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There's No Place Like Work: How Modern Technology is Changing the Judiciary's Approach to Work-At-Home Arrangements, as an ADA Accommodation,

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COMMENTS

THERE'S NO PLACE LIKE WORK: HOW MODERN TECHNOLOGY IS CHANGING THE JUDICIARY'S APPROACH TO WORK-AT-HOME ARRANGEMENTS AS AN ADA ACCOMMODATION

INTRODUCTION

In 1973, Jack Nilles, a researcher with the University of Southern California, coined the term "teleworking."[1] His idea was to create a more flexible communication system for employees, reduce the need for transportation, and ultimately decentralize the traditional workplace.[2] Six years later, Marvin Minsky, a professor at the Massachusetts Institute of Technology ("MIT"), first used the term "telepresence."[3] Minsky sought to create a phenomenon whereby people could use technology to replicate their presence in an environment where they were not physically present.[4]

Decades later, these social pioneers' ideas have merged to create "robotic telepresence," a form of technology which enables employees to project their likeness onto mobile robots while they

1. *Biography of Jack Nilles*, JALA INT'L, http://www.jala.com/jnmbio.php (last modified Sept. 26, 2011).

2. *See* Jennifer Mears, *Father of Telecommuting Jack Nilles Says Security, Managing Remote Workers Remain Big Hurdles*, NETWORK WORLD (May 15, 2007, 1:00 AM), http://www.networkworld.com/article/2299251/computers/father-of-telecommuting-jack-nilles-says-security--managing-remote-workers-remain-big-hurd.html (quoting Jack Nilles' initial thoughts about telecommuting and his perceptions on how his ideas contrasted with those of the "business world").

3. Wijnand A. IJsselsteijn, *History of Telepresence*, *in* 3D VIDEOCOMMUNICATION: ALGORITHMS, CONCEPTS, AND REAL-TIME SYSTEMS IN HUMAN CENTRED COMMUNICATION 7, 7 (Oliver Schreer, Peter Kauff & Thomas Sikora eds., 2005).

4. *See id.* ("[Telepresence] refers to the phenomenon that a human operator develops a sense of being physically present at a remote location through interaction with the system's human interface, that is, through the user's actions and the subsequent perceptual feedback he/she receives via the appropriate teleoperation technology.").

work conveniently from a location of their choice.[5] However, this technology is only in its early stages, and creators are already developing ideas to make the robots more lifelike by adding features such as limbs and even skin.[6]

Telepresence is only one example of the endless ways in which technology is constantly evolving to reduce the need for employees to be physically present in their employers' offices.[7] This phenomenon has forced the courts to reconsider the definition of the workplace in the employment law context.[8] Nowhere has this shift been more evident than in judicial analysis of teleworking as a reasonable accommodation under the Americans with Disabilities Act ("ADA"). While courts have long applied case law principles to determine whether an accommodation within the traditional workplace is reasonable under the ADA, emerging technology now forces courts to question whether an employee's physical presence in the office is necessary to perform the essential functions of his or her work.[9] As a result, courts must respond by amending their analysis so as to appropriately address modern teleworking arrangements. Absent such analytical changes, which appropriately consider the extent to which modern telecommunications technology has changed the work dynamic, courts will tend to look unfairly upon work-at-home accommodations that allow the employee to work as if he or she is physically present in the office.

5. Robotic telepresence technology, such as the Beam Pro, is equipped with sensors, which allow the user to see and hear the surrounding environment as well as a camera and speaker that allow the user to interact with others in that environment. *See, e.g.*, Seth Stevenson, *Wish I Were There: The Beam Telepresence Robot Lets You Be in Two Places at Once*, SLATE (May 1, 2014, 11:44 PM), http://www.slate.com/articles/technology/technology/2014/05/beam_pro_telepresence_robot_how_it_works_and_why_it_is_strangely_alluring.html. Furthermore, the robot can be maneuvered throughout an office setting simply by using the arrow keys on a computer. *Id.*

6. *Your Alter Ego on Wheels*, ECONOMIST (Mar. 9, 2013), http://www.economist.com/news/technology-quarterly/21572916-robotics-remotely-controlled-telepresence-robots-let-people-be-two-places.

7. *See infra* text accompanying notes 53–89 (discussing modern teleworking technology).

8. *See* EEOC v. Ford Motor Co., 752 F.3d 634, 641 (6th Cir. 2014) ("[T]he law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the 'workplace' is anywhere that an employee can perform her job duties.") (internal citation omitted) *vacated en banc*, 2014 U.S. App. LEXIS 17252 (6th Cir. 2014).

9. *See id.* at 640–44.

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This comment addresses the extent to which the evolving definition of the "workplace" has upset the courts' traditional approach to teleworking as a reasonable accommodation for disabled employees under the ADA and ultimately necessitated changes in the reasonable accommodation framework. Part I discusses the history and purpose of the ADA and the traditional framework that courts apply to determine whether an accommodation is reasonable. Part II discusses the development of teleworking and how the courts generally apply the reasonable accommodation framework to proposed teleworking accommodations. Part III discusses the ways that reasonable accommodation analysis has adapted, and must continue to adapt, to innovations in telecommunications technology and ultimately proposes a new test for telework that recognizes the modern definition of the workplace. Finally, Part IV identifies defenses that employers may raise to ADA telework accommodation claims in the modern era of telecommunications technology. This comment concludes that in order for a court to address the evolving nature of the workplace and accurately consider whether teleworking is a reasonable accommodation under the ADA, it must apply a test that considers whether the work-at-home accommodation renders the employee functionally present at the traditional workplace for the purposes of his or her job duties.

I. THE ADA AND REASONABLE ACCOMMODATIONS

Though the ADA is an expansive statute, the scope of this comment is primarily limited to the reasonable accommodation requirement under Title I. This part discusses the standards that courts apply to determine whether there is a duty to accommodate, the way that courts define reasonable accommodation, and an exception that employers might utilize under the ADA.

A. *ADA Development*

Congress passed the ADA in 1990 as one aspect of a series of civil rights legislation designed to reduce discriminatory decisions in the workplace.[10] The statute was preceded by the Rehabilita-

10. *See The Law*, EEOC, http://www.eeoc.gov/eeoc/history/35th/thelaw/ (last visited Apr. 3, 2015). Perhaps the earliest federal legislation directly relating to employment dis-

tion Act of 1973, which provided protection to disabled federal employees and contractors.[11] However, the Rehabilitation Act was seen as inadequate to address the needs of disabled Americans on a more comprehensive level, and Congress ultimately responded by passing the ADA with an overwhelming majority.[12]

The ADA was designed not only to protect disabled individuals from discriminatory employment decisions, but also as an effort to reduce strains on public welfare resources.[13] Before the ADA, many disabled persons who were otherwise capable of working were forced to rely on public assistance because of misconceptions about their ability to perform in the workplace.[14] Despite this purpose, advocates have struggled to convince employers to invest in ideological change.[15] However, as technology has continued to advance, reducing costs and efforts that employers must make to accommodate the disabled, courts have become increasingly willing to enforce the law with greater stringency.[16]

B. *Duty to Provide Reasonable Accommodations*

Title I of the ADA provides employment-based protections against disability discrimination.[17] An employee is only protected against discrimination by employers covered under the ADA

crimination was the Equal Pay Act of 1963 prohibiting sex-based discrimination in wages. *Id.* This was followed by the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Equal Employment Opportunity Act of 1972, the Rehabilitation Act of 1973, the Pregnancy Discrimination Act of 1978, and then the Americans with Disabilities Act of 1990. *Id.* More recently, Congress passed the Genetic Information Nondiscrimination Act of 2008 to prevent discrimination in the workplace based on genetic information. *Genetic Information Discrimination*, EEOC, http://www.eeoc.gov/laws/types/genetic.cfm (last visited Apr. 3, 2015).

11. MARION G. CRAIN ET AL., WORK LAW: CASES AND MATERIALS 657 (2d ed. 2010).

12. Brianne M. Sullenger, Comment, *Telecommuting: A Reasonable Accommodation Under the Americans with Disabilities Act as Technology Advances*, 19 REGENT U. L. REV. 537, 538 (2007).

13. CRAIN ET AL., *supra* note 11, at 657.

14. *See id.* (discussing the welfare policy underlying the ADA and the belief that otherwise capable individuals were being forced to rely on public assistance).

15. *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 924 (2003) ("[T]he ADA was enacted before the disability rights movement had a full opportunity to educate the public about the important principles that underlay the new law. As a result, employers and other entities regulated by the ADA have resisted full compliance.").

16. *See infra* notes 110–13 and accompanying text (discussing courts' reduced threshold for finding that an accommodation is reasonable).

17. *See* Sullenger, *supra* note 12, at 539.

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18. 42 U.S.C. § 121
19. *Id.* § 12111(8).
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25. *See* Smith v. Am

when the employee is considered a "qualified individual" with a disability.[18] Qualified individuals are those who "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[19] Disability is broadly defined to include "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[20]

In order to successfully assert a claim of discrimination under the ADA, qualified employees must establish that they were discriminated against "on the basis" of their disability.[21] Actions constituting such discrimination include, inter alia, a failure to provide reasonable accommodations to disabled employees who would otherwise be considered qualified individuals under the ADA.[22] However, no such reasonable accommodations need be provided under the ADA if the employer can show that the suggested accommodation "would impose an undue hardship on the operation of the business of such covered entity."[23]

The initial burden rests upon the employee to show not only that he or she is disabled, but also to establish that he or she is a qualified individual under the ADA.[24] Additionally, the employee carries the burden of demonstrating that there is a reasonable accommodation that would allow performance of the essential functions of the work.[25] The burden then shifts to the employer to show that the employee cannot perform the work even with the

18. 42 U.S.C. § 12112(a) (2012).

19. *Id.* § 12111(8).

20. *Id.* § 12102(1). The ADA establishes a rule of construction whereby the definition of disability is to be construed broadly in favor of coverage of individuals. *Id.* § 12102(4)(A). This language was added as part of the ADA Amendments Act of 2008, which was intended to broaden the scope of individuals covered under the ADA. *See* Reagan S. Bissonnette, Note, *Reasonably Accommodating Nonmitigating Plaintiffs After the ADA Amendments Act of 2008*, 50 B.C. L. REV. 859, 860 (2009) ("One of the most significant changes of the ADAAA was to reject the holdings of the Supreme Court cases that had narrowed the scope of coverage under the ADA by limiting the interpretation of 'disability.'").

21. 42 U.S.C. § 12112(a).

22. *See* Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1133 (9th Cir. 2001).

23. *Id.* (quoting 42 U.S.C. § 12112(b)(5)).

24. *See* EEOC v. Ford Motor Co., 752 F.3d 634, 640 (6th Cir. 2014), *vacated en banc*, 2014 U.S. App. LEXIS 17252 (6th Cir. 2014).

25. *See* Smith v. Ameritech, 129 F.3d 857, 866 (6th Cir. 1997).

accommodation, or that such accommodation would represent an undue hardship to the business.[26]

C. *Defining Reasonable Accommodations*

Identifying which accommodations are reasonable under the ADA has proved challenging for courts.[27] Indeed, commentators have characterized this provision of the ADA as among the "most vague" in the entire statute.[28] In *Vande Zande v. Wisconsin Department of Administration*, Chief Judge Posner, writing for the United States Court of Appeals for the Seventh Circuit, stated that although accommodation simply requires that the "employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions . . . . [t]he difficult term is 'reasonable.'"[29]

Congress has shed some light on the matter by providing examples of accommodations such as modified equipment, restructured work schedules, or reassignment of employees to vacant positions.[30] However, the mere existence of a proposed accommodation which might enable a disabled employee to work does not render the accommodation presumptively reasonable. As the court in *Whillock v. Delta Air Lines, Inc.*, noted, "The term 'reasonable' . . . would have no meaning if employers were required to provide employees . . . every conceivable accommodation possible."[31]

Ultimately, the court must look to both the efficacy and the cost of the accommodation in proportion to the benefit it bestows upon the disabled employee.[32] This determination tends to involve a

26. *See* Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 452–53 (6th Cir. 2004) (citing Monette v. Elect. Data Sys. Corp., 90 F.3d 1173, 1186 (6th Cir. 1996)) (explaining the burden-shifting arrangement under the ADA).

27. *See* Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 339–40 (2003) (discussing dissention among commentators and courts as to whether work-at-home accommodations are reasonable).

28. *Id.* at 339.

29. 44 F.3d 538, 542 (7th Cir. 1995).

30. 42 U.S.C. § 12111(9)(B) (2012).

31. 926 F. Supp. 1555, 1565 (N.D. Ga. 1995); *see* Smith v. Ameritech, 129 F.3d 857, 867 (6th Cir. 1997) ("The ADA does not require employers to create a new position for a disabled employee who can no longer perform the essential functions of his job.").

32. *See Vande Zande*, 44 F.3d at 542–43.

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highly fact-specific inquiry into both the disabled employee's circumstances and the needs of the employer.[33] It is this fact-specific inquiry that renders the reasonableness of particular accommodations highly dependent upon the technology available at the time.[34] Accommodations that may have been highly cost-prohibitive and impracticable for employers two decades ago may be considered only minor inconveniences today.[35]

D. *The Undue Hardship Defense*

The ADA also provides an exception for employers who might otherwise be required to accommodate a disabled employee where the proposed accommodation would constitute "an undue hardship on the operation of the business of such covered entity."[36] In contrast to a showing of a reasonable accommodation, the burden rests upon the employer to establish an undue hardship defense.[37] The ADA also expressly defines "undue hardship" as "an action requiring significant difficulty or expense" when considered in light of certain factors.[38] These factors include, inter alia, "the nature and cost of the accommodation; the number of persons employed by the company; the financial resources of the company; and the impact of the accommodation upon the operation of the company."[39]

33. *See* Wong v. Regents of Univ. of Cal., 192 F.3d 807, 818 (9th Cir. 1999) ("Because the issue of reasonableness depends on the individual circumstances of each case, this determination requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards.").

34. *See* EEOC v. Ford Motor Co., 752 F.3d 634, 641 (6th Cir. 2014), *vacated en banc*, 2014 U.S. App. LEXIS 17252 (6th Cir. 2014) ("[T]he law must respond to the advance of technology in the employment context, as it has in other areas of modern life . . . .").

35. *Compare Vande Zande*, 44 F.3d at 544 (stating that no reasonable jury could find working at home to be a reasonable accommodation given the existing state of technology at the time), *with Ford Motor Co.*, 752 F.3d at 642 (stating that advances in technology have made a physical presence at the office less important).

36. 42 U.S.C. § 12112(b)(5)(A) (2012).

37. *See* Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 452–53 (6th Cir. 2004) (citing Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1186 (6th Cir. 1996)) (explaining burden-shifting under the ADA).

38. 42 U.S.C. § 12111(10)(A).

39. Rascon v. U.S.W. Commc'ns, Inc., 143 F.3d 1324, 1334 (10th Cir. 1998) (citing 42 U.S.C. § 12111(10) (B)).

Inevitably, the undue hardship consideration tends to intersect with the reasonableness of the accommodation.[40] However, undue hardship analysis under the ADA is largely a product of cost or pure impracticability.[41] Specifically, courts must look to the costs of a particular accommodation in relation to both its benefits and the extent to which the employer can afford it.[42] For example, courts might excuse an employer from compliance with an otherwise reasonable accommodation when it is simply too expensive.[43] Thus, smaller and less financially stable companies will be more likely to prevail under this defense because larger companies have more resources to accommodate employees.

II. TELEWORKING UNDER THE ADA

The development of teleworking, along with modern and emerging telecommunications technology, has implications for the application of reasonable accommodation analysis to telework. Ultimately, advances in technology have proven a challenge not only to courts in applying the ADA to telework, but also to the legal community in interpreting the court's analysis.

A. *The Development of Teleworking*

The definition of telework varies depending upon the purpose for which it is used.[44] As the opportunities to telework expanded

40. *See* CRAIN ET AL., *supra* note 11, at 670 (explaining the overlap between the reasonableness consideration and the undue hardship consideration when considering the cost of an accommodation).

41. *See id.* ("The [ADA] also provides employers with an affirmative defense when costs are so substantial that they would pose an undue hardship for the particular employer."); *see also* Kristen M. Ludgate, Note, *Telecommuting and the Americans with Disabilities Act: Is Working at Home a Reasonable Accommodation?*, 81 MINN. L. REV. 1309, 1318 (1997) ("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.").

42. *See* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995) (stating that even when the employee establishes that a particular accommodation is reasonable, the employer can still show that the costs of the accommodation are too high relative to either the accommodation's benefits or the employer's financial condition).

43. *See id.* ("[T]he function of the 'undue hardship' safe harbor . . . is to excuse compliance by a firm that is financially distressed, even though the cost of the accommodation to the firm might be less than the benefit to disabled employees.").

44. *See* Cath Sullivan, *What's in a Name? Definitions and Conceptualisations of Teleworking and Homeworking*, 18 NEW TECH., WORK & EMP'T 158, 159 (2003) ("As telework is

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over time, the definition evolved by necessity.[45] This was largely because of the difficulties posed in defining an emerging trend when its purpose is not yet clear.[46] Ultimately, the use of technology became the defining feature of telework and the means by which it was distinguished from other remote work or work-from-home arrangements.[47] Today, broadly defined, telework is work performed remotely through the use of information and communication technology.[48]

In the 1970s, Jack Nilles developed the idea of telework in response to the Arab Oil Embargo and the recognition that fossil fuels were a finite resource.[49] Thus, during its origins, telework was seen primarily as a means to avoid commuting to work.[50] However, later that decade, the use of the silicon chip resulted in a proliferation of personal computers and word-processing technology.[51] Gradually, this led to a recognition that telework had functional benefits for professionals beyond its environmental use.[52] In addition to providing employees with a more flexible work schedule, teleworking helped employers save on overhead office costs, increased worker productivity, and decreased employee absences.[53]

As telecommuting technology advanced and the workforce became less centralized, inevitably the law began to respond. In 1999, the Occupational Safety and Health Administration issued

a very varied and rapidly changing phenomenon, it is inevitable that any general definition will also be broad.").

45. *See generally id.* at 159–60 (describing how the original conception of the term telework was a way to avoid commuting but has since shifted to include remote working by utilizing information and communication technologies).

46. *Cf. id.* at 158–59 ("The breadth and complexity of the phenomena under study make defining telework and work at home particularly difficult.").

47. *See id.* at 159 ("Technology is a crucial element in the distinction between telework and other forms of decentralised work and work at home.").

48. *Id.*

49. *See* Kurt Reymers, *Telecommuting: Attempts at the Re-Integration of Work and Family*, MORRISVILLE ST. C. (1996), http://sociology.morrisville.edu/infospace/telecomm.html.

50. Sullivan, *supra* note 44, at 159. As a result of its early use as a means to avoid commutes, the term "telework" is often used synonymously with "telecommute." *Id.*

51. *See* Reymers, *supra* note 49 (discussing how people became aware of the silicon chip and the subsequent impact this awareness had on computer technology in the workplace).

52. *See id.*

53. Dawn R. Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 38 AM. BUS. L.J. 857, 861–62 (2001).

an advisory letter on safety issues pertaining to work-at-home arrangements.[54] In the same year, the Department of Labor included a definition of "homeworker" in the Code of Federal Regulations ("C.F.R.") definitions section concerning the Fair Labor Standards Act.[55] Subsequently, a plethora of issues arose regarding the right of teleworkers to receive workers' compensation benefits for injuries incurred at a home office.[56] However, despite the various impacts of introducing telework into the American workforce, perhaps the most profound and controversial changes concern whether teleworking is considered a reasonable accommodation under the ADA. While the ADA itself does not directly address the issue of teleworking, courts have increasingly addressed the issue over the past two decades.[57]

B. *The Evolution of Telework Technology*

Though modern technology has facilitated teleworking arrangements generally, certain telecommunication technologies developed over the past two decades have profoundly impacted telework. This section provides a brief discussion of each of these areas: mobile phones, the Internet, cloud technology, and robotic telepresence.

1. Mobile Phones

The idea for the mobile phone (or cell phone, as it is commonly known) existed long before the technology developed to make it a reality.[58] In the late 1940s, an American engineer named D.H.

54. RICHARD E. FAIRFAX, OSHA POLICIES CONCERNING EMPLOYEES WORKING AT HOME, OSHA STANDARD INTERPRETATION AND COMPLIANCE LETTERS (Nov. 15, 1999), www.osha.gov/as/opa/foia/hot_4.html. This response was subsequently withdrawn by OSHA on Jan. 5, 2000. *See id.*

55. Employment of Homeworkers in Certain Industries, 29 C.F.R. § 530.1 (1999) (defining homeworker to be "any employee employed or suffered or permitted to perform industrial homework for an employer").

56. *See* Swink, *supra* note 53, at 874–75 (discussing various workers' compensation issues arising based on injuries incurred while telecommuting).

57. *See id.* at 893–94 ("Although the ADA does not address telecommuting directly as a reasonable accommodation, several courts have suggested that employers must at least *consider* telecommuting as an accommodation for disabled employees, recognizing that employers will only be expected to allow telecommuting as an accommodation under certain circumstances.").

58. Jon Agar, *Learning from the Mobile Phone*, 151 RSA J. 26, 26 (2004) ("[T]he idea

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59. *See id.*

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61. *Id.*

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Ring developed the idea of "cellularity," whereby radio signals would be divided into cells to allow for independent communications among speakers.[59] However, the technology and the market for such a device developed very slowly, and the first mobile phone did not appear in the U.S. market until 1983.[60]

Since its commercialization, mobile-phone technology has rapidly evolved. In the early 1990s, "second generation," or 2G, mobile phones with digital technology allowed for better phone batteries, downloading capabilities, and text messaging.[61] In the late 1990s, 3G phones increased data download speeds as well as the number of uses for data.[62] As modern phones transition into 4G, also known as Long Term Evolution ("LTE"), processing power and storage capacity currently double approximately every eighteen months.[63] These changes have had a profound impact on telework. While basic cell phone technology has enabled employers and employees to contact one another from virtually any location outside the office, smartphone technology now provides even more data-sharing capabilities whereby teleworkers can share documents, graphics, videos, or charts almost instantly from remote locations.[64]

2. The Internet

Not only has the Internet on its own had the most profound impact on modern teleworking arrangements of any technology, it also serves as the foundation for other critical telecommunica-

for a cellular phone was written down as early as 1947, yet the product did not take off until the 1980s.").

59. *See id.*

60. *The History of Mobile Phones*, DERBY TELEGRAPH, Sept. 16, 2008, http://www.derbytelegraph.co.uk/HISTORY-MOBILE-PHONES/story-11635326-detail/story.html.

61. *Id.*

62. *See* Louis E. Frenzel, *What's the Difference Between 3G and 4G Cellular Systems?*, ELECTRONIC DESIGN (Jan. 25, 2012, 7:21 AM), http://electronicdesign.com/4g/what-s-difference-between-3g-and-4g-cellular-systems.

63. *See id.* (discussing LTE and 4G concepts); Jim Lynch, *How Cell Phones and Tablets Enable Telework*, TECHSOUP (Apr. 25, 2014, 12:25 PM), http://forums.techsoup.org/cs/community/b/tsblog/archive/2014/04/25/how-cell-phones-tablets-enable-telework.aspx ("The processing power of our mobile phones roughly doubles every 18 months as does storage capacity, as do Internet speeds with the advent of faster 4G and 4G LTE mobile networks.").

64. *See* Lynch, *supra* note 63; MOBILE WORK EXCH., STRAIGHT TALK ON TELEWORK TECHNOLOGY (2008), *available at* http://www.mobileworkexchange.com/uploads/2000/1741-17288_MWE_WTP_StraightTalkWhitePaper.pdf.

tions technology.[65] Like the mobile phone, the initial idea for the Internet arose many years before the technology was available when in 1962, J.C.R. Licklider, an MIT professor, wrote a series of memos describing the idea of a "Galactic Network."[66] Yet it was not until the early 1970s that Internet developers began to make substantive technological progress.[67] Moreover, the Internet did not become available as a commercial product in the United States until the early 1990s.[68] Since that time, the Internet has expanded and evolved on an unprecedented scale. Across the world, over three billion people use the Internet, with nearly all of them connecting on a daily basis.[69]

One of the foundational elements of the Internet is its function as a means for communication.[70] Thus, the Internet has undoubtedly revolutionized telecommunications technology and dramatically expanded teleworking opportunities. From simple concepts like email to complex systems such as telepresence, the Internet has made long-distance communication and information sharing vastly more simple than it was at the inception of teleworking.[71]

3. Cloud Technology

Roughly defined, cloud technology (or cloud computing) involves the virtual storage of information on a network as opposed

65. *See* Barry M. Leiner et al., *Brief History of the Internet*, INTERNET SOCIETY 1 (Oct. 15, 2002), http://www.internetsociety.org/sites/default/files/Brief_History_of_the_Internet.pdf ("The Internet has revolutionized the computer and communications world like nothing before.").

66. *See id.* at 2.

67. *See id.* at 3 (discussing the ability of users to develop applications and the first public demonstration of certain networking technology in the early 1970s).

68. *See* Shane Greenstein, *Innovation and the Evolution of Market Structure for Internet Access in the United States* 2 (Stanford Inst. for Econ. Policy Research, Discussion Paper No. 05-18, July, 2006), *available at* http://www-siepr.stanford.edu/papers/pdf/05-18.pdf (identifying 1993 as the point in time when the Internet was commercialized).

69. *See Internet Usage Statistics*, INTERNET WORLD STATS (June 30, 2014), http://www.internetworldstats.com/stats.htm (last updated Feb. 3, 2015) (providing data on the number of Internet users worldwide); *see also Global Internet User Survey 2012*, INTERNET SOCIETY, http://www.internetsociety.org/surveyexplorer/key_findings (last visited Apr. 3, 2015) ("Internet users nearly universally (96 percent) indicated they accessed the Internet at least once a day.").

70. *See* Robert E. Kahn & Vinton G. Cerf, *What Is the Internet (And What Makes It Work)*, CORP. FOR NAT'L RES. INITIATIVES (Dec. 1999), http://www.cnri.reston.va.us/what_is_internet.html (last updated Feb. 10, 2003) (indicating that the Internet was designed to provide a means for both "communications capabilities and information services").

71. *See id.*

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72. Eric Griffith,
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to a computer's physical hard drive.[72] Although the development of cloud technology somewhat parallels that of the Internet, its wide-scale usage as a business tool has only recently developed.[73] Cloud technology in the corporate world has become massively popular and is on a path to soon become a $100 billion annual industry.[74]

As a result of its increasing popularity and availability, cloud computing is now one of the biggest players in modern teleworking technology.[75] Many major corporations such as Google, Apple, and Microsoft now offer limited cloud storage space free of charge.[76] Moreover, publicly available cloud services often offer better IT services than employers possess independently.[77] Such easy and cheap access to effective virtual information sharing makes it a particularly enticing option for employers considering telework.[78] Moreover, these options leave little excuse for employers who might claim that work-at-home arrangements are not feasible. While employers sometimes cite concerns such as security or privacy as a reason to oppose cloud computing,[79] these excuses have become less compelling in the modern world of highly security-conscious cloud services.[80]

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72. Eric Griffith, *What Is Cloud Computing*, PC MAG (Mar. 13, 2013), http://www.pcmag.com/article2/0,2817,2372163,00.asp.

73. *See* Arif Mohamed, *A History of Cloud Computing*, COMPUTER WKLY. (Mar. 27, 2009), http://www.computerweekly.com/feature/A-history-of-cloud-computing (discussing the development of cloud computing from its conception in the 1960s to more modern usage). The concept of being able to access data from any location is attributed to J.C.R. Licklider's network ideas in the 1960s. *Id.*

74. Griffith, *supra* note 72.

75. *See* David Linthicum, *Telecommuting and Cloud Computing: For Innovators Only*, INFOWORLD (Mar. 5, 2013), http://www.infoworld.com/article/2613694/cloud-computing/telecommuting-and-cloud-computing-for-innovators-only.html ("While a remote workforce issue is typically not the only benefit that drives business to the cloud, it's often on the radar. Moreover, companies innovative enough to create a strong remote workforce are typically the organizations that accept cloud computing.").

76. Lisa Eadicicco, *Which Cloud Storage Is Cheapest? How Prices for Google Drive, Dropbox, iCloud, and OneDrive Compare*, BUS. INSIDER (Dec. 14, 2014, 8:12 AM), http://www.businessinsider.com/best-cloud-storage-price-google-drive-dropbox-icloud-one-drive-2014-12.

77. *See* Linthicum, *supra* note 75.

78. *See id.* (identifying better IT services as a reason why cloud technology is enticing for employers that allow work-at-home arrangements).

79. *Id.*

80. *See* Martyn Casserly, *7 Best Cloud Storage Services 2015: Dropbox vs Google Drive, OneDrive, iCloud & More*, PC ADVISOR (Feb. 9, 2015), http://www.pcadvisor.co.uk/features/internet/3506734/best-cloud-storage-dropbox-google-drive-onedrive-icloud/ (indicat-

4. Robotic Telepresence

Robotic telepresence is an emerging form of communications technology that enables a remote user to project their likeness onto a mobile robot, which can then roam around an environment.[81] While cloud technology enables employees to digitally transfer data to their employer from a remote location, robotic telepresence takes this a step further by enabling employees to remotely transfer something more—their physical presence.[82] Thus, robotic telepresence has tremendous implications for the future of telework.[83] For jobs that do not require manual labor, this technology leaves little to no work that an employee cannot perform remotely. Teleworking office workers can wander to a colleague's desk to have a quick conversation or catch the boss on his way out the door.[84] Doctors can remotely wander from room to room conversing with patients and interacting with staff.[85] Security guards can monitor entire buildings while sitting at a desk.[86] To some extent, the possible applications of such technology is limited only by the creativity of the users.

While robotic telepresence has not had the same impact on telework as mobile phones and cloud technology, it is poised to make a mark in the future.[87] Not only are several companies jumping on board with the idea, but costs are declining as well.[88] Moreover,

ing security features available on different cloud providers).

81. *See* ECONOMIST, *supra* note 6 ("'Robotic telepresence' . . . allows people to move virtually through a distant building by remotely controlling a wheeled robot equipped with a camera, microphone, loudspeaker and screen displaying live video of its pilot's face.").

82. *See id.* (explaining the function of telepresence robots).

83. *See Robots Are Changing the Future of Telecommuting*, FAST COMPANY (Oct 22, 2010, 2:00 PM), http://www.fastcompany.com/1693845/robots-are-changing-future-telecommuting ("Proponents argue that [telepresence robots] are the natural outgrowth of pervasive connectivity, inexpensive broadband, and the realization that constant business travel is taxing on both people and the planet.").

84. *See* ECONOMIST, *supra* note 6 ("They give their pilots the freedom to converse with anybody at the remote location—rolling over to the desk of a colleague, say, or accompanying a busy boss on her way to a meeting—rather than limiting communication to a specific time in a special room.").

85. *See id.* ("[Telepresence robots] allow doctors to conduct bedside consultations from afar . . . .").

86. *See id.* ("[Telepresence robots] provide a cheap way to patrol workplaces at night.").

87. *See id.* ("Several start-ups are introducing new telepresence robots this year, and sales are growing as costs fall.").

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designers are developing ways to make the technology both more intelligent and lifelike.[89] Indeed, robotic telepresence could easily be the future of telework.

C. *Traditional Application of the ADA to Teleworking*

Technology available to the modern teleworker is undoubtedly far beyond what it was when Congress passed the ADA in 1990.[90] This raises the question of how the courts have historically dealt with reasonable accommodation claims based on teleworking.

One of the earliest cases applying ADA reasonable accommodation principles to teleworking arose just five years after the ADA passed. In *Vande Zande v. Wisconsin Department of Administration*, a paraplegic program assistant for the Wisconsin Department of Administration suffered from pressure ulcers that required her to stay at home for weeks at a time.[91] She requested that the division provide her with a desktop computer so she could perform work at home, but her supervisor denied the request.[92] The employee sued under the ADA seeking to restore the sick leave that she used to compensate for the time she was confined to her home.[93] In an opinion that has been characterized as "one of the most hostile views regarding whether working at home constitutes a reasonable accommodation,"[94] Chief Judge Posner resolutely held, "No jury . . . could in our view be permitted to stretch the concept of 'reasonable accommodation' so far."[95]

A few months later, the Northern District of Georgia was presented with a similar claim in *Whillock v. Delta Air Lines, Inc.* whereby an employee was denied a requested accommodation to work at home due to "Multiple Chemical Sensitivity Syndrome," a condition which caused her to experience unusually strong adverse reactions to chemicals in her workplace.[96] Relying heavily

89. *See id.*

90. Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995); *see supra* notes 58–89 and accompanying text (discussing advances in teleworking technology).

91. *Vande Zande*, 44 F.3d at 543–44.

92. *Id.* at 544.

93. *See id.*

94. *See* Sullenger, *supra* note 12, at 548.

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

96. 926 F. Supp. 1555, 1558, 1560 (N.D. Ga. 1995).

on the Seventh Circuit's decision in *Vande Zande*, the court found that "no reasonable jury, under the particular facts of this case, could find that allowing Plaintiff to work at home . . . is a reasonable accommodation."[97]

Scholars often cite these cases and others for having created a strong presumption against teleworking that can only be overcome by the most exceptional circumstances.[98] However, other cases which are said to apply a more fact-specific approach to teleworking contrast with this presumption.[99] For example, in *Humphrey v. Memorial Hospitals Ass'n*, an employer denied a work-at-home arrangement for her employee who had demonstrated "absenteeism and tardiness" due to her Obsessive Compulsive Disorder.[100] In that case, the Ninth Circuit held that a work-at-home arrangement can be a reasonable accommodation "when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer."[101]

However, starkly categorizing ADA teleworking cases as applying either a presumption of unreasonableness on one hand, or a fact-specific approach on the other, fails to contextualize teleworking case law in light of the rapid developments in technology taking place over the past two decades. Courts that supposedly developed presumptions against telework were more likely making fact-based determinations based upon the existing technology at the time.[102] For instance, *Vande Zande*, considered to be the

97. *Id.* at 1566.

98. *See* Sullenger, *supra* note 12, at 548–50 (identifying *Vande Zande* and *Whillock* as examples of cases applying the "presumption-against-telecommuting approach"); *see also* Ludgate, *supra* note 41, at 1324–27 (examining *Vande Zande* and *Whillock* for their "presumption that telecommuting is an inappropriate accommodation").

99. *See* Sullenger, *supra* note 12, at 550–52 (citing three cases which apply a fact-specific approach to teleworking); *see also* Ludgate, *supra* note 41, at 1330 ("Two courts have used a fact-specific approach to examine the issue of telecommuting as a reasonable accommodation," finding it plausible).

100. *See* 239 F.3d 1128, 1131–32 (9th Cir. 2001).

101. *Humphrey*, 239 F.3d at 1136. A Massachusetts Court came to a similar conclusion in 2005. Smith v. Bell Atl., 829 N.E.2d 228, 241 (Mass. App. Ct. 2005) ("We conclude that there was ample evidence from which the jury could find that allowing Smith to do substantial amounts of her work at home . . . was a reasonable accommodation.").

102. *See Bell Atl.*, 829 N.E.2d at 240 (citing Mason v. Avaya Commc'ns, Inc., 352 F.3d 1114, 1124 (10th Cir. 2004)) (noting that the distinction between courts which are favorable and unfavorable to teleworking as a reasonable accommodation are misleading because of the "fact-specific, case-by-case analysis").

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seminal case for the presumption against teleworking, pertained to an employee who worked in the early 1990s.[103] This means that during much of Vande Zande's employment, it is likely that the Internet was not even available to her employer as a commercial product.[104] Moreover, the plaintiff in *Whillock* submitted her request to work at home in early 1993, a time when the commercial Internet was, at best, still in its infancy.[105] Indeed, it is highly likely the judges who decided these cases probably had little to no familiarity with the concept of the Internet at all.[106] Therefore, courts made these decisions well before the advent of some of the most significant telecommunications-based developments in the history of telework.

This analysis is not intended to suggest that the Internet is the exclusive means by which teleworking is accomplished effectively, nor is it meant to say that ADA decisions approving telework as a reasonable accommodation perfectly correlate with technological advancement. However, it does provide context through which one can see how the alleged presumption against teleworking in cases such as *Vande Zande* and *Whillock* appear to be more fact-specific determinations based on the communications technology that existed at the time. Even Chief Judge Posner seemed to recognize the limited nature of his supposed ban on telework by indicating that it "will no doubt change as communications technology advances."[107] The inevitable conclusion is that courts in the early 1990s never actually developed a presumption against teleworking, but instead applied the existing facts to the law, which required that accommodations be reasonable.[108] Subsequent cases

103. *See* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995) ("Vande Zande worked for the housing division . . . for three years, beginning in January 1990."); *see also* Sullenger, *supra* note 12, at 548 ("*Vande Zande* . . . is representative of one of the most hostile views regarding whether working at home constitutes a reasonable accommodation.").

104. *See* Greenstein, *supra* note 68, at 2 (identifying 1993 as the point in time when the Internet was commercialized).

105. Whillock v. Delta Air Lines, Inc., 926 F. Supp. 1555, 1560 (N.D. Ga. 1995); *see* Greenstein, *supra* note 68, at 8.

106. *See* Greenstein, *supra* note 68, at 8 ("To a knowledgeable insider in 1993, the Internet was still progressing, but it received no attention outside a very small technically oriented community."); *see also* EEOC v. Ford Motor Co., 752 F.3d 634, 642 (6th Cir. 2014) ("[T]eleconferencing technologies that most people could not have conceived of in the 1990s are now commonplace.").

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

108. *See* Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1133 (9th Cir. 2001) (quoting

further support this by noting that the apparent divide between courts finding teleworking accommodations unreasonable and those finding it potentially reasonable is "largely illusory," because each case was individually decided based on its specific facts.[109]

Refuting the existence of a presumption against telework is important in showing that a court's determination as to whether telework is a reasonable accommodation under the ADA is not based upon a judge's arbitrary decision, but rather is "closely tied to the technology available to make the accommodation reasonable."[110] Unsurprisingly, the D.C. Circuit recently noted that "[t]echnological advances and the evolving nature of the workplace" have made it "rare that any particular type of accommodation will be categorically unreasonable as a matter of law."[111] This suggests that, over time, the threshold for which a court is willing to declare that an employer must accommodate their employee through telework has become, and will continue to remain, increasingly low.[112] As the Sixth Circuit recently noted in *EEOC v. Ford Motor Co.*, "[T]eleconferencing technologies that most people could not have conceived of in the 1990s are now commonplace."[113] While it is clear that courts have adapted, and will continue to adapt, their case-by-case analysis to evolving technology, the pertinent question now becomes what this shift means for ADA jurisprudence.

42 U.S.C. § 12112(b)(5)(A) (2012)) ("Under the ADA, the term 'discriminate' is defined as including 'not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.'").

109. Smith v. Bell Atl., 829 N.E.2d 228, 240 (Mass. App. Ct. 2005) (citing Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1124 (10th Cir. 2004)).

110. *Cf. id.* (noting that the distinction between courts' approaches to teleworking as a reasonable accommodation are misleading because of the "fact-specific, case-by-case analysis").

111. Solomon v. Vilsack, 763 F.3d 1, 10 (D.C. Cir. 2014).

112. *See* EEOC v. Ford Motor Co., 752 F.3d 634, 641 (6th Cir. 2014) ("[T]he law must respond to the advance of technology in the employment context, as it has in other areas of modern life . . . .").

113. *Id.* at 642.

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III. ADA ADAPTATIONS TO INNOVATIONS IN TELECOMMUNICATIONS TECHNOLOGY

As communications technology becomes increasingly available in the workplace, courts are being forced to confront these transformations. This part concludes that in order to sufficiently address these changes, courts must adopt a new reasonable accommodation test whereby they consider whether the work-at-home accommodation renders the employee functionally present at the traditional workplace for the purposes of his or her job duties.

A. *Attendance Versus Physical Presence*

"[T]echnology evolves in an unpredictable way."[114] As a result, courts must not only recognize technological changes, but also ensure that the law responds appropriately.[115] Employment law is no exception.[116] Though courts have become more willing to consider teleworking as a reasonable accommodation as telecommunications technology advances,[117] courts have only recently begun to recognize that technology is fundamentally changing the way that it must analyze the ADA.[118] In other words, when applying a fact-specific approach to ADA jurisprudence, the evolving facts not only change the outcomes, but also change the way the law itself is applied.[119]

This is most evident in the recent Sixth Circuit decision, *EEOC v. Ford Motor Co.*[120] There, a Ford employee suffered from Irritable Bowel Syndrome ("IBS"), a condition which caused her to experience severe incontinence.[121] As her condition worsened, it be-

114. ANTONIO VÁZQUEZ-BARQUERO, ENDOGENOUS DEVELOPMENT: NETWORKING, INNOVATION, INSTITUTIONS AND CITIES 77 (2002).

115. *Cf. Ford Motor Co.*, 752 F.3d at 641 n.2 ("The Justices of the Supreme Court have recognized the law's evolution in response to advancing technology in a number of different contexts.").

116. *Id.* at 641 ("[T]he law must respond to the advance of technology in the employment context, as it has in other areas of modern life . . . .").

117. *See supra* text accompanying notes 98–113 (discussing courts' openness to finding reasonable accommodations due to advancing technology).

118. *See infra* text accompanying notes 120–46 (discussing the impact of the *Ford Motor Co.* case on ADA jurisprudence).

119. *See Ford Motor Co.*, 752 F.3d at 641.

120. *Id.*

121. *Id.* at 637.

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118. *See infra* text accompanying notes 120–46 (discussing the impact of the *Ford Motor Co.* case on ADA jurisprudence).

119. *See Ford Motor Co.*, 752 F.3d at 641.

120. *Id.*

121. *Id.* at 637.

came difficult for her to drive to work or even stand up from her desk.[122] After several months, the employee made a formal request to telecommute as an accommodation for her IBS.[123] Ford denied her request and she subsequently filed a discrimination claim with the EEOC.[124] The EEOC moved forward with her case, filing a complaint in the Eastern District of Michigan for, inter alia, a failure to accommodate the plaintiff's disability under the ADA.[125] The district court dismissed the case on summary judgment, finding that the "request to telecommute . . . was not a reasonable accommodation."[126] The district court also found that the employee was not a "qualified individual" under the ADA based upon her "excessive absenteeism."[127]

In reviewing the district court's decision, the Sixth Circuit found that the employee was plainly a qualified individual under the ADA because, absent some proof that physical attendance in the workplace was necessary for her job, she was "otherwise qualified" for her position.[128] Therefore, the burden shifted to Ford to show "that physical presence in the workplace is an 'essential function' of [her position]."[129]

The Sixth Circuit placed unique importance on physical presence in this case because it recognized that as telecommunications technology has advanced, attendance in the workplace is no longer synonymous with physical presence.[130] In essence, for many jobs, it is not necessary that an employee actually attend the physical work location in order to be *present* at their job. The emergence of cell phones, email, and teleconferencing technology means that employees can remotely communicate with their employer. Cloud technology means that employees can retrieve and send documents, pictures, charts, files, or virtually any form of data through the Internet. Furthermore, technology as sophisticated as robotic telepresence means that employees can even rep-

122. *Id.*
123. *Id.* at 637–38.
124. *Id.* at 638.
125. *Id.* at 639.
126. *Id.*
127. *Id.*
128. *Id.* at 640.
129. *Id.* at 640–41.
130. *See id.* at 641 ("[A]s technology has advanced . . . attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location.").

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139. *Id.* at 213.

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As a result of these changes, courts must now reconsider their definition of the workplace, and in so doing, shift the focus of the analysis away from attendance and toward physical presence.[132] In its "Enforcement Guidance" on the matter, the EEOC even recognized that "[a]ttendance . . . is not an essential function as defined by the ADA because it is not one of 'the fundamental job duties of the employment position.'"[133] However, as David Fram of the National Employment Law Institute has noted, courts "almost uniformly say the opposite."[134]

For example, in *Vande Zande*, Chief Judge Posner relied on the Fourth Circuit case, *Tyndall v. National Education Centers, Inc.*, as support for his claim that the unreasonableness of teleworking as an accommodation was a majority view.[135] In *Tyndall*, the court addressed an ADA discrimination claim based upon, inter alia, the employer's failure to accommodate a medical condition that caused excessive absences from work.[136] However, there was no claim in *Tyndall* that the employer failed to provide an opportunity for the plaintiff to work at home.[137] Instead, the claim seemed to be based more upon the employer's failure to provide adequate leaves of absence.[138] The court held that "a regular and reliable level of attendance is a necessary element of most jobs" and "[a]n employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA."[139]

131. *See, e.g.*, Stevenson, *supra* note 5.

132. *See Ford Motor Co.*, 752 F.3d at 641 (criticizing the dissent's characterization of the "workplace" and the "physical worksite provided by the employer" as synonymous).

133. *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, EEOC n.65 (quoting 29 C.F.R. § 1630.2(n)(1) (2014)) (last modified Oct. 22, 2002), http://www.eeoc.gov/policy/docs/accommodation.html.

134. C. Reilly Larson, *NELI Addresses Disabilities, EEOC on Pregnancy, Wellness*, 65 BULL. TO MGMT. 319, 319 (2014).

135. Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544–45 (7th Cir. 1995).

136. Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209, 211–12 (4th Cir. 1994).

137. *See id.* at 211.

138. *See id.* at 212. We are simply told that one of the complaints was that the defendant "failed to make reasonable accommodations for her disability prior to her termination." *Id.* However, the claim did arise shortly after she was denied additional leave, suggesting that this was the accommodation about which she was complaining. *See id.*

139. *Id.* at 213.

It is clear based upon *Vande Zande*'s reliance on *Tyndall* that, at the time, a failure to be physically present at work was seen as synonymous with a failure to attend work.[140] However, *Vande Zande* was not the only court with this opinion.[141] The *Whillock* court also cited *Tyndall*, noting that "regular attendance [is] an essential function of [the] Plaintiff's job."[142] Even the district court's opinion in *Ford Motor Co.* cited *Tyndall* as a basis for finding that the plaintiff was not qualified under the ADA.[143]

The strong link between absence from work and absence from a physical office will undoubtedly be challenging for proponents of the teleworking accommodation to overcome. This is further demonstrated by the fact that the Sixth Circuit vacated its decision in *Ford Motor Co.* and granted Ford en banc review.[144] Plainly, there is a great deal of hesitance to accept the Sixth Circuit's original opinion that "attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location."[145] This trepidation is likely why Gail Coleman of the EEOC began her en banc oral argument by cautiously warning the court that "[t]his case is not a referendum on telework in general."[146] However, the original decision by the Sixth Circuit does in fact suggest that the courts are radically reconsidering their approach to telework under the ADA in recognition of the evolution in telecommunications technology.

140. Chief Judge Posner also relied upon the Federal Circuit's decision in *Law v. United States Postal Service* to support his opinion. *Vande Zande*, 44 F.3d at 544–45. However, unlike *Tyndall*, this case did not pertain to an ADA claim, but rather was based on a review of the U.S. Postal Service's removal of an employee from his position. Law v. U.S. Postal Serv., 852 F.2d 1278, 1279 (Fed. Cir. 1988) (per curiam). Nonetheless, as with *Tyndall*, the *Law* court relied heavily on attendance as a basis for its decision. *Id.* at 1279–80.

141. *See* Whillock v. Delta Air Lines, Inc., 926 F. Supp. 1555, 1564 (N.D. Ga. 1995); Ludgate, *supra* note 41, at 1331 ("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.").

142. *Whillock*, 926 F. Supp. at 1564.

143. *See* EEOC v. Ford Motor Co., No. 11-13742, 2012 WL 3945540, at *5 (E.D. Mich. Sept. 10, 2012).

144. Order Vacating Judgment, EEOC v. Ford Motor Co. (6th Cir. 2014) (No. 12-2484).

145. EEOC v. Ford Motor Co., 752 F.3d 634, 641 (6th Cir. 2014) *vacated en banc*, 2014 U.S. App. LEXIS 17852 (6th Cir. 2014).

146. *Courtroom Audio: EEOC v. Ford Motor Co.*, 752 F.3d 634 (6th Cir. 2014) (No. 12-2484), U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT, (Dec. 3, 2014), http://www.ca6.uscourts.gov/internet/court_audio/audSearchRes.php.

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B. *Future Interpretations of ADA Telework Cases*

It is now well established that in determining whether a particular accommodation under the ADA is reasonable, courts use a fact-specific or case-by-case analysis.[147] In fact, the relational nature of the term "reasonable" necessitates such analysis.[148] Courts must look to the particular facts of each case to assess the relative costs and benefits to each party.[149] As discussed previously, some courts' alleged uses of "presumptions" against telework as a reasonable accommodation are largely illusory due to the existing technology when those decisions were made.[150] Moreover, any such determination that telework under the ADA is per se unreasonable would inevitably conflict with unforeseen future innovations in telecommunications technology.[151]

However, while assessing each case based on its individual facts accommodates these innovations, it also tends to yield unpredictable outcomes.[152] When judges are given wide discretion to determine what is "reasonable" based on the particular facts of each case, decisions are largely ad hoc, leaving little room for precedent.[153] A wide range of judicial opinions result, leaving employers with little idea as to whether they have a legal obligation to provide a particular accommodation and potentially subjecting them to extensive jury trials.[154]

This extreme subjectivity under the ADA is particularly problematic for employers facing the question of whether to permit

147. *See, e.g.*, Wernick v. Fed. Reserve Bank of N.Y., 91 F.3d 379, 385 (2nd Cir. 1996) ("Whether or not something constitutes a reasonable accommodation is necessarily fact-specific. Therefore, determinations on this issue must be made on a case-by-case basis.") (internal citation omitted).

148. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2nd Cir. 1995).

149. *Id.*

150. *See supra* notes 31–35 and accompanying text.

151. *See* Ludgate, *supra* note 41, at 1335 ("Unlike a presumption analysis, a fact-specific approach requires courts to acknowledge technological change . . . . [T]he 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.").

152. *See* Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 78–79 (1999).

153. *Id.* at 79.

154. *See id.* at 79–80 (stating that the "individualized inquiry approach" hinders courts from establishing precedent and makes any ADA case a strong prospect for a long jury trial).

their employee to telecommute. Indeed, it would have been nearly impossible for Ford to predict that the Sixth Circuit would dramatically change course from its decision in *Smith v. Ameritech* less than two decades earlier in which it agreed with Chief Judge Posner that employers are not required to permit disabled employees to telework "where their productivity inevitably would be greatly reduced."[155] Yet, the *Ford Motor Co.* court noted that "teleconferencing technologies that most people could not have conceived of in the 1990s are now commonplace."[156]

Fortunately, decisions on these matters need not be entirely arbitrary. Individuals are "qualified" under the ADA where they, "with or without reasonable accommodation, can perform the essential functions of the employment position."[157] This means that the question as to whether one can telework as a reasonable accommodation may ultimately be a question of whether one's physical presence is an essential function of their job.[158]

Here, courts can look to regulatory law for guidance.[159] In *Ford Motor Co.*, the Sixth Circuit identified factors in the C.F.R. to help determine whether physical presence at the employer's worksite was an essential function of the employee's job duties.[160] These include "written job descriptions, the business judgment of the employer, the amount of time spent performing the function, and the work experience of past and present employees in the same or similar positions."[161] In addition, the EEOC has posted a

155. Smith v. Ameritech, 129 F.3d 857, 867 (6th Cir. 1997) (quoting Vande Zande v. Wis. Dep't Admin., 44 F.3d 538, 545 (7th Cir. 1995)).

156. EEOC v. Ford Motor Co., 752 F.3d 634, 642 (6th Cir. 2014), *vacated en banc*, 2014 U.S. App. LEXIS 17252 (6th Cir. 2014).

157. 42 U.S.C. § 12111(8) (2012).

158. *See Ford Motor Co.*, 752 F.3d at 641 ("[T]he vital question in this case is . . . whether physical presence at the Ford facilities was truly essential.").

159. *See, e.g.*, 29 C.F.R. § 1630.2(n)(3) (2014) (identifying factors to consider for determining whether a job activity is an essential function).

160. *Ford Motor Co.*, 752 F.3d at 641; *see also* Hoskins v. Oakland Cnty. Sheriff's Dep't, 227 F.3d 719, 726 (6th Cir. 2000) (identifying the C.F.R. factors as a means to determine the essential functions of a deputy position).

161. *Ford Motor Co.*, 752 F.3d at 641. Other factors identified in the C.F.R. include: "The consequences of not requiring the incumbent to perform the function; The terms of a collective bargaining agreement; . . . and/or . . . [t]he current work experience of incumbents in similar jobs." 29 C.F.R. § 1630.2(n)(3). However, the court in *Ford Motor Co.* did not reference these, likely because it did not find them relevant to the facts of the case. *See Ford Motor Co.*, 752 F.3d at 641.

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fact sheet identifying specific factors to consider in order to determine "the feasibility of working at home" including:

> the employer's ability to supervise the employee adequately[;] whether any duties require use of certain equipment or tools that cannot be [replaced or] replicated at home[;] . . . whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace.[162]

However, both the C.F.R. and the EEOC Fact Sheet have deficiencies in their ability to create predictable outcomes in ADA telework cases. The C.F.R. factors were published in the Federal Register in 1991,[163] well before the first major ADA telecommuting case had even reached the federal circuit courts.[164] As a result, the regulations tend to consider elements that do not make sense when applied to a determination of whether physical presence in the office is an essential function of one's job.[165] For example, "the amount of time spent performing the function" is a factor that was likely intended to address situations where a worker needed an accommodation to perform a specific physical task, as opposed to circumstances where they were away from the worksite entirely.[166] Indeed, even after the *Ford Motor Co.* court referenced the C.F.R. considerations, only one of them—"the business judgment

162. *Work At Home/Telework as a Reasonable Accommodation*, EEOC, http://eeoc.gov/facts/telework.html (last modified Oct. 27, 2005) [hereinafter EEOC Fact Sheet].

163. Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,726–29 (July 26, 1991) (to be codified at 29 C.F.R. pt. 1630).

164. *Vande Zande v. Wisconsin Department of Administration*, decided on January 5, 1995, appears to be the first federal circuit court case on teleworking under the ADA. 44 F.3d 538, 539 (7th Cir. 1995). *Vande Zande* does cite other cases as illustrating the "majority view" on the matter. *Id.* at 544–45. However, these decisions either did not relate to telework, or did not pertain to the ADA. *See, e.g.*, Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209, 211 (4th Cir. 1994) ("The question in this case is whether an employer violated the Americans with Disabilities Act, by discharging a disabled employee who was frequently absent from work due to her disability and the disability of a family member.") (internal citation omitted); Carr v. Reno, 23 F.3d 525, 527 (D.C. Cir. 1994) ("[The plaintiff] sued under the Rehabilitation Act of 1973 and the Civil Service Reform Act, claiming that handicap discrimination motivated her discharge.").

165. *See Ford Motor Co.*, 752 F.3d at 641 (explaining that attendance at a workplace can no longer be assumed to mean attendance at the employer's physical location).

166. *See, e.g.*, Cremeens v. City of Montgomery, 427 F. App'x 855, 857–58 (11th Cir. 2011) (referencing the C.F.R. factors and determining that an essential function of a Fire Investigator position includes the physical task of fire suppression).

of the employer"—was directly applied to the facts of the case.[167] Even then, the court demonstrates how this factor is inherently unreliable in that it is highly subject to manipulation by the employer.[168]

Alternatively, while the factors listed in the EEOC Fact Sheet are significantly more specific and relevant to teleworking as a reasonable accommodation under the ADA, they are nevertheless inadequate given that they are not binding upon any court.[169] Furthermore, the EEOC characterizes these factors as those that should be used to determine "the feasibility of working at home," thus signaling to any court that might otherwise consider these factors that they are not pertinent to the legal question of whether teleworking is a reasonable accommodation.[170] Therefore, unless these factors are both reworded and codified, they will likely have minimal impact on creating a more consistent interpretation of teleworking under the ADA.

C. *Deriving a New Test from ADA Telework Case Law*

Ultimately, the most effective means of unearthing a usable test to determine whether telecommuting is reasonable under the ADA is to derive one from case law. Perhaps unknowingly, courts have been developing such a test since the earliest days of ADA teleworking analysis. As noted previously, *Vande Zande* did not actually develop a presumption against teleworking, but rather recognized the technology available at the time as patently inadequate to justify a finding that teleworking was a reasonable accommodation.[171] Therefore, the court left a small window of opportunity available for ADA teleworking advocates, finding that "it would take a very extraordinary case for the employee to be able

167. *See Ford Motor Co.*, 752 F.3d at 641–42 (referencing factors to consider from the C.F.R., briefly discussing Ford's argument about teamwork, and subsequently discussing the business judgment factor).

168. *Id.* at 642 n.3 ("[A]n employer can just as easily provide self-serving testimony that even marginal job functions are absolutely essential.").

169. *See* EEOC Fact Sheet, *supra* note 162.

170. *See id.* ("Several factors should be considered in determining the feasibility of working at home . . . .").

171. *See supra* notes 98–106 and accompanying text (refuting the presumption against telework).

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There is similar language in *Tyndall*, the predecessor case to *Vande Zande*, discussing reasonable accommodations in the context of leave of absences.[173] There, the court noted the importance of consistent attendance at work, but again left an opportunity available for "the unusual case where an employee can effectively perform all work-related duties at home."[174] A few years later, the Sixth Circuit consolidated this language in *Ameritech*, citing the limited exceptions from both *Tyndall* and *Vande Zande*, but still concluded that this case was not "one of those exceptional cases where [the plaintiff] could have 'performed at home without a substantial reduction in the quality of [his] performance.'"[175] Nonetheless, the court seemed to signal that it would consider teleworking as a reasonable accommodation in rare instances where all of the employee's work could be performed at home without any significant reduction in quality.[176]

Interestingly, just as the court seemed to become more amenable to teleworking as technology advanced from the *Vande Zande* court in 1995 to the *Humphrey* court in 2001,[177] the test evolved as well.[178] In *Humphrey*, the court stated that teleworking was a reasonable accommodation under the ADA where "the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer."[179] Here, the court did not mention the need for exceptional cases, but instead simply required that the essential functions of the job could be done at home to justify a showing of a reasona-

172. Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 545 (7th Cir. 1995).

173. *See* Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209, 213–14 (4th Cir. 1994).

174. *Id.* at 213.

175. Smith v. Ameritech, 129 F.3d 857, 867 (6th Cir. 1997) (quoting *Vande Zande*, 44 F.3d at 544).

176. *See id.*

177. *See supra* notes 90–113 and accompanying text (indicating that the supposed presumption against telework is more likely a fact-based approach that changed based upon the evolution of technology).

178. *See* EEOC v. Ford Motor Co., 752 F.3d 634, 643 (6th Cir. 2014) (explaining that there are significantly more cases now in which an employee can work effectively from home than at the time when telecommuting as a reasonable accommodation was considered rare).

179. Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1136 (9th Cir. 2001).

ble accommodation.[180] With such a finding, the court signaled that effective work-at-home arrangements were no longer anomalies.[181]

As such, it is now important that a modern test for teleworking as a reasonable accommodation accounts for the leaps telecommunications technology made over the past decade. Such a test must not only recognize the importance of the employee's ability to effectively perform his or her work from home, but must also account for the changing definition of the workplace.[182] Thus, the new test for determining whether a teleworking accommodation is reasonable under the ADA should ask the following: Does the work-at-home accommodation render the employee functionally present at his or her traditional workplace for the purposes of the job duties?'

This test would be valuable in that it would not only recognize the evolution of tests that courts have previously applied, but would also capture the elements the EEOC identified as important in determining whether teleworking should be an ADA accommodation. For example, the EEOC Fact Sheet suggests that an important consideration for determining whether to incorporate a telework arrangement is "the employer's ability to supervise the employee adequately."[183] If a court were to find a major supervisory deficiency in a particular teleworking arrangement, by necessity that court would find the employee was not functionally present for the purposes of his or her job duties. Moreover, the EEOC asks whether the job "require[s] use of certain equipment or tools that cannot be replicated at home."[184] Thus, when the key instrumentalities of an employee's work could not be used from his or her teleworking location, a court could not find that the arrangement rendered the employee functionally present at the traditional workplace.

180. *Id.*

181. *Compare* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 545 (7th Cir. 1995) (identifying a reasonable work at home accommodation as the "extraordinary case"), *with Humphrey*, 239 F.3d at 1136 (identifying the conditions for a work-at-home accommodation to be considered reasonable).

182. *Cf. Ford Motor Co.*, 752 F.3d at 641 (explaining that the definition of the workplace has evolved so that attendance at work does not necessarily mean attendance at the employer's physical workplace).

183. EEOC Fact Sheet, *supra* note 162.

184. *Id.*

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This test would also allow the court to appropriately adapt its analysis to modern telecommunications technology. Advances over the past twenty years rendered many tasks Internet-based to the extent that performing them remotely could not possibly reduce the quality of the work.[185] In fact, research suggests that work-from-home jobs are likely to increase employee performance, attitude, and satisfaction without negatively impacting the in-office workers.[186] While there are still many tasks whose performance cannot be replicated by technology, a new test that differentiated between work that can and cannot be reproduced in a teleworking arrangement would help courts draw clearer boundaries.

Undoubtedly, this test would not be a perfect solution. It would continue to leave room for a great deal of interpretation based upon the facts of each case and would almost inevitably yield inconsistent decisions among circuits.[187] However, the flexibility to make case-by-case determinations is an inherent feature of the ADA that cannot be undone without disrupting the fundamental purpose of the legislation itself.[188] The function of this test would be to draw a line against which employers, employees, and courts could measure how far a teleworking accommodation can go in light of technological innovation. It provides the necessary room for courts to exercise discretion while simultaneously providing employers and employees a means by which they can feel more secure in accepting or denying a requested work-at-home arrangement. Though uncertainty will inevitably remain, this test provides the ideal compromise.

185. *See, e.g.*, *infra* note 199 and accompanying text.

186. *See* Nicholas Bloom et al., *Does Working from Home Work? Evidence from a Chinese Experiment* (Nat'l Bureau of Econ. Research, Working Paper No. 18871, 2014), *available* at http://www.nber.org/papers/w18871.pdf.

187. *Cf.* Befort & Thomas, *supra* note 152, at 78–79 (stating that the individualized approach to analyzing reasonable accommodation and undue hardship under the ADA results in differing judicial decisions and hinders the creation of precedent).

188. *See* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995) (explaining that "reasonable" is a "relational term" that requires the court to balance the costs and benefits of an accommodation); *see also* Ludgate, *supra* note 41, at 1336 ("[T]he EEOC regulations explicitly state that the pursue of a fact-specific approach is to allow disabled individuals to successfully pursue a wide variety of employment opportunities.").

IV. EMPLOYER RESPONSES TO ADA TELEWORK CLAIMS

Courts are now more willing to consider teleworking as a means by which employers are required to accommodate disabled employees under the ADA. However, even when presented with opportunities to utilize the most advanced telecommunications technology, the ADA does not require all employers to accommodate disabled employees with teleworking arrangements. Two possible defenses are particularly relevant for employers faced with a prima facie claim for discrimination under the ADA based on a failure to accommodate through telework.

A. *The Employee Cannot Perform the "Essential Functions" of the Job*

First, an employer can negate the contention that the employee is a "qualified individual" under the ADA by demonstrating that he or she would be unable to perform the essential functions of the job even with an accommodation.[189] When an employee successfully demonstrates that a teleworking arrangement is a reasonable accommodation, the employer would then be required to demonstrate that the employee's physical presence is truly an essential function of his or her work.[190] Even under the aforementioned test, whereby a court might ask whether the teleworking arrangement rendered the employee functionally present in the office, employers can still point to a number of job elements suggesting that physical presence is essential.

One reason employers often cite in arguing for the necessity of physical presence in the office is the notion that teamwork and personal interaction are key elements of effective work performance.[191] After facing heavy criticism for revoking Yahoo's work-

189. *See* Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 452–53 (6th Cir. 2004) (citing Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1186 (6th Cir. 1996)) (explaining the burden shifting arrangement under the ADA).

190. *See* EEOC v. Ford Motor Co., 752 F.3d 634, 641 (6th Cir. 2014), *vacated en banc*, 2014 U.S. App. LEXIS 17252 (6th Cir. 2014) (stating that the critical question is whether physical presence was an essential function of the job).

191. *See* Rauen v. U.S. Tobacco Mfg. Ltd. P'ship, 319 F.3d 891, 896 (7th Cir. 2003) ("The reason working at home is rarely a reasonable accommodation is because most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation.").

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from-home policy, Marissa Mayer, the company's CEO, defended her decision by alleging that "people are . . . more collaborative and innovative when they're together."[192] In *Ford Motor Co.*, Ford raised a similar claim among its principal defenses, alleging that physical presence "was critical to the group dynamic of the resale-buyer team."[193] Undoubtedly, this argument persuades many courts.[194] However, as the *Ford Motor Co.* court noted, "[A]dvancing technology has diminished the necessity of in-person contact to facilitate group conversations."[195] As communications technology becomes more sophisticated and machinery-like robotic telepresence becomes more commonplace, courts will be forced to distinguish between the teamwork and social interaction fostered by physical presence and that which is provided through technology.[196]

Another commonly used argument to support physical presence as an essential function of a job is the importance of employee supervision.[197] This appeared to be one of Chief Judge Posner's principal concerns in *Vande Zande* when he stated, "Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work."[198] Multiple courts have denied teleworking accommodations citing this very reasoning.[199]

192. Christopher Tkaczyk, *Marissa Mayer Breaks Her Silence on Yahoo's Telecommuting Policy*, FORTUNE (Apr. 19, 2013, 3:26 PM), http://fortune.com/2013/04/19/marissa-mayer-breaks-her-silence-on-yahoos-telecommuting-policy/.

193. *See Ford Motor Co.*, 752 F.3d at 641–44 (explaining Ford's arguments pertaining to the importance of personal interaction in the workplace).

194. *See, e.g.*, Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1122 (10th Cir. 2004) (agreeing with the district court that a lack of teamwork was one of the reasons why physical attendance at the worksite was an essential function of the employee's job); *Rauen*, 319 F.3d at 896 (citing "teamwork" and "personal interaction" as some of the main reasons why work-from-home arrangements are often found unreasonable under the ADA); Hypes v. First Commerce Corp., 134 F.3d 721, 727 (5th Cir. 1998) ("[The employee] was a part of a team and the efficient functioning of the team necessitated the presence of all members.").

195. *Ford Motor Co.*, 752 F.3d at 642.

196. *See* ECONOMIST, *supra* note 6 (indicating that many start-up companies intend to introduce telepresence robots).

197. *See, e.g.*, *Rauen*, 319 F.3d at 896 (citing supervision as a reason why a work-at-home arrangement is "rarely a reasonable accommodation").

198. Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995).

199. *See Mason*, 357 F.3d at 1120, 1122 (referring to Chief Judge Posner's work supervision reasoning in *Vande Zande* as a basis for finding that physical presence is an "essential function" of the plaintiff's position); *see also* Leahr v. Metro. Pier & Exposition Auth.,

Nonetheless, existing technology certainly raises the question as to whether this logic still applies today. A device as simple as a Google Doc enables an employer to oversee an employee's progress on a memo in real time.[200] Alternatively, websites such as GoToMyPC or LogMeIn provide employers with the means to remotely access their employees' computers as they work.[201] Finally, various webcam-monitoring options are available for employers who feel the need to physically observe their employees as they work.[202] While these options can be intrusive, they may also be seen simply as the new form of supervision in a home-office setting.

Finally, some employers might allege that the specific characteristics of their employees' work necessitates physical presence at the worksite. This argument is most persuasive for jobs that require manual labor or contact with customers and patients.[203] For example, in *Samper v. Providence St. Vincent Medical Center*, the Ninth Circuit noted that a neo-natal nurse is one of the prime examples of a position where "on-site regular attendance is an essential job function."[204] Among a litany of justifications, the court points to the need for interacting with patients face-to-face and utilizing medical equipment.[205] Nonetheless, courts should not underestimate the ability of technology to enable employees to replicate their presence in these jobs as well. Indeed, hospitals

1997 U.S. Dist. LEXIS 10601, at *12 (N.D. Ill. 1997) (quoting language from Judge Posner regarding supervision as a basis for finding that the present work-at-home arrangement was not a reasonable accommodation).

200. *See Overview of Google Docs, Sheets, and Slides*, GOOGLE, https://support.google.com/docs/answer/49008?hl=en (last visited Apr. 3, 2015).

201. *See GoToMyPC vs. LogMeIn*, BEST REMOTE PC, http://www.bestremotepc.com/compare/gotomypc-vs-logmein/ (last visited Apr. 3, 2015) ("GoToMyPC and LogMeIn are two of the best remote access software companies in the business.").

202. *See* Ishan Bansal, *5 Best Free Webcam Surveillance Software*, I LOVE FREE SOFTWARE (June 5, 2010), http://www.ilovefreesoftware.com/05/windows/5-best-free-webcam-surveill ance-software.html.

203. *See, e.g.*, Waggoner v. Olin Corp., 169 F.3d 481, 485 (7th Cir. 1999) (indicating that production jobs are "almost certainly" not the types of jobs conducive to work-at-home arrangements).

204. 675 F.3d 1233, 1238 (9th Cir. 2012). This case did not pertain to a requested work-at-home arrangement, but instead focused on whether "regular attendance" was an essential function of a neo-natal intensive care unit (NICU) nurse's position. *See id.* at 1235, 1237 ("This case turns on the role that regular attendance plays in the functions of a [sic] NICU nurse."). However, it nonetheless illustrates how certain jobs can be less conducive to work-at-home arrangements than others.

205. *Id.* at 1238.

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have expressed a major interest in utilizing telepresence robot technology to interact with patients when their personnel are not physically present.[206]

B. *The Accommodation Places an Undue Hardship on the Employer*

Another defense employers can raise in response to an argument that they failed to reasonably accommodate their employee under the ADA is that the accommodation itself would place an undue hardship on the operations of the employer's business.[207] This defense primarily applies when the costs of accommodation are excessive in light of either the benefits it provides or the financial condition of the employer.[208]

While many basic accommodations can be made at little to no cost to the employer,[209] more advanced technology can cost hundreds, or even thousands, of dollars to implement.[210] These costs have differing implications for the future of telework as an accommodation under the ADA. First, larger and more financially stable employers will likely subsidize the development of ADA jurisprudence in the near future as it relates to telework, because these employers are less likely to have cases dismissed on the grounds that they could not afford a proposed accommodation.[211] As a result, they are more likely to be the targets of suits asking juries to decide whether the newest, cutting-edge telecommunications technology should have been used as an accommodation.[212] Secondly, as advanced telecommunications technology becomes more affordable, ADA requirements that this technology be used

206. *See* ECONOMIST, *supra* note 6 (referencing hospitals' interest in telepresence robot technology).

207. 42 U.S.C. § 12112(b)(5) (2012).

208. *See supra* notes 36–43 and accompanying text (discussing the undue hardship defense under the ADA).

209. This might include accommodations whereby the employee simply needs to use means such as their own cell phone or an email account in order to work from home.

210. *See* ECONOMIST, *supra* note 6 (identifying costs for telepresence robots ranging from a flat fee of $149 to $5000 per month).

211. *Cf.* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995) (indicating that the undue hardship provision tends to excuse companies with who are financially struggling).

212. *Cf.* Befort & Thomas, *supra* note 152, at 80 ("The ADA's complicated antidiscrimination formula, implemented through an individualized mode of analysis, inevitably leads to a crush of litigation.").

to accommodate employees will likely become more widespread because employers will find themselves less able to claim that the accommodation poses an undue hardship due to its cost.[213] This leaves virtually limitless implications for potential accommodations that all employers may be required to provide to disabled employees in the future.

CONCLUSION

ADA teleworking analysis demonstrates how judicial interpretations of the law must constantly evolve to accommodate innovations in technology. Courts today are forced to consider whether a statute requires employers to utilize devices that did not exist when the law was passed. As a result, they must exercise their discretion with both caution and foresight.

Over time, the tests that courts have applied to determine whether teleworking is a reasonable accommodation under the ADA have changed to adapt to unpredictable advances. When telecommunications technology made teleworking accommodations more practical, courts responded by acknowledging that ADA teleworking accommodations were no longer the anomaly.[214] When the definition of the workplace began to change, courts responded by recognizing that it must look to physical presence, as opposed to attendance, to determine whether the accommodation renders the employee unable to perform the essential functions of his or her job.[215]

Today, courts must continue to advance its approach in response to newer forms of technology that allow employees to more easily replicate their physical presence in an office. Courts can allow for these advances by asking whether the teleworking accommodations render the employee functionally present in the office for the purposes of his or her job. In so doing, courts will be able to apply the ADA's reasonable accommodation analysis more

213. *See Vande Zande*, 44 F.3d at 543 (indicating that an employer can overcome a showing that an accommodation is reasonable by demonstrating that the costs are too high relative to the benefits or relative to the employer's financial condition); ECONOMIST, *supra* note 6 (indicating that sales of telepresence robots are increasing as costs to manufacture them are decreasing).

214. *See* EEOC v. Ford Motor Co., 752 F.3d 634, 647 (6th Cir. 2014), *vacated en banc*, 2014 U.S. App. LEXIS 17252 (6th Cir. 2014); *see also* Swink, *supra* note 53, at 893–94.

215. *Ford Motor Co.*, 752 F.3d at 641.

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specifically to telework. However, without these changes, courts may neglect opportunities for disabled individuals to continue to work when easy and effective alternatives are available.

By making appropriate changes, courts can more effectively balance Congress's goal of preventing unjustified workplace discrimination and employers' goals of hiring effective employees. While there are undoubtedly limits to the lengths that employers must go to accommodate an employee or prospective employee's disability, technology has dramatically reduced the extent to which these accommodations are unreasonable.

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