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## Note

### Telecommuting and the Americans with Disabilities Act: Is Working at Home a Reasonable Accommodation?

*Kristen M. Ludgate\**

Patricia Langon, who suffers from multiple sclerosis, worked for the Department of Health and Human Services (HHS) as a computer programmer.<sup>1</sup> Although she adequately performed her job for over a year and a half, Langon eventually developed symptoms that interfered with her work.<sup>2</sup> At first, Langon attempted to adjust to her deteriorating condition by altering her work schedule, having her sister drive her to the office, and taking extended unpaid leaves where necessary to recuperate.<sup>3</sup> When her bouts of weakness and fatigue became more severe, however, Langon and her physician concluded she could no longer regularly commute to work.<sup>4</sup>

On the advice of her physician,<sup>5</sup> Langon asked HHS for permission to work from home.<sup>6</sup> HHS denied her request, contending that Langon's job required her physical presence in the

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1. *Langon v. Department of Health & Human Servs.*, 959 F.2d 1053, 1054 (D.C. Cir. 1992).

2. *Id.*

3. *Id.* HHS initially supported these efforts, even though Langon's frequent absences were disruptive. *Id.*

4. *Id.* at 1054-55. Langon believed commuting to work contributed to her deteriorating condition. *Id.* at 1054. In a letter to HHS, Langon's physician agreed, stating that her condition was so serious that "daily commuting to the job will rapidly and severely threaten her health." *Id.* at 1055.

5. Langon's physician advocated telecommuting because it would allow Langon to work full-time without jeopardizing her health. *Id.*

6. *Id.* at 1054. Langon also requested several other accommodations, including the opportunity to rest during the day and a more comfortable work environment; the agency granted these requests. *Id.* at 1055.

workplace.<sup>7</sup> Eventually, HHS terminated Langon for unsatisfactory performance.<sup>8</sup> After exhausting a series of administrative remedies,<sup>9</sup> Langon filed suit in federal district court<sup>10</sup> under the Rehabilitation Act (Rehab Act),<sup>11</sup> which prohibits disability discrimination by recipients of federal funds.<sup>12</sup> Langon argued that the Rehab Act required HHS to allow her to work from home as a reasonable accommodation for her multiple sclerosis.<sup>13</sup> The district court disagreed, however, and granted summary judgment for HHS.<sup>14</sup> The D.C. Circuit reversed,<sup>15</sup> holding that Langon had offered sufficient proof that working at home was a reasonable accommodation under the Rehab Act to survive summary judgment on that issue.<sup>16</sup>

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7. *Id.* Although initially HHS told Langon that the agency did not have a telecommuting policy, it later conceded that it did allow severely disabled workers to telecommute and requested additional information about Langon's disability. *Id.* Langon's physician wrote to HHS and volunteered to answer additional questions by phone, but the agency apparently never contacted him. *Id.* When HHS formally denied Langon's request to work at home, it stated that the job of computer programmer was not appropriate for telecommuting because it required precision, tight deadlines, and ongoing communication with colleagues requesting computer reports. *Id.*

8. *Id.* at 1056. After HHS denied her request to work from home and later refused to grant her a promotion she had long sought, Langon failed to complete any of her assignments. *Id.* at 1055-56.

9. Langon first filed an internal complaint with HHS alleging that the refusal to allow her to telecommute was discriminatory. *Id.* at 1056. When HHS denied this complaint, Langon appealed to the Equal Employment Opportunity Commission (EEOC), which sustained the agency's action. *Id.* The EEOC found that allowing Langon to telecommute would unduly burden HHS. *Id.* Langon also appealed to the Merit Systems Protection Board, which found that HHS had just cause to fire Langon. *Id.*

10. See *Langon v. Department of Health & Human Servs.*, 749 F. Supp. 1, 4 (D.D.C. 1990) (evaluating Langon's request to seek review of the EEOC's decision).

11. 29 U.S.C. §§ 791-795 (1994).

12. See *id.* § 794(a) (proscribing discrimination against disabled individuals by "any program or activity receiving Federal financial assistance").

13. *Langon*, 749 F. Supp. at 5.

14. *Id.* at 4. The district court found Langon had failed to prove her inability to commute to work. *Id.* at 6.

15. *Langon v. Department of Health & Human Servs.*, 959 F.2d 1053, 1058 (D.C. Cir. 1992).

16. *Id.* The court noted HHS's changing positions in the 10 years since the agency first denied Langon's request and found that the district court erred by agreeing with the agency's "litigating position" that Langon failed to provide sufficient medical information to prove her need to work from home. *Id.* The court noted that nothing in the Rehab Act or the regulations required an employee to provide medical evidence. *Id.* Furthermore, HHS routinely granted work-at-home requests without such evidence. *Id.* at 1059. Finally,

*Langon* arose before the employment discrimination provisions of the Americans with Disabilities Act (ADA)<sup>17</sup> went into effect.<sup>18</sup> Like the Rehab Act,<sup>19</sup> however, Title I of the ADA<sup>20</sup> requires employers to take affirmative steps to accommodate the known disabilities of their employees.<sup>21</sup> Thus, if a disabled employee cannot perform some job responsibilities because of his or her disability, the ADA requires that the employer attempt to make modifications or adjustments that would enable the employee to do the job.<sup>22</sup> Although alleged failures to provide reasonable accommodation make up a substantial portion of ADA complaints,<sup>23</sup> considerable confusion remains about the scope of an employer's obligation to accommodate.<sup>24</sup> In several cases decided after *Langon*, courts de-

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the court found that HHS failed to prove its contention that *Langon's* job could be completed only at the agency. *Id.* at 1060.

17. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12117 (1994)).

18. *See id.* § 108, 104 Stat. at 337 (noting that the ADA's employment discrimination provisions were not fully effective until 1992).

19. Although the duty to reasonably accommodate is not explicit in the statutory text, it is clearly stated in the accompanying regulations. *See* 45 C.F.R. § 84.12 (1996) (imposing a reasonable accommodation requirement).

20. Title I contains the ADA's employment discrimination provisions. *See* 42 U.S.C. §§ 12111-12117 (1994) (containing the statutory provisions of Title I); *see also* 42 U.S.C. §§ 12101-12102 (1994) (outlining the findings, purpose and definitions for the ADA, which are important for interpreting Title I); 29 C.F.R. § 1630 (1996) (listing regulations implementing Title I and providing an interpretive appendix).

21. *See* 42 U.S.C. § 12112(b)(5)(A)-(B) (defining unlawful discrimination to include the failure or refusal to reasonably accommodate a disabled applicant or employee); *see also* 29 C.F.R. app. § 1630.9 (1996) (explaining that "[t]he obligation to make reasonable accommodation is a form of non-discrimination").

22. *See* 42 U.S.C. § 12111(9) (providing examples of reasonable accommodations); *see also infra* notes 49-58 and accompanying text (describing potential accommodations).

23. From 1992 to 1995, over 50,000 ADA complaints were filed with the EEOC. *See* James H. Coil III & Lori J. Shapiro, *The ADA at Three Years: A Statute in Flux*, 21 EMPLOYEE REL. L.J. 5, 5 (1996). One-quarter of the complainants alleged a failure or refusal to provide reasonable accommodation. *Id.*

24. Several commentators have criticized the reasonable accommodation provisions of the ADA as unduly ambiguous and unworkable. *See, e.g.,* Gerald T. Holtzman et al., *Reasonable Accommodation of the Disabled Worker—A Job for the Man or a Man for the Job?*, 44 BAYLOR L. REV. 279, 279 (1992) (predicting that the ADA will be "a source of new litigation worries and a potential compliance nightmare for large and small businesses alike"); Floyd D. Weatherspoon, *The Americans with Disabilities Act of 1990: Title I and Its Impact on Employment Decisions*, 16 VT. L. REV. 263, 282 (1991) (concluding that ADA compliance is challenging because "it is difficult to identify what

clined to hold that an employer was obligated to allow a disabled employee to work from home.<sup>25</sup>

This Note considers whether and when telecommuting is a reasonable accommodation under the ADA. For the purposes of this Note, the term telecommuting refers to any work-at-home arrangement that is facilitated at least in part by telecommunications technology.<sup>26</sup> Because of the advantages it offers to employers<sup>27</sup> and employees,<sup>28</sup> telecommuting has become increasingly prevalent in the American workplace.<sup>29</sup> Given the trend toward telecommuting and the increasing litigation of disability discrimination claims resulting from the passage of the ADA,<sup>30</sup> requests by disabled employees to telecommute are likely to increase.

This Note argues that courts considering telecommuting as a reasonable accommodation must use a fact-specific analysis to determine whether telecommuting is reasonable under the circumstances of a particular case. Part I outlines the ADA provisions defining an employer's obligation to accommodate disabled employees and describes the trend toward telecommuting in the United States. Part I also examines case law relevant to the ADA and telecommuting. Part II argues that current judicial approaches to telecommuting as a reasonable accommodation are flawed because courts have presumed telecommuting is inappropriate. As a result, courts have failed to adhere to the ADA's requirement of case-by-case adjudication. Part III describes a fact-specific framework for evaluating

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constitutes reasonable accommodation and what sufficiently establishes undue hardship").

25. See *infra* notes 104-134 and accompanying text (summarizing cases holding against an employee who wanted to work from home).

26. See P.L. Mokhtarian & I. Solomon, *Modeling the Choice of Telecommuting: Setting the Context*, 20 ENV'T & PLANNING 749, 749 (1994) (defining telecommuting as "using telecommunications technology to work at home . . . during regular work hours, instead of commuting to a conventional work place at the conventional time").

27. See *infra* notes 80-84 and accompanying text (outlining the advantages of telecommuting for employers).

28. See *infra* note 79 and accompanying text (describing advantages to employees).

29. See *infra* notes 77-78 and accompanying text (discussing the increasing prevalence of telecommuting).

30. Since Title I went into effect in 1992, the EEOC has been deluged with ADA complaints. See Coil & Shapiro, *supra* note 23, at 5 (noting that the EEOC received 19,750 new ADA charges during the first nine months of 1995); Lisa Stansky, *Opening Doors*, ABA J., Mar. 1996, at 66 (noting that 20% of all discrimination charges filed with the EEOC are ADA claims).

whether telecommuting is a reasonable accommodation under the ADA. This Note concludes that a fact-specific evaluation of telecommuting as a reasonable accommodation best achieves the purposes of the ADA by maximizing employment opportunities for disabled workers without unduly burdening employers.

## I. THE ADA AND TELECOMMUTING: EVOLVING OBLIGATIONS IN A CHANGING WORKPLACE

Because telecommuting challenges traditional notions of how work is structured, it poses unique questions for the development of employment law.<sup>31</sup> The issue of telecommuting as a reasonable accommodation has forced courts to articulate the boundaries of an employer's obligations under the ADA.<sup>32</sup> Courts faced with the issue have not yet settled on a consistent approach.<sup>33</sup>

### A. THE AMERICANS WITH DISABILITIES ACT

#### 1. Comprehensive Protection for Qualified Individuals

Congress enacted the ADA to provide a comprehensive program that would end discrimination against disabled individuals and bring persons with disabilities into the economic and social mainstream.<sup>34</sup> Prior to the passage of the ADA, discrimination against individuals with disabilities was regulated primarily by the Rehab Act, which applies only to federal employers and contractors.<sup>35</sup> Congress derived the ADA's employment discrimination provisions from Rehab Act regulations<sup>36</sup>

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31. See Barry A. Hartstein & Mark L. Schulman, *Telecommuting: The New Workplace of the '90s*, 21 EMPLOYEE REL. L.J. 179, 180-87 (1996) (describing the implications of telecommuting for employment law).

32. See *infra* Part I.C (describing the reasoning of courts addressing the telecommuting issue).

33. See *infra* Part I.C (comparing judicial approaches to telecommuting).

34. See 42 U.S.C. § 12101(b)(1) (1994) (declaring that the ADA's purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"); H.R. REP. NO. 101-485, pt. 2, at 22 (1990), reprinted in 1990 U.S.C.C.A.N. 344 (explaining that the purpose of the ADA is "to bring persons with disabilities into the economic and social mainstream of American life").

35. 29 U.S.C. §§ 791-795 (1994).

36. See H.R. REP. NO. 101-485, at 62-67, reprinted in 1990 U.S.C.C.A.N. 344, 349-50 (acknowledging that the ADA's definition of "reasonable accommodation" is based on interpretations of that phrase under the Rehab Act).

that outline the duty to provide reasonable accommodation.<sup>37</sup> Unlike the Rehab Act, however, Congress gave statutory authority to the duty, by including it in the text of the ADA.<sup>38</sup> The ADA also applies to both public and private employers.<sup>39</sup> Despite these differences, courts generally view existing Rehab Act precedent as persuasive in ADA cases.<sup>40</sup>

While the ADA's protections are comprehensive, they are available only to qualified individuals with a disability.<sup>41</sup> Title I defines a "qualified individual" as one who "with or without reasonable accommodation . . . can perform the essential functions of the employment position that such individual holds or desires."<sup>42</sup> Thus, the ADA's conception of a qualified individual is directly related to the reasonable accommodation requirement. Determining whether a particular job function is essential requires a factual analysis<sup>43</sup> that focuses on whether the

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Congress amended the Rehab Act in 1992 so that the standards for proving employment discrimination under the Rehab Act are the same as those applied under the ADA. See Pub. L. No. 102-569, § 506, 106 Stat. 4344, 4428 (1992) (clarifying applicable interpretive standards).

37. See 45 C.F.R. § 84.12 (1996) (requiring that recipients of federal financial assistance reasonably accommodate disabled employees).

38. See 42 U.S.C. § 12111(5)(A)-(B) (1994) (defining unlawful discrimination under the ADA to include the failure or refusal to provide reasonable accommodation). The text of the Rehab Act, however, does not explicitly create an affirmative duty for employers to accommodate disabled workers. See 29 U.S.C. § 794(a) (1994) (providing only that disabled individuals should not be excluded from federally funded programs). But see *supra* note 37 (explaining that Rehab Act regulations do impose an affirmative duty on employers).

39. See 42 U.S.C. § 12111(5)(A) (defining "covered entities" as employers with 15 or more employees).

40. See, e.g., *Allison v. Department of Corrections*, 94 F.3d 494, 497 (8th Cir. 1996) (recognizing that "[b]ecause the same basic standards and definitions are used under both Acts, cases interpreting either are applicable and interchangeable"); *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995) (holding that the Rehab Act precedent is persuasive because Title I of the ADA "merely generalize[s] to the economy as a whole the duties, including that of reasonable accommodation, that the regulations under the Rehabilitation Act impose[] on federal agencies").

41. See 42 U.S.C. § 12112(a) (prohibiting discrimination against a qualified individual with a disability).

42. *Id.* § 12111(8).

43. See 29 C.F.R. app. § 1630.2(n) (1996) (explaining that "[w]hether a particular function is essential is a factual determination that must be made on a case by case basis"). According to the EEOC, determining whether an employee or applicant is qualified is a two-step process. *Id.* § 1630.2(m). First, a court must determine whether the individual possesses the required background and experience for the position in question. *Id.* Next, a court evaluates whether the individual is able to perform, with or without reasonable accommodations from the employer, the essential functions of the job. *Id.*

function is so fundamental to the particular position that it cannot be reallocated or restructured without transforming the nature of the job.<sup>44</sup>

## 2. The Duty to Accommodate

The duty to take affirmative steps to accommodate disabled workers distinguishes the ADA from other civil rights laws that only mandate equality of treatment.<sup>45</sup> Neither the statute nor the regulations promulgated by the Equal Em-

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44. See *id.* § 1630.2(n)(1) (defining essential functions as "the fundamental job duties of the employment position the individual with a disability holds or desires"). According to the EEOC, the essential functions inquiry usually focuses on three issues: whether the employer actually requires all individuals in the position to perform the function, whether other employees could perform the function if the plaintiff's job was restructured, and the degree of expertise required to perform the function. *Id.*

Courts must consider the employer's opinion about whether a particular function is essential. See 42 U.S.C. § 12111(8) (mandating that "consideration shall be given to the employer's judgment as to what functions of a job are essential"). Although the employer's opinion is not dispositive, a court's essential function inquiry should not attempt to "second guess an employer's business judgments." 29 C.F.R. app. § 1630.2(n).

45. As the Fifth Circuit explained, unlike under civil rights laws "an employer who treats a disabled employee the same as a non-disabled employee may violate the ADA." *Reil v. Electronic Data Sys. Corp.*, 99 F.3d 678, 681 (5th Cir. 1996); see also Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 493-522 (1991) (comparing the ADA with other civil rights laws).

Like other civil rights legislation, the ADA's aim is equal opportunity. Congress designed the reasonable accommodation provisions of the ADA to reduce or eliminate unnecessary barriers between an individual's abilities and the requirements for performing essential job functions. See, e.g., H.R. REP. NO. 101-485, at 65, reprinted in 1990 U.S.C.C.A.N. 344, 350 (explaining that "the reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed"). A reasonable accommodation provides a disabled employee with the opportunity to attain the same level of performance as a similarly situated non-disabled person. See 29 C.F.R. app. § 1630.9 (stating that a reasonable accommodation should provide equal employment opportunity, defined as "an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability"). Equality of opportunity for disabled individuals can only be achieved, however, by providing disabled workers with accommodations not available to their non-disabled colleagues. See Burgdorf, *supra*, at 460-61 (explaining the United States Commission on Civil Rights' finding that "[d]iscrimination against handicapped people cannot be eliminated if programs, activities, and tasks are always structured in the ways people with 'normal' physical and mental abilities customarily undertake them").



ployment Opportunity Commission (EEOC), however, requires any particular accommodation.<sup>46</sup> The ADA does not even provide an explicit definition of the term "reasonable accommodation" but, instead, lists the kinds of modifications that may be required.<sup>47</sup>

The EEOC regulations are similarly open-ended. The regulations require employers and employees to engage in an interactive process in order to determine the appropriate reasonable accommodation for their situation.<sup>48</sup> An appropriate accommodation is one that accounts for the abilities and limitations of the disabled applicant or employee and the specific functional requirements of the job in question.<sup>49</sup> An employer is not required to implement an accommodation that involves restructuring the essential functions of the position, or that does not enable the employee to adequately perform these functions.<sup>50</sup>

The ADA provides that reasonable accommodations may include making facilities accessible, restructuring work sched-

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46. See 29 C.F.R. app. § 1630.2(o) (explaining that the EEOC's listing of accommodation possibilities is not intended to be exhaustive).

47. See 42 U.S.C. § 12111(9)(A)-(B) (listing accommodations which the term "reasonable accommodation" may encompass).

48. The interpretative appendix to the EEOC regulations places considerable emphasis on the procedural aspects of Title I. See 29 C.F.R. app. § 1630 (explaining that the ADA "establishes a process in which the employer must assess a disabled individual's ability to perform"); *id.* § 1630.2(o) (stating that finding an appropriate accommodation "involves a process in which the employer and employee identify the precise limitations imposed by the disability and explore potential accommodations"); *id.* § 1630.9(a) (describing a four-step process employers should use when an employee requests an accommodation).

The regulations do not specify, however, what happens when the process breaks down. The Seventh Circuit has held that where there is a failure of communication, "courts should attempt to isolate the cause of the breakdown and then assign responsibility." *Beck v. University of Wis.*, 75 F.3d 1130, 1135 (7th Cir. 1996). The *Beck* court held that an employer is not liable for failure to provide accommodations when the employee is the one who caused the process of identifying an accommodation to break down. *Id.* at 1137. In a subsequent case, the Seventh Circuit found that an employer's failure to participate in the required interactive process precluded summary judgment for the employer. *Bultemeyer v. Fort Wayne Community Sch.*, 100 F.3d 1281, 1287 (7th Cir. 1996).

49. See 29 C.F.R. app. § 1630.9 (explaining that the reasonable accommodation process requires the assessment of both the job and the individual's disability).

50. See *id.* § 1630.2(o) (explaining that "the essential functions are by definition those that the individual who holds the job would have to perform"); see also *supra* notes 43-44 and accompanying text (describing essential job functions).

ules and responsibilities, or adapting examinations and other training and selection tools.<sup>51</sup> Accommodations upheld by courts under the Rehab Act and the ADA include requiring a school to provide an assistant for a teacher who was disabled in a car accident,<sup>52</sup> restructuring a chemist's duties to minimize his contact with the public,<sup>53</sup> reassigning an employee to a vacant alternative position,<sup>54</sup> and transferring an employee to a location where he can obtain better medical care.<sup>55</sup> Other courts have interpreted the reasonable accommodation requirement more narrowly, denying requests for a modified work schedule,<sup>56</sup> prolonged leaves to accommodate chronic illness,<sup>57</sup> and a smoke-free work environment.<sup>58</sup>

### 3. The Undue Hardship Defense

An employer may avoid accommodating a disabled employee or applicant by demonstrating that the proposed accommodation

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51. See 42 U.S.C. § 12111(9) (noting accommodations which the term "reasonable accommodation" may include). This list "is not intended to be exhaustive of accommodation possibilities." 29 C.F.R. app. § 1630.2(o). The interpretive appendix to the regulations also mentions, as other possible accommodations, providing additional leave, providing personal assistants, or reallocating or restructuring nonessential job functions. *Id.*

52. See *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 142 (2d Cir. 1995) (holding that a school district may be required to provide a teaching assistant to a disabled teacher).

53. See *Overton v. Reilly*, 977 F.2d 1190, 1195 (7th Cir. 1992) (holding that an employer could have accommodated a plaintiff's inability to interact with the public by allowing the plaintiff to communicate by mail and providing him with someone who could speak on the phone for him).

54. See *Benson v. Northwest Airlines*, 62 F.3d 1108, 1114 (8th Cir. 1995) (noting that reassignment to an alternative position was a possible accommodation where the plaintiff presented evidence that positions were vacant and that he was qualified for them).

55. See *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993) (holding that an HIV-positive plaintiff's request to transfer for access to better medical treatment was not unreasonable as a matter of law).

56. See *Guice-Mills v. Derwinski*, 967 F.2d 794, 798 (2d Cir. 1992) (refusing to require an employer to allow a head nurse to begin her shift two hours late as an accommodation for severe depression because communication with the night supervisor was essential to her position).

57. See, e.g., *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995) (holding that an employer was not required to grant indefinite leave so that a bus driver suffering from chronic illnesses could improve his health).

58. See *Harmer v. Virginia Elec. & Power Co.*, 831 F. Supp. 1300, 1306 (E.D. Va. 1993) (holding that an employee was not entitled to a completely smoke-free environment as an accommodation to a pulmonary disability where the employer limited smoking to designated areas).

would impose an undue hardship on its operation.<sup>59</sup> An undue hardship exists when a proposed accommodation creates "significant difficulty or expense"<sup>60</sup> for the employer. Determining whether an accommodation presents an undue hardship requires a fact-specific analysis of the costs and logistical difficulties imposed on the employer's resources.<sup>61</sup> If a particular accommodation poses an undue hardship, the employer must attempt to provide a less burdensome alternative accommodation.<sup>62</sup>

The requirements for establishing an undue hardship defense are ambiguous, because neither Congress nor the EEOC have promulgated specific guidelines that distinguish a reasonable accommodation from an undue hardship.<sup>63</sup> This uncertainty forces courts to make fact-specific determinations in individual cases. While this ambiguity increases litigation, the EEOC argues that a fact-specific approach "is essential if qualified individuals of varying abilities are to receive equal

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59. See 42 U.S.C. § 12112(b)(5)(A) (1994) (defining discrimination to include the failure to make reasonable accommodation, "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business") (emphasis added). An employer may avoid a particular accommodation on undue hardship grounds even if the proposed accommodation would allow the employee to do the job. See, e.g., 29 C.F.R. app. § 1630.2(p) (1996) (explaining that although bright lighting might enable a visually impaired waiter to work in a nightclub, this accommodation would impose an undue hardship if it would destroy the club's ambiance or make it difficult for patrons to see the stage).

60. 42 U.S.C. § 12111(10)(A).

61. See *id.* § 12111(10)(B) (listing several factors to be considered in determining whether a proposed accommodation presents an undue hardship, all of which focus on the cost and nature of the accommodation, relative to the resources and structure of the entity in question); 29 C.F.R. app. § 1630.2(p) (stating that the undue hardship inquiry should account for the financial realities of the particular employer).

62. See 29 C.F.R. app. § 1630.2(p) (explaining that if one accommodation presents an undue hardship, an employer is required to provide an alternative accommodation if one is available).

63. One commentator argues that Congress had specific reasons for refusing to clearly define the undue hardship defense. Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 427 (1995). Epstein suggests that Congress implemented a vague standard because (1) it expected the costs of reasonable accommodations would be insignificant; (2) it believed cases decided under the Rehab Act provided ample interpretive guidance; (3) it concluded that courts could interpret any ambiguities on a case-by-case basis; and (4) it decided that coming up with a fixed standard would be impossible, given the enormous range of disabilities and employment settings. *Id.*

opportunities to compete for an infinitely diverse range of jobs."<sup>64</sup>

#### 4. Burdens of Proof in a Reasonable Accommodation Case

Neither the text of the ADA nor the EEOC regulations allocate the burdens of proof between employer and employee for violations of Title I, creating considerable confusion about what is required to prove a prima facie case under the available theories of discrimination.<sup>65</sup> Despite the lack of specific guidelines, courts have developed a relatively consistent framework for evaluating reasonable accommodation cases. Typically, the employee must establish that he or she is disabled<sup>66</sup> and qualified to perform the essential functions of the job with a proposed reasonable accommodation.<sup>67</sup> Conversely, the employer bears the burden of proving that any contested job criteria are genuinely essential.<sup>68</sup> The burden of proving undue hardship also rests with the employer.<sup>69</sup>

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64. 29 C.F.R. app. § 1630.

65. For a detailed summary of possible theories of employment discrimination under the ADA and their corresponding burdens of proof, see *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1179-86 (6th Cir. 1996) (examining alternative burdens of proof and arguing that the appropriate model should depend on the nature of the plaintiff's claim). See also Paul S. Greenlaw & John P. Kohl, *Proving ADA Discrimination: The Court's View*, 47 LAB. L.J. 376, 376-80 (1996) (comparing burdens of proof under Title VII and the ADA).

66. See, e.g., *Monette*, 90 F.3d at 1185 (requiring plaintiffs to prove they are disabled as part of their prima facie case); *Katz v. City Metal Co.*, 87 F.3d 26, 30-32 (1st Cir. 1996) (providing an extended analysis of the requirements for proving disability under the ADA); see also 42 U.S.C. § 12102(2) (1994) (defining "disability" under the ADA).

67. See, e.g., *Monette*, 90 F.3d at 1183-84 (explaining that the plaintiff bears the burden of establishing "that he or she is capable of performing the essential functions of the job with the proposed accommodation"); *Katz*, 87 F.3d at 30 (explaining that an element of the plaintiff's case is to show the ability to perform the essential functions of the job with or without reasonable accommodation); *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir. 1994) (holding that the "[p]laintiff bears the burden of demonstrating that she could perform the essential functions of her job with reasonable accommodation"); *Hendry v. GTE North, Inc.*, 896 F. Supp. 816, 825 (N.D. Ind. 1995) (holding that the plaintiff bears the burden of showing that he or she is a qualified individual with a disability and, thus, plaintiff bears the burden of demonstrating that he or she could perform the essential functions of the job with reasonable accommodation); *Dutton v. Johnson County Bd. of County Comm'rs*, 859 F. Supp. 498, 506 (D. Kan. 1994) (explaining that the "plaintiff must prove that he is a 'qualified individual'").

68. See, e.g., *Monette*, 90 F.3d at 1185 (explaining that "[t]he employer will bear the burden of proving that a challenged job criterion is essential"); *Reil v. Electronic Data Sys. Corp.*, 99 F.3d 678, 683 (5th Cir. 1996) (noting

A plaintiff challenging the failure or refusal to provide reasonable accommodation must propose an accommodation as part of the prima facie case in order to demonstrate his or her qualifications for the position.<sup>70</sup> In addition to allowing the plaintiff to perform the job, the proposed accommodation must be facially reasonable.<sup>71</sup> Unlike the undue hardship inquiry, which focuses only on the defendant's resources,<sup>72</sup> determining whether an accommodation is facially reasonable requires a factual analysis "untethered to the defendant employer's particularized situation."<sup>73</sup> Courts have held that an accommodation is facially reasonable if it would be reasonable for a similar employer,<sup>74</sup> if the costs do not appear to

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that the employer failed to prove that meeting deadlines was essential to the plaintiff's job); *Dutton*, 859 F. Supp. at 508-09 (denying summary judgment to the defendant because the defendant failed to prove regular attendance was an essential function).

69. See, e.g., *Monette*, 90 F.3d at 1186 (explaining that the burden of proving undue hardship rests with the employer); *Reil*, 99 F.3d at 682 (noting that the employer may avoid accommodating a plaintiff if the employer shows undue hardship); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995) (stating that the employer must prove that it is unable to accommodate the employee without undue hardship).

70. See, e.g., *Monette*, 90 F.3d at 1183 (holding that "the disabled individual bears the initial burden of proposing an accommodation"); *Reil*, 99 F.3d at 683 (holding that the proposal of a reasonable accommodation is an element of the plaintiff's prima facie case); *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (holding that the plaintiff must propose an accommodation that is reasonable with respect to efficacy and cost); *Willett v. Kansas*, 942 F. Supp. 1387, 1393 (D. Kan. 1996) (holding that a plaintiff is required to suggest possible accommodations).

71. See, e.g., *Monette*, 90 F.3d at 1183 (holding that an accommodation must be "objectively reasonable" apart from the employer's particular situation); *Reil*, 99 F.3d at 683 (explaining that a plaintiff bears the burden of proving reasonableness); *Vande Zande*, 44 F.3d at 542 (arguing that the term "reasonable" qualifies the term "accommodation," such that an accommodation may be unreasonable even if it does not impose an undue hardship).

72. See *supra* notes 60-62 and accompanying text (describing factors considered as part of an undue hardship inquiry).

73. *Monette*, 90 F.3d at 1183-84 n.10 (explaining that "[o]nce a determination is made that a proposed accommodation is . . . 'generally' reasonable, the defendant employer then bears the burden of showing that the accommodation imposes an undue hardship upon it, given the employer's specific situation").

74. See, e.g., *Reil*, 99 F.3d at 683 (explaining that a reasonable accommodation is one which is "reasonable in the run of cases") (quoting *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993)).

outweigh the benefits,<sup>75</sup> or if it appears appropriate in view of industry standards.<sup>76</sup>

## B. THE TREND TOWARD TELECOMMUTING

While most employees travel to their employer's facilities to work, evolving information technologies<sup>77</sup> are enabling more and more people to work effectively from home.<sup>78</sup> Telecommuting is an attractive option for employees because it often provides increased flexibility and greater control over the employees' work environment.<sup>79</sup> Benefits to employers include savings on office overhead,<sup>80</sup> lower employee absenteeism,<sup>81</sup> increased

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75. See, e.g., *Vande Zande*, 44 F.3d at 543 (holding that the cost of a plaintiff's proposed accommodation must be considered with respect to both efficacy and proportionality).

76. See *Monette*, 90 F.3d at 1183 n.10 (noting that one way a plaintiff can demonstrate reasonableness is to offer proof that similar accommodations are provided by similar employers).

77. See JACK M. NILLES, MAKING TELECOMMUTING HAPPEN 2 (1994) (explaining that as workers increasingly use telephones, computers and other technologies to do their work, they are more able to work in different locations); MINNESOTA DEPT OF TRANSP., A REPORT TO THE MINNESOTA LEGISLATURE ON TELECOMMUTING IN THE TWIN CITIES METROPOLITAN AREA 3-4 (1994) (summarizing the proliferation of affordable technology that has expedited the trend toward telecommuting) [hereinafter TCMA REPORT].

78. Reliable estimates of the number of telecommuters are difficult to obtain because of the wide variety of work-at-home arrangements. See Cheryl Russell, *How Many Home Workers?*, AM. DEMOGRAPHICS, May 1996, at 6 (discussing the difficulties of measuring the increasing popularity of telecommuting). One survey estimates that 9 million Americans telecommuted at least part of the time in 1994, and predicts this number could reach 13 million by 1998. Allan H. Weitzman & Kathleen M. McKenna, *Legal Complications Affect Trend Toward Telecommuting*, EMPLOYMENT L. STRATEGIST, June 1996, at 1. Another suggests the number of telecommuting employees could reach 15 million by 2002. TCMA REPORT, *supra* note 77, at 10 (citing U.S. DEPT OF TRANSP., TRANSPORTATION IMPLICATIONS OF TELECOMMUTING 59 (1993)). Most experts agree that the number of telecommuters continues to increase, perhaps by as much as 15% per year. See George M. Piskurich, *Making Telecommuting Work*, TRAINING & DEV., Feb. 1996, at 20, 22 (describing the predicted increase in telecommuting).

79. See Piskurich, *supra* note 78, at 22 (listing advantages of telecommuting for employees). Additional advantages to employees include avoiding the costs and stresses of commuting, reducing expenses for work attire, and easier management of child care arrangements. See TCMA REPORT, *supra* note 77, at 7-8 (listing the benefits of telecommuting from both management and employee perspectives).

80. See NILLES, *supra* note 77, at 141 (estimating that organizations with significant numbers of telecommuters can achieve reductions of up to 33% in office space); *Increased Productivity Found Among Employees Who Telecommute*, 1995 Daily Lab. Rep. (BNA) 205, at D10 (Oct. 24, 1995) (noting that in

productivity,<sup>82</sup> improved employee morale,<sup>83</sup> and higher employee retention.<sup>84</sup> Telecommuting also provides significant public policy benefits,<sup>85</sup> including reduced traffic congestion,<sup>86</sup> air pollution,<sup>87</sup> and energy consumption.<sup>88</sup>

Despite the advantages of telecommuting, several disadvantages limit its use by employers. Full-time telecommuting is not suited to jobs where face-to-face contact with colleagues or clients is essential to the position.<sup>89</sup> Telecommuting also

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1994, 35,000 AT&T managers telecommuted, resulting in an \$80 million reduction in real estate costs) [hereinafter *Increased Productivity*].

81. See NILLES, *supra* note 77, at 140 (estimating that telecommuters will take two less sick days per year); TCMA REPORT, *supra* note 77, at 7 (reporting that studies of telecommuters show reduced use of sick leave).

82. See *Increased Productivity*, *supra* note 80, at D10 (discussing General Services Administration estimate that telecommuting employees are 20% more productive); Piskurich, *supra* note 78, at 22 (reporting that telecommuters are 16% more efficient than their in-office counterparts).

83. See TCMA REPORT, *supra* note 77, at 7 (reporting that studies of telecommuters show increased employee morale and motivation).

84. See NILLES, *supra* note 77, at 141 (reporting that 74% of respondents in his study who considered quitting their jobs cited the ability to telecommute as a substantial influence on their decision to stay).

85. Several states and the federal government have taken actions to promote telecommuting. See PAMELA MARTIN, LEGIS. REFERENCE BUREAU (Hawaii), TELECOMMUTING: THE RIDE OF THE FUTURE 34-37 (1992) (summarizing state and local telecommuting initiatives); Hartstein & Schulman, *supra* note 31, at 179 (noting that 60,000 federal jobs are slated for telecommuting by 1998).

86. See TCMA REPORT, *supra* note 77, at ii-iii (finding that in the Twin Cities in 1994, telecommuting was estimated to reduce commuter travel by 6.2% during the morning and evening rush hours, and that under the most optimistic projection telecommuting could reduce Twin Cities commuter travel by 21% by 2003); Patricia L. Mokhtarian, *Telecommuting and Travel: State of the Practice, State of the Art*, 18 TRANSP. 319, 336-39 (1991) (analyzing a number of studies that examine the relationship between telecommuting and individual travel behavior and finding that the overall trip-taking of telecommuters tends to decrease).

87. Determining the potential of telecommuting to reduce air pollution is complicated by the uncertain relationship between decreased traffic and decreased vehicle emissions. See TCMA REPORT, *supra* note 77, at 20-21 (summarizing possible air quality impacts of telecommuting); Mokhtarian, *supra* note 86, at 332-33 (concluding that reduced commuting should result in decreased vehicle emissions, but also noting that this effect may be smaller than commonly assumed).

88. See PHILLIP E. MAHFOOD, HOMEWORK: HOW TO HIRE, MANAGE & MONITOR EMPLOYEES WHO WORK AT HOME 16-17, 27-28 (1992) (arguing that telecommuting reduces energy consumption and dependence on foreign oil); NILLES, *supra* note 77, at 142-43 (explaining that decreases in traffic congestion and vehicle use also result in decreased energy consumption).

89. See NILLES, *supra* note 77, at 27 (listing a sample of telecommutable jobs); Daniel B. Rathbone, *Telecommuting in the United States*, ITE J., Dec.

poses a variety of management challenges,<sup>90</sup> from figuring out a systematic mode of communication to developing new ways to assess employee performance.<sup>91</sup> Even an otherwise successful telecommuting program may decrease flexibility in a crisis, because fewer employees are at the workplace to deal with emergencies.<sup>92</sup>

Telecommuting is also not appropriate for every worker. Some employees lack the independence and commitment required of successful telecommuters,<sup>93</sup> while others prefer working with colleagues in an office.<sup>94</sup> In addition, some telecommuting employees may feel isolated from colleagues<sup>95</sup> and

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1992, at 44 (estimating that 54% of the labor force is employed in information or knowledge jobs that are appropriate for telecommuting). According to one author:

A telecommuting job should have activities that can be measured, be done for the most part independently, be portable to a non-office environment, have observable beginning and end points, not need special equipment that is only at the work site, and not have deadline requirements that come from outside the telecommuter's department.

Piskurich, *supra* note 78, at 24.

90. See NILLES, *supra* note 77, at 134-38 (describing the planning, selection, training, evaluation and administrative costs associated with implementing an effective telecommuting program); Piskurich, *supra* note 78, at 21-25 (outlining the training and administrative requirements for an effective telecommuting program). For a comprehensive overview of management challenges raised by telecommuting, see generally MAHFOOD, *supra* note 88.

91. Many managers fear they will be unable to effectively supervise telecommuting employees. See Maggie Murray Courtney & Lisa A. Lavelle, *From Workplace to Work Space*, LEGAL TIMES, June 10, 1996, at S31 (reporting that "[s]ome managers feel very uncomfortable with their ability to supervise workers they cannot see"); Piskurich, *supra* note 78, at 22-23 (noting "[m]anagers often believe that telecommuting will cause them to lose control of their employees, or will reduce the need for managers"); *Increased Productivity*, *supra* note 80, at D10 (reporting that "[m]anager's attitudes have been the most persistent barrier to telecommuting").

92. See Piskurich, *supra* note 78, at 22 (noting that decreased flexibility is one drawback of having fewer people in the office).

93. See NILLES, *supra* note 77, at 27-28 (describing the ideal telecommuter as one "who is strongly self-motivated and self-disciplined," and who already possesses the required skills for their position); Piskurich, *supra* note 78, at 25 (describing successful telecommuters as those who are committed, responsible, task-oriented, and trustworthy).

94. See Piskurich, *supra* note 78, at 23 (reporting that in companies with telecommuting programs, only 15-25% of employees will volunteer for telecommuting).

95. See Michael A. Verespej, *Communications Technology: Slave or Master?*, INDUSTRY WK., June 19, 1995, at 50 (noting isolation among telecommuting employees).



unable to separate their work and personal lives.<sup>96</sup> For clerical or blue-collar workers, telecommuting may result in lost benefits rather than increased flexibility.<sup>97</sup>

Proponents of telecommuting argue that work-at-home arrangements facilitate improved employment opportunities for disabled individuals.<sup>98</sup> Some advocates for the disabled, however, are less enthusiastic. These critics fear that the expansion of telecommuting will result in the segregation of disabled employees from the mainstream workplace, cautioning that disabled employees should never be forced to telecommute.<sup>99</sup>

### C. TELECOMMUTING AS A REASONABLE ACCOMMODATION: JUDICIAL APPROACHES

#### 1. The Excessive Absenteeism Cases: Presence as an Essential Function

Some courts considering telecommuting cases have looked to cases addressing excessive absenteeism to support a presumption that telecommuting is an inappropriate accommodation. In several excessive absenteeism cases, courts evaluating whether an employer must accommodate chronic absenteeism have held that disabled employees are not qualified for a position if they cannot maintain predictable attendance at work.<sup>100</sup>

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96. See TCMA REPORT, *supra* note 77, at 8 (noting employees' concern that telecommuting makes it difficult to separate work from home).

97. See Donald Tomaskovic-Devey & Barbara J. Risman, *Telecommuting Innovation and Organization: A Contingency Theory of Labor Process Change*, 74 SOC. SCI. Q. 367, 368 (1993) (noting that while for white collar professionals telecommuting may result in increased flexibility, "[c]lerical telecommuting tends to be sub-contract or piece rate work done totally at home and with the loss of benefits packages"); see also TCMA REPORT, *supra* note 77, at 11 (noting the implications of telecommuting for workers' rights).

98. See, e.g., MAHFOOD, *supra* note 88, at 14-15 (arguing that telecommuting is appropriate for physically disabled individuals who are otherwise qualified for meaningful work); NILLES, *supra* note 77, at 144 (noting that one of the policy benefits of telecommuting is that it increases access for disabled individuals).

99. See Courtney & Lavelle, *supra* note 91, at S31 (reporting that advocates for the disabled fear that telecommuting may not be in the best interests of disabled workers).

100. See, e.g., Jackson v. Veterans Admin., 22 F.3d 277, 279 (11th Cir. 1994) (holding that plaintiff was not "otherwise qualified" for his position where he was absent on a "sporadic, unpredictable basis"); Santiago v. Temple Univ., 739 F. Supp. 974, 979 (E.D. Pa. 1990) (holding that a plaintiff who "has demonstrated an apparent inability to attend work with any degree of predictability" could not be accommodated), *aff'd*, 928 F.2d 396 (3rd Cir. 1991);

Typically, these courts support this conclusion by noting the disruption caused to an entity's operations when an employee is not reliably present.<sup>101</sup> Many excessive absenteeism cases contain sweeping statements declaring the necessity of workplace attendance, often going beyond the facts of the case.<sup>102</sup> These declarations have formed the basis for a presumption, followed in some telecommuting cases, that because physical presence at work is an essential function of employment, telecommuting is almost by definition an inappropriate accommodation.<sup>103</sup>

## 2. The *Vande Zande* Presumption Against Telecommuting

Excessive absenteeism cases figured prominently in *Vande Zande v. Wisconsin Department of Administration*,<sup>104</sup> the only circuit case to consider whether working at home can be a rea-

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Matzo v. Postmaster Gen., 685 F. Supp. 260, 263 (D.D.C. 1987) (holding that an employee who missed several months of work was not "otherwise qualified"), *aff'd*, 861 F.2d 1290 (D.C. Cir. 1988).

101. See, e.g., *Jackson*, 22 F.3d at 279 (holding that requiring the employer to accommodate the plaintiff's absences would "place upon the [employer] the burden of making last-minute provisions for [the plaintiff's] work to be done by someone else"); *Walders v. Garrett*, 765 F. Supp. 303, 309 (E.D. Va. 1991) (holding that requiring an employer to allow an employee "to work only when her illness permits" through manipulation of leave and attendance policies would impose undue hardship upon the employer), *aff'd*, 956 F.2d 1163 (4th Cir. 1992); see also Steven H. Winterbauer, *Is Disability-Related Absenteeism a Lawful Basis for Discharge Under the ADA?*, 21 EMPLOYEE REL. L.J. 51, 53-71 (1996) (summarizing the circumstances under which courts have permitted discharge for disability-related absenteeism).

102. See, e.g., *Larkins v. CIBA Vision Corp.*, 858 F. Supp. 1572, 1584 (N.D. Ga. 1994) (stating that "regular attendance and the ability to perform work are an essential function of any position under the Rehabilitation Act"); *EEOC v. AIC Sec. Investigation*, 820 F. Supp. 1060, 1064 (N.D. Ill. 1993) (stating that for ADA purposes "attendance is necessary to any job"); *Santiago*, 739 F. Supp. at 979 (finding that "attendance is necessarily the fundamental prerequisite to job qualification").

For an overview of the development of the "presence is an essential function" presumption in cases dealing with excessive absenteeism, see generally Audrey E. Smith, Comment, *The "Presence Is an Essential Function" Myth: The ADA's Trapdoor for the Chronically Ill*, 19 SEATTLE U. L. REV. 163 (1995).

103. See, e.g., *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 544-55 (7th Cir. 1995) (citing excessive absenteeism cases for the proposition that most jobs cannot be performed from home); *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555, 1564 (N.D. Ga. 1995) (citing excessive absenteeism cases to support its conclusion that the plaintiff's request to work at home was unreasonable as a matter of law), *aff'd*, 86 F.3d 1171 (11th Cir. 1996); *Misek-Falkoff v. IBM*, 854 F. Supp. 215, 227 (S.D.N.Y. 1994) (asserting that presence is essential to most jobs), *aff'd*, 60 F.3d 811 (2d Cir. 1995).

104. 44 F.3d 538 (7th Cir. 1995).

sonable accommodation under the ADA. While *Vande Zande* is frequently interpreted to have held that telecommuting is almost always inappropriate,<sup>105</sup> the actual holding of the case was more narrow. *Vande Zande*, a paraplegic, requested to work at home after a bout of pressure ulcers prevented her from traveling to work for eight weeks.<sup>106</sup> *Vande Zande's* employer allowed her to work at home, but refused to provide her with the computer she needed to work full time. Her employer also required that she take paid sick leave for any hours she was unable to work.<sup>107</sup> The Seventh Circuit held that by allowing *Vande Zande* to work most of her hours from home and giving her paid sick leave for the remainder, *Vande Zande's* employer had reasonably accommodated her.<sup>108</sup>

More important to the development of telecommuting jurisprudence, however, is the *Vande Zande* court's sweeping statement in dicta that "it would take a *very extraordinary case* for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home."<sup>109</sup> In crafting this presumption, the court noted that because most

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105. Two district courts have discussed *Vande Zande* in addressing the appropriateness of telecommuting. See *Anzalone v. Allstate Ins. Co.*, 5 Am. Disabilities Cas. (BNA) 455, 457-58 (E.D. La. Jan. 19, 1995) (distinguishing *Vande Zande* and holding that telecommuting might be an appropriate accommodation); *Whillock*, 926 F. Supp. at 1566 (relying on *Vande Zande* for the proposition that telecommuting is appropriate only in rare cases).

Several commentators also have discussed the implications of *Vande Zande* for telecommuting and the ADA. See, e.g., Hartstein & Schulman, *supra* note 31, at 180-81 (recounting the *Vande Zande* case to describe the ADA issue raised by telecommuting); Weitzman & McKenna, *supra* note 78, at 6 (explaining that *Vande Zande* held that employers are not generally required to allow disabled workers to telecommute); Winterbauer, *supra* note 101, at 58 (describing Judge Posner as an "eloquent proponent" of the proposition that telecommuting is generally an unreasonable accommodation).

106. *Vande Zande*, 44 F.3d at 544.

107. *Id.* *Vande Zande* did ultimately work at home for all but 16.5 hours of the eight-week period, taking the remaining time as sick leave. *Id.* She argued, however, that the ADA required her employer either to provide her with the support she needed to work full time or to excuse her from having to use sick leave. *Id.*

108. *Id.* at 545 ("An accommodation that allows a disabled worker to work at home, at full pay, subject only to a slight loss of sick leave that may never be needed, hence never missed, is, we hold, reasonable as a matter of law.")

109. *Id.* (emphasis added). Although the court conceded that "as to any generalization about so complex and varied an activity as employment there are exceptions," it concluded that under most circumstances "an employer is not required to accommodate a disability by allowing the disabled worker to work by himself, without supervision, at home." *Id.* at 544.

jobs require teamwork, they cannot be performed at home without a substantial reduction in productivity.<sup>110</sup> The court then cited two excessive absenteeism cases for the proposition that the "majority view"<sup>111</sup> is that an employer is generally not required to allow a disabled worker to work from home.

A subsequent district court case, *Whillock v. Delta Air Lines, Inc.*,<sup>112</sup> relied heavily on *Vande Zande* in ruling that even if a plaintiff could perform her job from home, her request to do so was "unreasonable as a matter of law."<sup>113</sup> Whillock requested to work at home after she began experiencing severe allergic reactions to common chemicals at work.<sup>114</sup> When Delta refused her request,<sup>115</sup> Whillock filed suit under the ADA, alleging a failure to provide reasonable accommodation.<sup>116</sup>

The *Whillock* court's analysis followed two alternative approaches. First, the court considered the particular facts of the case and determined that Whillock could not adequately perform her duties as a reservation sales agent from home.<sup>117</sup> Thus, the court held, working at home was not an appropriate accommodation because it would not allow Whillock to perform required job responsibilities.<sup>118</sup>

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110. *Id.*

111. *Id.* (citing *Tyndall v. National Educ. Ctrs., Inc.*, 31 F.3d 209 (4th Cir. 1994) and *Law v. United States Postal Serv.*, 852 F.2d 1278 (D.C. Cir. 1988)).

112. 926 F. Supp. 1555 (N.D. Ga. 1995), *aff'd*, 86 F.3d 1171 (11th Cir. 1996).

113. *Id.* at 1566. The court's argument relies heavily on the *Vande Zande* presumption that working at home is reasonable only in rare cases. *See id.* at 1565-66.

114. *Id.* at 1557-58. Whillock was diagnosed with Multiple Chemical Sensitivity Syndrome. *Id.* at 1558. Although the precise nature of her condition was disputed, *id.* at 1558-59, the court assumed Whillock was disabled for the purposes of its reasonable accommodation analysis. *Id.* at 1563.

115. *Id.* at 1559.

116. *Id.* Although initially Whillock also contested Delta's refusal to provide disability benefits and its failure to modify her work environment, by the time of trial she alleged that telecommuting was the only possible accommodation. *Id.*

117. *Id.* at 1564. The court offered three reasons for this conclusion. First, Delta's agents have access to classified airline information, the security of which could not be maintained off premises. Second, agents work in a highly supervised environment where on the job training is ongoing and essential. Finally, providing Whillock with her own computer would be disproportionately expensive, as compared with the cost of sharing a terminal with other agents on site. *Id.*

118. *Id.* at 1565; *see also supra* note 50 and accompanying text (explaining that employers are not required under the ADA to implement ineffective accommodations).

While the preceding analysis was sufficient to justify granting Delta's motion for summary judgment,<sup>119</sup> the court's second, alternative analysis was more sweeping.<sup>120</sup> The court stated that even if Whillock could effectively perform her duties from home, her request to do so was nonetheless "not reasonable as a matter of law."<sup>121</sup> The court did not specify how this analysis differed from its initial reasoning, making its alternative argument primarily to emphasize that it would not be sympathetic to work-at-home requests except in highly unusual situations.<sup>122</sup>

### 3. Presumed Unusual: The Hybrid Approach

Two other courts ruling against employees also presumed telecommuting would be unusual, although their analyses were more restrained than in either *Vande Zande* or *Whillock*. In *Carr v. Reno*,<sup>123</sup> the D.C. Circuit upheld an employer's refusal to allow a disabled clerk to work from home.<sup>124</sup> Unlike in *Vande Zande* or *Whillock*, however, the *Carr* court assumed that the Rehab Act required employers to consider telecommuting as a reasonable accommodation.<sup>125</sup> After examining the facts of the case, however, the court found that the plaintiff's job required her to adhere to ongoing and inflexible deadlines that made off-premise employment unworkable.<sup>126</sup> Moreover,

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119. *Whillock*, 926 F. Supp. at 1565; see also *supra* note 67 and accompanying text (explaining that under the ADA the plaintiff bears the burden of proving whether she is qualified for the job with the proposed accommodation).

120. The court sets this alternative analysis apart from its previous inquiry, under the heading "Plaintiff's Suggested Accommodation is Unreasonable as a Matter of Law." *Whillock*, 926 F. Supp. at 1565.

121. *Id.* at 1566.

122. It is difficult to determine the extent to which the court thought its alternative holding was genuinely compelled by law since the court conceded that working at home might be a reasonable accommodation in "a very extraordinary case." *Id.*

123. 23 F.3d 525 (D.C. Cir. 1994).

124. *Id.* at 530. Carr was discharged from her position as a coding clerk because of prolonged and unpredictable absenteeism, and contested her termination under the Rehab Act. *Id.* at 527-28.

125. *Id.* at 530 (noting that the Rehab Act, which "demands a great deal from federal employers," requires an organization to consider telecommuting as a potential accommodation).

126. Carr conceded that she was unable to meet the agency's deadlines by working from home. *Id.* Furthermore, the court held, her employer demonstrated that its daily four o'clock deadlines made flexible scheduling an undue hardship. *Id.*

the plaintiff failed to demonstrate that she could maintain predictable performance by working at home, and thus could not prove her qualifications for the job.<sup>127</sup>

A more recent district court case, *Misek-Falkoff v. IBM*,<sup>128</sup> used a similar fact-based approach. The court found that telecommuting was an inappropriate accommodation because an essential function of the plaintiff's job as a systems analyst was attending meetings and collaborating face-to-face with colleagues.<sup>129</sup> In holding for the employer, the court emphasized that its conclusion rested not on a presumption against telecommuting,<sup>130</sup> but on the specific functional requirements of *Misek-Falkoff's* job and the nature of her disability.<sup>131</sup>

Although the *Carr* and *Misek-Falkoff* courts avoided the explicit presumption against telecommuting applied in *Vande Zande* and *Whillock*,<sup>132</sup> they still assumed telecommuting would rarely be appropriate. The *Carr* court remarked in passing that predictable performance can be achieved from home only in "the unusual case."<sup>133</sup> Likewise, the court in *Misek-Falkoff* cited an excessive absenteeism case for the proposition that "predictable attendance is fundamental to most jobs."<sup>134</sup> Thus, underlying each court's decision is an assumption that telecommuting is a disfavored accommodation,

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127. *Id.* The district court found that Carr's attendance "was so erratic as to make her unqualified for any position." *Id.* The D.C. Circuit agreed, noting that Carr failed to demonstrate that by telecommuting she could fulfill even minimal expectations of regular job performance. *Id.*

128. 854 F. Supp. 215 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 811 (2d Cir. 1995).

129. *Id.* at 227. The plaintiff requested to work at home when she began experiencing bouts of rage and irrationality, allegedly as a result of a neurological disorder. *Id.* at 218. These outbursts made it impossible for the plaintiff to work effectively with others. *Id.*

130. *Id.* at 227 (explaining that "[w]hat is most significant . . . is not absences as such, but whether or not the job is completed in a timely manner").

131. *Id.* at 226-27. The court found that presence was essential to *Misek-Falkoff's* job so that she could test new systems with other employees in a timely manner and attend training sessions and other meetings. *Id.* Since plaintiff's disability made her unable to interact with others, however, the court held that no accommodation was possible. *Id.* at 228.

132. Indeed, the *Carr* court explicitly states that the essential function of attendance at work can be achieved at home in some cases. *Carr*, 23 F.3d at 530. Likewise, in *Misek-Falkoff*, the court emphasizes that performance, rather than presence *per se*, is significant. *Misek-Falkoff*, 854 F. Supp. at 227.

133. *Carr*, 23 F.3d at 530.

134. *Misek-Falkoff*, 854 F. Supp. at 227 (citing *Walders v. Garrett*, 765 F. Supp. 303, 310 (E.D. Va. 1991)).

although their analyses also contain some elements of a factual approach.

#### 4. Telecommuting as a Plausible Accommodation: A Fact-Specific Alternative

Two courts have used a fact-specific approach to examine the issue of telecommuting as a reasonable accommodation, finding it plausible. In *Langon v. Department of Health & Human Services*,<sup>135</sup> the plaintiff, a computer programmer, survived a summary judgment motion on the issue of the reasonableness of telecommuting.<sup>136</sup> The court concluded that summary judgment was inappropriate because Langon presented sufficient evidence that her job could be completed from home.<sup>137</sup> The court also noted that the employer had an existing work-at-home policy, indicating that telecommuting was not facially unreasonable.<sup>138</sup>

A more recent district court case, *Anzalone v. Allstate Insurance Co.*,<sup>139</sup> used a similar approach to deny summary judgment to an employer who refused to allow a claims adjuster to work from home.<sup>140</sup> In denying the motion, the court noted that most of the plaintiff's job functions were ordinarily conducted outside the office.<sup>141</sup> Furthermore, there was no evidence that the plaintiff's productivity declined when he worked from home.<sup>142</sup> The court also noted that Allstate allowed other

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135. 959 F.2d 1053 (D.C. Cir. 1992). The *Langon* case is also discussed *supra* in the introduction to this Note.

136. *Id.* at 1061.

137. *Id.* at 1060-61. HHS contended that telecommuting was inappropriate because the plaintiff's job had tight deadlines and required frequent collaboration with colleagues. *Id.* at 1060. Langon disagreed, and the court held that her deposition was sufficient to put the issue in dispute. *Id.* In articulating the relevant standard for summary judgment, the court noted that HHS failed to prove either that Langon's job could be completed only at the agency or that telecommuting would impose an undue hardship. *Id.* at 1057.

138. *Id.* at 1055.

139. 5 Am. Disabilities Cas. (BNA) 455 (E.D. La. Jan. 19, 1995). Anzalone injured his back when he fell from a roof. He returned to work for eight days, but later resigned when office work aggravated his back and the company denied his request to work from the field. *Id.* at 455-56. Several months later, Anzalone discovered Allstate had a work-at-home policy, and again requested to telecommute. *Id.* at 456. When Allstate denied his request, Anzalone sued under the ADA, alleging that Allstate failed to reasonably accommodate his disability. *Id.*

140. *Id.* at 459.

141. *Id.* at 458.

142. *Id.* Anzalone's home was located in the territory where he evaluated

claims adjusters to work from home, thus undermining its contention that the plaintiff's job required presence at the office.<sup>143</sup> On these grounds, the *Anzalone* court distinguished *Vande Zande* and declined to adopt a presumption that telecommuting is appropriate only in an extraordinary case.<sup>144</sup>

## II. A CRITIQUE OF THE PRESUMPTION APPROACHES

### A. MISPLACED RELIANCE ON EXCESSIVE ABSENTEEISM PRECEDENT

The presumption approach to evaluating telecommuting as a reasonable accommodation rests on a shaky analytical foundation. The *Vande Zande* and *Whillock* courts relied on excessive absenteeism cases for the presumption that because virtually all jobs require physical presence in the workplace, telecommuting is rarely an appropriate accommodation.<sup>145</sup> Neither court, however, explained how the reasoning underlying the excessive absenteeism cases applies in the telecommuting context. Both courts state, as if it was a universal rule applicable under all factual scenarios, that presence is an essential function of employment.<sup>146</sup>

This reliance on excessive absenteeism cases for the proposition that telecommuting is an unreasonable accommodation is misplaced because of critical differences in the two factual contexts. In a typical case involving disability-related absenteeism, the issue is whether a court should require an employer to accommodate a disabled employee's repeated, extended, and often unpredictable absences.<sup>147</sup> The reasoning in

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claims, whereas the Allstate office was 50 miles away; thus, working at home was arguably more efficient than working in the office. *Id.*

143. *Id.*

144. *Id.*

145. See *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 544-45 (7th Cir. 1995) (citing excessive absenteeism cases for the assertion that most jobs cannot be performed effectively at home); *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555, 1564 (N.D. Ga. 1995), *aff'd*, 86 F.3d 1171 (11th Cir. 1996) (citing several absenteeism cases for the proposition that plaintiff's attendance at work constitutes an "essential function of her job").

146. See *Vande Zande*, 44 F.3d at 544-45 (citing two cases facing an absenteeism scenario in stating the "majority view," that telecommuting is generally an inappropriate accommodation); *Whillock*, 926 F. Supp. at 1564 (citing several absenteeism cases for the proposition that a plaintiff who cannot come to work cannot perform an essential function of her job).

147. See, e.g., *Tyndall v. National Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1991) (stating that plaintiff's frequent absences from school made it im-



these cases focuses not on the plaintiff's physical presence at work per se, but on the disruptions caused by the plaintiff's unreliable job performance.<sup>148</sup> An examination of one case cited by the *Vande Zande* and *Whillock* courts illustrates this point. In *Tyndall v. National Education Centers, Inc.*,<sup>149</sup> the plaintiff never requested to work at home because her teaching responsibilities could only be carried out on campus.<sup>150</sup> Instead, Tyndall contended that her employer should not have discharged her when her absences became frequent and unpredictable.<sup>151</sup> The court disagreed, however, and held that the plaintiff's employer could not be compelled to continue to employ a teacher who did not show up for class.<sup>152</sup>

While *Tyndall* was correctly decided, its reasoning does not apply in the typical telecommuting case. In a *Tyndall*-type case, adequate job performance and physical presence at work are interrelated, either because the plaintiff's job cannot be performed off premises or because the plaintiff is unable to work with any regularity. In a typical telecommuting case, however, the plaintiff argues that presence and performance are not linked because performance can be achieved without commuting to the office.<sup>153</sup> Determining whether or not the plaintiff actually can achieve reliable performance by working at home requires a factual inquiry into whether or not physical presence at work is essential to the plaintiff's job. The required analysis cannot adequately be completed by resorting to

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possible for her to function effectively as a teacher); *Wimbley v. Bolger*, 642 F. Supp. 481, 485 (W.D. Tenn. 1986) (finding that a plaintiff terminated for repeated unscheduled absences could not reasonably be accommodated).

148. See *supra* notes 100-103 and accompanying text (summarizing the reasoning of courts facing excessive absenteeism cases).

149. 31 F.3d 209 (4th Cir. 1994).

150. *Id.* at 213. Tyndall, who suffered from lupus, taught at a business college; the school terminated her after she missed so many classes that other teachers, who worked overtime to cover Tyndall's schedule, complained. *Id.* at 211-12.

151. Tyndall missed nearly 40 days of work in 7 months. *Id.* at 213. Tyndall asserted that she should have been allowed additional time off to care for an ailing son, after being provided with substantial leaves to deal with her own health concerns. *Id.* at 211. Thus, the plaintiff's proposed accommodation did not enable her to regularly perform her job.

152. *Id.* at 213.

153. See, e.g., *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995) (discussing plaintiff's request to telecommute so that she could work full-time during her illness); *Langon v. Department of Health & Human Servs.*, 959 F.2d 1053, 1054 (D.C. Cir. 1992) (citing plaintiff's request to work at home in order to maintain full-time employment).

a presumption that presence is essential because this presumes away the entire inquiry. By importing from the excessive absenteeism cases a presumption that physical presence is per se essential to employment, and that telecommuting is thus by definition an inappropriate accommodation, the presumption cases confuse the need for physical presence at work with the need for predictable job performance.

Thus, the *Vande Zande* court's assertion that excessive absenteeism cases establish a presumption against compelling employers to facilitate telecommuting for disabled workers is simply incorrect. In fact, the *Tyndall* court explicitly acknowledged that its holding would not apply in a case where a plaintiff could effectively perform her job from home.<sup>154</sup> The only presumption one can legitimately draw from the excessive absenteeism cases is that reliable, predictable performance is an essential function of most jobs. Because this is precisely what a plaintiff who asks to telecommute seeks to achieve, excessive absenteeism cases will often have little to contribute to an analysis of telecommuting as a reasonable accommodation.<sup>155</sup>

## B. UNDERESTIMATING THE FEASIBILITY OF TELECOMMUTING

In addition to relying on excessive absenteeism cases, the *Vande Zande* court also based its presumption against compelling employers to facilitate telecommuting for disabled employees on the assumption that most jobs cannot be performed at home without substantial reductions in productivity.<sup>156</sup> The court stated further that ongoing supervision of telecommuting employees is virtually impossible.<sup>157</sup> Most research, however, suggests that telecommuters are more productive than their in-office counterparts.<sup>158</sup> While the productivity gains or losses achieved through telecommuting depend in part on the suitability of the employee and the job requirements,<sup>159</sup> this is a fact-specific inquiry that courts can consider in evaluating a

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154. *Tyndall*, 31 F.3d at 213.

155. See *infra* notes 203-205 and accompanying text (describing the limited role excessive absenteeism cases should play in the telecommuting context).

156. See *Vande Zande*, 44 F.3d at 545.

157. *Id.* The court does not offer any empirical evidence to support these assumptions.

158. See *supra* note 82 (noting studies which found increased productivity among telecommuting employees).

159. See *supra* notes 89, 93 and accompanying text (describing telecommutable jobs and traits of successful telecommuters).

plaintiff's case. Likewise, while the supervision of telecommuting employees presents unique challenges,<sup>160</sup> whether these challenges and their accompanying costs rise to the level of undue hardship<sup>161</sup> or render telecommuting facially unreasonable in some employment settings<sup>162</sup> is another fact-specific question that cannot be answered by resorting to a broad presumption against telecommuting.

Although their analyses were less sweeping, the *Carr* and *Misek-Falkoff* courts also underestimated the feasibility of telecommuting. In *Carr*, the court assumed that telecommuting is an ineffective accommodation for jobs that have frequent and inflexible deadlines.<sup>163</sup> The *Misek-Falkoff* court deemed telecommuting impractical in jobs requiring interaction with others.<sup>164</sup> Unfortunately, neither court examined whether a telecommuting alternative could accomplish these functions. Given the widespread availability of fax machines and e-mail transmission,<sup>165</sup> the presence of deadlines bears little relationship to the facial reasonableness of telecommuting. A coding clerk like Carr, for example, could presumably enter data from home.<sup>166</sup> Likewise, the need for collaboration may not preclude telecommuting because electronic or phone conferencing may enable a telecommuting employee to share ideas with colleagues.<sup>167</sup>

The *Vande Zande* court acknowledges that a presumption against telecommuting will be less tenable as technology ad-

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160. See *supra* notes 90-91 and accompanying text (noting management challenges raised by work-at-home arrangements).

161. See *supra* notes 60-61 and accompanying text (explaining the factors which make a proposed accommodation an undue hardship).

162. See *supra* notes 71-76 and accompanying text (defining the "facially reasonable" requirement).

163. See *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994) (noting that a coding clerk could not work at home because her job involved tight deadlines). The court repeated this assumption in *Langon*, suggesting that the employer could prevail if it demonstrated that Langon's inability to comply with tight deadlines imposed an undue hardship. *Langon v. Department of Health & Human Servs.*, 959 F.2d 1053, 1060 (D.C. Cir. 1992).

164. See *Misek-Falkoff v. IBM*, 854 F. Supp. 215, 227 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 811 (2d Cir. 1995) (explaining that an employer may require an employee's presence "when interaction with others is essential to the task to be performed").

165. See *supra* note 77 (noting the improving telecommunications technology).

166. See NILLES, *supra* note 77, at 27 (listing the position of data entry clerk as a job well-suited to full-time telecommuting).

167. See *id.* at 25 (describing available telecommunications technology).

vances.<sup>168</sup> While this statement is accurate, the court erred in assuming that current technologies are inadequate to support work-at-home arrangements. Although telecommuting is not yet widespread, neither is it the rarity the *Vande Zande* court assumes.<sup>169</sup> Indeed, telecommuting has become more common precisely because technologies have evolved to support it.<sup>170</sup>

Unlike a presumption analysis, a fact-specific approach requires courts to acknowledge technological change. Courts using a fact-specific analysis will sometimes conclude that telecommuting is a reasonable option because some employees can adequately work from home.<sup>171</sup> Courts will not always reach this conclusion, however, because telecommuting is effective only in certain employment settings.<sup>172</sup> In either case, the final decision under a fact-specific approach will reflect the actual feasibility of telecommuting in a particular circumstance, rather than rely on outdated and inaccurate assumptions.

### C. DISREGARDING THE ADA'S EMPHASIS ON INDIVIDUALIZED INQUIRY

Not only is a fact-specific approach to telecommuting cases more analytically sound, it is also the approach that the ADA requires. When deciding reasonable accommodation cases, the ADA directs courts to undertake a fact-specific inquiry that balances employer and employee interests.<sup>173</sup> Courts that adopt a presumption against telecommuting foreclose serious inquiry into the reasonableness of telecommuting in particular circumstances, however, because they assume that a plaintiff

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168. See *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995) (predicting that technological advances will make telecommuting more feasible).

169. See *supra* note 78 (surveying estimates of the current extent of telecommuting).

170. See *supra* note 77 (noting that the expansion of telecommuting coincides with the development of affordable information technologies).

171. See *supra* note 89 and accompanying text (describing telecommutable jobs).

172. See *supra* notes 89, 99 and accompanying text (explaining the limitations and disadvantages of telecommuting).

173. The ADA provisions and EEOC regulations repeatedly refer to the necessity of a fact-specific inquiry. See *supra* notes 43-44 and accompanying text (describing the fact-specific inquiry into essential job functions); *supra* note 48 and accompanying text (discussing the interactive process required by the EEOC to determine an appropriate reasonable accommodation); *supra* notes 61-64 and accompanying text (explaining that the undue hardship analysis requires a factual inquiry).

who can only work from home is not qualified to perform an essential function of his or her job.<sup>174</sup> Under this analysis, a plaintiff who cannot perform the essential function of coming to work cannot meet a threshold element of his or her prima facie case<sup>175</sup> because the protections of Title I apply only to qualified individuals.<sup>176</sup> Consequently, the employee will not have any meaningful opportunity to articulate why telecommuting is a reasonable accommodation, nor will the employer be called upon to defend its resistance to telecommuting. The required balancing of employer and employee interests never occurs.

By failing to seriously examine the reasonableness of either a plaintiff's claim that he or she can perform the job from home, or a defendant's insistence that telecommuting is inappropriate, a presumption analysis hinders the case-by-case development of reasonable accommodation standards envisioned under the ADA. Any clarity achieved by the *Vande Zande* presumption against telecommuting is likely to be fleeting. As telecommuting becomes increasingly common,<sup>177</sup> a presumption against work-at-home arrangements will be less tenable, and courts will have to articulate factors for evaluating the reasonableness of telecommuting in individual cases.

While the presumption approach may reduce litigation, it does so at the expense of the ADA's fundamental purpose, which is to maximize employment opportunity for disabled employees.<sup>178</sup> Nothing in the ADA or its regulations suggests that it would be appropriate to exclude an entire category of accommodations from serious consideration. To the contrary, the EEOC regulations explicitly state that the purpose of a fact-specific approach is to allow disabled individuals to successfully pursue a wide variety of employment opportunities.<sup>179</sup> To exclude from serious consideration an accommodation that

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174. See *supra* notes 104-122 and accompanying text (describing the reasoning of courts using a presumption approach).

175. See *supra* note 67 and accompanying text (explaining that plaintiffs bear the burden of demonstrating their job qualifications).

176. See *supra* notes 41-42 and accompanying text (defining the scope of coverage of Title I).

177. See *supra* notes 77-78 and accompanying text (describing the increasing prevalence of telecommuting).

178. See *supra* note 34 and accompanying text (describing the overall purpose of the ADA); *supra* note 45 (explaining how the ADA seeks to achieve equal opportunity for disabled individuals).

179. See *supra* text accompanying note 64 (explaining the purpose of a fact-specific approach).

is rapidly gaining acceptance in the mainstream American workplace is fundamentally inconsistent with the ADA's approach to remedying employment discrimination.<sup>180</sup> A fact-specific analysis, on the other hand, furthers the goals of the ADA and is consistent with the statute and the regulations.

#### D. PUBLIC POLICY CONSIDERATIONS

Judicial disapproval of telecommuting is also inconsistent with Title I's fundamental purpose of increasing employment opportunities for individuals with disabilities.<sup>181</sup> Telecommuting may be the only possible accommodation for individuals who cannot regularly commute to work.<sup>182</sup> Under a fact-specific analysis, telecommuting can be implemented where it is appropriate. Thus, the potential of telecommuting to increase the employment of disabled individuals previously beyond the reach of traditional accommodations can be realized under a fact-specific approach. By contrast, a presumption approach excludes a class of disabled workers from the protections of Title I by treating physical presence at work as a prerequisite for establishing qualifications for virtually all positions.<sup>183</sup>

A presumption against telecommuting is particularly indefensible given the additional public policy advantages of work-at-home arrangements.<sup>184</sup> Unlike other accommodations compelled under the ADA, telecommuting has significant public policy advantages, such as decreased traffic congestion and air pollution,<sup>185</sup> beyond the employment opportunities it facilitates for disabled workers. Given these advantages, courts should not underestimate telecommuting as an effective and practical accommodation for disabled workers.

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180. See *supra* notes 45, 48 and accompanying text (explaining the centrality of the reasonable accommodation requirement to the ADA's anti-discrimination provisions and outlining the process for identifying an effective accommodation).

181. See *supra* note 34 and accompanying text (describing the purpose of Title I).

182. Langon and Vande Zande, for example, were both plaintiffs who could have performed their jobs even though they could not commute.

183. See *supra* notes 104-122 and accompanying text (describing the presumption analysis).

184. See *supra* notes 86-88 and accompanying text (outlining the public policy benefits of telecommuting).

185. See *supra* notes 86-87 (describing the estimated impact of telecommuting on traffic congestion and air pollution).

### III. A FRAMEWORK FOR ASSESSING THE REASONABLENESS OF TELECOMMUTING

This Note advocates a fact-specific approach to evaluating whether telecommuting is a reasonable accommodation. Although this was the approach of the *Langon* and *Anzalone* courts,<sup>186</sup> neither court articulated in any detail the relevant considerations or appropriate burdens of proof for assessing telecommuting as a reasonable accommodation. This Note provides a more explicit framework for a fact-specific analysis.

#### A. THE PLAINTIFF'S PRIMA FACIE CASE

Under the ADA, an employee has the initial burden of establishing his or her qualifications for the position in question, including proposing any accommodations necessary to perform essential job functions and establishing the reasonableness of these accommodations.<sup>187</sup> In a telecommuting case, therefore, a plaintiff must show that he or she can adequately perform essential job responsibilities from home. The plaintiff must also establish that telecommuting is facially reasonable.<sup>188</sup>

In evaluating the plaintiff's showing, courts should not presume that telecommuting is either reasonable or unreasonable.<sup>189</sup> Instead, courts should consider the nature of both the plaintiff's responsibilities and the plaintiff's disability.<sup>190</sup> This includes examining the need for the plaintiff's physical presence at work. If, for example, a plaintiff's job involves attending meetings, the plaintiff must demonstrate that he or she can fully participate by phone or other electronic media. If regular performance is essential to the job and the plaintiff has a history of absenteeism, the plaintiff must show that telecommuting will facilitate predictable job performance.<sup>191</sup> Alternatively,

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186. See *supra* notes 135-144 and accompanying text (summarizing the *Langon* and *Anzalone* opinions).

187. See *supra* notes 66-67, 70-76 and accompanying text (describing the plaintiff's prima facie case).

188. See *supra* notes 71-76 and accompanying text (defining the "facially reasonable" standard).

189. See *supra* notes 173-180 and accompanying text (explaining how a presumption approach is incompatible with the fact-specific analysis required under the ADA).

190. See *supra* notes 47, 49-50 and accompanying text (describing the general characteristics of a reasonable accommodation).

191. Thus, even under a fact-specific approach telecommuting would not be a reasonable accommodation for the plaintiff in *Carr*, who could not remedy her absenteeism by telecommuting. See *Carr v. Reno*, 23 F.3d 525, 529 (D.C.

in either case the plaintiff may challenge the problematic job criteria as nonessential, shifting the burden of proof to the defendant to establish the essential functions of the position.<sup>192</sup>

Once a plaintiff demonstrates that he or she can perform the job from home, a court should then require the plaintiff to demonstrate that telecommuting is not so disproportionately expensive or impractical as to be obviously inappropriate for employers in the industry.<sup>193</sup> While this showing of facial reasonableness need not be extensive, it can serve to mitigate the "wild goose chase"<sup>194</sup> effect inherent in a case-specific inquiry, by imposing a reasonable evidentiary hurdle in the path of a plaintiff for whom telecommuting is clearly inappropriate.

#### B. EMPLOYER DEFENSES UNDER A FACT-SPECIFIC APPROACH

In a reasonable accommodation case, the employer carries the burden of establishing the essential job functions.<sup>195</sup> Because telecommuting may be a limited solution in some cases,<sup>196</sup> an employer will sometimes be able to prove that physical presence is an essential function, thus precluding telecommuting as a potential accommodation.<sup>197</sup> Persuasive evidence might include the need for ongoing supervision,<sup>198</sup> the impossibility of effective collaboration with clients or colleagues other

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Cir. 1994) (stating that the plaintiff failed to show that by working at home she could remedy her absenteeism).

192. See *supra* note 68 and accompanying text (explaining that the defendant must prove the essential nature of any contested function).

193. See *supra* notes 71-76 and accompanying text (describing the plaintiff's burden to show the facial reasonableness of a proposed accommodation).

194. See *Carr*, 23 F.3d at 530 (cautioning that the district courts should not transform the individualized inquiry envisioned by the Rehab Act into a "pro forma wild goose chase").

195. See *supra* note 68 and accompanying text (noting that the defendant must prove the essential nature of any contested job function).

196. See *supra* notes 89-92 and accompanying text (describing the limitations of telecommuting for both employers and employees).

197. See *supra* note 49 and accompanying text (explaining that the ADA does not require employers to implement an accommodation that allows an employee to perform all essential functions of his or her position).

198. See *supra* note 117 (identifying the need for personal supervision as one reason for the *Whillock* court's decision not to sanction telecommuting as a reasonable accommodation).



than in person,<sup>199</sup> or the centrality of the employer's facilities for the conduct of day-to-day operations.<sup>200</sup>

Even if physical presence is not an essential function of the plaintiff's employment, an employer may still demonstrate that the plaintiff cannot adequately perform a job by telecommuting. For example, an employer might show that the plaintiff has not demonstrated the ability to work independently, which is often critical to the success of telecommuting arrangements.<sup>201</sup> This defense is also appropriate where a plaintiff has a history of prolonged and unpredictable absenteeism unrelated to the need to commute to work.<sup>202</sup>

When continued absenteeism is an issue, an employer may draw on excessive absenteeism precedent for the proposition that a plaintiff who cannot reliably perform a job is not qualified for purposes of the ADA.<sup>203</sup> In evaluating this argument, however, courts should adhere to a fact-specific analysis rather than presume that regularity is essential.<sup>204</sup> For example, if, as in *Langon*, the plaintiff can show that by conserving the energy used in commuting he or she can achieve reliable job performance,<sup>205</sup> a court may find this justification persuasive even if the plaintiff has a prior history of absenteeism from work. This analysis recognizes that telecommuting may facilitate job performance in cases where other accommodations have proved unworkable, while also acknowledging that the chronically absent employee may indeed be unable to function effectively in many work environments.

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199. See *supra* notes 129, 131 (explaining that the *Misek-Falkoff* court found the need for collaboration with others inconsistent with telecommuting).

200. See Piskurich, *supra* note 78, at 24 (listing dependence on an employer's equipment as a barrier to telecommuting).

201. See *supra* note 93 and accompanying text (identifying characteristics of successful telecommuters).

202. See, e.g., Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994) (explaining that because "[w]ith or without reasonable accommodation, Ms. Carr's performance since 1984 showed that she would not be able to work regular hours," there was no need for an individualized inquiry into various forms of accommodation).

203. See *supra* note 101 and accompanying text (discussing the reasoning of the excessive absenteeism cases).

204. See *supra* notes 173-180 and accompanying text (arguing that the ADA requires a fact-specific approach that precludes the use of a presumption analysis).

205. *Langon v. Department of Health & Human Servs.*, 959 F.2d 1053, 1055 (D.C. Cir. 1992).

If the employer fails to prove either that presence is essential or that the plaintiff is not qualified for the job, an employer may still prevail by proving that telecommuting imposes an undue hardship. An employer bears the burden of persuasion on this defense, however,<sup>206</sup> and must prove that telecommuting is either unworkable or too expensive.<sup>207</sup> For example, telecommuting might be unworkable if a small employer proves that its ability to meet flexible business demands will be severely diminished if one of its employees is unavailable on short notice. The question of when the cost of an accommodation renders it an undue hardship requires a fact-specific inquiry focusing on the employer's financial resources.<sup>208</sup> Under the EEOC regulations, however, an employee committed to telecommuting may be able to defeat a cost-based defense if he or she is willing to share the expenses with the employer.<sup>209</sup>

### C. ENFORCING THE INTERACTIVE PROCESS

The obvious disadvantage of a fact-specific approach to reasonable accommodation analysis is that it encourages litigation. One way for courts to minimize this result is to insist that both parties prove their good faith participation in an interactive process to determine a workable accommodation.<sup>210</sup> In addition to its efficiency advantages, insisting on meaningful interaction encourages the compromise and negotiation underlying the ADA's reasonable accommodation requirement.<sup>211</sup>

Where an interactive process results in the identification of an appropriate accommodation, the ADA's purposes are achieved while litigation is avoided. By contrast, under a pre-

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206. See *supra* note 69 and accompanying text (explaining that the employer bears the burden of proving undue hardship).

207. See *supra* notes 59-64 and accompanying text (describing the undue hardship defense).

208. Neither the ADA nor the EEOC regulations provide any guidance as to the scope of an employer's financial obligations under the ADA's reasonable accommodation provisions. For an extended analysis of an employer's financial obligations under Title I of the ADA, see generally Epstein, *supra* note 63 (criticizing the vagueness of the undue hardship standard).

209. See 29 C.F.R. app. § 1630.2(p) (1996) (providing that if an accommodation is unduly expensive, the employee should be allowed either to provide the accommodation or to pay a portion of the cost).

210. See *supra* note 48 and accompanying text (describing the interactive process required of employers and employees under the EEOC regulations).

211. See *supra* note 48 (summarizing the process aspects of the reasonable accommodation requirement).

sumption approach, litigation is reduced but the ADA's purposes may be thwarted.<sup>212</sup> Ideally, a fact-specific approach to adjudicating telecommuting cases should produce an outcome similar to what good faith negotiations would achieve, because both processes focus on the realities and limitations of telecommuting in particular cases.

### CONCLUSION

The increasing prevalence of telecommuting in the American workplace confirms its potential as an accommodation for disabled employees. As telecommuting becomes more common, its possibilities and limitations as a reasonable accommodation will be more fully understood. This in turn should make it easier for courts to assess the reasonableness of telecommuting in particular settings, while decreasing employer resistance to telecommuting in circumstances where it is appropriate.

In the future, courts considering telecommuting as a reasonable accommodation should abandon the presumption analysis and undertake the fact-specific inquiry Congress intended. Properly implemented, a fact-specific approach takes employer objections to telecommuting seriously, while acknowledging that the realities of technological advancement make telecommuting more feasible than commonly assumed. Most importantly, a fact-specific analysis of telecommuting as a reasonable accommodation advances the overriding objective of the ADA, by facilitating additional employment opportunities for disabled workers.

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212. See *supra* notes 178-180, 181-183 and accompanying text (arguing that the presumption approach undermines the purposes of the ADA).