied entry to the store for not wearing a face covering, although he exhibited no symptoms of the COVID-19 virus, the store was uncrowded, and his mother explained to store employees that he allegedly could not wear a face covering for more than a few seconds because of his condition).

[70] Giles v. Sprouts Farmers Mkt., Inc., No. 20-CV-2131-GPC-JLB, 2021 WL 2072379 (S.D. Cal. May 24, 2021).

[71] *Id.*

for failure to wear a face mask.[72] The defendants, however, provided plaintiff and other "disabled individuals who cannot wear a face covering inside their facilities" with "several different accommodations," including home-delivery and a "Mobile Pantry" program.[73] The court dismissed plaintiff's ADA accommodation claim because he did not show that the alternative accommodations were unsatisfactory, and "exempting Plaintiff from their mask policy would pose a direct threat to the health and safety of others, *including Plaintiff himself*, due to the COVID-19 pandemic."[74]

VII. Other COVID-19 Effects on Accommodations

Finally, tricky issues may arise when an employee who had been receiving **reasonable accommodations for a disability in the workplace** is required, whether by their employer or government mandate, to work remotely. The EEOC has advised that when an employee needs to work remotely, she and her employer should engage in an interactive dialog to determine what she may need and why, and whether the same or a different accommodation could suffice in the home setting.[75] Some accommodations provided by the employer at the workplace may not be necessary in the remote work context. For example, a blind employee who requires her employer to install text-to-speech software at her work computer may already have an equivalent program at their home office.

Other accommodations, which **do not impose an undue** hardship in the workplace, may impose undue hardship when the benefitting employee is working remotely.[76] Accommodations that make sense for long-term use in the workplace, such as investing in expensive assistive technology, may not be feasible for temporary home use. Situations that occasion the need for employees to work remotely in the first place may

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[72] Hernandez v. El Pasoans Fighting Hunger, No. EP-21-CV-00055-DCG, 2021 WL 2763827 (W.D. Tex. July 1, 2021).

[73] *Id.*

[74] *Id.* at *6 (citing 42 U.S.C.A. § 12182(b)(3)).

[75] EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last modified June 28, 2021).

[76] *Id.*

also place "constraints on the normal availability of items or on the ability of an employer to conduct a necessary assessment."[77]

While a reasonable accommodation may not have posed an undue burden on an employer before the COVID-19 pandemic, when "considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components)," a sudden loss to an employer's income stream due to the pandemic may make a previously agreed-to accommodation unworkable.[78] An employer may also be constrained by the amount of discretionary funds available at the time, taking into consideration other expenses and the expected economic impact of lifted, substituted, or additional restrictions on their operations.[79] Nevertheless, an employer should not be under the impression that any COVID-19 related accommodation may be summarily rejected on fiscal grounds. In light of the unusual circumstances that led to the need for remote work, both employers and employees have been encouraged to be "creative and flexible" about crafting reasonable accommodations for working from home.[80] In each case, the employer must weigh the cost of an accommodation against its financial resources. Many COVID-19 related accommodations have no or low costs. Further, employers have been advised, where possible, to provide interim accommodations while engaged in discussion with a requesting employee or while waiting for additional information to make their decision.[81]

One final, commonly arising question: in the midst of the pandemic, many employees have wanted to know whether they are entitled to an accommodation in order to avoid exposing a family member in a higher-risk group, who would face severe illness due to an underlying medical condition, to COVID-19. **The EEOC has issued firm guidance that an employer does not need to provide this sort of accommodation.**[82] **Although the ADA prohibits discrimination based on association with an individual with a disability, protection is limited to disparate treatment or**

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[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

harassment and does require special accommodation.[83] Accordingly, an employer is not required to accommodate an employee without a disability by allowing them to work from home in order to protect a family member or partner from potential COVID-19 exposure.[84] An employer remains free to offer such accommodations if it chooses to. However, any employer that offers accommodations beyond what is required by law should be careful to offer these accommodations consistently.

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[83] *Id.*

[84] *Id.*