Oral argument not yet scheduled.

No. 22-5124

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GHULAM ALI,

Plaintiff-Appellant,

v.

MICHAEL REGAN, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 17-cv-1899
Before the Honorable Tanya S. Chutkan

Amicus Curiae Brief for the Disability Rights, Education, and Defense Fund, Metropolitan Washington Employment Lawyers Association, et al., In Support of Appellant

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July 24, 2023

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Certificate as to Parties, Rulings, and Related Cases

A. **Parties And Amici:** The following *amici curiae* seek to appear on behalf of Plaintiff-Appellant: Disability Rights, Education, and Defense Fund (DREDF); the Metropolitan Washington Employment Lawyers Association (MWELA); Communication First; Disability Rights Bar Association (DRBA); Disability Rights DC at University Legal Services; Judge David L. Bazelon Center for Mental Health Law; National Disability Rights Network (NDRN); National Employment Lawyers Association (NELA); and RespectAbility.

The law firm of the Court-appointed *amicus curiae*, Wilmer Cutler Pickering Hale and Dorr, and all other parties appearing before the district court and in this Court, are listed in the Brief of Court-Appointed *Amicus Curiae*.

B. **Rulings Under Review:** References to the rulings at issue appear in the Brief of the Court-Appointed *Amicus Curiae* and are contained in the Public Appendix of the Court-Appointed *Amicus Curiae*.

C. **Related Cases:** This case has not previously been before this Court or any court save the district court below. There are no related cases.

Rule 29(a)(4)(A) Corporate Disclosure Statement

Amici are nonprofit associations. They do not have any corporate parents. They do not have any stock, and, therefore, no publicly held company owns 10% or more of the stock of these *amici*.

Rule 29(a)(4)(E) Statement

No party or party's counsel authored or funded this brief, and no person other than the *amici curiae* covered the printing costs of the brief.

Rule 29(a)(4)(D) Statements of Interest of the *Amici Curiae*

Disability Rights Education & Defense Fund (DREDF), based in Berkeley, California, is a national nonprofit law and policy center dedicated to advancing and protecting the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. DREDF pursues its mission through education, advocacy, and legal reform. It is nationally recognized for its expertise in the interpretation of federal civil rights laws protecting persons with disabilities. DREDF advocates for reasonable accommodations for people with disabilities in employment, housing, health care, and government programs and activities, including during the COVID-19 pandemic. Based on its extensive experience, DREDF knows that while telework has many benefits to many people with disabilities, it is not always an appropriate arrangement. Forced unnecessary telework excludes and segregates workers with disabilities from the physical workplace environment and their nondisabled peers. Forced telework can exacerbate disabilities and adversely impact an employee's employment opportunities.

Metropolitan Washington Employment Lawyers Association (MWELA), founded in 1991, is a professional association and is the local chapter of the National Employment Lawyers Association, a national organization of attorneys who specialize in employment law. MWELA conducts continuing legal education programs for its more than 350 members, including an annual day-long conference which usually features one or more judges as speakers. MWELA also participates as *amicus curiae* in important cases in the District of Columbia, Maryland, and Virginia, the three jurisdictions in which its members primarily practice. MWELA's members represent employees, including those who need reasonable accommodations on the job. MWELA's members, and their clients, have an important interest in protecting the rights of disabled employees to reasonable accommodation under the Americans with Disabilities Act and the Rehabilitation Act of 1973. In particular, MWELA's interest here is in clarity and proper interpretation of the extent of the employer's obligations to engage in an "interactive process" with the employee so that, together, they can determine the accommodation that would enable the employee to continue working without unduly burdening the employer.

Communication First is a national, disability-led nonprofit organization dedicated to protecting and advancing the human, civil, and communication rights of the estimated 5 million children and adults in the United States who, due to

disability or other condition, cannot rely on speech alone to be heard and understood. Its mission is to further these rights, and the autonomy, opportunities, and dignity of people with speech-related disabilities, through public engagement, policy reform, and impact litigation.

Disability Rights Bar Association (DRBA) is a group of disability rights lawyers from nonprofit advocacy groups, private law firms, and law professors who share a commitment to effective legal representation of individuals with disabilities. Members of DRBA are committed to supporting the fundamental civil rights of people with disabilities, which are often inadequately represented in our society, through litigation and other legal advocacy strategies that are highly effective and necessary to enforce and advance the rights of people with disabilities. DRBA strongly supports this case because Congress enacted the Rehabilitation Act to end the use of stereotypes about individuals with disabilities that prevent them from participating fully in society. DRBA regularly participates as amicus curiae in cases, like this, to eliminate the perpetuation of harmful stereotypes, such as EPA's forced telework requirement, which prevents people with disabilities from participating fully in the workplace.

Disability Rights DC at University Legal Services serves as the federally-mandated Protection and Advocacy (P&A) Program for people with disabilities in the District of Columbia. As the P&A, Disability Rights DC advocates for the

human and civil rights of D.C. residents with disabilities to receive quality services and supports in their communities and to be free from abuse, neglect and discrimination. Disability Rights DC represents hundreds of individual clients with disabilities annually, with thousands more benefitting from the results of investigations, systemic litigation, outreach, education and group advocacy efforts. Disability Rights DC assists clients with issues related to, among other things, abuse and neglect, community-based services and housing, employment and vocational supports, access to health care, and education.

Judge David L. Bazelon Center for Mental Health Law. Founded in 1972 as the Mental Health Law Project, the Judge David L. Bazelon Center for Mental Health Law ("Bazelon Center") is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. Through litigation, public policy advocacy, education, and training, the Bazelon Center works to advance the rights and dignity of individuals with mental disabilities in all aspects of life, including health care, community living, employment, education, housing, voting, parental and family rights, and other areas. The Americans with Disabilities Act and Section 504 of the Rehabilitation Act are the foundation for most of the Center's legal advocacy.

National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and

Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

National Employment Lawyers Association (NELA). Founded in 1985, NELA is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA attorneys litigate daily in every circuit, giving NELA a unique perspective on how principles announced by courts in employment cases actually play out on the ground. Many NELA members represent employees with disabilities who require reasonable accommodation under the Americans with Disabilities Act. As such, NELA and its members have a compelling interest in ensuring that courts properly

interpret the employer's obligations to engage in an interactive process when determining what constitutes a reasonable accommodation, a process which allows the employee and employer to develop accommodations that allow the employee to continue working in a way that is not unduly burdensome to the employer.

RespectAbility is a diverse, disability-led nonprofit that works to create systemic change in how society views and values people with disabilities, and that advances policies and practices that empower people with disabilities to have a better future. Its mission is to fight stigmas and advance opportunities so people with disabilities can fully participate in all aspects of community, including employment. As a nonpartisan organization, RespectAbility works toward full participation in all aspects of community through policy advocacy, education, leadership development, and consultation and training with various organizations, including employers. RespectAbility has a strong interest in promoting disability inclusion and protecting the rights of all disabled employees, including rights to reasonable accommodations under the Rehabilitation Act and the Americans with Disabilities Act. The disability community and its access needs are incredibly diverse, and there is no one-size-fits-all accommodation, even for employees with the same disabilities. Telework can be an appropriate accommodation for some disabled employees, but it must not be forced on a disabled employee when there are other reasonable accommodations to explore. Employers must actively engage

with any employee needing accommodations to find what works well for the employee and will not constitute an undue burden to the employer.

Rule 29(a)(2) Statement

The *Amici* file this brief with the consent of the Plaintiff-Appellant. The Defendant-Appellee takes no position on the motion for leave. Fed. R. App. P. 29(a)(2).

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES ii

RULE 29(a)(4)(A) CORPORATE DISCLOSURE STATEMENT..... ii

RULE 29(a)(4)(E) STATEMENT.....iii

RULE 29(a)(4)(D) STATEMENT OF INTEREST OF *AMICI*.....iii

RULE 29(a)(2) STATEMENT ix

TABLE OF CONTENTS.....x

TABLE OF AUTHORITIES xi

BACKGROUND AND SUMMARY OF ARGUMENT.....1

ARGUMENT.....2

I. The EPA's Unilateral Offer of Full-Time Telework Did Not Satisfy Its Obligations Under the Rehabilitation Act.....2

A. Certain Accommodations, by Their Nature, Require the Disabled Employee to Opt In; Full-Time Telework Is This Type of Accommodation. 6

B. Forced Telework Violates the Nondiscrimination Principles of the Rehabilitation Act, Including the Principle of Integration.....9

C. Forced Telework Can Isolate Workers and Exacerbate Disabilities 14

D. Mr. Ali Permissibly Declined the Offer of Telework.....16

II. An Employer Causes the Interactive Process to Break Down when It Fails to Inquire About an Employee's Objections to the Sole Accommodation Offered and Refuses to Consider Alternatives 18

CONCLUSION.....25

CERTIFICATE OF COMPLIANCE.....27

CERTIFICATE OF SERVICE.....27

TABLE OF AUTHORITIES

Cases

Page(s)

Aka v. Wash. Hosp. Ctr.,
156 F.3d 1284 (D.C. Cir. 1998) (*en banc*) 7

Ali v. McCarthy,
179 F. Supp. 3d 54 (D.D.C. 2016) 16

Beck v. Univ. of Wis., Bd. of Regents,
75 F.3d 1130 (7th Cir. 1996) 19, 23

Bultemeyer v. Fort Wayne Cmty. Schools,
100 F.3d 1281 (7th Cir. 1996) 20-21

Bundy v. Jackson,
641 F.2d 934 (D.C. Cir. 1981) 9

Colwell v. Rite Aid Corp.,
602 F.3d 495 (3d Cir. 2010) 20, 21-22

Doak v. Johnson,
798 F.3d 1096 (D.C. Cir. 2015) 23-24

Elledge v. Lowe's Home Ctrs., LLC,
979 F.3d 1004 (4th Cir. 2020) 6-7, 8

Firefighters Inst. v. City of St. Louis,
549 F.2d 506 (8th Cir. 1977) 9

Garcia-Ayala v. Lederle Parenterals,
212 F.3d 638 (1st Cir. 2000) 23

Gile v. United Airlines,
213 F.3d 365 (7th Cir. 2000) 22

Groff v. DeJoy,
600 U.S. __, 143 S. Ct. 2279 (2023) 24-25

Harrington v. Vandalia-Butler Bd. of Educ.,
585 F.2d 192 (6th Cir. 1978) 10

Humphrey v. Mem'l Hosps. Ass'n,
239 F.3d 1128 (9th Cir. 2001) 17

Johnson v. Ryder Truck Lines,
1975 WL 265, 12 F.E.P. Cases 895 (W.D.N.C. 1975) . . 10

Kiphart v. Saturn Corp.,
251 F.3d 573 (6th Cir. 2001) 7

Lane v. Kitzhaber,
841 F. Supp. 2d 1199 (D. Or. 2012) 14

Lynch v. Freeman,
817 F.2d 380 (6th Cir. 1987) 10

Mengine v. Runyon,
114 F.3d 415 (3d Cir. 1997) 18

Rogers v. EEOC,
454 F.2d 234 (5th Cir. 1971) 9

Smith v. Midland Brake, Inc.,
180 F.3d 1154 (10th Cir. 1999) 8

Solomon v. Vilsack,
763 F.3d 1 (D.C. Cir. 2014) 22, 23

Taylor v. Phoenixville Sch. Dist.,
184 F.3d 296 (3d Cir. 1999) 18, 19, 20

United States v. Medical Soc. of South Carolina,
298 F. Supp. 145 (D.S.C. 1969) 10

US Airways, Inc. v. Barnett,
535 U.S. 391 (2002) 6, 23

Vande Zande v. State of Wis., Dep't of Admin.,
44 F.3d 538 (7th Cir. 1995) 23

Velente-Hook v. E. Plumas Health Care,
368 F. Supp. 2d 1084 (E.D. Cal. 2005) 17

Ward v. McDonald,
762 F.3d 24 (D.C. Cir. 2014) 18

Wirtes v. City of Newport News,
996 F.3d 234 (4th Cir. 2021) 6

Statutes And Legislative Materials

29 U.S.C. § 701(a)(3)(F) 12

29 U.S.C. § 701(a)(4) 12

29 U.S.C. § 701(b)(1)(F) 12

29 U.S.C. § 794 2

29 U.S.C. § 794(d) 3

42 U.S.C. § 12101(a)(1), (2), (5). 12

42 U.S.C. § 12111(10)(b)(ii) 25

42 U.S.C. § 12112(a) 9

42 U.S.C. § 12112(b)(1) 11

Rehabilitation Act Amendments of 1992, Pub. Law 102-569 (1992) . 2

House Comm. on Educ. & Labor, Rep. No. 101-485(II) (May 15, 1990) 7, 13

House Jud. Comm., Rep. No. 101-485(III) (May 15, 1990) . . 13

Sen. Comm. on Lab. and Hum. Res., Rep. No. 101-116 (Aug. 30, 1989) 13

Regulations

28 C.F.R. § 35.130(b)(2), (d) 13-14

28 C.F.R. § 39.130(b)(2) 13

28 C.F.R. § 39.130(d) 13

28 C.F.R. Part 35, App. A 14

29 C.F.R. § 1614.203(b) 3

29 C.F.R. § 1630.2 8

29 C.F.R. § 1630.2(o)(1)(ii) 10-11

29 C.F.R. § 1630.2(o)(3) 18

29 C.F.R. § 1630.2(p)(v) 25

29 C.F.R. § 1630.5 11

29 C.F.R. § 1630.9 17

29 C.F.R. § 1630.9(d) 10

29 C.F.R. Part 1630, App. § 1630.2(o) 7, 11

29 C.F.R. Part 1630, App. § 1630.5 . . . . . 11, 19

29 C.F.R. Part 1630, App. § 1630.9 18

40 C.F.R. § 12.130(b)(2) 13

40 C.F.R. § 12.130(d) 13

40 C.F.R. § 12.140 3

Agency Policy Guidance and Agency Decisions

EEOC Decision 71-2330, 3 F.E.P. Cases 1248 (June 1, 1971) . . 10

EEOC Compliance Manual at § 613.1 9

EEOC Compliance Manual at § 618 10

EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act,* No. 915.022, 2002 WL 31994335 (Oct. 17, 2002) 7, 20

EEOC, *What You Should Know About the Pregnant Workers Fairness Act* (2023) 7

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Other Authorities

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Nazmul Islam *et al.*, *Effects of Telework on Anxiety and Depression Across the United States During the Covid-19 Crisis*, 18(1) PLoS ONE e0280156 (2023) 5, 16

Job Accommodation Network, *Accommodation and Compliance: Allergies* 17

Arlene S. Kanter, *Our New Remote Workplace Culture Creates Opportunities for Disabled Employees*, Bill of Health: Examining the Intersection of Health, Law, Biotechnology and Bioethics (Mar. 10, 2022) 3

Minji Kim *et al.*, *Teleworking Is Significantly Associated with Anxiety Symptoms and Sleep Disturbances among Paid Workers in the COVID-19 Era*, 20(2) Int. J. Environ. Res. Public Health 1488 (2023) . 5

Ritsu Kitagawa *et al.*, *Working From Home and Productivity Under the COVID-19 Pandemic: Using Survey Data of Four Manufacturing Firms*, 16(12) PLoS ONE e026171 (2021) 5

Betsy Lake & David W. Maidment, *"Is This a New Dawn for Accessibility?": A Qualitative Interview Study Assessing Teleworking Experiences in Adults with Physical Disabilities post COVID-19*, School of Sport, Exercise & Health Sciences, Loughborough Univ. (Apr. 20, 2023) . . . 5

Don Lee, *Surge in Remote Working Due to COVID Fuels Record Employment for People with Disabilities*, Los Angeles Times (Dec 15, 2022) 2

Nelson D. Schwartz, *Working From Home Poses Hurdles for Employees of Color*, New York Times (Sept. 6, 2020) 15

Brianne M. Sullenger, *Telecommuting: A Reasonable Accommodation Under the Americans with Disabilities Act as Technology Advances*, 19 Regent Univ. L. Rev., 533, 542-43 (2007) 3

Becky Upham, *Is working from home during COVID-19 giving you a headache or migraine?*, Everyday Health (Jan. 27, 2021) . . . 16

GLOSSARY

ADA	Americans with Disabilities Act
EEOC	U.S. Equal Employment Opportunity Commission
EPA	U.S. Environmental Protection Agency

BACKGROUND AND SUMMARY OF ARGUMENT

The district court, in *Ali v. Regan*, No. 17-cv-1899-TSC (D.D.C. Oct. 19, 2020), addressed Mr. Ali's claim that the employer, the U.S. Environmental Protection Agency (EPA), violated his rights under the Rehabilitation Act. JA265-271. The district court found that Mr. Ali failed to act in good faith during the interactive process because he did not explain to his management why the offer of full-time telework was not a suitable alternative accommodation for him. For this reason, the district court granted EPA's motion for summary judgment on Mr. Ali's Rehabilitation Act claim. JA282. The brief of the Court-appointed *amicus* explains that there is a material factual dispute about whether Mr. Ali notified EPA about why indefinite full-time telework was not a reasonable accommodation for him. Court Appointed Amicus Brief, pp. 3, 13-16, 19, 27-28, 38-39, and 40. However, for purposes of the arguments advanced in this brief, it does not matter whether Mr. Ali provided this notice to the EPA.

This *amicus* brief will explain amici's views that:

1. While full-time telework can be an effective reasonable accommodation in *some* circumstances for *some* disabled employees, an employee with a disability who seeks to work on site with available reasonable accommodations, alongside his nondisabled peers, is entitled to do so. Because full-time telework away from a physical worksite materially changes the terms and conditions of employment, an

employee who is able to work on site need not agree to full-time telework. Forced telework segregates disabled workers and can exacerbate disabilities and impede equal employment opportunities; and

2. The district court's analysis of the good faith obligations of the parties to an interactive process places a disproportionate burden on the employee, rather than treating the disabled employee and the employer as equal partners.

ARGUMENT

I. THE EPA'S UNILATERAL OFFER OF FULL-TIME TELEWORK DID NOT SATISFY ITS OBLIGATIONS UNDER THE REHABILITATION ACT.

Full-time telework can be an effective and practical accommodation that expands employment opportunities for people with disabilities,[1] furthering the Congress's objective that the Rehabilitation Act "achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency" for people with disabilities. Rehabilitation Act Amendments of 1992, Pub. Law 102-569, H.R. 5482 (1992), at § 1. The Rehabilitation Act Amendments of 1992 amended 29 U.S.C. § 794 to incorporate the standards of Title I of the Americans with Disabilities Act (ADA), making

[1] Don Lee, *Surge in Remote Working Due to COVID Fuels Record Employment for People with Disabilities*, Los Angeles Times (Dec 15, 2022), 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.

authorities decided under the ADA relevant to this matter.[2]

By minimizing structural barriers associated with commuting and transportation, reducing stress through a healthier work-life balance, and tailoring the workplace environment to the employee's unique needs, remote work can allow people with disabilities to participate in previously inaccessible work opportunities.[3] The productivity and low cost associated with remote work can combat ableist and discriminatory hiring practices and dispel unwarranted fears over the expense of workplace accommodations.[4]

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[2] 29 U.S.C. § 794(d) ("The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 et seq.) and the provisions of [Title V of the ADA], as such sections relate to employment."); 40 C.F.R. § 12.140 (EPA regulation incorporating by reference EEOC regulations now found at 29 C.F.R. Part 1614); 29 C.F.R. § 1614.203(b) (incorporating ADA standards).

[3] Brianne M. Sullenger, *Telecommuting: A Reasonable Accommodation Under the Americans with Disabilities Act as Technology Advances*, 19 Regent Univ. L. Rev., 533, 542-43 (2007); Matt Gonzales, *Remote Work Helps People with Disabilities Land Jobs*, Society for Human Resource Management (Oct. 21, 2022), https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/remote-work-helps-people-with-disabilities-land-jobs.aspx; Ben Casselman, *For Disabled Workers, a Tight Labor Market Opens New Doors*, New York Times (Oct. 25, 2022), https://perma.cc/YCW6-3D45.

[4] Arlene S. Kanter, *Our New Remote Workplace Culture Creates Opportunities for Disabled Employees,* Bill of Health: Examining the Intersection of Health, Law, Biotechnology and Bioethics (Mar. 10, 2022), https://blog.petrieflom.law.harvard.edu/2022/03/10/remote-work-disability-ada/.

Moreover, the expansion of telework opportunities aligns with guidance of the Equal Employment Opportunity Commission (EEOC) and other federal policy guidance that encourages the use of telework as a reasonable accommodation and recommends agencies "institutionalize" remote work programs. *See* U.S. Office of Personnel Management, *Frequently Asked Questions on Reentry and Post-Reentry Personnel Policies and Workplace Environment*, at 4 (July 23, 2021) ("agencies should leverage their experiences with expanded telework during the pandemic to institutionalize telework programs as a routine way of doing business");[5] EEOC, *Work at Home/Telework as a Reasonable Accommodation* (Feb. 3, 2003).[6]

At the same time, however, employers should not consider full-time telework a "catch-all" accommodation to use with all employees with disabilities. If other employees have the option to work on site, forced full-time telework materially alters workplace terms and conditions to the potential detriment of disabled employees who wish to remain on site. For example, the shift from in-person work environments to screen-based, isolated telework can exacerbate mental and physical disabilities such as anxiety, depression, and sleep-related

[5] https://www.chcoc.gov/content/additional-guidance-post-reentry-personnel-policies-and-work-environment

[6] https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation

disorders.[7] Furthermore, disabled, remote employees frequently encounter an "out of sight, out of mind" mentality that can hamper their ability to advocate for necessary accommodations while simultaneously limiting their career opportunities due to a lack of in-person visibility.[8]

Additionally, for workers with and without disabilities, telework can have an adverse impact on employment conditions by forcing employees to work in stressful, noisy home environments and eroding the boundaries between work and personal life.[9] Thus, the evaluation of telework as a reasonable accommodation must depend upon available feasible alternatives as well as the needs and

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[7] Minji Kim *et al.*, *Teleworking Is Significantly Associated with Anxiety Symptoms and Sleep Disturbances among Paid Workers in the COVID-19 Era*, 20(2) Int. J. Environ. Res. Public Health 1488 (2023), https://www.mdpi.com/1660-4601/20/2/1488; Nazmul Islam *et al.*, *Effects of Telework on Anxiety and Depression Across the United States During the Covid-19 Crisis*, 18(1) PLoS ONE e0280156 (2023), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0280156.

[8] Betsy Lake & David W. Maidment, *"Is This a New Dawn for Accessibility?": A Qualitative Interview Study Assessing Teleworking Experiences in Adults with Physical Disabilities post COVID-19*, School of Sport, Exercise & Health Sciences, Loughborough Univ. (Apr. 20, 2023), https://content.iospress.com/articles/work/wor220622.

[9] World Health Organization and International Labour Organization, *Health and Safe Telework Technical Brief*, at 7-8 (2021) https://www.who.int/publications/i/item/9789240040977; Ritsu Kitagawa *et al.*, *Working From Home and Productivity Under the COVID-19 Pandemic: Using Survey Data of Four Manufacturing Firms*, 16(12) PLoS ONE e026171 (2021) (decline in teleworkers' productivity due to poor work-from-home set ups), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0261761.

preferences of the disabled employee.

Hence, while many employees with disabilities affirmatively desire telework accommodations and flourish in those arrangements, other disabled workers prefer remaining on site rather than being segregated from their office, colleagues, and the broader workforce. As telework continues to expand, becoming a commonplace practice across industries, employees who seek to work on site are entitled to feasible accommodations that grant them access to "the *same workplace opportunities* that those without disabilities automatically enjoy." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (emphasis added). The district court's opinion failed to apply these core principles.

A. Certain Accommodations, by Their Nature, Require the Disabled Employee to Opt In; Full-Time Telework Is This Type of Accommodation.

Unilaterally imposed telework, like unilateral reassignment and forced leave of absence, does not satisfy the employer's obligation to accommodate if the employee seeks an alternative, feasible accommodation to remain in their current position, *i.e.*, on site. *See Wirtes v. City of Newport News*, 996 F.3d 234, 241 (4th Cir. 2021) ("Every circuit court to have addressed this issue has concluded that an employer fails to accommodate its qualified disabled employee when it transfers that employee from a position they could perform if provided with reasonable accommodations to a position they do not want."); *Elledge v. Lowe's Home Ctrs.*,

LLC, 979 F.3d 1004, 1014 (4th Cir. 2020) (holding that reassignment is a "last among equals" accommodation); *Kiphart v. Saturn Corp.*, 251 F.3d 573, 586-87 (6th Cir. 2001) (jury could find that employer's imposition of involuntary medical leave violated ADA as there was evidence that employee could perform his job with accommodations).[10]

Where an employee does not affirmatively seek telework, an employer must explore on-site accommodations, consistent with long-standing guidance from the EEOC on the ADA that instructs employers to prioritize accommodations that keep employees in their positions and with equal access to workplace opportunities. 29 C.F.R. Part 1630, App. (Interpretive Guidance on Title I of the Americans with Disabilities Act) at § 1630.2(o); EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act,* No. 915.022, 2002 WL 31994335 at *20 (Oct. 17, 2002); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1301 (D.C. Cir. 1998) (*en banc*) (citing EEOC). The ADA's legislative history is consistent with the EEOC's regulatory position. *See* House Comm. on Educ. & Labor, Rep. No. 101-485(II), at 63 (May 15, 1990).

[10] *Cf.* EEOC, *What You Should Know About the Pregnant Workers Fairness Act* (2023) ("Covered employers cannot . . . [r]equire an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working."), https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act.

Like reassignment, full-time telework materially alters the conditions of employment, fundamentally changing key aspects of the work environment such as collaboration with colleagues, communication, and day-to-day interaction with peers and supervisors. *See generally* Stacy A. Hickox & Chenwei Liao, *Remote Work as an Accommodation for Employees with Disabilities,* 38 Hofstra Labor & Employment L.J. 25 (2020).

Unilateral imposition of full-time telework where an on-site accommodation is feasible is not a reasonable accommodation, because it is not a "modification[n] or adjustmen[t] that enable[s] . . . [an] employee with a disability to enjoy *equal benefits and privileges of employment* as are enjoyed by its other similarly situated employees without disabilities." 29 C.F.R. § 1630.2 (emphasis added).

Permanent telework, by its remote nature, does not offer equal access to the workplace and the professional opportunities therein. Thus, employees should be entitled to explore accommodations to remain on site, as for their non-disabled colleagues, in "respect [of the] core values underlying the ADA and employment law more generally." *Elledge*, 979 F.3d at 1014; *see also Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1170 (10th Cir. 1999) ("When an employer selects among several possible reasonable accommodations, the preferred option is always an accommodation that keeps the employee in his or her existing job if that can reasonably be accomplished.").

B. Forced Telework Violates the Nondiscrimination Principles of the Rehabilitation Act, Including the Principle of Integration.

Where another, on-site accommodation is feasible and preferred by an employee with a disability, forced telework violates the nondiscrimination requirement of Section 504 of the Rehabilitation Act. Under Section 504 (which incorporates the standards of Title I of the ADA, *see supra* at 3 & n.2), an employer may not discriminate based on disability in regard to the "terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

This language evinces a Congressional intention to define discrimination in the broadest possible terms. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (construing identical phrase in Title VII); *Firefighters Inst. v. City of St. Louis*, 549 F.2d 506, 514 (8th Cir. 1977) (Congress "pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow;" finding that the terms and conditions phrase covered informal supper clubs); EEOC Compliance Manual at § 613.1 ("The intent of Congress was not to list specific discriminatory practices, nor to definitively set out the scope of the activities covered.") (citing *Rogers*); *accord Bundy v. Jackson*, 641 F.2d 934, 944 (D.C. Cir. 1981) (describing phrase as "expansive concept").

The prohibition has been construed to cover the material environment that constitutes an employee's workplace, such as offices, lunchrooms, lockers,

restrooms, and other employee facilities. *Harrington v. Vandalia-Butler Bd. of Education*, 585 F.2d 192, 193-94 & n.3 (6th Cir. 1978) (prohibition on discrimination in terms, conditions, and privileges encompassed physical working conditions such as offices, toilets, and showers); *Lynch v. Freeman*, 817 F.2d 380 (6th Cir. 1987) (prohibition covered unsanitary toilets); *Johnson v. Ryder Truck Lines*, 1975 WL 265, at *8, 12 F.E.P. Cases 895, at ¶ 39 (W.D.N.C. 1975) (separate holiday parties); *United States v. Medical Soc. of South Carolina*, 298 F. Supp. 145, 156 (D.S.C. 1969) (lounges, toilets, dressing rooms, and lockers); EEOC Decision 71-2330, 3 F.E.P. Cases 1248 (June 1, 1971) (vending machines); *see also* EEOC Compliance Manual at § 618 (collecting Commission decisions and court cases). Here, where an on-site accommodation was feasible, Mr. Ali was entitled to enjoy the same physical working conditions as his nondisabled peers.

This reading is consistent with the EEOC's regulations implementing Title I of the ADA. While an employee must be qualified to perform the job with or without accommodations, an employee is not required to accept an accommodation: "An individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept." 29 C.F.R. § 1630.9(d). Further, "reasonable accommodation" is defined to include "[m]odifications or adjustments that enable a covered entity's employee with a disability to enjoy *equal benefits and privileges*

of employment as are enjoyed by its other similarly situated employees without disabilities." 29 C.F.R. § 1630.2(o)(1)(ii) (emphasis added). An involuntary telework accommodation separating employees with disabilities, such as Mr. Ali, from the physical workplace violates these principles.

Moreover, prohibited employment discrimination includes "limiting, segregating, or classifying" an employee in a way that adversely affects their opportunities or status based on disability. 42 U.S.C. § 12112(b)(1); 29 C.F.R. § 1630.5. Thus, covered entities are "prohibited from segregating qualified employees into separate work areas or into separate lines of advancement on the basis of their disabilities." 29 C.F.R. Part 1630, App. at § 1630.5. The EEOC specifies that this prohibition covers all employee facilities:

> Similarly, it would be a violation for an employer to assign or reassign (as a reasonable accommodation) employees with disabilities to one particular office or installation, or to require that employees with disabilities only use particular employer provided non-work facilities such as segregated break-rooms, lunch rooms, or lounges.

Id.; *accord id.* at 1630.2(o) ("Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities.").

In enacting the Rehabilitation Act, Congress expressed its commitment to the integration of disabled people, an outcome that forced, unnecessary, full-time telework would impede:

> [D]isability is a natural part of the human experience and in no way diminishes the right of individuals to enjoy ... *full inclusion and integration* in the economic, political, social, cultural, and educational mainstream of American society …

29 U.S.C. § 701(a)(3)(F).

> [I]ncreased employment of individuals with disabilities can be achieved through … meaningful opportunities for employment in *integrated work settings* through the provision of reasonable accommodations …

29 U.S.C. § 701(a)(4).

> [It is the purpose of the Rehabilitation Act] to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and *inclusion and integration* into society, through … the guarantee of equal opportunity[.]

29 U.S.C. § 701(b)(1)(F).

In enacting the ADA, Congress made similar findings and commitments. *See* 42 U.S.C. § 12101(a)(2) ("historically, society has tended to isolate and segregate individuals with disabilities"); *id.*, § 12101(a)(5) (disabled people encounter "failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities"); *id.*, § 12101(a)(1) (ADA's purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

The legislative history of the ADA is consistent. The report of the House Committee on Education and Labor specified:

> Employment activities must take place in an integrated manner. *Employees with disabilities must not be segregated into particular work areas*. Moreover, non-work activities offered by the employer should also be integrated, such as break-rooms or lunch rooms.

House Comm. on Educ. & Labor, Rep. No. 101-485(II), at 36 (May 15, 1990) (emphasis added); *see also* Sen. Comm. on Lab. and Hum. Res., Rep. No. 101-116, at 5-6 (Aug. 30, 1989) ("One of the most debilitating forms of discrimination is segregation imposed by others."); House Jud. Comm., Rep. No. 101-485(III), at 26 (May 15, 1990) ("The ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation."); *id*. at 56 ("Integration is fundamental to the purposes of the ADA. Provision of segregated accommodations and services relegate persons with disabilities to second-class citizen status.").

Moreover, the Department of Justice and the EPA have adopted regulations codifying the "integration mandate" of Section 504 of the Rehabilitation Act. *See* 28 C.F.R. § 39.130(d) ("The agency [DOJ] shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons."); 40 C.F.R. § 12.130(d) (same, EPA); 28 C.F.R. § 39.130(b)(2) ("The agency [DOJ] may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities."); 40 C.F.R. § 12.130(b)(2) (same, EPA). The ADA regulations for the Department of Justice are

analogous. 28 C.F.R. § 35.130(b)(2), (d). The "most integrated setting appropriate" is a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. Part 35, App. A (2010).

Thus, in another context, the U.S. District Court for the District of Oregon found that the integration mandate supported a claim seeking choice and integration in employment services. *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1205 (D. Or. 2012). In reaching this conclusion, the Court sided with the plaintiffs' position: "[S]heltered workshops – ostensibly 'designed to provide a benefit to persons with disabilities' – cannot be used to restrict the participation of persons with disabilities in general, integrated employment. … Accordingly, participation for persons with disabilities in sheltered workshops 'must be a choice, not a requirement.'" *Id*. at 1204; *see also id.* ("Modified participation for persons with disabilities must be a choice, not a requirement.") (quoting 28 C.F.R. Part 35, App. B). Here, consistent with the integration mandate, Mr. Ali should not be forced to telework if he chooses not to and can work alongside his nondisabled peers.

C. Forced Telework Can Isolate Workers and Exacerbate Disabilities.

Telework that is not desired by an employee with a disability but rather imposed involuntarily can have adverse impacts by isolating the individual and exacerbating disabilities. While telework can benefit some people with disabilities, it is not a one-size-fits-all solution, as the facts of this case demonstrate.

People working from home are physically isolated from their colleagues and work environment. Forcing telework on a person with a disability segregates them from their non-disabled colleagues, counter to the principles of Section 504 of the Rehabilitation Act and the ADA. Working from home can inhibit career growth and opportunities.

One pre-pandemic study found that telework can impede the accumulation of social capital by employees with disabilities, including by hindering their participation in the workplace community.[11]

During the pandemic, experts explained that this effect is exacerbated if a person working remotely is also a person of color, as people of color tend to have fewer connections and less extensive networks than their more privileged counterparts.[12]

Telework can also worsen some disabilities. For example, working from home can cause a significant increase in screen time, exacerbating disabilities such

[11] Paul M. A. Baker, *et al.*, *Virtual exclusion and telework: barriers and opportunities of technocentric workplace accommodation policy*, 27:4 Work 421 (2006), https://pubmed.ncbi.nlm.nih.gov/17148880/.

[12] Nelson D. Schwartz, *Working From Home Poses Hurdles for Employees of Color*, New York Times (Sept. 6, 2020), https://www.nytimes.com/2020/09/06/business/economy/working-from-home-diversity.html.

as migraines.[13] Telework can also exacerbate mental health disabilities such as depression and anxiety disorders.[14] Mr. Ali experienced "itchy skin, rashes, swelling of the eyes, face and arms . . . [and] difficulty breathing, seeing, walking and sleeping," *Ali v. McCarthy*, 179 F. Supp. 3d 54, 67 (D.D.C. 2016), while working in a cubicle exposed to workplace fumes, including the fumes from printers. Telework would have required Mr. Ali to print documents from home in a more confined space, thus exacerbating his exposure to printing fumes.

In short, telework is not always a good option for a person with a disability. Given its inherent characteristics, with the material changes telework makes to the workplace, the accommodation of telework must only be implemented on an individualized basis, and only when it meets the needs and preferences of the disabled employee.

D. Mr. Ali Permissibly Declined the Offer of Telework

Consistent with the right of employees to decline unilaterally imposed reassignment, Mr. Ali justifiably declined the EPA's offer of full-time telework accommodations. JA241. He was "not required to accept [the] accommodation"

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[13] Becky Upham, *Is working from home during COVID-19 giving you a headache or migraine?*, Everyday Health (Jan. 27, 2021), https://www.everydayhealth.com/migraine/is-working-from-home-giving-you-a-headache/.

[14] Nazmul Islam, *et al.*, *supra* note 7.

because it was not "necessary to enable [him] to perform the essential functions of the position." *See* 29 C.F.R. § 1630.9. There were several accommodations that would have enabled Mr. Ali to stay on site, and the EPA failed to satisfy its "affirmative duty to explore other possible accommodations." *See Velente-Hook v. E. Plumas Health Care*, 368 F. Supp. 2d 1084, 1094 (E.D. Cal. 2005).

For example, Mr. Ali could have been placed in a private office. Employees who use fragrances could have been moved to cubicles that were further away from him. The EPA could have implemented a perfume-free policy and moved the printer away from Mr. Ali's cubicle. The EPA could have rearranged the office layout to minimize Mr. Ali's exposure to irritants.[15] The employer was required to consider these feasible alternatives as a part of its "continuing duty" to accommodate the employee. *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1138 (9th Cir. 2001).

Because the EPA failed to explore and consider alternative, feasible accommodations, Mr. Ali was within his rights to decline permanent telework and maintain his status as a qualified, on-site employee with a disability. *Accord* 29 C.F.R. § 1630.9.

[15] *See* Job Accommodation Network, *Accommodation and Compliance: Allergies*, Ask Jan, https://askjan.org/disabilities/Allergies.cfm.

II. An Employer Causes the Interactive Process to Break Down when It Fails to Inquire About an Employee's Objections to the Sole Accommodation Offered and Refuses to Consider Alternatives.

The district court's conclusion that Mr. Ali caused the breakdown in the interactive process (JA268-69) is not consistent with prevailing legal standards. "To determine the appropriate reasonable accommodation, it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of accommodation. This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). The EEOC's interpretive guidelines provide that the responsibility for fashioning an appropriate reasonable accommodation is shared between the employer and the employee, and "is best determined through a flexible interactive process that involves both the employer and the individual with a disability." 29 C.F.R. Part 1630, App. § 1630.9.

Both the employer and the employee have a duty to act in good faith during the interactive process. *Ward v. McDonald*, 762 F.3d 24, 32 (D.C. Cir. 2014); *Mengine v. Runyon*, 114 F.3d 415, 419-20 (3d Cir. 1997). A party that fails to communicate by way of initiation or response may be acting in bad faith. *Ward*, 762 F.3d at 32; *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 312 (3d Cir. 1999). Here, the district court concluded Mr. Ali had caused the interactive process to break down, finding that he did not explain to his employer why telework was not

a good option for him at the time that the EPA was considering his accommodation request. JA269. This analysis understates the obligation of the employer to engage in the interactive process. That the EPA viewed Mr. Ali's request for a private office unfavorably and instead offered full-time telework did not end its obligation. *See Taylor*, 184 F.3d at 315. A genuine interactive process required that EPA ask Mr. Ali why telework was not a good option for him. The interactive process, "as the name implies, requires the employer to take some initiative." *Id*.

Here, it appears that EPA jumped to the conclusion that telework was the most effective and least burdensome accommodation for Mr. Ali, without asking him why he disagreed. *Cf.* 29 C.F.R. Part 1630, App., at § 1630.5 ("it would be a violation of this part [prohibiting segregation] for an employer to limit the duties of an employee with a disability based on a presumption of what is best for an individual with such a disability"). Had management asked Mr. Ali why he did not think telework was a good option, Mr. Ali would then have explained, among other concerns, that teleworking would exacerbate his disability. At that point, the EPA could have explored options for allowing Mr. Ali to work on site.

During the interactive process, both parties, not only the employer, may be missing information. *Beck v. Univ. of Wis., Bd. of Regents*, 75 F.3d 1130, 1135-36 (7th Cir. 1996). While the district court emphasized that EPA was missing information on why Mr. Ali objected to the sole accommodation he was offered,

full-time telework, the district court did not acknowledge that Mr. Ali likely was missing information as well. It seems likely that Mr. Ali would have known less than EPA about what office spaces were or would become available. *Accord* EEOC, "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA," question 28 (Oct. 17, 2002) ("The employer is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time."). It also seems likely that EPA employees who manage the allocation of office space would have been better positioned to track suitable and available office spaces. Here, where management unilaterally shut the door on the private office option or other on-site accommodations, a jury reasonably could find management was responsible for the breakdown in the interactive process, as it had access to information that it was unwilling to find and share with Mr. Ali.

Although the interactive process imposes burdens on both the employee and the employer, the employer plainly has advantages when it comes to information on the range of accommodations it can provide. *Taylor*, 184 F.3d at 316. To prevent breakdown of the interactive process, the employer "has to meet the employee half-way." *Bultemeyer v. Fort Wayne Cmty. Schools*, 100 F.3d 1281, 1285 (7th Cir. 1996); *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 507 (3d Cir. 2010).

In *Bultemeyer*, the Seventh Circuit considered an accommodation requested by a custodian with mental illness, through his physician, of not having to work at

a particular school within the school system but to work instead at a school that was "less stressful." The employer argued that the custodian presented no evidence that any other school presented a less stressful environment than the assigned school. On appeal from the district court's grant of summary judgment to the employer, the Seventh Circuit reversed and remanded, finding that if the accommodation request was unclear, then the employer should have reached out to the custodian or his physician to find out *why* the custodian thought the assigned position was more stressful than a custodian position at any other school. *Bultemeyer*, 100 F.3d at 1284. Because the employer failed to make those further inquiries, it failed to engage in the interactive process.

In *Colwell*, the Third Circuit considered a request by a partially blind employee to be reassigned to only day shifts because her condition made night driving difficult and dangerous. The employer rejected the request because it would not be fair to her coworkers. The interactive process ended after the employee told the employer that she could get rides to work from her grandson. The employee eventually resigned because of dissatisfaction with her schedule. The Third Circuit held that a reasonable jury could conclude that the employer failed in its obligation to engage in the interactive process, because the record supported a reasonable inference that the grandson's driving the employee to work was an unreliable and temporary solution. *Colwell*, 603 F.3d at 507. Finding

genuine issues of material fact as to which party caused the interactive process to break down, the Third Circuit reversed the grant of summary judgment for the employer on the employee's failure to accommodate claims. *Id*. at 508.

Viewing the facts in the light most favorable to Mr. Ali, EPA fell short of its responsibilities to communicate with Mr. Ali and ask him why full-time telework would not help him perform his work. *See Solomon v. Vilsack*, 763 F.3d 1, 9 (D.C. Cir. 2014) (determining whether a particular type of accommodation is reasonable "is commonly a contextual and fact-specific issue"). Instead of rejecting Mr. Ali's accommodation request outright and unilaterally deciding on telework as the most effective accommodation, EPA "had the affirmative obligation to seek [the employee] out and work with [him] to craft a reasonable accommodation, if possible . . . ." *Gile v. United Airlines*, 213 F.3d 365, 373 (7th Cir. 2000).

Further, Mr. Ali's proposed accommodation of a private office was not unreasonable, and the EPA should have explored this option. When Mr. Ali, who then worked in the Standards and Health Protection Division (SHPD), inquired about private offices that he understood to be available in the Engineering and Analysis Division (EAD), his supervisor's response was:

> I personally did not consider that. It was a different division. I had nothing to do with [EAD's] space allocation. It was not within my purview to decide how they should use their space.

JA264-265.

However, an employer addressing an employee's request for a reasonable accommodation may need to make exceptions to neutral rules absent proof of undue hardship. *Barnett,* 535 U.S. at 397-98 (reasonable accommodation obligations may require modifications to "[n]eutral office assignment rules"). Such an employer "must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions of employment in order to enable a disabled employee to work" unless doing so would create undue hardship on the employer. *Beck*, 75 F.3d at 1135 (quoting *Vande Zande v. State of Wis., Dep't of Admin*., 44 F.3d 538, 542 (7th Cir. 1995)); *accord Garcia-Ayala v. Lederle Parenterals*, 212 F.3d 638, 647 (1st Cir. 2000) (employee's requested accommodation to extend job-protected leave beyond that permitted under employer's policy was reasonable and lower court erred when it "applied per se rules – rather than an individualized assessment of the facts").

This Court has pointed out that "'it is rare that any particular type of accommodation will be categorically unreasonable as a matter of law.'" *Doak v. Johnson*, 798 F.3d 1096, 1105 (D.C. Cir. 2015) (quoting *Solomon*, 763 F.3d at 10). In *Doak*, the plaintiff had requested a schedule adjustment and the ability to telecommute. This Court held that the accommodations at issue "are not unreasonable as a matter of law" or "so inherently unworkable for all employees in all workplaces that the law would categorically disqualify them from

consideration." *Id*. The same can be said for Mr. Ali's accommodation request. No undue hardship caused to EPA is evident, and considering an exception to a rule about office allocation protocol would not be unduly burdensome.

Similarly, the district court in this case erred when it accepted, at face value, Mr. Ali's supervisor's explanation that the EPA could not even consider Mr. Ali's request for a private office at EAD (another division) because of a "rule" that SHPD management could only offer its employees private offices within SHPD (Mr. Ali's division). Mr. Ali's supervisor had a duty to ask an EAD supervisor about the availability of EAD private offices and, further, had a duty to find out about other potentially available private offices that were unknown to Mr. Ali.

Even if providing Mr. Ali a private office in EAD would have disrupted the allocation of private offices to EAD employees, that would not necessarily allow management to end the interactive process. The Supreme Court in *Groff v. DeJoy*, 600 U.S. __, 143 S. Ct. 2279 (2023), *vacating and remanding* 35 F.4th 162 (3d Cir. 2022), addressed a religious accommodation request made by a U.S. Postal Service mail carrier not to work on Sundays. The Court held that showing "more than a *de minimis* cost" to an employer "does not suffice to establish 'undue hardship' under Title VII." *Groff*, 143 S. Ct. at 2294. Instead, the Court found that the burden on the employer must be "substantial." *Id*. The Court went on recognize that Title VII requires an assessment of a possible accommodation's effect on the conduct of

an employer's business, which would include the accommodation's effect on co-workers. *Id*. at 2296. As to Mr. Groff's accommodation request, the Court held that "it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship." *Id*. at 2297. The Rehabilitation Act and the ADA similarly require assessment of the effect of an accommodation on an employer's workforce. *See* 42 U.S.C. § 12111(10)(b)(ii); 29 C.F.R. § 1630.2(p)(v). Just as the Court recognized in *Groff*, an employer cannot establish undue hardship merely by arguing that providing a disabled employee with a private office may mean that another employee is deprived of a private office.

CONCLUSION

For the foregoing reasons, the *amici* respectfully submit that this Court should reverse the district court's judgment for the EPA on Mr. Ali's Rehabilitation Act claim and remand the case for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) in that, according to the word-count function of the word-processing system used to generate the brief (Microsoft Word), the brief contains 5,644 words, exclusive of the portions exempted by Rule 32(f).

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CERTIFICATE OF SERVICE

I certify that on this date, July 24, 2023, the foregoing Amicus Curiae Brief has been served upon counsel of record via the Court's CM/ECF system, and a copy of the foregoing will be sent by first-class mail, postage prepaid, to:

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