Office of Congressional Workplace Rights

Office of the General Counsel

HYBRID WORKPLACES: POTENTIAL CAA ISSUES APRIL 30, 2025

Introduction

Since the beginning of the COVID-19 pandemic in March 2020, the prevalence of hybrid workplaces – i.e., employees engaging in a combination of in-office work and telework – has increased dramatically. Employees have become adept at using technology to do their jobs at home or in other locations outside the physical office. Although the amount of time spent in-office has gradually increased for many employees since the end of the pandemic, many employing offices remain hybrid workplaces.

Below, we discuss several issues of particular interest to hybrid workplaces that may arise under some of the statutes applied by the Congressional Accountability Act (CAA). While we focus here on reasonable accommodations under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA), issues arising under the Family and Medical Leave Act (FMLA), discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, and labor-management issues under the Federal Service Labor-Management Relations Statute (FSLMRS), this is not an exhaustive list. Legal issues may arise in hybrid workplaces under any of the 15 laws currently applied by the CAA.[1]

Americans with Disabilities Act/Rehabilitation Act

The employment discrimination provisions of the ADA (Title I) and RA apply to the legislative branch through section 201(a)(3) of the CAA, 2 U.S.C. § 1311(a)(3). Hybrid workplaces can implicate many issues under the ADA and RA as applied by the CAA. Here, we focus on

[1] Please note that evaluation of the lawfulness of particular employment actions is determined on a case-by-case basis, and the information in this outline does not constitute legal advice. Rather, our goal is to remind employing offices of their obligations under the CAA and get them thinking about how various issues might arise under these laws in the particular context of hybrid workplaces.

telework as a reasonable accommodation, an issue that has arisen with greater frequency since the onset of the COVID-19 pandemic and employers' shifting telework policies.

Background of telework as a reasonable accommodation

Unless it would be an undue burden, it is discriminatory to not make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee or to deny employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need to make reasonable accommodation. 42 U.S.C. § 12112.

The term "reasonable accommodation" means modifications or adjustments: (1) to a job application process; (2) to the work environment; or (3) that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities. 29 C.F.R. § 1630.2(o)(1). As particularly relevant to telework as an accommodation, reasonable accommodations may include, but are not limited to: job restructuring; reassignment to a vacant position; acquisition or modifications of equipment or devices; and appropriate adjustment or modifications of examinations, training materials, or policies. *Id.* at § 1630.2(o)(2).

"Qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires. 42 U.S.C. § 12111(8). "Essential functions" are fundamental job duties and do not include the marginal functions of a position. 29 C.F.R. § 1630.2(n)(1). A job function may be considered essential for any of several reasons, including because the position exists to perform the function or because there are a limited number of employees available who can perform that function. *Id.* at § 1630.2(n)(2). Evidence of whether a particular function is essential includes the employer's judgment, written job descriptions, and the amount of time spent on the job performing the function. *Id*. § 1630.2(n)(3).

While telework is not expressly mentioned in the text of the ADA or RA, the U.S. Equal Employment Opportunity Commission issued guidance in 2003 indicating that telework can be a reasonable accommodation. U.S. Equal Employment Opportunity Commission, Work at Home/Telework as a Reasonable Accommodation, https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation (last accessed April 28, 2025).

For more information on the ADA and RA as applied by the CAA, please see the Unlawful Discrimination section of the OCWR web site, as well as the OGC's July 26, 2016 Brown Bag outline, "ADA Reasonable Accommodation and Reasonable Modification."

COVID-19 and telework as a reasonable accommodation

The following are specific issues we identified in one or more post-COVID cases (that is, cases where some or all of the operative facts took place after the onset of the COVID-19 pandemic) that may be important to consider.

An employer temporarily modifying essential job functions at the height of the COVID pandemic does not mean these functions are not essential.

- *Stanley v. Phelon*, No. 23-731-CV, 2024 WL 1453872 (2d Cir. Apr. 4, 2024) – David Stanley worked as a Maintenance and Labor Supervisor at a college. All supervisors and managers worked at home for a time beginning in March 2020. Stanley's accommodation request to work from home permanently was denied because the essential functions of his position could not be performed remotely. Instead, his employer offered masking and continued social distancing as accommodations.

  In holding that Stanley failed to state a claim for failure to accommodate, the Second Circuit noted that, though Stanley was permitted to work from home for a time, "that period was during the initial phase of COVID-19…. Stanley's job responsibilities might have changed as the pandemic progressed and schools opened for in person classes." Stanley had failed to allege any specific details of his job responsibilities such that the court could infer that he could perform his job at home.

- *Geter v. Schneider Nat'l Carriers, Inc.,* No. 22-11285, 2023 WL 7321610 (11th Cir. Nov. 7, 2023) – Cierra Geter worked as a night-shift area planning manager (APM) for Schneider, a transportation and logistics company. Her job duties included developing relationships with drivers, retrieving spare keys for drivers from the secure lock box, and printing drivers' paperwork. Schneider denied her accommodation request for full-time remote work and terminated her in April 2019. In response to the COVID-19 pandemic, from March 2020 to March 2021, Schneider reallocated job duties and modified protocols so APMs could perform their jobs remotely. For instance, the printers were relocated from behind a locked door into the drivers' lounge so that APMs could print drivers' paperwork remotely, and for a brief time the office was left unlocked so drivers could independently retrieve keys while APMs worked from home.

  The Eleventh Circuit affirmed summary judgment for Schneider on Geter's failure to accommodate claim. It held that Geter was not a qualified individual because in-person work was an essential function of her job that she could not perform. Geter argued that Schneider's office operations at the start of the pandemic showed that physical presence in the office was not necessary for APMs. The court disagreed: "The bare feasibility of temporarily suspending a function in response to the COVID-19 pandemic does not demonstrate that the function was not essential….Because Geter's argument that Schneider should return to its pandemic-era policies collapses into an argument that Schneider should effectively excuse Geter from performing a fundamental function of her job, we reject it." Additionally, the court noted that events postdating her termination could not support her claim: the relevant question was "whether the employee 'was ... a qualified individual at the time of her termination'" (internal citation omitted).

- *Kinney v. St. Mary's Health, Inc*., 76 F.4th 635 (7th Cir. 2023) – As director of imaging services at a hospital, Anna Kinney was responsible for planning, administering, monitoring, and evaluating the delivery of imaging services to patients. She and many other employees began working remotely in March 2020 because of COVID, but when her coworkers returned to work at the hospital once safety protocols were developed, she

refused, contending that masking exacerbated her anxiety. Her accommodation request to continue to work solely from home was denied. The Seventh Circuit affirmed summary judgment for the hospital, holding that Kinney was not a qualified individual because she could not perform certain essential functions of her job remotely.

The court acknowledged that its precedents generally disfavored working from home as an accommodation because of difficulties created with teamwork, supervision, and productivity. But even in 2019, it had recognized "that technological advances have made working from home more feasible, so that employers cannot rely on an automatic presumption working from home is unreasonable. The many lessons learned about working from home effectively during the pandemic have reinforced that point…. Determining whether a specific job has essential functions that require in-person work has become much more of a case-specific inquiry." (internal citation omitted).

Kinney's claim did not survive such an inquiry. She argued she should have been allowed to work remotely because she and many coworkers did so for a few months beginning in March 2020. The court disagreed: "The fact that many employees were able to work remotely temporarily when forced to do so by a global health crisis does not mean that those jobs do not have essential functions that require in-person work over the medium to long term."

- *Galette v. Ave. 365 Lending Servs. LLC*, No. 24-1221, 2025 WL 429973 (3d Cir. Feb. 7, 2025) – Susan Galette worked in the office as a funding specialist for Avenue 365, a title insurance and settlement company. In March 2020, Avenue's employees began working from home due to COVID, and only three employees (Galette not among them) could print and scan checks outside the office. By July 2020, Avenue discontinued remote printing and scanning due to security concerns, and funding specialists returned to the office. Galette's accommodation request to continue working from home was denied, and she was terminated when she did not return to the office.

  The Third Circuit affirmed summary judgment for Avenue on Galette's disability discrimination and failure to accommodate claims, holding that she failed to establish a prima facie case because she did not show she could perform the essential functions of a funding specialist with or without reasonable accommodation. Galette claimed that she simply needed to be provided with a printer to accomplish all the essential functions remotely. The court refused to require this of Avenue, reasoning that "the burdens of an accommodation cannot be 'clearly disproportionate to the benefits that it will produce[]'" (internal citation omitted); since Avenue "discontinued the remote printing and scanning of checks almost five years ago due to security concerns … Galette's 'proposed accommodation would impose a wholly impractical obligation.'" (internal citation omitted). Galette also argued that two other funding specialists worked remotely and did not perform the functions Avenue alleged were essential. The court found that these employees were improper comparators as they were specifically hired to work remotely.

An employer is not required to reallocate an essential function to an on-site employee to accommodate an employee who cannot work in person.

- *Gibson v. Gables Residential Servs., Inc*., No. 21-CV-2952 (DLF), 2024 WL 1239667 (D.D.C. Mar. 22, 2024) (Judge Dabney L. Friedrich), *appeal dismissed*, No. 24-7086, 2024 WL 4248473 (D.C. Cir. Sept. 17, 2024) – Halston Gibson worked as an assistant community manager at Gables. Due to lupus, an autoimmune disease, she felt unsafe working from the office when the COVID-19 pandemic began and requested a number of accommodations that would reduce her contact with others, including working from home. Gables allowed assistant community managers, including Gibson, to work remotely one day a week during the height of the pandemic. However, it ended that arrangement as quickly as it could, finding that it "didn't work well" and "was very problematic." She was terminated when she did not return to the office and sued under the DC Human Rights Act's disability discrimination provisions, which mirror the ADA.

  The DC District Court granted summary judgment to Gables, holding that any reasonable jury would find that in-person attendance was necessary to perform Gibson's essential job functions, and so she was not qualified for her position as a matter of law. The job duties requiring her to work in the office included providing clerical and phone support, maintaining resident files, and meeting with residents in person when they requested to do so (including decades-long tenants who did not use email or cell phones). Gibson argued that she could have done her job remotely, but offered little supporting evidence. She pointed to certain job duties that could be performed remotely, such as handling lease renewals, "But an employee must be able to perform all the essential functions of her position to be qualified for it." She argued that tasks requiring in-person work could be done by others, but the DCHRA, like the ADA, does not require employers to reallocate essential functions as an accommodation.

- *Kinney v. St. Mary's Health, Inc*., 76 F.4th 635 (7th Cir. 2023) – As detailed above, the Seventh Circuit affirmed summary judgment for Kinney's employer, holding that she was not a qualified individual because she could not perform certain essential functions of her job remotely. By her own admission, remotely performing her required tasks of evaluating staff, serving as a department liaison, and overseeing equipment and facilities would require another staff person to perform on-site monitoring; however, "accommodations" that would allow the employee to avoid an essential function, rather than help them accomplish it, are not reasonable.

An employer is not required to provide an employee's preferred accommodation, as long as the accommodation chosen is effective. In some cases, this issue arises when the employee's medical documentation does not specifically require telework or explain how telework will accommodate their disability.

- *Nguyen v. Bessent*, No. 23-1220, 2025 WL 502073 (4th Cir. Feb. 14, 2025) – An employee claimed the Treasury Department failed to accommodate her by denying her telework request. Her doctor stated that she needed to be in a low-stress environment, and that this could be achieved by transferring her to a new position, allowing her to telework, or shortening her commute. Treasury chose the transfer accommodation, so was

not liable for failing to offer telework: "We've held that without medical documentation specifically stating remote work was required, an alternative accommodation was reasonable. And an employer has the ultimate discretion to choose between effective accommodations." (internal citations and quotations omitted).

- *Smith v. Shelby Cnty. Bd. of Educ.*, No. 23-5815, 2024 WL 3622387 (6th Cir. Aug. 1, 2024) – When the Shelby County Board of Education (SCBE) returned to in-person instruction following the end of pandemic-related restrictions in March 2021, educator Harold Smith did not return to the classroom. He requested to continue to teach remotely due to his immunocompromised status, supporting his request with doctor's letters "recommending and requesting" (cleaned up) that he be permitted to work from home until July, but nonetheless providing precautions to be taken should he be required to be in the presence of others. In response, SCBE proposed two on-site accommodation options, which would involve Smith teaching remotely from an isolated location within the school. Smith turned down these options, ultimately ceasing communications with the SCBE and not returning to work.

  The Sixth Circuit affirmed summary judgment for the SCBE on Smith's failure to accommodate claim, holding that Smith caused the breakdown in the interactive process, rendering him not qualified under the ADA. The SCBE responded to Smith's accommodation request with proposed alternative accommodations which took into consideration the restrictions communicated by his doctors (who never stated that he was required to work from home). Thus, even assuming that Smith's proposed accommodation was reasonable, he remained obligated to continue with the interactive process: "if an individual rejects an employer's reasonable accommodation, the individual will no longer be considered a qualified individual with a disability under the ADA." (cleaned up; internal quotations omitted).

- *Stanley v. Phelon*, No. 23-731-CV, 2024 WL 1453872 (2d Cir. Apr. 4, 2024) – As detailed above, when the campus he worked at reopened, Stanley requested to continue to work remotely. His request was denied because the essential functions of his position could not be performed remotely. Instead, his employer offered masking and continued social distancing as accommodations. Stanley failed to allege how these accommodations, though they may not have been his preferred ones, were not effective.

These assorted other cases may be instructional:

- *Laguerre v. Nat'l Grid USA*, No. 20-3901-CV, 2022 WL 728819 (2d Cir. Mar. 11, 2022) – Customer service representative (CSR) Janina Laguerre's failure to accommodate claim survived summary judgment when her employer, National Grid, failed to demonstrate that her pre-pandemic request to work remotely would have been unreasonable. Taking inbound calls was an essential function of the CSR position. Laguerre presented evidence supporting her position that it was plausible for CSRs to work from home and the technology to enable such an arrangement was not, on its face, unobtainable for National Grid. Though the ADA defines "reasonable accommodation" to include "acquisition or modification of equipment or devices," 42 U.S.C. § 12111(9)(B), National Grid's only response was that it did not possess the requisite technology at the time of Laguerre's

request. The Second Circuit held that National Grid failed to satisfy its burden to demonstrate that the accommodation was unreasonable or unduly burdensome: it did not investigate the feasibility of procuring the requisite technology or present any evidence of the costs of doing so.

However, the court did not allow Laguerre to reopen the summary judgment record to include evidence regarding National Grid's prompt transition to remote work in response to COVID, holding that National Grid's post-pandemic actions were not relevant to the reasonableness of her pre-pandemic accommodation request.

- *McCann v. D.C.,* No. 23-CV-2398 (JMC), 2025 WL 958130 (D.D.C. Mar. 31, 2025) (Judge Jia M. Cobb) – In August 2021, Lynette McCann requested an accommodation of full-time telework. Her employer granted the initial request and multiple extensions over the next year and half, until it claimed that continuing to work remotely would constitute an undue burden to her division and that she could not perform all the essential functions of her job while teleworking. It instead provided her a rotational telework schedule, but this did not accommodate her effectively.

  The employer argued that it sufficiently accommodated McCann twice by providing her with full-time and then rotational telework, and that her dissatisfaction with these accommodations did not give rise to an ADA claim. The district court found that McCann had stated a plausible failure to accommodate claim when she alleged that she had in fact been performing her essential job functions at the time she was denied further full-time telework, and that rotational telework was not effective. The court noted, "An employer's duty to accommodate is a continuing duty that is not exhausted by one effort." (internal quotations omitted).

- *McLaurin v. Ga. Dep't of Nat. Res.,* 739 F. Supp. 3d 1254 (N.D. Ga. 2024) – There were genuine issues of material fact regarding whether physical presence in the office was an essential function of Michelle McLaurin's Budget Analyst/Administrative Operations Manager position, precluding summary judgment on whether she was a qualified individual under the ADA. McLaurin asserted that before COVID, she performed all job functions using the computer and telephone, only meeting with anyone at the office twice a year. Her employer argued that her job description stated that in-person work was required, but it had amended the description to include the in-person requirement during the interactive process. A supervisor's testimony that McLaurin's teleworking created problems such as tasks not being done promptly or having to be performed by others conflicted with the same supervisor's positive performance evaluation for her during that time, which specifically noted that she was successful at keeping up with the workload remotely.

- *Cruz v. N.Y. City Transit Auth.*, No. 1:23-CV-05272 (JLR), 2025 WL 551809 (S.D.N.Y. Feb. 19, 2025) – This case provides an example of an analysis that accords with the *Kinney* court's statement that "Determining whether a specific job has essential functions that require in-person work has become much more of a case-specific inquiry" due to lessons learned about working from home during the pandemic. *Kinney v. St. Mary's Health, Inc*., 76 F.4th 635, 644 (7th Cir. 2023). Lisette Cruz's employer presented

evidence that managers in her division were not successful in completing their duties and managing employees remotely during the COVID-mandated remote work time period – employees did not reliably answer their phones, and technology issues made large meetings unsuccessful. Additionally, at the time Cruz sought her accommodation, the division experienced a significant backlog in claims processing as a result of the pandemic, and was put even further behind by the departure of two assistant directors. The court found that these case-specific issues supported a finding that Cruz's request for full-time remote work would have imposed an undue hardship on her employer.

Family and Medical Leave Act (FMLA)

The FMLA, applied to the legislative branch through CAA section 202, 2 U.S.C. § 1312, allows employees to take job-protected leave for certain medical reasons or to care for family members under specified circumstances.

In 2024, two circuit courts held that remote work is not "leave" within the meaning of the FMLA.

- *Garland-Gonzalez v. Universal Grp., Inc.*, No. 19-1998, 2024 WL 3252657 (1st Cir. July 1, 2024) – Catherine Garland-Gonzalez was terminated after she took what she alleged was protected leave under the FMLA to care for her husband. The First Circuit affirmed summary judgment for her employer, finding that Garland-Gonzalez did not notify her employer of her need for leave. Instead, she had notified her supervisor she would be traveling to care for her husband and thus completing various tasks remotely; she received her regular pay throughout and did not use any accrued leave. In essence, she requested (and received) a remote work arrangement – which does not implicate FMLA rights.

- *Kemp v. Regeneron Pharms., Inc.*, 117 F.4th 63 (2d Cir. 2024) – Denise Kemp, a Senior Manager in Regeneron's Quality Assurance Department, worked remotely from a hospital for 15 days while her daughter recovered from surgery. When she returned to the office, supervisors told her she needed to be more visible in the office and limited her to one day of remote work per week, though others with similar duties worked remotely regularly or full-time. Supervisors began discussing transitioning her to a role with fewer managerial responsibilities. When she retired a few months later, she alleged Regeneron interfered with her FMLA rights by attempting to discourage her from taking FMLA leave and by limiting her remote work. The Second Circuit affirmed dismissal of Kemp's FMLA claim, rejecting her argument that Regeneron substantially limited her remote work days and punished her for working remotely. It noted that remote work is not "leave" withing the meaning of the FMLA: the FMLA "does not entitle employees to work remotely or make it unlawful for an employer to punish an employee who works remotely."

Title VII

Discrimination and retaliation claims related to telework under Title VII – which applies to the legislative branch through section 201(a)(1) of the CAA, 2 U.S.C. § 1311(a)(1) – are nothing new. However, in the year since the Supreme Court issued its decision in *Muldrow v. City of St. Louis, Missouri*, 601 U.S. 346 (2024), which lowered the bar for employees to show that they suffered an "adverse action" for purposes of Title VII discrimination claims, courts appear to be less likely to dismiss allegations of discrimination related to telework.

Prior to *Muldrow*, most federal courts required a plaintiff to demonstrate a "significant" or "serious" harm in order to establish the "adverse action" prong of a prima facie case of discrimination under Title VII. The Supreme Court in *Muldrow* examined the statutory language – which makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e–2(a)(1) – and determined that the courts were demanding more than the statute required. Rather, a plaintiff need only show "some harm respecting an identifiable term or condition of employment." 601 U.S. at 355. Although the *Muldrow* opinion was limited to cases involving involuntary transfers, courts quickly began applying the lower "some harm" threshold in a wide variety of Title VII cases, as well as cases under other statutes with similar analytical frameworks, such as the Age Discrimination in Employment Act.

Unsurprisingly, this change has been reflected in cases involving telework, as courts have recognized that changes in an employee's telework schedule affect the terms or conditions of that individual's employment. Before *Muldrow*, courts were often dismissive of discrimination claims involving telework, holding that changes in telework were not "materially significant" enough to support a prima facie case of discrimination. Some examples:

- *Terry v. Perdue*, No. 20-2016, 2021 WL 3418124 (4th Cir. Aug. 5, 2021) – The Fourth Circuit affirmed the district court's dismissal of the plaintiff's Title VII discrimination claim because he failed to allege that his employer, the Department of Agriculture, took an adverse employment action against him. Among other things, the plaintiff alleged that he was discriminated against when he temporarily lost a telework day, but the court held that "the loss of one telework day did not change the terms and conditions of his employment."

- *Price v. Wheeler*, 834 F. App'x 849 (5th Cir. 2020) – An EPA employee brought discrimination and harassment claims under Title VII based on a variety of alleged adverse employment actions, including the temporary revocation of her telework privileges. The court noted that, while the Fifth Circuit had not yet concluded definitively whether the revocation of telework privileges could constitute an adverse employment

action, in the instant case it did not, because the change was temporary and "does not resemble an 'ultimate employment decision.'"[2]

- *Staggers v. Becerra*, No. CV ELH-21-0231, 2021 WL 5989212 (D. Md. Dec. 17, 2021) – An employee of the Department of Health and Human Services alleged sex discrimination based on eight different adverse actions, one of which was the revocation of his "Scheduled Flexiplace" arrangement, pursuant to which he worked from home on Mondays and Fridays. In granting the employer's motion to dismiss with respect to this claim, the judge noted that "both the Fourth Circuit and judges in this District have concluded that the termination of telework or alternative work privileges does not, without more, constitute an adverse employment action. … And, Staggers has not alleged any consequence or negative effect from the revocation of his Flexiplace arrangement, aside from having to come to work in person on Mondays and Fridays, nor anything more that might transform this denial into an adverse employment action. This is so notwithstanding plaintiff's conclusory allegation that revocation of Flexiplace 'alter[ed] the terms of Mr. Staggers' employment.'"

- *Redmon v. U.S. Capitol Police*, 80 F. Supp. 3d 79 (D.D.C. 2015) (Judge Tanya S. Chutkan) – In a case alleging, among other things, race and sex discrimination under Title VII as applied by the CAA, the court granted the employing office's motion to dismiss, because "a denial of a request to telework, without more, does not rise to the level of an adverse employment action, as it does not involve hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits." (internal quotations omitted).

More recently, courts have cited *Muldrow* in allowing similar claims to survive dismissal or summary judgment.

- *Wilson v. Noem*, No. 20-CV-100 (GMH), 2025 WL 1000666 (D.D.C. Apr. 3, 2025) (Magistrate Judge G. Michael Harvey) – A FEMA employee alleged race-based discrimination and retaliation based on thirteen alleged adverse employment actions, one of which was that his supervisor twice denied his request to telework. Surveying case law from D.D.C. and other district courts, the judge drew a distinction between the denial of *initial* telework requests and the removal of *existing* telework privileges: "Although rescinding or suspending an employee's approved telework schedule or refusing to permit an employee to engage in telework to which he is otherwise entitled may well be an adverse employment action under that standard, merely refusing an employee's request to telework is not, because there is no 'identifiable term or condition of employment' that has been harmed by the denial." (citing *Muldrow*, 601 U.S. at 347). In this case, the plaintiff did not have an approved telework schedule or a vested right to

[2] Prior to the Supreme Court's decision in *Muldrow*, the full Fifth Circuit did away with its previous "ultimate employment decision" standard for plaintiffs to show an adverse action in Title VII discrimination cases, holding that such a requirement was inconsistent with the plain language of the statute. *Hamilton v. Dallas Cnty.*, 79 F.4th 494 (5th Cir. 2023) (en banc).

telework, so his claim failed even under the lower *Muldrow* standard because he could not show any harm to an identifiable term or condition of his employment.

- *Dixon v. Blinken*, No. CV 22-2357 (RDM), 2024 WL 4144105 (D.D.C. Sept. 11, 2024) (Judge Randolph D. Moss) – The plaintiff, an HR specialist for the State Department, usually teleworked on Mondays, but asked to change his telework day during one week when the Monday was a federal holiday, so that he would still have one telework day during that week. His request was denied, even though a female coworker was granted a similar request when her scheduled telework day fell on a federal holiday. The plaintiff alleged sex discrimination in violation of Title VII. The agency argued that a single lost telework day was "*de minimis*" and an "isolated instance" and that even under *Muldrow* he could not show that he suffered "some harm" so as to establish an adverse action. The court disagreed and denied the agency's motion to dismiss the discrimination claim, explaining that under *Muldrow* a plaintiff need only show that he was treated worse than someone outside his protected class, not *how much* worse he was treated.

- *Miller v. O'Malley*, No. 20 C 2118, 2024 WL 4240443 (N.D. Ill. Sept. 19, 2024) – The plaintiff, a paralegal specialist with the Social Security Administration, was given an unsuccessful rating in a critical element on a performance appraisal, which made him ineligible to telework pursuant to a CBA, so his teleworking privileges were revoked. He re-applied to telework and was denied, filed a grievance based on that denial, and was subsequently denied after a second application. He claimed that these denials were based on sex discrimination and retaliation, and produced evidence that similarly situated female employees were granted requests to resume teleworking. Citing *Muldrow*, the court denied summary judgment for the employer, holding that a reasonable factfinder could conclude that the plaintiff's inability to telework "transformed the terms and conditions of his work and left him 'worse off' than he would have been if [he] didn't have to commute into the office every day." The plaintiff provided evidence that the revocation of his privileges caused a "disadvantageous" change in the terms and conditions of his employment, and therefore counted as an adverse action.

Unlike the standard for establishing a prima facie case of discrimination, the standard for establishing a prima facie case of retaliation under Title VII has not changed since *Muldrow*. On the contrary, in its *Muldrow* decision the Supreme Court noted that the Title VII retaliation provision "applies only when the retaliatory action is 'materially adverse,' meaning that it causes 'significant' harm." 601 U.S. at 357 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)). "The test was meant to capture those (and only those) employer actions serious enough to 'dissuade[ ] a reasonable worker from making or supporting a charge of discrimination.'" *Id*. Courts therefore continue to assess telework-based retaliation claims using the "materially adverse" standard.[3]

[3] The CAA contains its own anti-reprisal provision at section 208, 2 U.S.C. § 1317. The OCWR Board analyzes claims under this provision using a formulation of the prima facie requirements similar to that used by federal courts in Title VII retaliation claims. *See*, *e.g.*, *Rager v. U.S. Senate Sergeant at Arms*, No. 17-SN-28 (DA, FM, RP, CV), 2018 WL 4908519, at *7 (Oct. 3, 2018) ("The Board has adopted a Title VII-based approach to analyze all [section 208] claims. Therefore, to establish a prima facie claim of reprisal under the CAA, the employee is required to

- *Phoenix v. Wormuth*, No. 23-5130, 2023 WL 9660884 (6th Cir. Nov. 13, 2023) – A delay in learning that her telework request had been approved did not constitute a "materially adverse" action to support plaintiff's retaliation claim. It was the kind of *de minimis*, minor annoyance that would not dissuade a reasonable worker from making or supporting a charge of discrimination.

- *Overfield v. Kansas*, No. 23-3057, 2024 WL 1611473 (10th Cir. Apr. 15, 2024) – This case presents the opposite scenario from many other cases involving telework. In this instance, a court reporter alleged that she was required to work from home on certain days in retaliation for engaging in protected activity under Title VII. The Tenth Circuit held that there was insufficient evidence that the challenges she faced while carrying out her duties remotely were serious enough to dissuade a reasonable worker from engaging in protected activity, and thus they were not "materially adverse" for Title VII retaliation purposes.

- *Wilson v. Noem*, No. 20-CV-100 (GMH), 2025 WL 1000666 (D.D.C. Apr. 3, 2025) (Magistrate Judge G. Michael Harvey) – As with the plaintiff's discrimination claim (described above), the court distinguished between the revocation of an existing telework arrangement – which "may constitute a materially adverse employment action and support a retaliation claim" – and the denial of an initial telework request. Because the plaintiff in this case had no existing telework privileges and no vested right to telework, the denial of his telework request was not a materially adverse action that would dissuade a reasonable worker from protected activity.

- *Miller v. O'Malley*, No. 20 C 2118, 2024 WL 4240443 (N.D. Ill. Sept. 19, 2024) – The plaintiff alleged that after losing his telework privileges, he was twice denied a request to reinstate them; after the first denial he had complained of sex discrimination, and he alleged that the second denial was made in retaliation for that complaint. The court denied summary judgment for the employer, concluding that "A reasonable juror could find that the loss of telework would dissuade a reasonable worker from engaging in activity protected by Title VII. … The ability to telework changes the structure of an employee's workday. By way of example, a worker who may have personal circumstances that depend on his ability to telework certainly could be dissuaded from filing a grievance if he feared losing telework privileges as a result. The same would be true for a worker who cannot bear the cost of commuting on a daily basis."

Labor-Management Relations

Unionized employing offices may face challenges as they adapt to a hybrid workplace. Different legal obligations may arise if management decides to change the number of days employees may work from home, hold staff meetings with some employees in the office and some virtual, and restructure the physical office to suit operational needs. This section addresses these three areas

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demonstrate that: (1) he engaged in activity protected by [section 208(a)] of the CAA; (2) the employing office took action against him that is reasonably likely to deter protected activity; and (3) a causal connection existed between the two.") (internal citations omitted).

of potential conflict and confusion, encouraging employing offices and unions to collaborate on hybrid workplace issues preemptively during collective bargaining agreement negotiations or before management implements a change.

Bargaining Over Changes to Telework

Employing offices must give unions prior notice and an opportunity to bargain before making changes to employee telework schedules. *IRS, New Orleans Dist. Off.*, 1 F.L.R.A. 896, 900-01 (1979). It is well settled that employing offices must bargain over the impact and implementation of the decision, but whether the office must bargain over the number of telework days depends on the language of the union's proposal and management's response. In general, management has the burden of showing that the union's proposed number of telework days would unduly restrict the office's ability to accomplish its mission.

- *NTEU v. FLRA*, 1 F.4th 1120 (D.C. Cir. 2021) – The D.C. Circuit Court of Appeals vacated and remanded an FLRA decision which found that a union's proposal increasing the number of telework days was non-negotiable. In that case, the facts of which all took place before the COVID-19 pandemic, the union proposed a two-tiered telework program in which most employees would be eligible to telework six days per pay period and employees who met certain criteria could telework seven or eight days per pay period. The proposal allowed management to decide whether the employees met the eligibility criteria as long as the requests were not "unreasonably denied." The agency claimed that the proposal was non-negotiable and the union filed a negotiability petition with the FLRA.

    - The FLRA found that the proposal was a non-negotiable restraint on management's "right to determine the methods used to evaluate and supervise its employees." By requiring a significant increase in "computer and telephone based supervision," the proposal precluded management from "in-person methods of supervision, such as unannounced visits or spot checks." As such, the proposal unduly infringed on management's right to assign work and direct employees under 5 U.S.C. § 7106(a)(2).

    - In a dissent, FLRA Member DuBester argued that the proposal was negotiable because it reserved management's right to approve telework requests and adjust telework schedules if necessary to accomplish the agency's mission. As long as management maintains the ability to adjust schedules when necessary and revoke them when abused, proposals for the maximum number of *possible* telework days are negotiable.

    - The D.C. Circuit largely agreed with Member DuBester. The court held that the FLRA misinterpreted the proposal as an "entitlement" to telework, when the union explained that in fact it offered "no guarantee to any employee." The court found that the FLRA's failure to acknowledge management's wide latitude to approve or deny telework requests under the proposal was "not a product of reasoned decisionmaking."

    - The case was remanded to the FLRA and the union withdrew the petition.

- *HHS, Ctrs. for Medicare & Medicaid Servs., Baltimore, Md.*, 57 F.L.R.A. 704 (2002) – The FLRA upheld an arbitrator's decision to allow an employee to work from home two days per pay period. The agency had a telework policy in place and the grievant met the requirements under the policy. The agency argued that it had a management right under 5 U.S.C. § 7106(a)(2)(B) to assign employees to work at a given location. The FLRA disagreed. The right to assign work does not mean the right to assign employees to complete the work at a certain place. The burden is on the agency to prove that the nature of the employee's work would prevent them from completing that work at home. In this case, the arbitrator and FLRA sustained the union's grievance because the agency wholly failed to tie the employee's substantive work to his designated office.

Nonetheless, in several cases before the Federal Service Impasses Panel (FSIP) since employees began returning to work after the pandemic, agencies have come to the table to bargain with unions over the number of telework. In these cases, the Panel has required agencies to demonstrate why the unions' proposals to increase telework would be unworkable.

- *NFFE Local 476*, 23 FSIP 039 (2023) – As pandemic restrictions loosened, the Department of Defense and two unions reopened telework negotiations for communications employees at Aberdeen Proving Ground. During the pandemic, most bargaining unit employees teleworked every day. The unions and the agency agreed that employees should work in the office more, but disagreed over how much. The unions proposed three days in-office per pay period, while the agency proposed four days in-office per pay period. The unions presented undisputed evidence demonstrating that bargaining unit productivity improved during the COVID-19 maximum telework posture. The agency responded with philosophical objections, that the workforce must be "cohesive to meet any emerging and unforeseen conflicts across the globe," and that four days in-office per pay period "strikes the proper balance." The Impasses Panel found for the union and imposed three days in-office per pay period. The Panel found that while the agency's arguments were "important and weighty," they were supported with only conclusory assertions lacking in specifics. The Panel noted that the agency could not specify how one additional day in the office would allow the agency to achieve its sweeping goals.

- *SEC*, 23 FSIP 003 (2023) – The SEC and one of its unions were negotiating the telework provisions in a successor collective bargaining agreement. During the pandemic, all bargaining unit employees teleworked 100% of their schedules. It was undisputed that full-time telework was highly successful and had no negative impact on work quality or productivity. During negotiations, the union proposed a "Presence with a Purpose" program for employees who lived within 40 miles from of their duty station. This program would allow employees to telework full-time unless they were required to be in the office for a specific purpose. Under this program, the agency would be required to reimburse employees for travel between their home and their duty station or other work location during work hours. The union also proposed that employees who live more than 40 miles from the office work in the office two days per pay period. The agency responded by proposing that all employees be required to work in the office two days per pay period. The Impasses Panel found for the agency and imposed two days in-office per pay period. The Panel found that the "Presence with a Purpose" program would have a

significant impact on productivity because it would force employees to commute during work time, thereby reducing their work time. Moreover, the program's requirement that the agency pay for commuting costs during work time created too much uncertainty.

- *NTEU & U.S. Dep't of Energy*, 23 FSIP 041 (2023) – The agency proposed a "hoteling" policy where employees would share an office. The agency proposed that employees would maintain a dedicated office if they were physically present 6 days per pay period. The union proposed that employees could maintain dedicated workspace if they were physically present for at least 5 days per pay period. The FSIP put the burden on the agency to demonstrate the necessity for this number of days. The Panel found that the agency failed to justify its economic argument because the agency could not explain why one day less would break the bank. The Panel imposed the union's proposal.

Union Access to Meetings

Investigative interviews and formal discussions in a hybrid work environment may present issues for employing offices, unions, and employees when all necessary people are not in the same physical location. For either type of meeting, employing offices and unions may bargain over procedures for announcing and conducting hybrid investigative interviews and formal discussions in collective bargaining agreements.

Investigative Interviews

If the meeting is occurring over telephone or by videoconference, that technology must allow the union representative to take an "active part" in the interview and effectively represent the employee by:

- Counseling the employee before they answer a question;
- Asking their own questions; and
- Reviewing the same documents and evidence presented to the employee.

Dept. of Justice, Bureau of Prisons, Safford, Ariz., 35 F.L.R.A. 431, 440 (1990).

The hybrid work environment may make it harder to find a union representative to be present for an investigative interview. The union has a presumptive right to choose the representative for a meeting, but the availability of that representative may not unduly delay the investigation. *INS, N.Y. Dist. Office*, 46 F.L.R.A. 1210, 1222 (1993).

- In *INS, N.Y. Dist. Office*, the union and management agreed that the union's president and vice president – who were also the union's designated representatives for investigative interviews – would use official time to travel to meet with agency heads. A week before the planned travel, the agency notified the union of the need for an investigative interview that would occur during the travel dates. The union asked to postpone the interview because of the scheduled travel, but the agency refused and suspended the employees under investigation after they refused to attend. The union admitted that other representatives were available but preferred the president or vice president to be present.

The FLRA held that the agency did not violate the statute by refusing to postpone the interview and disciplining the employees. The FLRA stressed that the agency never directed the union to designate certain representatives for certain meetings with management: the union could have cancelled the planned travel for the president or vice president to attend the interview.

- Similarly, in *Buonadonna Shoprite, LLC*, 356 NLRB 857 (2011), the NLRB held that an employer need not delay an investigative interview when one union representative is available but the employee would prefer another. In that case, the employer brought the employee and a shop steward to the office on a Thursday for an investigative interview. The employee said that he would not participate unless a different union representative was there. He then left and called that representative, who said he would not be available until the following Monday. The employee then refused to give a statement and was suspended for an insubordination. The Board held that the employer had satisfied its obligations by inviting the shop steward and the employee to the meeting.

As such, unions transitioning to a hybrid work environment should consider training additional representatives to attend investigative interviews. With more representatives available, the parties will avoid disruption and litigation if one union agent cannot be located before a statutory meeting with management.

Formal Discussions

To include staff working at home and in the office, employing offices with a hybrid workforce may choose to hold larger meetings discussing important changes to conditions of employment over videoconference with some employees attending in-person and some virtual. In most cases, these meetings will be formal discussions to which management must invite the union. As with investigative interviews, employing offices must ensure that the hybrid formal discussions allow the union to participate actively in the meeting, including by asking questions and receiving the same materials that other attendees receive.

Changes to the Workplace Environment

Returning to the office with hybrid workers may lead employing offices to alter their workplace, including moving employees' job locations to different buildings or different locations in the same building. Restructuring the physical office – even the offices of non-bargaining unit employees – can trigger the duty to bargain if the change to conditions of employment is more than *de minimis*.

- *U.S. Army Rsrv. Components Pers. & Admin. Ctr., St. Louis, Mo.*, 20 F.L.R.A. 117 (1985) – The FLRA held that an office relocation that moved 23 employees to a different area of the same floor was *de minimis* and did not necessitate bargaining. In this case, the work duties of the affected employees were not affected by the change and the change only affected a small percentage of the 1500-person bargaining unit. Without any evidence that the parties had a practice of bargaining over similar relocations, the FLRA found that the move had such a minimal impact no bargaining was required.

- However, in *Dep't of HHS, SSA, Baltimore, Md.*, 31 F.L.R.A. 651 (1988), the FLRA found that the agency had a duty to bargain over the impact and implementation of a work processing system that required a change to the office layout. Before the change, intake employees interviewed claimants at a desk and then assigned the claimant to a claims representative, who would meet the claimant in their office. Under the new plan, the intake employees interviewed the claimants behind plexiglass and then the claims representative met them in a designated room away from the representative's office. The new plan moved employee offices – changing heating, lighting, and ventilation – and changed work procedures, like how interviews would be assigned and the scheduling and duration of the interviews. All of these changes were more than *de minimis*, triggering the duty to bargain over their impact and implementation.

- Moving an office of non-bargaining unit employees may trigger the duty to bargain if the move changes bargaining unit employees' conditions of employment. In *Dep't of the Treasury, IRS, Chicago, Ill.*, 33 F.L.R.A. 147 (1988), the IRS moved its Security Office, which housed non-bargaining unit employees who investigated bargaining unit employee misconduct, from downtown Chicago to the suburb of Lisle. The Security Office had been within six blocks of the bargaining unit employees' office but after the relocation it would be 30 miles away. The FLRA found that the IRS had to bargain with the union over the change because the move would be a significant inconvenience for employees and union representatives traveling to the new office for interviews.

To preempt disputes about the negotiability of an office move, parties may elect to include relocation as an item in their collective bargaining agreements. The decision, as well as the impact and implementation of the decision, to change allocation of space, furniture, and equipment are generally negotiable subjects of bargaining unless the employing office can show that the proposal implicates the technological relationship to the furtherance of the office's work. 5 U.S.C. § 7106(b)(1); *Dep't of Lab., OSHA*, 21 F.L.R.A. 658, 660 (1986).